

**ZIMBABWE'S APPROACH TO COMMUNITY PARTICIPATION AND
INDIGENISATION IN EXTRACTIVE ACTIVITIES: PROBLEMS AND PROSPECTS**



060045716T

North-West University
Mafikeng Campus Library

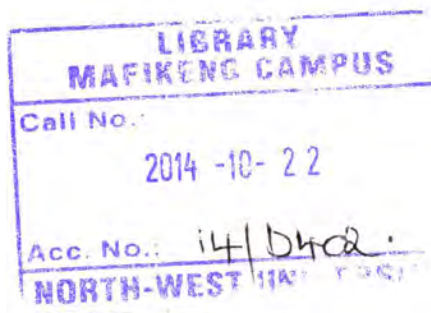
by

Hoitsimolimo Mutlokwa

LLB

Student Number: 18013546

Submitted in partial fulfilment of the requirements for the degree of Master of Laws
by Research at the North-West University (Mafikeng Campus), South Africa



Supervisor: Prof OJ Olowu

August 2014

DECLARATION

I, Hoitsimolimo Mutlokwa, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfilment of the requirement for the award of the LLM Degree.

Signed.....H. Mutlokwa.....

Date.....11-08-2014.....

Supervisor: Professor Oladejo Olowu

Signature..........

Date.....18 August 2014.....

DEDICATION

To the affected voiceless communities located close to extractive activities in Zimbabwe.

ACKNOWLEDGEMENTS

I would like to thank Professor O J Olowu under whose supervision this work was prepared for a thorough criticism and expertise which is beyond words of appreciation. A big thank you also to my parents Mr INT and Mrs A Mutlokwa for showing unwavering financial support at the start of this dissertation. I am deeply indebted to my brothers and sisters; Nhla and Wayne Young who sacrificed their time and courageously spent sleepless nights in the bitter cold nights of Europe in proof reading and trying to make sense of this work, Uratile, Urifile, Kgositsile, Sinqobile and Gubokwe for being there and making sure finances were available for the completion of this dissertation. I am indebted to my cousin, Rorisang Siziba, in sacrificing his hectic schedule to provide critical comments on this dissertation. I am equally indebted to Jabulani Ndlovu for his constant questioning on the progress of this dissertation and this pushed me even harder to put more effort to my study. I would also like to thank my cousin, Patience Nkwate, for her encouragement, prayers and constant reminder to communicate with the Almighty in this tough journey. I am indebted too, to Oliver Fou for volunteering to give this dissertation an independent analysis of constructive criticism before it went to my supervisor. Another appreciation goes to Carlos Mbiada who also sacrificed his time in making sense and giving out a criticism on some of the chapters before they went to Professor Olowu. May God bless you all.

I am equally thankful to the North-West University for granting me tuition fees to pursue this dissertation. I am also ever grateful to the Postgraduate Faculty of Law seminars which proved to be worthwhile in the year 2012. I cannot forget to thank the Legal Resources Centre in Bulawayo, Zimbabwe, for providing me with journals and case law that could not be found on the internet and other libraries in South Africa on information pertaining to Zimbabwean communities in the mining sector. I cannot forget to thank the University of Witwatersrand Law Library for providing me with valuable materials that I could not have found at my own campus Library.

Another thank you to friends such as Phyllis Magudugudu Nxumalo and Modisa John Sebolai for their constant encouragement especially when all hope was lost towards the submission of this dissertation. Lastly, I would like to thank a fellow LLM

companion, Samson Leshilo, for his encouragement in my completion of this dissertation. The list is endless; I could not have made it without all these people mentioned and many others. All errors if any, are my own fault with no one to be blamed. Without all these people and organisations, I would not have made it.

ABSTRACT

Community participation is one of the most important initiatives in the extractive activities sector with regard to any community benefiting from the resources around it. There is lack of community participation in extractive activities, despite the plethora of mineral deposits in Zimbabwe, particularly in the "Great Dyke". Lack of community participation is fertile ground for the political elite to use it as a means of attaining authority from the communities with the anticipation that development will transpire. The community's interests are often not fully attended to despite having a constitution which protects access to information and socio economic rights.

The research seeks to explore the existence of participation by communities in the extractive sector in Zimbabwe. Emphasis is made on its problems and prospects. A comparative analysis will be drawn with other jurisdictions. Zimbabwe has shown its commitment to socio economic rights by ratifying the major international and regional instruments. These principles must be implemented in ensuring that communities with minerals around them are empowered.

The findings of this research indicate that Zimbabwe could make great strides in making sure that communities benefit from the extractive sector if it learns from other jurisdictions with regard to empowering the communities around it. At the same time, the research advocates for the promotion and respect of human rights which in other words is less censoring of media in order for people to be informed about what is happening in the extractive sector and that mechanisms have been put in place by government to make sure that the people benefit from the minerals around them.

This research consists of a background study, analysis of legislation, case study of a selected community in Zimbabwe, community involvement in revenue management, comparative study with three other jurisdictions and, finally, conclusions and recommendations are laid out based on the discussion in this dissertation.

LIST OF ABBREVIATIONS

ACR	African Consolidated Resources
AC	Aarhus Convention
ARDA	Agricultural and Rural Development Authority
ACHPR	African Charter on Human and Peoples Rights
AIMES	African Initiative Mining Environment and Society
AIPPA	Access to Information and Protection of Privacy Act
EITI	Extractive Activities Transparency Initiative
BEE	Black Economic Empowerment
CBOs	Community Based Organisations
CCDT	Chiadzwa Community Development Trust
CDAs	Community Development Agreements
CKGR	Central Kalahari Game Reserve
CHA	Cultural Heritage Assessment
CLA	Communal Land Act of 1982
CMA	Civil Matters Act 14 of 1996
CSOT	Community Share Ownership Trust
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EPFI	Equator Principle Financial Institutions
ESOTs	Employment Share Ownership Trusts

FDI	Foreign Direct Investment
HRC	Human Rights Commission
HRCA	Human Rights Commission Act
HRIA	Human Rights Impact Assessment
IANRA	International Alliance on Natural Resources in Africa
IBA	Impact Benefit Agreements
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IEEA	Indigenisation Economic and Empowerment Act
IIED	International Institute of Environment and Development
ILUA	Indigenous Land Use Agreements
KPCS	Kimberly Process Certification Scheme
MMA	Mines and Minerals Act Chapter 21:05
MOU	Memorandum of Understanding
MPRDA	Mineral and Petroleum Resources Development Act
MRPDAA	Mineral and Petroleum Resources Development Amendment Act
NEPAD	New Partnership for Africa's Development
NGOs	Non-Governmental Organisations
NIEEB	National Indigenisation and Economic Empowerment Board
NRM	Natural Resource Management
OSA	Official Secrets Act Chapter 11:09
PDAC	Prospectors Developers Association of Canada

PFMA	Public Finance Management Act No. 1 of 1999
PSTA	Precious Stones and Trade Act Chapter 21:06
PWYP	Publish What You Pay
R	Rands
RBZ	Reserve Bank of Zimbabwe
RDC's	Rural District Councils
RLOA	Rural Land Occupier Act 13 of 2001
SADC	Southern African Development Committee
SIA	Social Impact Assessment
TLA	Traditional Leaders Act 22 of 2001
TNC	Trans-National Cooperation's
UNCESCR	United Nations Committee on Economic Social and Cultural Rights
UNDHR	Universal Declaration of Human Rights
UNDHC	United Nations Human Rights Council
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USA	United States of America
US\$	United States Dollars
ZANU PF	Zimbabwe African Union Patriotic Front
ZAPU	Zimbabwe African Peoples Union
ZDF	Zimbabwe Defence Forces
ZDP	Zimbabwe Diamond Policy
ZELA	Zimbabwe Environmental Law Association

ZMC	Zimbabwe Media Commission
ZMDC	Zimbabwe Mining Development Cooperation
ZMRT	Zimbabwe Mining Revenue Transparency
ZRP	Zimbabwe Republic Police
ZSE	Zimbabwe Stock Exchange

TABLE OF CONTENTS

Title Page	i
Declaration	ii
Dedication	iii
Acknowledgements	iv-v
Abstract	vi
List of Abbreviations	vii-x

CHAPTER 1: Introduction

1.1	Introduction	1
1.2	Background of the Study	1
1.3	Statement of the Problem	3
1.4	Justification	6
1.5	Aims and Objectives	11
1.6	Delimitation of the Study	12
1.7	Literature Review	12
1.8	Methodology	14
1.9	Outline of Chapters	14
1.10	Limitations	16
1.11	Expected Outcomes of the Study	16

CHAPTER 2: The Historical Background of Extractive Activities in Zimbabwe and the Conceptual Framework of Community Participation

2.1	Introduction	17
2.2	Meaning of Community	17
	2.2.1 Types of Communities in the Extractive Industry Sector	17
	2.2.1.1 Occupational Community	17
	2.2.1.2 Residential Communities	18
	2.2.1.3 Indigenous Community	18
2.3	Meaning of Community Participation	19
	2.3.1 Types of Participation	20
	2.3.1.1 Manipulative Participation	20
	2.3.1.2 Passive Participation	20
	2.3.1.3 Participation by Consultation	20
	2.3.1.4 Participation for Material Incentive	21
	2.3.1.5 Interactive Participation	22
2.4	Historical Background of Extractive Activities in Connection to community participation	22
	2.4.1 The period before 1896	22
	2.4.2 The Rudd Concession	23
	2.4.3 The Period after 1896	25
	2.4.4 The Unilateral Declaration of Independence in 1965	28
	2.4.5 Attainment of Independence in 1980	29
	2.4.6 The year 2000 Referendum and Policy	30

2.5	Conclusion	30
-----	------------	----

CHAPTER 3: LEGISLATIVE AND POLICY FRAMEWORK ON EXTRACTIVE ACTIVITIES

3.1	Introduction	31
3.2	Constitutional Approach to Community Participation	31
	3.2.1 Good Governance and Accountability	31
	3.2.2 Communication	33
	3.2.3 Community interests A socio-economic approach	34
3.3	Indigenisation Economic and Empowerment Act 14:33 of 2007	37
	3.3.1 Announcement to Indigenise the Extractive Activities Sector	37
	3.3.2 Sustainability in Indigenisation	40
	3.3.3 Indigenisation Legislation Perverted at Community Level	42
	3.3.3.1 The Establishment and Disposal of 10% Equity to Community Share Ownership Trust	43
	3.3.3.2 Mining Fee Structure	46
	3.3.3.3 Comments from the Chamber of Mines	46
3.4	Precious Stones Trade Act Chapter 21:06	47
3.5	Mines and Minerals Act Chapter 21:05	47
3.6	Communal Land Act of 1982	49

3.7 Traditional Leaders Act 22 of 2001	50
3.8 Rural Land Occupier (Protection from Eviction) Act 13 2001	51
3.9 Civil Matters Act 14 of 1996	52
3.10 Observance of the Kimberley Process Certification Scheme	52
3.11 Conclusion	53
 CHAPTER 4: COMMUNITY PARTICIPATION AT VILLAGE LEVEL: CASE STUDY OF THE MARANGE COMMUNITY	
4.1 Introduction	55
4.2 Background of Extractive activities in Marange	55
4.2.1 Blood diamonds in Marange	57
4.2.2 Scheme of Blood Diamonds	58
4.3 Strategies of remaining in Power	59
4.4 Community Benefit Agreements	60
4.5 Resettlement of Communities	62
4.6 Disturbance of Sacred Places	62
4.7 Lack of Compensation	63
4.8 Weaknesses of Zimbabwe's Parliament Preventing Effective Community Participation with reference to the Marange Community	64
4.9 Relocation of Communities	66
4.10 Meaningful Engagement of the Marange Community protected by the Constitution	67
4.11 Meaningful Engagement of the Marange Community protected by the African Charter on Human and Peoples Rights	67

4.12 Communities Access to Expertise	69
4.13 Referral to the African Commission on People and Human Rights	70
4.14 Meaningful Community Participation of the	
Marange community protected by the International instruments	74
4.15 Principles and Guidelines that make community participation meaningful	75
4.16 Approach in conducting a Social Impact Assessment	75
4.17 A question of Eviction	76
4.18 China's roles in the Extractive activities sector	79
4.19 Conclusion	81
CHAPTER 5: INTROSPECTION ON COMMUNITY INVOLVEMENT IN REVENUE MANAGEMENT FROM THE EXTRACTIVE SECTOR	
5.1 Introduction	83
5.2 Taxation Regime in Zimbabwe	83
5.3 Rent Distribution Systems	85
5.4 The Lusaka Declaration on Mining Taxation	86
5.5 Infrastructure Incentives scheme	86
5.6 Resource Curse	87
5.7 Advancement of Human Rights	88
5.8 Corporate Social Responsibility	88
5.9 Lesson from the Bafokeng	90
5.10 Community engagement in revenue sharing regimes	90
5.11 Transparency in Revenues obtained from the Extractive Activities Sector	91

5.11.1 Lack of Transparency	92
5.11.2 Benefits of Transparency	93
5.11.3 Instrumentalities of transparency in revenue management	93
5.11.4 Negative Impact of Lack of Transparency	95
5.11.5 Extractive Industries Transparency Initiative	95
5.11.6 Four principles for revenue management in the Extractive Activities Sector	96
5.12 Publish What you pay campaign	96
5.13 Zimbabwe Mining Revenue Transparency	98
5.14 Centralisation of Revenue Sharing and Management	98
5.16 Conclusion	99
CHAPTER 6: COMMUNITY PARTICIPATION IN INTERNATIONAL INSTRUMENTS AND OTHER JURISDICTIONS	
6.1 Introduction	101
6.2 Core International Instruments	101
6.3 Three core international Instruments related to community participation	101
6.3.1 Universal Declaration of Human Rights	102
6.3.1.1 Dignity and Justice	102
6.3.1.2 Development	102
6.3.1.3 Participation	103
6.3.2 International Covenant on Civil and Political Rights	103
6.3.3 International Covenant on Socio Economic Rights	103
6.3.3.1 State Party Obligations	103

6.4 United Nations Declaration on the Rights of Indigenous Peoples	106
6.5 Human Rights based Approach to Natural Resources Governance	107
6.6 Application of Sub Regional Standards	108
6.7 Declaration on Human Rights Based Approach to Natural Resources Governance	108
6.8 The Aarhus Convention	109
6.9 Equator Principles	110
6.10 South Africa	111
6.10.1 Framework of Community Participation in the South African Mining Sector	111
6.10.2 The Royal Bafokeng Community	111
6.10.3 Mineral and Petroleum Resources Development Act	112
6.10.4 Procedure of Consultation with the Community in terms of the Mineral and Petroleum Resources Development Act	112
6.10.5 Chamber of Mines and Community Participation	114
6.10.6 Methods of Enhancing Community Participation in South Africa	115
6.10.6.1 The Inception Stage	115
6.10.6.2 The Mining Stage	116
6.10.6.3 The Closure Stage	115
6.10.7 Mining Indaba	117
6.10.8 Case Law Approach to Community Participation in South Africa	118
6.11 Australia	121

6.11.1 Framework of Community Participation in the Australian Mining Sector	121
6.11.1.1 Native Title in Australia	123
6.11.1.2 Mining Ombudsman in Australia	125
6.12 Canada	125
6.12.1 Framework of Community Participation in the Canadian Mining Sector	125
6.12.2 Case law approach	126
6.12.3 Memorandum of Understanding	129
6.12.4 Three Steps towards Community Sustainability in Canada	130
6.12.4.1 Local Capacity Building	130
6.12.4.2 Sustained Employment	130
6.12.4.3 Meaningful Infrastructure	131
6.13 Summary	131
CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS	
7.1 Introduction	137
7.2 Conclusions	137
7.3 Recommendations	139
7.3.1 Respect for the Judiciary and judicial processes	139
7.3.2 Compromising foreign investment	140
7.3.3 Removal of sanctions	141
7.3.4 Information Disclosure	141

7.3.5 Empowerment of Artisanal Miners	142
7.3.6 Adherence to International Instruments	144
7.3.7 Amendment of the Mines and Minerals Act	147
7.3.8 Relaxation of Freedom of Expression Laws	148
7.3.9 Liaison with Commonwealth Countries implementing Programs of Community participation in the Extractive Sector	149
7.3.10 Impact Assessment Mechanisms on Community Participation	150
7.3.11 Dispute Resolution Mechanisms	151
Bibliography	152

CHAPTER 1: INTRODUCTION

1.1 Introduction

According to the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset), the Zimbabwe government seeks to address on a sustainable basis, the numerous challenges affecting sustainable development community participation in extractive activities.¹ Community participation can be described as a policy in which people in a community participate in local, communal activities.² This dissertation will look at community participation in extractive activities. An extractive activity is described as any activity that involves prospecting and exploring natural resources for revenue generation. This dissertation critically examines some of the main obstacles associated with facilitating community participation in extractive activities. It will mainly focus on the legal framework policy of Zimbabwe with reference to other jurisdictions such as South Africa, Australia and Canada which shall be discussed in depth in the later chapters.

1.2 Background to the Study

Community participation is of paramount importance in the granting of mineral rights, and in the process of the community benefiting from the revenue generated. Success in this regard contributes to the sustainable development of the community. Communities across Zimbabwe have not been benefitting fully from the extraction of natural resources found in their communities. This is evident from the recent complaints by the Minister of State and Provincial Affairs in Manicaland Christopher Mushowe as he lashed out at the companies involved in extractive activities in Manicaland Province about the manner in which they sideline communities³ Extractive activities are not contributing to accomplishing the objective of rooting out poverty among the communities which they take place.⁴ Instead, mining activities have brought about significant suffering to these communities.⁵ Besides the danger

¹ Anon 2014 <http://www.herald.co.zw/wp-content/uploads/2014/01/Zim-Asset.pdf> at 26

² Mathbor *Effective Community Participation* 8.

³ Gumbo L' Mushowa Raps Diamond Companies' *Herald* 14 April 2014 5.

⁴ Gumbo L' Mushowa Raps Diamond Companies' *Herald* 14 April 2014 5.

⁵ Saunders 2008 *African Sociological Review* 69. Structural adjustment that had helped sweeten the business climate for new mining investors had simultaneously helped transfer a growing proportion of

that mineral wealth has brought to communities, it is shrouded with secrecy and used as political weapon, including showering the rural and pre-rural communities with empty promises by the government, in order to amass support for election campaigns.⁶ It could be argued that this is in gross violation of the socio-economic rights that people are entitled to, and that it certainly does not make a meaningful contribution to sustainable development. Three organs of the state; namely, the judiciary, parliament and the legislature; have an important role to play in ensuring effective community participation. This will be discussed in the main body of the dissertation.

There is no clear cut legal framework that gives communities a chance to fully participate in extractive activities. The state, through the Ministry of Mining and Mining Development and the Ministry of Youth Development, Indigenisation and Empowerment is worsening the situation by implementing policies that make it impossible for communities to benefit from the resources around them. This results in a lack of consensus and agreement amongst stakeholders.⁷ In what is supposed to be a fulfilment of their mandate, the two ministries are implementing the draconian legislation known as the Indigenisation Economic and Empowerment Act (IEEA). This legislation does not only sideline the communities where minerals are found but also gives benefit to those of higher political muscle in benefiting from IEEA . The only opportunity that most people in most communities get to participate in mining activities is through the practice of artisanal mining. Minerals obtained are sold for a very low price in order to make money quickly but it is spent just as quickly without any savings made. The new Constitution of Zimbabwe touches on the aspect of socio-economic rights, which is one of the key issues in ensuring effective community participation. Reference will be made to other jurisdictions in order for an effective comparative analysis to be performed.

national income away from working and rural communities, towards a strengthened business and political elite.

⁶ Team Zanu Pf 2013 www.sokwanele.com/system/.../zanupf_election_manifesto_130705.pdf 73

⁷ Chamber of Mines Zimbabwe Sixty Eight Annual General Meeting Presidents Speech 10.

1.3 Statement of the Problem

The question that arises is to what extent have communities benefited from extractive activities, such as access to water, mineral rights and revenue management, in a manner that does not compromise other issues such as compensation to former mine owners, because the communities have been previously disadvantaged. In Zimbabwe, it is evident that people who stay in areas where extractive activities are taking place are the last to benefit from such activities, despite the fact that Zimbabwe has ratified both the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter on Human and Peoples' Rights (ACHPR). Both instruments touch on the aspects of socio-economic rights and human rights.

There is a general lack of will and enthusiasm amongst communities to participate matter related to extractive activities such as workshops and meetings. This is a serious problem, as it raises questions as to whether the state has played a meaningful role in ensuring that people know their rights as charted by the new Constitution. In order for these rights to be effective, it is essential to achieve community participation.

In substantiation of this viewpoint, Coleman and Williams emphasise that Broad Based Black Economic Empowerment in South Africa seeks a wider participation of black people in the economy, and not the majority owning the economy, thus making it difficult for investors to operate.⁸

A second question that is fundamental to the topic is "Will compulsory compliance with IEEA that has been passed into law affect production in the mining sector, either boosting it or plunging the mining sector into a situation in which most mines are forced to shut down due to operational constraints?" There is a general lack of will and enthusiasm amongst communities to participate in matters related to extractive activities such as workshops and meetings. This is a serious problem, as it raises questions as to whether the state has played a meaningful role in ensuring that people know their rights as charted by the new Constitution.

⁸ Coleman and William 2008 *Business Law International* 35.

The three organs of the state must not be controlled by one other in such a manner, in playing their role of ensuring that communities benefit from the extractive activities through advancing and promoting the human rights set out in the Constitution as it is essential to achieve effective community participation. The signing of poorly decided and debated bills created by parliament into law by the executive. Poorly reasoned judgements by the judiciary in matters that involve community participation in extractive activities does not contribute to the establishment of community rights.

It is important to note that mining rights are obtained through prospecting and mining licenses. Such licences are generally awarded to people who have customary rights to the land.

However, disagreements have arisen with the Ministry of Mines, and some mining companies, on the best practices around mining development agreements. This hampers the growth of mining activities in Zimbabwe. IEEA does not make any provisions for recognition of tribal law or custom where extractive activities are taking place, with direct consequences for the rights of relevant communities. It is quite evident that communities cannot fully engage in extraction activities on their own. Government is a key partner in empowering communities as are investors. Hence, the call for legislation that will attract investors and not drive them away.⁹

This dissertation was prompted by the way other jurisdictions have successfully approached the problem of community participation in extractive activities. Zimbabwe has approached this with the aim of achieving overnight results, which can be regarded as wishful and impossible thinking. In as much as IEEA talks of the prospect of the indigenous people of Zimbabwe being fully empowered, it is important to note that lessons from other jurisdictions in the world can inform practice where companies fail to engage the communities in the extractive activities sector.¹⁰ The state together with the companies to which it gives tenders or contracts to prospect for minerals, cannot dictate to the people in that community on what to do

⁹ See Coleman and William 2008 *Business Law International* 35. The authors emphasise that Broad Based Black Economic Empowerment in South Africa seeks a wider participation of black people in the economy, and not the majority owning the economy, thus making it difficult for investors to operate.

¹⁰ Langford 1998 *Centre for Energy, Petroleum and Mineral Law Policy Annual Review* 85.

but should be engaging with them in order to ensure that local communities benefit from the resource in their areas.¹¹

At the present moment the greatest challenge is that Zimbabwe does not have a comprehensive and cohesive mining legislation. Mining activities in Zimbabwe have been taking place for more than a century now and it is evident that communities have not adequately benefited from those resources. Legislation on minerals belongs to the nation as a whole. Any revenue generated accruing to the nation and not to the community, hence this affects community participation.¹²

Despite having vast deposits of major minerals such as diamonds, gold and platinum the benefits of this wealth are not evident in both the communities and the nation because of the rather slow process by which remittances from the mining sector are flowing into the national treasury. This means the interests of the community are sidelined because the interests of the nation take priority. In order to ensure that these benefits do reach the intended beneficiaries, legislation is required.

The current legislation such as the Mines and Minerals Act is under review and is supposed to be replaced by the Mines and Minerals Amendment Bill that has been temporarily shelved. This bill derives its influence from the IEEA and its accompanying regulations.¹³ The IEEA requires that all foreign owned companies with a turn-over of US\$500 000(R5 000 000) to cede 51% of the shares to Indigenous Zimbabweans. It is contended that 51% is far above the ground for a nation that has just come out from the shambles of economic instability and the best would have been to put a 15% ownership to Indigenous Zimbabweans.

Justification for the legislation that has been drafted by legislators is that the past comprised dispossession and colonisation of land and resources of communities

¹¹ See section 13 (4) of the Constitution which states The state must ensure that local communities benefit from the resources in their areas and see also section 14 of the Constitution which states that the State and all institutions and agencies of government at every level must endeavour to facilitate and take measures to empower through appropriate, transparent, fair and just fair affirmative action, all marginalised persons, groups and communities in Zimbabwe.

¹² Williams 2007 *Georgetown Journal for International Law* 695.

¹³ Matsika 2010 '<http://www.howwemadeitinafrica.com/a-closer-look-at-zimbabwes-mining-sector/3769/> The most pertinent legislature affecting mining at present is the Indigenisation and Economic Empowerment (here after referred to IEEA) regulations. Under these regulations, all large companies with a net asset value exceeding \$0.5m will be required to have a minimum indigenous shareholding of 51% within a period of five years.

residing on such land. Basically the new legislation is meant to restore the imbalance of the past.

1.4 Justification

The research is centred on the lack of participation by communities in extractive activities where minerals are found. The IEEA is designed to bring economic empowerment to previously disadvantaged people. However its implementation is a far cry from its intentions. Community participation policy needs a harmonious legal frame work that acknowledges the communities as a key element in fostering such a legal framework and supporting it.¹⁴ It is noted that jurisdictions with progressive realisation of the need to include communities in the extractive sector periodically review their policies which includes legislation, tariffs and royalties, and employment quotas of local people. Such will be discussed in chapter 6 of this dissertation. This mostly occurs at government level with little community engagement, and the decisions are imposed on communities without any significant negotiation. This defeats the whole purpose of effective community participation. There is a need for engagement with communities for the realisation of socio- economic rights which are espoused in international sources such as regular reports published by the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) and the and regular case law by the ACHPR.

The dissertation also refers to other jurisdictions such Australia where it was stated by the New South Wales Department of Primary Industries in an Article titled "Mining Royalties in New South Wales" that the people own the Majority of Assets in New South Wales.¹⁵ The replication of legislation from the old dispensation impact negatively as this does not involve community participation. Sadly there is no binding obligation by the government of Zimbabwe to consult stake holder before passing a bill to parliament. Consultations are carried out at government's discretion.¹⁶

¹⁴ Principle 3 of the 1992 Rio Declaration on Environment and Development states that the right to development must be fulfilled so as to equitably meet developmental and sustainable needs of present and future generations.

¹⁵ Mining Royalties in New South Wales.

¹⁶ Madhuku *Introduction to Zimbabwean Law* 50. Over the past 12 year a plethora of legislation such as the Public Order Security Act (POSA) and the Access to Information Privacy Act (AIPPA) have been passed without consultation from the general public.

It should be noted that the public bears consequences of legislation hastily made by the state. This is why there is a need for the embodiment of greater public participation in decisions made by the state. The aspect of revenue management will analyse administration concepts on revenue obtained from the mines. This aspect discusses the manner which revenue should be managed for the benefit of the communities. Presently the mining sector is facing a number of liquidity challenges making the 51% policy on indigenisation impossible because the state through the Ministry of Mines and Mining Development insists that they will be no compensation to Mining companies that compulsorily cede 51% share ownership to Indigenous Zimbabweans through the IEEA. Some economic experts say that the IEEA is a deterrent to investment and is ill conceived.¹⁷ Instead the legislature must come up with legislation that is comprehensive and constructive for the benefit of communities to extractive activities. The best model will be discussed in the preceding chapters that follow suit.

The lack of transparency from government is a further significant issue for example the government does not fully disclose how the Mbada diamonds¹⁸ are handled because of draconian legislation such as the Access to Information and Protection of Privacy Act (AIPPA). This Act makes certain information by the state confidential and any person, including the media, will be held accountable if they disclose such information. This is an Act being used by the state at will, and is a serious hindrance to the communities across the nation benefiting from mineral wealth on their land. There is a general feeling of distrust from both the communities and the public at large about the revenue generated from the sale of diamonds. The figures released annually by the Minister of finance in the annual budget speech are regarded as inaccurate.

¹⁷Bloch 2012 Parastatals constraining economic recovery 31 May 2012<http://www.theindependent.co.zw/opinion/35713-eric-bloch-column-parastatals-constraining-economic-recovery.html>.

¹⁸ In the state media, it is said that the state has a 51% share in Mbada Diamonds through Marange resources a subsidiary run by the Zimbabwe Mining Development Corporation (ZMDC). While the other 49% is owned by the New Reclamation Group (South Africa) through Grandwell Holdings (Mauritius). Mbada Diamonds Facts and Figures Sunday Mail Newspaper 18-24 March page D8. This in contrast to the report from the Extractive activities handbook which states that other companies such as Candile, a Chinese company called Anjin also have a stake in Mbada Diamonds and there is rumours that a Russian company has some shares. See Mtisi (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011) 33.

This situation is further exacerbated by the fact there is no disclosure to the public on how licences are issued. It should be made public by state media and the government as to which people have been granted licences to carry out mining activities.¹⁹ In this case the Government is of the opinion that there are certain forces resisting to it being given permission to trade in diamonds by the Kimberly Process Certification Scheme (KPCS).²⁰

The dissertation aims to explore how there can be effective revenue management whilst overriding matters such as liquidity challenges and inflation. At the same time it aims to investigate why there is so much government interference in the case of Zimbabwe.²¹ Revenue obtained by the state must not be in compromise with Foreign Direct Investment (FDI). The policy of Indigenisation likely to have a negative impact on the FDI of the Country. FDI is needed to support the country's economy.²² There is a need for amendment for various legislations in Zimbabwe on revenue management for the benefit of the communities.

The mining sector in Zimbabwe is in serious need of capital injection to stay afloat. At this rate the implementation of the draconian laws on indigenisation is most likely to continue scaring away investors. This one of the main reasons why the IMF and the World bank have frozen loaning Zimbabwe any form of credit to boost its economy since the inception of the Economic Structural Adjustment Programme (ESAP).²³

Many factors about governance, rule of law, and respect for human rights need to be considered so as to make an impact on community participation. These will be

¹⁹ Principle 10 of the Rio Declaration states that Extractive issues are best handled with participation of all concerned citizens, at the relevant level. National level, each individual shall have appropriate access to information concerning the extractive activity that is held by public authorities.

²⁰ Kimberly Process Certification Scheme (KPCS) The Kimberly Process is an international scheme made up of governments, the diamond mining industry and civil society to curb trade in conflict diamonds.

²¹ Practical knowledge and basic calculation indicates that there is bound to a serious depletion in profit if the state has too many players in revenue management. In the case of Zimbabwe there is ZMDC and the Mineral Marketing Corporation of Zimbabwe who are part of the long chain in state involvement. This defeat's the whole purpose of the state ploughing back to the communities from proceeds received mainly because there are too many players.

²² The Minister of Mining and Mining Development Zimbabwe has been too defensive stating that Zimbabwe's inflation rate is much lower than that of countries not under any sanction forgetting that the nation had control inflation through the use of a multi currency system that includes the use of the United States Dollar, the South African Rand and the Botswana Pula.

²³ Mlambo 1993 *Zambezia* 57.

elaborated more in the progressing chapters of the dissertation. Implementation of community participation must be implemented like the land reform programme which was done in a chaotic way. Some expects state that the country has failed to leave up to expectations with regards to community participation in the region. Community participation means the immediate communities near to the particular mineral must benefit from the mineral in matters pertaining to infrastructure, bursaries and employment in those particular mines.²⁴ Nationalisation of mines has the main aim of getting short term returns in the guise of empowering the people at the expense of long term growth that would sustain long term revenue generation.

Vilhena²⁵ states that for sustainable development to take place in the mining sector. Mining laws should define the rights of respective parties that include land owners, in order for investors to recognise these rights.²⁶ There has been massive resistance from mining companies in Zimbabwe to comply with economic empowerment legislation. Currently less than 50 companies of the 200 companies registered with the minister of mines have complied with this legislation.²⁷ This legislation requires that mining companies must submit acceptable indigenisation proposals that require 51% ownership must go to indigenous Zimbabweans.

This situation is worsened by the fact that government has increased mining tariffs and prospecting fees. Zimbabwe has participated in a number of Mining conferences some known as *Indaba's* but there is doubt as to whether the attendance of these conferences is bearing any fruit. The Ministry of Mines in Zimbabwe hiked mining fees in 2011, for example prospecting fees stand at about US\$1 000 000 (R 10 000 000) while US\$5 000 000 (R50 000 000) is required to register a claim.²⁸ This makes it impossible for both indigenous people and foreign investors to make investments because the capital needed outweighs the profit made by the mine.

²⁴ Mining laws are meant to create sustainable development which enhances greater community participation. See *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd Case CCT 39/10 [2010] ZACC 26*.

²⁵ Vilhena "Main issues for formulating mining policies towards attracting foreign investment" 10-14 2002.

²⁶ Vilhena "Main issues for formulating mining policies towards attracting foreign investment" 10-14 2002.

²⁷ Sunday Business Newspaper 26 February- 3 March 2012 3.

²⁸ Staff Reporter 2014 <http://harare24.com/index-id-news-zk-13914.html>.

Mines are supposed to pay royalties ranging from 7% to 10% in total earning in gold and platinum respectively. Such a situation can result in mining giants being put under judicial management or liquidation in terms of the Companies Act.²⁹

Legislation from selected jurisdictions to be discussed in the course of this dissertation is clear on community participation as compared to Zimbabwean legislation. Facts and figures³⁰ show that despite the world economic meltdown that is creeping on most economies, mining in the jurisdictions selected for discussion is booming. There has been a paradigm shift of legislation including the previously disadvantaged communities who now benefit from the minerals in their area. The case law in South Africa, Canada and Australia which will be discussed in chapter 6 provides a strong precedent that Zimbabwe could learn from.

Mining projects have enormous socio economic impacts on communities. They create displacement which disturbs the general community life hence there is a need for binding agreements between mines and communities.³¹ Currently in Zimbabwe the Chiwadza community has not been fully compensated by the State after being evicted from their land to pave way for diamond mining operations. This is worsened by the fact that there is not enough land to relocate the displaced villagers. Each house hold was given a paltry US\$1000 (approximately R10 000) as disturbance allowance in the relocation to another area.³² This is meagre as the state should at least have made a pledge of \$50 000 compensation to each house hold (R500 000) so that they are able purchase shares in line with economic empowerment. Other

²⁹ See Section 200 of the Companies Act Chapter 24:03 of the law Zimbabwe.

³⁰ Facts and figures from the Chamber of Mines South Africa indicate the mining industry is on a positive curve despite employment falling by 5.1%, see introduction to the chamber of mines South Africa 2012 page 1. Page 13 of the facts and figures 2011 Chamber of Mines shows that in the 2010 92% of the total expenditures were captured locally resulting in millions of jobs being created. This results in greater community participation hence there is effective revenue management.

³¹ Sosa Keenan 2001
<http://metisportals.ca/MetisRights/wp/wpadmin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf>.

³² Nyathi 2014 <http://www.thestandard.co.zw/2014/04/22/displaced-villagers-demand-full-compensation/>.]See also Manicaland Correspondent 2014 <http://www.newzimbabwe.com/news-16354-Marange+villagers+starve+as+miners+scoot/news.aspx>

jurisdictions such as Canada have what are known as Impact Benefit Agreements (IBA).³³

It is common knowledge that government is mandated in terms of the implementation plan adopted at the World Summit on Sustainable Development in September 2002 to ensure that extractive activities in communities achieve sustainable development in such a way that benefits generated today should be distributed between present and future generations.³⁴ So far in Southern Africa only South Africa has entrenched such a clause in its Constitution.³⁵ Apart from employment communities should be involved in equity participation. This basically involves receiving benefits from royalties, profit shares or fixed cash amounts that are linked to specific events in the life time of the mine and possible representation on the companies' board of directors.³⁶ This is not the case in most communities where extractive activities are taking place in Zimbabwe. IEEA falls short of making such clear cut provisions. This will be touched in greater depth in Chapter 3 and 4.

1.5 Aims and Objectives

This dissertation aims to investigate Zimbabwe's approach to community participation and indigenisation in Extractive Activities. It seeks to address issues in Zimbabwe's legislation that have not been rigorously analysed and in the country's IEEA policy that is meant to uplift indigenous people in any key sector of the economy such as extractive activities. Lessons have to be learnt from nations such as South Africa, Canada and continents such as Australia.

Therefore the dissertation comes up with mechanisms that make government policies deviated from settling political objectives. It aims to stimulate the rate at which mining is taking place for the benefit of communities located next to extractive activities. To understand the issue of extractive activities it is important to highlight

³³ Sosa and Keenan 2001
<http://metisportals.ca/MetisRights/wp/wpadmin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf>.

³⁴ National Report on Mining in Romania Date Unknown
<http://www.un.org/esa/dsd/dsdaofwni/nipdfs/NationalReports/romania/mining.pdf>.

³⁵ See section 24 (b) of the South African Constitution.

³⁶ Sosa and Keenan 2001
<http://metisportals.ca/MetisRights/wp/wpadmin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf> 13.

key facts and issues that have legally shaped the history of mining activities Zimbabwe.

The dissertation looks at mechanisms of promoting private investment such as Foreign Direct Investment (FDI). It is anticipated that FDI will enhance effective community participation. It aims to show the advantage of private investment over nationalisation. The current Zimbabwean economic empowerment legislation is preventing this from occurring. It is of paramount importance that foreign investment fosters sustainable development and accommodates the interests of the mining communities and governments in a fair way.³⁷

1.6 Delimitation of the Study

The study will focus on the existing related mining legislation in Zimbabwe. A comparative analysis is drawn from other jurisdictions to find solutions for effective community participation. These countries are blessed with an abundance of minerals such as gold, platinum and diamond reserves where some still lie untapped. These countries have become a prime investment destination as investors want to invest in them.

1.7 Literature Review

The Constitution is clear on the right to engagement with communities, section 13 (1) states that “ The state and all institutions and agencies of government at every level must endeavour to facilitate rapid and equitable development, and further in 13(4) The state must ensure that local communities benefit from the resources in their areas”.³⁸ The aspect of development in an area for the benefit of the people is further emphasised in the African Commission on Human and Peoples Right’s Resolution on Human Rights-Based Approach to Natural Resources Governance in ACHPR/Res.224 (LI) 2012 “that recalls state parties to in (ii) Confirm that all necessary measures must be taken by the state to ensure participation, including the free, prior and informed consent of communities, in decision making related to natural resources”.³⁹ This right is further emphasised in the International Covenant

³⁷ International Bar Association Model Mining Development Agreement Project.

³⁸ Section 13 (1) and (4) of the Constitution.

³⁹ Resolution ACHPR/Res.224 (LI) 2012.

for Socio Economic Rights which states in article 3(1) that each state, subject to the availability of resources, must achieve progressive realisation of rights through adoption of legislative measures.⁴⁰

Chenwi and Tissington in *Engaging Meaningfully with Government on Socio Economic Rights* emphasise the government's role in facilitating community participation through adherence to the Constitution, legislation and international law.⁴¹ Lovel, Katz and Solomon in "Participation Processes for the Minerals Industry,"⁴² state that participation processes can be selected to facilitate the appropriate level of participation, with consultation probably being the most frequently used term in the mining sector to describe community involvement. Murombo in a "Conceptual Framework for Implementation and Enforce of Environmental, Economic, Social and Cultural Rights in Southern Africa: Challenges and Opportunities"⁴³ states that for the progressive realisation of Socio Economic rights in the extractive sector it is imperative that the manner in which natural resources are managed is related to good governance.

Where there is lack of good governance, it is difficult to implement policies that will assist communities in benefiting from their natural resources. This results in a survival of the fittest situation whereby people get involved in unregulated artisanal mining to make a living. Otto, Andrews, Cawood, Doggett, Guj, Stermole, Stermole and Tilton, in "Mining Royalties: A Global Study of Their Impact on Investors, Government and Civil Society",⁴⁴ state that the impact of mineral development on communities is hard to establish where there is no appropriate legislation. The attitude of the mining companies and their commitment to paying their royalties to an effective government is contributory factor. It is the role of the government to ensure that suitable structures are put in place in the community to foster good relations with

⁴⁰ See Article 3 (1) of the ICESCR.

⁴¹ Chenwi and Tissington *Engaging Meaningfully with Government on Socio Economic Rights*, 7.

⁴² Lovel R, Katz E and Solomon F "Participation Processes for the Mineral Industry" CSIRO Minerals Report DMR-2375 2.

⁴³ Murombo 'Conceptual Framework for Implementation and Enforce of Environmental, Economic, Social and Cultural Rights in Southern Africa: Challenges and Opportunities' Mtisi S "Securing Environmental, Economic, Social and Cultural Rights in the Natural Resources Sector" (Zimbabwe Environmental Law Association 2010) 7.

⁴⁴ Otto, Andrews, Cawood, Doggett, Guj, Stermole, Stermole and Tilton in "Mining Royalties: A Global Study of Their Impact on Investors, Government and Civil Society" (The International Bank for Reconstruction and Development; The World Bank 2006) 205

the mining company. The government can enforce this by ensuring that there are regular compliance checks up on mining companies carrying out extractive activities close to the communities.

In the case of *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd*⁴⁵ the Court held that the prospector of a mineral has duty to consult with the community at hand before acquiring mining rights. The Botswana case of *Matsipane Mosetlhanyane and others v The Attorney General of Botswana*⁴⁶ gives an in depth opinion on communities benefiting from resources around them.

In the case of *Government of the Republic of South Africa v Grootboom*,⁴⁷ the Court held that unless the plight of communities is not alleviated, people may be tempted to take the law in to their own hands. In this instance where the minerals are located people may be forced to practice artisanal mining. This case mandates government to ensure that people are not sidelined from policy making hence the need for adequate housing. Government can make strides in achieving such goals by setting out investment oriented policies that bring in revenue to the state coffers for it to carry out its mandate.

1.8 Methodology

The study is qualitative, based on the study and analysis of both primary and secondary sources. The primary sources are legislation of Zimbabwe, case law and International instruments such as the Universal Declaration of Human Rights (UNDHR). The secondary sources are the textbooks, journals and internet sources. In general this is library based research.

1.9 Outline of Chapters

This dissertation is divided into 7 Chapters.

- Chapter 1 deals with the introductory work to the research;

⁴⁵ *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd* CCT 39/10 [2010] ZACC 26.

⁴⁶ *Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana* Court of Appeal, CALB-074-10 (unreported).

⁴⁷ *Government of the Republic of South Africa v Grootboom and Others* 2001 SA (CC).

