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The Effectiveness of Initiatives to Promote Good Governance, Accountability and Transparency in the Extractives Sector in Zimbabwe

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Abstract

The regulation of the extractives sector in Zimbabwe has recently come under scrutiny due to the uncertain social, economic and political environment. Zimbabwe's mining sector was under colonial legislation for a long time and that legislation has recently been reviewed. Existing extractives sector laws do not adequately promote transparency and accountability, an issue recognized by stakeholders throughout the mining sector. The advent of the new constitution and law reform processes indicates Zimbabwe's intention to incorporate good governance, transparency and accountability provisions in the mining sector. State driven reforms have been inspired by global and local civil society initiatives. Analysis shows that, for various reasons, the government does not readily embrace such initiatives, which are important drivers of official policy and legal reforms. Zimbabwean environmental civil society groups have been exceptional in this regard.

Keywords
Accountability, EITI, environmental law, extractives, mining law, transparency, Zimbabwe

INTRODUCTION

The extractives sector is one of the most resilient sectors of the Zimbabwean economy. Since 2000, the country's economy has gone through extremely challenging phases that threatened the viability of the mining sector. However, despite the challenges, the extractives sector has now emerged as key to economic recovery.[1] This is despite the global impact on minerals prices, and asymmetries and distortions in the global resources market. The extractives sector, specifically mining, can play a critical role in economic

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1 C Mudhunguyo and A Ndaona "An investigation into the contribution of mining to the Zimbabwe economy" (2012) *Journal of Strategic Studies* 96 at 105.

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development, growth and democracy.[2] In many countries, leakage of revenue has been the foundation for corruption, patronage, conflict and the eventual underdevelopment and impoverishment of mining communities.[3] Despite abundant mineral resources, the Zimbabwean economy continues to struggle to return to its former glory. There is a pervasive lack of transparency in the management of mineral revenues and contracts in Zimbabwe.[4] In order to assess effectively the extent to which Zimbabwe's minerals sector is bedevilled by a lack of transparency and accountability, appropriate research methods must be employed to reach authentic, defensible and valid findings. Furthermore, the findings must be usable by policy makers to reform Zimbabwe's mining laws so that they promote accountability and transparency, leading to good natural resources governance. While assessing the effectiveness of civil society and state initiatives to promote transparency and accountability, this article also includes an analysis of existing legal and policy frameworks that enable or obstruct such transparency.

Against this backdrop, the purpose of this article is first to analyse how the legal and policy framework, and civil society initiatives in Zimbabwe have either promoted or obstructed good natural resources governance, transparency and accountability in the minerals sector. Secondly, it assesses the effectiveness of the different initiatives adopted, including the Publish What You Pay, Kimberly Process Certification Scheme and Civil Society Coalition, in promoting good governance in the extractives sector. The article also discusses regional and international initiatives that seek to promote transparency and accountability in the extractives industry. These study objectives are pursued through the gathering and analysis of different stakeholder perceptions on transparency and accountability issues in Zimbabwe's mining sector. The challenges faced by Zimbabwe as a resource rich country are not peculiar to this country alone, hence the findings of this study could very well be replicable in other similarly situated African countries. An underlying aim of this article is also to understand the relevance of non-state initiatives and the possibility of such initiatives shaping legal developments and policy reforms to promote transparency and accountability.

The article begins by setting the context of the current legal and institutional framework for the mining sector in Zimbabwe, to provide a background for the study. It then analyses the framing concepts confirmed by field surveys through focus group discussions and discursive interviews with interested and affected stakeholders. The article concludes with findings and recommendations.

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2 NM Jensen and NP Johnston "Political risk, reputation, and the resource curse" (2011) 44/6 *Comparative Political Studies* 662 at 665. See also generally T Hawkins *The Mining Sector in Zimbabwe and its Potential Contribution to Recovery* (2009, UNDP Zimbabwe).

3 C Rose "The application of human rights law to private sector complicity in governmental corruption" (2011) 24 *Leiden Journal of International Law* 715 at 716.

4 Portfolio Committee on Mines and Energy "First report on diamond mining (with reference to Marange Diamond Fields) 2009–2013" (presented to the Parliament of Zimbabwe, Harare, June 2013).

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Why accountability and transparency initiatives matter

Analyses of the strengths and weaknesses of policy and legal frameworks for good governance, transparency and accountability in the extractives sector are confounded by conceptual ambiguities, contested meanings and implications of framing norms. This background analysis is crucial for an understanding of the civil society or non-state actor initiatives discussed in this article. To start, it is therefore important to determine the origins, content and relevance of these concepts in the context of natural resources governance in Zimbabwe, focusing on the mining sector.

It is now a truism that the concept of "good governance" defies universal definition and there are various interpretations of what good governance is and how to achieve it.[5] Varied conceptualizations have been developed and various indicators mooted.[6] Invariably, the concept is linked to democracy and there are several assumptions that underpin its presence in a governance system.[7] The United Nations (UN),[8] the World Bank,[9] the African Union and other international organizations have projected their own understandings of good governance and how it should be implemented and measured.[10] While there are various understandings of good governance, this article seeks to extrapolate the common threads linking these understandings and apply them to the extractives sector. It became clear in unpacking the literature on governance that the concept seems largely related to *procedural issues* as opposed to *substantive rights*. Transparency and accountability appear

5 D Kaufmann et al "The worldwide governance indicators methodology and analytical issues" (policy research working paper 5430, the World Bank Development Research Group Macroeconomics and Growth Team, September 2010) at 3, noting: "Although the concept of governance is widely discussed among policymakers and scholars, there is as yet no strong consensus around a single definition of governance or institutional quality. Various authors and organizations have produced a wide array of definitions. Some are so broad that they cover almost anything." In specific areas of governance, such as the rule of law, there is extensive debate among scholars over "thin" versus "thick" definitions, where the former focus narrowly on whether existing rules and laws are enforced, while the latter emphasize more the justice of the content of the laws.

6 Ibid.

7 S Mtisi et al "Extractive industries policy and legal handbook analysis of the key issues in Zimbabwe's mining sector: The case study of the plight of Marange and Mutoko mining communities" (2012, ZELA) at 9. Contrast with S Wilkins "Can bad governance be good for development?" (2011) 53/1 *Global Politics and Strategy* 61 at 69, reporting that the causal effect between democracy and good governance as solutions to bad governance is not always true.

8 L Kotze "Environmental governance" in A Paterson and L Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009, Juta) 103 at 103 and 105.

9 Kaufmann et al "The worldwide governance indicators", above at note 5 at 2.

10 Wilkins "Can bad governance", above at note 7 at 71. See also T Bovaird "Public-private partnerships: From contested concepts to prevalent practice" (2004) 7/2 *International Review of Administrative Sciences* 199 at 208–10, setting out criteria for assessing good public governance.

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among other components or indicators of good governance.[11] The rule of law[12] and compliance with, and enforcement of, laws also appear as indicators and components of good governance.[13] There is an inextricable link between the notion of democracy and good governance, although the nature of this link seems misunderstood or poorly explored in the literature. There is disagreement over the authority to define and shape the content and meaning of the idea of good governance, especially between public state and non-state (mainly civil society) actors. There are also global and local nuances shaping the discourse on good governance. Ultimately, it is observed that there are limits to what good governance can do in environmental (natural resources) management.[14]

In the natural resources sector (focusing on extractive activities), good governance has been understood to refer to the existence of certain institutions, procedural guarantees and recourse aimed at promoting the sustainable management and use of natural resources. Bonnie Campbell argues that "[t]he quality of governance of a country is a key determinant for the development outcomes of extractive industries activities".[15] Meanwhile Louis Kotze, after reviewing the various understandings of the notion of "governance",[16] states:

> "Certain elements can be distilled from the above array of definitions:
> - governance is a management process;
> - there are numerous actors involved in governance, including the international community, government and civil society;
> - governance is concerned with the promotion of common interests;
> - governance relationships are embedded in law; and
> - functions embedded in governance include formulating policies and law and implementing and ensuring compliance with this policy and law."[17]

11 R Ako and N Uddin "Good governance and resource management in Africa" in F Botchway (ed) *Natural Resource Investment and Africa's Development* (2011, Edward Elgar) 21 at 24.

12 Some writers caution against abuse of these good norms by global capital. See J Hund "Globalisation and the rule of law: Socio-economic reflections" (2004) 19 *Southern Africa Public Law* 25 who, at 26, labels the "rule of law as [an] export product of global capitalism" and argues that "a series of linked concepts have been deployed to explain the West's ascendancy and as a prescription for underdeveloped countries. The 'rule of law' has emerged as a concept that has been central to the economic success of the West."

13 Kotze "Environmental governance", above at note 8 at 106.

14 K Muller "Environmental governance in South Africa" in HA Strydom and ND King (eds) *Environmental Management in South Africa* (2nd ed, 2009, Juta) 68 at 73; Kotze "Environmental governance", above at note 8; B Campbell (ed) *Factoring in Governance is Not Enough: Mining Codes in Africa, Policy Reform and Corporate Responsibility* (2003) 18/3 *Minerals & Energy Raw Materials Report* 1 at 1.

15 Ibid, Campbell; JG Frynas "Corporate social responsibility and societal governance: Lessons from transparency in the oil and gas sector" (2010) 93 *Journal of Business Ethics* 163 at 164.

16 Kotze "Environmental governance", above at note 8 at 104.

17 Id at 105.

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Kotze concludes that "good governance" is about improving the quality of governance of these listed aspects.[18]

While transparency[19] and accountability strike one as two sides of the same coin, clearly one is an enabler of the other. First, by definition, accountability presupposes transparency, that is, to hold an authority to account one must understand what the authority, functions, powers, duties and mandate of that other authority are. Secondly, accountability presupposes the presence and observance of other norms, institutions, practices and concepts, such as access to information, openness, rule of law, absence of fear and intimidation, protection of a number of human rights (expression, liberty, association, assembly and movement), an impartial tribunal and access to courts. Lastly, apart from a constitutional guarantee of these rights, transparency and accountability both depend on the existence of strong institutions to implement and enforce laws and policies.

