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## THE DIFFERENT INITIATIVES ON DUE DILIGENCE FOR RESPONSIBLE MINERAL SUPPLY CHAINS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS: ARE THERE MORE EFFECTIVE ALTERNATIVES?

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I. INTRODUCTION – II. RESOLUTION 1952 OF THE UNITED NATIONS SECURITY COUNCIL AND THE CONCEPT OF DUE DILIGENCE – III. THE DIFFERENT INITIATIVES ON DUE DILIGENCE IN THE MINERAL SUPPLY CHAINS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS – IV. ARE THERE MORE EFFECTIVE ALTERNATIVES? THE KIMBERLEY PROCESS CERTIFICATION SCHEME – V. CONCLUSIONS.

**ABSTRACT:** Minerals from conflict-affected and high-risk areas such as coltan, present in all the technological devices that we use on a daily basis, contribute to the exacerbation and escalation of armed conflicts, as well as to prolonging situations of human rights violations in numerous regions of the world and, specially, in Africa. To put an end to this problem, many states and international organizations, such as the United States, the Organization for Cooperation and Development in Europe or the European Union, have adopted different initiatives, all of them focused on the due diligence that agents that participate in the supply chain of all this series of conflict minerals must carry out. However, the fact that some of these initiatives are not even in force has not prevented the possibility of identifying limits that obstruct the achievement of its main objective: to break the link between the illegal exploitation of natural resources, the illicit trade of these resources, and the perpetuation of armed conflicts. In this way, it is worth asking if there are more effective viable alternatives to the existing initiatives, such as a certification system similar to the Kimberley Process Certification Scheme.

**KEYWORDS:** Due diligence, conflict minerals, coltan, Resolution 1952, Dodd-Frank Act, OECD Guidance, Regulation (EU) 2017/821, Kimberley Process, armed conflicts, international trade.

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## **LAS DIFERENTES INICIATIVAS SOBRE DILIGENCIA DEBIDA EN LA CADENA DE SUMINISTRO DE MINERALES DE ZONAS DE CONFLICTO Y DE ALTO RIESGO: ¿EXISTEN OTRAS ALTERNATIVAS MÁS EFICACES?**

**RESUMEN:** Los minerales de zonas de conflicto y de alto riesgo como el coltán, presente en todos los aparatos tecnológicos que utilizamos de manera diaria, contribuyen a la exacerbación y al recrudecimiento de los conflictos, así como a la prolongación de situaciones de violación de derechos humanos en numerosas regiones del mundo y, sobre todo, en África. Para acabar con esta lacra, numerosos Estados y organizaciones internacionales, como Estados Unidos, la Organización para la Cooperación y el Desarrollo en Europa o la Unión Europea, han adoptado diferentes iniciativas, centradas todas ellas en la diligencia debida que deben llevar a cabo los agentes que participan en la cadena de suministro de toda esta serie de minerales de conflicto. No obstante, el hecho de que algunas de estas iniciativas ni siquiera se encuentren en vigor, no ha impedido la posibilidad de identificar límites que obstruyen el logro de su principal objetivo: romper el nexo entre la explotación ilegal de recursos naturales, el comercio ilícito de estos recursos, y la perpetuación de conflictos armados. De esta manera, cabe preguntarse si existen alternativas viables más efectivas a las iniciativas existentes, como podría serlo un sistema de certificación análogo al del Proceso Kimberley de Certificación de Diamantes.

**PALABRAS CLAVE:** Diligencia debida, minerales de conflicto, coltán, Resolución 1952, Dodd-Frank Act, Guía de la OCDE, Reglamento (UE) 2017/821, Proceso Kimberley, conflictos armados, comercio internacional.

## **LES DIFFÉRENTES INITIATIVES DE DUE DILIGENCE DANS LA CHAÎNE D'APPROVISIONNEMENT EN MINÉRAIS DANS LES ZONES DE CONFLIT ET À HAUT RISQUE : EXISTE-T-IL D'AUTRES ALTERNATIVES PLUS EFFICACES?**

**RÉSUMÉ:** Les minéraux des zones de conflit et à haut risque comme le coltan, présents dans tous les dispositifs technologiques que nous utilisons au quotidien, contribuent à l'exacerbation et à l'aggravation des conflits, ainsi qu'à la prolongation des situations de violation des droits humains dans de nombreuses régions du monde et, surtout, en Afrique. Pour mettre fin à ce fléau, de nombreux États et organisations internationales, comme les États-Unis, l'Organisation pour la coopération et le développement en Europe ou l'Union européenne, ont adopté différentes initiatives, toutes axées sur la diligence raisonnable que les agents doivent exercer. impliqués dans la chaîne d'approvisionnement de toute cette série de minerais de conflit. Cependant, le fait que certaines de ces initiatives ne soient même pas en vigueur n'a pas empêché la possibilité d'identifier des limites qui entravent la réalisation de leur objectif principal: rompre le lien entre l'exploitation illégale des ressources naturelles, le commerce illicite des ces ressources et la perpétuation des conflits armés. Ainsi, la question est de savoir s'il existe des alternatives viables plus efficaces aux initiatives existantes, comme un système de certification analogue au processus de certification Kimberley Diamond.

**MOT CLÉS:** Diligence raisonnable, minerais de conflit, coltan, Résolution 1952, Loi Dodd-Frank, Guide de l'OCDE, Règlement (UE) 2017/821, Processus de Kimberley, conflits armés, commerce international.

## I. INTRODUCTION

It is undeniable that the world of telecommunications is advancing by leaps and bounds. Just in the territory of Spain, in the last twenty years, the number of mobile phone lines has increased from 6 to 54 million<sup>2</sup>, and it can be affirmed that, nowadays, practically all Spanish people in adulthood have a smart mobile phone and, more and more users, of other electronic devices such as laptops, tablets or wireless headphones.

Surrounded by so much technology, sometimes, it is inevitable to wonder about the composition of all this series of devices. What are the components of the smartphones on which we depend so much on a daily basis? Without the intention of transforming this article into a scientific disclosure on geology, all current smartphones are made with tin, which is a metal that is used to solder the wires of electronic circuits, with tungsten, which is another metal with the that the electrical resistances are manufactured, and with tantalum or tantalum, metal contained in tantalite that, mixed with columbite, results in a very precious metallic mineral called columbite-tantalite, whose industrial name is coltan, which is what makes our phones vibrate<sup>3</sup>.

As Nana Addo Dankwa Akufo-Addo, President of the Republic of Ghana, recalled in his speech at the General Debate of the 74th session of the United Nations General Assembly<sup>4</sup>, it is no surprise to anyone that this entire series of Minerals, on which the world depends to function, are found primarily in Africa. Currently, it is estimated that 80% of the world's coltan reserves

<sup>2</sup> Comisión Nacional de los Mercados y la Competencia, “Número de líneas de telefonía móvil por tipo de contrato”, 1998-2018. Available at: [http://data.cnmc.es/datagraph/jsp/inf\\_anual.jsp](http://data.cnmc.es/datagraph/jsp/inf_anual.jsp) (last accessed: 9 of November of 2020).

<sup>3</sup> ABELARDO, J. “Who starved for that smartphone: limitations of the SEC’s approach to the Congolese conflict minerals trade problem and the need for the European Union to better address its associated human rights abuses”, *Fordham International Law Journal*, vol. 40, n° 2, 2017, 583-624, p. 588. HENLEBEN, C., “The Kimberley Process’ Legacy: How the 2000 Certification Process for Conflict-Free Diamonds Can Help Solve Contemporary Human Rights Violations Within the Cobalt and Coltan Mining Industries”, *Loyola University Chicago International Law Review*, vol. 16, n° 1, 2020, pp. 115-127, p. 116.

<sup>4</sup> United Nations, “Nana Addo Dankwa Akufo-Addo, President of the Republic of Ghana, addresses the general debate of the 74th Session of the General Assembly of the UN”, New York, 24–30 September 2019. Available at: <https://www.youtube.com/watch?v=glcD6npvdn8> (last accessed: 9 of November of 2020).

lie in the Democratic Republic of the Congo (DRC), followed by Australia and Brazil, and, to a lesser extent, by Canada and China<sup>5</sup>. However, from the data related to its production, it can be deduced that those who most take advantage of these coltan reserves are Australia and Brazil<sup>6</sup>, among others, and, paradoxically, Rwanda, which, despite not owning a considerable number of mined tantalum extraction mines, however, it stands as one of the world's leading producers. What is this dysfunction due to? To find the reason, we must go back to the Second Congo War of 1998, also called the Coltan War, which, although it formally ended in 2003, it still continues to wreak havoc today. The Democratic Forces for the Liberation of Rwanda continue to be installed in regions such as Kivu, in east DRC, using the coltan extracted in the mines of these places to profit thanks to its illegal commercialization and, in this way, to be able to finance a conflict that involves serious human rights violations of the civilian population in these areas.

This whole series of minerals from areas characterized by the presence of armed conflicts, generalized violence or other risks of harm to people have been called “Minerals from Conflict-Affected and High-Risk Areas”<sup>7</sup> or “conflict minerals”, and, since the United Nations Security Council in 2010 declared the illegal trade in natural resources as one of the issues that can endanger world peace and security, many states and international organizations have tried to adopt initiatives to break the existing nexus between the illegal exploitation of natural resources such as coltan, the illicit trade of these resources, and the perpetuation of armed conflicts in certain regions of the world, whose common denominator revolves around due diligence. Regarding the multinational enterprises, although it is true that there exists a lack of direct obligations under International law, it does not prevent some companies from carrying out their activities and decisions in accordance with the

<sup>5</sup> Minerals Mining, “Coltán en África”. Available at: <https://www.mineralsmining.com/presencia-internacional/mineral-colt%C3%A1n/> (last accessed: 9 of November of 2020).

<sup>6</sup> SCHULZ, K.J., PIATAK, N.M., and PAPP, J.F. “Niobium and tantalum”. In Schulz, K.J., Deyoung, J.H., Seal, R.R., and Bradley, D.C. (eds.), *Critical mineral resources of the United States—Economic and environmental geology and prospects for future supply: U.S. Geological Survey Professional Paper 1802*. Reston: U.S. Geological Survey, 2017, in pp. M1-M34, p. M23.

