

# 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*

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## ACRONYMS

EITI	Extractive Industries Transparency Initiative
DMC	Diamond Mining Corporation
JWP	Joint Work Plan
KPCS	Kimberley Process Certification Scheme
LFP	Local Focal Point
MDC	Movement for Democratic Change
MMCZ	Minerals Marketing Corporation
PAYE	Pay As You Earn
VAT	Value Added Tax
WGM	Working Group on Monitoring
ZANU PF	Zimbabwe African National Union Patriotic Front
ZELA	Zimbabwe Environmental Law Association
ZIMRA	Zimbabwe Revenue Authority
ZMDC	Zimbabwe Mining Development Corporation
ZMRTI	Zimbabwe Mining Revenue Transparency Initiative

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Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements

## TABLE OF CONTENTS

<b>ACKNOWLEDGEMENTS</b>	ii
<b>EXECUTIVE SUMMARY</b>	i
<b>INTRODUCTION</b>	3
<b>BACKGROUND</b>	4
<b>Importance of the Diamond Mining Sector in Zimbabwe</b>	4
<b>Marange Diamonds: Where the Problem Lies</b>	5
Inadequate licencing and control systems	6
Problems with security measures	7
Porous Borders	9
Problems with Transparency and Accountability	9
Problems in the Value addition and beneficiation sector	11
The Curse of Alluvial Diamonds	12
Exploration work: Following the footsteps of illegal miners	13
Human rights violations: The scourge of Marange	13
<b>ANALYSIS OF LEGISLATION GOVERNING DIAMOND PRODUCTION</b>	15
Mines and Minerals Act	15
Mines and Minerals (Minerals Unit) Regulations	16
Precious Stones Trade Act	17
Precious Stones Trade Regulations	19
MMCZ (Diamond Sales to Local Diamond Manufacturers) Regulations	20
Zimbabwe Mining Development Corporation Act	23
The Zimbabwe Diamond Policy	26
<b>INTERNATIONAL AND REGIONAL BEST PRACTICE</b>	30
The Kimberley Process Certification Scheme (KPCS)	30
Botswana's Legal Framework	33
Namibian Legal Framework	36
South African Legal Framework	39
Ghana Legal Framework	40
<b>TOWARDS A DIAMOND ACT: LEGAL OPTIONS FOR ZIMBABWE</b>	42
Legal Options for the Development of a Diamond Act	43
Application of the proposed Diamond Act	43
Diamond licencing system and processes to curb illegal activities	44
Security measures and declaration of protected/restricted areas	45
Diamond marketing and sales	45
Transparency and Accountability	46
Diamond industry Responsibility	46
Artisanal and small scale diamond mining	47
Institutional Arrangements	47
Offences and Penalties	47
Diamonds and Development	47
Amending the Mines and Minerals Act	47
<b>Bibliography</b>	48

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Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements

## EXECUTIVE SUMMARY

There is no doubt that the clarity, colour, caratage and sparkle of the Zimbabwean diamonds from Marange can only be restored and guaranteed through the restoration and respect of human rights, rule of law, transparency and accountability and systemic improvements in institutional governance across the whole diamond supply chain from prospecting, mining, marketing and export. The purpose of this analysis is to demonstrate that part of the solution to restore the sparkle and fire in the Zimbabwean diamond is to craft a good legal framework that can be effectively enforced and implemented in line with the Kimberley Process Certification Scheme (KPCS) minimum requirements on the trade and export of rough diamonds. At the outset, there is need to be alive to the fact that resolution of the problems relating to Zimbabwe's diamond industry do not only lie in developing a policy or legal framework, but also in the political will to implement those reforms. This analysis, therefore, presents some of the various legal options that can be pursued to reform the sector as the need for mining laws to respond to new economic and social realities cannot be ignored.

In light of the above, the objective of this paper is to review the current legal and policy framework on diamonds and make a case for the development of a specific legal framework on diamonds. The paper includes an analysis of the importance of the diamond sector, the problems and challenges being experienced, a review of the laws and policies, analysis of the country's compliance with the KPCS minimum requirements, juxtaposed with the experience of other diamond producing countries. The paper will conclude by making a case for legal reforms in the diamond sector.

The paper starts by stating the importance of the diamond sector to national economic development. However, the paper makes it clear that what is being treated as the importance of the diamond sector at the moment is mainly the potential of the sector since the sector is still in its infancy and has so far been dogged by secrecy and corruption in the management and distribution of generated revenue. However, the optimism lies in the figures that have been thrown around by government officials regarding the Marange diamond fields. This obsession with Marange has led people to forget about River Ranch and Murowa diamond mining companies, which are the other diamond mining operations in Zimbabwe. Marange has been touted as the world's biggest discovery in the last century with reports suggesting that it has the potential to supply between 20-30% of world diamond production worth over US \$2 billion per year<sup>1</sup>. With such big numbers, the country has been gripped by the euphoria and belief that the diamond sector will create jobs, increase foreign currency and foreign direct investment; and lead to national and local economic growth and development. However, these benefits are yet to be realised. The national coffers are still empty with the country crippled by a ballooning external debt.

On problems and challenges, the paper states that the major problem lies in the inadequate licencing and control systems in the sector due to lack of a clear, specific legal framework that sets out control measures and systems for curbing illegal mining, theft, leakages and smuggling of rough diamonds. While Government recently passed a Diamond Policy, the country does not have a Diamond Act. Nevertheless, the Diamond Policy has not yet been tested through implementation of its mostly ambiguous but highly aspirational provisions. The second problem identified in this paper relates to the security systems that were established in Marange diamond fields to protect the diamond resources from informal diggers and dealers. In this case the physical security systems involve the military, police, private security companies and other security infrastructure established by mining companies. In 2007-2008 the police and military were involved in a violent campaign to remove informal miners that had occupied the diamond fields at the encouragement of government officials. The campaign resulted in gross human rights violations. Later in 2010 most of the companies contracted private security companies to secure their mining sites and some of the security guards also committed human rights violations. Apart from the human rights violations, some of the poorly paid soldiers and police officers who were deployed to protect the diamond resources got involved with or facilitated illegal mining and smuggling activities through syndicates. The other security problem is that the border between Zimbabwe and Mozambique is porous and diamonds have been smuggled across the border due to limited law enforcement efforts. The smuggling, leakages and theft of diamonds was contrary to the Kimberley Process Certification Scheme minimum requirements.

1. Zimbabwe does not need De Beers. Herald, 3 November, 2011

# 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

The paper also points out problems around transparency and accountability on licencing, production statistics and revenue management. It states that the existing laws are not adequate to promote transparency and accountability especially public disclosure and access to information on revenues and diamond production figures. Production statistics of rough diamonds from the mines are not known and the exports are not publicized. Worse still, revenue generated from mining is not known and the little that goes to the treasury is not used for uplifting the lives of people most of whom are living in poverty. The majority cannot access adequate food, shelter, electricity, school facilities, water and other basics necessities that constitute economic, environmental and social rights. Consequently, the diamond sector is plagued by corruption, greed, secrecy and sometimes subtle and violent conflicts.

On value addition and beneficiation, the paper states that Government tried to promote value addition of diamonds through the establishment of a local diamond pool for the local cutting and polishing industry. However, the companies and individuals who accessed the diamonds ended up selling or smuggling the rough diamonds. It later emerged the majority did not have adequate equipment and financial resources to cut and polish the rough diamonds. This forced government to suspend the scheme.

The paper also presents an analysis of existing laws that are applicable to the diamond sector in addition to the Diamond Policy. The following laws are analysed; the Mines and Minerals Act (Chapter 21:05), the Precious Stones Trade Act (Chapter 21:06), the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufactures) Regulations of 2010, the Minerals Marketing Corporation of Zimbabwe Act, the Mines and Minerals Unit) Regulations, 2008, the Zimbabwe Mining Development Corporation Act, the Income Tax Act and the Finance Act. The paper demonstrates that while these laws regulate the issuance of mining rights, mining, marketing, trade and export of diamonds, they are not adequate to curb illegal digging, smuggling and illicit trade. Further, the laws do not address all the relevant Kimberley Process Certification Scheme minimum requirements and standards. In arriving at this conclusion, the analysis includes a review of the KPCS minimum requirements and a comparison of regional and international best practice in the diamond sector. In particular, the paper looks at the legal position in other diamond producing countries in Africa such as Botswana, Namibia, South Africa and Ghana. While the overall concepts and principles drawn from the legal position in other countries is important, there is no single solution to the problems inhibiting the diamond sector's ability to trigger economic and social growth in Zimbabwe. It will be unrealistic to believe that what is happening in other countries can act as a silver bullet in Zimbabwe, unless coupled with a major systems change by all stakeholders in the mining sector.

The review of the Diamond Policy shows that there are a number of structural and content defects inherent in it. For example the draft policy is badly written and uses loose language. It does not contain specifics and is, therefore, too general. The policy does not contain any section on strategies that will be pursued by government to implement the policy positions and principles.

In conclusion the paper provides various legal options and recommendations on how the legal gaps and weaknesses identified in the current laws can be addressed. It makes a case for the formulation and adoption of a Diamond Act and outlines some of the key legal issues and provisions that may be included in a new law to ensure compliance with KPCS minimum requirements. The paper recommends that the Diamond Act should provide for control over the possession, purchase and sale, processing, local beneficiation and export of diamonds, including both unpolished and polished diamonds. The Diamond Act must clearly state the various kinds and types of licences and permits that may be issued by government such as the licencing of dealers, agents, buyers, sellers, importers, exporters, couriers, toolmakers, researchers and any other actors who may play a role in the diamond supply chain from prospecting to export. Acquisition of diamond exploration and mining rights can continue to be handled in terms of the Mines and Minerals Act. It is also recommended that the Diamond Act should include a clause that empowers the licence issuing authority to carry out investigations and background checks on all applicants for all the licences and permits to eliminate known criminals from participating. On security issues the paper proposes the preparation and approval of security plans by all applicants for licences and permits. On marketing and diamond sales, the Diamond Act should provide for the auction of diamonds through a public tender system. For purposes of monitoring compliance with KPCS minimum requirements the Diamond Act must make provision for the creation of a national level multi-stakeholder body that includes government, diamond mining industry, civil society and community.

Further options related to transparency and accountability that may be captured in the Diamond Act include the disclosure of revenues, payments and contracts in the diamond sector in a publicly accessible and disaggregated manner. In this case it will also be good for government to consider joining the Extractive Industries Transparency Initiative (EITI) and incorporating some of the principles underpinning the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) into national laws.

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Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements

## INTRODUCTION

During the past decade many countries, particularly in Africa, Latin America and Asia, instituted legal, policy and institutional reforms in their mining sectors to modernize sector management, attract investments and to optimise the contribution of mining to their economies at the local and national level<sup>2</sup>. Zimbabwe joined the race, but has been slow and indecisive in reforming its mining laws. In 2007 a Draft Mines and Minerals Amendment Bill to amend the Mines and Minerals Act (Chapter 21:05) was gazetted by government, but was never presented to Parliament for approval. Up to this day it remains a draft Bill, occasionally shuttled between Cabinet, Ministry of Mines and the Attorney-Generals Office. The twin problem to the failure by government to pass the amendments to the Mines and Minerals Act is the confusion and conflict in government, pitting the Ministry of Mines and the Ministry of Finance on whether to formulate a Diamond Act or a Diamond Revenue Act or just to pass regulations under the Precious Stones Trade Act that will regulate trade in rough diamonds in Zimbabwe. Nevertheless, in May 2012 government through the Ministry of Mines and Mining Development hesitantly developed a Diamond Policy. The Diamond Policy makes reference to the development of a Diamond Act. However, it is not clear when this will be done. The purpose of the Diamond Policy is stated as; "to provide a framework for promoting the image of Zimbabwean diamonds, to promote valuation and marketing of diamonds, to protect diamonds from threats of smuggling, to account for diamonds and promote transparency, to enhance handling and transportation of diamonds and to promote security related aspects of the diamond production chain".

In light of the above, the objective of this paper is to review the current legal framework on diamonds and the Diamond Policy and make a case for the development of a specific legal framework on diamonds. This will be done in the context of the minimum requirements of the KPCS.

The paper starts by describing the importance of the diamond mining sector in Zimbabwe's economic recovery, stabilisation and growth. In fact, there is hope that the diamond mining sector can make a significant contribution to Zimbabwe's economic recovery and growth if properly regulated, managed and developed in an orderly and transparent manner. Although the country has a long history of diamond mining beginning in 1903, diamond mining became more significant after the "official discovery" of the Marange diamond fields in 2006<sup>3</sup>. Apart from the Marange diamond fields, Zimbabwe has two other known mining areas namely River Ranch in Beitbridge and Murowa mine in Zvishavane. In this section, the problems and challenges that are hindering and slowing growth in the diamond sector are outlined.

Further, the paper contains a section that analyses the existing laws such as the Mines and Minerals Act (Chapter 21:05), the Precious Stones Trade Act (Chapter 21:06), the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufactures) Regulations of 2010<sup>4</sup>, the Minerals Marketing Corporation of Zimbabwe Act, the Mines and Minerals Unit Regulations, 2008<sup>5</sup> and the Zimbabwe Mining Development Corporation Act. In addition, the paper analyses the Diamond Policy developed by the Ministry of Mines and Mining Development. The analysis is meant to identify gaps and weaknesses by benchmarking it against international and regional best practice. The current legal and policy framework will be compared to the position in other diamond producing countries such as Botswana, Namibia, South Africa and Ghana on how they have regulated the diamond production chain from exploration to export. Most importantly, the paper will assess the extent to which Zimbabwean legislation measures up to the minimum requirements of the KPCS which is the international scheme that regulates trade in rough diamonds. The KPCS sets out minimum requirements and optional recommendations which rough diamond producer member countries like Zimbabwe are required to comply with.

The paper will conclude by providing legal options and recommendations on how the legal gaps and weaknesses identified in the current laws and the diamond policy can be addressed. In fact, the paper presents and makes a case for the adoption of a Diamond Act that will ensure full compliance with Kimberley Process Certification Scheme minimum requirements.

2. Enrique Ortega Girones, Alexandra Pugachevsky and Gotthard Walser (2009) Mineral Rights Cadastre: Promoting Transparent Access to Mineral Resources; published by The World Bank page 5

3. Although prospecting of Marange Diamonds began in 1963, their presence and extent were kept a closely guarded secret by De Beers under the guise of prospecting until illegal diamond panners invaded the area in 2006. For a detailed discussion on how De Beers successfully kept it a secret from the Zimbabwe Government, see Farai Maguwu: Zimbabwe's Diamond Story: Unbundling the mystery that surrounds it, a paper that was presented at the Southern African Political and Economic Series Policy Dialogue meeting in 2011.

4. Statutory Instrument 157 of 2010

5. Statutory Instrument 82 of 2008

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Analysis of the Legal and Policy Framework on Diamonds and Zimbabwe's Compliance with the Kimberley Process Certification Scheme (KPCS) Minimum Requirements

## BACKGROUND

### Importance of the Diamond Mining Sector in Zimbabwe: The Statistics

Zimbabwe is still emerging from more than a decade of economic, social and political problems. Mining in general and diamond mining in particular has been earmarked as the turbo for kick-starting the economic recovery, stabilization and growth of the Zimbabwean economy. The contribution of the mining sector to the total national exports was about 65% in 2010 while in 2011 it cemented its position as one of the major Gross Domestic Product drivers along agriculture<sup>6</sup>. In his 2011 National Budget Statement, the Minister of Finance noted that the mining sector has been the fastest growing sector since 2009 with growth up from 33% to an estimated 47% in 2010. Commenting on the potential of mining to contribute to economic recovery and development, the Minister noted "the mining sector in Zimbabwe has the capacity and potential for being both a foundational and champion issue for the reconstruction of the country"<sup>7</sup>. The mining sector is, therefore, expected to remain the pillar of economic recovery and growth in 2012 and beyond, building on its 2010 and 2011 successes.

The country's economic blue print, the Medium Term Plan (2011-2015) is equally optimistic about the role that mining can play in Zimbabwe's economic, recovery, stabilization and growth. It notes that the mining sector has "the capacity and potential to create substantial impetus for economic growth and value addition". The Ministry of Mines and Mining Development also strongly believes and recognizes that it is carrying Zimbabwe's hopes and expectations in terms of economic recovery and development. In its 2011-2015 Strategic Plan, the Ministry of Mines notes that the mining sector has been identified as the core pillar in the country's economic and social turn-around and that the success of the Medium Term Plan is anchored on the mining sector which is expected to drive the growth of the economy during the plan's period<sup>9</sup>. There is, therefore, unison between the Ministries of Finance, Mines and Mining Development and Economic Planning and Investment Promotion on the role that the mining sector can and should play in nurturing Zimbabwe's economy and steer it out of the doldrums, that it currently finds itself in, towards recovery, stabilization and growth. However, the unison only goes as far as an acknowledgement of the potential of the diamond mining sector and not at all about how this potential can be unlocked. These Ministries have different political and economic ideologies based on their political affiliations. Ministry of Mines is controlled by the Zimbabwe African National Union Patriotic Front (ZANU PF) while Ministry of Finance is controlled by the Movement for Democratic Change (MDC).

Statistics show that Zimbabwe's mining sector is projected to grow from 2011-2015 as illustrated by the table below. With proper policies and management of revenues, this projected growth may further enhance the role of the mining sector's potential to contribute to economic recovery and development as envisaged by the Ministries of Finance, Mines and Mining Development and Economic Planning and Investment Promotion.

**Table 1: Mining Sector's Projected Growth Rates from 2011-2015**

	2011	2012	2013	2014	2015
Gold /kg	13,000	15,000	18,000	21,000	25,000
Nickel/t	7,675	8,842	10,611	12,733	15,279
Coal/t	3,000,000	6,360,000	7,146,000	7,146,000	7,146,000
Asbestos /t	2,100	2,100	2,100	2,100	2,100
Chrome/t	610,000	700,000	700,000	700,000	700,000
Platinum/kg	12,000	13,287	15,751	19,721	19,666
Paladium/kg	9,600	10,630	12,601	15,776	15,732
Black Granite/t	168,000	170,811	173,748	176,602	179,511
Diamonds/carat	8,065,651	12,111,867	14,837,707	18,443,797	21,463,054
Growth Rate	44%	20.0%	18.3%	19.4%	8.0%

Source: Ministry of Economic Planning and Investment Promotion, Reserve Bank of Zimbabwe and Ministry of Finance

6. Ministry of Finance 2010 Budget Statement and 2011 Mid-Year Fiscal Policy Review Statement

7. Ministry of Finance National Budget Statement, 2011 p.199

8. Ministry of Economic Planning and Investment Promotion

9. Ministry of Mines and Mining Development. 5 Year Strategic Plan, 2011-2015.

# 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

While statistics and suggestions by the three Ministries are spot on regarding the role of the mining sector in economic recovery and growth, a closer look at the figures shows that it is diamond mining, Marange diamonds to be specific, that are at the heart of this hope and optimism. Marange diamonds are estimated to be the biggest discovery in the last century with unconfirmed reports suggesting that they have the potential to supply between 20-30% of world diamond production worth over US\$2 billion per year<sup>10</sup>. Estimates about Marange diamonds are that about 10% of the diamonds in the Marange fields consist of gem and near gem quality diamonds, while about 90% consist of industrial quality diamonds<sup>11</sup>. The diamonds are a mix of alluvial and Kimberlites (conglomerate). Possibly with these statistics in mind, soon after the Kimberly Process Certification Scheme<sup>12</sup> allowed Zimbabwe to trade the Marange diamonds, the Ministry of Mines was quoted as saying "Zimbabwe will not be begging anymore. We are now going to unleash our worthiness to the world"<sup>13</sup>. Diamond mining has also been described as a redeemer for the Zimbabwean economy<sup>14</sup>. In its 2012 Budget statement the Ministry of Finance estimated that diamonds alone were expected to generate US\$600 million.

All these statements indicate the hope in many people about the potential of the diamonds. Therefore, the Diamond Policy and the proposed diamond legal reforms are some of the many necessary steps to ensure that the hope and aspirations are realized. Even the Diamond Policy itself is alive to the fact that diamonds can play a significant role in the national economy. It notes that "if developed to full capacity, including the promotion of downstream activities, the diamond industry has the capacity to contribute significantly to the national economy through growth in direct revenue to the fiscus from the industry"<sup>15</sup>.

## Marange Diamonds: Where the Problem Lies

The problems that afflict the diamond sector cut across the whole diamond supply chain, from allocation of mining rights to the trade and export of rough diamonds. In a number of African countries alluvial diamond production and trade have fuelled and fanned conflicts and gross human rights abuses. That is why the Kimberley Process Certification Scheme Core Document states that trade in conflict diamonds has over the years had an adverse and devastating impact on peace, security of people and systematic and gross human rights violations<sup>17</sup>. While the KPCS has largely defined conflict diamonds as 'rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments', this definition is problematic in that the nature of conflicts in the diamond sector have changed since the KPCS was formed in 2002. The conflicts are no longer solely caused by rebel movements seeking to unseat governments, but rather there are now conflicts fuelled by governments and non-state actors like diamond mining companies that disregard the rights of host communities where diamond mines are located. The state may act through state security forces (the military and police) while the mining companies normally contract private security companies. In this case conflicts arise out of disrespect of community rights through wrongful displacement and failure to pay compensation for loss of property, land and livelihoods. Added to this are limited opportunities for participation in mining, environmental pollution and degradation. The Marange diamond mining fiasco fits the bill and has exposed the legal, policy and administrative deficiencies in Zimbabwe and how the country's internal control measures are not in tandem with KPCS minimum requirements.

