Host communities and the award and utilisation of mineral rights in Zimbabwe

Stanford Chagadama

orcid.org/ 0000-0002-6045-5002

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Promoter: Prof G Viljoen

Co-Promoter: Prof NJJ Olivier

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DEDICATION

To my family, Chipo, Nokutenda, Victor, Victorious, Davies and Vimbai for their support, and their understanding as I took away many hours of precious family time to make this work possible.

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ABSTRACT

Minerals are non-renewable natural resources. Extraction of these resources leads to their exhaustion. This raises many questions, including, for instance, the involvement of host communities, access and distribution of benefits derived from the exploitation that centre on these non-renewable resources. These questions are most prominent when it comes to mineral extraction on lands that are inhabited by so-called mine-host communities. Extraction of minerals on such lands often leaves the communities socio-economically and environmentally worse off when compared to the time prior to the entry of mining companies on their lands for extraction of the minerals. Instances such as these are often characterised by the terms 'resource curse' or the 'paradox of plenty'. Zimbabwe, a mineral-rich country, has not been spared by the paradox of plenty, as mine-host communities in the country live in abject poverty while they are surrounded by abundant mineral resources that are extracted to the benefit of mining companies or a few politically connected elites.

In an endeavour to understand the legal tools available for mine-host communities to regain control over their lands and mineral resources thereon in order to improve their socio-economic well-being, this thesis considers requirements set out in international and regional regulatory instruments when it comes to mine-host community involvement in, and benefit accrual from mineral extraction. The thesis focuses on how these requirements are realised in the Zimbabwean constitutional, policy and legislative frameworks.

The thesis commences with an exposition of the theories of social justice to lay the foundations for the involvement of mine-host communities in and benefit accrual from mineral extraction on the lands they inhabit. This is followed by sections that unpack applicable provisions in international and regional regulatory instruments against which the Zimbabwean constitutional, policy and legislative frameworks can be evaluated. The thesis proceeds to an overview of the Zimbabwean frameworks followed by a discussion of the South African frameworks. Recommendations for reform are then made based on requirements observed in international and regional regulatory instruments and lessons

distilled from the overview of the South African frameworks.

Key words

minerals, mineral rights, mine-host communities, involvement, benefit accrual, consultation, notification, consent

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AER	American Economic Review
Afr JIntl Comp L/ AJICL	African Journal of International and Comparative Law
AHRLJ	African Human Rights Law Journal
AHRLR	African Human Rights Law Reports
AJDG	African Journal of Democracy and Governance
AJLS	African Journal of Legal Studies
AM J.INT'L L.	American Journal of International Law
Annu. Rev. Enviro. Resour	Annual Review of Environment and Resources
Ariz. J. Intl. Comp. L	Arizona Journal of International and Comparative Law
ARSP	Archives for Philosophy of Law and Social Philosophy
AUST.Y.B. INT'L L.	Australian Yearbook of International Law
BBBEE	Broad-Based Black Economic Empowerment
BBBEEA	Broad-Based Black Economic Empowerment Act 53 of 2003
Buff. L. Rev.	Buffalo Law Review
B.J.Pol.S	British Journal of Political Science
BMJ	British Medical Journal
BYIL	British Yearbook of International Law
Calif West Int Law J	California Western International law journal
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on Elimination of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CILJSA	Comparative and International Law Journal of South Africa
CJICL	Cambridge Journal of International and Comparative Law
CRC	Convention on the Rights of the Child
DUKE L. J./DLJ	Duke Law Journal
DMRE	Department of Minerals and Energy
ELR	Environmental Law Reporter
EMA	Environmental Management Act 13 of 2002
Environ Dev Sustain	Environment Development and Sustainability

Environ Polit	Environmental Politics
EPW	Economic and Political Weekly
ESR Rev	Economic and Social Rights Review
Ethics and Int. Aff	Ethics and International Affairs
Eur.J.ofPhilos	European Journal of Philosophy
FLA. J.INTER'L	Florida Journal of International Law
FPIC	Free, prior and informed consent
Geo. Wash. Int'l Envtl L. Rev	George Washington International Law Review
GELR	Georgetown Environmental Law Review
GJIL	Georgetown Journal of International Law
GG	Government Gazette
GN	Government Notice
HJIL	Heidelberg Journal of International Law
HRC	Human Rights Council
HRR	Human Rights Review
HRQ	Human Rights Quarterly
HUM. RTS. L.J.	Human Rights Law Journal
IAPA	Impact Assessment and Project Appraisal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
ICLQ/ Intl & Comp LQ	International and Comparative Law Quarterly
IJCL	International Journal of Constitutional Law
IJHSS	International Journal of Humanities and Social Science
IJMGR	International Journal on Minority and Group Rights
ILO Convention 169	International Labour Organisation Convention No. 169 of 1989
Int'L Org	International Organisation
INT'L L.	The International Lawyer
IOWA L Review	IOWA Law Review
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
JAL	Journal of African Law
JCLP	Journal of Cleaner Production
JENRL	Journal of Energy and Natural Resources Law
JHE	Journal of Human Ecology

J. INT'L STUD.	Journal of International Studies
JJS	Journal for Juridical Science
JOP	Journal of Politics
JSDLP	McGill International Journal of Sustainable Development Law and Policy
JVMC	Journal of Violence, Mimesis and Culture
LDD	Law, Democracy and Development
LEAD	Law, Environment and Development Journal
Loy.U.Chi.Int'l L. Rev	Loyola University Chicago International Law Review
MJIL	Melbourne Journal of International Law
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
MPRDR	Mineral and Petroleum Resources Development Regulations 2020
MqJICEL	Macquarie Journal of International and Comparative Environmental Law
MLR	Minnesota Law Review
MSILR	Michigan State International Law Review
NEMA	National Environmental Management Act 107 of 1998
NJIL	Nordic Journal of International Law
NLR	New Left Review
Notre Dame L Rev	Notre Dame Law Review
NQHR	Netherlands Quarterly of Human Rights
NWA	National Water Act 36 of 1998
Nw. U. J. Int'l Hum. Rts.	Northwestern Journal of International Human Rights
NYU J INTL L & POL	New York University Journal of International Law and Policy
OAU	Organisation of African Unity
Ogirisi: NJAS	Ogirisi: A New Journal of African Studies
Okla. City U. L. Rev.	Oklahoma City University Law Review
Oxford J. Legal Stud	Oxford Journal of Legal Studies
PELJ/PER	Potchefstroom Electronic Law Journal
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
Proc. Of the Am. Soc'y of Int'l L.	Proceedings of the American Society of International Law International
PWRA	Protocol to the African Charter on Human and

	Peoples' Rights on the Rights of Women in Africa
RECIEL	Review of European, Comparative and International Environmental Law
RLRA	Restitution of Land Rights Act 22 of 1994
SA	South Africa
SAJELP	South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law
SCA	Supreme Court of Appeal
S. Cal. L. Rev	Southern California Law Review
SDLP	Sustainable Development Law and Policy
SERAC	Social and Economic Rights Action Centre
SI	Statutory Instrument
SLP	Social and Labour Plan
Soc. Theory Pract	Social Theory and Practice
Stell LR	Stellenbosch Law Review
T. Marshall L. Rev	Thurgood Marshall Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse reg / Journal of South African law
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration of Rights of Indigenous Peoples
UNDROP	United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas
UNDP	United Nations Development Programme
UNHRC	United Nations Human Rights Council
UNGA	United Nations General Assembly
VA. J. INT'L L.	Virginia Journal of International Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vienna J. on Int'l Const. L.	Vienna Journal on International Constitutional Law
Vt. L. Rev.	Vermont Law Review
Whitehead J. Dipl. & Int'l Rel	Whitehead Journal of Diplomacy and

	International Relations
WHO	World Health Organisation
Windsor Y.B.A.J	Windsor Year Book of Access to Justice
YBWA	Yearbook of World Affairs
ZHRB	Zimbabwe Human Rights Bulletin

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CHAPTER 1: INTRODUCTION

1.1 Background

The *Natural Resource Charter*,[1] with its contents echoed by the Natural Resource Governance Institute,[2] states that countries with non-renewable natural resources or mineral wealth[3] face not only special economic opportunities,[4] but also special challenges. The Institute explains that while mineral extraction can create prosperity, the same mineral resources may cause economic instability, social conflict and long-lasting environmental damage.[5] The observation by the Natural Resource Governance Institute presents an intriguing synthesis of the predicament facing mineral endowed countries such as Zimbabwe.[6]

The continued discovery of minerals in Zimbabwe presents a special opportunity for

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1 Natural Resource Governance Institute 2014 http://www.naturalresourcecharter.org. See the introduction of the *Charter*.

2 Natural Resource Governance Institute 2014 http://www.naturalresourcecharter.org.

3 Principle 2 of the *Declaration of the United Nations Conference on the Human Environment*, Stockholm, 16 June 1972, 11 I.L.M 1416/1972 states that natural resources of the earth include the land, water, air, flora and fauna. The *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 12 defines natural resources as referring to both the "non-renewable resources including oil, gas and minerals and renewable resources, tangible and intangible, including the sun, soil, water, wind, fauna and flora." Section 2 of Zimbabwe's *Environmental Management Act* 13 of 2002 (EMA) defines natural resources as including the air, soil, waters and minerals. Non-renewable natural resources are finite, as they cannot be replenished at the same rate as their utilisation. Fossil fuels (for instance natural gas and oil) and minerals (for instance gold, iron and platinum) are non-renewable natural resources while the air, water and forests are renewable natural resources. This study focuses on minerals.

4 See the preamble of the *African Commission on Human and Peoples' Rights: Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* - ACHPR/Res. 367 (LX) 2017.

5 Natural Resource Governance Institute 2014 http://www.naturalresourcecharter.org. See Kotze and Du Plessis 2014 47 (4) *VRU* 447-481. The South African Human Rights Commission's *Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa* 2018, 1 explains that "when underpinned by good governance and respect for the community and environment in which they operate, extractive industries harness significant potential to transform a country's social and economic development. Employment opportunities, increased investment and access to revenues can drive economic growth and reduce poverty at local, regional and national levels. However, often these opportunities are not realised and the negative impacts of extractive industries detract from and undermine the potential benefits and opportunities that accompany them."

6 See Murombo 2010 25 *SAPL* 568. Zimbabwe is endowed with minerals such as coal, platinum, gold, diamonds and chrome, mostly found along the famous geological feature known as the Great Dyke, which stretches for 550 kilometres from northern to southern Zimbabwe. Zimbabwe hosts the world's second largest platinum group metals after South Africa. However, these resources do not seem to be benefiting the generality of Zimbabweans, who remain in poverty.

national economic growth, and for ensuring the self-sustaining development of mine-host communities.[7] Self-sustaining development could be achieved through the involvement of the mine-host communities in decision-making processes pertaining to the award and utilisation[8] of mineral rights[9] as well as sharing the benefits derived from mineral extraction on the lands the communities inhabit. It is also attained if a part of the revenue from mineral extraction is used to build the capacity of mine-host communities in order for them to engage in alternative economic activities that do not require constant input from the mining operations and which can last beyond mine closure.[10] On the other hand, however, the continued discovery of minerals in Zimbabwe on the lands inhabited by mine-host communities presents a special challenge in the sense that the communities fail to reap tangible benefits from natural resource wealth. These communities live in extreme poverty, even as they are surrounded by abundant mineral resources, while the state and mining companies capture the mining benefits.[11] This phenomenon has come to be known as the 'paradox of plenty' or 'resource curse,' which is explained as a socio-economic phenomenon in which countries that are rich in natural

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7 In present study, the phrase "self-sustaining development" is used to designate progressive realisation of socio-economic development by mine-host communities through use of mineral resources available to them. Examples of alternative economic activities include artisanal mining and irrigation schemes for crop production.

8 The term "award" is used in the present study to refer to the allocation or granting of mineral rights such as prospecting rights and mining rights, while "utilisation" entails the use, enjoyment and disposal of mineral rights.

9 The *Minerals and Mining Policy for South Africa* of 1998, para 1.3.1.1(v), explains that "mineral rights represent a parcel of rights including the rights to prospect and mine together with ancillary rights to do what is reasonably necessary in order to effectively carry-on prospecting and mining operations." Van der Vyer 2012 *De Jure* 126 concludes that mineral rights represent the entitlement to search for and to mine minerals. In *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 8, Mogoeng CJ observes the confusion that often surrounds the terms mineral and mineral right and explains that, while the term "mineral" refers to the actual mineral deposit such as coal, mineral rights refer to the rights to do certain things in relation to that coal. See also Mostert 2014 17 *Recht in Afrika – Law in Africa – Droit en Afrique* 29–51 for a detailed analysis of the notion of mineral rights.

10 MMSD: *Breaking New Ground* 2002 http://pubs.iied.org.

11 See Murombo *SAPL* 2010 25 (2) 568-589; Chimonyo, Mangure and Scott 2012 http://www.crdzim.com; Murombo 2013 9 (1) *LEAD* 31 for a discussion of adverse impacts of diamond mining operations on the poor communities of Marange and Chiadzwa in Zimbabwe's Manicaland Province; Bhatasara 2013 15 *Environ Dev Sustain* 1527–1541 who discusses the implications of black granite mining on the Mutoko communities of Mashonaland East Province of Zimbabwe. See also the Centre for Natural Resource Governance 2021 https://www.cnrgzim.org pertaining to the threats of forced eviction of the Nambya and Tonga indigenous peoples of Dinde village in Hwange, Zimbabwe from their ancestral land to pave way for a coal mining project. The Centre for Natural Resource Governance explains that the affected Nambya and Tonga indigenous peoples first settled in areas around Hwange and Victoria Falls along the Zambezi River between 300 AD and 400 AD.

resources, including minerals, have poor economic growth.[12] Finding remedies for this challenge has occupied academic debates by legal scholars and development economists.[13] The present study explains that, in the context of the award and utilisation of mineral resources, the resource curse is a result of the unequal sharing of the burdens and benefits[14] of mineral extraction by host states,[15] mining companies and mine-host communities as well as the lack of or inadequate remedial measures for affected communities.

1.2 Problem statement

The last century witnessed a worldwide trend where host states and mining companies tended to capture most of the benefits of mineral resource extraction, leaving mine-host communities to bear the adverse socio-economic and environmental impacts of mining.[16]

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12 Langton and Mazel 2003 *JENRL* 26 (1) 32; Sachs and Warner 2001 45 *EER* 827; Van der Ploeg 2011 49 (2) *JEL* 366; Arezki and van der Ploeg 2007 *IMF Working Papers* 1; Basedau 2005 http://www.ssrn.com; Arezki, Gylfason and Sy 2011 *Beyond the Curse: Policies to Harness the Power of Natural Resources* 1. Nkongolo 2014 *AJDG* 81 observes that "instead of being beneficial, the expansion of mineral activities in developing countries drains and causes a damaging effect on local communities."

13 Van der Ploeg 2011 *JEL* 366; Arezki and van der Ploeg 2007 *IMF Working Papers* 1; Basedau 2005 http://www.ssrn.com; Arezki, Gylfason and Sy 2011 *Beyond the Curse: Policies to Harness the Power of Natural Resources* 1. The 'resource curse' is often attributed to the volatility of world metal prices, uneven expertise among stakeholders as well as weak and unaccountable governments, among other causes. See Humphreys, Sachs and Stiglitz *Escaping the Resource Curse* 4, 6,11; Duruibgo 2006 38 *GWILR* 33-34 describes the phenomenon as a leadership curse where the political leaders of a country deprive the rest of the population and ensure that they receive almost no benefit from the natural resource endowment of their country.

14 Carrington and Hogg 2011 20(2) *Human Rights Defender* 9-12 identifies the burdens to include environmental pollution, influx of migrant workers overburdening social amenities and a rise in crime. The benefits include infrastructure development, increased employment and business opportunities.

15 Seck 2008 11(1) *Yale Human Rights and Development L.J* 177-206 identifies the host state in the context of mineral extraction as the state where the mining operations are carried out.

16 Kotze and Du Plessis 2014 47 *VRU* 448-454; Warden-Fernandez 2005 23 (4) *JENRL* 397. See Anaya "Extractive Industries and Indigenous Peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* UN Doc. A/HRC/24/41(2013) para 4. See also para 4.7 of the *Assessment of the Broad-Based Economic Empowerment Charter for the South African Mining Industry* 2015 which states that "mining host communities (in South Africa) have historically endured a disproportionate negative socio-economic impact from the development of mining." See the South African Human Rights Commission "*Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa"* 2018, 1 which states that "despite extensive regulation and notable attempts by mining companies and government to implement progressive and sustainable projects […] many mining-affected communities continue to experience significant levels of poverty and systemic inequality, which reinforces the notion that the benefits of mining operations disproportionately favour mining companies and the State, and are often to the detriment of local communities." See the UNEP 2011 Report on Environmental Assessment of Ogoniland, Nigeria https://www.unenvironment.org which states that (i) oil extraction polluted soils through hydrocarbons in some areas going down to a depth of five meters, (ii) all the water in Ogoniland was polluted (iii) benzene levels were more than 900

The benefits of mineral extraction would accrue largely to mining companies and a few political leaders.[17] In fact, in Zimbabwe, mine-host communities have been losing land to mining operations without consultation or fair compensation and without participation in sharing the benefits of mineral extraction.[18] The same applies to other development projects in Zimbabwe.[19] Environmental and other impacts of mining on the land, air and

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times those accepted by the WHO standards and (iv) it will take approximately 35 years to clean up Ogoniland requiring no less than US$ 1 billion for the clean-up.

17 See Kiwanuka 1988 82 *AM J.INT'L L.* 97-98.

18 Chimonyo, Mangure and Scott 2012 http://www.crdzim.com. In the unreported case of *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others* (HC 6334/09), the Chiadzwa community in Zimbabwe claimed compensation through the courts without success. Cases of host communities losing land to extraction of mineral and other resources are, however, not limited to Zimbabwe. See Daes "Indigenous Peoples and their Relationship to Land" *Final Working Paper prepared by the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2001/21 para 132 where it is explained that "the expropriation of indigenous lands and resources for national development is a growing and severe problem. Development projects are frequently undertaken on indigenous lands and territories without indigenous consent or even consultation." See also the *Committee on the Elimination of Racial Discrimination, General Recommendation No. 23: Rights of Indigenous Peoples* (1997) U.N. Doc. A/52/18, annex V at 122 (1997), para 3; *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHR A, Comm. No. 155/96, 2001; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Com No 276/2003; *Kichwa Indigenous Peoples of Sarayaku v. Ecuador,* Judgment, 2012 Inter-Am. Ct. H. R. (ser. C) No. 245; *Saramaka People v. Suriname*, Merits and Reparations, Judgment, 2007 Inter-Am. Ct. H. R. (ser. C) No. 172.

19 See Centre for Conflict Management and Transformation "Development-Induced Displacements in Zimbabwe: Learning from Colonial and Post-Colonial Experiences" 8-14. In 2020, the Government of Zimbabwe gazetted *Statutory Instrument* 188 of 2020: *Communal Land (Setting Aside of Land) (Batoka Township) Notice*, 2020 (SI 188 of 2020) which ordered villagers in Batoka, Hwange, Matabeleland North province of Zimbabwe to vacate their communal lands by 31 December 2020 to pave way for the establishment of a new township situated on the southern bank of the Zambezi River and on the Boterekwa hills that overlook Kariba Gorge and Lake Kariba. SI 188 of 2020 orders the villagers to vacate the area within 150 days and without giving them alternative land or any indication of compensation for loss of their ancestral lands and properties. Similarly, on 26 February 2021 the Government of Zimbabwe gazetted *Statutory Instrument* 50 of 2021: *Communal Land (Setting Aside of Land) (Chiredzi) Notice*, 2021 (SI 50 of 2021) and *Statutory Instrument* 51 of 2021: *Communal Land (Excision of Land) Notice*, 2021 (SI 51 of 2021). Through SI 50 of 2021 which is based on section 10 of the *Communal Land Act* 20 of 1982, the government set aside 12 940 hectares of communal land inhabited by the Shangaan indigenous peoples of Chilonga villages in Chiredzi South District for the purpose of growing lucerne grass used as stock feed for dairy cattle. SI 51 of 2021 is based on section 6(1)(b) of the *Communal Land Act* 20 of 1982 which allows the President to convert communal land to state land, in this case rendering the Chilonga lands of the Shangaan people to be no longer part of the Chiredzi communal lands. Section 3 of SI 50 of 2021 specifies that any person occupying or using the land other than a mineral right holder in terms of the *Mines and Minerals Act* 38 of 1961 should depart from the land permanently with all of his or her property by "the date of publication of [the] notice, unless he or she acquires rights of use or occupation to the said land in terms of section (9)(1) of the *Communal Land Act*." The High Court of Zimbabwe in *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 7 described this directive in section 3 of SI 50 of 2021 as an obnoxious order. Amendment of SI 50 of 2021 by *Communal Land (Setting Aside of Land) (Chiredzi) Notice, 2021: Correction of Errors* (SI 63A of 2021) and its latter replacement by *Communal Land (Setting Aside of Land) (Chiredzi) Notice,* 2021 (SI 72A of 2021) to remove (i) the obnoxious order to depart permanently on the date of publication of the notice and (ii) to change the purpose of excision of the land from production of lucerne grass to establishment of an irrigation scheme did not legally reverse the loss of

water bodies as well as emergent social ills such as prostitution, drug abuse and crime resulting from an influx of outsiders seeking jobs have all been borne by Zimbabwe's mine-host communities.[20] These burdens that mine-host communities in Zimbabwe continue to endure are indeed of serious concern and must be minimised. It is crucial to level the unequal balance between the benefits and burdens or costs borne by mine-host communities.[21]

In the search for an equal balance between the interests of mining and mine-host communities, the award and utilisation of mineral rights on lands inhabited by mine-host communities has been discussed largely within the context of social justice.[22] There are three dimensions of social justice, namely distributive (allocative), participatory (procedural) and corrective (remedial) under which rubrics the undertaking of mining operations on lands inhabited by mine-host communities can be explained and discussed.[23] Notably, mining activities do not take place in a legal vacuum, but are regulated by domestic, regional and international regulatory instruments. Existing studies regarding the relationship between mining and mine-host communities show that

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the Shangaan people of their ancestral lands. The High Court of Zimbabwe in *Chikutu and Others v Minister of Lands and Others* HH 02/2022 upheld these regulatory instruments, and the Shangaan indigenous peoples can now as a result be evicted at any time set by the government.

20 Chimonyo, Mangure and Scott 2012 http://www.crdzim.com; Jike 2010 30 (2) *JHE* 131. For a detailed exposition of the impacts of mineral extraction on mine-host communities, see Centre for Environmental Rights: "Written Submissions to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-Economic Challenges in Mining-Affected Communities in South Africa" 2016 https://cer.org.za/virtual-library. See the case of *Zimbabwe Environmental Law Association and Others v Anjin Investments (Private) Limited and Others* HH 523/15, 2 where it is stated that mining companies involved in diamond exploration and mining in the Marange Communal Lands discharged their untreated waste material, effluent and untreated human waste into the Odzi and Singwizi Rivers. These discharges polluted the rivers resulting in silting, muddying and exposure to chemical and metal deposits including iron, chromium and nickel. The pollution destroyed aquatic life like fish and disturbed the ecosystem in the rivers and exposed the mine-host communities to the risks of diseases such as cancer, cholera, typhoid and dental and skeletal fluorosis. Mine host-communities inhabiting the riparian villages on the banks of the rivers depend on these rivers for their subsistence including using the water for drinking, bathing, livestock, gardening and fishing and these uses are no longer possible due to the pollution.

21 Ejobowah 2000 47 (1) *Africa Today* 28-47.

22 Alanis 2013 5 (1) *GJIL* 187; Warden-Fernandez 2005 23 (4) *JENRL* 385; Urkidi and Walter 2011 42 *Geoforum* 683; Onifade 2015 16 (4) *HRR* 348.

23 Kuehn 2000 30 *ELR* 10681; Ebbeson "Introduction: Dimensions of Justice in Environmental Law" 2; Bullard 1998 -1999 23 *Vt. L. Rev.* 457-458; Hill *Environmental Justice: Legal Theory and Practice* 3rd ed 8. Arguably, equal distribution of socio-economic and environmental benefits and costs is a concept based on distributive justice. Meaningful involvement of mine-host communities in mineral extraction is connected to the notion of participatory or procedural justice while redressing historical wrongs is based on corrective (remedial) justice.

elements of all three dimensions of social justice can often be discerned when regional and international regulatory instruments centred on mine-host community involvement in and benefit accrual from mining are analysed.[24]

International and regional regulatory instruments, for instance, provide for the requirement of benefit accrual.[25] This requirement can be observed in Article 15(2) of the *International Labour Organisation Convention* No. 169 of 1989 (ILO Convention No. 169 of 1989),[26] Article 5(2) of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* of 2018 (UNDROP),[27] as well as Articles 21(1) and 21(5) of the *African Charter on Human and Peoples' Rights* of 1982 (ACHPR).[28] As will be discussed in more detail below,[29] these instruments are a reflection of the notion of equal distribution of burdens and benefits linked to distributive justice.

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24 See Onifade 2015 16 (4) *HRR* 348; MMSDP: *Breaking New Ground* 2002, 220-221 http://pubs.iied.org.

25 Benefit sharing is justified by the (i) use of local resources by outsiders, which resources are necessary for the survival of the mine-host communities, (ii) adverse impacts of resource extraction on the mine-host communities (compensation for material and non-material damage), (iii) the right of mine-host communities to property in the form of lands and natural resources therein and (iv) the role of the mine-host communities as good stewards of the environment for the good of the nation and humanity and (v) the right to development. See Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* U.N. Doc. A/HRC/15/37(2010) paras 67,89,91; Anaya "Extractive Industries and Indigenous Peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* U.N. Doc. A/HRC/24/41(2013) para 76 on the connection between compensation and benefit-sharing and the fact that local communities actually "give up alternatives for the future development of their territories by agreeing to the projects." See *Saramaka Peoples v. Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C)* No.172, (Nov. 28, 2007) paras 138-140, 200-201 where among other things, the Inter-American Court ordered the creation of a community development fund and emphasised the suffering and distress endured by the Saramakas as a result of resource extraction on thier lands. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, ACHPR Com No 276/2003 paras 228, 283, 294-295, 298-299. In this case (para 283) the African Commission linked benefit sharing to empowerment of host communities.

26 *International Labour Organisation Convention* No. 169 of 1989, 1650 U.N.T.S 383. Zimbabwe and South Africa are not state parties to this convention.

27 *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP) 2018 UN. Doc.A/RES/73/165/2018.

28 *African Charter on Human and Peoples' Rights* of 1982, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See para 1(a) of the *African Commission on Human and Peoples' Rights: Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* - ACHPR/Res. 367 (LX) 2017; the *Report of the Committee set up to Examine the Representation Alleging Non-observance by Ecuador of ILO Convention No. 169,* ILO Doc GB.282/14/4 (2001) para 44(3) pertaining to the sharing of the benefits of oil extraction.

29 See chapters 3 and 4 below.

The *United Nations Declaration on Environment and Development* of 1992[30] requires access to information, consultation and free prior informed consent (FPIC).[31] Articles 18(2)(b) and 19(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003[32] require the participation of women at all levels of decision-making in environmental matters, sustainable use of natural resources as well as development policies and programmes. These requirements reflect the concept of meaningful involvement in decision-making as embodied in the notion of participatory justice.[33]

The requirement for payment of compensation to dispossessed indigenous communities provided for, *inter alia,* in the *United Nations Declaration on the Rights of Indigenous Peoples* of 2007[34] (UNDRIP) is a reflection of the notion of remedial justice.[35] International and domestic instruments mandating local economic empowerment in the mining sector also reflect the notion of corrective or remedial justice mentioned above.[36] The notion of corrective or remedial justice can also be observed at regional level. For instance, Article 21(2) of the *African Charter on Human and Peoples' Rights* of 1982 empowers people dispossessed of their natural resources and wealth to recover their property through lawful means and obtain adequate compensation.

To ensure that mine-host communities are properly consulted and that they derive

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30 *United Nations Declaration on Environment and Development* (1992) UN Doc A/CONF.151/26 (Vol. I) (1992).

31 See Principle 10 of the *United Nations Declaration on Environment and Development* (1992) UN Doc A/CONF.151/26 (Vol. I) (1992); A 10, 11, 28, 32 (2) of *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), GA Res 61/295, UN Doc A61/295 (2007).

32 *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* adopted in Maputo, Mozambique on 11 July 2003.

33 Shrader-Frechette *Environmental Justice: Creating Equality, Reclaiming Democracy* 27-29 explains that participatory justice provides citizens and environmental stakeholders a voice in decision making, rights to consent, due process and compensation.

34 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN Doc A61/295 (2007).

35 A 11(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN Doc A61/295 (2007) provides for restitution of cultural, intellectual, religious and spiritual property taken without FPIC in violation of the laws, traditions and customs of indigenous peoples. On its part, A 28 of the same declaration requires just, fair and equitable compensation for confiscated lands and resources.

36 Matsa and Masimbiti 2014 4 8(1) *IJHSS* 152; Gunn 2013 31 (1) *Windsor Y.B.AJ* 148 describes UNDRIP as a remedial instrument. See A 21 of the *African Charter on Human and Peoples' Rights* of 1982, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); section 100 (2) of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

benefits from mining, a state's domestic legal framework must provide for the elements of all three stated dimensions of social justice. Against this background, this study examines the international and regional regulatory instruments relevant for the protection of the rights of mine-host communities, especially in Zimbabwe, with a special focus on involvement in and accrual of the benefits of mineral extraction on their lands.[37]

The research first develops a benchmark or a dashboard against which Zimbabwe's domestic adherence to international and regional regulatory instruments, both binding law and non-binding[38] can be measured. It subsequently evaluates Zimbabwe's constitutional, policy and legal frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction against the requirements set in the instruments.[39]

Zimbabwe and South Africa have a common history of the dispossession of black people of their land and minerals by colonial regimes that used similar prejudicial regulatory instruments.[40] Currently, the quest for national economic development in both Zimbabwe and South Africa is causing an increase in extractive development projects, which leads to development-induced dispossessions and displacements.[41] Communal lands are impacted most by these displacements because they are remote, sparsely populated and mostly unexplored, while ownership of these lands is ordinarily reserved by the state.[42]

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37 Chapter 3 below discusses applicable international regulatory instruments while chapter 4 discusses the regional and sub-regional regulatory instruments.

38 De Wet and Du Plessis 2010 10(2) *AHRLJ* 347 explain that binding instruments (hard law) include treaties and customary international law while non-binding instruments (soft law) are those instruments that are not open to ratification, such as the United Nations General Assembly Declarations and decisions by international bodies such as United Nations Human Rights Committee whose mandate is the interpretation and application of human rights. The value of non-binding instruments such as decisions and comments of rights bodies resides in clarifying and cementing legal requirements by identifying the core content of rights and obligations in international regulatory instruments. The court in *Resident of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W), 15-17 explains that general comments of the specialised agencies of the United Nations such as the Human Rights Council (formerly the United Nations Commission on Human Rights) have authoritative status under international law.

39 See Chapter 5 below.

40 See Hansungule 2000 *IJMGR* 7(4) 305-340 who explains why colonialism is at the center of the socio-economic problems faced by Zimbabwe and South Africa.

41 Centre for Conflict Management and Transformation "Development-Induced Displacements in Zimbabwe: Learning from Colonial and Post-Colonial Experiences" 8-14.

42 Section 4 of the *Communal Land Act* 20 of 1983 vests communal land in the President who permits its occupation and usage in accordance with the Act.

Since Zimbabwe and South Africa have similar political history and challenges of land dispossessions and disempowerment of the black majority, the study incorporates a comparative overview of South Africa's constitutional, policy and legislative frameworks. These frameworks are pertinent when it comes to (i) redressing historical wrongs; (ii) responding to the need for national economic development through mineral extraction on communal lands, and (iii) ensuring the involvement and benefit accrual by the mine-host communities.[43] The aim of the comparative analysis is to find the "best, fairest and most equitable approach" to access, use and development of mineral resources[44] and to ensure that mineral extraction in Zimbabwe improves and does not diminish the well-being[45] of mine-host communities.

1.3 Research question

The research question that forms the basis and focus of this study is how the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction, as contained in applicable international and regional regulatory instruments, are realised in the Zimbabwean constitutional, policy and legislative frameworks.

1.4 Objectives of the study

The primary objective of the study is to determine how the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction, as contained in applicable international and regional regulatory instruments, are realised in the Zimbabwean constitutional, policy and legislative frameworks. To achieve this objective, it is important to:

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43 See Chapter 6 below.

44 Warden-Fernandez 2005 23 (4) *JENRL* 385 identifies these issues as contemporary challenges in mineral law. See Arezki, Gylfason and Sy 2011 *Beyond the Curse: Polices to Harness the Power of Natural Resources* 1; World Bank Group 2004 *Striking a better Balance: The World Bank Group and Extractive Industries* http://documents.worldbank.org.

45 The welfare and well-being of people have social, economic, environmental, spiritual and cultural dimensions. See section 6.2.3 below for a detailed exposition of the term well-being.

1) Provide an exposition of the theories of social justice applicable to the question of mine-host community involvement in and benefit accrual from mineral extraction;

2) Distil principles centred on mine-host community involvement in and benefit accrual from mineral extraction, as contained in applicable international regulatory instruments;

3) Unpack principles centred on mine-host community involvement in and benefit accrual from mineral extraction, as contained in applicable regional regulatory instruments;

4) Conduct a review of the Zimbabwean constitutional, policy and legislative frameworks that facilitate the extraction of mineral resources so as to determine how these frameworks realise the principles pertaining to mine-host involvement in and benefit accrual from mineral extraction, as gleaned from an examination of international and regional regulatory instruments;

5) Conduct a comparative overview of South African constitutional, policy and legislative frameworks and draw lessons centred on mine-host community involvement in and benefit accrual from mineral extraction. A comparative analysis of the South African frameworks is imperative, given that Zimbabwe and South Africa have the same geographical location in the southern African region and share the same history of colonialism, the dispossession of black people of their lands and minerals, and their marginalisation from the mainstream economy. To redress these historical problems, South Africa overhauled its mining legislation in 2002 but Zimbabwe is still saddled with colonial legislation crafted in 1961 with no intention to benefit the majority black people and this requires change; and

6) Highlight strengths and shortcomings in the current Zimbabwean constitutional, policy and legislative frameworks that facilitate the extraction of mineral resources with focus on mine-host community involvement in and benefit accrual from mineral extraction. The findings derived from this as well as international and regional

regulatory instruments will be used to formulate recommendations for reform of the Zimbabwean frameworks.

1.5 Assumptions and hypothesis

1.5.1 Assumptions

The study makes the following assumptions:

i) Zimbabwe is recognised as a mineral-endowed country.

ii) Minerals in Zimbabwe are mostly found in remote rural communal lands.

iii) The continued discovery of minerals on lands inhabited by mine-host communities in Zimbabwe is causing an increase in the instances of dispossession and relocation of these communities, without consultation, adequate compensation for or accrual of benefits from the mining operations.

iv) There is growing international and African consensus on the need for mine-host community involvement in and benefit accrual from mineral extraction.

v) Lessons for the purposes of reform can be drawn from a comparative analysis of the South African constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction.

1.5.2 Hypothesis

Zimbabwe's constitutional, policy and legislative frameworks do not optimally realise the requirements of distributive justice, procedural justice and remedial justice as well as the principles contained in international and regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction and must therefore be reformed or improved. The South African constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction can assist Zimbabwe when it comes to the optimal

realisation of the requirements of distributive justice, procedural justice and remedial justice and the principles contained in international and regional regulatory instruments.

1.6 Research methodology

This study encompasses an analytical literature review of legislation, case law, books and journal articles. It reviews international and regional regulatory instruments both binding and persuasive, including treaties, conventions, protocols, resolutions, charters, declarations, directives and guidelines. The study reviews the Inter-American and African human rights systems in order to extract standards developed at a regional level that are key to involvement and benefit accrual by mine-host communities from mineral extraction on their lands. These two regions are relevant to the study as they both recognise certain human rights as collective rights. A comparative legal analysis of the South African constitutional, policy and legislative frameworks with a focus on the involvement of and benefit accrual by mine-host communities provides lessons that may facilitate realisation of standards set in applicable international and regional regulatory instruments and will be examined as such. South Africa's experiences, challenges and solutions help to identify opportunities for improvement of Zimbabwe's regulatory framework and act as caveats about the impacts of certain frameworks.

South Africa is a suitable comparator for Zimbabwe given that the legal systems of the two countries are built on the historic mix of Roman Dutch common law and English law principles due to their common colonial history. The two countries have also enacted mining legislation during different phases of history. Most concerning is, however, the retention of colonial legislation in Zimbabwe which means that the laws still stifle the full realisation of economic emancipation for the people of Zimbabwe through utilisation of their land and mineral resources. Zimbabwe's principal mining legislation, the *Mines and Minerals Act* 38 of 1961 was crafted during the colonial era by a colonial regime that had no intention to benefit the majority black citizens of the country. The same can be said about the *Communal Land Act* 20 of 1982 which retains the adverse land laws introduced by the colonial-era *Tribal Trust Land Act* 6 of 1979. Although it attained freedom much later than Zimbabwe, South Africa has introduced mineral legalisation in the form of the

Mineral and Petroleum Resources Development Act 28 of 2002 *(MPRDA)* that introduces new concepts such as people's ownership of mineral resources with the state as custodian and further seeks to effectively open the mining industry to the once marginalised black majority. New concepts introduced in the South African mining legislation in the form of notice, consultation, community consent and preferent community prospecting rights can offer solutions to Zimbabwe to resolve its persistent challenge of balancing the award and utilisation of mineral rights against communal land rights. A comparative legal analysis aimed at developments in the South African mining law brings benefits to law reform in Zimbabwe where the new and useful concepts stated above can be adopted with appropriate modifications to fill gaps, refine and eliminate any ambiguities in domestic mining laws.

1.7 Chapter outline

The thesis is organised in seven chapters. The present chapter introduces the background of the study, provides the problem under discussion and describes the research methodology adopted.

Chapter 2 embodies a theoretical analysis of the connection between social justice and mine-host community involvement in and benefit accrual from mineral extraction.

Chapter 3 unpacks applicable requirements as found in international regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction in their areas.

Chapter 4 sets out the applicable requirements in regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction.

Chapter 5 outlines the relevant Zimbabwean context by discussing the constitutional, policy and legislative frameworks centred on the extraction of mineral resources so as to determine how these realise the requirements for mine-host community involvement in and benefit accrual from mineral extraction, as gleaned from careful reading of

international and regional regulatory instruments.

Chapter 6 provides a comparative analysis of the South African constitutional, policy and legislative frameworks centred on the extraction of mineral resources, with special attention paid to mine-host community involvement in and benefit accrual from mineral extraction, so as to distil lessons to be applied to the Zimbabwean situation.

Chapter 7 encompasses an overview of the strengths and shortcomings in the current Zimbabwean constitutional, policy and legislative frameworks centred on the extraction of mineral resources, with special reference to mine-host community involvement in and benefit accrual from mineral extraction. Based on the findings from the study of the Zimbabwean frameworks and those distilled from international and regional regulatory instruments as well as South African frameworks, recommendations are made towards improved Zimbabwean frameworks that would optimally realise the principles centred on mine-host community involvement in and benefit accrual from mineral extraction, as expressed in international and regional regulatory instruments.

CHAPTER 2: THEORETICAL FOUNDATIONS OF THE CONNECTION BETWEEN SOCIAL JUSTICE AND MINE-HOST COMMUNITY INVOLVEMENT IN AND BENEFIT ACCRUAL FROM MINERAL EXTRACTION

> The fruits of the earth belong to all and the earth to no one.
> Jean-Jacques Rousseau *Discourse on the Origin of Inequality in Basic Political Writings* 60

2.1 Introduction

As stated in chapter 1, the main objective of this thesis is to determine exactly how the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction, as contained in applicable international and regional regulatory instruments, are realised in the Zimbabwean constitutional, policy and legislative frameworks. The present chapter aims partly to accomplish this objective by unpacking theoretical perspectives centred on social justice that underpin the award and utilisation of mineral rights on lands inhabited by mine-host communities.

Mineral extraction has often left mine-host communities in a worse position economically and socially than they were at the time prior to the commencement of mining on their lands.[46] Instead of benefiting from the development of mining projects in their areas, mine-host communities often lose their land without compensation and bear disproportionate socio-economic and environmental burdens associated with mining.[47] Terms coined to characterise this predicament are the 'paradox of plenty' and the 'resource curse'. These terms succinctly describe the scenario where resource-rich countries experience lower socio-economic development than resource-poor countries.[48] In countries suffering from this resource curse, mine-host communities endure extreme poverty in the midst of rich mineral resources that are often exploited by outsiders, mainly

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46 Kongolo 2014 *AJDG* 82; Murombo 2013 9 (1) *LEAD* 37-38.

47 Olawuyi 2015 11 *JSDLP* 298; Kongolo 2014 *AJDG* 82; Kitula 2006 14 *JCLP* 409 -410; Murombo *SAPL* 2010 25 (2) 568-589; Murombo 2013 9 (1) *LEAD* 31, 37-39.

48 Kongolo 2014 *AJDG* 82; Olawuyi 2015 11 *JSDLP* 297 argues that "resource extraction and production in many parts of Africa have not fostered corresponding economic, social and environmental development and growth." Gilbert 2013 31 (3) *NQHR* 314-315 concludes that, generally, control, ownership and exploitation of high value natural resources have often led to conflicts and extreme poverty.

transnational companies and politically connected elites.[49] Consequently, the current chapter is premised on the argument that, when minerals are extracted on lands inhabited by mine-host communities, and when such extraction leaves the mine-host communities worse off economically, socially and environmentally, such mineral extraction is unfair and unjust.[50]

Pertinent questions exist about justice and fairness[51] in the awarding and utilisation of mineral rights on lands inhabited by mine-host communities. Concerns have been arising over the distribution of benefits and burdens, correction of unjust distribution and the availability of opportunities for affected mine-host communities to participate when decisions that affect their livelihoods[52] are made. Three levels of social justice, namely distributive, procedural and remedial justice, are important when it comes to examining the question of mineral extraction on lands inhabited by mine-host communities.[53] These notions of social justice are expected to address issues of equality in the distribution of resources, fairness in participation and correction of unjust distribution of resources.[54]

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49 Kongolo 2014 *AJDG* 82. See Murombo *SAPL* 2010 25 (2) 568-589; Murombo 2013 9 (1) *LEAD* 31.

50 The preamble to the *Constitution of Zimbabwe Amendment* (No. 20) *Act,* 2013 states that the people of Zimbabwe are united by their common desire for freedom, justice and equality and that the people commit themselves to build a just and prosperous nation based on equality and fairness, among other values. Fairness in the award and utilisation of mineral rights in Zimbabwe prescribes that no group of people, surely including mine-host communities, should be made to bear a disproportionate share of the burdens of mineral extraction.

51 Rawls *A Theory of Justice* 3 considers justice to be the first virtue of social institutions.

52 Vanclay 2017 35 1 *IAPA* 6 defines livelihood as the various means that people and communities use to make a living, including land and water-based activities such as farming, fishing, hunting and wage-based work.

53 Ebbesson "Introduction: Dimensions of Justice in Environmental Law" 3 explains that "justice concerns arise in just about any legal context involving health, the environment and the use of natural resources." Theories of social justice are therefore expressed in various ways and apply to various contexts. In this chapter, theories of justice are examined in the context of the mineral extraction on lands inhabited by mine-host communities.

54 The notions of justice, equality and fairness are discussed in this current chapter and further elucidated in chapter 5 and chapter 6, which discuss the respective South African and Zimbabwean frameworks for mine-host community involvement in and benefit accrual from mineral extraction.

2.2 Theories of social justice and the award and utilisation of mineral rights on lands inhabited by mine-host communities

The concept of social justice has been associated with the distribution of socio-economic resources and the well-being of society.[55] Shookner[56] considers social justice to be a tool for ensuring that all people benefit from the distribution of the social and economic resources of society. On his part, Chaskalson[57] posits that social justice is achieved when the basic needs of people are satisfied and there is harmonious co-existence with respect and concern for others.[58] Understood in this way, social justice seeks fair (re)distribution of resources;[59] opposes oppression and injustice, and seeks eradication of poverty and socio-economic inequalities.[60] It follows that social justice cannot exist if resource distribution does not benefit all the people in a society. These understandings of social justice stand in stark contrast with the hostilities and deprivation that often characterise mineral extraction on lands inhabited by mine-host communities.[61]

From a legal perspective, it is necessary to study the theories of social justice and its relations to the award and utilisation of mineral rights on lands inhabited by mine-host communities. Concerns over justice and fairness in the awarding and utilisation of mineral rights on lands inhabited by mine-host communities invite a critical evaluation of existing laws and policies. In a legal context, these theories provide a useful standard for evaluating existing or proposed policy and legislative frameworks and guide the reform process. Theories of social justice do help to either legitimise or criticise existing policies

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55 Miller 1991 21(3) *B.J.Pol.S* 371-391.

56 Shookner *An Inclusion Lens: Workbook for Looking at Social and Economic Exclusion and Inclusion* 2.

57 Chaskalson 2000 *SAJHR* 204-205. Jost and Kay "Social Justice: History, Theory and Research" 1122-1165 propose a nuanced view. They conceptualise social justice as a state of affairs in which benefits and burdens in society are dispensed in accordance with some allocative principle or set of principles; procedures, norms and rules that govern political and other forms of decision making preserve the basic rights, liberties and entitlements of individuals and groups and they further state that human beings are to be treated with dignity and respect not only by authorities but also by other relevant social actors, including other citizens.

58 Rodes Jr 1996 71 *Notre Dame L Rev* 626 explains that social justice demands first that "members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages."

59 See Chipkin and Meny-Gibert *Understanding the Social Justice Sector in South Africa* 3 who view social justice as entailing a situation where there is a fair distribution of benefits and burdens in society.

60 United Nations 2006 https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.

61 See Chimonyo, Mangure and Scott 2012 http://www.crdzim.com. See also *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others* (HC 6334/09).

and laws.[62] This may be termed the legitimising role of these theories.[63] For instance, Locke's theories of justice were used as justification for the acquisition of colonial territories which were considered *terra nullius,* or land belonging to nobody, following his reasoning around private ownership of land and property through the application of labour.[64] Locke's theories of justice are discussed in detail in section 2.2.1.3 below. Furthermore, as society evolves, governments are faced with circumstances that require legislative and policy reforms to meet the aspirations of citizens.[65] The influence of theories of social justice can be discerned in governmental justifications such as correcting past injustices and ensuring equal access to national resources[66] which are used to pursue the reforms. For instance, Aristotle's views on the notion of justice are credited for the distributive and remedial principles embedded in the *Constitution of the Republic of South Africa*, 1996 (henceforth the *Constitution of South Africa*).[67] In particular, it is argued that

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62 Millon 1990 *DLJ* 241 discusses the role of the theories of corporation and the author affirms that the theories assist when it comes to justifying certain legislative or judicial interventions through new legal doctrines.

63 Millon 1990 *DLJ* 241.

64 See Bennett *Pasts Beyond Memory: Evolution Museums Colonialism* 59; Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 2005, 25, https://www.iwgia.org/en/resources/publications/.

65 The South African Broad Based Black Economic Empowerment (BBBEE) and Zimbabwe's Indigenisation and Economic Empowerment policies are particularly meant to ensure that a disadvantaged group (mainly black people) obtain economic rights geared to fight poverty and inequality. The government of Zimbabwe faced circumstances necessitating land redistribution resulting in the fast-track land reform in the year 2000. The need for balanced economic ownership became apparent by 2010 and Zimbabwe adopted indigenisation and economic empowerment laws. Economic challenges and the failure of the indigenisation law resulted in amendments through the *Finance Act* 1 of 2018 and the *Finance Act* 2 of 2020.

66 See justifications for distributive and remedial legislative measures to empower previously disadvantaged South Africans in sections 9(2), 25(6)(7)(8), 29(2), 195(1)(i) and 217(2)(b) of the *Constitution of South Africa*; Preamble and sections 1, 2(d)(i) and 104 of the *Mineral and Petroleum Resources Development* Act 28 of 2002; sections 2(j), 18(5) and 31(1) of the *Marine Living Resources Act*, 18 of 1998; Preamble and Chapters 4 and 5 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. The Constitutional Court of South Africa affirmed the commitment to social justice in several cases including *Government of the Republic of South Africa and Three Others v Irene Grootboom and Others* 2001 SA 46 (CC) para 1; *Soobramoney v Minister of Health, Kwazulu-Natal* 1997 12 BCLR 1691 (CC) paras 8-9*; City of Johanesburg Metropolitan Municipality v Blue Moonlight Properties Ltd 39 (Pty)* 2012 2 BCRL 150 para 2.

67 Okharedia 2005 6(2) *Phronimon* 1. In sections 9(2) and 25, the *Constitution of South Africa* seeks to attain distributive and remedial justice for historically disadvantaged South Africans discriminated against during the apartheid era. Prominent South African legal minds such as the late advocate George Bizos and former Judge Abie Sachs affirm the theoretical heritage as derived from Plato and Aristotle. George Bizos participated in the drafting process for the Constitution and is quoted in Okharedia 2005 6(2) *Phronimon* 3 to have stated that "we had to make a break from the values and principles of the policy of apartheid […]. We were particularly influenced by the Platonic ideals that are expounded in his work, the Laws." Sachs 2000, *Public Lectures on Constitutional Law* quoted in Okharedia 2005 6(2) *Phronimon* 3, affirms that the Aristotelian ideas on justice influenced the drafting and implementation of

the Bill of Rights in the *Constitution of South Africa*[68] for instance provisions on equal access to land and restoration of dispossessed lands set out in section 25, exhibits remarkable similarities with Aristotle's ideas about justice.[69] His conception of distributive justice seeks to foster equality by taking into account the existing inequalities in society, such that equals are awarded equal shares, while un-equals are awarded unequal shares tilted in favour of the most disadvantaged. In this way, Aristotle's idea of justice supports affirmative action, redistribution of wealth and empowerment of historically disadvantaged persons and groups as expressed in section 9(2) and section 25 of the *Constitution South Africa* and section 56(5) of the *Constitution of Zimbabwe Amendment* (No.20) Act, 2013.[70] These sections guarantee the right to equality and non-discrimination[71] and provide for equal access to land and other natural resources.[72] Aristotle stated that "those things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal."[73] This philosophy is embedded in section 9 of the *Constitution of South Africa*[74] and section 56 of the *Constitution of Zimbabwe* so as to overturn the apartheid and colonial order which was based on discrimination and denial of equality.

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the *Constitution of South Africa* and that courts adjudicating cases of fundamental rights and justice must think along the lines of Aristotle's philosophical work.

68 Sections 7-39 of the *Constitution of South Africa*.

69 Okharedia 2005 6(2) *Phronimon* 1. South Africa and Zimbabwe emerged from apartheid and colonial rule which are anathema to the concept of justice and equality as propounded by Aristotle. Apartheid and colonial laws promoted discrimination based on race, culture and religion among other criteria. According to Aristotelian philosophy these apartheid and colonial laws are instruments of injustice. On attainment of freedom and independence, the democratic governments of South Africa and Zimbabwe discarded discriminatory instruments in favour of Aristotelian values and principles of justice.

70 Okharedia 2005 6(2) *Phronimon* 1 explains Aristotle's idea as requiring that, in the endeavor to achieve equality, the distinct inequalities among people and groups in society should be taken into consideration. The distribution of goods and rights cannot be one size fits all (where unequals are awarded equal shares), since people are differently positioned materially. Some people have more (privileged) and some less (underprivileged). Aristotle argues that race should not be used as a criterion for the distribution of goods, rights and determine equality. This view contrasts with colonial and apartheid thinking, which oppressed and marginalised the black majority in South Africa and Zimbabwe. Aristotle's views on race and equality accords with the post-colonial and post-apartheid dispensation in South Africa and Zimbabwe as expressed in section 9(1)(2)(3) of the *Constitution of South Africa* and section 56 of the *Constitution of Zimbabwe*.

71 Section 9 of the *Constitution of South Africa* and section 56(5) of the *Constitution of Zimbabwe*.

72 Section 25(5)-(8) of the *Constitution of South Africa.*

73 Aristole quoted in Okharedia 2005 6(2) *Phronimon* 12.

74 See the case of *Brink v Klitshoff* 1996 (4) SA 197 (CC) 42 where the court explains that the right to equality prohibits discriminatory actions and permits the taking of steps that remedy or correct the results of past discrimination.