<sup>7</sup> OECD, “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”. Second Edition. OECD Publishing. Available at: <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>.

principles and internationally recognized human rights standards<sup>8</sup>, although this, unfortunately, is not the general rule.

In this article, the 1952 Resolution of the United Nations Security Council (UNSC) will be analysed, and subsequently, the initiatives of the United States (USA), of the Organization for the Cooperation and Development in Europe (OECD) and the new approach of the European Union (EU) contained in Regulation (EU) 2017/821. In addition, this work proposes the consideration of a system analogous to the Kimberley Process Certification Scheme as a viable multilateral alternative to the current initiatives.

## II. THE RESOLUTION 1952 OF THE UNITED NATIONS SECURITY COUNCIL AND THE CONCEPT OF DUE DILIGENCE

In 2010, the UNSC adopted the Resolution 1952<sup>9</sup> in relation to the conflict situation in the DRC. In this Resolution, the Council reiterates its concern about the presence of armed groups in the eastern part of the aforementioned country - such as the Democratic Forces for the Liberation of Rwanda in the province of Kivu - as it “perpetuates the climate of insecurity throughout the region”.

When the UNSC secures a certain issue, what it is actually doing is declaring that this particular issue is likely to compromise international peace and security and, therefore, it is necessary to take measures in this regard, understanding by measures, those contained in chapters VII and VIII of the Charter of the United Nations, many of them related to the control of arms, transport or the finances of a certain State. This is precisely what the UNSC Resolution 1952 does: to secure the illicit trade in natural resources, understanding that “the relationship between the illegal exploitation of natural resources, the illicit trade of those resources and the proliferation and trafficking arms is one of the main factors fuelling and exacerbating conflicts in the Great Lakes Region of Africa”. Following this series of conflicts, what we find are countless violations of the human rights of the Congolese civilian

<sup>8</sup> MÁRQUEZ CARRASCO, C. and IGLESIAS MÁRQUEZ, D. “Empresas, Derechos Humanos y la COVID-19: La conducta empresarial responsable en la nueva normalidad”. *Revista Española de Derecho Internacional*, vol. 73, n° 1, 2021, pp. 329-336, p. 333.

<sup>9</sup> Resolution 1952 (2010), adopted by the Security Council at its 6432nd session, on 29 November 2010 (S/RES/1952 (2010) General Distr., 29 of November of 2010).

population, including the killing and displacement of significant numbers of civilians, the recruitment and use of child soldiers, and acts of widespread violence<sup>10</sup>, which endangers world peace and security, and which the UNSC, through the measures contained in this Resolution 1952<sup>11</sup>, tries to prevent. Likewise, the nexus between conflicts over mineral resources and generalized acts of sexual violence is undeniable, this sexual violence being characterized by its “exceptional brutality”<sup>12</sup>.

The most important thing of the UNSC Resolution 1952 for the matter are paragraphs 7 to 9. For the very first time, the UNSC talk about the need for people or entities that participate in the mineral supply chains from conflict-affected and high-risk areas of demonstrating that they have exercised due diligence in order to avoid direct or indirect support for illegal armed groups operating in these countries. But what should we understand by this due diligence? Although it is true that, traditionally, the concept of due diligence has been used in general international law to refer to the obligation that states have to prevent damage in their territory against their population or other

<sup>10</sup> Amnesty International has reported that in Tanganyika, the number of internally displaced people reached 500,000, and between January and September 2018, more than 5,700 Congolese fled to Zambia to escape the conflict. Amnesty International: “República Democrática del Congo 2017/2018”. Available at: <https://www.amnesty.org/es/countries/africa/democratic-republic-of-the-congo/report-democratic-republic-of-the-congo/> (last accessed: 19 of November of 2020). As Pilar Diago points out, this violence against the population of the Democratic Republic of the Congo has been aggravated as a result of the global pandemic of COVID-19. Trade union organizations and various reports have revealed that companies have confined workers to their workplaces, under threat of dismissal. Workers at six mines have been confined for more than two months. The overcrowded conditions and lack of protective equipment has led to them becoming ill. At times, they have been forced to work for more than eight hours, without any compensation: DIAGO DIAGO, M. P. “Violación de Derechos Humanos en las cadenas de suministro en tiempos de pandemia: reacciones de Derecho Internacional Privado y diligencia debida”, *Revista Española de Derecho Internacional*, vol. 73, n° 1, 2021, pp. 337-344, p. 339.

<sup>11</sup> Actually, the UNSC Resolution 1952 refers to measures adopted in previous resolutions, such as measures on weapons, measures on transport, financial and travel measures mentioned in Resolution 1807 (2008), and the measures related to persons and entities indicated in Resolution 1857 (2008).

<sup>12</sup> Buss, D. “Conflict Minerals and Sexual Violence in Central Africa: Troubling Research”. *Social Politics: International Studies in Gender, State and Society*, vol. 25, n° 4, 2018, pp. 545-567, p. 548.

sovereign states<sup>13</sup>, over time it has been evolving, as it is a flexible concept with progressive realization. At present, due diligence is a standard of conduct that implies for states the obligation to respond to violations of international norms committed by state and non-state actors<sup>14</sup>, including this obligation measures such as the investigation of the facts or the prosecution of crimes. Furthermore, this due diligence is no longer understood solely as an obligation to be carried out exclusively by states, but is also the responsibility of non-state actors themselves, such as multinational companies, that implies identifying, preventing, mitigating and responding to the negative consequences of their activities on human rights<sup>15</sup>. Thus, when companies have a duty to act with due diligence, to their passive role of avoiding harm is added an active obligation to respect international standards aimed at protecting human rights.

The concept of due diligence, thus defined, is not exempt from criticism by the doctrine. Dhooge, for example, argues that this vague characterization of due diligence, which, among others, does not include the obligation to conduct human rights impact assessments, can be used by multinational companies

<sup>13</sup> The Study Group on “Due Diligence in International Law” of the International Law Association has carried out reports on the history, concept and nature of due diligence in the different branches of International Law. These reports are available at: <http://www.ila-hq.org/index.php/study-groups> (last accessed: 19 of November of 2020). According to this Group, due diligence emerged as a concept in international law to mediate interstate relations at a time of significant change. Although Grotius laid the intellectual foundations of the concept in the seventeenth century, however, it was not until the nineteenth century that the concept of due diligence began to take shape and was applied as a duty and a restriction on arbitrary behaviour by the state, since it was understood that “a State is obliged to use due diligence to avoid the commission within its domains of criminal acts against another nation or its own people” (SS Lotus (*France v. Turkey*), 1927 Court Permanent Court of International Justice, Ser. A, No. 10, September 7).

<sup>14</sup> CULLEN, H. “The irresistible rise of Human Rights Due Diligence: Conflict minerals and beyond”. *The George Washington International Law Review*, vol. 48, 2016, pp. 743-780, p. 745.

<sup>15</sup> MÁRQUEZ CARRASCO, C. and IGLESIAS MÁRQUEZ, D. “Empresas, Derechos Humanos...” *cit.*, p. 333. The first time that this series of obligations in the field of human rights were applied to non-state actors, and, in this case, to multinational companies, was in 2011 with the approval of the Guiding Principles on Companies and the United Nations Human Rights (A/HRC/RES/17/4 (2011), Distr. General, 6 of July of 2011).

for their own benefit<sup>16</sup>. For his part, Lambooy affirms that due diligence constitutes more a preventive obligation than a reason for responsibility<sup>17</sup>.

To solve this criticism, as the interest in this relatively recent concept has increased, its content has been specified. Thus, in the context of conflict-affected and high-risk mineral supply chains, due diligence is presented as a holistic concept that aims to provide transparency and proper monitoring of minerals from the moment they are extracted from the mine until they reach the end users in the form of finished products<sup>18</sup>. In this sense, the concept of due diligence in relation to mineral supply chains in conflict and high-risk areas transcends the conventional approach of mere risk management to focus on transparency as a goal<sup>19</sup>.

Going back to Resolution 1952 of the UNSC, its paragraph 8 urges all states to adopt appropriate measures to better publicize the guidelines for the exercise of due diligence and urge the different links in the mineral supply chain in conflict zones and high risk to exercise due diligence applying said guidelines or other equivalent. To this end, numerous states and international organizations have taken various initiatives that seek to define more precisely the steps that multinational companies have to take in order to effectively exercise due diligence in the mineral supply chain in conflict and high risk areas.

### **III. THE DIFFERENT INITIATIVES ON DUE DILIGENCE IN THE MINERAL SUPPLY CHAINS FROM CONFLICT-AFFECTED AND HIGH-RISK AREAS**

#### **1. The American initiative: The Dodd-Frank Act**

One of the first states to propose an initiative in relation to due diligence in the mineral supply chains from conflict-affected and high-risk areas was

<sup>16</sup> DHOOGHE, L. J. “Due diligence as a defense to corporate liability pursuant to the alien tort statute”. *Emory International Law Review*, vol. 22, 2008, pp. 455-498.

<sup>17</sup> LAMBOOY, T. “Corporate Due Diligence as a Tool to Respect Human Rights”. *Netherlands Quarterly of Human Rights*, vol. 28, n° 3, 2010, pp. 404-448, p. 432.

<sup>18</sup> BLEISCHWITZ, R., DITTRICH, M., and PIERDICCA, C. “Coltan from Central Africa. International trade and implications for any certification”. *Resources Policy*, vol. 37, n° 1, 2012, pp. 19-29.

<sup>19</sup> HOFMANN, H., SCHLEPER, M. and BLOME, C. “Conflict minerals and supply chain due diligence: an exploratory study of multi-tier supply chains”. *Journal of Business Ethics*, vol. 147, n° 1, 2018, pp. 115-141, p.117.

the USA. Since 2008, coinciding with the approval by the UNSC of the Resolution 1857, different legislative initiatives of the USA have tried to address the issue by focusing on the conflict in the DRC with the intention of providing transparency and reducing international trade in minerals from the illegal mines of this State.