In November 2009, the KPCS considered rough diamond mining in Marange to be non-compliant with basic minimum requirements of the KPCS<sup>18</sup>. The KPCS reached the decision after well documented and publicized reports of state-sponsored involvement in illegal mining, smuggling and human rights abuses. Between 2007 and 2010 many informal miners and villagers were either abused or coerced into illegal mining and smuggling syndicates with soldiers and the police<sup>19</sup>. Diamonds were also being smuggled from Marange into Mozambique and South Africa. In addition, the acquisition of mining rights in Marange was done secretly and tender procedures were not followed. Following these problems, KPCS together with Zimbabwe agreed on a Joint Work Plan (JWP) that was adopted in 2009 at Swakopmund in Namibia to try and ensure that Zimbabwe complies with KPCS minimum requirements and enable the government to address the problems.

10. Zimbabwe does not need De Beers. Herald, 3 November, 2011

11. Kimberley Process Certification Scheme, Chair's Notice (issued 6 May 2010), Production Footprint of Marange Diamond Fields (6 May 2010)

12. Kimberley Process Certification Scheme Administrative Decision on Marange Diamonds, 1 November, 2011

13. Minister of Mines and Mining Development, Obert Mpofu addressing a press conference soon after the Kimberly Process Decision on Marange Diamonds. Herald, 3 November, 2011

14. Permanent Secretary of Information and Publicity, George Charamba. Herald 24 February, 2012

15. Sunday Mail, 15-21 January, 2012

16. Section 1.7 of the Diamond Policy of Zimbabwe Document

17. Kimberley Process Certification Scheme Core Document, adopted at Interlaken, 5 November 2002

18. See generally the KPCS Report of the Follow-up Mission to Zimbabwe (9-14 August 2010)

19. See generally Partnership Africa Canada; Diamonds and Clubs (June 2010), the Militarised Control of Diamonds and Power in Zimbabwe

# 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

The JWP was adopted following the recommendations of the KPCS Review Mission that visited Zimbabwe in 2009 and adjudged that Zimbabwe was not compliant with KPCS minimum requirements. Some of the elements of the JWP included the immediate cessation of exports and the creation of a Supervised Export Mechanism by which future exports will be assessed and monitored by a KP appointed Monitor. In addition, JWP also required Zimbabwe to identify diamond resource areas within Marange, select and engage investors, install modern processing equipment and adequate security structures, install physical security systems and internal controls at mining sites and the phased withdrawal of the military from Marange. Further, the JWP required the formulation of a system for the licencing of small scale miners, reconciliation of production and sales records from 2007 -2009 and tightening of border security between Zimbabwe and Mozambique to curb smuggling.

Further, through the St. Petersburg Agreement of July 2009, the KPCS Working Group on Monitoring agreed to strengthen the JWP monitoring and reporting mechanism through the establishment of a Local Focal Point (LFP) representing civil society, appointed by the KP civil society coalition. The Local Focal Point is now called the KPCS Civil Society Coalition Representatives in Zimbabwe after the adoption of the Administrative Decision on Marange of November 2011 in Kinshasa, DRC. The civil society representatives are coordinated by Mr. Shamiso Mtisi a lawyer working at the Zimbabwe Environmental Law Association (ZELA)<sup>21</sup>. The group independently monitors the situation in Marange and reports to the KPCS on Zimbabwe's compliance with the KPCS minimum requirements.

In order to demonstrate the legal, policy and administrative problems affecting the diamond sector in Zimbabwe, a number of basic aspects that are based on KPCS minimum requirements will be outlined in this section. These aspects include; the inadequate licencing and control systems to curb smuggling, ineffective security systems, failure to tighten border security to curb smuggling, illegal mining, problems around transparency and accountability, corruption in the diamond beneficiation sector and violations of human rights.

## Inadequate licencing and control systems

While the Ministry of Mines and Mining Development drafted the Diamond Policy, the absence of a clear and specific legal framework that sets control measures and systems for curbing illegal mining, smuggling and leakages of rough diamonds in Zimbabwe is an issue of major concern. Over the past two years there have been confusing and mixed signals within government on the proposed development of the Diamond Policy and the Diamond Act which were expected to bring reforms in the diamond licencing and control systems. On the one hand, the Minister of Finance, in his November 2010 Budget Statement as well as in previous Budget Statements, was advocating for the passage of a Diamond Act or a Diamond Revenue Act. Conversely, the Ministry of Mines and Mining Development has been advocating for a Diamond Policy and while also stating that the current laws are adequate and that there is no need for a new law on diamonds. Instead some officials in the Ministry of Mines propose the passage of regulations in terms of the Precious Stones Trade Act. This discord in government has seeded confusion and resulted in limited progress towards the formulation of a law on diamonds that would set out the control and licencing measures.

The problems with the licencing and control systems are evident from recent media press statements issued by the Minerals Marketing Corporation (MMCZ) which is the sole marketing and selling agent for diamonds and other minerals in Zimbabwe. In the media statements the MMCZ was advising customers, business community and all stakeholders that it does not have any approved, certified and accredited diamond agents<sup>22</sup>. This was done after some criminals were masquerading as MMCZ agents and diamond trade middlemen. The people were reportedly even enticing their targets to pay a facilitation fee. The press statements also pointed out that some of the criminal elements claimed links with officials at MMCZ and in Government. The press statements indicate the problems in the sector around the selling and buying of diamonds in Zimbabwe and the control measures to curb smuggling and leakages. The alleged link between MMCZ officials and the criminals is another cause for concern. It is possible the criminals have a way of getting diamonds from the system and this may indicate some loopholes along the whole diamond value chain in Zimbabwe.

21 Abbey Chikane a South African was appointed as the KP Monitor.

22 The LFP included the following civil society organisations monitoring the situation in Marange; NANGO, Crisis Coalition, Zimbabwe Environmental Law Association, Counselling Services Unit, Zimbabwe Lawyers for Human Rights, Centre for Research and Development and Women's Coalition

# 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

## Problems with security measures adopted to curb illegal digging, leakages and smuggling and role of the military in the diamond sector

In 2006 there was a mass scramble and rush to mine and deal in Marange diamonds by various actors. This resulted in illegal digging, illicit trade and smuggling. The situation posed a major security challenge. However, in 2007 government realized the need to secure and protect the resources and stop illegal activities. Subsequently, the Marange diamonds fields were declared as a protected area in terms of the Protected Areas and Places Act and government deployed the army and police to forcibly remove all unlicensed miners and dealers. However, instead of providing security some of the poorly paid soldiers and police officers who were deployed ended up forcing some informal miners into illegal mining and smuggling syndicates that would share the proceeds. Smuggling from the area through Mozambique and South Africa was rife.

Since 2010, government has licensed mining companies such as Mbada diamonds, Marange Resources (formerly Canadile), DMC, Sino-Zimbabwe and Anjin. The companies established security systems and infrastructure meant to fight against illegal mining and smuggling inside their concessions. The security systems include; hands-free diamond processing equipment, recruitment of private security guards to carry out physical searches and patrols with dogs and on mounted horses, installation of fixed and mobile cameras and use of X-ray machines<sup>23</sup>. These security systems were confirmed by civil society groups during a visit to the diamond mining fields and were found to be working well<sup>24</sup>. However, in previous months, civil society groups had reported cases of syndicates of soldiers, the police and illegal miners cutting security fences to gain entry into the mining sites and enabling illegal miners to mine<sup>25</sup>. Further, reports of thefts by management and employees at diamond mining sites were also recorded. Thus, while the companies involved have put in place security infrastructure, there remain instances of security breaches resulting in smuggling and or leakages.

At the present moment one of the major security threats in Marange is that some mining companies are paying very low wages to employees and this has previously tempted some employees to be part of the smuggling syndicates<sup>26</sup>. For example, Anjin Investments is one of the low paying diamond mining companies. On average the lowest paid worker at Anjin gets US\$235 per month less than the Zimbabwe poverty datum line which currently stands at US\$560<sup>27</sup>. This situation attracts theft and illicit activities since the workers know how valuable the diamonds are and are aware of the security details and measures at the mining site. The other problem in Marange is that illegal digging and unlicensed dealing outside the fenced areas still continues, although at much lower levels than before<sup>28</sup>. This is despite the fact that the military and police are still stationed in various unfenced mining sites around Marange. The lapses in security systems in Marange were at one point exposed when reports emerged that there was an alleged robbery of a truck carrying concentrated diamond ore at Marange Resources by armed robbers in December 2011<sup>29</sup>. The robbers allegedly overpowered the security guards and got away with diamond ore.

The role of the military in providing security in Marange has been controversial and is one of the major issues of concern. While the military and the police were originally deployed to remove the huge numbers of illegal miners and dealers from the diamond fields and to restore order, peace and security, some members of the security forces became active participants in a game of illegal digging and smuggling of diamonds<sup>30</sup>. The security forces also committed gross human rights violations as many people were killed and injured when the security forces were forcibly removing and chasing informal miners from the diamonds fields. In response the KPCS in the Joint Work Plan recommended the phased withdrawal of the military from the diamond fields and the mining companies were required to recruit private security companies to provide security. Cases of abuse of villagers by private security guards employed by mining companies were also reported especially at Mbada where the security guards would set dogs on villagers. However, while there was a phased withdrawal of the military in 2011 from an estimated high of 1500, some remnants of the soldiers are still present in the area and villages. The military also holds some shares in Anjin Investments through a shelf company called Matt Bronze<sup>31</sup>.

23. Additional security measures at sorting houses require sorters to wear gloves in the glove boxes, at each corner will be a security guard, vehicles and persons are thoroughly searched on exit and no one is allowed to pick any object on the ground in the absence of a security officer.

24. Report of the KPCS Civil Society Coalition Representatives on the Visit to Marange, 7-8 March 2012

25. Monitoring Report compiled by the Local Focal Point in December 2010

26. *ibid*

27. Daily News, August 2, 2012

28. Report of the KPCS Civil Society Coalition Representatives on the Visit to Marange, 7-8 March 2012

29. The Herald: 400kg diamond ore vanishes Friday, 30 December 2011 00:00

[http://www.herald.co.zw/index.php?option=com\\_content&view=article&id=30285](http://www.herald.co.zw/index.php?option=com_content&view=article&id=30285)

30. Monitoring Report compiled by the Local Focal Point in December 2010

31. Global Witness (June 2012) Financing a Parallel Government; The Involvement of the secret police and military in Zimbabwe's diamond, cotton and property sectors

# 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

The military factor is also evident through the signing of a loan agreement to the tune of US\$98 million between the Chinese (secured through China Eximbank) and the government of Zimbabwe for the Construction of a National Defence College in Harare<sup>32</sup>. Article 9 of the agreement clearly states that an escrow account will be established to secure the payment and repayment of the facility with the revenue of the Zimbabwe side's benefits from Anjin Investment (Pvt) Ltd. This means revenue from diamond sales at Anjin will be used to repay the loan. The agreement was even approved by parliament<sup>33</sup>. Construction of a military academy at a time when the country is struggling to feed its people and to provide social services makes one wonder whether we are getting our priorities right. The participation of the military in diamond mining has increased opacity in revenue generation and distribution.

Another lapse of the security systems in Zimbabwe was exposed in April 2012 at Mutare Central Police Station, where Sergeant Elphas Dube, a police officer who was the exhibits officer at the Minerals Unit, is facing charges of stealing 13 383 carats of diamonds and 196,4 grammes of gold, all worth over US\$1,3 million from the exhibits room. The minerals were part of diamonds and gold exhibits that were confiscated and recovered from illegal miners and dealers by the police. The diamonds were from Marange. The case is still pending at the Mutare Magistrates Court. However, reports indicate that more than 300 criminal cases involving the illegal possession of precious minerals, mostly diamonds, risk being thrown out by the courts following the theft of the exhibits at the Minerals Unit in Mutare<sup>34</sup>.

The human rights abuses and participation in illegal mining and smuggling by security forces and private security guards in Marange expose a lack of adherence to security standards and lack of respect for human rights in the provision of security to protect diamond resources. This is contrary to internationally accepted standards such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and the United Nations Code of Conduct for Law Enforcement Officials among other human rights instruments. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials recognize that law enforcement officials have a vital role in the protection of the right to life, liberty and security of the person<sup>35</sup>. The United Nations recognizes that law enforcement officials shall at all times fulfill the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts<sup>36</sup>. In this respect member countries are encouraged to ensure that law enforcement officials shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result or when it is strictly necessary<sup>37</sup>. In addition, Government and law enforcement agencies shall ensure that in the training of law enforcement officials there is need to give special attention to issues of police ethics and human rights<sup>38</sup>. More importantly, the United Nations Code of Conduct for Law Enforcement Officials states that law enforcement officials "shall respect and protect human dignity and maintain and uphold human rights of all persons in the performance of their duty"<sup>39</sup>. These rights are guaranteed in the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Declaration on the Elimination of All Forms of Racial Discrimination among others.

However, the problems with security pervade the whole natural resources sector in Africa. In many African countries mining and oil companies spend millions of dollars investing in security, often paying state and private security companies to guard and protect their interests in the natural resources sector. This will enable them to extract and tap the resources for profit without any investment in surrounding communities. Hence this creates conflict with local communities. For example, Shell, an oil company in Nigeria, reportedly paid the Nigerian security forces \$383m over three years for protecting staff and installations in the Niger delta region<sup>40</sup>. As a result activists in Nigeria have expressed concern that the escalating cost of Shell's security operation in the delta was further destabilising the oil rich region and helping to fuel rampant corruption and criminality. In addition, companies often transfer funds into the hands of soldiers and police known for human rights abuses.

32. The Loan agreement for the Construction of the National Defence College was signed by the Minister of Finance on the 21st of March 2011

33. The Loan agreement for the Construction of the National Defence College was approved by Parliament on 31 May 2011

34. The Manica Post, 4-10 May 2012 "300 diamond criminal cases, vanish"

35. Office of the United Nations High Commissioner for Human Rights; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 <http://www2.ohchr.org/english/law/firearms.htm>

36. Article 1 of the United Nations Code of Conduct for Law Enforcement Officials, Adopted by the United Nations General Assembly resolution 34/169 of 17 December 1979 <http://www2.ohchr.org/english/law/codeofconduct.htm>

37. See article 3 of the United Nations Code of Conduct for Law Enforcement Officials, Adopted by the United Nations General Assembly resolution 34/169 of 17 December 1979 <http://www2.ohchr.org/english/law/codeofconduct.htm>

38. Ibid Principle 20 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 <http://www2.ohchr.org/english/law/firearms.htm>

39. Article 2 of the United Nations Code of Conduct for Law Enforcement Officials, Adopted by the United Nations General Assembly resolution 34/169 of 17 December 1979 <http://www2.ohchr.org/english/law/codeofconduct.htm>

40. The Guardian; 19 August 2012; Shell spending millions of dollars on security in Nigeria, leaked data shows; <http://www.guardian.co.uk/business/2012/aug/19/shell-spending-security-nigeria-leak>

# 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

## **Porous Borders: Weak Border Controls between Zimbabwe and Mozambique**

Zimbabwe's borders with its neighbours are porous and this has resulted in significant leakages and smuggling of rough diamonds across the borders mainly into Mozambique and South Africa. This was more evident during the height of the diamond rush between 2006 and 2010. However, the epicenter of illegality and smuggling was the border between Zimbabwe and Mozambique. In order to curb leakages and smuggling of diamonds from Marange the Joint Work Plan of 2009 required the tightening of border controls between Zimbabwe and Mozambique by the Zimbabwe Republic Police Border Patrol Unit and the Zimbabwe Revenue Authority (ZIMRA). This was because most illegal miners were crossing the border into Mozambique to Villa De Manica where the diamond dealers, mostly from West Africa and Lebanon, were based. However, by 2011 the numbers had gone down due to limited supply of diamonds after security measures had improved in Marange. Estimates by civil society have put the number of buyers that were in Manica in December 2010 at approximately 30 buyers as compared to more than 100 that were there in 2009<sup>42</sup>. Despite the reduction in numbers, there are still a few illegal dealers that are still operating in Mutare and Villa De Manica. Civil society groups have observed that illegal miners cross into Mozambique either through official border post at Forbes or through established routes in the bushes. This shows that the border control systems are not strong and that customs, immigration officials and the police are not taking effective steps to curb smuggling.

Apart from the Mozambique and Zimbabwe border, the Harare International Airport appears to be another route for smugglers of rough diamonds from the country. A case in point was the arrest of an Israeli diamond agent who was caught at Harare International Airport with 1,7kg of 8 486 carats of rough diamonds valued at US\$2 437 708.22. The agent was subsequently charged of possession of diamonds without a licence in terms of the Precious Stones Trade Act and also charged for contravening the Immigration Act. However, he was acquitted on the 25th of April 2012. The Magistrate court decided that the State had failed to prove a prima facie case against the pilot. While the whole episode is difficult to follow, it raises red flags and may point to a broader problem of smuggling through the airport. This may not have been the first time the agent or other smugglers have used the airport as an exit point in smuggling.

## **Problems with Transparency and Accountability in licencing, production statistics and revenue management**

Like elsewhere in Africa the diamond mining sector in Zimbabwe has been associated with corruption, greed, secrecy and human rights violations. In many cases, mining rights are acquired without following proper tender procedures and bribes are paid. At another level, production figures and statistics of rough diamonds from the mines are not known and the exports and auctions are not publicized. Worse still, disaggregated data on revenue generated from mining is not publicly known and the little that goes to the treasury is not used for uplifting the lives of people. While a few people are benefiting the majority of the population lives in poverty without access to adequate food, shelter, electricity, water and other basic necessities that form part of economic, environmental and social rights. Therefore, the importance of promoting transparency and accountability in the diamond sector cannot be over-emphasised. Transparency and accountability are themselves functions of democracy and good governance. In simple terms, transparency requires governments, mining companies and other actors in the extractive industries to be open about their operations, decisions or actions that have either a negative or positive impact on community interests, national development or sustainable development. It is generally agreed that transparency and accountability of public administration is necessary for sustainable economic development and the achievement of socio-economic rights<sup>43</sup>.

41. Ibid

42. Monitoring Report compiled by the Local Focal Point in December 2010

43. Carter Centre, (February 2010), Politics and Economics: Shifting the Balance toward Openness, From a Concept Note developed for the African Conference on Access to Information, held in Ghana in February 2010.

# 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

Accountability entails that government or the extractive industries are held responsible for their actions by citizens or other bodies and failure to do so would result in sanctions. Providing communities and the general public with information about mining contracts and disclosing the revenue and payments in the mining sector are critical steps in promoting transparency and accountability. In issuing mining rights, a transparent system of awarding contracts and making them public or disclosing them may signal to the public that companies and government have nothing to hide, that they honor citizens' rights of access to information and that they respect citizens' right to have a say in how resources are used<sup>44</sup>. It is now the information age and people want to know what governments are doing and want to sit at the table where decisions are made.

In Zimbabwe limited transparency and accountability in the diamond sector is regarded as the greatest threat to the potential of diamonds to contribute to sustainable development. Limited transparency and accountability in the diamond mining sector has been alleged by a number of stakeholders including the Ministry of Finance, Members of Parliament, civil society organisations, community based organisations and the media. For example in the 2011 Mid-Year Fiscal Policy Review Statement, the Ministry of Finance alleged limited transparency and accountability in the sale of diamonds and management of revenues realized thereof. The Minister of Finance noted that: "Wherever rough diamonds exist and are not managed transparently and openly, they become a major source of suspicion, conflict and national dislocation. Zimbabwe diamonds continue to be arrested by problems associated with the Kimberley Process Certification System as well as internal issues of transparency and accountability. The reality of Zimbabwe's situation is that there is no connection between Zimbabwe's income from diamonds, its output and international prices"<sup>45</sup>. The Minister of Finance further repeated these allegations in the 2011 National Budget Statement when he stated that; "diamonds can make a decisive difference in this country. It can be a positive one in which our GDP increases as a result of greater transparency and accountability of diamond resources to the state or it can be a sad one"<sup>46</sup>.

Lack of transparency and accountability is also reflected in the war of words that erupted between the Minister of Finance and the Minister of Mines and Mining Development regarding the exact proceeds from diamond sales in 2011. The Minister of Mines said he had given the Ministry of Finance US\$174 million worth of diamond sales while the Minister of Finance said he had only received US\$62 million<sup>47</sup>. The difference between these two figures is staggering, leaving people wondering who is telling the truth and who is not. At the beginning of 2012, civil servants went on a massive strike demanding pay increases. The Minister of Public Service argued that one of the reasons why the Government was not giving civil servants a pay raise was because of the limited transparency and accountability in the sale of diamonds and the revenue generated therefrom. She pointed out that "it is pertinent to note that the issue of civil servants is inextricably linked to transparency in revenues from diamonds"<sup>48</sup>.