Aristotle[75] considered all three dimensions of social justice, namely distributive justice, remedial justice and procedural justice. The division of social benefits and burdens is the main concern of distributive justice, while remedial justice is concerned with correcting or rectifying injustices.[76] Rawls[77] and Solum[78] added to Aristotle's observation on the concept of procedural justice, which is concerned with the fairness of procedures for distribution of resources.[79]

Mineral extraction on the lands inhabited by mine-host communities invokes all three concepts, namely distributive, procedural and remedial justice. Distributive justice would prescribe that mine-host communities should derive benefits from mineral extraction on their lands. When it comes to procedural justice, since mine-host communities are the most affected by mineral extraction, they should participate in decision making and be consulted in terms of their customs and traditions. Remedial justice would prescribe that those traditional lands that are dispossessed from mine-host communities without their consent should be returned to them, while compensation should be paid for any damage caused to them.

2.2.1 Distributive justice

Aristotle[80] defines the concept of distributive justice as "the distribution of honour, wealth, and the other divisible assets of the community, which may be allotted among its members." Distributive justice has also been defined by Dworkin[81] as "the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given." When these definitions are considered closely, the concept of distributive justice arguably seeks to answer two basic questions: what are the principles that define a

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75 Aristotle *Nicomachean Ethics,* V 1131a 1.
76 Aristotle *Nicomachean Ethics,* V 1131a 1.
77 Rawls *A Theory of Justice* 85.
78 Solum 2004 78 *S. Cal. L. Rev* 183.
79 Solum 2004 78 *S. Cal. L. Rev* 183; Kuehn 2000 30 *ELR* 10681; Ebbeson "Introduction: Dimensions of Justice in Environmental Law" 2; Schrader-Frechette *Environmental Justice: Creating Equality, Reclaiming Democracy* 24 identifies distributive and procedural justice as the two dimensions of environmental justice. Equal distribution of environmental burdens and benefits is a concept with a direct link to distributive justice and meaningful involvement which, in turn, connects with the notion of procedural justice.
80 Aristotle *The Nichomachean Ethics, Book V* 267.
81 Dworkin *Taking Rights Seriously* 273.

just distribution and how should resources be distributed amongst citizens?[82]

Three different principles of distributive justice, namely utilitarianism, libertarianism and egalitarianism, seek to explain when the approach to be adopted for purposes of distribution of resources may be regarded as just or equitable. Shelton, however, warns that electing the appropriate principle to determine a just or equitable allocation of resources is highly contested.[83] Variances are also common within the dimensions of distributive justice. For instance, within the egalitarian perspective of distributive justice, some authors advocate strict egalitarianism and[84] others luck egalitarianism;[85] and there are those who support the difference principle.[86] Due to the scope of the inquiry, this

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82 See 2.4.1.1; 2.4.1.2 and 2.4.1.3 below. Chapters 3, 4, 5 and 6 of this study also seek to answer these two questions. Questions of distributive justice arise among nations (between developed and developing ones), within nations (among citizens) and across generations (that is, these are inter-generational). In the context of mineral extraction at the national and local community level, distributive justice invokes mine-host communities' concerns over the unfair distribution of the burdens and benefits of extraction of the minerals. Mine-host communities are not only overburdened with the harms of mineral extraction, but they are also left out of the process of making decisions that affect their livelihood.

83 Shelton "Describing the Elephant: International Justice and Environmental Law" 143, explains that there is contestation regarding "whether decisions should be based on need, capacity, prior entitlement […], the greatest good for the greatest number, or strict equality of treatment." Max's "Critique of the Gotha Program" 87 puts forward the distribution of resources according to needs, thus "from each according to his abilities, to each according to his needs." Nielsen *Equality and Liberty* 62-63 sets out his egalitarian distributive principle of justice as follows: "[A]fter provisions are made for common social (community) values, for capital overhead to preserve the society's productive capacity, allowances made for differing un-manipulated needs and preferences, and due weight is given to the just entitlements of individuals, the income and wealth (the common stock of means) is to be so divided that each person will have an equal share. The necessary burdens requisite to enhance human well-being are also to be equally shared subject, to limitations by differing abilities and differing (natural) environments."

84 Strict egalitarians argue that members of a society should be allocated equal amounts of resources based on the argument that all people are morally equal and only strict equality can lead to the full realisation of the equal moral worth of human beings. Leading advocates of strict egalitarianism include Kai Nielsen and Amartya Sen.

85 Anderson 1999 109 (2) *Ethics* 290; Arneson 2010 110 (2) *Ethics* 389-390 sets out luck egalitarianism in the following words: "[T]he concern of distributive justice is to compensate individuals for misfortune. Some people are blessed with good luck, some are cursed with bad luck, and it is the responsibility of society — all of us regarded collectively — to alter the distribution of goods and evils that arises from the jumble of lotteries that constitutes human life as we know it […]. Distributive justice stipulates that the lucky should transfer some or all of their gains due to luck to the unlucky."

86 Rawls *A Theory of Justice* 83, 302; Rawls *Political Liberalism* 5-6; Rawls *Justice as Fairness: A Restatement* 242-243. Rawls acknowledges that all citizens do not start with the same socio-economic privileges and allocating benefits equally may not be fair to those least advantaged. Accordingly, the difference principle as advocated by Rawls will ensure equity by first satisfying the needs of the least advantaged in cases where strict equality would result in unfairness to the least well-off. This principle permits diverging from strict equality if the inequalities would make the least advantaged in society materially better off than they would have been under strict equality. The utilitarian objection to the difference principle is that it does not maximise utility. The libertarian objection is that it infringes liberty, property rights and/ or self-ownership as it may require redistribution to benefit the poor, which libertarians view as the immoral taking of just holdings.

chapter will not pursue these variances within any theoretical framework but focus instead on broad categories to provide a general exposition of each theory of social justice.

2.2.1.1 The utilitarian perspective of distributive justice

The origins of utilitarianism can be traced to Jeremy Bentham, an English legal reformer.[87] Bentham set out to establish a norm that would act as a barometer for determining the kinds of law England should enact. He settled for a framework that would bring about the greatest net benefits to society after subtracting the burdens or costs. His utilitarian axiom was "the greatest good for the greatest number."[88] Utilitarianism, according to Bentham, is therefore a theory of distributive justice that defines a just distribution as one which produces the greatest amount of utility (or happiness) for the greatest number of people.[89] Utilitarians[90] all ask the same fundamental question: "what distribution of goods, what principle of justice, what ascriptions of rights are such that their acceptance is in the general interest?"[91] Scholars who critically engage with these questions suggest that a just society is one that is arranged to achieve the greatest amount of satisfaction among its members.[92] Laws and policies should therefore maximise the common good.[93] To achieve a just outcome, relative benefits and burdens should be weighed against one another, and a determination be made regarding that which maximises the greatest good for the greatest number of people.[94] In addition, distributive rules are to be designed and assessed according to how they maximise or reduce welfare. It follows that a good law is one that aims for the maximisation of happiness for a greater number of individuals.[95] Andre and Velasquez opine that, as long as a course of action produces maximum benefits for all, utilitarians are prepared to ignore the use of misinformation, manipulation or force

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87 Carter *The Philosophical Foundations of Property Rights* 51 cites Bentham as the founder of utilitarianism.

88 Quoted in Andre and Velasquez 1989 2 (1) *Issues in Ethics* http://www.scu.edu.

89 Bilchitz 2008 9 *ESR Review* 1.

90 See Bentham *Introduction to the Principles of Morals and Legislation* 1789; Mill *Utilitarianism* 1863; Sidgwick *The Methods of Ethics* 1874; Singer *The Expanding Circle: Ethics, Evolution, and Moral Progress* 1981.

91 Hare "Justice and equality" 185 -199.

92 Sidgwick *The Methods of Ethics* 7th ed 411.

93 Rawls *A Theory of Justice* 233 conceived of the common good as entailing conditions and objectives that are to everyone's advantage.

94 Hooft 1987 73 (1) *ARSP* 31 observes that the utilitarian philosophy is concerned with achieving the greatest happiness for the greatest number.

95 Carter *The Philosophical Foundations of Property Rights* 51.

to achieve the desired results.[96] In the end, the rightfulness or wrongfulness of policies or laws depend on whether the consequences are good or bad, that is, their ability to maximise utility or welfare.[97]

Utilitarianism influences, in a significant way, the manner in which benefits and resources are currently distributed in society.[98] This is evident from the way governments and lawmakers constantly weigh the consequential benefits and harms of policies and legislation when they make decisions that affect resource distribution.[99] In that sense, when considering participation in and benefit accrual by mine-host communities from mineral extraction, governments may consider interests other than those of the communities, such as those of the generality of citizens and foreign investors. This line of thought is shown in the case of *Sawhoyamaxa Indigenous Community v Paraguay* and *Yakye Axa Indigenous Community v Paraguay*,[100] which involved deprivation of community land rights and where the state justified its decision (which was rejected by the Inter-American Court of Human Rights) to negate the indigenous community's right to their ancestral lands,[101] based on some utilitarian argument centred on the productive use of the land by the title holders (investors). In the case of *African Commission of Human and Peoples' Rights v The Republic of Kenya,*[102] the Government of Kenya justified its negation of the human rights of the Ogiek people on the basis that the logging concessions it granted on their lands were in the public interest and were destined to ensure economic development. Elements of utilitarianism can also be gleaned in the Zimbabwean case of *Chikutu and Others v Minister of Lands and Others;*[103] involving the deprivation of community land rights. In this case the government defended its decision to strip the Shangaan indigenous peoples of their ancestral lands based on overall benefits to the nation, including the generation of foreign currency from the intended national irrigation

96 Andre and Velasquez 1989 2(1) *Issues in Ethics* http://www.scu.edu.
97 Du Plessis 2013 2 *STELL LR* 363.
98 Taylor "Social Justice: Reframing the "Social" in Critical Discourses in Africa" 18.
99 Andre and Velasquez 1989 2(1) *Issues in Ethics* http://www.scu.edu.
100 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 139. See also *Yakye Axa Indigenous Community v. Paraguay* Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) para 142.
101 Indigenous peoples' ancestral lands are protected under the right to property in A 21 of the *American Convention on Human Rights* 1969 OASTS No. 36, 1144 UNTS 123.
102 *African Commission of Human and Peoples' Rights v The Republic of Kenya* (26 May 2017) (Ogiek Case) App. No 006/2012.
103 *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 12.

scheme. These cases show that the governments did not consider development as a complex concept which cannot be applied on a one-dimensional basis. There are certain intangibles that are valuable to host communities for instance their cultural and spiritual well-being. When considered in this way, economic development projects such as mining must respect the interests, rights and expectations of the mine-host communities.

The utilitarian perspective of distributive justice has therefore rightly been subjected to criticism. Rawls[104] and Sen[105] argue that utilitarianism is over-fixated on maximising the happiness of the greater number of people in society, irrespective of the resulting unequal distribution of resources. The focus of utilitarianism on maximising utility is not oriented towards justice, as it negates basic concern for equality and fairness in the distribution of benefits.[106] It follows, therefore, that utilitarianism as a guiding distributive principle presents serious challenges for mine-host community involvement in and benefit accrual from mineral extraction. Utility maximising may require, for example, that a few minorities or mine-host communities suffer or sacrifice for the benefit of others. Maximising happiness using minerals requires the extraction of minerals at all costs for the benefit of most citizens through national economic growth, even if mine-host communities suffer disproportionate burdens such as relocations, social ills and loss of income. In the utilitarian view, relative or long-term benefits of national development outweigh the harm to mine-host communities caused by mineral extraction.[107] Utilitarians would argue that the harm caused to mine-host communities is a short-term burden or disadvantage that is outweighed by the long-term benefits to be enjoyed by the majority of citizens through national economic growth if mineral revenue is used prudently. Therefore, when considered from the utilitarian perspective, no injustice arises from entering the lands

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104 Rawls *A Theory of Justice* 27, 177.

105 Sen 1999b 89 (3) *AER* 351-352, 262. Sen concludes that "if equity is central to justice, utilitarianism starts off somewhere at the periphery." Falk *et al* "Social Equity and the Urban Environment" 2, explains that equity is a derivative of the concept of social justice that "represents a belief that there are some things which people should have, that there are basic needs that should be fulfilled, that burdens and rewards should not spread too divergently across the community and policy should be directed with impartiality, fairness and justice towards these ends." Bedar *The Nature of Sustainable Development*, states that "equity implies a need for fairness (not necessarily equality) in the distribution of gains and losses, and the entitlement of everyone to an acceptable quality and standard of living."

106 Taylor "Social Justice: Reframing the "Social" in Critical Discourses in Africa" 18.

107 Hooft 1987 73 1 *ARSP* 31 asserts that, for utilitarians, justice is achieved by weighing the relative benefits and harms and determining that which maximises the greatest good for the greatest number of people.

inhabited by mine-host communities to extract minerals, even if it harms those communities, as long as this maximises the happiness of the greater number of citizens.

Ideally, mine-host communities should be put in a better or equal position with other citizens and mining companies when it comes to the distribution of costs and benefits, since they bear the greater brunt of the inconveniences of mineral extraction on the lands they inhabit. In the same vein, the common good[108] emphasised by utilitarians is often defined by the state, and not those most affected by mineral extraction. For states, the common good is generally national economic growth or development. The challenge is that this seeming common good is foisted on mine-host communities, especially indigenous peoples, without their contribution and to the detriment of their livelihoods. Rawls concludes that "the utilitarian principle is not primarily concerned with the distribution of happiness among individuals, [so that] the aggregating focus of the principle can thus leave some very badly off, provided the general happiness is maximised."[109] In that context, laws and policies that promote general welfare while leaving others worse off find root in utilitarianism and this is morally wrong according to Rawls.[110] In his book entitled *A Theory of Justice,* Rawls proffers an alternative approach to distributive justice, based in this instance on an egalitarian perspective.[111]

2.2.1.2 The egalitarian perspective of distributive justice

The egalitarian school of thought disputes that a society with social and economic inequalities can be just.[112] This thinking stands in stark contrast with utilitarianism, which defends social and economic inequalities if they maximise the well-being of the greatest

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108 See Rawls *A Theory of Justice* 233 who considers the common good as those conditions and objectives that are to everyone's advantage.

109 Rawls *A Theory of Justice* 77 argues that utilitarianism is indifferent to the ways in which the total sum of benefits is distributed. Bilchitz 2008 9 *ESR Review* 1.

110 Bilchitz 2008 9 *ESR Review* 2. Utilitarianism sacrifices the least advantaged for the benefit of the whole society.

111 Rawls first published his book entitled *A Theory of Justice* in 1971. A revised edition was published in 1999. Rawls' notion of distributive justice is organised in accordance with two principles. Principle 1: Each person has an equal claim to a fully adequate scheme of basic rights and liberties, compatible with a like scheme for all (equal basic liberties principle). Principle 2: Social and economic inequalities are to satisfy two conditions (a) they are to be attached to positions and offices open to all under fair equality of opportunity (fair equality of opportunity principle) (b) they are to be to the greatest benefit of the least advantaged (difference principle).

112 Van Soest 1994 39 (6) *Social Work* 714.

number even at the expense of the minority. So, what kind of distribution makes a society just from an egalitarian perspective? Leading egalitarian theorists such as Dworkin,[113] Sen[114] and Rawls[115] have sought to answer this question.[116] They have addressed further questions, including that which must be equalised, and that which is the nature or measure of equalisation that meets the requirements of distributive justice.[117] Dworkin explains his version of egalitarian distributive justice through a principle of equal concern.[118] He holds that governments should treat each citizen with equal concern, arguing that it "is the sovereign virtue of political community;" he adds that, without it, "government is only tyranny and when a nation's wealth is very unequally distributed" it follows that "its equal concern is suspect."[119]

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113 Dworkin *Sovereign Virtue: The Theory and Practice of Equality*.

114 Sen *Development as Freedom*; Sen *The Idea of Justice*.

115 Rawls *A Theory of Justice.*

116 Aristotle also considered the question of just distribution. Okharedia 2005 6(2) *Phronimon* 6 explains that Aristotle's principle of justice entails equality of treatment. With a view to attaining distributive justice members of a society are therefore entitled to equitable distribution of, *inter alia,* rights and goods. The distribution takes into account the distinct conditions or inequalities of the members. Equals are treated equally by awarding them equal shares. Unequals are treated equally by awarding unequal shares that are in their favour.

117 Liebenberg 2015 132(2) *SALJ* 413.

118 Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1. See Chaskalson 2003 1 *IJCL* 600, 608 who explains that the notion of equal concern is foregrounded in s 1, 7, 9, 10, 36(1), 39(1) of the *Constitution of South Africa* through the guarantee of equality and the values of an open and democratic society based on human dignity, equality, respect and freedom. Albertyn 2018 34 (3) *SAJHR* 458 states that the notion of equal concern and respect also speaks to "fair or reasonable process, and to accountability by government and participation by citizens" when it comes to achieving socio-economic rights.

119 Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 1. In the context of mineral extraction, failure to consult host communities can be interpreted by them to mean that they are not deserving of equal concern and respect. South African courts have drawn on theories of social justice such as Dworkin's conception of justice and equality as bases for approaching the question of addressing the injustices of the past wrought by apartheid. In *President of the Republic of South Africa v Hugo* 1997 (4) *SA* 197 (CC) 41 the Constitutional Court of South Africa interpreted equality as a right to be treated with equal concern, dignity and respect regardless of one's membership in a particular group, which echoes the principles advanced by Dworkin. This was quoted with approval in *Prinsloo v Van der Linde* 1997 (3) SA 1012 para 32 where the court interprets the right to equality to mean the right to be treated as equals, thus agreeing with Dworkin *Taking Rights Seriously* 227. See also Dworkin *A Matter of Principle* 211 where he argues that any policy "that denies any group of citizens, however small or politically negligible, the equal resources that equal concern would otherwise grant them" is unjust. In *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 (1) SA 217 (CC) paras 10, 11 and 19 the court took the position that for state action to be reasonable it must treat citizens with respect, care and dignity and that "the larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement." In *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) 44, the court held that an allocation of resources by government for housing cannot be considered as reasonable if it leaves out those whose needs are the greatest. The court in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) 42 states that "the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and

In Dworkin's view, the appropriate measure of social justice is the equal distribution of resources.[120] The decisions affecting the distribution of wealth, benefits and burdens must be consistent with equal concern for the interests of members of a society.[121] It follows that government policy and legislation should be focused on both the equal importance of people's lives and their personal choice to live the kind of life they want.[122] In the context of distribution of resources, it would mean that government should be concerned about the well-being of its citizens who should decide for themselves how they want to live their lives and how best to use their resources to attain that kind of life.[123]

The principle of equal concern as explained by Dworkin is sensitive to the plight of mine-host communities that often endure extreme poverty in the midst of rich mineral resources exploited by outsiders. An egalitarian approach in accordance with the work of Dworkin would therefore prescribe that government, through legislative instruments and policy measures, should be concerned with the plight of mine-host communities in as much as it may be concerned about national economic growth or the well-being of the generality of citizens. The government may, therefore, have to allocate more resources to mine-host communities to compensate them or to offer a counterbalance for their vulnerability to the socio-economic and environmental impacts of mineral extraction.

According to Rawls' principles of justice, a distribution will be just if (i) it accords equal liberty rights to everyone[124] and (ii) it only allows for inequality in social and economic

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respect." See also the case of *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) 54 where the court explains that "the discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians." In *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes* 2009 9 BCRL 847 (CC) 7 the court held that "the requirement of engagement flows from the need to treat residents with respect and care for their dignity." In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) 81 the court states that "no members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration." See also *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) 46-68, 71, 159-165.

120 Dworkin *Philosophy and Public Affairs* 1981 10 (4) 283-345 argues that equality of resources is the distributive expression of the "equal moral worth of persons."

121 Dworkin *Freedom's Law: The Moral Reading of the American Constitution* 25.

122 Dworkin *Sovereign Virtue: The Theory and Practice of Equality* 323-324.

123 Liebenberg 2015 132(2) *SALJ* 421 adds that equal concern requires "sensitivity to distinct circumstances and needs of groups in their particular social and historical context."

124 Rawls *Justice as Fairness: A Restatement* 42-43. This is an equal liberty principle. See section 9(1)(2) of the *Constitution of South Africa* and section 56(1)(2) of the *Constitution of Zimbabwe*.

resources where such inequalities are to the benefit of those who are least advantaged.[125] The first principle requires equalisation of basic liberties, because citizens of a just society have the same basic liberties.[126] The second principle asserts that, although the distribution of wealth or resources needs not be equal, it must be to everyone's advantage.[127] Rawls effectively opposes the utilitarian view that justifies inequalities by off-setting the hardships of some with the greatest happiness of the greater number of people in a society.[128] He argues that inequalities in wealth and resources should only exist if they work to the benefit of the least advantaged.[129] In Rawls' view, justice occurs when benefits and burdens in society are distributed as if there were a 'veil of ignorance' that precluded personal interests from influencing decisions.[130] This approach ensures that all people have equal access to basic liberties and benefits. Rawls therefore advocates for a society where members share the benefits and burdens of achieving their common well-being and enjoy principles that guide members of society to act in a fair and equitable manner. Naturally, this reasoning may well offer favourable outcomes for mine-host communities, who are often the least advantaged in society.

Rawls has been criticised for overstressing distribution as the overarching principle of justice.[131] Consequently, Sen[132] introduces the capabilities approach and asserts that

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125 Dworkin *Hypothetical Contracts and Rights* 145-157. See section 9(1)(2) of the *Constitution of South Africa* and section 56(1)(2) of the *Constitution of Zimbabwe*.

126 Rawls *Justice as Fairness: A Restatement* 42-43. See section 9(1)(2) of the *Constitution of South Africa* and section 56(1)(2) of the *Constitution of Zimbabwe*.

127 Rawls *Justice as Fairness: A Restatement* 42-43.

128 Van Soest 1994 39 (6) *Social Work* 714.

129 Dworkin *Hypothetical Contracts and Rights* 145-157.

130 Taylor "Social Justice: Reframing the "Social" in Critical Discourses in Africa" 18. Rawls *A Theory of Justice* 87-88. Rawls developed his philosophy of justice based on what he called "the 'original position' when society has not yet come into existence and the (future) place of peoples in this position is hidden from them by a 'veil of ignorance.' The person in the original position decides what is just from a veil of ignorance of their place in society, their class position or social status nor do they know their fortune in the distribution of natural assets and liabilities. People in this position maximise benefits for the least well-off since they are ignorant of their position. Ignorance of one's own status leads to principles which are fair to all and especially the weak." See Liebenberg 2015 132(2) *SALJ* 423-424 and Rawls *A Theory of Justice* 87-88 where it is argued that resources should benefit society, particularly the most disadvantaged, and no one is to gain or lose because of their arbitrary position in the distribution of natural resources or their initial/ original position in society. Swat 2013 28 *SAPL* 83; Gans 2006 12 (13) *JVMC* 150.

131 Schlosberg 2004 13 *Environ Polit* 517; Young *Justice and the Politics of Difference* 1; Miller *Principles of Social Justice* 1, 232; Ako and Okonmah 2009 16 *IJMGR* 60-61.

132 Sen *Development as Freedom* 74-75. Sen *The idea of Justice* 231-235. Notably, Sen does not argue that the central focus of justice should be equalising capabilities, but rather that equality of capabilities should be emphasised. Liebenberg 2015 132(2) *SALJ* 422-423; Sen *The Idea of Justice* 295-297. Sen

distributive justice should be concerned with competences, which people have to attain in order to enjoy the kind of life they want. This reasoning connects with the idea of developing the skills within mine-host communities to enable them to engage in alternative economic activities that are not wholly dependent on support from mining companies.

2.2.1.3 The libertarian perspective of distributive justice

Dissatisfied with both the utilitarian and egalitarian conceptions of distributive justice, Nozick[133] propounds an entitlement principle based on the libertarian conception of distributive justice. Locke[134] and Nozick[135] explain that libertarian justice means that (i) inequalities of resources or wealth are permissible if their acquisition does not prejudice others and that (ii) property rights are acquired where a person produces something through his or her labour using resources not claimed by anyone else or by voluntary transfer of the resources by a transferor who has property rights. According to this reasoning, the question as to whether a distribution is just or not depends on how it came about.[136] Inequalities in resource distribution are forbidden only if they are caused by force, fraud, misinformation and other related means.[137] In the context of mineral extraction, a libertarian approach would support the inequality of burdens and benefits between mining companies and mine-host communities if the communities let go of their lands and minerals thereon through free, prior and informed consent. The mine-host communities would not be considered to have suffered any harm if they knowingly and voluntarily handed over their right to natural resources and wealth to mining corporations. To justify his approach, Nozick organises his theory into two ideas, which he refers to as

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argues against a "unifocal view of equality" and argues in favour of multi-dimensions in which equality of capabilities is included. Interestingly, in the case of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR .Com No 276/2003 par 283, the African Commission on Human and Peoples' Rights emphasised that development should improve the capabilities of the Endorois peoples rather than diminish existing capabilities.

133 Nozick *Anarchy, State and Utopia*.

134 Locke *The Second Treatise of Government* 33.

135 Nozick *Anarchy, State and Utopia* 213-229. Schwartz 1992 18 (3) *Soc. Theory Pract* 260, 276.

136 Nnajiofor and Ifeakor 2016 12 Ogirisi: *NJAS* 176.

137 Schwartz 1992 18 (3) *Soc. Theory Pract* 261.

justice in acquisition and justice in transfer.[138]

2.2.1.3.1 The notion of justice in acquisition

The idea of justice in acquisition is based on an initial acquisition of holdings, namely, resources or wealth and focuses on how people obtain them.[139] In terms of this idea, natural resources are justly acquired through having found them first, known as first arrival; having mixed the resource with one's labour, that is, labour embodied or having first improved the resource, meaning having acted as the first improver. Nozick uses the idea of the "first arrival or first comer" where "things" are acquired where no one else has a prior claim. Nozick explains that one "may find an unheld thing now and appropriate it."[140] The firstcomer can justly claim sole ownership of natural resources of a "newly discovered and uninhabited area" if the resources are available in unlimited quantities.[141] The idea of the firstcomer could aid mine-host communities by allowing them to claim a share of the proceeds of mineral extraction on their ancestral lands, having arrived there first. However, it is also not clear why the firstcomer who appropriates, for example, minerals or land, should have exclusive rights,[142] as this scenario can generate greater wealth for some at the exclusion of others.[143] To alleviate this concern, benefit sharing is advocated so as to ensure fair and equitable distribution of the benefits of mineral extraction on lands inhabited by mine-host communities.

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138 Nozick *Anarchy, State and Utopia* 150-151. To remedy injustices arising from the acquisition of possessions, Nozick put forward the idea of rectification of injustice and this idea will be discussed in detail below under the rubric of remedial justice.

139 Nozick *Anarchy, State and Utopia* 150-151.

140 Nozick *Anarchy, State and Utopia* 151.

141 Nozick *Anarchy, State and Utopia* 175.

142 Schwartz 1992 18 (3) *Soc. Theory Pract* 270; Nozick *Anarchy, State and Utopia* 178 argues that the first to appropriate previously unowned resources are justified in having exclusive ownership if in their appropriation, they as indicated by Locke, leave "enough, and as good […] in common for others."

143 George *Progress and Poverty* 328, 338, argues that "the equal right of all men to use land is as clear as their equal right to breathe the air, it is a right proclaimed by the fact of their existence […]. If we are all here by the equal permission of the Creator, we are all here […] with an equal right to the use of all that nature so impartially offers." The view that it is not acceptable for a people to claim rights to natural resources based on them having historically inhabited a certain territory is echoed in the case of the *Centre For Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Com No 276/2003 para 97 where the Endorois people stated before the African Commission on Human and Peoples' Rights that, by dismissing their claims, the High Court of Kenya had stated that that which "is in issue is a national natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource."

As for his idea of the first improver, Nozick[144] refers to Locke to explain a just acquisition:

> Whatsoever then he removes out of the state that nature have provided, and left in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state of nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

Extraction of minerals is an act of mixing one's labour, that is, capital or paid labour, with the mineral deposit, and if only this part of Locke's statement is applied to the context of mineral extraction, mining companies would have exclusive entitlement to benefits of mineral extraction. Mine-host communities would have no claim to the minerals by the mere fact of having historically inhabited the land bearing minerals, since they would not have mixed their labour with the minerals. However, Locke also suggested that "enough and as good for others" must remain for justice to exist.[145] Nozick interprets this part of Locke's assertion to mean that the appropriation of natural resources must not worsen the condition of other people.[146] In Nozick's opinion, the phrase "enough and as good for others" also provides other people, for instance, mine-host communities in the current context, a right to a share of the benefits of natural resources, but that right is limited to a share sufficient for subsistence and not an equal share.[147] In this sense, a libertarian approach based on the idea of application of one's labour prescribes that mineral extraction should not worsen but rather improve the situation of the mine-host communities and that these communities should also have a share in the benefits of mineral extraction on the lands they inhabit, even though it may not be an equal share.

The notion of justice in acquisition has been criticised by Palmer, who argues that most current possessions are historically traceable to injustices such as spoils of war, slavery, colonialism, apartheid, marginalisation and forced relocations.[148] He further argues that as long as these historical injustices are unresolved, Nozick's entire proposition based on

144 Locke *The Second Treatise of Government* 17, 27.
145 Locke *The Second Treatise of Government* 17, 27.
146 Nozick *Anarchy, State and Utopia* 175, 178.
147 Nozick *Anarchy, State and Utopia* 175.
148 Palmer *Looking at Philosophy: The Unbearable Heaviness of Philosophy Made Lighter* 4th ed 358.

justice in acquisition is misplaced.[149] Nozick acknowledges that not everyone follows the ideas expressed in justice in acquisition.[150] He observes that "some people steal from others or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges."[151] This leads to Nozick's second idea of justice in transfer as discussed below.

2.2.1.3.2 The notion of justice in transfer

The idea of justice in transfer focuses on the way a person can acquire holdings from another. Possessions that are justly held, that is, without force, theft or fraud among others, can be freely transferred.[152] To explain his idea of justice in transfer, Nozick draws attention again to Locke,[153] who states that "[…] If he would give his nuts for a piece of metal, pleased with its colour; or exchange his sheep for shells, or wood for a sparkling pebble or a diamond, and keep those by him all his life he invade not the right of others."

Nozick interprets Locke's argument to mean that, if the arrangement, that is, transfer of resources and wealth, was voluntary and not forced, the transfer is just.[154] A libertarian approach based on the idea of justice in transfer suggests that the state can justly sell or transfer rights in mineral resources to mining companies without consultation with the mine-host communities if it owns them.[155] However, this libertarian approach needs to be confronted by mine-host communities, particularly indigenous peoples, who consistently claim prior ownership of their lands and natural resources thereon even if the current national law vests these resources in the state.[156] In fact, governments arguably use force,

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149 Palmer *Looking at Philosophy: The Unbearable Heaviness of Philosophy Made Lighter* 4th ed 358.
150 Nozick *Anarchy, State and Utopia* 152.
151 Nozick *Anarchy, State and Utopia* 152.
152 Locke *Second Treatise on Government* 46.
153 Locke *Second Treatise on Government* 46.
154 Locke *Second Treatise on Government* 46.
155 Schwartz 1992 18 (3) *Soc. Theory Pract* 262 holds that it is a grave concern that libertarianism "licenses some people suffering appalling misery and degradation for the benefit of others or at least while others thrive" as long as the transfer was voluntary by the person with a claim to the resources.
156 *Mayagna (Sumo) AwasTigni v Nicaragua*, Inter-Am Court HR (Ser C) No 79 (2001); *Maya Indigenous People of Toledo v Belize*, Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004); *Yakye Axa v Paraguay*, (Merits, Reparations and Costs) 17 June 2005 Series C no 125 IACHR 6; *Sawhoyamaxa* (2006), (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2; *Moiwana v Suriname*, Inter-Am Ct. H.R. (ser. C) No. 124 (2005); *Saramaka Peoples v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007); *Kichwa People of Sarayaku v*

intimidation and misinformation to evict the mine-host communities to make way for mining.[157] Consequently, justice in transfer is difficult to attain in the context of mineral extraction.

The process in which justice is attained is also important when it comes to the notion of social justice. Unjust processes violate social justice, while just processes aid the attainment of social justice. This thinking is encapsulated in the notion of procedural justice discussed in section 2.2.2 below as an element of social justice.

2.2.2 Procedural justice

According to Aristotle, procedural justice entails a "status wherein individuals have an equal share in ruling and being ruled."[158] In other words, procedural justice is concerned with one's treatment as an equal and with respect, relating to decision-making affecting the distribution of goods and opportunities.[159] In Kuehn's view, procedural justice "involves justice as a function of the manner in which a decision is made, and it requires a focus on the fairness of the decision-making process, rather than on its outcome."[160] So interpreted, procedural justice is concerned about treating others with fairness in the procedures leading to a certain decision and distribution of resources in society.[161] This notion of justice emphasises democratic decision-making, which encompasses involvement, representation, equality and engagement.

Scholars[162] have grappled with the question regarding that which makes a procedure just

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Ecuador (2012) Inter-Am Court HR (Ser C) No 245 (2012); *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* ACHPR Com No 155/96 (2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 and *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment 26 May 2017.

157 Human Rights Watch 2016 "They Destroyed Everything" Mining and Human Rights in Malawi https://www.hrw.org/report/2016/09/27.

158 Heyman 1992 77 *IOWA L Review* 851.

159 Dworkin *Taking Rights Seriously* 273.

160 Kuehn 2000 30 *ELR* 10688.

161 Tyler 2011 *Mechanisms of Legal Effect: Theories of Procedural Justice* 2 especially points to "the justice of procedures, whether they are fair or unfair, ethical or unethical, and otherwise accord with people's standards of fair processes for social interaction and decision-making."

162 Solum 2004 78 *S. Cal. L. Rev* 228; Rawls *A Theory of Justice* 73–75; Kuehn 2000 30 *ELR* 10692. Kuehen also sought to determine whether a "fair process can negate a claim that a disproportionate outcome is

or fair and the notion of procedural justice that should be adopted in a just society. In his analysis of the subject, Rawls[163] identifies three notions of procedural justice: perfect, imperfect, and pure procedural justice.[164] As for perfect and imperfect procedural justice, a brief outline is sufficient, while pure procedural justice, which accords with the idea of involvement and effective participation, will be discussed in detail, as it directly relates to the involvement of mine-host communities in decision-making about mineral extraction on the lands they inhabit.

According to Rawls,[165] perfect procedural justice comprises two elements, namely (i) an independent criterion for that which constitutes a fair or just outcome of the procedure and (ii) a procedure that guarantees achieving that fair outcome. A procedure is perfect when people know that which is just and if they can craft a procedure that guarantees attainment of that result.[166] For instance, if people know in advance that mine-host communities deserve half of the proceeds of mineral extraction on their land, perfect procedural justice is attainable if a procedure is crafted to ensure that mine-host communities obtain half of the proceeds.

Although in the case of imperfect procedural justice an independent criterion for fairness of outcomes exists, Rawls asserts that no procedure guarantees a fair result.[167] An imperfect procedure therefore exists when people know that which is just in advance, but cannot put in place a procedure that guarantees that result.[168] A situation where the government intends that benefits of mineral extraction accrue to mine-host communities and only to the individuals within those communities, but where it cannot devise a

unjust." Hart *The Concept of Law* 167 argues that a disparate distribution of benefits may be considered just if impartial attention was given to competing claims to the benefits. Greenberg 1993 4 *Risk: Health Safety and Environment* 236 contends that, if appropriate criteria are applied to every area, then the results of the sitting decision are fair even if they disproportionately burden some groups and benefit others.

163 Rawls *A Theory of Justice* 73–75.

164 Rawls *A Theory of Justice* 73–75.

165 Rawls *A Theory of Justice* 73–75. Rawls explains that, where perfect procedural justice reigns, "there is an independent criterion of what is a fair division, a criterion defined separately from and prior to the procedure which is to be followed. And […] it is possible to devise a procedure that is sure to give that desired outcome." In this case "equal shares for each person" is the independent criterion of a fair division. A rule that says the "slicer picks last" is the procedure that produces that outcome. Brown 2005 53 (65) *Buff. L. Rev.* 104.

166 Robinson and Reeser *Ethical Decision Making in Social Work* 9.

167 Sadurski 2006 26 *Oxford J. Legal Stud* 397–399.

168 Robinson and Reeser *Ethical Decision Making in Social Work* 9.

procedure that will ensure that result, serves as an example of imperfect procedural justice. When it comes to trying to ensure that benefits accrue to mine-host communities, these may end up accruing to people who are not part of the community or fail to benefit some members of the community. For instance, South Africa's Mining Charter Impact Assessment Report of 2009 reveals that mine-host communities continue to live in poverty despite various empowerment efforts.[169] This is attributable to, *inter alia,* mining companies who take a narrow approach to empowerment that involves handpicked individuals who are then disguised as representing the broader interest of the mine-host community.[170] In Zimbabwe, parliamentary reports reveal no progress towards empowerment of local communities while extraction of mineral resources continue.[171]

Pure procedural justice entails situations where there is no criterion for that which constitutes a just outcome other than the procedure itself.[172] In such a case, there is no independent criterion for the right result; instead, there is a correct or fair procedure which, if properly followed, makes it likely that the outcome will be correct or fair.[173] Accordingly, a just system, whether it be of a legal or socio-economic nature, is one that follows just processes. As long as just processes are followed, whatever the outcomes are, they will also be just. An approach based on pure procedural justice would prescribe, as an example, that extraction of minerals on lands inhabited by mine-host communities should be preceded by the free, prior, and informed consent (FPIC) of those communities and not force, aggression, deceit or misinformation, even if the FPIC results in dislocation of the communities. A procedure that ensures consultation and involvement and that affords affected people an opportunity to participate in the process of making decisions that affect them, is therefore considered to be a just procedure. Such a procedure is considered to be

169 Mining Charter Impact Assessment Report 2009 11 http://www.dmr.gov.za.
170 Mining Charter Impact Assessment Report 2009 11 http://www.dmr.gov.za.
171 See the First Report of the Portfolio Committee on Mines and Energy on Diamond Mining (with special reference to Marange Diamond Fields 2009-2013) of 2013 https://veritaszim.net/node/1633. See also the Second Report of the Portfolio Committee on Mines and Energy on the Diamond Sector in Zimbabwe for the period 2009 – 2016 (S.C. 15, 2018) http://www.parlzim.gov.zw; Report of the Portfolio Committee on Mines and Mining Development on A Self-Assessment of the Diamond Sector in Zimbabwe Fourth Session - Ninth Parliament April 2022 https://www.veritaszim.net/node/5665.
172 Rawls *A Theory of Justice* 86.
173 Rawls *A Theory of Justice* 86.

just even if the results are unfavourable.[174] In this sense, participation in the process and not outcomes define procedural justice.[175] Participation in the process gives dignity to those who are affected by the proceedings, as every citizen has a right to be treated with concern and respect.[176]

Scholars[177] express additional views on what makes a procedure just or fair. For instance, Solum[178] points out that a procedure is fair if it affords people their right to participation in the form of notice and an opportunity to be heard. Fraser[179] propounds the notion of "parity of participation," according to which a just society is one in which citizens have equal participation in political and socio-economic decision making. This is because all people have a right to participate as equals in society[180] which is based on the equal moral worth of human beings.[181] In Fraser's[182] view, citizens should engage with the government when it comes to deciding their livelihoods. It follows that government must ensure conditions for genuine participation by citizens. Fraser[183] states that participatory parity requires from a government to remove "social arrangements that institutionalise deprivation, exploitation and gross disparities" when it comes to resources. Related to the present focus, a just procedure would be one that ensures equal participation by mine-host communities in decision making about mineral extraction on their lands.

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174 In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) para 24 the court held that the determination of the procedural fairness of an administrative decision is independent of the outcome of the decision.

175 Tyler 2001 *Issues of Democracy* 16-19. Tyler 2001 *Issues of Democracy* 20 discusses participation in terms of three elements, namely (i) voice/ neutrality entails fairness of decision making or opportunities for input before decisions are made, (ii) validation relates to whether their views are listened to and considered in decision making and whether decisions are made following understandable and transparent rules, while (iii) respect relates to fairness of treatment during the decision-making process. Gibson 2008 70 (3) *JOP* 701 concludes that, where people view the process that was used as fair, they are likely to accept unfavorable outcomes or unequal shares of resources they receive compared to others.

176 Mashaw *Due Process in the Administrative State* 162-163 explains the importance of participation independent of outcomes and states that "it is common-place for us to describe process affronts as somehow related to disrespect for our individuality, to our not being taken seriously as persons."

177 Solum 2004 78 *S. Cal. L. Rev* 191; Fraser 2000 3 *NLR* 107-120; Liebenberg 2015 132(2) *SALJ* 427-428; Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" 30.

178 Solum 2004 78 *S. Cal. L. Rev* 191.

179 Fraser 2000 3 *NLR* 107, 109; Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" 7, 30, 36.

180 Liebenberg 2015 132(2) *SALJ* 427-428.

181 Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" 45.

182 Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" 45.

183 Fraser "Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation" 36.

2.2.3 Remedial justice

In the context of mineral extraction, remedial justice entails the right of mine-host communities to redress for (i) lands and minerals lost to mining companies without consultation and their consent, and (ii) damage, including to health, suffered due to the adverse impacts of mineral extraction. In these circumstances the theory of remedial justice, which seeks to ensure redress for wrongs suffered through the provision of appropriate remedies, becomes invaluable.[184] The remedies may be in the form of compensation, restitution, an apology or an undertaking of non-repetition.[185] These remedies branch into strands of remedial justice such as rectificatory justice, corrective justice, compensatory justice, reparatory justice, restorative justice and restitutive justice.[186] The existence and overlapping nature of these constituent strands of remedial justice show that no one single form of remedial justice may sufficiently redress a wrong. For example, provision of compensation may have to be accompanied by an apology[187] or an undertaking of non-repetition.[188]

Rectificatory justice stems from the work of Aristotle who considers the role of judges to be that of making parties equal by imposing a penalty on the wrongdoer, especially by taking away from the wrongdoer that which they gained or secured through the wrongful

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184 Maguire and Lewis 2012 8(1) *MqJICEL* 24.

185 Buyse 2008 68 *HJIL* 129–153.

186 It is also noticeable that some remedies are referred to interchangeably in extant literature, as in the case of rectificatory justice and corrective justice. Compensatory, restitutory and reparatory justice are also used interchangeably.

187 In *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment (Reparations) 23 June 2022 para 129 the African Court on Human and Peoples' Rights considered the issue of an apology as a remedy. However, the court did not order an apology by the Kenya government as it determined that the other measures ordered by the court such as restitution of lands and recognition of the Ogiek as an indigenous people were sufficient and effective.

188 See the case of the *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment (Reparations) 23 June 2022 para 150 in which the African Court on Human and Peoples' Rights ordered the Kenyan government to adopt legislative, administrative and other measures to ensure non-repetition of the violations of the rights of the Ogiek. The measures (para 117, 151-155) included (i) compensation (ii) restitution of the lands (iii) recognition of the Ogiek as an indigenous people (iv) establishment of frameworks for dialogue and consultation with the Ogiek on all matters that affect them (v) dialogue and consultation on whether thoses entities awarded commercial operations within the Ogiek lands could continue their operations under lease from the Ogiek or on the basis of a royalty and benefit sharing with the Ogiek (vi) establishment of a Development Fund for the Ogiek.

action.[189] Aristotle's view of justice as "rectificatory" treats parties as equals, as based on the principle of equality before the law,[190] and it determines whether one has done a wrong to another who suffered the wrong or damage and then seeks to restore the wronged party to the position they were before the injustice occurred.[191] In this sense, the role and aim of rectificatory justice is to rectify the wrong suffered by the victim by correcting the injustice.[192]

Based on Aristotle's work, Nozick argues that some past injustices are so great that it is necessary to rectify them.[193] Nozick's idea of rectification of injustice is related to questions such as (i) how to deal with possessions that are unjustly acquired or transferred; (ii) how to deal with historical transgressions or injustices by the state, and (iii) the quantum of compensation due to victims.[194] Nozick's notion of rectification of injustice prescribes that property acquired through violation of the rights of others can only remain with the current holder if the prejudiced people have been compensated for their loss.[195] In this way, rectification of injustices seeks to return the *status quo* to the situation closest to that which would have obtained had the injustice not occurred. Alternatively, rectification and compensatory justice require the counter balancing of benefits for those wrongly injured "which will serve to bring them up to the level of wealth and welfare they would now have if they had not been disadvantaged."[196] A remedial justice approach based on rectification of injustices would therefore prescribe rectification of past transgressions against mine-host communities by improving their welfare and well-being, including compensation for the unjust displacement of the communities.[197]

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189 Maguire and Lewis 2012 8(1) *MqJICEL 25.*

190 Swat 2013 28 *SAPL* 75.

191 Maguire and Lewis 2012 8(1) *MqJICEL 25.*

192 Maguire and Lewis 2012 8(1) *MqJICEL 25.* Adler 2007 155 *University of Pennsylvania Law Review* 1859 refers to this form of justice as corrective and states that it "imposes a duty on the agent who has acted wrongfully, and thereby caused loss to some individual, to repair the loss."

193 Nozick *Anarchy, State and Utopia* 32.

194 Nozick *Anarchy, State and Utopia* 27,152-153.

195 Nozick *Anarchy, State and Utopia* 27,152-153.

196 Nickel "Preferential Policies in Hiring and Admissions: A Jurisprudential Approach" quoted in Swat 2013 28 *SAPL* 78.

197 The Supreme Court of South Africa explained in the case of *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA) para 48 that the "purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken."

The third form of justice, remedial justice, entails more than just compensation. If compensation alone would suffice, it would mean that, once compensation has been paid an otherwise unjust action is acceptable.[198] In the context of damages caused to mine-host communities, remedial justice requires that, in addition to payment of compensation, restitution or restoration of lands expropriated as well as a clean-up of any spillages or contamination must be undertaken. Restitutive or restorative justice would prescribe that natural resources unjustly acquired should be restored to the mine-host communities and, if that is no longer possible, the communities must be compensated or share in the benefits of exploitation of the resources.[199] To this end, the ILO Convention 169 of 1989 and the UNDRIP discussed in chapter 3 below provide remedial justice in cases where land and natural resource rights of indigenous peoples are violated.[200] The UNDROP also provides a remedy for the violation of land and natural resource rights of peasants.[201] The right to redress has also been recognised and elaborated by the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights (ACHPR)[202] in case law involving deprivation of the lands and mineral resources belonging to indigenous and other local communities.

Meaningful engagement has been deployed as a remedy at both the national court level using domestic law[203] and regional court level based on international law.[204] For instance,

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198 Kuehn 2000 30 *ELR* 10694.

199 See A 8 of the *Universal Declaration on Human Rights* GA Res 217A of 1948; A 6, 9(5), 14(6), and 29(3) of the *International Convention on the Elimination of All Forms of Racial Discrimination* U.N.T.S 660, 195, (1965); A 2(c) of the *Convention on the Elimination of Forms of Discrimination Against Women* U.N.T.S 1249, 13 (1979); A 2 of ICCPR; A 39 of the *Convention on the Rights of the Child*; A 7 of the A*frican Charter on Human and Peoples' Rights*; A 25 of the *American Convention on Human Rights*; *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law General Assembly Resolution* 60/147 of 2005 U.N. Doc. A/RES/60/147 (2005).

200 A 15(2) of *ILO Convention* 169 of 1989; A 8(2), 10, 20, and 28 of UNDRIP.

201 A 17 of UNDROP.

202 *Saramaka Peoples v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007) para 128; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Com No 276/2003*; Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* ACHPR Communication ACHPR Com No 155/96 (2001) (Ogoni Case). The cases of *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), *Mabo and Others v Queensland* (No.2) [1992] HCA 23 and *Delgamuukw v British Columbia of Canada* [1997] 3 S.C.R 1010, 7 122 provide notable applications of remedial justice at national level where the courts ordered restoration of traditional lands taken from indigenous and tribal peoples.

203 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 (1) SA 217 (CC).

the Constitutional Court of South Africa deployed meaningful engagement as a remedy for inadequate engagement with affected people. The case of *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*[205] is the first to consider meaningful engagement as a remedy. In this case, the applicants opposed eviction from dangerously dilapidated buildings on the basis that the eviction and relocation to city outskirts would destroy their livelihood, which was dependent on informal trading in the inner city of Johannesburg. The Constitutional Court first ordered the parties, in an interim judgement, to engage with each other meaningfully before eviction of the applicants. The court defined meaningful engagement as a two-way process in which the parties would discuss the proposed eviction in a meaningful way to find a palatable solution.[206] In the court's view, the purpose of meaningful engagement is to determine whether the plight of the affected people could be alleviated by upgrading the buildings to improve the living conditions on the properties. In the final judgement, the court linked meaningful engagement to the right to access to adequate housing with the requirement for involvement of communities in affairs of local government.[207] Meaningful engagement can also be deployed in the context of this study to resolve disputes centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands. For instance, in the case of *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)*[208] the African Court on Human and Peoples' Rights deployed meaningful engagement as a remedy when it ordered the Kenyan government to commence dialogue and consultation with the Ogiek people for purposes of reaching an agreement on whether those granted concessions within the Ogiek lands could continue with their operations through leases or royalty and benefit sharing with the Ogiek who are the land owners.

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204 *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment (Reparations) 23 June 2022 para 117

205 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 (1) SA 217 (CC).

206 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2005 (1) SA 217 (CC) para 14. The court in *Doctors for Life International v The Speaker of the National Assembly* 2006 (6) SA 416 (CC) affirmed that involvement is a powerful tool that brings participatory processes to those previously excluded voices.

207 Section 151(1)(e) of the *Constitution of South Africa*.

208 *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment (Reparations) 23 June 2022 para 117.

2.3 Concluding remarks: Theoretical foundations underpinning the award and utilisation of mineral rights on lands inhabited by mine-host communities

The goal of this chapter was to examine and explain theoretical perspectives that may be viewed as underpinning the award and utilisation of mineral rights on lands inhabited by mine-host communities with particular focus on the involvement in and accrual of socio-economic benefits by these communities. The chapter identified three theories of social justice: distributive, procedural and remedial, under which the award and utilisation of mineral rights on lands inhabited by mine-host communities could be discussed and explained. The chapter examined the content of the three theories and established what they entail in the context of mine-host community involvement and benefit accrual from mineral extraction.

The chapter examined the question regarding the conception of distributive justice that would ensure the ideal distribution of resources among host communities, mining companies and other citizens. It was established that the distributive justice strand embraces utilitarian, egalitarian and libertarian perspectives. The utilitarian perspective of distributive justice advances the greatest happiness for the greatest number of citizens even if it means that a few must be sacrificed. It was demonstrated that this perspective would legitimise the exploitation of mineral resources on the lands inhabited by mine-host communities for the benefit of the whole nation even if such exploitation negated the well-being of the communities. For that reason, utilitarianism was found to be unsatisfactory when it comes to the welfare and well-being of mine-host communities, as it does not support their involvement and benefit accrual from mineral extraction on their lands. In terms of the libertarian perspective of distributive justice, the chapter showed that inequalities of resources or wealth are permitted if these are not brought about by prejudicing others and where resources have been acquired by producing something through one's labour or using resources not belonging to anyone else. In this way, libertarianism would legitimise the exploitation of minerals by mining companies on lands inhabited by mine-host communities without the communities being involved or accruing benefits if the minerals are adjudged to belong to someone else who is not the communities, such as the state. This chapter therefore confirmed that libertarianism does

not support involvement and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit. The egalitarian perspective of distributive justice prescribes that the government must show equal concern for all its citizens without sacrificing some for the benefit of others. All citizens are to have an equal distribution of benefits, and inequality is only permissible where it is entertained for the benefit of the least advantaged. Consequently, the egalitarian perspective legitimates the re-distribution of wealth and would ensure that mine-host communities are involved and accrue maximal benefits from mineral extraction on their lands, since they would then be viewed as the ones most affected by the mining operations. Significantly, in the context of mineral extraction on lands inhabited by mine-host communities, a just distribution of the costs and rewards of mineral extraction as based on the egalitarian perspective is one in which these communities would not bear a disproportionate share of the burdens. Instead, they would be accorded socio-economic benefits commensurate with the burdens that they have to bear due to mineral extraction on their lands. In this way, the costs and benefits of mineral extraction on their lands would be equalised. Therefore, the egalitarian idea of justice connects with the quest for mine-host community involvement in and benefit accrual from mineral extraction on their land.