This interest in preventing the illegal trade in minerals from conflict areas from affecting the human rights of the population of the DRC and fuelling the existing conflict in the country was first reflected in the proposed law called Conflict Coltan and Cassiterite Act<sup>20</sup>, of 2008. This bill, presented by Senator Sam Brownback, sought, firstly, to create an exhaustive list of armed groups operating in the DRC and committing human rights violations, updated annually and, secondly, to completely prohibit the importation of coltan and cassiterite originating in the DRC that had the potential to profit all this series of groups. Although the proposal was not approved before the end of the 110th US Congress, it is true that it served as the basis for subsequent proposals<sup>21</sup>.

A year later, Congressman Jim McDermott raised a new initiative under the proposed law called the Conflict Minerals Trade Act<sup>22</sup>. In this proposed law, the idea of creating a list of armed groups was abandoned to focus on the control of the global processing facilities of these conflict minerals, a task that would be carried out by the United States Customs and Border Protection Office, to eventually restrict the importation of those minerals that financed human rights violations committed by armed groups operating in the DRC<sup>23</sup>. Like its predecessor, this proposal was never approved.

<sup>20</sup> *Conflict Coltan and Cassiterite Act*, 2008, S. 3058, 110th Congress, 2nd session. Available at: <https://www.congress.gov/bill/110th-congress/senate-bill/3058> (last accessed: 19 of November of 2020).

<sup>21</sup> VEALE, E. "Is there blood on your hands-free device: examining legislative approaches to the conflict minerals problem in the Democratic Republic of Congo". *Cardozo Journal of International and Comparative Law*, vol. 21, 2013, pp. 503-544, p. 519.

<sup>22</sup> *Conflict Minerals Trade Act*, 2009, H.R. 4128, 111th Congress, 1st session. Available at: <https://www.congress.gov/bill/111th-congress/house-bill/4128> (last accessed: 12th of August of 2019).

<sup>23</sup> VEALE, E. "Is there blood... *cit.*, p. 519.

At the same time that Congressman McDermott was raising his initiative, Senator Brownback launched a new bill, the Congo Conflict Minerals Act<sup>24</sup>, which sought, like the Conflict Minerals Trade Act, to provide transparency and control mineral imports from conflict-affected areas, but entrusting that function to the US Securities and Exchange Commission (SEC), and not to the US Customs and Border Protection Office<sup>25</sup>. Again, although this bill did not get passed at the close of the 111th Congress, its provisions were nevertheless incorporated later into the Dodd-Frank Act.

The Wall Street Reform and Consumer Protection Act, more commonly known as the Dodd-Frank Act<sup>26</sup>, was approved in 2010, incorporating matters related to conflict minerals in the famous section 1502. This section establishes that certain multinational companies have the duty to report annually to the SEC the origin of the tin, tantalum, tungsten and gold used in their products to verify if they come from the DRC or one of its neighbouring countries. As we can see, the scope, both material and geographical, of the Dodd-Frank Act is quite limited (extending only to tin, tantalum, tungsten and gold<sup>27</sup> originating in the DRC and its neighbouring countries). If the company, acting in good faith, concludes that the minerals it uses to manufacture its products do not come from the DRC or one of its neighbouring countries, the only obligation imposed on said company is the transfer of the information to the SEC and the publication of its findings on its website. However, if the company is able to determine that the minerals originate from the DRC or a neighbouring country, the company must exercise due diligence, file a “conflict minerals report” with the SEC, and make the report publicly available at its website.

<sup>24</sup> *Congo Conflict Minerals Act*, 2009, S. 891, 111th Congress, 1st session. Available at: <https://www.congress.gov/bill/111th-congress/senate-bill/891> (last accessed: 12th of August of 2019).

<sup>25</sup> RAJ, S. “Blood Electronics: Congo’s Conflict Minerals and the Legislation That Could Cleanse the Trade”. *Southern California Law Review*, vol. 84, 2011, pp. 981-1034, p. 983.

<sup>26</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 2010, H.R. 4173, 111th Congress, 2nd session. Available at: <https://www.congress.gov/bill/111th-congress/house-bill/4173> (last accessed: 12th of August of 2019).

<sup>27</sup> These minerals are known today as “3T + G”: tin, tantalum, tungsten and gold. They are also known by their names in the form of a mineral before being processed into metals: the mineral of tin is called cassiterite, the mineral of tantalum is called columbite-tantalite or coltan, and the mineral of tungsten or tungsten is known as tungsten. Once processed, these minerals become extremely valuable metals. RAJ, S. “Blood Electronics... *cit.*, p. 988.

In this report, the company will clarify whether its final products are made with minerals “conflict-free from the Democratic Republic of the Congo” (conflict-free minerals), that is, whether they do not contain minerals that directly or indirectly finance or benefit the armed groups operating in the DRC or adjacent countries. Finally, regarding the due diligence required of these multinational companies in this case, section 1502 of the Dodd-Frank Act only dictates that it will be recognized in national and international guidelines. It was the SEC that later specified this requirement by linking due diligence with that established in the OECD Guidance that we will study below<sup>28</sup>.

As a positive aspect of the Dodd-Frank Act, still in force – although not without the pertinent reforms introduced by the Trump administration –, It should be noted that multinational companies, after several years of application of the Dodd-Frank Act, have decided to pay more for minerals with, we can say, a conflict-free stamp, making minerals from conflict-affected and high-risk areas less profitable for armed groups<sup>29</sup> and causing, in turn, a reduction in the number of mines controlled by all this series of groups<sup>30</sup>. However, this Act is not exempt from criticism, as it leaves the door open to, on the one hand, the lack of transparency and the falsification of information<sup>31</sup>, and, on the other hand, to the increase of the illegal mineral trade from conflict areas in countries not subject to the Dodd-Frank Act<sup>32</sup>. In addition, some critics have affirmed that this initiative represents a de facto embargo, a boycott of the African economies that depend so much on the international trade of these minerals. Likewise, other critics point to the “flight” of companies as another adverse effect of the approval of the Dodd-Frank Act, causing damage to one of the main sources of income in the DRC<sup>33</sup>. Last but not least, section 1502 of the Dodd-Frank Act does not prohibit under penalty that multinational companies use conflict zone minerals in their products, it only requires these

<sup>28</sup> SCHWARTZ, J., & NELSON, A. “Cost-Benefit Analysis and the Conflict Minerals Rule”, *Administrative Law Review*, vol. 68. 2016, pp. 287-357, p. 295.

<sup>29</sup> VOLAND, T., and DALY, S.” The EU Regulation on Conflict minerals: the way out of a vicious cycle?” *Journal of World Trade*, vol. 52, n° 1, 2018, pp. 37-63, p. 42.

<sup>30</sup> ABELARDO, J. “Who starved for... *cit.*, p. 607.

<sup>31</sup> *Ibidem.*, p. 610.

<sup>32</sup> VOLAND, T., and DALY, S.” The EU Regulation on Conflict minerals... *cit.*, p. 42.

<sup>33</sup> ABELARDO, J. “Who starved for... *cit.*, p. 609.

companies to reveal the origin of said minerals<sup>34</sup>, leaving, in this way, at the discretion of the companies the use of minerals that, directly or indirectly, finance armed groups in the DRC or in neighbouring countries and that prolongs the situation of conflict and violation of human rights in this region.

## 2. The OECD Guidance

The main objective of the OECD, in accordance with the provisions of article 1 of its constitutive treaty, is to promote policies aimed at achieving healthy economic and commercial expansion on a multilateral and non-discriminatory basis to contribute to the development of the world economy of all countries, both developed and developing countries<sup>35</sup>. To achieve this goal, the Organization may adopt, among others, non-binding recommendations, and it is precisely within the framework of these recommendations where the numerous codes of conduct of the OECD for multinational companies are formulated, so that their participation in the economy and world trade does not imply an impairment of the living conditions and human rights of the population of the least developed countries.

Among all this series of voluntary codes of conduct, the OECD Guidelines for Multinational Enterprises of 1976 - last revised in 2011 - stand out, which contain non-binding principles and rules for responsible business conduct in the global context, in accordance with applicable laws and internationally recognized standards<sup>36</sup>. Regarding mineral supply chains, the OECD published in 2011 its OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas<sup>37</sup> (hereinafter the Guidance), last revised in 2016.

<sup>34</sup> RAJ, S. “Blood Electronics... *cit.*, p. 1014.

<sup>35</sup> Article 1 of the Convention on the Organisation for Economic Co-operation and Development, 14th of December, 1960. Available at: <http://www.oecd.org/centrodemexico/laocde/convenciondelaoecde.htm> (last accessed: 9th of August of 2019).

<sup>36</sup> OECD, “OECD Guidelines for Multinational Enterprises”, 2011 edition, *OECD Publishing*, p. 3. Available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf> (last accesses: 9th of August of 2019).

<sup>37</sup> OECD, “OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas”, 2016 edition, *OECD Publishing*. Available at: <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf> (last accessed: 9th of August of 2019).

Not only the OECD Member States, but also the International Conference on the Great Lakes Region, the industry, the civil society and the United Nations Group of Experts on the DRC took part in the process of preparing the Guidance and its Annexes. This process, which began in 2009 and is based on the recommendations contained in Resolution 1952 of the UNSC, ended in May 2011 with the approval of a Guidance whose main characteristic is to constitute the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas. Its objective is to help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices<sup>38</sup>.

Within the Guidance, the OECD tries, first, to clarify concepts such as conflict-affected and high-risk areas, due diligence, or the mineral supply chain itself. Second, the Organization is in charge of clarifying the nature of the Guidance, stating that the “Observance of this Guidance is voluntary and not legally enforceable”<sup>39</sup>. Finally, the Guidance incorporates three annexes with concrete recommendations for conducting due diligence<sup>40</sup> and two supplements<sup>41</sup>.

The OECD Guidance has the virtue of being the first multilateral international initiative on due diligence to be carried out in the mineral supply chain in conflict-affected and high-risk areas<sup>42</sup>. In addition, its unlimited

<sup>38</sup> *Ibidem.*, p. 3.

<sup>39</sup> *Ibidem.*, p. 16.

