

'A Rough Trade'? Towards a More Sustainable Minerals Supply Chain

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Abstract

Target 16.6 of the 2015 Sustainable Development Goals (SDGs) seeks to create 'effective, accountable and transparent institutions at all levels' for the purpose of achieving sustainable development. Nevertheless, the inherent vagueness of the notions of transparency and accountability poses difficulties for achieving the target. This is why this article examines how these notions have been conceptualized in international legal discourse and applied in practice. It does so within the context of the trade in natural resources that finance armed conflict, which is considered detrimental to the development opportunities of developing countries. The article examines how two of the most important initiatives in this field, namely the Kimberley Process for the Certification of Rough Diamonds and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas, operationalize transparency and accountability. It posits that both initiatives fall short of establishing full accountability. However, notwithstanding their flaws and limitations, they make a valuable contribution to achieving target 16.6.

Keywords

transparency – accountability – Kimberley Process – OECD Due Diligence Guidance – Sustainable Development Goals – natural resources – armed conflict – illicit financial flows

1 Introduction¹

In December 1998², a (then) relatively unknown NGO called Global Witness issued a report entitled 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict', uncovering the role that rough diamonds played in fueling the bloody armed conflict in Angola.³ The shock that this report caused within the international community spurred several developments aimed at stopping the trade in so-called conflict resources, namely 'natural resources whose systematic exploitation and trade finance or fuel armed conflicts'.⁴ This practice is highly destructive in more than one way. In addition to prolonging armed violence, the trade in conflict resources also seriously hampers the economic opportunities of developing countries, which often are highly reliant on these very same natural resources. A 2017 report published by the United Nations Conference on Trade and Development (UNCTAD) indicates that two-thirds of a total of 135 developing countries are dependent on commodity exports and this number is on the rise.⁵ Furthermore, about one quarter of these countries, mostly African, depends specifically on minerals,

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- 1 The Special Issue 'International Law for the Sustainable Development Goals' is a research outcome of the 2017–2018 Workshop Series 'International Law for the Sustainable Development Goals' organised by the Department of Transboundary Legal Studies, Faculty of Law, University of Groningen. Mando Rachovitsa and Marlies Hesselman led the organisation of these workshops. The series included 8 workshops, which explored the role and relevance of international law to the implementation of the Sustainable Development Goals. The Special Issue includes some of the papers presented at the workshops and papers submitted to an open Call for Papers. More information is available at <https://www.rug.nl/rechten/congressen/il4sdgs/>.
 - 2 This paper builds on and occasionally borrows from my previous work, most notably Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* (Cambridge: Cambridge University Press, 2015); Daniëlla Dam-de Jong, 'The Role of Informal Normative Processes in Improving Governance Over Natural Resources in Conflict-torn States', *The Hague Journal on the Rule of Law*, 7/2: 219–241 (2015); and Daniëlla Dam-de Jong, 'UN Natural Resources Sanctions Regimes: Incorporating Market-based Responses to Address Market-driven Problems' in Larissa van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (Camberley: Edward Elgar, 2017), pp. 147–174.
 - 3 Global Witness, *A Rough Trade: The Role of Companies and Governments in the Angolan Conflict*, 1 December 1998, available at <https://www.globalwitness.org/en/archive/rough-trade>, accessed 21 February 2019.
 - 4 See Dam-de Jong, *International Law and Governance of Natural Resources*, p. 27. This definition is proposed in the absence of a formal definition of the term 'conflict resources'.
 - 5 United Nations Conference on Trade and Development, *State of Commodity Dependence 2016*, UNCTAD/SUC/2017/2, 12 December 2017, p. 19.

ores and metals as a subcategory of natural resources.⁶ Addressing the trade in conflict resources is therefore both a security and a development priority.

The dual objectives of security and development also underlie efforts to address the trade in conflict resources. The most important initiatives to curb the trade in conflict resources include the Kimberley Process Certification Scheme for Rough Diamonds (KPCS), adopted by States, the diamond industry and civil society in 2002, and the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas (the OECD Guidance), adopted by the Organisation for Economic Cooperation and Development (OECD) in 2011. Both initiatives emphasize that their objective is to prevent natural resources from contributing to armed conflict and to promote sustainable development.⁷ Their principal method for achieving this is to protect the legitimate trade in natural resources and to ban illegitimately sourced natural resources from the international market. In these ways, the initiatives have the potential to make a valuable contribution to the realization of the Sustainable Development Goals (SDGs), notably to Goal 16 on peace, justice and strong institutions.

This Goal does not only generally recognize the inter-linkages between peace and development, but also contains several targets to which the initiatives (can) contribute. This is especially so for target 16.4, which seeks to 'significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime'.⁸ Firstly, the trade in conflict resources is encompassed by the notion of 'illicit financial flows', which according to the World Bank refers to 'cross-border movement

⁶ *Ibid.*

⁷ See the preamble of the Kimberley Process Certificate Scheme, *Core Document*, 22 November 2013, available at <https://www.kimberleyprocess.com/en/documents> under 'core documents', accessed 21 February 2019, which refers to the 'critical contribution [that the trade in diamonds make] to the economies of many of the producing, processing, exporting and importing states, especially developing states'; Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, C(2012)93, 25 May 2011 (amended on 17 July 2012), which recommends that 'Members and non-Member adherents to the Declaration on International Investment and Multinational Enterprises actively promote the observance of the Guidance by companies operating in or from their territories and sourcing minerals from conflict-affected or high-risk areas with the aim of ensuring that they respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development'.

⁸ UNGA, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015, p. 25.

of capital associated with illegal activity'.⁹ The notion not only encompasses the flows themselves, but also the underlying activities that generate the flows, including activities such as the smuggling and trafficking of minerals or other illegally obtained natural resources.¹⁰ In addition, the trade in conflict resources is strongly connected to illicit arms flows, as encompassed by target 16.4. This is explicitly recognized by the KPCS, which states in the preamble that 'the trade in conflict diamonds is a matter of serious international concern, which can be directly linked to [...] the illicit traffic in, and proliferation of, armaments, especially small arms and light weapons'.¹¹ Furthermore, the trade in conflict resources is largely dependent on organized crime. An investigation led by various international organizations in the Democratic Republic of Congo (DRC), for instance, concluded that around 98% of net profits from illegal natural resource exploitation in the DRC – particularly gold, charcoal and timber – goes to transnational organized criminal networks, while armed groups retain only 2% of these profits.¹²

Given the close connections between the trade in conflict resources and target 16.4, it is evident that the KPCS and the OECD Guidance can play an important role in achieving it. However, these initiatives can also make a valuable contribution to achieving other targets within Goal 16 of the 2015 Sustainable Development Goals. The current article focuses on target 16.6, which seeks to create 'effective, accountable and transparent institutions at all levels' for the purpose of achieving sustainable development. It is beyond doubt that an effective approach towards curbing the international trade in conflict resources relies to a great extent on the establishment of effective, accountable and transparent institutions, which are capable of monitoring the trade in natural resources. This is precisely what the KPCS and the OECD Guidance seek to achieve. At the same time, target 16.6 does not specify what is understood by effective, accountable and transparent institutions. This raises important questions.

A first concern focuses on institutions. Obviously, public institutions play an essential role in curbing the trade in conflict resources. It is first and

9 World Bank, *The World Bank Group's Response to Illicit Financial Flows: A Stocktaking*, 104568, 22 March 2016, p. 1.

10 *Ibid.*, p. 2.

11 Kimberley Process Certificate Scheme, preamble.

12 UNEP-MONUSCO-OSESG, *Experts' Background Report on Illegal Exploitation and Trade in Natural Resources Benefitting Organized Criminal Groups and Recommendations on MONUSCO's Role in Fostering Stability and Peace in Eastern DR Congo*, Final report, 15 April 2015, <https://www.unenvironment.org>, accessed 21 February 2019.

foremost up to governments to establish and administer regulatory systems aimed at preventing illegal trade in natural resources. Yet, the private sector plays a pivotal role as well. This can be illustrated with reference to the OECD Guidance, which focuses precisely on enhancing the resilience of corporate control systems as a means to prevent corporations from contributing to the trade in conflict resources. The question can therefore be raised whether the private sector is encompassed by the notion 'institutions' as envisaged by target 16.6. The current article argues in favor of adopting an inclusive interpretation. Arguably, this position is supported by the sustainable development agenda itself, which specifically envisages a role for the private sector to contribute towards the realization of the SDGs as part of the Global Partnership for sustainable development.¹³

Other questions concern the understanding of the notions 'transparency' and 'accountability', which constitute the primary object of inquiry in this article. In this respect, it is relevant to note that both the KPCS and the OECD Guidance rely on transparency and accountability as tools to strengthen institutions. The KPCS focuses primarily on governmental institutions and the OECD Guidance on corporate structures and processes. The principal question that is to be addressed in this article is therefore how these two initiatives operationalize transparency and accountability within their respective frameworks. The purpose of this inquiry is to shed light on how the initiatives contribute to achieving target 16.6 of the SDGs within the specific context of curbing illicit financial flows, as encompassed by target 16.4.