The media also wrote stories pointing out the lack of transparency and accountability in the diamond mining sector. In one of its editorials on Marange diamonds, the Herald stated that "there appears to be some confusion over just what money is coming in, how it is distributed, and how it eventually comes into the Government's bank account, whether as taxes, royalties or dividends. But the industry is far too much important for this to continue"<sup>49</sup>. The Sunday Mail also hints on limited transparency and accountability in the mining sector. In one of its editorials, it noted; "in Zimbabwe, mining companies are not being adequately monitored. This creates room for the deliberate understatement of output and the smuggling of minerals across our borders. Is the State aware of the goings on at these mines? Here is a simple indicator of the sorry state of affairs: the mineral export receipts from the Reserve Bank of Zimbabwe do not tally with the mineral production figures from the other organs of State"<sup>50</sup>. These two editorials from the public media indicate serious problems of limited transparency and accountability in the mining sector in general and the public sector in particular.

44. Peter Rosenblum and Susan Maples (2009), *Contracts Confidential: Ending Secret Deals in the Extractive Industries*, Revenue Watch Institute, page 42

45. Biti, T. Minister of Finance in the 2011 Mid Year Fiscal Policy Review Statement, pgs 30-31

46. Biti, T. Minister of Finance in the 2011 National Budget Statement, pgs 200-202

47. Timba, J. Minister of State in the Zimbabwean Prime Minister's Office. Statement made at a reception on the eve of the eve of the EITI Global Conference, 1 March, 2011, Paris

48. Matinenga, L. Minister of Public Service. Press Statement, 24 January, 2012

49. Herald Editorial. Clear policies for diamond sector vital, 21 July 2011.

50. Sunday Mail Editorial. Lets maximize on our mining sector. July 10-16, 2011

# 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

On rough diamonds statistics, there are problems related to failure by government and mining companies to disclose how much they are producing from Marange to an expectant society. During tours of Marange by civil society as well as Parliament most of the mining companies declined to disclose actual statistics of how much they have produced from Marange and how much revenue they have realized from exports. Another example of the challenges around transparency and accountability in the diamond sector in Marange relates to the failure by government to adequately account for what happened to the diamonds that were in the stock piles from the 2007-2009 production and diamonds that were seized by police from illegal miners. The KPCS Joint Work Plan required the government to institute a reconciliation audit of production and sales records from 2007-2009 to account for what happened to stock piles and to assess what was in the stock piles. The JWP recommended the appointment of an independent forensic auditor to reconcile the figures. Ernst and Young were engaged to carry out the audit and they produced their report in September 2010<sup>52</sup>. However, Ernst and Young did not physically audit and verify the existence of a total of 357 118.12 carats of rough diamonds that were confiscated by the ZRP, under the pretext that these stock piles were the subject of ongoing criminal cases before the courts, so they could not audit them as they were sub judice. This decision was wrong and based on wrong legal advice and precedent. There was no reason why the state and auditors could not have simply approached the courts and police to examine the diamonds or at least verify their existence.

Another problem in the diamond supply chain is that some government departments especially the Zimbabwe Revenue Authority (ZIMRA) may not be present at all the critical points across the diamond supply chain to ensure accountability. It was noted that ZIMRA, the Minerals Marketing Corporation (MMCZ), the Zimbabwe Revenue Authority (ZIMRA), Criminal Investigations Department (CID) and private security company representatives are stationed at some mining companies in Marange. However, it is not clear whether these representatives will have adequate oversight over all critical points of the diamond production chain starting from the ore mining/extraction process to the end of line when diamonds are marketed and exported.

## Problems in the Value addition and beneficiation sector

While the government has tried to put in place legal measures to promote value addition and beneficiation of diamonds through the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations, the controversy dogging the Marange diamonds dogged these initiatives as well. The law was passed as a response to calls by many Zimbabweans that there is need to promote value addition as a way to create jobs and ensure that the country export finished products that will fetch more revenue. Although Zimbabwe has a significant and diverse mineral resource base, the bulk of these minerals are exported as raw materials, which fetch low prices on the international market as compared to selling finished products. However, value addition requires thorough investment in infrastructure, equipment and human capital and the benefits may take time to materialise. The sad reality about Zimbabwe's failure to promote value addition of diamonds is amply demonstrated by the downstream benefits that the Marange diamonds are creating in India through cutting and polishing. It is estimated that Marange diamonds will create 60 000 jobs in the Indian city of Surat through cutting and polishing<sup>53</sup>. For a country where unemployment is estimated at between 80-90%, creation of jobs through value addition of diamond will be a good development and could go a long way in addressing the unemployment crisis in Zimbabwe.

51. Civil society visited Marange under the auspices of the KPCS in March 2012, while the Parliamentary Committee on Mines and Energy visited in April 2012.
52. Ernst and Young (September 2010), Forensic Report in Respect of the Marange Diamond Reconciliation, Submitted to the Ministry of Mines and Mining Development
53. Manavarire, Bridget. Zim gems to create 60 000 jobs in India. Daily News, Wednesday 14 March, 2012. See also Prince Mushawevato. Stakeholders call for value addition. [http://www.sundaymail.co.zw/index.php?option=com\\_content&view=article&id=27255:stakeholders-call-for-value-addition-prioritisation&catid=41:business&Itemid=133](http://www.sundaymail.co.zw/index.php?option=com_content&view=article&id=27255:stakeholders-call-for-value-addition-prioritisation&catid=41:business&Itemid=133). Sunday Mail, 26 February-4 March, 2012.

# 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

The Minister of Finance clearly articulated how Zimbabwe is losing out on the true value of its minerals due to lack of value addition when he stated that; “the low level of value addition activities, particularly on mining and agriculture products, has resulted in the country being unable to realize meaningful benefits from its endowments hence compromising employment creation, foreign exchange earnings and economic growth among others. It will therefore be necessary to institute further measures to discourage exportation of raw products that have potential for value addition inside the country”<sup>54</sup>. In turn the Ministry of Mines noted that; “Government would like to see local beneficiation of minerals playing a critical role towards sustainable development of the mining sector. Local beneficiation of minerals is desirable as it results in skills and technology transfer through the establishment and value addition plants. It also creates new jobs for our people and other downstream benefits”<sup>55</sup>.

In response government created a local diamond pool to enable local cutters and polishers to access rough diamonds for cutting and polishing through the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations. The regulations prescribe the allocation and reservation of 10% of gem quality rough diamonds, 10% of near gem rough diamonds and 10% of industrial diamonds for local cutting and polishing. However, when the scheme was opened in 2011, most of the companies that applied to access rough diamonds from the local diamond pool had no equipment and capital to cut and polish the diamonds. They ended up illegally exporting the diamonds and this led government to suspend the scheme.

## The Curse of Alluvial Diamonds

The other challenge Zimbabwe faces in dealing with the so-called huge diamond deposits in Marange lies in the geological occurrence of the diamonds. The Marange diamonds are a mix of alluvial diamonds and conglomerates. Mining of alluvial diamonds by individuals and groups of people that are in most cases not formally organized has historically contributed to financing conflicts in countries such as Liberia, Sierra Leone, Angola and the Democratic Republic of Congo. Historically, mineral revenue from diamonds mined by artisanal miners has been used to buy arms and weapons for rebel movements, militia and warlords, hence the moniker, 'blood diamonds'. These are the conflicts that led to the creation of the Kimberley Process Certification Scheme in 2003. Therefore, in many African countries alluvial diamond mining presents numerous legal and practical complexities for policy makers<sup>56</sup>.

The problems are associated with failure by government to monitor and control extraction of diamonds through effective enforcement of laws. In many countries artisanal mining of alluvial diamonds is informal and illegal and the rights of miners are ignored or legal protections may be minimal as the miners are often evicted and face human rights violations<sup>57</sup>. The miners are also manipulated by dealers and agents. This makes artisanal mining areas an attraction for corrupt people and money launders. In addition, fierce and sometimes violent contestations over the control and access to mining sites have characterized the resource tenure issues in the artisanal and small scale mining sector<sup>58</sup>. This makes it a huge challenge for fragile countries to put in place systems that will ensure compliance with KPCS minimum requirements, especially the optional measures such as the need to register all miners and putting in place security systems aimed at curbing illegal trade and smuggling. Other risks associated with artisanal mining include HIV/AIDS, safety, crime and sexual abuse since the areas are normally overcrowded and various social vices happen.

In countries where alluvial diamond mining is taking place such as the Democratic Republic of Congo, Liberia, Central African Republic, and Sierra Leone among others the governments have allowed small scale miners and artisanal miners to operate under a licencing and regulation system that promotes compliance with Kimberley Process Certification Scheme minimum requirements. In these countries alluvial diamond mining is a major source of income and employment and estimates put the number of artisanal miners at between 13-20 million in over 50 developing countries<sup>59</sup>. Therefore, for some countries artisanal mining of alluvial diamonds represents an important stream of revenue for national economies as well as livelihoods<sup>60</sup>.

54. T.Bit, 2012. Minister of Finance in the 2012 National Budget Statement. See also Musarurwa, D. Africa's value addition, Sunday Mail January 29-February 4, 2012. This article analyses how Africa is losing out from getting maximum value from its mineral resources due to lack of value addition.

55. Ministry of Mines and Mining Development, Obert Mpofu in his foreword to the Ministry of Mines and Mining Development 5 Year Strategic Plan, 2011-2015.

56. USAID ISSUE BRIEF; “Property Rights and Artisanal Mining; Clarifying and Strengthening Rights: Options for Policy Makers”; Property Rights and Resource Governance Briefing Paper 14

57. World Bank, CASM and DFID; Communities and Artisanal and Small Scale Mining: A Global Partnership for Action (undated)

58. USAID ISSUE BRIEF; “Property Rights and Artisanal Mining; Clarifying and Strengthening Rights: Options for Policy Makers”; Property Rights and Resource Governance Briefing Paper 14

59. Ibid

60. Hentschel, T, Hruschka F and Priester M (2002) Global Report on Artisanal and Small Scale Mining, Report commissioned by the Mining, Minerals and Sustainable Development Project IIED and WBCSD.

# 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

Zimbabwe has not yet allowed small scale or artisanal diamond mining in Marange in areas where diamond deposits are economically unattractive for large mining companies. However, the Joint Work Plan encouraged Zimbabwe to identify and licence small scale miners. At the moment Zimbabwe has not yet developed any legal or policy framework that may be used to regulate and control artisanal mining in compliance with KPCS requirements. There are fears in government that opening up the area for small scale miners will unleash illegality and illicit trade in rough diamonds from Marange. However, reports indicate that government has launched a community share ownership scheme in Marange in terms of the Indigenisation and Economic Empowerment Act to spearhead community participation in the diamond sector. It is not clear how the community share ownership trust will operate and how compliance with KPCS standards will be achieved.

## **Exploration work: Following in the footsteps of illegal miners**

Over the years, what has also fuelled illegal digging and smuggling in Marange is the failure by government to carry out exploration work. The mining companies and government officials initially relied on illegal miners to find diamond deposits. They were following the footsteps and trails of illegal miners. However, the mining companies in Marange have secured contracts that allow them to carry out diamond exploration and mining. Most of them are carrying out exploration work in Marange and beyond.

At one point Government of Zimbabwe expressed commitment to carry out a comprehensive assessment of the quantities of the mineral resources in Marange and surrounding areas. The Ministry of Mines even issued a call for tenders in the media in May 2011 seeking companies that can carry out an aeromagnetic survey of the Marange diamond mining area. However, to date the assessment has not yet been carried out. In addition, government officials have been making statements about the need to establish a Minerals Exploration Company whose core function is mineral exploration and maintaining a database of mineral resources of the country. This was going to be established through a Mineral Exploration Corporation Bill. The objective of the proposed Bill was to set the legal framework for exploration work in Zimbabwe<sup>61</sup>. Up to now all these statements have remained just that, statements not backed up by any action. This possibly points to lack of political will or the gridlock nature of governance within the Government of National Unity.

## **Human rights violations: The scourge of Marange**

As demonstrated elsewhere in this paper diamond mining has been linked with devastating impacts on peace, security and human rights. Some of the rights violations that have traditionally been associated with diamond mining in many African countries include; killings, beatings and evictions. The mining sector has often been characterized by violations of environmental, economic, social and cultural rights of local communities. In some cases communities are involuntarily displaced. Access to information is limited in cases of displacements and adequate compensation is not often paid.

Diamond mining in the Marange diamond fields has resulted in the violation of communities' civil, political, environmental, economic, social and cultural rights. Communities have been involuntarily displaced and forcibly resettled to pave way for mining activities without being provided with information or payment of fair and adequate compensation. It is estimated that about 4000 families are going to be displaced. Currently over 700 families have already been displaced. Families that have been affected were paid US\$ 1 000 as a disturbance allowance and are also given some groceries on a quarterly basis. A few business people in Marange, however, received compensation<sup>62</sup>. From an environmental perspective, the mining companies in Marange, especially Anjin, DMC and Marange Resources, have been polluting water resources in the Save and Odzi Rivers and this has deprived communities living downstream of water for bathing, watering livestock, gardening and drinking. The water is heavily polluted with chemicals and heavy metals as indicated by a scientific investigation on water quality that was commissioned by the Zimbabwe Environmental Law Association<sup>63</sup>.

61. Speech by the President of Zimbabwe to the Parliament of Zimbabwe on the occasion of the Official Opening of the 4th Session of the 7th Parliament of Zimbabwe on the 6th of September 2011.

62. Reports from community monitors in Marange state that some business people received more than \$60 000 from mining companies, while another famous business man Newman Chiadzwa allegedly received \$250 000 as compensation.

63. Zimbabwe Environmental Law Association (July 2012) 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 livelihood impacts.

# 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

Major incidences of human rights violations in Marange were recorded in 2007-2008 when the army and police launched an operation to remove informal miners from the area. Reports put the number of people who died as a result of beatings and other abuses at more than 200<sup>64</sup>. Other gruesome cases of abuse and murder include the case of a police officer called Supt Joseph Chani who beat a villager, Tsorosai Kusena, to death in Marange in September 2011<sup>65</sup>. Chani was subsequently brought before the courts facing murder charges and was convicted and sentenced to 18 years in jail for murder. Private security guards contracted by mining companies were also involved in human rights abuses. For example security guards contracted by Mbada diamonds had a reputation of beating villagers and setting vicious dogs on them<sup>66</sup>. However, by the beginning of 2012 these cases had significantly gone down.

64. See generally, Partnership Africa Canada; *Diamonds and Clubs* (June 2010), the *Militarised Control of Diamonds and Power in Zimbabwe* and *Global Witness* (2010), *Return of the Blood Diamond*, the *Deadly Race to Control Zimbabwe's new found Diamond wealth*

65. Criminal case RRB 0976638

66. Reports from community monitors in 2010 and 2011; For example a man called Mr. Van Heeden was involved in terrorising villagers in Marange on behalf of Mbada diamonds.

# 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

## ANALYSIS OF LEGISLATION GOVERNING DIAMOND PRODUCTION AND TRADE IN ZIMBABWE: A TALE OF WEAK AND FRAGMENTED LAWS

Zimbabwe has a plethora of laws that regulate and control diamond mining, marketing, sales and exports. These laws include the Mines and Minerals Act, Precious Stones Trade Act, the Minerals Marketing Corporation of Zimbabwe Act, the Income Tax Act, and Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufactures) Regulations and the Mines and Minerals (Minerals Unit) Regulations among others. The Diamond Policy forms part of the policy framework that provides the aspirational objectives of the country.

The objective of this section is to assess how adequate the existing laws and policies are and the extent to which they take into account some elements of the Kimberley Process Certification Scheme minimum requirements. The analysis will be done to assess the weaknesses and strengths of the current laws on the following issues; licencing and control systems, prospecting and mining, security issues, diamond sales, exports, beneficiation, transparency and accountability and generally revenue management and distribution among other issues.

### Mines and Minerals Act (Chapter 21:05)

The Mines and Minerals Act (Chapter 21:05) is the principal legislation that regulates the acquisition of mining rights in Zimbabwe. It applies to all minerals in Zimbabwe including diamonds. In terms of Section 2 of the Mines and Minerals Act, all rights to minerals are vested in the President. In this case the Act states that the dominium in and the right of searching and mining for and disposing of all minerals is vested in the President. For one to prospect, explore and mine mineral resources in Zimbabwe, they need to apply for a mining title or permit/licence. There are different types of mining rights or licences that are issued in terms of the Mines and Minerals Act. These include a prospecting licence which gives the holder the right to prospect and search for any minerals on land open for prospecting<sup>67</sup>, Exclusive Prospecting Orders (EPO), Mining Leases, Special Mining Leases or Special Grants. It is, therefore, illegal for anyone to prospect, explore or mine minerals including diamonds without a licence.

The Kimberley Process Certification Scheme requires all member countries to ensure that only licenced diamond miners are allowed to mine for diamonds. This is in terms of Annex II to Section IV of the KPCS Core document. Accordingly, Mines and Minerals Act makes it an offence for one to mine minerals without a licence. Companies that are exploring and mining for diamonds in Marange have acquired exploration and mining rights from the Zimbabwe Mining Development Corporation (ZMDC) which holds a Special Grant in Marange. They acquired the rights by entering into Joint Ventures with Marange Resources which is a subsidiary and investment arm of ZMDC in Marange. While the private investors brought in capital, ZMDC brought in the special grant and the diamond resources on behalf of government since it is a government owned company. The following companies are Joint Ventures between government and private investors; Mbada and DMC. It is not clear if ZMDC through Marange Resources is part of Anjin which is allegedly controlled by the Chinese and the military. The third Joint Venture company called Sino Zimbabwe ceased operations while another one called Canadile was taken over by Marange Resources and is now fully owned by government.

Since the Mines and Minerals Act makes it an offence to mine for any mineral without a licence, the activities of organized syndicates including soldiers, police, informal miners and dealers who used to participate in unauthorized mining inside and outside fenced mining sites in 2007-2011 were purely illegal and contrary to the Mines and Minerals Act and the KPCS minimum requirements. Section 379 of the Mines and Minerals Act states that any person who breaks or removes any mineral from any mining location or deposit with the intent to deprive the owner or licence holder thereof shall be guilty of theft and liable to prosecution and shall be punished accordingly. At the height of the diamond rush the problem in Marange was lack of enforcement of the laws since the same people who were supposed to enforce the law were the ones who facilitated illegal diamond mining.

67. Section 20

# 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

In terms of acquisition and negotiation of mining rights and contracts, the Mines and Minerals Act establishes a Mining Affairs Board whose functions include considering applications for acquisition of mining rights and making recommendations to the Minister on applicants that should be granted mining rights. In turn the Minister will also make recommendations to the President. The licencing system in Zimbabwe has been viewed as complex and opaque. However, it is not clear what role the Board played in the selection of investors in Marange. Most of mining companies operating in Marange were engaged without following the procurement procedures and some of them allegedly misrepresented their financial position in order to get mining rights. An example is Canadile whose agreement with ZMDC was terminated by government after it had allegedly misrepresented its financial position to enter into a Joint Venture with the ZMDC through Marange Resources to explore and mine for diamonds. The Procurement Act (Chapter 22:14) sets out the tender procedures that should be followed by state entities when they are engaging service providers.

Related to the acquisition of mining rights, the contracts that are signed with foreign or local investors in the mining sector are not made public or disclosed for public scrutiny. The Mines and Minerals Act have very limited provisions that may be used to promote access to information on applications for mining rights. For example Section 138 that deals with mining leases provides for the publication of an application for a mining lease in the government gazette so that members of the public can lodge objections if any. Objections are rarely lodged by members of the public. However, once a mining contract has been signed the contract is never disclosed or made public. Nevertheless, one may try to access and demand for the disclosure of mining contracts by using the Access to Information and Protection of Privacy Act (Chapter 10:27). The Access to Information and Protection of Privacy Act provides every person the right to access information. It states that every person has a right of access to any record that is in the custody or under the control of a public body. The person will be required to make a written application to the public body<sup>68</sup>. The problem with this Act lies with the set of claw-back clauses or restrictions that are stated in Part III of the Act. Part III deals with protected information. Classes of protected information include deliberations of cabinet, information whose disclosure will be harmful to law enforcement process and national security, information relating to the financial or economic interests of public bodies or the State and information relating to public safety, security and defence. Using these restrictions some government officials have been claiming that information about the contracts signed with diamond mining companies and revenue therefrom is protected information and cannot be disclosed to the public<sup>69</sup>. Government officials also claim that the information falls within the realm of state security and defence and cannot be publicised. The general public, therefore, ends up relying on "black market information" and rumor mongering to get snippets of what the diamond mining contracts provide for in terms of diamond revenue sharing arrangements. This is clearly undesirable.