<sup>40</sup> The first of these annexes details the Five-Step Framework for Risk-Based Due Diligence in the Mineral Supply Chain (establishing robust business management systems, detecting and evaluating risks in the supply chain, designing and implementing a strategy to respond to identified risks, conduct an independent external supply chain due diligence audit at selected points in the supply chain, and report on supply chain due diligence), the second annex incorporates a Model of Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas, and the third annex contains Suggested Measures for Risk Mitigation and Indicators for Measuring Improvement.

<sup>41</sup> One on tin, tantalum and tungsten, and another on gold. The objective of the supplements is to regulate the entire process related to the mining and processing of these categories of minerals. CULLEN, H. “The irresistible rise of Human Rights Due Diligence... *cit.*, p. 761.

<sup>42</sup> ARIKAN, O., REINECKE, J., SPENCE, C. and MORRELL, K. “Signposts or weathervanes? The curious case of corporate social responsibility and conflict minerals”. *Journal of Business Ethics*, vol. 14, n° 3, 2017, pp. 469-484, p. 478. VOLAND, T., and DALY, S.” The EU Regulation on

geographical scope sets it apart from other initiatives such as the Dodd-Frank Act already studied, since it does not restrict its scope to a specific country or region, such as the DRC and its neighbouring countries, but rather extends its application to all conflict-affected or high-risk areas defined in the terms established in the Guidance.

However, the OECD Guidance is not without limits. In the first place, the fact that compliance with the Guidance is totally voluntary is, perhaps, its greatest weakness, since it makes compliance depend on the discretion of the parties involved in said supply chain. Second, like Regulation (EU) 2017/821 that we will study below, it limits its material scope to tin, tantalum, tungsten and their minerals, as well as gold, leaving out minerals and metals as important as cobalt (of which the DRC is a producer with 40% of the world share).

### **3. The European initiative: Regulation (EU) 2017/821**

In 2014, a Joint Communication of the European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy was approved on the responsible sourcing of minerals originating in conflict-affected and high-risk areas with a view to adopting an integrated EU approach<sup>43</sup>. This Joint Communication accompanied a proposal for a Regulation of the European Parliament and of the Council, presented by the European Commission, which sought to establish a system for the self-certification or voluntary certification of due diligence in the supply chain of importers responsible for tin, tantalum and tungsten, their minerals and gold originating from conflict-affected and high-risk areas<sup>44</sup>.

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Conflict minerals... *cit.*, p. 48.

<sup>43</sup> Joint Communication to the European Parliament and the Council: “Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach” (JOIN (2014) 8, Brussels, 5th of March of 2014).

<sup>44</sup> Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas (COM (2014) 111 final, Brussels, 3rd of March of 2014). In this proposal for a Regulation, various options were raised, namely: an independent communication from the EU, non-binding legal instruments, a regulation for self-certification or voluntary certification (initially preferred proposal), a regulation establishing a mandatory certification, a directive establishing due diligence obligations based on the OECD Guidance and, finally, the import ban when EU mineral importers do not demonstrate compliance with the OECD Guidance.

However, finally, Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas<sup>45</sup>, abandon the idea of the self-certification system to establish a Community Regulation on due diligence in the mineral supply chains from conflict-affected and high-risk areas, very similar to the OECD Guidance<sup>46</sup>.

First, in the preamble to the Regulation, it is recalled that in conflict-affected and high-risk areas it is necessary to break the nexus between conflicts and the illegal exploitation of minerals as an essential element to guarantee peace, development and stability. Furthermore, an allusion is made, precisely, to the aforementioned OECD Guidance, to the OECD Guidelines for Multinational Companies, to the Security Council Resolution 1952 of 2010, to the section 1502 of the Dodd -Frank Act and, finally, to the Joint Communication of the year 2014 that we have just mentioned.

Within the text of the Regulation, article 1 is in regard to the object and scope of application, establishing a Union system for supply chain due diligence in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold. As it follows, this Regulation is designed to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing from conflict-affected and high-risk areas. Thus, the scope is more limited with respect to the provisions of the OECD Guidance (assimilating, in this way, to what is contained in the Dodd-Frank Act).

Regarding the due diligence in the supply chain, article 2 of the Regulation defines it as the set of the obligations of Union importers of tin, tantalum and tungsten, their ores, and gold in relation to their management systems, risk management, independent third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high-risk areas to prevent or mitigate adverse impacts associated with their sourcing activities, referring the Regulation at all times

<sup>45</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (OJ L 130, of 19th of May of 2017).

<sup>46</sup> VOLAND, T., and DALY, S. "The EU Regulation on Conflict minerals..." *cit.*, p. 49.

to Annex II of the OECD Guidance for the development of said obligations and their correct compliance. It is worth highlighting, within this series of obligations, those related to external auditing, which are subsequently developed in article 6 of the Regulation, which establishes that importers of minerals or metals shall carry out audits via an independent third party, in order to observe the aforementioned due diligence. These external controls will be made available to the competent authorities of the Member States by the importers of the Union, and that is, each Member State, by virtue of article 11, must designate one or more competent authorities responsible for the application of this Regulation. In the case of Spain, the first list of competent national authorities has been published on April 9, 2019, designating as the competent authority the Secretary of State for Commerce<sup>47</sup>.

In relation to what is to be understood by “conflict-affected and high-risk areas”, article 2.f) of the Regulation states that these are areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses. Subsequently, Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821<sup>48</sup> has clarified concepts such as “situation of armed conflict”, “fragile post-conflict” and “failed states”. Unlike the Dodd-Frank Act, the Regulation does not provide a specific list of these areas, although in article 14.2 it provides that the Commission shall call upon external expertise that will provide an indicative, non-exhaustive, regularly updated list of conflict-affected and high-risk areas<sup>49</sup>

<sup>47</sup> List of Member State competent authorities designated under Article 10(1) of Regulation (EU) 2017/821. Available at: [https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc\\_157843.pdf](https://trade.ec.europa.eu/doclib/docs/2019/april/tradoc_157843.pdf) last accessed: 13<sup>th</sup> of August of 2019).

<sup>48</sup> Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council (OJ L 208, 17th of August of 2018).

<sup>49</sup> DIAGO DIAGO, M. P. “El control del comercio internacional de los minerales de conflicto: Reglamento (UE) 2017/821 por el que se establecen obligaciones en materia de diligencia debida en la cadena de suministro de estaño, tantalio y wolframio, sus minerales y oro”. *Diario La Ley*, n° 9099, 2017, pp. 1-5, p. 2.

At this point, we must ask ourselves what happens in case of infringement, that is, what happens in case a Union importer is found to have failed to act with due diligence. In these situations, article 16 of the Regulation establishes that the Member States shall lay down the rules applicable to infringements of this Regulation and must notify said rules to the Commission. Thus, in the event of infringement of the Regulation, the competent authorities of the Member States shall notify the corrective measures to be taken by the Union importer who has committed such infringement.

For a correct monitoring of this Regulation, that have entered into force on January 1, 2021, finally, article 17 establishes that no later than June 30 of each year, the Member States will present a report on the application of the Regulation to the Commission and, in particular, information on the corrective measures notified by its competent authorities. Moreover, no later than January 1, 2023 and every three years thereafter, the Commission will review the operation and effectiveness of the Regulation.

It should also be noted that on January 11, 2019, Commission Delegated Regulation (EU) 2019/429 was approved, supplementing Regulation (EU) 2017/821 of the European Parliament and of the Council as regards the methodology and criteria for the assessment and recognition of supply chain due diligence schemes concerning tin, tantalum, tungsten and gold<sup>50</sup>, which seeks to facilitate compliance with the requirements of Regulation (EU) 2017/821 by economic agents and recognize these programs.

Finally, it is important to point out that the European Union is working on a future directive on due diligence and corporate accountability for supply chains. According to the article 1 of the draft, “the directive is aimed at ensuring that undertakings under its scope operating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to potential or actual adverse impacts on human rights, the environment and good governance through their own activities or those directly linked to their operations, products or services by a business

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<sup>50</sup> Commission Delegated Regulation (EU) 2019/429 of 11 January 2019 supplementing Regulation (EU) 2017/821 of the European Parliament and of the Council as regards the methodology and criteria for the assessment and recognition of supply chain due diligence schemes concerning tin, tantalum, tungsten and gold (OJ L 75, of 19th of March of 2019).

relationship or in their value chains, and that they prevent and mitigate those adverse impacts”<sup>51</sup>.

All in all, like the OECD Guidance and contrary to what the Dodd-Frank Act does, Regulation (EU) 2017/821 has the virtue of not limiting its application to a specific State or groups of states<sup>52</sup>, and for its formulation, the opinion and experience of many parties involved has been taken into account, which is expected to have a positive global impact on mineral supply chains in conflict-affected and high-risk areas where it applies. However, despite these advantages, the new European Regulation also suffers from some limits, such as the fact of restricting its application to a reduced group of minerals, the “3T + G”<sup>53</sup>, leaving out other minerals that are equally relevant today, such as diamond, which we will now mention, cobalt or copper<sup>54</sup>, or a reduced group of obligated actors (Union importers). Finally, as what happens with the Dodd-Frank Act, the success of this Regulation will largely depend on multinational companies having access to reliable information from the first steps in the supply chain<sup>55</sup>. Given that the Regulation have entered into force on January 1, 2021, at the moment we do not have the data regarding the effects of its application.

#### **IV. ARE THERE MORE EFFECTIVE ALTERNATIVES? THE KIMBERLEY PROCESS CERTIFICATION SCHEME**

Once the main existing initiatives on due diligence in the mineral supply chain in conflict-affected and high-risk areas have been analysed, and having observed that all of them suffer from limits that condition the achievement of their main objective, which is to prevent the agents that participate in the trade of this series of minerals from contribute directly or indirectly to the

<sup>51</sup> European Parliament, “Draft report with recommendations to the Commission on corporate due diligence and corporate accountability» [2020/2129(INL)] PR\1212406EN.docx. DIAGO DIAGO, M. P. “Violación de Derechos Humanos...” *cit.*, p. 341.