The chapter also discussed the contribution of the second form of justice, namely procedural justice, to the understanding of the question of mineral extraction on lands inhabited by mine-host communities. It was established that an approach based on pure procedural justice would prescribe effective involvement and participation by citizens in decision-making on matters affecting them. This would advance consultation, involvement and participation of mine-host communities in matters centred on mineral extraction on the lands they inhabit.

Lastly, the chapter assessed that which the third form of justice, remedial justice, would bring to mine-host communities when faced with mineral extraction on the lands they inhabit. The chapter established that, where the rights of mine-host communities are violated and their lands taken and exploited without their involvement and accrual of benefits, remedial justice is necessary. It does not only prescribe restitution of the lands

and resources but holds that compensation should be paid for damages caused to mine-host communities.

With the theoretical foundation laid, it is necessary to discern their existence and influence in requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction. The elements of distributive, procedural and remedial justice discussed in this chapter can be discerned in international and regional regulatory instruments, which will be discussed in chapter 3 and chapter 4.

CHAPTER 3

INTERNATIONAL REGULATORY INSTRUMENTS RELATING TO INVOLVEMENT AND BENEFIT ACCRUAL BY MINE-HOST COMMUNITIES FROM MINERAL EXTRACTION

> Natural resources are neither a curse nor a blessing; they are simply a source of opportunity. They can be used for tremendous good or they can be wasted.
> (Former UN Secretary-General Kofi-Annan, addressing the UN Security Council, 19 June 2013)

3.1 Introduction

The reality that mineral extraction is often conducted without much concern for mine-host communities has been canvassed in the preceding chapters. Mine-host communities endure the disproportionate social, economic and environmental burdens associated with mineral extraction on the lands they inhabit, while benefits accrue to mining companies and a few political leaders and sometimes to a small group within a community.[209] To ensure that mine-host communities are involved in decisions relating to mineral extraction on their lands and derive benefits from it, the country's constitutional, policy and legislative frameworks should provide for distributive, procedural and remedial justice.[210]

International law is indispensable to any endeavour at national level to achieve distributive, procedural and remedial justice in the award and utilisation of mineral rights, given its ability to establish legal rights and obligations concerning the utilisation of natural

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209 Pring, Otto and Naito 1999 17 (2) *JENRL* 175.

210 At least four expressions can be identified in international regulatory instruments requiring involvement and benefit accrual by affected communities from mineral extraction on the lands they inhabit. These are (i) "participation in," which entails the active contribution of host communities in processes and decision making, policy formulation and project implementation, thereby achieving procedural justice; (ii) "contribute to" or "consultation," requiring the active involvement of the host communities, thereby achieving procedural justice, (iii) "enjoyment of," requiring equitable sharing and distribution of benefits, thereby achieving distributive justice for host communities and (iv) "redress for," requiring effective remedies or redress of violations through compensation and restitution among other means, thereby achieving remedial justice. De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 25.

resources.[211] The application of international law is a legislated obligation in the *Constitution of Zimbabwe*. Importantly, sections 34 and 327 of the *Constitution of Zimbabwe* require the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.[212] The role of international law is further recognised in section 46(1)(c)(e), which requires courts and tribunals to consider international law, treaties and conventions to which Zimbabwe is a party when interpreting the Bill of Rights. Judicial officers are especially encouraged to acquaint themselves with developments in international law[213] and they are required, when they interpret legislation, to adopt any reasonable interpretation that is consistent with customary international law, treaties, conventions and agreements that are binding on Zimbabwe.[214] Given this background, it is necessary to critically analyse international regulatory instruments relevant to mine-host community involvement in and benefit accrual from mineral extraction. The analysis is expected to provide a benchmark or dashboard of international regulatory instruments against which Zimbabwe's constitutional, policy and legislative frameworks can be measured.

To provide a platform for establishing the categories of international norms and principles that can be used to calibrate Zimbabwe's constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction, this chapter first examines some basic sources of international law. This is followed by an exposition of the notion of mine-host communities and its connection with people or peoples in international law. International regulatory instruments relevant to mine-host community involvement in and benefit accrual from mineral extraction are then discussed under three strands namely, the sovereign rights approach, the human rights approach and the environmental rights and sustainable development approach. The chapter closes with concluding remarks on the international regulatory instruments that pertains mine-host community involvement and benefit accrual from mineral extraction on their lands.

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211 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 25. See Dugard J *International Law: A South African Perspective* 336-340 for a discussion of the relevance of international human rights instruments in South African law.

212 Section 12(b) of the *Constitution of Zimbabwe* also makes respect for international law part of the foreign policy of Zimbabwe.

213 See section 165(7) of the *Constitution of Zimbabwe*.

214 See sections 326 (2) and 327(6) of the *Constitution of Zimbabwe.*

3.2 Sources of international law

Scholars explain two opposing opinions on the sources of international law.[215] On the one hand, one finds the view that international norms or rules are to be considered as "law" that is binding on states if they arise from treaties or from customary norms and this is generally referred to as "hard law".[216] This view tends to exclude from the list of sources of international law further potential sources that exist outside treaties and customary international law. On the other hand, one finds the view that also embraces other instruments that are considered as "soft law," such as declarations of the United Nations General Assembly, to act as sources of international law.[217] Abott and Snidal,[218] who advocate this second view, consider international regulatory instruments to be arrayed along a hard-soft law continuum that displays different hard or soft characteristics, while states utilise both, depending on context.

The most authoritative statement on the sources of international law is Article 38 of the Statute of the International Court of Justice (ICJ), which identifies treaties, customary international law, general principles of law and judicial decisions and the writings and teachings of eminent jurists to be the sources of international law.[219] Although the Statute of the ICJ does not mention international declarations and guidelines of the United Nations and its organs to be sources of international law, these instruments may still lead to international obligations and commitments.[220] In this way they abet mine-host

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215 See Lepard *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* 100-101; Abott and Snidal 2000 54 (3) *Int'L Org* 421, 424, 436; Shaffer and Pollack 2010 *MLR* 707-708.

216 Lepard *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* 100-101. Lepard further asserts that "this positivist doctrine results from an emphasis on state autonomy and sovereignty and the notions that only states can create international law and that states can be bound solely by their own free consent."

217 See Abott and Snidal 2000 54 (3) *Int'L Org* 421, 424, 436; Shaffer and Pollack 2010 *MLR* 707-708.

218 Abott and Snidal 2000 54(3) *Int'L Org* 421, 424, 436; Shaffer and Pollack 2010 *MLR* 707-708.

219 A 38(1) of the *Statute of the International Court of Justice* (ICJ) states that "the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d)subject to the provisions of A 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

220 Villaroman 2011 29 (1) *NQHR* 20; Lichtenstein 2001 35(4) *INT'L L.* 1434, 1440 calls the hard and soft law dichotomy unnecessary since it is not the softness or hardness of a norm that matters: rather, what

communities by establishing rights such as permanent sovereignty over natural resources, upon which claims for involvement and benefit accrual from mineral extraction can be secured.

3.2.1 Treaties

The legal force of treaties is based on the international law principle of *pacta sunt servanda,* which means that agreements must be respected and fulfilled.[221] This principle is codified in Article 26 of the *Vienna Convention on the Law of Treaties* of 1969[222] which asserts that treaties are binding upon the parties and must be performed by them in good faith.[223] For effective implementation of international treaties, section 34 of the *Constitution of Zimbabwe* requires the state to ensure that "all conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law."[224] Section 327(2) of the *Constitution of Zimbabwe* directs that such instruments must be approved by parliament and incorporated into domestic law through legislation in order to be binding. As a corollary to the principle of *pacta sunt servanda*, states may not invoke the provisions of internal law as justification for failure to comply with their obligations in terms of a treaty to which they are a party.[225] This tenet is important in the context of this study as it precludes Zimbabwe from justifying failure to recognise and protect the rights of its

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matters is the process or methodologies that work "to achieve greater adherence by states to legitimate internationally agreed norms."

221 Wehberg 1959 53 *AM. J. INT'i L.* 780-782.

222 Although both Zimbabwe and South Africa are not signatories to the *Vienna Convention on the Law of Treaties* of 1969 1155 UNTS 331 (1969), the principle of *pacta sunt servanda* is applicable to treaties signed by the two states since it is a general principle of international law. Wehberg 1959 53 *AM. J. INT'i L.* 782-783 asserts that *pacta sunt servanda* is part of customary international law and therefore binding on both Zimbabwe and South Africa.

223 In the *Nuclear Test Cases (New Zealand; Australia v France)*, 1974 I.C.J. 253 para 46 the ICJ held that "One of the basic principles governing the creation and performance of legal obligations… is good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation. Thus, interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."

224 In addition, section 46(1)(c) of the *Constitution of Zimbabwe* states that Zimbabwean courts, tribunals and administrative forums and bodies mandated to interpret the Declaration of Rights enshrined in the *Constitution of Zimbabwe* "must take into account international law and all treaties and conventions to which Zimbabwe is a party" while they may consider foreign law. The term "must" in section 46(1)(c) of the *Constitution* implies that it is peremptory for the courts to consider international law when construing the constitutional bill of rights while the term "may" entails that it is optional.

225 See also A 27 of the *Vienna Convention on the Law of Treaties* of 1969.

citizens (mine-host communities included) to involvement in and benefit accrual from mineral extraction because of provisions in its domestic legislation.

3.2.2 Customary international law

Customary international law is that source of international law that is based on the uniform and consistent conduct of states undertaken by them in the conscious belief that their action is in conformity with law or that they are required to act that way.[226] Dinstein[227] explains that, once formed, customary international law is binding without exception. It follows that, since customary international law binds all states, it contributes to the general legal framework regulating the exploitation of mineral resources on the lands inhabited by mine host communities. Only two exceptions to this general binding rule exist. The first exception is that a local or regional customary law only binds those states who are part of the identified group.[228] The second exception is that a state that has persistently objected to being bound by a rule that has eventually crystallised into a rule of customary international law will not be bound by the rule when it finally becomes customary international law.[229]

Article 38(1)(b) of the Statute of the ICJ states that determining the existence of a rule of customary international law must be based on "evidence of a general practice accepted as law." There must be an established state practice, that is, an objective requirement, and states should have believed that such behaviour is required of them under international law (subjective requirement).[230] The subjective element is referred to in international law as *opinio juris.*[231] The ICJ has also observed that treaty obligations may evolve into

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226 Olufemi 1995 44 (3) *ICLQ* 501.

227 Dinstein 2006 322 *Recueil des Cours* 2344.

228 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 33.

229 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 33.

230 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 34.

231 Pertaining the objective requirement, the ICJ in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* I.C.J Reports 1986 14 para 186 states that, for formation of customary international law, the state practice or conduct required does not have to be in rigorous conformity with the rules but rather generally consistent. Referring to the subjective element, the ICJ in *The North Sea Continental Shelf Cases* (Federal *Republic of Germany v Denmark*;

general customary international law.[232] Customary international law can also be codified in a treaty. It is interesting to note that section 326 of the *Constitution of Zimbabwe* states that customary international law is part of the law of Zimbabwe. Therefore, in Zimbabwe, there is no need for incorporation of customary international law into domestic law through a statute. The courts are nonetheless obliged in terms of section 326 of the *Constitution of Zimbabwe* to adopt a reasonable interpretation of legislation that is consistent with customary international law.

3.2.3 General principles of international law

General principles of international law[233] are also recognised as sources of international law in terms of the Statute of the ICJ.[234] General principles of international law are particularly useful where there is a lacuna in the law, that is, where the court cannot find rules in a treaty or customary international law to underpin its decision.[235]

3.2.4 United Nations Security Council and General Assembly resolutions and declarations

While resolutions of the United Nations Security Council may be binding,[236] the General Assembly resolutions and declarations are often characterised as non-binding soft law,[237]

Federal Republic of Germany v Netherlands) ICJ Reports 1969 4 para 77 states that "not only must the acts concerned amount to a settled practice, but they must also be such, or to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need for such a belief, [that is], the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitates*."

232 *The North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, *ICJ Reports* 1969 4 paras 71-74.

233 Schlesinger 1957 51(4) *AM.J.INT'L.L* 739 identifies general principles of international law as "a core of legal ideas which are common to all civilised legal systems." Bassiouni M.C A 1990 11(3) *MJIL* 771 explains that general principles of international law consist of "a common core of identifiable legal principles …found in the underlying or posited principles or postulates of national legal systems of international law."

234 See A 38 of the Statute of the ICJ.

235 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 41. A 21 of the *Rome Statute of the International Criminal Court* of 1998.

236 United Nations Security Council Resolutions are binding by virtue of A 25 of the *Charter of the United Nations* which states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

237 Chinkin 1989 38 *Intl & Comp LQ* 850; Klabbers 1998 67 *NJIL* 383.

although others attribute legal effect to these nonetheless.[238] Those who advocate the binding effect of General Assembly resolutions point to Article 31 of the *Vienna Convention on the Law of Treaties* of 1969[239] as affirmation that soft law documents can be used to interpret and clarify state obligations and establish the ordinary meaning of vague or indefinite provisions of treaties.[240] The United Nations General Assembly resolutions are also important in that they often indicate the direction of future development of international law and indicate the acceptance by states of certain principles and standards for their future behaviour. These instruments often form the basis or are endorsed through incorporation into treaties and/ or graduate into customary international law.[241]

3.2.4.1 Resolutions of the United Nations Security Council

The resolutions of the United Nations Security Council, known also as the Security Council, derive legal force from Article 25 of the *Charter of the United Nations* of 1945 which states that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."[242] To determine whether measures taken by the Security Council are legally binding, there is a need to examine the language used, objectives and context of the resolution.[243] For instance, Security Council

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238 Villaroman 2011 29 (1) *NQHR* 20; Barelli 2009 58(4) *Intl & Comp LQ* 957-983; Shaw *International Law* 5th ed 108.

239 Article 31 of the *Vienna Convention on the Law of Treaties* of 1969 deals with the interpretation of treaties and provides that: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

240 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 38.

241 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 38.

242 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 39. The Security Council has the competence to adopt binding resolutions under A 24 and A 25 of the *Charter of the United Nations*.

243 In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, I.C.J

resolutions punctuated by the words "decides or demands" shows that the measures are meant to be legally binding while words such as "urges and request" mean that no binding effect is intended.[244]

Security Council resolutions have addressed permanent sovereignty over natural resources in cases centred on mineral extraction. Examples include the *United Nations Security Council Resolution* 1457 of 24 January 2003 regarding the Democratic Republic of the Congo (the DRC),[245] which affirms permanent sovereignty over natural resources as a principle of customary international law.[246] Most importantly, the Security Council took enforcement measures under chapter 22 of the *Charter of the United Nations* to restore the DRC's sovereignty over its natural resources, including gold and wildlife as referred to in *United Nations Security Council Resolution* 2198 of 29 January 2015.[247]

3.2.4.2 United Nations General Assembly Resolutions/ Declarations

The question of whether United Nations *General Assembly Resolutions* constitute a source of international law with binding effect has been contested.[248] Article 38(1) of the Statute of the ICJ provides a list of sources of international law[249] and there is no express mention of resolutions of the United Nations General Assembly in that Article. The general view is that United Nations *General Assembly Resolutions* are not legally binding on member states but merely advisory, recommendatory, or hortatory.[250]

Reports 1971, 53 para 114, the ICJ indicated that the binding nature of Security Council Resolutions is to be determined through careful analysis of the language used "having regard to the terms of the resolution to be interpreted, the discussions leading to it, the *Charter* provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."

244 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 39.

245 UN Doc S/RES/1457.

246 See the *United Nations Security Council Resolution* 1521 of 22 December 2003 on Liberia UN Doc S/RES/1521 which affirms state sovereignty over natural resources and the need to ensure that the resources are used for the benefit and development of the people. See also Report by the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the DRC UN Doc S/2002/1146.

247 UN Doc S/RES 2198 paras 20-26.

248 Crowford *The Creation of States in International Law* 113; Sands and Klein *Bowett's Law of International Institutions* 28; Sloan 1987 58 *BYIL* 39.

249 Shaw *International Law* 70-71.

250 Schwebel 1979 73 *Proc. Of the Am. Soc'y of Int'l L.* 301; Castaneda *Legal Effects of United Nations Resolutions* 2-3, 197; *South-West Africa Cases (Ethiopia v South Africa) (Liberia v South Africa)* Second

Objections to accord legal force to United Nations General Assembly Resolutions include the argument that binding states to these resolutions will circumvent traditional treaty-making processes, which include ratification.[251] This position is based on the fact that the United Nations General Assembly does not have legislative powers, since the *Charter of the United Nations* does not constitute the General Assembly as a world legislature or parliament.[252] Articles 10, 11 and 13 of the *Charter* only confer broad powers to the General Assembly to discuss and make recommendations, but they do not bestow the necessary powers to enact or create international law.[253] Therefore, since a recommendation of the General Assembly only expresses an intention, it cannot be binding on member states.

There are, however, exceptions to the general view stated above. These include instances where the resolution concerned provides for internal administrative matters of the United Nations General Assembly such as budgetary matters, elections and membership. Legal

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Phase 1966 37 I.L.R 243. The case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 26 states that section 39(1)(b) of the *Constitution of South Africa* obliges the courts "to consider international law as a tool to the interpretation of the Bill of Rights." Kruger 2019 9 *Constitutional Court Review* 475 affirms that section 39(1)(b) of the *Constitution of South Africa* obliges the courts to consider both binding and non-binding international law. See also De Wet and Du Plessis 2010 10(2) *AHRLJ* 347. The Constitutional Court of South Africa in *S v Makwanyane* 1995 (3) SA 391 (CC) paras 34-35 held that, while the courts are not obliged to follow non-binding international law, they must look to international law for guidance when interpreting the Constitutional Bill of Rights. The Court explains that "public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]." This was further endorsed by the Constitutional Court of South Africa in the case of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 26-33.

251 Schwebel 1979 73 *Proc. Of the Am. Soc'y of Int'l L.* 301.

252 Falk 1966 60 (4) *AM. J. INT'LL* 783. In 1945, at the drafting session of the *Charter of the United Nations*, the Philippines proposed that the General Assembly be vested with legislative authority such that its resolutions would become legally binding upon approval by a majority vote in the Security Council. States rejected the proposal by a vote of 26 to 1.

253 Yturriaga 1964 *YBWA* 178, 209-212. For instance, A 13 (1) (a) of the *Charter of the United Nations* provides that the United Nations General Assembly may initiate studies and make recommendations for progressive development and codification of international law. Kerwin 1983 32 *DUKE L. J.* 876 899 argues that United Nations General Assembly resolutions remain too unreliable to be regarded as definitive sources of international law, particularly because they lack the characteristics of a treaty and therefore must be denied any obligatory or legal force.

effect attaches to these specific instances of internal and administrative matters of the General Assembly.[254] In addition, legal effect attaches to a General Assembly resolution where it restates, elucidates[255] or substantially embodies pre-existing rules of international law and where it has crystallised into a rule of customary international law.[256] In support of giving binding effect to United Nations General Assembly resolutions, Falk[257] argues that Article 38(1) of the Statute of the ICJ, which provides sources of international law, should not be confused with the creation of international law. Article 38(1) is limited to enumerating sources of international law that the ICJ must apply in determining international disputes.[258] A gap is therefore left for recognition of other sources of international law such as General Assembly resolutions that are not enumerated in the Statute of the ICJ. As a consequence, when it comes to indicating *opinio juris* on the part of member states, United Nations General Assembly resolutions may supply the missing elements in a line of existing practice and thus transform usage into a custom or they may inspire practice which will develop into law.[259] Brownlie[260] suggests that it would be erroneous to completely ignore United Nations General Assembly resolutions and view

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254 Akehurst *A Modern Introduction to International Law* 3rd ed 44; Wallace *International Law: A Student Introduction* 28.

255 Villaroman 2011 29 (1) *NQHR* 20-21 argues that the usefulness of United Nations *General Assembly Resolutions* "lies in being authoritative elaborations of existing legal norms as understood by States." In Villaroman's view, the fact that United Nations General Assembly resolutions are often adopted with unanimity or near unanimity of voting states creates a legitimate expectation that states in their actions will comply with the dictates of the resolutions.

256 Schachter "The UN Legal Order: An Overview" 5 concluded that United Nations *General Assembly Resolutions* may be viewed as authoritative evidence of the existence of a binding international law either on the basis of being, "(a) 'authentic' interpretations of the United Nations Charter as agreed by all the parties (b) as affirmations of recognised customary law and (c) as expressions of general principles of law accepted by states." Villaroman 2011 29 (1) *NQHR* 21 says that United Nations General Assembly Resolutions are authoritative aids for treaty interpretation and evidence of *opinio juris* that is important for the formation of customary law. Akehurst *A Modern Introduction to International Law* 3rd ed 19 explains that the value of United Nations General Assembly resolutions is found in their being evidence of customary international law since they constitute state practice and reflect the views of states voting in favour of the resolution. See Ladan *Introduction to Jurisprudence: Classical and Islamic* 147; *South West Africa Cases* (1966) ICJ Rep. 292.

257 Falk 1966 60 (4) *AM. J. INT'LL* 782.

258 Falk 1966 60 (4) *AM. J. INT'LL* 782.

259 Sloane *United Nations General Assembly Resolutions in Our Changing World* 71-75.

260 Brownlie 1979 162 *Recueil des Cours* 245, 260; Sornarajah *The International Law on Foreign Investments* 3rd ed 446; Crawford *Brownlie's Principles of Public International Law* 8th ed 24 states that the practice of international organs and resolutions of United Nations Organs (such as the General Assembly) that relate to legal questions are important elements for the formation of customary international law. The preamble of the *United Nations General Assembly Resolution* 3232 of 1974 on *Review of the Role of the International Court of Justice* says that it "recognises that the development of international law may be reflected, *inter alia* by declarations and resolutions of the General Assembly which may to that extent be taken into consideration by the ICJ."

them as non-binding, as the General Assembly is the vehicle through which the "formulation and expression of the practice of states in matters pertaining to international law" are manifested. Resolutions adopted after debate and voting, therefore, may constitute evidence of customary international law.[261]

International courts and tribunals have not questioned the notion that United Nations General Assembly resolutions are to be viewed as state practice and hence as evidence of custom. In the case of *Military and Para-military Activities in and Against Nicaragua (Nicaragua v USA (Merits))*,[262] the ICJ gave considerable weight to United Nations General Assembly resolutions and relied on these to articulate the law on the use of force and intervention. The ICJ held that "*opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the parties and the attitude of states towards certain General Assembly resolutions."[263] An affirmative vote by a state may therefore be understood to amount to acceptance of the validity of the rules declared in a General Assembly resolution.[264]

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261 N'gambi 2015 12 (2) *Loy.U.Chi.Int'l L. Rev* 158; Akinsanya 1978 7 (2) *J. INT'L STUD.* 124, 125; Bleicher 1969 63 *AM. J. INT'LL.* 444.

262 *Military and Para-military Activities in and Against Nicaragua (Nicaragua v USA (Merits)*, (1986) ICJ Rep.

263 *Military and Para-military Activities in and Against Nicaragua (Nicaragua v USA (Merits)*, (1986) ICJ Rep 14.

264 Affirming this position, the ICJ in the *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion (Nuclear Weapons Case)* (1997) 35 I.L.M 809, 1343 (1996) ICJ Rep 226 stated that "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this [...], it is necessary to look at its content and conditions of its adoption; it is also necessary to see whether *opinio juris* exists as to its normative character. A series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule." The tribunal in *Texaco Overseas Petroleum Company and California Asiatic Oil Company v The Government of the Libyan Arab Republic* 1978 17 I.L.M 1 held that United Nations *General Assembly Resolution* 1803 *on Permanent Sovereignty over Natural Resources* reflected the tenets of customary international law. Lauterpacht J also highlighted the value of United Nations General Assembly resolutions in the *Voting Procedures on Questions Relating to Reports and Petitions Concerning the Territory of South West Africa* (Advisory Opinion) 1955 67 ICJ Rep 112, as follows "[I]t would be wholly inconsistent with the sound principles of interpretation as well as with the highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly – one of the principal instrumentalities of the formation of the collective will and judgement of the community of nations represented by the United Nations, and to treat them […] as nominal, insignificant, and having no claim to influence the conduct of the members." In *Libyan American Oil Co. (LIAMCO) v Government of the Libyan Arab Republic*, 20 I.L.M. 1, 53 (1981), the tribunal opined that "the said resolutions, if not a unanimous source of law, are evidence of the recent dominant trend of international opinion concerning the sovereign right of States over natural resources." Further, the ICJ in the *Certain Expenses of the United Nations* (A 17(2) *Advisory Opinion* (1962) ICJ Rep 151 was of the view that United Nations General Assembly resolutions play an important role where the Security Council is unable to reach a unanimous decision. This was buttressed by the *United Nations General*

3.3 The notion of mine-host communities and its connection with people or peoples in international law

Minerals are land-based resources. Consequently, mining is conducted on land as either underground or surface operations. This makes remote and under-developed rural communal areas with substantial land, suitable sites for prospecting and mining operations.[265] It is important to differentiate between the three communities that are most impacted by mining operations. These are mine-host communities, mining communities and labour-sending communities. Mine-host communities can be identified as those hosting the mining operations, that is, those communities that either own the land or reside on and have interests or rights in the land on which mining operations are conducted.[266] A mine community is identified in this study as the one immediately surrounding or located adjacent to the mine-host community and, just as in the case of the mine-host community, is impacted by the mining operations.[267] Labour-sending communities are those found in areas from which mining operations recruit most of their labour, particularly unskilled labour.[268]

This study focuses on mine-host communities and the term is used regardless of whether they are local, rural or traditional communities and other vulnerable marginalised communities such as indigenous communities or ethnic or racial-minority communities

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Assembly Resolution 377 (V) *(Uniting for Peace Resolution)* UN GA Res 377 (V) U.N Doc. A.1775 (1950) para 1 which specifically grants the General Assembly power to consider any matter which has failed to reach a unanimous decision in the Security Council.

265 See MMSD: *Breaking New Ground* 2002 http://pubs.iied.org; Anaya "Extractive Industries and Indigenous Peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* UN Doc. A/HRC/24/41(2013) para 1; Para 4.7 of the *Assessment of the Broad-Based Economic Empowerment Charter for the South African Mining Industry (Mining Charter)* 2015 http://www.dmr.gov.za; Dias 1999 6 *SAJELP* 67.

266 See Humby 2016 133(2) *South African Law Journal* 316–351 for an exposition of the term community in relation to those impacted by mining operations. See also Heyns 2019 12(2) *Law and Development Review* 561-593.

267 The definition of mine community in the present study is different from that provided in South Africa's *Mineral and Petroleum Resources Development Amendment Regulations* 2020 (MPRDAR 2020) which defines a mine community as encompassing one where mining takes place as well as adjacent communities and major labour sending areas.

268 South Africa's *Mineral and Petroleum Resources Development Amendment Regulations* 2020 (MPRDAR 2020) identifies labour sending communities as those areas where most mineworkers reside permanently from time to time.

often inhabiting communal lands.[269] These communities are adversely impacted by mineral extraction through relocations, environmental pollution and socio-economic ills associated with mining.[270] Moreover, processing of mineral ores away from the remote locations where mining operations occur and the technological advances in mineral exploration and extraction which entail less usage of local labour and equipment all culminate in less investment by mining companies in local infrastructure, local supply chains and the local labour force, with diminished gains accruing to mine-host communities.[271]

The adverse impacts of mining mentioned above have significantly changed the balance of costs and benefits from mineral extraction when considered at the mine-host community level and require a reconsideration of the relations between mining companies and the communities.[272] The need for change in these relations is further underscored by the growing awareness among local communities of their rights relating to involvement in decision-making and accrual of socio-economic benefits.[273] For the mine-host communities, involvement in decision-making entails meaningful engagement or involvement,[274] consultation[275] and participation in determining the award and utilisation of mineral

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269 The *Constitution of Zimbabwe Amendment* (No. 20) Act of 2013 defines communal land to mean "land set aside under an Act of Parliament and held in accordance with customary law by members of a community under the leadership of a Chief."

270 Heyns "Empowerment through Mine Community Development: How the Politics of Development Perpetuate Poverty in Mining Areas – A legal Theoretical Analysis" LLD Thesis, University of Cape Town (2020), 23-32.

271 MMSD: *Breaking New Ground* 2002 http://pubs.iied.org.

272 MMSD: *Breaking New Ground* 2002 http://pubs.iied.org.

273 Mine-host communities in Zimbabwe are increasingly forming community trusts to engage mining companies and the government and protect their rights through the courts. See *Malvern Mudiwa and Others v Mbada Mining Private Limited and Others* HC 6334/2009; *Marange Development Trust v The District Administrator Mutare District and Others* HC12237/2016; *Marange Development Trust v The Zimbabwe Consolidated Diamond Company (Pvt) Ltd* HC 902/2017; *The Trustees of Arda Transau Relocation Development Trust v The Minister of Local Government Public Works and Others* HC 68/2018.

274 Hill *Environmental Justice: Legal Theory and Practice* 3rd ed, 8 affirms that meaningful consultation encompasses four elements, namely (i) participation by potentially affected people in the decision-making process pertaining to an activity that will fact them (ii) the contribution by the public must be able to influence the final decision (iii) the concerns raised by potentially affected people must be considered in the decision-making process and (iv) decision-makers must invite potentially affected people and ensure their involvement in the decision-making process.

275 The court in *Maqoma v Sebe NO and Another* 1987 (3) ALL SA 414 (CK) 490C-E explains that "consultation in its normal sense, without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate." The Supreme Court of South Africa in *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) paras 43-44 clarified that the obligation to consult demands that the person entitled to be consulted be given an adequate opportunity to exercise the right. However, where

resources, including the planning, designing, implementation and evaluation of mineral projects on the lands that they inhabit. Decision-making in this sense entails determining whether to allow a mining project on the land and the terms and conditions under which it can be undertaken.

The terms "people" and "peoples" appear frequently in this study. It is important to define these terms at the outset and establish their connection with mine-host communities as well as natural resources such as minerals. The New Shorter Oxford English Dictionary[276] states that the term "people" can be used as a collective noun to refer to a specific group, nation, tribe or community. It further asserts that the term "peoples" is the plural of the word people.[277] Consequently, the term "peoples" can also be used to refer to a collective in the form of a nation, tribe or community sharing a common identity,[278] for instance indigenous peoples.[279] It can be gleaned from the dictionary definitions that the terms "people" and "peoples" can be used interchangeably to refer to collectives instead of the individual, that is, the nation, citizens, a group, a tribe or a community within a nation. Considered in this way, the terms "people" and "peoples" include mine-host communities within their ambit since they are a part of the citizens of a nation or a group within a nation.

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those entitled to be consulted disregard the opportunity when provided, they cannot complain that they were denied the right to be consulted.

276 *The New Shorter Oxford English Dictionary* 5th ed 1993.

277 *The New Shorter Oxford English Dictionary* 5th ed 1993.

278 See also the *Final Report and Recommendations of the International Meeting of Experts on Further Study of the Concept of the Rights of Peoples,* UNESCO, Doc. SHC-89/CONF.602/7 (1990) 8 which defines "peoples" broadly as a group with common characteristics including common historical tradition, linguistic, racial, religious, cultural identity or common economic life and who are conscious or willing to be identified as a people.

279 Pertaining the contentious concept of "indigenous peoples" see Cobo "*Study of the Problem of Discrimination Against Indigenous Populations* UN. Doc E/CN.4/Sub.2/1986/7. The *Constitution of Zimbabwe Amendment* (No. 20) Act 2013 does mention the term indigenous peoples or indigenous communities but nonetheless refers to indigenous Zimbabweans in section 295(1) without defining it. The term indigenous is thus generally used in Zimbabwe to refer to people of African descent whose predecessors inhabited the country prior to colonisation by the British in 1890. This can be deduced from the *Access to Genetic Resources and Indigenous Genetic Resource-Based Knowledge* (Regulations) *Statutory Instrument* 61 of 2009, which defines an indigenous community as one comprising persons who inhabited Zimbabwe continuously since the time before the year 1890 and whose members share the same language or dialect or the same cultural values, traditions or customs." Even though this is a contested view, the Tshwa San, Doma, Shangaan, Tonga and Nambya are groups in Zimbabwe who self-identify as indigenous people. See Hitchcock, Begbie-Clench and Murwira 2016 http://www.iwgia.org. See also Desmet 2011 *Indigenous Rights Intertwined with Nature Conservation* 7 for a discussion of the African notion of indigenousness, and the ACHPR and and IWGIA "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities" 2005 http://www.iwgia.org which considered all Africans as indigenous to Africa.

The recognition of mine-host communities as part of the citizens of a nation establishes a connection between mine-host communities and "people" or "peoples" when observed in international and regional regulatory instruments. This link entails that the rights that accrue to "people" and "peoples" in international and regional regulatory instruments also accrue to mine-host communities. In fact, mine-host communities claim those rights based on their being a "people" and "peoples."[280] For instance, paragraph 1 of the *United Nations General Assembly Resolution* 1803 on *Permanent Sovereignty over Natural Resources* of 1962[281] provides that permanent sovereignty over natural resources belongs to peoples and nations.[282] The same paragraph of the resolution states that the permanent sovereignty of peoples and nations over natural resources must be exercised in the interest of "national development and of the well-being of the people of the State concerned."[283] It can be observed that the terms "people" and "peoples" are used interchangeably in paragraph 1 of the *United Nations General Assembly Resolution* 1803 and in that context, both terms refer to citizens as opposed to the state or nation which is mentioned separately. The same can be said regarding Article 21(1)(2) of the *African Charter on Human and Peoples' Rights* of 1982.[284] The African Charter does not define the term people or peoples, but it states in Article 21(1)(2) that:

> 1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
> 2. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

It should also be mentioned that while there is no doubt that the drafters had both peoples and people as well as states in mind, there is no consensus on the meaning of the term "peoples" as contained in paragraph 1 of the *United Nations General Assembly*

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280 See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Com No 276/2003; *African Commission of Human and Peoples' Rights v The Republic of Kenya* (26 May 2017) (Ogiek Case) App. No 006/2012.

281 *United Nations General Assembly Resolution* 1803 on *Permanent Sovereignty over Natural Resources* of 1962 U.N. Doc A/5217 (1962).

282 Para 1 of the *United Nations General Assembly Resolution* 1803 on *Permanent Sovereignty over Natural Resources* of 1962 U.N. Doc A/5217 (1962).

283 Para 1 of the *United Nations General Assembly Resolution* 1803 on *Permanent Sovereignty over Natural Resources* of 1962 U.N. Doc A/5217 (1962).

284 *African Charter on Human and Peoples' Rights*, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

Resolution 1803 on *Permanent Sovereignty over Natural Resources* of 1962 since the term is open-ended, thus admitting a multitude of meanings.[285] Some scholars conclude that "peoples" mean those still under colonial domination,[286] a portion of the population such as indigenous peoples or a local community, the whole population, all citizens or the state.[287] For Miranda,[288] permanent sovereignty over natural resources belongs to people generally and indigenous peoples. Carleton[289] narrows the scope and argues that minerals and other natural resources belong to the people on whose land such resources are found. De Jong[290] explains that peoples are not a mere group of individuals but a community with a separate identity distinct from its members and the meaning of the term peoples may depend on context. For instance, in the context of the *Charter of the United Nations* of 1945, the use of the term peoples in the preamble and Articles 1(2), 55 and 73 may be interpreted to mean those within the member states, in non-member

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285 Visser 1988 21(1) *CILJSA* 76, 84, 86.

286 Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* 9 explains that "the term 'peoples' was originally meant to refer to those peoples who had not yet been able to exercise their right to political self-determination." Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 53 argues that the permanent sovereignty of peoples over natural resources does not end with the attainment of political independence. For instance, the *African Charter on Human and Peoples' Rights* of 1982 was adopted by the majority of African states that had already attained independence, yet the *Charter* utilises the term peoples when vesting the right to permanent sovereignty over natural resources. See Marie 1986 7 *HUM. RTS. L.J.* 200-201.

287 Aladeitan 2012 *T. Marshall L. Rev* 190. Carleton 2014 21 *IJMGR* 135; Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 52; Vinuales 2011 17 *Global Governance* 200. Miranda 2012 45(3) *Vand. J. Transnat'l L. 804*-805 explains that the terms "peoples" and "state" were traditionally used interchangeably to mean the state and this gave legitimacy to the view that permanent sovereignty over natural resources was a right of states "irrespective of internal communities with legitimate interests in benefiting from the natural resources wealth."

288 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 795; Daes "Indigenous Peoples' Permanent Sovereignty over Natural Resources" *Final report of the Special Rapporteur* E/CN.4/Sub.2/2004/30/Add.1 para 32, states the following reasons for vesting permanent sovereignty in natural resources specifically in indigenous peoples: "(i) Indigenous peoples are colonised peoples in the economic, political and historical sense, (ii) indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples, iii) the principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements, (iv) indigenous peoples have a right to development and actively to participate in the realisation of this right, while sovereignty over their natural resources is an essential prerequisite for this and (v) the natural resources originally belonged to the indigenous peoples concerned and were not, in most situations, freely and fairly given up."

289 Carleton 2014 21 *IJMGR* 131 argues that A 1(2) of the ICCPR supports the argument that permanent sovereignty over natural resources vests in the people on whose land the resources are found. Carleton 2012 6 *Vienna J. on Int'l Const. L.* 372, 373 posits that peoples are the right holders since governments are elected by people to be their representatives on various matters including managing their natural wealth for their common good. Therefore, where those elected cease to be representative or accountable to the people, the rights over natural resources revert to the peoples.

290 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 69-70.

states and or in colonised territories.[291] However, when it is used in the context of the *African Charter on Human and Peoples' Rights*, it may be interpreted to be referring to populations of non-self-governing territories, the state itself, the entire population of a state and indigenous peoples.[292] On its part, the *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018,[293] clarifies that the term "peoples" under Articles 21 and 24 of the *African Charter* refers:

> to a group of individuals having a common identity on account of objective markers of shared language, racial or ethnic makeup, historical experience, religious, cultural or ideological affinity, connection to a particular territory and the subjective manifestations of self-identification and awareness as a distinct group possessing of shared identity. Peoples are therefore not to be equated solely with 'Nation' or 'State' but include subnational groups including communities of a particular region exhibiting the above characteristics, or people whose resources are exploited under foreign occupation. Local communities or individuals who are most immediately affected by activities of extractive industries can claim the rights guaranteed in these Articles to 'peoples.'

This affirms the connection between people or peoples in whatever sense they are considered, with natural resources on their lands. Arguably, what the above contending perspectives do, is to link the terms "people" and "peoples" with the term "mine-host community" when minerals are found on their lands, whether they are comprised of local or rural communities, indigenous communities or ethnic or racial-minority communities.

3.4 International regulatory instruments relevant to mine-host community involvement in and benefit accrual from mineral extraction

International and regional regulatory instruments that implicate mine-host community involvement in and benefit accrual from mineral extraction on their lands can be analysed under the following three themes:

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291 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 69-70.

292 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 69-70.

293 *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 11.

i) Instruments focussing on the permanent sovereignty of peoples/people and nations over their natural resources and wealth, hence, the sovereign rights approach;[294]

ii) Instruments addressing the human rights and grounded in international human rights law, therefore, the human rights approach; and

iii) Instruments focussing on the environmental rights of citizens and sustainable development, grounded in international environmental law and sustainable development, that is, the environmental rights and sustainable development approach.[295]

Each of these three approaches contain notions of the distributive, procedural and remedial justice that were discussed in chapter 2 of the present study. These approaches address questions relating to vesting of rights to freely dispose of natural resources and decision-making in development projects,[296] and also entail distributional, procedural and remedial justice consequences.

3.4.1 The sovereign rights approach: permanent sovereignty of peoples and nations over natural resources and wealth

3.4.1.1 Introduction

The sovereign rights approach is based on self-determination and the sovereign right of peoples and nations to freely dispose of natural resources and wealth.[297] In terms of this approach, the state exercises the rights on behalf and for the well-being of the citizens who are active participants and the ultimate beneficiaries. The *Charter of the United Nations*[298] laid the foundations for the emergence of the right to self-determination and

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294 Chekera and Nmehielle 2013 6 *AJLS* 73 observe that a state's sovereignty encompasses supreme authority over all persons and things within its territory, power to legislate within the country, inviolability of a state (non-interference) and equality of status in international law.

295 As to why is it important to locate mine-host community involvement and benefit accrual within the human rights approach and the environmental rights approach, Nkongolo 2014 *AJDG* 84 explains that a rights approach to community involvement recognises that affected communities possess some existing fundamental rights and this empowers affected communities to demand that they be consulted and their views given due consideration.

296 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 832.

297 See Miranda 2012 45(3) *Vand. J. Transnat'l L.* 795, 804, 807 for the discussion on peoples and nations as both bearers of sovereign rights.

298 *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. South Africa became a member of the United Nations on 07 November 1945 while Zimbabwe became a member on 25 August 1980.

permanent sovereignty over natural resources in international law. These rights justify the involvement in and benefit accrual by mine-host communities from mineral extraction on their lands as citizens or the peoples/people of the state.

3.4.1.2 The right to economic self-determination under the sovereign rights approach

Article 1(2) of the *Charter of the United Nations* declares that the United Nations aims "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."[299] In the same vein, Article 55 of the *Charter* declares that the United Nations shall promote (i) socio-economic progress and development and (ii) respect for human rights in order to create conditions of stability and well-being based on the principles of equal rights and self-determination of peoples.

On the basis of these foundations, self-determination evolved from a principle to a right in the 1950s, underpinned by the struggle of colonised peoples for political self-determination and the struggle of newly independent states for economic self-determination.[300] Although the notion of self-determination is not defined in the *Charter*, it is generally understood that it grants the people/citizens of a state the right to decide their own political and socio-economic status and policies.[301] Notably, economic self-determination entails that (i) citizens have a right to freely dispose of their mineral resources[302] and use these in ways

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299 The importance of self-determination is shown by the fact that it is one of the four basic purposes of the United Nations, including peace and security, human rights and development.

300 As it emerged in the 1950s, self-determination had both political and economic dimensions. The *Declaration on the Granting of Independence to All Colonial Countries and Territories in Accordance with the Charter of the United Nations*, GA Res 1514 (XV) U.N Doc. A/RES/1514(XV) 1960, is the political self-determination declaration and the *Declaration on Permanent Sovereignty over Natural Resources, United Nations General Assembly Resolution* 1803 is the economic self-determination declaration. These dimensions are also reflected in A 1(1)(2) of the ICCPR and ICESCR, A 1(1) of the *United Nations Declaration on the Right to Development* of 1986 and A 20(1)(2)(3) and A 21 of the *African Charter on Human and People's Rights* of 1982. The people's right to economic self-determination as it pertains to natural resources is enshrined in A 21 and 22 of the UDHR; *United Nations General Assembly Resolution* 523 of 1952; *United Nations General Assembly Resolution* 626 of 1952; A 2 of *United Nations General Assembly Resolution* 1514 of 1960. See also *United Nations General Assembly Resolution* 2625 of 1970; *Vienna Declaration and Programme of Action* of 1993.

301 See A 1(1) of the ICESCR and ICCPR. Farmer 2006 39 *N.Y.U. J. INT'l L. & POL.* 432, 434 explains that the right of peoples to economic-self-determination is a permanent, unquestionable and inalienable right.

302 Farmer 2006 39 *N.Y.U. J. INT'l L. & POL.* 437.

that benefit them;[303] (ii) citizens have a right to involvement in decision-making centred on disposal of mineral resources;[304] and (iii) states must utilise mineral resources in the interest and for the benefit of the people of the state.[305]

3.4.1.3 The right of peoples and nations to permanent sovereignty over natural resources under the sovereign rights approach

The emergence of permanent sovereignty over natural resources in international law is also traced to the decolonisation period at the end of the Second World War.[306] The right to control and freely dispose of their natural resources was a component of the claim for economic independence by the new politically independent states.[307] Since the first recognition of permanent sovereignty over natural resources in *United Nations General Assembly Resolution* 523[308] and *United Nations General Assembly Resolution* 626, both of 1952,[309] new politically independent states did not relent on this right, which culminated in the landmark *United Nations General Assembly Resolution* 1803 of 1962.[310] The right to

303 Farmer 2006 39 *N.Y.U. J. INT'l L. & POL.* 437.

304 Farmer 2006 39 *N.Y.U. J. INT'l L. & POL.* 437.

305 Farmer 2006 39 *N.Y.U. J. INT'l L. & POL.* 427.

306 Pereira and Gough 2013 14 *MJIL* 451 observe that the principle allowed post-colonial states to assert control over their natural resources.

307 N'gambi 2015 12(2) *Loy.U.Chi.Int'l L. Rev* 153. The case of *Kuwait v American Independent Oil Company* (Awards) (1982) 21 I.L.M 976 (Aminoil Case) where Kuwait sought reversal of a concession granted to American Independent Oil Company before Kuwait attained independence from Great Britain, was one of the highlights of the struggle for economic self-determination.

308 U.N Doc A/2051 of 1952. *United Nations General Assembly Resolution* 523 recognised the right of under-developed countries to "determine freely the use of their natural resources." The resolution further enjoined under-developed countries to use their natural resources for their economic development in line with their national interest.

309 U.N Doc A/2332 of 1952. *United Nations General Assembly Resolution* 626 affirmed the right of the newly independent states to freely exploit natural wealth and resources and asserted that this right is inherent in their sovereignty.

310 In 1954, the *United Nations General Assembly adopted Resolution 837 on Recommendations Concerning International Respect for the Right of Peoples and Nations to Self-Determination*, U.N Doc. A/2829 of 1954 also recognised the right of peoples and nations to permanent sovereignty over natural resources as an inherent element of their right to self-determination. This was followed by *United Nations General Assembly Resolution* 1314 of 1958, U.N. Doc. A/4019 of 1958, which established the Commission on Permanent Sovereignty over Natural Resources. As the 1950s drew towards the end, the United Nations General Assembly highlighted that since the Human Rights Covenants (the ICCPR and ICESCR) which were being drafted by the Human Rights Commission also included permanent sovereignty over natural resources, there was a need for the General Assembly to be fully informed about the principle. The Human Rights Commission was therefore tasked by *United Nations General Assembly Resolution* 1314 of 1958, U.N Doc. A/4019 (1958) to study sovereignty over natural resources as a basic constituent of the right to self-determination and report back to the General Assembly's Economic and Social Council. The Commission was tasked to determine (i) the nature or status of the

permanent sovereignty over natural resources is also prominent in the *United Nations Declaration on a New International Economic Order* of 1974 (NIEO) [311] and the *Charter on the Rights and Duties of States* of 1974 (CERDS).[312]

Permanent sovereignty over natural resources raises important questions, that is, whether it is a right of states or peoples, and, if it includes sub-soil resources such as minerals. These pertinent questions have a bearing on mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit since they are a key part of the citizenry, people or peoples of the state.

The question centred on exactly who holds rights over natural resources, especially mineral resources, has been disputed.[313] This has been the case since time immemorial, as reflected by George Agricola in his famous 1556 book, titled *De Re Metallica*.[314] In Gilbert's view,[315] the struggle over who has rights over natural resources within domestic jurisdictions rests between the peoples or people and the state, while Cambou and Smis[316]

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permanent sovereignty of people and nations over their natural wealth, (ii) the way the right should be exercised and (iii) measures that could be taken in international law to make the right effective. On 14 December 1960, the General Assembly adopted Resolution 1514 titled *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. Doc. A/4684 of 1960 and Resolution 1515 on *Concerted Action for Economic Development of Economically Less Developed Countries*, U.N. Doc. A/4648 of 1960. Notably, both resolutions affirmed permanent sovereignty over natural resources but, in Resolution 1514, the right holders are the peoples while in Resolution 1515 the state is the right holder. See para 7 of the preamble as read with para 2 of *United Nations General Assembly Resolution* 1514 of 1960, and para 5 of *United Nations General Assembly Resolution* 1515 of 1960; Gilbert 2013 31 (3) *NQHR* 319.

311 GA Res 3201 U.N. Doc. A/RES/S-6/3201 (1974).

312 GA Res 3281 U.N. Doc. A/RES.29/3281 (1974).

313 Hoover and Hoover "Note from the Translators" Agricola *De Re Metallica 82*. See also Badenhorst and Olivier 2011 44 (1) *De Jure* 34.

314 Hoover and Hoover "Note from the Translators" Agricola *De Re Metallica 82*. Agricola states that, "unlike the land, the minerals have ever been regarded as a sort of fortuitous property, for the title of which there have been four principal claimants, that is, the Overlord, as represented by the King, Prince, Bishop or what not; the Community or the State, as distinguished from the Ruler; the Landowner; and the Mine Operator, to which class belongs the Discoverer. The one of these that possessed the dominant right reflects vividly the social state and sentiment of the period. The Divine Right of Kings; the measure of freedom of their subjects; the tyranny of the land owning class; the rights of the Community as opposed to its individual members; the rise of individualism and […] the modern return to more communal view, have all been reflected promptly in the mineral title […] The conception as to which of these classes had a right in the title have been by no means the same in different places at the same time, and in all it varies with different periods; but the whole range of legislation indicates the encroachment of one factor […] over another, so that their relative rights have been the cause of never-ending contention, ever since a record of civil and economic contentions begun."

315 Gilbert 2013 31 (3) *NQHR* 316-321.

316 Cambou and Smis 2013 (1) *MSILR* 360-364.

conclude that permanent sovereignty over natural resources accrues to peoples or groups such as indigenous peoples and not the state. Global citizens and individuals have also been touted as right holders.[317]

Generally, the claim by states to permanent sovereignty over natural resources is based on the international law principle of state sovereignty, which is premised on the inviolability of state territories and the power of states over their land and natural resources.[318] The state's sovereignty over natural resources is affirmed in several international regulatory instruments including *General Assembly Resolution* 1803 *on Permanent Sovereignty over Natural Resources* of 1962;[319] *General Assembly Resolution* 3171 *on Permanent Sovereignty over Natural Resources* of 1973;[320] the *United Nations Charter of Economic Rights and Duties of States* of 1974 (CERDS)[321] and the *United Nations Declaration on the*

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317 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 45. Risse 2008 17 (2) *Eur.J.ofPhilos* 293-294; Armstrong 2014 (2) *Politics, Philosophy and Economics* 129-151 and Armstrong 2013 27 (4) *Ethics and Int. Aff 413-428* quoted in Onifade 2015 16 (4) *Human Rights Review* 346 considers natural resources as belonging to all human beings or global citizens, including current and future generations. Armstrong argues that no one has any special claim to natural resources since none created them or caused their random allocation. According to Armstrong, claims to natural resources should be reserved for those who have done something that significantly increases the value of the resources, developed projects that require secure and constant access to specific natural resources and if it is impossible to exercise self-determination without the right over and access to the natural resources. Armstrong holds that domestic states are unable to fairly distribute resources to citizens, hence the need for distribution across jurisdictions and generations. The rights of global citizens as co-owners of natural resources with the states should, in Armstrong's view, be protected by international law. Accordingly, states must ensure that their actions do not diminish citizens' rights to enjoy their natural resources but rather enable citizens to enjoy the natural resources, thus imposing positive and negative duties on states.

318 State sovereignty means that every state has exclusive jurisdiction within its territory to adopt laws, enforce the laws, administer the territory, settle disputes that arise therein and exclude other states from exercising sovereign rights unless agreed on by treaty. Onifade 2015 16 (4) *Human Rights Review* 355 states that, while "state sovereignty emphasises the supremacy of states in the hierarchy of land and natural resources ownership [...] peoples-based sovereignty acknowledges citizens as the original owners of land and natural resources even where they assign management rights to the government."

319 Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 45; Brownlie 1979 162 (1) *Recueil des Cours* 245-318; Vinuales 2011 17 *Global Governance* 199-200 all concluded that sovereignty over natural resources as defined in the *United Nations General Assembly Resolution* 1803 resides with the state.

320 *United Nations General Assembly Resolution* 3171 of 1973 on Permanent Sovereignty over Natural Resources, UN Doc A/RES/3171 (1973) is assertive when it declares that permanent sovereignty over natural resources is an inherent and indispensable element of state sovereignty. Significantly, *United Nations General Assembly Resolution* 3171 does not subject the exercise of the states' permanent sovereignty over natural resources to the interest of national development and the well-being of the peoples.