- Chapter 2 aims to look into the history of extractive activities through unpacking fundamental matters in the era of the old dispensation, before Zimbabwe attained independence from British rule, and the situation in the new dispensation where Zimbabwe is fully independent. It further looks into the conceptual framework of community participation;
- Chapter 3 deals with Legislative and Policy Framework on Extractive Activities. This chapter also deals with core definitions and core contexts such as the meaning of extractive activities, and the extractive activities legislation in Zimbabwe. It further tries to discover the meaning of community participation amongst communities in which extractive activities are taking place. It analyses the rationale behind participation of the community in extractive activities, and addresses other legislation that is related to extractive mining activities, such as the Indigenisation and Economic Empowerment Act of Zimbabwe;
- Chapter 4 is a Case study of Marange Community and the level of community participation by the Marange people in the extractive activities. It looks into the case law that will give us a greater understanding of community participation;
- Chapter 5 deals with revenue management; specifically, its legal impact on the respective communities under discussion. The dissertation will look into several case studies of revenue management which impact on the livelihood of communities, in line with the Millennium Development Goals. It explores how the use of revenue can create lasting value for those communities;
- Chapter 6 will look into international and regional instruments-related community participation, and will provide a comparative study of community participation with other jurisdictions in the Southern African Development Committee (SADC) and International Framework. In the international scene, it will make a comparative overview with South Africa, Australia and Canada in extractive activities, and cover how case law, legislation and policies are directed at made to fully benefitting the communities; and

- Chapter 7 is a submission and conclusion on what has been discussed in the main body of the Chapters.

1.10 Limitations

Due to the sensitive and political nature of this research it will solely rely on writings of different authors, and statutory law that are linked to the topic, because an interview-based research is expensive considering the limited financial resources available to the candidate. This leaves room for those with an interest of sustainable development in Zimbabwe to dig in, as this field is fertile ground for research and leaves many questions to be answered.

1.11 Expected Outcomes of the Study

The research is aimed at informing the reader of recommendations which might make community participation more effective, and how revenue generated from the mining sector can be ploughed back for the benefit of the communities, at the same time boosting the revenue of Zimbabwe's economy. It aims to show that, for effective sustainable development to impact positively on people, there has to be effective community participation. It tries to put forward suggestions as to how the government can draft policies for attracting investment, while at the same time unleashing the potential of communities as to how they can benefit from such participation, and avoiding policies that are divorced from the realities and the requirements of reasonable socio-economic rights in the context of socio-economic participation.

CHAPTER 2

CONCEPTUAL AND HISTORICAL FRAMEWORK OF COMMUNITY PARTICIPATION IN EXTRACTIVE ACTIVITIES IN ZIMBABWE

2.1 Introduction

This chapter aims to look into the history of the mining tenure system in Zimbabwe. It explains the meaning of community participation while looking at the different types of community participation. This will be linked with the history of community participation in the sector. The period covered will be from the time before settlers entered Zimbabwe prior to 1894 right up to the time of colonisation. After the first Chimurenga of 1896, up until the formation of the federation in the early 1950s, the Unilateral Declaration of Independence in 1965 and the new constitutional dispensation of 1980 to the present day, the history will give us a rough background on how communities have been engaging with the mining tenure system.

2.2 Meaning of Community

A community can be the people who are the original inhabitants of the area prior to extractive activities taking place. Obara and Jenkins submit that there are three types of communities which are occupational, residential and indigenous communities.⁴⁸

2.2.1 Types of Communities in the Extractive Industry Sector

2.2.1.1 Occupational Community

Occupational Communities can be described as households or families that derive all their income from mining.⁴⁹ A community can also be the workers who are employed by the mine. In instances some of the workers spend more than a decade working for the mine. In such circumstances these workers, despite the fact they may come from somewhere else in the country, become fully-fledged members of the community. In other words they have no other place of domicile besides the mine

⁴⁸ Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 4.

⁴⁹ Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 4.

they are working for. So they become absorbed into the surrounding community that has originally inhabited the mining area before any extractive activity took place. In Zimbabwe a number of employees in these mining towns are not originally from these areas. Many are third generation descendents of migrant workers who came during the colonial era from Nyasaland which is now Malawi and Northern Rhodesia which is now Zambia. Gaidzanwa submits that the heavy presence of immigrants relying on the extractive sector is a result of being unable to use strategies of falling back on communal land for farming. Thus most of these immigrants tended to rely wholly on waged jobs in the mining companies.⁵⁰

2.2.1.2 Residential Communities

Residential Community can be described as those communities that are within the geographical area affected by the extractive activities and have developed as result of the mine.⁵¹ In the case of Zimbabwe there are many urban areas that have developed as a result of mining activities. Places that come to mind are towns such as Gwanda which has three mines within a radius of not more than 15 kilometres from the town such as, Blanket mine, Vumbachikwe and Collenbawn. The Province of Midlands is endowed with numerous residential communities such as Zishvabane, Shurugwi and Kwekwe.

2.2.1.3 Indigenous Community

An indigenous community can be described as a population of people or families with an ancient and cultural attachment to the land where mining occurs or has an impact.⁵² The people of Chiadzwa in Marange make a classic example. Marange is a village situated about 100km from Mutare, a city in Zimbabwe, the Provincial Capital of Manicaland province, one of Zimbabwe's 9 provinces. The area is blessed with a

⁵⁰ Gaidzanwa 1991 *Zambezia* 50. See Crush, Williams and Peberdy "Migration in Southern Africa" A Paper prepared The writers submit that in alone in 1935 150 000 labour migrants left Malawi to work in Zimbabwe or the Policy Analysis and Research Programme of the Global Commission on International Migration in Global Commission on International Migration 4.

⁵¹ Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 4. Murombo 2010 *SAPL* 580.

⁵² Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 3-5.

diamond belt that covers an area of 60 000 hectares.⁵³ Recently extractive activities took place and a lot of displacements or evictions have been taking place with the aim of expanding the extractive activities. In most instances indigenous communities have lived in the area for many centuries. Indigenous people are the most vulnerable in the extractive sector because they do not have ready access to justice, formal political process, decision making structures, social services, economic systems and they experience higher rates of poverty, discrimination and prejudice.

2.3 Meaning of Community Participation

Community participation can be described as the involvement of people in any activities in their communities to solve their own challenges. Community participation is said to be a basic human right and a fundamental principle of democracy.⁵⁴ Sometimes people may not participate in extractive activities in their area because they fear government and its agents and also their participation will not bring any meaningful results.⁵⁵ Government must ensure that there is a clear cut policy on community participation.

This also means that government needs to deal with negative perceptions in regard to the idea of community participation being seen as a campaign gimmick. Community participation is far more than a requirement fulfilled in the government's agenda. It is a condition for success.⁵⁶ The United Nations development report describes participation as a method whereby people are involved in the economic, social, cultural and political processes that affect their lives.⁵⁷ A mining community can also be described as one where the population is significantly affected by the operations taking place in a mine. The relations of the community with the mine can be in the form of employment or through social, economic and other impacts.⁵⁸ Theoretically speaking extractive activities after concessions have been granted to mining companies are supposed to provide jobs to the members of the community and create enormous wealth for the people.

⁵³ Anon 2011 3<http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf>

⁵⁴ Mathbor *Effective Community Participation* 8.

⁵⁵ Williams 2006 *Policy Studies Journal* 204.

⁵⁶ Reid *How People Power Brings Sustainable Benefits to Communities* 3.

⁵⁷ UNDP Human Development Report 1993.

⁵⁸ Veiga, Scoble and McAllister 2001 *Natural Resources Forum* 191.

2.3.1 Types of Participation

There are 5 types of participation namely: Manipulative participation, passive participation, participation by consultation, participation for material incentive which is also known as functional participation and interactive participation.⁵⁹

2.3.1.1 Manipulative Participation

This type of participation is participation by pretence whereby there are people's representatives on the official boards. Such boards have little power in representing the people's views and are un-elected.⁶⁰ Participation by manipulation does not benefit the people because the people are not fully informed as to what is transpiring in the project. The community where the natural resource is located is hoodwinked or persuaded into believing in participation that in actual fact they will never benefit from.⁶¹ The consultation process could be very intense but with misleading information to make members of the community believe that they will benefit from the project. Such a type of participation could be used by companies to stay in control of the mining project. Another contributing factor to the manipulative participation is the fact the community does not understand the mining process and the company do not seek to address this issue but instead take advantage of the ignorance of the community.

2.3.1.2 Passive Participation

In some instances the community can participate but they are not fully engaged in what is happening around them.⁶² This is a passive way of participating, the community has either showed little interest in what is going on the project or is not interested in what is going on. This may be attributed to the politics on the ground where the community is not interested because the project is seen as a campaign gimmick to garner votes for the elections.

2.3.1.3 Participation by Consultation

⁵⁹ Cavaye 2002

<http://www.communitydevelopment.com.au/Documents/The%20Role%20of%20Government%20in%20Community%20Capacity%20Building.pdf>.

⁶⁰ Cornwall 2008 *Oxford University Press and Community Development Journal* 272.

⁶¹ Wilcox 1994 *RRA Notes* 80.

⁶² Siyongwana and Mayekiso 2011 *Africa Insight* 146. Cornwall 2008 *Oxford University Press and Community Development Journal* 272.

Participation by consultation involves action and decision making by that community.⁶³ It involves a thorough interaction between the company and the community. This can be described as the best practice for sustainable community development.⁶⁴ Because the community has been consulted the company would have to make decisions and be held accountable by way of giving a feedback to whoever was consulted in the community. This type of participation involves the use of Social Impact Assessment (SIA) that will be discussed in more emphasis in chapter 4.

Participation by consultation opens avenues for other benefits to the community, such as economic benefits that will allow the community to make decisions themselves, rather than to leave outsiders to take control of their affairs. Some critics say that participation by consultation is nothing more than a form of “pseudo-participation.” It is frequently characterised by an element of manipulation; rather than allowing real participation, which would include co-operative control and partnership⁶⁵, it turns into “therapeutic” communication in which the facts regarding the project are exaggerated.⁶⁶ It is submitted where an agreement does not provide for the right of refusal by the community on the project, then such would amount to “therapeutic communication” because it is not genuinely participatory in nature.

2.3.1.4 Participation for Material Incentive

Participation for material incentive means that members of the community participate in the extractive sector to gain something tangible from it. This type of participation has a major disadvantage, in that the incentives come to an end when the mine decides to shut down its activities.⁶⁷ In most cases, people will actively participate in something where they are likely to get something from it, meaning that in the case of mining, the community will become actively involved in the project, where there is an

⁶³ Siyongwana and Mayekiso 2011 *Africa Insight* 146.

⁶⁴ Choshi 2001 *African Institute of Corporate Citizenship* 5. See also Cheney, Lovel and Solomon 2002 http://www.isf.uts.edu.au/publications/HC_RL_FS_2002.pdf. The article talks about consultation being a two way dialogue between the company and the community.

⁶⁵ Hipwell, Mamen, Weitzner and Whiteman “Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change” Working Discussion Paper Prepared by the North South Institute 2002 33.

⁶⁶ Hipwell, Mamen, Weitzner and Whiteman “Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change” Working Discussion Paper Prepared by the North South Institute 2002 33.

⁶⁷ Cornwall 2008 *Oxford University Press and Community Development Journal* 272.

assurance that they are likely to benefit out of it.⁶⁸ In most instances, people would not be involved in a project where they are not appropriately incentivized. The primary incentives that come to mind are dividends from the shares that have been invested in the stock market. People in the community will participate in a project if they feel that it is important and their participation will bring some meaningful change into their lives. The whole motive of this kind of participation is for material gain and nothing more or less.

2.3.1.5 Interactive Participation

This participation process involves the community fully in whatever is being done. The community is given a thorough outlook on what the activities and mandate of the mining company are. It further defines who is responsible for any revenue, dividends and shares the community is supposed to get from the mining company. The community's say will have a bearing on whether the company is in a position to carry out any activities or not. Fraser submits that the interactive approach is more or less like a progressive/empowerment approach, in that members of the community participate in the activities.⁶⁹

2.4 Historical Background of Extractive Activities in Connection to community participation

2.4.1 The period before 1896

The Shona people were very active in extractive activities before the white settlers came into Zimbabwe. This can be seen from the activities of iron smelting for tools in the 16th century amongst the inhabitants of Great Zimbabwe.⁷⁰ This was commercialised for trade with the Portuguese around the same time. According to Gayre in the book 'The origin of Zimbabwean Civilisation', before the establishment of early European mining in Zimbabwe, the first European settlers found the local people involved in extractive activities of mining for gold which was sold to Portuguese merchants.⁷¹ This was an art that the local people had learnt from their

⁶⁸ Wilcox 1994 *RRA Notes* 81.

⁶⁹ Fraser 2005 *Oxford University Press and Community Development Journal* 292.

⁷⁰ Jaffey 1966 *The Journal For African History* 193.

⁷¹ Gayre *Zimbabwean Civilisation* 177.

ancestors. Reef and alluvial gold mining were in actual fact seasonal activities.⁷² The communities were governed by village heads or chiefs, particularly in areas such as what is now Mashonaland Central Province. These village heads were responsible for the sites believed to have minerals. All the people residing in the community participated in the process of gold panning.⁷³ Alluvial panning fostered a degree of economic integration between the communities in the north eastern side of Zimbabwe and the Portuguese.

The arriving British settlers in 1888 had an expectation that they would find the same minerals which they found in South Africa, thus signing treaties with King Lobengula of the Ndebele people. This paved the way for extractive activities and other activities to take place. Gayre states that the local communities, despite engaging in mining activities, the communities had done so on a small scale, with the local chiefs inviting the likes of Baines to prospect on their land for gold.⁷⁴

2.4.2 The Rudd Concession

The Rudd Concession was an agreement between Lobengula and Charles Rudd, a messenger sent by Cecil John Rhodes, to sign a treaty in order to acquire mining rights in Zimbabwe. Rhodes had several motives in this concession: to exploit the mineral resources, to extend the British Empire, and self-aggrandisement. During the negotiations, Lobengula was bullied, tricked and swindled like a child in a gambling game. Lobengula was to receive a salary of 1000 pounds a month, 1000 rifles and other ammunition, and a gun ship, which was to patrol the Zambezi River to stop external threats such as the Portuguese from entering Zimbabwe and Boers from South Africa who also had an interest in Zimbabwe.

Lobengula in return agreed to grant Cecil Rhodes and his men:

The complete and exclusive discharge over all metals and minerals situated and contained in my Kingdom, principalities and dominion together with full power to do all things that they deem necessary. I

⁷² Phimister 1974 *The Journal of African History* 447.

⁷³ Phimister 1974 *The Journal of African History* 448. See also Beach 1979 *The Journal of African History*, 400. Beach states that there was a rise in the extraction of upper level of gold from the reef mines between 950 and 1800.

⁷⁴ Gayre *Zimbabwean Civilisation* 177.

do hereby authorise the said grantees, to take all necessary and lawful steps to exclude from my kingdom all persons seeking land, metals, minerals, or mining rights there-in and I agree to grant no concessions of land or mining rights from and after date without their consent.

This agreement did not contain any clause of fostering community participation and facilitated exploitation. In October 1888, the parties to this concession finally reached an agreement, and signed the agreement in which Lobengula gave up all metal and mineral rights in Zimbabwe. Upon realising that he had been tricked, Lobengula signed another treaty with a man by the name of Edouard Lippert on 22 April 1891. The signing of this concession was a tactic by Lobengula to take advantage of the rivalry between Rhodes and Lippert.

The Lippert Concession granted:

“The sole and exclusive right, power and privilege for the full term of 100 years to lay out, grant lease...farms, townships, building plots and grazing areas; to impose and levy rents, licenses and taxes thereon and to get in, collect and receive the same for his own benefit; to give and grant certificate for the occupation of any farms, townships, building plots and grazing areas.”

With an element of shrewdness Rhodes was able to buy out Lippert from this concession. In 1894 Lobengula sent a delegation of chiefs, 'Induna', to complain to Great Britain's Queen Victoria that this treaty dispossessed Africans of their right to their ancestral land. In response Queen Victoria, said “It is not wise to put too much power into the hands of men who come first, and to exclude other deserving men. A King gives a stranger an ox not his whole herd of cattle, otherwise what would other strangers have to eat?” However these complaints did not solve anything in terms of “liberal theory” Great Britain could cancel any agreements entered into willingly by any person. In this case dispute although Lobengula had been tricked into entering into the agreement he had done so unwillingly.⁷⁵ This meant that the ownership of

⁷⁵ Hansungule 2000 *International Journal on Minority and Groups Rights* 307.

the land in Zimbabwe was now in the hands of the British South Africa Company who had the objective of finding minerals on Zimbabwean soil. Scores of Europeans entered the country with the hope that they would get land and carry out extractive activities. However, relations soured and reached a boiling point around 1894 between the settlers and the indigenous people. The Ndebele were the only tribe recognised by the British South Africa Company, mainly because they had conquered the Shona tribes and exercised some sort of sovereignty over them. The white settlers, with the supremacy of their weapons, were able without any difficulty to defeat the Ndebele people.⁷⁶

This paved the way for them to demarcate large concessions of land for farming and extractive activities. Indigenous people around these areas were deprived of their land as a result of the Native Reserves Order in Council in 1898 which dispersed Natives onto low-potential arable lands.⁷⁷ The Native Reserves Order did not cover any aspect of community participation.

2.4.3 The Period After 1896

The era of 1896 was marked by events such as the first *Chimurenga* (uprising) where Ndebele and Shona people fought over the land that was taken from them and against the taxes imposed on them such as hut tax which was imposed in a bid to force them to work in the mines as labourers.⁷⁸ This was a form of exploitation because it did not let the people choose to work in the mines for their benefit, unfortunately the Ndebele had been tricked into surrendering by Cecil John Rhodes and the Shona eventually lost the battle mainly because of inferior weapons.

The rebellions between 1890 and 1896 in Matabeleland and Western and Central Mashonaland hardly had any impact on mining activities of this tribe. It was only after the crushing of these rebellions that the Salisbury Chamber of Mines passed a resolution urging the Native department to stop receiving the payment of Hut tax in gold.⁷⁹ Similar to other countries in Africa extractive activities in Rhodesia were used to develop the interests of the colonisers with hardly any attention being given to the

⁷⁶ Todd 2007 *The Black Scholar* 21.

⁷⁷ Todd 2007 *The Black Scholar* 21.

⁷⁸ Bonello 2010 *The Journal of African Historical Studies* 346. See also Cobbing 1977 *The Journal of African History* 76-77.

⁷⁹ Phimister 1974 *The Journal of African History* 453.

local communities close to where the extractive activities were taking place.⁸⁰ This resolution was meant to ban communities in the long run from participating in extractive activities. The Gold Trade Ordinance further prevented Africans from dealing in gold although they could mine but they could not legally buy it or sell it.⁸¹ White people were able to take advantage of this position to buy gold below its market price from the Africans. Communities were used as guides to prospect for minerals, but once found their rights were ignored. For example the Mines and Minerals Ordinance of 1895 offered a reward of 5000 pounds to the discoverer of alluvial gold deposits capable of supporting 200 whites for a year.⁸²

The years that followed were characterised by oppression. As extractive activities started to increase in Zimbabwe many towns particularly along the great dyke were born as result of extractive mining activities. Black People in the communities could only participate as labourers. Most blacks did not possess the skills that their colonial oppressors had. The highest position that a black man could ever attain was the position of being a clerk or what was commonly known in the vernacular as *umabhalani*.

Before independence the plethora of minerals in Rhodesia resulted in the British South Africa Company bringing in legislation that would force black people to work in the mines. A range of taxes were introduced after 1894 such as hut tax, poll tax, dog tax and dipping fees.⁸³ These taxes could be paid in the form of money, crops and livestock seized at gun point by the Native commissioners. These taxes worked in favour of the colonial administration by forcing Africans to be involved in the extractive activities sector as labourers.

The Masters and Servants Ordinance of 1901 and the Native Ordinance of 1902 were passed in 1901. This legislation was meant to regulate the mobility of black labour and stabilise employment under a contract. It made it an offence for a black

⁸⁰ United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 3.1-16.

⁸¹ Phimister 1974 *The Journal of African History* 453.

⁸² Phimister 1974 *The Journal of African History* 453.

⁸³ In many instances Africans would sell their stock to avoid forced participation in the mines. Shona communities, in particular, sold grain to meet their legal obligation and to avoid mine labour. See Van Onselen 1973 *The Journal of African History* 24.

labourer to break a contract. The Rhodesia Native Bureau was used to force black people to work in the mines.

In 1923, Britain terminated the British South Africa Company jurisdiction and formally annexed Southern Rhodesia as a Crown Colony.⁸⁴ This was meant to protect the interests of the growing settler population and capitalise on Southern Rhodesia's resource base.⁸⁵ The European settlers were able to formulate legislation that excluded the indigenous communities from benefiting from local resources such as the Constitution adopted in 1923.⁸⁶ In 1925, the colonial government initiated a policy of land apportionment which established exclusively white and exclusively black residential zones.

The country's most valuable mineral regions were designated as 'white zones'.⁸⁷ Under this Constitution only persons of European descent were allowed to vote and hold office in the legislative body.⁸⁸ This meant that these legislatures represented the interests of the minority white population.⁸⁹ The colonial government again in 1950 took further steps to enhance white dominance over extractive activities by restricting the indigenous black people to the Native reserves.⁹⁰ This made it difficult for indigenous people to enter the areas where extractive activities were taking place. Only those hired as unskilled labourers to work in the mines could enter these areas.

The Rhodesian Federation was more interested in fostering international relations in the extractive activities sector in the 1950's. It cared very little for the communities near the mines that were dotted all over the country. Relations with powerful nations such as the United States of America (USA) were meant to secure loans for infrastructural development in Rhodesia.⁹¹ In 1957, the World Bank whose main funder was USA was able to loan the Rhodesia Federation more than US\$19 000 000 (R 171 000 000) for railroad improvement in 1958.⁹² The Rhodesian Federation

⁸⁴ Nickerson 1994 *Boston College Third World Law Journal* 191.

⁸⁵ Nickerson 1994 *Boston College Third World Law Journal* 191.

⁸⁶ Nickerson 1994 *Boston College Third World Law Journal* 191.

⁸⁷ Nickerson 1994 *Boston College Third World Law Journal* 192.

⁸⁸ Bonello 2010 *The Journal of African Historical Studies* 343.

⁸⁹ Bonello 2010 *The Journal of African Historical Studies* 343.

⁹⁰ Nickerson 1994 *Boston College Third World Law Journal* 192.

⁹¹ De Rouche 1998 *Zambezia* 212.

⁹² De Rouche 1998 *Zambezia* 212.

was able to repay the USA by shipping over 450 000 tons of chromite in 1959.⁹³ Chromite exports continued in the 1960's with the abundance of cheap labour provided by black people.

In 1962, the Rhodesian Government came with further legislation that prevented black people from benefiting from the use of their land. This restriction on the use of land meant that participation by indigenous communities in the extractive sector was very limited.

2.4.4 The Unilateral Declaration of Independence in 1965

In 1965, Southern Rhodesia was the only country that had not yet attained independence in the federation that had been composed of Northern Rhodesia which is now Zambia and Nyasaland which is now known as Malawi. The Ian Smith Regime chose to impose independence from Great Britain with the hope that they would govern themselves. This was not independence because political and economical power still remained in the hands of the minority. Without majority rule as the black population remained without any right to self-determination. Life amongst communities situated close to mines remained no different from the advent of colonialism. The system of governance was still concentrated in a few hands of white people and the resources such as mineral wealth were still in the hands of the same. Hence there was still no community participation in Rhodesia. Mining in Rhodesia until the late 1970's depended more on Black immigrant unskilled labour than unskilled local labour.⁹⁴ Mining tended to be low-paid, hazardous and unpopular amongst Black Zimbabweans.⁹⁵

The safety records were poor and locals tended to pursue jobs in the better-paid sectors of the economy and they were able to exercise discretion because the bulk of them held land rights in the communal areas.⁹⁶ Communities with minerals were not really bothered about what was happening in the mines. This was because they

⁹³ De Rouche 1998 *Zambezia* 212.

⁹⁴ Gaidzanwa 1991 *Zambezia* 50.

⁹⁵ Gaidzanwa 1991 *Zambezia* 50.

⁹⁶ Gaidzanwa 1991 *Zambezia* 50. See also Van Onselen 1973 *The Journal for African History* 246. Van Onselen writer speaks of the desertions in the mines because communities feared for their lives if they ever thought of working in the mines. An example is that of Ayshire mine where between August and November 1904, the mine employed an average of 1300 workers a total of 500 of these workers deserted the mines.

could sustain themselves on subsistence agriculture. Hence the colonial government was able to recruit from other countries of the federation such as Malawi and Zambia.

2.4.5 Attainment of Independence in 1980

After a series of lengthy negotiations in Lancaster House, London which ended round about December 1979, Zimbabwe attained its independence on 18 April 1980 with a Constitution that was be regarded as part of the problem bedevilling community participation in extractive activities until recently. The two main political parties namely the Zimbabwe African National Union Patriotic Front (ZANU PF) and the Zimbabwe African Peoples Union (ZAPU) who won most of the parliamentary seats were in control of the government. They promised the masses that they would own the means of production and natural resources but unfortunately this did not happen. This Constitution did not highlight themes such as socio economic rights. There was very little or no participation by the respective communities in extractive activities.⁹⁷ Scarce community participation initiatives were handled by government through the creation of the Mining Development Corporation in 1982 to invest on behalf of the Government.⁹⁸ Most mining companies were focussed on profit maximisation.⁹⁹

The big mining corporations such Rio Tinto and Anglo America's drive to maximise profits made it difficult for them to voluntarily formulate policies that engaged communities because this threatened to reduce their profits.¹⁰⁰ Profit maximisation remained unchallenged partly because at the end of the day the profits were removed from Zimbabwe and taken to the countries where these international mining corporations had their headquarters. Community participation remained relatively nonexistent.

The government decided to draft a hasty constitution that was rejected by the majority of Zimbabweans in the year 2000. This resulted in government embarking on a fast track land reform exercise that saw FDI in Zimbabwe falling to

⁹⁷ Clarke 1987 *Zambezia* 79.

⁹⁸ Clarke 1987 *Zambezia* 82.

⁹⁹ Maphosa 1997 *Zambezia* 190.

¹⁰⁰ Maphosa 1997 *Zambezia* 190.

unprecedented levels. A lot of people were forced to engage in illegal extraction activities (gold panning). One can say it was a form of community participation but many would agree that it was really a desperate means of survival. The 1990s witnessed a short lived legacy of mining ownership. This excluded local participation in most the large scale mining save for governments own ill-fated interventions through its parastatal, the Zimbabwe Mining Development Cooperation (ZMDC).¹⁰¹

2.4.6 The year 2000 Referendum and Policy

In the year 2000, the government drafted what can be considered the country's first independently and indigenously drafted Constitution. This Draft Constitution did contain essential provisions such as the provisions contained in the current one like a respect for human rights. The majority of the people that voted 'No' against this constitution were disgruntled by the economic woes that Zimbabwe was challenged with

2.5 Conclusion

From a conceptual analysis one can see that there are various types of communities and different types of participation. This provides an understanding of where Zimbabwe has come from. It is imperative for the nation to avoid manipulative participation because of the hidden agendas behind it. From the above discussion it is clear that community participation in the extractive sector is not a new phenomenon, but it has changed over the years generally to the detriment of the communities. Before the advent of colonialism, communities took part in the extractive activities to trade with the Portuguese. Colonialism resulted in people working merely as labourers in the mines. Have shown that colonialism cannot solely be blamed for the lack of community participation currently prevalent in Zimbabwe.

¹⁰¹ Saunders 2008 *African Sociological Review* 75.

CHAPTER 3

LEGISLATIVE AND POLICY FRAMEWORK ON EXTRACTIVE ACTIVITIES

3.1 Introduction

This chapter shall look at the Zimbabwean legislative framework regulating extractive activities and reviews its impact on the communities and indigenisation policy. Because of colonial imbalances, the indigenous people of Zimbabwe were marginalised and remain so to the present day such will be discussed as the chapter proceeds. The only people who could penetrate the mining sector and benefit from it were Zimbabwe's educated elite and foreign investors who continued to mine with the usual payment of taxes to the state, while the same time sending their profits to their respective countries.

Theoretically legislation such as the, IEEA can be said to find its origins in Affirmative Action, which originated in the United States of America. It is regarded as positive discrimination which empowers members of a previously disadvantaged people to achieve living standards similar to those of the mainstream. In the case of Zimbabwe, and its approach to community participation in the extractive activities, this is an unrealistic goal because of the socio-political reality which makes it difficult to apply this approach. Politicians secretly have a large stake in the 51% quota of IEEA, meant to be achieved by the state in industries and companies which includes the mining sector ceding their shares to the local communities.

3.2 Constitutional Approach to Community Participation

3.2.1 Good Governance and Accountability

The Constitution, advocates issues such as the dignity of its people.¹⁰² A united community can act as a countervailing force to corporations in specific areas.¹⁰³ The community can exercise its Constitutional right in ensuring that it is actively involved in the negotiating process of investors coming to mine in its area, as has been happening in other jurisdictions.

¹⁰² See section 51 of the Constitution.

¹⁰³ Williams 2006 *Policy Studies* 205.

One of the pillars of the new Constitution is government accountability. Government accountability is a process whereby the government accounts for its policies. The preamble of the Constitution clearly and categorically states that there is a need to entrench democracy, the rule of law and good, open and accountable governance.¹⁰⁴ Section 3(2) states that the principles of good governance which bind all institutions of the state and government at all levels include in section 3(2) (f) openness, justice, accountability and responsiveness on the part of all institutions of government.¹⁰⁵ By engaging the community in extraction activities, the government shows that it is acting in a transparent manner.

Section 9 (1) talks of good governance, whereby the state should adopt and implement policies and legislation to develop competence, accountability, openness, personal integrity and financial probity in Government at all levels and in all institutions.¹⁰⁶ In the case of community participation, the state has a duty to ensure that such legislation represents the interests of the communities and fosters participation from the public.

The new Constitution does not fully address the issue with regard to setting a standard in ensuring that local communities are protected from mining developments that cannot sustain them.¹⁰⁷ Furthermore, it has failed in ensuring that there is a clause for the enforcement of community rights that guarantees the right to access to justice and judicial redress for local communities.¹⁰⁸

There is a difference between having rights and enjoying rights. Within the legal framework for community participation, there is a need for people to enjoy those rights. In order to find out whether people are enjoying those rights, there is a need to carry out Human Rights Impact Assessment (HRIA).¹⁰⁹ A HRIA shows the commitment made by the state and the actual ability of individuals or groups and

¹⁰⁴ Preamble of the Constitution of Zimbabwe which is set to be put on referendum in due course so that the people of Zimbabwe can vote for it.

¹⁰⁵ See Section 3 (2) (f) of the Constitution of Zimbabwe.

¹⁰⁶ See Section 9 (1) of the Constitution of Zimbabwe.

¹⁰⁷ Murombo 2010 *SAPL* 579.

¹⁰⁸ Murombo 2010 *SAPL* 579.

¹⁰⁹ Human Rights Impact Resource Centre Date Unknown An Introduction to Human Rights Impact Assessment <http://www.humanrightsimpact.org>.

communities to enjoy these rights.¹¹⁰ Gildenhuys submits that a community deserves the right to free prior consultation when a policy is passed. The right to free and prior consent can also be described as a moral right, because it is crucial to planning and implementation of policies that in the end bring benefit to the communities.¹¹¹ Governments normally use HRIA to evaluate their strategy and to implement a rights-based approach.¹¹² In the end, this approach is beneficial to the government, in the sense that it avoids legal battles with affected communities who feel that they have been forcibly removed from their land. This creates the standard on community rights in mining.¹¹³ It is also important to note that HRIA in the end makes the government accountable to the respective communities.¹¹⁴ Through assessments done it is possible to evaluate the level of the promotion of human rights in a community.

3.2.2 Communication

The Constitution in section 61 (1) states that everyone has the right to freedom of the press and other media communication.¹¹⁵ Section 61 (2) states that everyone including the press and other media communication has the right of access to (a) any information held by all institutions and agencies of the state and government at all levels insofar as the information is required for the exercise or protection of a right.¹¹⁶ From a mining perspective, in order to avoid the difficulties relating to acculturation processes and power relationships, and to build good relationships with surrounding communities, the mine needs to establish a communication department with a division set aside for relations with the community.¹¹⁷ This fosters community participation as the mining company directly works hand in hand with the community. It is important for the company to understand the hierarchy within the community

¹¹⁰ Human Rights Impact Resource Centre Date Unknown An Introduction to Human Rights Impact Assessment 1 <http://www.humanrightsimpact.org>

¹¹¹ Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 476.

¹¹² Human Rights Impact Resource Centre Date Unknown An Introduction to Human Rights Impact Assessment <http://www.humanrightsimpact.org>.

¹¹³ Masara 2011 <http://www.minesandcommunities.org/article.php?a=11030&l=>

¹¹⁴ Human Rights Impact Resource Centre Date Unknown <http://www.humanrightsimpact.org>

¹¹⁵ See section 61 (1) of the Constitution of Zimbabwe.

¹¹⁶ See section 61(2) of the Constitution of Zimbabwe.

¹¹⁷ Cronje and Chenga Date Unknown <http://www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf> 11.

structures when communicating to prevent offending people.¹¹⁸ The first people in mind would be the traditional leaders such as the Kraal Heads, Head Men and the Chief of the area. This will create trust between the mine and the community. An example of bad communication would happen if the company communicated only with the Government. This is the case in Marange where the Government decided not to communicate with the people before it carried out extractive activities.

Date-Bah submits that it is imperative that there must be adequate public and Constitutional court structures to ensure that ordinary people enjoy the benefits of exploitation of natural resources.¹¹⁹ The Constitutional Court in Zimbabwe is formed within the powers of Section 166 of the constitution.¹²⁰ To date since the implementation of the Constitution there have been no cases brought before it in regard to violation of community rights.

3.2.3 Community Interests, a Socio Economic Approach

Community participation is supposed to allow ordinary people to gain access to vital information in regard to production expenditure and other relevant issues transpiring in the mine. Williams submits that this exposure of information is meant to generate a radical consciousness amongst ordinary people as to how extractive activities are taking place within their regions.¹²¹ A sustainable community is one that can realise a net benefit from the introduction of mining that lasts through the closure of the mine and beyond. This would mean that community adheres to two fundamental pre-requisites needed to be met for a sustainable society, namely social equity and economic vitality.¹²²

However, mining companies have a fair amount of challenges in trying to engage in an equitable partnership with the associated community that will leave a lasting legacy of well being and sustainability of the community.¹²³

¹¹⁸ Cronje and Chenga Date Unknown "Sustainable Development in the South African Mining Sector" <http://www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf> 11

¹¹⁹ Date-Bah 1998 *Journal for Energy and Natural Resources* 395.

¹²⁰ See section 166 of the Constitution.

¹²¹ Williams 2006 *Policy Studies Journal* 204.

¹²² Veiga, Scoble and McAllister 2001 *Natural Resources Forum* 191.

¹²³ Veiga, Scoble and MacAllister 2001 *Natural Resources Forum* 191.

Communities are encouraged to engage in social mobilisation if they feel their rights are not being represented. They must ensure that socio-economic development programmes are implemented from the proceeds of the extractive activities taking place in their community. Mining companies can make a meaningful contribution by ensuring that communities are given adequate employment and other services such as accommodation, health and development of infrastructure. This means that socio economic rights are realised.

The state has ratified covenants such as the ICESCR and it is important that it adheres to the principles of the Covenant by achieving the principles of the right to Socio Economic Rights and using revenue made obtained from the mines to ensure that the goals contained therein are met. It is the duty of Human Rights Commission (HRC) established in terms of section 242 of the Constitution to ensure that these rights are met.¹²⁴ This commission needs get regular funding from the government for it to act in its full capacity.

In terms of submissions made to the Human Rights Commission Act (HRCA) which has been recently passed as an Act¹²⁵, a framework must be drafted to enable the HRC to adopt a complaints procedure based on the principles of accessibility, transparency, accountability and efficiency. In addition to this the commission must adopt a complaints procedure that is fair and just, with the status of the procedures and reasons for decisions to be given to all. Most importantly, the commission must have the capacity to encourage ratification of regional and international human rights instruments and ensure that domestic laws are in line with treaties and conventions that Zimbabwe has ratified.¹²⁶

The establishment of the HRC has been welcomed by the international community. This can be seen by the positive comments from member countries in the Human Rights Council.¹²⁷ The member states of the United Nations Human Rights Council (UNHRC) insist that the Zimbabwe Human Rights Commission becomes operational,

¹²⁴ See section 242 of the Constitution.

¹²⁵ On the 15 of October 2012 the Human Rights Act was gazetted.

¹²⁶ Zimbabwe Human Rights NGO Forum, Submissions on the Human Rights Commission Bill 2011 3.

¹²⁷ 'Report of the Working Group on the Universal Periodic Review: Zimbabwe' Human Rights Council Nineteenth Session Agenda Item 6 Universal Periodic Review 7.

since its establishment and launch as soon as possible and its operations would be in line with the Paris Principles.¹²⁸

Presently the Human Rights Commission is not operating effectively because it is not getting adequate funding from the government. This hampers the commission from carrying out its mandate of empowering communities. As a result, the communities where minerals are found are not treated fairly. The other major cause for general lack of community involvement can be mainly attributed to the historical treatment of community participation in the colonial era and indeed in independent Zimbabwe when we look at what has transpired in Marange.

Section 242 of the Constitution recognises the creation of the HRC as an independent institution that supports democracy.¹²⁹ Section 243 of the Constitution states that independent institutions supporting democracy such as the HRC should:

- Support and entrench human rights and democracy;
- Protect the sovereignty and interests of the people;
- Promote Constitutionalism;
- Promote transparency and accountability in public institutions;
- Secure the observance by all State institutions and agencies and government controlled entities of democratic values and principles ;and
- Ensure injustices are remedied.¹³⁰

The Constitution has tried to address some of the injustices incurred in the mining sector by the state and the multinational companies who invest in the mining industry in Zimbabwe. In most instances, the communities are deeply rural, such as the Marange Community. Running water, roads, and electricity are issues that need to be addressed. The government has passed the responsibility to the Rural District Councils (RDCs) to address this. These RDCs are failing to grapple with the

¹²⁸ 'Report of the Working Group on the Universal Periodic Review: Zimbabwe' Human Rights Council Nineteenth Session Agenda Item 6 Universal Periodic Review 14.

¹²⁹ Section 243 of the Constitution of Zimbabwe.

¹³⁰ Section 243 of the Constitution of Zimbabwe.

challenge of implementing development because they do not receive adequate funds from the government.

3.3 Indigenisation Economic and Empowerment Act 14:33 of 2007

3.3.1 Announcement to Indigenise the Extractive Activities Sector

In March 2011, the Minister of Mines made an announcement to indigenise industries in Zimbabwe including the mining sector. Section) 2(1)(b) of IEEA describes an indigenous Zimbabwean as any person who, before 18 April 1980 was disadvantaged by unfair discrimination on the grounds of his or her race and any descendant of such persons. This includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest.¹³¹ Murombo submits that the definition of an indigenous Zimbabwean will remain controversial given the lapse of time since 1980, the rights of white Africans born and raised in the country and the dispersion of most of the indigenous middle class across the globe.¹³² The Minister's words were based on the fact that foreign companies have plundered the minerals that Zimbabwe has at the expense of the local people.¹³³ The statement by the Minister was met with massive resistance from companies that struggling to cope with the implementation of these laws. Most mining communities are trapped in abject poverty despite the fact that mineral wealth is mined in the areas in which they reside. The minister is faced with a daunting task as to how to distribute the mineral wealth in a manner that benefits the relevant communities.

Section 20(1) of the Interpretation Act states that every Act shall be published in or as a supplement to the Gazette and shall come into operation on the date of the publication.¹³⁴

In the case of *Hayes v Baldachin & Others*¹³⁵ Fieldsend CJ stated that:

It is a recognised principle in Zimbabwe that no law becomes effective until it has

¹³¹ Section 2(1)(b) of the IEEA Act 14 of 2007.

¹³² Murombo 2010 SAPL 572.

¹³³ Mutenyo and Routman
2011 http://www.brookings.edu/opinions/2011/0321_zimbabwe_mining_mutenyo.aspx.

¹³⁴ Section 20(1) of the Interpretation Act 236 of 1980.

¹³⁵ *Hayes v Baldachin & Ors* (2) 1980 ZLR 422 at 427.

been published in the Gazette. But the general rule that before a law or any regulation or by-law having the force of law can become operative it must be duly promulgated, must be read subject to the qualifications that the word 'law' in the rule must not be given too wide a connotation and that the enabling enactment must be looked to in order to see whether the necessity for promulgation is or is not excluded.

This announcement most probably came out pressure by the Ministry of Mines to ensure that the IEEA came into force. Indigenous people in Zimbabwe constitute approximately 99.5% of the Zimbabwean population. In the view of the Government Indigenous peoples interests should be prioritised over the few foreigners who are allegedly controlling the majority of the countries resources. While this is a noble ideal, the IEEA was promulgated prematurely and fails to balance the interests of investors in the extractive industries against those of communities where the extractive activities are taking place. It is abundantly clear that the IEEA has not received much public support as result of lack of funding.

The National Indigenisation and Economic Empowerment Board (NIEEB) is also supposed to receive funding from donors and the corporate world to carry out its mandate.¹³⁶ Retired army generals make up the top staff of NIEEB, and some people feel that this is fertile ground for embezzlement of funds mobilised by the NIEEB and will hamper efforts to address transparency and accountability deficits.¹³⁷ The Mandate of the NIEEB is to advise the Minister of Youth Development, Indigenisation and Empowerment, on the best way to implement IEEA and also to set up a National and Economic Empowerment Fund, and oversee compliance with the IEEA Charter.¹³⁸

The Constitution contains a clause which states that everyone has a right not to be deprived from property. Section 71 (3) which states, that:

no one can be compulsorily deprived of their property except where the following conditions are satisfied (a) (i) in the interests of defence,

¹³⁶ Sunday Mail Reporter 2012 *The Sunday Mail* 6.

¹³⁷ Mambo 2010 *The Standard* 4.

¹³⁸ See section 8 of the IEEA.

public safety, public order, public morality, public health, safety, public, order, public morality, public health or town and country planning: or (ii) in order to develop or use that or other property for a purpose beneficial to the community.¹³⁹ Furthermore subsection (c) the law requires the acquiring authority to: (i) to give reasonable notice to anyone whose interest will be affected by such acquisition (ii) to pay a fair price and adequate acquisition before acquiring the property (iii) if the acquisition is contested to apply to a competent court before acquiring the property.¹⁴⁰

The courts are mandated to strike down any Act of Parliament, Presidential or Ministerial Regulation which transgresses these Constitutional provisions. Before the year 2000, the Supreme Court of Zimbabwe was able to act restoratively to declare null and void regulations of anybody deemed to be in breach of the Constitutional Provisions.¹⁴¹ However the Judiciary was often defied by the government when it passed decisions contrary to government's land reform. Now that a new Constitution has been passed it is yet to be seen whether the legislators and the judiciary keep themselves abreast of what is happening in other jurisdictions in terms of how communities can best benefit from the resources around them. In addition it is to be seen whether the separation of powers of the three organs of state will balance their power in fostering community participation in the extractive activities.