<sup>52</sup> VOLAND, T., and DALY, S. “The EU Regulation on Conflict minerals...” *cit.*, p. 60.

<sup>53</sup> *Ibidem*.

<sup>54</sup> DIAGO DIAGO, M. P. “El control del comercio...” *cit.*, p. 2. DIAGO DIAGO, M. P. “Minerales y diamantes de conflicto: mecanismo de control y diligencia debida en tiempos de ODS”. *Cuadernos Europeos de Deusto*, n° 63, 2020, pp. 151-182, p. 167.

<sup>55</sup> VOLAND, T., and DALY, S. “The EU Regulation on Conflict minerals...” *cit.*, p. 62.

worsening of conflicts in these regions and to the situation of violation of human rights through the adoption of obligations regarding due diligence, it is worth asking: Are there more effective viable alternatives? At this point, it is convenient to bring up the Kimberley Process Certification Scheme of 2003 (hereinafter KPCS) as a possible alternative to the initiatives currently in force on due diligence in the mineral supply chains from conflict-affected and high-risk areas.

### 1. Context: conflict diamonds

Diamonds have traditionally been associated with wealth and eternal love, especially after De Beers' 1947 ad campaign "A diamond is forever"<sup>56</sup>. However, the public was not aware of the atrocities that were being committed to obtain these diamonds until, at the beginning of the new century, public opinion began to express its concerns, being significant the famous film starring Leonardo Di Caprio entitled "Blood Diamonds", which relates the importance of diamonds in the armed conflict that Sierra Leone was suffering at that time.

Although it is true that diamonds are a luxury item that Western consumers can choose not to buy, unlike minerals from conflict-affected or high-risk areas such as coltan, which are part of finished products such as mobile phones and computers, considered today as essential in the daily life of Western consumers<sup>57</sup>, we are facing two types of natural resources, whose extraction and production process is very similar, which have the potential to generate large benefits to producing countries and that, therefore, deserve to be treated in a similar way<sup>58</sup>.

Like coltan, copper or cobalt, the illicit trade in diamonds has been the source of numerous human rights violations, especially in Sierra Leone,

<sup>56</sup> DE BEERS: "A diamond is forever: How the slogan of the century changed the diamond industry". Available at: <https://www.debeersgroup.com/the-group/about-debeers-group/brands/a-diamond-is-forever> (last accessed: 14th of November of 2019).

<sup>57</sup> RAJ, S. "Blood Electronics..." *cit.*, p. 994.

<sup>58</sup> It is worth mentioning, at this point, the theory of the resource curse, which tries to explain why states with a greater volume of natural and mineral resources tend to be, at the same time, those with the lowest growth and development rate, and what can be done to remedy it. BURTON, E. G. "Reverse the Curse: Creating a Framework to Mitigate the Resource Curse and Promote Human Rights in Mineral Extraction Industries in Africa". *Emory International Law Review*, n° 28, 2014, pp. 425-472, p. 425.

Angola and the DRC, where armed groups operating in these states have used these precious stones to finance his campaign of terror<sup>59</sup>. All this situation of generalized violence against the civilian population began to be revealed by civil society and by non-governmental organizations, such as Oxfam or Global Witness<sup>60</sup>.

## **2. The Kimberley Process Certification Scheme for Rough Diamonds**

In May 2000, a process of open tripartite consultations began under the presidency of South Africa with the governments of the main countries involved in the diamond trade, as well as with industry and civil society, called the Kimberley Process, to discuss ways to stop the trade in conflict diamonds and ensure that diamond purchases do not finance violence by rebel movements and their allies seeking to undermine legitimate governments<sup>61</sup>. Soon after, the United Nations General Assembly adopted Resolution 55/56<sup>62</sup> on the role of diamonds in fuelling conflicts with the intention of creating an international scheme for the certification of rough diamonds<sup>63</sup>. The consultation process ends in November 2002 with the adoption of the Interlaken Declaration, which contains the main document of the Certification

<sup>59</sup> HARRINGTON, A. R. "Faceting the Future: The Need for and Proposal of the Adoption of Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market". *Transnational Law Contemporary Problems*, vol. 18, n° 2, 2009, pp. 353-418, pp. 356-357.

<sup>60</sup> Global Witness: "A rough trade: the role of companies and governments in the angolan conflict", December, 1998. Available at [www.globalwitness.org](http://www.globalwitness.org) (last accessed: 20th of August of 2019).

<sup>61</sup> Kimberley Process, "History". Available at: <https://www.kimberleyprocess.com/en/what-kp> (last accessed: 20th of August of 2019). We must bear in mind that what they were trying to protect was not the diamonds as such, but the legal trade of diamonds. DIAGO DIAGO, M. P. "Minerales y diamantes de conflicto..." *cit.*, p. 160.

<sup>62</sup> Resolution 55/56 (2001), approved by the General Assembly at its 55th period of sessions, held on January 29, 2001 (A/RES/55/56 (2001) General Distr., 29th of January of 2001).

<sup>63</sup> HOWARD, A. "Blood Diamonds: he Successes and the Failures of the Kimberley Process Certification Scheme in Angola, Sierra Leone and Zimbabwe". *Washington University Global Studies Law Review*, vol. 15, n° 1, 2016, pp. 137-159, p. 145.

System of the Kimberley Process for the Certification of Rough Diamonds<sup>64</sup>, which became operational in the year 2003<sup>65</sup>.

Through this System, the Participating countries<sup>66</sup> undertake to implement the KPCS in their respective internal legislation<sup>67</sup> and to accompany all shipments of rough diamonds destined for export with a certificate that specifies the origin of said diamonds and that ensures that they have been treated in accordance with the provisions of the KPCS system in order to eliminate the presence of conflict diamonds from the production and marketing chain.

<sup>64</sup> Kimberley Process: “*Core Document*”, 5th of November of 2002. Available at: <https://www.kimberleyprocess.com/en/system/files/documents/KPCS%20Core%20Document.pdf> (last accessed: 20th of August of 2019).

<sup>65</sup> MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos ante el Derecho internacional”. In Embid Irujo, A. (coord.), *Comercio internacional y derechos humanos*, Navarra, Thomson Reuters Aranzadi, 2007, pp. 247-264, pp. 247-248.

<sup>66</sup> As of October 1, 2019, the Kimberley Process has 55 participants, representing 82 countries, since the European Union and its 28 Member States count as a single participant, represented by the European Commission. These Kimberley Process members represent approximately 99.8% of the world’s rough diamond production. See, Kimberley Process: “Participants”. Available at: <https://www.kimberleyprocess.com/en/participants> (last accessed: 20th of August of 2019). Furthermore, membership in the Kimberley Process is not limited to sovereign states, as non-state actors may be incorporated into the group of “observers”, whose mission is to advise and control the effectiveness of the Process. HOWARD, A. “Blood Diamonds...” *cit.*, p. 146. Currently, the observers are the African Association of Diamond Producers, the Civil Society Coalition, the Diamond Development Initiative and the World Diamond Council. See, Kimberley Process: “Observers”. Available at: <https://www.kimberleyprocess.com/en/observers> (last accessed: 20th of August of 2019).

<sup>67</sup> The European Union has been one of the participants that has been most involved and has supported the Kimberley Process, which is applied in the community territory through Council Regulation (EC) 2368/2002, of 20 December 2002, implementing the Kimberley Process certification scheme for the international trade in rough diamonds (OJ L 358, 31th of December of 2002), recently amended by Commission Implementing Regulation (EU) 2019/1189 of 8 July 2019 amending Council Regulation (EC) 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds (OJ L 187, 12th of July of 2019). For a more detailed analysis of Regulation (EC) 2368/2002 see DIAGO DIAGO, M. P. “Minerales y diamantes de conflicto...” *cit.*, pp. 159-164. FERNÁNDEZ, G. “The European Union and the Kimberley Process”. *Cleer Working Papers*, n° 3, 2014, pp. 1-38, p. 20. For its part, the US has implemented the KPCS through the Clean Diamonds Trade Act, 2003, S. 760, 108th Congress. Available at: <https://www.congress.gov/bill/108th-congress/senate-bill/760> (last accessed: 14th of November of 2019).

The serious breach of these provisions entails the temporary inclusion of the offending State in a list of non-Participating countries, being important the fact that the rest of the Participating countries have the obligation to avoid that any shipment of rough diamonds is imported or exported from a non-participating country<sup>68</sup>.

An example of temporary inclusion of the offending State on a list of non-Participating countries was that of the Republic of Congo in 2004. Because real exports of rough diamonds from the Republic of Congo greatly exceeded its capacity to production, the KPCS, at the proposal of South Africa, launched a review mission in May 2004. This mission determined that the controls in the Republic of Congo were inadequate, poorly applied and, therefore, the Republic of Congo was unable to prevent rough diamonds from illegal mines from entering the legitimate diamond trade<sup>69</sup>. The Republic of Congo was subsequently readmitted in 2007<sup>70</sup>.

Similarly, Zimbabwe was sanctioned in 2009 due to the numerous reports that confirmed the military control and the numerous human rights violations against the civilian population by government authorities in the Marange mines to later be readmitted on 2011<sup>71</sup>. The case of the Marange mines in Zimbabwe was especially significant for two reasons: first, because in this case the human rights violations were not committed by rebel groups, but by the military on behalf of the Government of Zimbabwe, and, second, because as a result of the readmission of Zimbabwe to the KPCS, Global Witness, a non-governmental organization highly involved in the proper functioning of the Process, resigned its position of observer, evidencing the crisis of the System<sup>72</sup>.

<sup>68</sup> MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, pp. 249-250. DIAGO DIAGO, M. P. “El comercio internacional de diamantes: sistema de certificación del Proceso Kimberley”. *Cuadernos de Derecho Transnacional*, vol. 1, n° 1, 2009, pp. 72-91, p. 81.

<sup>69</sup> WALLIS, A. “Data Mining: Lessons from the Kimberley Process for the United Nations’ Development of Human Rights Norms for Transnational Corporations”. *Northwestern Journal of International Human Rights*, vol. 4, n° 2, 2005, pp. 388-417, p. 408.