321 A 2(1) of the *United Nations Charter of Economic Rights and Duties of States* GA Res 29/3281, UN Doc A29/3281 (1974). A 2 of CERDS affirms that "every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." A 7 of CERDS affirms the state's (i) obligation to ensure the economic, social and cultural development of its people through use of its resources and (ii) right to choose the means and goals of

Establishment of a New International Economic Order of 1974 (NIEO).[322] The *Convention of the Law of the Sea* of 1982,[323] *Convention on Biological Diversity* of 1992 (CBD)[324] and the *Framework Convention on Climate Change* of 1993[325] exclusively mention the state in reference to permanent sovereign over natural resources. Justifications for vesting sovereignty over natural resources in states include the notion that (i) they are the main guarantors of the well-being of their citizens;[326] (ii) they will promote national economic development through the exploitation of natural resources,[327] and (iii) the trickle-down of national economic gains from the state will enable the development of all local communities.[328] However, as Miranda[329] explains, there is a realisation that the state is unable to distribute the benefits to historically marginalised communities in a consistent and equitable manner, because it can be captured by government elites who abuse

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development. Significantly, A 7 affirms that the state must "ensure the full participation of its people in the process and benefits of development." The CERDS provides in para 2(a) that the state has a right to "regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities." This is important for regulating the activities of transnational companies conducting mining activities and who often violate the property rights, environmental rights and human rights of mine-host communities. Cases of damage of the environment and lands of these communities and human rights violations perpetrated by mining companies under the watch of governments in developing countries should not even arise if states were to utilise rights set out in the CERDS for the benefit of their people.

322 A 4(e) of the *United Nations Declaration on the Establishment of a New International Economic Order* GA Res 3201, UN Doc A/S-6/3201 (1974). Para 4(e) of the Declaration of the NIEO proclaims the "full, permanent sovereignty of every State over its natural resources and all economic activities" including the right to control, nationalise and transfer ownership to a state's own nationals. In terms of para 4(e) of the Declaration of the NIEO, permanent sovereignty over natural resources is considered as accruing exclusively to states. There is no mention of the peoples' sovereign rights over natural resources or any obligation on states to utilise natural resources and wealth in the interest of national development and the well-being of the peoples. Para 4(f) of the Declaration of the NEIO frames the right to claim restitution and full compensation for the exploitation and depletion of natural resources in such a way that they are mostly claimable against foreign states and not the domestic state except possibly in the case of apartheid.

323 A 2 of the *Convention of the Law of the Sea* of 1982, U.N. Doc. A/CONFJ621122 (1982). See also A 13 of *Vienna Convention on Succession of States in Respect of Treaties* of 1978 (17 ILM 1488); A 56, 193 of the *Convention on the Law of the Sea* of 1982 (1833 UNTS 397); A 32(2) of Vienna Convention on Succession of States in Respect of State Property, Archives and Debt of 1983 25 ILM 1640. Zimbabwe ratified the *Convention of the Law of the Sea* on 24 February 1993 while South Africa ratified on 23 December 1997.

324 A 3 of the *Convention on Biological Diversity* (CBD), 1760 U.N.T.S. 69 (1992). Zimbabwe ratified the Convention on 11 November 1994 while South Africa ratified on 2 November 1995.

325 Preamble para 8 of the *Framework Convention on Climate Change* 1771 UNTS 107, 31 ILM 849 (1992). Zimbabwe ratified the Convention on 3 November 1992 while South Africa ratified on 29 August 1997.

326 Vinuales 2011 17 *Global Governance* 197.

327 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 831.

328 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 831.

329 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 831-832. Dufresne 2008 40 *N.Y.U.J. INT'L L. & POL* 214-215 maintains that permanent sovereignty over natural resources has "produced a concentration of the resource-based wealth in the hands of the political elites controlling state apparatuses, obscuring any assessment of the internal sharing among different groups."

national resources. The state can also repeat or perpetuate patterns of historical subjugation.[330] Consequently, an interpretation of international law that recognises the sovereignty of peoples, people or citizens over natural resources is paramount.[331]

Dovetailing with the view above, paragraph 1 of *United Nations General Assembly Resolution* 1803 of 1962, vests sovereignty over natural resources in both peoples and nations. These natural resources must be used for national development and the well-being of the people.[332] *United Nations General Assembly Resolution* 1803 declares:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interests of their national development and of the well-being of the people of the State concerned.[333]

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330 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 832.

331 See Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 65-67. See also Dufresne 2004 36 *NYU J INTL L & POL* 356 who assert that permanent sovereignty over natural resources is a right of peoples and not states. Kiwanuka 1988 82 *AM J.INT'L L.* 97 contends that the vesting of permanent sovereignty in both peoples and the state tends to weaken the people's rights especially when the interests of the people and those of the state are not in convergence. Kiwanuka points out that "equating states with "peoples" assumes that the interests of the people are adequately represented by their state-a rarity in most developing countries... In consequence, equating peoples and states further strengthens the state and subjects the rights of the people to the whims of whoever controls the political process… In such situations, peoples' rights might initially be treated as state rights and then degenerate into sectarian, class, government, regime and clique rights. In the extreme, they could become certain individuals' rights."

332 Reisman 1989 83 *Am.J.INT'L L.* 57 explains that the essence of the declaration on permanent sovereignty over natural resources is that "the national community in which the resources are found is to be a significant beneficiary of their exploitation." The exploitation of natural resources for the benefit and well-being of the people is also emphasised in A 73 of the *Charter of the United Nations*. The Resolution 111 of the *Second United Nations Conference on the Law of the Sea* of 1960 also states that "in the case of a territory whose people have not attained full independence or other self-governing status recognised by the United Nations, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development."

333 GA Resolution 1803 U.N. Doc A/5217 (1962) para 1. The right of permanent sovereignty over natural resources is a right of both peoples and the states. Its state-centric orientation is rooted in public international law and international investment law. Its people-centric approach is largely rooted in international human rights law. The requirement for the state to exercise permanent sovereignty in the interest of national development and for the benefit of its citizens is confirmed in further United Nations General Assembly resolutions adopted after 1962. For example, *United Nations General Assembly Resolution* 2158 of 1966 on *Permanent Sovereignty over Natural Resources* UN Doc A/RES/2158 (1966) states that all countries have an inalienable right to exercise permanent sovereignty over natural resources in the interest of national development. In para 9, *United Nations General Assembly Resolution* 2158 recommends to regional bodies that they should constantly review the issue of permanent sovereignty over natural resources and economic utilisation of the resources in the national interests of their peoples. Further, para 2 of *United Nations General Assembly Resolution* 2692 of 1970 on *Permanent Sovereignty over Natural Resources of Developing Countries and Expansion of Domestic Sources of Accumulation of Economic Development* UN Doc A/RES/2692 (1970), asserts the right of peoples and nations to permanent sovereignty over natural resources. Significantly, the right must be exercised in the interest of national development and of the well-being of the people of the state

This paragraph makes the people of the state (thus including mine-host communities) the ultimate beneficiaries of the exploitation of mineral resources. The affirmation contained in the resolution is pertinent for mine-host communities on whose lands mining operations are often carried out against their well-being and without their involvement in decision-making or accrual of any benefits. Any legislative and policy frameworks inclined to serve interests other than those of citizens and the affected mine-host communities is, therefore, a violation of their sovereign right over natural resources and of the duty imposed on states to use natural resources for national development and the well-being of the people. When considered in the context of mineral extraction, the state is confronted in paragraph 1 of *United Nations General Assembly Resolution* 1803 of 1962 with a duty to ensure distributive justice through equitable distribution of benefits from mineral extraction commensurate with the burdens that mine-host communities endure from the exploitation of the mineral resources on their lands.[334]

To cement the right of citizens over natural resources, it can be argued that permanent sovereignty over natural resources as expressed in paragraph 1 of *United Nations General Assembly Resolution* 1803 of 1962 has two dimensions, namely the sovereignty of the state and self-determination of the citizens. Accordingly, the exercise of state sovereignty over natural resources is subject to the self-determination of citizens regarding control, use and development of the natural resources for their well-being.[335] The term "exercise" in

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concerned. Para 7 of the preamble of the *United Nations General Assembly Resolution* 2692 of 1970, UN Doc A/RES/2692 (1970), provides that states should exercise their right to permanent sovereignty over natural resources both on land and marine to ensure optimum utilisation of the resources for the benefit and for the welfare of their peoples.

334 Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 66-67. In Duruigbo's view, the peoples' right to permanent sovereignty over natural resources implies "an entitlement to demand that governments manage these resources to the maximum benefit of the people." The right ultimately justifies claims by peoples against their government for beneficial resource governance by restraining irresponsible award and utilisation of mineral rights. Duruigbo further asserts that "not only should governments proactively use resources for the benefit of people, they are also prevented from exercising permanent sovereignty in a way that would cause substantial harm to their peoples." Triggs "The Rights of 'Peoples' and Individual Right: Conflict or Harmony" 142 asserts that, "if peoples' rights are to have any meaning beyond States' rights, they must include the right of a people against its own government."

335 Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* 370-371 subscribes to the notion that permanent sovereignty is jointly vested in states and peoples based on para 1 of United Nations General Assembly Resolution 1803 of 1962. He asserts that the state has sovereignty over natural resources, but it exercises it through the government in conjunction (self-determination) with the people. A 21(1)(4) of the *African Charter on Human and Peoples' Rights* of 1982 also vests permanent sovereignty over natural resources in both the peoples and the state. Kiwanuka 1988 82 *AM J.INT'L L.* 80, 95A and D'Sa 1981-1983 10 *AUST.Y.B. INT'L L.* 110 have also asserted this joint vesting

paragraph 1 of *United Nations General Assembly Resolution* 1803 of 1962 is instructive, as it entails management of natural resources where the state is assigned the duty to manage these for the sake of national development and well-being of peoples.[336] This understanding of sovereignty over natural resources legitimises claims to ownership of natural resources and benefit accrual by mine-host communities who can seek to hold governments accountable under international law for spoliation and misuse of their natural resources.[337]

As to whether permanent sovereignty over natural resources includes both surface and sub-soil resources, there is sufficient reason to accept that the phrase "natural wealth and resources" refers to both surface and sub-surface resources, including minerals. The cases of the *Mayagna (Sumo) Awas Tigni v Nicaragua*,[338] *Saramaka Peoples v Suriname*,[339] *and Mabo v Queensland* (No.2)[340] explain that no distinction should be drawn with respect to indigenous peoples' rights to their surface and sub-surface resources. In the Canadian case of *Delgamuukw v British Columbia of Canada*,[341] the court expressly stated that aboriginal title encompasses mineral rights. The South African case of *Alexkor Limited and*

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of the right in the state and peoples. The ICJ also endorsed permanent sovereignty over natural resources as a right of both peoples and nations in the *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda I.C.J Reports* 2005 para 244, where the court asserts that the right of peoples and nations (states) to permanent sovereignty over natural resources is now a principle of customary international law.

336 Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 49 indicates that the reason why General Resolution 1803 of 1982 vested permanent sovereignty in both the state and the peoples was to protect the peoples and "prevent even the well-meaning but weak or short-sighted leadership from adversely affecting the survival of the country through wide concessionary arrangements." The inclusion of limitations on state power by such notions as "means of subsistence" was to "prevent weak or penniless governments from harming a country's future and imperilling the people's well-being through its method of awarding concessions." It is also worth mentioning that states merely exist to serve the aspirations of their citizens and they cannot conceivably have other interests that are not the interests of their citizens. Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 50 concludes that "where governments act as agents, they act in a secondary capacity and not as holders of the right."

337 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 805. Pereira and Gough 2013 14 *MelbJIIntL* 451, 453 observe that international law has evolved to recognise several substantive and procedural rights for indigenous peoples, including ownership rights over natural resources, the right to participate in decision-making and prior and informed consent in the context of natural resources extraction projects and the sharing of benefits arising from the exploration and commercial exploitation of natural resources in indigenous lands.

338 *Mayagna (Sumo) Awas Tigni v Nicaragua* Inter-Am Court HR (Ser C) No 79 (2001).

339 *Saramaka Peoples v. Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007).

340 *Mabo and Others v Queensland* (No.2) [1992] HCA 23.

341 *Delgamuukw v British Columbia of Canada* [1997] 3 S.C.R 1010, 7 122.

Others v The Richtersveld Community and Others[342] also addresses the issue of rights to sub-surface resources. In that case, the court was called upon to determine whether the Richtersveld community owned the mineral resources found on or within their lands. The court found that the people of Richtersveld had a right of communal ownership of the land under indigenous law and to the mineral resources thereon.[343] The recognition of peoples as owners of minerals on their lands provides mine-host communities with leverage around claims for involvement and benefit accrual from extraction of the minerals.

Remarkably, the sovereignty of peoples and nations over natural resources has been referred to as permanent and inalienable.[344] This means that it is eternal and cannot be bargained away, either by way of a treaty or by mineral extraction agreements with mining companies. Dovetailing with this assertion, paragraph 2 of *United Nations General Assembly Resolution* 1803 declares:

> The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorisation, restriction or prohibition of such activities.

Villaroman[345] explains that paragraph 2 of *United Nations General Assembly Resolution* 1803 of 1982 entails a right of peoples and nations to make decisions centred on the exploitation of their natural resources as they deem fit and also to withdraw from unequal exploitative investment treaties that unjustly enrich mining companies. It follows that peoples and nations should set the rules and conditions for exploration, development and disposal of mineral resources. For mine-host communities, paragraph 2 of *United Nations General Assembly Resolution* 1803 of 1982 entails that the state should ensure their involvement in the formulation of legislation and policies relating to the exploitation of minerals as well as in the negotiation of mining contracts that relate to the lands that they inhabit.

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342 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
343 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) paras 64, 102, 103(1)(a).
344 Schrijver *Sovereignty over Natural Resources: Balancing Rights and Duties* 2.
345 Villaroman 2010 22 *FLA. J.INTER'L* 319.

The issue of sharing of profits raised by the exploitation of natural resources, as a distributive justice element, is addressed in paragraph 3 of *United Nations General Assembly Resolution* 1803 of 1982 which states that the profits derived from the exploitation of natural resources:

> must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

States and investors are mentioned in the above paragraph as participants in profit sharing, but there is no mention of peoples or citizens, particularly mine-host communities. This is different from the *United Nations General Assembly Resolution* 2158 of 1966[346] which emphasises profit-sharing for the benefit of national development and in the interests of the people of the state concerned. The exclusion of the peoples of the state in paragraph 3 of *United Nations General Assembly Resolution* 1803 of 1982 is a cause of concern because their needs can be ignored when it comes to sharing of benefits. For paragraph 3 of *United Nations General Assembly Resolution* 1803 of 1982 to be of benefit to the peoples or citizens of a state, it must be interpreted to mean that the state's participation in profit sharing is in a representative capacity for and on behalf of citizens. This by extension, includes mine-host communities as a constituent component of citizens or peoples of the state.

To preserve the right of peoples, citizens and therefore mine-host communities to their mineral resources, it is also imperative to apply the human rights approach to natural resources management and change the discourse from equality amongst states to equality amongst those within the state as it pertains to involvement in and accrual of benefits of exploitation of the resources.[347] The human rights approach and the environmental rights and sustainable development approach discussed in sections 3.4.2 and 3.4.3 below seek to

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346 See *United Nations General Assembly Resolution* 2158, UN Doc A/RES/2158 (1966) para 5 which states that all countries have a right to secure and increase their control in foreign funded extractive companies operating within their jurisdictions and to have a greater share in the advantages and profits derived from extractive operations on an equitable basis with due regard to the development needs and aspirations of the peoples concerned.

347 See Hernandez *Sovereignty over Natural Resources* 57.

rectify the flaws in state management of natural resource extraction projects by either advocating increased citizen participation or reassigning rights and duties.[348] Requirements in international human rights law relevant to mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit are unpacked further in the paragraphs below.

3.4.2 The human rights approach to mine-host community involvement in and benefit accrual from mineral extraction

3.4.2.1 Introduction

The human rights approach provides an alternative benchmark for gauging the constitutional, policy, legislative frameworks for awarding and utilisation of mineral rights in Zimbabwe. This is based on human rights instruments that increasingly characterise the intra-state allocation of natural resources as a matter of internal self-determination and a right to property and cultural rights, rather than sovereign rights.[349] In this way, human rights instruments emphasise the centrality of natural resources to the spiritual and cultural survival of indigenous peoples and other local communities who often contend with extraction of natural resources such as minerals on their lands.[350] For instance,

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348 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 831-832. Duruigbo 2006 38 *Geo. Wash. Int'l L. Rev* 44 cautions against vesting permanent sovereignty in the state alone as the right becomes an exclusive right and it alienates citizens who cannot challenge the natural resources policies that work against their interests and well-being.

349 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 810-812. Miranda stresses that the human rights approach to intra-state allocation has received more scholarly consideration and, in her view, this suggests that "matters of intrastate allocation of land and resources appear to be more palatable when framed as issues of human rights rather than as issues of sovereignty." Miranda attributes this trend to the fact that human rights directly regulate the relationship between the state and citizens and do not seem to challenge the state's territorial sovereignty. Except in the case of indigenous peoples, under the human rights approach, mine-host communities can claim rights to gains of mineral resources exploitation without claiming that they are sovereigns. Therefore, the usefulness of the human rights approach is that governments are expected to respect, protect and fulfil the human rights of these communities irrespective of any claim of sovereign entitlement.

350 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 811. Daes "Indigenous Peoples and their Relationship to Land" *Final Working Paper Prepared by the Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2001/21 highlights indigenous peoples' unique cultural and religious ties to their land. *Mayagna (Sumo) Awas Tingni Cmty. v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001); *Saramaka Peoples v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Sarayaku Community v Ecuador*, Petition, Inter-Am. Comm'n H.R., Report No. 64/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1; *Centre for Minority Rights Development*

indigenous peoples' right to own, occupy, access and use lands cannot be considered separately from their right to preserve their cultural identity, values and traditional means of subsistence.[351]

Human rights regulatory instruments that have implications for mine-host community involvement in and benefit accrual from mineral extraction include the ICCPR and ICESCR of 1966,[352] *ILO Convention on Indigenous and Tribal Peoples* No. 169 of 1969[353] and the *United Nations Declaration on the Right to Development* of 1986.[354] The current section also discusses the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) of 1997[355] the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP) of 2018[356] and various guidelines of the United Nations and United Nations Agencies.[357] These instruments have been expounded in various reports by special rapporteurs[358] and in general comments by United Nations

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(Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, ACHPR Com No 276/2003.

351 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 814. *The ECOSOC, Committee on Human Rights, Sub-Committee on Prevention of Discrimination and Protection of Minorities, Transnational Investments and Operations in Lands of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1991/49, highlights that indigenous peoples cannot maintain their subsistence activities and their way of life without access to their lands and territories. The Human Rights Committee interprets the right to enjoy cultural rights enshrined in A 27 of the ICCPR such that it requires effective participation and consultations with indigenous peoples before granting of licenses for economic exploitation of their lands, and this encompasses mining activities. See *HRC Concluding Observation, Chile*: UN Doc CCPR/C/CHL/CO/5 2007 para 19; *HRC Concluding Observation, Panama*: UN Doc CCPR/C/PAN/CO/3 2008 para 21; *HRC Concluding Observation, Nicaragua*: UN Doc CCPR/C/NIC/CO/3 2008 para 21. See also the CESCR, General Comment No. 21, 'Right of Everyone to take part in Cultural Life' (Art. 15 1(a) of the ICESCR)', UN Doc. E/C.12/GC/21 of 21 December 2009, para 36.

352 *International Covenant on Civil and Political Rights* (ICCPR) GA Res A21/2200A U.N. Doc.A/6316 (1966) and *International Covenant on Economic Social and Cultural Rights* (ICESCR) GA Res A 21/2200A U.N. Doc. A/6316 (1966). Zimbabwe ratified the ICCPR on 13 May 1991 while South Africa ratified on 10 December 1998. As for the ICESCR, Zimbabwe ratified on 13 May 1991 while South Africa ratified 12 January 2015.

353 1650 U.N.T.S 383. Zimbabwe and South Africa are not state parties to the convention.

354 GA Res 41/128, UN Doc A41/128 (1986).

355 GA Res 61/295, UN Doc A61/295 (2007).

356 UN. Doc.A/RES/73/165/2018.

357 *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* UN Doc A/HRC/4/18 (2007); *United Nations Guiding Principles on Business and Human Rights* UN Doc HR/PUB/11/04 (2011).

358 Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* U.N. Doc. A/HRC/9/9, Adds. 2,5,8 (2008); Anaya "Extractive industries and indigenous peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* UN Doc. A/HRC/24/41(2013); Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* UN Doc. A/HRC/15/37(2010) paras 67,89,91; Daes "Indigenous peoples and their relationship to land" *Final working paper prepared by the Special*

treaty implementation bodies such as the Human Rights Committee (HRC), Committee on Economic Social and Cultural Rights (CESCR) and Committee for Elimination of Racial Discrimination (CERD).[359] Applicable human rights protected in these instruments include, *inter alia*, the right of peoples (i) to self-determination; (ii) to freely dispose of natural wealth and resources; (iii) not to be deprived of their means of subsistence; (iv) to participate in public affairs; (v) to FPIC and (vi) to protection against arbitrary evictions. The significance of these human rights as part of the core requirements for mine-host community involvement in and benefit accrual from mineral extraction on their lands cannot be underestimated.

3.4.2.2 Peoples' right to economic self-determination under the human rights approach

Article 1(1) of the ICCPR and ICESCR asserts:

> All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

Self-determination as presented in the ICCPR and ICESCR has a political and economic dimension, where the latter is emphasised within the present study. The economic dimension of self-determination is inextricably linked to the right of peoples to use their natural resources for their own ends, for economic development and to exercise control

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Rapporteur, U.N. Doc. E/CN.4/Sub.2/2001/21; Daes "Indigenous Peoples' Permanent Sovereignty over Natural Resources" *Final report of the Special Rapporteur* E/CN.4/Sub.2/2004/30/Add.1.

[359] *Länsmann v Finland*, Views, Human Rights Comm., 52d Sess., No.511/1992, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994) in which the Human Rights Committee found that Finland had not violated A 27 of the Covenant on Civil and Political Rights by allowing stone quarrying on land where the indigenous Saami herd reindeer because the reindeer herding in the area had not been adversely affected by the quarrying. *Lubicon Lake Band v Canada*, Views, Human Rights Commission U.N. Doc. A/45/40 (Vol. II) (Oct. 4, 1990) where it was found that Canada had violated A 27 of the ICCPR by allowing the province of Alberta to grant oil and gas leases as well as timber development rights within the land of the Lubicon Lake Band of Cree Indians. It was held that Canada had deprived the indigenous peoples of their means of subsistence through selling of oil and gas concessions on their lands. See the *International Convention on the Elimination of All Forms of Racial Discrimination*, Feb. 20–Mar. 10, 2006, *Warning and Urgent Action Procedure: Decision 1(68): United States* 8, U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006) where the committee issued recommendations to the United States to observe the Western Shoshone peoples internationally recognized rights to their ancestral land.

over natural resources within their territory.[360] Consequently, it can be argued that in the context of mineral extraction, economic self-determination empowers mine-host communities comprising indigenous peoples and other local communities to contest the state's disposal of mineral resources if such disposal is detrimental to the well-being or common good of the communities on whose land the minerals are found. Article 1(1) of the ICCPR and ICESCR can be further interpreted to mean that peoples should be put in a position in which (i) they are the ones to determine the life they wish to live (ii) they control, fully participate and have effective involvement in determining their development path including determining the manner of disposing of their natural resources.[361] When considered in the context of mine-host communities, Article 1(1) of the ICCPR and ICESCR entails entitlements to involvement in and benefit accrual from extraction of minerals on their lands.[362] This position is confirmed in the CESCR's 2009 concluding observations on the DRC[363] which states that lack of transparency and mismanagement of the award of mining contracts for the Katanga province constitutes a violation of the right to economic self-determination of the people of that province who remain in poverty.[364] Consequently, the CESCR called upon the DRC government to ensure that the people of Katanga province

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360 Raic *Statehood and the Law of Self-determination* 205 explains that internal self-determination "refers to the relationship between the government of a State and the people of that State" while external self-determination is concerned with "determination of the international status of a territory and a people." The right to self-determination is also recognised in several other international regulatory instruments including A 2 of the *Charter of the United Nations Charter* of 1945; A 2 of the *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, *United Nations General Assembly Resolution* 1514 of 1960. A 20 of the *African Charter on Human and Peoples' Rights* of 1982. See De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 74-75, 89; *International Court of Justice, in Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion* of 22 July 2010, I.C.J Reports (2010) para 89. See also Carleton 2014 21 *IJMGR* 146 who argues that land and natural resource access lies at the heart of claims to identity, culture and self-determination by many marginalised groups.

361 See A 3(e) of the *United Nations General Assembly Declaration of Social Development and Progress* GA Res 2542 of 1969 (DSDP), which states that peoples are to determine freely their own objectives of social development and priorities and means and methods for achieving the same.

362 Anaya "Extractive Industries and Indigenous Peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* UN Doc. A/HRC/24/41(2013) para 9 states that indigenous peoples' right to self-determination and to determine priorities and strategies for the development or use of their lands as provided in A 32 (1) of UNDRIP "implies a right of indigenous peoples to pursue their own initiatives for resource extraction within their territories if they so choose. In cases in which indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, ownership of the resources naturally includes the right to extract and develop them. But even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others."

363 CESCR Concluding Observations, DRC: UN Doc E/C.12/COD/CO/4 2009.

364 CESCR Concluding Observations, DRC: UN Doc E/C.12/COD/CO/4 2009 para 12.

derive benefits from mineral extraction in their province in order to improve their living conditions.[365]

3.4.2.3 Peoples' right to freely dispose of natural resources and wealth under the human rights approach

Article 1(2) of the ICCPR and ICESCR asserts:

> All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.

The acknowledgement that all peoples have a right to freely dispose of their natural resources is a powerful legal statement,[366] which is a fundamental rallying point for mine-host communities' claims for involvement in and benefit accrual from mineral extraction on their lands. In this way, the right to freely dispose of natural resources and wealth reverses situations where exploitation of mineral resources is conducted against the interests and fundamental human rights of mine-host communities.

It must be pointed out that the human right to freely dispose of mineral resources does not mean unrestrained use or plunder of the resources.[367] Article 1(2) stresses that peoples "may" dispose of their natural resources, meaning that they are entitled to decide whether to dispose and at what rate or simply not to extract the mineral resources. In the context of mineral extraction, this prerogative can only be exercised with the involvement and participation of the peoples who include the mine-host communities on whose lands, minerals are found. In Carleton's[368] view, the right to dispose of natural resources assist when it comes to determining cases where mine-host communities can legally contest state plunder or dispossession of mineral resources. Such instances are (i) when the government is neither representative nor accountable, in which case the mineral rights

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365 CESCR Concluding Observations, DRC: UN Doc E/C.12/COD/CO/4 2009 para 12.

366 Gilbert 2013 31(3) *NQHR* 340. Article (1) of the ICCPR and ICESCR vest permanent sovereignty over natural resources in peoples and not states. Cassese "The Self-determination of Peoples" 92, 103; Mutua 1995 35 *VA. J. INT'L L.* 339.

367 Haugen 2007 3(1) *LEAD* 73.

368 Carleton 2014 21 *IJMGR* 134.

should revert to the people[369] and (ii) where benefits of mineral resources accrue to foreigners and not the rightful beneficiaries, who are the inhabitants of the land upon which the minerals are found.[370]

The phrase "for their own ends," as used in Article 1(2) of the ICCPR and ICESCR, entails that the people and in the present case mine-host communities have a right to dispose of their natural resources and wealth for their own benefit. This right provides mine-host communities a legal basis for claiming or reclaiming the benefits accruing from mineral extraction. The import of the statement "without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law" is discussed in section 3.4.2.5 below in conjunction with Articles 25 of the ICESCR and 47 of the ICCPR.

3.4.2.4 Peoples' right not to be deprived of their means of subsistence

Article 1(2) of the ICCPR and the ICESCR states: "In no case may a people be deprived of its own means of subsistence." The prohibition against deprivation of means of subsistence can be interpreted as imposing a duty on the state to protect citizens and in the present case mine-host communities from dispossession of their natural resources by outsiders.[371] Deprivation occurs when those outside the community undermine the resource base and the resource is exploited against the community's will.[372] While the prohibition against deprivation was initially meant to protect developing states from exploitation by the developed states and transnational companies, citizens and mine-host communities can invoke the right against their own state or government.[373] The prohibition limits governmental power when exploiting natural resources in that the exercise of sovereignty over natural resources should not result in deprivation of the peoples' own means of

369 Carleton 2014 21 *IJMGR* 134.
370 Carleton 2014 21 *IJMGR* 133
371 See Haugen 2007 3(1) *LEAD* 73; Carleton 2014 21 *IJMGR* 133; Alston "International Law and the Human Right to Food" 9, 40.
372 Haugen 2007 3(1) *LEAD* 73.
373 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 86.

subsistence.[374] These proscriptions mean that mine-host communities as part of the citizens or people of the state have a right to raise objections whenever the allocation of minerals rights and mining activities on the land they inhabit pose a threat to their means of subsistence. The objections are underpinned by the connection between mine-host communities and their lands and the survival argument grounded in the right not to be deprived of resources essential for their survival.[375]

The UNDRIP and UNDROP reinforce the prohibition against depriving peoples of their means of subsistence. In terms of Article 20 of the UNDRIP, indigenous peoples have a right to be secure in the enjoyment of their own means of subsistence and development. Accordingly, Article 26(1) (2) of UNDRIP asserts that indigenous peoples have the right to own, use, develop and control the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The right to ownership, use, enjoyment, control and development of their lands is held in accordance with the people's own land tenure systems and irrespective of formal title.[376] Indigenous peoples who are deprived of means of subsistence are entitled to just and fair redress.[377] In terms of Article 5(1) of UNDROP, peasants have a right to access, use and participate in the management of natural resources on the lands they inhabit.[378] All these provisions point to the fact that mineral extraction on the lands of mine-host communities comprised of indigenous and other local communities should only proceed with their involvement and participation.

The phrase "means of subsistence" may call for distinguishing resources that represent means for survival and those that do not. It is also important to determine that which can be considered as means of subsistence for a mine-host community. Sepulveda[379] argues that the right not to be deprived imposes a duty on the state to avoid depriving peoples of the opportunity to support themselves from their own work and means for survival,

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374 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 86.

375 Haugen 2007 3(1) *LEAD* 73.

376 A 26(2) and A 27 of UNDRIP; Miranda 2012 45(3) *Vand. J. Transnat'l L.* 818.

377 See A 28(2) of UNDRIP, which states that indigenous peoples have a right to redress for lands and territories and resources taken without FPIC.

378 A 4(2)(h) of *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* GA Res 73/165 UN Doc A/RES/73/165/2018.

379 Sepulveda *The nature of the obligations under the International Covenant on Economic Social and Cultural Rights* 212-214.

particularly land. When considered in the context of mineral extraction it means that mine-host communities as part of the citizens or people of the state cannot be denied access to minerals on their lands if these resources constitute their source of livelihood.[380] It can therefore be contended that those who have the minerals of their land as their means for survival cannot be deprived of both the physical access to the resources and financial benefits derived from their exploitation.

It is pertinent to consider whether a people can be deprived of their means of subsistence in the name of greater national benefit or good, based on the utilitarian perspective of social justice. The prohibition in the ICCPR and ICESCR against deprivation is couched in absolute terms by stating that it can occur "in no case," thus disallowing any exceptions or derogation of this right. The state is therefore prohibited from depriving mine-host communities of their natural resources if the resources are their means of subsistence, and the prohibition stands even if such deprivation would be of greater benefit or good to the nation. In support of this view, Kiss[381] asserts that, while the resources of a country should be utilised for the benefit of the whole population, no community deserves to be spoliated of its means of subsistence in order to benefit others. Consequently, it can be said that the ICCPR and ICESCR do not support any utilitarian arguments that justify sacrificing the well-being of groups such as indigenous and other local communities, who often constitute mine-host communities, through the imposition of unequal burdens in order to benefit the nation as a whole.

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380 Carleton 2014 21 *IJMGR* 133; De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 86 asserts that the prohibition against deprivation of means of subsistence entail that local communities and indigenous peoples cannot be denied physical access to hunting grounds, rivers or forests if these are necessary for their subsistence. In addition, the government is also precluded from denying people economic access to their means of subsistence. This means that governments cannot deny local communities access to mines if these communities are dependent on mining to earn a basic living. Haugen 2007 3(1) *LEAD* 73, 77 regards "means of subsistence" to be the natural resources essential for sustaining lives and it "must include everything which is crucial in order to uphold life, of which food is an essential element" and "means of subsistence cannot only refer to resources which are used for direct human intake. Also, mineral resources that can be sold and generate financial resources, can represent means of subsistence. Without any income from such mineral resources, there will obviously be fewer possibilities to make investments in order to strengthen the subsistence base."

381 Kiss 1986 7 *HUM. RTS.L.J.* 165, 171.

3.4.2.5 Prohibition against impairing the peoples' inherent right to enjoy and utilise fully and freely their natural wealth and resources

Articles 25 of ICESCR and 47 of ICCPR are important as they indicate that nothing in the Covenants "shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources." It is important to determine the significance of these provisions and the reasons for their incorporation into the two covenants given the clear provisions of Article 1 of the ICESCR and ICCPR. In De Jong's[382] view, Article 25 of the ICESCR and Article 47 of the ICCPR were inserted in the two Covenants to avoid state derogation of the right of peoples to freely dispose of their natural resources based on international obligations and economic cooperation. In this sense, the two Articles protect citizens and therefore mine-host communities in natural resource-rich countries who can be dispossessed by their own governments under the pretext of international obligations and economic cooperation.

In the context of mineral extraction, Article 25 of the ICESCR and Article 47 of the ICCPR are important when it comes to mine-host community involvement in and benefit accrual from mineral extraction, as they recognise the right of peoples to their natural resources as inherent or inborn. The citizens of a state are born with this right, and it is not a creation or a gift from the state. Article 25 of the ICESCR and Article 47 of the ICCPR recognise the right of peoples to their natural resources as an absolute right which cannot

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382 See De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 86. Gilbert 2013 31 (3) *NQHR* 322-324 points out that, despite agreeing to the text of Article 1 of the ICESCR and the ICCPR, developing countries were not entirely content with the limitation placed on the right to freely dispose of natural resources. For instance, A 1(2) places limitations on the disposal of natural resources by referring to obligations of international economic co-operation, the principle of mutual benefit and international law. Developing countries argued that the implication of notions such as international economic cooperation, when used as a limitation to free disposal of natural resources, is to cement the continued exploitation of the natural resources of developing countries beyond decolonisation. Therefore, as a compromise, A47 of the ICCPR and A25 of the ICESCR were incorporated into the two international human rights instruments. However, the compromise reached by the General Assembly resulted in the ICCPR and ICESCR being uncertain in relation to the people's right to freely dispose of their natural resources and wealth. Arguably, the right to freely dispose of natural resources, is qualified under A1 while it is an absolute right under A 25 of the ICESCR and A 47 of the ICCPR that have no limitations. Tyagi 2015 4(3) *CJICL* 599 stresses a different view, that is, while it may appear as if permanent sovereignty over natural resources surfaces in two places in the ICCPR and ICESCR without consistency, the drafting history shows that there is no such inconsistency, because A 1(2) was drafted in rights language while A 25 and A 47 were incorporated merely to reiterate a principle of international law.

be negated. It can, therefore, be argued that contrary actions by governments that have the effect of depriving citizens and especially mine-host communities of their right to freely use and derive benefits from their natural wealth and resources are void and can be challenged.

3.4.2.6 Right to consultation and to participate in public affairs

In terms of Article 25(a) of the ICCPR, every citizen shall have a right and opportunity to "take part in the conduct of public affairs, directly or through freely chosen representatives."[383] The United Nations Human Rights Commission explains this right in its General Comment No. 25, as entailing a right of citizens to participate in processes that constitute conduct of public affairs and that make decisions affecting them.[384] General Comment No. 25 paragraph 6 explains that citizens may participate in the conduct of public affairs by "taking part in popular assemblies that have the power to make decisions about local issues or about affairs of a particular community and in bodies established to represent citizens in consultation with government." In the context of mine-host communities, participation in the conduct of public affairs would entail involvement in decision-making processes on the formulation and implementation of policy and legislation and decisions regarding mineral extraction on lands inhabited by those communities.

The right to participate in public life is recognised in several international regulatory instruments including the ILO Convention 169 of 1989, UNDRIP, UNDROP and *United Nations Declaration on Environment and Development* of 1992.[385] The ILO Convention

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383 The right to participate in public affairs is enshrined in A 21 of the UDHR and A 25 of the ICCPR. It provides citizens with a right to access information, consult and make informed decisions. See Chapter 23.2 of Agenda 21 of the 1992 Earth Summit which states that "one of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making."

384 See *Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service* CCPR/C/21/Rev./Add.7, General Comment No. 25, para 5. The CESCR "Poverty and the ICESCR" UN Doc E/C.12/2001/10 (2001) para 12 states that the international human rights framework includes the right of those affected by key decisions to participate in the decision-making process.

385 See A 16 and A 23 of the *World Charter for Nature* of 1982; para 4(d) of the *Committee on the Elimination of Racial Discrimination, General Recommendation* No. 23: *Rights of Indigenous Peoples* (1997) U.N. Doc. A/52/18, annex V at 122 (1997); A 15(1)(2) ILO Convention 169 of 1989 grants indigenous peoples participatory rights in the ownership, possession and use of their lands and natural resources and to participate in the benefits derived from exploitation thereof; A 6(1)(a) ILO Convention 169 of 1989 states that indigenous peoples are to be consulted wherever legislative and administrative measures that may affect them are being considered; A 2(6) and A 4(2) of the *Convention on*

No.169 of 1989 recognises the right of indigenous and tribal peoples to lands and territories flowing from long-time possession and traditional ownership,[386] right to self-determination,[387] participatory and consultation rights and the right to benefit from exploitation of natural resources on their lands.[388] In terms of Article 6(1) (2) of ILO Convention No. 169 of 1989, states are obliged to conduct consultations with indigenous and tribal peoples before undertaking legislative and administrative measures that may affect them. Indigenous and tribal peoples are also entitled to freely participate at all levels of decision-making for policies and programmes affecting them.[389] Consultation with indigenous and tribal peoples should be underlined by good faith and should be performed in a form that is appropriate for the peoples to attain an agreement.[390] When considered in the context of mineral extraction, the provisions of ILO Convention No. 169 of 1989 entail

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Environmental Impact Assessment in a Transboundary Context of 1991; Principle 10 of the *United Nations Declaration on Environment and Development* of 1992; A 6, 7, 8 and Annexure 1 of the Aarhus Convention. See A 5(c) and 15(a) of the DSDP, which provides that states are to take measures for effective participation of all elements of society, individually or through associations, in defining, preparation and execution of the goals, plans and programs of social and economic development. A 15(b) of the DSDP further requires states to take measures to increase popular participation in economic, social and cultural life of the nation through among other things plans for community development. See A 5 of UNDRIP relating to participation in the political, economic, social and cultural life of the state; A 15(2) of UNDRIP concerning elimination of discrimination against indigenous peoples; A 17(2) of UNDRIP pertaining protection of indigenous children against economic exploitation and forms of labour harmful to their education, physical, mental, spiritual, oral and social developments; A 18 of UNDRIP concerning decision-making in matters that affect their rights; A 19 of UNDRIP pertaining adoption and implementation of legislative and administrative measures impacting indigenous peoples; A 23 of UNDRIP relating to development and determining economic and social programmes affecting indigenous peoples; A 27 of UNDRIP concerning establishment of processes to adjudicate and recognise indigenous peoples' rights to their lands and resources, A 30 (2) of UNDRIP relating to use of indigenous territories for military purposes; A 32(2) of UNDRIP concerning approval of development projects on indigenous lands and territories and A 36(2) of UNDRIP right of indigenous peoples to develop and maintain contacts with their members and peoples across borders.

386 A 14(1) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382.

387 See A 1(2) and A 7(1) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382 in terms of which indigenous and tribal peoples have a right to decide priorities for their development relating to, *inter alia*, the lands they occupy or use together with rights to control processes for their economic, social and cultural development. Indigenous and tribal Peoples decide priorities for development through participation in the formulation, implementation and evaluation of development plans and programs directly affecting them. The award of minerals rights and mineral extraction on lands inhabited by indigenous and tribal peoples undoubtedly fall within the ambit of development plans alluded to in A 7(1) of ILO Convention 169 meaning that the peoples should be involved in such plans.

388 A 15(1) (2) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382.

389 A 6(1) (b) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382.

390 A 6(2) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382.

that governments and mining corporations should consult and involve indigenous and tribal peoples constituting mine-host communities whenever exploration and exploitation of minerals directly affecting them are being considered, planned or implemented. This means that they must be involved at all the mining stages from exploration, and extraction up to mine closure.

In terms of Article 32(2) of the UNDRIP, states should consult and cooperate in good faith with the indigenous peoples by engaging their own representative institutions in matters concerning development, utilisation or exploitation of mineral, water or other resources.[391] Restrictions on mineral extraction on indigenous lands are also placed by requirements for consultation and participatory rights enshrined in Article 7(1)[392] and Article 18 of the UNDRIP.[393] Article 18 of the UNDRIP requires participation in decision making to be conducted by representatives chosen by indigenous peoples in accordance with their own procedures and customs. This provision does not refer to national parliamentary elections and representatives chosen from such elections. This limits the potential arguments by politicians that they consult the communities and ensure participation by way of parliamentary elections and participation of the government's local community representatives in parliament.[394] Article 19 of UNDRIP further explains that the consultations must be performed in good faith; this rules out *mala fide* consultation meant to unfairly exploit lands and resources, including minerals. These provisions indicate that the UNDRIP essentially recognises the right of mine-host communities comprised of

391 In terms of A 32(3) of UNDRIP states must put in place effective mechanisms for just and fair redress of impacts of development activities on the lands inhabited by indigenous peoples. In *Kaliña and Lokono Peoples v. Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R.* (ser.C) No. 309 (Nov. 25, 2015) para 202 the Inter-American Court of Human Rights applied the right to take part in the conduct of public affairs to resolve the case involving exploitation of mineral resources on lands inhabited by indigenous peoples.

392 A 7(1) of UNDRIP concerns formulation, implementation and evaluation of plans and programmes for national and regional development which may directly affect indigenous peoples and tribal peoples.

393 A 18 of UNDRIP concerns participation by indigenous peoples and tribal peoples in decision-making in matters affecting their rights.

394 Clavero 2005 22(41) *Ariz. J. Intl. Comp. L* 49 states that participation of indigenous peoples at the broadest level, be it national or parliamentary must not supplant participation at community level. In the two cases involving the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 and *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. *006/2012* Judgment 26 May 2017 para 206, the government of Kenya argued that consultations can be conducted in various ways and that, as regards the Ogiek, the consultation had been conducted with the constitutionally elected representatives of the area in which the Ogiek reside. The African Court found the state in violation of A 22 of the *African Charter* without addressing the above argument.

indigenous peoples to sub-surface resources such as minerals and sharing of benefits derived from exploitation of these resources.

States are obligated in terms of Article 2(3) of the UNDROP[395] to consult and cooperate in good faith with peasants who could be impacted before they adopt or implement legislation, policies, international agreements and other decision-making processes. The consultation process is to be conducted by engaging with the peasants' own representative institutions. Article 2(3) of UNDROP further requires states to respond to contributions by the peasants and to ensure their free, active, effective, meaningful and informed participation in decision-making processes. Additionally, Article 10(1)(2) of UNDROP affirms the right to "active and free participation […] in the preparation and implementation of policies, programmes and projects that may affect their lives, land and livelihoods." These requirements in the UNDROP serve to entrench the right of peasants constituting mine-host communities to involvement in and benefit accrual from mineral extraction on the lands they inhabit.

3.4.2.7 Protection of the right to free, prior and informed consent (FPIC)

The key safeguards for mine-host communities faced with extractive projects on their lands include benefit sharing, prior environmental and social impact assessments (ESIAs), free, prior and informed consent[396] and effective participation in use, access, management

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395 *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* GA Res 73/165 UN Doc A/RES/73/165/2018. The definition of the term 'peasant' in A 1 of UNDROP includes all rural populations including indigenous peoples, local rural communities, nomads, agricultural workers and any person engaged in subsistence agriculture. The rural peasant population host mining operations on their lands and territories and are exposed to the adverse effects of mineral extraction. A 14(2)(a) and A 14(2)(g) of the *United Nations Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) GA Res 34/180, U.N Doc. A/34/46 (1981) requires states to ensure that rural women participate together with men and benefit from rural development and especially participate in the elaboration and implementation of development planning at all levels. In the context of mineral extraction, this provision entails participation of rural women (in host communities) in decision making processes and their accrual of benefits from mineral extraction.

396 Simons and Collins 2010 6(2) *JSDLP* 189 state that FPIC is an international legal principle that developed in response to the destructive impacts of mineral extraction on indigenous peoples' lands, culture, traditional and spiritual practices and self-sustenance. MacKay 2004 4(2) *SDLP* 49, 55-56 explains that the concept of FPIC entails that states must obtain consent without "coercion, prior to commencement of activities, and after the project proponent's full disclosure of the intent and scope of the activity, in language and process understandable to the affected indigenous peoples and communities." MacKay explains that the term "free" entails no coercion, intimidation or manipulation, while the term "prior" entails obtaining consent sufficiently in advance of any authorisation or

and conservation of the natural resources. These requirements are triggered when the physical and cultural survival of the mine-host communities is threatened by the proposed extractive activities, such as exploration and exploitation of minerals on their lands.[397] Survival is endangered when the proposed extractive project involves natural resources that are traditionally used by the mine-host communities. It is also threatened where the extraction of a natural resource, such as minerals that are not traditionally used by the mine-host communities for subsistence, is likely to affect other natural resources traditionally used by the communities such as water, land, forests.[398]

The right of indigenous peoples to FPIC, which is an element of procedural justice, is recognised in various international regulatory instruments, and is pertinent when it comes to involvement in and benefit accrual from mineral extraction on the lands they inhabit.[399] FPIC is specifically guaranteed in several Articles in the UNDRIP.[400] For example, Article

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commencement of activities and respect for time requirements of indigenous consultation/consensus processes. The term "informed" is explained as requiring that information is provided and that it includes (but is not limited to) the following aspects: the nature, size, pace and scope of any proposed project or activity as well as the reasons for the project or activity and the duration. MacKay further asserts that the concept of FPIC embraces involvement of the localities affected and a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing.

397 See Morgera 2018 *Under the Radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realizing Human Rights connected to Natural Resources* 6; *Saramaka Peoples v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) paras 122-123.

398 See Morgera 2018 *Under the Radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realizing Human Rights connected to Natural Resources* 6; *Saramaka Peoples v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007) paras 155-158.

399 *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. To date the ILO Convention No. 169 of 1989 has been ratified by only 23 countries thus indicating the reluctance by States to recognise the rights of indigenous and tribal peoples. Although Zimbabwe and South Africa have not yet ratified the Convention, it can still be utilised as a benchmark for the domestic policy, legislative, constitutional framework for mine-host community involvement in and benefit accrual from mineral extraction. Indigenous peoples' collective land rights based on long-time usage and possession was first recognised in A 13 of the *ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (1957) 328 U.N.T.S 247. The aim of ILO Convention No. 107 of 1957 was integration of indigenous peoples into the mainstream society and this resulted in non-consensual relocation on grounds of national development. Due to better understanding of the distinctiveness of indigenous peoples in international law, these initial objectives have evolved over time resulting in the adoption of the ILO Convention No. 169 1989 that discarded the assimilation approach and recognises indigenous peoples' cultures and territories.

400 The right of indigenous peoples to FPIC is mentioned in A 10 of UNDRIP concerning forced removals, A 11(2) pertaining to cultural and other properties unlawfully taken from them, A 19 relating to adoption and implementation of legislative and administrative measures affecting indigenous peoples, A 28(1) concerning right to redress including restitution, just, fair and equitable compensation for lands and

32(2) of UNDRIP proclaims:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.

Further, Article 19 of the UNDRIP obliges states to consult with indigenous peoples through engagement with their own representatives to obtain their FPIC before adopting and implementing legislative or administrative measures that affect them.[401] In the context of mineral extraction, Article 19 entails that indigenous peoples constituting mine-host communities are entitled to free, prior and informed consent during the process of drafting mining legislation and before the state issues prospecting and exploration licenses.[402] FPIC is therefore significant as it enables indigenous peoples among other mine-host communities to contribute to and influence legislative and other measures centred on mineral extraction on their lands.[403]

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resources confiscated, taken occupied, used or damaged without their FPIC; A 29(2) pertaining storage or disposal of hazardous materials on indigenous lands; and A 32(2) relating to approval of extractive projects including mineral extraction on indigenous lands. The FPIC of indigenous and local communities is also widely recognised in other instruments such as A 16 of ILO Convention 169 of 1989; A 15(5) of the *Convention on Biological Diversity* relating to access to genetic resources and its Nayoya Protocol and *Akwe:Kon Guidelines on Cultural Impact Assessment*. See also the *Committee on the Elimination of Racial Discrimination, General Recommendation of the Rights of Indigenous Peoples, General Recommendation* 23, UN Doc A/52/18 (1997) 122.

401 Pertaining the state obligation to obtain FPIC before adopting decisions relating to extraction of minerals, oil and timber among other projects affecting indigenous peoples see the Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Canada, 22, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006) 178; *Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples*, 3 A.I.L.R. 142, 143 (Mar. 1998) 179; U.N. Comm. on Econ., Soc., & Cultural Rts. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, 12, U.N. Doc. E/C.12/1/Add.74 (Nov. 10, 2001); *Dann v United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.116, Doc. 46 4 131 (2002) 183; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000), 184; *Moiwana v Suriname*, Case 11.821 44 209-211. 185; *Yakye Axa Indigenous Community v Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

402 FPIC is a requirement during all phases of the mine life cycle, that is, from exploration, mine development, extraction and mine closure. See Sophr "Human Rights Risks in Mining: A baseline Study" 2016 www.bmz.de/rue; *Committee on Elimination of Racial Discrimination, Concluding Observation Suriname*: UN Doc. CERD/C/64/CO/9 2004 para 13; *Human Rights Committee, Concluding Observation Suriname:* UN Doc. CCPR/C/80/SUR/ 2004 para 21.

403 Clavero 2005 22(41) *Ariz. J. Intl. Comp. L* 41-42. See A 29 of the UNDRIP which states that no hazardous materials shall be stored on indigenous lands and territories without their FPIC. A 28(3) of UNDRIP provides that unless agreed otherwise by the indigenous peoples, compensation for expropriated lands and natural resources shall be in the form of monetary compensation, lands, territories and resources of equal quality, size and legal status or other appropriate redresses. This

The circumstances under which FPIC would be required were explained in the case of *Saramaka People v Suriname*[404] to include instances where large-scale development projects will have a major impact on the territories of the communities.[405] The Inter-American Court on Human Rights further explained that consultation must be conducted "at the early stages [and] not only when the need arises to obtain approval from the community […]. Early notice provides time for internal discussion within the communities and for proper feedback to the State."[406] Similarly, the CESCR called upon Madagascar to obtain the FPIC of affected communities before concluding mining and other contracts with foreign companies that adversely impact the right of peasants and people living in rural areas to their land and natural resources.[407]

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entails that the process of determining the form of compensation should be with the involvement and in consultation with the indigenous peoples. Compensation from this perspective cannot be imposed on indigenous peoples, for instance by the state or a mining company. See Tuncak UN Doc A/HRC/30/40 (2015) paras 28-29 regarding the right of host communities to FPIC on issues of exploitation of natural resources on their lands and disposal of hazardous substances and waste on those lands.

404 *Saramaka People v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007) para 134.

405 Regarding the basis for indigenous peoples' right to FPIC, Motoc UN Doc E/CN.4/Sub.2/AC.4/2005/WPI (2005) para 56 explains that the right to free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources. See the *Western Sahara Advisory Opinion* [1975] ICJ Rep 12, where the ICJ refers to the "freely expressed will and desire" of the people as the basis of agreements between the state and indigenous peoples. See also the World Resources Institute 2007 "Development Without Conflict: The Business Case For Community Consent" 45 http://www.wri.org/publication/developmentwithout-conflict, where it is stated that "[A]lthough the right to FPIC is more firmly entrenched for indigenous communities, there is a growing recognition that all communities should have a meaningful role in making decisions about projects that directly affect them, including the ability to refuse to host projects that do not provide adequate benefits or help them to realise their development aspirations. For non-indigenous communities, the case for FPIC is based on (i) the right to meaningful participation in environmental decision making, established in Principle 10 of the *United Nations Declaration on Environment and Development*, 31 I.L.M. 874 (1992) (ii) the right to control access to their lands and resources (*Moiwana Village v Suriname*, Inter-American Court of Human Rights, Judgment of June 15, 2005, pp. 54-55) (iii) contemporary standards of public participation as a hallmark of legitimate governance; and (4) basic principles of equity and justice (*World Resources Institute (WRI), United Nations Development Programme, United Nations Environment Programme, and World Bank. 2005. World Resources 2005: The Wealth of the Poor—Managing Ecosystems to Fight Poverty. Washington, DC: WRI.*).