The IEEA shows that if too much power is given to the state it makes the investment environment uncertain. The concept of ceding 51% shares to locals is very unclear. Matters such as compensation should be clearly addressed and decided so that the would be investor can safely invest without fear knowing that should the state decide to expropriate that property for public purposes or for investment, adequate compensation will be given. In spite of its objective of addressing the imbalances of the past, the IEEA has had a very low positive impact in the extractive activities sector for the benefit of local communities.

¹³⁹ Section 71 (3) of the Zimbabwe Constitution.

¹⁴⁰ Section 71 (3) (c) of the Zimbabwe Constitution.

¹⁴¹ Gubbay 1997 *Human rights Quarterly* 223.

3.3.2 Sustainability in Indigenisation

Indigenisation is supposed to be an important tool in improving the livelihoods of people and cutting down on poverty. Indigenisation policies that are implemented successfully give people and the communities they originate from empowerment and sustainability. People are given the platform to participate actively in the economic affairs of the nation.¹⁴² An Indigenisation policy needs to be designed in such a way that it is sustainable and balances the interests of stakeholders such as the mining companies and local communities. Legislation such as the IEEA emphasises the interests of the community to the detriment of mining companies. Where the state monopolises a sector this does not work well for such entities. Investors prioritise areas where the business environment is politically and economically stable. It is only when the state can give investors the confidence that they will not interfere in the affairs of the investors that revenue can flow into the state's coffers. Current conditions such as the compulsory 51% policy do not inspire confidence because the policy looks at enriching individuals and not indigenous communities.

The state is in desperate need of revenue. One way of obtaining revenue is through the use of Tax collection. A depleted base for collecting revenue will inevitably impact on the national budget and prevent it from supplying resources to critical ministries such as the Ministry of Local Government and Public Works. As a consequence most rural communities lack proper basic infrastructure such as decent roads, readily available running water and electricity.

History has shown that state monopoly over entities has never gone down well. Two struggling entities that come to mind are National Railways of Zimbabwe and Air Zimbabwe.¹⁴³

These two state entities are on the brink of collapse because of weak governance and are failing to provide the nation with adequate transport services. Indirectly this form of indigenisation is for the benefit of the public but it has not worked well. Indigenisation in the mining sector from a legal perspective has also come at the

¹⁴² Makwiramiti2011 http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=674:in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe&catid=87:african-finance-a-economy&Itemid=294.

¹⁴³ Gono, 2004 <http://www.ansole.org/download/WorkshopZimbabwe-2012.pdf> See also Zhou 2012 *International Journal of Humanities and Social Science* 216.

wrong time, since, legislation that has not taken into consideration the basic principles of good governance which affect the social and economic life of the local communities.¹⁴⁴

In its attempts to redress the racial inequities of past colonial rule.¹⁴⁵ The Minister of Youth Development, Indigenisation and Empowerment stated in April 2012 that all mining companies that have not ceded 51% of shares to local indigenous people will have their assets taken over by the government.¹⁴⁶ Since questions have been raised on the sustainability of indigenisation mining companies are likely to pull out of the mining sector because they are interested in securing a stable environment and legal fiscal regime for their investments. If they do not have confidence, this could be a contributing factor to their withdrawal from the Zimbabwean extractive activities sector.¹⁴⁷

The IEEA makes it impossible for the mining investor to recover investments because they, like other companies in Zimbabwe, have experienced serious economic decline after the implementation of programs such as the Economic Structural Adjustment Programme (ESAP) in the early 1990s.

A major setback to indigenisation is that the IEEA is politicised in a way that community participation initiatives are heavily dominated by one party in the pursuit of populism among the poor rural communities.¹⁴⁸ The general public view, which includes most of the communities where minerals are found, is that the primary purpose of the IEEA is to gain popularity by certain political parties in the previous election campaigns through promises of undeliverable enrichment.¹⁴⁹ The IEEA is also seen as a means of achieving disempowerment of all those whose influence is thought to be used in support of politicians who are against Zimbabwe African

¹⁴⁴ Anon 2012 <http://www.globaldialogue.info/linkagesMPF-AMV>. See also Williams 2007-2008 *Georgetown Journal for International Law* 694.

¹⁴⁵ Banya *Business day* 9.

¹⁴⁶ See Masenyama *Herald* 13 August 2013 6.

¹⁴⁷ Williams 2007-2008 *Journal for International Law* 694.

¹⁴⁸ Nyamunda 2013 <http://aehworkshop.files.wordpress.com/2013/10/sedco-article-revised.pdf>.

¹⁴⁹ Anon 2012 http://www.economic.co.zw/index.php?option=com_content&view=article&id=1190:the-socio-economic-impact-of-indigenisation-&catid=125:public-sector&Itemid=566.

National Union Patriotic Front (ZANU PF) policies.¹⁵⁰ Ownership rights by communities in terms of the IEEA are limited.

Murombo critiques the IEEA by asking several questions as to what happens to the wealth generated by the mining activities. To what extent do local communities living in mineral rich areas share equitably in the benefits of mining? Since its inception indigenisation has given the expected equitability. The current government has admitted that IEEA has not had the expected outcomes as anticipated. Does the legal framework promote the interests of local communities and concomitantly ensure a mining industry that is socially, economically and environmentally sustainable?¹⁵¹ The answer is that mining output has dropped since the inception of IEEA.

Some commentators such as Saunders argue that the Indigenisation campaign is a high risk. This is because it has fuelled an intra-elite conflict, clouded the transparency of agreements and caused negative public debate.¹⁵² Unlike other jurisdictions offering the same policy such as the Broad Based Black Economic Empowerment (BBBEE) in South Africa, the IEEA faces many challenges despite being in its fifth year of implementation at the time of writing this dissertation. The other reason is the motives and the beneficiaries of this scheme. From a perspective of community participation, the IEEA has yet to show signs of success. Only in time will we be able to see whether this legislation has been successful. Judging by the history the land reform brought catastrophic results to the agricultural sector, experts are inevitably sceptical about the IEEA because it is felt that catastrophic results will fall upon profit and production in the mining sector. To gauge if the IEEA is producing the desired empowerment results, the best plan is to use performance score similar to what is happening with the Black Economic Empowerment (BBBEE) policy in South Africa. This would be useful as proof that the company has met the intention of IEEA.

3.3.3 Indigenisation Legislation perverted at Community Level

¹⁵⁰ Anon 2012 http://www.economic.co.zw/index.php?option=com_content&view=article&id=1190:the-socio-economic-impact-of-indigenisation-&catid=125:public-sector&Itemid=566.

¹⁵¹ Murombo 2010 *SAPL* 568.

¹⁵² Saunders 2008 *African Sociological Review* 75.

3.3.3.1 The Establishment and Disposal of 10% Equity to Community Share Ownership Trust

Section 14(b) of IEEA statutory instrument 21 of 2010¹⁵³ provides for the establishment of Community Share Ownership Trust (CSOT). Section 14(b) (1) defines community as the residents of a Rural District Council established in terms of the Rural District Council Act 22 of 2001. NIEEB requires that mining companies achieve indigenisation by disposing 10% shares to a Community Share Ownership Trust (CSOT). The objective of a CSOT is for the community in the district of a mining operation is to reap some of the benefits from the exploitation of the natural resources in the area where they reside.¹⁵⁴ In as much as a CSOT is meant to benefit the community some argue that companies have been forced with no alternative option into making such agreements. The IEEA makes it an emphasis for the compulsory acquisition of 51% shares by the government to distribute to the indigenous people.¹⁵⁵ The first CSOT was launched in Mhondoro, Ngezi and Zvimba communities where mining giant Zimplats entered into an agreement to cede 10% shares to the community in October 2011.

This was subsequently followed by the Tongogara Community Share Ownership Trust launched by Unki Mine in Tongogara, Mimosa Community Share Ownership Trust in Zivishavane launched by Mimosa Mine¹⁵⁶ and the latest being Blanket Mine which has launched a CSOT with the community. Blanket mine has pledged to donate to the community of Gwanda US\$1 000 000 (R10 000 000).¹⁵⁷ To this date the mine has not fulfilled its promise. The major challenge behind the CSOTs from a legislative perspective is for which constituencies will members of the legislature be

¹⁵³ Section 14(b) of IEEA Statutory Instrument 21 of 2010.

¹⁵⁴ Matyszak

2012 http://www.idasa.org/media/uploads/outputs/files/digging_up_the_truth_20_april_2012.pdf

¹⁵⁵ See page 42 of this Dissertation

¹⁵⁶ Anonymous 2012 <http://www.zbc.co.zw/news-categories/top-stories/19635-community-share-ownership-trusts-hailed.html> [date of use 06 September 2012]

¹⁵⁷ Esternuizen 2012 <http://www.miningweekly.com/article/caledonia-inks-two-more-indigenisation-deals-for-blanket-2012-05-24>

working? Will it be constituencies that voted for them or will they be compassionate to work for the newly assigned or the mineral rich constituencies?¹⁵⁸

Murombo submits that the problem with the Zimbabwean situation at present is the issue of community mapping.¹⁵⁹ Murombo further raises the question on who constitutes this group we call 'local community?',¹⁶⁰ because what is supposed to be a local community may in fact be a distant community such as the example of CSOT such as the Mhondoro Ngezi and Zvimba CSOT which were formed because of political influence, as Zvimba is where the President of Zimbabwe comes from.¹⁶¹ Although Zvimba is in the same province as Mhondoro-Ngezi it is in fact miles away from Mhondoro-Ngezi and is an independent district on its own. Zvimba does not have a mine or a processing plant. So as it is part of the Ngezi and Zvimba CSOT this is likely to cause a strain on the resource benefits for the people in Mhondoro-Ngezi.

Some observers such as the Zimbabwe Environmental Law Association submit that CSOTs are a very good initiative and if transparently and properly handled and managed can result in benefits flowing to communities affected by mining operations.¹⁶² The question regarding these CSOTs is whether they are of any significance in stimulating community participation. Too much political infiltration will hinder community participation. The Zimbabwe Environmental Law Association observes that an obstacle to the success of the CSOTs is the way they have been infiltrated by corrupt elements who will sit on the board of trustees that are supposed

¹⁵⁸

Matonhodze

2012

http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1262:community-share-trusts--who-is-benefiting&catid=80:crisis-comment-on&Itemid=

¹⁵⁹ Murombo 2010 SAPL 573.

¹⁶⁰ Murombo 2010 SAPL 573.

¹⁶¹

Matonhodze

2012

http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1262:community-share-trusts--who-is-benefiting&catid=80:crisis-comment-on&Itemid=213

¹⁶² Anon 2011

<http://www.zela.org/rnp/docs/Update%20of%20Recent%20Developments%20in%20Zimbabwe%27s%20Extractive%20and%20Mining%20Sector.pdf>

to be for the benefit of communities.¹⁶³ The political elite may as in most cases benefit from these CSOTs at the expense of needy people.¹⁶⁴

Recently the Standard newspaper carried out a report on the abuse of CSOTs by certain political elements to gain votes from the rural population for the 2013 parliamentary and presidential elections.¹⁶⁵ Most mining companies have voluntarily given into the CSOTs to bolster their reputation and because failure to do so will mean that 51% of the company's shares will be summarily expropriated by the government to distribute to the indigenous people.¹⁶⁶ The CSOTs have been set up to ensure that normal operations carry on for the mining company. The success of a mining company is determined by the amount of carats, tonnes or kilograms it has produced of whatever is mined and companies do not want to be in position where they would have to compromise their mineral production over a threat of closure by the government. The government has recently terminated the mining contracts of 334 mining companies because these companies have allegedly acted in bad faith through speculative agreements that benefited these companies.¹⁶⁷

Government is at loggerheads with most companies over the issue of CSOTs. The likely outcome will result in most companies bowing down to government policy. Statutory Instrument 21 of IEEA entrenches the position of Government in the Mining sector through the ZMDC. History has shown that ZMDC has failed in managing the affairs of government entities before, such as the now defunct ZISCO steel in the late 1990's. ZMDC has been given a vote of no confidence by the general public because it has not shown any ability in running new mines acquired through the indigenisation programme. According to Herald newspaper those sitting in the CSOTs committees will be the chief executives of companies, lawyers, accountants and traditional chiefs.¹⁶⁸ However, chiefs have been recently accused of giving themselves hefty allowances for sitting in the CSOT committees. Recently the

¹⁶³ Anon 2011

<http://www.zela.org/rnp/docs/Update%20of%20Recent%20Developments%20in%20Zimbabwe%27s%20Extractive%20and%20Mining%20Sector.pdf>.

¹⁶⁴ Anon 2011

<http://www.zela.org/rnp/docs/Update%20of%20Recent%20Developments%20in%20Zimbabwe%27s%20Extractive%20and%20Mining%20Sector.pdf>.

¹⁶⁵ Mambo *The Standard* 4.

¹⁶⁶ See page 54 of this Dissertation

¹⁶⁷ Sunday Mail Reporter *Sunday Mail* 3.

¹⁶⁸ Muchetu *Sunday News* 6.

Standard newspaper also carried a report on the abuse of CSOTs by certain political elements to gain votes from the rural population in the next coming elections.¹⁶⁹

3.3.3.2 Mining Fee Structure

The current mining fee structure is not making the situation conducive for the participation of indigenous miners. Mining fees were gazetted in early February 2012 are said not be in line with the mining legislation. According to the Chamber of Mines, the fee structure is unworkable and set to push out the small-scale miner.¹⁷⁰ Conditions have been unfavourable over the last decade for miners to conduct mining activities so any policies that create additional challenges will stifle growth.

3.3.3.3 Comments from the Chamber of Mines

The Chamber of Mines in Zimbabwe has challenged the government to come up with a harmonised legislative framework that will ensure that communities benefit from extractive activities.¹⁷¹ The Chamber of mines has also proposed a minimum direct equity participation of 15% by local communities in the mining sector and not the 51% that has been imposed by the government.¹⁷² This is also meant to ensure that the communities would benefit without political pressure and other forces that will prevent them from enjoying the benefits of these minerals. Gapera states in order for communities to benefit from the mineral wealth there is need to create an environment which will attract capital into the industry.¹⁷³

It would be worthwhile to visit developed and developing countries that have a robust framework where communities benefit from extractive activities.¹⁷⁴ The Gapera also recommended at the start of the indigenisation policy that elite-focused deals must be substituted with performance guarantees involving corporate social responsibility to the local communities.¹⁷⁵ At least part of the stake in foreign owned companies targeted for takeover must be waived in exchange for social and public infrastructure

¹⁶⁹ Mambo 2012 *The Standard* 4.

¹⁷⁰ Reuters 2012 <http://www.minesandcommunities.org/article.php?a=11518&l=1>.

¹⁷¹ Gapare 2010 *Chamber of Mines Journal* 4.

¹⁷² Matsika 2010

<http://www.howwemadeitinafrica.com/a-closer-look-at-zimbabwes-mining-sector/3769/>.

¹⁷³ Gapare 2010 *Chamber of Mines Journal* 24.

¹⁷⁴ Gapare 2010 *Chamber of Mines Journal* 24.

¹⁷⁵ Saunders *Briefing Note* 11.

by the mining houses.¹⁷⁶ This is beneficial to the communities because they not only benefit directly from community empowerment initiatives but they also benefit in the long term. The major challenge behind this process is the omissions in the existing Minerals Act leading to prolonged deliberations and resulting in the perfect opportunity for some elements to act in a corrupt way.

3.4 Precious Stones Trade Act Chapter 21:06

The Precious Stones Trade Act Chapter 21:06(PSTA)¹⁷⁷ controls the possession of and dealing in precious stones. The Act prohibits any person from buying, selling, bartering, exchanging, giving, receiving or possessing precious stones unless such person is licensed or holds a permit.¹⁷⁸ A licensed dealer or permit holder can only be permitted to deal in precious stones with persons permitted by law to be in possession of precious stones.¹⁷⁹ It is difficult for people in the community to get such licenses, as the fees are very exorbitant. Prospecting fees stand at about US\$ 1 000 000 (R 10 000 000) whilst US\$ 5 000 000 (R50 000 000) is required to register a claim.

3.5 Mines and Minerals Act Chapter 21:05

This Act has a weakness of not accommodating the interests of the communities in the sense that where minerals are found on a piece of land, the right of the owner is cancelled. Once the mining claim has been pegged, all other Acts become void.¹⁸⁰ The process of claiming land that has been expropriated for mining purposes is quite complicated and can leave those communities where there are extractive activities at risk of having their right to land grossly violated. Section 180 (2 (a) of the Mines and Minerals Act (MMA) states that:

...the occupier of any land on which a registered mining location is situated may lodge with the mining commissioner, for examination by him and approval by the Board, a written scheme, together with three copies thereof, in regard to the cultivation by such occupier of the

¹⁷⁶ Saunders Briefing Note 11.

¹⁷⁷ Precious Stones Trade Act 1978.

¹⁷⁸ Human Rights Watch *Diamonds in the Rough* 17.

¹⁷⁹ Human Rights Watch *Diamonds in the Rough* 17.

¹⁸⁰ National Environmental Policy
<http://unfccc.int/resource/ccsites/zimbabwe/legislat/policy.htm>.

Date

Unknown.

*whole or any part of the surface of such location: Provided that (i) no such scheme shall provide for the cultivation of land for the purpose of planting or establishing orchards, tree plantations or other like permanent crops; (ii) where the occupier is not the owner of the land, no such scheme shall be lodged with the mining commissioner unless the owner has agreed to the scheme and his agreement has been endorsed on the scheme and signed by him.*¹⁸¹

Some commentators describe this piece of legislation as having nothing to do with sustainable mining for the benefit of communities. Zimbabwean law does not recognise the common law principle that the landowner owns everything below and above the land.¹⁸² However, in most cases, land is occupied by rural communities who do not have the capacity to defend their rights.

Section 30 describes the meaning of land under cultivation as:

*(a) land which has been cleared, or ploughed or prepared for the express purpose of growing (b) ploughed land on which farm crops are growing (c) ploughed land where farm crops have been reaped and (d) ploughed land from which farm crops have been reaped, for a period of three years from the date of completion of such reaping.*¹⁸³
No prospector of a mineral may prospect on land that is under cultivation or that has been prepared for cultivation. The prospector should wait for at least a period of three years before he can prospect for minerals on that land.

A contradicting situation is the relocation of the villagers in Marange in 2011 to pave way for the diamond operations. This relocation was done in contravention of the MMA. Such clauses mentioned above, are unfair and do not fit into the scope of good governance in terms of the New Economic Partnership for Africa's Development (NEPAD). Section 180 imposes terms and conditions on how to use

¹⁸¹ Section 180 (2)(a) of the Mines and Minerals Act Chapter 21:05 (here after referred to MMA).

¹⁸² Murombo 2010 SAPL 580. In most cases, land is occupied by rural communities who do not have the capacity to defend their rights.

¹⁸³ Section 30 of MMA.

the land. In addition, not many farmers are conversant with legislation. It also contradicts the government's objective land reform, which advocated for an increase in food production. The rights to mine minerals in Zimbabwe are vested in the Office of the President¹⁸⁴ and any acquisition of mining rights is subject to the approval of the President.¹⁸⁵

3.6 Communal Land Act of 1982

The Communal Land Act of 1982 (CLA) removed the authority to manage and allocate land from customary institutions and vested authority in elected local government institutions. This Act was created because it was believed that customary institutions collaborated with the former white minority government in order to undermine their authority and ensure the power transferred to the local government. Section 3 of CLA states that communal land shall be vested in the President, who shall then permit it to be occupied and used in concurrence with this piece of legislation.¹⁸⁶ Section 10 (1) gives the Minister of Local Government, Rural and Urban Development the power to set aside land but before doing so, in (3)(d) he must publish a statutory instrument ordering such persons occupying such land to depart permanently with all their property from the land concerned within such a reasonable period as the minister may specify.¹⁸⁷ CLA in section 10(7) further makes it an offence for anybody who resists departing from the land to be liable to a fine or imprisonment for one year or both.¹⁸⁸ This further raises the issue of forced evictions in Zimbabwe. The Court can convict a person who is unlawfully residing on such order and eject them from that land in terms section 16(2)(b) of CLA.¹⁸⁹ This Act is applicable the instant a mineral is found on the particular land. The community residing on the land has to leave the land on the basis that the mineral belongs to the state.

¹⁸⁴ See Section 2 of the Mines and Minerals Act chapter 21:05

¹⁸⁵ Nickerson 1994 *Boston College Third World Law Journal* 215.

¹⁸⁶ Section 3 of the Communal Land Act 13 of 2002 (here after referred to CLA).

¹⁸⁷ Section 10(1) and (3) (d) of the CLA.

¹⁸⁸ Section 10(7) of the CLA.

¹⁸⁹ Section 16(2) (b) of the CLA.

3.7 Traditional Leaders Act 22 of 2001

The Traditional Leaders Act 22 of 2001 (TLA) restored the local administration role of the Chiefs. TLA mentions the grass root organisation which is supposed to play a role in community participation in Part 4 of the Act by explaining what a village assembly is in section 14.¹⁹⁰ A village assembly is a group of elder's who sit with and advice the chief in council meetings. The Act goes on further to explain the roles and the function of the village assembly between sections 15-22.¹⁹¹ Murombo submits that the institution of traditional leadership has been weakened to the extent that traditional institutions have become political. For example it is not difficult to notice in section 5(1) (g) of the TLA that the chief has the responsibility of ensuring that communal land is allocated in accordance with part II and part III of CLA and to ensure that the requirements of any enactment in force for the use and occupation of communal or resettlement land are observed.¹⁹² In other words, chiefs are anchors of oppressive legislation because they can instruct that people in an area with minerals to move out without any form of prior consultation from the Government.

Traditional leaders should be the anchors of the communities in ensuring that the participation in extractive activities is recognised like in other jurisdictions. Traditional leadership in this sense is composed of Kraal Heads, Head Men and Chiefs. In South America, traditional leaders play a very important role in ensuring that where resources are found communities can benefit from these resources.¹⁹³ Gone is the era where traditional leadership was confined to customary and cultural activities. Nevertheless traditional leadership is now centralised with power being focussed on the traditional leaders and the subjects or people in that community are being sidelined from the activities of the traditional leaders. Traditional leaders have, therefore, not been effective in defending community interests.¹⁹⁴

In Zimbabwe there has been abuse and manipulation of traditional leaders by the government brushing aside socio economic issues in the case of mining activities.

¹⁹⁰ Section 14 of the Traditional Leaders Act 22 of 2001 (here after referred to as the TLA).

¹⁹¹ Section 15-22 of the TLA.

¹⁹² Section 5 (1) (g) of the TLA.

¹⁹³ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 287.

¹⁹⁴ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 287.

Traditional leaders are confined to customary and cultural activities. This can be used by current traditional leaders to justify the ancestral attachment of the displaced communities in Marange to pave the way for diamond operations.

One can see that the colonial government, before Zimbabwe attained its independence failed to destroy the institution of traditional leadership.¹⁹⁵ It is unfortunate that in the decade of political and economic turmoil after the year 2000 the ZANU PF government found the perfect opportunity to curry the favour of the traditional leaders to the extent that now they will not object to any government policy. The passing of IEEA passing was not objected to by the traditional leaders. The relocation of indigenous people in Marange to pave way for the Chinese company that was given the licence to mine there was not met with an outcry.

The Government has used cunning methods to silence the chiefs such as giving them cars, monthly allowances and other benefits under the guise that the chiefs have demanded these themselves¹⁹⁶ which are luxuries in villages. With all these benefits and sweeteners, the traditional leaders would never object to any policy of the state because of the fear of losing all of them. Nevertheless traditional leaders need to play a role that is vital to the development of people in the society. They need to be aware of and be able to work for their community's right to benefit from extractive activities that take place in their areas.

3.8 Rural Land Occupier (Protection from Eviction) Act 13 2001

The purpose of the Rural Land Occupier Act 13 of 2001(RLOA) is meant to protect certain occupiers of rural land from eviction, This Act was passed at the peak of the land reform exercise. Section 3 states the matter on the restraint of eviction of such people.¹⁹⁷ Section 6 states that RLOA does not bind the State in subsection 1 and in subsection 2(a) no person shall be a protected occupier of any land held or registered in the name of the State or (b) no person shall continue to be a protected occupier of land which has been subjected to an acquisition order, after the date on

¹⁹⁵ Keulder Traditional Leaders and Local Government in Africa 14.

¹⁹⁶ Staff Reporter "Chiefs told to return share scheme funds" <http://forum.newzimbabwe.com/index.php?/topic/60445-community-share-ownership-scheme-funds-abused-by-chiefs/>

¹⁹⁷ Section 3 of the Rural Land Occupier (Protection from Eviction) Act 13 2001. Hereafter referred to as RLOA.

which the title of the State to such land is registered in terms of section 10 of the Land Acquisition Act.¹⁹⁸ From what happened in Marange, it can be seen that these villagers were not protected in terms of the Act. This Act emphasises the point that state will not bind itself in offering protection to displaced villagers, especially where such displacement will benefit the state. The Act does not provide any clause for consultation with villagers who have to be relocated.

3.9 Civil Matters Act 14 of 1996

This Act, on a positive note, governs the enforcement of foreign judgments. Communities that have been aggrieved, such as the Chiadzwa community in Marange, can rely on this Act. Section 5 states that any person who has obtained foreign judgment may apply to the High Court for the enforcement of that judgment. For example, when local remedies have been exhausted and the community approaches the African Court for Human and Peoples Rights, they can achieve a judgment in their favour.¹⁹⁹ This Act means that such judgment is enforceable in terms of this Act. The Court, in terms of section 6, has to register such judgment if it is proved that external remedies sought by the applicant are given by courts that have jurisdiction.²⁰⁰

3.10 Observance of the Kimberley Process Certification Scheme standards

The Kimberley process is a rough diamond certification scheme that was established in 2003. A series of civil wars in countries such as Angola and Sierra Leone resulted in the formation of the Kimberley Process Certification Scheme (KPCS). Its main purpose is eradicating trade in conflict diamonds.²⁰¹ It is important for a country like Zimbabwe that does not have a comprehensive extractive legislation to pass legislation that ensures observance of the KPCS standards. Observance of KPCS standards means amongst other things adhering to human rights in the trade of diamonds.

¹⁹⁸ Section 6 of the RLOA.

¹⁹⁹ Section 5 of the Civil Matters Act 14 of 1996 (here after referred to as CMA). See also Chokuda 2009 SA Merc LJ 763.

²⁰⁰ Section 5 of the CMA. See also Chokuda 2009 SA Merc LJ 763.

²⁰¹ Smillie 2010 The Kimberley Process and its gaping holes
<http://www.minesandcommunities.org/article.php?a=11234&l=1>.

The KPCS standards include an auditable chain of custody, such that any rough diamonds being exported or imported can be traced back to the place they mined were mined or to the point of export. No diamonds should be imported into any Kimberley Process (KP) member state, unless such diamonds are from another KP state.²⁰² KP emphasises that Zimbabwe must trade only with KPCS member countries. The major challenge that Zimbabwe is currently facing is that it is at loggerheads with some of the KPCS member countries who accuse it of trading in conflict diamonds, because of the military activities and presence of the military in guarding the diamond-rich Marange area. KPCS standards are not being observed in the legislation for extractive activities. This includes the killings and harassment of villagers by police and militia to clear up the diamond fields in Marange.

It is imperative that the government of Zimbabwe adheres to the standards of the KPCS, because there have been success stories in former conflict-ridden countries such as Sierra Leone that adopted this scheme. For example, legal diamond exports before the adoption of KPCS were below US\$1 000 000 (R10 000 000) but after the adoption of KPCS diamond exports went up to US\$140 000 000 (R140 000 000 000).

3.11 Conclusion

From the above discussion, the legislative regimes, save for the Constitution do not comprehensively address the needs of communities in pronouncements for their own development. It can be seen that Zimbabwean legislation falls short of accommodating communities in the extractive activities sector. It is heavily politicised, with individuals from certain groups benefiting from the scheme. Community participation should become a philosophy and responsibility of the Government. Legislation should not be used to silence people in airing their views. There is a need for decentralisation that has not been fully addressed by the legislation and the new Constitution. Most of the pieces of legislation that have been discussed reinforce the fact that all resources are vested in the state. Advocacy groups such as the Zimbabwe Environmental Law Association (ZELA) have a role to play in ensuring that there is substantial representation and empowerment of the

²⁰² Smillie 2010 <http://www.minesandcommunities.org/article.php?a=11234&l=1>.

community where minerals are found.²⁰³ Constitutional rights have to be taken seriously in order to result in harmonised relations between the community and the government.²⁰⁴ This is supposed to take into account the concerns of the people.

²⁰³ Williams 2006 *Policy Studies Journal* 206.

²⁰⁴ Williams 2006 *Policy Studies Journal* 207.

CHAPTER 4

COMMUNITY PARTICIPATION AT VILLAGE LEVEL: CASE STUDY OF THE MARANGE COMMUNITY

4.1 Introduction

This chapter looks at the Marange community, and the challenge of implementing community participation initiatives amongst the Marange people. It emphasises that the judgments of the judiciary must not be politically influenced. It is imperative to note that the best model of ensuring that there is effective community participation is for the courts to pass well-reasoned decisions. This was not the case in the case of *Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others* (HC 6334/09). The courts have to ensure that there is an exercise of Supervisory Jurisdiction in order to ensure that the government carries out judicial orders handed down against it.

Community participation is a form of participatory democracy, in the sense that the rights of the communities cannot be denied. Government must ensure that this right is not subject to abuse. Evictions which are done under the guise of relocations must not be done forcibly and in military style, as this violates the communities' rights. These are rights that were hard won when Zimbabwe gained its independence in 1980.

4.2 Background of Extractive Activities in Marange

Marange is a village situated about 100km from Mutare, a city in Zimbabwe, the Provincial Capital of Manicaland. It is situated in the district of Chiadzwa and it is blessed with diamonds. The diamond belt in Marange covers an area of 60,000 Hectares.²⁰⁵ Marange village is in a semi-arid area, thus making the area unfavourable for commercial farming. Most of the people in Marange are peasant farmers and barely grow enough food for their subsistence. Very few villagers are able to make enough to harvest for commercial sale. Livestock ownership varies greatly between households, but in general, cattle and goat ownership is way below

²⁰⁵ Anon 2011 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf>.

the national average.²⁰⁶ The low levels of livestock are attributed to persistent droughts, with the rainfall pattern decreasing over the years because of global warming. With this background, it is imperative to involve the community in the entire mining process. This goes beyond employing them as labourers in the mines, and involves giving fair compensation to those families that were displaced to pave the way for full-scale mining. The precarious nature of the way the people of Marange survive is justification for the adoption of informal diamond mining as a livelihood strategy.²⁰⁷

In 2006, the Marange area was flooded with a number of Artisanal Miners who came from all over the country with the hope of getting a stake in diamond extraction. However, government intervened, under the pretext that it was quelling the disorderly situation by using the Zimbabwe Republic Police (ZRP). This was named Operation *Chikorokodza Chapera* (End of illegal extractive activities and dealing). The ZRP, in the two years in which it was tasked to end this, has failed to handle the situation.

The Government then unleashed its militia the Army in an operation called Operation *Hakudzokwi* (No Return). The aim was to get rid of the 30,000 illegal Artisanal Miners popularly known as *Makorokoza* or *Ochekeke* in the Chiadzwa district who were selling the diamonds to Lebanese traders.²⁰⁸ Some writers argue that the Government intervention was not meant to curb the illegal sale of diamonds by these artisanal miners, but rather to incorporate the mining regime dominated by elements of ZANU PF's security and political leadership.²⁰⁹ The discovery of alluvial diamonds coincided with the worsening political and economic crisis of 2006.²¹⁰ State security forces secretly managed the extraction and criminal smuggling of diamonds, which violently and irregularly displaced the local communities, the legal titleholders and

²⁰⁶ Gaidzanwa 1991 *Zambezia* 49.

²⁰⁷ Katsaura 2010 *Journal of Sustainable Development in Africa* 341.

²⁰⁸ Incidentally, the Lebanese moved to neighbouring Mozambique when the situation became unbearable.

²⁰⁹ Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 4.

²¹⁰ Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 1. See also Katsaura 2010 *Journal of Sustainable Development in Africa* 342. The writer states that the police presence fuelled the conflicts in the diamond fields which became a series of fights between them and the artisanal miners. The state then decided to unleash militia in the pretext for beefing up security. In reality, the writer says it was an undercover move to carry out activities for the benefit of the militia.

informal miners.²¹¹ There are allegations that the soldiers tasked to guard the area against expelled artisanal miners and forced some of them to pan for diamonds. This is against the International Labour Organisation laws, which state that nobody should be subjected to forced labour.²¹² The state then decided to enter into a joint venture with Grandwell Holdings and Core Mining and Minerals Limited to form Mbada and Canadile respectively, two companies that are mining diamonds in Marange.²¹³

The controversy about this joint venture is that there was no public tender held to form a joint venture with the Ministry of Mines and Mining development.²¹⁴ It is argued that the Minister of Mines and Mining Development secretly and unilaterally approved the concessions between the two companies.²¹⁵ This controversy is a result of the wrangle over the Marange Diamonds by many parties such as the original legal titleholder to the Chiadzwa Claim, African Consolidated Resources (ACR) a British registered company led by mostly white Zimbabweans, state structures such as the Reserve Bank of Zimbabwe (RBZ), ZMDC, and not least the impoverished Chiadzwa community in Marange.²¹⁶



4.2.1 Blood Diamonds in Marange

With all the interests that have been circulating around Marange, its diamonds have been alleged to be blood diamonds. It is believed that the State's approach in bullying its way into the Marange diamond fields was meant to finance the Army. An airstrip was built when diamonds were discovered next to the Marange diamond fields and analysts believe that this airstrip is meant to fly in armaments in exchange for the diamonds extracted from Marange.²¹⁷ A report by Human rights Watch 2009 indicates that the army massacred 200 artisanal miners and enlisted conscripted

²¹¹ Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 1.

²¹² Human Rights Watch *Diamonds in the Rough* 39. See also Article 1,2 and 14 of the Convention Concerning Forced or Compulsory Labour.

²¹³ Shamiso (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011).

²¹⁴ Anonymous 2010 <http://www.financialgazette.co.zw/top-stories/10517-diamond-secrets-revealed.html>.

²¹⁵ Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 1 12.

²¹⁶ Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" 14.

²¹⁷ Anon 2011 3<http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf> 26.

labourers.²¹⁸ According to a report by Partnership Africa, the police were able to drive the Artisanal Miners into an ambush using a helicopter and teargas.²¹⁹ Some of the artisanal miners were the villagers of Marange.

As time went on, the police routinely and arbitrarily arrested members of the local community. This was allegedly on suspicion that these members of the community were dealing in diamonds without proper documents such as prospecting licences.²²⁰ To date no one has been held responsible nor came forward and made a public apology for the death of the 200 Artisanal Miners. This means for these diamonds to be mined in many instances the civilians fell victims to the militia and its interests. Because of these events, commentators argue that Zimbabwe is not able to manage its mining industry for the benefit of the communities particularly having regard to the events that took place in Marange.²²¹

4.2.2 Scheme of Blood Diamonds

Commentators describe the diamonds mined in Marange as Conflict Diamonds. This is because of the manner in which the state conducted itself in taking over the Marange diamond area. Between 2006 and 2009 there was the emergence of criminalised networks spanning political, security and business elites.²²² This has come under harsh spotlight from the international community that believes these diamonds are conflict diamonds.²²³ The International community has further accused the government of profiteering from joint ventures with companies that have questionable human rights records with no benefits going to the people of Chiadzwa in Marange.

The government has also been accused of smuggling diamonds to supply unauthorised illegal markets in the Far East. The Kimberley Process Certification

²¹⁸ Hough 2011 <http://www.minesandcommunities.org/article.php?a=11034&l=1>.

²¹⁹ Smillie 2009

http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf.

²²⁰ *Human Rights Watch* Diamonds in the Rough 28.

²²¹ Smillie 2009

http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf.

²²² Anon 2011 3 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf> 26

²²³ Hough 2011 <http://www.minesandcommunities.org/article.php?a=11034&l=1>.

Scheme, (KPCS)²²⁴ decided to impose a ban on the sale of Zimbabwe's diamonds in November 2009 under rules to screen out conflict gems. However, on the 11th August 2010 this ban was lifted.²²⁵ The lifting of this ban saw a limited sale of 900 000 carats of diamonds worth \$72 000 000 (R720 000 000).²²⁶ This is barely enough for the government to plough what has been made from the sale of diamonds back to the community.

The Marange people have to walk long distances to get transport because the government has secured the diamond area preventing any civilians or modes of transport from passing through. This violates section 22 of the Constitution which protects the freedom of movement.²²⁷

Some sources say that the presence of the military in these areas is meant to ensure that the Zimbabwean Defence Force (ZDF) is able to raise enough capital to acquire new equipment and pay off their debts because they are not getting enough money from the treasury.²²⁸ According to Zimbabwean constitutional law expert Professor Lovemore Madhuku, the involvement of the army in the extractive activities, is very unusual and is meant to facilitate corruption. Madhuku further states that if military personnel want to be involved in the extractive activities process they should do so in their private capacity like everyone else and not do so as an entire institution.²²⁹

4.3 Strategies of remaining in power

The crucial ministries that influence community participation in extractive activities are clouded by politics and there is minimal policy implementation. As previously mentioned the Ministry of Mines and Mining Development and the Ministry of Youth Development, Indigenisation and Empowerment are pushing for the 51% equity ownership. Headlines in the state media constantly praise the efforts of the two ministries in ensuring that the 51% equity ownership is met but currently means little

²²⁴ Kimberley Process Certification Scheme (KPCS) is method by which consumers of all levels could know the origin of their diamonds. The scheme only certifying those harvested from legal, government run mines. See Shannon 2011 *Pepperdine Dispute Resolution Law Journal* 208.

²²⁵ Matsika 2010

<http://www.howwemadeitinafrica.com/a-closer-look-at-zimbabwes-mining-sector/3769/>.

²²⁶ Shannon 2011 *Pepperdine Dispute Resolution Law Journal* 223.

²²⁷ Section 2 of the Constitution of Zimbabwe.

²²⁸ Gagare *The Independent* 3.

²²⁹ Gagare *The Independent* 3.

to the communities since their participation is minimal.²³⁰ This tends to be rather biased as this does not fit into the real spectrum that will enhance community participation in the extractive Industries. Military presence leads to wide spread allegations that extractive revenues have been used to fund the purchase of artillery for the military.²³¹

A traditional mining tenure system in which the community is the owner of the land where the minerals are found might work. This, however, has its own challenges and would most probably result in an influx of artisanal miners and be detrimental to the environment.

4.4 Community Benefit Agreements

A Community benefit agreement is an agreement that is legally enforceable whereby the company or organisation undertaking any developments in the community agrees to, specific outcomes decided by the impacted community, and the community groups publicly support the development.²³² Such agreements make interaction with the community clear.²³³ This must apply to all communities in Zimbabwe that are surrounded by mineral resources. An active dialogue is very important to ensure that communities benefit from their resources.

This reduces district and provincial disparities and gives the community a feeling of ownership of the minerals around them. Before the government, through its militia, decided to take over the Marange Diamond fields most of the people in the community were engaged in artisanal mining because the discovery of diamonds attracted people from all over the nation. Artisanal miners generally have limited rights to the land as in any instance they have not registered the mining claim.²³⁴ This is how the state managed to find it easy to evict these people on the pretext that this was for the benefit of the state.

The state has a responsibility to ensure that it effectively implements and enforces the constitutional, legislative and regulatory provisions of their internal law. This

²³⁰ Zindoga 2013 <http://www.herald.co.zw/indigenisation-when-the-messenger-matters/>.

²³¹ Al Faruque 2006 *Journal for Energy and Natural Resources* 67.

²³² Alliance for Metropolitan Stability 2001 <http://www.metrostability.org/efiles/CBAREPORT.pdf>.

²³³ Cavaye 2002 <http://www.communitydevelopment.com.au/Documents/The%20Role%20of%20Government%20in%20Community%20Capacity%20Building.pdf>.

²³⁴ Anon 2012 http://commdev.org/section/projects/asm_drc.

fosters greater community participation.²³⁵ However, communities have lost their land to the various private economic interests of either firms or individual invaders and the state is using its military to mark its presence over the control of extractive activities in the traditional areas.²³⁶ The lack of payment of royalties can produce conditions of extreme poverty amongst the communities where such minerals are located.²³⁷

The state violates the communities' access to socio economic rights when it prevents the communities from using and enjoying their natural resources such as the minerals found in those areas. The state has taken over the Marange diamond fields as evidenced by the use of the military to guard these areas. It is imperative that those communities are given an adequate stake in those diamonds.

Extractive activities are taking place amongst communities that have a unique relationship with the land that they are in possession of. Taking it away in the guise that national interests are being pursued is not an ideal situation because this results in win-lose situation.

The MMA and IEEA do not provide make provisions for indigenous peoples to have permanent use of and enjoyment of their ancestral territory. This leads to serious manipulation and abuse of the communities. The state can evict people any time with the excuse of prospecting for minerals in those particular areas.²³⁸ Communities right across Zimbabwe lack title to their land. Currently companies that have been carrying out extractive activities in Zimbabwe have been operating in the country long before Zimbabwe attained its independence. The state has forced these companies to comply with IEEA. This creates a tug of war situation where the owner either loses the title to the mine or partially loses the title to mine by ceding shares without adequate compensation from the State. This is practically no different to what transpired during the land reform exercise of the year 2000 and the year 2002.

²³⁵ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 287.

²³⁶ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 289.

²³⁷ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 300.

²³⁸ Inter-American Commission on Human Rights Indigenous and Tribal Peoples 2010-2012 *American Indian Law Review* 320.

4.5 Resettlement of Communities

Mining communities, as in the case of the Marange people, have been compelled to vacate their land where the land has been acquired for mining. This creates conflict between the mining company and the community. Challenges arise in the evaluation of the properties and the rate negotiations. This also leads to loss of social ties, psychological problems and a disturbance in their way of life.²³⁹

4.6 Disturbance of Sacred Places

In any typical African rural community, there are ancestral places such as shrines, cemeteries and sacred places that connect the inhabitants culturally and spiritually. Relocation of affected communities is as good as taking away their identity because such communities are attached to those monuments.²⁴⁰ In most instances, the relocation of communities from their traditional lands results in these ancestral places being neglected. It is important for the state to ensure there is a prevention of the violation of fundamental human rights that ensue when communities are evicted to make way for mining operations. Removing people from their sacred places is ignoring the sacred tenets that prevail, whereby the dead are deemed part of the living.²⁴¹ It is important before a mining company embarks on any activity that it respects and protects the cultural heritage of the community because they have a cultural connection to the land.

The African land concept has a spiritual as well as a historical concept.²⁴² Land belongs to the community hence it does not belong to a particular person or organisation. This has always been the case since time in immemorial. In the case of *Re: Southern Rhodesia*²⁴³ the fact in question was whether individuals, rather than communities could assert their right over land held under customary tenure. The Privy Council in this case held that land belonged to the community and not the individual.²⁴⁴ The court further held that African land subject to customary tenure

²³⁹ Yirenkyi 2008 *The Southern African Institute of Mining and Metallurgy Surface Mining* 4.