For this purpose, the discussion first provides a theoretical framework for assessing the transparency and accountability requirements in the two initiatives. It inquires how transparency and accountability have been conceptualized in international legal discourse and how the two notions are interconnected (section 2). The international legal framework is considered most relevant, because the KPCS and the OECD Guidance have an important normative function, notwithstanding the fact that these are strictly speaking not part of formal international law. The normative function of the two instruments is addressed in the following section. More specifically, section 3 examines the objectives, scope, norm creators and addressees of the two instruments for the purpose of clarifying the institutional setting in which the transparency and accountability standards operate. It subsequently addresses the mechanisms on which these instruments rely to operationalize transparency and accountability. Furthermore, promoting transparency and accountability in itself does not necessarily result in transparent and accountable institutions, as proposed

13 *Transforming Our World: The 2030 Agenda for Sustainable Development*, para. 39.

by target 16.6. The current contribution also inquires into the underlying purposes of the transparency and accountability standards designed by the two initiatives (section 4). Finally, the analysis relates the operation of the standards within these two instruments to the objectives of SDG 16.6 (section 5).

2 A Conceptual Exploration of Transparency and Accountability

In order to assess how the two initiatives operationalize transparency and accountability and thereby contribute to achieving target 16.6, this section aims to develop a general understanding of the notions of transparency and accountability. Sub-section 2.1 explores the notion of transparency, while sub-section 2.2 focuses on accountability. Sub-section 2.3 clarifies the connections between transparency and accountability and briefly discusses how these will be assessed in the context of the KPCS and the OECD Guidance. The current section does not elaborate on the question of the addressees of transparency and accountability norms. It takes as its starting-point that existing transparency and accountability standards are primarily addressed to public authorities (States and, to a lesser extent, international organizations), but that similar standards have been developed as a matter of *soft law* for private actors (NGOs and corporations) as well.¹⁴ Of course, both standards are closely related to the notion of good governance, which includes, in addition to transparency and accountability, standards such as abiding by the rule of law and public participation.¹⁵

2.1 Transparency

Demands for greater transparency have permeated contemporary debates on governance in all fields, ranging from environmental protection to the more classical domain of peace and security, and with respect to a great variety of

14 See, e.g., Larry Backer, 'Transparency and Business in International Law: Governance between Norm and Technique' in Andrea Bianchi and Anne Peters (eds.), *Transparency in International Law* (Cambridge: Cambridge University Press, 2013), pp. 477–501.

15 See, e.g., Thomas Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges', *Third World Quarterly*, 21/5: 795–814 (2000); Andy Knight, 'Democracy and Good Governance' in Thomas Weiss and Sam Daws (eds.), *The Oxford Handbook on the United Nations* (Oxford: Oxford University Press, 2008), pp. 620–633; Edith Brown-Weiss and Ahila Sornarajah, 'Good Governance' in Rüdiger Wolfrum (ed.), *Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), vol. IV, pp. 516–528; Karl-Heinz Ladeur, 'Governance, Theory of' in Wolfrum, *Encyclopedia of Public International Law*, Vol. IV, pp. 541–553.

actors, both in the public and the private sphere. This development has been aptly coined by Gupta as the 'transparency turn'.¹⁶ Due to the variety of contexts in which transparency is used and promulgated, it may have multiple meanings, which of course underlies the problems of defining the standard for the purposes of the SDGs. However, notwithstanding the plurality of contexts in which the term is used, a common feature underpinning all understandings of 'transparency' is the availability or disclosure of information. Peters defines transparency as 'a culture, condition, scheme or structure in which relevant information [...] is available' and contrasts the notion with such diverse antonyms as opaqueness, secrecy, confidentiality, complexity and disorder.¹⁷

The availability of information however does not necessarily guarantee that the information is accessible. Whether information is truly accessible depends on both formal and material conditions.¹⁸ A question that should be raised is therefore whether the standard of transparency requires that procedures are put in place to obtain access to information (formal accessibility) and whether information should be presented in a way as to enable those for whom it is destined to understand the information (material accessibility). It is posited that disclosing information in and of itself serves no purpose unless it can be easily accessed and is comprehensible for its beneficiaries, which would further inform transparency as a standard. The question of accessibility in turn raises other questions, related to the beneficiaries (accessible to whom?) and the objectives of transparency (for what purpose?).

As regards the beneficiaries, a distinction can be drawn between the general public on the one hand and States and international organizations on the other. For third States and international organizations, transparency requirements are strongly embedded in specific treaty regimes, mostly in the form of reporting obligations.¹⁹ The specific requirements however vary greatly across the various regimes. Under the International Covenant on Civil and Political

16 Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance', *Global Environmental Politics*, 8/2: 1–7 (2008), p. 1.

17 Anne Peters, 'Towards Transparency as a Global Norm' in Bianchi and Peters, *Transparency in International Law*, pp. 534–544.

18 The issue of material accessibility is raised by Andrea Bianchi, 'On Power and Illusion: The Concept of Transparency in International Law' in Bianchi and Peters, *Transparency in International Law*, p. 10. Bianchi argues that whether information is accessible depends on the capabilities of the interpreter.

19 These reporting obligations can be found in a variety of treaty regimes, ranging from an obligation for States to report their exercise of the right to self-defense to the UN Security Council under the UN Charter to reporting their climate change policies to the secretariat of the Paris Agreement under the climate change regime.

Rights (ICCPR), for example, States are to submit a report every four years, in which they set out ‘the measures they have adopted which give effect to the rights recognized [in the Covenant] and on the progress made in the enjoyment of those rights’ as well as ‘the factors and difficulties, if any, affecting the implementation of the [...] Covenant’.²⁰ In contrast, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), an environmental treaty which uses a permit system to regulate the trade in endangered species, requires parties to submit annual reports containing an overview of ‘the number and type of permits and certificates granted; the States with which [...] trade [in specimens and species] occurred; the numbers or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question’ as well as bi-annual reports on legislative, regulatory and administrative measures taken to enforce the Convention’s provisions.²¹

In addition, it is generally accepted that an obligation for States to notify other States exists in particular circumstances, whether as part of dedicated treaty regimes or on the basis of customary international law. This was first enunciated by the International Court of Justice in its 1949 Corfu Channel judgment in relation to Albania’s obligation to notify third States of a minefield in its territorial waters.²² It seems that this customary obligation now extends to other situations as well, such as with respect to activities which may have a significant transboundary environmental effect.²³ This obligation follows from Principle 19 of the 1992 Rio Declaration on Environment and Development and has been further developed through specialized treaty regimes as well as through the case law of the International Court of Justice on shared natural resources.²⁴ The obligation to notify is however very much confined to

20 1976 International Covenant on Civil and Political Rights (signed 16 December 1966; entered into force 23 March 1976), *UNTS* 999: 171, Article 40.

21 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora (signed 3 March 1973; entered into force 1 July 1975), *UNTS* 993: 243, Article 8(7).

22 See *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment, ICJ Rep. 1949, 22.

23 Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn., Cambridge: Cambridge University Press, 2018), p. 695.

24 In its 2010 *Pulp Mills* judgment, the Court indicated that the obligation to inform the mechanism established by Argentina and Uruguay for the management of their shared waters ‘allows for the initiation of co-operation between the Parties which is necessary in order to fulfill the obligation of prevention’, the latter being ‘part of the corpus of international law relating to the environment’. See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Rep. 2010, 14, paras. 101 and 102. In its 2015 judgment in the

situations involving risks, whether these concern emergency situations or situations in which a State's proposed activities may have harmful effects on other States.²⁵ More general obligations for States to share information with other States are notably encompassed by the reporting obligations under distinct treaty regimes, as indicated earlier in this section.