406 *Saramaka People v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007) para 133. It is contentious whether FPIC includes veto power over. Simons and Collins 2010 *JSDPLP* 6 (2) 194, 196-197 indicate that there is no international or domestic jurisprudence that suggests indigenous peoples' right to FPIC includes a right to veto investment, development or extractive projects on their territory. On his part, MacKay 2004 4 (2) *SDLP* 49, 55-56 is of the view that indigenous peoples have a right of veto over development projects allowing them to say no or demand the state to fulfil certain conditions before consent can be granted.

407 CESCR Concluding Observations, Madagascar: UN Doc E/C.12/MDG/CO/2 2009 para 12. Specific instances mentioned in the ILO Convention 169 of 1989 as requiring FPIC are the development, utilisation or exploitation of mineral, water or other resources (A 32), relocation (A 10), disposal of any hazardous materials (A 29) and accessing cultural, intellectual, religious and spiritual property (A 11).

3.4.2.8 Right of mine-host communities to accrue benefits from mineral extraction

The right to share in the benefits of mineral extraction, which is an element of distributive justice, is guaranteed in various international human rights instruments.[408] For instance, while Article 15(1) of ILO Convention 169 of 1989 does not grant indigenous and tribal peoples ownership rights over minerals in the lands they inhabit, it does grant a right to participate in the use, management and conservation of natural resources on their lands.[409] Significantly, indigenous and tribal peoples have a right to participate "wherever possible" in the benefits accruing from the use, management and conservation of the mineral resources.[410] The implication of the requirement to participate in the benefits "whenever possible" is to give indigenous and tribal peoples a right to share in the benefits even when the state retains the ownership or other rights to the minerals.[411] The requirement for benefit-sharing obliges the state "to demonstrate when and why it is not

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408 Anaya "Extractive industries and indigenous peoples" *Report of the Special Rapporteur on the Rights of Indigenous Peoples* UN Doc. A/HRC/24/41 (2013), para 76 explains that fair and equitable benefits should accrue to host communities as they allow access to their territories, give up future development alternatives and bear the adverse effects of development projects on their lands. See the case of *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R.* (ser. C) No.172, (Nov. 28, 2007) in which the IACtHR pointed to the need for legislative measures guaranteeing the right of indigenous peoples to effective consultation, FPIC and share in the benefits of development projects on their lands. The African Commission in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 reiterated the CERD's recommendation that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories and the equitable sharing of benefits to be derived from such exploitation must be ensured.

409 Northcott 2012 16 *IJHR* 73, 79. In *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) *Pars* 64, 102, 103(1)(a) the court held that sub-surface resources (minerals) of the community are vested in the community not the state. This is despite the South African law vesting resources in the state as custodian. The fact that lands were occupied and belonged to peoples before the coming of the nation or state was recognised in the *Western Sahara Advisory Opinion* [1975] ICJ Rep 12, 81 where the ICJ recognised that at the time of colonisation of Western Sahara by Spain, the territory was not *terra nullius* since it was "inhabited by peoples, which if nomadic, were socially and politically organised in tribes and under chiefs competent to represent them." It was recognised in this case that consent is the basis for the relationship between governments and indigenous peoples and that entry into indigenous lands required the free informed consent of the peoples.

410 A 15(1) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Sophr "Human Rights Risks in Mining: A baseline Study" 2016 www.bmz.de/rue 26 posits that the term "use" in A 15(1) of ILO Convention 169 of 1989 implicates exploration and exploitation of minerals. In the consequence, mining activities fall within the scope of application of A 15(1) of ILO Convention 169 of 1989.

411 Swepston 1990 15 *Okla. City U. L. Rev.* 704; Morgera 2018 *Under the Radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realizing Human Rights connected to Natural Resources* 4; Marchegiani, Morgera and Parks 2019 *Indigenous peoples' Right to Natural Resources in Argentina: The Challenge of Impact Assessment, Consent and Fair and Equitable Benefit Sharing in Cases of Lithium Mining* 2.

possible to share benefits."[412] Swepston[413] asserts that the words "wherever possible" establishes an obligation on the state to demonstrate that it is not possible before it negates such participation in benefit sharing. Therefore, not even a legislative provision vesting dominium in minerals resources in the state or President would on its own make it impossible to share the benefits of mineral extraction with mine-host communities.[414]

Article 15(2) of *ILO Convention* No. 169 of 1989 recognises the situation in most states where ownership of mineral resources is vested in the state. In these circumstances, the state retains a right to remove mine-host communities and exploit the mineral resources at will. Mindful of this situation, Article 15(2) of *ILO Convention* No. 169 of 1989 bestows a right on the peoples to have a say in the said exploitation by means of state obligations centred on consultation, assessments, benefit-sharing and compensation.[415] On its part, the CERD highlighted in its General Recommendation No. 23 the need not only for consultation and FPIC, but also for benefit sharing.[416] In its report on the human rights situation in Bolivia, the CERD referred to benefit accrual by host communities when natural

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412 Morgera 2018 *Under the Radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realizing Human Rights connected to Natural Resources* 4.

413 Swepston 1990 15 *Okla. City U. L. Rev.* 705.

414 Swepston 1990 15 *Okla. City U. L. Rev.* 705. Doyle *Indigenous peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* 55 argues that the phrase "wherever possible" dilutes the rights of indigenous peoples and that it should rather have been replaced with the word "always". Doyle argues that in this way, ILO Convention No. 169 of 1989 did not sufficiently re-enforce indigenous peoples' claims to sub-soil resources including benefits thereto and did not adequately challenge the state claims to exclusive ownership of the resources.

415 A 15(2) of ILO Convention 169 of 1989 stresses that "in cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities." Daes "Indigenous peoples' permanent sovereignty over natural resources" *Final report of the Special Rapporteur* E/CN.4/Sub.2/2004/30/Add.1 para 70 reinforces this position by stating that "[I]n situations where indigenous peoples, for valid legal reasons, do not own or control the natural resources pertaining to all or a part of their lands or territories, the indigenous peoples concerned must nevertheless share in the benefits from the development or use of these resources without any discrimination and must be fairly compensated for any damage that may result from development or use of the resources."

416 Para 5 of General Recommendation No. 23 states that "The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories."

resources are extracted from their lands.[417] Significantly, the CERD stated in its report on the human rights situation in Ecuador,[418] particularly pertaining to the exploitation of mineral resources:

> [A]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought, and that the equitable sharing of benefits to be derived from such exploitation be ensured.

Article 14(2)(g) of the *Convention on the Elimination of All Discrimination Against Women* (CEDAW) of 1979[419] requires states to ensure, among other things, that rural women enjoy "equal treatment in land and agrarian reform as well as in land resettlement schemes." This obligation set out in Article 14(2)(g) of the CEDAW was elaborated by the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 34 of 2016 on the Rights of Rural Women,[420] as requiring from states to develop and implement measures to enable rural women to benefit from use of land, rural investments and exploitation of natural resources in rural areas.[421] The state is particularly required to (i) ensure that exploitation of rural land and natural resources does

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417 Committee on Elimination of Racial Discrimination, Concluding Observations: Bolivia, UN Doc. A/66/18, para 43(7)(f) (2012); Committee on Elimination of Racial Discrimination, Concluding Observations: Bolivia, UN Doc. A/56/18, (2001) para 335; Committee on Elimination of Racial Discrimination, Convention Concluding Observations on Ecuador, UN Doc. CERD/C/ECU/CO/19 (2008) para 16, interpreted the required for FPIC mentioned in General Recommendation No. 23 of 1997 and indicated that states are to "… consult the indigenous population concerned at each stage of the process and obtain their consent in advance of the implementation of projects for the extraction of natural resources." Benefit sharing has also been referenced by Anaya *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* UN Doc. A/HRC/15/37 (2010) para 73; Stavenhagen *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc. E/CN.4/2003/90, para 66; Stavenhagen *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, submitted pursuant to Commission Resolution 2005/51, Addendum: Progress Report on Preparatory Work for the Study Regarding Best Practices carried out to Implement the Recommendations contained in the Annual Reports of the Special Rapporteur* UN Doc. E/CN.4/2006/78/Add.4, para 11.

418 Committee on Elimination of Racial Discrimination, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2, (2003) para 16.

419 Zimbabwe became a member state to the CEDAW on 13 May 1991 while South Africa became a member state on 15 December 1995.

420 *Committee on the Elimination of Discrimination against Women, General Recommendation* No. 34, CEDAW/C/GC/34 (2016).

421 *Committee on the Elimination of Discrimination against Women, General Recommendation* No. 34, CEDAW/C/GC/34 (2016) para 78(d).

not violate the rights of rural women;[422] (ii) protect rural women from the adverse effects of land acquisition for development and extractive projects[423] and (iii) obtain the FPIC of rural women before approval of projects that affect rural lands and resources, including decisions relating to leases, expropriation and resettlement.[424] Lastly, benefit sharing is a requirement in terms of Article 5(2)(c) of UNDROP, which obliges states to take measures to ensure that any exploitation of natural resources traditionally held or used by peasants and other people working in rural areas is approved, as based on fair and equitable sharing of the benefits of such exploitation. This is to be achieved through mutually agreed terms between companies and the affected peasants and other people working in rural areas.[425] It follows that, if peasants traditionally hold or use minerals on their lands, mining companies intending to exploit the minerals will have to enter into benefit-sharing agreements with them.

3.4.2.9 Right not to be subjected to forced evictions

Cernea stresses that people who are forcibly displaced from their land and habitats are exposed to a greater degree to the risk of becoming poorer than they were before the displacement, as the people seldom receive compensation for their loss and effective assistance to re-establish themselves productively.[426] Potential risks intrinsic in displacement identified by Cernea are landlessness, loss of means of subsistence and joblessness as well as homelessness, marginalisation and food insecurity emanating from the fact that expropriation of land resources removes the foundation of people's productive systems and livelihoods.[427] Displacement makes people lose their existing jobs, while creation of new jobs is difficult. When mine-host communities lose their lands, members of the community cannot use their existing skills in the new location due to the differences in

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422 *Committee on the Elimination of Discrimination against Women, General Recommendation* No. 34, CEDAW/C/GC/34 (2016) para 62(c).

423 *Committee on the Elimination of Discrimination against Women, General Recommendation* No. 34, CEDAW/C/GC/34 (2016) para 62(c).

424 *Committee on the Elimination of Discrimination against Women, General Recommendation* No. 34, CEDAW/C/GC/34 (2016) para 62(d).

425 A 5(2)(c) of *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* GA Res 73/165 UN Doc A/RES/73/165/2018. See also A 5(2)(a)(b) of UNDROP which requires states to ensure that the exploitation of the natural resources is preceded by a social and environmental impact assessment and consultations with the host communities in good faith.

426 Cernea 1999 34 (31) *EPW* 2153-2154.

427 Cernea 1999 34 (31) *EPW* 2153-2154.

economic activities. Regrettably, instances of evictions and relocations are inevitable when mineral extraction is conducted on lands inhabited by mine-host communities. Consequently, international regulatory instruments impose a general prohibition against forced eviction and regulates specific conditions where it is inevitable.

Article 16(1) of *ILO Convention* No. 169 of 1989 addresses the issue of relocations through a general prohibition. However, the Convention is also conscious of situations where relocations may have to be conducted. As a consequence, Article 16(2) of *ILO Convention* No. 169 of 1989 permits relocations to be undertaken in exceptional circumstances, that is, where they are unavoidable.[428] A relocation to be undertaken due to exceptional circumstances still triggers certain obligations for the state.[429] The relocation should take place with the FPIC of the affected community.[430] Where the community withholds its FPIC, the state will be required to conduct a public enquiry about the need for the relocation.[431] The public enquiry ensures that affected communities have an opportunity to publicly present their side of the argument in opposing the relocation. The state is required to guarantee through legislative provisions a right of the affected people to return to their lands once the cause for the relocation ceases.[432] Resettlement, rehabilitation and compensation for losses incurred by the affected communities are additional requirements

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428 Daes "Indigenous Peoples' Right to Land and Natural Resources" 89 states that "[L]imitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people."

429 A 16 of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Swepston 1990 15 *Okla. City U. L. Rev*. 706-707 asserts that the implication of the term relocation instead of removal is that "in every case in which they lose their lands they must be given new lands" with similar environmental aspects. In addition, the procedure must be "appropriate" meaning that it must be tailored to the needs and situations of the communities. See also *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC); United Nations Office of the High Commissioner for Human Rights, Forced Evictions, Fact Feet No. 25. Rev.1 2014, 30, where it is stated that the state cannot justify forced evictions merely on the claim that the affected peoples and communities did not have legal title to the land or property.

430 A 16(2) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Swepston 1990 15 *Okla. City U. L. Rev.* 707 interprets the notion of "free and informed consent" to mean that "the communities must understand and agree to the proposal."

431 A 16(2) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Swepston 1990 15 *Okla. City U. L. Rev.* 707 explains that proceedings should, *inter alia* be in a form and language that is comprehensible and must not be a formality for decisions already made.

432 A 16(3) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382.

to be fulfilled by the state.[433]

The right of peasants to lands they inhabit and to be protected against arbitrary and unlawful displacement and eviction is prominent in the UNDROP. Peasants have a right in terms of Article 17(1) to the land they hold individually or collectively, and this includes a right to access, use and management of lands, water bodies, pastures and forests therein for purposes of attaining an adequate standard of living so as "to live in security, peace and dignity and to develop their cultures." Article 17(3) of UNDROP requires states to legally recognise the land tenure rights of peasants, including customary ones not presently protected by law. States are to ensure that peasants are not arbitrarily or unlawfully evicted and that their rights are not extinguished or infringed upon.[434]

The non-binding *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* of 2007 (*Guidelines on Development-Based Evictions*) prohibits arbitrary evictions to pave way for development projects such as mining.[435] The *Guidelines* define forced evictions as follows:

> Acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property

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433 A 16(4) (5) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Swepston 1990 15 *Okla. City U. L. Rev.* 708 explains that communities should not suffer diminution in their land rights so that, for instance, if they had freehold title before they should receive lands with the same title whenever possible. See also A 17 of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989) 28 I.L.M 1382* pertaining to instances when consideration is being given to alienate indigenous lands or transmitting them outside the community. The UNDRIP imposes in A 10, a general prohibition against forceful removal or relocation of indigenous peoples from their lands and territories. Where the relocation of the indigenous peoples is unavoidable, A 10 of UNDRIP places preceding conditions for such relocation, namely (i) the FPIC of the indigenous peoples must be obtained, (ii) the parties must agree on just and fair compensation and (iii) there must be an option for the indigenous peoples to return to lands and territories. Negotiation of a just and fair compensation involves consultations and participation of the indigenous peoples since the compensation cannot just be imposed. The option of returning to their lands especially after mineral extraction on their lands has ceased has to be exercised by the indigenous peoples themselves and this requires their involvement in discussions pertaining to this matter.

434 The UNDROP in A 17(4) proclaims that "peasants and other people working in rural areas have the right to be protected against arbitrary and unlawful displacement from their land or place of habitual residence, or from other natural resources used in their activities and necessary for the enjoyment of adequate living conditions. States shall incorporate protections against displacement into domestic legislation that are consistent with international human rights and humanitarian law."

435 *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007). The guidelines were presented as an annexure of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living.

> resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.[436]

Examples of development-based evictions and displacement are identified in paragraph 8 of the Guidelines, and these include evictions related to infrastructure projects such as large dams, industrial or energy projects, mining and other extractive projects.[437] Paragraph 1 of the *Guidelines on Development-Based Evictions* explains that the state's duty to refrain from and to protect against forced evictions is based on the right of citizens to adequate housing as an element of the right to an adequate standard of living.[438] Therefore, evictions must only be carried out in exceptional circumstances by following the domestic law and relevant provisions of international human rights and humanitarian law.[439]

The *Guidelines on Development-Based Evictions* contends that states should protect citizens against forced evictions regardless of whether persons or groups hold title to the lands or property under domestic law.[440] For the affected people and the public to be

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436 Para 4 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

437 Para 8 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007) states that development-based evictions include evictions often planned or conducted under the pretext of serving the "public good," such as those linked to development and infrastructure projects (including large dams, large-scale industrial or energy projects, or mining and other extractive industries).

438 Para 1 and 2 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007) makes reference to the Universal Declaration of Human Rights, A 11(1) of the ICCPR, A 16 (1) and 27 (3) of the *Convention on the Rights of the Child*, A 14(2) (h) of the *Convention on the Elimination of All Forms of Discrimination Against Women* of 1979, and A 5 (e) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, and A 16 of the ILO Convention No. 169 of 1989. See A 17 of the ICCPR which states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence" and "everyone has the right to the protection of the law against such interference or attacks."

439 Para 6 of the United Nations *Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

440 Para 21 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007) asserts that states "shall ensure that evictions only occur in exceptional circumstances. Evictions require full justification given their adverse impact on a wide range of internationally recognized human rights. Any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare;(d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines. The protection provided by these procedural requirements applies to all vulnerable persons and affected groups, irrespective of whether they hold title to home and property under domestic law."

properly involved in decision making, states are to provide appropriate notice of the proposed projects; allow sufficient time for public review of the development plans and conduct public hearings on the proposed projects.[441] During the public hearings, affected communities should be given opportunities to present alternative proposals and to express their demands and development priorities.[442] In terms of paragraph 38 of the *Guidelines on Development-Based Evictions*, potentially affected groups, including indigenous peoples, have the right to "relevant information, full consultation and participation during the entire process, and to propose alternatives that authorities should duly consider."[443] The affected persons, groups and communities have a right to full and prior informed consent regarding relocation, which must be guaranteed by the state.[444] Therefore, before initiating an eviction, the state must demonstrate that the eviction is inevitable and that the process is consistent with applicable international human rights law.[445]

The *United Nations Guiding Principles on Internal Displacement*[446] is relevant to the question of mine-host community involvement in and benefit accrual from mineral extraction, because they prohibit displacement of communities for large-scale development projects, where these are not justified by "compelling or overriding" public interests.[447] The

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441 Para 21 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

442 Para 21 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

443 Para 56(i) of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007) also emphasise that the "entire resettlement process should be carried out with full participation by and with affected persons, groups and communities."

444 Para 56 of the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

445 Para 40 of the United Nations *Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007).

446 *United Nations Guiding Principles on Internal Displacement* UN Doc E/CN.4/1998/53/Add.2 (1998). South Africa enacted the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998, among other legislation to prevent unlawful displacement. See also A 3, 4 and 5 of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* (Kampala Convention) of 2009 pertaining to state responsibility to refrain from, prohibit and prevent arbitrary internal displacement of their populations and related matters. A 10 of the Kampala Convention addresses the issue of development-induced displacements (such as those caused by mining projects) agreed to by the state or private actors and obliges the states to carry out prior socio-economic and environmental impact assessments, ensure that affected people and communities are consulted and that they are provided with full information. The Kampala Convention entered into force on 6 December 2012. Zimbabwe ratified the Kampala Convention on 22 July 2013 while South Africa has neither signed or ratified it.

447 Principle 6(2)(c) of the *United Nations Guiding Principles on Internal Displacement*. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities' Resolution of 1997 affirms "the

qualification of compelling and overriding public interests ensures that development projects such as mineral extraction are not used as means or defences for violation of other human rights. It denotes proportionality, demanding the balancing of public and other communal interests.[448] Also important when it comes to dealing with the despoliation of natural resources is the *United Nations Guiding Principles on Business and Human Rights*.[449] The instrument is based on (i) the state's duty to respect, protect and fulfil human rights; (ii) corporate responsibility to comply with all applicable laws and to respect human rights;[450] and (iii) the right of victims to appropriate and effective remedies.[451] The state's duty to respect, protect and fulfil human rights and fundamental freedoms can be extended to the context of mineral extraction on lands inhabited by mine-host communities. The duty generally requires the state to refrain from interfering with the enjoyment of human rights. In the context of mineral extraction, this entails refraining from interfering with the right of mine-host communities to enjoy their lands and natural

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right of persons to be protected from forcible displacement and to remain in peace in their homes, on their lands and in their own countries." States are cautioned against violation of host community rights in the name of national development or public interest in *Lansman v Finland* HRC Communication No 511/1992, UN Doc. CCPR/C/52/D/511/1992 para 58; CERD Concluding Observations on Suriname, UN Doc. CERD/C/64/CO/9/Rev.2 (2004) para 15; Vienna Declaration and Programme of Action of the World Conference on Human Rights, UN Doc. A/CONF.157/23 (1993) para 10.

448 Principle 7(3)(b)(c)(d) of the *United Nations Guiding Principles on Internal Displacement* provide procedural safeguards and guarantees to be fulfilled by states including the provision of access to information to affected peoples, seeking the affected peoples' free and fully informed consent and their active participation and involvement of the affected peoples when it comes to planning and management of their relocation. In terms of Principle 9 of the guidelines, special care must be taken to avoid displacement of indigenous peoples among others who have a special attachment to their traditional lands while Principle 18 provides that the displaced peoples have a right to an adequate standard of living.

449 UN Doc HR/PUB/11/04 (2011).

450 For instance, Principle 18(b) of the *Guiding Principles on Business and Human Rights* requires business enterprises to conduct human rights risk assessments through involvement and meaningful consultation with potentially affected communities within the context of their operations. Remedies available for victims of human rights abuses include compensation, restitution, rehabilitation, penal sanctions and guarantees of non-repetition.

451 See the *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'*, Sec. I., A., 1., Commentary, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para 1. A 2(1) of the ICCPR indicates that states are obliged to respect and ensure the rights recognised in the present Covenant. Nowak *U.N. Covenant on Civil and Political Rights-CCPR Commentary* 2nd ed 37 interprets this to encompass the positive and negative obligations to respect, protect and fulfill human rights. See Eide UN-Doc. E/CN.4/Sub.2/1983/25 (1983); Eide UN-Doc. E/CN.4/Sub.2/1987/23 (1987) who first framed the obligations to respect, protect and fulfill human rights. See also Shue 1984 *Netherlands Institute of Human Rights* 83-95; De Schutter *International Human Rights Law-Cases, Materials, Commentary* 242.

resources or the right to their property, culture and traditions.[452] The duty to protect human rights requires the state to take measures to prevent violations by third parties, thus including mining companies and, if a violation takes place, to investigate and punish the violator.[453] In the context of mineral extraction, the duty to protect human rights entails the duty of the state to take protective measures such as appropriate legislation to protect mine-host communities from reasonably foreseeable violations by both state owned and privately owned mining companies.[454] The duty to fulfil seeks to ensure the actual realisation of the human rights for instance through enactment of policy and legislative measures. The ensuing section turns to the environmental rights and sustainable development approach.

3.4.3 Environmental rights and sustainable development approach

The environmental rights and sustainable development approach to involvement and benefit accrual focuses attention on two elements or strands, that is, the environmental rights of the mine-host communities, and sustainable development.[455] These elements encompass the right to an environment that is not harmful to health and well-being, the right to participate in decision-making on environmental matters, the right to share in the

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452 Human Rights Committee (HRC), General Comment No. 31 (2004) on Art. 2 ICCPR 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004, para 6.

453 See HRC, General Comment No. 31 (2004) on Art. 2 ICCPR 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004, para 8; Inter-American Court of Human Rights (IACHR), *Velásquez-Rodríguez v. Honduras*, Inter-Am Ct HR 1988, Series C, No. 4, para 172-173. See A 18 of the International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, https://www.refworld.org/docid/48abd5730.html. See also Principle 1 of the *United Nations Guiding Principles on Business and Human Rights*. The *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework'*, Sec. I., A., 1., Commentary, UN Doc. A/HRC/17/31 of 21 March 2011, Annex, para 1 provides that "States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."

454 In *'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area'*, Advisory Opinion (1 February 2011), Case No. A17 paras 186, 189, the International Tribunal for the Laws of the Sea examined state liability for the damages caused by private companies in the context of deep seabed mining in terms of responsibilities arising from A 139 (1) and 153 (4) UN Convention of the Law of the Sea. The Tribunal concluded that state liability only arises where the state has failed to meet its obligation of due diligence. Consequently, no liability arises if the state has taken all the necessary measures with a view to ensure compliance by the third party.

455 Pertaining the notion of sustainable development, see the World Commission on Environment and Development (WCED) 1987 Report titled "Our Common Future" (also known as the Brundtland Report after its Chair, Gro Harlem Brundtland), WCED, UN Doc. A/42/427 (1987) para 27.

benefits of natural resources and utilise the resources in a way that satisfies current needs without compromising the ability of future generations to meet their own needs.[456]

Although described in different terms, the right to an environment not harmful to health and well-being can be observed in various international environmental regulatory instruments.[457] Significantly, the *Declaration of the United Nations Conference on the /Human Environment* (*Stockholm Declaration* of 1972)[458] asserts that human beings are key to environmental protection while the environment gives human beings "physical sustenance and […] the opportunity for intellectual, moral, social and spiritual growth."[459] Principle 1 of the *Stockholm Declaration* of 1972 stresses that people have a right to an environment of minimally acceptable standard which is essential to humanity's well-being and enjoyment of human rights including the right to life.[460] This entails that a polluted,

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456 World Commission on Environment and Development (WCED) 1987 Report titled "Our Common Future" (also known as the Brundtland Report), WCED, UN Doc. A/42/427 (1987) para 27.

457 *Declaration of the United Nations Conference on the Human Environment* UN Doc A/Conf.48/14/Rev.1 (1972); *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *Agenda 21* A/CONF.151/26 (Vol. II) (1992); *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012); *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015). A 1 of the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Convention) UN Doc ECE/CEP/43 (1998); A 3(8) of the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention) Doc. E.ECE. 1250 (1997); A 11 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*; A 11 para 1 of the 1988 *Additional Protocol to the American Convention on Human Rights*; A 24 of the *African Charter on Human and Peoples' Rights* of 1982. See also A 18 of the *Protocol to the African Charter on Human and Peoples" Rights on the Rights of Women in Africa* of 2003, which states in A 18 that women "shall have the right to live in a healthy and sustainable environment."

458 *Declaration of the United Nations Conference on the Human Environment* UN Doc A/Conf.48/14/Rev.1 (1972). The United Nations Conference on the Human Environment of 1972 was attended by 113 member states of the United Nations therefore showing wide state support. The major outcomes of the conference were the *Declaration of the United Nations Conference on the Human Environment* (Stockholm Declaration) and establishment of the United Nations Environment Programme (UNEP), GA Re 27/2997 of 1972 and the World Charter for Nature, GA Resolution 37/7 of 1982. The Stockholm Declaration is famed as the forerunner of various international regulatory instruments on the protection of the environment.

459 Para 1 of the Preamble of the *Declaration of the United Nations Conference on the Human Environment* UN. Doc A/Conf.48/14/Rev.1 (1972). The International Court of Justice in its *Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons* 8 July 1996, ICJ Reports 1996, 226, states that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn."

460 Principle 1 of the *Declaration of the United Nations Conference on the Human Environment* UN. Doc A/Conf.48/14/Rev.1 (1972) states that "man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations". A 24 of the *African Charter on Human and Peoples' Rights* CAB/LEG/67/3 REV. 5, 21 I.L.M. 58 (1982) also provides that '[A]ll peoples shall have the right to a general satisfactory

poisoned and contaminated environment is harmful to mine-host communities. In this way, the *Stockholm Declaration* of 1972 emphasises the importance of the environment without which there is no human life and development. The well-being of mine-host communities must, therefore, not be sacrificed by allowing potentially harmful projects such as mineral extraction to proceed without appropriate environmental assessments and their involvement, even if the projects create economic benefits for the whole nation.

In terms of Principle 2 of the *Stockholm Declaration* of 1972, natural resources must be preserved for the benefit of present and future generations through careful planning and management.[461] This requirement presents a strong basis for the (i) involvement of mine-host communities in the decision-making processes pertaining to awarding and utilisation of mineral rights affecting their immediate environment and (ii) accrual of benefits from the mining operations.[462] Significantly, safeguarding of natural resources cannot be achieved without the involvement and participation of mine-host communities who inhabit the lands on which the resources are found, a fact affirmed in paragraph 7 of the Preamble of the *Stockholm Declaration* of 1972.[463] Principle 5 emphasises inter-

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environment favourable to their development." The *Study on the Problems of the Environment and its Relation to Human Rights* GA Res 45/94 UN Doc A/RES/45/94 (1991), affirms that "all individuals are entitled to live in an environment adequate for their health and well-being" and also highlighted that environmental degradation can endanger the very basis of life. The resolution also refers to the right of everyone to an adequate standard of living for their health and well-being. Section 24 of the *Constitution of South Africa* and section 73 of the *Constitution of Zimbabwe* recognise the right of citizens to an environment that is not harmful to their health or well-being.

461 The *Declaration of the United Nations Conference on the Human Environment* of 1972 indicates the need for "planning" in Principles 2, 4, 12, 13, 14, 15 and 17. Planning and EIA requires the involvement of host communities. These provisions have evolved into a state obligation to conserve and sustainably use natural resources for present and future generations in what is called intra and inter-generational equity.

462 Obligations on states to ensure involvement and benefit accrual by host communities are not isolated to the context of mineral extraction projects. Community evolvement and benefit accrual also feature in other contexts such as bio-logical diversity and climate change. See A 1, 3 and 15 of the *Convention on Biological Diversity* (CBD); A 8(j) and A 14(1) (a) of the *Convention on Biological Diversity* regarding involvement of indigenous and local communities, public participation, environmental impact assessments and sharing of benefits of biological diversity; A 23 of the *Cartagena Protocol on Bio-safety to the Convention on Biological Diversity* of 2000, 39 I.L.M 1027 (2001); the *Forest Carbon Partnership Facility and UN-REDD Programme, 'Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities'* (Guidelines, 20 April 2012); World Bank Operational Policy on Indigenous Peoples 2005 (OP 4.10) https://policies.worldbank.org; World Bank Operational Policy 4.30 (OP 4.30 Involuntary Resettlement). The World Bank Environmental and Social Policy outline several standards including Environmental and Social Standard 5 (ESS5) and Environmental and Social Standard 7 (ESS7). See also the African Development Bank (AFDB) Involuntary Resettlement Policy of 2003.

463 Para 7 of the Preamble of the Stockholm Declaration of 1972 states that "[T]o achieve this environmental goal will demand the acceptance of responsibility by citizens and communities and by

generational equity. It is stated in Principle 5 of the *Stockholm Declaration* of 1972 that non-renewable resources must be exploited in a manner that guards against the danger of their future exhaustion. This is maintained in paragraph 10(d) of the *World Charter for Nature* of 1982, which calls upon states not to waste natural resources but use them with restraint.[464] These regulatory instruments confirm that non-renewable resources such as minerals are finite and require sustainable utilisation. Although principle 5 of the *Stockholm Declaration* of 1972 requires sharing of benefits by all of humanity, in the context of mineral extraction, it should be the mine-host communities that should benefit first and foremost, given that they are the ones most affected by resource extraction on the lands they inhabit.

The *United Nations Declaration on Environment and Development* of 1992[465] (Rio Declaration of 1992) also asserts that humans are at the centre of "sustainable development."[466] This can be interpreted to mean that people's needs should be the

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enterprises and institutions at every level, all sharing equitably in common efforts. Individuals in all walks of life as well as organizations in many fields, by their values and the sum of their actions, will shape the world environment of the future. Local and national governments will bear the greatest burden for large-scale environmental policy and action within their jurisdictions." Principle 1 asserts the responsibility of citizens to safeguard the environment for present and future generations since a good environment provides a life of dignity and well-being.

464 Para 10(d) of the *World Charter for Nature* GA Res 37/7 UN Doc A/RES/37/7 (1982) provides that "non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance, the rational possibilities of converting them for consumption and the compatibility of their exploitation with the functioning of natural systems."

465 Principle 1 of the *United Nations Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (1992).

466 The United Nations General Assembly commissioned the World Commission on Environment and Development (WCED) to carry out a study on the environment and development resulting in the 1987 Report titled "Our Common Future" (also known as the Brundtland Report after its Chair, Gro Harlem Brundtland), WCED, UN Doc. A/42/427 (1987). The Brundtland Report reconciled economic development and natural resources management with environmental protection through the notion of sustainable development explained in para 27, where it is defined as "development that meets the need of the present without compromising the ability of future generations to meet their own needs." The WCED highlights that the environment and economy should be interwoven in all levels of governance. The reason for reconciling economic, social and environmental objectives is to protect natural resources from reckless exploitation. Para 16 emphasises that benefits of growth should be shared fairly while the financially powerful states and individuals should bear more responsibility. Para 96 asserts that decision making on sustainable development requires the widespread support and involvement of an informed public among others and that their "role and participation in development planning, decision-making, and project implementation should be expanded." Para 20 of chapter 2 states that effective participation in decision-making processes by local communities can help them articulate and effectively enforce their common interest. In addition, para 78 of Chapter 2 states that large-scale development projects, require participation in the form of public inquiries and hearings on the development and environment impacts and that projects with significantly high environmental impacts must be subjected to mandatory public scrutiny and prior public approval even through a referendum.

foundation of or are central to all decisions impacting the human environment.[467] It follows that development must be measured against the welfare of humans and, in the same vein, the welfare of mine-host communities must not be degraded as a result of development projects such as mineral extraction. This view is buttressed by principle 2 of the *Rio Declaration* of 1992 which subjects the state's sovereignty over its natural resources to the responsibility not to cause damage to the environment.[468]

The requirement for states to balance development with social and environmental concerns is underpinned not only by the *Rio Declaration* of 1992 but also by the *United Nations Conference on Environment and Development Agenda* 21 of 1992,[469] *United Nations Conference on Sustainable Development* of 2012[470] and the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* of 2015.[471] By reconciling competing goals between development and environment, principle 3 of the *Rio Declaration* of 1992 attributes equal weight to development and environmental needs.[472] Most importantly, principle 3 of the *Rio Declaration* of 1992 stresses that the right to development "must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[473] Principle 4 of the *Rio Declaration* of 1992 proclaims that "environmental

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467 Wirth 1995 29 (3) *Georgia Law Review* 614.

468 Principle 2 of the *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), provides that "states have, in accordance with the *Charter of the United Nations* and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

469 *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *Agenda 21* A/CONF.151/26 (Vol. II) (1992). The outcomes of the United Nations Summit on Environment and Development (Earth Summit) of 1992 comprised four documents, namely the *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *United Nations Conference on Environment and Development Agenda 21* A/CONF.151/26 (Vol. II) (1992), *Framework Convention on Climate Change* 1771 UNTS 107, 31 ILM 849 (1992), and the *Convention on Biological Diversity* 1760 U.N.T.S. 69 (1992). This was followed by the establishment of the Commission on Sustainable Development (CSD) by the United Nations General Assembly in 1993. The CSD was tasked with monitoring and promoting the implementation of the outcomes of the Earth Summit.

470 *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

471 *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

472 Principle 3 of the *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *Agenda 21* A/CONF.151/26 (Vol. II) (1992).

473 Wirth 1995 29(3) *Georgia Law Review* 614 points out that Principle 3 of the *United Nations Declaration on Environment and Development* of 1992 is ambivalent on whether the right to development is an

protection shall constitute an integral part of the development process and cannot be considered in isolation from it." Consequently, principle 4 limits the right to development in terms of environmental concerns. Principle 22 Rio Declaration of 1992 recognises the vital role of indigenous peoples and other local communities in environmental management and development based on their knowledge and traditional practices. When considered in the context of mineral extraction, the above essential elements entail that the well-being of mine-host communities, present and future, should not be sacrificed in order to merely attain national economic development. Sustainable development is attained when mine-host communities are involved in decision making and where the environmental burdens they bear are balanced by the accrual of socio-economic benefits.

The *United Nations Conference on Environment and Development: Agenda 21* of 1992 affirms that indigenous and other communities have a historical relationship with their lands and are generally descendants of the original inhabitants of the lands they live in.[474] States are, therefore, required to ensure protection of indigenous lands from activities that are environmentally unsound or that the communities consider to be socially and culturally inappropriate.[475] Involvement of communities in the decision-making process is emphasised since broad public participation in decision making is a prerequisite for attaining sustainable development.[476] States are also required to involve and consult with indigenous peoples and other communities at the national and local levels to reflect their needs and incorporate their values, traditions and practices in national policies and programmes centred on natural resources management and other development programmes affecting them, which would in the present context include mineral extraction.[477]

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attribute of states or is a people's right. The case of *Director: Mineral Development, Gauteng Region & Another v Save The Vaal Environment (Pty) Ltd* [1999] 2 All SA 381 (SCA) directly associates the principle of sustainable development with the issuing of mining licenses because of the enormous damage mining can do to the environment and ecological systems.

474 Para 26.1 *United Nations Conference on Environment and Development Agenda 21* A/CONF.151/26 (Vol. II) (1992).

475 Para 26.3(a)(ii) (vii) *United Nations Conference on Environment and Development Agenda 21* A/CONF.151/26 (Vol. II) (1992).

476 Para 23.2 *United Nations Conference on Environment and Development Agenda 21* A/CONF.151/26 (Vol. II) (1992).

477 See paras 26.6(a), 26(c), 26.1 of the *United Nations Conference on Environment and Development Agenda 21* A/CONF.151/26 (Vol. II) (1992). The World Summit on Sustainable Development of 2002 adopted the *United Nations Johannesburg Declaration on Sustainable Development*, UN Doc

The *United Nations Conference on Sustainable Development* of 2012[478] confirms support for goals and targets set in the *Millennium Declaration* of 2000,[479] reaffirms support for principles set in the *United Nations Declaration on Environment and Development* of 1992,[480] and confirms support for the formulation of sustainable development goals.[481] In addition, the *United Nations Conference on Sustainable Development* of 2012 acknowledges the importance of UNDRIP.[482] States committed to ensure broad public participation, access to information, meaningful involvement and active participation of local communities and indigenous peoples.[483] Most importantly for mine-host communities, paragraph 227 of the *United Nations Conference on Sustainable Development* of 2012 recognises that minerals make a major contribution to national economies and offer an opportunity to catalyse broad-based economic development and reduce poverty if managed effectively and properly. Therefore, the *United Nations Conference on Sustainable Development* of 2012 confirms that mineral extraction should maximise social and economic benefits and effectively address the negative environmental and social impacts endured by mine-host communities.[484] States are required to provide opportunities for people to influence their lives and future through participation in decision making to

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A/CONF.199/L.6/Rev.2, as a follow up to the 1992 United Nations Summit on Environment and Development. The Johannesburg Summit produced the 2002 *Johannesburg Declaration on Sustainable Development* and the *Johannesburg Plan of Action*. Paras 25, 26 of the Johannesburg Declaration recognise the role of indigenous peoples in sustainable development and states that sustainable development requires long-term and broad participation in policy formulation, decision making and implementation at all levels. Para 27 of the declaration states that in their pursuit of their activities companies have a duty to contribute to the evolution of equitable and sustainable communities and societies.

478 *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012). The Millennium Development Goals expired in 2015 and were replaced with the Sustainable Development Goals.

479 Para 5 of the *United Nation Conference on Sustainable Development* of 2012.

480 Para 15 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

481 Para 10 of the *United Nation Conference on Sustainable Development* of *2012* GA Res 66/288, UN Doc A66/288 (2012).

482 Para 49 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

483 Para 43 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

484 Para 228 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012) calls upon states to "adopt strong, effective legal and regulatory frameworks, policies, practices for mining sector that deliver economic, social benefits and include effective safeguards that reduce social and environmental impacts as well as conserve biological diversity and ecosystems during post and after mine closure."

voice their concerns.[485] The development process itself must be inclusive and people-centred, benefiting and involving all people.[486]

When they adopted the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* in 2015[487] (2030 Agenda for Sustainable Development), parties committed to ensure equality,[488] inclusive economic growth[489] and that "no one will be left behind."[490] This shift focus away from the emphasis on state sovereignty. Instead, greater focus is now being put on the well-being of the peoples of the states underpinned by the notion of sustainable development. The *2030 Agenda for Sustainable Development* sets out 17 sustainable development goals (SDGs) to be realised in the period between 2016 and 2030. The goals seek, *inter alia*, to ensure that the poor and vulnerable have equal rights to economic resources, ownership and control over land and natural resources.[491] Significantly, the SDGs seek to balance the three dimensions of sustainable development namely the social one (people), the environmental one (planet) and the economic one (prosperity). The SDGs are to be achieved in a balanced and integrated manner and the targets should be met for all nations and all

485 Para 13 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

486 Para 31 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012).

487 Paras 10 and 11 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

488 Para 3 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

489 Para 3 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

490 Para 4 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015)

491 Goal 1.4 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015). Sustainable Development Goal 1 seeks to end poverty in all its forms everywhere and "ensure the poor and vulnerable, have equal rights to economic resources, access to basic services, ownership of land and other forms of prosperity including natural resources." Sustainable Development Goal 2 seeks to end hunger, achieve food security and improve nutrition and promote sustainable agriculture. It seeks in para 2 to promote access to and fair and equitable sharing of benefits arising from utilisation of genetic resources and associated traditional knowledge. Sustainable Development Goal 3 seeks to ensure healthy lives and promote well-being for all. In para 3.9 it aims at reducing the number of deaths and illness from hazardous chemicals, air water and soil pollution and contamination. Sustainable development Goal 6 seeks to ensure availability and sustainable management of water and sanitation for all. In para 6.1 seeks to achieve universal and equitable access to drinking water for all by 2030, while para 6.3 seeks to ensure improvement of water quality by reducing pollution, eliminating dumping and minimising release of hazardous chemicals and materials.

peoples and all segments of society.[492] The *2030 Agenda for Sustainable Development* also states that it seeks a just and equitable, tolerant and open society and inclusive world in which the needs of the most vulnerable are met.[493] In the context of mineral extraction, these principles and goals aid mine-host communities by requiring the state to ensure eradication of poverty which can only be achieved through involvement and accrual of socio-economic benefits by the mine-host communities.

The right of affected mine-host communities to participate in decision making on environmental matters is subject of the first strand of the environmental rights and sustainable development approach as it focusses attention on environmental rights. This right is recognised in the *Rio Declaration* of 1992 and the *ILO Convention* No. 169 of 1989.[494] Principle 10 of the *Rio Declaration* of 1992 stresses the importance of participation of all concerned citizens at all levels in decision-making processes and management of environmental issues.[495] Significantly, citizens must have access to environmental information held by public authorities such as hazardous materials and activities in their communities.[496]

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492 Para 4 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

493 Para 8 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

494 A 7(3)(4) of *ILO Convention* No. 169 of 1989 does not explicitly use the phrase environmental and social impact assessment (ESIA). However, it ultimately imposes an obligation on states to conduct such impact assessments with the involvement and participation of the indigenous and tribal peoples whenever development projects, including mineral extraction on their lands, are being considered. A 6(1) (a) of the *ILO Convention* No. 169 of 1989 states that indigenous and tribal peoples' participation should be involved in such impact assessments through their own representatives and not those imposed from outside of the community. The ESIA must be conducted before project implementation, as it provides information that facilitates meaningful participation and consultation by the host communities. A 7(3) of *ILO Convention* No. 169 of 1989 provides that "Governments shall ensure that whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impacts on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities." The ESIA (including consideration of benefit-sharing options) should be prepared by an independent, technically qualified entity with the "active participation of indigenous communities concerned." See also para 11(b) and 16 of the *World Charter for Nature* GA Res 37/7 UN Doc A/RES/37/7 (1982).

495 Principle 10 Rio Declaration of 1992 states that environmental issues are best handled with the participation of all concerned citizens at the relevant levels.

496 See Tuncak *Report of the Special Rapporteur on the implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Waste*, UN Doc A/HRC/30/40 (2015) paras 28-29 regarding right of host communities to information relating to disposal of hazardous substances and waste on their lands.

Access to environmental information, public participation and access to justice are important in the context of environmental issues pertaining to mineral extraction on lands inhabited by mine-host communities. For instance, access to environmental information ensures transparency in decision-making that affect mine-host communities and ensures effective participation by an informed community. Public participation ensures that concerns raised by citizens and mine-host communities are considered in policymaking. In turn, access to justice demands protection of the rights to access to information and effective participation.[497]

The extraction of minerals often causes damage to the lands inhabited by mine-host communities, thereby affecting their right to access, use and enjoyment of those lands and natural resources as well as their right to develop and maintain their distinct cultural identities.[498] Direct[499] and indirect references to the right to development are found in several international and regional regulatory instruments, key among which is the *United*

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497 See A 6 of the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Convention) UN Doc ECE/CEP/43 (1998), which states that for public participation to be effective, there must be (i) early notification and information, (ii) reasonable preparation time to participate, (iii) early public participation, (iv) disclosure of all relevant information at the time of participation, (v) an opportunity for the public to submit comments, information, analyses or opinions in writing or at the public hearings and (vi) due account of the outcome of the public participation and publicly accessible decisions with reasons and considerations. The United Nations Environment Programme developed the *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (Bali Guidelines) of 2010 aid states to implement Principle 10 of the *United Nations Declaration on Environment and Development* of 1992 within the framework of their national legislation and processes. The guidelines elaborate the key requirements in Principle 10 of the *United Nations Declaration on Environment and Development* of 1992 by stating that access to environmental information, including environmental quality and health, requires governments to make information available and accessible to any individual in an affordable and timely manner. Public participation requires early and effective public participation in decision making with adequate opportunities for members of the public to express their view. Access to justice requires access to courts and administrative bodies to challenge decisions and action or omission by public authorities.

498 *United Nations General Assembly Declaration on the Right to Development*, GA Res 41/128, UN Doc A 41/128 (1986).

499 The right of indigenous peoples to development is addressed in A 23 of UNDRIP which entitles indigenous peoples to determine and develop priorities and strategies for their development. Indigenous peoples should therefore be actively involved in developing and determining health, housing and other social, economic programs affecting them. This is followed by A 24 of UNDRIP providing for the right of indigenous peoples to the highest attainable standard of physical and mental health and A 25, which provides a right to distinct spiritual relationship with their lands owned, occupied and used as well as other resources. These provisions require indigenous peoples to be actively involved in decision-making concerning their economic, cultural and social development, and this entails involvement in development projects such as mineral extraction on their lands.

Nations Declaration on the Right to Development (DRTD).[500] The right to development is subject of the second strand of the environmental rights and sustainable development approach and itself has two elements, namely the right to participate in the development process and the right to partake in the fruits of development. Therefore, the preamble of the DRTD defines development as:

> a comprehensive economic, social, cultural and political process which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation and in the fair distribution of benefits resulting from it.[501]

This means that development is dynamic and is a pursuit for the better in all areas including the economic, social, cultural and political realms. The term "well-being" therefore encompasses more than economic growth, as it includes growth opportunities,

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500 See A 22 of the *Universal Declaration of Human Rights* (1948), which provides a right of everyone to "the realization […] of the economic, social and cultural rights indispensable for his dignity and free development of his personality;" A 1(1) of the ICCPR and ICESCR, which provides a right of peoples to "freely pursue their economic, social and cultural development" and A 11 of the ICESCR, which provides a right to adequate standard of living and a right to "adequate food, clothing and housing and to the continuous improvement of living conditions." A similar provision is also found in A 25 of the *Universal Declaration of Human Rights*. See A 9 of the *United Nations General Assembly Declaration on Social Progress and Development*, GA Res 2542 1969, asserting that development is one of the common concerns of the international community. The *Declaration on Social Progress and Development* provides in A 1 and A 3 a right of all peoples and human begins to "live in dignity and freedom and to enjoy the fruits of social progress" and indicates that permanent sovereignty over natural resources is important for social progress and development. See also A 22 of the *African Charter on Human and Peoples'* Rights OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); A 5, A10 and A11 of the *Vienna Declaration and Programme of Action of the World Conference on Human Rights* of 1993 *(UN Doc. A/CONF.157/23 of 1993)*; A 7 (1) of *ILO Convention* 169 of 1989; Principle 3 of the *United Nations Declaration on Environment and Development* of 1992; A 3 (4) of the *United Nations Framework Convention on Climate Change* of 1992; A 23 of the *Declaration on the Rights of Indigenous Peoples* (2007); para 11 of the Millennium Declaration (2000); para 8 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012), and paras 10 and 35 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015). The right to development has been affirmed in case law including *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* ACHPR Com No 276/2003.

501 Sen *Development as Freedom* 16, 35 defines development as an "expansion of substantive freedom or capabilities of persons to lead the kind of lives they value or have reason to value." Sengupta 2002 24(4) *HRQ* 845-846, defines the right to development as a right to "a process of development which leads to the realisation of each human right and of all of them together and which has to be carried out in a manner known as rights-based, in accordance with the international human rights standards, as a participatory, non-discriminatory, accountable and transparent process with equity in decision-making and sharing of the fruits of the process." Villaroman 2011 29 (1) *NQHR* 18 criticises the definitions put forward by Sen and Sengupta in terms of a lack of tangible entitlements and recognisable obligations. This view is shared by Beetham in his book titled *The Right to Development and its Corresponding Obligations* 83, 84, 95, who proposes a narrow definition focused on a nation's or people's right to economic development.

capabilities and social and cultural well-being and improvement in the overall well-being of peoples and not impoverishment. Thus, from a human rights perspective, development is considered as a means to improve the well-being of all citizens.[502] In the context of mineral extraction on lands inhabited by mine-host communities, the definition of development in the DRTD entails that mining projects should enhance rather than result in deterioration of the well-being of mine-host communities. The benefits resulting from mining projects should be fairly distributed, which entails that the mine-host communities should accrue meaningful benefits from mineral extraction on the lands they inhabit. In addition, the participation of mine-host communities in the mineral extraction projects is required, but it should be free (not coerced), active and meaningful. Consequently, mineral extraction should be measured, from the period prior, during and after mine closure, in terms of the well-being of the mine-host communities.

The right to development is often criticised for allowing states to derogate the human rights of peoples in the process of pursuing narrow economic development.[503] For instance, a narrow pursuit of economic development would result in the state privileging the interests of transnational companies who invest in mineral extraction over the rights of mine-host communities.[504] The right to development is further criticised as lacking in content: that it adds nothing new to international law, as it is a mere collection of already existing human rights law.[505] It is, however, incorrect to assume that the right to development is devoid of content since some key elements of this right can be observed when the DRTD is analysed. Notedly, state development policies should be anchored in the improvement of the well-being of the citizens. Any policy or legislative measures that diminish rather than improve the well-being of citizens violates their right to development. The development process must be voluntary, participatory and not forced, and the people

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502 Sengupta 2004 32 (2) *Oxford Development Studies* 179-180.

503 Orford *"Globalization and the Right to Development"* 132-133 claims that "the right to development has become something of a mantra for states seeking to justify the privileging of economic development over human rights and to legitimize repressive or authoritarian policies."

504 The case of *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* ACHPR Communication ACHPR Com No 155/96 (2001) (Ogoni Case) provides an example of the narrow pursuit of economic development by the State.

505 Donnelly 1985 15 3 *Calif West Int Law J* 473. Schrijver *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* 271 observes that those who champion the right have elevated it to "lofty heights" while the protagonists view the right to development as a "dangerous smokescreen."

must be involved in making decisions regarding their development path. Citizens are the rightful holders of the right to development and they should have a share in the benefits derived from the development process.

Since the right to development entails an independent process of progress whose aim is to improve the well-being of citizens, both the means (processes or procedures) of realising the outcomes and the outcomes themselves (the well-being of citizens) are key elements of the right to development.[506] The emphasis put on processes and procedures is linked to the notion of procedural justice while outcomes in the form of the well-being of citizens is linked to distributive justice. This right to an independent process of economic development is based on legally binding international law norms such as the right of peoples to economic self-determination and permanent sovereignty over natural resources.[507]

The DRTD recognises the right of peoples to self-determination by virtue of which they freely pursue their economic, social and cultural development.[508] Article 1(2) of the DRTD states that the right to development implies realisation of the right to self-determination, while this includes the exercise by peoples "of their inalienable right to full permanent sovereignty over all their natural resources and wealth." The phrase "all their natural resources and wealth" means that the entire spectrum of natural resources and wealth, minerals included, is subject to their permanent sovereignty.[509] The right of peoples to self-determination also entails a right to decide what is best for them and this is critical to

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506 Villaroman 2011 29 (1) *NQHR* 23. Villaroman 2011 29 (1) *NQHR* 106 explains that participation in the development is a matter of procedural justice that is as important as the end goal, development itself. None of the aspects is sacrificed for the other. Therefore, the environmental and social well-being of mine-host communities is not to be sacrificed for the economic development of the whole nation. This gives weight to peoples' claims for participation in the enjoyment of economic, social and cultural rights and corresponding duties on the state to ensure realisation of those rights.