²⁴⁰ Yirenkyi 2008 *The Southern African Institute of Mining and Metallurgy Surface Mining* 4.

²⁴¹ Anonymous 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>.

²⁴² Hansungule 2000 *International Journal on Minority and Groups Rights* 309.

²⁴³ *Re: Southern Rhodesia* 1919 AC 211.

²⁴⁴ *Re: Southern Rhodesia* 1919 AC 211.

could not be alienated under English tenure system.²⁴⁵ Traditional social systems and cultural values greatly change because of mining projects bringing a new way of life and changes into local communities.²⁴⁶

It is imperative that the traditional aspects of local communities are identified and documented prior to the development of a mining project.²⁴⁷ This helps in determining how the community stands to benefit from the project. African People have a strong connection with their ancestral spirits. This connection is believed to enhance prosperity which is why communities prefer to be close to their gravesites of their ancestors. With the arrival of European settlers into Zimbabwe in the 1880's they established tribal lands and some indigenous people were moved. However, in the case of the Marange community in Chiadzwa they have been staying on this land since before the advent of colonialism. Relocating them is uprooting them from the area which they have been attached to since the time of their ancestors.

Mining companies in Zimbabwe unfortunately do not have initiatives such as the Cultural Heritage Assessment (CHA) that assess the potential and actual impact of the extractive activities by the mining company on the heritage of the community.²⁴⁸ Where a mining company is informed of cultural heritage, sites in the area it is important for the company to avoid damage where possible. If it is not possible to avoid any damage then consent should be obtained from the community in order to carry out the extractive activities that will cause harm to the heritage site and an effort to minimise the damage must be made.²⁴⁹

4.7 Lack of Compensation

Communities in the Marange area were not fully compensated by the state after being evicted from their land to pave way for the diamond mining operations. Each household was promised a paltry US\$1000 (R10 000) as disturbance allowance in

²⁴⁵ *Re: Southern Rhodesia* 1919 AC 211.

²⁴⁶ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

²⁴⁷ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

²⁴⁸ Report on Community and Social Performance Fact Sheet by Rio Tinto Sustainable Development 2011 2. This report by Rio Tinto gives a brief discussion on cultural heritage assessments conducted by Rio Tinto.

²⁴⁹ Report on Community and Social Performance Fact Sheet by Rio Tinto Sustainable Development 2011 2.

their relocation to another area.²⁵⁰ To make matters worse the villagers were promised decent accommodation, proper healthcare and educational facilities but to date the villagers' life has not changed for the better.²⁵¹ It is important to note that these promises constitute socio economic rights which are supposed to enforceable.²⁵²

In defence the state, through the Minister of Mines and Mining Development, states that the relocation of the villagers was justifiable because this would, in the opinion of the Minister, make way for proper extractive activities instead of the illegal artisanal mining that was being practised by the villagers.²⁵³ There is no legislation that provides for the legality of Artisanal mining. It is considered illegal and the state has used ruthless such as torture and heavy sentences to deal with artisanal miners.²⁵⁴ The Government does not adhere to basic human rights standards enshrined in international treaties, conventions and charters to which it is signatory. It falls short of the benchmark to which every state must adhere.

4.8 Weaknesses of Zimbabwe's Parliament Preventing Effective Community Participation with reference to the Marange Community

Communities whether at ward, district and provincial level entrust that certain appointed leaders will represent them²⁵⁵. Leaders can be councillors or members of the legislature and senators. However, it is noticed the most important people who have a special role to play in ensuring that the views of the people are represented are the Members of Parliament (MPs). They get the platform to address the challenges of their constituencies in Parliament.

MPs rarely visit their constituencies to be informed about the needs of the constituents. In addition, most MPs rarely hold any consultative meetings with their

²⁵⁰ Mtisi (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011)11.

²⁵¹ Saxon 2011 <http://www.minesandcommunities.org/article.php?a=10779&l=1>.

²⁵² See Chapter of the Declaration of Rights in the Constitution.

²⁵³ Saxon 2011 <http://www.minesandcommunities.org/article.php?a=10779&l=1>.

²⁵⁴ Anon 2011 3 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf> 6.

²⁵⁵ See section 267 and Section 275 of the Constitution. These sections discuss the governance structure of national, provincial, district and ward level.

constituencies.²⁵⁶ A consultative meeting normally helps in knowing what the people in the constituency expect and need from their MP. The political culture is very unfavourable now as it inhibits MPs from effectively scrutinising policy proposals placed before the house by the Executive.²⁵⁷ This is worsened by the fact that there is a low calibre of MPs to initiate policy proposals that will enhance community participation.²⁵⁸

Draconian Acts such as AIPPA which was mentioned in the first chapter of the dissertation make it difficult for realisation of rights found in the constitution. This Act gives any department or ministry in the state the right to withhold any information if it is believed that such information will affect its interests if it was in the public domain. The community in Marange have been caught up in wrangling between the two major political parties. The control of the diamond fields in Marange was used in July 2013 elections as a description on which political party had the stronger muscle in control of the diamond fields. This affects and undermines the interests of the communities in Marange.

Without democratic participation, regardless of their stated ideology, governments everywhere apparently respond not to the poor and powerless, but primarily to those with power and privilege.²⁵⁹ It is unfortunate to realise that our lawmakers have failed to focus attention on how to use law to institutionalise democracy and participation in the developmental process.²⁶⁰ Through their law making functions, legislators can support the passage of laws or other instruments that create an enabling environment for sustainable and accountable management of minerals. The legislature should also play a central role in overseeing management of extractive activities. Legislation developed to regulate mining activities requires clauses that require the broadest involvement of communities who stand to gain in the process.

²⁵⁶ Chauke 1998 *Legal Forum* 11.

²⁵⁷ Chauke 1998 *Legal Forum* 11.

²⁵⁸ Chauke 1998 *Legal Forum* 11.

²⁵⁹ Chauke 1998 *Legal Forum* 11.

²⁶⁰ Chauke 1998 *Legal Forum* 11. Through their law making functions, legislators can support the passage of laws or other instruments that create an enabling environment for sustainable and accountable management of minerals. The legislature should also play a central role in overseeing management of extractive activities. See Bryan and Hofmann (eds) *Transparency and Accountability In Africa's Extractive Industries: The Role of The Legislature* (National Democratic Institute for International Affairs 2007)19.

4.9 Relocation of communities

In the case of Zimbabwe's approach to community participation, as is the case with some other jurisdictions, there is a perception that the interests of the communities are not taken into account.²⁶¹ This is especially with the case of the Marange people where there is government influence in the extractive activities sector. The government interests are aligned with that of the mining company rather than with the local community. There is no indication that relocation of communities is a factor considered in the mining process.²⁶²

Conflict is always likely to arise within the communities that are supposed to relocate. Some members of the community will be for the issue of relocation, whilst some members of the community will be against the relocation. This can permanently divide the community and creates antagonism amongst people in that community. The people that do not want to relocate will feel that the others are selling out their cause to self-determination whilst those that are willing to relocate will feel those who do not want to relocate are laggards resisting the movement of change.

Conflict can also arise within the larger community. In the case of the people of Marange, there arose an outcry in the community and a public outcry on how best the communities could benefit from the resources, as they were not adequately compensated. The situation has become so tense that it is dividing the nation on what is transpiring with allegations being made by both sides.

In Zimbabwe, a number of towns owe their development to the discovery of minerals. The same must apply now to villages where minerals are found. The village must not just grow into a growth point its It must expand into a town that will attract other services and development, which would lead to greater employment opportunities for the wider community because not everyone will be employed by the mine.

²⁶¹ Centre for Research and Development 2012
<http://www.kimpavitapress.no/blog/2012/04/14/zimbabwe-diamonds-could-undermine-justice-democracy-and-development/>.

²⁶² Centre for Research and Development 2012
<http://www.kimpavitapress.no/blog/2012/04/14/zimbabwe-diamonds-could-undermine-justice-democracy-and-development/>, See also Chimhangwa 2014
http://www.zimbabwesituation.com/news/zimsit_marange-diamond-firms-fail-to-honour-social-responsibility-obligations/.

4.10 Meaningful Engagement of the Marange Community protected by the Constitution

The Constitution in section 3 (2) states that the principles of good governance, which bind all institutions of the state and government at all levels, include (i) the equitable sharing of natural resources including land.²⁶³ This clause provides for a framework to encourage transparency in the government. If there is transparency then people will be able to understand why certain decisions are being made and this would encourage them to have an input in the process of governance.²⁶⁴ A dictatorship thrives on either lack of information or misinformation. In order for the government to be transparent, the Constitution should provide for a right to information.²⁶⁵

4.11 Meaningful Engagement of the Marange community protected by the African Charter on Human and Peoples Rights

The ACHPR Article 21 states that 'All peoples shall freely dispose of their wealth and natural resources. This right should be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'²⁶⁶ The charter further advocates for empowerment of the communities by stating in Article 21 (4) that the state shall undertake to eliminate all forms of foreign economic exploitation.

The lack of title and failure to give communities full access to extractive activities taking place is a serious breach of the ACHPR. Zimbabwe is not a signatory to this and shown no willingness to be bound by the obligations created by this Charter. Little has changed with regard to the Government giving attention to socio economic rights for the people residing where minerals are found.

In terms of the Liberal approach, human rights agreements that have been signed by a state create international obligations that domestic interests groups can use to mobilise to put pressure on political institutions within the state.²⁶⁷ This is where groups such as Zimbabwe Lawyers for Human Rights and Zimbabwe Environmental

²⁶³ Section 3 (2) (i) of the Constitution of Zimbabwe.

²⁶⁴ Chauke 1998 *Legal Forum* 11.

²⁶⁵ Chauke 1998 *Legal Forum* 11.

²⁶⁶ Article 21 of the African Charter on People and Human Rights (here after referred to as the ACPHR).

²⁶⁷ Hathaway 2002 *Yale Law Journal* 1954.

Law Association can play a part in ensuring that the rights of the Marange Community are advanced.

The state by signing Human Rights Agreements creates international obligations. Thus if the state takes a Liberal approach to human rights, domestic interest groups can use this to put pressure on the political institutions within the state.²⁶⁸

Currently, no legal framework provides communities with effective security over their lands. This is because in terms of section 4 of the CLA, communal land is vested in the President who shall permit it to be occupied and used in accordance with the Act.²⁶⁹ This creates legal uncertainty for communities such as those of Marange and of Mhondoro Ngezi.

The courts of Zimbabwe are bound to produce poorly reasoned decisions because of their lack of knowledge and understanding of what ownership of ancestral lands means to these communities. In the case of other jurisdictions, such as South American countries like Bolivia, Colombia and Venezuela, the right to legal certainty in respect of territorial property requires the existence of special, prompt and effective mechanisms to resolve existing legal conflicts over the ownership of indigenous lands.²⁷⁰ A lesson not only for Zimbabwe, but also the African Court on Human and Peoples' Rights, is the need to emulate the Inter American Court²⁷¹ on how best to handle matters that involve land disputes.²⁷² The Inter-American Court has handled several cases that are related to community participation such as the case of *Case of Yakye Axa Community v. Paraguay*²⁷³

It was held that the state must within a reasonable time incorporate into its domestic law the legal, administrative and other necessary measures to guarantee the effective enjoyment of the right to property of indigenous people.

²⁶⁸ Hathaway 2002 *Yale Law Journal* 1954.

²⁶⁹ Section 4 of the CLA.

²⁷⁰ Inter-American Commission on Human Rights, Indigenous and Tribal Peoples 2009 <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

²⁷¹ Inter-American Commission on Human Rights, Indigenous and Tribal Peoples 2009 <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.

²⁷² Common principle states that the owner of the land owns what is below and above the land.

²⁷³ *Yakye Axa Community v. Paraguay Inter-American Court of Human Rights* February 6, 2006 Paragraph 10.

In this case, the local community of *Yakye Axa* had been deprived of their right to access land which the state had unlawfully taken over for the purpose of extractive activities. The lesson drawn from the South American experience indicates that African human rights system lags behind in terms of the realisation of socio economic rights. The Marange situation confirms this. The present government has a habit of documenting, publishing and broadcasting human rights atrocities of the past as in the case of what happened prior to independence, yet it does not realise the need to advance the interests of its own indigenous people and is blind to its own human rights abuses.

Where people in a community unwillingly leave their land to make way for extractive activities, it is imperative to know that whoever is responsible for the eviction process is in breach of the various legal instruments both domestically and internationally such as the Constitution and the Universal Declaration of Human Rights. This is so even in the instance that the land is transferred to a third party to carry out the activities. Such third party may be required to pay compensation to those affected. It is important to note that the people in Marange left their land unwillingly, and as pointed out earlier, the militia was used to ensure that villagers in the community of Marange complied with the order.

4.12 Communities' Access to Expertise

A community is not on the same level as the government and multinational companies in terms of seeking legal advice. Ignorance on the part of the community and lack of financial muscle means the community can fail to engage the services of mining lawyers, or the best mining lawyers. The government has not been supportive on its part because the judiciary, which is an organ of the government, can hand down poorly reasoned judgements which may be in favour of the Ministries such as the Ministry of Indigenisation Economic and Empowerment and the Ministry of Mines and Mining Development. This dents the image of the judiciary as a neutral organ in handling any disputes that not only affect the interests of the state but also the interests of the people.

4.13 Referral to the African Commission on Human and Peoples' Rights

With regard to *locus standi*, Zimbabwean law has been slightly relaxed in cases involving human rights violation such as the displacement of the people in Marange. In such instances, the Court will allow a person or person that does not have any direct interest to seek a remedy on behalf of those who have been affected.²⁷⁴ However, this did not happen in the case *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others*.²⁷⁵ Fombad submits that the actions of poor people should not be commenced by way of a formal petition, that a letter addressed to the court is enough.²⁷⁶ He goes on further to refer to the Indian case of *Gupta v Union of India*²⁷⁷ where the Chief Justice said;

Where a legal wrong or legal injury is caused to a person or to a determinate class of person is by reason of poverty, helpless or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction.

If the community of Marange in Chiadzwa fails to get a remedy from the domestic courts through the case *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others*²⁷⁸ they have the option of approaching the African Commission on Human and People's Rights. In this case 700 families were unwillingly removed from their land to pave way for the extraction of alluvial diamonds. The families were told that they would be given US\$1 000 (R10 000) as disturbance allowance in relocation to another area.

This is meagre as the state should at least have made a pledge of US\$50 000 compensation to each house hold (R500 000) so that they are able purchase shares in line with economic empowerment. A further 4000 families face relocation to

²⁷⁴ Feltoe *A Guide to Administrative and Local Government Law in Zimbabwe* 50.

²⁷⁵ *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others* (HC 6334/09).

²⁷⁶ Fombad 2011 *Buffalo Law Review* 1071. India is credited with being the first jurisdiction to develop what we might call a relatively mature Economic Social and Cultural Rights jurisprudence. It is important for the Court to ask itself whether there has been some substantive justification and procedural due process before vital social and economic interest are affected. For more on the judicial enforcement on socio economic rights see Langford 2009 *International Journal on Human Rights* 91-123.

²⁷⁷ *Gupta v Union of India* 2 SCR 1982.

²⁷⁸ *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others* (HC 6334/09).

Agricultural and Rural Development Authority Transau (ARDA Transau). This relocation process has been handled with very little communication with the households concerned, thus, resulting in human rights violations and community despondency.²⁷⁹ The Community told Human Rights Watch that at least 4 secondary schools and 18 primary schools would be forced to close as a result of this relocation, affecting the children's future as well.²⁸⁰ The report by Human Rights Watch further states that an official from Zimbabwe Mineral Development Company (ZMDC) mentioned that the relocation plans were premature and without any merit.²⁸¹ Some of the local people believe that the relocation is punishment from ZANU-PF for voting for the Movement for Democratic Change in the March 2008 elections.

It is an indisputable fact that socio-economic rights are difficult to realise if the state does not have sufficient resources as Mclean puts it.²⁸² The Government has no excuse for the manner in which it has approached the forced relocation of the Marange people even though socio economic rights are difficult to realise under Zimbabwe's present economic circumstances. In addition, the Government has been giving civil servants endless promises of salary increments from the sale of diamonds. Political and civil rights could easily have been exercised by the Marange community if they had been given the opportunity to be adequately briefed about the need for relocation in what is also known as prior consultation on the project.

This move, which is being done under the guise of indigenisation, may further marginalise the poor and the under-represented villagers whose rural homesteads are situated above mining prospects. The people of Marange should be able to exercise their constitutional rights such as the right not to be deprived of property and right to just administrative justice to resist these evictions.²⁸³ The dismissal of this case by the Harare High Court is, evidence that the people of Marange have had their rights trampled on. The delaying tactics by the Government in giving

²⁷⁹ Zimbabwe Environmental Law Association 2012
<http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV>.

²⁸⁰ Human Rights Watch *Diamonds in the Rough* 22.

²⁸¹ Human Rights Watch *Diamonds in the Rough* 22.

²⁸² Mclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 103.

²⁸³ Murombo 2010 SAPL 580.

compensation to the community of Marange indicates they are not likely to give any compensation to the community.

The Mudiwa case was dismissed on the basis that Zimbabwean administrative law does not cover third party litigation. Mudiwa was said to have no *locus standi* in representing the community. The state has used very ruthless means in suppressing the rights of the community. The police arrested Mudiwa in 2010 for organising meetings with the people of Marange to resist the evictions.²⁸⁴ The arrest of Mudiwa is a clear indication of the ordeal that human rights lawyers go through in trying to advance the rights of communities. This arrest is nothing new in campaigns by human rights activists who put their lives at risk to oppose corrupt policies of corrupt politicians in the extractive industries that sideline the interests of the communities.²⁸⁵ Besides incarceration by the government, Human Rights Activists also face lawsuits in the form of defamation charges by politicians and top government officials.

In order to try to uplift the spirit of community ZELA is in the process of implementing a project to strengthen and develop the organisational and financial management of Community Based Organisations (CBOs). CBOs act as watchdog over Community Share Ownership Trusts (CSOTs) whereby mining companies are supposed to account and respect the rights of the communities. So far in Marange the Chiadzwa Community Development Trust (CCDT) has been formed. The purpose of CCDT is to fight for the community rights of the villagers in Marange on the relocation, compensation, participation in small-scale mining and human rights violations.²⁸⁶ The CCDT has experienced some challenges as the government has seen it as a tactic to de-campaign the objective of CSOTs. Another challenge facing the CCDT is difficulty in interacting with the Chiadzwa traditional leader because of politics. It is reported that the late Acting Chief refused to give an audience to the CCDT because of fear that the Minister of Local Government would associate him with Non-

²⁸⁴ *S v Malvern Mudiwa* CRB 3750/10.

²⁸⁵ Bryan and Hofmann (eds) *Transparency and Accountability In Africa's Extractive Industries: The Role of The Legislature* (National Democratic Institute for International Affairs 2007) 24.

²⁸⁶ Anon 2012.

http://www.zela.org/index.php?option=com_content&view=article&id=9&Itemid=84.

Governmental Organisations (NGO's) funded by nations that have not been had good relations with Zimbabwe such as United States of America and Great Britain.²⁸⁷

The chief was also said to believe that this was a campaign gimmick²⁸⁸ that was meant to denounce ZANU PF as the nation was due to have elections anytime. The government in turn sidelined the chief because it was believed that he was sympathetic to the Movement for Democratic Change, one of the major opposition parties. The case of *Sesana and Others v Attorney General*²⁸⁹ demonstrates the possible remedies that can be given to people who have been deprived of socio-economic rights and their right to ancestral land.

Initially in this case the Khoi San Bushmen had been removed from what was known as Central Kalahari Game Reserve (CKGR). The Government defended its stance by giving the reason that this was meant to bring the San Bushman into modern society. This exercise was full of gross human rights violations such as beatings and torture of the San Bushmen who refused to comply with evictions. The applicant argued that was disrespectful to the San Bushmen's way of life as vast tracts of land on the CKGR were leased to Diamond mining companies.

State compliance under the ACHPR is somewhat problematic because it is normatively strong but is at the same time institutionally weak.²⁹⁰ The major challenge in case of *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others*²⁹¹ is that there is no forcing mechanism to bring the government of Zimbabwe before the ACHPR.

The Marange community can take motivation from precedents in South Africa in bringing an application in the Constitutional court established in terms of section 166²⁹² of the Constitution of the Zimbabwean Constitution. Especially from the South African Constitutional Court case of *51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.²⁹³ This case touches on

²⁸⁷ Mutingwende *The Zimbabwean* 7.

²⁸⁸ Mutingwende *The Zimbabwean* 7.

²⁸⁹ *Sesana and Others v Attorney-General* [2006] 2 BLR. 633(HC).

²⁹⁰ Viljoen 2010 *Interights Bulletin* 60-63.

²⁹¹ *Malvern Mudiwa and Others v. Mbada Mining Private Limited and Others* (HC 6334/09).

²⁹² See Section 166 of the Constitution of Zimbabwe.

²⁹³ *51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC). See *SERAC v Nigeria* AHRLR 2001 60 in this case the communities were not

meaningful engagement where the respondents wanted to evict the applicants because the building the applicants were residing in was unfit for human habitation. The Constitutional court held it was the duty of the City of Johannesburg Council to engage meaningfully with the occupants on matters pertaining to eviction because this also touches on the matter of treating human beings with respect. In the case of the Marange people the government did not meaningfully engage with the people before embarking on the relocations.

4.14 Meaningful Community Participation of the Marange community protected by the International instruments

The people of Marange have been marginalised geographically, economically and politically despite an abundance of diamonds. Zimbabwe acceded to the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Hence, it is important to come up with mechanisms that advance and protect the rights of communities in terms of ICESCR and ICCPR. Zimbabwe acceded to the ICCPR on 13 May 1991. This covenant has provisions that protect people in Marange to have access to information. Article 19 (2) states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, “receive and impart information and ideas of all kinds”, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. This in turn reinforces the right of the people of Marange’s to get information from the state about the revenue generated in the production of diamonds.²⁹⁴ If the state were to make any meaningful progress in the realisation of Socio-Economic rights amongst the people it would be a positive development because its reports submitted to the United Nations Committee on Economic Social and Cultural Rights (UNCESCR) would indicate positive developments.

consulted before the companies begun operations of extraction of crude oil. Security forces were used by the government to unleash terror on villagers protested about the company’s activities. The commission held that adequate compensation be given to the Ogoni people and the Nigerian government desist from harassing these people. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* AHRLR 2009 75 in this case the Kenyan government had removed the Endorois people from their ancestral land thus depriving them of their right to practice their rituals on religious sites located in the Bogoria Lake Region.

²⁹⁴ Article 19 of the ICCPR.

4.15 Principles and Guidelines that make community participation meaningful

The best approach that can be used to help the people of Marange would be the use of Social Impact Assessment (SIA). SIA can be described as an assessment that checks on the socio economic impact that the activities of the mine have on the community where the mine is operational. At present the impact assessments do not have any formal recognition in the Zimbabwean legislation save for the Environmental Impact Assessment. Key aspects such as the extent of general development in the area such as infrastructure put in the area, the services provided by the mining operations such as electricity, healthcare and transport need to be considered.²⁹⁵ It is important for a mining company to conduct an SIA.

Economic changes may occur or have occurred because of the opening of a mine. Economic returns to the community include royalties and mine taxes and mine development initiatives.²⁹⁶ Direct economic challenges may occur because of relocation of the people.²⁹⁷ It can happen that villagers are relocated during the planting season. The effects of this will be felt later when there are no harvests or poor harvests. Murombo submits that if a community cannot benefit from the royalties or revenue sharing regimes, the least the community can get from this ordeal is relief in the form of social impacts arising out of the extractive activities.²⁹⁸

Mining activities affect farming activities such as grazing land for livestock and the contamination of underground water for both domestic use and irrigation.²⁹⁹ Mines often relocate people, not fully taking into account the rural lifestyles or subsistence livelihoods.³⁰⁰ It is an indisputable fact that communal people in Zimbabwe have a culture of relying on subsistence agriculture. When a mining company gets the right to mine, it should mean that it would have to arrange the relocation after the rainy season and harvesting season. Nothing would be more disruptive and hurtful than relocating people in the middle of the raining and harvesting season that happens

²⁹⁵ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

²⁹⁶ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

²⁹⁷ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

²⁹⁸ Murombo 2010 SAPL 574.

²⁹⁹ Capel 2012 <http://www.iol.co.za/business/opinion/columnists/are-mining-profits-ethically-earned-1.1229375>.

³⁰⁰ Capel 2012 <http://www.iol.co.za/business/opinion/columnists/are-mining-profits-ethically-earned-1.1229375>.

between the first weeks of November to the end of June. The best time to consider relocation would be between the months of June and September. This will allow people time to clear the land and carry out activities such as fencing and the building of granaries to store their harvests in readiness for the next season.

4.16 Approach in conducting a Social Impact Assessment

The mining company should first conduct preliminary investigations undertaking a broad analysis of the social environment affected by its operations. This stage will focus on the identification and definition of communities that are affected by the mine.³⁰¹ A consultation process with the interested and affected parties should be initiated in this phase to record the key social issues.³⁰²

Secondly, the company should then conduct a survey in what is known as a baseline socio-economic study survey. This survey is meant to determine the baseline characteristics, profile and dynamics of mine-affected communities and areas. It will indicate the true needs and information on the communities. This will enable the formulation of community development interventions and livelihood creation initiatives.³⁰³

Finally, SIA should not be regarded by mining companies as a moral responsibility but as a tool used to promote sustainability for both the mining company and the affected communities.³⁰⁴ This builds a strong relationship with interested parties. If the mining companies are to promote sustainability then the basic SIA methodologies have to be considered as a starting point.³⁰⁵

4.17 A question of Eviction

Eviction is when an individual is expelled from a place. Because there was no prior consultation with the people of Marange on their relocation, one could argue that this was in effect some form of eviction. Keterere submits that the right to prior

³⁰¹ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

³⁰² Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

³⁰³ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

³⁰⁴ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

³⁰⁵ Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf.

consultation must be seen in the light of the community fully accepting to the activity.³⁰⁶

It is alleged that the evictions disguised as relocations were done in an inhuman and undignified manner. The International Workshop on Forced evictions held in Berlin 2005 organised by United Nations Special Rapporteur on Adequate Housing has set some of the Basic Principles and Guidelines on Eviction and Displacement.³⁰⁷

The Rapporteur points out that there are development-based evictions that are often planned or conducted under the pretext of serving the public or the community good. Projects that come to mind are extractive activities.³⁰⁸ The basic principles and guidelines have been incorporated in Chenwi's book on illegal evictions in South Africa.

The guidelines declare that:³⁰⁹

- *States are required to explore fully all possible alternatives to evictions;*
- *States have an obligation to ensure that eviction occurs only in exceptional circumstances and any eviction must be: authorised by law; carried out in accordance with international human rights law; undertaken solely for the purpose of promoting the general welfare; reasonable and proportional; regulated so as to ensure full and fair compensation and rehabilitation; and carried out in accordance with present guidelines;*
- *Any decision relating to eviction should be announced sufficiently in advance, in writing and in the local language, to all individuals concerned;*

³⁰⁶ Mohamed-Katerere 2001 *African Studies Quarterly* 126.

³⁰⁷ See Chenwi *Evictions in South Africa: Relevant International and National Standards* 14. See Also, the United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement A/HRC/4/18.

³⁰⁸ See Chenwi *Evictions in South Africa: Relevant International and National Standards* 14.

³⁰⁹ See Chenwi *Evictions in South Africa: Relevant International and National Standards* 14. See Also, the United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement A/HRC/4/18.

- *An eviction notice should contain a detailed justification for the decision, including information on reasonable alternative to eviction the full details of proposed alternative accommodation and where no alternatives exist, all measure taken and foreseen to minimise the adverse effects of evictions;*
- *All final decisions on eviction should be subject to administrative and judicial review;*
- *Evictions should not result in individuals becoming homeless or vulnerable to the violation of other human rights;*
- *States are required to make provision for the adoption of all appropriate measures to ensure that adequate alternative housing, resettlement or access to productive land, as the case maybe, is available and provided, especially those who are unable to provide for themselves; and*
- *States are also required to take into account, in particular, all alternative plans proposed by the affected people, groups and communities.*

Based on the above principles regarding forced eviction the Marange community should be able to demand speedy compensation for their forced removal from their ancestral lands. Ocheje refers to the United Nations Economic and Social Council in defining forced evictions as:

*"The permanent or temporary removal against their will of individuals, families or communities from the homes or land which they occupy without the provision of or access to, appropriate forms of legal and other protection."*³¹⁰

Ocheje further submits that such evictions are attributable to the state. The relocation of the people in the Marange village is, based on the above quote, a forced eviction. It is unfortunate that the Government has decided not to use the

³¹⁰ Ocheje 2007 Journal of African Law 173.

word eviction but to use the word relocation. The alternative resettlement offered does not match the previous land that was inhabited by the people of Marange. Furthermore, it is important to note that the villagers have been relocated to a farm that used to be run by the Government. Evidence shows that government run entities have failed.³¹¹ The production on the farm when the Government was still carrying out activities was not yielding any positive results. No reasons have been furnished by the state in showing why the farm was earmarked for the resettlement of relocated families. The Zimbabwe Environmental Law Association undertook some research to determine how the relocation had affected the morale of the relocated villagers. To the dismay of many villagers, their compensation was delayed thus causing low morale. This in turn made them negative towards the new proposed relocation to ARDA Transau.

This relocation has contributed to the statistics of displaced people attributed to mining activities around the globe.³¹² Typical of most relocation scenarios, the villagers in Marange are poor and form part of a marginalised society. Most of the households only have the option of anticipating that their children will get jobs as labourers in the mines or search for work in the urban areas and in South Africa. The future looks very bleak for the people of Marange. These are strong grounds for human rights and community based organisations to conclude that the relocations are meant to hoodwink the villagers into assuming that their lives will change for better if they comply with the relocation with immediate compensation.

4.18 China's role in the Extractive activities sector

In 2006, China unveiled 'China's African Policy' as a guide to fostering its relations with Africa.³¹³ The policy was based on a non-interventionist and non-ideological approach to its economic and development relations. This was in sharp contrast to the approach made by western countries on 'adherence to good governance and respect for human rights in order to encourage investment.'³¹⁴ This resulted in the government of Zimbabwe formulating a Look East policy, one of the first of its kind in

³¹¹ Bloch 2012 <http://www.theindependent.co.zw/opinion/35713-eric-bloch-column-parastatals-constraining-economic-recovery.html>.

³¹² Globally, six out of every 1000 people or 37 million people are displaced. See Ocheje 2007 *Journal of African Law* 174.

³¹³ Hodzia, Hartwell and de Jager 2012 *South African Journal of International Affairs* 80.

³¹⁴ Hodzia, Hartwell and de Jager 2012 *South African Journal of International Affairs* 80.

Africa. This meant that the Chinese were welcome to trade with Zimbabwe part of which included investment in the Mining Sector. In order to clinch these deals the Chinese approach was somewhat shrewd. The government of China donated over US\$ 2 000 000 (R20 000 000) towards Zimbabwe's land reform program as well as an MA60 aeroplane.

With such kind of support, there was nothing in the way of the Chinese clinching lucrative mining deals in Zimbabwe. Some described this kind of approach, as an approach by the Chinese not only to promote good governance in Zimbabwe, but also to secure Chinese interests.³¹⁵ Nevertheless currently, deals between Zimbabwe and China in the extractive activity sector lack accountability and transparency. The Anjin Investments (Pvt) Ltd is an example of this. At present, nobody knows who is collaborating with the Chinese from the Zimbabwean side in the extractive activities sector in Marange.³¹⁶ This is in sharp contrast to the principles of the Zimbabwe Diamond Policy (ZDP). Section 6 of the ZDP states that there shall be access to diamond trade and financial records of all mining companies involved in the diamond activities by the Ministry of Mines and Mining Development or its agents, such as the Treasury and the Zimbabwe Revenue Authority.³¹⁷

Section 6 of the ZDP seeks to enhance transparency in the diamond trade and the beneficiation of gemstones. Chinese investment in Marange has hardly brought any development for the Marange community. Members of the community who are employed as labourers in the Chinese mining concession are said to be amongst the most exploited and underpaid.³¹⁸ This has all been happening openly with little conscience from the Chinese or acknowledgement that their actions are wrong. In the midst of the Zimbabwe crisis around the period of 2007 and 2008, Zimbabwe signed a deal with China in which it was agreed that Zimbabwe would pay its debts through mineral concessions and exportation of minerals and crops to China. This explains why there is a Chinese presence in the Marange deal. One can only hope that ZDP will combat the secrecy that has resulted in non-disclosure of revenue generated from the sale of diamonds in Marange.

³¹⁵ Hodzia, Hartwell and de Jager 2012 *South African Journal of International Affairs* 80.

³¹⁶ Mazwi *The Independent* 2.

³¹⁷ Section 6 of the Zimbabwe Diamond Policy.

³¹⁸ Mazwi *The Independent* 2.

The burgeoning Chinese influence in the extractive activities is most likely to have a negative impact on the communities blessed with mineral resources because it will increase rampant corruption at the expense of political accountability.³¹⁹ The general assumption by civil society is that Chinese investment in the extractive activities in Zimbabwe is not about serving the interests of the communities in Zimbabwe but it is about serving the interests of ZANU PF.³²⁰ A recent brief meeting between the Chinese Vice Premier and Vice President of Zimbabwe where the Chinese Vice Premier indicated Chinese commitment to avail funds for the Zim-Asset programme.³²¹ This programme seeks to address the challenges affecting sustainable development in extractive activities.

4.19 Conclusion

Without doubt, the people of Marange have been treated unfairly in this issue of multiple relocation. This is not in conformity with Zimbabwe's obligations to the ACHPR and other international instruments that Zimbabwe has signed and ratified. It further breaches the Vienna Convention on the Law of Treaties, which compels parties to a treaty to act in good faith.³²² It is noted that the trade of diamonds is not regularised. Military presence in the Marange area raises a lot of suspicions and questions that cannot be quashed. The people of Marange are urged to take their matter to the newly formed Constitutional Court, with the anticipation that a precedent will be set for the protection of the rights of communities. Not only will this precedent benefit the Marange community, it will also benefit other communities across the country. For example, mining companies have left holes uncovered in Zvishavane. The seriousness of the danger posed by uncovered mining holes came after the recent death of a girl in Zvishavane in 2012, after she fell into a disused mine.³²³ The media states that most of those people who survive the ordeal of falling into mining holes end being crippled. As the province of Midlands has population that

³¹⁹ Hodzia, Hartwell and de Jager 2012 *Journal of International Affairs* 97. See also Anon 2011 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf>.

³²⁰ Mbiba 2014 <http://www.dailynews.co.zw/articles/2014/06/22/chinese-vp-snubs-zimbabwe-again>

³²¹ Anon 2014 <http://www.herald.co.zw/wp-content/uploads/2014/01/Zim-Asset.pdf> at 26.

³²² See Article 26 of the Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969.

³²³ Masara C *The Standard* 7.

is composed of subsistence farmers, most own small herds of livestock, which are a source of livelihood, especially for draught power. Oxen are at risk of falling into abandoned mining pits, leaving the poor farmer with no draught power. This is exacerbated by the fact that mining companies do not adhere to mining legislation which compels to rehabilitate or cover up mining pits after finishing of their activities.

From the discussion above it is clearly evident that mining activities disrupt the peace and tranquillity that villagers are supposed to enjoy in Zimbabwe. The situation in Marange is just the tip of the ice-berg in the government's commitment to uplifting of the people in the community. Should the government continue ignoring the plight of the Marange people, a risk is posed to the both regional and international commitments of adhering to human rights. The study of Marange has shown the mammoth task that the community faces in benefiting from the resources around it. Now that the elections have passed, the ruling party must adhere to its commitment of implementing its election manifesto drafted in the run up to the elections. Some interesting points in its manifesto are the intensification of the implementation of the indigenisation policy and the legalisation of artisanal mining. This should offer some justice to the people of Marange massacred in the state's campaign to clear up artisanal miners panning for diamonds in Marange. Failure to yield good results from the manifesto will dent its credibility, which already needs some intensive cleaning up.

CHAPTER 5

INTROSPECTION ON COMMUNITY INVOLVEMENT IN REVENUE MANAGEMENT FROM THE EXTRACTIVE SECTOR

5.1 *Introduction*

This chapter covers the aspect of revenue management, and aims to seek the best model for communities to benefit from the resultant revenue. It argues for the formation of committees at the National, Provincial and Local Spheres of Government to oversee the management for the benefit of the communities. Revenue management in the extractive sector is centralised: it barely gets back to the communities it originates from. Communities with mineral deposits should fully benefit from minerals found on their land. Corporate Social Responsibility will also be discussed as this links to the issue of royalties.

The best model for revenue management should be utilised to prevent an outcry or unease from the communities that have mineral resources. Such a model must quash rumours and stories from the media and other sources that the ordinary people access. In Zimbabwe, transparency and good management will nullify allegations that minerals such as gold and diamonds are smuggled through the back door and sold on the thriving black market in countries such as Mozambique.³²⁴ This chapter will analyse the revenue management system that can best benefit the communities.

5.2 *Taxation Regime in Zimbabwe*

The Zimbabwean taxation regime, with regard to extractive activities, is weighed to benefit a handful of political elites, shareholders of mining companies, and the engineering, construction and management-consulting firms servicing the local mining industry. Mines are not paying adequate tax that will in the long run enable the state to uplift the lives of the people.³²⁵ This defeats the function of taxation,

³²⁴

Lathem and Katerere

2011

http://www.businessweek.com/magazine/content/11_04/b4212011769982.htm.

³²⁵ Kassala 2010 <http://www.minesandcommunities.org/article.php?a=9925&l=1>.

which is to achieve equitable development and improve the socio-economic status of the communities.

Currently in Zimbabwe, mining companies have to pay tax only if their declared profit is more than 20% of their revenue.³²⁶ This is rather high compared to countries that have much better community participation policies. For instance, in South Africa, mining companies pay no tax only if their declared profit falls below 5% of their revenue.³²⁷ This gives the mining companies the opportunity to plough back to the communities often in the form of developmental projects since the government pardons them from paying taxes.

Declarations such as the Lusaka Declaration on Mining Taxation emphasise the importance of transparency and accountability in payment of taxes and levies by mining corporations.³²⁸ The *Ad Valorem Royalty Regime* states that mining firms should pay taxes according to the profits and not the revenue generated.³²⁹ Most countries like Australia, South Africa and Canada apply such a regime. *Ad Valorem Royalty Regime* also considers other aspects such as the type of the mineral. At present, the government has put all minerals on an equal standing. Zimbabwe is diverse and has minerals such as diamonds, gold, platinum, copper and nickel. Diamonds have a greater value than the other minerals. Therefore, the taxing regime of diamonds should not be the same as that of other minerals such as copper and nickel.

Taxes and royalty revenues derived from exploration, mine development and mining should reflect the value to society of the resources mined. Whatever the source, source, tax revenues should be put to work in support of the sustainable development of the community.³³⁰ An illustration is where the major roads in a community are riddled with potholes, and in some instances have never been repaired since the initial tar was laid. This is a clear indication of lack of support in the sustainable development of the community.

³²⁶ Kassala 2010 <http://www.minesandcommunities.org/article.php?a=9925&l=1>.

³²⁷ Kassala 2010 <http://www.minesandcommunities.org/article.php?a=9925&l=1>.

³²⁸ The Alternative Mining Indaba 2011

http://www.kirkensnodhjelp.no/PageFiles/13437/Alternative_Indaba_Statement.doc.

³²⁹ Investors words http://www.investorwords.com/122/ad_valorem.html#ixzz1vdNY0eUp.

³³⁰ Anon 2012 <http://www.globaldialogue.info/linkagesMPF-AMV>.

It is important to design institutions and arrangements that effectively manage the revenue. The ideal model will avoid the situations that have arisen in other countries such as Nigeria, where people suffer socially, environmentally and economically from lack of local resources.³³¹ This been attributed to the failure by the top companies, such as the oil giant Shell, to give back to communities in the Niger Delta. Obara and Jenkins submit that sustainable development requires the bringing of mining revenues to an area to compensate communities that have lost land, housing and livelihoods.³³² Obara and Jenkins recommend that this revenue should be used not only as cash payment to compensate the affected families, but also for infrastructural improvements such as the upgrading of existing roads and schools.³³³ Revenue should also be used for community health initiatives, such as equipping hospitals with trained and qualified medical personnel. Micro-credit schemes can be launched by the mine to reduce financial dependency on the mine. This would create an alternative means of income, whereby people not employed by the mine get involved in income-generating projects such as selling wares and agricultural products to the mining staff.

5.3 Rent Distribution Systems

Rent distribution systems require companies to pay some form of rent if they do not own the land on which they operate, but are merely using the land on a temporary basis in the hope that it will generate profits. According to Carbonnier, this notion refers to excess return on investment after deducting production costs.³³⁴ Such a system is supposed to have a positive outcome for the benefit of the community, because whatever revenue is obtained over a period is deducted from the cost incurred to generate that revenue. Carbonnier goes further to state that the best way to get a good rent distribution system is to use case studies of failed resource distributive systems. Low rent can be said to align the interests of the elite with those of a majority of the people in favour of growth-enhancing strategies based on

³³¹ Olowu 2010 *African Journal on Conflict Resolution* 90.

³³² Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 5.

³³³ Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 5.

³³⁴ Carbonnier 2011 *Global Governance* 140.

competitive and labour intensive industrialisation.³³⁵ A low rent allows both the community and the company carrying out extractive activities to benefit from the profits obtained from the mineral.

5.4 The Lusaka Declaration on Mining Taxation

The Lusaka Declaration on Mining Taxation was drafted under the auspices of the International Alliance on Natural Resources in Africa³³⁶ (IANRA) which emphasises the importance of transparency and accountability in the payment of taxes and levies by corporations. Taxes are in effect are supposed to contribute to national development and as a matter of course all mining companies must declare what they pay in taxes, levies and royalties.³³⁷ In other words, companies should disclose what they have paid in tax to the state. This helps the state to confirm with its own records what has already been collected in tax. The state can later publish such records to the public and the respective communities. Communities can therefore be made aware of what has been allocated to them from the tax collected from the mines.

5.5 Infrastructure Incentives Scheme

An infrastructure Incentives Scheme would occur where companies use part of their income tax payments to construct infrastructure projects agreed with local communities.³³⁸ This system of revenue management is beneficial subsequent generations benefit from the infrastructure provided by the mining company and the company gets exempted from paying full tax. In addition, this improves the image of the company and it stands to get more mining concessions in the country because it has managed to establish excellent community relations.

³³⁵ Carbonnier 2011 *Global Governance* 140.

³³⁶ Preamble of the Lusaka Declaration on Mining Taxation. See also The Alternative Mining Indaba 2011 http://www.kirkensnodhjelp.no/PageFiles/13437/Alternative_Indaba_Statement.doc

³³⁷ Anon 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>. See also section 1 (b) of the Lusaka Declaration on Mining Taxation which states that that effective and equitable taxation is critical to the overall economic growth of our countries and, specifically to the socio-economic and political wellbeing of our communities leading to the strengthening of channels of political representation and government accountability.