## **Mines and Minerals (Minerals Unit) Regulations, 2008 Statutory Instrument 82 of 2008**

Another important piece of legislation that is critical in the diamond mining sector is the Mines and Minerals (Minerals Unit) Regulations of 2008 (SI 82 of 2008). The regulations establish a Minerals Unit in section 3(1). The Minerals Unit is supposed to be a crack unit composed of officers from the Ministry of Mines, the police and the Reserve Bank of Zimbabwe. The functions of the Minerals Unit are stated as; assisting miners in preventing the theft of minerals from mining locations, preventing smuggling of minerals outside Zimbabwe and safeguarding the mineral resources of Zimbabwe. The Minerals Unit has power to inspect, enter any mining location, examine or inspect mining operations, examine books, accounts vouchers, documents, maps and records<sup>70</sup>. In addition, the Minerals Unit has power to examine security systems at mining locations. In this regard, the Minerals Unit is empowered to give direction to any miner to improve security of mining locations to prevent theft of minerals<sup>71</sup>. Further, the Act authorizes the Minerals Unit to station one or more of its members at premises of any registered mining locations or at any port of entry or exit to curb smuggling or theft of minerals<sup>72</sup>.

To a large extent, the Regulations are an important piece of legislation in the fight against smuggling and theft of minerals, especially in the diamond mining sector. Theoretically, the regulations are arguably a good attempt by the country to try and create internal control and security measures to prevent smuggling as contemplated in Section IV of the KPCS Core Document. The regulations are also essential in that they provide scope for accountability and law enforcement since they empower the Minerals Unit to inspect records, documents and books.

68. Section 5(1)

69. In 2011 ZELA applied for access to mining contracts signed with diamond mining companies in Marange to the Ministry of Mines and ZMDC using the procedures laid out in the Access to Information and Protection of Privacy Act. There was no response and the organization has since appealed to the Zimbabwe Media Commission.

70. Section 4

71. Section 5

72. Section 7

# 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

In addition, the fact that the Minerals Unit may examine the security systems at mining sites is critical in the security aspects of diamond production. In this case the provision is in line with KPCS requirements on the need for member countries to ensure that mining companies put in place security measures to curb smuggling and theft. The examination of security systems at mining sites will enable mining companies to improve their systems. In Marange, this means the Minerals Unit may look closely at all the security procedures and systems adopted by mining companies such as the security cameras, security guards, patrols and the hands-free systems. The deployment of members of the Minerals Unit at mining sites and ports of entries or borders is another important issue that is in line with KPCS requirements. The KP requires countries to secure borders to prevent conflict diamonds entering or exiting.

However, while these regulations are progressive and may be useful in the diamond mining sector, what has been lacking is rapid and effective implementation and enforcement of the law. Reports of smuggling and leakages have always been observed by civil society organisations in Marange. In addition, the Minerals Unit may be powerless if it is not provided with adequate training and resources in detecting cases of theft and smuggling of diamonds. In some cases the situation in Marange may have compromised the work of the Minerals Unit as some of the counterparts of the police force and the military were involved in facilitating illegal digging and smuggling of diamonds through syndicates. The role of the Reserve Bank is also questionable at this point. Rather, it would have been desirable for officers from ZIMRA to be part of the Minerals Unit in terms of the Act.

## Precious Stones Trade Act (Chapter 21:06)

The Precious Stones Trade Act (Chapter 21:06) is one of the key pieces of legislation that regulates possession and dealing in rough diamonds and other precious stones in Zimbabwe. The Act was passed in 1978 and has been amended over the years. Precious stones are defined in the Act as rough or uncut diamonds or rough or uncut emeralds or other stones which may be declared to be precious stones<sup>73</sup>. The Act broadly defines dealing in precious stones as including; buying, selling, barter, pledge, exchange, give or receive, or offer or expose for sale, barter, pledge or exchange or any other dealings or transactions.

From the above definitions, it is clear that the Precious Stones Trade Act deals with rough diamonds and does not regulate polished diamonds that may be exported from or imported into Zimbabwe. This means diamonds that are exported after being cut or polished are not subject to the provisions of this Act. This gap also exists in the KPCS which has been criticised for its failure to play an oversight role and require statistics on polished diamonds. The KPCS has only confined itself to rough diamonds. The exclusion of the cutting and polishing industry from the KP system creates a vacuum between the production of rough diamonds and the trading system and retailers and consumers<sup>74</sup>. In Zimbabwe the Precious Stones Trade Act is silent on the control and regulation of the export, import or dealing in polished diamonds.

In order to curb illegal dealing, the Precious Stones Trade Act makes it an offence for anyone to deal in or possess precious stones unless one is a licenced dealer, holder of a mining location or tributor or an employee or an agent of a licenced dealer, permit holder or the holder of a mining location or tributor<sup>75</sup>. Any person found guilty of unlawfully dealing and possession of precious stones will be sentenced to imprisonment for a period of not less than five years and be liable to a fine of any amount up to or not exceeding level 14. At the moment a level 14 fine is about US\$5000<sup>76</sup>. From the above position there are a few important issues to note that make the Precious Stones Trade Act weak and inadequate to address the problems of smuggling, illicit trade and dealing in Zimbabwe. Firstly, on the issue of employees or agents of licenced dealers, permit holders or holders of mining location or tributors, there is no specific requirement in the Act for that agent or employee to be given a certificate of authority or some form of letter of authority to show that he is a representative of a licence holder. In the absence of legal certainty this makes it difficult for law enforcement agents or inspectors who are responsible for monitoring such as customs or immigration officials, the Minerals Unit or other officers to curb smuggling especially at borders. In other countries like South Africa and Namibia the law requires such agents to be issued with a certificate of registration and the law is very clear on this.

73. Section 2 of the Precious Stones Act

74. Kimberley Process Civil Society Coalition (November 17-19, 2011), Brussels Meeting Communiqué. The coalition is led by Partnership Africa Canada (PAC). In Zimbabwe the Zimbabwe Environmental Law Association (ZELA) and Centre for Research and Development (CRD) are members and sit as observers in KPCS meetings.

75. Section 3(1) (a)-(d)

76. The Standard Scale of Fines was revised in terms of section 50(1) (f) of Finance Act 3 of 2009.

# 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

Secondly, the issue of penalties is a critical issue in the Kimberley Process Certification Scheme. Section IV of the Kimberly Process Core Document requires participants to maintain dissuasive and proportional penalties for transgressions that relate to trade in conflict diamonds. This means member countries are encouraged to adopt criminal measures or sanctions against offenders and these measures are supposed to be deterrent and proportional to the crime committed. While the provision in the Precious Stones Trade Act makes it clear that any person found guilty of unlawfully dealing or possession of rough diamonds shall be sentenced to imprisonment for a period of not less than five years and be liable to a fine not exceeding level 14 which is pegged at US\$5000, this is not deterrent when compared to countries like Namibia where the prison term is 20 years. This fine can be easily paid. This then means that our legal system is not adequate to deter and punish offenders or those who go against the KPCS requirements.

The Precious Stones Trade Act also contains legal provisions that may be interpreted as intended to promote accountability in the trade and selling of rough diamonds. Section 6 of the Act provides for the keeping of registers and returns by dealers, holders of mining locations and tributors. The registers shall include the following details; the amount of precious stones recovered and the amount held at the end of the preceding month. In the same vein, licenced dealers are required to keep registers and within 24 hours of any transaction they are required to enter the date of transaction, name and address of the other party to the transaction, particulars of licence, the nature and mass of precious stones and the price paid or received. The dealers are required to render to the Secretary in the Ministry of Mines the returns setting out full details of all precious stones deposited with or received or disposed by him during the preceding month. In addition, the dealers are required to submit affidavits, certificates, and other documents relating to the matters above. The Act accordingly makes it an offence for one to supply false information<sup>77</sup>. This is an important measure to ensure that those who contravene the law are held accountable. The Secretary in the Ministry of Mines is required to keep a register of every licence issued in terms of the Act<sup>78</sup>.

While the above provisions are meant to promote accountability in the diamond trade sector, it is not clear why the Act does not also require holders of mining locations to submit returns. Section 6(1) only requires holders of mining locations to keep registers. Only licenced dealers are required to submit returns to the Ministry of Mines in terms of Section 6(2) (b). This glaring omission in the Act is a cause for concern in situations where diamond mining companies who are the holders of mining locations may also be involved in trade or selling of rough diamonds in cases where they are allowed by the Minerals Marketing Corporation to market and sell their diamonds under the Minerals Marketing Corporation Act. Concern around this issue is based on the fact that in many cases leakages of diamonds happen at the mining site as well. The other issue of concern is that the Precious Stones Act does not contain provisions that may provide scope for transparency in terms of access to information for members of the public. The returns and even names of the dealers are not made public and this creates a veil of secrecy around diamond mining operations. It would have made good practice and legal sense for the Ministry of Mines to publish in a publicly accessible manner all the returns submitted by dealers as well as the licences issued by the Ministry in terms of the Precious Stones Trade Act.

In addition to the above, the Precious Stones Act also provides for the issuance and cancellation of licences and the conditions under which a licence holder or miner may deal in or possess precious stones in Section 7. Section 7 (1) gives power to the Minister of Mines to issue or refuse a licence to trade in precious stones. The weakness of the Precious Stones Trade Act in relation to the issuance of licences to dealers is that the Act does not contain any specific provision for investigation of applicants before they are issued with a licence or permit as a way of checking their backgrounds. This position may open the system to unscrupulous diamond dealers and other criminals and crooks that may have been involved in illegal acts that are against the KPCS minimum standards in Zimbabwe or in other countries. It should be noted that the KP requires member countries to notify it of all those convicted in other countries of trade in conflict diamonds. Without background checks the country may end up harbouring people who have been involved in trade in conflict diamonds elsewhere. In Namibia, Botswana and South Africa licences are issued after investigations.

77. Section 6(2) (a)

78. Section 7(5)

# 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

In order to enhance law enforcement, the Precious Stones Trade Act provides for the powers of police officers and inspectors of the Ministry of Mines in Section 11 and 14. Police officers are empowered to open postal articles suspected of containing precious stones<sup>79</sup>. In addition, police officers, the mining commissioner and inspectors are given powers to enter and search at all times any premises of a licenced dealer on reasonable grounds for believing that it is necessary to prevent the commission of an offence. The police may also take copies or make copies of any documents or registers. It is an offence to hinder the police officers from performing their duties. These are all important provisions for the enforcement of the law. However, the problem lies in the fact that there have been limited instances of actual enforcement and implementation of these provisions in the diamond mining sector.

An analysis of the Precious Stones Trade Act shows that the Act is part of the internal control systems adopted by Zimbabwe to comply with the KPCS minimum requirements. However, it is clear that these measures are not adequate to ensure that illegal goods or diamonds are eliminated from the system. In fact, the Act is not good enough to curb smuggling, illicit trade and to enhance transparency and accountability. In this case there is an urgent need to embark on legal reforms that will concretize and domesticate some of the KPCS minimum standards that are meant to prevent trade in conflict diamonds.

## Precious Stones Trade Regulations, 1978

The Precious Stones Trade Regulations provide the framework for the export and import of rough diamonds in Zimbabwe. The regulations have been amended a number of times<sup>80</sup>. The major amendments were made through the Precious Stones Trade (Amendment) Regulations, Statutory Instrument 282 of 2002. The amendment regulations were purposefully passed by government to ensure domestication of the Kimberley Process Certification Scheme in Zimbabwe. This means Zimbabwe domesticated the KPCS minimum requirements through these regulations. The KPCS requires participants to enact appropriate laws, policies or regulations or amend existing laws so as to implement and enforce the KPCS and to maintain dissuasive and proportional penalties for offenders. It is also important to note that in Zimbabwe the Zimbabwe Minerals Marketing Corporation (MMCZ) was designated as the exporting authority for all rough diamonds from Zimbabwe. An exporting authority is mandated to validate the Kimberley Process Certificate.

In section 7A (1a), the Precious Stones Trade Regulations as amended by the Precious Stones Trade (Amendment) Regulations (SI 282 of 2002) provides that the export or import of rough diamonds shall only be permitted if the shipment is accompanied by a valid Kimberley Process Certificate. The Certificate is supposed to indicate a number of details. One of the key details is a statement to the effect that "the rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process International certification scheme for rough diamonds"<sup>81</sup>. This statement is in line with the KPCS requirements to assure other participants that the diamonds are not conflict diamonds. Other details that should be reflected on the certificate include; the country of origin of the rough diamonds, date of issuance, date of expiry, issuing authority, name and address, particulars of licence, permit or authority of exporter and importer, carat weight of the rough diamonds, value of the rough diamonds in United States dollars, number of parcels in the shipment covered by the certificate, description of the rough diamonds according to the relevant harmonised description and coding system and validation by export authority among other details<sup>82</sup>. In addition, the regulations also require rough diamonds to be shipped in sealed and temper resistant containers and that only shipment to or from a KPCS participant are allowed<sup>83</sup>. All these details are in line with KPCS requirements.

The regulations also require the exporting or importing authority to keep a register where it enters the details of the rough diamonds it imported or exported during each month including the following details; the date of transaction, the name and address of all parties to the transaction, particulars of the Certificate, the nature and mass of the rough diamonds involved and the value of the diamonds in United States dollars. While this provision is important for accountability purposes, the limitation is that the regulations do not provide scope for public access and inspection of the register of the certificates and other details. This may create barriers on access to information and perpetuate secrecy in the diamond mining and trading sector. However, as noted elsewhere in this paper any member of the public may make a written request for any public record from a public body under the Access to Information and Protection of Privacy Act. Sadly, the problem with the Access to Information and Protection of Privacy Act is that it contains a lot of claw-back clauses or limitations that seek to protect information or to stifle access to information. Information about diamonds has been treated as sensitive in Zimbabwe.

79. Section 11(3)

80. As amended by the Precious Stones Trade (Amendment) Regulations Statutory Instrument 282 of 2002, as well as SI 248/03, SI 188/04 and SI 109/08

81. Second Schedule to Section 7A

82. *ibid*

83. Section 7A (1a), (b) and (c); Subsection (1a) inserted by SI 249/03 with effect from the 21st November, 2003.

# 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

The Precious Stones Trade Regulations also contain a section on offences and penalties<sup>84</sup>. Section 9A states that any person who contravenes the regulations shall be guilty of an offence and liable to a fine not exceeding level five or to imprisonment for a period not exceeding six months or to both such fine and imprisonment. In terms of the Criminal Law Codification and Reform Act (Chapter 9:23) which set the fine levels for crimes in Zimbabwe, a level five fine is currently pegged at US\$200. It is submitted that such a fine level is extremely low and is not sufficiently punitive for someone who may have been found guilty of exporting or importing rough diamonds. This completely defeats the whole legal system of creating penalties in the KPCS. In addition, an imprisonment term of six months is also low for people who may be convicted of exporting or importing conflict diamonds. The KPCS requires participants to maintain dissuasive and proportional penalties for offenders in their laws. The penalties contained in the regulations are, therefore, not dissuasive or proportional as prescribed by the KPCS.

## **Minerals Marketing Corporation of Zimbabwe Act (Chapter 21:04)**

The Minerals Marketing Corporation of Zimbabwe Act is another piece of legislation that is relevant for the export and sale of rough diamonds. The Act provides for the control and regulation of the export, sale and stockpiling of minerals. The Act establishes the Minerals Marketing Corporation of Zimbabwe (MMCZ). The key functions of the MMCZ include acting as the sole marketing and selling agent for all minerals, investigating market conditions and encouraging local beneficiation and use of minerals<sup>85</sup>. The Act prohibits the sale or export of minerals by anyone else except the corporation or in terms of a contract negotiated by the corporation on behalf of sellers or when someone is authorized to do so by the corporation<sup>86</sup>. For negotiating or authorizing contracts for the sale of minerals, the MMCZ is empowered to levy commission which is fixed as a percentage of the price at which the minerals were sold<sup>87</sup>.

On revenue from the sale of minerals the Act in Section 44 (2) (a) gives power to MMCZ to receive payment or the purchase price from the sale of minerals in situations where the MMCZ would have negotiated or authorized a contract for the selling of minerals. This position is restated in Section 47 (1) which also gives power to MMCZ to receive proceeds from the sale of minerals in situations where the MMCZ would have authorized the sale or negotiated a contract for the sale of minerals whether inside or outside Zimbabwe.

Depending on what the mining companies operating in Marange agreed with MMCZ in relation to the sale and marketing of diamonds, the MMCZ may be getting the revenue first and then transferring it to the mining companies. It is not clear in the case of Marange whether the MMCZ looked for the market or negotiated the contracts on behalf of the diamond mining companies or approved contracts negotiated by mining companies. In the event that MMCZ negotiated the contracts for the sale of minerals with certain buyers or approved the sale with a condition that it will receive the payment, it may invoke Section 44 or section 47. What this will effectively mean is that MMCZ would receive payments and then transfer that payment to the miner. Then MMCZ will deduct commission from the revenue in terms of section 48. Thereafter, the miner will pay royalties and other taxes to ZIMRA. This creates a multi-layered system that results in deduction of revenue at every turn of the system. This may then mean limited revenue is going to the treasury and complicates the diamond trade chain.

The MMCZ is also required by the law to pay dividends in terms of section 33 of the Act. This is done where in a financial year the revenues of MMCZ are more than sufficient to meet expenditures. In such a case, the MMCZ may pay dividends to shareholders. The financial year of MMCZ ends on the 30th of June of each year.

The importance of the MMCZ to the diamond sector also lies in the fact that it was designated as the government institution that is responsible for issuing Kimberley Process Certificates in Zimbabwe. This means all diamond exports from Zimbabwe are supposed to be certified by the MMCZ. The KPCS certificate that is issued by the MMCZ certifies that the diamonds contained in a particular parcel were handled in compliance with KP systems and are not conflict diamonds<sup>88</sup>. This means the MMCZ gives a guarantee to the market.

84. As amended by SI 282/02 with effect from the 5th November, 2002

85. Section 20

86. Section 42

87. Section 48

88. See generally Precious Stones Trade Regulations, 1978 as amended by the Precious Stones Trade (Amendment) Regulations, SI 282 of 2002.

# 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

Since the MMCZ is the sole marketing and selling agent for all minerals, this means even diamonds are subject to this Act and diamond mining companies should seek authority to sell and market the diamonds they produce if they want to sell or market on their own. At one point, in January 2010 Mbada Diamonds had unilaterally attempted to auction a total of 300 000 carats of rough diamonds without the knowledge of the MMCZ<sup>89</sup>. This was going to be a major breach of the Act. In addition, the attempted auction was going to be contrary to the Supervised Export Mechanism initiated by the KPCS through the Joint Work Plan which prescribed that the diamonds should be assessed for compliance with KPCS requirements and certified by the Monitor before they are sold and exported. However, the auction was stopped after Mbada was advised against the move.

In carrying out its functions, the MMCZ is required by the law to observe certain principles such as the need to act in a manner that can best promote efficient marketing, export and sale of minerals taking into account national interests of Zimbabwe as well as the interest of producers<sup>90</sup>. On the issue of accountability, Section 23 of the Act requires the MMCZ to submit reports of its operations to the Minister of Mines. In turn, section 23(3) states that the Minister of Mines may lay a report submitted by the MMCZ before Parliament. Ideally, the fact that reports submitted by the corporation may be laid before Parliament may act as a measure to promote transparency. This means Parliament have an oversight role in the operations of MMCZ. However, what would be vital is for the corporation to publish in a publicly accessible manner results of its operations and other activities, especially revenue generated and contracts negotiated on behalf of miners.

The Minerals Marketing Corporation Act also gags employees from disclosing information. Section 54(1) provides for the preservation of secrecy and confidentiality. It states that members and employees of the corporation shall keep secret all information relating to the business of producers, sellers, purchasers of minerals. The Act makes it an offence to disclose such information. While it is acknowledged that MMCZ employees may come across commercially sensitive information in their business, sometimes the way this provision is interpreted by employees may result in denial of basic information to members of the public. This information may not be confidential but may be interpreted as such especially in the diamond sector that has always been treated by most public officials as sensitive and as a national security issue. These provisions put a veil of secrecy on the operations of the MMCZ especially when taken together with the restrictive provisions on protected information in the Access to Information and Protection of Privacy Act.

## Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufacturers) Regulations

The Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufacturers) Regulations of 2010 (SI 157 of 2010) are a recent attempt by the government to legislate on diamond value addition and beneficiation. The regulations were passed by the Ministry of Mines in terms of the Minerals Marketing Corporation of Zimbabwe Act. A local diamond manufacturer is defined as "a person who in Zimbabwe cuts, polishes, crushes or otherwise processes rough diamonds for gain or reward. In that regard, the regulations provide for the retention of rough diamonds (in a local diamond pool) for sale to local diamond manufacturers at competitive prices for cutting and polishing upon application to the MMCZ. In turn MMCZ is required in terms of section 3(1) (d), (e) and (f) to set aside, every month, not more than 10% gem quality diamonds, 10% near gem and not more than 10% industrial diamonds for sale to local diamond manufacturers<sup>91</sup>. The application is made to the General Manager of the MMCZ, who has powers to deny or restrict access to the local diamond pool.

To promote accountability, the Regulations state that at the end of each quarter the General Manager of MMCZ is required to account to the Minister, the Board and diamond producers for the total sale of diamonds from the local diamond pool<sup>92</sup>. In addition, the regulations impose a duty on the local diamond manufacturers to cut, polish and crush the diamonds as per their application<sup>93</sup>. Diamond manufacturers are also required to make written returns and reports to the General Manager of MMCZ of the volume, clarity, colour and shape of the diamonds purchased, cut or polished in every quarter<sup>94</sup>. They are also required to state the amount of diamonds that are still in their rough form at the end of the quarter and state the reasons why they have not been cut, polished or crushed in the reporting quarter. The regulations also state that manufacturers may be prohibited from making further applications or have the volume of rough diamonds allocated reduced if they fail to timeously make returns, make false statements in their returns or fail to use all diamonds from the previous allocations. In order to promote compliance with the requirements of the regulations the regulations give powers to inspectors in the Ministry of Mines to enter and inspect premises, records or other documents to verify the truth of any statement or investigate the commission of any offence<sup>95</sup>.