The extractives sector as the analytical space

Natural resources have been a site of lack of transparency and accountability, not only in Zimbabwe, but also in other resource rich countries.[20] They have masked corruption, red tape and pillaging of many a country's natural resources for private wealth creation, thus earning the adage of being a "curse".[21] Recently it has been recognized that to enable natural resources to play their rightful role in the economy there must be transparency, accountability and overall good environmental, economic, social and political governance.[22] The need for transparency and accountability is even more urgent in resource-endowed developing countries that are plagued by serious regulatory gaps that cause huge revenue losses at the expense, generally, of the state but more specifically of communities affected by extractive activities.[23] Bad governance, and the lack of transparency and accountability pervade all

18 Id at 120.

19 Frynas "Corporate social responsibility", above at note 15 at 167; C Lindstedt and D Naurin "Transparency is not enough: Making transparency effective in reducing corruption" (2010) 31 *International Political Science Review* 301 at 302, commenting at 304.

20 See generally C Eads et al (eds) *Advancing the EITI in the Mining Sector: A Consultation with Stakeholders* (2009, Extractive Industries Transparency Initiative) at 46–89.

21 This is why transparency is seen as the initiative to address the governance deficit: Frynas "Corporate social responsibility", above at note 15 at 167.

22 L Etter "Can transparency reduce corruption? Evidence from firms in Peru and Mali on the impact of the Extractive Industries Transparency Initiative (EITI) on corruption" (master of public policy thesis, Georgetown University, 2012) at 10.

23 Ibid. See also S Tsiko "Lobbyists push for Diamond Act enactment" (7 November 2012) *The Herald* (Harare) available at: <http://www.herald.co.zw/lobbyists-push-for-diamond-act-enactment> (last accessed 5 March 2016); Contrast with FS Mtondoro et al "Research paper on the power dimension to mineral related corruption: Preliminary findings on the state of corruption in the mining sector: The case of gold diamond and platinum mining in Kwekwe, Gwanda, Marange and Mhondor-Ngezi" (Transparency International Zimbabwe (TIZ), 14 January 2013).

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natural resources including minerals, forests, oil and gas, referred to in this article as the extractives sector or industries.[24] Developed countries also face a degree of opaqueness in how they exploit and channel revenues from extractive natural resources.

States' failure over time to spearhead initiatives to promote good governance, transparency and accountability in the extractives sector, spawned non-state initiatives aimed at promoting these principles.[25] Civil society organizations (CSOs) are driven by various motives to engage in promoting transparency and accountability in the natural resources sphere of the economy.[26] While some countries buy into and support such CSO initiatives,[27] others are averse to the whole notion of CSOs driving such publicly interested initiatives.[28] This is the case in countries where bad governance, and a lack of transparency and accountability have become ingrained in the cronyism, corruption and rent seeking behaviour of political institutions. CSO initiatives are also motivated by conflicts and human rights abuses linked to extractives sectors worldwide. The question is whether CSO initiatives have been, and can be the foundations for state driven legal and policy initiatives to promote transparency and accountability in the exploitation of natural resources.

Recently, quite a substantial amount of research has been done on the regulation of mining in Zimbabwe. Much of this literature focuses on the mineralogy of Zimbabwe and the social and economic impacts of mining.[29] The Zimbabwe Environmental Law Association and Transparency International Zimbabwe have recently performed studies on the legal framework governing mining, yet this research still focused on Marange diamonds and the platinum

24 This borrows from international practice, including usage by the UN Development Programme in its "Strategy for supporting sustainable and equitable management of the extractive sector for human development" (December 2012), available at: <http://www.undp.org/content/dam/undp/library/Poverty%20Reduction/Extractive%20Industries/StrategyNote_ExtractiveSector.pdf> (last accessed 2 April 2015).

25 Notable examples include advocacy work by Global Witness, Human Rights Watch, Transparency International, Open Society Institute and Revenue Watch Institute, among many other global civil society organizations. These international initiatives have filtered through to regional and domestic levels with networks such as the AIMES promoted by Third World Network-Africa, Southern Africa Resource Watch and ZELA.

26 In Zimbabwe, some civil society actors are motivated by their cause and remain apolitical, while others are clear instruments of political persuasion. An example is one NGO that used to advocate heavily for the government, some of whose leaders later competed for political office on ZANU (PF) tickets.

27 Nigeria enacted the Nigerian Extractive Industry Transparency Initiative Act 2007, while Mozambique, Zambia, Niger, Mali, Liberia and Ghana are among the EITI compliant countries in Africa that report regularly.

28 It is argued and claimed that foreign funded CSOs push these initiatives to promote the ideology and agenda of the governments of their funders. However, there is not much evidence on the ground to support such claims.

29 Most in the tone of Mudhunguyo and Ndaona "An investigation", above at note 1.

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group of metals on the Great Dyke.[30] These studies are mostly intended as baseline surveys and seldom explore the high-level legal analysis of the specific laws and policies involved. In particular, the studies are pioneering but can only begin to unravel what the legal framework is. This article goes a step further in seeking to analyse the laws and policies, and the institutional context within which they operate. This is done with reference to how these laws and policies promote transparency, accountability and good natural resources governance. This analysis sets the scene for an assessment of the effectiveness of the initiatives to promote transparency and accountability in the minerals sector, as outlined below.

Accountability, transparency and good governance in the mining sector are matters scattered across a range of legislative instruments. This article unpacks the regulatory synergy or disjuncture among the legislation governing mining, environmental taxation, corruption prevention, empowerment and access to information, with reference to provisions, if any, promoting accountability, transparency and good governance in the minerals sector. Superimposed on this is a similar, if somewhat concise, analysis of policy documents, such as the Diamond Policy, Environmental and Natural Resources Policy, Medium Term Strategic Plan, and the draft Zimbabwe Mining Revenue Transparency Initiative. Precisely because the latter are still mere policy documents that are not legally effective in Zimbabwe, much more research will need to be done when they become law.

THE NORMATIVE LEGAL AND INSTITUTIONAL FRAMEWORK

The crosscutting analytical framework for this article is good governance, transparency and accountability in the extractives sector. However, promoting good governance, transparency and accountability does not depend merely on making laws and policies. More fundamental are the institutions created to implement these laws and the governance institutional culture that directs such institutions. Implementation of laws, monitoring and enforcement against violations are critical components of good governance and safeguarding transparency.

Constitutional and policy context

A country's constitution defines the state entity, its people, structures, ethos, and rights and obligations. It is the supreme law of the land and any law that is inconsistent with it is invalid to the extent of such inconsistency.[31] Zimbabwe is at the dawn of a new constitutional era and it is crucial for this study to situate the issues of good governance, transparency and

30 G Makore and V Zano "Mining within Zimbabwe's Great Dyke: Extent, impacts and opportunities" (2012, ZELA).

31 Constitution of the Republic of Zimbabwe 2013, sec 2(1).

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accountability in this new constitutional context.[32] Unlike the Lancaster House Constitution of 1979, Zimbabwe's Constitution of 2013 (2013 Constitution) contains provisions that, if implemented, could change the regulatory environment for natural resources in Zimbabwe.[33] In particular, the 2013 Constitution contains all known social, economic and cultural rights[34] whose fulfilment requires the prudent management and sustainable use of natural resources to provide the state with the necessary capital resources.

Elsewhere, the inclusion of environmental rights premised on the sustainable use of natural resources has improved the role of natural resources in a country's socio-economic development.[35] However, environmental rights clauses have not in themselves been directly useful in promoting transparency and accountability in the extractives sector. In South Africa, legislation mandated under section 24 of the constitution, such as the Minerals and Petroleum Resources Development Act 28 of 2002 and the National Environment Management Act 107 of 1998, particularly provisions on environmental impact assessment, have been more useful in this function.[36] Civil and political rights that promote public participation, administrative justice, and access to justice and information have augmented the National Environment Management Act 107 of 1998 and been useful in this respect.[37] Overall, the mining sector in South Africa remains untouchable, despite environmental and other rights in South Africa's Constitution.[38] As the

32 It is significant that the 2013 Constitution expressly refers only to transparency and accountability in its preamble and founding principles. Sec 3(1)(h) and 3(2)(g) refer to good governance, the rule of law, transparency, justice, accountability and responsiveness as part of the founding values and principles. These preliminary parts of the constitution may not be justiciable. However, sec 9 provides further for good governance and its essential elements.

33 This includes provisions in chap 2 on national objectives, particularly good governance, development and empowerment, and fostering fundamental rights and freedoms.

34 2013 Constitution, chap 4 and particularly secs 73 (environmental rights), 77 (right to food and water), 62 (right of access to justice) and 68 (right of access to information).

35 In South Africa a similarly worded constitutional environmental rights clause has spawned well-crafted mining and environmental legislation.

36 *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC), *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) and *Supersize Investments 11 CC v MEC of Economic Development Environment and Tourism Limpopo Provincial Government* (70853/2011) [2013] ZAGPPHC 98 (11 April 2013).

37 *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC); *AgriSA v Minister of Minerals and Energy* 51/12 [2013] ZACC 9 (CC); J Dugard and A Alcaro "Let's work together: Environmental and socio-economic rights in the courts" (2013) 29 *South African Journal on Human Rights* 14. The 2013 Constitution, secs 62 and 68 guarantee administrative justice and access to information.

38 Constitution of the Republic of South Africa 1996. See generally *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

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Zimbabwean environmental rights clause is modelled on section 24 of the South African Constitution, experience with this section in South Africa provides good lessons on the potential impact of the Zimbabwean clause. While South Africa's section 24 has mainstreamed sustainable development and promoted the sustainable use of natural resources, it has played a peripheral role in eradicating poverty and has had minimal impact on preventing unsustainable mining activities.

The initial impact of the 2013 Constitution is that natural resources and environmental legislation must be amended to comply with the constitution where there are inconsistencies. Thus, the Mines and Minerals Act contains many inimical provisions that must be amended.[39] As a law regulating a natural resource, it must be informed by section 73 of the constitution on the sustainable use of natural resources. The Environmental Management Act of 2002 (chapter 20:27) is largely compliant and is expected to have greater impact with the advent of the 2013 Constitution. The expanded right in section 85 (1)(c) and (d) of the 2013 Constitution to enforce constitutional rights is a new development, timely for civil society as guardians and stewards of the "voiceless" environment and disempowered mining communities.