With respect to the general public, transparency is inextricably connected to the right for individuals and designated minorities, most importantly indigenous peoples, to have access to information as well as to the principle of public participation in decision-making.²⁶ While this confirms that the standard of transparency is *prima facie* embedded in international law, its scope can only be determined with reference to relevant legal instruments. The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which is the most comprehensive treaty in this respect, requires, for example, that information 'is effectively accessible', which implies *inter alia* that public authorities provide 'sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible, and the process by which it can be obtained'.²⁷ While the Aarhus Convention is a regional treaty, similar requirements were put forward by the Human Rights Committee in its General Comment No. 34, dealing with the right of access to information for the purpose of the right to freedom of expression incorporated in Article 19 of the ICCPR.²⁸ Transparency in this context is therefore understood first and foremost as an obligation for States to establish mechanisms that enable individuals to gain access to information (formal accessibility). In contrast, no specific requirements have been formulated with

Costa Rica-Nicaragua and *Nicaragua-Costa Rica* cases, the Court implicitly confirmed the existence of an obligation under customary international law to notify potentially affected States when there are risks of significant transboundary environmental damage. See *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Rep. 2015, 665, para. 107.

25 Sands and Peel, *Principles of International Environmental Law*, p. 685.

26 Maeve McDonagh, 'The Right to Information in International Human Rights Law', *Human Rights Law Review*, 13/1: 25–55 (2013).

27 2001 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (signed 28 June 1998; entered into force 30 October 2001), *UNTS* 2161: 447, Article 5(2)(a).

28 Human Rights Committee, *General Comment No. 34 concerning Article 19: Freedoms of Opinion and Expression*, CCPR/C/GC/34, 12 September 2011, paras. 18 and 19.

respect to the quality of the information that is disclosed, in other words its comprehensibility (material accessibility).

Related to the distinction between various beneficiaries, transparency may serve several purposes. Disclosure of information may firstly serve to improve the knowledge base for decision-making. In this respect, transparency may help to ensure that all participants in a process or parties to a treaty can rely on adequate information as a basis for decision-making. In addition, transparency may help to ensure the inclusiveness of the decision-making process, in the sense that it allows affected communities to participate in the decision-making process and to hold decision-makers accountable.²⁹ The close connection between transparency and accountability also becomes apparent if one considers a second purpose of transparency, which is related to ensuring compliance.³⁰ Arguably, the act of disclosing information is in itself a form of accountability. In addition, the availability of information may help to assess the extent to which duty-bearers comply with their obligations. This, in turn, is a prerequisite for holding actors accountable for their actions. These forms of accountability are examined in more detail in the following sub-section.

2.2 *Accountability*

Like transparency, accountability is an open-ended concept which can be used in a variety of settings. At its core, accountability refers to ‘the process of being called ‘to account’ to some authority for one’s actions.’³¹ This short definition can be traced back to Bovens’ definition of accountability, which is used as a framework of reference by all authors working on accountability. Bovens defines accountability as a ‘relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pose judgement, and the actor may face consequences.’³² Most importantly, the definition emphasizes that accountability is

29 See, e.g., Jonas Ebbesson, ‘Global or European Only? International Law on Transparency in Environmental Matters for Members of the Public’ in Bianchi and Peters, *Transparency in International Law*, pp. 49–74; Jutta Brunnée and Ellen Hey, ‘Transparency and International Environmental Institutions’ in Bianchi and Peters, *Transparency in International Law*, pp. 23–48.

30 Peters, ‘Towards Transparency as a Global Norm’, p. 543.

31 Richard Mulgan, ‘Accountability’: An Ever-Expanding Concept?, *Public Administration*, 78/3: 555–573 (2000), p. 555. See further Deirdre Curtin and André Nollkaemper, ‘Conceptualizing Accountability in International and European Law’, *Netherlands Yearbook of International Law*, 36/1: 3–20 (2005).

32 Mark Bovens, ‘Public Accountability’ in Ewan Ferlie, Laurence Lynn and Christopher Pollitt (eds.), *The Oxford Handbook of Public Management* (Oxford: Oxford University Press, 2005), pp. 182–208.

a 'relational concept, linking those who owe an account to those to whom it is owned'.³³

In international law, accountability has traditionally been addressed through the prism of State responsibility.³⁴ This regime however suffers from important inherent limitations. As Brunnée rightly points out, '[b]y definition, the regime can facilitate only inter-state accountability on the basis of positive legal rules'.³⁵ In other words, the system is premised on two conditions, which reduce its utility as a tool to foster accountability in a broader sense. The first is that the regime points to States as being exclusively competent to invoke the responsibility of other States.³⁶ This limitation has been partially overcome through the development of specialized regimes, which provide avenues for individuals, international organizations and corporations respectively to hold States accountable for their behavior.³⁷ Conversely, similar developments have occurred with respect to the addressees of accountability. The most notable developments include the adoption of the ILC draft Articles on the Responsibility of International Organizations with respect to accountability for international organizations and the emergence of international criminal

33 Mark Bovens, Thomas Schillemans and Robert Goodin, 'Public Accountability' in Mark Bovens, Robert Goodin and Thomas Schillemans (eds.), *The Oxford Handbook of Public Accountability* (Oxford: Oxford University Press, 2014), p. 7.

34 Jutta Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility', *Netherlands Yearbook of International Law*, 36/1: 3–38 (2005).

35 *Ibid.*, p. 5.

36 See International Law Commission, *Articles on State Responsibility, Part III, Chapter I, Annex to UNGA Resolution 56/83, Responsibility of States for Internationally Wrongful Acts*, A/RES/56/83, 12 December 2001.

37 The role of human rights treaty monitoring bodies is of particular significance for individuals. Implementation reviews, which are connected to States' reporting obligations under a variety of treaty regimes, are an important tool for international organizations to hold States accountable. Finally, corporations have been given a right to resort to international arbitration pursuant to international investment law. See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Report of the International Law Commission on the Work of its Fifty-third Session*, 23 April–1 June and 2 July–10 August 2001), A/56/10; Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), pp. 172–173; Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility', p. 33; Alan Alexandroff and Ian Liaird, 'Compliance and Enforcement' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), pp. 1175–1185.

tribunals for individuals.³⁸ In these ways, accountability as an international legal concept has moved beyond the strictly inter-State paradigm.

However, accountability as an international legal concept remains incomplete. This is not only related to limitations in terms of mechanisms to hold actors accountable, but also due to restrictions in its normative content. This brings us to the second limitation that can be discerned from Brunnée's description of the regime of State responsibility, namely that accountability depends on the breach of a positive legal rule. This is problematic in an era in which informal standard-setting instruments have gained traction as alternative regulatory frameworks on the international plane. As these instruments do not impose legally binding obligations on their addressees, they are not governed by international legal accountability frameworks. In addition, several of these instruments aim to regulate the behavior of actors who are at most partial subjects of international law. For instance, corporations have no binding obligations under international law, notwithstanding the fact that they have been granted selective rights under international investment law. Informal regulatory frameworks are the only tools that formulate standards for these actors with respect to fundamental international legal norms.

As the traditional international legal framework for accountability is not well suited to accommodate this new reality, scholars have started to reconsider how accountability should be framed in international law. Research develops along two different lines, which correspond to a more general distinction made by Bovens between accountability as a virtue and as a mechanism.³⁹ The first conceptualizes accountability as 'a normative concept, as a set of standards for the evaluation of the behaviour of public actors.'⁴⁰ This idea underlies efforts to formulate substantive and procedural standards for accountability as, for instance, undertaken as part of the Global Administrative Law project. These standards include transparency, participation, reasoned decision-making, review and legality.⁴¹ Accountability in this sense focuses on substantive norms that define accountable behavior.

The second conception of accountability, according to Bovens, regards accountability as a social mechanism and defines it as 'an institutional relation

38 Brunnée, 'International Legal Accountability through the Lens of the Law of State Responsibility', pp. 21–31.

39 Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism', *West European Politics*, 33/5: 946–967 (2010).

40 *Ibid.*, p. 947.