89. Revelations were made by MMCZ officials during a Parliamentary hearing by the Committee on Mines and Energy on the operations of ZMDC and its partners in Marange diamond mining area. The hearings were held on the 1st and 8th of February 2010.

90. Section 22

91. Section 3(2) ibid

92. Section 5 (1) (e)

93. Section 6

94. Section 6(b)

95. Section 8

# 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

Further, to promote compliance, the regulations have a section on offences and penalties. In terms of section 10 the following are offences; making false statements in the applications and returns, failure to timeously render returns and obstructing inspectors. If one is convicted of these offences he/she may be sentenced to a fine in level 4 or to prison for 3 months. A level 4 fine is currently pegged at US\$100 in terms of the Criminal Law Codification and Reform Act.

From the above position, there are a number of strengths and weaknesses that are inherent in the regulations. One of the positive aspects about the regulations is that they are an attempt by the government to ensure that locals are involved in the cutting and polishing industry of rough diamonds. This addresses the demands by various stakeholders for government to promote value addition and beneficiation so as to fetch more revenue from selling finished products like jewellery and create jobs rather than exporting rough diamonds. Reports indicate that more than 28 cutting and polishing companies had been issued licences to access rough diamonds from the local diamond pool. The Regulations were also aimed at ensuring that indigenous Zimbabweans benefit from the exploitation of diamonds under the ambit of the Indigenization and Economic Empowerment programme<sup>96</sup>. Theoretically, the other good thing about the regulations is that local diamond manufacturers are required to submit returns of the diamonds cut and polished in every quarter. This may promote accountability if the returns are submitted. From a KPCS perspective the regulations form part of efforts by government to ensure regulation of rough diamond buyers, sellers and exporters in terms of Annex II paragraphs 13-16 of the KPCS Core document.

However, a closer analysis of the regulations and the way they have been applied in practice raises a lot of questions and exposes the weaknesses. Firstly, the approval of applications for the purchase and allocation of rough diamonds should not have been relegated to the General Manager of the MMCZ alone. In fact this duty should have been given to a special committee that will control allocations and access to the diamond pool, rather than relying on a single person. The fact that the General Manager has a lot of powers such as the power to allow or refuse applications alone exposes the whole scheme to corruption and patrimony. Secondly, while the General Manager is required to account to the Minister the sale of diamonds in every quarter to the Minister and Board this will be done after the fact, that is, after applications would have already been approved by him. In addition, the accountability is to the Minister and not the general public who have an interest in diamond mining as it represents the exploitation of public goods.

The third weakness of the regulations is that they do not provide scope for a background checks or investigation of the applicants to determine if they have premises, financial resources or equipment for cutting and polishing the rough diamonds. Investigations and background checks are important for weeding out those without the capacity, those with previous convictions or those who have been involved in illegal activities such as smuggling or illegal trade in diamonds in Zimbabwe or in other countries. In Namibia and South Africa it is a legal requirement that before diamond cutters and polishers are licenced, investigations are carried out and that the premises of licence holders are registered. This legal gap is a major concern in light of the fact that in 2011 some of the local diamond manufacturers who had accessed the diamond pool to cut and polish rough diamonds allegedly lied that they have equipment, finance and premises for cutting and polishing diamonds. Some of the local diamond manufacturers ended up smuggling the diamonds out of the country to Dubai, India, Lebanon and other countries. It was further reported that diamonds were being looted from the local diamond pool at MMCZ by dealers who were getting diamonds for a song instead of the competitive prices as recommended in the regulations<sup>97</sup>. These diamonds would then be sold at higher prices. As a result, in June 2011, the Ministry of Mines and Mining Development issued a series of press statements indicating that it had suspended the scheme. It is currently not clear how many local manufacturers are now accessing the rough diamonds.

96. The programme is being implemented in terms of the Indigenisation and Economic Empowerment Act (Chapter 14:33)

97. Diamond looting sucks in minister, <http://www.dailynews.co.zw>, By Reagan Mashavave, 26 June 2011 15:40

# 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

## Zimbabwe Mining Development Corporation Act (Chapter 21:08)

The Zimbabwe Mining Development Corporation Act (Chapter 21:08) is another piece of legislation with great implications on diamond mining and production in Zimbabwe. The Act establishes the Zimbabwe Mining Development Corporation (ZMDC) which is the government's investment arm in the mining sector. This position is confirmed in section 20(a) and (c) which outlines the functions of ZMDC. Its functions include investing in the mining industry on behalf of the state and engaging in prospecting, exploration, mining and mineral beneficiation. The ZMDC is also required to pursue its mandate in the mining sector in the national interest and strictly within government economic policy. The ZMDC is wholly owned by the government and in terms of Section 33 it is required to pay dividends to the government.

In response to this legislative mandate the ZMDC has invested in the diamond mining sector. It holds 4 Special Grants in Marange namely SG 4718, SG 4719, SG 4720 and SG 4765<sup>98</sup>. The corporation entered into partnership with foreign investors to form Mbada Diamonds, Diamond Mining Corporation (DMC) and a controversial outfit operating in Marange called Anjin Investments. According to Global Witness, Anjin Investments is a partnership between ZMDC, members of the Zimbabwe Defence Forces and the Chinese. The ZMDC also operates Marange Resources (formerly Canadile)<sup>99</sup>.

What is clear from the above position is that ZMDC is fully involved in diamond mining operations and the state owned company is deriving its mandate from the Zimbabwe Mining Development Corporation Act. However, what is not clear is how beneficial the contracts and agreements signed between Marange Resources and foreign investors are to the country. So far, as stated by the Ministry of Finance, some diamond mining companies like Anjin are not remitting all revenues to the treasury. In this case then it is difficult to state that the investments by ZMDC are benefiting the country and are in the national interest as contemplated in Section 22 (b) of the Zimbabwe Mining Development Corporation Act (Chapter 21:08). These challenges arise as a result of failure by government to publish and disclose the mining contracts, revenues and payments being made by mining companies in a disaggregated manner so that the general public can track and know how much is being generated and understand the contractual terms and conditions set for the mining companies.

## Mining Taxation (Mines and Minerals Act, Income Tax Act and Finance Act)

Taxation in the mining sector provides scope for government to receive revenue and payments from the mining industry to cater to social services, government operations and other important state activities. In Zimbabwe there are various forms of taxes and charges that are paid by mining companies including diamond mining companies. These taxes and charges include royalties, income tax (corporate tax), Pay As You Earn (PAYE), non-residents tax, Additional Profit Tax, Value Added Tax (VAT), marketing commission, customs duty, presumptive tax for small scale miners, capital gains tax, withholding tax, licencing fees, environmental charges and in some cases charges by local authorities among others. Among the pieces of legislation that require mining companies to pay taxes are the Mines and Minerals Act, the Income Tax Act (Chapter 23:06) and the Finance Act.

As an example, a royalty is a payment to the owner of reserves for the right to extract (and to purchase) that reserve on a per unit basis and it is not a tax according to the Revenue Watch Institute<sup>100</sup>. In fact companies that extract minerals must pay the resource owner a price that compensates that owner for the depletion of its resource. In this case the owner will be government. Royalties are paid in terms of the Mines and Minerals Act, the Income Tax Act and the Finance Act. The Mines and Minerals Act (Chapter 21:05) provides for the payment of royalties by mining companies in section 244. The Act requires the miner of a registered mining location to pay royalty on all minerals disposed whether within or outside Zimbabwe. Different rates of royalties are charged depending on the mineral type.<sup>101</sup> For diamonds the royalty is pegged at 15%. The other type of tax diamond mining companies are also expected to pay in terms of the Income Tax (Chapter 23:06) is income tax which is commonly known as corporate tax. Income tax refers to the tax charged on a company after it deducts operational costs and relevant capital allowances.

98. Abbey Chikane (21 March 2010), Kimberley Process Certification Scheme, Fact Finding Mission Report

99. Global Witness (June 2012) Financing a Parallel Government; The Involvement of the secret police and military in Zimbabwe's diamond, cotton and property sectors

100. Revenue Watch Institute (2011), Fiscal Tools, and Extractives: Introduction to Basic Fiscal tools in the extractive industries. (Power Point Presentation)

101. Section 37 of the Finance Act

# 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

However, the major problem with the current tax system is the issue of tax exemptions or in some cases remissions. The Income Tax Act and the Mines and Minerals Act provide scope for capital allowances and remissions. Remissions may be granted by the President in terms of Section 254 of the Mines and Minerals Act which provides for remission of royalty. In this case the President has power to remit, in whole or in part, the royalty payable on any mineral for such period as he may determine whenever he deems it expedient to do so as an inducement to the commencement or continuation of mining operations, the processing or refining within Zimbabwe of minerals or the development of any export market. The remission may not be for more than 4 years from the date it was granted. This may mean the fiscus will not be getting revenue in taxes during that period. In addition, the fifth Schedule to Section 15 (2) (f) of the Income Tax Act provides for allowances and deductions in respect of income from mining operations and this includes capital allowances. Most companies will be exempted due to procurement of capital equipment and building of infrastructure, especially during the development stage of the mine. In this case capital redemption allowance is calculated from all capital goods that are purchased or constructed (in the case of buildings i.e. schools, dams, clinics etc.) and are first used for the purpose of mining operations. However, tax holidays and exemptions and other hidden subsidies granted to multinationals in secretive agreements deprive governments and their citizens of significant tax revenues<sup>102</sup>.

In terms of enforcement of the taxation system, the Income Tax Act in 37B (1) places a duty on every person whose gross income does not consist solely of salary, wages or similar compensation for personal service, to keep proper books and accounts of all his or her transactions. More importantly, section 40 of the Income Tax Act gives power to the Commissioner-General of ZIMRA to have access to all public records. The Commissioner or any person authorised by him may inspect any registers, books, accounts, records, returns, papers, documents in the custody of any officer in the Public Service. The inspection may tend to secure any tax or to give proof or lead to the discovery of any fraud, offence or omission in relation to any tax. Public officials are required to furnish the Commissioner or an authorized person such information as may be required<sup>103</sup>. Section 252 of the Mines and Minerals Act also gives power to the Commissioner-General of ZIMRA or any person duly authorized by him to have access for the purpose of inspection of all books and records, reports and other documents relating to the acquisition, disposal or removal of any mineral for the purpose of ascertaining or verifying any return, details, solemn declaration, certificate or document rendered.

Any tax payer may also be required by the Commissioner to furnish him information on his shareholding and dividends received<sup>104</sup>. The Income Tax Act also requires every company in section 42(1) to furnish the Commissioners with returns and a copy of the memorandum and articles of association within 30 days of its incorporation. It is an offence to fail or refuse to file with the Commissioner a copy a company's memorandum or articles of association. Other offences related to the mining tax system include; failure to furnish or submit any return or document required by the Commissioner<sup>105</sup>, failure to keep proper accounts, obstruct or hinder any officer in the discharge of his duties, failure to submit correct returns and information and willfully making false statements and keeping false accounts and fraud<sup>106</sup>. When royalty has not been paid the Commissioner-General of ZIMRA, or an officer of the Authority appointed by the Commissioner-General, may issue an order prohibiting the disposal of any minerals or mineral-bearing products from such location or from any other location which is being worked by the miner in terms of section 253(1) of the Mines and Minerals Act. Further, in terms of section 253 (2) of the Mines and Minerals Act if the Commissioner-General of ZIMRA or an officer of the Authority has reason to believe that minerals have been produced or disposed of from any registered mining location and he has not received the return, details, solemn declarations, certificates and documents he may issue an order prohibiting the disposal of any minerals from that location until the return, details, solemn declarations, certificates and documents have been rendered and any royalty due has been paid or until an arrangement has been made which is acceptable to the Commissioner-General or officer for the payment of such royalty.

102. Tax Justice Network-Africa (2011): Tax Us if You Can: Why Africa Should Stand Up for Tax Justice:

103. Section 40(2)

104. Section 41(1)

105. Section 81 (1)

106. Section 82, 84 and 86

# 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

From the above it is clear that the Commissioner-General of ZIMRA has a lot of powers that may enable him to carry out inspections or investigations for taxation purposes. These powers can even be exercised in the diamond sector. However, it is surprising that the Ministry of Finance under which ZIMRA falls stated in its 2012 Mid-Year Fiscal Policy Review Statement that Anjin has not provided information on its output and revenue to the fiscus. The powers vested in ZIMRA should have been exercised in such cases. In addition, ZIMRA has the power to inspect any records of any company and this may include the mining contracts since they will form part of the records and documents contemplated in section 40 or section 37B of the Income Tax Act. In the 2012 Mid-Year Fiscal Policy Review Statement, the Minister of Finance stated that ZIMRA should be involved at all stages of the mining chain from mining to marketing. He stated that in practice ZIMRA only stationed its officials at selected mining locations only through negotiation with mining companies since this is not legally provided for. This means ZIMRA should not only go to the diamond mines after the sales and exports have been done, but before, during and after, hence checking the whole diamond supply chain.

In the collection of royalties the Finance Act (Chapter 23:04) states in section 37B (a) that in respect of precious stones the MMCZ or any person authorised by the MMCZ to export minerals shall act as agents for and on behalf of the Commissioner-General of ZIMRA. As agents they will be authorized to deduct royalties on the minerals at source, based on the face value of the invoice thereof. The royalties deducted will then be remitted to the Zimbabwe Revenue Authority no later than the 10th day of the month following the month in which the proceeds from which the royalties were deducted are received<sup>109</sup>.

The above position is problematic. ZIMRA should not relegate the duty of collecting royalties, especially in the diamond mining sector to MMCZ. ZIMRA should be on the ground and collect the revenue. In addition, basing deduction of royalties at source based on the face value of the invoice may not be adequate. There is need for ZIMRA to be involved in the valuation process of minerals such as diamonds and not only rely on the invoice.

Overall, the legal framework that regulates the diamond sector in Zimbabwe is weak. Even some industry players also state that there are weaknesses in the legislation that deals with illegal possession and dealing in rough diamonds and the weakness were further demonstrated by the lack of enforcement as evidenced by the illegal activities in Marange in 2006 -2010<sup>110</sup>.

107. Ministry of Finance, (18 July 2012), The 2012 Mid-Term Fiscal Policy Review Statement "From Crisis to Austerity: Getting Back to Basics"

108. Ibid page 144

109. Section 37B(b)

110. This statement was made by the Managing Director of Murowa Diamonds, Cameron McRae in a letter that was written to the Secretary for Mines. The letter was published in the Zimbabwe Independent of 1 June 2007. However, the letter was written on October 23, 2006. See Zimbabwe Situation: [http://www.zimbabwesituation.com/jun1a\\_2007.html#Z4](http://www.zimbabwesituation.com/jun1a_2007.html#Z4)

# 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

## THE ZIMBABWE DIAMOND POLICY, 2012

In an attempt to address the policy gaps and weaknesses that exist in the diamond supply chain related to diamond exploration, licencing, protection of diamonds from smuggling and theft, valuation, value addition, marketing and export of rough diamonds, the Government of Zimbabwe, through the Ministry of Mines developed a Diamond Policy. The Policy was reportedly approved by Cabinet in May 2012. However, the final Diamond Policy has not yet been made public, hence reference to the Diamond Policy in this analysis refers to the draft Diamond Policy that was presented to stakeholders by the Ministry of Mines on the 23rd of February 2012<sup>111</sup>. The process leading to the development of the Diamond Policy involved consultation of stakeholders by the Ministry of Mines<sup>112</sup>. However, the question is whether the views of these stakeholders were captured in the final Diamond Policy that was approved by Cabinet.

In terms of structure, the draft Diamond Policy is divided into various sections and issues that include; principles, objectives, ownership, storage and transportation, marketing, valuation, beneficiation and regulation. These are some of the issues that will be analysed to determine if the policy measures up to regional and international best practices and gives a solid basis for the development of a specific legal framework to regulate diamond production, management, marketing and export in Zimbabwe. At both a conceptual and practical level, a policy can be regarded as a statement of Government's intentions, strategies and overall vision for a given sector. A policy is usually in the form of statements and pronouncements or formal positions on an issue<sup>113</sup>. By providing direction, vision and guidance on decisions, a policy helps to mitigate against negative effects and to maximize positive results. However, it should be mentioned that a Policy as a statement of intent does not have the force of law and, therefore, it is not enforceable. In the legal field it will be extremely difficult to successfully claim enforcement of provisions contained in a policy statement in the event that government fails to fulfill its policy objectives. Therefore, the draft Diamond Policy developed by the Zimbabwean government is just a policy that does not have the force of law and Zimbabweans may not be able to hold government or diamond mining companies to account in the event that they fail to adhere and implement its objectives and aims.

The draft Diamond Policy identifies some of the diamond mining areas in Zimbabwe such as Marange diamond fields, River Ranch Mine in Beitbridge, Murowa Mine in Zvishavane and deposits that were discovered in 1903 at Somabula in the Midlands Province. Another diamond mine is operating in Chimanimani District called DTZ ORZEGO allegedly owned by the Russians and some local partners. The policy notes some of the challenges being faced in the exploitation and production of diamond resources such as limited exploration, smuggling, lack of value addition and beneficiation, limited transparency and accountability and the lack of a comprehensive legislative framework to regulate the sector. An analysis of the problems identified in the draft Diamond Policy shows that the policy misses some of the glaring problems that have dogged the diamond mining sector such as violations of communities' civil, political, environmental, economic, social and cultural rights<sup>114</sup>. Diamond mining operations resulted in human rights violations, environmental degradation, disruption of livelihoods and displacement of communities.

In terms of objectives, article 3.1 of the draft Diamond Policy states that the objective of the policy is to enable the development of diamond legislation, the "Diamond Act" with the following objectives; to preserve the image of Zimbabwean diamonds, valuation, marketing in line with international standards and to protect the diamond industry from smuggling. In addition, the Diamond Act is expected to promote transparency, economic benefits, beneficiation and efficient and effective control, handling and transportation of diamonds as well as monitoring of security related aspects. Reference to the development of a legislative framework (Diamond Act) in the draft Diamond Policy clearly indicates that there is need for the country to adopt a specific and legally binding instrument to regulate the sector.

The draft Diamond Policy also identifies the need to put in place stringent measures and controls for licensing and security across the rough diamonds chain. In that respect, one of the principles included in the policy is the need to provide stringent controls to ensure licencing of participants in the diamond industry from prospectors, miners, buyers/dealers, cutters and exporters with the objective of ensuring good reputation and professional standards in the industry. This principle is in line with the KPCS requirement that all diamond buyers, sellers, exporters, agents and courier companies should be registered and licensed. However, what is missing is clear-

111. The Draft Diamond Policy for Zimbabwe was presented during a stakeholders meeting on the 23rd of February 2012 at Pandhari Lodge.

112. The Ministry of Mines organized a Stakeholders Consultation Meeting on the Diamond Policy at Pandhari Lodge on the 23rd of February 2012. The I. KPCS Civil Society Coalition Representatives in Zimbabwe represented by ZELA and CRD were given an opportunity to make presentations on the issues they wanted to be included in the Diamond Policy.

113. Borrini –Feyerabend et al., 2004

114. Zimbabwe Environmental Law Association 2011. Legal and Policy Handbook

# 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

-language in the policy of the types of licences that will be issued. For example it is not clear if government will also issue licences for research as is the case in South Africa, Botswana and Namibia. This category is important as it should be treated differently from those who acquire diamonds for trade and business purposes. Research in the diamond sector is vital as it will lead to discovery of new uses of the diamonds.

The draft diamond policy recognizes that security of the diamonds is critical since they are a high value commodity and that there is need to monitor security related aspects of diamond prospecting, mining and downstream acts as well as the declaration of certain areas as restricted areas. Security areas may include diamond exploration, sorting areas and extraction areas<sup>115</sup>. Another relevant security aspect that is included in the diamond policy is that all diamond mining and handling operations shall operate on a security plan approved by the Minister of Mines prior to commencement of operations<sup>116</sup>. This provision is valuable for curbing smuggling, leakages and illicit trade. However, the problem is that the draft diamond policy does not give particular and specific details on the security requirements to be included in the security plans. It does not also contain specific standards on security requirements for the diamond industry. In addition, the policy omits the need for security checks, monitoring and investigations to assess compliance with security plans by all licence holders or the diamond industry. In the same breath, the diamond policy does not provide for security and background checks for prospective employees and agents by licence holders across the diamond supply chain to eliminate those who at any point may have been involved in illegal diamond trade or other offences related to diamonds.

One of the positive issues contained in the diamond policy is the requirement for payment of appropriate and regular remuneration for people responsible for the regulation and administration of the diamond industry. If employees are not adequately remunerated they may end up stealing and smuggling diamonds through formation of syndicates. At the moment diamond mining companies in Marange such as Anjin Investments have not been adequately remunerating employees. The employees at Anjin have been going on industrial action repeatedly demanding for better salaries and working conditions since 2011.