507 Villaroman 2011 29 (1) *NQHR* 24.

508 Para 6 of the preamble of the *United Nations Declaration on the Right to Development* of 1986. In terms of A 3 of the UNDRIP "indigenous peoples have the right to self-determination. By virtue of this right, they freely determine their political status and pursue their economic, social and cultural development." Indigenous peoples' self-determination also appears in As 4, 5, 18, 19, 20 and 34 of the UNDRIP.

509 De Jong *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations* 74-75, considers A 1(2) to be "a logical extension of the right to self-determination and an expression of the obligation of States to exploit their natural resources for national development and the well-being of the people of the State concerned." This right to self-determination includes a people's right to freely pursue their economic, social and cultural development and a right to freely dispose natural wealth and resources for national development and the well-being of the peoples.

communities who stand to benefit from greater distributional gains if they control the direction of their development.[510]

Paragraph 12 of the preamble of the DRTD affirms that humans are at the centre of the development process and development policy should therefore make them the main participants and beneficiaries of development.[511] In terms of Article 2(1) of the DRTD, the human person is the central subject of development and should be the active participant and beneficiary of the right to development. Human beings are identified in Article 1(1) of the DRTD as the holders of the right to development:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.[512]

The DRTD calls for active, free and meaningful participation development and fair distribution of the benefits resulting from the development.[513] Therefore, development decisions should be taken with the active involvement of the affected peoples who are the subjects and beneficiaries of development.[514] In the context of mineral extraction it means

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510 In the context of mineral extraction, the peoples' right to self-determination entails that the mine-host communities should be involved in, consulted and participate in decision-making processes pertaining to mineral development projects on the lands they inhabit. Recognition of the right of peoples to permanent sovereignty over their natural resources entails that the resources belong to the peoples. Affirmation that mineral resources belong to the peoples, entails that, mine-host communities as owners of minerals by virtue of being peoples, must participate in decision making pertaining to exploration and exploitation of their mineral resources and should partake of benefits resulting from their exploitation.

511 See also UNDROP, which provides a right of peasants to determine priorities for their development. In terms of A 3(2) of UNDROP, peasants have the right to determine and develop priorities and strategies for their development. A 4(1) obliges states to ensure that both peasant women and men "are able to freely pursue, participate in and benefit from rural economic, social, political and cultural development." In terms of A 4(2)(a), states are to accord both peasant women and men rights to participate equally and effectively in the design and execution of development projects. A 11(1) of UNDROP provides the right of peasants to "seek, receive, develop and impart information." In terms of A 11(2) of UNDROP, states are to ensure that "relevant, transparent, timely and adequate information" is provided to peasants "in a language and form and through means adequate to their cultural methods so as to promote their empowerment and to ensure their effective participation in decision-making in matters that may affect their lives, land and livelihoods."

512 As an inalienable right, the right to development cannot be taken or negotiated away.

513 A 2(3) of the *DRTD.* Kamga 2011 *De Jure* 390 considers meaningful participation as that which encompasses the right to receive appropriate information that enables consulted persons to make decisions. See also Kamga and Fombad 2013 *JAL* 210.

514 A 3(1)(3) of the DRTD declares that states "have the right and duty to formulate appropriate national developmental policies aimed at the constant improvement of the well-being of the entire population

that a mineral development policy or project that is foisted on citizens and communities on whose lands the mining operations are carried out, would violate this requirement in the DRTD.[515] Consequently, Vasak counsels that the right to development is useful and that citizens and communities can utilise it to hold their governments accountable for development in their areas.[516] This is buttressed by Article 3(1)(3) of the DRTD which identifies the state as the primary duty bearer with a duty to create conditions favourable for the realisation of the right to development. Therefore, states only claim the right to development at international law as the representatives of peoples and not because they are endowed with human or peoples' rights.[517]

3.5 Concluding remarks on international regulatory instruments relating to involvement and benefit accrual by mine-host communities from mineral extraction

The present chapter unpacked requirements relevant to mine-host community involvement in and benefit accrual from mineral extraction as set out in international regulatory instruments under three strands namely the sovereignty rights approach, the human rights approach and the environmental rights and sustainable development approach.

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and of individuals, on the basis of their active, free and meaningful participation in the development and in the fair distribution of the benefits resulting therefrom."

515 In the context of mineral extraction, Article 2(3) of the DRTD[515] read with Article 3(1)(3) demands that the state should take policy, legislative and other measures that permit mine-host communities to participate in decision-making centred on mineral extraction on the lands they inhabit as well as accruing benefits therefrom. Article 2(3) of the DRTD creates a basis for involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit by emphasising popular participation in decision-making, equality of opportunity and fair distribution of income.

516 Vasak quoted in De Feyter *World Development Law: Sharing Responsibility for Development* 21 argues that the holders of the right to development are individuals, states and sub-national groups such as local communities and the duty bearers are the domestic states and the international community. De Feyter *World Development Law: Sharing Responsibility for Development* 22 argues that development should benefit people including indigenous peoples. The state is obliged to consult and respect people's views and priorities regarding development.

517 Villaroman 2011 29 (1) *NQHR* 22. As a human right, the right to development is therefore not a right of states but a right that states assert as representatives of their peoples. It is a serious flaw for the state or government to claim the right to development for itself against other states and end there without passing the benefits thereof to its citizens, or itself deny the right when asserted by its own citizens. The states have the duty to put in place procedures in domestic legislation permitting individuals and communities to participate in the development process and ensure fair distribution of development benefits among citizens.

The sovereign rights approach establishes that peoples are entitled to natural resources and wealth as a matter of their sovereignty as separate from state sovereignty.[518] The terms "peoples" and "people" can be interpreted as referring to indigenous peoples, local communities and the whole population or citizens of the state. In this way, the term opens up for claims by mine-host communities irrespective of whether they are an indigenous or a local community. The peoples' sovereign rights limit and qualify the traditional notion of state sovereignty, as it rejects the absolutist conception of state sovereignty together with the latter's unqualified right to dispose of natural resource wealth, which is often abused by ruling elites and transnational corporations at the expense of mine-host communities. The thrust of sovereignty is shifted away from state rights and refocused on the duties of the state towards its citizens. In this way, permanent sovereignty over natural resources becomes a tool for ensuring the involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.

The chapter demonstrated that the peoples' right to involvement in and benefit accrual from mineral extract is a constituent element of their sovereign rights to freely use and dispose of their natural resources. The requirement for mine-host community involvement in and benefit accrual from mineral extraction can therefore be distilled from those international regulatory instruments that recognise the right of peoples to economic self-determination and the sovereignty of both nations and peoples over natural resources. These instruments include the *Charter of the United Nations, United Nations General Assembly Resolution* 1514 of 1960*, United Nations General Assembly Resolution* 1803 of 1962, *United Nations General Assembly Resolution* 2158 of 1966 and the *United Nations General Assembly Resolution* 2692 of 1970.

It was also observed that states sought, from 1966 into the 1970s, to shift the nature, scope and subjects of the right to permanent sovereignty over natural resources from both peoples and nations to a right of states only, as shown in the *United Nations Declaration*

[518] It must be pointed out, however, that states sought from 1966 going into the 1970s to shift the nature, scope and subjects of the right to permanent sovereignty over natural resources from peoples and nations to a right of states only, as shown in the NIEO and CERDS. This shift sought unsuccessfully to dilute the international law standards limiting the state's exercise of permanent sovereignty over natural resources that were set out in *United Nations General Assembly Resolution* 1803 of 1962.

on the Establishment of a New International Economic Order of 1974 and the *Charter of Economic Rights and Duties of States* of 1974. This shift sought to dilute the international law standards limiting the state's exercise of permanent sovereignty over natural resources that were set out in *United Nations General Assembly Resolution* 1803 of 1962. The principles established in the *United Nations General Assembly Resolution* 1803 entailed that both peoples and states have the right to permanent sovereignty over natural resources, but this right must be exercised in the interest of the people.

The chapter established that people have a right to freely determine whether and how to use their natural resources to attain their socio-economic development. In the context of mineral extraction, this entails the award and utilisation of the mineral rights must occur with the involvement of the mine-host communities, who must also accrue socio-economic benefits. Mine-host communities must be free to express their concerns and preferences in the award and utilisation of mineral resources on the lands they inhabit and even influence the state to withdraw from exploitative arrangements that enrich mining companies at their expense. The communities are entitled to be involved in the process of design, implementation and evaluation of mineral policy and legislation that affect them. The right of peoples to economic self-determination and permanent sovereignty over natural resources must be contained in the domestic constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction. The domestic frameworks should guarantee the right of peoples to freely dispose of their mineral resources, use mineral resources in ways that benefit them and participate in decision making pertaining disposal of these resources. This must be accompanied by the state's duty to utilise minerals for national development and for the benefit of the peoples. The frameworks should contain provisions to ensure that mine-host communities share in the proceeds of exploitation of mineral resources without undue constraints from international investment agreements signed by the state.

The discussion on the human rights approach established that the award and utilisation of mineral rights on lands inhabited by mine-host communities with particular focus on involvement and benefit accrual is anchored by international regulatory instruments that characterise intra-state allocation of natural resources as primarily a matter of property

and cultural rights rather than sovereignty. Natural resources are considered to be central to the spiritual and cultural identity, values, subsistence and survival of mine-host communities, especially those comprised of indigenous peoples. The rights to self-determination, to freely use and dispose of natural resources, not to be deprived of means of subsistence and to information are identified as integral to the right of mine-host communities when it comes to involvement in and benefit accrual from mineral extraction on their lands. These rights are protected in key international regulatory instruments such as the ICCPR, ICESCR, CEDAW, ICERD, the *ILO Convention* 169 of 1989, UNDRIP and the UNDROP. For instance, Article 1(2) of the ICCPR and ICESCR provides that peoples may dispose of their natural resources for their own benefit. The term "may" means that they have the right to decide whether to dispose of their natural resources and wealth and the terms and conditions under which this must occur. In no case can the people be deprived of their means of subsistence. This means they may not be deprived of their natural resources such as rivers for fishing, lands for agriculture and forests for hunting. Those communities who have minerals as their means of subsistence cannot be deprived of the mineral resources. Mine-host communities can therefore raise objections against the state where the award and utilisation of mineral rights on their lands is done without their involvement and benefit accrual, thus posing a threat to their survival. The prohibition against deprivation of means of subsistence applies irrespective of whether the people have title to the lands or not. It applies even though the deprivation stands to benefit whole nation. In this way the human rights approach rejects any utilitarian ideas in the award and utilisation of mineral rights on the lands inhabited by mine-host communities.

The human rights approach establishes the right of citizens and therefore mine-host communities to involvement in and benefit accrual from mineral extraction based on the rights to participate in the conduct of public affairs,[519] participation in ownership, possession and use of lands and the benefits of natural resources.[520] Consultations must be held in good faith, in accordance with their customs and traditions and through their own representative institutions, therefore entrenching procedural justice elements.[521]

519 A 25 of the ICCPR.
520 A 15 of the ILO Convention 169 of 1969 and A 32 (2) of the UNDRIP.
521 A 2(3), 18, 19 and 32(2) of the UNDRIP and A 5(2)(c) of UNDROP.

The chapter concluded with a discussion of the environmental rights and sustainable development approach which focussed on two main strands, that is, environmental rights of mines-host communities and sustainable development when it comes to awarding and utilisation of mineral rights. The chapter established that the requirement for the involvement in and benefit accrual by mine-host communities from mineral extraction on their lands can be sustained by focussing on their environmental rights. Key environmental rights identified in the chapter include the right to an environment that is not harmful to health and well-being, to environmental information,[522] to participate in decision making in environmental matters, to share in the benefits of exploitation of natural resources and to sustainable development. The chapter further established that the right to development as a basis for the involvement in and benefit accrual from mineral extraction has two elements: firstly, to participate in the development process and, secondly, to enjoy the benefits of development. The manner of attaining development and the outcomes themselves, that is, the well-being of the people, are key elements of the people's right to development. This emphasises both procedural and substantive justice when it comes to awarding and utilisation of mineral rights on lands inhabited by mine-host communities.

The international regulatory instruments discussed in this chapter set a benchmark or barometer for assessing how the requirements centred on mine-host community involvement in and benefit accrual from mineral extraction are realised in the Zimbabwean constitutional, policy and legislative frameworks. The study turns to the requirements to be gleaned from regional and sub-regional regulatory instruments in order to set a benchmark to be used for assessing the Zimbabwean constitutional, policy and legislative frameworks.

[522] Principle 10 of the *United Nations Declaration on Environment and Development* of 1992.

CHAPTER 4

REGIONAL AND SUB-REGIONAL REGULATORY INSTRUMENTS CENTRED ON MINE-HOST COMMUNITY INVOLVEMENT IN AND BENEFIT ACCRUAL FROM MINERAL EXTRACTION

4.1 Introduction

The Inter-American and African human rights systems articulate requirements centred on mine-host community involvement in and benefit accrual from extraction of minerals at a regional level. At sub-regional level, requirements centred on mine-host community involvement in and benefit accrual from mineral extraction projects can be observed in regulatory instruments of the Southern African Development Community (SADC).[523] These instruments to be found in the Inter-American, African and SADC regions are critical for setting a benchmark against which Zimbabwe's constitutional, policy and legislative frameworks for mine-host community involvement in and benefit accrual from mineral extraction can be evaluated. This is particularly so given that section 46(1)(c) of the *Constitution of Zimbabwe* requires the domestic courts, when interpreting the Bill of Rights, to consider international law and treaties signed by Zimbabwe. On its part, section 46(1)(e) permits the domestic courts to consider relevant foreign law when interpreting the Bill of Rights.

The instruments and case law of the Inter-American human rights system are relevant to the African human rights system and SADC countries such as Zimbabwe and South Africa despite the geographical distance. This is because of the common background of colonialism and subjugation suffered by South American and African countries, Zimbabwe and South Africa included. Both regions were once subjected to colonial dispossessions of lands and other natural resources of the natives. This makes the right to property

[523] Other African sub-regional regulatory instruments that have addressed the issues pertaining to mine-host community involvement in and benefit accrual from the extraction of minerals are the *ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* of 2009 and the *Protocol of the International Conference of the Great Lakes Region Against the Illegal Exploitation of Natural Resources* of 2006. Zimbabwe and South Africa are not state parties to these instruments as the two states are not part of ECOWAS and the Great Lakes Region.

including lands and natural resources a key substantive right in both systems. The common socio-economic conditions especially poverty and lack of access to economic resources for most citizens in the Inter-American and African contexts, point to the need for urgent restoration of natural resources and wealth to the rightful owners of these resources. This background has seen, at regional level, the African Commission on Human and Peoples' Rights (AComHPR)[524] drawing insights mostly from the Inter-American Human Rights System.[525] Similarly, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) have also made references to the *African Charter on Human and Peoples' Rights* of 1982 (*African Charter*) and decisions of the African Commission.[526] At domestic level, national courts have also utilised Inter-American case law as a guide to constitutional interpretation. For instance, the Constitutional Court of South Africa stated in the case of *S v Makwanyane*[527] that decisions of tribunals dealing with comparable instruments such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, may provide guidance as to the correct interpretation of the constitutional bill of rights. There is therefore substantial cross-pollination between the two systems and, for that reason, this chapter shall only dwell on the Inter-American and African requirements centred on involvement in and benefit accrual by mine-host communities from mineral

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524 The African Commission on Human and Peoples' Rights was established in 1987 and its mandate is the protection and promotion of human and peoples' rights in Africa and interpretation of the *African Charter on Human and Peoples' Rights* of 1982.

525 Morgera *Under the Radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realising Human Rights connected to Natural Resources* 6, asserts that it is common knowledge that the *Saramaka* line of reasoning has had visible impact on the African framework on human rights. See the case of *Kichwa Peoples of Sarayaku Community v Ecuador*, Petition, Inter-Am. Comm'n H.R., Report No. 64/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, which refers to the *African Charter on Human and Peoples' Rights* of 1982 and the AComHPR case of the *Endorois*, especially paras 250-251 where it was stated that "protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity." See Pentassuglia 2010 3 *UCL Hum. Rts. Rev*. 158; *African Commission of Human and Peoples' Rights v The Republic of Kenya* (26 May 2017) (Ogiek Case) App. No 006/2012, paras 137,187.

526 See the case of *Maya Indigenous Community v Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, para 87 where it is held that "the organs of the inter-American system have previously held that developments in the *corpus* of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments." The case of *Maya Indigenous Community v Belize* para 149 mentions with approval the *African Charter on Human and Peoples' Rights* and the case of *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* ACHPR Communication ACHPR Com No 155/96 (2001) (Ogoni Case).

527 *S v Makwanyane* 1995 (3) SA 391 (CC), 35. See also references to the Inter-American system in the Zimbabwean case law of *Retrofit (Pvt) Ltd v Posts and Telecommunications Corporation and Anor* 1995 (2) ZLR 199 (S) 847 at 856 G-H and *S v A Juvenile* 1990 (4) SA 151 (ZSC) at 155 H-I).

extraction on the lands they inhabit.

This chapter discusses the regulatory instruments and case law of both the Inter-American and African human rights systems in order to identify requirements relevant to the question of mine-host community involvement in and benefit accrual from mineral extraction, that can be used for reform of the Zimbabwean constitutional, policy and legislative framework. The chapter commences with a discussion of the key regulatory instruments and case law from the Inter-American human rights system. This is followed by the African regulatory instruments and case law. African sub-regional instruments are discussed last.

4.2 The Inter-American regional system

4.2.1 Inter-American human rights regulatory instruments

The paramount regional human rights regulatory instruments of the Organisation of American States (OAS) are the *American Declaration on the Rights and Duties of Man* of 1948 (*American Declaration*)[528] and the *American Convention on Human Rights* of 1969 (*American Convention*).[529] The *American Declaration* is the foundational document for the Inter-American human rights system while the *American Convention* is instrumental when it comes to updating and elaborating the rights and principles set out in the *American Declaration*. Determination of cases of violations of human rights including those centred on natural resources in which the victims are unable to realise justice in their home country is achieved by means of the Inter-American Commission on Human Rights based in Washington D.C, United States of America, and the Inter-American Court of Human Rights based in San Jose, Costa Rica. Determinations of the Inter-American Commission are expressed in the form of recommendations, while those of the Inter-American Court are passed as binding judgements.

The Inter-American Commission and Inter-American Court have relied on the human right

528 1948 OEA/Ser.L.V/II.82 doc.6 rev.1.
529 1969 OASTS No. 36, 1144 UNTS 123.

to property in the *American Declaration* and the *American Convention* to protect the lands, natural resources and culture of mine-host communities comprised of indigenous and tribal peoples. In terms of Article 23 of the *American Declaration,* every person has the right to private property, which ensures decent living and the dignity of the individual. Article 21 of the *American Convention* asserts the following:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society;
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law;
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Significantly, Article 23(1)(a) of the *American Convention* which guarantees the right of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives, is also instrumental when it comes to determinations relating to natural resources of indigenous peoples. These fundamental legal provisions were interpreted and elucidated by the Inter-American Commission and the Inter-American Court in various cases related to mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit. The key cases, discussed in section 4.2.2 below, present useful principles against which the Zimbabwean constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction can be evaluated and reformed.

4.2.2 Decisions from the Inter-American Commission and the Inter-American Court

4.2.2.1 Background

Hernandez[530] explains that decisions centred on resource use and allocation as well as distribution of burdens and benefits were previously the exclusive domain of states. However, the Inter-American Commission and the Inter-American Court have in landmark

[530] Hernandez *Sovereignty over Natural Resources* 57.

cases taken a distributional role, allocating burdens and benefits of sovereignty over natural resources within the state.[531] In this process, they circumscribed the state's sovereignty over natural resources where decisions centred on award and utilisation of natural resources were made without the involvement of the affected communities.[532]

Benefit-sharing was expressly recognised in *Saramaka Peoples v Suriname*[533] discussed in 4.2.2.2 and the case of *Kalina and Lokono Peoples v Suriname*[534] discussed in 4.2.2.9, below. The Inter-American case law exhibits the following three commonalities:[535]

(i) Mine-host communities claiming preservation of their identity and culture as the basis of their rights to ownership, possession, use, control and development of traditional lands and natural resources including mineral resources;

(ii) State arguments denying violation of the rights of mine-host communities based on the state's permanent sovereignty over natural resources;[536] and

(iii) The Inter-American Commission and Inter-American Court upholding the substantive rights of mine-host communities to own, use, control, occupy and develop lands and natural resources including minerals based on their right to exist as a distinct people.[537]

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531 Hernandez *Sovereignty over Natural Resources* 57.

532 Hernandez *Sovereignty over Natural Resources* 57. See *Mayagna (Sumo) AwasTigni v Nicaragua* Inter-Am Court HR (Ser C) No 79 (2001); *Maya Indigenous People of Toledo v Belize* Case 12.053, Inter-am.C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004); *YakyeAxa v Paraguay* (Merits, Reparations and Costs) 17 June 2005 Series C no 125 IACHR 6; *Moiwana v Suriname* Inter-Am Ct. H.R. (ser. C) No. 124 (2005); *Saramaka Peoples v. Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007); *Kichwa People of Sarayaku v Ecuador* Inter-Am Court HR (Ser C) No 245 (2012); *Kalina and Lokono Peoples v Suriname* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015).

533 *Saramaka Peoples v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, para 130 and fn 128; 129, para 138 and fn 137.

534 *Kalina and Lokono Peoples v Suriname* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015), paras 197-198, 295.

535 Miranda 2012 45(3) *Vand. J. Transnat'l L.* 820.

536 For instance, in *Kichwa People of Sarayaku v Ecuador* Inter-Am Court HR (Ser C) No 245 (2012) para 38, the government argued that oil concessions were permissible pursuant to the "constitutional principle of public domain over natural resources of the sub-soil." In *Saramaka Peoples v Suriname* Inter-Am. Ct. H.R. (ser. C) No.172, para 118, the state argued that "all rights to land, particularly its subsoil natural resources, are vested in the state, which can freely dispose of these resources in concessions to third parties."

537 In *Xákmok Kásek Indigenous Community v Paraguay, Judgment*, Inter-Am.Ct. H.R. (ser. C) No. 214, (Aug. 24, 2010) para 86, the court determined that "the close relationships that the indigenous people maintain with the land must be recognised and understood as the essential basis of their cultures, their spiritual life, their integrity, and their economic survival."

4.2.2.2 *Yanomami Peoples v Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1

In the case of *Yanomami Peoples v. Brazil*, the Inter-American Commission found violations of the Yanomami indigenous peoples' identity and culture triggered by the Brazilian government's approval of tin mining projects on lands that they were inhabiting.[538] The Inter-American Commission found that conflicts that affected the lives, security, health and cultural integrity of the Yanomamis arose after the discovery of tin and other minerals on the lands in 1976.[539] After examining the concessions and exploitation of minerals, it was determined that Article 168 of the Brazilian Constitution vested all minerals in the state even when such minerals were found on properties held privately. However, the Inter-American Commission made a finding to the effect that, conscious of the constitutional position and to protect the indigenous peoples, Brazil's law permits the exploitation of minerals on indigenous lands only under exceptional circumstances. Most importantly, the minerals should first be designated as strategic resources necessary for national security or development; the extraction should be made in cases of great national interest and be carried out by state entities, who must first obtain the consent of the indigenous peoples.[540]

The Inter-American Commission held that the tin mining concessions granted by the state without having fulfilled the above criteria resulted in violation of the indigenous peoples' rights including the rights to life, liberty, personal security,[541] residence and movement[542] and the preservation of health and well-being.[543] The Commission pointed out that programmes centred on indigenous peoples should be carried out in consultation with the affected indigenous population.[544]

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538 *Yanomami Peoples v Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985), paras 7- 9.

539 *Yanomami Peoples v Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 para 10 (d) (1985).

540 Brazil Law 6,001 para 4(e) ii.

541 A 1 of *American Declaration of the Rights and Duties of Man.*

542 A 18 of *American Declaration of the Rights and Duties of Man.*

543 A 16 of *American Declaration of the Rights and Duties of Man.*

544 *Yanomami Peoples v Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1, recommendation 3(c).

4.2.2.3 *Mayagna (Sumo) Awas Tigni v Nicaragua* (2001) Inter-Am Court HR (Ser C) No 79

The case of *Mayagna (Sumo) Awas Tigni v Nicaragua* was presented by the Inter-American Commission to the Inter-American Court to determine whether Nicaragua violated the obligation to respect the right to property of the community, among other rights.[545] Although the subject of this case was not centred on minerals, the principles enunciated in the case are applicable to all natural resources. The state had, among other things, granted road construction and logging concessions on indigenous lands without the consent of the community, and failed to ensure an effective remedy in response to protests by the community over violation of their property rights. In this case, the Inter-American Court did not rely on the notion of indigenous peoples as sovereigns to find a violation of their communal land rights or the right to control exploitation of their natural resources. Instead, the court relied on Article 21(2) of the *American Convention* which protects the right to property and international human rights law that guarantees the right of indigenous peoples to enjoyment and protection of their culture, identity, traditional lands and natural resources including minerals.[546] The Inter-American Court affirmed that the right to property as enshrined in Article 21 of the *American Convention* extends to lands held under customary tenure regimes.[547] The court explained that:

> indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.[548]

It was held that, as a result of indigenous customary practices, possession of the land was a sufficient title for indigenous communities who lack real title to property of the land to obtain official recognition of their lands. Most importantly, the court interpreted the right

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545 A 21 of the American Convention.

546 *Mayagna (Sumo) Awas Tingni Cmty. v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para 140(d).

547 *Mayagna (Sumo) Awas Tingni Cmty. v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para 148.

548 *Mayagna (Sumo) Awas Tingni v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para 149. The court asserted on para 151 that, "for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."

to property under Article 21 of the *American Convention* to include indigenous peoples' lands and natural resources thereon.[549] These rights are held by the community in their collective capacity and according to their own customs.[550]

4.2.2.4 Maya Indigenous Communities v. Belize, Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004)

The case of *Maya Indigenous Communities v Belize* concerned state disposal of natural resources, particularly granting of logging and oil exploration licenses within the lands inhabited by the Maya *Indigenous Communities* (Maya) in violation of their right to property.[551]

The Maya argued that the state had violated their right to meaningful consultation about decisions affecting their interests in lands and natural resources and this right is implicit in human rights provisions including Article 27 of the ICCPR.[552] It was argued that the state violated the Maya's right to participate in government[553] and the right to self-determination guaranteeing them a right to be in control of their own destinies under conditions of equality. The Maya further argued that, for indigenous peoples, the right to self-determination entails, at a minimum, a right to meaningful involvement in all decision-making that affects them.[554] Pertaining the *ILO Convention* No. 169 of 1989, the Maya argued that the *Convention* granted indigenous peoples a right to be consulted even

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549 *Mayagna (Sumo) Awas Tingni v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para 153.

550 *Mayagna (Sumo) Awas Tingni v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) paras 148, 151, 153.

551 *Maya Indigenous Communities v Belize* paras 99, 145. It was noted that the oil and logging concessions had resulted in damage to "critical parts of the natural environment upon which the Maya people depend for subsistence, including vulnerable soils, primary forest growth and important watersheds […] plant and animal life, and, as a consequence […] affected Maya hunting, fishing, and gathering practices essential to the Maya cultural and physical survival."

552 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 55. A 27 of the ICCPR states that ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.

553 A 20 of the American Declaration.

554 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 55.

where the decision pertains natural resources under state ownership.[555] It was indicated that consultation must not be a mere formality where they are given information about development projects.[556] Instead, it must be a process where they are given a full and fair opportunity to be heard and to genuinely influence the decisions that impact their lives.[557] The Inter-American Commission determined that granting of oil exploration and logging concessions in the absence of effective consultations and informed consent of the Maya violated their human rights as set out in Article 23 of the *American Declaration* and international law.[558] It was further highlighted that the free exercise of the right to property is essential to the enjoyment and perpetuation of indigenous peoples' culture.[559] Further, protection of indigenous property rights requires of the state to undertake effective and fully informed consultations with indigenous communities before decisions impacting their traditional lands are made.[560] In addition, Articles 18 and 23 of the *American Declaration* require member states to obtain the full informed consent of the indigenous community when determining the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title, had occupied and had used.[561]

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555 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 56. A 15.1 of ILO Convention 169 of 1969.

556 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 57, it is made clear that providing vague and incomplete information is not meaningful consultation.

557 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 56. A 6.2 of ILO Convention No. 169 of 1969.

558 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (20.04) para 94, 95, 96 and 153-154. The Commission indicated that the other rights violated by lack of consultation included "the right to life under Article I of the American Declaration, the right to religious freedom and worship under Article III of the American Declaration, the right to a family and to protection thereof under Article VI of the American Declaration, the right to preservation of health and well-being under Article XI of the American Declaration, and the "right to consultation" implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and the principle of self-determination."

559 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 155.

560 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 142.

561 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 142. The Commission further explained that FPIC "requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories." See *Mayagna (Sumo) AwasTigni v Nicaragua* Inter-Am Court HR (Ser C) No 79 (2001) para 153.

While drawing inspiration from the case of *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,*[562] the Inter-American Commission indicated that it took cognisance of the importance of economic development for the prosperity of the Inter-American peoples. However, it found that development projects:

> must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.[563]

4.2.2.5 Yakye Axa Indigenous Community v. Paraguay Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005)

This case was brought before the Inter-American Court by the Inter-American Commission on behalf of the Yakye Axa Community, who sought to recover their ancestral lands and natural resources which were sold by the government of Paraguay to British investors in the nineteenth century. The court stated that, when it comes to deciding resource allocation, the state should consider the importance of the land for the preservation of the indigenous cultures and human rights.[564] The court rejected the state's utilitarian argument pertaining to the productive use of the land by the title holders (investors) as a justification for negating the indigenous community's human right to property as guaranteed by Article 21 of the *American Convention on Human Rights*.[565]

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562 *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* ACHPR Communication ACHPR Com No 155/96 (2001) (Ogoni Case).

563 *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 150. The African Commission on Human and Peoples' Rights had indicated in *Serac v Nigeria* para 69 that it did not "wish to fault governments that are labouring under difficult circumstances to improve the lives of their people," but at the same time emphasised that "the intervention of multinational corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities."

564 *Yakye Axa Indigenous Community v Paraguay* Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) paras 124,131, 146.

565 *Yakye Axa Indigenous Community v Paraguay* Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) para 142. See paras 17, 20 of the Partly Concurring and Partly Dissenting Opinion of Judge Ramon Fogel.

4.2.2.6 Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2

In this case, the Inter-American Commission observed that Paraguay sold vast stretches of land in the Paraguayan Chaco at the end of the 19th century to investors to repay wartime debts. The territories were sold without the Indian indigenous inhabitants' knowledge.[566] Importantly, the Inter-American Commission rejected the utilitarian argument of the investors' productivity on the land as a reason for the denial of indigenous land rights.[567] The government had argued that indigenous communities were not entitled to claim traditional lands which were now being exploited and fully productive.[568] Further, the Inter-American Commission asserted that Article 21 of the *American Convention* should be interpreted to protect the close ties of indigenous peoples with their traditional lands, natural resources and culture.[569] Consequently, the term "property" in Article 21 of the *American Convention* include lands[570] and the right to property extends to lands held under customary tenure regimes. The Commission explained that, in the case of indigenous communities, property such as lands is owned by the collective rather than by individuals, and this conception of landownership, which does not correspond to the dominant notion of property, is equally protected under Article 21 of the *American Convention*.[571]

The Inter-American Court made important conclusions to be drawn from its previous determinations in the cases of *Mayagna (Sumo) Awas Tingni Community v Nicaragua; Moiwana Community v Suriname and Yakye Axa v Paraguay*. Most importantly, indigenous

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566 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 73(1).

567 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 paras 138,139, 141.

568 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 paras 137, 138,139.

569 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 121.

570 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128.

571 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 120. In the court's view, disregarding "specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under A 21 of the Convention illusory for millions of persons."

peoples' traditional possession of their lands has equivalent legal effects to those of a state-granted full property title[572] and indigenous people have a right to official recognition and registration of property title based on traditional possession of their lands.[573] Even though they lack legal title, indigenous peoples do not lose property rights to their traditional lands if they had unwillingly left their lands or lost possession thereof, and they[574] are entitled to restitution or to obtain other lands of equal extension and quality if the lands have been lawfully transferred to innocent third parties. Consequently, indigenous land restitution rights exist even when the people do not have possession of the lands.[575]

4.2.2.7 Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)

The Saramaka, whose ancestors are of African origin, were brought to the Upper Suriname River during the period of the slave trade.[576] Therefore, the Saramaka are not indigenous but rather tribal peoples. However, they have the same characteristics as indigenous peoples, such as collective ownership of land and identifying with ancestral land, which is more than a source of subsistence for them, as it is connected to their spiritual and cultural survival.[577] The ancestral lands symbolise the Saramaka people's fight against slavery and their physical and cultural survival.[578] The issue of sub-surface resources essential for subsistence and resources traditionally used by indigenous peoples was elaborated on in this case.[579] The Inter-American Court affirmed for the first time the requirement of FPIC in concessions for large-scale mining operations in indigenous

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572 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128. *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Inter-Am Court HR (Ser C) No 79 (2001) para 151.

573 S*awhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128.

574 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128. See *Moiwana v Suriname* Inter-Am Ct. H.R. (ser. C) No. 124 (2005), para 134.

575 *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128.

576 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 78-79.

577 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 82.

578 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 82.

579 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 125-133.

lands.[580] The court also elaborated on the essential nature of Environmental and Social Impact Assessment and benefit-sharing for the survival of indigenous communities.[581]

The Inter-American Court held in *Saramaka v Suriname* that Article 1 of the ICCPR and ICESCR accords indigenous and tribal peoples a right to freely dispose of their natural resources and a right not to be deprived of their means of subsistence.[582] Using this provision as a foundation, the court asserted indigenous and tribal peoples' right to property in terms of Article 21 of the *American Convention*. The court held that the right of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development guarantees them the right to enjoy their property (in this case their lands) in accordance with their own customs and traditions.[583]

The right to use and enjoy lands and territories in accordance with traditions and customs begs the question as to whether this right extends to sub-soil natural resources such as minerals. Suriname's *Constitution* and *Mining Code* of 1986 vested ownership of minerals in the state, which claimed the right to exploration and exploitation of the minerals and asserted that the Saramakas were entitled to occupy and use the land only.[584] The state, argued that the land rights of the Saramaka did not include any interests in minerals and forests beyond that which the tribe traditionally possessed and used for subsistence in terms of hunting, fishing, agriculture and the religious and cultural needs of its peoples.[585] The Saramaka claimed that their customary law embraced all natural resources to be found on the surface and sub-soil of the lands to the community.[586] The court took note of the positions of the African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,*[587] the Constitutional Court of South Africa in *Alexor Ltd and Government of South Africa v*

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580 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 136-137.

581 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 138- 140.

582 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 93.

583 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 95.

584 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 5, 99, 115, 116, 119.

585 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 125.

586 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 124.

587 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 of 2001 paras 42, 54 and 55.

Ritchersveld Community and Others[588] and the Supreme Court of Canada in *Delgamuukw v British Columbia.*[589] These cases ruled that indigenous peoples' land rights include rights to surface and sub-surface resources such as minerals.[590] When considered in the context of Zimbabwe, these decisions would be in stark contrast with the domestic law which vests minerals resources in the President.[591]

The court in *Saramaka v Suriname*, however, ruled that natural resources found within the territories and that are protected under Article 21 of the American Convention are only "those natural resources traditionally used and necessary for the very survival, development and continuation of such peoples' way of life."[592] The host community's mineral rights would thus be protected if the minerals were traditionally used and essential for the subsistence of the community. It was held by the court that Article 21 of the *American Convention* must not be read to restrict the state from granting concessions for extraction of natural resources not traditionally possessed or used by the peoples for their subsistence.[593] This was found to be the case regardless of the possibility that such extraction would affect the use and enjoyment of resources traditionally exploited as means of subsistence by the Saramaka, such as forests and rivers for clean water, animals and fish.[594]

The Inter-American Court indicated that it was aware that extraction of one resource not essential for the subsistence of the Saramaka would affect the use and enjoyment of

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588 *Alexor Ltd and Government of South Africa v Ritchersveld Community and Others* CCT/1903 of 2003 para 103.

589 *Delgamuukw v British Columbia* (1997) 3 S.C.R 1010 of 1992 paras 194, 199 and 201.

590 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 120.

591 See section 2 of the *Mines and Minerals Act* 38 of 1961.

592 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 122; *Yakye Axa Indigenous Community v Paraguay* Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) paras 124 and 137; *Sawhoyamaxa Indigenous Community v Paraguay* Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 paras 118, 121.

593 While the court in Saramaka indicated that A 21 of the *American Convention on Human Rights* should not be interpreted as proscribing the state from granting concessions for resource extraction on the indigenous lands, the court ruled in para 214 that the state should put in place safeguards and ensure effective participation and reasonable benefit by the indigenous peoples. Suriname had not complied with these safeguards and therefore violated A 21(2) of the *American Convention on Human Rights* in conjunction with A 1 of the ICCPR and ICESCR. In particular, the state had violated the Saramaka's (i) right to effective consultation in line with their customs, (ii) right to give or withhold free prior informed consent relating to development projects affecting their lands and (iii) right to a reasonable share in the benefits of development projects.

594 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 126.

another resource essential for their subsistence. The court further highlighted that the rights of the mine-host communities are not absolute, as they could be restricted under circumstances stated in the *American Convention*.[595] The state could restrict the use and enjoyment of the lands and territories if the restriction did not amount to a denial of the peoples' traditions and customs and when it did not deny their survival as a tribal people.[596]

Given these considerations, the Inter-American Court held that,[597] to ensure that the mining and logging concessions did not amount to a denial of the Saramaka's survival as a tribal people, the state had to ensure the following:

i) The effective involvement of the Saramaka in accordance with their customs and traditions in any development, investment and exploration or extraction plan within the territory.

ii) That no concession would be issued unless and until an environmental and social impact assessment (ESIA) had been conducted by independent and technically capable entities under the state's supervision.

iii) That the Saramaka should receive a reasonable benefit from extraction projects within their territory.

It was stated that these requirements dovetailed with Article 15(2) of the *ILO Convention* 169 of 1989[598] and the major reason for such interventions on behalf of indigenous and tribal communities was "to guarantee that they may continue living their traditional way of life and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states."[599]

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595 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 126.

596 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* paras 124, 128. Additionally, in paras 34 and 35 the Inter-Am. Ct. H.R. states that any such restriction of the rights of indigenous peoples must be previously established by the law and must be necessary, proportional and aimed at attaining a legitimate objective in a democratic society.

597 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 129.

598 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* paras 129, 130, 133-134. See A 15(2) of the *ILO Convention* 169 of 1989; World Bank OP 4.10; UNHRC General Comment No. 23 para 7 relating to A 27 of the ICCPR; UNCERD General Comment No. 23 para 4(d) on the Rights of Indigenous Peoples; A 32(1)(2)(3) of the UNDRIP.

599 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 32. The court in Saramaka also referred to para 196 of the Endorois case, where it was held that such special measures are necessary in order to address discrimination experienced by indigenous peoples under a property system that did not give recognition to communal property rights of the Endorois

The Inter-American Court considered the state's duty to consult and obtain consent in *Saramaka Peoples v Suriname*[600] and held that, to ensure effective participation, the state was required to consult the Saramaka people according to their customs and traditions, through culturally appropriate procedures, to reach an agreement. It was deemed that the consultation process should occur at the early stages of a development or investment plan and not just when the need arose to obtain approval of the community.[601] The state was also required to disseminate information to the community and ensure that the Saramaka people were informed of possible risks, including those related to environment and health, so that the peoples could accept the development knowingly and voluntarily.[602] Relating to FPIC, the court stated that, in cases involving large scale projects with a major impact on the host community, the state must consult the community and obtain their free, prior and informed consent in compliance with their customs and traditions.[603] This requirement for consultation and FPIC in projects involving exploitation of sub-soil resources such as minerals is confirmed in the UNCERD concluding observations on Ecuador.[604] The Inter-American Court further asserted that the duty to consult indigenous peoples is a general principle of international law.[605] That makes the duty to consult a source of international

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people. It was determined that the Kenyan government did not obtain the FPIC of the Endorois before designating their land as a game reserve and commencing operations. The action of the government had violated their right to development as there was no effective participation of the Endorois nor reasonable benefit enjoyed by the community.

600 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 133.

601 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 133.

602 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 133.

603 Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007) paras 134, 137. It can be observed that the court considered that in addition to consultation, effective participation must be understood to also require the FPIC of the host community.

604 *UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations, Ecuador*, (Sixty Second Session, 2003) UN Doc. CERD/C/62/CO/2 (2003), para 6. In para 16, CERD indicates that the state should ensure equitable sharing of benefits to be derived from the exploitation of natural resources. UNCERD explained that relating to exploitation of the sub-soil resources of the traditional lands of indigenous communities, "merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's General Recommendation XXIII on rights of Indigenous peoples. The Committee therefore recommends that the prior, informed consent of these communities be sought." See also *CESCR Concluding Observations on Ecuador*, (32nd Session, 2004) UN Doc. E/C.12.1.Add.100 paras 12, 35; *CESCR Concluding Observations on Colombia*, (27th Session, 2001) UN Doc. E/C.12.1.Add.74 paras 12, 33; *Poma Poma v Peru* HRC Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (95th Session, 2009) paras 7.4 and 7.6 where it is stated that mere consultation with indigenous peoples is insufficient and FPIC is required if their rights are to be protected; *Lansman v Finland* HRC Communication No 511/1992, UN Doc. CCPR/C/52/D/511/1992 para 9.4 states that measures by states whose impact amount to denial of the right to culture violate state obligations in terms of A 27 of the ICCPR.

605 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 164.

law in line with Article 38 of the Statute of the International Court of Justice.

In addition, the court held that the concept of benefit sharing is inherent in the right to compensation under Article 21(2) of the *American Convention*, which provides that no one shall be deprived of their property unless they are compensated.[606] The court stated that:

> benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and those natural resources necessary for the survival of the Saramaka people.[607]

It was further held that, although the Saramaka had not traditionally mined gold or used it, gold mining within the Saramaka lands affected the other natural resources necessary for their survival, for instance waterways.[608] Therefore, the state had a duty to consult with the Saramaka, in conformity with their traditions and customs regarding proposed mining concessions and allow the community to reasonably participate in the benefits derived from any such concession and perform or supervise an ESIA before the commencement of the mining projects.[609]

4.2.2.8 Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-Am Court HR (Ser C) No 245

The case of the *Kichwa Indigenous People of Sarayaku v Ecuador* involved oil exploration in indigenous lands. The case explains the procedural aspects of the requirement to consult indigenous peoples with a view to obtaining consent and conduct impact assessments with their active participation. The court was called upon to determine whether the state violated the rights of the Sarayaku people by granting an oil exploration

606 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C)* No.172, (Nov. 28, 2007) para 138.

607 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C)* No.172, (Nov. 28, 2007) para 140. Benefit sharing is also canvassed in A 15(2) of ILO Convention 169 of 1989; *UNCERD, Consideration of Reports submitted by States Parties under A 9 of the Convention, Concluding Observations, Ecuador*, (Sixty Second Session, 2003) UN Doc. CERD/C/62/CO/2 (2003), para 16, where the CERD indicated that the state should ensure equitable sharing of benefits to be derived from the exploitation of natural resources. See also the *Report of the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples*, para 66, stating that, in order to guarantee "the human rights of indigenous peoples in relation to major development projects, [states should ensure] mutually acceptable benefit sharing."

608 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 155

609 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 156.

license to a private company that went on to conduct exploration with adverse effects on the indigenous peoples. There was no dispute as to the Sarayaku peoples' right to their lands and territories. The contention rather centred on the cultural identity of the Sarayaku people and the requirements for consultation concerning the rights to the communal lands. The Inter-American Court reiterated that indigenous peoples have a close relationship with their lands and territories and that their community-based tradition of communal collective landownership deserves equal protection under Article 21 of the *American Convention*.[610] The court held that the right of indigenous peoples to use and enjoy lands and territories is connected to the protection of natural resources on the territories. Therefore, any restriction of access to those territories would deny indigenous communities their right to use and enjoy natural resources essential for their physical and cultural survival.[611] The court referred to and drew inspiration from the *African Charter on Human and Peoples'* Rights and the AComHPR case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.[612] In that case, the African Commission stated that "protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity."[613]

Pertaining to participation and consultation, the question was this: when does the duty to consult mine-host communities arise? The Inter-American Court held that, in terms of Article 15(2) of the *ILO Convention* No. 169 of 1989, consultation should be conducted before undertaking or permitting any programme for the exploration or exploitation of natural resources.[614] The court also drew attention to the Supreme Court of Canada case of *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*,[615] where it was held that the duty to consult arises immediately, that is, once it is determined that the activity will have potentially adverse impacts on the indigenous peoples. In conclusion, the Inter-American

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610 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 145. See also *Mayagna (Sumo) Awas Tigni v Nicaragua* Inter-Am Court HR (Ser C) No 79 (2001) para 140.

611 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 146.

612 See *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 216; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003.

613 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 250-251.

614 A 32(2), 36(2), 38 of UNDRIP; A 6(1) of ILO Convention 169 of 1989.

615 *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council* (2010) 2 S.C.R 650 paras 31 and ff.

Court held that participation and prior consultation must be conducted in good faith at all stages, starting with the preparation and planning stages of the project that would affect the indigenous peoples.[616]

As to the question about who should carry out the consultation process, the court emphasised that the state should carry out the consultation and not the extractive company.[617] The court explained that the objective of the consultation is to ensure good faith and the absence of coercion of any form by the state or third parties in order to reach an agreement.[618] For that reason, effective participation and consultation should involve a genuine dialogue in a participatory process carried out in good faith and with mutual respect so as to reach an agreement.[619] A consultation process that is not genuine and participatory, and is meant merely to fulfil legal obligations (that is, box-ticking), will not suffice.[620]

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616 In the *Community of La Oroya v Peru*, 5 August 2009, IACHR Admissibility Report No. 76/09 para 74, the IACHR on alleged harms from a metallurgical complex operating at La Oroya it is stated that "public participation in decision-making allows those whose interests are at stake to have a say in the processes that affect them. Public participation is linked to A 23 of the American Convention, which provides that every citizen shall enjoy the right to take part in the conduct of public affairs, directly or through freely chosen representatives as well as to the right to receive and impart information [...] Affected individuals should be able to be informed about and have input into the decisions which affect them."

617 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 paras 187 and 298. See A 19, 36(2), 38 of UNDRIP; A 6(1), 15(2) of ILO Convention 169 of 1989; *Saramaka Peoples v. Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* paras 102, 129 and 131. In *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 167, it was held that the state had a duty to "guarantee these rights to consultation and participation at all stages of the planning and implementation of a project that may affect the territory on which an indigenous or tribal community is settled, or other rights essential to their survival as a people."

618 See A 6(2) of ILO Convention 169 of 1989; *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 134; A 19 and 22 of UNDRIP. The *Permanent Forum on Indigenous Issues Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, E/C.19/2005/3 (17 February 2005) para 46 explains the elements FPIC as follows: (a) Free entails that there is no coercion, intimidation or manipulation; (b) Prior means that consent has been sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes; (c) Informed means that information is provided that covers at least the nature, size, pace, reversibility and scope of any proposed project or activity; the reason(s) for or purpose(s) of the project and/or activity; the duration of the above; the locality of areas that will be affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); procedures that the project may entail (d) consent entails agreement.

619 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 paras 167,186 and 200.

620 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 paras 167,186 and 200.

The court also emphasised that international standards require that an environmental and social impact assessment (ESIA) should be carried out by qualified entities with the active participation of the people.[621] The court explained that the purpose of carrying out an ESIA is:

> to serve to evaluate the possible damage or impact that a proposed development or investment project may have on the property and community in question. The purpose is not only to have some objective measure of the possible impact on the land and the people, but also ...to ensure that the members of the community...are aware of the potential risks, including the environmental and health risks so that they can decide whether to accept the proposed development or investment plan knowingly and voluntarily.[622]

4.2.2.9 Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)

The case of *Kaliña and Lokono Peoples v Suriname* was brought before the Inter-American Court by the Inter-American Commission on behalf of eight communities of the Kaliña and Lokono Indigenous Peoples whose ancestral lands and territories are located around the Lower Marowijne River in Suriname. The claim against Suriname included that the state neglected to put in place legislative and other measures to legally recognise the land and natural resource rights of the indigenous peoples, as required under the *American Convention*. Instead, the state had issued private titles to non-indigenous individuals.[623] Most importantly, the state granted mining concessions and created three nature reserves on the indigenous peoples' ancestral lands without consultation or obtaining their free, prior, and informed consent.[624] Bauxite mining operations on the lands began in 1997 in the Wane Kreek reserve, according to a 1958 concession, which was granted before Suriname attained independence from the Netherlands in 1975. Since bauxite is found

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621 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 300.

622 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 205. It was held in *Saramaka v Suriname* para 134 that "consultation should take place, in accordance with the inherent traditions of the indigenous peoples, during the first stages of the development or investment plan and not when it is necessary to obtain the community's approval...because prior notice allows sufficient time for an internal discussion with the community."

623 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 1.

624 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 1.

near the surface, the extraction involved strip open cast over large tracts of land, causing significant environmental damage.[625] The mining operations also entailed road construction and logging, but the Kaliña and Lokono peoples were not allowed to use the road or enter the concession area to hunt and fish.[626] The logging noises from mining explosives and construction work adversely impacted the indigenous peoples' hunting activities, as animals and birds migrated away from the area, while contamination of soil and streams harmed their fishing stocks; some traditional plants stopped growing.[627]

Regarding participation and consultation, the Inter-American Court in *Kaliña and Lokono Peoples v Suriname* reiterated its earlier decisions in the cases of *Saramaka People v Suriname* and *Kichwa Indigenous People of Sarayaku v Ecuador.* The court held that, to ensure that restrictions on indigenous and tribal peoples' right to property due to concessions within their territory, do not threaten their survival, the state had to ensure their effective participation, conduct an ESIA before granting any concession, while further ensuring that the peoples obtain a reasonable share of the benefits of exploitation of the natural resources.[628] Further, to ensure effective participation of the peoples, the state should actively consult with the community according to their customs and traditions. The state had to receive and provide information and ensure the consultations were performed in good faith so as to reach an agreement.[629] Consultations had to be conducted at the early stages of a development or investment plan, before the start of the mining operations, so as to enable sufficient internal deliberations within the communities and appropriate feedback to the state.[630] The state also had to ensure that the communities were fully informed of possible risks, including environmental and health risks, so that the

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625 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 126.

626 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 88, 89.

627 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 90, 93, 217.

628 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 227. *Saramaka People v Suriname* paras 138 and 139.

629 The court explained *in Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 203, that the state must ensure effective participation of the indigenous peoples as part of the exercise of their right to take part in any decision making on matters that affect their interests.

630 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 207, 212. See *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment (Pty) Ltd* [1996] 1 All SA 2004 (T) para 17.

proposed development or investment plan was accepted knowingly and voluntarily.[631]

The court explained that an ESIA is meant to inform the community of planned projects on their lands and assess the possible impact of a development project on the community before the commencement of extraction operations.[632] The ESIA also serves to raise community awareness regarding possible environmental and health risks, among others, and enable it to consider voluntarily accepting the proposed development project with full knowledge of its impacts.[633] To achieve these objectives, the ESIA must respect the traditions and culture of the indigenous and tribal peoples. The court pointed out that these requirements, including supervision of the ESIA, interrelate with the state's duty to ensure the effective participation of the indigenous and tribal peoples.[634] In this case, Suriname failed to comply with the stated requirements, since the state did not conduct an independent ESIA before the commencement of bauxite mining and did not supervise the assessment that was eventually conducted.[635]

The court upheld the indigenous and tribal peoples' right to participate in the conduct of public affairs, which is guaranteed in provisions of the *American Convention* and the UNDRIP.[636] Article 23(a) of the *Convention* establishes that every citizen shall enjoy the right to "take part in the conduct of public affairs directly or through freely chosen

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631 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 7, 201. See *Saramaka People v Suriname* paras 129, 133. *Kichwa Indigenous People of Sarayaku v Ecuador* para 178. See also the case of *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment (Pty) Ltd* [1996] 1 All SA (T) para 17, which explains the need for early consultations in the applications for prospecting and mining rights. In this case, the court had to determine whether any rights were infringed by the mere issuing of a mining right. The argument proffered in support of the issuance of the mining right was that the mere granting of mining rights had no tangible, physical effect on the environment meaning that no rights were violated. The court held that the issuance of mining rights triggers a chain of events that ordinarily lead to the commencement of mining operations. For that reason, consultations are implicated where a preliminary decision leads to serious consequences and thus must not be left out until actual mining commences.