41 See, e.g., Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law', *Law and Contemporary Problems*, 68/3–4: 15–61 (2005), p. 17.

or arrangement in which an actor can be held to account by a forum'.⁴² It is this conception of accountability that underlies Bovens' original definition of accountability, as presented at the start of this sub-section. The following definition, which was developed as part of the Informal International Law-Making project (IN-LAW), builds on that definition and complements it for the purpose of understanding accountability in the context of informal international legal instruments:

Accountability is a relationship (*at the domestic or international level*) between an actor (*exercising public authority in the context of IN-LAW*) and a forum (*internal to the IN-LAW process or an external stakeholder*), in which the actor has an obligation (*in particular, but not exclusively, expressed in legal rules or procedures*) to explain and to justify his or her conduct (*ex ante leading up to a decision or ex post in the implementation of a decision*), the forum can pose questions and pass judgment, and the actor may face consequences (*in particular, but not exclusively, so as to enhance the democratic legitimacy of IN-LAW*).⁴³

An important aspect of this definition is that it distinguishes between two functions of accountability as a mechanism, namely as a means to improve the quality of decision-making (*ex ante*) and as a means to assess the quality of decision-making (*ex post*). This represents a more comprehensive view of the functions of accountability, as it includes influencing future behavior to the same degree as sanctioning past behavior.

Another useful framework of reference is provided by Curtin and Nollkaemper, who distinguish between 'giving account' and 'holding to account'.⁴⁴ Their approach to 'giving account' of one's behavior largely corresponds to Bovens' first type of accountability, namely accountability as a virtue. It refers to the act of disclosing information (transparency) and justifying behavior. 'Holding to account' on the other hand refers to Bovens' second type of accountability, namely accountability as a social mechanism. Curtin and Nollkaemper define this second form of accountability as 'a process in which an actor explains conduct and gives information to others, in which a judgment or assessment of

42 Bovens, 'Two Concepts of Accountability', p. 946.

43 Joost Pauwelyn, 'Informal International Law-making: Framing the Concept and Research Questions' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds.), *Informal International Law-making* (Oxford: Oxford University Press, 2012), p. 28.

44 Curtin and Nollkaemper, 'Conceptualizing Accountability in International and European Law', p. 7.

that conduct is rendered on the basis of prior established rules or principles and in which it may be possible for some form of sanction (formal or informal) to be imposed on the actor.⁴⁵ This form of accountability includes the possibility for the beneficiaries to assess whether the actions of the duty-bearers violate the rules or standards, to appeal these in an international forum and to attach consequences to these violations.⁴⁶

Although the distinction between ‘giving account’ and ‘holding to account’ is in itself useful and will be adopted throughout the present analysis, it is submitted that these notions should be redefined. In the opinion of the present author, giving account necessarily implies that an actor explains its conduct and justifies its behavior (both *ex ante* and *ex post*) vis-à-vis another actor. From this perspective, giving account would therefore refer to requirements (whether formal or informal) for actors to provide information to designated beneficiaries. As Bovens argues, ‘[e]xplanations and justifications are not made in a void, but vis-à-vis a significant other’.⁴⁷ In contrast, ‘holding to account’ in this context sees to the possibility for (affected) actors to appeal to an internal or external mechanism that can verify compliance (whether *ex post* or *ex ante*) with a prescribed set of standards and potentially provides remedies for non-compliance. These mechanisms could include courts and tribunals, but also other – external or internal – monitoring mechanisms.

Consequently, the current contribution approaches accountability first and foremost as a social mechanism, which is firmly based on a relationship between two types of actors: duty-bearers on the one hand and beneficiaries on the other. Obviously, depending on the institutional framework, actors can switch between these roles. This is especially the case for peer-review mechanisms, in which actors must give account to and can be held accountable by their peers.

2.3 *Connections and Approach*

Section 2 explored the notions of transparency and accountability. It argued that transparency may serve several interrelated purposes, such as improving

45 *Ibid.*, p. 8.

46 The term ‘consequences’ is preferred over the term ‘sanctions’, since it is more neutral and encompasses a broader array of possibilities to hold an actor accountable for its actions. See Bovens, ‘Two Concepts of Accountability’, p. 952. See also Katherine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford: Oxford University Press, 2017), p. 6. This broader conception regarding the possibilities to hold actors accountable is essential in the context of this contribution, since the possibilities that the KPCS and the OECD Guidance offer to hold actors to account do not necessarily qualify as sanctions.

47 Bovens, ‘Two Concepts of Accountability’ p. 951.

the knowledge base for decision-making and enhancing the inclusiveness of the decision-making process. However, there is also a clear overlap with accountability, as transparency ultimately also serves to provide the means for holding actors accountable for their behavior. This makes it difficult to clearly distinguish between the two notions.

After all, for the purposes of the present contribution, accountability is defined as a two-pronged notion, consisting of a requirement to give account of one's actions vis-à-vis designated beneficiaries and a possibility to be held to account for one's actions. This includes justifying behavior leading up to a decision. The principal difference between transparency proper and accountability in this context is the underlying rationale for providing information. Making information available as an aspect of transparency proper aims to ensure a proper functioning of the system, as it provides the basis for informed decision-making. In the context of accountability, on the other hand, providing information has the objective of enabling beneficiaries to scrutinize the behavior of actors.

The following sections introduce the institutional setting of the KPCS and the OECD Guidance (section 3) and assess the ways in which these instruments construe transparency and accountability (section 4). More precisely, it is assessed to what extent the initiatives require actors to make information available and to whom (both as an aspect of transparency proper and as a first component of accountability); to what extent mechanisms are established to verify compliance (second component of accountability); and to what extent mechanisms are created to impose sanctions in case of violation of the standards (third component of accountability).

3 Introducing the KPCS and the OECD Guidance

Section 3 contextualises the two instruments for the purpose of clarifying the institutional setting in which the transparency and accountability standards operate. Sub-section 3.1 examines the principal characteristics of the KPCS, while sub-section 3.2 focuses on the OECD Guidance. Sub-section 3.3 compares the characteristics of the two instruments.

3.1 *The Kimberley Process Certification Scheme*

The KPCS was set up between 2000 and 2002 for the purpose of finding an effective international solution to stopping the trade in 'conflict diamonds', defined by the scheme as 'rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as

described in relevant United Nations Security Council (UNSC) resolutions.⁴⁸ For this purpose, governments, civil society and the diamond industry introduced a system for the certification of rough diamonds, thereby distinguishing legal (certified) diamonds from illegal (uncertified) diamonds. In this way, these actors sought to ensure that States would be able to continue exporting and importing diamonds, while closing the trade routes for armed groups at the same time.⁴⁹

The KPCS is a stand alone initiative, in the sense that it is not embedded in an international organization. The process was set up as a partnership between governments, the diamond industry and interested NGOs in order to ensure that all relevant stakeholders would be involved in the initiative.⁵⁰ This multi-stakeholder partnership is reflected in the governance structure of the KPCS, which is gradually evolving towards an international organization.⁵¹ Decision-making is reserved to the Plenary, which convenes once a year and consists of all relevant stakeholders. However, decision-making power itself has been reserved to formal participants (States and regional organizations), while representatives from the diamond industry and civil society, in their

48 See Kimberley Process Certificate Scheme, *Core document*, Section I. The Security Council had previously adopted sanctions targeting the export of diamonds originating from Angola and Sierra Leone, armed conflicts that were both financed through the trade in rough diamonds. See UNSC Resolution 1173, S/RES/1173 (1998), 12 June 1998 and UNSC Resolution 1295, S/RES/1295 (2000), 18 April 2000 concerning the armed conflict in Angola; UNSC Resolution 1306, S/RES/1306 (2000), 5 July 2000 concerning the armed conflict in Sierra Leone; and UNSC Resolution 1343, S/RES/1343 (2001), 7 March 2001 concerning Liberia's involvement in the smuggling of diamonds from Sierra Leone. However, in the absence of an effective system in place to track the origin of diamonds mined in these States, these sanctions could easily be busted by armed groups smuggling the diamonds into neighbouring countries, from where they were re-exported and sold on the international market. See Panel of Experts on Angola, *Report of the Panel of Experts on Violations of Security Council Sanctions Against UNITA (Fowler report)*, S/2000/203, 10 March 2000, paras. 75–114; and Panel of Experts on Sierra Leone, *Report of the Panel of Experts Established Pursuant to Security Council Resolution 1306 (2000), paragraph 19, in Relation to Sierra Leone*, S/2000/1195, 20 December 2000, paras. 65–166.