The declaration of diamond mining, prospecting and sorting areas as restricted areas is another issue that is emotive and should be handled properly. The policy does not make reference to the need to respect the interests, rights and needs of communities where prospecting or mining is taking place and in situations where areas or buildings have been declared as protected or restricted areas. In this respect the policy does not give any indication of how the rights of communities will be protected in areas that are declared as protected or restricted areas. International best practice in the provision of security in the extractive sector requires state or private security officials to act in a manner consistent with the protection and promotion of human rights and consistent with local and national laws of the country<sup>118</sup>. For example the Voluntary Principles on Security and Human Rights that were adopted by the United States of America and United Kingdom Governments require companies in the extractive and energy sectors to carry out a security risk assessment which identifies security risks and outlines ways to deal with the risks and how to protect human rights. Further, companies are required to consult regularly with communities about the impact of their security arrangements. The Voluntary Principles also require security officials to use force only when it is absolutely necessary and to an extent proportional to the threat. At the same time the rights of individuals should not be violated when people are exercising the right to freedom of association and peaceful assembly and the right to engage in collective bargaining. This brings to the fore the behavior of the South African Police Service who killed 34 miners at Lonmin Platinum Mine in Marikana, Rustenburg (North West Province of South Africa) who were demanding for better wages and working conditions<sup>119</sup>. In this case the police appear to have been protecting the interests of big business. In its current form the draft diamond policy pays little attention to human rights issues.

Another gap in the draft Diamond Policy is that it makes casual and vague reference to transparency and accountability issues. The policy states the need to promote transparency by government entities to all stakeholders and promote the involvement of all relevant stakeholders in the operations of the industry<sup>120</sup>. These statements are not backed by any clear and specific strategies or provisions that will be used by government to promote transparency and accountability in the diamond production chain such as access to information, disclosure of contracts, investment agreements and revenue flows and use, prior informed consent for communities affected by diamond production operations, public participation and consultation. Closely related to the issue of revenue disclosure, the policy is silent on the issue of cash payments and transactions in the diamond industry. The KPCS requires all cash payments and transactions to be made through the banking system. This is a measure that may prevent money laundering, fight against corruption and broadly promote transparency and accountability in the sector since the paper trail can be followed through the bank system.

115. Article 4.6 especially areas where there is advanced diamond exploration, where sorting of gravel/diamond concentrate and all diamond mining is occurring.

116. Section 9.8 of the draft Diamond Policy

117. Article 2.2

118. Voluntary Principles on Security and Human Rights, 2000. The Voluntary Principles on Security and Human Rights were adopted by the Governments of the United States and the United Kingdom. This followed dialogue with companies in the extractive and energy sectors and non-governmental organizations with an interest in human rights and corporate social responsibility.

119. See generally Mail and Guardian (20 August 2012) Marikana tragedy: Who authorised the use of live ammunition?, <http://mg.co.za/article/2012-08-21-marikana-tragedy-who-authorized-the-use-of-live-ammunition>

120. Article 2.2

# 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

The other missing link in the draft policy is failure to make provision for the local diamond industry to develop self-regulation mechanisms that will help in addressing some of the industry related challenges. There is no system of warranties at a local level as provided for in the KPCS core document. In this case the policy is silent on voluntary measures that may be adopted by the diamond industry in Zimbabwe to regulate and control its own operations amongst members to curb illegal digging, illicit trade and smuggling and even human rights violations. As at the end of 2011 most of the diamond mining companies operating in Marange had not even joined the Zimbabwe Chamber of Mines<sup>121</sup> which is an association of mining companies established through an Act called the Chamber of Mines of Zimbabwe Incorporation (Private) Act (Chapter 21:02). The Chamber was established for purposes of promoting, encouraging, protecting and fostering the mining industry of Zimbabwe<sup>122</sup>. In this regard, one would expect the diamond mining companies in Marange to join others to develop self-regulating and control systems related to the mining sector. Further, the diamond policy is silent on provisions relating to how and what role citizens, civil society organisations and oversight bodies such as parliament or any other bodies that may be created to monitor the diamond sector can play to promote transparency and accountability. This is in light of the fact that the KPCS is a tripartite arrangement that includes the states, the diamond industry and civil society, and this arrangement should also be reflected at the local level.

In terms of article 4.4, the policy states that “the government shall promote the participation of indigenous Zimbabweans in diamond mining”. This provision is in line with the Indigenisation and Economic Empowerment Act. While this is a progressive provision, the policy should have provided a clearer vision of the meaning of indigenous participation in diamond mining. There have been serious allegations that indigenous Zimbabweans mean people who are economically and politically connected to the Zimbabwe African National Union Patriotic Front (ZANU PF) to the exclusion of those Zimbabweans who do not share its ideology. Artisanal and small scale miners also do not seem to feature under this section. If they constitute an important part of the mining sector, then the policy as a statement of intent should have provided an outline of how their participation will be modeled and licensed. This includes commitments to develop buying and marketing structures to support small scale and artisanal miner's participation and how KPCS requirements will be fulfilled with the participation of artisanal miners.

With regard to value addition and beneficiation, the policy states that the Government shall reserve a quota of all diamonds produced in Zimbabwe for local polishing and jewellery manufacturing<sup>123</sup>. This provision is a very noble and understandable one, as the Government would want to create opportunities for value addition and beneficiation of the diamond sector at the local level through cutting and polishing. While the draft diamond policy does not provide a threshold for the quota to be reserved for domestic beneficiation and value addition, it currently stands at 10% per category of diamonds (gem, near gem and industrial) in terms of the Minerals Marketing Corporation of Zimbabwe (Diamond Sales to Local Diamond Manufacturers) Regulations<sup>124</sup>. However, while this provision is noble, lessons need to be learnt from the licencing of the diamond manufacturers, most of who ended up exporting the diamonds they received from the diamond pool. This means there is need for greater transparency and accountability safeguards in the policy and the MMCZ regulations.

In terms of institutional arrangements, the draft diamond policy envisages a marketing system where the government controls diamond sales and marketing through an agent appointed by Government. Further, the policy states that the sale of diamonds shall either be by tender or negotiation or any other system approved by government<sup>125</sup>. It is not clear whether the agent will be state owned like the Minerals and Marketing Corporation of Zimbabwe, privately owned or a joint venture between a private entity and the State. However, whatever form it takes, the merits and demerits of these entities need to be fully considered. The advantage of a single government-owned entity is that it enables maximum control by the government over taxes. However, its disadvantage is that a state-owned monopoly on diamond marketing may not provide scope for competition and realization of market prices to diamond producers and dealers. The lack of competitive prices may encourage dealers and producers to create a black market and smuggle diamonds in a bid to get better and fairer prices. On the sale of diamonds through a tender system or negotiations, it is submitted that negotiations may create opportunities for corruption. The best way will be through a public tender system that will promote transparency and accountability.

121. This was gathered from discussions with the Zimbabwe Chamber of Mines in December 2011.

122. Section 3

123. Section 8

124. Statutory Instrument 157 of 2010

125. Article 6.1 and 6.2

# 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

Further, on institutional arrangements, the draft diamond policy provides for the establishment of the Diamond Commissioner, a Government Diamond Valuator and the Diamond Board. The policy proposes that these will be established through a Diamond Act. It is not clear from the diamond policy how both the Diamond Commissioner and Diamond Valuator are going to be appointed and what their specific functions and powers will be. Another gap in the policy is that it does not make any reference to the Zimbabwe Revenue Authority, especially in marketing, sales and valuation of diamonds, yet ZIMRA plays a key role in revenue collection. However, the policy makes constant reference to the Diamond Act as a means for regulating the diamond sector and that regulations will be developed to support the Diamond Act and the Mines and Minerals Act<sup>126</sup>. In this regard, the Diamond Board and the Diamond Commissioners will be established through the Diamond Act.

Overall, there are a number of structural and content defects inherent in the draft Diamond Policy. For example, the draft policy was badly written and uses loose language. Further, while the policy document captures some of the key conceptual issues that are vital in the diamond sector such as transparency, curbing smuggling, provision of security, value addition and beneficiation among others, these concepts are just stated or parlayed across the whole document without specifics and particular details. Therefore, the policy is too general. The policy does not contain any section on strategies that will be used by government to implement the policy positions and principles. Further, the policy document does not contain enough information on statistics to show the potential of the diamond sector. It appears as if the diamond policy is not being treated as an important government policy document. It is not clear at the moment if government adopted the policy as was presented during a stakeholders meeting which was analysed for purposes of this paper.

126. Article 9

# 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

## INTERNATIONAL AND REGIONAL BEST PRACTICE

In order to compare the legislative and policy framework regulating the diamond industry in Zimbabwe with international and regional best practice, this paper will use the Kimberley Process Certification Scheme (KPCS) as a template upon which Zimbabwe's diamond control and regulatory systems will be measured. This is because Zimbabwe is a member of the KPCS and the KPCS requires member countries to develop internal control measures and legislative frameworks to curb the flow of conflict diamonds. At the regional level, the analysis includes an assessment of the legal position on diamond trade, export and management in other diamond producing African countries such as Botswana, South Africa, Namibia and Ghana.

### The Kimberley Process Certification Scheme (KPCS)

The Kimberley Process Certification Scheme (KPCS) is an international scheme that was established in 2003 with the objective of eliminating trade in conflict diamonds. The scheme was established following a United Nations General Assembly Resolution<sup>127</sup> calling for the establishment of a simple and workable international certification scheme for rough diamonds based primarily on national certification schemes and on internationally agreed upon minimum standards. The KPCS is guided in its activities and operations by what is called the KPCS Core Document that was adopted on the 5th of November 2002. The KPCS Core Document defines what constitutes conflict diamonds, sets out the nature and content of a KPCS Certificate, state the internal control measures (KPCS minimum requirements) and state the tripartite nature of the scheme (it consists of governments, industry and civil society) among other issues. To guide and regulate its meetings and other procedural and administrative issues the KPCS adopted Rules of Procedure.

The KPCS is simply a system to regulate trade in rough diamonds by ensuring that each shipment of diamonds is accompanied by a forgery resistant Certificate which indicates that the diamonds in the shipment are compliant with KPCS requirements. The system regulates trade in rough diamonds or unpolished diamonds. The KPCS Core Document defines conflict or blood diamonds as "rough diamonds used by rebel movements or their allies to finance conflicts aimed at undermining legitimate governments"<sup>128</sup>. The KPCS was created after the realization of the devastating impacts of conflicts fuelled by trade in rough diamonds by rebel movements and their allies in Angola, Democratic Republic of the Congo, Liberia and Sierra Leone. These conflicts resulted in gross human rights violations that undermined peace, safety and security.

At the outset, it should be noted that the preamble of the KPCS Core document recognizes the impact of conflicts fuelled by diamonds on human rights. This shows that the issue of human rights is inherent and lies at the heart and in the DNA of the KPCS. However, the limitation of the KPCS Core Document is that the conflicts being referred to are conflicts committed by rebel movements. This seems to leave out conflicts or situations of violence committed by state actors such as a state's armed forces or private security guards contracted by mining companies against populations that live in diamond rich areas or artisanal and informal miners who are not licenced. In this regard, the definition of conflict diamonds has caused controversy in the KPCS with particular focus on the situation in Zimbabwe in 2007-2008 when the military and police and later private security guards led a violent campaign and crackdown on informal miners to drive them out of the diamond mining area. The campaign led to deaths and injuries and other human rights abuses<sup>129</sup>.

On the issue of Marange diamonds, the result was a major international outcry and diversity of opinion on whether the Marange diamonds constitute blood diamonds/conflict diamonds that squarely fits within the KPCS definition. The KPCS was, however, timid to treat the Marange diamonds as blood diamonds. The KPCS had sent a Review Mission team to Zimbabwe to look at various aspects of non-compliance of Zimbabwe with KPCS minimum standards. The Review Mission found significant non-compliance with KPCS requirements and suspended trade and recommended the adoption of a Joint Workplan that would enable Zimbabwe to trade under a Supervised Export Mechanism and address non-compliant issues. However, in November 2011, Zimbabwe was finally allowed to trade Marange diamonds from compliant mining sites. The conflict in Zimbabwe that involved state sponsored violence resulted in many players in the KPCS calling for a redefinition of what constitutes conflict diamonds to include language on human rights violations or state sponsored violence as constituting conflict diamonds. Currently there is no agreement in the KPCS on the issue of redefinition of conflict diamonds and other reforms.

127. UN General Assembly Resolution 55/56

128. Section 1 of the Kimberley Process Certification Scheme Core Document

129. Some reports put the number of people who died at more than 200. See generally Global Witness (2010), Return of the Blood Diamond, the Deadly Race to Control Zimbabwe's new found Diamond wealth

# 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

For purposes of this analysis and for Zimbabwe which is contemplating developing a legislative framework on diamonds, the most important section to focus on is Section IV of the KPCS Core Document which outlines the KPCS Internal Control measures or the so-called minimum requirements/standards. This section sets out the undertakings that all participating governments will abide by in the trade of rough diamonds. As a member of the KPCS, Zimbabwe is bound by these minimum requirements and is required to domesticate them.

The following are some of the mandatory internal control measures or minimum standards required by the KPCS in Section IV for participants to put in place;

- a) Participants must establish a system of internal controls at a national level to eliminate conflict diamonds from shipments imported into and exported from the country.
- b) Participants are required to enact appropriate laws, policies or regulations or amend existing laws so as to implement and enforce the KPCS and to maintain dissuasive and proportional penalties for offenders.
- c) Shipments of rough diamonds to be accompanied by a KPCS Certificate.
- d) Participants are required to collect and maintain official production, import and export data on rough diamonds and collate and exchange such information with other participants. Further, in terms of Annex III, participants are required to keep and publish quarterly aggregate statistics on rough diamond exports and imports and certificates.
- e) Participants are encouraged to promote closer co-operation between law enforcement agencies and customs agencies.
- f) The diamond industry is required to establish a system of voluntary self-regulation underpinned by verification by independent auditors of individual companies and supported by internal penalties by industry to help facilitate full traceability of rough diamond transactions (system of warranties).

In addition to the minimum standards outlined above, Annex II of the KPCS Core Document contains optional standards and recommendations that can be used to support and improve internal control measures contained in Section IV (above). The recommendations cover general issues, control over diamond mines, small scale mining and control of buyers, sellers and exporters among others.

On “**general issues**”, the following are the recommendations and options that participants may adopt;

- Participants may collect and publish statistics.
- Participants are encouraged to make known the names of individuals or companies convicted of activities relevant to the purposes of the KPCS Scheme.
- Participants are encouraged to ensure that all cash purchases of rough diamonds are routed through official banking channels, supported by verifiable documentation.

On “**control over diamond mines**”, the KPCS Core Document contains the following recommendations and options that may be adopted by participants;

- Participants are encouraged to ensure that all diamond mines are licensed and to allow only those licensed to mine diamonds.
- Participants are encouraged to ensure that prospecting and mining companies maintain effective security standards to ensure that conflict diamonds do not contaminate legitimate production.

Participants with “**small-scale diamond mining**” are required to consider the following recommendations;

- Artisanal and informal diamond miners should be licensed and only those persons so licensed should be allowed to mine diamonds.

# 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

For “**rough diamond buyers, sellers and exporters**”, the KPCS Core Document recommends that participants may adopt the following measures;

- All diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed.
- All rough diamond buyers, sellers and exporters should be required by law to keep for a period of five years daily buying, selling or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased.

From the above, there are important provisions contained in the KPCS Core Document that should be closely analysed and compared with the situation in Zimbabwe. It is clear that the KPCS hinges on the implementation and enforcement of the internal control measures and the recommendations by member countries at the national level. This means the KPCS relies on the willingness of participating governments to put in place internal control measures and to enforce them. In the context of Zimbabwe it means the country is expected to establish adequate internal control measures as prescribed and pass or amend legislation that incorporates KPCS requirements. Zimbabwe has already domesticated the KPCS through the Precious Stones Trade (Amendment) Regulations, but there are a lot of gaps in terms of the existing legislative framework and this merits a revision of the laws.

The question of whether or not the penalties established in the current legislative framework such as the Precious Stones Trade Act, the Precious Stones Trade (Amendment) Regulations, the Mines and Minerals Act, the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations and other applicable pieces of legislation are dissuasive and proportional as contemplated in the KPCS Core Document is important. As demonstrated in the analysis of these pieces of legislation, the penalties in Zimbabwe are not dissuasive and do not deter criminals from dealing in illicit diamonds and committing further offences.

The other crucial issue contained in the KPCS Core Document is the need for participants to collect, keep and publish production statistics and certificates issued for rough diamonds. While the objective of the KPCS in coming up with this may appear to be the need to ensure that participants share information, the Core Document in Annex II states that participants may consider the utility of complementing and/or enhancing the collection and publication of statistics. In this case, it is argued that there is nothing that can stop any country such as Zimbabwe from publishing and disclosing all the mining production figures and statistics from diamond mining companies as well as the KPCS Certificates issued and the revenue generated from the exports of rough diamonds in a publicly accessible manner. This will at least promote transparency and accountability in the diamond sector and ensure that the public is aware of what is happening. It may, as well, help stem out corruption in the sector. The KPCS is permissive and does not bar the publication of information that is not commercially sensitive. In any case, even some of the information being claimed by governments to be commercially sensitive, may be known by competitors and other countries that are members of the KPCS since they access the information from the KPCS website for participants. In this case it is only the general public that is in the dark about what is happening in terms of production figures, KPCS certificates issued and the number of exports. Therefore, claims of sovereignty and confidentiality serve only to disempower the population from calling the government to be accountable.

The development of voluntary self-regulation measures or a system of warranties by the diamond industry is another important issue. In this case, the diamond industry through the World Diamond Council has developed a system of warranties aimed at making sure that diamond traders package their diamonds and insert a clause that guarantees the consumer that the diamonds contained in the package are not conflict diamonds. However, what is not clear is the extent to which the WDC captures the activities of all diamond industry players and the application of the system of warranties at a national level in developing countries such as Zimbabwe where self-regulation systems are normally weak and are often ignored by the diamond industry. In this case, it is not clear if the diamond mining companies in Zimbabwe, for example, have tried to come together to develop a suitable self-regulation system with clear penalties, verification of production and security systems by independent auditors. This system can be included in national legislation and complement the legal measures that will be adopted by the country. What is worrying is that, as stated elsewhere in this paper, it is not clear if the Marange based diamond mining companies are now members of the Zimbabwe Chamber of Mines which has various voluntary guidelines and processes on mining for its members.

# 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

The KPCS requirement that all cash purchases of rough diamonds should be routed through official banking channels is noble. This may help to address problems of money laundering, corruption and funding of off-budget activities in the diamond sector. The use of banks for all transactions may act as a positive step in promoting traceability of transactions and payments by importers, exporters, dealers and other licence holders. Revenue flows will be easy to trace and this may also assist the payment of mining taxes.

The other issue to note is the need for participants to ensure that all mines are licenced and that only those licenced are allowed to operate. In Marange, for example, there was a time when illegal mining sites flourished and this was clearly contrary to the KPCS requirements. In addition, the need for prospecting and mining companies to maintain effective security systems and standards cannot be over-emphasised. Until recently, the Marange diamonds fields have been shrouded in allegations of security breaches such as the cutting of fences by syndicates of soldiers, police officers and illegal miners. However, the security systems have since significantly improved with mining companies putting in place hands-free production systems, deployment of security guards to patrol and carry out body searches, mobile and stationery cameras, body scanners and other security measures<sup>130</sup>.

## **BOTSWANA'S LEGAL FRAMEWORK**

Botswana is one of the major producers of diamonds and scored significant economic development points from its proper management and regulation of the diamond mining sector. The success of Botswana appears to be attributable to a more stable political, legislative and institutional framework that attracts investments and has worked in curbing leakages and smuggling. Some of the laws that regulate diamond trade and management in Botswana include; the Diamond Cutting Act (Chapter 66:04), Export and Import of Rough Diamonds Regulations (SI 24 of 2004) and the Precious and Semi-Precious Stones (Protection) Act (Chapter 66:03). It is, therefore, imperative for countries like Zimbabwe that claim to have larger diamond resources to analyse the position in Botswana and assess what may work or may not work if applied to the situation in Zimbabwe. The important thing is not to take wholesale the legal, policy and institutional frameworks of Botswana or any other country, but to learn lessons and customize best practices and avoid bad practices. In this case it is important to give a summary of the legislative and regulatory framework for the diamond sector in Botswana and compare it with the position in Zimbabwe.

### **Diamond Cutting Act (Chapter 66:04)**

The Botswana Diamond Cutting Act was passed to regulate the cutting, sawing, cleaving and polishing of rough and uncut diamonds. This Act is the Botswana equivalent of Zimbabwe's Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations. The Botswana Diamond Cutting Act prohibits any person from cutting any rough or uncut diamond unless they hold a licence<sup>131</sup>. In this case, the Botswana Diamond Cutting Act clearly and elaborately sets out the various classes and types of licences in the diamond cutting and polishing sector in Section 4. The following types of licences are issued in terms of the Act; a Diamond Cutters Licence that entitles the holder to cut rough diamonds for business or trade purposes, a Diamond Research Licence that entitles the holder to conduct research into the physical properties of diamonds and the uses to which diamonds can be put (this will not be for business or trade purposes) and a Diamond Toolmakers Licence that entitles the holder to set rough diamonds or uncut diamonds not suitable for polishing in tools or implements.