632 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 214.

633 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 214. *Saramaka People v Suriname* para 133; *Kichwa Indigenous People of Sarayaku v Ecuador* para 205.

634 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 215.

635 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 226.

636 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 202.

representatives." Article 18 of UNDRIP recognises the right of indigenous peoples to participate through their freely chosen representatives in decision making around matters that would affect their rights. In addition, Article 32 of UNDRIP asserts that "states shall consult and cooperate in good faith […] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the […] utilization or exploitation of mineral […] resources."[637]

The court also addressed the issue of corporate responsibility for human rights violations in the case of *Kaliña and Lokono Peoples v Suriname*. It was established that the adverse mining operations were conducted by private companies, namely Suralco, and a joint venture named BHP Billiton-Suralco. As a consequence, the court referred to the *United Nations Guiding Principles on Business and Human Rights* of 2011, which states that businesses must respect and protect human rights as well as prevent, mitigate and accept responsibility for the adverse human rights impacts directly linked to their activities.[638] The principles also require of states to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[639] The state of Suriname was ordered to adopt appropriate legislative and other measures to ensure indigenous and tribal peoples' effective participation through a consultation process that would take into account the traditions and customs of the peoples in any development project that posed potential impacts on their territory. The state was to ensure that ESIAs were prepared by independent and technically qualified entities before agreeing to any investment or development project to be carried out in indigenous and tribal peoples' territories. Benefits resulting from mining projects among others were to be shared with

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637 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 202.

638 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 223, 224, 225. The *United Nations Guiding Principles on Business and Human Rights* UN Doc. A/HRC/17/31 (2011) para 18, states that "business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalisation, and bear in mind the different risks that may be faced by women and men." The principles also require states to "protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."

639 *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* paras 223, 224, 225.

the indigenous and tribal peoples.[640]

4.2.3 Concluding remarks on the Inter-American regional human rights system

The discussion on the Inter-American human rights system sought to extract those requirements imbedded in the system that can be used for reforming the Zimbabwean policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands. It is apparent that regions facing similar challenges to the rights of vulnerable groups have the potential for cross-fertilisation of standards developed to address those challenges. The African and Inter-American regions are such regions of the global south faced with challenges to the rights of vulnerable groups such as mine-host communities. Both regions recognise individual rights as well as collective rights thus offering suitable learning points for standards set for mine-host community involvement and benefit accrual from mineral extraction on their lands. The Inter-American human rights system is particularly persuasive as it is a much older system established before most African countries attained independence. Consequently, the system has several case law that has assessed and clarified developments in international law when it comes to the rights of vulnerable communities with distributive justice, procedural justice and remedial justice implications. This review of the Inter-American human rights system helped to identify standards that can be adapted to advance the realisation of the rights of vulnerable groups such as mine-host communities in the Zimbabwean context. Key among these standards is that the legislative framework must balance the state's interest in optimum exploitation of mineral resources and protection of communities. Lands are the foundation for the cultural, spiritual and economic survival of the communities. For that reason, the right to property under the Inter-American human rights system includes a right to communal lands and natural resources on those lands. Affected communities have a right to consultation in all decisions even when the mineral resources are vested in the state. The consultation process must be in good faith and accordance with the customs and traditions of the affected people. It must involve disclosure of full information including environmental and health risks so that the people accept the development project willingly and voluntarily. Consultation with

[640] *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser.C) No. 309 (Nov. 25, 2015)* para 305.

affected communities must be prior to the granting of the concessions and must continue throughout all stages of the resource exploitation. FPIC must be obtained for large scale mining concessions on indigenous and tribal lands with a major impact and the affected people must accrue benefits from the resource extraction.

4.3 The African regional regulatory instruments

4.3.1 Introduction

The African human rights system is important because it sets the tone for human rights systems at sub-regional levels such as the SADC through the operations of the African Union, African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. The discussion seeks to determine and extract key requirements set out in African regional instruments and case law that can be used by Zimbabwe to improve its policy and legislative frameworks for mine-host community involvement in and benefit accrual from mineral extraction on their lands. The foundational African regional legal instrument applicable to matters of mine-host community involvement in and benefit accrual from mineral extraction on their lands is the *African Charter on Human and Peoples' Rights* adopted by the Organisation of African Unity (OAU) in 1982 and entered into force in 1986.[641] The OAU was replaced by the African Union (AU) in July 2002. Fifty-five (55) African states including Zimbabwe and South Africa ratified the *African Charter on Human and Peoples' Rights* (ACHPR).[642] At the African regional level, cases of violations of human rights are determined by the African Commission on Human and Peoples' Rights

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641 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Other African initiatives relevant to or expressing concerns over mine-host community involvement in and benefit accrual from mineral extraction on their lands include the Africa Mining Vision of 2009 which recognises the need for new regulatory instruments to ensure mine-host community participation and a "new social contract for mining" intended to balance mine-host community benefits with national poverty alleviation strategies. See Greenspan 2014 http://www,oxfamamerica.org pertaining to the Pan African Parliament which urged African States to ensure that local communities affected by investment projects are fully consulted and projects are approved through the free, prior, and informed consent of the affected communities.

642 See the *African Commission on Human and Peoples' Rights 'Ratification table: African Charter on Human and Peoples' Rights'* available at: http://www.achpr.org/instruments/achpr/ratification/. Zimbabwe ratified the *African Charter on Human and Peoples' Rights* on 30 May 1986 while South Africa ratified on 09 July 1996.

(AComHPR) based in Banjul, Gambia[643] and the African Court on Human and Peoples' Rights (ACtHPR) based in Arusha, Tanzania.[644]

4.3.2 The African Charter of Human and Peoples' Rights

4.3.2.1 Background

In terms of Article 1 of the *African Charter on Human and Peoples' Rights*, state parties are required to recognise the rights, duties and freedoms as set out in it. States are also obliged to adopt legislative and other measures to give effect to the rights, duties and freedoms. This obligation means that states should position their constitutional, policy and legislative frameworks, including those pertaining to mine-host community involvement and benefit accrual from mineral extraction, to comply with the rights accorded to peoples[645] and obligations imposed on states.[646]

Fundamental provisions of the *African Charter on Human and People's Rights* in the context of mine-host community involvement in and benefit accrual from mineral

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643 The African Commission on Human and Peoples' Rights (AComHPR) was established in 1987 in terms of Article 30 of the *African Charter on Human and Peoples' Rights.* It is responsible for monitoring by states' compliance with their obligations under the African Charter and is also mandated with protection of the Charter rights.

644 The African Court on Human and Peoples' Rights (ACtHPR) was established pursuant to the Protocol to the *African Charter on Human and Peoples' Rights* adopted in 1998 by the Organisation of African States (OAU) which preceded the African Union. The Protocol came into force on 25 January 2004 after attaining fifteen ratifications by member states in terms of its Article 34(3). Article 3 of the Protocol extends the court's jurisdiction to all cases and disputes submitted to it concerning the interpretation and application of the *African Charter on Human and Peoples' Rights*, the Protocol and any other human rights instrument signed by concerned states. South Africa became a signatory to the Protocol on 09 June 1998. Zimbabwe has not ratified the protocol.

645 The *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 And 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 11 clarifies that the term "peoples" under Articles 21 and 24 of the *African Charter* refers "to a group of individuals having a common identity on account of objective markers of shared language, racial or ethnic makeup, historical experience, religious, cultural or ideological affinity, connection to a particular territory and the subjective manifestations of self-identification and awareness as a distinct group possessing of shared identity. Peoples are therefore not to be equated solely with 'Nation' or 'State' but include subnational groups including communities of a particular region exhibiting the above characteristics, or people whose resources are exploited under foreign occupation. Local communities or individuals who are most immediately affected by activities of extractive industries can claim the rights guaranteed in these Articles to 'peoples.' 'Communities' in this context refers to residents of a locality which is organised either as part of an administrative or self-governing unit of a state or on the basis of the customary or religious law/s of the area."

646 See Nkongolo 2014 *AJDG* 94.

extraction include Article 14, which addresses the protection of the right to property, and Article 21(1) on the right of peoples to freely dispose of their natural wealth and resources. Article 22 on the right to economic, social, and cultural development and Article 24 on the right to a satisfactory environment suitable to development, are also pertinent.[647]

4.3.2.2 Right to property

Article 14 of the *African Charter on Human and People's Rights* addresses the right to property and provides that the right:

> to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

In the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* the African Commission on Human and Peoples' Rights interpreted the phrases "in the public interest or general interest of the community" and "in accordance with the provisions of appropriate laws." In the Commission's view, the "public interest" test is met with a much higher threshold in the case of encroachment of lands, especially when applied to the rights of indigenous peoples to their ancestral lands.[648] The Commission reiterated its position that any limitations imposed on people's right to property must be strictly proportionate with and necessary for the rewards thereof as well as involving the least restrictive measures possible.[649] In the context of mineral extraction, the position of the African Commission on permissible limitations on the right to property entails that any restrictions imposed on

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[647] Unlike the ICESCR, the *African Charter* rights in A 2 are absolute, as they are not subjected to the concept of progressive realisation. The state obligations under the *Charter* are not subjected to or limited by the notion of available resources. The obligation to recognise the rights, duties and freedoms in the *African Charter on Human and Peoples' Rights* was described by the African Commission in the case of *Legal Resources Foundation v Zambia*, Communication No. 211/9, 62 (2001) to be mandatory.

[648] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 212.

[649] See *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 213-214; *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,* African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94,145/95 (1999) para 42. The African Commission on Human and Peoples' Rights also referred to *Handyside v United* Kingdom, No. 5493/72, Series A.24 (7 December 1976) para 49*,* where the European Court of Human Rights stated that any condition or restriction imposed upon a right must be "proportionate to the legitimate aim pursued."

mine-host communities must be the least onerous, strictly necessary and proportionate with the benefits that would accrue to them and the nation.

4.3.2.3 Right to self-determination

The right to self-determination is addressed in Article 20 of the *African Charter on Human and Peoples' Rights*, while permanent sovereignty over natural resources is addressed in Article 21. Article 20(1) of the *Charter* provides that all peoples:

> shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

In the context of mineral extraction on lands inhabited by mine-host communities, the right to self-determination entails the right to determine the course and means of economic, social and cultural development. It also entails the right to determine how minerals and other natural resources on the lands are to be utilised for the development of the mine-host communities. Implicit in the right of mine-host communities to self-determination is the right to participate and be consulted when decisions centred on minerals and natural resources on their lands are made and a right to accrue benefits from the extraction of those resources.

4.3.2.4 Right of peoples to freely dispose of natural resources

Article 21 of the *African Charter on Human and Peoples' Rights* addresses the right of peoples to freely dispose of natural resources, and provides that:

1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people.
2. In no case shall a people be deprived of it. In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.
5. States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.[650]

While Article 21 of the *African Charter on Human and People's Rights* seeks to unravel former colonial systems of exploitation of African resources, there is no doubt that the citizens and mine-host communities in Africa are still vulnerable to exploitation by their governments and foreign companies.[651] This requires an interpretation of the *Charter* that protects the right of citizens and mine-host communities in Africa around their natural resources and wealth.

Article 21(1) of the *African Charter* is similar to Article 1 of the ICCPR and ICESCR meaning that peoples have the freedom of choice relating to natural resources lying within the land on which they live.[652] It is apparent that Article 21(1) regards peoples as the only exclusive

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650 The African Commission on Human and Peoples' Rights states in *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) (Nigeria) v Nigeria* (ACHPR 2001) para 56 that the origin of A 21 of the ACHPR "may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birth right and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African Society."

651 The *African Commission Guidelines for National Periodic Reports to the Commission* of 1989, 14 states that, regarding A 21 and A 22 of the *African Charter*: "these rights consist in ensuring that the material wealth of the countries is not exploited by aliens to no or little benefit to the African countries. Establishment of machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country." The assumption in the guidelines is that foreign entities are to guard against exploitation of natural resources without benefit to the local population, yet the contemporary challenge is the plunder by own African governments and how they should turn natural resources rents into benefits for their citizens.

652 Carleton 2014 21 *IJMGR* 136. The *African Charter* does not define peoples and neither does the African Commission define the term peoples. However, the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities on the Human Rights Situation of Indigenous Peoples and Communities in Africa* 2005, http://www.iwgia.org.sw163.asp, has confirmed that the word "peoples" in the title and A 21 of the *African Charter* is meant to protect collective rights. It distinguishes rights enjoyable by individuals and rights enjoyable by a collective or peoples. Therefore, in this context, "peoples" refers to citizens and communities, and the rights to be protected are not state rights but the rights of citizens and communities. It follows that subsoil resources belong to the collective/ community, especially local communities. Depleting the mineral resources of a community without replacement with alternative forms of livelihood or productive wealth or providing for the future welfare of the local community is an injustice.

beneficiaries of natural resources. This means that the state should utilise natural resources for the exclusive benefit of the peoples, who cannot be deprived of their rights.[653] This is greater than the people's right to dispose of their natural resources expressed in Article 1(2) of the ICCPR and ICESCR, since it makes the disposal exclusively in the interests of the people.[654] Therefore, the interests of the people are under the *African Charter* the only reason for the disposal of mineral wealth, as the right is not conceived to be that of the state or the government.

Gilbert[655] argues that Article 21(1) of the *African Charter on Human and People's Rights* does not clarify whether the peoples are exclusive right holders and refers to Article 21(4) whose literal reading implies that states are also right holders.[656] However, when analysed, it can be argued that Article 21(1) vests the right to freely dispose of wealth and natural resources in the peoples. Article 21(4) then authorises the state to exercise the right to freely dispose of wealth and natural resources. Consequently, there is no ambiguity if Article 21(4) of the *African Charter* is construed in this manner, since it is only the state that can exercise the right on behalf of the people.[657] That the state exercises the right to freely dispose of natural resources does not make it the holder of that right. In this view, the state is only a representative or agent for its people with delegated authority.[658] These

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653 The *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 18 explains that the requirement to use wealth and natural resources in the exclusive interest of the people is based on "the principle that the use of natural resources should be for the exclusive interest and benefit of the citizens of a state in general and host communities in particular. In this regard, the rights of the people of the state as a whole may not detract from the specific rights of affected people who are directly impacted by extractive industries to benefit from the exploitation of natural resources. While this does not confer an absolute right on affected people over the national interest, there is a need for these, at times conflicting interests to be balanced in a fair and just manner through a cost benefit analysis, which does not prejudice the affected people." When read together, A 21(1) and A 21(5) promote the participation of mine-host communities in the exploitation of minerals and their accrual of benefits therefrom by vesting decision making in the state and the people themselves, which implicates the right to self-determination in the development process.

654 Gilbert 2013 31 (3) *NQHR* 325.

655 Gilbert 2013 31 (3) *NQHR* 325.

656 A 21(4) provides that states parties to the present Charter "shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity."

657 Kiwanika 1988 82 *AM. J. INT'LL* 80. In Kiwanika's view, A 21(4) of the *African Charter* does not make states the right holders but merely designate them to be trustees who will exercise the right on behalf and for the benefit of the peoples who are the right holders

658 The *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 20.

views are supported by the case of *Democratic Republic of Congo v Burundi, Rwanda and Uganda.*[659] In that case, the African Commission on Human and Peoples' Rights held that the deprivation of the right of the people to freely dispose of their wealth and natural resources violated their right to economic, social and cultural development guaranteed under Article 22 of the *African Charter on Human and Peoples' Rights*.[660]

Article 21(2) of the *Charter on Human and Peoples' Rights* entitles a people to seek recovery or compensation if they are dispossessed of their natural resources, and this should be viewed as some form of remedial justice for dispossessed communities. Carleton[661] supports the peoples' right to reclaim natural resources and wealth if they are dispossessed, since people underlie the very notion of a state. Consequently, the right to freely dispose of natural resources ought to revert to the people if the government is neither representative nor accountable.[662] Philosophical support for this perspective is found in Locke's writings discussed in section 2.2.1.3 above.[663] The implication of the perspective by Carleton and Locke, especially in the context of mineral extraction, is that any extraction that proceeds without the involvement and accrual of benefits to mine-host communities entitles them to reclaim the mineral resources from the possessor. Article 21(2) of the *African Charter*, as read with Article 1(2) of ICCPR and the ICESCR, legitimises such restitution of lands and mineral resources.[664] There is no doubt that Article 21 of the *Charter* requires Zimbabwe, among other African states, to ensure that their mineral resources are used to serve the needs of their citizens, especially the mine-host communities. This is achieved through legislative and other measures that guarantee the

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659 Communication No. 227/99 20th Annual Activity Report of the African Commission; annex IV, 111.

660 Communication No. 227/99 20th Annual Activity Report of the African Commission; annex IV, 111 para 95.

661 Carleton 2014 21 *IJMGR* 139, 151.

662 Carleton 2014 21 *IJMGR* 139, 151.

663 Locke *Second Treatise* 164, 192. Locke states that "the people who are the descendants of, or claim under those who were forced to submit to the yoke of government by constraint, have always a right to shake it off, and free themselves from the usurpation or tyranny which the sword hath brought in upon them, till their rulers put them under such a frame of government as they willingly and of choice consent to…till they are allowed their due property, which is so to be proprietors of what they have, that nobody can take away any part of it without their own consent." Locke further argues that a government that exercises power to promote self-interest and exercise its power even where it harms the people, gives the people the right to limit the power of such government.

664 Carleton 2014 21 *IJMGR* 141. In terms of A 21(5) of the *African Charter*, state parties are required to "eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable peoples to fully benefit from the advantages derived from their national resources." This is meant to ensure that national resources benefit the citizens of the state.

involvement and benefit accrual from mineral extraction.

4.3.2.5 Right to development under the African Charter on Human and People's Rights

The *African Charter on Human and Peoples' Rights* asserts the following in Article 22:

> 1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.[665]

It is apparent that peoples and states are both subjects of the right to development, but peoples are presented as the right holders and states as the duty bearers. Article 22(1) of the *African Charter* entitles peoples not only to socio-economic and cultural development but also equitable distribution and enjoyment of their natural resources including minerals. A mineral extraction agreement that negates the economic, social and cultural development and well-being of the peoples, violates these rights guaranteed under Article 22(1) of the Charter.

4.3.2.6 Right to a satisfactory environment favourable to development

The *African Charter on Human and People's Rights* endorses the right to a clean environment in Article 24, which provides that all peoples "shall have the right to a general satisfactory environment favourable to their development." A harmful environment brought

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665 See A 19 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* adopted in Maputo Mozambique on 11 July 2003. Commitments by African states to ensure the right to development are evident in the *Report of the Meeting of Experts of the First Ministerial Conference on Human Rights in Africa Kigali* 5-6 May 2003 EXP/CONF/HRA/RPT(II) para 42. See also para 2 of the *Grand Bay Declaration and Plan of Action* adopted by the First OAU Ministerial Conference on Human Rights of 1999; para 3 of the *Kigali Declaration* adopted by the AU Ministerial Conference on Human Rights in Africa held in Kigali May 2003; para 6 of the *Solemn Declaration on Gender Equality in Africa* adopted by the AU Assembly of Heads of State and Government in Addis Ababa July 2004; preamble and para 1 of the *Pretoria Declaration on Economic, Social and Cultural Rights in Africa* adopted by the African Commission at its 36th Session December 2004; A 10 of the *African Youth Charter* adopted in Banjul the Gambia on 2 July 2006; preamble of the *African Charter on Democracy, Elections and Governance* adopted in Addis Ababa, 30 January 2007. For a detailed review of the history of the right to development in Africa see Ngang *The Right to Development in Africa and the requirement of Development Cooperation for its Realisation* 2017 LLD Thesis, University of Pretoria 15-75.

about by mineral extraction in the lands inhabited by mine-host communities is therefore contrary to Article 24 of the *African Charter*. In the context of mineral extraction on the lands inhabited by mine-host communities, the right to a satisfactory environment favourable to development can only be realised with the involvement of the mine-host communities in decision-making processes centred on award and utilisation of mineral rights. This must be viewed as an element of procedural justice discussed in section 2.2.2 above.

4.3.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Charter) of 2003

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Charter) of 2003 incorporates provisions that are pertinent to mine-host communities, particularly for women in such communities.[666] Article 18 of the *Women's Charter* relates to the right of women to live in a healthy and sustainable environment. To realise this right, Article 18(2)(a) of the *Women's Charter* obliges states to take all appropriate measures to ensure effective participation by women "in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels." Along the same lines, Article 19(b) of the *Women's Charter* provides a right for women to sustainable development, and states are required to ensure the participation of women at all levels of "conceptualisation, decision-making, implementation and evaluation of development policies and programmes." These requirement for participation by women in decision-making processes involving .development policies and programmes, environmental matters and use of natural resources extends to the context of decision-making in the context of the award and utilisation of minerals. In this context it entails the involvement and benefit accrual by women in mine-host communities from mineral extraction on their lands.

[666] A 18(1) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.* Zimbabwe ratified the protocol on 15 April 2008 while South Africa ratified it on 17 December 2004.

4.3.4 African Youth Charter of 2006

Reinforcing the provisions found in the *Women's Charter* discussed in 4.3.3 above, which seek the involvement of women in decision-making around matters that affect their lives, the *African Youth Charter* of 2006[667] seeks the involvement of the youth in decision making as well as accrual of benefits from development programmes and projects. Key provisions of the *African Youth Charter* relevant to the subject of this study include, *inter alia,* protection of the right to property,[668] the right to social, economic, political and cultural development[669] and the right to participate in all spheres of society.[670] The *African Youth Charter* also provides for the right to participate in the design, implementation and evaluation of national development plans and environmental policies including conservation of natural resources.[671] When applied to the context of mineral extraction on lands inhabited by mine-host communities, these requirements entail that youths in mine-host communities have a right to be involved in processes centred on the award and development of mineral resources in those communities.

4.3.5 African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention) of 2009

Article 4 of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention)* of 2009[672] provides a general prohibition against arbitrary displacement of all persons. Internal displacement is defined in Article 1(i) of the Kampala Convention to mean "the involuntary or forced movement, evacuation or

667 *African Youth Charter* was adopted by the African Union on 02 July 2006 and came into force on 8 August 2009 after attaining fifteen 15 ratifications by member states as required by Article 30(2) of the Charter. The *African Youth Charter* was ratified by Zimbabwe on 16 March 2009 and South Africa on 28 May 2009.

668 A 9 of the *African Youth Charter* of 2006.

669 A 10 of the *African Youth Charter* of 2006.

670 A 11 of the *African Youth Charter* of 2006.

671 A 14(2)(4) and A 19(2)(d) of the *African Youth Charter* of 2006. See A 14(1) of the *African Youth Charter* on the right to a standard of living adequate for their holistic development. See also A 16(1) of the *African Youth Charter* on the right to enjoy the best attainable state of physical, mental and spiritual health.

672 The *African Union Convention for the Protection and Assistance of Internally Displaced Persons* was adopted in 2009 but entered into force on 06 December 2012 after attaining fifteen (15) ratifications by member states of the African Union in terms of Article 17(1). Zimbabwe ratified the African Union *Convention for the Protection and Assistance of Internally Displaced Persons* on 22 July 2013. South Africa is not a signatory to the Convention and therefore not legally bound by it.

relocation of persons or groups of persons within internationally recognised state borders." This definition naturally incorporates those persons displaced by mining development projects on their lands. Article 4(5) obliges states "to protect communities with special attachment to, and dependency on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests." This provision protects those communities comprising indigenous peoples from displacement from their ancestral lands to pave the way for mineral extraction as they have cultural and spiritual attachment to their lands. When applied in the context of award and utilisation of mineral rights on lands inhabited by them, Article 4(5) compels state parties to involve indigenous peoples in decision making pertaining to planned and on-going mining that may result in their displacement. Article 10 of the Kampala Convention specifically requires states to prevent displacement caused by development projects carried out by public or private actors. It stresses that alternatives to a proposed development project must be explored in consultation with affected peoples. An ESIA of the proposed development project must be conducted prior to its implementation.[673] This provision protects all mine-host communities, irrespective of their identity, whether indigenous or non-indigenous communities. In line with the notion of remedial justice, Article 12(2) of the Kampala Convention provides for just and fair compensation or other forms of reparations for damages suffered by displaced persons. This remedy is useful to mine-host communities displaced by mining developments projects.

4.3.6 Africa Mining Vision of 2009

The *Africa Mining Vision* (AMV) was adopted by the African Union (AU) in 2009. The objective of the AMV is to support broad-based development in Africa through equitable access and prudent exploitation of mineral resources.[674] The AMV also seeks to balance local and national interests and ensure that mine-host communities are equipped with alternative livelihoods post-mine closure. Key to the subject of this study, the AMV affirms the right of mine-host communities to FPIC and addresses mining-related social and environmental impacts. States are encouraged in the AMV to ensure benefit sharing with

673 A 10 of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* (Kampala Convention) of 2009.

674 Africa Mining Vision, 45, 55.

local communities through revenue-sharing arrangements.[675] Mine-host communities are also to benefit through local employment and infrastructure development. The AMV is set to contribute to reforms through implementation of Country Mining Visions that align the country's mining regulation framework to the Regional Mining Visions and the AMV. Zimbabwe and South Africa are yet to develop their own country mining vision documents following the Africa Mining Vision.

4.3.7 The African Commission on Human and Peoples' Rights: Resolution 224 on a Human Rights Based Approach to Natural Resource Governance of 2012

The African Commission on Human and Peoples' Rights formally recognised the rights of mine-host communities through *Resolution 224 regarding the Human Rights Based Approach to Natural Resource Governance* adopted in 2012.[676] The preamble of Resolution 224 points out that:

> the current natural resources governance is gravely hampered by ill-planned development, misappropriation of land, corruption, bad governance and prevailing insecurities, amongst others" and the "disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights of access and control of various resources, including land, minerals, forestry and fishing.[677]

Consequently, *Resolution* 224 of the African Commission on Human and Peoples' Rights calls upon African states to take all necessary measures to ensure participation and the FPIC of communities in decision making related to exploitation of natural resources.[678] The resolution declares that states have the main responsibility for ensuring natural resources

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675 Africa Mining Vision, 45.

676 ACHPR/Res.224(LI) 2012 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. In its preamble, Resolution 224 reiterated Articles 20, 21 and 24 of the *African Charter*, and Principles 1, 2 and 22 of the *United Nations Declaration on Environment and Development* of 1992. Olawuyi 2015 11 (2) *JSDLP* 300 regards the ACHPR Resolution 224 of 2012 as significant attempt to incorporate human rights language into natural resources development in Africa.

677 Preamble paras 6-7 of the *African Commission Resolution 224 Regarding the Human Rights Based Approach to Natural Resource Governance* of 2012.

678 Para II of the *African Commission Resolution 224 Regarding the Human Rights Based Approach to Natural Resource Governance* of 2012.

stewardship in the interest of their citizens, in compliance with international human rights law and standards.[679] States are to ensure that respect for human rights permeates all aspects of natural resources exploration, extraction and development and investment agreements.[680] In particular, states are called upon to strengthen regional efforts that promote natural resources legislation that provide effective community participation in decision making pertaining to exploitation of natural resources and accrual of benefits from such resource utilisation.[681]

4.3.8 African Commission on Human and Peoples' Rights Niamey Declaration on ensuring the upholding of the African Charter in the Extractive Industries Sector ACHPR/Res. 367 (LX) 2017 (Niamey Declaration)

In the *Niamey Declaration* of 2017, the African Commission on Human and Peoples' Rights reiterated that the right to freely dispose of wealth and natural resources guaranteed under Article 21 of the *African Charter on Human and Peoples' Rights* of 1982 is an inviolable right of all peoples.[682] To this end, both the state and extractive companies have the duty to respect the right. The African Commission observed that the terms on the basis of which the extractive industries operate in Africa are exploitative and deprive the populations of their benefits, while causing adverse environmental and social impacts that exacerbate poverty in the host communities.[683] In addition, the African Commission on Human and Peoples' Rights stressed the need for reforming the national legal regulatory framework for extractive activities in line with the *African Charter on Human and Peoples'*

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679 Para I of the *African Commission Resolution 224 Regarding the Human Rights Based Approach to Natural Resource Governance* of 2012.

680 Para IV of the *African Commission Resolution 224 Regarding the Human Rights Based Approach to Natural Resource Governance* of 2012.

681 Para IV (3) (4) of the *African Commission Resolution 224 Regarding the Human Rights Based Approach to Natural Resource Governance* of 2012, requires states to "(3) Set up independent monitoring and accountability mechanisms that ensure that human rights are justiciable and extractive industries and investors legally accountable in the country hosting their activities and in the country of legal domicile; (4). Ensure independent social and human rights impact assessments that guarantee free prior informed consent; effective remedies; fair compensation; women, indigenous and customary people's rights; environmental impact assessments; impact on community existence including livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights."

682 Preamble of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

683 Preamble of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

Rights of 1982, especially to meet the development needs and to accrue benefits for local communities, indigenous populations/ communities among others.[684] The *Niamey Declaration* promotes the adoption of new or the amendment of existing legislation to provide for prior-informed consultation with affected communities.[685] The declaration also promotes revenue sharing between the national government, regional authorities and local communities, and this is underlined by the idea of distributive justice discussed in 2.2.1 above.[686] Consistent with the notion of procedural justice discussed in 2.2.2 above, the declaration promotes negotiation of extractive contracts and licenses with the participation of local communities in line with international standards and respect for human rights.[687] Along the same lines and consonant with the idea of remedial justice discussed in 2.2.3 above, the *Niamey Declaration* promotes compensation to affected communities for all material and non-material damages suffered[688] and contribution by extractive companies to the development needs of the affected communities through employment, educational, health and agricultural projects.[689] The domestic legislative framework should facilitate the transition of affected communities from dependence on the extractive projects established on their lands to alternative self-sustaining livelihoods that last beyond the extractives.[690]

4.3.9 Case law of the African Commission on Human and Peoples' Rights

4.3.9.1 Introduction

The rights enshrined in the *African Charter on Human and People's Rights* were tested in the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights case law. Prominent cases include the *Social and Economic Rights*

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684 Preamble of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

685 Para 1(d) of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

686 Para 1(a) of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

687 Para 1(b) and (e) of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

688 Para 2(b) of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

689 Para 2(d) of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

690 Para 3 of the *Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017.

Action Center and the Center for Economic and Social Rights v Nigeria (the Ogoni case);[691] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (the Endorois case)[692] and *African Commission on Human and Peoples' Rights v Republic of Kenya* (the Ogiek case).[693]

In the cases, the respondent governments were found to have violated the communities' right to culture (Articles 2 and 17 of the *African Charter*), religion (Article 8 of the *African Charter*), property (Article 14 of the *African Charter*), natural resources (Article 21 of the *African Charter*), development (Article 22 of the *African Charter*) and a satisfactory environment suitable to their development (Article 24 of the *African Charter*), among other rights. The cases are important to mine-host-communities because they provide valuable interpretations of the *African Charter on Human and People's Rights* and precedents for affected communities as well as kerbing the powers of governments to interfere with property rights of the people and mine-host communities. Further, the cases are instrumental in removing the differential treatment between indigenous peoples and the general rural local communities by emphasising that the aim is simply to protect all people or groups that have been marginalised and discriminated against.[694]

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691 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001). See Kamga and Fombad 2013 57 (2) *J. Afri. L* 205-208 for a discussion of other interesting cases including the *Bakweri Land Claims Committee v Cameroon,* Comm No. 260/2002, AHRLR (2004) 43; *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Comm 227/99 20th Annual Activity Report of the African Commission, annex IV, 111; *Kevin Mgwanga Gumme et al v Cameroon* Comm 266/2003 26th Annual Activity Report of the African Commission, annex IV.

692 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003.

693 *African Commission on Human and Peoples' Rights v Republic of Kenya (the Ogiek Case)* Application No. 006/2012 Judgment 26 May 2017.

694 See the *African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs, "Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities,"* 2005 http://www.iwgia.org, where it is stated that recognising indigenous peoples is not meant to privilege some people or groups over others. Instead, the objective is to protect groups that are marginalised and discriminated against because of "their particular culture, mode of production, and position within the state." The Commission has emphasised that it is the violation of people's rights rather than the people's demand for their rights that is causing conflicts.

4.3.9.2 *Social and Economic Rights Action Centre (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria,* ACHPR Communication ACHPR Com No 155/96 (2001) (SERAC v Nigeria)

Although the case of *SERAC v Nigeria* dealt with oil extraction activities, the requirements set out in this case are equally applicable when it comes to mineral extraction. In this case, the African Commission found the Government of Nigeria to have violated Articles 2, 4, 14, 16, 18(1), 21 and 24 of the *African Charter on Human and Peoples' Rights* of 1982. The violations stemmed from the government's direct involvement in oil extraction on lands inhabited by the Ogoni people in partnership with Shell Petroleum Development Corporation (SPDC). The oil extraction operations triggered environmental degradation and health problems due to contamination of the community's lands, especially the soil, water and air.[695] The Ogoni communities were not involved in making the decisions regarding the developments impacting their lands and survival and were not informed regarding the risks of the operations. No consultation with the communities was conducted, although the operations posed serious harmful impacts to the Ogoni peoples. This contradicts the idea of procedural justice discussed in 2.2.2 above.

By establishing violations by the Nigerian government, the African Commission reiterated the state's obligation to respect, protect and fulfil human rights.[696] The duty to respect entails refraining from interfering with the enjoyment of human rights.[697] Further, the duty to protect human rights requires states to enact relevant legislative measures to prevent third parties such as mining companies from violating the rights of mine-host

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695 Oil exploitation was undertaken with no regard for the health and environment of the local communities, as the oil consortium disposed toxic waste into the lands and local waterways, aggravated by oil spills and gas flaring. Contamination of the soils, air and water of the local communities had serious health impacts such as skin infections, gastro-intestinal and respiratory ailments, cancers and reproductive problems. The operations were not monitored or supervised by the government and no safety or impact assessments were conducted. The government also barred environmental organisations from accessing Ogoni land to carry out impact assessments.

696 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 44. See Asbjorn Aide, UN Special Rapporteur on the Right to Food: *Final Report on the Right to Adequate Food as a Human Right* UN. Doc. E/CN.4/Sub.2/1987/23 who developed the concepts of respect, protect and fulfill.

697 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 45.

communities.[698] The duty to fulfil human rights seeks to ensure the actual realisation of human rights, for instance through the adoption of policy, legislative and other measures towards the realisation of the rights.[699] When analysed in the context of mineral extraction, the duty to respect human rights requires the state to refrain from interfering with the customs and traditional values of mine-host communities and the free use of natural resources owned or at their disposal. The elements of respect and protection are realised through policy and legislative measures that ensure involvement and consultation with the mine-host communities on whose lands mineral extraction projects are planned or are carried out. In the same vein, the obligation to fulfil the human rights of mine-host communities is realised through policy and legislative measures that ensure accrual of benefits to the mine-host communities.

The African Commission on Human and Peoples' Rights determined that the government of Nigeria had the obligation, in compliance with Articles 16 and 24 of the *African Charter on Human and People's Rights,*[700] of ordering or:

> at least permitting independent scientific monitoring of threatening environments, requiring and publicising environmental and social impacts studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

Article 16 of the *African Charter on Human and Peoples' Rights* obliges states to refrain from directly threatening the health and environment of citizens.[701] The Commission on

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698 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) paras 46, 57. See para 69 where the Commission indicates that it "does not wish to fault governments that laboring under difficult circumstances to improve the lives of their people [...].The intervention of multi- national corporations may be a potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities." *Velasquez Rodriguez v Honduras*, Inter-Am Court of HR, Judgement of 19 July 1988, Series CN.4, where it was emphasised that, by failing to protect those who needed it, governments violated the of citizens by allowing private parties to act freely and with impunity to the detriment of the citizens.

699 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 47.

700 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 53.

701 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 52.

Human and Peoples' Rights addressed the right to a healthy environment and found Nigeria to have violated the right to health[702] and the right to clean environment[703] due to its participation in the contamination of water, soil and the air, thereby harming the health of the Ogoni. The government of Nigeria also failed to protect the Ogoni people from the harmful activities of the oil operations and used its legal and military system to facilitate the harm.[704]

The African Commission on Human and Peoples' Rights referred to Articles 16 and 24 of *African Charter on Human and People's Rights* and held that these Articles oblige states to conduct EIAs and monitor and publish results thereof with the participation of host communities before the commencement of development projects.[705] It was held that states should not sponsor or tolerate the violations of the rights of host communities, but that they should rather take measures to prevent pollution and environmental degradation. The Nigerian government violated Article 21 of the *African Charter* by facilitating the destruction of the lands of the Ogoni people and failing to protect them from the devastating activities of oil companies.[706] There was no involvement of the Ogoni people in decision making that affected their land and no material benefit accrued to the local population. This conduct violated Article 21 of the *African Charter*, which guarantees the right of peoples to freely dispose of natural wealth and resources.[707]

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[702] A 16 of the *African Charter* states that: "every individual shall have the right to enjoy the best attainable state of physical and mental health. State parties to the present Charter shall take necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick." The right to health is recognised in A 14 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* and A 2 and A 14 of the *African Charter on the Rights and Welfare of the Child*. A 24 of the *African Charter on Human and Peoples' Rights* then recognises the right to a healthy environment as part of the right to health, by stating that "all people shall have the right to a general satisfactory environment favourable to their development."

[703] A 24 of the *African Charter* provides that "[A]ll peoples shall have the right to a general satisfactory environment favorable to their development."

[704] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 50.

[705] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 53.

[706] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 155/96 (2001) pars 55-58.

[707] *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 61. The African Commission gave the term "peoples" a wider meaning and found that the reference in A 21 of the *African Charter* to the right of all peoples to freely dispose their wealth and natural resources included distinct indigenous people within a state and does not refer to the whole people of the state.

4.3.9.3 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com (No 276/2003) (Endorois case)

The Endorois are a pastoralist community who live in the Kenyan rift valley and consider the land around Lake Bogoria to be their ancestral land.[708] This land was, however, designated as a game reserve in 1973 and, in 2002, Kenya granted mining concessions for red rubies on the land.[709] Displacement caused by various commercial activities, including the erection of wildlife reserves, electricity generation and mining threatened the survival of the Endorois.[710] The African Commission determined that the government of Kenya violated, *inter alia*, the Endorois peoples' right to property,[711] the right to enjoy and freely dispose of natural resources[712] and the right to development.[713]

The African Commission on Human and Peoples' Rights considered the term "peoples" as found in the *African Charter on Human and Peoples' Rights* of 1982 and particularly whether the Endorois constituted a "people" and "indigenous peoples." The Commission acknowledged the various existing criteria for identification of peoples or indigenous peoples and asserted that all definitions of indigenous peoples acknowledge the linkage between the peoples, their land and culture.[714] In addition, indigenous peoples express the desire to be identified as a people or are conscious that they are a people.[715] The African

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708 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 72.

709 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 14. The mining operations constructed a road for access by heavy mining machinery to the concession area, which resulted in the pollution of waterways used by the Endorois community for household use and for their livestock.

710 Lynch 2012 111 (442) *African Affairs* 34.

711 A 14 of the *African Charter*.

712 A 21 of the *African Charter*.

713 A 22 of the *African Charter on Human and People's Rights*. The Commission recommended among other reparations that the government of Kenya should (i) recognise the rights of ownership to the Endorois and restitute Endorois ancestral land, (ii) ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle, (iii) pay adequate compensation to the community for all the loss suffered and (iv) pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

714 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 145, 147–151.

715 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 145, 147–151.

Commission on Human and Peoples' Rights noted that the characteristics for identification of indigenous peoples in the African context include the following items:

> the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[716]

The African Commission on Human and Peoples' Rights concluded that the Endorois are a people, as based on their sacred relationship with ancestral lands, collective distinctiveness and their self-identification as a people.[717] Because of these reasons, they were entitled to protection of their collective rights under the *African Charter*.[718] Importantly, this case clarified that in the African context the term "peoples" is not reserved for indigenous peoples because there is no cause to differentiate much between indigenous and other rural local communities. On that basis, both indigenous peoples and local communities were found to be entitled to rights guaranteed in the *African Charter*, including Article 21, which guarantees the right of peoples to freely dispose of wealth and natural resources.[719] In the Endorois case, the African Commission affirmed that states have the duty to respect and protect the right to property.[720] The Kenyan government displaced the Endorois from

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716 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 150.

717 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 157 and 162.

718 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 157 and 162.

719 In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 162, the African Commission accepted that local communities are peoples if they enjoyed sufficient distinctive features that identified them as peoples. See also *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 155/96 (2001); *Katangese Peoples Congress v Zaire* (Communication No. 72/92) [1992] ACHPR para 3 where the African Commission held the Katangese to be a people and that it was irrelevant whether they consisted of one or more ethnic groups. The *Report of the African Commission's Working Group Report of Experts on Indigenous Populations and Communities* 2005 https://www.iwgia.org/images/publications/African_Commission_book.pdf, 79 indicates that sections of a nation's population, including both indigenous people and local communities, are entitled to rights recognised in the *African Charter* formulated as rights of peoples.

720 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 191. The Commission noted in para 204 that indigenous peoples have ownership and access rights over their ancestral lands and "if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries."

the land they considered to be their home without consultation and compensation.[721] This conduct violated the Endorois' property rights guaranteed under Article 14 of the *African Charter*.[722] In terms of the permissible exceptions set out in Article 14 of the *Charter*, the right to property may only be encroached upon in the interest of the public or community and in compliance with the provisions of appropriate laws. The Commission concluded that the upheaval and displacement of the Endorois from their ancestral lands and the denial of their rights to natural resources on those lands were disproportionate to any public need served by the development projects.[723] The eviction also failed the proportionality test, since it was carried out by force[724] and threatened the cultural survival of the Endorois.[725] It was also found that the displacement of the Endorois failed to satisfy the requirement of being "in accordance with the provisions of appropriate laws," which the Commission interpreted as subjecting state interference with property rights to the standards of both national and international law.[726]

The African Commission on Human and Peoples' Rights held that the Endorois had the right to freely dispose of their wealth and natural resources in consultation with the

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721 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 229-234. Only 170 out of 400 families received payments and these were merely aimed at facilitating relocation and not as compensation for loss of lands and other possessions.

722 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 238. In para 186, the Commission affirms that property for purposes of A 14 of the *African Charter* includes land and economic resources, and that the right to property includes undisturbed access, possession and use and control of one's property. The Commission relied on the cases of *Malawi African Association and Others v Mauritania,* African Commission on Human and Peoples' Rights, Comm. No. 210/98 (2000) para 128; *Serac v Nigeria (Ogoni Case) (2001)* para 54; *Mayagna (Sumo) Awas Tingni v Nicaragua* (2001) para 140(b), 151; *Moiwana Village v Suriname*, Judgment of June 15, 2005. Series C No. 124, para 134. In para 207, the African Commission interpreted the phrase "occupied or otherwise used" in A 26 and A 27 of the UNDRIP to mean "that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds." The African Commission also adopted, in para 209, the conclusion in *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128 to the effect that, *inter alia*, indigenous peoples' traditional possession of their lands has equivalent legal effects to those of a state-granted full property title.

723 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 214.

724 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 218.

725 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 235.

726 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 219.

Kenyan government, as guaranteed in Article 21 of the *African Charter*.[727] In the view of the African Commission on Human and Peoples' Rights, the fact that creating a game reserve within the lands inhabited by the Endorois would have a major impact on them entailed that the state had a duty to consult with the affected community and also obtain their free, prior and informed consent in accordance with their customs.[728] Regarding ruby mining within the Endorois' lands, the African Commission drew comparisons with gold mining within the lands of the Samaraka.[729] In the Saramaka case, discussed in section 4.2.2.7 above, the Inter-American Court found that the people did not identify with gold and did not have any particular relationship with the mineral other than a general claim to "own everything, from the very top of the trees to the very deepest place that you could go under the ground."[730] The Inter-American Court found that gold mining within Saramaka territory would impact other natural resources such as the waterways necessary for their survival. On that basis, the state had a duty to consult with the Saramaka regarding any gold concession within their lands, ensure that they derived reasonable benefits from the gold extraction and ensure that an ESIA was conducted before issuing any gold concessions within the lands.[731] When it comes to the Endorois case, although they did not have any attachment with ruby, the mining of the mineral was impacting on other natural resources necessary for their survival[732] and, on that basis, it was found that the reasoning in Saramaka was applicable.[733]

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727 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 268.

728 Para 291. The African Commission noted in para 226 that, in terms of "consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent or to compensate, ultimately results in a violation of the right to property."

729 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 266.

730 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 266.

731 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 266.

732 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 14, 267. In para 14, the Endorois indicated that the mining of rubies and construction of a road to facilitate access by heavy mining machinery posed a high risk of polluting the waterways used by the Endorois for their own personal use and for their livestock.

733 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 266. The Kenyan government had a duty to (i) consult with the Endorois regarding mining concessions within their lands, (ii) carry out EIAs and (iii) ensure that the Endorois derive reasonable benefit from mineral extraction.

In the case of the Endorois, there was no effective participation allowed for the community and no reasonable benefit accrued to the community, while no prior ESIA had been carried out, all of which violated Article 14 of the *African Charter*.[734] Further, violation of the Endorois peoples' right to freely dispose of their wealth and natural resources contradicted the provisions of Article 21 of the *African Charter*. The African Commission reiterated its earlier decision in the *SERAC v Nigeria*, where it stated that "the right to natural resources contained within their traditional lands is vested in the indigenous people [and] a people inhabiting a specific region within a state can claim the protection of Article 21."[735]

Regarding the right to development, the African Commission determined that the failure to ensure effective participation and benefit-sharing also violated the Endorois' right to development, which is guaranteed in Article 22.[736] The Commission asserted that:

> the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development…it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[737]

The government of Kenya had violated the Endorois peoples' right to development by failing to involve them in the development process.[738] Concerning development or investment projects with a major impact on the Endorois, the state had a duty to consult with the community and obtain their free, prior and informed consent in accordance with

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734 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 228.

735 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 267.

736 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 228.

737 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 277. Equitability and non-discrimination require equal distribution and accessibility of opportunities and benefits of development. They require government policies and legislative reforms relating to access and enjoyment of benefits from natural resources do not privilege some people and disadvantage others.

738 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 298.

their customs and traditions.[739] It was emphasised that development should result in the empowerment of the Endorois.[740] The right to development could be attained through improvement of the capabilities and choices of the Endorois, which did not happen in this case.[741]

In the African Commission's assessment, the *African Charter on Human and Peoples' Rights* of 1982 entail that benefit sharing is a key element of the right to development, which would be violated if development projects result in a decrease in the well-being of the community.*[742]* Reference was also made to the Committee on the Elimination of Racial Discrimination[743] to reiterate the requirement for equitable sharing of benefits derived from exploitation of natural wealth and resources.[744] It was held that the Endorois, as beneficiaries of the development process, are entitled to an equitable distribution of the benefits derived from development on their land.[745] The Commission confirmed the right of the Endorois to benefit-sharing as compensation for exploitation of their traditional lands by the extractive companies and restriction or deprivation of their own "right to the use and enjoyment of their traditional lands and those natural resources necessary for their survival."[746] These findings by the African Commission on Human and Peoples' Rights are consistent with the principles of distributive justice, procedural justice and remedial justice discussed in chapter 2 above.

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739 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 291. The Commission pointed to A 2(3) of the *United Nations Declaration on the Right to Development*, GA Res 41/128, UN Doc A41/128 (1986), which requires the peoples' active, free and meaningful participation in development.

740 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 283.

741 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 283.

742 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 294. See para 295 of the *African Charter for Popular Participation in Development and Transformation. UN. ECA International Conference on Popular Participation in the Recovery and Development Process in Africa* (1990): Arusha, Tanzania) https://repository.uneca.org/handle/10855/5673.

743 The Committee on the Elimination of Racial Discrimination is a body of independent experts established in terms of Article 8 of the *International Convention on the Elimination of All Forms of Racial Discrimination* to monitor implementation of the Convention by state parties.

744 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 296.

745 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 297.

746 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 295, 296.

4.3.9.4 African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case) Application No. 006/2012 Judgment 26 May 2017

The case of the Ogieks Community of the Mau Forest of Kenya was brought before the African Court of Human and Peoples' Rights by the African Commission. Although the case involved logging concessions, the principles established and affirmed in the case are applicable to the award and utilisation of other natural resources such as minerals.

The Kenyan government designated the Mau Forest inhabited by the Ogiek indigenous minority ethnic group as a reserved water catchment zone and ordered their eviction in October 2009.[747] The state also commenced the granting of logging concessions on the lands without consultation with and the consent of the Ogieks, who were subjected to similar dispossession since the colonial era to which they consistently raised objections.[748] In its determination, the African Court held that Kenya had, *inter alia*, violated Articles 14, 21 and 22 of the *African Charter*.

It was confirmed by the court that the *African Charter on Human and Peoples Rights* of 1982, like other international human rights instruments, does not define indigenous peoples or populations and that there is no universally accepted definition of these.[749] The court acknowledged the criteria for identifying indigenous peoples adopted by the African Commission's Working Group on Indigenous Populations/ Communities and[750] the United Nations Special Rapporteur on Minorities.[751] The criteria was explained by the court as involving:

> presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of

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747 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 6.

748 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 8.

749 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 105.

750 *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* 2007, 4.

751 *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* E/CNA/Sub.2/1986/7/AddA, para 379.

> production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.[752]

The court, based on this criterion, recognised the Ogieks as an indigenous population deserving protection owing to their vulnerability, subjugation, marginalisation and dispossession, among others.[753]

The Court determined that the right to property enshrined in Article 14 of the *African Charter* protects the property rights of individuals as well as collectives such as groups or communities.[754] As explained by the court, the right to property entails "three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof *(fructus)* and the right to dispose of the thing, that is, the right to transfer it *(abusus)."*[755] The court also held that indigenous peoples enjoyed, in terms of Article 26 of the UNDRIP, rights to ownership, possession, occupation and the use/ utilisation of their lands.[756] These rights could only be restricted where such restriction was in the public interest.[757] Evidence before the court showed that degradation of the Mau Forest was attributable to ill-conceived logging concessions granted by the state, with negative impacts on the Ogieks. The state's argument that its decisions were in the public interest (namely the preservation of the ecological system) could not be sustained given the destruction caused by the logging concessions.[758] In the circumstances, the court held that the state violated Article 14 of the *African Charter* by evicting the Ogieks from their

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752 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 107. See Daes *Working Paper by the Chairperson- Rapporteur, on the Concept of "Indigenous People*" UN Doc. E/CNA/Sub.2/ACA/1996/2, para 69.

753 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 paras 110 -112.

754 A 14 of the Charter provides that "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

755 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 124.

756 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 paras 107 126-127.

757 A 14 of the *African Charter*.

758 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 paras 129-130.

ancestral lands against their will and without prior consultation.[759]

The African Court in the Ogieks case held that the term "peoples" in Article 21 of the *African Charter* encompassed the whole population of a state and "sub-state ethnic groups and communities that are part of that population" that acknowledge being part of the state.[760] Therefore, the Kenyan government violated the right of the Ogieks' as a people to freely dispose of natural resources and wealth as enshrined in Article 21 of the *African Charter*. This violation was perpetrated by evicting the Ogieks from their lands, denying them access to natural resources therein and granting logging concessions there in the absence of their prior consent, while they did not share in the benefits accruing from the resource exploitation.[761] It was held that, since the eviction of the Ogieks from their ancestral lands without involvement in decision making took away their right to occupy, access, use and enjoy the fruits of the lands, the state violated Article 21 of the *African Charter*, which guarantees the right to freely dispose of natural resources.[762]

It was argued that the government of Kenya violated the Ogiek people's right to development by evicting them from their ancestral lands and by failing to consult the community as regards their path of development.[763] The state did not actively involve the Ogiek people around developing and determining development programmes affecting

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759 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 131.

760 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 198-199.

761 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 191.

762 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 201.