49 This system is discussed in more detail in section 4.

50 For an overview of the negotiating history, see Clive Wright, 'The Kimberley Process Certification Scheme: A Model Negotiation?' in Päivi Lujala and Siri Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding* (London: Earthscan, 2012), pp. 181–187.

51 See Gloria Fernández Arribas, 'The Institutionalization of a Process: The Development of the Kimberley Process towards an International Organization', *International Organizations Law Review*, 13/2: 308–340 (2016).

capacity of observers, have been granted the right to intervene and to submit proposals and amendments.⁵²

This suggests that the KPCS reserves norm creation to the traditional subjects of international law. This is somewhat counterbalanced by the active participation of civil society and the diamond industry in the KPCS committees and working groups, which have been established to address particular aspects relevant to the further development and implementation of the scheme. The process itself is overseen by a Chair, a position that rotates on an annual basis between the KPCS participants.⁵³ A permanent secretariat to support the work of the KPCS was finally established in 2013, ten years after the KPCS entered into force. The functions of this Administrative Support Mechanism (ASM) include the collection of all data submitted by participants as well as all KP decisions, to arrange for the distribution of information to the participants and the general public, to provide logistical support to the KP Chair, working groups and committees and to provide technical support to the participants.⁵⁴ The ASM therefore has the primary responsibility for both internal and external transparency for the process itself.

3.2 *The OECD Guidance*

The Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas was developed through several multi-stakeholder meetings held between 2009 and 2011 by the Organization for Economic Co-operation and Development (OECD) in cooperation with the UN Group of Experts on the DR Congo, the International Conference for the Great Lakes Region (ICGLR), the business community and civil society.⁵⁵

52 See Kimberley Process Certification Scheme, *Core document*, Section VI and the 2003 *kp Administrative Decision Rules of Procedure of meetings of the plenary and its Ad Hoc Working Groups and Subsidiary bodies* (Johannesburg) for more specific rules regarding decision-making (Rule 42) and participation of observers (Rule 45).

53 See Kimberley Process Certification Scheme, *Core document*, Section VI (4).

54 *Ibid.*, Section VI and *Amendment to the 2010 Administrative Decision on the Establishment of an Ad Hoc Committee for Exploring the Modalities of Enhancing the Efficiency of the Kimberley Process with a View to Provide Administrative Support for Its Activities*, Administrative Decision of 3 November 2011, available at <https://www.kimberleyprocess.com/en/documents>, accessed 21 February 2019.

55 The UN Group of Experts on the DR Congo is a fact-finding body established as a subsidiary body of the UN Security Council to assist the Security Council to take informed decisions on the armed conflict in the DR Congo. The International Conference for the Great Lakes Region is an intergovernmental organization consisting of States in the African Great Lakes Region.

Its purpose is to prevent corporations which operate in or source from conflict-affected or high-risk areas from contributing to serious human rights abuses or international crimes associated with the extraction, transport or trade in minerals; and to prevent corporations from providing any form of support to armed groups or from engaging in bribery and/or fraudulent misrepresentation of minerals.⁵⁶

When the Guidance was adopted in 2011, it focused primarily on the three categories of minerals that are mostly associated with armed conflict in the African Great Lakes Region. These are tin, tantalum and tungsten, including their ores or mineral derivatives.⁵⁷ The Guidance was subsequently amended in 2012 to cover gold. A further amendment in 2015 clarified that the OECD Guidance applies to all minerals from conflict-affected and high-risk areas.⁵⁸

The Guidance is embedded in a broader framework of instruments and policies, both within and outside the OECD. Firstly, it is part of the policy framework adopted by the OECD in the field of International Investment and Multinational Enterprises that is intended to enhance corporate social responsibility. More specifically, the Guidance is an implementation tool for the supply chain due diligence requirements set out in the OECD Guidelines for Multinational Enterprises, which are in turn based on the human rights due diligence framework established by Harvard professor John Ruggie.⁵⁹ Secondly, the Guidance is a reference document for the more specific guidelines adopted by the UN Security Council for mineral resources from the African

56 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (3rd edn., Paris: OECD Publishing, 2016), available at <http://dx.doi.org/10.1787/9789264252479-en>, accessed 21 February 2019. For a detailed assessment of the normative function of the Guidance, see Mary Footer, 'Human Rights Due Diligence and the Responsible Supply Chain of Minerals from Conflict-Affected Areas: Towards a Normative Framework?' in Jernej Čeranič and Tara Van Ho (eds.), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Oisterwijk: Wolf Legal Publishers, 2015), pp. 179–228.

57 OECD, *Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, C(2012)93, 25 May 2011 (amended on 17 July 2012),.

58 *OECD Council on Due Diligence Guidance*, p. 4.

59 The 2011 revised Guidelines contain recommendations on responsible business conduct for multinational companies, including recommendations on supply chain due diligence for the purpose of helping companies 'to identify, prevent and mitigate actual and potential adverse impacts [...] and account for how these impacts are addressed'. See OECD, *OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011), Chapter II, para. A 10.

Great Lakes Region which establish mandatory due diligence requirements for corporations aimed at curbing the trade in conflict minerals and promoting responsible supply chains of minerals.⁶⁰ Thirdly, several States have adopted domestic legislation to implement the Guidance.⁶¹ Whereas the OECD Guidance in itself does not impose legally binding obligations on corporations, it therefore does so indirectly within the specific context of the UN Security Council sanctions regime with respect to the DR Congo and through domestic implementation legislation.

3.3 *Comparing the Institutional Setting*

The current sub-section compares the two initiatives for the purpose of clarifying the institutional setting in which their transparency and accountability standards operate. From a legal positivist perspective, it is important to note that both initiatives have created instruments that are informal in nature and which are not part of formal international law.⁶² The fact that the OECD Guidance is embedded in an international organization, while the KPCS is a stand-alone initiative, does not affect the legal nature of the instruments themselves. Both instruments obtain legal effect notably through domestic implementation legislation. While the KPCS explicitly requires States to adopt domestic implementation legislation as part of their commitments,⁶³ the OECD Guidance relies on States promoting the standards in their national systems, including through their OECD National Contact Points (NCPS). Every OECD

60 See Group of Experts, *Final Report Prepared Pursuant to Paragraph 6 of Security Council Resolution 1896 (2009)*, S/2010/596, 29 November 2010 for the guidelines presented by the Group of Experts on the DR Congo to the Security Council; and UNSC Resolution 1952, S/RES/1952 (2010), 29 November 2010, especially para. 7, for the Security Council's endorsement of the guidelines. See also Dam-de Jong, 'UN Natural Resources Sanctions Regimes'.

61 See, e.g., with regard to the USA the Dodd Frank Wall Street Reform and Consumer Protection Act, 21 July 2010, Bill number H.R. 4173, Report number H. Rept. 111–517, S. Rept. 111–176, Section 1502 (on conflict minerals from the DR Congo) and Section 1504 (on payments made by corporations in the oil, gas and minerals industries to governments); with regard to the EU see Regulation 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, *Official Journal of the European Union* L130 60, 19 May 2017.

62 For the concept of informal international law, see Pauwelyn, Wessel and Wouters, *Informal International Law-making*.

63 See Kimberley Process Certification Scheme, *Core document*, Section IV(d).

member is obliged to appoint such an NCP for the purpose of furthering the effectiveness of the Guidelines.⁶⁴ In addition, as mentioned earlier, various States have adopted specific legislation, implementing the OECD Guidance in their domestic legislation.

The substantive scope of the OECD Guidance and the KPCS present some overlap, in the sense that both initiatives aim to curb the trade in (particular) conflict minerals. Whereas the KPCS focuses exclusively on diamonds, the OECD Guidance covers all minerals, including diamonds. This overlap should not be problematic given the complementary nature of the two initiatives in terms of their addressees.