<sup>70</sup> KIMBERLEY PROCESS: “*Republic of Congo*”. Available at: <https://www.kimberleyprocess.com/en/republic-congo> (last accessed: 28th of August of 2019).

<sup>71</sup> BURTON, E. G. “Reverse the Curse...” *cit.*, p. 435.

<sup>72</sup> CULLEN, H. “Is There Future for the Kimberley Process Certification Scheme for Conflict Diamonds”. *Macquarie Law Journal*, n° 12, 2013, pp. 61-80, p. 76. NICHOLS, E. J. “Conflict of

### 3. Legal nature of the Kimberley Process

An important issue debated by the doctrine is the legal nature of the Core Document of the KPCS. What type of legal instrument is it? What it is for sure, is that the states and the parties involved in the adoption of the KPCS did not deliberately want to conclude a binding international treaty as defined in Article 2 of the 1969 Vienna Convention on the Law of 'Treaties'<sup>73</sup>, and, much less, to constitute an international organization. This can be inferred from nuances such as the fact that non-state actors have taken part in the negotiations, or that the document is not called an international treaty, pact or convention, but rather “Core Document”, as well as that the states are not called Parties, but rather Participants, the use of verbs such as “recommend” and, of course, the lack of formal ratification of the document<sup>74</sup>. Taking into account all this, we can conclude that we are dealing with a mere political agreement or Memorandum of Understanding<sup>75</sup> and not with a binding

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Diamonds: The Kimberley Process and Zimbabwe's Marange Diamond Fields”. *Denver Journal of International Law and Policy*, vol. 40, n° 4, 2012, pp. 648-685, p. 651.

<sup>73</sup> See article 2.1.a) of the Vienna Convention on the Law of 'Treaties, where “treaty” means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. Vienna Convention on the Law of 'Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980. (U.N.T.S., vol. 1155, p. 443).

<sup>74</sup> FERNÁNDEZ, G. “The Institutionalization of a Process: The development of the Kimberley Process towards an International Organization”. *International Organizations Law Review*, vol. 13, 2016, pp. 308-340, p. 329. CULLEN, H. “Is There Future for the Kimberley Process...” *cit.*, p. 63. FERNÁNDEZ, G. “The European Union...” *cit.*, p. 16.

<sup>75</sup> These types of political agreements have traditionally been classified under the category of soft-law, although the place of soft-law in international law has been the subject of debate in recent decades. Aust defines soft-law as “international instruments not recognized as international treaties by their creators –even if they use expressions such as ‘must’– but whose main purpose is the promulgation of rules of general or universal application, even if they are not legally binding”. AUST, A. *Modern Treaty Law and Practice*. Oxford University Press, 2007, pp. 52-53. For his part, Sztucki defines it as the “body of international instruments that, per se, do not originate law and do not have a legal character, but which, even so, have regulatory force”. SZTUCKI, J. “Reflections on International Soft Law”. In RAMBERG, J., BRING O. and MAHMOUDI, S. (eds.), *Festschrift till Lars Hjerner: Studies in International Law*. Stockholm, Norstedts, 1990, p. 573. Finally, Tammes defines it as an “umbrella concept for normative phenomena that show the characteristics of the law because they influence and restrict the will and freedom of its recipients, but on the other hand do not establish a genuine international obligation, leaving

international treaty or an international organization<sup>76</sup>. Among the reasons why the KPCS was concluded as a mere political agreement and not as an international treaty, we find the fact that the conclusion of legally binding instruments is subject to long processes of conclusion and review<sup>77</sup>. Also, some of the Participants in the consultation process considered that trying to conclude an international treaty would have been inappropriate due to the way the industry had developed along national lines, others argued that a parliamentary ratification of the treaty could took years in some countries and, finally, other Participants feared that an excessively strict and intrusive control system would be included in said treaty<sup>78</sup>.

However, this non-binding nature of the Core Document does not deprive it of constituting an instrument that generates international custom<sup>79</sup>, similar to the resolutions of the United Nations General Assembly<sup>80</sup>. Just as room for a ‘soft obligation’”. TAMMES, A. J. P. “Soft Law”. In ARBOR E. R. y ASSER, T. M. C. (eds.), *Essays on International & Comparative Law in Honour of Judge Erades*. Hague, Martinus Nijhoff Publishers, 1983, p. 187.

<sup>76</sup> Statement defended by authors such as Gloria Fernández Arribas or Jan Klabbbers. These authors argue that “it is necessary to consider the possibility of thinking of the KPCS as an international organization that has a membership, well-defined functions, an organizational structure and a legal order. In this way, if the KPCS, at any time, expressly denies the intention to create an international organization, this intention can be deduced from the content of the Process and the subsequent practices of this entity and its Participants”. FERNÁNDEZ, G. “The Institutionalization of a Process...” *cit.*, p. 340. In our opinion, if the intention of the Participating countries was not originally to create an international organization, and this has been made clear in the wording of the Core Document, this intention cannot be inferred in any other way.

<sup>77</sup> MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, p. 263.

<sup>78</sup> FERNÁNDEZ, G. “The European Union...” *cit.*, p. 16.

<sup>79</sup> HOLMES, J. D. “The Kimberley Process: Evidence of change in international law”, *International Law Management Review*, vol. 3, n° 2, 2007, pp. 213-232, p. 228.

<sup>80</sup> The idea that the resolutions of the United Nations General Assembly have a customary character is strongly consolidated and accepted by the doctrine. Despite the fact that these resolutions formally constitute non-binding recommendations addressed to the states, their normative value and their declarative, crystallizing and generating effects of customary norms cannot be denied, in part thanks to the nature of the political and plenary body of the United Nations that characterizes the General Assembly. Regarding the capacity of General Assembly resolutions to generate international custom, Antonio Remiro Brotóns affirms that “these resolutions (...) can influence the legislative policies of the states through their projection in the internal legal systems and, hence, to interstate relations, thus weaving a generating fabric, sometimes imperceptible but incessant, of customary international law”. REMIRO BROTONS, A.,

General Assembly resolutions can influence the legislative policies of the states through their projection in domestic legal systems, the KPCS also conditions these legislative policies by recommending the adoption of internal controls (“*Each Participant should establish a system of internal controls...*”) and the truth is that, although it is a recommendation without binding effects, a real state practice has been generated around this recommendation<sup>81</sup> derived from the expectation of the Participating states to achieve certain degree of effectiveness in the achievement of the objectives<sup>82</sup> and absolutely all the Participating States have implemented the Core Document in their corresponding national legislation through mandatory norms. This state practice of promulgating acts of the internal legislative power of the states to implement the KPCS meets all the necessary requirements to be considered a practice for the purposes of creating a customary norm, as it is general, since all the Participating countries have adopted their respective internal legislative acts, is constant and uniform, since all these acts are aimed at the implementation of the KPCS and the creation of internal control bodies, and, finally, it is durable over time, and, proof of this, is the recent adoption by the EU of the Implementing Regulation (EU) 2019/1189 that modifies Regulation (EC) 2368/2002 by which the Kimberley Process certification system is applied. However, to be able to speak of international custom, the existence of an *opinio iuris* or the conviction of forming a legal obligation is also necessary, being difficult to verify this element in relation to the KPCS. Although there are acts to induce the existence of *opinio iuris*, such as the enactment of legislation<sup>83</sup>, an aspect that is fulfilled when we talk about the KPCS, the true test of the *opinio iuris* would come from the hand of the future adoption of a general multilateral international treaty in relation to conflict diamonds, which would be desirable, although at present it does not seem likely to happen. At the moment, the effectiveness of the KPCS depends on the internal legislation of

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*et al. Derecho Internacional*, Valencia, Tirant Lo Blanch, 2007, p. 554.

<sup>81</sup> HOLMES, J. D. “The Kimberley Process...” *cit.*, p. 229.

<sup>82</sup> CULLEN, H. “Is There Future for the Kimberley Process...” *cit.*, p. 65. FERNÁNDEZ, G. “The Institutionalization of a Process...” *cit.*, p. 331.

<sup>83</sup> REMIRO BROTONS, A., *et al. Derecho Internacional...* *cit.*, p. 509.

each state adopted to implement it and it is only binding to the extent that the Participating countries desires it<sup>84</sup>.

#### **4. Compatibility of the Kimberley Process with the basic rules of international trade**

Although it is true that the KPCS Core Document is still a document of a political nature and, per se, it is not incompatible with the General Agreement on Tariffs and Trade (GATT) of 1947, the truth is that the different national regulations that, according to the provisions of the Kimberley Process document, had to be adopted to implement it, they could become an obstacle to international trade, as evidenced by countries such as the US<sup>85</sup>. Specifically, the obligation “to ensure that no shipment of rough diamonds is exported to or imported from a non-Participating country” is inconsistent with article XI of the GATT, which states that “no prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party”<sup>86</sup>. Taking into account this incompatibility, what solution can be adopted?

Of all the possible solutions<sup>87</sup>, finally the World Trade Organization (WTO) and, more specifically, the General Council, by a three-fourths majority, as provided in article IX.3 of the Marrakesh Agreement of 1994, adopted the decision to temporarily suspend the application of the principles contained in the GATT in relation to the measures necessary to prohibit the import and export of rough diamonds from states not participating in the KPCS in May

<sup>84</sup> HOLMES, J. D. “The Kimberley Process...” *cit.*, p. 230.

<sup>85</sup> PRICE, T. M. “The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate”. *Minnesota Journal of Global Trade*, vol. 12, n° 1, 2003, pp. 1-70, p. 5.

<sup>86</sup> General Agreement on Tariffs and Trade (GATT), 30th of October of 1947, (LT/UR/A-1A/1/GATT/2, 15th of April of 1994). MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, p. 253.

<sup>87</sup> As could be the allegation of any of the exceptions provided for in articles XX and XXI of the GATT, that is, public morals, protection of the health and life of people, and national security, or an interpretive decision authorized by the Ministerial Conference and by the General Council binding on all Member States, this being the preferred option by some authors. MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, p. 263.