Institutional arrangement for the minerals sector in Zimbabwe

Mining in Zimbabwe is largely regulated by the Mines and Minerals Act of 1961 (chapter 21:05).[40] This archaic law defines what constitutes mining and regulates licensing and mining rights acquisition. However, there are also other laws that regulate aspects of the mining process and the management of revenue from mining. Furthermore, there are laws that are indirectly relevant to mining. These include laws governing the environment and natural resources,[41] regulating and controlling pollution, and laws for the relocation and resettlement of displaced communities. Such laws include local government, communal property and land laws.

Specific mining laws and other laws that are indirectly relevant may contain provisions that could be regarded as promoting transparency and accountability in extractive processes. Similarly, pollution control and environmental sustainability laws may contain provisions that provide for accountability.[42] The

39 These include provisions giving mining activity precedence over environmental regulation and other forms of regulation.

40 The deputy prime minister has called this act a "criminal" law that is allowing the plunder of Zimbabwean minerals by individuals and multinational corporations: F Machivenyika "Need to amend mining laws" (13 February 2013) *The Herald* (Harare), available at: <http://www.herald.co.zw/need-to-amend-mining-laws> (last accessed 5 March 2016).

41 Mtondoro et al "Research paper", above at note 23 at 10. Mining cannot take place unless the Environment Management Agency has approved the project after an environmental impact assessment.

42 In this sense, transparency and accountability are conceived in a broader sense beyond tracking mining revenues. There has been a tendency in the literature to focus overly on

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overall assumption underlying this study is that most of these laws, as currently implemented in Zimbabwe, do not adequately provide for transparency and accountability,[43] hence the claim that the whole mining value chain is opaque and full of gaps that can be exploited by opportunists. Noteworthy however, is the deeper issue of whether laws are in fact necessary to promote transparency and accountability or whether voluntary and non-state initiatives are just as good. Hund argues that "[t]he specificity of rules, and concomitant curtailment of discretion, is thought to enhance transparency, while the unbounded use of official discretion is seen as opening the door to corruption and the abuse of power."[44]

The primary institution responsible for regulating mining in Zimbabwe is the Ministry of Mines and Mining Development together with its Mining Affairs Board and the mining commissioner. The ministry and its functionaries are complemented by the Minerals Marketing Corporation of Zimbabwe (MMCZ),[45] Zimbabwe Mining Development Corporation (ZMDC), Ministry of Finance, Zimbabwe Revenue Authority (ZIMRA), and Environment[46] and Tourism Ministries. Relevant non-state industry bodies include the Chamber of Mines Zimbabwe, labour unions and industry level associations. State departments responsible for mining are constituted almost exclusively through political processes, such as appointment by the president after consulting one or more statutory bodies. Such processes are inherently political, but one could say there is technical transparency. The boards and management of parastatals are also appointed by the respective ministers after consultation with specified bodies, inevitably leading to problems of board and management independence.[47] In Zimbabwe there have been repeated

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diamond revenue and money matters and less on human rights abuses, except for the pioneering work of the Centre for Research and Development in exposing gross human rights violations in the Marange diamond fields, documented by F Maguwu "Marange diamonds and Zimbabwe's political transition" (2013) 8/1 *Journal of Peacebuilding & Development* 74 at 74–78; C Kabemba "The Kimberley Process and the Chiadzwa diamonds in Zimbabwe: Challenges and effectiveness" (2010) 3 *Perspectives* 4 at 6, available at: <http://www.boell.de/sites/default/files/assets/boell.de/images/download_de/2010-07-22_Perspectives_3.10.NEU%281%29.pdf> (last accessed 31 March 2015).

43 Mudhunguyo and Ndaona "An investigation", above at note 1 and Mtondoro et al "Research paper", above at note 23 at 13.

44 Hund "Globalisation", above at note 12 at 29.

45 The Minerals Marketing Corporation of Zimbabwe Act, sec 20 provides for the functions of the MMCZ.

46 This ministry should be consulted on environmental authorization and pollution control matters.

47 MMCZ Act, sec 5 provides that the minister appoints the MMCZ board after consulting the president and representatives of special interests and affected departments. See also sec 5 of the ZMDC Act; even the ZMDC general manager's appointment is subject to ministerial approval (sec 27(1)(a)), a problem played out in *Mubayiwa v Zimbabwe Mining Development Corporation* case no LC104/10 [2014] ZWLC 10 (31 January 2014).

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arguments that state owned enterprises are inefficient due to the appointment of poor or incompetent political nominees.[48] This has compromised a number of state owned enterprises from delivering effectively on their mandates. MMCZ and ZMDC are state owned enterprises that have been beset with these problems. ZMDC presents further transparency challenges, as it is not only a state owned enterprise but also a mining corporation that undertakes mining activities on behalf of the state, and is regulated by sister government departments like Water, Environment and Tourism, the Environment Management Agency and Finance.

The minister of mines is accountable to the cabinet and Parliament through the relevant portfolio committee that can summon the minister when necessary.[49] This committee has however had longstanding challenges in holding the ministry to account. The removal of a minister is essentially the prerogative of the president; currently there is nothing much that the public or civil society can do with corrupt or incompetent ministers in Zimbabwe. The relationship between the government, MMCZ and the Ministry of Mines and Mining Development can be complicated and lead to obscure processes, especially where there is a lack of co-operative governance.[50] This is despite clear laws mandating which institutions are responsible for licensing mining, and for marketing and trading precious minerals. This was evident when the ministry accused one company, Mbada Diamonds (Pvt Ltd), of trying to auction diamonds illegally in 2010. Mbada Diamonds is one of the companies mining diamonds in Marange. Its ownership and shareholding are a point of contention as investigative studies have exposed how it may be a front for state securocrats,[51] which supposedly explains its unwillingness to be subjected to regulation. The authorities stopped the attempted illegal auction. Meanwhile, the MMCZ was led to believe that the government had given the same mining company powers to market and sell minerals that are statutorily bestowed on the MMCZ.

The lack of co-operation was also evident when the Ministry of Finance struggled to obtain figures on diamonds sold and the revenue collected by

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See also "Masimirembwa plays one-man board at ZMDC" (3 December 2010) *NewsDay* (Harare), available at: <https://www.newsday.co.zw/2010/12/03/2010-12-03-masimirembwa-plays-oneman-board-at-zmdc> (last accessed 31 March 2015).

48 Mtondoro et al "Research paper", above at note 23.

49 Ministers often rebuff the committee, as reported in the Portfolio Committee on Mines and Energy "First report", above at note 4.

50 B Chiketo "Zimbabwe's Marange diamonds: ZANU-PF's best friend" (4 February 2013) *Think Africa Press*, available at: <http://allafrica.com/stories/201302051291.html> (last accessed 5 March 2016) and Mtondoro et al "Research paper", above at note 23 at 61.

51 N Kriger "ZANU PF politics under Zimbabwe's 'power sharing' government" in D Moore, N Kriger and B Raftopoulos (eds) *Progress in Zimbabwe?: The Past and Present of a Concept and a Country* (2013, Routledge) 11 at 22; see also S Ntlhakana "Conflict diamonds in Zimbabwe: Actors, issues and implications" (2014) 3/1 *Southern African Peace and Security Studies* 61 at 69, detailing the controversial shareholding of Mbada.

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ZIMRA.[52] The role of the Ministry of Mines and Mining Development in the marketing of diamonds is murky. While the MMCZ is the sole marketer for all minerals, the MMCZ Act allows the MMCZ to authorize the sale and export to other persons, subject to the MMCZ negotiating the contracts and receiving the proceeds.[53] Parliament may be able to check on the minister through annual reports or audited financial statements, as the MMCZ receives a parliamentary appropriation.[54] However, this is only a permissive section, as the minister "may" or "may not" table annual reports submitted to the office by the MMCZ.[55] The act requires the MMCZ to consult when executing its mandate.[56] Whether or not this happens in practice is open to question. This is particularly so given the reported lack of transparency surrounding the marketing and sale of diamonds in Zimbabwe.[57] This veil of secrecy is officially provided for in the MMCZ Act.[58]

A worrying aspect though is the extent to which these institutions are accountable, not only to other government departments, but also to the public.[59] To what extent are the operations of public entities like the MMCZ, ZMDC and Ministry of Mines and Mining Development open to public scrutiny? The provisions in the founding legislation for these state owned enterprises provide little room for transparency and accountability in what the institutions do.[60] The public has little say in the composition of their boards. It was only given the problems with Marange diamonds from 2006 onwards that the public and civil society became alert to the functions of the MMCZ and ZMDC and the potential for these corporations to mask mismanagement of critical resources. Undoubtedly, the original idea behind the corporations was to promote the national interest by ensuring that natural resources are exploited to support national development.[61] With time, the institutions could have become dysfunctional and prone to abuse by the people appointed to run them.[62]

52 Budget speeches by Zimbabwe minister of finance, 2010 and 2011.
53 MMCZ Act, secs 42(1)(iii), 42(1)(b)(ii), 43(1) and 47.
54 Id, secs 23(3), 36 and 37 generally. While there is no express provision to table audited financial statements in Parliament, the MMCZ is bound to do so as it can receive appropriation from Parliament to its purchasing fund.
55 Reports are required under the Audit and Exchequer Act (chap 22:03).
56 MMCZ Act, sec 22(b).
57 Mudhunguyo and Ndaona "An investigation", above at note 1 at 122.
58 Id, sec 54.
59 Mtondoro et al "Research paper", above at note 23 at 16, claiming that the minister of mines and the president are accountable to no-one when they exercise functions under the Mines and Minerals Act.
60 Ibid.
61 The founding legislation for MMCZ and ZMDC provides as one of the key objectives the promotion of the national interest by the respective corporations.
62 D Muleya "Diamond saga: A case of deceit, fraud" (4 November 2010) *The Standard* (Harare), available at: <http://www.thestandard.co.zw/2010/11/04/diamond-saga-a-case-of-deceit-fraud> (last accessed 31 March 2015); B Chakaodza "Govt must come clean on

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The minister of mines is not the only authority defining ownership and sharing in the benefits from mineral resources and this has recently become a thorny issue. There is a sustained drive in Zimbabwe to enhance the participation of indigenous Zimbabweans in the mining sector. Legislation is in place to mandate indigenization and empowerment transactions, requiring that Zimbabweans must own a proportion of multinational mining companies operating in the country. This has been partly implemented through the constitution of community share ownership trust schemes, a concept pioneered by civil society in Zimbabwe and later borrowed by the government. The key legislation in this regard is the Indigenization and Empowerment Act and regulations. Under this act, the National Indigenization and Economic Empowerment Board is, like the MMCZ and ZMDC boards, a key authority in the implementation of the state's indigenization and empowerment programme. However, the appointment procedure creates a potential lack of autonomy, as is the case with the other parastatal boards discussed above.[63] Lack of transparency and accountability is self-evident, not only from the feedback during field research regarding the composition of community share ownership trusts, but even some of the mining companies involved are not sure of the nature of the agreements they conclude with the trusts. The recent dispute between Zimplats and the government is further illustration of uncertainty in the implementation of the indigenization policy.[64] It is important to investigate if this institutional context, which disables transparency and accountability, has anything to do with substantive mining legislation, which is considered in the next section.