³³⁸ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

5.6 Resource curse

Resource curse or Dutch Disease as it is commonly known, generally results in negative effects such as greater poverty, lower growth and slower development.³³⁹ The Africa Review Report on Mining describes Resource Curse “as a situation whereby high mineral revenues limit structural diversification which in turn fails to uplift the lives of the communities that have a plethora of minerals”.³⁴⁰ Resource curse can be attributed to a dependence on natural resources correlated with disappointing economic growth and inequality.³⁴¹ Dutch disease has negative bearing on the inequality and social structure of the community because of the extractive activities. Essentially what happens under such conditions is that those with the “muscle” or power will control the means of production whilst the poor sink deeper into poverty.³⁴² Resource revenue can cover up for poor governance in the short-term but plentiful revenues shield government from hard choices and efficient operation.³⁴³ In a resource rich nation such as Zimbabwe all its people should be able to benefit from its resources, but this has been shown several times in the preceding discussion to be a debilitating problem.

The Minister of Finance has on several occasions complained that diamond revenues are being looted, probably by the government officials and military officers involved in shady deals in the diamond sector in Marange.³⁴⁴ This is because the Chinese company that has collaborated with the government in the extractive activities has not submitted any revenue to the treasury despite the company being the largest mining entity in the diamond rich area.³⁴⁵ Resource Curse in the case of Zimbabwe cannot be eliminated because of the low government accountability.³⁴⁶ The implication behind this notion is that resource wealth produced from a region or nation is exported with minimal benefits remaining for the communities.³⁴⁷ Resource curse is a serious problem not only for Zimbabwe but also for the African continent

³³⁹ Shultz *Follow the Money A Guide to Monitoring Budgets and Oil and Gas Revenue* 14.

³⁴⁰ United Nations Economic and Social Council Economic Commission for Africa :Africa Review Report on Mining 29 September 2009 4.1-16

³⁴¹ Standing 2007 *Institute for Security Studies Paper 3*.

³⁴² Standing 2007 *Institute for Security Studies Paper 3*.

³⁴³ Shultz *Follow the Money A Guide to Monitoring Budgets and Oil and Gas Revenue* 14.

³⁴⁴ Author Unknown *The Standard Newspaper* 24 May 2012 4.

³⁴⁵ Author Unknown *The Standard Newspaper* 24 May 2012 4.

³⁴⁶ Genasci and Pray 2008 *Yale Human Rights and Development Law Journal* 62.

³⁴⁷ Godden, Langton Mazel and Tehan 2008 *Journal of Energy and Natural Resources Law* 22.

as a whole. Nations that have minerals of high value such as oil and diamonds have been victims of on-going conflict. In the case of Sierra Leone, for example, the rebels used diamonds to purchase arms and ammunition. The issue of blood diamonds has already been dealt with in Chapter 4.

5.7 Advancement of Human Rights

For effective revenue, management, there has to be an advancement of human rights. It is accepted that big mining corporations do not hold the same powers as the state within the area where they are operating. In other words these corporations are answerable to the state, but this does not mean corporations ought not to have human rights obligations.³⁴⁸ Lack of accountability in revenue management leads to instability and this means that taxes and royalties the government is supposed to receive are diverted elsewhere. This leads to a bad investment environment. The state is not able to accomplish its mandate to champion for socio economic rights.

5.8 Corporate Social Responsibility

Corporate Social Responsibility (CSR) can be described as a policy whereby companies carry out operations in a manner that does not endanger but instead enhances peoples' lives through revenue generating programmes and giving back to the communities from which they extract minerals.³⁴⁹ CSR might mean that there has to be direct engagement with the local communities.³⁵⁰ At present, CSR is a voluntary initiative that not only benefits the community, but also uplifts the image of the mining company. CSR must not only be a policy, it must be made mandatory. Through annual meetings such the African Initiative Mining Environment and Society (AIMES), CSR could possibly be made mandatory.³⁵¹ Zimbabwe can learn from other jurisdictions (discussed in chapter 6) on how to ensure effective revenue management for the benefit of the Communities through CSR. CSR will mean that mining companies manage their revenues in such a way that they give back to the communities that surround them. These companies can plough finances back into

³⁴⁸ Post Seminar Report Pilot Workshop on Human Rights and Business 28 July 2011 3.

³⁴⁹ Masara 2011 <http://www.minesandcommunities.org/article.php?a=11030&l=1>.

³⁵⁰ Genasci and Pray 2008 *Yale Human Rights and Development Law Journal* 38.

³⁵¹ Masara 2011 <http://www.minesandcommunities.org/article.php?a=11030&l=1>.

the community in the form Community Share Ownership Trusts (CSOTs) and Employment Share Ownership Trusts (ESOTs).

CSR can come in the form of improvements of existing infrastructure or construction of new infrastructure. Currently in Zimbabwe mining towns do not have the glamour that mining towns in South Africa have. A clear example is Gwanda, the writer's hometown, a town which is the provincial capital of Matabeleland South Province. Gwanda has roads that are riddled with potholes and a water system crippled repeatedly by water cuts. The road that leads to the two functional mines is a strip road. This raises the question of whether the mining companies are practising CSR. A further question that arises is whether the town even deserves to be called a provincial capital.

There is a need for the community to be constantly kept up to date with what is going on in their community. The feedback mechanisms should ensure that all affected people are conversant with the outcome of the project, especially the financial aspects of the project.³⁵² The financial aspects of the project indicate the need for an effective and transparent revenue management system that will impact positively on the community. In the case of Gwanda, on a positive note the media reports that in line with CSR, Portland cement, a mining company mining limestone about 22km from Gwanda, contributed 16 million Rands to the Gwanda CSOT. Gwanda CSOT has identified six developmental areas with livestock restocking and irrigation programmes receiving priority.³⁵³

Pray and Genasci submit that CSR practices do not adequately take into account the important effects of business activity on local communities, but rather divert attention from them.³⁵⁴ The Marange situation is a clear example of a lack of CSR because Mbada Mining and the government have failed to pay compensation to the relocated villagers on time and furthermore there has been a delay in providing infrastructure such as schools and clinics. Children are reported to be learning beneath trees with minimal books and equipment. This is typical not only of the Marange community but of other relocated communities situated near mines.

³⁵² Siyongwana and Mayekiso 2011 *Africa Insight* 6.

³⁵³ Dube *Chronicle* 3.

³⁵⁴ Genasci and Pray 2008 *Yale Human Rights and Development Law Journal* 41.

Local mining companies should take lessons from the mining companies in other countries discussed in chapter 6 of this dissertation on their success stories of CSR. This will take the momentum of CSR to be one solid chain that will inspire other companies to follow suit. In summing up, the best way to boost a mining company's relationship with the community is to fund essential services such as health, education and infrastructure projects.

5.9 Lesson from the Bafokeng

The Royal Bafokeng Nation, is situated in Phokeng, just outside Rustenburg town in South Africa. Its approach to community participation is a motivational example that can be applied not only to the Marange Communities but also to other communities in Zimbabwe. The Bafokeng own land which has vast reserves of platinum. In 1999, the Bafokeng reached an agreement with Impala Platinum on royalties payable to them. In addition the Bafokeng also received a million shares from the platinum mining company Implats.³⁵⁵ This is the exact opposite to the experience of the people of Marange. The Zimbabwe government did not initiate any meaningful engagement with the people to enable them to have a stake in the minerals found on their land in regard to allocation of shares and royalties. This has created a negative impression of government's commitment in empowering communities.

The government through the Ministry of Mining and Mining Development and the Ministry of Youth Development, Indigenisation and Empowerment has further complicated the situation in Marange by involving army generals to sit in on the steering committee to ensure that indigenisation policies are complied with. Instead of the community being empowered and their interests being looked after, there is a probability that those sitting in the steering committee will practise nepotism.

5.10 Community engagement in revenue sharing regimes

Budgetary work must not just be a record of the amount of minerals that have been extracted. It must involve following up whether the money goes back to that

³⁵⁵ Mtisi (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011 32.

particular community.³⁵⁶ Key questions are “What is it buying?” “What effect is it actually having on people’s lives?”³⁵⁷ People at the highest level of government can also be as equally on how revenue from mining is used. An example of this was when the then Minister of Finance Tendai Biti made a statement in the press that the treasury was not receiving any revenue from diamond sales in Marange.³⁵⁸ He has cited Ajin Investments, a Chinese company, as the main culprit. The business dealings conducted by the Chinese clearly show that they are not interested in the development of the Marange community and that very little attention is given to transparency and accountability.³⁵⁹

This Statement comes after the Minister of Mines told the Minister of Finance that he had no right to question how proceeds from the Marange diamond fields were being administered.³⁶⁰ The United Nations Universal Periodic Review states that stronger mechanisms must be in place to ensure greater revenue transparency from diamond mining and the demilitarization of the diamond industry in Zimbabwe.³⁶¹

Many excuses are given as to why there is no immediate benefit to the community from the Marange diamonds. Excuses range from that the community of Marange cannot claim money from the diamond field because it is not a shareholder, and that even if it was a shareholder it can only get dividends at the end of each trading year. The dividends from these diamonds are also said to be little, because the billions of dollars in expenses supposedly swallowing profits made from the diamond fields.³⁶² In other words the people of Marange are placed in situation where the prospect of gaining from the diamonds is not promising because of the bureaucracy created over the ownership of the diamonds.

5.11 Transparency in Revenues obtained from the Extractive Activities Sector

³⁵⁶ Section 2 (a) (ii) of The Lusaka Declaration on Mining Taxation Calls upon African governments to enact and/or implement fair and equitable revenue sharing mechanisms of proceeds emanating from mining operations.

³⁵⁷ Shultz *Follow the Money A Guide to Monitoring Budgets and Oil and Gas Revenue* 23.

³⁵⁸ Chipangura *Newsday* 4.

³⁵⁹ Mazwi *The Independent* 2.

³⁶⁰ Mazwi *The Independent* 2.

³⁶¹ Report of the Working Group on the Universal Periodic Review: Zimbabwe’ Human Rights Council Nineteenth Session Agenda Item 6 Universal Periodic Review 20.

³⁶² Chipangura *Newsday* 4.

5.11.1 Lack of Transparency

At the present, there is little transparency in the manner in which diamonds are mined. The ministry responsible for keeping records of how much is made in terms of both revenue and diamonds is very secretive.³⁶³ Lack of transparency is a fertile ground for speculation to mushroom. Speculation can be as varied as the thought that revenues generated are being stashed in some foreign bank account so that in the event the ruling party loses power they know that they have money somewhere to fall back on.

A system that is riddled with corruption is not transparent. The Marange scenario represents a situation whereby the extractive companies mining the alluvial diamonds are very complicit in their dealings with the state. The fear is that this will result in even more widespread corruption that will make a resource rich nation like Zimbabwe to be amongst the most highly indebted poor countries with low per capita income.³⁶⁴ It is the mandate of the state to counter such by setting up transparency mechanisms that will facilitate proper management of the revenues made from the extractive activities sector.

Transparency can be facilitated by disclosing crucial information on the revenue distribution for the benefit of the communities.³⁶⁵ The purpose of disclosure is to inform a diverse set of local stakeholders who might not have intensive knowledge on the mining sector, finance, revenue or taxation.³⁶⁶ Disclosure must take into

³⁶³ Chipangura *Newsday* 4.

³⁶⁴ Al Faruque 2006 *Journal for Energy and Natural Resources* 67.

³⁶⁵ Al Faruque 2006 *Journal for Energy and Natural Resources* 67. The Declaration on a Human Rights-Based Approach to Natural Resource Governance states that Nations should place natural resources governance under transparency, including through open budgeting and certification processes and protection of the freedom of the press information and expression. This right of access to information and to documents generated by the government, or to which the government is a party, that are necessary for citizens to understand the extent and value of their natural resources and the payments for those resources received and disbursed by their governments, in order to bring their legislation in line with the African Charter on Human and People's Rights.

³⁶⁶ Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society* 244. See also Bennett Date Unknown 5 http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/RevenueSharingRegimes.pdf. The article emphasises on the need for provisions to assure accountability in the management of funds. If central governments or community organisations cannot ensure accountability in the management of funds, a third party trustee maybe necessary particularly when private sector engagement has an impact on local communities and indigenous stakeholders.

consideration the people's level of education because it differs from person to person.

Sometimes the public or the community may have high expectations of the revenue generated and may have derived their own inflated figures before the actual benefits appear.³⁶⁷ The government must work hand in hand with communities, the Chamber of Mines and the various companies that have mining concessions in Zimbabwe. The companies and the Government should develop a culture of being proactive in the way of disclosing revenue payments by the companies to the Government. The Government should disclose what projects and infrastructure it has developed or rehabilitated in the respective communities where the minerals are found.

Not everyone has access to the print media or radio and television. Also in the case of Zimbabwe the radio communications system is very bad especially in the remote areas. A suitable method of disclosure to communities where radio and television signals are very bad would be to constantly have workshops and meetings with the villagers to update them, preferably in a language that they best understand. This would also encourage villagers to stay alert and informed on what is transpiring in their villages.

5.11.2 Benefits of Transparency

Transparency erases doubts and unfounded allegations about the facts in issue. It is a mechanism meant to ensure that ordinary people are aware of what is happening on the ground. Transparency in the revenue management brings trust to the host communities. This paves the way for a long-standing relationship between the Government, the mining companies and the hosting community.³⁶⁸ The community is able to see what is transpiring because any activity taking place is not cloaked in secrecy.

5.11.3 Instrumentalities of transparency in revenue management

Transparency in contractual arrangements is an important step feature towards revenue transparency. Contractual arrangements should contain provisions that

³⁶⁷ Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society* 244.

³⁶⁸ Al Faruque 2006 *Journal for Energy and Natural Resources* 69.

state the equity participation and the fiscal regimes of the contract.³⁶⁹ Transparency in extractive revenue requires accountability in three different ways, that is, revenue collection, revenue management and revenue distribution.³⁷⁰ Transparency requires that records of revenue earnings be kept and that proper accounting is done of what the company pays to the government and how revenues are spent.³⁷¹ A transparent process for all these activities should be put in place for managing the resources for the greater wellbeing of the community.³⁷² The transparent and efficient ways of revenue collection through taxes or the fiscal provisions of a contract should be highly emphasised.

Most importantly, revenue management systems should be designed so there is stability in the revenue system to avoid an instance of price shocks. Recently the pricing system has not been favourable for the extractive sector. For example in its mineral forecast the World Bank projected that an ounce of gold which stood at US \$1 368 (R13 680) in 2012 will rise to US\$1 600(R16 000) in 2013 but it would fall to US\$1400 (R14 000) in 2014 and it would further fall to another US\$1 200 (R12 000) in 2015.³⁷³ Good governance would entail setting funds aside in the event of the price shock anticipated.³⁷⁴ If there is a price shock for the mineral in question or if the company decided to shut down because of operational requirements or if there was lack of demand for that particular mineral, the community that is benefiting from royalties is bound to be prejudiced because of a decline in royalties.

Bad governance is characterised by secrecy and is a breeding ground for corruption particularly in the instance where top officials want a stake in the extractive activities sector. This can be addressed by ending the monopoly, reducing the scope of discretion of revenue authorities, enforcing regulations strictly and establishing accountability in political processes.³⁷⁵ Government may further address this by coming up with an efficient judicial system and respecting the rule of law.

³⁶⁹ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷⁰ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷¹ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷² Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷³ Quoted by Minister of Finance Tendia Biti in his budget speech titled 'The 2013 National Budget Statement' *Beyond the Enclave: Unleashing Zimbabwe's Economic Growth Potential* Ministry of Finance 15 November 2012 39.

³⁷⁴ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷⁵ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

5.11.4 Negative Impact of Lack of Transparency

Lack of transparency and accountability can result in the embezzlement of revenue generated. For example in Zaire, now the Democratic Republic of Congo Mobutu Sese Seko, the President, siphoned the nation's minerals and banked the revenue in off shore off accounts.³⁷⁶ Misappropriation of revenue can seriously affect the well-being of the people because they do not realise any benefit from their nations' resources.³⁷⁷

If the Government does not act in a manner that shows it is transparent in revenue management, potential investors will become reluctant to invest in the country. This lack of transparency ends up prejudicing those communities.³⁷⁸

5.11.5 Extractive Activities Transparency Initiative

The Extractive Activities Transparency Initiative (EITI) was formed as result of the need to increase transparency in the extractive activities sector. Before its formation in 2002, revenues paid to the government by the mining sector were confidential.³⁷⁹ This was because most contracts around the globe are performed under a veil of secrecy with confidentiality clauses that stop the general community and public from knowing what revenues are going to the state and what privileges and rights have

³⁷⁶ Shekhawat 2009 http://www.mu.ac.in/arts/social_science/african_studies/seemawp6.pdf.

³⁷⁷ Mlambo 1993 *Zambezia* 57.

³⁷⁸ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

³⁷⁹ Collier 2008 *Yale Human Rights and Development Law Journal* 17. See also Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society* 244. See also Standing 2007 "Institute for Security Studies Paper 17. The writer talks of EITI preventing government embezzling funds for their own benefit. It also a move to ensure that there are guidelines for creating national legislation and procedures rather than strict rules. Similar to EITI is the IMF code of good practice on transparency which recommends that public funds be subject to publicly reported audits of financial operations and an independent assurance of integrity provision made under law for verification of the transparency and thoroughness of government accounts by a means of an independent central audit office. Bennett Date Unknown 5 http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/RevenueSharingRegimes.pdf f 5.

been awarded to mining companies.³⁸⁰ This is because of insufficient independent Government structures in the area of revenue management.³⁸¹

5.11.6 Four principles for Revenue Management in the Extractive Activities sector

EITI sets out four important principles for revenue transparency. The first principle states that payments by extractive companies and receipts by governments must be independently verified and published and there must be a mechanism for identifying any discrepancies arising in the figures. Publication removes doubt and puts those people who have been discrediting the company and the government to shame. The second principle states that the role of civil society must be duly recognised and it should be actively involved in the process of transparency.

The third principle states that the right of companies to confidentiality should never extend to payments to the state. This means that payments may not be done in secret. They must be done in an open way so that civil society is made aware what is transpiring in terms of payments made to the Government. The fourth principle states that donors and international financial institutions must commit themselves in providing capacity building and technical assistance to support the country's will to implement EITI.

At present, questions are raised as to why Zimbabwe has not yet implemented EITI transparency initiatives.³⁸² This is mainly because EITI is a voluntary approach that needs a significant degree of commitment in implementing it. Journalists have lambasted the lack of transparency in the Marange diamond fields because they have not been allowed to make regular assessments as to what has been transpiring there.³⁸³

5.12 Publish What You Pay Campaign

³⁸⁰ United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 4 1-16. Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society* 244.

³⁸¹ United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 4.1-16 Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society* 244.

³⁸² Section 2 (a) (viii) of the Lusaka Declaration on Mining Taxation on mining calls on African governments to adopt and enforce the Extractive Industry Transparency Initiative (EITI) regulations in existing mining legislation and to ratify the United Nations Convention Against Corruption.

³⁸³ Mutingwende *The Zimbabwean* 7.

The Publish What You Pay campaign (PWYP) was recently launched in Zimbabwe. This campaign was influenced by what has been transpiring in Marange. PWYP has an objective to push the Zimbabwean Government and mining companies to subscribe to EITI.³⁸⁴ The PWYP Zimbabwe chapter also aims at targeting ongoing and future legislative reform processes on mining such as the proposed Diamond Revenue Bill, the Mines and Minerals Amendment Bill, the Mineral Policy and the Constitutional Reform processes.³⁸⁵

The initiative comes at a good time because the existing legislation in Zimbabwe hinders access to information and community participation. Legislation that comes to mind is the AIPPA and the Public Order and Security Act (POSA). It is hoped that PWYP will fight to promote the civil, political, social, economic and cultural rights of communities affected by the actions or omissions of state entities or private companies carrying out extractive activities in Zimbabwe. The major challenge behind this initiative is that the Government might not have the administrative capacity to create, organise, audit and publicise a budget of resource revenues.³⁸⁶

At present, a resource rich nation such as Zimbabwe does not have a legal and regulatory framework allowing the free flow of information on revenues received, particularly the revenues that have been received from Marange. In presenting the 2012 budget, the Minister of Finance has reiterated that there is a need for transparency concerning diamond mining in Marange, if revenue generated is to benefit the economy.³⁸⁷ Legal obligations must not only be centred on the government, but they must also be imposed on the companies carrying out the extractive activities in Zimbabwe. Reporting of the expenditure of extractive revenues plays an important role in the evaluation of government performance in transparency and accountability.³⁸⁸ The main challenge with PWYP is that it is voluntary and Zimbabwe is not bound to adhere to PWYP principles because it is a sovereign nation.

³⁸⁴ Lee 2011

<http://www.osisa.org/economic-justice/zimbabwe/publish-what-you-pay-launches-zimbabwe>.

³⁸⁵ Lee 2011

<http://www.osisa.org/economic-justice/zimbabwe/publish-what-you-pay-launches-zimbabwe>.

³⁸⁶ Genasci and Pray 2008 *Yale Human Rights and Development Law Journal* 62.

³⁸⁷ Zimbabwe Environmental Law Association 2012

<http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV>.

³⁸⁸ Al Faruque 2006 *Journal for Energy and Natural Resources* 71.

5.13 Zimbabwe Mining Revenue Transparency

The Zimbabwe Mining Revenue Transparency (ZMRT) is a national participatory process aimed at promoting dialogue and trust amongst stakeholders in the mining sector and to enable transparency in Zimbabwe's mining revenues.³⁸⁹ This is in line with EITI standards which advocates for states to adhere to the principles and criteria set by it for transparent revenue management. ZMRT has its own challenges such as refusal by the government to recognise it. This comes after the Minister of Mines said his ministry would not subscribe to the resource mobilisation committee on the basis that Zimbabwe is still under sanctions from the western block of nations.³⁹⁰ The ZELA submits that there is a need to institutionalise transparency in the community trusts that are being established to ensure that the benefits filter to the local community members.³⁹¹ Without transparency and accountability, the indigenisation and economic empowerment drive may become a cloak for those in the most senior positions in government, parastatals and local municipalities to carry out the looting of resources.³⁹²

5.14 Centralisation of Revenue Sharing and Management

Centralised revenue management is one of the major sources of corruption and lack of transparency. This has led to discontent amongst local communities regarding the exploitation of natural resources.³⁹³ Opposition Political Parties have been calling for decentralisation of government structures so that they can benefit from resources. Decentralisation can be described as "Any act by which a central government formally concedes power to actors and institutions at lower levels in a political and territorial hierarchy."³⁹⁴ Decentralisation not only brings the benefit of democracy and

³⁸⁹ Lee 2011

<http://www.osisa.org/economic-justice/zimbabwe/publish-what-you-pay-launches-zimbabwe>.

³⁹⁰ Mudarikiri *The Independent* 7.

³⁹¹ Zimbabwe Environmental Law Association 2012

<http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV>.

³⁹² Zimbabwe Environmental Law Association 2012

<http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV>.

³⁹³ Al Faruque 2006 *Journal for Energy and Natural Resources* 92.

³⁹⁴ Mohamed-Katerere 2001 *African Studies Quarterly* 114-138. Decentralisation not only brings the benefit of democracy and accountability but it also recognises that there is cultural diversity and equitable development. See Fombad 2011 *Buffalo Law Review* 1051.

accountability but it also recognises that there is cultural diversity and equitable development.³⁹⁵

The local communities may view an extractive activity agreement's fiscal regime that is insensitive to their needs and exclusively providing revenue to central government as inequitable and unjust. Sharing part of the revenue with the local communities goes a long way towards addressing socio-economic challenges, as addressed by the African Charter on Human and Peoples Rights that Zimbabwe has not only signed, but also ratified.

Revenue sharing has its own challenges, such as companies negotiating directly with the central government. This excludes the local communities who feel marginalised by the whole deal. The communities who voice their need to be part of the revenue sharing regime may sometimes be confounded by terminology found in the contracts which are not always easy to understand. Communities are blocked by legislation from demanding a share in revenue from extractive activities by the Mines and Minerals Act in Section 2, which states that all minerals are vested in the President.³⁹⁶ A remedy to such legislation would be perhaps to implement the maximum possible devolution of power to the lower levels of government. The greatest challenge is that the devolution of regulatory policies is difficult to implement in Zimbabwe because mining contributes a huge portion of the national income. Devolution without responsibility in a country of uneven development can result in increased marginalisation. It involves the creation of autonomy.

5.16 Conclusion

From the above discussion, one can see that there is a need to have effective revenue management in the mining sector in Zimbabwe. Zimbabwe must seriously consider adopting the conventions proposed by the KPCS and EITI in order to make revenue management transparent and effective. Academics, politicians, NGOs and civil society need to work hand in hand to come up with robust ideas in effecting proper revenue management in the extractive activities sector for the benefit of the communities.

³⁹⁵ Fombad 2011 *Buffalo Law Review* 1051.

³⁹⁶ See Section 2 of the MMA.

It is evident that the revenue management system in most mining powerhouses is not transparent. Initiatives such as the PWYP and EITI have been met with resistance from the state, saying that they are the ideologies of the west, initiated to come up with methods of plundering Zimbabwe's minerals. The PWYP and EITI campaigns cannot improve the transparency in the extractive activities sector if they are not fully implemented. Furthermore, they become useless if they do not involve sectors such as civil society and the respective communities. The voluntary nature of PWYP, EITI and CSR makes it optional for companies to reveal their revenues.



CHAPTER 6

COMMUNITY PARTICIPATION ENCAPSULATED IN INTERNATIONAL INSTRUMENTS AND OTHER JURISDICTIONS

6.1 Introduction

This Chapter attempts to examine matters related to community participation as provided for in the various treaties, charters and conventions. The chapter also makes a comparative analysis of community participation in extractive activities at regional and international level. It looks at nations that are prospering with regard to mining activities and doing well in integrating local communities, allowing them to benefit in extractive activities. In the specific countries analysed, the chapter looks at community participation in extractive activities and how it has affected the communities.

6.2 Core International Instruments

At the regional level, the African Charter on Human and Peoples Rights states that States must give meaningful opportunities for individuals to be heard and to participate in the development decisions that affect their communities.³⁹⁷ This idea is encapsulated in the African Charter for Human and People's Rights, 1981. Like every other African state, Zimbabwe has ratified this treaty. However, although this is clearly stated, many citizens, especially those living in communities where extractive activities are taking place, are not aware of their rights as individuals. This is particularly problematic in the matter of evictions.³⁹⁸ There is a need to increase awareness of the substantive and procedural standards that have to be respected prior to, during and after evictions so that people are informed of their rights.

6.3 Three Core International Instruments Related To Community Participation

At the international level, there are three major human rights instruments relating to community participation in the mining tenure system. These are the Universal Declaration of Human Rights (UDHR), which was adopted in 1948, the International

³⁹⁷ Chenwi & Tissington *Engaging Meaningfully with Government on Socio-Economic Rights A focus on the Right to Housing* 17. See Article 13 on the African Charter on Human and Peoples Rights.

³⁹⁸ Chenwi & Tissington *Evictions in South Africa Relevant International and National Standards* 3.

Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which were both adopted in 1966. Under these instruments, states that have ratified or acceded to them have the legal obligation to give effect to the rights through incorporation, institutionalisation, operationalisation and internalisation.³⁹⁹

6.3.1 Universal Declaration of Human Rights (UDHR)

The UDHR has some cross cutting themes that are related to community participation in the extractive activities sector. These themes are dignity and justice, development and participation.

6.3.1.1 Dignity and Justice

Dignity and justice for all human beings is a promise in the UDHR. The preamble states that all human beings are born with equal and inalienable rights and fundamental freedoms.⁴⁰⁰ Article 1 repeats the same statement in the preamble on equality.⁴⁰¹ Government has a responsibility in ensuring that it treats its citizens who make up the various communities with respect.

6.3.1.2 Development

The UDHR provides a vision in which all people, regardless of their social position and where they live, have an equal opportunity to grow and develop in freedom and equality, and to the fullness of their potential. In the year 2000, eight international development goals – the Millennium Development Goals – were formulated. The aim is to achieve the aspiration in the UDHR by the year 2015. These goals were formulated in line with the right to development found in Articles 22 and 29 of the UDHR.⁴⁰² Article 29(1) is significant because it mentions the duty that one owes to the community in development. The right to development is an important aspect in ensuring that an individual benefits from the resources around him or her.

³⁹⁹ Viljoen 2011 *De Jure* 214.

⁴⁰⁰ Universal Declaration of Human Rights Preamble here after referred to as the UDHR.

⁴⁰¹ Article 1 of UDHR.

⁴⁰² See Articles 22 and 29 of the UDHR.

6.3.1.3 Participation

Human beings have the right to take a full part in the life of their community.⁴⁰³ If there is no participation, there can be no enjoyment of the rights and freedoms found in the UDHR. Such participation should be active, free and meaningful. Participation is imperative to those people who have been excluded and can be used as a platform to voice their concerns, especially where prior consultation is needed.

6.3.2 International Covenant on Civil and Political Rights (ICCPR)

ICCPR, from a community participation in the extractive activities sector perspective, protects the rights of the communities. Article 1 of ICCPR mentions the right to self-determination and the right to development.⁴⁰⁴ Self-determination implies independence amongst the people to participate in matters affecting them. Hence it is important that companies need to take into consideration the existence of this instrument as this covers the respect of the cultural and political integrity of the communities where mining companies may want to operate. The right to free, prior and informed consent cannot be ignored because it is covered by this instrument. Communities, after consenting to the mining project, deserve the right to be included in the benefit agreements. ICCPR protects rights such as effective participation in the mining projects.⁴⁰⁵

6.3.3 International Covenant on Socio Economic Rights (ICESCR)

6.3.3.1 State Party Obligations

ICESCR in article 2(1) states that each state, subject to the availability of resources, must achieve progressive realisation of rights through adoption of legislative measures.⁴⁰⁶ The state should plough resources back into the community from where it has reaped benefits. The community deserves to be treated with respect in terms of the resources extracted from its lands. Hence, most countries in the west have a comprehensive legislative framework that takes into account these measures

⁴⁰³ See Article 27 of the UDHR. The right to participate in all forms of cultural life includes the right not to be dispossessed of land that a community has a cultural attachment, which includes the occupation for the land by the communities' fore-fathers.

⁴⁰⁴ See Article 1 of the International Covenant on Civil and Political Rights.

⁴⁰⁵ Laplante and Spears 2008 *Yale Human Rights and Development Journal* 87. See also article 19 of the International Covenant on Civil and Political Rights.

⁴⁰⁶ See Article 2 (1) of the ICESCR.

of the ICESCR. In the case of *Government of the Republic of South Africa and Others v Grootboom*,⁴⁰⁷ the Court in paragraph 27 mentioned the positive obligations taken by states in realising these rights.⁴⁰⁸ In paragraph 29 of the judgement, the court held that these obligations are monitored by the United Nations Committee on Economic, Social and Cultural Rights, which consists of a panel of 18 independent experts.⁴⁰⁹

By engaging the community in the extractive activities process, the state and the mining companies are advancing the socio economic interests of the community. Yacoob J stated in the *Grootboom*-case⁴¹⁰ that:

*The minimum core obligation required by the states to advance this right was done in order to ensure that states comply with it. This minimum core has been developed by the Committee over years of examining reports of member states.*⁴¹¹

In essence the advancement of this right is monitored by a selected panel. Dodging the implementation of this right deprives the communities from enjoying this right. Not only does this prejudice the communities, but it also damages the reputation of the nation. Donor's become reluctant to pour funds into the advancement of such rights where the government is not fully adhering to them.

In another South African Case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others*⁴¹² O'Regan J stated that:

The concept of progressive realisation of socio economic rights recognises that policies formulated by the state need to be reviewed and revised to ensure that the realisation of social and economic rights is progressively

⁴⁰⁷ *Government of the Republic of South Africa and Others v Grootboom* 2000 (11) BCLR 1169 (CC) Paragraph 27, hereafter referred to as "*Government of the Republic of South Africa and Others v Grootboom*".

⁴⁰⁸ *Government of the Republic of South Africa and Others v Grootboom* paragraph 27.

⁴⁰⁹ *Government of the Republic of South Africa and Others v Grootboom* paragraph 29.

⁴¹⁰ *Government of the Republic of South Africa and Others v Grootboom* paragraph 30

⁴¹¹ *Government of the Republic of South Africa and Others v Grootboom* Paragraph 33.

⁴¹² *Lindiwe Mazibuko and Others v City of Johannesburg and Others* Case CCT 39/09 [2009] ZACC 28 Paragraph 40, hereafter referred to as *Lindiwe Mazibuko and Others v City of Johannesburg and Others*.

achieved.⁴¹³

Review of policies is a mechanism of identifying the challenges that make policies difficult to implement. Amongst the obstacles that prevent the implementation of policies for socio economic rights is not working with the people in ensuring such rights are realised.

In keeping with the ICESCR, the United Nations Berlin guidelines provide recommendations on how to engage in sustainable mining practices that promote adequate community consultation and development.⁴¹⁴ Interests of the communities can be advanced through economic instruments, prescriptive standards, binding agreements, corporate reporting and industry charters.⁴¹⁵ The Berlin guidelines make provision for artisanal miners in the sense of viable and efficient financing and credit systems provided to ensure viability of all projects.⁴¹⁶ Artisanal miners in most instances do not have access to readily available credit facilities to ensure that they progress in the extractive activity sector. This is partly because most of them come from peasant backgrounds and do not have valuable collateral security like immovable property or movable property that would be of equal value to the amount loaned.

It is important that there is interaction between small-scale miners and large scale mining entities in the form of working groups and association.⁴¹⁷ Most artisanal miners are residents of the community where the particular mineral is found. It is important to give them credit so that they can purchase proper equipment such as gloves, mercury, and dynamite from trusted sources to facilitate their activities. The state must make provision to recognise these people so that they can carry out their mining in a legal, efficient and safe manner.

⁴¹³ *Lindiwe Mazibuko and Others v City of Johannesburg and Others* paragraph 40.

⁴¹⁴ Eastern Cape Socio Economic Consultative Council 2011
http://www.ecsecc.org/files/library/documents/WP15_1.pdf.

⁴¹⁵ Eastern Cape Socio Economic Consultative Council 2011
http://www.ecsecc.org/files/library/documents/WP15_1.pdf.

⁴¹⁶ Eastern Cape Socio Economic Consultative Council 2011
http://www.ecsecc.org/files/library/documents/WP15_1.pdf.

⁴¹⁷ Eastern Cape Socio Economic Consultative Council 2011
http://www.ecsecc.org/files/library/documents/WP15_1.pdf.

According to Wiles socio-economic rights are socially orientated in the sense that they add a participatory element to the idea of human rights and reflect a concern for the welfare of the community.⁴¹⁸ Mining companies should consider the advancement of socio economic rights because this uplifts the welfare of the communities where they are extracting minerals.

Wiles further proposes that for an international instrument such as the ICESCR to be effective there should be mechanisms such as a commission, office of the ombudsman or other monitoring body that will submit reports, statistics and impact assessment studies.⁴¹⁹ From a community participation perspective in the extractive sector approach, this could lay the benchmark for an international forum for comparative discussions between developing countries and developed countries. Enforcement of ICESR in the extractive activities sector brings about mechanisms to improve the quality of life on the communities which in most cases are rural.

6.4 United Nations Declaration on the Rights of Indigenous Peoples

Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that “indigenous people have the right to full enjoyment of all human rights and fundamental freedoms as recognised in the UNDRIP charter”.⁴²⁰ Article 10 states “that Indigenous people shall not be forcibly removed from their lands or territories. Relocation shall not take place without free, prior and informed consent and after the parties have come to an agreement on just and fair compensation and where possible with an option of return”.⁴²¹ Article 19 states the right of indigenous people to participate fully, if they opt to, at all levels of decision making in matters affecting their rights, lives and destinies through representatives chosen by them.⁴²² Article 20 further goes on to state that indigenous people have the right to participate fully in devising legislative or administrative measures that may affect them.⁴²³ These articles indicate the prospective challenges that indigenous communities are likely to encounter from the mining companies. The

⁴¹⁸ Wiles 2006 *AM.U.INT'L L.REV.* 50.

⁴¹⁹ Wiles 2006 *AM.U.INT'L L.REV.* 63.

⁴²⁰ Article 1 of the United Nations Declaration on the Rights of Indigenous Peoples (here after referred to as UNDRIP).

⁴²¹ Article 10 of the UNDRIP.

⁴²² Article 20 of the UNDRIP.

⁴²³ Article 21 of the UNDRIP.

original inhabitants of land that has been earmarked for extractive activities should be able to rely on the UNDRIP to ensure that their rights are protected. UNDRIP is connected to free, prior informed consent in terms of exploitation of mineral resources.

According to Chan, this declaration does not have any binding force because it does not impose any legal obligations on the signatories.⁴²⁴ However, on a positive note, the countries that are not signatories to this declaration namely Canada and Australia are advancing the interests of the indigenous communities.

6.5 Human rights based approach to Natural Resources Governance

At the African Union 51st Ordinary Session held from 18 April to 2 May 2012 on a Human rights based approach to Natural Resources Governance in Banjul Gambia the delegates recalled Articles 14, 20, 21 and 24 of the ACHPR which protect the rights of people to pursue their social and economic development terms of policies freely chosen and also to dispose of their resources in the exclusive interest of the people in a generally satisfactory environment.⁴²⁵ Local communities have a vital role to play in the decisions as to whether they accept what is happening in their area. Policies must not be imposed on them. In the affirmation, state parties were called upon to act in accordance with the Rio Declaration and the ACHPR Charter which states that it is the duty of the state parties to ensure that there should be natural resource stewardship within the interest of the population and is line with international human rights law and standards.⁴²⁶ The state must act as a custodian to ensure that resources are a used in an equitable way for the benefit of the communities around them.

It was emphasised that state parties must confirm that all necessary measures have been taken to ensure there is participation, including the free, prior and informed consent of communities, in decision making process's related to natural resources

⁴²⁴ Chan 2008 *Yale Human Rights and Development Law Journal* 120.

⁴²⁵ Anon 2012

<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

⁴²⁶ Anon 2012

<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

governance.⁴²⁷ State parties must also ensure that there is a respect for human rights in all issues related to natural resource exploration and extraction. Mineral resources have the potential for social and economic development of most African countries. Article 14 of the ACHPR is of great significance as it protects property and subordinates this right to the interests of the community. Property in Africa must be submitted to the wider interests of the community.⁴²⁸ This right was asserted in the case of *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*⁴²⁹ where it was held that the confiscation of the complainants' equipment/property and depriving them of a source of income and livelihood was a violation of the right to property assured under Article 14 of the Charter. It is therefore submitted that the Human Rights based approach on Natural Resource Governance sets out clearly issues on resource governance for the benefit of the community.

6.6 Application of Sub regional Standards

The SADC framework on mining emphasises the participation of citizens in mining projects and benefit sharing with the local communities around the mining projects.⁴³⁰ The SADC Gender Protocol further encourages women to participate in the minerals sector.⁴³¹ Article 2 (8) of the SADC Protocol on Mining states that member states shall promote economic empowerment of the historically disadvantaged in the mining sector.⁴³²

6.7 Declaration on Human Rights-Based Approach to Natural Resources Governance

International standards state that there should be a clear legal framework for the extraction of natural resources. The Declaration on a Human Rights-Based

⁴²⁷ Anon 2012

<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

⁴²⁸ Hansungule 2000 *International Journal on Minority and Groups Rights* 339.

⁴²⁹ *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe* ACHPR 284/03 2003.

⁴³⁰ United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 8.1-16. See article 5 of the Treaty of Southern African Development Community.

⁴³¹ United Nations Economic and Social Council Economic Commission for Africa :Africa Review Report on Mining 29 September 2009 8.1-16

⁴³² Article 2 (8) of the SADC Protocol on Mining.

Approach to Natural Resources Governance adopted by the African Commission on Human and Peoples' Rights at its 51st Ordinary Session held from 18 April to 2 May 2012 in Banjul, Gambia advocates for the setting up of independent monitoring and accountability mechanisms. These are meant to ensure that human rights are justiciable and that extractive industries and investors are legally accountable in the country hosting their activities and in the country of legal domicile.⁴³³

The declaration further emphasises on the establishment of independent social and human rights impact assessments that guarantee free prior informed consent, effective remedies, fair compensation and public participation.⁴³⁴ International legal instruments emphasise the importance of community participation in extractive activities, particularly with reference to the violation of human rights on the community where natural resources have been found.

6.8 The Aarhus Convention

The Aarhus Convention (AC) provides detailed procedure on public or community participation in decisions concerning specific activities. This convention is based on three pillars, which are access to information, public participation and access to justice.⁴³⁵ The public or community must be informed early in an environmental decision-making procedure and in an adequate, timely and effective manner about the proposed activity and possible decisions, procedure and opportunities for the public to participate.⁴³⁶ There must be reasonable period for the public to prepare and participate early whilst all avenues are open.⁴³⁷ The public must have free access to documents for examination as soon as the documents become available.⁴³⁸ In this case, it is important for the community to have access to such documents. Where members of the community cannot understand what is actually contained in these documents mechanisms should be put in place to ensure that

⁴³³ Anon 2012 <http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

⁴³⁴ Anon2012<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

⁴³⁵ Lee and Abbot 2003 *The Modern Law Review* 82. See the Preamble of the Aarhus Convention (here after referred to as AC), Article 1, Article 3(1-6, 9) of the AC.

⁴³⁶ Kravchenko 2003 *Tulane Environmental Law Journal* 43. See the Preamble of the AC. See Article 3(3) and (9), Article 2 (d) (ii), Article 6(2), Article 7 of AC.

⁴³⁷ Kravchenko 2003 *Tulane Environmental Law Journal* 43. See also Article 6(3), Article 8 of AC.

⁴³⁸ Kravchenko 2003 *Tulane Environmental Law Journal* 43. See also Article 6 (2)(d)(iv) and (6) of the AC.

such documents are drafted in a language that is simple and to the point for the ordinary person in the community to understand. Perhaps Zimbabwe can take a lesson from this European convention and use it to reform its law in the extractive activities sector.

6.9 Equator Principles

The Equator principles are a set of guidelines on the best international practice of mining. Some of these guidelines are of great importance to community participation because they constitute a financial industry benchmark for determining, assessing and managing the social risk of mining.⁴³⁹ These guidelines are meant for the big financial institutions that loan cash to mining companies that want to expand their projects.⁴⁴⁰ In the year 2008, sixty financial institutions adopted the Equator Principles to form the Equator Principal Financial Institutions (EPFIs) had adopted these principles. It is commendable to note that EPFIs have made a commitment not to loan or facilitate any loan to projects where the borrower has not made a commitment to comply with the social policies that implement the Equator Principles.⁴⁴¹ Social policies in this case would involve the participation of the communities in the extractive sector. This move is not only positive for the communities but in the end, it will bind the mining company to its principles of enhancing community participation.