2003, extended for the last time in 2018<sup>88</sup>. This exemption definitely opens the door to the consideration of exemptions to the basic principles of the GATT relating to the prohibition of trade restrictions between WTO Members for human rights issues. However, although at first glance the intention may seem good, some authors argue that the WTO cannot be a “Christmas tree” on which to hang all possible good causes<sup>89</sup>.

In Pauwelyn’s opinion, the best solution in this regard would have been an interpretative decision stating that all measures that prohibit or limit the import or export of conflict diamonds necessary for the correct implementation of the KPCS are presumed to be included in the exception provided for in article XXI of the GATT<sup>90</sup>.

### 5. Strengths, weaknesses and proposals for improvement of the Kimberley Process

Statistically speaking, the KPCS has turned out to be a success, since it is estimated that currently, as of November 2019, the diamonds denominated as conflictive that are outside the Kimberley Process do not account for more than 0.2% of production and the global diamond trade<sup>91</sup>. Furthermore, the KPCS has proven to be especially effective in solving the problems of some Participating countries such as Sierra Leone<sup>92</sup> and Liberia<sup>93</sup>.

<sup>88</sup> WTO: “*Extension of waiver concerning Kimberley Process Certification Scheme*”, 26th of July of 2018 (WT/L/1039, 30th of July of 2018). MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, p. 261. PAUWELYN, J. “WTO Compassion or Superiority Complex: What to Make of the WTO Waiver for Conflict Diamonds”, *Michigan Journal of International Law*, n° 24, 2003, pp. 1177-1207, p. 1178.

<sup>89</sup> ARNOLD, L. L. “Labour and the World Trade Organization: Towards a Reconstruction of the Linkage Discourse”, *Deaking Law Review*, vol. 10, n° 1, 2005, pp. 84-119, p. 90.

<sup>90</sup> PAUWELYN, J. “WTO Compassion or Superiority Complex...” *cit.*, p. 1204.

<sup>91</sup> See, Kimberley Process: “*What is the Kimberley Process?*”. Available at: <https://www.kimberleyprocess.com/en/what-kp> (last accessed: 14th of November of 2019).

<sup>92</sup> One of the cities most affected by the conflict diamond trade was the city of Koidu, that has now recovered its activity and witnessed advances such as the construction of roads or the advent of electricity. HOWARD, A. “Blood Diamonds...” *cit.*, p. 150.

<sup>93</sup> Liberia, a state that suffered a trade embargo on diamonds by the UNSC, saw this embargo lifted only when in 2007 it began to cooperate with the KPCS. CULLEN, H. “Is There Future for the Kimberley Process...” *cit.*, p. 69.

However, despite these advances, after several years of application, the doctrine has identified some limits that cast doubt on its effectiveness as a possible and viable alternative to current initiatives on due diligence in the mineral supply chains conflict-affected or high-risk areas.

One of the limits of the KPCS has to do with the definition of “conflict diamond” that it provides, as “conflict diamonds” are understood to be all those diamonds used by rebel movements or their allies to finance conflicts aimed at undermining legitimate governments. In other words, it focuses solely on diamonds that have the potential to profit rebel groups. Some authors affirm the need to include, on the one hand, abuses committed by governments and corporations, and, on the other hand, the protection of human rights as one of the objectives to be achieved by the Process, beyond its mere mention in the Preamble<sup>94</sup>. According to Audrie Howard and Pilar Diago, a good redefinition of the concept of “conflict diamond” would include the diamond trade not only by armed groups or rebels, but also by legitimate governments that commit serious human rights violations within the State boundaries<sup>95</sup>, as occurred in the case of the Marange mines in Zimbabwe. For her part, Tina Gooch argues that simply changing the term “conflict diamonds” to “illicit diamonds” would solve all problems and prevent the KPCS from falling into obsolescence<sup>96</sup>. Finally, Julie Elisabeth Nichols proposes the most accurate definition from my point of view: conflict diamonds should be defined as “all diamonds that come from areas where diamond mining is based on the systematic violation of human rights”<sup>97</sup>.

The second of the limits has to do with the legal nature of the KPCS Core Document. As we have already mentioned, this document does not constitute an international treaty as defined in Article 2 of the 1969 Vienna Convention on the Law of Treaties, but rather a kind of voluntary political

<sup>94</sup> FERNÁNDEZ, G. “The European Union...” *cit.*, p. 38. CULLEN, H. “Is There Future for the Kimberley Process...” *cit.*, p. 77. DIAGO DIAGO, M. P. “Minerales y diamantes de conflicto...” *cit.*, p. 175.

<sup>95</sup> HOWARD, A. “Blood Diamonds...” *cit.*, p. 159. DIAGO DIAGO, M. P. “Minerales y diamantes de conflicto...” *cit.*, p. 175.

<sup>96</sup> GOOCH, T. M. “Conflict diamonds or illicit diamonds: Should the difference matter to the Kimberley process certification scheme?”, *Natural Resources Journal*, vol. 48, n° 1, 2008, pp. 189-214, p. 192.

<sup>97</sup> NICHOLS, E. J. “Conflict of Diamonds...” *cit.*, p. 675.

agreement without binding legal force, an instrument of soft-law, leaving, in this way, its correct implementation at the discretion of the Participating states<sup>98</sup>. Regarding the risk of the KPCS becoming ineffective, some authors have proposed turning it into a binding international treaty, since by doing so, breaches of obligations could be brought before an international or national court to be judged<sup>99</sup>, although it should be noted that if the KPCS has been successful for something, it is precisely because of its lack of enforcement<sup>100</sup>. Other authors defend the idea of leaving aside the current tripartite system, with the participation of states, corporations and civil society, to move towards a multilateral instrument of due diligence whose target is only the diamond industry<sup>101</sup>, that is, an instrument similar to the OECD Due Diligence Guidance for the responsible management of mineral supply chains from conflict-affected and high-risk areas.

As we have just mentioned, the KPCS entrusts the Participants with the independence to enact the national legislation they consider appropriate for the correct application of the System<sup>102</sup>, and it is precisely this fact that leads us to speak of the third of the limits: the lack of means and resources for the correct implementation of the Process<sup>103</sup> and the lack of uniformity in national legislation<sup>104</sup>, which has as its main consequence the lack of effectiveness of the control system that helps to identify non-compliance<sup>105</sup>. To overcome this limit, perhaps it would be advisable to think about the creation of a body inserted in the institutional structure of the KPCS that controls the internal procedures of the Participating States through which the

<sup>98</sup> HOWARD, A. "Blood Diamonds..." *cit.*, p. 146.

<sup>99</sup> GOOCH, T. M. "Conflict diamonds or illicit diamonds..." *cit.*, p. 192. BURTON, E. G. "Reverse the Curse..." *cit.*, p. 443.

<sup>100</sup> CULLEN, H. "Is There Future for the Kimberley Process..." *cit.*, p. 70.

<sup>101</sup> NICHOLS, E. J. "Conflict of Diamonds..." *cit.*, pp. 675-676.

<sup>102</sup> WALLIS, A. "Data Mining..." *cit.*, p. 390.

<sup>103</sup> MALAMUT, S. A. "A Band-aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-caused Bloodshed in the Democratic Republic of Congo". *Suffolk Transnational Law Review*, vol. 29, n° 1, 2005, pp. 25-52, p. 41.

<sup>104</sup> HOWARD, A. "Blood Diamonds..." *cit.*, p. 147.

<sup>105</sup> MARTÍNEZ PÉREZ, E. J. "El comercio de diamantes conflictivos..." *cit.*, p. 264. TAMM, I. "Diamonds in peace and war: severing the conflict-diamond connection", *WPF Report*, n° 30, 2002, pp. 1-60, p. 34.

Certification System is implemented, as well as giving greater importance to the reports of non-governmental organizations and civil society, who, despite enjoying an increasingly significant weight within all these new structures and instruments of international law, still argue that the state-centred conception of international relations does not allow to advance in denouncing infractions and injustices.

Likewise, the doctrine points out as another limit of the KPCS the need to reach decisions by consensus, considering it a barrier to the correct functioning of the System<sup>106</sup>. Perhaps thinking about changing the decision-making system and requiring a qualified majority would fix the blocking of some important decisions.

One of the most important criticisms of the KPCS is, precisely due to its non-binding nature, the lack of sanctions for non-compliance, the lack of enforcement mechanisms, trusting the achievement of its objectives and its effectiveness in “naming and shaming”<sup>107</sup>, that is, in the public shame of being pointed with the finger for a breach of the KPCS, being, however, true that sometimes this possible damage to the reputation of a State can be a good mechanism to achieve effectiveness. An idea, in my opinion, very interesting is the one proposed by Shannon Murphy, who suggests that the KPCS could use the dispute settlement system contained in the 1994 Marrakesh Agreement that gave life to the WTO, as it would make the Process more “effective, legitimate, safe and predictable”<sup>108</sup>.

A final limitation of the PKCD has to do with the lack of control by governments over the mines from which rough diamonds are mined. In this regard, it could be argued that investing efforts in an effective inspection system would prevent the presence of unregistered, unlicensed or illegal miners and, therefore, the presence of conflict diamonds in international diamond trade

<sup>106</sup> BURTON, E. G. “Reverse the Curse...” *cit.*, p. 434. CULLEN, H. “Is There Future for the Kimberley Process” *cit.*, p. 72.

<sup>107</sup> FERNÁNDEZ, G. “The Institutionalization of a Process...” *cit.*, p. 338.

<sup>108</sup> MURPHY, S. “Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberley Process Will Ultimately Fail in Ending Conflicts Fueled by Blood Diamonds”, *Pepperdine Dispute Resolution Law Journal*, vol. 11, n° 2, 2011, pp. 207-228, p. 225.

flows<sup>109</sup> (Fishman, 2005: 238). Furthermore, falsifications have been detected in certificates<sup>110</sup>.

### 6. Application of the Kimberley Process to minerals from conflict-affected or high-risk areas

The proposal to apply the Kimberley Process to other material conflicts is nothing new, since in 2009 Harrington proposed the application of the KPCS to the illegal trade in precious gemstones<sup>111</sup>. In 2014 Burton also proposed to apply the Process to other minerals such as copper and cobalt<sup>112</sup>. In 2017 Huffman defended the idea of applying this Certification Scheme to the problem of environmental degradation in the South China Sea<sup>113</sup>. Finally, Diago asserts that Kimberley has the necessary characteristics to become a standard international trade procedure for problematic raw materials like coltan<sup>114</sup>.