Transparency and accountability in minerals legislation and policy

Recent mining policy documents, such as the Diamond Policy, the Draft Mines and Minerals Amendment Bill[65] and Zimbabwe's Draft Minerals Policy of

contd
Chiadzwa" (12 November 2010) *Financial Gazette* (Harare), available at: <http://allafrica.com/stories/201011150385.html> (last accessed 5 March 2016).

63 Indigenisation and Empowerment Act 47 of 2007, sec 7. Some of the appointments go against the requirement to appoint independent boards in the Corporate Governance Framework for State Enterprises and Parastatals (Ministry of State Enterprises and Parastatals, November 2010).

64 M Mtaranyika "Zimplats stand firm despite policy chaos" (6 March 2013) *Mining MX* (South Africa) 1; R Ndlovu "Mugabe broadside leaves Zimplats takeover in a muddle" (8 March 2013) *Mail & Guardian* (South Africa) available at: <http://mg.co.za/article/2013-03-08-00-mugabe-broadside-leaves-zimplats-takeover-in-a-muddle> (last accessed 5 March 2016).

65 House Bill no 14 of 2007, published in (16 November 2007) *Government Gazette*. See also C Anderson "Creating a legislative framework to govern mining in Zimbabwe" (July 2011) *Revenue Watch Brief*, available at: <http://www.revenuewatch.org/sites/default/files/zimbabwebriefing.pdf> (last accessed 31 March 2015).

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2013,[66] seek to mainstream transparency and accountability provisions in Zimbabwean mining law.[67] Disappointingly, these remain policy documents and will be of little relevance until the government acts to transform them into legally binding laws. Civil society should focus on ensuring that there are sufficient public consultations and stakeholder input into the final documents and advocating for legislation to implement the policy objectives in these documents.

The mines and minerals legislation

The Mines and Minerals Act regulates the process of granting various mining permits and licences.[68] The intention of this article is not to delve deeper into the individual processes involved but to look at the generic processes and analyse if there are opportunities for transparent and accountable decision-making.[69] The legal framework for mining in Zimbabwe does not permit adequate public participation in the granting of prospecting licences and mining permits, does not protect the environment, and lacks provisions on transparency and accountability.[70] Good governance, transparency and accountability in the process of granting mining permits can be measured by subjecting the processes to common good practices. These good practices include whether or not there is public participation through comment or objection processes, appeal and review procedures, and independence of decision-making authorities, and whether there is consultation with interested and affected parties such as landowners, communal people and relevant government departments in the case of protected areas or environments. Most land in Zimbabwe is open to prospecting and mining.[71]

An analysis of the act indicates that there is no space for consultation with interested and affected parties. A prospective miner who is applying for a

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66 Republic of Zimbabwe, Ministry of Mines and Mineral Development *Draft Minerals Policy* (2013); see also M Dhliwayo *A Review of Zimbabwe's Draft Minerals Policy* (2014, ZELA) and M Dhliwayo and S Mtisi *Towards the Development of a Diamond Act in Zimbabwe: Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements* (2012, ZELA).

67 G Sibanda "Government to overhaul Mines Act" (19 March 2013) *The Herald* (Harare), quoting then Deputy Minister of Mines and Mining Development G Chimanikire, who indicated that, instead of creating a mineral specific act for diamonds, the Cabinet Committee on Legislation is aiming to revamp the entire Mines and Minerals Act.

68 Part IV (acquisition and registration of mining rights).

69 For a detailed discussion of the processes, see Mtondoro et al "Research paper", above at note 23 at 15–17 and Hon G Chimanikire "Zimbabwe's mining industry policy" (presentation to the Japan Sustainable Mining, Investment and Technology business forum, Tokyo, Japan, 16 May 2013).

70 "Distribution of mining revenue in Zimbabwe" (National Association of Non Governmental Organisations policy brief no 5/2012) and S Mtisi et al "Extractive industries policy", above at note 7 at 35.

71 Mtondoro et al "Research paper", above at note 23 at 8 and Mines and Minerals Act, sec 26.

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prospecting licence,[72] special mining rights, exclusive prospecting order or mining permit deals directly with the mining commissioner and relevant government departments, such as rural district councils, the Forestry Commission[73] and private land owners.[74] The details of contracts and concessions negotiated and signed by the government and investors are seldom made public.[75] This is a contested area, where civil society advocates call for such contracts to be made public, while corporates often raise the defence of confidentiality based on privity of contract.[76] Most of the arguments for the disclosure of contracts are not based on law but on good corporate governance, global transparency and accountability best practice. Failure to ground these demands in law may continue to undermine any calls for disclosure. Transparency in this contested field should ideally be a legally mandated requirement. This could be grounded in the need for government, as public trustee over natural resources, to manage such resources transparently, and the rights of citizens to know; disclosure must be made in both the public and national interests.[77] Basing the call for disclosure on voluntary international initiatives may not prevail with regimes that perceive themselves to be under assault by western ideologists bent on controlling the global economy.[78] The Access to Information and Protection of Privacy Act (AIPA) has proved ineffective, as it contains exceptions[79] within which these defences fit very well. Implementation of the 2013 Constitution could improve this situation, with section 62 providing for the right of access to information, provided the AIPA is amended to improve the administrative bottlenecks currently being experienced.

There is some protection in the Mines and Minerals Act against mining within certain distances of dwelling places, boreholes, roads, railway lines etc.[80] These provisions can be used to ensure accountability when decisions are made about where to mine and how to address the relocation of affected communities. To an extent, it could be argued that these provisions provide for transparent decision-making on matters affecting the livelihoods of communities affected by mining. However, this only works if the law is complied with and enforced in the event of violations. The Mines and Minerals Act

72 Mines and Minerals Act, sec 27 (rights granted under prospecting licence).

73 Id, sec 36 (application to reserve 50% of forests from mining activities).

74 Id, sec 38.

75 Mtisi et al "Extractive industries policy", above at note 7 and Mtondoro et al "Research paper", above at note 23 at 13.

76 See above at note 23 for contrasting views and opinions.

77 This can arguably fit within disclosure under sec 28(1) of the AIPA, which allows disclosure of third party information in the public interest in defined categories, including safety and environmental protection.

78 Some argue that disclosure is required of developing countries, but developed countries seldom disclose the contracts they conclude with extractive corporations or the revenues made from the sector.

79 AIPA, sec 24(1).

80 Mines and Minerals Act, secs 31(1)(a) and 34(2) and (7).

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provides for consultation with communal dwellers, rural district councils and local authorities; however there is less transparency in how decisions on whether or not to authorize mining in communal areas are made. Arguably, consultation has tended to consist of information sessions, where local authorities and communal area dwellers are simply advised that mining is to take place. In some cases, even the information shared is vague and useless for planning purposes.[81]

Complementary and specific minerals legislation, such as the Gold Trading Act of 1940 (chapter 21:03), Base Minerals Export Control Act of 1949 (chapter 21:01) and Precious Stones Trade Act 1978 (chapter 21:06), largely consists of technical regulatory laws with no provisions to promote transparency and accountability in the mining sector. This legislation generally aims to promote the regulatory monopoly of the Ministry of Mines and Mining Development, the MMCZ and other authorized agencies like the Reserve Bank to be the sole dealers in minerals.[82] The sole mandates created by these acts are not guarantees of transparency although, if enforced, they could reduce leakage of revenue and easily identify accountable authorities. Most decisions made under these acts, including the issuing of licences, permits or prohibitions, are not open to public consultation and scrutiny, hence exposing the acts to abuse in the wrong hands.

Transparency and accountability in environmental laws

Apart from the mining legislation discussed above, a number of environmental laws contain provisions that could promote transparency in the regulation of extractive mining activities.[83] Key among these is the recent Environmental Management Act (EMA). The EMA is the overarching framework law that regulates the sustainable use of natural resources in Zimbabwe. The key clauses include provisions for an environmental impact assessment (EIA)[84] to be carried out before listed activities are authorized. Globally, EIA has proved to be central to transparency and accountability in the extractives sector. The process provides an opportunity not only to assess the possible impacts of mining on the environment, but also to scrutinize the sustainability of mining activities and provide for the rehabilitation of the natural environment[85] once mining has ceased. Environmental legislation enables access to information about new mining ventures authorized by the regulators and permits challenges to such information. A better law than the AIPA could improve the

81 For example, the Chiadzwa communities were not, until recently, provided with official information on relocation and compensation plans.

82 The Reserve Bank of Zimbabwe has exclusive marketing and trading rights over gold and silver; remaining minerals are marketed by MMCZ.

83 EMA sec 3.

84 Id, sec 1, defines “environmental impact assessment”. Id, sched 1, items 7 and 8 list mining activities.

85 Id, sec 1 defines “environment”.

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effectiveness of environmental laws in this regard. The utility of environmental legislation also depends on the extent to which the legislation provides for public participation in the EIA processes and issuance of various pollution control permits.[86]

The Environmental Management Act

Several provisions of the EMA could promote transparency and accountability in natural resources management. First, the principles of environmental management in section 4 of the act can promote transparency and accountability, or facilitate platforms for civic engagement. In particular, these principles include the duty to promote public participation in environmental decision-making, the need to promote sustainable development, the precautionary approach and access to justice. More fundamentally, these principles are embedded in an environmental right, which is the basis on which to question the impact of many extractive activities on the environment. Environmental rights highlight pollution prevention and the EIA process. Environmental rights are human rights and good governance is a precondition for them to be protected, promoted and fulfilled. To this end, it is argued that the EMA would create a framework for good and transparent environmental governance, if effectively implemented.