This in fact marks an important difference between the two initiatives. Whereas the KPCS formulates standards for States, the OECD Guidance focuses on corporations. The two initiatives may even be said to mirror one another. This becomes apparent when one considers both initiatives within the broader context in which they operate. Where the KPCS is backed up by a system of warranties developed by the World Diamond Council for corporations purchasing diamonds,⁶⁵ the OECD Guidance is backed up, at least where the African Great Lakes Region is concerned, by a regional certification mechanism for tin, tantalum, tungsten and gold mines.⁶⁶

In addition to the differences between the two initiatives in terms of their addressees, it should also be noted that there are important differences with respect to the practices that the initiatives address. Firstly, the KPCS focuses exclusively on banning trade with non-state armed groups, whereas the OECD Guidance also addresses trade with governments under particular circumstances. Secondly, in terms of the types of abuses covered, the KPCS is limited to conflict financing, whereas the OECD Guidance encompasses other types of abuses as well, including corruption. Of course, these differences in terms of

64 See OECD, *OECD Guidelines for Multinational Enterprises (2011), Part II, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises*, Section I, available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>, accessed 21 February 2019.

65 The KPCS is paralleled by a system of self-regulation for the diamond industry under the auspices of the World Diamond Council. This Council has been established in 2000 with the purpose of 'represent[ing] the diamond industry in the development and implementation of regulatory and voluntary systems to control the trade in diamonds embargoed by the United Nations or covered by the Kimberley Process Certification Scheme'. For more details see www.worlddiamondcouncil.com, accessed 21 February 2019.

66 ICGLR, *ICGLR Regional Certification Mechanism (RCM) — Certification Manual*, p. 11, available at <http://www.oecd.org/investment/mne/4911368.pdf>, accessed 21 February 2019.

addressees and scope have implications for the way in which the transparency and accountability standards are operationalized and thereby for their contribution to achieving target 16.6 of the Sustainable Development Goals. This is discussed in the following section.

4 A Closer Look at the Standards

Section 4 discusses the standards established by the two initiatives and analyses their contribution to creating 'effective, accountable and transparent institutions at all levels' within the context of target 16.6 of the 2015 Sustainable Development Goals. For this purpose, sub-sections 4.1 and 4.2 examine how the respective initiatives construe the standards.

4.1 *The KPCS*

As explained in sub-section 3.1, the KPCS is a certification mechanism aimed at preventing conflict diamonds from entering the global supply chain. The scheme operates on the basis of a system of import and export permits for shipments of rough diamonds, to be implemented by participating States.⁶⁷ A large discretion is left to the States themselves in devising and implementing a certification scheme, as long as they meet certain minimal standards prescribed by the KPCS regarding their processes for issuing Certificates as well as certain minimum requirements regarding the Certificates themselves.⁶⁸ These minimum standards and requirements include transparency requirements.

Firstly, transparency requirements have been formulated as part of the minimum requirements for the certificates to enable importing countries to verify the identity and contents of the shipment of diamonds that enters their territory. Exporting States are required to indicate details on the Certificate regarding *inter alia* the country of origin, the issuing authority, the carat weight, the value and the number of parcels in the shipment.⁶⁹ Importing States are required to *inter alia* send a confirmation of receipt to the exporting State, which refers to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter.⁷⁰ These transparency requirements can therefore be seen as a form of sharing of information between participants, which primarily aims to ensure the proper functioning of the system.

67 Kimberley Process Certification Scheme, *Core document*, Section III.

68 Kimberley Process Certificate Scheme, *Core document*, Section II.

69 *Ibid.*, Annex I.

70 *Ibid.*, Section III.

Secondly, the KPCS has included transparency requirements in the minimum standards regarding the internal processes for issuing Certificates.⁷¹ Participating States are required to communicate information on their laws, regulations, rules, procedures and practices to the KP Chair and other participants for the purpose of informing the other participants of how the KPCS requirements are implemented in their domestic jurisdiction.⁷² For this purpose, they submit an annual report. Moreover, participating States are to collect and maintain relevant official production, import and export data in a structured manner, as well as to exchange such statistical data with other participants in the scheme.⁷³ These transparency requirements are therefore aimed at ensuring the integrity of the certification process itself. The purpose of sharing information on implementation is ultimately to enable other participants and observers to verify compliance with the standards. As such, these requirements are directly related to accountability.

It is important to note that the KPCS does not include formal transparency requirements for the benefit of the general public. Nevertheless, a practice has developed which requires the publication of country implementation reports and key statistical data on diamond imports and exports on the KP website, together with decisions by relevant KP committees and working groups.⁷⁴ This practice is based on administrative decisions adopted by working groups and committees and, as such, has become mandatory for KP participants.⁷⁵

Consequently, transparency in the KPCS is construed in two ways. The requirements relating to the information that should be transmitted with the certificates enables public officials to make an informed decision on whether or not to accept a shipment of diamonds. These transparency requirements can be regarded as a means to improve decision-making. The obligations for participating States to report on their implementation of the KPCS requirements in their domestic systems and to disclose statistical information relating to their diamond trade on the other hand are more closely related to accountability. These can be considered examples of ‘giving account’. This information

71 Of course, these requirements are part of a broader package of measures that States should take, including an obligation to establish a system of internal controls that is designed to eliminate conflict diamonds from shipments of rough diamonds; to designate Import and Export Authorities and to implement relevant legislation. *Ibid.*, Section IV.

72 *Ibid.*, Sections IV and VI(11).

73 *Ibid.*, Sections IV, V and Annex IV.

74 See <https://www.kimberleyprocess.com>, accessed 21 February 2019.

75 See, e.g., Administrative Decision on Publication of Aggregated Statistical Data, as adopted at the Gaborone Plenary, November 2006, amended at the Brussels Plenary, November 2007.

could in turn be used to raise awareness among the general public, to assess compliance and to act in situations of non-compliance. This raises the question of whether and to what extent the KPCS also includes mechanisms to hold participants accountable in cases of non-compliance. In particular, it raises the interrelated questions of whether the KPCS has established mechanisms to verify compliance, on the one hand, and whether it can impose sanctions in case of violation of the standards, on the other hand.

Of course, it should be emphasised that the KPCS standards are not binding under international law which means that the secondary rules on State responsibility do not play any role in their enforcement. However, compliance with the standards is mandatory for States wishing to participate in the KPCS. Compliance is verified in first instance by the Working Group on Monitoring, in which participants and observers are both represented.⁷⁶ This working group is responsible for the assessment of the annual reports on domestic implementation submitted by the participants and to report on progress to the Plenary. Compliance is also verified through a peer-review system. Review visits are regularly sent to the participating States, consisting of representatives of other participating States, the diamond industry and NGOs. In cases of suspicion of non-compliance with the KPCS standards, the Plenary can further decide to conduct a review mission.⁷⁷ However, participants have to formally consent to the carrying out of such a mission.⁷⁸ In both situations, follow-up action can be taken, including the formulation of a compliance program by the Participation Committee, which should be implemented in order to achieve compliance status.⁷⁹ This type of non-compliance mechanism resembles in many respects some of the more sophisticated procedures that have been created for the purpose of ensuring compliance with multilateral environmental agreements, such as CITES.⁸⁰ An important innovation introduced by the

76 See Working Group on Monitoring, *2014 Terms of Reference of the Working Group on Monitoring*, available at <https://www.kimberleyprocess.com/en/2014-terms-reference-working-group-monitoring>, accessed 21 February 2019.

77 See Kimberley Process Certification Scheme, *Core document*, Section VI (13–14).

78 See the *2003 Administrative Decision on the Implementation of Peer Review in the KPCS*, available at <https://www.kimberleyprocess.com/en/documents>, accessed 21 February 2019. The peer review system has been revised several times, the last revision dates from 2012.

79 See *Revised Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements*, available at <https://www.kimberleyprocess.com>, accessed 21 February 2019.

80 See CITES Res. Conf. 14.3 on CITES compliance procedures, available at <https://www.cites.org/sites/default/files/document/E-Res-14-03.pdf>, accessed 21 February 2019.