The Equator Principles require that a thorough assessment of the project should be done. Assessments must include proof that local consultation and disclosure has been done with the respective communities. Furthermore, the principles state that there should be a grievance mechanism and independent review mechanism in place to ensure that the communities' views and rights are taken into consideration.⁴⁴² The equator principles have an advantage because of the fact that they refer to published standards of the social and environmental protection and secondly they are willingly adhered to by most of the major financial institutions.⁴⁴³

⁴³⁹ Williams 2007-2008 *Journal for International Law* 697. See also the Equator Principles (here after referred to as EP).

⁴⁴⁰ Williams 2007-2008 *Journal for International Law* 697. See EP.

⁴⁴¹ Williams 2007-2008 *Journal for International Law* 697. See Article 5 of EP.

⁴⁴² Williams 2007-2008 *Journal for International Law* 697. See also Article 5 of the Equator Principles

⁴⁴³ Williams 2007-2008 *Journal for International Law* 697. See also the Equator Principles.

6.10 South Africa

6.10.1 Framework of Community Participation in the South African Mining Sector

There is no specific provision on community participation in the South African Constitution but however, the Constitution of South Africa mentions that the government has a duty to promote and facilitate community participation.⁴⁴⁴ Section 152 states that the government must provide service to the communities in a sustainable way.⁴⁴⁵ The preamble of the South African Constitution affirms that South Africa's democracy is established on the will of the people, respect for the principles of openness, transparency, accountability and participation by the people.⁴⁴⁶ The Africa Review Report on Mining praises South Africa's stance on community participation by the promotion of local equity participation in the mining projects. South Africa has fared better in comparison to other African countries.⁴⁴⁷

6.10.2 The Royal Bafokeng community

The Bafokeng people of the North-West Province, South Africa, have been blessed by one of the richest platinum deposits in the world that was found on their land in 1925. This was farming land they acquired in the nineteenth century and twentieth century.⁴⁴⁸ Their mineral wealth is being invested in extensive residential, commercial, environmental, tourism and educational projects.⁴⁴⁹ The Bafokeng are considered the richest tribe/community in Africa mainly because of revenues they have received from the mining companies exploiting the platinum rich land. This is an example in Africa of the best model for the benefit of the mining industry to local communities. It is difficult to match any mining community in Africa with the Bafokeng. Most communities face a resource curse and this is the situation that is likely to arise in Marange.

⁴⁴⁴ Chenwi and Tissington *Engaging Meaningfully with Government on Socio Economic Rights: A Focus on the Right to Housing* 7.

⁴⁴⁵ Section 152 of the South African Constitution.

⁴⁴⁶ Pudifin and Bosch 2012 *PELJ* 234. See the Preamble of the South African Constitution.

⁴⁴⁷ United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 8.1-16.

⁴⁴⁸ Mbenga and Manson, "People of the Dew": A History of the Bafokeng of Phokeng-Rustenburg Region, South Africa, from Early Times to 2000.

⁴⁴⁹ Mbenga and Manson, "People of the Dew": A History of the Bafokeng of Phokeng-Rustenburg Region, South Africa, from Early Times to 2000.

6.10.3 Mineral and Petroleum Resources Development Act of 2002

The Mineral and Petroleum Resources Development Act of 2002 (MPRDA) was designed to accommodate communities who have minerals found in their land. The MPRDA was amended in 2008, in what is known as the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (MPRDAA), to give a new definition of community in relation to extractive activities. A community, in terms of this Act, is described:

*.....as a group of historically disadvantaged persons with interest or rights in a particular area of land on which members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provision of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.*⁴⁵⁰

It is commendable that MPRDAA contains stringent standards in order to ensure that community participation in the extractive sector is realised. Community interests by this definition are taken into account. The MPRDAA derives its theme from the on going BBBEE exercise which is meant empower the masses.

6.10.4 Procedure of Consultation with the Community in terms of the Mineral and Petroleum Resources Development Act

In terms of Section 16(4) (b) of MPRDAA:

the prospector of a mineral has to inform the owner of the land, which is the community, in writing that his application for prospecting rights on the owners land has been accepted by the regional manager concerned (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will

⁴⁵⁰ Section 1 of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (here after referred to as MPRDAA).

*have on the landowner's use of the land(c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult.*⁴⁵¹

MPRDAA in regulation 42 states that an application for a mining right must be accompanied by a social and labour plan. The social and labour plan makes it obligatory for the mining companies to contribute towards the socio-economic development of the areas in which they are operating.⁴⁵² The programme must also indicate the impact that the mine would have, not only on the local communities but also on the migrating communities.⁴⁵³ The programme must also indicate the infrastructure and poverty eradication projects the mine would support in line with the integrated development plan of the areas in which the mines operate.⁴⁵⁴

From case law and the legislation, it is evident that South Africa's approach to community participation is very robust. It is fused with the current global trends. Land agreements are negotiated between local South African Communities and the corporate sector.⁴⁵⁵ The agreements contain equity arrangements with resource companies whereby the local landholding community receives company shares in lieu of royalty payments.⁴⁵⁶ These arrangements are in line with BBBEE whereby communities acquire the shares at a discount rate. Social upliftment of communities is included in the MPRDAA to mean BBBEE which is further explained as 'a social or economic strategy, plan, principle, approach or act which is aimed at:

(a) redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry and related industries (b) transforming such industries

⁴⁵¹ See Section 16(4) (b) of MPRDAA.

⁴⁵² Kloppers and du Plessis 2008 *Journal for Energy and Natural Resources Law* 101. See also regulation 42 of the MPRDAA.

⁴⁵³ Kloppers and du Plessis 2008 *Journal for Energy and Natural Resources Law* 103.

⁴⁵⁴ Kloppers and du Plessis 2008 *Journal for Energy and Natural Resources Law* 104.

⁴⁵⁵ Godden, Langton, Mazel and Tehan 2008 *Journal of Energy and Natural Resources Law* 14.

⁴⁵⁶ Godden, Langton, Mazel and Tehan 2008 *Journal of Energy and Natural Resources Law* 14.

*so as to assist in, providing for, initiate or facilitate-(i) the ownership, participation in or the benefiting from existing or future mining, prospecting, exploration or production operations; (ii) the participation in or control of management of such operations (v)the ownership of and participation in the beneficiation of the proceeds of the operations or other upstream or downstream value chains in such industries (vi) the socio-economic development of communities immediately hosting, affected by supplying of labour to the operations.*⁴⁵⁷

BBBEE deserves a fair amount of criticism equal to the praise that it has received from commentators. Some experts submit that initially when the BBBEE started it benefited politically connected individuals rather the mass of previously disadvantaged people.⁴⁵⁸

6.10.5 Chamber of Mines and Community Participation

The South African Chamber of Mines advocates for prior consultation with the community before a mining activity can take place. In paragraph 4.4 of the BBBEE mining charter for the mining industry⁴⁵⁹ read with section 3 (2) of the MPRA⁴⁶⁰ requires a pattern of consultation as evidence of compliance.⁴⁶¹ This fosters trust with the community and ensures that the community is actively involved in the decision making process. However, despite all the positive outcomes of community participation there are setbacks such as practical challenges experienced in relation to the community consultation process, which have created conflict, bottlenecks, delays and even obstacles to the needs of the communities.⁴⁶²

⁴⁵⁷ See Section 2 of the Black Economic Empowerment Code of Good Practice.

⁴⁵⁸ Consultancy Africa Intelligence 2012

<http://www.polity.org.za/article/in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe-2011-02-24>.

⁴⁵⁹ See Paragraph 4.4 of the BBBEE Mining Charter for the Mining Industry.

⁴⁶⁰ Section 3 of the MPRA

⁴⁶¹ Paragraph 4.4 of the BBBEE Charter for the mining industry.

⁴⁶² Mining and Community Development News A publication of the Chamber of Mines South Africa May 2011 2.

The Chamber of mines has made further investigations as to whether community consultation as a process is an adequate and effective tool to address community development issues. It has been found that consultation processes are not as efficient as they are thought to be, in determining community needs with a view to collaborative project implementation.⁴⁶³

6.10.6 Methods of Enhancing Community Participation in South Africa

When a mining operation starts, there are expectations from the community. The Benchmark Foundation in South Africa came up with guidelines as to how there can be a meaningful relationship between the mining company and affected communities. There are three stages; namely the Inception stage, the Mining stage and the Closure stage. These have to be considered in turn to help advance the interests of both the company and the community. A discussion of them will be done below.

6.10.6.1 The Inception Stage

The Bench Mark foundation⁴⁶⁴ states that the establishment of the mine is the most important stage in developing a meaningful relationship between the mining company and the communities. This is a platform for the company to notify the community on the process and challenges that are ahead.⁴⁶⁵ The extent of impact of the mining on the land, the environment and resources cannot be foreseen by the community which has little exposure to the process of extractive activities.⁴⁶⁶ Consultation and discussion with the communities directly affected by the mining project should be done at the inception stage.⁴⁶⁷ This will allow for the identification

⁴⁶³ Mining and Community Development News A publication of the Chamber of Mines South Africa May 2011 3.

⁴⁶⁴ The Bench Mark Foundation is a non-profit organization owned by churches in South Africa that monitors corporate performance against an international measuring instrument, the Principles for Global Corporate Responsibility.

⁴⁶⁵ Bench Marks Foundation – Discussion Document Mining and Community Engagement Principles1.

⁴⁶⁶ Bench Mark Foundation- A review of the Corporate Social Responsibility Programmes of the Platinum Mining Industry in the North West Province 20.

⁴⁶⁷ See Cochilco, Chilean Copper Commission 2002
<http://www.elaw.org/system/files/044cochilco.pdf>.

of the role of stakeholders and the expectations and interests of the landowners which is the community.⁴⁶⁸ It needs to be borne in mind that the community may appear as a homogenous entity but it contains different interest groups. Companies may take advantage of these differences and obtain approvals that seem to reflect the will of the community when in actual fact such agreements reflect the interest of powerful elite in the community.⁴⁶⁹ Community participation must cover issues such as the relocation of people, environmental impact assessments, social impact assessments and economic impact assessments.⁴⁷⁰ The community must be made aware of what is taking place in full detail. Meetings with the general community are very important. Everybody in that community must be made aware and given invitations to the meetings.

6.10.6.2 The Mining Stage

At this stage, approval from the community has been obtained. It is still important for the mining company to be in touch with the community to avoid relations turning sour.⁴⁷¹ Factors such as loss of agricultural land, pollution, access to water, the health and safety of the communities, remuneration of employees and corporate social responsibility are taken into consideration.⁴⁷² By this point, the mining company is now carrying out extractive activities and over the year the community will begin to feel the impact of the company. It is very important that the mining company, at all times, tries to maintain good relations with the community.

6.10.6.3 The Closure stage

The closure of a mine is a sensitive stage because this is when indications are shown as to whether the mining company has taken into consideration the welfare of

⁴⁶⁸ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

⁴⁶⁹ Bench Mark Foundation- A review of the Corporate Social Responsibility Programmes of the Platinum Mining Industry in the North West Province 20.

⁴⁷⁰ Bench Marks Foundation – Discussion Document Mining and Community Engagement Principles

1.

⁴⁷¹ Bench Marks Foundation – Discussion Document Mining and Community Engagement Principles

2.

⁴⁷² Bench Marks Foundation – Discussion Document Mining and Community Engagement Principles1.

the community. Issues that need to be discussed with the community are job losses, health, pollution and the continuation of Corporate Social Responsibility.⁴⁷³ Mining closure is devastating for local communities. This is the case particularly in remote areas where the local government is weak and labour productivity and non-mining incomes are low.⁴⁷⁴ Generally, the activity in the area is mining and nothing else.

Advance planning and close cooperation by the company with local authorities and communities is important to successful mining closure and achievement of post-mine closure stability.⁴⁷⁵ Consultation with the community is equally as important as in the inception stage. This prevents a situation of false expectations from the community about the impact of the closure.⁴⁷⁶ Some of the services dependent on the mining company may disappear after the withdrawal of the mine and this affects the community.⁴⁷⁷ For example, the mining company could have been responsible for services such as provision of water to the community through purification works. The organisation, which is supposed to be responsible for the takeover of the purification works, might not have the capacity to operate this system. The community may be of the assumption that the company will inject capital for the rehabilitation of the mine dumps in preparation for those mine dumps to become grazing land or bush that will be used to sustain flora and fauna.

6.10.7 Mining Indaba

The Annual Mining Indaba, the world's biggest mining investment event and Africa's largest mining event, is held under the auspices of the Bench Marks Foundation, Economic Justice Network and the International Alliance on Natural Resources. Between 7-9 February 2011, it was agreed that mining companies must comply with the principle of engagement which is based on the policy of free, prior and informed consent before and during and after mining operations.⁴⁷⁸ Mining companies should

⁴⁷³ Bench Marks Foundation – Discussion Document Mining and Community Engagement Principles 2.

⁴⁷⁴ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

⁴⁷⁵ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

⁴⁷⁶ See Cochilco, Chilean Copper Commission 2002 <http://www.elaw.org/system/files/044cochilco.pdf>.

⁴⁷⁷ Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" 8.

⁴⁷⁸ Anon 2011

avoid creating conflict between communities by dividing them to pursue the interests of the mine.⁴⁷⁹

Traditional leaders must act as ambassadors of the community in ensuring that the mining companies prevent such division. This involves accountability and equitable sharing of the proceeds emanating from such agreements with the mining companies.⁴⁸⁰ Informed and community ownership of extractive activities must be mandatory within the legislative frameworks and not be optional.⁴⁸¹ Government must not use its discretion in ensuring which communities participate from extractive activities. It is a requirement as stated earlier that all communities must benefit from the resources around them.

Mining *Indaba's* of this kind are beneficial to communities because they are a platform for civil society organisations to represent the voiceless communities who deserve to benefit from the minerals around them.⁴⁸² Such *Indaba's* articulate the suffering of ordinary people brought about by mining companies and explore ways in which civil society organisations could support communities affected by mining.⁴⁸³

6.10.8 Case law Approach to Community Participation in South Africa

The case of *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd*⁴⁸⁴ dealt with the relief that communities may seek from the South African Government in respect of a wrong done by a mining company. In this case, the applicants were successfully able to set aside a prospecting right on their land. The applicant was a community that had been previously deprived of their land as result of racially discriminatory laws.⁴⁸⁵ The Bengwenyama community had enjoyed uninterrupted

<http://www.minesandcommunities.org/article.php?a=10724&l=1>.

⁴⁷⁹ Anon 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>.

⁴⁸⁰ Anon 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>.

⁴⁸¹ Anon 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>.

⁴⁸² Anon 2012

<http://www.ngopulse.org/press-release/civil-society-host-third-alternative-mining-indaba>.

⁴⁸³ Anon 2012

<http://www.ngopulse.org/press-release/civil-society-host-third-alternative-mining-indaba>.

⁴⁸⁴ *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd* Case CCT 39/10 [2010] ZACC 26 Paragraph 2, hereafter referred to as *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd*.

⁴⁸⁵ *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd* paragraph 2.

occupation of their land for over a century until it was dispossessed of its land in 1945. In 2010, they were able to successfully lodge a claim on the land.⁴⁸⁶ The court in paragraph 29 referred to Section 2 (i) of the MPRDA which states that the object of the Act is to ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.⁴⁸⁷ The holder of the mining and production right has to put mechanisms in place that promote community engagement, such as the presence of social and labour plans as well how the income from the mining activity is distributed.

The Court in this case held that one of the purposes of consultation with a landowner was whether there was some accommodation between the applicant of the prospecting right, and the community in as far as interference with the community's rights to use the property is concerned.⁴⁸⁸ Failure by the prospector to consult adequately and simply carry on with prospecting activities will result in the prospector having to pay compensation to the community which is the owner of the land. In its judgment, the Court held that Genorah Resources had not properly consulted with the community hence it was required to cede its mining rights on the applicants' land.

Some scholars submit that this case is important because it is indicative of the insufficient protection of communities provided for by the MPRDA.⁴⁸⁹ However, such a statement would be misleading because the MPRDA without doubt takes into account the plight of the communities. It is the duty of leadership such as councillors and chiefs to lobby their communities to fight for their rights through the implementation of MPRDA. The Constitution also emphasises a system of democracy that ensures accountability, responsiveness and openness.⁴⁹⁰

The Constitution further provides for legislative and other remedies to redress inequalities over land. The MPRDA was enacted to give effect to constitutional reforms which touch on issues such as individual ownership of the land and the community ownership of land and the empowerment of previously disadvantaged

⁴⁸⁶ *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd* paragraph 2.

⁴⁸⁷ Section 2 (i) MPRDA.

⁴⁸⁸ *Bengwenyama Minerals and Others v Genorah Resources* paragraph 65.

⁴⁸⁹ Badenhorst and Olivier 2011 *De Jure* 131.

⁴⁹⁰ See Section 57 of the South African Constitution.

people to gain access to the country's mineral resources.⁴⁹¹ Section 104 of the Act in (1) provides for a "preferent prospecting" or mining right in respect of communities that intend to obtain a prospecting right can lodge an application with the minister. (2) The minister may grant such right if the community can prove the following (a) the right shall be used to contribute towards the development and the social upliftment of the community concerned (b) the community submits a development plan, indicating the manner in which such right is going to be exercised (c) the envisaged benefits of the prospecting or mining project will accrue to the community in question and (d) the community has access to technical and financial resources to exercise such right.⁴⁹²

From the above section it is evident that communities are given the platform to explore their potential by bringing their cases before the Constitutional Court. Another case that put particular emphasis on community participation in extractive activities was the case of *Alexkor Ltd and Another v Richtersveld Community and Others*.⁴⁹³ In this case, the community had been deprived of diamondiferous land included in the Richtersveld next to the west coast of South Africa. This dispossession was as result of legislative and executive steps in the 1920s because of state alluvial diggings. Mineral rights were eventually given to a state owned company called Alexor.⁴⁹⁴

The Constitutional Court in this case held that under indigenous law of the Richtersveld the community, ownership of land included communal ownership of the minerals and the precious stones.⁴⁹⁵ The court further found that the annexation of the land would be cancelled if the community had been granted limited real rights by the crown and where the land had been taken by force.⁴⁹⁶ The Court amended the

⁴⁹¹ *Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd* paragraph 3.

⁴⁹² See Section 104 of MRPDAA.

⁴⁹³ *Alexkor Ltd and Another v Richtersveld Community and Others* Case CCT 19/03 2003 paragraph 9, hereafter referred to as *Alexkor Ltd and Another v Richtersveld Community and Others*. See also brief discussion of the case by Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 474.

⁴⁹⁴ *Alexkor Ltd and Another v Richtersveld Community and Others* paragraph 5. See also brief discussion of the case by Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 474.

⁴⁹⁵ *Alexkor Ltd and Another v Richtersveld Community and Others* paragraph 103. See also brief discussion of the case by Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 474.

⁴⁹⁶ *Alexkor Ltd and Another v Richtersveld Community and Others* paragraph 70. See also brief discussion of the case by Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 474.

order by the court *a quo* that the Richtersveld community was entitled restitution of their land and exclusive beneficial use and occupation thereof.⁴⁹⁷

6.11 Australia

6.11.1 Framework of Community Participation in the Australian Mining Sector

Australia is a developed nation with a variety of minerals such gold, bauxite and copper. The wealth is not evenly distributed. Despite the benefits that the mining sector has brought to Australia, it has come along with its own problems such as policies that reduce the living standards of the indigenous people.⁴⁹⁸ Unlike Zimbabwe where the indigenous people are a majority, the indigenous Aboriginal people are a minority in Australia. Most extractive activities or the location of most minerals are found next to the traditional lands of the indigenous people such as the Pilbara and the Kimberly regions. According to 'Good Practice Guide on Indigenous Peoples and Mining' 60% of mining activities are situated near Aboriginal communities.⁴⁹⁹ This has resulted in a resource curse amongst the original inhabitants of Australia.

On a positive note, Australia's economy is well managed and comparatively corruption free in comparison to other countries where there is a resource curse. Hypothetically speaking the Australia's indigenous people are not as prejudiced as other indigenous people from other jurisdictions because they receive subsidies such as free education and health from the state with the revenue that comes from the minerals.⁵⁰⁰ Agreements between communities and mining companies are specific as to who should gain from the extractive activities process. A classic feature is the Participation Agreement for the Argyle Diamond Mine in North-Western Australia which only applies to the people who have a specific connection with the area where the mine is located.⁵⁰¹ It does not cover people who moved from other regions or indigenous aborigines who moved from other areas.⁵⁰² People with a specific

⁴⁹⁷ *Alexkor Ltd and Another v Richtersveld Community and Others* paragraph 103. See also brief discussion of the case by Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 474.

⁴⁹⁸ Langton 2010 http://griffithreview.com/images/stories/edition_articles/ed28_pdfs/langton_ed28.pdf.

⁴⁹⁹ Hodge *et al* *Good Practice Guide: Indigenous Peoples and Mining* 9.

⁵⁰⁰ Brereton, Owen and Kim *Good Practice Note Community Development Agreements* 3.

⁵⁰¹ Brereton, Owen and Kim *Good Practice Note Community Development Agreements* 3.

⁵⁰² Brereton, Owen and Kim *Good Practice Note Community Development Agreements* 3.

connection to the land are considered the principal beneficiaries of the mining project. New community based Natural Resource Management (NRM) arrangements are being established across the country and this is described by some observers as a 'paradigm shift' in the relationship between communities and governments.⁵⁰³ Factors such as the licensing of mining companies fall into the hands of the states or provinces.⁵⁰⁴ Each sub-national jurisdiction can strike its own balance between the benefits that mining brings, and the risks and damages that accompany it.⁵⁰⁵

The approach is characterised by the devolution of planning, decision-making and funding to local communities where minerals are found.⁵⁰⁶ Because Australia falls under the category of a developed nation, infrastructure such as houses, roads and electricity are not a problem. This can quash allegations that there is a resource curse in Australia. The implementation of community participation policies in the extractive activities sector can be said to be very successful because of the well-structured legislative policy framework. Community participation in the extractive activities sector is not centralised like in Zimbabwe. In this case, it is governed by both the state and territory legislation.⁵⁰⁷ Because of the legal framework, states and territories manage mineral extraction in a manner which is vested in the public and not private individuals.⁵⁰⁸ This policy indicates there is decentralisation of resources and it is the best mineral policy a country can adopt.

In Australia, challenges and barriers to successful community engagement are being encountered and explored.⁵⁰⁹ Those sitting in National Resource Management Bodies are able to define the roles communities are supposed to play and the responsibility of those mining companies carrying out those activities.

⁵⁰³ Hoverman and Walker 2005 <http://www.engagingcommunities2005.org/abstracts/S22-hoverman-s.html>.

⁵⁰⁴ Anon2009 [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/\\$FILE/SectorLicensingStudiesMining.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/$FILE/SectorLicensingStudiesMining.pdf).

⁵⁰⁵ Anon2009 [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/\\$FILE/SectorLicensingStudiesMining.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/$FILE/SectorLicensingStudiesMining.pdf).

⁵⁰⁶ Hoverman and Walker 2005 <http://www.engagingcommunities2005.org/abstracts/S22-hoverman-s.html>.

⁵⁰⁷ Australia is composed of 16 Territories namely Tasmania, Queensland, Victoria, South Australia, Northern Territory, Norfolk Island, New South Wales, Jervis Bay Territory, Heard Island and McDonald Islands, Coral Islands, Coco Islands, Christmas Islands, Australian Capital Territory, Australian Antarctic Territory and Ashmore and Cartier Islands.

⁵⁰⁸ Godden, Langton, Mazel and Tehan 2008 *Journal of Energy and Natural Resources Law* 7.

⁵⁰⁹ Hoverman and Walker 2005 <http://www.engagingcommunities2005.org/abstracts/S22-hoverman-s.html>.

6.11.1.1 Native title in Australia

Indigenous rights were first recognised in the Native Title Act of 1993 (NTA).⁵¹⁰ NTA can be applauded for having a procedure that gives a period of about 4 years before a mineral exploration licence can be granted.⁵¹¹ Native title only exists where there is a continuing connection with land and where there is no extinguishment of native title by inconsistent Crown Actions.⁵¹² Native Title provides mechanisms for negotiation between the community and the mining company.⁵¹³ It further provides for arbitration where the parties are unable to negotiate a settlement.⁵¹⁴ Recognition of Native Title has had the effect of bringing companies to negotiate with the indigenous communities.⁵¹⁵ Native Title was recognised by the Australian high court in 1992. The judgment in *Mabo v Queensland*⁵¹⁶ held that denial of Native title to land was not in line with Australian Constitution. In this case, the court reversed the legal doctrine that Australia was *terra nullis*.⁵¹⁷ The *Mabo* case resulted in the government promulgating the Native Title Act which is meant to protect the rights of native Australians on title of their land.

At the start, mining companies were very resistant to the NTA. This contains provisions which call for Indigenous Land Use Agreements (ILUAs). ILUA are voluntary agreements made between native titleholders and the government or industry bodies. They are meant to settle matters including access to land, resources by the mining company and the access to infrastructure developed by the company for the benefit of the community.⁵¹⁸ The agreements constitute a major form of participation involving cooperation between the communities and the mining companies.⁵¹⁹ Fortunately, for the communities, it has been realised that it will be

⁵¹⁰ See Australian Native Title Act of 1993. The whole idea behind the Native Title Act is to give Traditional owners of land a right to negotiate over land use.

⁵¹¹ Ewing 1993 *The Australian Quarterly* 159.

⁵¹² Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law* 68.

⁵¹³ Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law* 68.

⁵¹⁴ Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law* 68.

⁵¹⁵ Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law* 68.

⁵¹⁶ *Mabo v Queensland* 1992 CLR.

⁵¹⁷ Terra nullis means land belongs to no one.

⁵¹⁸ Langton and Mazel 2008 *Journal for Energy and Natural Resources Law* 40.

⁵¹⁹ Langton and Mazel 2008 *Journal for Energy and Natural Resources Law* 40.

increasingly difficult for companies to operate profitably unless they establish cooperative working relationships with local community interests.⁵²⁰

In line with NTA, the government and the mining companies have shown willingness to collaborate in addressing some of the socio-economic obstacles to increasing engagement with the industry.⁵²¹ This has an advantage in that a strong statutory framework is created. Such laws promote agreement by making the right to negotiate with traditional landowners. This gives legal effect to agreements and provides for other legal routes if agreement between the community and the mining company cannot be reached.⁵²² Mining giant Rio Tinto recently signed participation agreements with five Aboriginal Native Title groups across the Pilbara region in Western Australia.⁵²³ Rio Tinto's relationship with the community can be traced back to 1994. An agreement worth noting is the agreement with the *Gumala* Aboriginal Corporation for the development of the *Yandicoogina* iron ore project in the Pilbara region of Western Australia.⁵²⁴ This project has resulted in positive developments amongst the community such as training and educational programmes for the aboriginal community. It has helped to build up their businesses and given them employment.

These agreements are meant to ensure that Native Title groups have access to participation opportunities.⁵²⁵ These agreements have the advantage of creating a win-win situation for both Rio Tinto and the aboriginal communities Rio Tinto gets to have some form of business certainty while the aboriginal communities get to have some form of socio economic participation.⁵²⁶ The benefits that arise from these agreements are paid into the trust structures managed by the Native Title⁵²⁷ group which are then directed to community development initiatives such as health, education, vocational training and Aboriginal business development. In the end, Rio

⁵²⁰ Langton and Mazel 2008 *Journal for Energy and Natural Resources Law* 40.

⁵²¹ Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law* 68.

⁵²² Hodge et al Good Practice Guide: Indigenous Peoples and Mining 53.

⁵²³ Anon 2011 http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf. Such agreements by Rio Tinto are not the first of the kind. In 1997, Hamersley Iron a subsidiary of mining company Rio Tinto and the Gumala Aboriginal Corporation signed a land use agreement for the development of the Yandicoogina mine.

⁵²⁴ Fernandez 2005 *Journal of Energy and Natural Resource Law* 412.

⁵²⁵ Anon 2011 http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf.

⁵²⁶ Anon 2011 http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf

⁵²⁷ Anon 2011 http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf.

Tinto is fully aware that such initiatives will boost the mining companies' reputation because of the positive developments that it has brought about to the community.

6.11.1.2 Mining Ombudsman in Australia

Another positive development that is in line with the NTA is the creation of the office of the Ombudsman by Oxfam Australia in February 2000. This office is meant to help those communities that have had a violation of their basic human rights as a result of bad mining practices by Australian mining companies. The Mining Industry Ombudsman, as it is also known, is also meant to assist indigenous communities that might have been affected by mining operations to understand their rights under international law. The office is also meant to develop enforceable, transparent and binding extra-territorial controls which require Australian mining companies to comply with the universal human rights standards.

6.12 Canada

6.12.1 Framework of Community Participation in the Canadian Mining Sector

Community Development Agreements (CDAs) are not a new phenomenon in Canada. Legislation such as the Nunavut Land Claims Agreement and Inuvialuit Final Agreement⁵²⁸ regulate the manner in which mining companies conduct themselves in a way that will benefit communities around them. As far back as 1975, the James Bay and Northern Quebec Agreement outlined the economic and cultural rights of the Aboriginal People in Quebec North and how these rights were to be protected.⁵²⁹ Falcon Ridge was the first mining company to sign an Impact Benefit Agreement with Makivik, the residents of Salluit and Kangiqsujuaq in what was known as the "Raglan Agreement" in 1995.⁵³⁰ The Raglan Agreement had five principles such as giving priority of employment to the local community of Salluit, giving priority of contracts to competitive Inuit enterprise for work required during the mines operating phase, making compensation and profit-sharing payments to the benefit of Salluit, Kangaiqsujuaq and Nunavik region inhabitants, selection of community members to oversee the implementation of the agreement and the

⁵²⁸ McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 21.

⁵²⁹ McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 21.

⁵³⁰ McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 21.

establishment of procedures for monitoring the environment beyond regulatory requirements.⁵³¹ It is such agreements that bring together experience and capacity in order to achieve solid long-term benefits for the communities affected by a mine.⁵³² This agreement did not involve the government as is the case of Zimbabwe but instead involved the community and the mining company. Therefore, at the end of the day, it is a relationship between the community and the company. The Raglan Agreement has seen numerous successful negotiations between mining companies and local Inuit communities in northern Canada.⁵³³

6.12.2 Case law approach

Unlike the developing world, Canada has a robust approach towards communities benefiting from resources around them. This can be traced back from case law such as the case of *Calder v Attorney General of British Colombia*⁵³⁴ where Judson J stated:

*The fact is that when the settlers came, the Indians were there, organised in societies, and occupying the land as their forefathers had done for centuries. This is what Indian title means.*⁵³⁵

Minerals rights belong to the Government which is known as the Crown and are leased to prospectors.⁵³⁶ Unlike Zimbabwe, in Canada the 10 provinces have full power over mineral exploration in other words there is devolution of powers. The Canadian Constitution in section 35 states that the "Government has a duty to consult and accommodate the interests of the indigenous people, some of whom live in communities where there are extractive activities".⁵³⁷

⁵³¹ McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 23.

⁵³² McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 28.

⁵³³ McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 22.

⁵³⁴ *Calder v Attorney General of British Colombia* 1973 35 DLR (3d) 145 hereafter referred to as *Calder v Attorney General of British Colombia*. See also *Alexkor Ltd and Another v Richterveld Community and Others* in paragraph 34 where the Court held that courts in other jurisdictions have in recent times been faced with complex and difficult problems of dealing, after the event, with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants by the later occupiers of the land in question. It is said the later occupiers claimed political and legal sovereignty over the land and such dispossessions invariably took place in a racially discriminatory manner.

⁵³⁵ *Calder v Attorney General of British Colombia* 145.

⁵³⁶ J Kuyek "Canada Mining Law and the Impacts on Indigenous Peoples Lands and Resources" in *North American Indigenous Mining Summit* 28 July 2005 Ottawa Canada 2. 1-6.

⁵³⁷ See Section 35 of the Canadian Constitution.

In the words of Canadian constitutional law expert Hogg.⁵³⁸

Indigenous people's rights are not rights held by virtue of 'Crown Grant' but due to the fact these indigenous people were once independent and self-governing entities in possession of most lands making up Canada.

In the case of *Haida Nation v. British Columbia (Minister of Forests)*⁵³⁹ the Crown held that the Government had a duty to consult with the indigenous community of Haida before harvesting timber on Haida indigenous peoples land. In paragraph 10 of the case the court emphasised that consultation must be done in good faith which accommodates the needs of the community.⁵⁴⁰ The positive outcome of consultation with a community before embarking on project would be to amend policy proposals in the light of information received and giving a feedback to that community.⁵⁴¹ The level of consultation with the community varies from notification to deep consultation.⁵⁴² One success story is the case of Manitoba Province. Communities have been built around this mineral industry and there is a generally supportive local culture for mining activities⁵⁴³ Unlike other mining communities, the communities in this province united together to try and attract investment in exploration and mineral related activities through marketing their potential mineral wealth and making it a point that their province is a favourable investment destination.⁵⁴⁴

Another recent landmark judgement that has added light to Canadian jurisprudence on community participation in the extractive industries sector is the case of *Ross*

⁵³⁸ Hogg *Constitutional Law in Canada* 21.

⁵³⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004

SCC 73 Paragraph 9 hereafter referred to as *Haida Nation v. British Columbia (Minister of Forests)*.

⁵⁴⁰ *Haida Nation v. British Columbia (Minister of Forests)* paragraph 10. See also *Dekgamuukw v British Columbia* [1997] 3 SCR1010 paragraph 168 Lamer CJC stressed the importance of consultation even rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith and with the intention of substantially addressing the concerns of aboriginal people whose lands are at issue. In paragraph 168 Lamer CJC further state in keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed.

⁵⁴¹ *Haida Nation v. British Columbia (Minister of Forests)*, paragraph 10.

SCC 73 paragraph 46. See also Simons and Collins 2010 *McGill International Journal of Sustainable Development Law and Policy* 24.

⁵⁴² Valiela and Baldwin "Dealing with Legacy-Some Canadian Approaches" 1-12.

⁵⁴³ Veiga, Scoble, McAllister 2001 *Natural Resources Forum* 191.

⁵⁴⁴ Veiga, Scoble, McAllister 2001 *Natural Resources Forum* 198.

River v Government of Yukon.⁵⁴⁵ The case is the first decision to consider the issue of whether the Government of Yukon has a duty to consult local communities known as first nation in recording quartz mineral claims under the Quartz Mining Act.⁵⁴⁶ The Ross River Dena Council had applied to the Court for a declaration that the Yukon Government had a duty to consult prior to recording mineral claims. The court determined that there was indeed a duty to consult before engaging on any extractive activities.⁵⁴⁷

The mining community has diversified into other sectors such as to tourism. The purpose of venturing into tourism is to try to bring visitors in to the towns to learn more about mining and the history of mining activities in the area.⁵⁴⁸ Tourists get to learn more about the aboriginal culture of the original inhabitants of the area. This is a good initiative as it makes the community gain some additional revenue at the side unlike a situation where a mining company gets the bulk of the revenue. Canadian legislation is centred on the fact that indigenous people are the minority population. When European settlers came to Canadian territory, they encountered indigenous tribes such as Inuits popularly known as Eskimos. They occupied and still occupy large tracts of their land.⁵⁴⁹

Consent to prospect for minerals on indigenous peoples land was sought through treaties and purchases that were riddled with exploitation and not clear on exactly what remuneration indigenous people were supposed to get.⁵⁵⁰ Over the years, the coloniser or immigrant population views have changed and the moral claims by the indigenous people for the return of their land gained acceptance.⁵⁵¹ The doctrine of "Aboriginal Title" like in Australia was developed.⁵⁵² This doctrine gives the indigenous people ownership of the resources around them. It also gives the indigenous people access to land that they had been formerly deprived of. The Canadian approach has shown the world that it is possible to allow indigenous

⁵⁴⁵ *Ross River Dena Council v Government of Yukon* 2011 YKSC 84 paragraph 2 hereafter referred to as *Ross River Dena Council v Government of Yukon*.

⁵⁴⁶ *Ross River Dena Council v Government of Yukon* paragraph 2.

⁵⁴⁷ *Ross River Dena Council v Government of Yukon* paragraph 2.

⁵⁴⁸ Veiga, Scoble, McAllister 2001 *Natural Resources Forum* 199.

⁵⁴⁹ Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 466.

⁵⁵⁰ Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 466.

⁵⁵¹ Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 467.

⁵⁵² Gildenhuys 2005 *Journal for Energy and Natural Resources Law* 467.

people to participate in extractive activities. Now indigenous people have their rights taken into account in a bid for them to benefit from extractive activities.

The Canadian approach accommodates indigenous communities participating in meetings such as the Prospectors Developers Association of Canada (PDAC). The purpose of PDAC is to advocate, network and inform. It represents the interests of the Canadian mining and exploration industry. Communities get the opportunity to take up ownership in exploration programmes, hire their own people and secure licences to develop projects which is a form of participation in the extractive activities sector.⁵⁵³ Local indigenous communities see this as a platform of embracing benefits by participating in the extractive sector something which was not possible in the past.

6.12.3 Memorandum of Understanding

On the 25 July 2012, three NGOs came to an agreement to sign a Memorandum of Understanding (MOU), which provided mechanisms for fostering community participation and indigenisation in the Canadian mining sector. In the statement of purpose the three NGO's came to an understanding that there should be a process which results in communities, sub-national authorities and national oversight actors having access to the information necessary to hold their governments and decision makers accountable for revenues derived from extractive resource development.⁵⁵⁴ The MOU is very clear on the need for access to information by the communities and those sectors that are responsible for delivering towards the communities such as the municipalities. This helps communities and those sub regional communities in determining that they are receiving adequate benefits from the extractive activities taking place in the areas.⁵⁵⁵

⁵⁵³ Heffernan Date Unknown <http://www.pdac.ca/programs/aboriginal-affairs/news/aboriginal-news/2013/02/27/leadership-in-aboriginal-affairs>

⁵⁵⁴ Anon 2012
<http://dev.revenuewatch.org/revenuewatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf>. See McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* 2-13 A MOU explains the principles that the signatories should follow in order to work together for mutual benefit. A community generally promises the company access to its lands for exploration and not to interfere with permit applications. A company generally promises to take measures to protect the community's environment or way of life.

⁵⁵⁵ Anon 2012
<http://dev.revenuewatch.org/revenuewatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf>

The MOU in its objectives campaigns for mandatory reporting mechanism that should be presented to the Canadian Government and provincial governments. Communities should be placed in a better position to hold their governments accountable for the revenue collected.⁵⁵⁶ The MOU encourages the use of guidelines from other jurisdictions such as the European Union on Revenue Transparency to allow communities where extractive activities are taking place to benefit from the extractive activities.⁵⁵⁷ The Canadian approach is very clear in referring to other jurisdictions unlike the Zimbabwean approach which is based on sovereignty. The Canadian approach should be applauded for accommodating communities and Zimbabwe must emulate such an approach for the realisation of community rights.

6.12.4 Three Steps towards Community Sustainability in Canada

6.12.4.1 Local Capacity Building

Community members are given choices as to how the mine can be developed and to know the tradeoffs that are possible within the existing financial, social and natural constraints. Local governance embraces and fosters a broader concept of community governance.⁵⁵⁸ It further elevates the social development to a position of at least equal prominence with other developmental objectives.⁵⁵⁹ Companies must empower the communities with skills so that in the event positions for work in the mine are available the mine is able to choose people from the community as first priority. As stated before the locals in the community are given the platform to be empowered with skills.

6.12.4.2 Sustained Employment

The second step towards community sustainability is the creation of sustained employment in mining communities. Sustained employment can be described as

⁵⁵⁶ Anon 2012
<http://dev.revenuewatch.org/revenuewatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf>.

⁵⁵⁷ Anon 2012
<http://dev.revenuewatch.org/revenuewatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf>.

⁵⁵⁸ Veiga, Scoble and McAllister 2001 *Natural Resources Forum* 200.

⁵⁵⁹ Veiga, Scoble, McAllister 2001 *Natural Resources Forum* 200.

employment that will raise the standard living of the people in those communities and is not temporary. There has to be an integration of economic and social consideration such as the creation of jobs without compromising the ability of future generations to meet their own needs.⁵⁶⁰ Community participation goes beyond creating contract based or seasonal employment but makes a bid to create permanent sustainable employment for the communities' right across Canada.

6.12.4.3 Meaningful Infrastructure

Mines that close down should not leave surrounding communities in the mist. They should leave infrastructure that will continue the legacy of the town. In the event there is diversification, the community can use that infrastructure to sustain themselves. For example, the roads, power supply and housing can be used as a means to boost tourism. Some of the residences can be used as guest lodges for visitors or tourists who want to know more about the history of the town. The government can even turn some of the infrastructure into tertiary institutions of higher learning whereby some of the buildings are renovated and turned into lecture rooms or classrooms.

6.13 Summary

From the discussion in this chapter, it can be seen that there are various the international frameworks that accommodate communities in the extractive activities sector. Case law from the jurisdictions discussed sets a strong precedent for such involvement. Fair compensation has to be paid to those communities that have been aggrieved by land dispossession to create way for extractive activities. The approach by other jurisdictions has shown that consultation with the communities as soon as possible is imperative and beneficial. This clarifies the expectations of the community, the challenges that are likely to be faced and how those challenges can be addressed. Community participation in the extractive activities should not shrouded in secrecy as is the situation in Zimbabwe. Support from the Government can be seen in these jurisdictions. The government works hand in hand with the community.

⁵⁶⁰ Costa and Scoble 2006 *Journal of Clean Production*, Elsevier Science 3.

NGO's are able to come to an agreement with the government to ensure that it has to be accountable for its actions, unlike in Zimbabwe where NGO's, such as the ZELA, are seen as fostering negative publicity meant to tarnish the image of government. NGO's in the three jurisdictions discussed in this chapter undertake feasibility studies on how communities can benefit from the natural resources around them. The government does not take such sentiment from the NGO's negatively, viewing it as a way of destruction, but uses the information gleaned as a means of making amendments to its legislation.

Like Zimbabwe, the three jurisdictions have had a challenge of communities situated next to mineral belts not benefiting from the extractive activities. However they have managed to overcome this issue by bringing their Constitutions and the other legislation in line with communities' right to benefit from the extractive activities sector. The strong international legal framework provides no excuses to Zimbabwe from developing its own statutory framework for communities to benefit from the Extractive Activities sector.