Secondly, the EMA provides for institutions that can be effective in implementing its provisions. Among these institutions is the Environment Management Agency (the Agency), charged with implementing the EMA. The Agency has been relatively effective in the country's current political circumstances. Relevant to the extractives sector is the regulation and control of emissions and discharges, mandated by norms and standards developed by the Agency's committees.[87] The Agency is charged with providing information to the Environmental Management Board so that the board can make informed decisions.

Thirdly, the EMA mandates planning instruments that have the potential to promote good environmental governance and transparency. Some of the plans are relevant as they can be used to regulate where and when mining takes place. The EMA provides for the development of a national environmental plan,[88] which must contain strategies and measures for the sustainable management of natural resources through, among others, the promotion of sustainable use, environmental protection, and protection of the environment against pollution and harmful substances.[89] Once approved, a national environmental plan binds every person as well as all state organs,[90] and no

86 T Murombo "Beyond public participation: The disjuncture between South Africa's environmental impact assessment (EIA) law and sustainable development" (2008) 3 *Potchefstroom Electronic Law Journal* 1 at 11.

87 EMA, part IX.

88 Id, sec 7.

89 Id, sec 88 on the contents of the national environmental plan.

90 Id, sec 92(1).

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project may be implemented unless it aligns with the plan.[91] The EMA also requires listed government agencies to develop environmental management plans if their mandate and activities positively or negatively affect the environment.[92] The Ministry of Mines and Mining Development and state owned enterprises all undertake activities that potentially affect the environment in terms of section 96(1)(a) and should therefore develop national environmental plans. Section 96(3) shows that these plans can be used to control the activities of these mining entities. Local authorities are bound to develop local environmental management plans that are synchronized with the national plan.[93] Environmental plans could be more effective if implemented in synergy with mining legislation, which is currently not the case in Zimbabwe where mining legislation predominates.

Fourthly, throughout the development of environmental plans the public can comment and provide input on drafts.[94] This is part of transparent policy-making and of making environmental information available. The plans impact extractive activities in that, for instance, the granting of prospecting licences or other mining permits should take into account these plans to prevent extractive activities in environmentally sensitive and protected areas. Furthermore, this planning is essential to prevent uncontrolled mining that affects infrastructure such as schools, roads, catchment areas and important ecosystems. Failure to align mining activities with these plans can be used by activists and communities to hold government and mining companies to account and to enforce environmental legislation.[95] Most effective remedies for holding mining companies accountable for the environmental impacts of their extractive activities lie in environmental legislation, not mining laws.

Fifthly, the EMA provides for pollution prevention through the licensing of certain activities.[96] A number of these activities emanate from extractive processes. For instance, the emission of polluted air and wastewater is regulated and licensed under the EMA.[97] The EMA provides a consultative process for the issuing of these licenses, and it is expected that communities affected by mining, as well as civil society, can participate in the process.[98] While civil

91 Id, sec 92(3)(b). Mining activities are listed in sched 1 (sec 97) as projects requiring an EIA. Mining activities should also be aligned with local plans; *Maccsand*, above at note 38, confirms this position in South Africa.

92 EMA, sec 96(1)(a).

93 Id, sec 95.

94 Id, sec 89.

95 In contrast, environmental legislation has been the main tool used in South Africa to control the negative impacts of mining. This ranges from water use licence requirements, to preventing mining in protected environmental and heritage sites.

96 EMA, part IX, secs 60, 64 and 71, regulating effluent, air and waste licences.

97 Id, secs 70 (prohibition against discharge and disposal of wastes), 71 (application for waste licence), 64 (licensing emissions) and 65 (application for emissions licence). One of the recent issues with diamond mining has been the pollution of the river systems in Marange by mining companies.

98 Id, sec 60 and 60(4) (licence to discharge effluents).

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society has heavily engaged in transparency and accountability regarding revenue from the mining sector, it is beyond doubt that, to communities affected by mining, holding mining companies to account includes ensuring that they are held accountable for environmental degradation.[99] The EMA does this by setting standards for pollution and waste control, regulating toxic and hazardous substances,[100] and providing for the environmental auditing[101] of projects. The Agency implements these processes.[102]

At the policy level, the national environmental policy and strategies of 2009 can promote transparency, accountability and good governance in the management of natural resources. The vision espoused in the policy is aimed at alleviating poverty and improving the life of Zimbabweans through the sustainable use of natural resources.[103] One of the goals supporting this vision is: "[*t*]*o avoid irreversible environmental damage, maintain essential environmental processes, and preserve the broad spectrum of biological diversity so as to sustain the long-term ability of natural resources to meet the basic needs of people, enhance food security, reduce poverty, and improve the standard of living of Zimbabweans through long-term economic growth and the creation of employment*".[104]

The vision and goals in the environmental policy and strategies call for laws and regulations that promote the transparent and accountable use of natural resources. Without accountability in how natural resources are used, the goals remain vainglorious. The impact of the policy has been minimal due to the dominance of resource exploitation laws such as the Mines and Minerals Act.

Water legislation

Similarly, an analysis of the Water Act shows that it contains provisions that could promote transparency in environmental decision-making, both generally and regarding mining activities. The Water Act provides for the control of water use and water pollution, and these provisions are critical for holding mining companies to account for activities that could pollute water resources. Water resources and catchment areas may be more valuable than revenue from mining activities; hence the Water Act requires all water uses, other than primary uses,[105] to be licensed. Applications for a water use licence for mining purposes must be submitted to the mining commissioner who

99 Id, sec 107.

100 Id, sec 77 (definition of "hazardous substance").

101 Id, sec 76.

102 Id, sec 10(1)(b)(xiv) and 10(2)(4) provide for the Agency's functions.

103 Government of Zimbabwe, Ministry of Environment and Natural Resources "National environmental policy and strategies" (2009) at 2. The policy is analysed at length by T Murombo "Balancing interests through framework environmental legislation in Zimbabwe" in M Faure and W du Plessis (eds) *The Balancing of Interests in Environmental Law in Africa* (2011, Pretoria University Press) 557 at 579.

104 Government of Zimbabwe, Ministry of Environment and Natural Resources "National environmental policy and strategies" (2009) at 2 (emphasis original).

105 Water Act of 1998 (chap 20:24), sec 34.

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transfers applications to the catchment council for consideration.[106] Compensation must be paid to beneficial users of water who may lose that use as a result of the granting of a mining water use licence.[107] Monitoring of the activities of most of the diamond mining companies in Marange and scientific studies have confirmed a disregard for these key provisions to prevent water pollution.[108] It has been the task of civil society, complementing the Agency, to hold mining companies to account for pollution and to spur them into action to improve the infrastructure installed for wastewater treatment at the plants.

Transparency and accountability in state revenue laws

Revenue from extractive industries, both worldwide and in Zimbabwe, has recently become the central focus of efforts to promote transparency and accountability. In particular, the controversy around Marange diamond revenue and how it has been managed, exposed huge gaps in transparency and accountability with respect to how the state determines, collects and accounts for revenue from royalties and other taxes on mining activities.[109] Transparency and accountability discourse in Zimbabwe has exclusively focused on revenue management. This leaves many questions unanswered. What laws govern the imposition of royalties and how they are determined and collected? What role do the public and Parliament play in the whole process of determining and collecting royalties? To whom does ZIMRA account for revenue collected from mining activities and royalties, amid claims that it has been sidelined?[110] What are the institutional misalignments that could impede transparency and accountability in how state revenue is collected? What do the Income Tax and the Revenue Authority Acts say and how accessible are the provisions to the affected communities, civil society and Parliament?[111]

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106 Id, sec 34(2).

107 Id, sec 34(6).

108 ZELA "Report on the scientific investigation of the impact of Marange diamond mining operations on water quality in the Save and Odzi rivers: Including assessment of the health, environmental and livelihoods impacts" (July 2012), available at: <http://woek.de/web/cms/upload/pdf/kasa/publikationen/zela_2012_report_on_the_scientific_investigation_marange_water.pdf> (last accessed 5 March 2016); *ZELA and Others v ANJIN and Others* Harare HC9451/12 (High Court Harare), an ongoing case in which ZELA and affected communities are suing diamond mining companies for polluting the Save River downstream.

109 Mundunguyo and Ndaona "An investigation", above at note 1 at 112 and Mtisi et al "Extractive industries policy", above at note 7; see also the Chamber of Mines, Zimbabwe "2011 fiscal budget analysis", noting that high royalties are counterproductive.

110 Id, Mundunguyo and Ndaona at 122.

111 Answers to these and many other questions can be found in the tax and exchange control legislation, but importantly proposed answers are also in the Draft Diamond Bill of 2011 and the principles behind the Diamond Policy of 2012.

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While the legal framework for revenue management exists, the persistent problem has been the potential for such legislation to be circumvented with impunity by government officials, acting alone or aiding private corporations to circumvent the legislation.[112] The mining sector pays various taxes to the government, ranging from income tax (corporate), "pay as you earn", marketing commissions, customs duty, licensing fees and royalties.[113] Also included must be the deductibles available to mining companies at the prospecting and pre-mining phases, some of which are claimed as corporate social responsibility (CSR) activities.[114]

Of these various taxes, royalties charged and remitted to governments have been the most controversial.[115] While it is clear which legislation provides for the levying of royalties, the ideal or optimum percentage rate of tax has never been agreed.[116] Members of the mining industry persistently contest the situation claiming that the government overestimates what the industry produces and should contribute to the fiscus, and that the government overlooks the capital and operational needs of the mining sector, while on the other hand it claims that the extractives sector is not contributing enough to the economy. Admittedly, the mining sector's economic contribution slowed down in sympathy with the economic decline. While it is recently picking up pace, the Chamber of Mines claims that high levels of taxation are eroding the capacity of the mining sector to recapitalize, grow and improve its infrastructure.[117] This process is necessary to bring the sector to full capacity.

Whatever the case may be, the challenge in Zimbabwe is how to hold government to account for the revenue collected from the mining sector. It is in this regard that the argument is made below that transparency and accountability initiatives that merely track movement of revenue without questioning how the government uses the funds are inadequate. Budget monitoring can provide better information in this respect.