Although it is true that countries such as the Republic of Congo or Zimbabwe have been included in the list of non-participating countries due to the incorrect application of the Scheme, it has proven to be effective in the fight against conflict diamonds in others such as Sierra Leone or Liberia. In addition, statistics and annual reports show the decline in the presence of conflict diamonds in world trade. This would not have been possible without the consensus and the will of the states, the diamond-producing industries and civil society that were once part of the consultation process that gave rise

<sup>109</sup> FISHMAN, J. L. “Is Diamond Smuggling Forever-The Kimberley Process Certification Scheme: The First Step down the Long Road to Solving the Blood Diamond Trade Problem”, *University of Miami Law School*, n° 13, 2005, pp. 217-242, p. 238.

<sup>110</sup> Antwerp warned about the falsification of Kimberley certificates in December 2015. In 2016 the authorities of the Kimberley Process in Sierra Leone activated the alert about a shipment to Hong Kong of rough diamonds with falsified certificate. Diago Diago, M. P. “Minerales y diamantes de conflicto...” *cit.*, pp. 173-174.

<sup>111</sup> HARRINGTON, A. R. “Faceting the Future: The Need for and Proposal of the Adoption of Kimberley Process-Styled Legitimacy Certification System for the Global Gemstone Market”, *Transnational Law Contemporary Problems*, vol. 18, n° 2, 2009, pp. 353-418.

<sup>112</sup> BURTON, E. G. “Reverse the Curse...” *cit.*

<sup>113</sup> HUFFMAN, J. “The kimberley process as framework for regulating conflict oil and gas sourced from the south china sea”. *William Mary Environmental Law and Policy Review*, vol. 42, n° 1, 2017, pp. 357-383.

<sup>114</sup> DIAGO DIAGO, M. P. “Minerales y diamantes de conflicto...” *cit.*, p. 177.

to the KPCS and it is precisely this world consensus that it would be desirable to reach in relation to minerals from conflict-affected and high-risk areas.

In strictly legal terms, the greater effectiveness of a system analogous to the KPCS applied to minerals from conflict-affected and high-risk areas is derived from several factors. In the first place, we are facing an instrument whose addressees are the sovereign states, which have the duty to implement the Process in their internal legislation, and not a due diligence instrument whose targets are companies (capable of falsifying information), as is the case with the other initiatives studied. Second, the certification scheme seems more precise and specific than due diligence instruments<sup>115</sup>, whose main problem is the imprecision of its characterization, which is understood more as a preventive obligation than as a reason for responsibility. Third, precisely with respect to this responsibility, while the different initiatives on due diligence studied suffered from the same limit: the lack of an eventual sanction for possible breaches, a system analogous to the KPCS would contemplate the possibility of temporarily including the violating state on a list of Non-Participating States, which would lead to a sanction. Fourth, the differences related to the scope of the instruments are also important, since the initiatives studied have a very limited material and geographical scope that could be avoided if an instrument similar to the KPCS was adopted, in which minerals such as diamonds and cobalt or even other natural resources such as wood could be included. Regarding the purpose, whereas the initiatives studied only pursue transparency in the process, the KPCS seeks the more ambitious purpose of eliminating the presence of conflict diamonds in the production and marketing chain. Finally, the most criticized aspect of initiatives such as the 2011 OECD Guidance is their lack of binding nature, leaving it to the companies to comply with its stipulations. This aspect could be remedied with a system analogous to the KPCS because, despite the fact that its Core Document is not binding, however, all national laws adopted to implement it are mandatory.

On the other hand, to make even more effective a possible system analogous to the KPCS that could be applicable to minerals from conflict-

<sup>115</sup> Not surprisingly, in the EU Proposal for a Regulation, the first preferred option was to implement a self-certification system for importers of minerals from conflict-affected and high-risk areas, although, finally, this option was rejected in favour of a Regulation on due diligence similar to the OECD Guidance.

affected and high-risk areas, it would be convenient to take into account the suggestions provided by the doctrine, such as inserting an organ in the institutional structure of the Process that controls the internal procedures of the Participating States through which the Certification System is implemented or that of using the Dispute Settlement System contained in the Marrakesh Agreement of 1994.

Although we are not talking about the same type of minerals<sup>116</sup>, the KPCS, even with all its limits, constitutes evidence of a change in International Law<sup>117</sup> and an important step in the right direction<sup>118</sup>, and it is not only a viable alternative to the current initiatives on due diligence in the mineral supply chains in conflict-affected or high-risk areas, but also the most successful, desirable and effective one, since to solve global problems, responses are required at the same level. These responses, as recalled by the President of Ghana in his speech to the United Nations General Assembly<sup>119</sup>, must be multilateral, and it is because “multilateralism is effective because it is legitimate per se”<sup>120</sup>. Wherever there are situations of generalized violence and serious and massive human rights violations, states, private corporations and civil society must be present, showing unity and cooperating to re-establish peace and security for citizens. In the words of Martin-Joe Ezeudu, the KPCS represents “an unprecedented example of how the international community can address specific problems in an interface where conflicts over resources, corruption, human rights violations and global trade converge”<sup>121</sup>, and, precisely for this reason, it is advisable to extend its scope of material application to all natural

<sup>116</sup> Because while conflict diamonds are a luxury item that Western consumers can choose not to buy, conflict minerals, such as coltan, are part of finished products such as smartphones and computers, considered today as essential in the daily life of Western consumers. RAJ, S. “Blood Electronics... *cit.*, p. 994.

<sup>117</sup> HOLMES, J. D. “The Kimberley Process... *op cit.*, p. 228.

<sup>118</sup> WEITZEL, J. “Targeted economic measures to curb armed conflict? The Kimberley Process on the trade in ‘Conflict Diamonds’”. In Quéniwet, N. & Shah-Davis, S. (eds.). *International Law and Armed Conflict: Challenges in the 21st Century*. Hague, T.M.C. Asser Press, 2010, pp. 161-181, p. 161.

<sup>119</sup> See footnote 4.

<sup>120</sup> BARBÉ IZUEL, E. “Multilateralism: Adapting to world with emerging powers”. *Revista Española de Derecho Internacional*, vol. 62, n° 2, 2010, pp. 21-50, p. 35.

<sup>121</sup> EZEUDU, M. J. “From a Soft Law Process to Hard Law Obligations”. *European Journal of Law Reform*, vol. 16, n° 1, 2014, pp. 104-132, p. 104.

resources that are likely to be the main cause of any violation of human rights, thus including not only diamonds and precious gemstones, but also coltan, cobalt, copper or even wood.

## V. CONCLUSIONS

In conflict-affected and high-risk areas, many of them located on the African continent, multinational companies engaged in mineral extraction, processing and trading have the potential to generate income, growth and prosperity, maintain the means subsistence and promote local development. However, these companies may also be exposed to the risk of contributing to or being associated with significant adverse effects in relation to their sourcing activities or decisions, such as armed conflict and serious human rights violations<sup>122</sup>.

As international law develops in new and increasingly complex areas, due diligence is gaining ground as an important tool to respond to such challenges. Thus, in order to break the existing nexus between the illegal exploitation of mineral resources, their illicit trade, and the perpetuation of armed conflicts in certain regions of the world, numerous states and international organizations, among which the United States stands out for being the pioneer, The OECD and the EU have adopted different initiatives and legal instruments on due diligence in the mineral supply chain in conflict-affected and high-risk areas, each with its own nuances and with the limits that we have been identifying throughout the present analysis that diminish their ability to achieve the purpose for which they were adopted.

Given these series of limitations to the existing initiatives, it is inevitable to wonder if it is possible to go a step further and if there are viable alternatives that will make it possible to put an end to the illicit trade in conflict minerals. In this article, the creation of a certification system similar to the existing one for rough diamonds, the Kimberley Process Certification Scheme, has been proposed as an alternative. The KPCS has the virtue of being a multilateral solution to a global problem that has proven to be relatively effective over time

<sup>122</sup> Commission Recommendation (EU) 2018/1149 of 10 August 2018 on non-binding guidelines for the identification of conflict-affected and high-risk areas and other supply chain risks under Regulation (EU) 2017/821 of the European Parliament and of the Council (OJ L 208, of 17th of August of 2018, p. 96).

in preventing the illegal trade in diamonds from profiting armed rebel groups that subject the civilian population to serious violations of human rights. Some authors have sought to go further by proposing a binding international treaty with sanctions that prohibits the illegal trade in conflict minerals, similar to the already existing Arms Trade Treaty or the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>123</sup>. However, this solution implies long processes of negotiation, conclusion and review<sup>124</sup>, as well as a high degree of rigidity that a system analogous to the Kimberley Process System would avoid.

As the proverb that Nana Addo Dankwa Akufo-Addo, President of the Republic of Ghana, brought up in his speech at the General Debate at the 74th session of the United Nations General Assembly, “the birds sing not because they have answers, but because they have songs”<sup>125</sup>. Faced with the problem of minerals from conflict-affected and high-risk areas that seriously affects many countries on the African continent, there is no single answer, but the hope is that the different initiatives proposed to solve it, including the consideration of an instrument similar to the KOCS, progressively lead to closer multilateral cooperation between the states involved, trying to achieve a more effective regulation on due diligence in the mineral supply chain from conflict-affected and high-risk areas that protects, at the same time, the legitimate trade and human rights. Likewise, it is worth mentioning the need for true public awareness in order to involve consumers in the problem of conflict minerals and the consequences that their use entails.

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<sup>123</sup> MONCEL, R. “Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals”. *Berkeley Journal of International Law*, vol. 34, n° 1, 2016, p. 233. DIAGO DIAGO, M. P. “El control del comercio...” *cit.*, p. 4.

<sup>124</sup> MARTÍNEZ PÉREZ, E. J. “El comercio de diamantes conflictivos...” *cit.*, p. 263.

<sup>125</sup> See footnote 4.

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