Most importantly, activists in these three jurisdictions are not prohibited from questioning the role of government in the extractive activities sector. There is no indication of secrecy in the three jurisdictions discussed. The lack of transparency and secrecy results in a blame game. If the government is not providing essential services to rural communities such as basic infrastructural development or disclosing accurate figures in the media as to how much has been produced in the mining sector then tensions arise. In the three jurisdictions mentioned activists defending the rights of communities are not subject to incarceration. This is unlike the case of Zimbabwe, where defending the rights of communities in the extractive activities sector is very risky. Activists campaigning for the interests of the communities are subject to interrogation by the government at conferences, such as the diamond conference at Victoria Falls in November 2012 where certain human rights activists were confronted by government officials who accused the activists of spearheading smear campaigns against the government by publicising negative information.⁵⁶¹

⁵⁶¹ Karimakwenda 2012 <http://www.swradioafrica.com/2012/11/22/civic-groups-walk-out-after-threats-by-mines-minister/>

At these conferences related to defending of community rights in the mining sector, delegates who are neutral are used as an attempt to legalize the current chaotic situation in the Marange area.⁵⁶² Such conferences have failed to clear the speculation behind the untold killings of artisanal miners by security forces in the Marange area and why villagers still live in abject poverty despite the fact that nation has one of the largest untapped diamond reserves the world. Most human rights activists in Zimbabwe bear testimony of spending nights in police cells as a result of engaging in protest marches denouncing the government's corrupt activities. In addition to focusing their attention on giving food aid to communities that could be on their own feet, NGOs must continue fighting for the rights of communities to benefit from the extractive activities.

We can also see from the jurisdictions discussed that the courts are ready to protect the interests of the communities that have not benefited from the extractive activities sector. There is a very strong precedent in the case law of the countries discussed that indicates the importance of community participation in the extractive activities. Unlike the case of Zimbabwe, mining activities are not shrouded in secrecy and characterised by human rights violations. The three mentioned jurisdictions take into account the issue of good governance which is entrenched in their constitutions. Zimbabwe's present situation of the adoption of a new constitution in March 2013 poses the right opportunity for it to take matters of good governance seriously in handling its extractive activities. Canada and South Africa are considered to be the torch bearers in advancing socio economic rights. It is necessary that Zimbabwe takes a lesson from Canada and South Africa on how to enforce socio economic rights in the extractive activities. The scale between community and national interests in these three jurisdictions is balanced. It does not tilt in favour of any side unlike in Zimbabwe where the scale is heavily weighted on the side of government because there is lack of concern for the plight of communities. The Marange situation, discussed earlier on, has illustrated how heavily tilted the scales are in favour the government, neglecting the interests and needs of the community.

⁵⁶² Karimakwenda 2012 <http://www.swradioafrica.com/2012/11/22/civic-groups-walk-out-after-threats-by-mines-minister/>

Although it was not an overnight process in the three mentioned jurisdictions, it was as a result of adherence to international law that rich jurisprudence developed that takes account the plights of the communities. Furthermore the case law in the jurisdictions discussed indicates communities which have been dispossessed of their land dating from the advent of colonialism have been supported by the courts that have made orders of restitution and compensation to the communities. In most cases, the courts have been observant in realising the need for accommodating indigenous people by acknowledging that such indigenous people have an attachment to the land. The jurisdictions discussed are very particular about adhering to human rights practices.

The governments of these three jurisdictions are the main funders of human rights organisations which act as *Amicus Curiae*⁵⁶³ in some of the cases brought before the courts. Human rights organisations that fight the cause of the communities are seen as bringing the needs of the communities to the attention of the governments. Human rights organisations act as advisors to the governments on how to uplift the rights of the communities who are supposed to benefit from the extractive activities. Judicial precedents have made it possible for companies, after clinching deals with government, to make consultations and negotiations with the surrounding communities before embarking on any mining activities. This is not the case in Zimbabwe, where consultation with the community only goes as far as informing the community that a mining activity will take place, and the community has to move out of the area or face forced eviction. This was the situation in Marange.

The jurisdictions discussed show that it is no longer a common phenomenon, whereby all taxes and royalties go to the government for its own benefit without government ploughing back some of the proceeds it has received as taxes from the mining companies to the communities. Communities now get a direct share of the revenue made by the mining company through their local authorities or municipalities. This is a much simpler method, than revenue first going to the national treasury before it is distributed to the communities. Without going any

⁵⁶³ In South Africa, organisations such as the Centre for Applied Legal Studies have guided the Constitutional Court in reaching judgments such as the case of *Agric South Africa v Minister for Mines and Energy* and others CCT 51/12 [2013] ZACC 9. See Also Bastin 2012 *Cambridge Journal of International and Comparative Law* the shows the role of participation by *Amicus Curiae* in dispute resolution.

further, the Marange situation is an example where the community has not received any revenue from the mines operating in the area.

In South Africa the Public Finance Management Act (PFMA) requires communication between the Ministry of Finance and the Provincial and Local government structures before the Minister of Mines and Energy can determine whether a community or a municipality can receive any royalties from the mines. At the same time, South Africa has been quick to learn from other jurisdictions to ensure that communities benefit from the extractive activities. Without any doubt, these countries in the past twenty years have not been under the spotlight with regard to not taking into account the communities, save for issues of environmental pollution which are beyond their control.

Zimbabwe can also learn from other jurisdictions on the issue of dealing with mine closures. For example, in Canada, some mines are turned into national monuments. Not too far to the south far, in South Africa, the Kimberley hole is a tourist attraction, bringing in tourists from around the globe and generating income for the Kimberley community. The local municipalities consequently have some source of revenue to carry out service delivery for the community. People are also in a position to open up shops for tourists to buy curios and souvenirs. Zimbabwe has many ghost mines that could be turned into tourist attractions. This further advances the nation's status as to where it is coming from in the extractive activities sector. As a nation that is clearly concerned about making itself one of the leading tourist destinations, it is imperative that the Ministry of Mines and the Ministry of Tourism consider looking at ghost mines as mines that can be turned into tourist destinations. This would involve vigorous publicity campaigns. An improvement for the respect of human rights in Zimbabwe would result in confidence from the international community, preventing media from making negative publicity reports.

Zimbabwe has a long way to go towards removing the negative perception that the government and political parties are not taking into account the priorities of the communities. It is evident that community participation is a campaign gimmick, in which CSOTs meetings have become a platform for political parties to launch their manifestos. They have also become a platform to brag to the ordinary poor villager about what they can do for them as leaders, if the villager casts his vote for that

political party. It can be seen in these jurisdictions that community participation is based on partisan lines. It is noted that learning from other jurisdictions should not be portrayed as being a “copycat”, but rather as a manner of trying to act legitimately in adherence to international norms and practices.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

This chapter deals with the conclusions and recommendations of this study. Thus, it revisits the critical observations made in previous chapters and based on that, it draws up the overall outcomes of the dissertation. While it is commendable to have a new Constitution and legislation that are aimed at empowering the masses, it does not fully cover the aspect of community participation in the extractive industry. There has been an over-reliance on the Mineral Mines Act which does not comprehensively deal with the needs of the communities with regard to minerals. This dissertation argues that in order for there to be effective community participation it is imperative that there should be a robust judiciary, respect for human rights and adherence to international instruments. There are critical recommendations to enhance effective community participation and indigenisation in extractive activities.

7.2 Conclusions

The dissertation has assessed community participation in Zimbabwe, taking into consideration different perspectives. Chapter 2 gives an insight on the different forms of community participation from a conceptual point of view. This chapter gives an outline of the different types of communities in and around Zimbabwe. Most communities fall under mining communities, although, on a sad note, some mines have shut down or downsized, but the people continue to reside on the premises of the mines. Local politics make it difficult to differentiate between qualified communities and ordinary communities. A qualified community is any community which is located a reasonably low number of kilometres from a mine. A community which is many miles away from a mine must not benefit from royalties and other developments at the expense of surrounding communities because it has a strong political connection with politicians having shares in the mine. Community participation is an engagement of the community in order to benefit from the resources around it. Zimbabwe has the potential to play a leading role in

empowerment of communities in the extractive sector that can make it the envy of other jurisdictions.

Chapter 3 demonstrates that the legislation discussed does not accommodate the interests of qualified communities. In an effort to promote indigenisation in the mining sector, the government should not only target European and American-owned mining companies, but it should also target other foreign owned firms. From the discussion, it can be seen that lack of community participation is nothing new. What began as oppression and displacement of communities during the advent of colonialism is now taking place in a different way, and consists of the government oppressing its own people. The inclusion of mining rights for communities in the mining legislation will definitely advance the rights of the communities. Therefore, it is important for the state to speed up the process of coming up with comprehensive mining legislation, similar to other jurisdictions in which community participation in the extractive sector has been a success.

Manicaland province is the brainchild of Zimbabwe's need to embrace community participation in the extractive sector, as can be seen in Chapter 4. The killings of artisanal miners indicate the need to stop oppression of people making a living out of artisanal mining. The community has become very vocal and impatient, because it is not benefiting from the mining of diamonds. The community continues living in abject poverty, while research has shown that the diamond fields could be one of the largest in the world. Inadequate compensation was given to the villagers relocated to other areas. The companies carrying out extractive activities have even run out of adequate land to continue to forcefully relocate villagers. Most rural people rely on firewood as a source of energy but concerning the Marange area, places where proper firewood can be obtained have been fenced to secure the diamond fields and prevent villagers from obtaining any firewood there.

The nation is blessed with a plethora of resources. However, because of Dutch disease syndrome discussed in Chapter 5, communities are not fully benefiting from the resources around them. Corporate Social Responsibility is another important factor that government must implement for people to benefit from the resources around them. Repeatedly, Corporate Social Responsibility advocates for

transparency and accountability in the extractive sector. This can be achieved if the state decides to disclose the actual amount derived from revenue obtained at Marange diamond fields. The advancement of community interests in the extractive activities sector is at a standstill. It is high time that Zimbabwe seriously considers learning from other jurisdictions in a bid to improve community interests in the extractive activities sector.

The government must relax its legislation, such as IEEA, to allow more investors to participate in the extractive activities sector. It is not hard to notice that there is too much political involvement in the issue of community participation in the activities of the extractive sector. An interesting point is the manner in which community participation is implemented in other jurisdictions. The foreign court cases discussed in Chapter 6 serve as very good guidelines that Zimbabwe can follow in its judicial system. International law is very rich in terms of providing laws concerning the advancement of human rights. It is important for Zimbabwe to take a lesson from International law, in order to make its legislation in line with common human rights trends. The recommendations below provide a possible solution to what has been discussed in the dissertation.

7.3 Recommendations

7.3.1 Respect for the Judiciary and Judicial Processes

The judiciary's knowledge and expertise on, mining law must be strengthened in order to bolster efforts to prevent the rampant plundering of natural wealth by undeserving people in our society. In addition, doing so may ensure that there is a common frame of reference within which irregularities are both heard and prosecuted. In this regard, specialised mining courts or tribunals can be established in collaboration with the international community.⁵⁶⁴ As such, community participation has to be factored into the legal process. In order for that to become a reality, however, judicial independence must be guaranteed. In this regard, the judiciary must be guided by sound legal precepts, as opposed to cowering to the whims of

⁵⁶⁴ See Hunt *Mining Law in Western Australia* 42. Such courts are common in other jurisdictions such as Australia where it is known as the "wardens court". This Court has jurisdiction to adjudicate and regulate matters pertaining to mining disputes between landowners and miners or claims of compensation.

government. Indeed, for justice to take its full course, the executive and judiciary have to be independent of each other.⁵⁶⁵ In other words, the former must not flex its muscle with the view of weakening the latter's powers as an arbiter of society. A robust judiciary will be better positioned to assess the respective communities' plight. However, that is an ideal as the reality on the ground in Zimbabwe provides for grim reading. The judiciary's efficacy and credibility are both compromised and under assault by government and the media. *Malvern Mudiwa's case*⁵⁶⁶ is illustrative of the unholy alliance that exists between government and the media in their efforts to discredit and undermine the judiciary.

7.3.2 *Compromising Foreign Investment*

As stated before, matters pertaining to community participation have been largely overlooked in the Zimbabwean justice system. The country's approach to indigenisation and empowerment is, however, nothing new. Since independence, talk of indigenising the economy has dominated the political landscape without yielding tangible results. Though key in ensuring that communities receive their just share of mineral wealth, indigenisation must not be a hindrance to foreign direct investment, which is a key driver of job creation.⁵⁶⁷ Thus, regulatory frameworks such as the IEEA should be amended to accommodate foreign direct investment.⁵⁶⁸ As such, the IEEA should not serve as a stick with which Zimbabwe beats foreign investors because the country is ill-equipped to deal with the complexities of the regulatory framework's requirements. Although it is important to empower indigenous people, implementing such a policy is problematic in a country such as Zimbabwe because it is difficult to define who is indigenous in the country. Unlike other countries where community participation programmes target a specific minority, no such framework exists in Zimbabwe.

⁵⁶⁵ See Hoexter *Administrative Law in South Africa* 22-23. The author points out that appropriate checks and balances ensure accountability, responsiveness and openness.

⁵⁶⁶ *Malvern Mudiwa and Others v. Mbada Mining Private Limited and Others* (HC 6334/09).

⁵⁶⁷ See Saunders *Briefing Note* 10.

⁵⁶⁸ Kanyenze (ed) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (Weaver Press 2011) 194. The writer goes on to emphasise that since the debate over indigenisation started it has been clouded by emotions and there has been little open and frank discussion based on the realities of the business. The mining industry has put it on record that it is not against indigenisation and would like to see policies that do not hinder the growth of the sector.

7.3.3 Removal of Sanctions

At present, the diamond sector has been mired in controversy because of the unfettered plundering of its revenue. Sanctions are another contentious issue. The ruling elite have used trade embargos as a political scarecrow to entrench themselves in power. In addition, sanctions have been used to demonise the opposition and sideline its support base. Thus, the ruling elite's divide and rule tactics in dispensing the fruits of mineral wealth serve to hamper the indigenisation process. In this regard, only those who are loyal to the elite stand to benefit from mineral wealth, leaving supporters of the opposition out in the cold. Community participation must not be based on partisan lines where people only benefit from the mineral resources based on the political party that they support.

7.3.4 Information Disclosure

Disclosure of information to the communities is imperative in order for them to be in a position to know what is transpiring in the extractive sector in their communities. The Minister of indigenisation must explain to the public the reasons why the people who seat on the National Indigenisation and Economic Empowerment Board (NIEEB) are mainly retired army staff and people associated with Zanu-PF.⁵⁶⁹ Further, it is imperative to disclose the allowances of those seating on CSOTs boards. It should be the responsibility of members of parliament, councillors, chiefs, village headman and kraal heads to ensure that they keep people in their respective communities informed about CSOTs. It is, however a cause of concern that CSOTs have been formed in the run up to elections, which were held on the 31st of July 2013.⁵⁷⁰ In order for indigenisation to yield its intended objectives, it is important that Zimbabwe revises its indigenisation laws. In this regard, mining deals should be reviewed by parliament before being endorsed by the executive as a means to guard against the latter having free reign on strategic national assets. In such a system, previous mining deals characterised by the kind of concessions granted to companies in Chiawadza would, for example, be renegotiated because they are plagued by

⁵⁶⁹ Refer to paragraph 3.2.1 in chapter 3 of this dissertation.

⁵⁷⁰ See *Jealousy Mbizvo Mawire v Robert Gabriel Mugabe and Others* CCZ1/13. The newly formed Constitutional Court ordered and directed the first respondent to make sure that the holding of presidential, general and local government elections should be held by no later than 31 July 2013 by virtue of section 58(C)(1) of the new Constitution.

controversy and secrecy.⁵⁷¹ As such, the state must demilitarise Chiawadza and cede the area's security function to mining companies. In addition, it is imperative that public servants, especially those holding top posts, distance themselves from direct involvement in the extractive sectors. In addition, public officials, especially ministers, should declare their assets. If the state is serious about its quest of involving communities in the diamond sector, it must desist from involving foreign companies in diamond polishing and cutting. Even the president was cited by one newspaper in saying: "Zimbabwe only managed to polish 0.1% of its diamonds in the year 2011".⁵⁷² Such a statement goes to show that the state has been inconsistent in its quest to indigenise the extractive sector for the benefit of communities.

7.3.5 Empowerment of Artisanal Miners

Some people working in the informal mining sector are known as Artisanal Miners. The government should not expel such people but should organise them to form cooperatives to mine minerals in a regularised way. Artisanal Miners used to account for about a fifth of Zimbabwe's gold production. Over the years, participation by artisanal miners in the extractive activities has plummeted because the state has put measures in place to ensure that these Artisanal Miners do not embark on any extractive activities. About 22 years ago, the government promulgated the Mining Regulations of 1991. These regulations allowed alluvial gold panning on riverbeds. The Minister of Mines granted permits to Rural District Councils (RDCs) who later issued licenses to Artisanal Miners to pan for alluvial gold along riverbeds.⁵⁷³ The sale of gold by communities situated next to reserves of gold has changed dramatically. It is reported that before 1991 there were about 600 000 Artisanal Miners in Zimbabwe.⁵⁷⁴ Because of the RDCs failure to monitor the activities of Artisanal Miners and the wave of 1991/1992 drought, most of the rural folk became Artisanal Miners and figures went up to 1 000 000 Artisanal Miners.

⁵⁷¹ Refer to paragraph 5.12 in chapter 5 of the dissertation.

⁵⁷² Mudzungairi *News Day* 5.

⁵⁷³ Kanyenze (ed) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (Weaver Press 2011) 187.

⁵⁷⁴ Kanyenze (ed) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (Weaver Press 2011) 196.

Production by Artisanal Miners is further hampered by the fact that the government has vowed to stamp out any unregistered mining claims through campaigns such as “Operation *Chikoroza Chapera*” (Operation wipe out all unregistered artisanal mining activities); this campaign started in mid-2007. Most Artisanal Miners alleged that they are not familiar with the mining laws which required them to do Environmental Impact Assessment (EIA) reports for claims registered before 17 March 2003 and Environmental Management Plan (EMP) for claims registered after 17 March 2003 before conducting any mining activity in terms of the current incomprehensive Mines and Minerals Act, Environmental Management Act and Statutory instruments 6, 7, 10 and 12 of 2007.⁵⁷⁵ One cannot blame Artisanal Miners for not being familiar with these stringent requirements because the government, over the past seven years, has not done much to educate Artisanal Miners to be compliant with mining legislation.

Even in the instance where Artisanal Miners are familiar with legislation, the costs of registering their claims, getting working capital and doing EIA and EMP make it highly impossible to follow such steps. Exorbitant mining levies make it impossible for an ordinary person to register a mine claim through the legitimate channels. Most Artisanal Miners enter such a profession not by choice, but because of the circumstances prevailing around them. The government, especially some elements of certain political parties, must desist from behaviour sidelining communities with minerals on their land. The government is quick to secure land where minerals are found and this is the perfect opportunity for politicians to bulldoze their way into certain mining concessions like what transpired in Marange. In some instances, crimes have gone unpunished where politicians use threats of confronting people with live ammunition in an effort to scare them away from areas where the minerals are found. If the government was to relax legislation pertaining to Artisanal Mining, it would mean that mineral claims would support and create jobs for the majority of people in communities where minerals are in abundance.

It is an indisputable fact that artisanal mining employs 10 times more people than large-scale mining. Recent figures received from the International Institute of

⁵⁷⁵ Kanyenze (ed) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (Weaver Press 2011) 187.

Environment and Development (IIED) indicate that there is between 350 000-500 000 Artisanal Miners in Zimbabwe.⁵⁷⁶ The fall in the figures is the result of a crackdown of Artisanal Miners in 2007 when they were estimated at 1 000 000. Large-scale mining employs about a tenth of what artisanal mining employs. Although the mining sector contributes to the economy through national taxes, the benefits do not reach the community immediately or they do not reach the community at all. Artisanal mining is quite different because it provides direct revenue to the poor communities. People have a hands-on benefit of the mineral because it is extracted directly by the people in the community. Families are able to enjoy their socio economic rights because they have the right to earn an honest living in a legitimate manner. The figures could be higher if the state was not using repressive means to clamp down Artisanal Miners.

The undisclosed killings of over 200 Artisanal Miners in Marange during the diamond rush must not be ignored.⁵⁷⁷ A commission of inquiry should be established to conduct investigations on the undisclosed killings. Commissions' of inquiry are common in other jurisdictions where there has been gross violation of people's rights. As long as the government continues to harass individuals who voice concerns over the secrecy in situations such as Marange the Nation will be under constant attack from western nations who could use this situation to ensure that the western nation's interests are served.

7.3.6 Adherence to International Instruments

As a nation that is concerned about increasing its diamond exports and other mineral exports, particularly at a time when the potential markets that can boost Zimbabwe's diamond sales are facing a lean spell and euro debt crisis, it is important that Zimbabwe shows commitment to human rights so that the potential markets can confidently give the nod to Zimbabwe's diamonds. With a new Constitution that protects people's rights, it is imperative for the nation to commit itself to the various international and regional human rights instruments that it has ratified. The African Charter obliges Member states to advance human rights and guarantees the right to

⁵⁷⁶ Buxton 2013 <http://pubsJled.org/16532IIED.html> 3.

⁵⁷⁷ Hough 2011 <http://www.minesandcommunities.org/article.php?a=11034&l=1>.

self-determination.⁵⁷⁸ The state should use resources available to advance the rights of people in terms of ICESCR.⁵⁷⁹ The ICCPR is clear on the right to self-determination.⁵⁸⁰ International instruments and international case law precedents can be used by Zimbabwe to make its legislation solid for the advancement and enforcement of community rights. It is unfortunate that the current Constitution does not advance the progressive realisation of the rights of the communities where minerals are found.

IEEA states that foreign owned companies must cede 51% of their wealth to indigenous Zimbabweans. Although a good initiative, from a closer view it is meant to benefit a few politically connected individuals who do not have the required capital to inject into the day-to-day running of these mines.⁵⁸¹ Logic puts it clearly that the majority shareholders should inject more capital for recapitalisation than the minority shareholders. For the sake of communities participating in the extractive activities process, this does not make sense because it may result in a situation where the minority shareholders (who are foreign owned companies) refuse to inject any capital into the company because they feel they have a lesser share. This will result in the community getting less from the royalties and profits simply because the company does not have any capacity to recapitalise. Indigenisation in the extractive activities sector must not be perceived as an attempt by the state to hijack existing entities, but it must be seen as an effort of empowering local communities where extractive activities are taking place.

The 50 CSOTs that have been formed because of IEEA countrywide fall far short of advancing the interests of the communities. As a main facilitator of CSOTs it is essential for the NIEEB to stretch its activities on monitoring those people accused of misappropriating funds meant to be budgeted for CSOTs.⁵⁸² The NIEEB must also be given that discretion of ensuring what appropriate sitting allowances should be given to those sitting on CSOTs boards. Such allowances should not enrich

⁵⁷⁸ Anon 2012.

<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>.

⁵⁷⁹ Refer to paragraph 6.3.3 in chapter 6 of this dissertation.

⁵⁸⁰ Refer to paragraph 6.3.2 in chapter 6 of this dissertation.

⁵⁸¹ Masekesa *Newsday* 3.

⁵⁸² Ndebele *The Herald Newspaper* 6.

individuals but they should be meant to refund such individuals for costs incurred in coming to such meetings. This comes after concern that those sitting in the CSOT boards receive outrageous allowances that are much higher than the salary package of a director in a company.

The state should do away with half-baked policies that do not advance the interests of the communities. Especially at a time when the nation is fresh from the election process that has determined a new government, such policies should be well thought out and accepted not only by citizens but also by the communities where minerals are found. By-laws of Rural District Councils do not contain any provisions aligning CSOTs. It is evident that the IEEA does not contain any specific Community Development Agreement (CDA). A CDA would benefit the community tremendously because there would be acceptance of a 'legal obligation' to development from the relevant stakeholders which also includes the community. Hence it can be observed that the CSOT's formed in terms of the IEEA do not put a commitment on the part of the community that it is willing and ready to use the CSOT's process to deal with the problems communities are facing. It creates an impression that the CSOT's have been created by the IEEA to delegate what is best for the community. The community should be educated on the main thrust of CSOT's. Such CSOT's should act in the interests of the entire community.

Information pertaining to the community must be given to the community as soon as possible. It is important for the Legislature to do away with its intractable attitude of refusing to amend IEEA. The IEEA does not provide for a policy of negotiation. It hides behind the notion that there is negotiation taking place but in fact there is no negotiation process that will allow the company to give its written reason as to why it cannot comply with a certain measures supposed to support CSOT's. Besides focussing too much on CSOT's there are other ways the state can use to engage communities in participating in the extractive activities process such as giving the mining company the platform to embark on investment programmes and bilateral agreements with the communities.

Companies' compulsory compliance with the IEEA by 2015 may result in declining levels of foreign investment because of uncertainty. The continued presence of the

military in Marange may lead to conditions that are conducive for a thriving illicit diamond market. In this regard, its presence may lead to an increased likelihood of the illegal extraction of the precious stones. That, in turn, may hamper government's efforts to plough back profits obtained from mineral resources into communities where there is considerable mineral wealth.

It is recommended that the government comes up with a harmonised legal framework that will not create doubts amongst doubting Thomases who have always doubted Zimbabwe's ability to advance interests of the communities in the extractive sector. Zimbabwe is not in a position presently to wipe out that perception for not advancing the interests of the communities because it has not been adhering to all international instruments that it has ratified. It is recommended that the nation must take shame for its actions because this dents on the image to protect the interests of the communities.

7.3.7 Amendment of the Mines and Minerals Act

The Mine and Minerals Act which vests all minerals in the President, must instead vest all minerals in all Zimbabweans with the state acting as custodian. This piece of legislation should have provisions that define a community that can benefit from extractive activities. A community that qualifies to benefit from extractive activities must be regarded as one that is within a certain radius of where the prospecting right to a company has been issued by the government. A community which wants to participate in the extractive activities process should have the freedom of approaching the Permanent Secretary, Deputy Minister and Minister in the Ministry of Mines if it believes to be a qualified community.

Where the community fails to qualify as a community benefiting from extractive activities, it must be notified in writing as to why it failed to be defined as a community that can benefit from the extractive activities process. For example, in the case of the Marange diamonds, residents of Mutare city which is not so far from the diamonds should also be accommodated but unfortunately because of the unbending legislative framework this has proved to be highly impossible. Diamond mining companies with operations in Marange have been focusing on recreational activities such as the sponsorship for the Mbada Diamond football knockout

tournament.⁵⁸³ Such money could be used to fix basic infrastructure such as the potholes on roads and sponsoring scholarship programmes for the youth who want to pursue tertiary studies that will benefit the mines in Manicaland Province.

7.3.8 Relaxation of Freedom of Expression Laws

Unfortunately, the state continues to label those who have been fighting for the cause of the Marange people to be sell-outs. Therefore, it is submitted that the Zimbabwean government must relax its legislation on freedom of expression such as Access to Information and Protection of Privacy Act (AIPPA) and Public Order and Security Act (POSA) in line with adherence to international instruments. These two pieces of legislation are a hindrance to protest groups and activists who want to show their cause in representing disadvantaged communities such as the people of Marange in order to uplift their lives.

In line with the Constitution, lobby groups and civic organisations must lodge applications before the recently established Constitutional Court to ensure that AIPPA and POSA are declared null and void because of their inconsistency with the Constitution. AIPPA is further worsened by the fact that it has a clause that allows the Zimbabwe Media Commission (ZMC) to scrutinise what media houses broadcast and publish. ZMC tends to tolerate state controlled media reports pertaining to community participation because they do not disclose full information such as the misuse of revenue obtained from the sale of the Chiadzwa diamonds. ZMC is a government-established entity and it is felt that media houses should establish their own self-regulating houses that act as a watchdog of the press. At present, publication or broadcasting of anything that exposes corrupt activities of the government is seen as means of ill discipline and not keeping up with the spirit of empowerment. If corruption in the extractive activities sectors continues to be exposed then it will be easier for more mining companies to be compliant with requirements for CSR.

AIPPA gives the state privileges to withhold information from reaching the masses for example information on the actual production of diamonds in Marange has been

⁵⁸³ Mbada Diamond Cup is a football tournament sponsored by Mbada Diamonds involving the country's premier league teams.

withheld from the public. POSA gives the state the right to incarcerate any person who has conducted activism or demonstration against regulation spelt out by POSA. For example, activists fear for their lives to canvass people to take part in protest marches against what has been taking place in Marange diamond area. As mentioned before, the state has barricaded the area to avoid communities from entering it.⁵⁸⁴ Activists who carry protest marches are seen as agents of foreign forces and accused of breaching POSA regulations. This makes people reluctant to engage in activities that monitor the way communities benefit from extractive activities because they fear for their lives. Activists must be portrayed as intermediaries who represent the concerns of local communities.⁵⁸⁵

The government must on the other hand make use of the withdrawal of the KPCS monitors to increase the sale of diamonds. This will improve the plight of the Marange community and other rural communities by providing basic services in line with the ICESCR. Community participation in the extractive sector is a three way process that involves the mining company, the community and the government. These key stakeholders should all act in good faith by honouring their commitments, particularly the government and the mining companies.

7.3.9 Liaison with Commonwealth Countries implementing Programs of Community participation in the Extractive Sector

It is high time that Zimbabwe seriously considers learning from other jurisdictions in a bid to improve community interests in the extractive activities sector. It is recommended that the Government of Zimbabwe, together with lobby groups, should fight for its reinstatement into the Commonwealth Group of Nations.⁵⁸⁶ The nations with successful mining programs for the benefit of communities will be able to assist Zimbabwe in coming up with robust strategies for legal enforcement of community rights. Canadian and Australian mining policies provide good models for Zimbabwe to emulate for the sake of advancement of the rights of the communities. The suspension of Zimbabwe from the Commonwealth Group of Nations, which resulted

⁵⁸⁴ Refer to paragraph 4.1.3 in chapter 4 of this dissertation.

⁵⁸⁵ Anguelovski *Community Engagement of Corporations and Social Movements: Towards New Models of for Participatory Deliberative Space* 119.

⁵⁸⁶ Zimbabwe decided to pull out of the Commonwealth in 2003 after it was suspended in 2002.

in Zimbabwe opting to pull out of the Commonwealth Group of Nations. The Commonwealth has assisted in establishing human rights commissions in three member countries and strengthening human rights commissions in other Commonwealth countries. Zimbabwe's absence highly prejudices it, as it does not benefit from such policies because they need funding that Zimbabwe does not have in order to be fully implemented. This in turn results in the revenue being used by the state for other purposes such as closing gaps on trade deficits. This occurs simply because the existing human rights commission is not effective enough in whistle-blowing gross corruption which infringes on the rights of communities. Furthermore, it should be noted that Commonwealth policies on regulatory and fiscal regimes position countries as investment destinations while adhering to social and cultural issues.

7.3.10 Impact Assessment Mechanisms on Community Participation

Impact Assessment mechanisms are a very broad concept. When cut down into the various types they can be in the forms of Environmental Impact Assessments, Heritage Impact Assessments, Social Impact Assessments and Human Rights Impact Assessments. Amongst others the assessment mechanisms mentioned are interrelated because the main objective is to assess the level of community participation in a community and how the activities of the mining company have affected them. Assessment mechanisms should assess whether people in the mining community have knowledge of the legal system. If complaints from the community are serious or reflect a deep level of community concern, then it is necessary to come up with methods of ensuring that thorough community involvement takes place, in order to develop a trust between the mining company and the community.

State media hardly publishes anything related to assessment mechanisms, save for exaggeration on the CSOTs which are used as a political gimmick in the run up to the elections. In most instances, the media tends to write about mineral wealth going to the people. There is hardly any talk of the media getting the communities' views regarding how they want to gain from the wealth surrounding them. For an assessment mechanism to succeed, information must be distributed to the

community. Government must carry out some form of assessment mechanism to establish if the community has benefited from the extractive activities. People employed by the government or the mining company should be put in the field to publicise the assessment mechanisms intended to be used by the government or the mining company to find out the level of community participation in the area.

7.3.11 Dispute Resolution Mechanisms

In regard to formation of the CSOTs in communities where minerals are found, those responsible for the monitoring and implementation of CSOTs have to be held responsible for resolving disputes between the community and the mining company. If the implementation and monitoring committee does not have capacity to resolve such a dispute, the matter should then go for litigation in the High Court which should have judicial officers well acquainted with laws pertaining to community participation in the extractive activities sector. Rural communities in general can use the dispute resolution mechanisms approach to participate in the extractive activities sector. *Imbizos* or *Dares* are a common way of people participating in large village meetings. It is a kind of platform for villagers to discuss matters affecting them. Village Headmen, Kraal Heads and Chiefs must use such meetings to inform the people about how they can benefit from the resources around them. NGOs also have a role to play in working together with chiefs and other leadership in the villages affected by mining operations, to ensure that the community is made aware of its rights in benefiting from extractive activities. CSOTs should not be used as a platform for campaigning by political parties.

BIBLIOGRAPHY

Books

A

Andre and Phimister *People and Power*

Andre P and Phimister I *People and Power* (Harare: Academic Books Pvt Ltd 1991)

B

Brereton, Owen and Kim *Good Practice Note Community Development Agreements*

Brereton D, Owen J and Kim J *Good Practice Note Community Development Agreements 2011* (EI Source Book 2011)

C

Chenwi and Tissington *Engaging Meaningfully with Government on Socio Economic Rights*

Chenwi L & Tissington K *Engaging Meaningfully with Government on Socio-Economic Rights A focus on the right to housing* (University of Western Cape Community Law Centre 2010)

Chenwi *Evictions in South Africa Relevant International Standards*

Chenwi L *Evictions in South Africa Relevant International and National Standards* (University of Western Cape Community Law Centre 2008)

F

Feltoe *A Guide to Administrative and Local Government Law in Zimbabwe 2012*

Feltoe G *A Guide to Administrative and Local Government Law in Zimbabwe 2012* (Weaver Press 2012)

G

Gayre *Zimbabwean Civilisation*

Gayre R *The Origin of Zimbabwean Civilisation* (Galaxy Press 1972)

Ginther, Denters, and de Waart, *Sustainable Development and Good Governance*

Ginther, K.; Denters, E. and de Waart, P *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers, 1995)

H

Hodge *Good Practice Guide: Indigenous Peoples and Mining*

Hodge T et al *Good Practice Guide: Indigenous Peoples and Mining* (International Council on Mining and Metals 2010)

Hoexter *Administrative Law in South Africa*

Hoexter C '*Administrative Law in South Africa*' (Juta and Company 2007)

Hogg *Constitutional Law in Canada*

Hogg PW *Constitutional Law in Canada* 3rd edition (Thomson Canada Limited 1992)

Human Rights Watch *Diamonds in the Rough*

Human Rights Watch *Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields* (Human Rights Watch June 2009)

Hunt *Mining Law in Western Australia*

Hunt M *Mining Law in Western Australia* 4th Edition (Federation Press 2009)

I

Introduction to the chamber of mines South Africa 2012 who is the publisher 17-05-2014

K

Keulder *Traditional Leaders and Local Government in Africa*

Keulder C *Traditional Leaders and Local Government in Africa: Lessons for South Africa* (HSRC 1998)

Kanyenze (ed) *Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe* (Weaver Press 2011)194.

Kanyenze G (ed) '*Beyond the Enclave: Towards a Pro-Poor and Inclusive Development Strategy for Zimbabwe*' (Weaver Press 2011)

M

Madhuku *An Introduction to Zimbabwean Law*

Madhuku L *An Introduction to Zimbabwean Law* (Weaver Press Harare 2010)

Mathbor *Effective Community Participation*

Matbhor B *Effective Community Participation in Coastal Development* (Lyceum Books 2008)

Mbenga and Manson, "*People of the Dew*": *A History of the Bafokeng of Phokeng-Rustenburg Region, South Africa, from Early Times to 2000*

Mbenga B and. Manson A, "*People of the Dew*": *A History of the Bafokeng of Phokeng-Rustenburg Region, South Africa, from Early Times to 2000* (Jacana Media, Auckland Park, 2010)

Mclean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*

Mclean K *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press 2009)

McNair *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community*

McNair D *Aboriginal Mining Guide: How to Negotiate Lasting Benefits for your Community* (Canada Centre for Community Renewal 2009)

Mtisi (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011)

Mtisi S (ed) *Extractive Activities Policy and Legal Hand Book* (Zimbabwe Environmental Law Association 2011)

O

Otto, Andrews, Cawood, Doggett, Guj, Stermole and Tilton *Mining Royalties: A Global Study of their Impact on Investor, Government and Civil Society*

Otto J, Andrews C, Cawood F, Doggett M, Guj P, Stermole J and Tilton J *Mining Royalties : A Global Study of their Impact on Investor, Government and Civil Society* (The International Bank for Reconstruction and Development 2006)

R

Reid *How People Power Brings Sustainable Benefits to Communities*

Reid JN *How People Power Brings Sustainable Benefits to Communities* (United States Development Agency Rural Development Office of Community Development June 2000)

S

Seidman A, Seidman R, and Wälde, (eds.) *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*

Seidman, A., Seidman, R. and Wälde, T. (eds.) *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (London: Kluwer Law International, 1999)

Shari and Hofmann (eds) *Transparency and Accountability In Africa's Extractive Industries: The Role of The Legislature* (National Democratic Institute for International Affairs 2007).

Shari B and Hofmann B (eds) *Transparency and Accountability In Africa's Extractive Industries: The Role of The Legislature* (National Democratic Institute for International Affairs 2007).

Shultz *Follow the Money A Guide to Monitoring Budgets and Oil and Gas Revenue*

Shultz J *Follow the Money A Guide to Monitoring Budgets and Oil and Gas Revenue* (Open Society Institute 2005)¹⁴

Saunders "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition"¹⁻¹⁶

Saunders R "Geologies of Power: Blood Diamonds, Security Politics and Zimbabwe's Troubled Transition" in Clarke M and Basset C (eds) *Legacies of Liberation: Post Colonial Struggles for a Democratic Southern Africa* (Toronto: Fernwood and Johannesburg: HSRC Press 2010)

Saunders

Saunders R *Briefing Note: Mining and Crisis in Zimbabwe* (Netherlands Institute for Southern Africa June 2007)

Chapters from Books

Anguelovski "Community engagement of corporations and social movements: towards new models of for participatory deliberative space"

Anguelovski I "Community engagement of corporations and social movements: towards new models of for participatory deliberative space" in Weiss and Teodoro Bustamante (eds) *Environmental Chess Natural Resource Management, Communities, Conflict and Cooperation* (Crearimagen 2008)

Thesis and Dissertations

Mbazira C *Enforcing the Economic, Social and Cultural Rights*

Mbazira C *Enforcing the Economic, Social and Cultural Rights in the South African Constitution as Justiciable Individual Rights: The Role of Judicial Remedies*⁷ (LLD thesis University of the Western Cape 2007)

Articles

A

Abramovich 2005 *International Journal on Human Rights*

Abramovich V "Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies" 2005 *International Journal on Human Rights* 181-216

Al Faruque 2006 *Journal for Energy and Natural Resource*

Al Faruque A "Transparency in Extractive Revenues in Developing Countries: A Review of Emerging Best Practices" 2006 *Journal of Energy and Natural Resources* 66-103

B

Badenhorst and Olivier 2011 *De Jure*

Badenhorst PJ and Olivier "Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002" 2011 *De Jure* 126-148

Bastin 2012 *Cambridge Journal of International and Comparative Law*

Bastin L "Amici Curiae in Investor-State Arbitration Eight Recent Trends" *Cambridge Journal of International and Comparative Law* 208-234

Beach 1979 *The Journal of African History*

Beach D N "Chimurenga: The Shona Rising of 1896-1897" 1979 *The Journal of African History* 395-42

Bonello 2010 *The Journal of African Historical Studies* 343.

Bonello 2010 "The Development of Early Settler Identity in Southern Rhodesia: 1890-1914" *The Journal of African Historical Studies* 341-367.

Brereton and Parmenter 2008 *Journal of Energy and Natural Resources Law*

Brereton D and Parmenter J "Indigenous Employment in the Australian Mining Industry" 2008 *Journal of Energy and Natural Resources Law* 66-90

C

Carbonnier 2011 *Global Governance*

Carbonnier G "Introduction: The Global and Local Governance of Extractive Resources" 2011 *Global Governance* 135-147

Chan 2008 *Yale Human Rights and Development Law Journal*

Chan CK A Response to Lisa J Laplante and Suzanne A. Spears article on "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" 2008 *Yale Human Rights and Development Law Journal* 117-127

Chokuda 2009 *SA Merc LJ*

Chokuda CT "International Investment Dispute Resolution: A Review of the Resolution of Investment Disputes Arising out of the Land Reform Programme in Zimbabwe" 2009 *SA Merc LJ* 753-772

Chauke 1998 *Legal Forum*

Chauke F "Agenda Debating Zimbabwe's Future Constitution" 1998 *Legal Forum* 09-15.

Chauke 1998 *Legal Forum*

Chauke F "Discussion on the Principles of a Democratic Constitution and the Bill of Rights" 1998 *Legal Forum* 22-27

Choshi 2001 *African Institute of Corporate Citizenship*

Choshi S "Mining Minerals Sustainable Development Southern Africa: Input to MMSDSA Regional Research" *African Institute of Corporate Citizenship* July 2001

Clarke 1987 *Zambezia*

Clarke DG "The Zimbabwe Economy: Prognostications and Realities after Six Years" 1987 *Zambezia* 73-83

Cobbing 1977 *The Journal of African History*

Cobbing J "The Absent Priesthood: Another look at the Rhodesian Risings of 1896-1897" 1977 *The Journal of African History* 61-84

Coleman and William 2008 *Business Law International* 56-94

Coleman M and William K "South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?" 2008 *Business Law International* 56-94

Cornwall 2008 *Oxford University Press and Community Development Journal*

Cornwall A "Unpacking 'Participation Models, Meanings and Practices'" 2008 *Oxford University Press and Community Development Journal* 269-283

Costa and Scoble 2006 *Journal of Clean Production, Elsevier Science*

Costa S and Scoble M "An Interdisciplinary approach to Integrating Sustainability into Mining Engineering Education and Research" 2006 *Journal of Clean Production, Elsevier Science* 366-373

D

Date-Bah 1998 *Journal for Energy and Natural Resources*

Date-Bah SK "Rights of Indigenous People in Relation to Natural Resources Development: An African Perspective" 1998 *Journal for Energy and Natural Resources*. 389-412

De Rouche 1998 *Zambezia*

De Rouche "Establishing the Centrality of Race: Relations between the US and the Rhodesian Federation 1953-1963" 1998 *Zambezia* 209-230

E

Ewing 1993 *The Australian Quarterly*

Ewing GW "Terra Australian Post Mabo: For Richer or for Poorer" 1993 *The Australian Quarterly* 157-165

F

Fernandez 2005 *Journal of Energy and Natural Resource Law*

Fernandez JW "Indigenous Communities' Rights and Mineral Development" 2005 *Journal of Energy and Natural Resource Law* 412-434

Fombad 2011 *Buffalo Law Review*

Fombad CM "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects" 2011 *Buffalo Law Review* 1007-1104

Fraser 2005 *Oxford University Press and Community Development Journal*

Fraser H "Four Different Approaches to Community Participation" 2005 *Oxford University Press and Community Development Journal* 286-300

G

Gapare 2010 *Chamber of Mines Journal*

Gapare V "From the President's Desk" 2010 *Chamber of Mines Journal* 2-6

Gapare 2010 *Chamber of Mines Journal* 20-28

Gapare V "Mining Thirsty for Funding" 2010 *Chamber of Mines Journal* 20-28

Gaidzanwa 1991 *Zambezia*

Gaidzanwa RB "Labour Relations in A Mining Enterprise Established After Independence" 1991 *Zambezia* 49-67

Gildenhuys 2005 *Journal for Energy and Natural Resources Law*

Gildenhuys A "Indigenous Peoples' Rights to Minerals and the Mining Industry Current Developments in South Africa from a National and International Perspective" 2005 *Journal for Energy and Natural Resources Law* 465-481

Genasci and Pray 2008 *Yale Human Rights and Development Law Journal* 59-67

Genasci M and Pray S "Accountability: Implications of the Resource Curse for CSR Theory and Practice" 2008 *Yale Human Rights and Development Law Journal* 59-67

Godden, Langton, Mazel and Tehan 2008 *Journal of Energy and Natural Resources*

Godden L, Langton M, Mazel O and Tehan M "Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability" 2008 *Journal of Energy and Natural Resources Law* 1-30

Gubbay 1997 *Human rights Quarterly*

Gubbay A "The Protection and Enforcement of Fundamental Human Rights: The Zimbabwean Experience" 1997 *Human rights Quarterly* 227-254

H

Hansungule 2000 *International Journal on Minority and Groups Rights*

Hansungule M "Who Owns Land in Zimbabwe? In Africa?" 2000 *International Journal on Minority and Groups Rights* 305-340

Hathaway 2002 *Yale Law Journal*

Hathaway OA "Do Human Rights Treats Make A Difference" 2002 *Yale Law Journal* 1935-2042

Hodzia, Hartwell and de Jager 2012 *South African Journal of International Affairs*

Hodzia O, Hartwell L and de Jager N "Unconditional aid': Assessing the impact of China's development assistance to Zimbabwe" 2012 *South African Journal of International Affairs* 79-103

J

Jaffey 1966 *The Journal For African History* 193

Jaffey AJE "The History of the Rhodesian Iron Age" 1966 *The Journal For African History* 189-195

K

Katsaura 2010 *Journal of Sustainable Development in Africa*

Katsaura O "Violence and the Political Economy of Informal Diamond Mining in Chiadzwa, Zimbabwe" 2010 *Journal of Sustainable Development in Africa* 340-35

Kloppers and du Plessis 2008 *Journal for Energy and Natural Resources Law*

Kloppers H and du Plessis W "Corporate Social Responsibility, Legislative Reforms and Mining in South Africa" 2008 *Journal for Energy and Natural Resources Law* 91-119

Kravchenko 2003 *Tulane Environmental Law Journal*

Kravchenko S "The Myth of Public Participation in a World of Poverty" 2003 *Tulane Environmental Law Journal* 33-55

Kuppe 2009 *International Community Law Review*

Kuppe R "The Three Dimensions of the Rights of Indigenous Peoples" 2009 *International Community Law Review* 103-118.