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112 For instance, in 2010 the ZMDC claimed that it had submitted collected revenue to the minister of finance who claimed not to have received the remittance; see also Mundunguyo and Ndaona "An investigation", above at note 1 at 122, noting that diamond production figures and remittances are always at a tangent, and Portfolio Committee on Mines and Energy "First report", above at note 4.

113 See generally ZELA "An outline of the mining taxation regime in Zimbabwe" (2012), a basic layperson's outline of the taxes levied on mining and applicable legislation.

114 Income Tax Act (chap 23:02), sec 15(2)(f)(i) read with 5th sched; mining companies' claims that CSR activities are benevolent are incorrect, as the state essentially co-funds such activities through deductions.

115 Royalties are paid under sec 15(2)(f)(iii) of the Income Tax Act, read with the Mines and Minerals Act (chap 21:05) and the Finance Act (chap 23:04).

116 See Mudhunguyo and Ndaona "An investigation", above at note 1 at 111–12, providing a comparative table of royalties in some Southern African Development Community countries as of 2011 and (at 109) providing a five year table showing the level of royalties levied on different minerals in Zimbabwe.

117 Chamber of Mines "2011 fiscal budget analysis", above at note 109.

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Transparency and accountability in corporate regulation and governance provisions

Many private companies in Zimbabwe have accepted the idea of sustainability reporting and want to be seen to be promoting sustainable ways of doing business. Questions, however, abound regarding the genuineness of these green initiatives. The green economy, green growth and low carbon economy are trending concepts and agendas. Nevertheless, traditional environmentalists doubt if, in a capitalist world, it would ever be possible for a private company to be sustainable, as it would be incorporated to create shareholder value and profit. Globally, companies involved in the extractives sector have been implicated in scandals concerning fraud, environmental pollution, human rights abuses, patronage and collaboration with rogue states to plunder natural resources.[118] Solutions have been proposed to this challenge, but this continues to be a mammoth task, especially for developing countries. The wealth of some of these countries pales into insignificance when compared with the cash reserves of private multinational corporations. It is in these mismatched economic power relations that it has been most challenging to promote good governance, transparency and accountability in the extractives sector. In one study, the World Bank found that resource rich countries often lack "pro-poor public and corporate governance" systems that can "maximize poverty alleviation through sustainable development".[119] It also found that there is need for "more effective social and environmental policies" and "increased respect for human rights".[120]

Analysing the recommendations from this World Bank study, a group of researchers have argued that increasingly resource rich countries lack "the ability to respond to pressures, notably from communities affected by mining", and that their abilities have "become circumscribed by the legal and practical conditions to attract foreign investment".[121] Szablowski adds that states have gradually abdicated their responsibilities to multinational mining companies, who unwittingly take on the task of social development and managing community expectations.[122] He argues that "states themselves are involved in transferring legal authority to mineral enterprises to manage social mediation".[123] This strategy has variously been termed the "retreat of

118 See generally Amnesty International "Profits and loss: Mining and human rights in Katanga, Democratic Republic of the Congo" (June 2013); International Council on Mining and Metals "Human rights in the mining & metals industry: Overview, management approach and issues" (May 2009), available at: <https://www.icmm.com/document/8331> (last accessed 5 March 2016).

119 B Campbell *Mining in Africa: Regulation and Development* (2009, Pluto Books) at 243.

120 Ibid.

121 Id at 246.

122 D Szablowski *Transnational Law and Local Struggles: Mining Communities and the World Bank* (2007, Hart Publishing) at 45, as cited by Campbell *Mining in Africa*, above at note 119 at 246.

123 Szablowski, id at 27.

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the state" or "selective absence", the sequel to which is "legitimacy gaps" or "governance gaps".[124] Communities are left to wonder if their fate is in the hands of their government or extractive corporations and they question the legitimacy of the companies to usurp state functions. Abdication by the state of its responsibilities is weakening legal and regulatory instruments for accountability.

In Zimbabwe, it is a paradox that the companies at the centre of the mining controversy are mostly state owned or private corporations in which the state holds a substantial stake even if not a majority. In addition, even the private companies involved have shareholders with strong connections to the state. The challenge in Zimbabwe, therefore, is how to regulate state owned enterprises that have virtually become laws unto themselves or alter egos of ministers contrary to the 2010 corporate governance framework.[125] If it were difficult to regulate multinational corporations, one would assume that it should be easier to deal with state owned local corporations. But alas, in Zimbabwe collusion between state owned mining entities and state actors has made regulating these companies a nightmare.[126] It is difficult to hold them accountable financially, socially or environmentally. Weak regulations, conflict of interest, and conflation of corporate and state priorities are having a debilitating effect on regulators, who struggle to hold these entities to account. The environment of mistrust that exists between regulatory ministries and some mining companies aggravates the situation. Consequently, claims and counterclaims of mismanagement of mining revenue abound. The Agency bemoans its impotence in the face of politically emboldened corporations that persistently violate environmental regulations, while revenue leaks along the way from the corporations to the taxman.

The legislation that created a number of state owned mining enterprises does contain orthodox features of corporate governance and accountability. However these are now out-dated and have been overtaken by the times. Having an independent board and reporting requirements are no longer sufficient to promote good corporate governance in state owned enterprises. In line with modern corporate governance practices, state owned enterprises must be legally bound to open their operations to public scrutiny, not only

124 B Campbell "Corporate social responsibility and development in Africa: Redefining the roles and responsibilities of public and private actors in the mining sector" (2012) 37 *Resources Policy* 138 at 140; see generally B Campbell, ER Grégoire and ML Julia "Regulatory frameworks, issues of legitimacy, responsibility and accountability: Reflections drawn from the PERCAN Initiative" in J Sagebien and NM Lindsay (eds) *Governance Ecosystems: CSR in the Latin American mining sector* (2011, Palgrave Macmillan) 84.

125 The Corporate Governance Framework, above at note 63, sought to incorporate King III Code principles and other modern good corporate governance principles into the management of state owned enterprises and parastatals in Zimbabwe. Persisting problems show that it has not been fully implemented.

126 As reported in the Portfolio Committee on Mines and Energy "First report", above at note 4.

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by Parliament and other government departments, but also by concerned members of the public.[127] A lack of transparency and accountability in investment arrangements, mining contracts and revenue flows thrives on a lack of legally mandated obligations for the companies. Attempts to obtain investment agreements and mining contracts entered into by the Ministry of Mines and Mining Development and mining companies are doomed, so long as there is no legal obligation on the state or the companies to comply with such requests, at the very least by disclosure to Parliament. This lack of transparency and accountability platforms in the public sphere drove non-state actors to create alternative spaces and initiatives to hold extractive entities to account.

GOOD GOVERNANCE, PUBLIC ACCOUNTABILITY AND TRANSPARENCY INITIATIVES

CSOs in Zimbabwe and internationally have instigated a number of initiatives to promote transparency and accountability in the natural resources sector. Such initiatives include the Extractive Industries Transparency Initiative (EITI),[128] Publish What You Pay (PWYP),[129] Kimberly Process Certification Scheme (KPCS), Global Reporting Initiative and others. Some of the initiatives were started by a combination of CSOs and state actors in pursuit of the sustainable use of natural resources. Central to most of the initiatives is a concern about the impact of extractive or mining activities on the environment, local communities and national economies. Human rights violations igniting civil conflicts also inspired a number of these initiatives. However, questions have been raised about the integrity of some of the global initiatives in terms of their ideological foundations and raison d'être. Politicians in some developing countries see Eurocentric initiatives as vectors for the imposition or perpetuation of forms of economic and political control or domination by nostalgic imperialists under the guise of human rights and good natural resources governance.[130] Others see the initiatives as part of bolstering the skewed world

127 Increasingly, public corporations are voluntarily subjecting themselves to the King III Code of Good Corporate Governance.

128 EITI is the brainchild of Tony Blair who was its face at the World Summit on Sustainable Development in 2002. However its launch resulted from pressure from Global Witness and Human Rights Watch. Not everyone recognizes the good intentions behind EITI, particularly given the lack of transparency in some reports submitted by its members, for instance Nigeria, which was praised for being the first African country to join the initiative. See J Gouseva "EITI: A new global standard for lying" (11 September 2008) *Open Democracy* (Russia), available at: <http://www.opendemocracy.net/article/yes/eiti-a-new-global-standard-for-lying> (last accessed 31 March 2015); see also Etter "Can transparency reduce corruption?", above at note 22 at 9.

129 PYWP preceded the establishment of EITI and is the brainchild of George Soros's Open Society Institute.

130 Hund "Globalisation", above at note 12 at 27–28; P Blunt "Cultural relativism, 'good' governance and sustainable human development" (1995) 15/1 *Public Administration and*

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development and trade systems that favour the West and relegate developing countries to permanent suppliers of unbeneficiated raw materials. In this regard Blunt cautions that:

> "[O]ne of the greatest obstacles to global development and harmony, that of social disintegration, becomes insurmountable in the face of hardening social divisions based on ideas of ethnic, religious or cultural supremacy. Such possibilities are encouraged by views of the human condition which imply that their authors have in some sense acquired or assumed exclusive occupation of the moral, intellectual and political high ground."[131]

Be that as it may, there is a consensus that countries do not need to adopt the non-state initiatives in their entirety. Countries can take lessons from the initiatives and implement, at the national level, what each state believes to be in its social, economic and political interests: aspects that resonate with its developmental aspirations.[132] This is precisely what Zimbabwe is in the process of doing with the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI),[133] as well as by complying with the KPCS to assure consumers that its diamonds are "clean".

Initiatives by state and state affiliated entities or actors

With CSO support, Zimbabwe began some initiatives to promote good natural resources governance, transparency and accountability in the mining sector. ZMRTI represents the high water mark of state and CSO co-operation in difficult circumstances. Encouragingly, the Zimbabwean state is also in the process of developing a diamond policy, a supposed precursor to a Diamonds Act and overhaul of the Mines and Minerals Act. While ZMRTI is encouraging, it is submitted that the country can do more in terms of law and policy formulation to promote good natural resources governance. This is particularly so in the areas of fiscal regulation, public participation and regulation of the mining process and its impact on the environment and the economy.[134] As noted above, the legal framework for mining is archaic, lacking provisions on public participation, access to information and protection of mining local

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Development 1 at 3; S Mtisi (ed) *Sowing the Seeds of Advocacy Work on Transparency and Accountability in the Extractive Sector in Zimbabwe* (report on the proceedings of the multi-stakeholder conference on promoting transparency and accountability in the extractive sector in Zimbabwe, 22–23 September 2010) at 6.