KPCS is the participation of the private sector and civil society in monitoring compliance. This indicates that accountability in the context of the KPCS is construed more broadly, extending to the general public as represented by civil society. In practice, however, civil society participation has been reduced over the course of the years, ever since some of the founding NGOs walked out of the process due to dissatisfaction about particular decisions taken by the participating States.⁸¹

In case of serious non-compliance, i.e. of a nature to threaten the effectiveness and credibility of the KPCS, a range of measures can be taken, including enhanced monitoring.⁸² In terms of actual sanctions for non-compliance, the only possibility is suspension from export and import operation.⁸³ This is a serious sanction, since it effectively precludes a State from trading in diamonds. This is because participants in the KPCS, including all States hosting major diamond markets, are not allowed to trade diamonds with suspended States or non-participants.⁸⁴ States which are subjected to this sanction remain participants in the KPCS, but may only resume diamond imports and exports after a decision to this effect has been taken by the Plenary.⁸⁵

The KPCS therefore covers all three constitutive elements of accountability as set out in sub-section 2.3. It encompasses an obligation to give account, which is reflected in the transparency requirements with respect to reporting on domestic implementation and to make available statistical data (first component of accountability). The KPCS further includes monitoring mechanisms as a means to assess compliance with the standards, most notably through a cooperation between the Working Group on Monitoring and the Plenary (second component of accountability). Finally, sanctions can be imposed in case

81 See in this regard, e.g., the Press Release by Global Witness, 'Global Witness Leaves Kimberley Process, Calls for Diamond Trade to be Held Accountable', 2 December 2011, available at <https://www.globalwitness.org/en/archive/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable/>, accessed 21 February 2019.

82 See *Revised Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements*, Section 12, available at <https://www.kimberleyprocess.com>, accessed 21 February 2019.

83 *Ibid.*

84 See Kimberley Process Certification Scheme, *Core document*, Section III(c). The KPCS currently has fifty-five participants, representing eighty-two countries, encompassing approximately 99.8% of the global production of rough diamonds, available at <https://www.kimberleyprocess.com>, accessed 21 February 2019.

85 See *Revised Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements*, Section 13, available at <https://www.kimberleyprocess.com>, accessed 21 February 2019.

of non-compliance, consisting of suspension from the process (third component of accountability). The presence of these monitoring mechanisms, however, does not necessarily suggest that the system truly fosters accountability in all respects. Transparency is primarily used as a tool to ensure the effectiveness of the system. In addition, the purpose of the incentive-based monitoring mechanisms is first and foremost to improve implementation. Hence, these mechanisms are not to be regarded as judgments or assessments of conduct, as referred to in Curtin and Nollkaemper's definition of accountability. Lastly, sanctions are rarely employed and when they are it is mostly with the consent of the non-compliant State.⁸⁶

4.2 *The OECD Guidance*

As discussed in sub-section 3.2, the OECD due diligence framework aims to promote the exercise of due diligence throughout the minerals supply chain for the purpose of preventing complicity by corporations in gross human rights abuses and corruption. Due diligence itself is defined as 'an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict'.⁸⁷ The due diligence framework is operationalized through a five-step approach aimed at identifying and responding to risks in the supply chain. The basic components of this approach are the establishment of strong company management systems; the identification and assessment of supply chain risks; the design and implementation of strategies to respond to identified risks; the performance of independent third-party audits; and the annual reporting on supply chain due diligence.⁸⁸ The OECD Guidance further contains two supplements that provide specific guidance to companies on how to implement these five steps when sourcing tin, tantalum or tungsten, on the one hand, and when sourcing gold, on the other hand.

The five-step approach includes several requirements with a view to enhance transparency and accountability. First of all, pursuant to step one of this approach, corporations are to implement internal policies in order to introduce transparency in the minerals supply chain. Corporations 'should adopt,

86 See <http://www.kimberleyprocess.com>, accessed 21 February 2019. Cases of suspension include the Republic of the Congo in 2004, Venezuela in 2008 and the Central African Republic in 2013. Venezuela was a case of self-suspension. For more information see Andrew Grant, 'The Kimberley Process at ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds' in Lujala and Rustad, *High-value Natural Resources and Post-conflict Peacebuilding*, pp. 159–179.

87 *OECD Council on Due Diligence Guidance*, p. 13.

88 *Ibid.*, Annex I, pp. 17–19.

and clearly communicate to suppliers and the public, a company policy for the supply chain of minerals originating from conflict-affected and high-risk areas. This policy should incorporate the standards against which due diligence is to be conducted.⁸⁹ These standards must conform to particular principles laid down in a model supply chain policy that has been designed by the OECD. This model supply chain policy includes a requirement for corporations to ensure that all taxes, fees and royalties are paid to the government and that they are disclosed in accordance with the principles formulated by the Extractive Industry Transparency Initiative (EITI), a voluntary instrument that aims to eliminate corruption in the extractive sectors through the introduction of transparency requirements for payments by corporations to domestic public authorities.⁹⁰ The principal purpose of this information sharing seems to be to enable the general public to take an informed decision on whether to purchase the products that have been produced by the respective corporation.

Other requirements pursuant to step one include the establishment of a system of controls over the mineral supply chain, including either a chain of custody or a traceability system, on the one hand, or the identification of upstream actors in the supply chain, on the other hand.⁹¹ More specifically, the Guidance requires corporations operating downstream in the supply chain (from smelters/refiners to retailers) to obtain information from their suppliers about the origin of the minerals purchased by them. Furthermore, corporations operating upstream in the supply chain (from the mine to smelters/refiners) should provide such information to their business partners.⁹² Moreover, corporations throughout the supply chain must obtain information on their business partners.⁹³ These transparency requirements are at the core of the system. Their purpose is to enable corporations throughout the supply chain to take informed decisions on the choice of their business partners. In this sense, they are to be considered both as conditions for the proper functioning of the system and as forms of giving account of behavior.

Transparency requirements have been included in other steps as well. Pursuant to step three, corporations are, for example, to establish internal

89 *Ibid.*, p. 17. More specific guidance on the types of measures corporations should take is provided in the supplements.

90 For more information on this initiative see <https://eiti.org>, accessed 21 February 2019.

91 *OECD Council on Due Diligence Guidance*.

92 *Ibid.* Also see the supplements on tin, tantalum and tungsten on the one hand and on gold on the other, which contain more specific requirements.

93 *Ibid.*

reporting structures to respond to identified risks.⁹⁴ Finally, step five requires corporations to publicly report on their supply chain due diligence policies and practices, for example, as part of their corporate social responsibility or annual reports.⁹⁵ Therefore, transparency for the purposes of the OECD Guidance is both horizontal (between duty-bearers) and vertical (towards the general public as beneficiaries). The purposes are two-fold: the requirements which relate to tracking the origin of the minerals and establishing the reliability of business partners aim to ensure the proper functioning of the system, while the publication requirements aim to enable public scrutiny.

Where these requirements can be regarded as examples of the obligation to give account of one's behavior, the OECD Guidance also contains requirements aimed at holding actors accountable. Firstly, when it comes to verifying compliance, the Guidance has built in safeguards to ensure the credibility of the information relied on by downstream companies as well as the information provided to them by upstream companies. More specifically, pursuant to step four of the due diligence approach, smelters and refiners are to submit their administration to an independent audit for verification.⁹⁶ This obligation does not apply to other corporations in the supply chain, although upstream corporations must allow the audit team access to company sites and to relevant documentation and records of supply chain due diligence practices.⁹⁷ This form of accountability operates both horizontally and vertically, since the audit reports must be published,⁹⁸ while its primary purpose is to verify compliance.

In addition to its internal accountability mechanisms, the Guidance may benefit from the institutional structure established for the OECD Guidelines for Multinational Enterprises, including its system of National Contact Points (NCPs). Every OECD member State or adherent country is obliged to establish an NCP. As part of their mandate, NCPs mediate in disputes that arise in relation to the implementation of the OECD Guidelines and related instruments.⁹⁹ Complaints can be brought to the respective NCP by all interested parties, including worker organizations and non-governmental organizations. This procedure results either in a statement that the issues do not merit further consideration, a report outlining the agreement that the parties have reached or, lastly, a decision of non-compliance by the NCP including

94 *Ibid.*, p. 18.

95 *Ibid.*, p. 19.

96 *Ibid.*

97 *Ibid.*, p. 50 for tin, tantalum and tungsten and p. 110 for gold.

98 *Ibid.*, p. 53 for tin, tantalum and tungsten and pp. 109–110 for gold.

99 *OECD Guidelines for Multinational Enterprises*, p. 68, Section I(1).

recommendations on how to reach compliance with the Guidelines.¹⁰⁰ Generally, a decision of non-compliance should be followed-up by the respective NCP for the purpose of monitoring the implementation of the recommendations by the corporation.¹⁰¹ All reports and statements are furthermore to be made publicly available.¹⁰² However, the NCPs are not in a position to impose sanctions on corporations in situations of non-compliance. The question can be raised whether the publication of the results of the NCP procedure itself qualifies as a sanction. Of course, a statement of non-compliance reflects badly on the image of a corporation. The answer to the question of whether this should qualify as a sanction in itself largely depends on the dependence of the corporation on public opinion.