The categorization of licences may act as a good measure to ensure that different conditions and procedures are adopted and applied to a type of licence. However, in Zimbabwe the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations do not specify the categories and types of licences that can be issued to people who are involved in value addition or in the cutting and polishing industry. It does not provide for situations where diamonds are used for research purposes and not for gain or business. It is not clear how the Zimbabwean authorities will deal with and regulate the activities of an applicant who may want to carry out research on diamonds as contemplated in the Botswana legislation.

<sup>130</sup>. Report on the Visit to Marange by the KPCS Civil Society Coalition Representatives in Zimbabwe, (7-8 March 2012).

<sup>131</sup>. Section 3(1)

# 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

The Botswana Diamond Cutting Act also outlines the application process for licences in Section 6. Most importantly, the Act prescribes that the Minister may cause an investigation to be carried out on the applicant to enable him to decide whether or not to grant any class of the licences<sup>132</sup>. Closely related to this requirement is another provision in the Act which bars people who have been involved in illicit diamond trade or other precious stones whether in Botswana or other countries from getting licences<sup>133</sup>. The concept of investigations before granting licences and barring those who have been involved in illegal diamond activities is critical in the diamond sector to curb illegality and illicit trade in the diamond supply chain. This requirement is closely linked to the Kimberley Process Certification Scheme requirement that participants shall make known the names of individuals or companies convicted of activities relevant to the purposes of the Certification Scheme. Previous offenders, either as individuals or companies can only be identified through investigations and due diligence before the issuance of licences for mining, cutting and polishing or any other activities that require a licence.

In Zimbabwe failure by the Minerals Marketing Corporation of Zimbabwe or possibly complicity by government officials in illegal activities has allegedly led to the allocation of rough diamonds from the Local Diamond Pool to companies that did not even have equipment and resources to cut and polish diamonds in terms of the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations. The companies ended up illegally selling and exporting the rough diamonds. Even in situations where due diligence is carried out in Zimbabwe, government officials do not follow best practice. A case in point is the pending case of corruption against the former Chief Executive Officer of the Zimbabwe Mining Development Corporation who is facing criminal charges for carrying out a sham due diligence and in the end choosing a diamond mining company, Canadile, that had misrepresented its financial capacity to enter into partnership with ZMDC to explore and mine for diamonds in Marange. The Director of Canadile is also facing criminal charges.

The other aspect that may be of interest in the Diamond Cutting Act of Botswana is that in order to ensure adequate and regular supply of diamonds to licence holders, the Minister may issue a notice to any diamond producer to make available for sale to any licence holder any such classes, qualities and description of diamonds as the Minister may fix<sup>134</sup>. However, such a notice can only be issued in situations where the licence holders would have failed to secure diamonds through agreements with producers. On the contrary, in Zimbabwe, the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations provides for the establishment of a local diamond pool from which polishers and cutters may access on application 10% of gem, 10% near gem or 10% of industrial diamonds.

On accountability issues, the Diamond Cutting Act of Botswana requires all licencees to keep true and correct daily records of dealings in diamonds that will be inspected by the Mining Commissioner. This position is similar to the position in the Zimbabwean regulations. Further, in terms of section 23 of the Diamond Cutting Act no licence holder is permitted to employ in diamond cutting any person who has not been approved by the Minister. People who have been involved in contravention of the law on possession or disposal of diamonds or precious stones in Botswana or elsewhere will not be employed.

## **Export and Import of Rough Diamonds Regulations (SI 24 of 2004)**

The Export and Import of Rough Diamonds Regulations (SI 24 of 2004) of Botswana were passed by authority of the Precious and Semi-Precious Stones (Protection) Act of Botswana. The regulations were passed to domesticate the Kimberley Process Certification Scheme since Botswana is a member of the KPCS. Section 3 prohibits the export of rough diamonds without a KPCS Certificate. The KPCS Certificate can only be issued by the Minister of Minerals, Energy and Water if he is satisfied that the provisions of the regulations have been met by an applicant. This will then enable him to certify that the diamonds have been handled in accordance with the KPCS. The Minister may refuse to issue a KPCS Certificate if diamonds have not been handled in line with KPCS standards. Section 6 also prohibits the import of rough diamonds unless they are accompanied by a KPCS Certificate issued in the country of export. Zimbabwe has also domesticated the KPCS.

132. Section 6(3)

133. Section 12(2)

134. Section 19

# 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

The Export and Import regulations also contain a section on offences and penalties as prescribed by the KPCS Core Document. Section 9 of the regulations makes it an offence to export or import rough diamonds contrary to the regulations. If a person is convicted of such an offence he will be liable to a fine not exceeding P500 or to an imprisonment term not exceeding six months, or to both. The penalty in the Botswana legislation for exporting or importing diamonds without a KPCS certificate is not deterrent enough and does not tally with the KPCS requirement that penalties must be dissuasive and proportional.

## **Precious and Semi-Precious Stones (Protection) Act (Chapter 66:03)**

Like Zimbabwe, Botswana has a law that deals with precious stones called the Precious and Semi-Precious Stones (Protection) Act. Zimbabwe's version of the law is called the Precious Stones Trade Act. The Botswana Precious and Semi-Precious Stones Act provides for the protection of the precious stones industry and regulates dealings in precious stones. The Act defines a precious stone as a diamond or any other substance declared to be a precious stone for purposes of this Act<sup>135</sup>.

On offences and penalties, the Act prohibits people from buying, dealing or receiving by barter or pledge, as a principal or agent, any rough or uncut precious stones unless one is an authorised buyer or seller or the holder of a mining lease or a prospector. It is, therefore, an offence to sell, buy or deal in precious stones without a licence. If a person is convicted of this offence he/she will be liable to imprisonment for not less than 5 years.

The Precious and Semi-Precious Stones (Protection) Act also provides the framework for the acquisition of licences. In terms of Section 8 any person may obtain a licence to deal in rough or uncut precious stones as a buyer, seller, importer or exporter. This is in line with the KPCS requirement that all diamond buyers, sellers, exporters, agents and courier companies involved in carrying rough diamonds should be registered and licensed by each Participant's relevant authorities. Zimbabwe's Precious Stones Trade Act provides for the licencing of buyers, dealers and sellers among others but does not clearly regulate couriers or transporters of rough diamonds.

In Botswana licenced dealers are required by the law to have a place of business and all dealings must be confined to such a place. The premises must be labeled at the door with a sign with the words "Licenced Precious Stones Dealer"<sup>136</sup>. To promote accountability, the Act also requires dealers to keep true and correct records of transactions and all details of rough precious or uncut stones won, recovered, manufactured, purchased, sold, received, exported or imported. The details will include the date, weight, value, price received or paid<sup>137</sup>. The licencees are also required to file a declaration of correctness of the information which will be send to the Minister<sup>138</sup>. As part of efforts to promote law enforcement, the police are given powers to enter, examine and search at all reasonable times the premises or vehicle of any person conveying or suspected to be conveying rough<sup>139</sup> or precious stones. In situations of suspected unlawful traffic in rough or uncut precious stones the police may stop any parcel or package in the post if there is good cause to believe that it contains rough or uncut stones.

In Botswana the Precious and Semi-Precious Stones Act provides for the declaration of precious stones protection areas and precious stones security areas. In terms of Section 25 the President may declare any part of land, building or part of buildings to be a precious stones protection area and define the boundaries of such area. In the event that an area has been declared to be a precious stones protection area, regulations may be passed to deal with the residence, removal of people in such area or building and administration of such area. The law also empowers the Minister to declare any mining area, any prospecting area or any building to be a precious stones security area<sup>140</sup>. In this case no person is allowed in a precious stone protection area unless he is in possession of a valid permit.

135. Section 2

136. Section 12

137. Section 15

138. Section 16(3)

139. Section 18(a)

140. Section 26

# 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

## NAMIBIAN LEGAL FRAMEWORK

Namibia is another producer of diamonds in Southern Africa. The country has developed a specific law called the Diamond Act that provides for control measures in respect of possession, purchase, sale, import and export of diamonds.

### **Diamond Act (Act 13 of 1999)**

The Namibian Diamond Act establishes the Diamond Board of Namibia in Section 2. The objectives of the Namibia Diamond Board include advising the Minister on any matters relating to the diamond industry and the control and protection of diamond resources. However, what is striking about the Namibian diamond law in terms of composition of the Namibia Diamond Board is that it also includes the appointment of a commanding officer of a unit of the Namibian Police Force to be a member of the Board. It is argued that the inclusion of police officers in the Diamond Board may be an attempt to ensure that the law enforcement agents are also actively involved in the decision making processes and bring their expertise on security issues. This may be critical for the KPCS which has been plagued by lack of enforcement of internal control measures by participants, therefore once the law enforcement agents are involved in decision making processes they will be able to implement diamond control measures effectively. In Zimbabwe the draft Diamond Policy proposes the establishment of a Diamond Board of Zimbabwe just like the position in Namibia. However, the Policy does not give details on how the proposed Diamond Board will be constituted and its composition. It is not clear if the Board will include a police officer as a member of the Board. While the Namibian Diamond Board includes representatives of government, diamond producers, small scale producers, trade unions, cutters and dealers, it is not specific on inclusion of community groups. It is not clear as well if the Diamond Board in Zimbabwe as proposed in the Diamond Policy will include communities affected by diamond mining operations.

Further, the Namibia Diamond Act provides for the establishment of a Diamond Board Fund in section 11 to cater for the expenses of the Board and the appointment of a Diamond Commissioner whose functions include issuing licences. In similar fashion, the Diamond Policy of Zimbabwe proposes the establishment of a Diamond Board Fund and the appointment of a Diamond Commissioner who will administer the Diamond Act. The above institutional provisions show that the drafters of the Zimbabwe Diamond Policy drew a lot of lessons from Namibia and were heavily influenced by the legal position in Namibia.

Like the Botswana Diamond Cutting Act, the Namibian Diamond Act has a section that states the various types of licences that can be applied for in the diamond sector. The types of licences are outlined in Section 15 and include the following: diamond dealers licence, diamond cutting licence, diamond tool making licence and diamond research licence. In addition, persons may be given various kinds of permits such as a permit to possess unpolished diamonds, permit to sell or dispose an unpolished diamond, permit to receive or purchase an unpolished diamond and a permit to export or import an unpolished diamond<sup>141</sup>. Notably, the licences issued in Namibia are similar to those in Botswana. However, Zimbabwean legislation does not contain a specific section on types of licences and permits that can be issued as is the case in Namibia and Botswana.

As is the case in Botswana, before granting an application for a licence in Namibia the law requires an investigation to be carried out in terms of section 16(3). In the event that a person or the directors of a company applying for the licence were at any time involved or convicted of illegal possession or dealing in diamonds in Namibia or any other country, the application will be refused<sup>142</sup>. This requirement is closely linked to the KPCS requirement on the need for countries to make known the names of individuals or companies convicted of illegal activities that are contrary to the KPCS. Zimbabwe does not have a specific provision on investigations before granting a licence, it just gives the Minister discretion to grant or refuse an application for a licence.

141. Section 27

142. Section 16

# 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

Another interesting provision in the Namibian Diamond Act is that in section 24 it seeks to ensure that Namibian citizens are given preference in the provision or supply of products and services. In particular the section states that it shall be a condition of any licence that the holder of such a licence or any contractor or subcontractor shall ensure that Namibian citizens who possess appropriate qualifications, expertise and experience are given preference during employment. The holder may employ people who are not Namibian citizens only where the qualifications, expertise and experience required for such employment cannot be obtained by recruiting Namibian citizens<sup>143</sup>. Further, section 24(b)(ii) also requires licence holders to give preference to procurement of products, materials, services and equipment manufactured in Namibia. The implication of the above provisions is that Namibia seeks to empower the local population and ensure that they participate in the diamond sector through employment opportunities or providing other downstream industries that support the diamond sector.

The above provisions resonate with the concept of indigenization and economic empowerment that is being driven by the government of Zimbabwe to empower the local population. However, in Zimbabwe a lot of problems have been observed in Marange where diamond mining companies, such as Anjin Investments run by the Chinese, brought in foreign laborers for jobs that do not require special expertise. In addition, there have always been complaints from locals in Marange that the mining companies are not doing enough to ensure that the locals are employed. On the supply of products and services, the agreement for the construction of a military academy with diamond revenue from Anjin Investments that was approved by government and parliament specifically provides for the acquisition of some of the materials and products from China for the construction of the defence college. This is clearly contrary to the provisions of the Indigenisation and Economic Empowerment Act.

The Namibian Diamond Act also contains a section on control measures related to unpolished diamonds<sup>144</sup>. The most notable is that the law makes it an offence for anyone to possess unpolished diamonds without a licence and if one is convicted of the offence he will be liable to a fine not exceeding N\$1 000 000 or to a prison term of 20 years or to both such fine and imprisonment term. In addition, any licence or permit holder who receives or purchases any unpolished diamond from a person who is not lawfully authorized to possess the diamond shall be guilty of an offence. On conviction the licence or permit holder will be liable to a fine not exceeding N\$1 000 000 or 20 years in prison or to both<sup>145</sup>. Further, the Diamond Act prohibits the export of unpolished diamonds without a permit and if one is convicted he will be fined N\$1 000 000 or given a prison term of 20 years or both<sup>146</sup>.

From the above, it is clear that the Namibian Diamond Act sets penalties that are deterrent, dissuasive and proportional as contemplated in the KPCS Core Document. In addition, the Diamond Act is progressive in that it ensures that the diamond industry especially licence and permit holders who buy diamonds from people who are in possession of unpolished diamonds illegally are also responsible and can be punished for buying illegal goods. Industry liability and responsibility is important in the fight against illegal digging, illicit trade and smuggling because most diamonds that are smuggled end up being used by the industry.

In Namibia the Diamond Act also provides for the registration of authorized representatives or agents. In this case any person who is licenced to buy, sell, receive or dispose of unpolished diamonds who may wish to appoint another person as his authorized representative to purchase, sell, receive or dispose unpolished diamonds is required to apply to the Minister to register such a person in terms of Section 43(1). The representative will be issued with a Certificate of Registration as an authorized representative. This legal requirement is progressive as it provides opportunities for elimination of unauthorized persons from the diamond trading system. Zimbabwean law is not clear on this. A case in point in Zimbabwe is the case of an Israeli Pilot who was charged in the Magistrates Courts of Zimbabwe with illegal possession of rough diamonds from Marange after he was caught with diamonds at the Harare International Airport. It was stated in media reports that the pilot had a letter which authorized him to carry the rough diamonds. The nature and content of the letter is not clear. It is submitted that ideally, these representatives or agents should be issued with certificates of registration as the case in Namibia.

143. Section 24 (a)(ii)

144. Section 30

145. Section 34

146. Section 36(1)

# 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

Licence holders including producers, contractors and subcontractors and holders of prospecting licences are also required to keep registers in respect of unpolished diamonds in Namibia<sup>147</sup>. These measures, as is the case in Botswana and Zimbabwe, are meant to ensure accountability. However, the problem is that this information is normally not made public. In addition, the law in Namibia requires security checks on all people employed or engaged by the producer, holder of prospecting licence or those who hold licences to purchase, sale, dispose, export deliver or processing unpolished diamonds<sup>148</sup>. Security checks are vital to eliminate potential offenders or those with previous convictions or who have been involved in illegal acts.

The Diamond Act in Namibia makes provision for the formulation of security plans by licence holders and their approval in section 50(1). The Act requires every producer of diamonds, contractor, subcontractor, holder of exclusive prospecting licence or any licencees to submit a security plan to the Minister for approval. The security plan may prescribe security systems or procedures regarding security, transport and safe keeping of unpolished diamonds. In addition, the security plan will provide for security systems regarding the movement of employees and other persons in the relevant areas of operation or business premises or any other relevant security systems or procedures. The preparation and approval of security plans is in line with the requirements of the KPCS which encourages participants to ensure that prospecting and mining companies maintain effective security standards to prevent conflict diamonds from contaminating legitimate production. Therefore, the legal position in Namibia is progressive. In Zimbabwe the current legal framework does not make explicit provision for the preparation and approval of security plans in the diamond sector. However, the draft Diamond Policy provides for the preparation and approval of Security Plans. This provision was clearly borrowed from the Namibian Diamond Act.

Another important issue to consider in the case of Namibia is that the Diamond Act also regulates the export of polished diamonds. The Act requires any person who intends to export polished diamonds from Namibia to notify the Minister. In turn the Minister is empowered to examine the diamonds to determine that the diamonds are in fact polished diamonds<sup>149</sup>. This provision is good for curbing smuggling of unpolished diamonds by those who are licenced to cut and polish. Zimbabwe does not have a specific law that regulates the examination of polished diamonds for export. Hence the case of local manufacturers who had been licenced to cut and polish diamonds ending up exporting those diamonds without cutting and polishing them.

147. Section 46

148. Section 47

149. Section 64

# 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

## SOUTH AFRICAN LEGAL FRAMEWORK

South Africa is another major producer of diamonds. The country also boasts a better organized cutting and polishing industry that is part of the country's beneficiation programme. South Africa passed a specific legal framework, the Diamonds Act to establish the South African Diamond and Precious Metals Regulator; the State Diamond Trader and to provide for control over the possession, purchase and sale, processing, local beneficiation and export of diamonds.

### Diamonds Act

The South African Diamond Act provides for the establishment of the South African Diamond and Metals Regulator. The following are the objectives of the Diamond Regulator; to ensure that diamond resources are exploited and developed in the best interest of the people of South Africa, to promote equitable access to and local beneficiation of South African diamonds and to ensure compliance with the KPCS minimum requirements<sup>150</sup>. The functions of the Regulators are stated as including; considering applications for licences and permits and to appoint an expert in market prices as a Diamond Valuator<sup>151</sup>. These objectives and functions are key to the development of the diamond sector in South Africa and show that the country is committed to complying with the KPCS requirements in the trade and export of diamonds.

The Regulator is controlled by a Board whose composition includes a member of the South African Police Service. This is similar to the situation in Namibia. Another institutional arm in the diamond sector in South Africa is the State Diamond Trader whose responsibility is to promote equitable access to and local beneficiation of diamonds<sup>152</sup>. The State Diamond Trader is required to comply with KPCS requirements in respect of any unpolished diamonds it handles. In addition, it is required to establish, maintain and expand a client base of local diamond beneficiators and may acquire diamonds from other diamond producing countries<sup>153</sup>. In particular, section 59A states that the State Diamond Trader has the following functions; to acquire and supply unpolished diamonds to local diamond beneficiators and to promote the diamond industry through research. The Minister in terms of section 59B is empowered to give notice and determine the percentage of diamonds produced that may be required for local beneficiation. The legal position in South Africa shows that the State Diamond Trader is at the centre of diamond trade in the country. Another institution key in the diamond sector in South Africa is the Diamond Exchange and Export Centre which is responsible for facilitating the buying, selling, export and import of diamonds<sup>154</sup>.

Section 26 of the Diamond Act of South Africa states the various kinds and types of licences and permits that may be issued by the Regulator. These include; diamond dealer's licence which entitles the holder to buy, sell, import or export unpolished diamonds; a diamond beneficiation licence which entitles the holder to polish diamonds for business purposes or trade; a diamond beneficiation licence which entitles the holder to set unpolished diamonds in tools, implements or other articles; and a diamond research licence which entitles the holder to carry out applied research and tests in connection with diamonds. These types of licences are similar to those issued in Botswana and Namibia. Other licences that may be issued include a diamond trading house licence which entitles the holder to facilitate the buying and selling of unpolished diamonds locally on registered premises. Business premises for licence holders are supposed to be registered as well<sup>155</sup>.

The Diamond Act also prohibits the export of polished diamonds irrespective of whether it is set in jewellery or not, unless the diamond has been registered and released for export<sup>156</sup>. The law also requires all diamonds to be exported to be examined and registered and to comply with KPCS requirements. In addition, people who want to sell or buy diamonds on behalf of others are supposed to be registered and issued with a Certificate of Registration as an authorized representative. In South Africa the law also empowers authorities to carry out investigations on the applicants before they are issued with licences.

150. Section 4

151. Section 5

152. Section 14

153. Section 16

154. Section 59

155. Section 31

156. Section 70

# 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

In terms of offences and penalties, the Diamond Act prohibits the possession and sale of diamonds without a licence or permit. Further, the law prohibits the polishing of diamonds or setting of diamonds in tools unless a person is a beneficiator or a researcher authorized in writing by the Regulator. The export of unpolished diamonds is prohibited unless one is a holder of a permit, a dealer or a producer. For accountability purposes the licenced dealers, producers and beneficiators are required to keep registers of the diamond transactions.

Overall, the legal position in South Africa is similar in many respects to the legal position in Namibia and Botswana.