131 Ibid, Blunt.

132 What is important is for states to implement the spirit of the EITI principles without necessarily getting bogged down with the question of whether or not they are a member of EITI.

133 "Zimbabwe mining revenue transparency initiative" (concept note developed by the office of Deputy Prime Minister Hon T Khupe, 8 September 2011).

134 Chamber of Mines budget commentary 2011 and Mtisi et al "Extractive industries policy", above at note 7.

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communities. In addition, inadequate licensing and control systems cripple the legislation.[135] Good political and economic governance are integral aspects of good natural resources governance.[136] Without the implementation of new constitutional guarantees and environmental legislation, the progressive revision and reform of mining law and policy is only one step in a multi-step process to improve governance, transparency and accountability.

Initiatives by the state and CSOs should not be the only interventions promoted. Private mining companies should join in and develop internal and industry-wide best practices, codes and other initiatives to promote good (corporate) governance and assist the state in promoting good natural resources governance.[137] The role of private corporations is even more relevant when it comes to transparency and accountability because, without their co-operation, state disclosure per se will be insufficient. However, as indicated in the next section, there are serious shortcomings with voluntary initiatives, whether they originate in the private or state sector.

Critical analysis of CSO initiatives

The EITI and PWYP initiatives originally had their impetus from civil society concerns about human rights violations and corruption funded by pilfered resource revenues. The EITI standard, principles and criteria are all grounded in good intentions that, if implemented at the local (national) level, can anchor transparency and accountability on revenue flows from extractive activities.[138] EITI's governance structure is the ideal, with representatives from the three key interested stakeholders (government, corporate and civil society). However, there is no direct representation of indigenous / local communities and it is assumed that civil society is the bridge between such communities and states. Among EITI's membership are "implementing countries" (largely African and east European resources rich states) and "supporting countries" (mostly European states, plus a few developing states).[139] The EITI process

135 Dhliwayo and Mtisi *Towards the Development*, above at note 66 at 6; T Biti "Mining, taxation laws need urgent amendment", available at: <http://www.mines.gov.zw/85-mining-taxation-laws-need-urgent-amendment> (last accessed 5 March 2016), arguing that "[t]here is need to amend the [sic] Zimbabwe's mining and taxation laws so that the country benefits from its natural resources. If we are going to wait for royalties and taxes, Government can forget using the minerals to pay for the country's debt … The mining sector requires a transparent, honest and proper evaluation report. If we are not transparent in this sector, then we should not talk about a resource-based debt repayment strategy".

136 L Feris "The role of good environmental governance in the sustainable development of South Africa" (2010) 13/1 *Potchefstroom Electronic Law Journal* 73 at 73.

137 Kotze "Environmental governance", above at note 8 at 121.

138 As noted above, EITI is a multi-stakeholder coalition of governments, companies, civil society groups, investors and international organizations; for more details, see: <http://eiti.org/eiti> (last accessed 31 March 2015).

139 EITI "Members registry", as of 24 February 2011, available at: <http://eiti.org/files/20110224-EITI-members-registry.pdf> (last accessed 31 March 2015).

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is a simple reporting process, which makes information available on who has paid what to whom, ie PWYP.[140] There is also a call by other activists for corporations to publish what they do not pay.

The EITI standard, principles and criteria are fundamental building blocks for an effective global system to promote transparency in the extractives sector. However, like other international legal regimes, EITI does not contain the necessary teeth to compel countries to join and implement its principles. Furthermore, it does not have effective enforcement mechanisms in the event of violations.[141] Unless implementing countries domesticate the EITI principles, it will remain a soft initiative.[142] The current EITI framework is as effective as was anticipated. In this respect, transparency and publishing revenue information are still some steps away from creating a platform for holding governments and corporations accountable for their actions.[143] This requires good governance at the national level, buttressed by key governance institutions, processes and laws that enable action against failures and abuses by the state and extractive corporations.[144]

The role of developed countries and the World Bank in the funding, management and implementation of EITI also raises questions that may affect how receptive resources rich countries are to the initiative. There is real potential for the power relations and asymmetries in the running of EITI to see some countries shaping the agenda. The World Bank's track record in supporting extractive development projects and economic structural adjustment programmes,[145] most of which fail to promote sustainable development in developing countries, is known.[146] Globalization, the world trade system and the capacity of actors to dominate and control it, play a crucial role in fostering good governance in resource rich countries. While it is possible for the

140 "Implementing the Extractive Industries Transparency Initiative: Applying early lessons from the field" (2008, The International Bank for Reconstruction and Development / The World Bank) at 60, available at: <http://siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf> (last accessed 31 March 2015).

141 See generally Etter "Can transparency reduce corruption?", above at note 22.

142 See for example the Nigeria Extractive Industries Transparency Initiative Act, 2007.

143 N Rudra and NM Jensen "Globalization and the politics of natural resources" (2011) 44/6 *Comparative Political Studies* 639 at 654, expressing doubt and uncertainty about the potential of civil society initiatives like EITI to mediate the effects of globalization on natural resources governance.

144 In 2011 and 2012 Zimbabwe produced KPCS annual reports that detail the carats exported and their value, but how much was recovered from diamond production remains contested with the Ministry of Mines and Mining Development. See *Zimbabwe 2011 Annual Report to Kimberley Process Certification Scheme*, submitted by the Ministry of Mines and Mining Development, available at: <http://www.kimberleyprocess.com/en/system/files/documents/Zimbabwe%20Annual%20Report%202011_0.pdf> (last accessed 5 March 2016).

145 See generally E Oshionebo "World Bank and sustainable development of natural resources in developing countries" (2009) 27 *Journal of Energy and Natural Resources Law* 193 at 203–04.

146 Ibid.

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global market to call supplier countries to account and uphold certain standards, this can also fuel bad governance, corruption and a lack of transparency to facilitate easy access to resources in critical demand.

Unlike EITI, KPCS is the product of diamond producing countries of southern Africa who came together in 2000 to develop best practices to stop the trade in conflict diamonds that was fuelling civil wars and conflict in many African countries. Starting as a regional initiative, it received the blessing of the UN later the same year.[147] Membership is open to countries that can abide by its requirements.[148] Diamond trade associations and some CSOs have participated in KPCS plenaries.[149] Once a member, a country's diamonds are certified as conflict free and therefore freely tradable. The scheme works by controlling access to diamond markets on the back of conditions that promote good governance, transparency and accountability in the diamond producing member countries. A particular strength of KPCS is its ability to reduce demand for tainted diamonds. This is bolstered by the membership of diamond producing and trading countries and associations.

One of the gaps identified by this research is the lack of initiatives targeting the consumers of mineral products as a way of promoting good governance, transparency and accountability. KPCS is among the few initiatives that attempt to use the markets to control the behaviour of states and corporations. Another attractive aspect of KPCS is its ability indirectly to drive policy and legal reforms in member countries, for them to meet its certification requirements. Such reforms can promote transparency and accountability in the mining sector.

KPCS's Achilles heel is its narrow focus on conflict diamonds.[150] This has been at the centre of its activities regarding Marange diamonds in Zimbabwe. Once diamonds are not classifiable as conflict diamonds, it becomes difficult to subject such diamonds to KPCS certification. Hence the call to redefine "conflict diamonds" to broaden KPCS's reach. Like EITI and other voluntary initiatives, KPCS is a voluntary scheme with consensus-based

147 "Role of diamonds in fuelling conflict" (report of the UN General Assembly 55th session, official record, 29 January 2001): A/RES/55/56.

148 Currently KPCS members account for approximately 99.8% of the global production of rough diamonds.

149 Notably the World Diamond Council and Partnership Africa Canada. KPCS regularly constitutes ad hoc working groups that provide opportunities for national civil society groups to feed into its processes.

150 See generally I Smillie "*Blood on the Stone: Greed, Corruption and War in the Global Diamond Trade*" (2010, Anthem Press), especially chap 12 "Kimberley: A hope in hell". Smilie gives an excellent account of the travails of the KPCS in Zimbabwe in id "Blood diamonds and non-state actors" (2013) 46 *Vanderbilt Journal of Transnational Law* 1003 at 1017 et seq. The UN defines a conflict diamond as "any diamond that is mined in areas controlled by forces opposed to the legitimate, internationally recognized government of a country and that is sold to fund military action against that government"; see "Blood diamond" *Encyclopaedia Britannica Online*, available at: <http://www.britannica.com/EBchecked/topic/1793249/blood-diamond> (last accessed 31 March 2015).

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decision-making. Apart from mobilizing the market against a country's products, KPCS does not appear to have any other effective enforcement mechanisms. This is among many reasons why legal reforms are still necessary to strengthen the transparency provisions in Zimbabwe's legal frameworks for mining and taxation.

Other relevant initiatives to promote transparency and accountability

The Africa Initiative on Mining, Environment and Society is a movement started by a coalition of CSOs working in the extractives sector and communities affected by mining in Africa. It has gained audience within intergovernmental ministerial bodies to lobby for better policies to regulate the extractives industry. This initiative was very instrumental in the adoption of the African Mining Vision by African heads of government and state in February 2009. The African Mining Vision has principles of good governance, transparency and accountability, which could promote good governance in the mineral sectors across the region. In addition, the African Mining Vision is geared towards promoting sustainable development through mining.

Globally, the Global Reporting Initiative (GRI) founded in 1997 is an initiative by two US non-profit organizations, the Coalition for Environmentally Responsible Economies and the Tellus Institute, aimed at creating and promoting sustainability reporting standards and tools for corporations generally. Although voluntary, GRI has been adopted by many companies involved in the extractives sector with the aim of cleaning up their operations and reputations. GRI dovetails into the UN Global Compact[151] that espouses ten principles[152] that can potentially promote good governance and responsible business practices. These principles are at the intersection of business, human rights and sustainable development. There is great potential for the Global Compact together with other initiatives, especially the UN driven business and human rights programme,[153] to promote good natural resource

151 "The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption"; see: <http://www.unglobalcompact.org/AboutTheGC/index.html> (last accessed 31 March 2015). For an analysis, see E Oshionebo "The UN Global Compact and accountability of transnational corporations: Separating myth from realities" (2007) 19 *Florida Journal of International Law* 1.