Other forms of external monitoring include the UN Sanctions Committee for the DR Congo and domestic legislation adopted for the purpose of implementing the OECD Guidance. As regards the first, corporations sourcing from or operating in the DR Congo are under an obligation to exercise due diligence in accordance with the five steps set out in the OECD Guidance. A failure to respect this obligation may be used by the Sanctions Committee as a relevant factor in determining to place a corporation on the UN sanctions list.¹⁰³ In this way, the UN Sanctions Committee indirectly plays a role in monitoring compliance with the OECD Guidance. Nonetheless, the relationship is very indirect and, moreover, geographically limited. As regards domestic legislation, reference can be made to the US Dodd Frank Act and the European Conflict Minerals Regulation.¹⁰⁴ Both instruments prescribe corporations to follow the OECD standards, albeit the requirements set out in the Dodd Frank Act are restricted to corporations sourcing from the African Great Lakes Region. In terms of accountability, their mechanisms differ to a great extent. Whereas the US Dodd Frank Act focuses on reporting obligations for corporations ('giving account'),¹⁰⁵ the emphasis of the EU Regulation is more on verifying

100 *Ibid.*, p. 72, Section C.

101 *Ibid.*, pp. 84–85.

102 *Ibid.*

103 UNSC Resolution 1952, para. 9.

104 See Dodd Frank Act, Section 1502 and EU Regulation 2017/821.

105 See Dodd Frank Act, Section 1502. For an assessment of the Dodd Frank Act and a comparison with the EU Regulation (in Dutch), see Daniëlla Dam-de Jong, 'Internationale Instellingen en de Aanpak van Conflictgrondstoffen' in Heleen de Coninck *et al.* (eds.), *Rood-groene Politiek voor de 21e Eeuw: Een Pact Tussen Generaties* (Amsterdam: Van Genneep, 2017), pp. 167–184.

compliance *ex post* and imposing sanctions for non-compliance ('holding to account').¹⁰⁶

We should therefore distinguish between accountability within the framework of the OECD Guidance, on the one hand, and by external mechanisms, on the other hand. Accountability within the OECD Guidance primarily covers the first two constitutive elements of accountability as set out in the previous subsection. It encompasses an obligation to give account, which is reflected in the transparency requirements. Similarly to the Kimberley Process, transparency is however primarily used as a tool to ensure the effectiveness of the system, in other words to ensure compliance. The OECD Guidance further includes monitoring mechanisms as a means to assess compliance with the standards, but these mechanisms do not equally apply to the various corporations in the supply chain. It is notable that downstream corporations are largely exempted from the auditing requirements, which is an indication that the primary purpose of these requirements is to improve implementation. Nevertheless, the publication of the audit reports also ensures a degree of accountability. Finally, the near absence of sanction mechanisms in the OECD framework reinforces the idea that the primary purpose of the accountability requirements is to improve compliance rather than to hold actors accountable for non-compliance. In this sense, external accountability mechanisms may play an important complementary function, notably through the imposition of sanctions.

5 Concluding Remarks

This article compared two non-binding initiatives, which aim at promoting responsible minerals trade, and assessed their contribution to achieving target 16.6 of the Sustainable Development Goals. By way of a reminder, target 16.6 sees to creating 'effective, accountable and transparent institutions at all levels' for the purpose of achieving sustainable development.

A central issue that was discussed in this article is how the two initiatives construe transparency and accountability. This issue was approached by reference to the following three questions: a) to what extent do the initiatives require actors to make information available and to whom (both as an aspect of transparency proper and as a first component of accountability)?; b) to what extent have mechanisms been established to verify compliance (second component of accountability)?; and c) to what extent have mechanisms been

¹⁰⁶ EU Regulation 2017/821, Articles 11 and 16.

created to impose sanctions in case of violation of the standards (third component of accountability)?

As regards the first question, it can be concluded from the analysis that the transparency requirements within these instruments serve two inter-related purposes. The first purpose is to improve the knowledge base for decision-making, thereby ensuring the proper functioning of these systems. Examples include the sharing of information on the origin of minerals between participants in both systems. The second purpose is to enhance compliance with the standards amongst the parties. Some of these requirements have a strong internal focus: examples include the domestic implementation reporting requirements between participants in the KPCS and the internal reporting structures that corporations are to establish pursuant to the OECD Guidance. However, both instruments also provide for the disclosure of information to the general public. The KPCS scheme provides for the disclosure of the annual reports on domestic implementation as well as the diamond statistics, in as far as this would not harm commercial interests. Within the OECD Guidance, the vertical dimension of transparency is integrated in the requirement for corporations to publish their due diligence policy in their annual reports, thereby permitting a degree of public scrutiny. This indicates that transparency within these two instruments is construed both as a form of transparency proper and as an aspect of 'giving account'.

Another purpose of transparency proper as identified in section 2, namely to enhance the inclusiveness of decision-making, is not addressed by the transparency requirements. However, a distinction should be made here between the requirements formulated for the parties implementing the instruments and the instruments themselves. Most importantly, notwithstanding the formal distinction made in the KPCS between participants (States) and observers (civil society and the private sector), the latter play an important role in day-to-day decision-making as members of KPCS committees and working groups. In addition, these committees and working groups also seek to involve external stakeholders (such as artisanal miners) in their decision-making. Likewise, the OECD Guidance has been developed with input from a variety of stakeholders. Whereas parties implementing the instruments are therefore not required to enhance inclusiveness in their decision-making processes, it is reflected in the internal structures of the initiatives themselves.

The second component of accountability, namely verifying compliance, is furthermore well developed through the accountability requirements in these initiatives. The KPCS, for example, contains mechanisms (review visits and review missions) to verify compliance with the minimum standards. The OECD Guidance on its part subjects specific corporations to auditing requirements.

The third and last component of accountability, namely the possibility of imposing sanctions for violation of the standards, is less developed in these initiatives. Where the KPCS allows for the suspension of participants as an *ultimum remedium*, corporate performance under the OECD Guidance is monitored by the NCPS. However, the NCPS do not have the authority to impose sanctions. In this sense, the OECD Guidance is hence largely dependent on external mechanisms, such as domestic legislation.

It is important to underline that target 16.6 specifically refers to institutions, as clarified in the introduction. A final question that deserves attention is to what extent the transparency and accountability requirements formulated by the two initiatives have an effect on *institutions*. As regards transparency, the KPCS requirements relating to *inter alia* the publication of diamond statistics would in principle have an effect on the transparency of State institutions which could go beyond the initiative's limited objective of preventing trade in rough diamonds that are used as a means to finance rebellions. After all, this type of information is also important for the purpose of determining a State's contribution to the global diamond trade. Likewise, the transparency requirements formulated by the OECD Guidance have an effect on the transparency of corporate structures, especially where these relate to introducing transparency requirements into internal corporate systems.

The question of whether the two initiatives contribute to creating accountable institutions is more difficult to answer. The transparency requirements and monitoring mechanisms certainly create the conditions for holding actors accountable, but the limited possibilities offered by the initiatives to impose sanctions as well as the general aims of these mechanisms, precludes a positive answer to this question. Perhaps one could say that the initiatives create accountable institutions to the extent that they create mechanisms which pressure actors to give account of their policies as well as mechanisms that allow the verification of the information provided by these actors. Whether this is sufficient to create true accountability is open to debate.¹⁰⁷

By way of conclusion, it must be emphasized that, notwithstanding their flaws and limitations, both initiatives play an important role in making the minerals trade more responsible. Their conception of transparency may be narrow and their operationalization of accountability incomplete, but both

107 Levon Epremian, Päivi Lujala and Carl Bruch, 'High-Value Natural Resources and Transparency: Accounting for Revenues and Governance' in William R. Thompson (ed.), *Oxford Research Encyclopedia of Politics*, October 2016, https://eiti.org/sites/default/files/documents/high-value_natural_resources_and_transparencyoxford_2016.pdf, accessed 21 February 2019.

initiatives have the potential to contribute to the sustainable development of developing countries which are largely dependent on minerals. Because of their flexibility, the instruments can be easily adapted to accommodate changing circumstances, and they are indeed constantly evolving. In this way, they contribute to the broader setting which Goal 16 envisages, namely to promote peaceful societies for sustainable development.