L

Langford 1998 *Centre for Energy, Petroleum and Mineral Law Policy Annual Review* 84-101

- Langford V "The Impact of Aboriginal Title on Mineral Rights Agreements in Canada: Legal and Commercial Realities" 1998 *Centre for Energy, Petroleum and Mineral Law Policy Annual Review* 84-101
- Langford 2009 *International Journal on Human Rights*
- Langford M "Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review" 2009 *International Journal on Human Rights* 91-123
- Langton and Mazel 2008 *Journal for Energy and Natural Resources Law*
- Langton M and Mazel O "Poverty in the Midst of Plenty: Aboriginal People, the 'Resource Curse' and Australia's Mining Boom" 2008 *Journal for Energy and Natural Resources Law* 31-65
- Lapante and Spears 2008 *Yale Human Rights and Development Journal*
- Lapante LJ and Spears SA "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector" 2008 *Yale Human Rights and Development Journal* 69-117
- Lee and Abbot 2003 *The Modern Law Review*
- Lee M and Abbot C "The Usual Suspects? Public Participation under the Aarhus Convention" 2003 *The Modern Law Review* 80-108
- M**
- Maphosa 1997 *Zambezia*
- Maphosa F "Corporate Social Responsibility in Zimbabwe: A Content Analysis of Mission Statements and Annual Reports" 1997 *Zambezia* 181-193
- Mlambo A.S 1993 *Zambezia* 57
- Mlambo A.S 1993 "The Rich Inherit The Earth: Towards An Analysis of The Role and Impact of IMF Structural Adjustment Programmes In Sub-Saharan Africa" *Zambezia* 53-76
- Mohamed-Katerere 2001 *African Studies Quarterly*

Mohamed-Katerere J "Participatory Natural Resource Management in the Communal Lands of Zimbabwe: What Role for Customary Law?" 2001 *African Studies Quarterly* 115-138

Murombo 2010 *SAPL*

Murombo T "Law and the Indigenisation of Mineral Resources in Zimbabwe: Any Equity for Local Communities?" 2010 *SAPL* 568-589

N

Naito, Remy, and Williams, 2001 *The Mining Journal*

Naito, K., Remy, F. and Williams, J "A Comparative Review of Legal and Fiscal Frameworks for Exploration and Mining: Best Practices London" 2001 *The Mining Journal* 43-66

Nickerson 1994 *Boston College Third World Law Journal*

Nickerson BJ "Environmental Laws in Zimbabwe: a unique approach to management of the environment" 1994 *Boston College Third World Law Journal* 189-218

O

Ocheje 2007 *Journal of African Law*

Ocheje PD "In the Public Interest: Forced Evictions, Land Rights and Human Development in Africa" 2007 *Journal of African Law* 173-214

Olowu 2010 *African Journal on Conflict Resolution* 90

Olowu D "From Defiance to engagement: An Evaluation of Shell's approach to conflict resolution in the Niger Delta" 2010 *African Journal on Conflict Resolution* 75-100

P

Phimister 1974 *The Journal of African History*

Phimister I R "Alluvial Gold Mining and Trade in Nineteenth-Century South Central Africa" 1974 *The Journal of African History* 445-456

Pudifin and Bosch 2012 *PELJ* 235

Pudifin S and Bosch S "Demographic and Social Factors Influencing Public Opinion on Prostitution: An Exploratory Study in Kwazulu-Natal Province, South Africa" 2012 *PELJ* 231-270

S

Saunders 2008 *African Sociological Review*

Saunders R "Crisis, Capital, Compromise: Mining and Empowerment in Zimbabwe" 2008 *African Sociological Review* 67-89

Simons and Collins 2010 *International Journal of Sustainable Development Law and Policy*

Simons P and Collins L "Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective" 2010 *International Journal of Sustainable Development Law and Policy* 1-48

Siyongwana and Mayekiso 2011 *Africa Insight*

Siyongwana P and Mayekiso T "Participation in Post-Apartheid Urban Renewal Development Projects in Port Elizabeth, South Africa" 2011 *Africa Insight* 142-156

Shannon 2011 *Pepperdine Dispute Resolution Law Journal*

Shannon K Murphy "Clouded Diamonds: Without Binding Arbitration and More Sophisticated Dispute Resolution Mechanisms, the Kimberly Process Will Ultimately Fail in Ending Conflicts Fueled By Blood Diamonds" 2011 *Pepperdine Dispute Resolution Law Journal* 207-228

Standing 2007 *Institute for Security Studies Paper* 1-27

Standing A "Corruption and the Extractive Industries in Africa" 2007 *Institute for Security Studies Paper* 1-27

Todd 2007 *The Black Scholar* 21.

Todd A "The Struggle in Zimbabwe" 2007 *The Black Scholar* 20-22

V

Van Onselen 1973 *The Journal of African History*

Van Onselen C "Worker Consciousness in Black Miners: Southern Rhodesia, 1900-1920" 1973 *The Journal for African History* 237-255

Veiga, Scoble, McAllister 2001 *Natural Resources Forum*

Veiga MM, Scoble M, McAllister ML "Mining with Communities" 2001 *Natural Resources Forum* 191-202

Viljeon 2011 *De Jure*

Viljeon F "Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education" 2011 *De Jure* 207-231

Viljeon 2010 *Interights Bulletin*

Viljeon F "State Compliance under the African Charter in Human and Peoples Rights" 2010 *Interights Bulletin* 60-63

W

Wilcox 1994 *RRA Notes*

Wilcox D "Community Participation and Empowerment: Putting Theory in to Practice" 1994 *RRA Notes* 78-82

Wiles 2006 *AM. U. INT'L L. REV.*

Wiles E "Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law" 2006 *AM. U. INT'L L. REV.* 36-63

Williams 2007-2008 *Journal for International Law*

Williams P "International Best Practice in Mining Who Decides and How and How Does it Impact Law Development?" 2007-2008 *Journal for International Law* 693-708

Williams 2007 *Georgetown Journal for International Law* Volume 656-694

Williams J P "International Best Practice Who Decides and How" 2007 *Georgetown Journal for International Law* Volume 656-694

Williams 2006 *Policy Studies Journal*

Williams JJ "Community Participation Lessons from post-apartheid South" 2006 *Africa Policy Studies Journal* 197-217

Y

Yirenkyi 2008 *The Southern African Institute of Mining and Metallurgy Surface Mining*

Yirenkyi S "Surface Mining and its Socio Economic Impact and Challenges" 2008 *The Southern African Institute of Mining and Metallurgy Surface Mining* 181-202

Z

Zhou 2012 *International Journal of Humanities and Social Science* 216

Zhou G 'Public Policy Making in Zimbabwe: A Three Decade Perspective' *International Journal of Humanities and Social Science* 212-222

Conference and Seminar Contributions

B

Biti "The 2013 National Budget Statement" *Beyond the Enclave: Unleashing Zimbabwe's Economic Growth Potential*

Minister of Finance Tendia Biti in his budget speech titled 'The 2013 National Budget Statement' *'Beyond the Enclave: Unleashing Zimbabwe's Economic Growth Potential'* Ministry of Finance 15 November 2012

C

Crush, Williams and Peberdy "Migration in Southern Africa"

Crush J, Williams V and Peberdy S "Migration in Southern Africa" A Paper prepared for the *Policy Analysis and Research Programme of the Global Commission on International Migration in Global Commission on International Migration*. September 2005

H

Hipwell, Mamen, Weitzner and Whiteman "Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change"

Hipwell W, Mamen K, Weitzner V and Whiteman G "Aboriginal Peoples and Mining in Canada: Consultation, Participation and Prospects for Change" Working Discussion Paper *Prepared by the North South Institute* 2002

J

Jenkins and Obara "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency"

Jenkins H and Obara L "Corporate Social Responsibility in the Mining Industry- the Risk of Community Dependency" in Queens University Belfast Conference 7-9 September 2008 Belfast 8.1-12

K

Kuyek "Canada Mining Law and the Impacts on Indigenous Peoples Lands and Resources"

Kuyek J "Canada Mining Law and the Impacts on Indigenous Peoples Lands and Resources" in North American Indigenous Mining Summit 28 July 2005 Ottawa Canada 2. 1-6

V

Valiela and Baldwin "Dealing with Legacy-Some Canadian Approaches"

Valiela D and Baldwin CG "Dealing with Legacy-Some Canadian Approaches"
at the *Rocky Foundation Course on "International Mining and Development
and Investment* held in Buenos Aires, Argentina on 16-18 April 2007 2 1-12

Vilhena "Main issues for formulating mining policies towards attracting foreign
investment, in the mining industry: Old threats and new challenges"

Vilhena FC "Main issues for formulating mining policies towards attracting
foreign investment, in the mining industry: Old threats and new challenges"
CEPMLP, University of Dundee Annual Mining Seminar, 10-14 2002

S

Standing "Corruption and the Extractive Industries in Africa"

Standing A "Corruption and the Extractive Industries in Africa" Institute for
Security Studies Paper 153 2007 3. 1-27

Newspapers

Banya *Business Day* 9

Banya N "Zimbabwe says it now 'owns' 51% of foreign miners" *Business day* 05 April
2012 9

Chipangura *Newsday* 4

Chipangura T 'Is Marange oiling another poll terror?' *Newsday* 04 August
2012 4

Dube *Chronicle* 3

Dube T 'Gwanda Prioritises Livestock Restocking' *Chronicle* 22 May 2012 3

Gagare *The Independent* 3

Gagare O 'Security Forces Tighten Mining Sector Grip' *The Independent* 18 May 2012 3

Masara *The Standard* 7

Masara C 'Change the way mining firms operate' *The Standard* 15 September 2013 7

Mambo *The Standard* 4

Mambo E 'Share Ownership Trust Funds Looted' *The Standard* 05 October 2012 4

Masekesa *Newsday* 3

Masekesa C 'Indigenisation Fake: Zanu PF Youths' *Newsday* 31 May 2013 3

Masenyama *Herald* 13 August 2013 6

Masenyama 'Indigenisation: All systems Go' *Herald* 13 August 2013 6

Mazwi *The Independent* 2

Mazwi F 'Chinese Investment Retrogressive' *The Independent* 09 November 2012 2

Muchetu *Sunday News*

Muchetu R 'No Mining Community will be left out' *Sunday News* 23 May 2012 6

Mudarikiri *The Independent* 7

Mudarikiri G 'Zimbabwe: Mpofu Defiant On Diamond Revenues' *The Independent* 15 June 2012 7

Mutandi and Musarurwa *The Sunday Mail* 3

Mutandi K and Musarurwa D 'Government moves into Zimplats' *The Sunday Mail* 26 February 2012 3

Mutingwende *The Zimbabwean* 7

Mutingwende D 'Chiefs determined to ensure locals benefit from mining' *The Zimbabwean* 8 October 2012 7

Swart *Mail and Guardian* 8

Swart H 'Lonhim Faces Community Showdown' *Mail and Guardian* December 14 to 20 2012 8.

Sunday Mail Reporter *Sunday Mail* 3

Sunday Mail Reporter 'Government Withdraws Mining Contracts' *Sunday Mail* 23 September 2012 3

Sunday Mail Reporter *Sunday Mail* 6

Sunday Mail Reporter 'Know your Indigenisation and Economic Empowerment Act' *Sunday Mail* 13 July 2012 6

Unknown Citizen *Daily News* 3

Unknown 'Citizen Economic Empowerment Law Unnecessary' *Daily News* 11 April 2012 3

Unknown 'Media release by COPAC 'COPAC Completes Review of 18 Chapters' *Sunday Mail Newspaper* 18-24 March 2012 L10.

Unknown *Sunday Business* 3

Unknown 'Billion dollar Economy' *Sunday Business* 26 February- 3 March 2012 3.

Unknown *The Standard* 4

Unknown 'Diamond Revenues We Need Answers' *The Standard* 24 May 2012 4

Speeches

Chamber of Mines Zimbabwe Sixty Eight Annual General Meeting Presidents Speech.

Case Law

51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg 2008 3 SA 208 (CC).

A

Alexkor Ltd and Another v Richterveld Community and Others Case CCT 19/03 2003

B

Bengwenyama Minerals and Others v Genorah Resources (Pty) Ltd Case CCT 39/10 [2010] ZACC 26

C

Calder v Attorney General of British Colombia 1973 35 DLR (3d) 145.

G

Government of the Republic of South Africa and Others v Grootboom 2000 (11) BCLR 1169 (CC)

Gupta v Union of India 2 SCR 1982

H

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73

Hayes v Baldachin & Ors (2) 1980 ZLR 422 at 427

I

In Re: Southern Rhodesia 1919 AC 211.

J

Jealousy Mbizvo Mawire v Robert Gabriel Mugabe and Others CCZ1/13

L

Lindiwe Mazibuko and Others v City of Johannesburg and Others Case CCT 39/09
[2009] ZACC 28

M

Mabo v Queensland 1992 CLR

Malvern Mudiwa and Others v. Mbada Mining Private Limited and Others (HC 6334/09)

Malvern Mudiwa and Others v The Co-Ministers of Home Affairs and Other
HC.6337/09

Matsipane Mosetlhanyane & Others v The Attorney-General of Botswana Court of Appeal, CALB-074-10 (unreported).

Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya AHRLR 2009 75

R

Ross River Dena Council v Government of Yukon 2011 YKSC 84

S

S v Malvern Mudiwa CRB 3750/10.

SERAC v Nigeria AHRLR 2001 60

Y

Yakye Axa Community v. Paraguay Inter-American Court of Human Rights
Judgment of February 6, 2006

Z

Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe ACHPR 284/03 2003

Legislation

Access to Information and Protection Act

Civil Matters Act 14 1996

Communal Land Act 13 of 2002

Companies Act Chapter 24:03 of Zimbabwe

Communal Land Act 13 of 2002

Constitution of Zimbabwe

Human Rights Act

Indigenisation Economic and Empowerment Act 14 of 2007

Indigenisation Economic and Empowerment Act Statutory Instrument 21 of 2010

Interpretation Act 236 of 1980.

Mines and Minerals Act 1135 of 1975.

Precious Stones Act 1978

Rural District Council Act 22 of 2001

Rural Land Occupier (Protection from Eviction) Act 13 2001

Traditional Leaders Act 22 of 2001

Zimbabwe Diamond Policy

Foreign Legislation

Black Economic Empowerment Code of Good Practice South Africa

Black Economic Empowerment Policy Legislation South Africa

Canadian Constitution

Mineral and Petroleum Resources Development Amendment Act 49 of 2008

The South African Constitution

Australian Native Title Act of 1993.

International Instruments

African Charter on Peoples and Human Rights

The Aarhus Convention

Equator Principles

Rio Declaration on Environment and Development 1992

International Covenant of Economic Social and Cultural Rights

International Covenant on Civil and Political Rights

United Nations Declaration on the Rights of Indigenous Peoples

Universal Declaration of Human Rights Preamble

United Nations Declaration on the Rights of Indigenous Peoples

United Nations Basic Principles and Guidelines on Development Based Evictions and Displacement A/HRC/4/18

Vienna Convention on the Law of Treaties, Concluded at Vienna on 23 May 1969

Reports

Cheney H, Lovel R and Solomon F "People, Power, Participation: A Study of Mining-Community Relationships" Mining and Minerals and Sustainable Development Project by the International Institute for Environment and Development 2002

Post Seminar Report Pilot Workshop on Human Rights and Business 28 July 2011 3.

United Nations Economic and Social Council Economic Commission for Africa Africa Review Report on Mining 29 September 2009 8.1-16

United Nations Economic and Social Council Economic Commission for Africa: Africa Review Report on Mining 29 September 2009 4.

United Nations Economic and Social Council Economic Commission for Africa:
Africa Review Report on Mining 29 September 2009 4.1-16

United Nation Development Project Human Development Report 1993.

United Nations Economic and Social Council Economic Commission for Africa:
Africa Review Report on Mining 29 September 2009 3.1-16

Report of the Working Group on the Universal Periodic Review: Zimbabwe' Human
Rights Council Nineteenth Session Agenda Item 6 Universal Periodic Review 7

Zimbabwe Human Rights NGO Forum, Submissions on the Human Rights
Commission Bill 2011 3

Policies

International Bar Association Model Mining Development Agreement Project

Internet Sources

A

Anon Date Unknown
<http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> [date of use 12 July 2012]

Zimbabwe Lawyers for Human Rights 'Amendments To the Constitution of
Zimbabwe: A Constant Assault on Democracy and Constitutionalism' Date
Unknown <http://www1.umn.edu/humanrts/research/constitution%20statement-sunday%20mirror.pdf> [date of use 12 July 2012]

Anon Date Unknown

http://www.investorwords.com/122/ad_valorem.html#ixzz1vdNY0eUp

Anonymous *Investors Words* Date Unknown

http://www.investorwords.com/122/ad_valorem.html#ixzz1vdNY0eUp [date of
use 22 May 2012]

Anon Date Unknown <http://unfccc.int/resource/ccsites/zimbab/legislat/policy.htm>

Anonymous	Date	Unknown
http://unfccc.int/resource/ccsites/zimbab/legislat/policy.htm [date of use 24 April 2012]		

Anon 2012 <http://www.zbc.co.zw/news-categories/top-stories/19635-community-share-ownership-trusts-hailed.html>

Anonymous 2012 <http://www.zbc.co.zw/news-categories/top-stories/19635-community-share-ownership-trusts-hailed.html> [date of use 06 September 2012]

Anon 2014 <http://www.herald.co.zw/wp-content/uploads/2014/01/Zim-Asset.pdf> at 26

Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Assets) "Towards an Empowered Society and a Growing Economy" October 2013-December 2018. <http://www.herald.co.zw/wp-content/uploads/2014/01/Zim-Asset.pdf> [Date of use 21 June 2014] 26

Alliance for Metropolitan Stability 2001 <http://www.metrostability.org/efiles/CBAREPORT.pdf>

Alliance for Metropolitan Stability 2001 *Community Benefit Agreements Growing a Movement in Minnesota* 3 <http://www.metrostability.org/efiles/CBAREPORT.pdf> [01 June 2012]

Anon 2009 [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/\\$FILE/SectorLicensingStudiesMining.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/$FILE/SectorLicensingStudiesMining.pdf)

Anonymous 2009 *Sector Licensing Studies: Mining Sector Report by the Investment Climate Advisory Services of the World Bank Group*. July 2009 [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/\\$FILE/SectorLicensingStudiesMining.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/BRG_Toolsimproveexistingreg_OtherMining/$FILE/SectorLicensingStudiesMining.pdf) [date of use 11 May 2012]

Anon 2010

<http://www.financialgazette.co.zw/top-stories/10517-diamond-secrets-revealed.html>

Anonymous 2010 *Diamond Secrets Revealed* 14 June 2010

<http://www.financialgazette.co.zw/top-stories/10517-diamond-secrets-revealed.html> [date of use 11 May 2012]

Anon

2011

<http://www.un.org/esa/dsd/dsdaofwni/nipdfs/NationalReports/romania/mining.pdf>

National Report on Mining in Romania

<http://www.un.org/esa/dsd/dsdaofwni/nipdfs/NationalReports/romania/mining.pdf> [date of use 09 March 2012]

Anon 2011 3 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf>

Anonymous 2011 *The Marange Diamond Fields of Zimbabwe An Overview*

3 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf> [date of use 28 May 2012]

Anon

2011

<http://www.zela.org/rnp/docs/Update%20of%20Recent%20Developments%20in%20Zimbabwe%27s%20Extractive%20and%20Mining%20Sector.pdf>

Anonymous 2011 *Update and Analysis of Extractive Sector and Mining Issues*

in Zimbabwe Period: January-August 2011

<http://www.zela.org/rnp/docs/Update%20of%20Recent%20Developments%20in%20Zimbabwe%27s%20Extractive%20and%20Mining%20Sector.pdf> [date of use 17 May 2012]

Anon 2011 3 <http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf>

Anonymous 2011 *The Marange Diamond Fields of Zimbabwe An Overview*
3<http://www.sokwanele.com/system/files/The-Marange-Diamond-Fields-Report-Oct-2011.pdf> [date of use 28 May 2012]

Anon2011 <http://www.minesandcommunities.org/article.php?a=10724&l=1>

Anonymous 2011 *Statement from the Alternative Mining Indaba 2011*

<http://www.minesandcommunities.org/article.php?a=10724&l=1> [date of use 25 April 2012]

Anon 2011

<http://www.minesandcommunities.org/article.php?a=10724&l=1>

Anonymous 2011 *Statement from the Alternative Mining Indaba*

<http://www.minesandcommunities.org/article.php?a=10724&l=1> [date of use 25 April 2012]

Anon 2011 <http://www.revenuewatch.org/grants/building-parliamentary-capacity-mining-laws-and-contracts-zimbabwe>

Building Parliamentary Capacity in Mining Laws and Contracts in Zimbabwe
<http://www.revenuewatch.org/grants/building-parliamentary-capacity-mining-laws-and-contracts-zimbabwe> [date of use 6 May 2012]

Anon 2011 <http://www.minesandcommunities.org/article.php?a=10724&l=>

Anonymous 2011 *Statement from Alternative Mining Indaba 2011*

<http://www.minesandcommunities.org/article.php?a=10724&l=> [date of use 25 April 2012]

Anon

2011

http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf

Anonymous 2011 *Community and Social Performance Fact Sheet 4*.
http://www.riotinto.com/sustainabledevelopment2011/pdf/communities_factsheet.pdf [date of use 24 May 2012].

Anon 2012 <http://www.zbc.co.zw/news-categories/top-stories/19635-community-share-ownership-trusts-hailed.html>

Anonymous 2012 *Community Share Ownership Trusts Way to Go*

<http://www.zbc.co.zw/news-categories/top-stories/19635-community-share-ownership-trusts-hailed.html> [date of use 06 September 2012]

Anon 2012 <http://www.globaldialogue.info/linkagesMPF-AMV.pdf>

Anonymous 2012 *Linkages between the IGF Policy Framework and the Africa Mining vision 10 February 2012* <http://www.globaldialogue.info/linkagesMPF-AMV.pdf> [date of use 01 June 2012]

Anon 2012 http://www.economic.co.zw/index.php?option=com_content&view=article&id=1190:the-socio-economic-impact-of-indigenisation-&catid=125:public-sector&Itemid=566

Anonymous 2012 *The Socio Economic Impact of Indigenisation* http://www.economic.co.zw/index.php?option=com_content&view=article&id=1190:the-socio-economic-impact-of-indigenisation-&catid=125:public-sector&Itemid=566 [date of use 07 May 2012]

Anon2012

http://www.zela.org/index.php?option=com_content&view=article&id=9&Itemid=84

Anonymous 2012 *Building the Capacity of Community Trusts in Mining Areas* http://www.zela.org/index.php?option=com_content&view=article&id=9&Itemid=84 [date of use 13 September 2012]

Anon 2012 http://commdev.org/section/projects/asm_drc

Anonymous 2012 *Artisanal and Small-Scale Mining, DRC* http://commdev.org/section/projects/asm_drc [date of use 23 April 2012]

Anon 2012 <http://www.thezimbabwemail.com/business/10932-zimplats-cedes-51-stake.html>

Zimplats cedes 51% stake <http://www.thezimbabwemail.com/business/10932-zimplats-cedes-51-stake.html> [date of use 29 March 2012]

Anon 2012 Zimplats cedes 51% stake <http://www.zbc.co.zw/news-categories/top-stories/17543-ziplats-cedes-51-stake.html>

Zimplats cedes 51% stake <http://www.zbc.co.zw/news-categories/top-stories/17543-ziplats-cedes-51-stake.html> [date of use 29 March 2012]

Anon 2012
http://www.weekendpost.co.bw/index.php?option=com_content&view=article&id=281%3Agovt-on-the-verge-of-enacting-cee-legislation&Itemid=68

Government on the Verge of Enacting CEE Legislation Weekend Post
http://www.weekendpost.co.bw/index.php?option=com_content&view=article&id=281%3Agovt-on-the-verge-of-enacting-cee-legislation&Itemid=68 [date of use 12 April 2012]

Anon 2011 http://www.ecsecc.org/files/library/documents/WP15_1.pdf

Anonymous 2011 *Benchmarking study on Municipalities and Communities in Mining Initiatives*
http://www.ecsecc.org/files/library/documents/WP15_1.pdf [date of 04 August 2012]

Anon 2012
<http://dev.revenuwatch.org/revenuwatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf>

Anonymous 2012 *Memorandum of Understanding Between Mining Association of Canada; Prospectors and Developers Association of Canada; Publish What You Pay-Canada; The Revenue Institute Signed 25 July 2012* 1
<http://dev.revenuwatch.org/revenuwatch2/sites/default/files/Final%20Signed%20Canada%20MoU%20-%20July%2025%202012.pdf> [date of use 12 January 2013]

Anon 2012 <http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance>

Anonymous 2012 *Resolution on a Human Rights-Based Approach to Natural Resources Governance*

<http://www.lrc.org.za/resources/regional-workshops/1947-2012-05-02-resolution-on-a-human-rights-based-approach-to-natural-resources-governance> [date of use 04 August 2012]

Anon 2012 <http://www.ngopulse.org/press-release/civil-society-host-third-alternative-mining-indaba>

Anonymous 2012 *Civil Society to Host Third Alternative Mining Indaba*

<http://www.ngopulse.org/press-release/civil-society-host-third-alternative-mining-indaba> [date of use 27 April 2012]

Anon 2012 <http://www.globaldialogue.info/linkagesMPF-AMV.pdf>

Anonymous 2012 *Linkages between the IGF Policy Framework and the Africa Mining Vision* <http://www.globaldialogue.info/linkagesMPF-AMV.pdf> [date of use 01 June 2012]

Alternative Mining Indaba 2011

http://www.kirkensnodhjelp.no/PageFiles/13437/Alternative_Indaba_Statement.doc

The Alternative Mining Indaba 7 -9 of February 2011

http://www.kirkensnodhjelp.no/PageFiles/13437/Alternative_Indaba_Statement.doc. [Date of use 29 June 2014]

B

Bennett

Date

Unknown

http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/RevenueSharingRegimes.pdf

Bennett J Date Unknown *Conflict Prevention and Diamond-Sharing Regimes*
http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/RevenueSharingRegimes.pdf [date of use 03 June 2012]

Bloch: <http://www.theindependent.co.zw/opinion/35713-eric-bloch-column-parastatals-constraining-economic-recovery.html> [date of use 03 June 2012]

Bloch E Zimbabwe Independent Parastatals constraining economic recovery
31 May 2012 <http://www.theindependent.co.zw/opinion/35713-eric-bloch-column-parastatals-constraining-economic-recovery.html> [date of use 03 June 2012]

Buxton 2013 <http://pubsJled.org/16532IIED.html> 3

Buxton A 2013 'Responding to the challenge of artisanal small-scale mining'
How can knowledge networks help? <http://pubsJled.org/16532IIED.html>
3 [Date of use 17 May 2013]

C

Cavaye 2002
<http://www.communitydevelopment.com.au/Documents/The%20Role%20of%20Government%20in%20Community%20Capacity%20Building.pdf>

Cavaye J 2002 *The Role of Government in Community Capacity building* 3.
<http://www.communitydevelopment.com.au/Documents/The%20Role%20of%20Government%20in%20Community%20Capacity%20Building.pdf>

Capel 2012 <http://www.iol.co.za/business/opinion/columnists/are-mining-profits-ethically-earned-1.1229375>

Capel J 2012 *Are Mining Profits Ethically Earned?*
<http://www.iol.co.za/business/opinion/columnists/are-mining-profits-ethically-earned-1.1229375> [date of use 27 April 2012].

Centre for Research and Development 2012

<http://www.kimpavitapress.no/blog/2012/04/14/zimbabwe-diamonds-could-undermine-justice-democracy-and-development/>

Centre for Research and Development 2012 *Zimbabwe: Diamonds could undermine justice, democracy and development*

<http://www.kimpavitapress.no/blog/2012/04/14/zimbabwe-diamonds-could-undermine-justice-democracy-and-development/>

Cheney, Lovel and Solomon 2002

http://www.isf.uts.edu.au/publications/HC_RL_FS_2002.pdf

Cheney H, Lovel R and Solomon F 2002 "People, Power, Participation: A Study of Mining-Community Relationships" Mining and Minerals and Sustainable Development Project by the International Institute for Environment and Development 2002 9.

http://www.isf.uts.edu.au/publications/HC_RL_FS_2002.pdf [Date of Use 15 October 2012]

Chimhangwa 2014 http://www.zimbabwesituation.com/news/zimsit_marange-diamond-firms-fail-to-honour-social-responsibility-obligations/ [Date Of use 14 June 2014]

Chimhangwa K 2014 *Marange Diamond Firms Fail to Honour Social Responsibility Obligations*

http://www.zimbabwesituation.com/news/zimsit_marange-diamond-firms-fail-to-honour-social-responsibility-obligations/ [Date Of use 14 June 2014]

Cochilco 2002 <http://www.elaw.org/system/files/044cochilco.pdf>

Cochilco, Chilean Copper Commission 2002 *Report on Research Mine Closure* 44 Policy <http://www.elaw.org/system/files/044cochilco.pdf> [date of use 26 April 2012]

Cochilco, Chilean Copper Commission 2002
<http://www.elaw.org/system/files/044cochilco.pdf>

Cochilco, Chilean Copper Commission 2002 *Report on Research Mine Closure 44 Policy* <http://www.elaw.org/system/files/044cochilco.pdf> [date of use 26 April 2012]

Consultancy Africa Intelligence 2012

<http://www.polity.org.za/article/in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe-2011-02-24>

Consultancy Africa Intelligence *In the name of economic empowerment: A case for South Africa and Zimbabwe 14 May 2012*

<http://www.polity.org.za/article/in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe-2011-02-24> [date of use 14 May 2012]

Cronje and Chenga <http://www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf>

Cronje F and Chenga C 2005 *Sustainable Development in the South African Mining Sector* <http://www.engagingcommunities2005.org/abstracts/Cronje-Freek-final.pdf> 11 [date of use 27 April 2012]

E

Esterhuizen 2012 <http://www.miningweekly.com/article/caledonia-inks-two-more-indigenisation-deals-for-blanket-2012-05-24>

Esterhuizen I 2012 *Caledonia inks two more indigenization deals for Blanket* <http://www.miningweekly.com/article/caledonia-inks-two-more-indigenisation-deals-for-blanket-2012-05-24> [date of use 05 September 2012]

Gono, 2004 <http://www.ansole.org/download/WorkshopZimbabwe-2012.pdf>

Gono G 2004 *Presentation to the Tripartite Turnaround Team of Parastatals Falling Under The Ministry of Transport and Communication* <http://www.ansole.org/download/WorkshopZimbabwe-2012.pdf> [Date of use 07 June 2014]

H

Heffernan Date Unknown <http://www.pdac.ca/programs/aboriginal-affairs/news/aboriginal-news/2013/02/27/leadership-in-aboriginal-affairs>

Heffernan V <http://www.pdac.ca/programs/aboriginal-affairs/news/aboriginal-news/2013/02/27/leadership-in-aboriginal-affairs> [date of use 06-03-2013]

Hough 2011 <http://www.minesandcommunities.org/article.php?a=11034&l=1>

Hough L 2011 *Zimbabwe Blood Diamonds" slip through Watchdog's Net* <http://www.minesandcommunities.org/article.php?a=11034&l=1> [date of use 25 April 2012]

Hoverman and Walker Date Unknown

<http://www.engagingcommunities2005.org/abstracts/S22-hoverman-s.html>

Hoverman S and Walker M Date Unknown *The Far End of the Engagement Ladder*

<http://www.engagingcommunities2005.org/abstracts/S22-hoverman-s.html> [date of use 27 April 2012]

Human Rights Impact Resource Centre Date Unknown
<http://www.humanrightsimpact.org>

Human Rights Impact Resource Centre Date Unknown An Introduction to Human Rights Impact Assessment <http://www.humanrightsimpact.org> [date of use 04 August 2012]

I

Inter-American Commission on Human Rights, Indigenous and Tribal Peoples 2009

<http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>

Inter-American Commission on Human Rights, Indigenous and Tribal Peoples
2009 *Rights Over their Ancestral Lands and Natural Resources: Norms and
Jurisprudence of the Inter-American Human Rights System* American Indian
Law Review

<http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf> [date of use 15
September 2012]

K

Karimakwenda 2012 <http://www.swradioafrica.com/2012/11/22/civic-groups-walk-out-after-threats-by-mines-minister/>

Karimakwenda T "*Civic Groups Walk Out After Threats By Minister of Mines*"
2012 <http://www.swradioafrica.com/2012/11/22/civic-groups-walk-out-after-threats-by-mines-minister/> [Date of use 16 June 2014]

Kassala 2010 <http://www.minesandcommunities.org/article.php?a=9925&l=1>

Kassala C 2010 *Presentation on mining, communities, and sustainable development*
<http://www.minesandcommunities.org/article.php?a=9925&l=1> [date of use 25 April 2012]

Kilian Date Unknown http://www.swc.org.za/own_uploads/SIA.pdf [date of use 27 April 2012].

Kilian JM Date Unknown *Addressing the social impact of mining activities on communities for sustainability 2*

http://www.swc.org.za/own_uploads/SIA.pdf [date of use 27 April 2012]

L

Langton 2010
http://griffithreview.com/images/stories/edition_articles/ed28_pdfs/langton_ed28.pdf

Langton M 2010 *The Resource Curse* 2010
http://griffithreview.com/images/stories/edition_articles/ed28_pdfs/langton_ed28.pdf [date of use 01 June 2012]

Lathem and Katerere 2011
http://www.businessweek.com/magazine/content/11_04/b4212011769982.htm

Lathem B and Katerere F 2011 *Diamond Smuggling Thrives in Zimbabwe*
http://www.businessweek.com/magazine/content/11_04/b4212011769982.htm [Date of use 29 June 2014]

Lee 2011 <http://www.osisa.org/economic-justice/zimbabwe/publish-what-you-pay-launches-zimbabwe>

Lee R 2011 *Publish what you Pay Launches in Zimbabwe*

<http://www.osisa.org/economic-justice/zimbabwe/publish-what-you-pay-launches-zimbabwe> [date of use 29 August 2012]

M

Makwiramiti 2011
http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=674:in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe&catid=87:african-finance-a-economy&Itemid=294

Makwiramiti AM 2011 *In the name of economic empowerment: A case for South Africa and Zimbabwe*
http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=674:in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe&catid=87:african-finance-a-economy&Itemid=294 [Date of use 07 May 2012]

Manicaland Correspondent <http://www.newzimbabwe.com/news-16354-Marange+villagers+starve+as+miners+scoot/news.aspx>

Manicaland Correspondent Displaced Marange Villagers starve as Miners Scoot" <http://www.newzimbabwe.com/news-16354-Marange+villagers+starve+as+miners+scoot/news.aspx> [Date of Use 21 June 2014]

Masara 2011 <http://www.minesandcommunities.org/article.php?a=11030&l=1>

Masara C 2011 *Statement from the Alternative Mining Indaba 2011*

<http://www.minesandcommunities.org/article.php?a=11030&l=1> [date of use 25 April 2012]

Masara 2011 <http://www.minesandcommunities.org/article.php?a=11030&l=1>

Masara C 2011 *Facing up to challenges of Africa's extractive sectors*

<http://www.minesandcommunities.org/article.php?a=11030&l=1> [date of use 25 April 2012]

Matsika 2010

<http://www.howwemadeitinafrica.com/a-closer-look-at-zimbabwes-mining-sector/3769/>

Matsika B 2010 *A closer look at Zimbabwe's mining sector*

<http://www.howwemadeitinafrica.com/a-closer-look-at-zimbabwes-mining-sector/3769/> [date of use 30 April 2012]

Matonhodze

2012

http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1262:community-share-trusts--who-is-benefiting&catid=80:crisis-comment-on&Itemid=213

Matonhodze M M 2012 *Community Share Trust for Whose Community?*

http://www.crisiszimbabwe.org/index.php?option=com_content&view=article&id=1262:community-share-trusts--who-is-benefiting&catid=80:crisis-comment-on&Itemid=213 [date of use 06 September 2012]

Matyszak

2012

http://www.idasa.org/media/uploads/outputs/files/digging_up_the_truth_20_april_2012.pdf

Matyszak D 2012 *Digging up the Truth: The Legal and Political Realities of the Zimplats Saga*

http://www.idasa.org/media/uploads/outputs/files/digging_up_the_truth_20_april_2012.pdf [date of use 06 June 2012]

Mbiba 2014 <http://www.dailynews.co.zw/articles/2014/06/22/chinese-vp-snubs-zimbabwe-again>

Mbiba L 2014 Chinese VP snubs Zimbabwe Again
<http://www.dailynews.co.zw/articles/2014/06/22/chinese-vp-snubs-zimbabwe-again> [date of use 28 June 2014]

Mutenyo and Routman 2011
http://www.brookings.edu/opinions/2011/0321_zimbabwe_mining_mutenyo.aspx

Mutenyo J and Routman B *Nationalization of the Zimbabwe Mining Sector: Another Blunder by the Mugabe Regime?*
http://www.brookings.edu/opinions/2011/0321_zimbabwe_mining_mutenyo.aspx [date of use 23 April 2012]

N

Nyamunda 2013 <http://aehworkshop.files.wordpress.com/2013/10/sedco-article-revised.pdf>.

Nyamunda 2013 SEDCO1 and black SME development: From 'access' to redistributive' Indigenisation and Economic Empowerment in Zimbabwe
<http://aehworkshop.files.wordpress.com/2013/10/sedco-article-revised.pdf>.
[Date of use 21 July 2014]

Nyathi 2014 <http://www.thestandard.co.zw/2014/04/22/displaced-villagers-demand-full-compensation>

Nyathi O Displaced Villagers to Demand full Compensation 22 April 2014
<http://www.thestandard.co.zw/2014/04/22/displaced-villagers-demand-full-compensation/> [Date of use 21 June 2014]

R

Reuters 2012 <http://www.minesandcommunities.org/article.php?a=11518&l=1>

Reuters *Miners fight new structures fees in Zimbabwe*
<http://www.minesandcommunities.org/article.php?a=11518&l=1> [date of use 25 April 2012]

S

Saxon <http://www.minesandcommunities.org/article.php?a=10779&l=1>

Saxon T *Relocated Chiadzwa Villagers: A Tale of False Promises*
<http://www.minesandcommunities.org/article.php?a=10779&l=1> [date of use 25 April 2012]

Shekhawat 2009
http://www.mu.ac.in/arts/social_science/african_studies/seemawp6.pdf.

Shekhawat S *Governance Crisis and Conflict in the Democratic Republic of Congo* 2009
http://www.mu.ac.in/arts/social_science/african_studies/seemawp6.pdf. [Date of use 20 July 2014]

Smillie 2009 http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf

Smillie I 2009 Zimbabwe, *Diamonds and the Wrong Side of History March*
http://www.pacweb.org/Documents/diamonds_KP/18_Zimbabwe-Diamonds_March09-Eng.pdf [date of use 12 May 2012]

Smillie 2011 <http://www.minesandcommunities.org/article.php?a=11234&l=1>

Smillie I *The Kimberley Process and its gaping holes*

<http://www.minesandcommunities.org/article.php?a=11234&l=1> [date of use 25 April 2012]

Sosa I and Keenan K 2010
<http://metisportals.ca/MetisRights/wp/wpadmin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf> [Date of use 21 April 2012]

Sosa I and Keenan K *Impact Benefit Agreements Between Aboriginal Communities and Mining Companies: their use in Canada*
<http://metisportals.ca/MetisRights/wp/wpadmin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf> [Date of use 21 April 2012]

Staff Reporter 2014 <http://harare24.com/index-id-news-zk-13914.html>

Staff Reporter "Zimbabwe to review exorbitant mining fees" Harare 24 21 June 2014 <http://harare24.com/index-id-news-zk-13914.html> [Date of use 21 June 2014].

Z

ZELA 2012 <http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV> [date of use 29 August 2012]

Zimbabwe Environmental Law Association 2012 *Transparency and accountability in the extractive sector vital in unlocking economic benefit for all*
<http://www.kubatana.net/html/archive/env/120304zela.asp?sector=ENV> [date of use 29 August 2012]

Zindoga 2013 <http://www.herald.co.zw/indigenisation-when-the-messenger-matters/>

Zindoga T 2013 *Indigenisation: When the messenger matters*
<http://www.herald.co.zw/indigenisation-when-the-messenger-matters/> [date of use 25 May 2014]