152 These include principles of human rights, labour, environment and anti-corruption; see: <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last accessed 31 March 2015).

153 The UN appointed a special representative on business and human rights, John Ruggie, whose mandate was from 2005–11. He established a working group that has developed fundamental principles that can enable countries and corporations to operate in an environment of openness, transparency and accountability; see "Guiding principles on business and human rights: Implementing the United Nations 'protect, respect, remedy' framework", available at: <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> (last accessed 2 April 2015). See also C Iglesias

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governance and transparency at the international level. The UN Principles for Responsible Investment also provide international good practices on investing in the natural resources sector, among other sectors. As officially stated, the "goal [of these principles] is to understand the implications of sustainability for investors and support signatories to incorporate these issues into their investment decision-making and ownership practices. In implementing the Principles, signatories contribute to the development of a more sustainable global financial system."[154]

The drawback is that the principles are voluntary and there is no enforcement mechanism against rogue investors who do not pay attention to human rights and sustainability when making investment decisions. An underdeveloped area is the UN business and human rights initiative, as the human rights approach can make it easier for CSOs and states to subject corporations to transparency and accountability mechanisms.

Overall, these global "soft law" voluntary codes, compacts, principles and standards are important, although they may not have effective enforcement mechanisms. Nevertheless, like general soft law declarations, they can still shape the development of progressive domestic legally binding laws and regulations. This is the case with initiatives that include state actors and intergovernmental bodies like the Africa Mining Vision and the UN backed initiatives. They cannot be discounted as mere voluntary initiatives, but be taken as foundational processes that can inform national and regional drivers towards transparency and accountability in the extractives sector.

PATHWAYS TO PROMOTING TRANSPARENCY AND ACCOUNTABILITY

Ultimately, the analysis in this article confirms that certain reforms should be implemented as conditions precedent to the introduction of any transparency and accountability initiatives in Zimbabwe. However, some of these reforms first require a change of ethics and attitude by government and corporate actors, steps that could be implemented immediately.

The legal and policy frameworks and possible reforms or review

The first step that can be taken by state actors, mining regulators and mining companies is to observe the rule of law, in the sense of following even the existing procedure and processes under the Mines and Minerals Act, Income Tax Act and how state revenue should be collected and managed. As recently

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"Conflict minerals regulation: Mapping international initiatives and challenges ahead" (2014) 13/1 *Southern African Peace and Security Studies* 45 for analysis of other international initiatives.

154 For more information on the UN backed Principles for Responsible Investment, see: <http://www.unpri.org/about-pri/about-pri> (last accessed 31 March 2015).

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reported, most of the transgressions and legal non-compliance in the mining sector are violations of current laws, a problem that can be addressed pending reform of the ineffective laws.

Secondly, as violations and breaches have been well documented, law enforcement agencies and authorities must act on violations to instil a culture of compliance on mining companies and state actors who have failed to uphold the law. This is the first step towards accountability, pending any legal and policy reforms. Reform of mining legislation or the lifting of economic sanctions does not affect the readiness of law enforcement agencies to implement and enforce existing laws impartially.

Lastly, while these recommended actions are being implemented, the legal and policy framework for mining must be reviewed and reformed where necessary. This has already begun with the diamond policy and the proposed amendment of the Mines and Minerals Act, yet the pace at which these reforms are being pursued and their nature could be improved. More public consultation and participation is required on draft legislative changes. The principles that underpin the 2013 Constitution and ZMRTI should be embedded in the mining code amendment process, rather than it being centred on technical amendments that may not change the ethical outlook on transparency and accountability in the sector.

State-driven initiatives and their implementation

The good intentions behind ZMRTI and law reform must promote a system where there are effective monitoring and enforcement mechanisms to strengthen the primary role of legal regulation. The role of local communities and civil society in state initiatives must be improved through the building of trust between the state, and civil society and community actors. This opens up vast resources for the state to use as it designs laws and policies to promote transparency and accountability. Local community and civil society actors are the eyes of the state and play a central role in monitoring compliance and reporting lack of transparency and violations to relevant state authorities.

Civil society should be strategic in its engagement with the state, particularly where the aim is to influence legal and policy reforms. Confrontational lobbying and shaming are good strategies but these often have no impact if brazenly executed. Legal and policy reform advocacy requires influencing the action of ministers, parliamentarians and agencies constitutionally mandated to initiate legal and policy reforms. Needlessly antagonizing these authorities is a fruitless exercise and civil society should seriously consider this recommendation. The effectiveness of the Portfolio Committee on Mines and Energy as well as the Parliament of Zimbabwe regarding extractives issues is a direct result of CSOs constructively engaging with these institutions. The lack of collaboration from the Ministry of Mines and Mining Development is equally a direct result of civil society's inability to work with this authority, exacerbated by the department's own intransigence. The recent change of minister holds promises of open engagement with all stakeholders.

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Unfortunately, in Zimbabwe, CSOs that complement state activities are vilified as sell-outs or weak activists. Yet confrontation for the sake of it has not produced any real impact. Of late, there have been increasing efforts by CSOs and funding partners to work collectively towards a common purpose that the author has also aligned to the public interest to promote the sustainable use of natural resources.

Co-operative governance is required among state institutions. This requires relevant state institutions to co-ordinate their functions to prevent the undermining of other state institutions. An example of such co-ordination is the relationship that existed between and among the Ministry of Mines and Mining Development, Ministry of Finance, and the Portfolio Committee on Mines and Energy and sometimes the Environmental Management Agency. Inter-ministerial co-ordination thrives on transparency and accountability within government institutions.

The role of public and private mining corporations

Corporate actors should desist from being technically legalistic in everything they do, especially if they need to retain the social licence to operate. Adherence to global and national voluntary codes, initiatives and standards is critical. CSR is not a legal requirement in Zimbabwe or many other countries, but mining companies undertake many CSR activities. Equally there is no reason why, in the absence of a legal obligation to promote transparency and accountability in the sector, mining companies cannot act by publishing their contracts, revenue flows and legal compliance reports. This has been the strength of the EITI and PWYP initiatives, which are often voluntary initiatives in those countries that have adopted the standard and principles. Good corporate citizens observe the law and it is recommended that mining companies should promote genuine good natural resources governance, pay their taxes and observe environmental regulations. In the same vein, corporate actors, including state owned enterprises, must recognize and respect the authority and role of state regulatory and oversight institutions such as Parliament and its committees, the judiciary and specialized agencies including the Environmental Management Agency, ZIMRA, Zimbabwe National Water Authority and rural district councils.

What the state should do

The Zimbabwe government must operationalize the sovereign wealth fund[155] and design an appropriate management strategy for it.[156] It must build

155 Constituted under the Sovereign Wealth Fund of Zimbabwe Act (chap 22:20) (no 7 of 2014), gazetted 10 November 2014 (general notice 461 of 2014) but not yet in force.

156 T Rosenberg "Avoiding the curse of the oil-rich nations" (13 February 2013) *The New York Times*, available at: <http://opinionator.blogs.nytimes.com/2013/02/13/avoiding-the-curse-of-the-oil-rich-nations> (last accessed 31 March 2015), lamenting the resource "curse" and giving examples of good uses of sovereign wealth funds.

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capacity and competency in contract negotiations, deal structuring, choosing joint venture partners and implementing mining laws and policies. In addition, the country must reclaim legitimacy with local communities impacted by mining, by taking the lead and regaining control from mining corporations, including the power to hold corporations accountable. The mining sector has witnessed an abdication by the state of its responsibilities to respect, promote and protect the rights of communities. This has caused citizens to mistrust the state and often treat it as complicit in violations by mining corporate actors. Lastly, Zimbabwe must strengthen state institutions that deal with corruption, fraud, patronage and revenue leakages. This requires legal reforms and nurturing a culture of good political, social, economic and environmental governance: breathing the spirit of transparency into laws and policies. Above all, enforcement of laws ranging from mining, environmental, revenue collection, export control to constitutional human rights, must be improved.

CONCLUSIONS

The cross cutting experience of stakeholders in Zimbabwe's extractives industry is that, while there are laws, regulations and policies to regulate mining and associated activities, these are inadequate as instruments to promote good governance, transparency and accountability in the mining sector within the current political context. Other things being equal, it is argued that, in a different and normal political context, the regulatory impact of current laws and policies could very well be different. Indeed, since 2013 there has been a marked improvement and this is partly the result of years of CSO activism.

The socio-economic and political environment of regulation shapes the regulatory effectiveness and responsiveness of regulated entities. The situation obtaining in Zimbabwe since 2000, with heavily informalized economic activities, was not conducive to effective regulation through law and enforcement. The global political "smart sanctions" taken against the country's political leadership and associated companies have admittedly had an impact on transparency in the diamond trade, yet this is not sufficient justification for the lack of transparency and accountability. The country and mining companies used grey channels to trade in diamonds, often at give-away prices. This is why targeted sanctions cannot primarily be used to explain away an inherent lack of accountability and the legal violations that are officially reported on by the Portfolio Committee on Mines and Energy, among others. The situation in Zimbabwe is complex and unique, influenced by other factors beyond the findings in this article.

The regulatory and political context of Zimbabwe necessitated the introduction of global and non-state actor driven transparency and accountability initiatives, but this very context makes it difficult to implement and enforce against the state and state actors as well as corporates. The politico-economic environment is a serious obstacle to any transparency and accountability interventions, especially those deriving inspiration from global initiatives.

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Perhaps general UN driven initiatives may be acceptable to the government. This is often lost on CSO and non-state actors, who often treat the regulatory and political environment in Zimbabwe as normal. In comparison, in countries that are not undergoing a revolution it has not been similarly difficult to domesticate the EITI and PWYP initiatives or to reform extractives laws. However, even in those countries it remains challenging to implement accountability and transparency initiatives; nothing more can be expected from a country in political limbo like Zimbabwe. The end of the Government of National Unity and the progressive easing of smart sanctions, especially by the European Union, have exposed the lack of transparency for what it is, as Zimbabwe is still not benefiting fully from the diamonds it exports.

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