## GHANA LEGAL FRAMEWORK

### Diamonds Act, 1972 (N.R.C.D 32)

Ghana is another producer of alluvial diamonds in Africa that is also a member of the Kimberley Process Certification Scheme. The country has a specific law that regulates the mining and sale of diamonds called the Diamonds Act that was passed in 1972 (N.R.C.D 32). The Act restricts the purchase and export of diamonds in section 2 which states that no one is allowed to export diamonds unless he is authorized by the Precious Minerals Marketing Corporation. In addition, only licenced buyers or the Corporation can buy diamonds<sup>157</sup>. The Corporation is empowered to appoint licenced buyers to purchase diamonds for or from the Corporation<sup>158</sup>. In Ghana the Precious Minerals Marketing Corporation provides official marketing services for small scale diamond miners and also handles the export of all diamonds produced in Ghana. This position is similar to Zimbabwe where the Minerals Marketing Corporation is the sole marketer of minerals including diamonds.

In Ghana the Minister is empowered in terms of section 6 of the Diamonds Act to declare an area of land to be an area for diamond exploitation and areas of restriction. The Act also empowers the Minister to make regulations imposing conditions and restrictions in respect of movement of persons and the conveyance of articles into, from diamond areas or areas of restriction and protection<sup>159</sup>. Further, in terms of section 8(2) the Minister for Internal Affairs may pass a law to exclude aliens from entering diamond areas except with a valid permit. Regulations may also be passed to prohibit unauthorized persons from entering demarcated parts, towns or villages situated in diamond mining concessions. In addition, the police are authorized to search persons, buildings and articles within demarcated parts, towns or villages situated on mining concessions.

In section 11 the Diamonds Act makes it an offence for any person to sell, export or dispose a diamond without authority issued in terms of the Act. The offences and penalties in Diamonds Act are complemented by the Criminal Code (Amendment) Act of 2003 (Act 646). Section 317A of the Criminal Code (Amendment) Act states that any person who without lawful authority exports or attempts to export any gold or diamond or conceals or carries away from Ghana any gold or diamond with the intent to evade any enactment relating to the export of gold or diamonds shall be liable on conviction to a sentence of death.

In the case of Ghana, there are a number of important issues to note. Firstly, the issue of penalties for exporting diamonds from Ghana without authority attracting a death sentence on conviction in terms of section 317A of the Criminal Code (Amendment) Act is extreme. However, it should be noted that the Kimberley Process Certification Scheme requires participants to put in place legal frameworks with dissuasive and proportional penalties for those who commit offences related to trade in conflict diamonds. While this sentence may be deterrent and dissuasive by discouraging others from committing the same offence and completely remove the offender from society, it may not be proportional and may be abhorrent and unreasonable in a democratic society. The sentence is clearly aimed at curbing smuggling of diamonds from Ghana. It is, however, not clear from literature if the death penalty has been applied in any case related to export of diamonds without a licence in Ghana and whether this position still holds.

157. Section 2(1)  
158. Section 3  
159. Section 8

# 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

The second issue to note from the Ghanaian experience is the restrictions and measures that may be imposed in villages and towns where diamond mining concessions are found so as to protect diamond resources. While these restrictions are found in many countries, often police officers in African countries take unreasonable steps to protect diamonds and end up committing human rights abuses and limiting people's freedoms. This case is similar to Zimbabwe where the Marange diamond mining area has been declared a protected area in terms of the Protected Areas and Places Act. After the declaration, the police and military committed gross human rights violations and limited the freedoms of movement, assembly and association. While in Ghana and Botswana diamond protection areas are declared in terms of diamond laws, in Zimbabwe protected areas are declared in terms of a law that generally applies to any area or sector that can be declared as a protected area through the Protected Areas and Places Act.

# 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

## TOWARDS A DIAMOND ACT: LEGAL OPTIONS FOR ZIMBABWE

The purpose of this section is to present a set of legal options and recommendations that may be adopted by government in developing a new legal framework to regulate and control the exploration, mining, buying, selling, transportation, export, beneficiation and licencing of players in the diamond sector. This is in light of the projected massive economic potential of the diamond sector in Zimbabwe especially taking into account the diamond deposits in Marange. The first question this section will try to address is what kind of legal instrument the country should adopt- whether an Act of Parliament "Diamond Act" or Regulations that can be passed in terms of the Precious Stones Trade Act. The section will also provide succinct key alternatives and provisions that should be considered for inclusion in the new law. Some of the issues and options are based on some of the progressive provisions contained in the draft Diamond Policy.

### Whether to amend existing laws or to develop a specific Diamond Act

- There have been muted discussions and questions in government circles and outside on whether Zimbabwe needs a new Diamond Act or if it can just amend existing laws or pass new regulations under the Precious Stones Trade Act to control and regulate the diamond supply chain from exploration, mining, selling, buying, dealing, cutting and polishing and export as well as establishing the necessary institutional framework. On this question, analysis has sufficiently demonstrated that the current laws regulating the diamond sector are scattered and do not contain sufficient detail and specific information and provisions to address the problems afflicting the mining sector. Therefore, the best option is to develop a specific Diamond Act. In any case the draft Diamond Policy already contains the framework for the development of a Diamond Act that will consolidate all the loose ends. Passing a Diamond Act will, therefore, constitute the first major step in implementing the Diamond Policy and government would have scored major points in complying with the KPCS requirement for countries to pass legislation that creates strong and effective internal control systems. The experience in South Africa, Namibia and Ghana shows that it is possible to develop a separate and specific Diamond Act. If Zimbabwe is serious and the statistics of the massive diamond deposits in Marange are to be believed, then there is no way the management of the massive diamond resources can adequately be regulated and controlled through regulations or amendments to the Precious Stones Trade Act. There is an urgent need for a new law to deal with this complex and often conflict ridden sector. An Act of Parliament occupies a superior legal position over regulations which are passed by a Minister without the active participation and approval by Parliament, except the parliamentary legal committee which checks the constitutionality of regulations. All members of parliament should debate the issue and approve the law while stakeholders should be consulted.

In addition, the institutions that are proposed in the Diamond Policy such as the Diamond Board cannot be competently created through regulations, but an Act of Parliament since this will impose financial obligations on the fiscus. A specific Diamond Act should be passed to provide for the control measures over the licencing, possession, purchase and sale, processing, security issues, accountability measures, local beneficiation and export of diamonds among other matters.

# 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

The mining industry, through the Chamber of Mines, acknowledges the existence of gaps in legislation and that there is need to develop a Diamond Act. In its annual report the Chamber of Mines stated that the legal framework should provide for licencing and permitting system for diamonds and tight provisions for the chain of custody of the product from the mine to the market.

- In this case the Minerals Marketing Corporation (Diamond Sales to Local Diamond Manufacturers) Regulations must be repealed and most of its provisions included in a Diamond Act.
- The Precious Stones Trade Act can be amended so that it can only deal with emeralds and other stones that may be declared to be precious stones in terms of that Act. This means all the progressive provisions in the Act related to diamonds will be repealed and inserted in a new Diamond Act.

## Legal Options for the Development of a Diamond Act

There are various legal options and provisions being suggested for inclusion in the Diamond Act if the country eventually makes a decision to develop one. These are derived from an analysis of regional trends and the requirements of the KPCS. The various legal options for inclusion in the new law will include security measures for curbing illegal digging, dealing, buying, selling and smuggling of rough diamonds, the licencing and permit system, offences and penalties to promote law enforcement and implementation, diamonds and development issues, measures to promote transparency and accountability, diamond marketing and sales, diamond industry self-regulation, regulation of artisanal miners and institutional arrangements.

### Application of the proposed Diamond Act

- The Diamond Act should apply and regulate both “**rough diamonds**” and “**polished diamonds**” that are intended for export or that are imported into the country. The Act should provide the legal framework for the licencing of dealers, agents, buyers, sellers, importers, exporters, couriers/transporters, researchers, premises for sorting and any other actors who may play a role in the diamond supply chain from prospecting to export.
- The Diamond Act should clearly state that applications for and acquisition of diamond prospecting, exploration and mining rights/licences and negotiation of contracts must continue to be done under the Mines and Minerals Act and the tender processes provided for under the Procurement Act must be followed. In all the diamond producing countries in the region such as South Africa, Botswana, Namibia and Ghana, the Mines and Minerals legislation governs the issuance of mining rights as well. However, there is need to amend the Mines and Minerals Act to ensure that the contracting processes are transparent, promote accountability and result in the respect of communities rights.

### Diamond licencing system and processes to curb illegal activities

- **Types of licences and permits:** The Diamond Act must clearly state the various kinds and types of licences and permits that may be issued by government. Examples of licences that may be issued are as follows; Diamond Dealer's Licence which entitles the holder to buy, sell, import or export unpolished diamonds, a Diamond Manufacturers licence which entitles the holder to cut and polish diamonds for business purposes or trade, a Diamond Toolmakers licence, and a Diamond Research licence which entitles the holder to carry out applied research and tests in connection with diamonds. Other classes of licences may also be issued. Permits that may be issued include; certificate of registration for agents or representatives, permit for couriers or transporters, registration certificate for premises used for handling, storage, sorting or dealing and selling of diamonds, permit to export or import rough diamonds, permit to export or import polished diamonds and a temporary permit/certificate for one to possess, sell or dispose unpolished diamonds which is not involved in trade among others. Overall, the Act should provide for the issuance of the KP Certificate and the attendant requirements as stated in the Precious Stones Trade (Amendment) Regulations. The regulations should be repealed in so far as they relate to KPCS issues.
- **Investigation of applicants:** The Diamond Act should include a clause that empowers the licencing authority to carry out investigations and background checks on all applicants for licences and permits as may be necessary. This will be important to weed out those who may have been involved in trade in conflict diamonds against the KPCS requirements or other illegal acts in terms of Zimbabwean laws relevant for the diamond or mining sector. In this case those who have been involved in illegal activities in Zimbabwe or other countries should not be allowed to get licences.

# 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

- **Technical and financial capacity and premises:** The Diamond Act must also contain a provision that requires applicants for licences and permits to demonstrate their financial and technical expertise that would enable them to carry out the activity for which they will be applying for a licence or permit. This will also include an assessment and inspection of the existence and suitability of the premises at which the business or activity will be carried out. The premises for cutting, polishing, research, sorting, storage, buying and selling of rough or polished diamonds must be inspected and registered in terms of the law.
- **Considering applications for access to the local diamond pool:** The Diamond Act should provide for the establishment of a special committee within a responsible institution that will be responsible for considering applications for licences to access the local diamond pool for polishers, cutters, toolmakers and researchers among other categories of licencees in the value addition and beneficiation sector. This should not be relegated to the General Manager of MMCZ only as is the current case in terms of the Diamond Sales to Local Diamond Manufacturers Regulations.

## Security measures and declaration of protected/restricted areas

- **Preparation and approval of security plans:** All applicants for a licence to prospect, explore, mine, sort, sell, buy, cut or polish, transport, export, import, research, dealing, market diamonds or any other activity for which security is vital must be required by the Diamond Act to prepare a Security Plan. The Security Plan must be approved by the relevant authority which includes in its membership security experts. The security plans once operationalized must be monitored and evaluated for efficiency and effectiveness in curbing leakages, theft and smuggling. The Diamond Act or regulations that may be passed in terms of the Diamond Act must state some of the standard security requirements or measures that must be put in place by all licence holders. The security plan may prescribe security systems or procedures regarding security, transport and safe keeping of unpolished diamonds among other issues. In addition, the security plan should provide for security systems regarding the movement of employees and other persons in the relevant areas of operation or business premises or any other relevant security systems or procedures. Other security aspects may include employment of security personnel, mobile and stationary cameras, CCTV, body scanners and use of hands-free systems at mining sites.
- **Role of private or state security agencies and human rights protection:** The Diamond Act must clearly state the roles that may be played by private security companies that may be employed or contracted by the diamond industry as well as state security forces. Alternatively, the Diamond Act may require the preparation of security plans (as indicated above) that recognize the need for security officials, either state or private security officials to act in a manner consistent with the protection and promotion of human rights and consistent with local and national laws of the country. Each diamond mining company should also be required to carry out a security risk assessment which identifies security risks and outlines ways to deal with the risk and how to protect human rights. Further, companies should consult regularly with communities about the impact of their security arrangements and security officers must be competent and capable through training on human rights and security. The security plans should also state that force should be used only when absolutely necessary and to an extent proportional to the threat. The rights of individuals should not be violated while exercising the right to freedom of association and peaceful assembly and the right to engage in collective bargaining. Overall, there is need to ensure compliance with the UN Principles on the Use of Force and Firearms by Law Enforcement Officials and the UN Code of Conduct for Law Enforcement Officials as well as the various international human rights standards.
- **Declaration of protected or restricted areas:** The Diamond Act should contain provisions that provide for restricted and protected areas such as diamond mining areas, prospecting and sorting areas, storage premises, courier and transport conveyances, buildings or premises. The law will then set clear procedures and rules of conduct for security officials and elaborate notices for the public. However, all restrictions have to be in line with the respect of human rights and the restriction and protection measures should be justifiable in a democratic society. The rights of host communities where diamond prospecting, mining, sorting and handling to assembly, expression, movement, religion among others must be fully respected in such areas.

# 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

- **Security checks on employees:** The Diamond Act should also require all licencees to carry out security checks and investigations on all employees across the diamond supply chain. This will be important to curb employment of those who have previously been involved in illegal acts in the diamond sector either in Zimbabwe or other countries. This will then be coupled with a requirement on the diamond industry to ensure adequate remuneration and provision of better working conditions and incentives for all employees in the diamond sector to reduce the chances of illegal acts.

## Diamond marketing and sales

- **Public tender or auction system:** The Diamond Act should provide for the auction of diamonds through a public tender system. In this regard, the Ministry of Finance through the Zimbabwe Revenue Authority and the Minerals Marketing Corporation of Zimbabwe must play a role so that the diamond auctioning processes are open for public scrutiny and that the state realises benefits from the diamonds. A public tender and auctioning system will help eliminate corruption in the sector.
- **Payments and transactions through the Bank:** The Diamond Act should also require all players and licencees in the diamond sector to make all cash payments and other transactions through the banking system and these payments must be supported by verifiable documentation and records. This will help to promote traceability, verification and prevent illegal activities such as money laundering and other corrupt practices. This will also be important for promoting transparency and accountability in the diamond sector.

## Transparency and Accountability

- **Disclosure of payments, revenues, contracts and production data:** The Diamond Act must require all revenues and payments made by mining and diamond trading companies and received by governments to be disclosed by government or mining companies in a publicly accessible manner and in a disaggregated manner. This means the transactions of each company must be published indicating all the payments it made in a particular year and month per licenced mining site. In addition, all contracts signed by government with private investors must be made public and possibly posted on a government web site for easy access to members of the public. Production data from all diamond mining companies and those involved in the cutting and polishing business or other licenced diamond operations must also be disclosed. In this case, the Diamond Act must include some provisions based on principles derived from the Zimbabwe Mining Revenue Transparency Initiative (ZMRTI) and the Extractive Industries Transparency Initiative (EITI) on disclosure of revenues and payments in the mining sector.
- **Access to information:** The Diamond Act must provide that all permits, licences, contracts, KPCS certificates and other records and documents in the custody of public bodies responsible for managing the diamond sector be made available for public inspection without the payment of any fees. In cases where one wants to make copies the cost of photocopying or printing can then lie on the person who wants to access the information.
- **Reports and returns by licence holders to be submitted to Ministry of Mines or a special body:** The Diamond Act must make provision for the compilation and submission of reports and returns of all transactions related to rough or polished diamonds by all licence and permit holders and diamond mining companies. In turn these reports must be made public and available for public inspection.
- **Keeping records:** All licenced players in the diamond sector such as rough diamond miners, buyers, sellers, exporters and importers must be required by the law to keep daily buying, selling, importing or exporting records listing the names of buying or selling clients, their license number and the amount and value of diamonds sold, exported or purchased among other relevant details.

# 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

- **Publication of names of licencees and permit holders:** The Diamond Act should provide for the publication of the names, addresses and nature of business of all licenced players in the diamond sector.
- **Role of Parliament:** The Diamond Act must ensure that the Ministry of Mines submits regular written reports on the activities and operations of public bodies involved in the diamond sector to Parliament on various issues including mining contracts, exploration and prospecting, marketing, beneficiation, exports, imports and any other relevant issues.
- **Creation of a multi-stakeholder oversight body:** For purposes of promoting continued monitoring and assessment of compliance with KPCS minimum requirements, the Diamond Act must provide for the creation of a multi-stakeholder body that includes government, the diamond industry, civil society organisations and representatives of the community. The group will be given powers to visit and assess all licencees and actors in the diamond supply chain for compliance with KPCS standards and produce reports for submission to government and the KPCS. This is in light of the fact that the KPCS is a tripartite arrangement that includes states, the diamond industry and civil society. Therefore, this arrangement should also be reflected at the national level.
- **Collection and maintenance of data:** The Diamond Act must give powers to the Ministry of Mines and the Ministry of Finance to collect, keep and share data on diamond production, sales, import and export data on rough diamonds. These statistics should then be published by government.

## Diamond Industry Responsibility

- **Voluntary system of self-regulation:** The Diamond Act must also prescribe the establishment of a voluntary system of self-regulation by the diamond industry in Zimbabwe. In this case the diamond industry will be required to adopt a system that will enable its members and players to develop systems and share information and strategies on how to curb illegal activities, improving security and other needs of the sector. The industry can enhance compliance with KPCS requirements by developing a voluntary system that promotes independent auditing and internal penalties.
- **Offence to buy stolen or smuggled rough diamonds:** In addition, the Diamond Act must make it an offence for any licence holder to buy, sell, export, import, or deal in any way in stolen or smuggled, rough or polished diamonds. This will ensure industry responsibility. The penalty must be deterrent, dissuasive and proportional.

## Artisanal and small scale diamond mining

- If Government decides to give mining claims to artisanal or small scale miners there is need to either develop regulations in terms of the Diamond Act or make provision in the Act for the registration of the small scale miners or artisanal miners. The legal framework should provide for close monitoring, inspection and assessment of community participants. The law must provide for measures to certify the flow of diamonds from the mine to the market as well as tracking diamond extraction and revenues. Particular aspects related to the procedures to be followed by artisanal miners may include production methods, security aspects, registration requirements, selling points and marketing aspects. Close monitoring of the small scale and artisanal mining is key to ensuring 'religious' compliance with KPCS minimum requirements. This is because alluvial diamond mining raises complex challenges on compliance with KP standards.

# 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

## Institutional Arrangements

- **Role of ZIMRA in diamond supply chain:** The Diamond Act must place the Zimbabwe Revenue Authority in the entire diamond value chain from diamond mining to marketing and export. In particular the following points are key; extracting, sorting, weighing, sealing, recording, receipting, storage, valuation, grading, cutting and polishing, auctioning and processing of export customs documents. ZIMRA officials or inspectors should be given powers to enter any mining location, to examine and make copies of or take extracts from books, accounts, vouchers and documents, among others. ZIMRA officers should also ensure that royalties or other taxes are paid and collected. Hindering the officers from carrying out their work should be made an offence. Alternatively, ZIMRA officials can also be part of the Minerals Unit established in terms of the Mines and Minerals (Minerals Unit) Regulations. Further, the Diamond Act should provide a platform for cooperation between the ZIMRA custom officials and law enforcement agents at all border posts or any entry and exit points.
- **Appointment of a Diamond Commissioner, Diamond Valuator and establishment of the Diamond Board:** As proposed in the Diamond Policy, the Diamond Act should provide for the establishment of a Diamond Board, the Diamond Commissioner and Diamond Valuator. These are important structures to ensure the administration of the Diamond Act and the licencing and valuation of diamonds. However, there is need to ensure that these structures operate independently and transparently. In terms of composition of the Diamond Board there is need to include representatives of the diamond producers, small scale producers, trade unions, cutters, exporters, dealers, government, the police or other or security experts, civil society and community representatives.

## Offences and Penalties

- The Diamond Act should set deterrent fines and imprisonment terms as penalties for those who are convicted of offences. This will help in curbing smuggling, illicit trade and illegal digging for diamonds. The penalties should be dissuasive and proportional as prescribed by the KPCS.
- The Diamond Act should also empower the Ministry of Mines and the law enforcement agencies to profile and make known the names of individuals or companies convicted of illegal activities in line with the KPCS requirements.

## Diamonds and Development

- The Diamond Act should contain provisions that are aimed at promoting national economic development. In this case the law should not rely only on a command and control approach, but should include incentives that will encourage people to desist from illegal acts and that require companies to invest in community projects. One of the incentives will be a requirement for the employment of locals and provision of services by locals or Zimbabweans. This is the situation in Namibia.

## Amending the Mines and Minerals Act

- The Mines and Minerals Act should be amended to ensure transparency and accountability in the acquisition of mining rights and negotiation of contracts.
- **Displacement / Relocation and Resettlement Plans:** The Mines and Minerals Act must be amended so that it includes clear and specific provisions that protect the rights of communities displaced by mining operations. In this case the Act must take into account the environmental and social impacts of diamond mining on the environment and the livelihoods of communities. Mining companies must be required to develop Displacement and Resettlement Plans in situations where communities are displaced and resettled and this can be informed by the United Nations' Basic Principles and Guidance on Development Based Evictions and Displacement. The Displacement and Resettlement Plans must include aspects on compensation, free and prior informed consent and consultation, and access to effective remedies.

# 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

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# 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

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