763 See *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012*,* para 202, where the African Court asserted that Kenya violated the Ogiek people's rights to development by failing to (i) "consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest" and (ii) "recognise the Ogieks' right to development and as indigenous people, with the right to determine development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions." In *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment (Reparations) 23 June 2022 Court explained that section 61 of the Constitution of Kenya 2010 recognises communal lands. Two sub-categories of such lands are recognised under section 63(2)(d)(ii) namely ancestral lands and those occupied by hunter-gatherer communities. Kenya's Community Land Act 27 of 2016 then sets out, in Part II, the procedures to be followed by communities seeking formal title over their land.

them, and evictions adversely affected their economic, social and cultural development.[764] The African Court agreed that the Ogiek were in fact entitled to social, economic and cultural development as guaranteed under Article 22 of the *African Charter*,[765] which should be read with Article 23 of UNDRIP.[766] Consequently, the court held that the government of Kenya violated the Ogiek people's right to development when evictions were carried out without consultation and consent.[767]

4.4 African sub-regional regulatory instruments

Sub-regional human rights systems are also important to the subject of mine-host community involvement in and benefit accrual from mineral extraction. Any dispossession and disempowerment of mine-host communities is mostly felt at the sub-regional level because of the close geographical locality. Similarly, positive requirements set at this level begin to bear positive results in the member states before they can impact those outside the region. Notable African sub-regional regulatory instruments relevant to mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit include the *ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector* (2009),[768] the *Protocol of the International Conference of the Great Lakes Region Against the Illegal Exploitation of Natural Resources* of 2006[769] and the

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764 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 210.

765 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 208.

766 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 209. A 23 of the UNDRIP provides that "indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

767 *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks case)* Application No. 006/2012 Judgment 26 May 2017 para 210.

768 This instrument applies to member states in the Economic Community of West African States (ECOWAS). A 16(2) of the Directive provides that "mining rights holders in member states shall respect the rights of local communities. They shall particularly respect the rights of local people and similar communities to own, occupy, develop, control, protect, and use their lands, other natural resources, and cultural and intellectual property." A 16(3) provides that "[C]ompanies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations."

769 This is a regional treaty signed by countries making up the African Great Lakes Region, namely Angola, Burundi, Central African Republic, Democratic Republic of Congo, Republic of Congo, Kenya, Uganda, Rwanda, South Sudan, Sudan, Tanzania and Zambia. A 3(1) of the *Protocol of the International*

Southern African Development Community (SADC) Protocol on Mining of 1997.[770] Key to this study is the *SADC Protocol on Mining* of 1997, given that Zimbabwe and South Africa are members of this regional body and they are both signatories to the binding protocol.[771]

The state parties to the *SADC Protocol on Mining* of 1997 undertook in the preamble of this instrument to develop the region's abundant mineral resources to improve the living standards of people throughout the region. Article 2(8) of the *SADC Protocol on Mining* states that the member states seek to promote the economic empowerment of the historically disadvantaged. The term "historically disadvantaged" is defined in Article 1 of the *Protocol* as meaning indigenous people, women and disabled people. In Article 2(8) of the *Protocol*, member states undertake to "develop and observe internationally accepted standards of health, mining safety and environmental protection." They are also required to ensure a balance between mineral extraction and protection of the environment so as to achieve sustainable development.[772] While Article 8(2) of the *SADC Protocol on Mining* concerns sharing of environmental information, it seems this is restricted to information sharing among states and does not extend to sharing it with citizens and affected communities.

4.5 Concluding remarks on regional and sub-regional regulatory instruments relating to involvement and benefit accrual by mine-host communities from mineral extraction

This chapter set out to draw requirements centred on mine-host community involvement in and benefit accrual from mineral extraction projects imbedded in applicable regional and

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Conference of the Great Lakes Region against the Illegal Exploitation of Natural Resources, provides that "Member States shall freely dispose of their natural resources" and this right "shall be exercised in the exclusive interest of the people" and "in no case, the populations of a State shall be deprived of it." A 3(4) then indicates that "Member States shall develop and implement a participatory and transparent mechanism for the exploitation of natural resources, according to their respective economic and social systems." The protocol clearly requires of states to exploit natural resources for national development and for the well-being of the population.

770 The *SADC Protocol on Mining* of 1997 is a regional treaty binding member states of the Southern African Development Community, namely Angola, Botswana, Democratic Republic of Congo, Tanzania, Lesotho, Namibia, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, South Africa, Swaziland, Zambia and Zimbabwe.

771 In terms of A 21, the *SADC Protocol on Mining* of 1997 entered into force upon ratification by a third of the signatory states.

772 A 8(1) of the *SADC Protocol on Mining* of 1997.

sub-regional and regulatory instruments that Zimbabwe can adopt in order to improve its own frameworks. In this endeavour, the chapter focussed on the Inter-American and African human rights systems as well as instruments from the SADC sub-African region where Zimbabwe is located. The African and Inter-American regions are part of the global south still grappling with violations to the rights of vulnerable groups such as mine-host communities. The fact that both regions uphold individual rights as well as collective rights such as those of communities to their ancestral lands offered opportunity to draw suitable standards for involvement and benefit accrual by mine-host communities from mineral extraction on their lands.

The right to property is a common feature of both the Inter-American and African regional systems. Most interestingly both systems regard this right as extending to lands and natural resources held under customary tenure regimes. The chapter established that it is not only ownership of land that entitles mine-host communities to consultation, participation and benefit sharing in the proceeds of mining on the lands they inhabit. It is rather the disproportionate damage and harm they are exposed to and the impact of mining on their subsistence that qualifies them for consultation, participation and benefit sharing. This is true regardless of the type of mine-host community involved: whether it be indigenous, tribal, a minority or a local rural community. That minerals vest in the state does not negate the mine-host communities' claims as long as their subsistence is impacted. Mine-host communities must be involved, participate in and share in benefits and have ESIA conducted so as to assess the impact of planned mining operations on their livelihoods. This perspective restricts arguments about state ownership of land and minerals and focuses attention on the impacts of mineral extraction on the subsistence of mine-host communities. When framed in this manner, impact assessments, consultation, involvement, participation and benefit-sharing become standard requirements, regardless of who owns the lands on which mineral extraction projects are planned.

The chapter confirmed that the proportionality test limits the state's ability to restrict the right to property by requiring that any interference with property rights must be proportionate with and necessary for the intended purpose. Any interference with property rights must also be realised using the least onerous measures. In the context of mineral

extraction on lands inhabited by mine-host communities, the proportionality test requires that any restrictions on the use and enjoyment of the lands must be unavoidable and be the least harmful and onerous. The mine-host communities must not be made to bear disproportionate social, economic, environmental and cultural burdens of mineral extraction on their lands. Forced evictions often accompanied by threats to the social, economic and cultural survival of the mine-host communities violate the proportionality test.

This chapter also established that the notion of the right of peoples to freely dispose of their natural resources exists independently from the sovereign right of the states over their natural resources. Article 21 of the *African Charter on Human and Peoples' Rights* of 1982 particularly regards peoples of the state as the exclusive beneficiaries of the exploitation of natural resources. The people may therefore reject prejudicial transactions concluded between the state and extractive companies that expose them to disproportionate social, economic, environmental and cultural harm without accrual of the benefits of mineral extraction on the lands they inhabit. This is particularly so given the substantive rights of especially those mine-host communities comprised of indigenous peoples have to own, use, control, occupy and develop lands and natural resources grounded on their right to culture and to exist as a distinct people.

It is interesting that standards for empowerment and involvement of women, youth and displaced persons come out prominently in the regulatory instruments of the African human rights system. Specific instruments notably the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003 and the African Youth Charter of 2006 are dedicated to the empowerment and involvement of women and the youth in the planning, management and preservation of the environment as well as implementation and evaluation of development policies and programmes. This certainly includes women and youths in mine-host communities who must be involved in processes centred on the award and development of mineral resources in those areas.

In conclusion, the chapter established that the *African Charter on Human and Peoples' Rights* of 1982 is the first to provide a binding requirement for states to realise the right to

economic, social and cultural development. The right to development is violated when the people's right to freely dispose of their wealth and natural resources is negated. Violation of the right to development also occurs when mine-host communities are not effectively involved in mapping their development path and when benefits of mineral extraction are pillaged by outsiders and do not accrue to the communities. Chapter 5 seeks to unpack how Zimbabwe's constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction realises the requirements set in the international and regional regulatory instruments, the latter as discussed in chapters 3 and 4 above and draw lessons from the South African frameworks to be discussed latter in chapter 6.

CHAPTER 5

THE ZIMBABWEAN CONSTITUTIONAL, POLICY AND LEGISLATIVE FRAMEWORKS CENTRED ON MINE-HOST COMMUNITY INVOLVEMENT IN AND BENEFIT ACCRUAL FROM MINERAL EXTRACTION

5.1 Introduction

Zimbabwe has a long history of mineral extraction. It dates back to the period before the colonial era. Kritzinger[773] gives a historical account of mining in Zimbabwe, as based on literature from Portuguese traders who had contact with Zimbabwe's ancient states, which dates as far back as the 1500s.[774] For instance, Kritzinger mentions a Portuguese trader, Izidoro Correia Pereira, who published a list of mines in ancient Zimbabwe in response to a Portuguese decree in 1857 which had called for an inventory of mineral resources south of the Zambezi River.[775] Later, the Portuguese traders were overtaken by British imperialist incursions that started with a search for mineral concessions by fortune hunters between 1870 and 1885, but eventually gave way to the conquest of the 1890s.[776] The political

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773 Kritzinger 2012 *Zimbabwe Geological Survey* 60. See Hollaway 1997 23(1) *Resources Policy* 27.

774 See Jourdan *et al* "Mining Sector Policy Study" 2012 *Zimbabwe Economic Policy Analysis and Research Unit* (ZEPARU) 96-97 for details of even older historical accounts of mining in Zimbabwe including (i) the 11th century gold mining and trading with Arab and Swahili traders at Sofala on the Mozambique coast, (ii) 15th Century gold mining by the Munhumutapa Empire located in the northern part of Zimbabwe and the Changamire Kingdom occupying the southern part trading through Sabi/ Save valley up to the Mozambique coast and (iii) the granting of gold mining rights to the Portuguese by the Munhumutapa in 1573.

775 Kritzinger 2012 *Zimbabwe Geological Survey* 60 states that "the document represents the mining activities of the Shona dynastic rulers Bocha, Bvumba, Duma, Hera, Manyika, Maungwe, Mbire and Rozvi that existed in the decade of 1500 when the Portuguese […] wrested the centuries-old Sofala gold trade from Arab-Swahili hands. Pereira's list is divided into three headings: mining 'localities', their 'discoverers' and their 'workers.'"

776 See Burrett 2001 33 *Botswana Notes and Records* 13-25. Lobengula, King of the Ndebele people of southern Zimbabwe (Matabeleland), his Kraal situated in the modern-day city of Bulawayo, also claimed control over Mashonaland (northern Zimbabwe) and granted several gold mining concessions to fortune hunters. The key ones among these were the (i)Tati Concession of 1870, which allowed the London and Limpopo Mining Company to mine gold in the Tati River area, (ii) the 1871 concession to Thomas Baines' South African Gold Fields Exploration Company for gold exploration between the Gweru and Manyame rivers, (iii) the 1880 Tati Concession to the Northern Light Gold and Exploration Company (iv) 1884 Philips Concessions for the area between Gwai and Manyame rivers, (v) the 1887 concession to the Woods-Chapman-Francis syndicate in the Shashe area and (vi) the 1888 Rudd Concession. Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 37 explain that, in 1888, Cecil John Rhodes tricked King Lobengula into signing the Rudd Concession, which gave exclusive mineral rights to the British South Africa Company (BSAC) in exchange for 1000 rifles, a gunboat for purposes of patrolling the Zambezi River and a monthly royalty of £100. See the case of *Re Southern Rhodesia* (1919) AC 211,

subjugation of the 1890s, led by Cecil John Rhodes' British South Africa Company (BSAC), marked the beginning of nearly a century of dispossession, deprivation, marginalisation and exploitation of the Zimbabwean black population.[777]

Beginning in 1894, the BSAC and white settlers accomplished the dispossession and deprivation of the Zimbabwean black population of their land and minerals through brutal subjugation and a litany of regulatory instruments. In the context of minerals, the *Mines and Minerals Ordinance* of 1895 disregarded any claims and rights of black communities to mineral resources. The *Mines and Minerals Ordinance* of 1895 allowed white settler prospectors to peg alluvial gold claims on lands along the Angwa, Ruenya, Mazowe and Nyadiri River valleys among others. In addition to minerals, the prospectors grabbed land around gold claims, thereby dispossessing blacks of both their gold claims and land.[778] In the *Gold Trade Ordinance* of 1913, black people were forbidden from mining, buying and selling gold, which they used to do before the white settler occupation.[779]

The key regulatory instruments used to dispossess blacks of their land were the *Lipper Concession* of 1889,[780] *Matabeleland Order-In-Council* of 1894,[781] *Southern Rhodesia*

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which denounced the Rudd Concession as outrageous but did not order cancellation of the agreement due to the principle of privity of contract. The case of *Re Southern Rhodesia* (1919) AC 211, 233, 235 pitted the BSAC against the British Crown over who owned Southern Rhodesia. The BSAC based its claim on the Lipper and Rudd concessions. In response to the appeal by the natives (black Zimbabweans) represented by the Aborigines Protection Society, for the court to consider the land rights of the native population, Lord Sumner stated that "some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged." Lord Sumner concluded that "whoever now owns the unalienated lands, the natives do not." The court eventually ruled in favour of the British Crown but ordered compensation to the BSAC for its conquest and administration of the country. The compensation was made in the form of cash and extensive mineral rights and lands. The natives, who were considered to have no land rights, received no compensation. This case culminated in the granting of self-government to the white settlers in 1923.

777 Murombo 2013 9(1) *LEAD* 39.

778 Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 37.

779 Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 37.

780 The case of *Re Southern Rhodesia* (1919) AC 211, 218 states that the Lipper Concession signed between Lobengula and Edward Amandas Lippert granted to the latter the exclusive land rights "to lay out, grant, or lease, for such period or periods as he may think, farms, townships, building plots, or grazing areas." Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 38-39 explains that armed with the 1888 Rudd Concession pertaining to minerals and the 1889 Lipper Concession pertaining to land, Cecil John Rhodes (who acquired both agreements) obtained a royal charter from the British government which granted his BSAC the right to establish a British colony north of the Limpopo River and to extend British rule from southern into central Africa. Rhodes who assembled a pioneer column in South Africa largely made up of former British soldiers, marched into Zimbabwe and settled at Fort Salisbury (modern-day Harare) in 1890. The BSAC immediately established a colonial government and

Order-In-Council of 1898,[782] *Native Reserves Order-In-Council* of 1889,[783] *Land Apportionment Act* of 1930,[784] *Native Land Husbandry Act* of 1951[785] and the *Tribal Trust Lands Act* of 1965.[786] When Zimbabwe attained independence from the colonial regime in April 1980, the white population constituted one per cent (1%) of the total population and held at least forty-five per cent (45%) of agricultural land.[787] The land reform programme initiated in the year 2000 reversed the unequal land distribution, albeit with debilitating consequences to the national economy.[788]

The current contention between mine-host communities and mining companies in Zimbabwe arise from its colonial history as well as contemporary extractive projects particularly on communal lands, which are causing development-based dispossession and

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named the country Southern Rhodesia and declared by means of the Proclamation of 1896 that the law that shall apply in the country shall be the law that was applicable at the Cape of Good Hope (modern day Cape Town) as of 1896.

781 See A 49 of the Matabeleland-Order-in-Council of 1894. Using the Matabeleland-Order-in-Council of 1894, the BSAC assumed ownership of Matabeleland by the right of conquest, which forced the eviction and relocation of the Ndebele people to the dry and infertile Gwaai-Shangani area where they were given occupation and use rights only. An uprising (first Chimurenga or War of Liberation) by the Shona and Ndebele people erupted in 1896, but this was ruthlessly subdued by 1897 and the Matabeleland-Order-in-Council was replaced with the Southern Rhodesia Order-In-Council of 1898 which covered both Matabeleland and Mashonaland.

782 See A 81 of the Southern Rhodesia Order-in-Council of 1898, which permitted the creation of native areas where the blacks had occupation and use rights only. Through A 84 of the Southern Rhodesia Order-In-Council of 1898, all mineral rights in lands assigned to black Zimbabweans were reserved in the BSAC, which could order the removal of the people whenever such land was required for mineral development.

783 Rugege 2004 8 (2) *Law, Democracy and Development* 236; Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 38 indicate that the Native Reserves Order-in-Council of 1898, which created reserves for blacks only, ensured systematic mass land expropriation by white settlers, who obtained the fertile lands and pushed black people to infertile, low-rainfall potential areas (the reserves) which are today's communal rural areas. Blacks were prohibited from owning any land in exclusive white areas.

784 Rugege 2004 8 (2) *Law, Democracy and Development* 236; Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 38 explains that the *Land Apportionment Act* of 1930 formalised the separation of land between whites and blacks.

785 The *Native Land Husbandry Act* of 1951 enforced destocking and conservation practices on black landholders. See Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 38.

786 Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 38, explain that the *Tribal Trust Lands Act* of 1965 changed native reserves to high population density homelands.

787 Mafa *et al Gender Politics and Land Use in Zimbabwe* 1980-2012, 58. Rugege 2004 8 (2) *LDD* 236 states that, in 1914, whites constituted 3% of the population but controlled 75% of the land, while blacks constituted 97% of the population but were confined to 23% of the land, which had increased to 41.41% at independence in 1980.

788 Agricultural productivity declined due to lack of capacity both in terms of funding and knowledge of commercial farming among the black people who were allocated farms. See Human Rights Watch 2002 https://www.refworld.org/docid/3c8c82df4.html.

displacement.[789] Mine-host communities seek access to mining information, meaningful participation in EIA processes and involvement in the decision-making processes centred on award and utilisation of mineral rights. In addition, they seek economic and social benefits from the extraction of minerals on the lands they inhabit.

Chapter 2 of this study outlined the mechanisms that should guide any domestic law centered on mine-host community involvement and benefit accrual from mineral extraction on their lands. It asserted that the state's domestic legal frameworks must promote social justice in all its dimensions namely distributive, procedural and remedial justice. On that basis, chapter 5 examines whether Zimbabwe has constitutional, policy and legislative frameworks to ensure a just distribution of the costs and rewards of mineral extraction on lands inhabited by mine-host communities. These frameworks should according to the egalitarian strand of distributive justice, ensure that mine-host communities have an equal distribution of benefits commensurate with the burdens that they bear as a result of mineral extraction on their lands. Chapter 5 also considers the constitutional, policy and legislative frameworks in place to ensure procedural justice for mine-host communities through effective consultation, involvement and participation in decisions affecting their lives. Concerning remedial justice, chapter 5 assesses whether Zimbabwe's constitutional, policy and legislative frameworks provide for restitution of the lands taken from mine-host communities without their involvement and consent as well as payment of compensation for damages caused to the communities.

Chapters 3 and 4 discussed applicable international and regional regulatory instruments. Zimbabwe ratified international and regional treaties[790] and voted in favour of key United

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[789] The most prominent are the evictions of local communities from the Marange and Chiadza diamond fields in the Manicaland Province of Zimbabwe and the black granite areas of Murehwa in the Mashonaland East Province. The government of Zimbabwe has also gazetted the eviction of the Tonga and Nambiya of Dinde in the coal-bearing area of Hwan.ge and the Shangaan of Chilonga in Chiredzi to pave way for an irrigation project. See *Statutory Instrument* 188 of 2020 and *Statutory Instruments* 50, 51, 63A and 72A of 2021.

[790] Zimbabwe is a state party to, among other treaties, the ICESCR, CEDAW, ICERD, ACHPR, *Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women* of 2003, *African Youth Charter* of 2006, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* of 2009, and the *SADC Protocol on Mining* of 1997. Zimbabwe ratified the ICERD on 13 May 1991 while South Africa ratified on 10 December 1998. As for CEDAW, Zimbabwe ratified on 13 May 1991 while South Africa ratified on 15 December 1995.

Nations General Assembly resolutions[791] relevant to the involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.[792] Through ratification and support for the international and regional regulatory instruments, Zimbabwe incurred an obligation to adapt its constitutional, policy and legislative frameworks so as to incorporate principles and requirements set out in these regulatory instruments.[793] Consequently, chapter 5 seeks to determine how the requirements in international and regional regulatory instruments as set out in chapters 3 and 4, are realised in the Zimbabwean constitutional, policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction.

5.2 Zimbabwe's constitutional framework pertaining to mine-host community involvement in and benefit accrual from mineral extraction

5.2.1 Introduction

The *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013 (*Constitution of Zimbabwe*) provides the basis for the policy and legal frameworks centred on mineral extraction and, in particular, the involvement and benefit accrual by mine-host communities discussed in

791 Zimbabwe voted in favour of, among other key resolutions, the DRTD, Rio Declaration of 1992, UNDRIP, UNDROP and the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

792 For the state's obligation to give domestic legal effect to applicable international human rights arising from customary international law and the human rights treaties, see A 2 of the ICCPR; A 2 of the ICERD 1965, 60 U.N.T.S. 195; *U.N. High Comm' for Hum. Rts. Hum. Rts. Comm., General Comment 31 on International Covenant on Civil and Political Rights*, 8, U.N. Doc. CCPR/C/Rev.1/Add.13 (May 24, 2004).

793 Section 12(b) of the *Constitution of Zimbabwe* provides that respect for international law is part of the country's foreign policy. In terms of sections 34 and 327 of the *Constitution of Zimbabwe*, the state is obliged to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. Section 46 of the *Constitution of Zimbabwe* recognises the role and place of international law in the interpretation of the Declaration of Rights and obliges Zimbabwean courts and tribunals to consider international law and all treaties and conventions to which Zimbabwe is a party. Members of the judiciary are particularly required by section 165(7) of the *Constitution of Zimbabwe* to acquaint themselves with domestic and international legal developments. It would, therefore, be amiss for the courts to apply and interpret local legislation and or policies in a manner that is contrary to international law and treaties to which Zimbabwe is a party. See also A 26 of the *Vienna Convention on the Law of Treaties* (1969) which requires states to perform in good faith all treaties to which they are parties, while A 27 of the same convention indicates that a state may not rely on provisions of its internal laws to justify failure to comply with international treaties.

5.3 and 5.4 below.[794] Applicable provisions of the *Constitution of Zimbabwe* can be identified in different sections addressing the state's duty to respect, protect and fulfil human rights,[795] equitable development and sharing of national resources,[796] recognition and empowerment of marginalised communities,[797] access to information and involvement in decision-making processes,[798] the right to administrative justice[799] and environmental and other related rights.[800] These provisions are the hallmarks of distributive justice, procedural justice and remedial justice and constitute the legal gateways for mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit, even if that is not expressly stated.

The *Constitution of Zimbabwe* stresses that, when the provisions which constitute the Bill of Rights are interpreted, the courts and tribunals should take into account international law, treaties, conventions and agreements, and consider relevant foreign law.[801] Further, in terms of sections 326(2) and 327(6) of the Constitution, courts and tribunals when interpreting legislation should adopt any reasonable understanding that is consistent with customary international law and any international convention, treaty or agreement which is binding on Zimbabwe, instead of an alternative and inconsistent reading of these instruments. In the case of *Smyth v Ushewokunze and Another*,[802] the Supreme Court of Zimbabwe confirmed that, when it comes to interpreting rights protected by the

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794 See sections 13(4), 18(2), 284(2)(e), and 289 of the *Constitution of Zimbabwe*. Constitutions generally set out fundamental principles, while policies indicate the government's intentions or positions and legislation as instruments for implementation of the former.

795 Section 44 of the *Constitution of Zimbabwe.*

796 Sections 3(2)(i), 13(1)(d) and 18(2) of the *Constitution of Zimbabwe.*

797 Sections 3(1)(d), 3(2)(i), and 14(1) of the *Constitution of Zimbabwe.*

798 Section 62(1)(2) of the *Constitution of Zimbabwe.*

799 Section 68(1) of the *Constitution of Zimbabwe.*

800 Section 73(1) of the *Constitution of Zimbabwe.*

801 Section 46(1)(c)(e) of the *Constitution of Zimbabwe*. This provision opens the door for appraisal of Zimbabwe's and constitutional, policy and legislative frameworks pertaining to mineral extraction on lands inhabited by mine-host communities as viewed through the lens of international and regional regulatory instruments and law.

802 *Smyth v Ushewokunze and Anor* 1997 (2) *ZLR* 544 (S) 266. The court stated that, "in arriving at the proper meaning and content of the right guaranteed by (the Declaration of Rights), it must not be overlooked that it is a right designed to secure a protection, and that the endeavour of the court should always be to expand the reach of the fundamental right rather than to attenuate its meaning and content. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to letter of the provision; one takes full account of changing conditions, social norms and values so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to move away from formalism and make human rights provisions a practical reality for the people."

constitution, courts must always seek to ensure the realisation of the rights rather than their curtailment. Supporting the realisation of rights entails adopting a purposive approach that expands rather than restricts constitutional rights. Therefore, in the context of mineral extraction on lands inhabited by mine-host communities, competing rights will have to be balanced instead of permitting the rights of mine-host communities to be trumped by holders of mineral rights and the state.[803]

5.2.2 The state duty to respect, protect and fulfil human rights

The state's obligation to respect, protect, promote and fulfil human rights and freedoms is recognised in section 44 of the *Constitution of Zimbabwe*. This duty is derived from international and regional regulatory instruments.[804] Incorporation of the state's duty to respect, protect, promote and fulfil human rights into the *Constitution of Zimbabwe* is important, in that it brings with it the relevant protections accorded to mine-host communities in international and regional regulatory instruments. In the context of mineral extraction on lands inhabited by mine-host communities such as the Chiadzwa and Marange (who inhabit diamond-bearing fields) and indigenous Tonga and Nambya of Dinde in Hwange (who inhabit coal-bearing lands), the duty to respect human rights entails respect for their rights as established in international and regional regulatory instruments.[805] These rights include access to and use of their lands and to freely dispose

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803 The South African courts have recognised the tension brought by competing interests, namely industrial activity for economic development (socio-economic development) and environmental protection for present and future generations. See the case of *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA) paras 3-4. In *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) 44-45, the court explained that section 24 of the *Constitution of South Africa* entrenches the right to an environment that is not harmful to health and well-being and simultaneously imposes a duty on the state to promote socio-economic development. Therefore, section 24(b)(iii) of the *Constitution of South Africa* envisages that environmental concerns will be balanced with socio-economic considerations through the concept of sustainable development, especially through "ecologically sustainable and use of natural resources while promoting justifiable economic and social development."

804 See the *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 21 March 2011; *Committee on Economic Social and Cultural Rights, General Comment* 12, 1999, E/C.12/1999/5, para 15; *Committee on Economic Social and Cultural Rights, General Comment* 14, 2000, E/C.12/2000/4, para 33; *Committee on Economic Social and Cultural Rights, General Comment* 15, 2002, E/C.12/2002/11, paras 20, 23, 24.

805 See para 1 of the *United Nations General Assembly Resolution* 1803 of 1962, A 1(2) of the ICCPR and the ICESCR, and A 21 of the *African Charter on Human and Peoples' Rights*. The *African Commission on*

of mineral resources on the lands. For the mine-host communities in Zimbabwe, the duty to protect human rights[806] entails a duty on the state to protect them from potentially invasive activities by mining companies. In the same vein, the duty to fulfil human rights[807] would prescribe that the government of Zimbabwe must, through legislative and other measures, ensure the realisation of the rights of the mine-host communities.

5.2.3 Equitable development and sharing of national resources

Concerning national development, sections 3(2)(i) and 13(1)(d) of the *Constitution of Zimbabwe* oblige the state to facilitate rapid and equitable[808] development by ensuring a

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Human and Peoples' African Commission on Human and Peoples' Rights: Press Statement on the threat of displacement of the Dinde Community from their land in Hwange, Zimbabwe due to mining activity, 29 April 2021 https://www.achpr.org/pressrelease/detail?id=577 stresses that the threat of eviction of the Dinde community in Hwange from their ancestral lands without consultation and against their will, potentially violated their human rights to live on their land and make a living off it as guaranteed under the *African Charter on Human and Peoples' Rights*, notably (i) A 14, which protects the right to property, which may only be restricted under very limited circumstances; (ii) A 21, which guarantees the right of the peoples to free disposal of their wealth and natural resources and provides that that natural resources must be managed in the exclusive interest of the people, who must under no circumstances be deprived of the right; (iii) A 22, which guarantees the right of peoples to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind; (iv) A 24, which guarantees the right to a satisfactory environment for development. The African Commission on Human and Peoples' Rights explains that eviction of the Dinde Community will expose it to "loss of access to their land and the resources on which they depend for their livelihood such as cultivation for their sustenance and grazing of land for livestock, the destruction to their cultural heritage and social and cultural systems associated with shrines and ritual sites and the pollution and environmental degradation that the mining activity would cause." Consequently, the African Commission reiterated that extractive activities should not lead to worse living conditions for mine-host communities but should instead contribute to the improvement of their standard of life, measured both objectively and subjectively. Further, the rights protected under A 21 and A 24 of the *Charter* entail a right to justice and remediation in case of violations, such that people whose land, water or source of livelihood is disrupted or spoiled by dispossession are entitled to restoration of their property and to full, effective and adequate compensation.

806 See *HRC, General Comment No. 31 (2004) on Art. 2 ICCPR, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant',* UN Doc. CCPR/C/21/Rev.1/Add.13 of 29 March 2004, para 8; Inter-American Court of Human Rights (IACHR), *Velásquez-Rodríguez v Honduras*, Inter-Am Ct HR 1988, Series C, No. 4, para 172-173. See A 18 of the International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, https://www.refworld.org/docid/48abd5730.html

807 See the *United Nations Guiding Principles on Business and Human Rights and State Responsibility*, UN Doc. E/C.12/2011/1 (20 May 2011).

808 The notion of equality is one of the pillars of the *Constitution of Zimbabwe*. The preamble of the *Constitution* states that the people of Zimbabwe are united in their diversity "by our common desire for freedom, justice and equality and our heroic resistance to colonialism, racism and all forms of domination and oppression." It further champions the concept of equality in section 3(1)(2) recognising the inherent dignity and worth of each human being; section 3(1)(f), which recognises the equality of all human beings; section 63(a)(b), which requires equitable treatment of all official languages of Zimbabwe including the Nambya, Shangani and Tonga. Equitable treatment of languages means

proper balance in the development of rural and urban areas. This requirement is rooted in the idea of distributive justice and ensures that mine-host communities, through the accrual of benefits from mineral resources on the lands they inhabit, are not left out of the national socio-economic development process. The requirement to involve the people is stated in section 13(2) of the *Constitution of Zimbabwe* which decrees that those affected should be involved in the formulation and implementation of development plans and programmes that affect them. This requirement to involve affected people promotes the concept of procedural justice discussed in chapter 2 and is derived from international and regional regulatory instruments as discussed in chapters 3 and 4 above, notably the *United Nations Declaration on the Right to Development* of 1986[809] and the *African Charter on Human and Peoples' Rights* of 1982.[810]

In the context of mineral extraction, the requirement to involve affected peoples in development planning entails that mine-host communities must be involved in policy making and the design of legislation relevant to the extraction of mineral resources.[811] Involvement of communities in the implementation of mining policy and legislation requires consultations with them before the granting of prospecting, exploration and

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equitable treatment of the people who speak those languages. See section 13(3) of the *Constitution of Zimbabwe*, which explains that the measures taken by government "must protect and enhance the right of the people, particularly women to equal opportunities in development." Section 69(3)(b) of the same *Constitution* emphasises that in government communications and measures affecting people, the language preference of the affected people must be taken into account. This entails the use of the local languages in consultation with mine-host communities. See also section 298(1)(c) of the *Constitution of Zimbabwe*, which says that "the burdens and benefits of the use of resources must be shared equitably between present and future generations."

809 See para 12 of the DRTD; A 23 of UNDRIP; A 22 and of the UDHR; A 1(1) of the ICCPR and ICESCR; A 11 of the ICESCR; A 1, 3 and 9 of the *United Nations General Assembly Declaration on Social Progress and Development* of 1969; A 5, A 10 and A 11 of the *Vienna Declaration and Programme of Action of the World Conference on Human Rights* of 1993, UN Doc. A/CONF.157/23 of 1993; A 7 (1) of *ILO Convention* 169 of 1989; Principle 3 of *United Nations Declaration on Environment and Development* of 1992; A 3 (4) of the *United Nations Framework Convention on Climate Change* of 1992; para 11 of the *Millennium Declaration* (2000); para 8 of the *United Nation Conference on Sustainable Development* of 2012 GA Res 66/288, UN Doc A66/288 (2012), and para 10 and 35 of the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015).

810 See A 22 of the *African Charter on Human and People's Rights*; A 19 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 277; *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogieks Case)* Application No. 006/2012, para 202.

811 In terms of section 13(3) of the *Constitution of Zimbabwe*, the measures by the state must "protect and enhance the right of the people, particularly women, to equal opportunities in development."

mining licenses for extraction of minerals on their lands.[812] Community involvement and participation in EIA[813] processes also provide opportunities for mine-host communities to be involved in the administration of mining and environmental policy and legislation that have a bearing on their livelihoods. By obliging the state to involve the people, the *Constitution of Zimbabwe* provides the requisite legal basis for the involvement of mine-host communities, among other citizens, who should not be mere passive recipients of development programs but rather active participants.

Section 3(2)(i) of the *Constitution of Zimbabwe* stresses that equitable sharing of national resources is one of the principles of good governance that binds the state, state institutions and government agencies.[814] On the same note, it makes provision for benefit accrual in section 13(4), which requires the state to ensure that communities benefit from the resources in their areas. The state and government agencies are obliged to take measures to ensure that local communities have equitable access to natural resources to promote their development and participate when it comes to determining development priorities within their areas.[815] This is buttressed in section 18(2) of the *Constitution of Zimbabwe*, which requires from the state that measures are taken to ensure that local communities have equitable access to resources to promote their development. In the context of mineral extraction on lands inhabited by mine-host communities in Zimbabwe, the concept of equitable sharing of national resources entails accrual of benefits to the

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812 Consultations should be conducted prior to award of mineral rights because, once the rights have been granted and extraction has commenced, it becomes difficult for mining companies and the community to agree on matters relating to the negative impacts of the resource extraction and benefit accrual for the community.

813 See para 11(b) the *World Charter for Nature*; A 16 and 24 of *African Charter on Human and Peoples' Rights*; *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 155/96 (2001) para 53; *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R.* (ser. C) No.172, (Nov. 28, 2007) paras 138-140; *Kaliña and Lokono Peoples v Suriname, Merits, Reparations and Costs, Inter-Am. Ct. H.R.* (ser.C) No. 309 (Nov. 25, 2015) para 227.

814 Section 8(1) of the *Constitution of Zimbabwe* states that, when laws and policies are formulated and implemented, the state must seek "promotion of a sustainable, just, free and democratic society in which people enjoy prosperous happy and fulfilling lives." If this requirement is to be realised, investment projects must lead to shared prosperity with communities. See also section 264(1)(2)(a)(d)(e) of the *Constitution of Zimbabwe*, which requires devolution of governmental power and responsibilities to, *inter alia*, local authorities, with the objective of giving power to the people and to enhance their participation in making decisions on matters affecting them, while recognising the right of communities to manage their own affairs and development and facilitating equitable sharing of resources at both the local and national levels.

815 Section 18 and Preamble to Chapter 14 of the *Constitution of Zimbabwe*. See sections 18(2), 284(2)(e) and 289 of the *Constitution of Zimbabwe*.

mine-host communities on a scale that is fair and equitable relative to the general citizenry. What the concept seeks to resolve is the persistent challenge of dispossession of mine-host communities of mineral resources on the lands they inhabit and their extraction to enrich the state, other citizens and foreign companies, without concern for the disproportionate burdens that the communities bear. The requirement for equitable sharing of benefits of the exploitation of natural resources is rooted in the idea of distributive justice explained earlier in chapter 2 and is established in both international and regional regulatory instruments and case law discussed in chapter 3 and 4 of this study.[816]

5.2.4 Recognition and empowerment of marginalised communities

Section 3(1)(d) of the *Constitution of Zimbabwe* states that the country is founded on, among other values and principles, respect for the nation's diverse cultural, religious and traditional values. Recognition of the rights of ethnic, racial, cultural, linguistic and religious groups is also identified as one of the founding values and principles in section 3(2)(i) of the Constitution. Although section 3(2)(i) does not mention indigenous peoples, this provision is fundamental for mine-host communities comprised of indigenous peoples who are acknowledged by international law as distinct ethnic, racial, cultural, linguistic and religious groups.[817] Recognition of the rights of indigenous peoples includes recognition of

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816 Para 1 *United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* U.N. Doc A/5217 (1962); A 15(2) of the *International Labour Organisation Convention* No. 169 of 1989, 1650 U.N.T.S 383; A 5(2) of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* (UNDROP) 2018 UN. Doc.A/RES/73/165/2018; A 2(3) of the DRTD. See *UNCERD, Consideration of Reports submitted by States Parties under A 9 of the Convention, Concluding Observations, Ecuador*, (Sixty Second Session, 2003) UN Doc. CERD/C/62/CO/2 (2003), para 16, where the CERD indicated that the state should ensure equitable sharing of benefits to be derived from the exploitation of natural resources. See Stavenhagen *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc. E/CN.4/2003/90, para 66 which states that, in order to guarantee "the human rights of indigenous peoples in relation to major development projects, (states should ensure) mutually acceptable benefit sharing." See also *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C)* No.172, (Nov. 28, 2007) para 140; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 297.

817 See A 1 of the *International Labour Organisation Convention* No. 169 of 1989, 1650 U.N.T.S 383; Cobo "Study of the problem of Discrimination against Indigenous Populations" UN. Doc E/CN.4/Sub.2/1986/7; Working Group on Indigenous Populations in Africa (WGIPA), ACHPR Report 2003, 3, 92, 93; *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 155/96 (2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International*

their rights to their lands, territories and natural resources, including minerals contained therein.

In terms of section 14(1) of the *Constitution of Zimbabwe*, the state must take measures to empower all marginalised groups and communities through appropriate, fair and just affirmative action. Section 16(1) of the *Constitution of Zimbabwe* further obliges the state and all institutions and agencies of government to "promote and preserve cultural values and practices which enhance the dignity, well-being and equality of Zimbabweans." Further, section 33 requires the state to "take measures to preserve, protect and promote indigenous knowledge systems, including knowledge of the medicinal and other properties of animal and plant life possessed by local communities and people." Mine-host communities are comprised of these ethnic, racial, cultural, linguistic and marginalised groups that the legislature had in mind when sections 3(1)(d), 3(2)(i), 14(1), 16(1) and 33 of the *Constitution of Zimbabwe* were enacted. This entails that any forced eviction of mine-host communities from their ancestral lands to make way for mineral extraction violates their rights stemming from sections 3(1)(d), 3(2)(i), 14(1), 16(1) and 33 of the *Constitution of Zimbabwe*. In the context of mineral extraction, empowerment of marginalised groups and communities demands the involvement of the mine-host communities in decision-making processes to determine their development priorities and accrual of socio-economic benefits from the extraction of mineral resources found on the lands they inhabit. Recognition of the rights and empowerment of ethnic, racial, cultural, linguistic, religious and marginalised groups is a requirement borrowed from international and regional regulatory instruments such as the ILO Convention 169 of 1989, UNDRIP, UNDROP, ACHPR and SADC Protocol on Mining of 1997.[818]

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on behalf of Endorois Welfare Council v Kenya, ACHPR Com No 276/2003; *General Recommendation No. 8: Identification with a Particular Racial or Ethnic Group* (Art. 1, paras. 1 and 4) (22 August 1990) A/45/18 (1991). See Gilbert 2007 14 *IJMGR* 218.

[818] See A 15(1)(2) of the *International Labour Organisation Convention* No. 169 of 1989, 1650 U.N.T.S 383; A 26(1)(2) of the UNDRIP; A 5(2)(c) of the UNDROP; A 21(1) and A 22 of the *African Charter on Human and Peoples' Rights; African Commission on Human and Peoples' Rights: Resolution 224 of 2012 on a Human Rights Based Approach to Natural Resource Governance* ACHPR/Res.224(LI) 2012; *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* of 2018, 21; A 2(8) of the *SADC Protocol on Mining* of 1997.

5.2.5 Right to access to information

Regarding access to information, section 62(1)(2) of the *Constitution of Zimbabwe*[819] provides that:

> (1) Every citizen and media have a right to access to any information held by the State or government at any level, in so far as the information is required in the interest of public accountability.
> (2) Every person, including the Zimbabwean media, has the right of access to any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right.

Access to information which is an element of procedural justice is further reinforced by section 141 of the *Constitution of Zimbabwe*,[820] which provides for access to and involvement in Parliament. In terms of section 141, Parliament is required to facilitate involvement in its legislative and other processes and the processes of its committees and ensure that interested parties are consulted about Bills that are considered by it, unless such consultation is inappropriate or impracticable. Parliament is also required to conduct its business in a transparent manner and in public. To give effect to the right to access to information, the government enacted the *Freedom of Information Act* 1 of 2020 (FIA), which is discussed in section 5.4.8 below.

Access to information held by both the government and juristic persons such as mining companies is guaranteed in the constitutional provision for access to information. This is fundamental, as it enables mine-host communities to access information pertaining to applications for mineral rights on their lands and information on environmental and other impacts of proposed and ongoing mining projects on the lands. For mine-host communities, access to information facilitates assessment of the impacts of planned and on-going projects on their livelihoods. Questions may thus be raised regarding their involvement in and benefit accrual from mineral extraction and protection of their right to

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819 Section 62(4) of the *Constitution of Zimbabwe* provides for enactment of legislation to give effect to this right and that it may restrict access to information in the interest of defence, public security or professional confidentiality.

820 The drawback of section 141 of the *Constitution of Zimbabwe* is that it permits the government to take measures to exclude public access to Parliament, although this is subject to the measures being fair, reasonable and justifiable.

an environment that is not harmful to health and well-being. The requirement to grant affected citizens access to information is underpinned by the idea of procedural justice examined in chapter 2 and various international and regional regulatory instruments discussed in chapters 3 and 4 above, notably the *UDHR*, ICCPR, ACHPR and the *United Nations Declaration on Environment and Development* of 1992.[821]

5.2.6 Constitutional guarantee to consultation

The *Constitution of Zimbabwe* sets a standard for the consultation processes conducted by government authorities.[822] Section 339(2) of the Constitution provides that a person or authority who is obliged to consult anyone else or act after consultation with anyone else, must first:

> (a) inform the other person, in writing, what he or she proposes to do and provide the other person with enough information to enable the other person to understand the nature and effect of the proposed act;
> (b) afford the other person a reasonable opportunity to make recommendations or representations about the proposal; and
> (c) give careful consideration to any recommendations or representations that the other person may make about the proposal.[823]

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821 A 19 of the UDHR; A 19 of ICCPR; A 9 of the *African Charter on Human and Peoples' Rights*; *ACHPR's Model Law on Access to Information in Africa*, 2013; Principle 10 of the *United Nations Declaration on Environment and Development* of 1992; A 6 of the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Convention) UN Doc ECE/CEP/43.

822 Consultation and participation by peoples are emphasised in A 6 and A 7 of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. Further, A 15 of this Convention prescribes the standard and purpose of consultation and participation in matters pertaining to mineral extraction on indigenous lands by stating that (i) the consultation process shall be conducted before undertaking or permitting any mineral extraction on the lands, (ii) in order to ascertain whether and to what extent the rights and interests of affected indigenous peoples would be affected and (iii) the affected peoples shall wherever possible participate in the benefits of the mineral extraction activities and receive compensation for damages occasioned by the operations.

823 When analysed, these elements of the consultation standard are consonant with international and regional regulatory instruments discussed in chapters 3 and 4 above. See Principle 10 of the *United Nations Declaration on Environment and Development* (1992) UN Doc A/CONF.151/26 Vol, Annex 1; A 10, 11, 19, 28, 32 (2) of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A61/295 (2007); A 6(2) of *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 I.L.M 1382. See A 14, 21, 22, 24 of the *African Charter on Human and Peoples' Rights*; para 295 of the *African Charter for Popular Participation in Development and Transformation, UN. ECA International Conference on Popular Participation in the Recovery and Development Process in Africa* (1990): Arusha, Tanzania) https://repository.uneca.org/handle/10855/5673; *Centre for Minority Rights Development (Kenya) and*

It may be argued that section 339(2) which appears in Part 3 that deals with interpretation of the *Constitution of Zimbabwe,* is related not only to consultation within government but also those involving affected parties such as mine-host communities. Section 339(2) of the Constitution should, therefore, be interpreted widely rather than narrowly, as there is nothing that militates against extending the consultation principles to protect citizens and especially mine-host communities. As discussed in 5.2.3 above, Parliament is one of the institutions that is obliged to conduct consultations pertaining to Bills submitted for its consideration. In the context of transformation of mining policy and legislation, section 339(2) of the *Constitution of Zimbabwe* entails that Parliament must conduct informed consultations and give reasonable opportunities for those interested and affected by the proposed changes to mining law and policy to make representations.

The downside of section 339(2) of the *Constitution of Zimbabwe* is that it provides no obligation to follow any recommendations received during the consultations. This implies, for instance, that Parliament, which is obliged to consult the public and particularly the affected persons and communities, as discussed in 5.2.5 above, is at liberty to disregard recommendations centred on any policy or legislation pertinent to the livelihoods of the communities, as long as it appears to have given the recommendations careful consideration. The absence of an obligation to follow recommendations arising from consultations limits the prospects of mine-host communities influencing change through policy and legislative processes that should have ensured greater involvement and benefit accrual from mineral extraction on the lands they inhabit.

5.2.7 Right to administrative justice

In terms of section 68(1) of the *Constitution of Zimbabwe*, every person has a right to administrative conduct that is lawful,[824] prompt, efficient, reasonable,[825] proportionate,[826]

Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, ACHPR Com No 276/2003 paras 226, 229-234.

824 The requirement for lawfulness entails that the decision adopted by the administrative authority must be based on existing legislation, either statute or common law, while it must be aimed at achieving a legitimate government purpose.

825 See *Booysen v Acting NDPP* [2014] 2 ALL SA 391 (KZD) para 15, which confirms that a reasonable decision is one that is equitable, sensible or rationally connected to the purpose for which the power was given to the decision maker, failure of which the decision is arbitrary and inconsistent with the law.

impartial and both substantively[827] and procedurally fair.[828] Section 68(2) of the *Constitution of Zimbabwe* explains that just administrative conduct protects any person's rights, freedoms, interests or legitimate expectations. Basic values and principles of public administration identified in the *Constitution of Zimbabwe* include ensuring public participation in policy-making, provision of timely, accessible and accurate information to the public and broad representation of the nation's communities.[829] Provincial governance is then aimed at ensuring, *inter alia,* equitable allocation of local and national resources and participation by local communities in terms of determining development priorities within their areas.[830] The state is obliged to enact a law to give effect to the right and

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In *Mazibuko v City of Johannesburg* [2010] 4 SA 1 (CC) 57, 67, 70, a case involving the right to access to water, the Constitutional Court of South Africa held that any measure that fails to provide for those desperately in need stands to be quashed on the basis of unreasonableness. The court held in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (1) SA 248 (CC) para 45 that the factors that indicate whether a decision is reasonable or not, include (i) the nature of the decision, (ii) the identity and expertise of the decision maker, (iii) the range of factors relevant to the decision, (iv) the reasons given for the decision, (v) the nature of the competing interests involved and (vi) the impact of the decision on the lives and well-being of those affected by it. The court decided that it would only intervene if the decision failed to strike an equilibrium between competing interests. It can be observed that, in the context of mineral extraction, even if an eviction of mine-host communities is lawful, that is, in accordance with the laws of Zimbabwe, the decisions and conduct by government in effecting the eviction must be reasonable, proportionate and both substantially and procedurally fair. These requirements entail that those instances in which the government of Zimbabwe notified affected communities to depart permanently with all their property from the said land by the date of publication of a notice, cannot pass the reasonableness, proportionality, substantive and procedural fairness test in terms of section 68(1) of the *Constitution of Zimbabwe*. See threatened eviction of the Shangaan people of Chilonga in Chiredzi under Statutory Instrument 50 of 2021 and the Tonga and Nambya of Batoka in Hwange under Statutory Instrument 188 of 2020. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 637, Sachs J stated that proportionality is always a significant element of reasonableness. A decision that is oppressive, imposes unnecessarily onerous effects on people and which is realised through excessive or disproportionate means is unreasonable. In the English case of *B v Secretary of State for the Home Department* [2000] *UKHRR* 498 (CA) the court stated that "a measure which interferes with a […] human right must not only be authorised by law but must correspond to a pressing social need and go no further than strictly necessary in a pluralistic society to achieve its permitted purpose; or, more shortly, must be appropriate and necessary to its legitimate aim."

826 Proportionality requires that there be a balance between the means employed/ adopted by the decision-maker and the end or purpose sought to be achieved. In the words of Hoexter *Administrative Law in South Africa* (2nd ed) 344, proportionality expresses the view that "one ought not to use a sledgehammer to crack a nut." Administrative authorities should therefore ensure that the adverse effects of their decisions do not outweigh the benefits, and they must consider less drastic, non-oppressive and less onerous means to accomplish the desired result.

827 Prior to *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013, administrative authorities were required only to ensure that their decisions were consistent with procedural justice, that is, ensuring procedural fairness. The requirements for fairness were then extended by section 68 of the *Constitution of Zimbabwe Amendment* (No. 20) Act, 2013 to include a requirement for substantive fairness.

828 Procedural fairness requires that there is a fair process leading up to the decision. The concept of substantive fairness extends the fairness requirements as it requires that the decision itself must be fair.

829 Section 194(1)(e)(h)(i) of the *Constitution of Zimbabwe*.

830 See Preamble to Chapter 14 and section 264(2)(a)(d)(e) of the *Constitution of Zimbabwe*.

allow for review of administrative conduct by the courts or independent and impartial tribunals.[831] The *Administrative Justice Act* 12 of 2004 discussed in 5.4.7 below is the law referred to in section 68(3) of the *Constitution of Zimbabwe*.

It must be pointed out that, although the right to administrative justice is couched as an individual right, it is also a right applicable to collectives such as mine-host communities, since they can suffer an administrative injustice as a collective. Mine-host communities can, therefore, rely on the requirement for administrative justice to protect their rights and interests without resorting to the problematic claims to ownership of the lands and mineral resources. Analysed in the context of mineral extraction, reasonable, proportionate, substantively and procedurally fair administrative action requires that mine-host communities are consulted and involved in decision-making centred on mineral extraction on their lands, since administrative action cannot be procedurally fair in the absence of consultation with the interested and affected communities. Reasonable, proportionate, substantively and procedurally fair administrative action requires that mine-host communities are provided just compensation for damages suffered due to mining operations and are not denied a share in the benefits of mineral extraction on their lands.[832]

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831 Section 68(3) of the *Constitution of Zimbabwe*.

832 Section 68 of the *Constitution of Zimbabwe* requires fair processes and fair outcomes. The notion of substantive fairness requires that the ultimate outcome of the decision or its effect must also be fair. Procedural fairness speaks to fair process while substantive fairness speaks to fair outcomes that eradicates marginalisation, exploitation, disadvantage and lack. It follows, therefore, that administrative decisions whose outcomes or results are to entrench marginalisation, distributive inequality, exploitation, material disadvantage, socio-economic deprivation and subordination fail the test for substantive fairness. This raises questions regarding the eviction of the Shangaan people of Chilonga in Chiredzi (under Statutory Instrument 50 of 2021) and the Tonga and Nambya of Batoka in Hwange (under Statutory Instrument 188 of 2020) from their ancestral lands to pave way for developmental projects that benefitted the nation or private entities/ persons despite the detrimental impacts on the host communities. The assessment of impact on well-being of those affected points to a proportionality test which also considers the substantive impact of an administrative decision and seeks to balance competing interest. See *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 166, which indicates that what is required is not only a process enquiry (to establish procedural fairness) but also a substantive enquiry as to whether the outcome itself is fair. Smith 2014 14 *AHRLJ* 614 explains that for minorities, equality of recognition or identity ensures equal concern and respect within differences without eliminating the differences or forced assimilation. An administrative decision that seeks to or that may potentially or whose outcomes or results undermines the cultural values and existence of host communities comprised of indigenous peoples as a distinct people cannot be regarded as substantively fair. By affirming and recognising cultural identities and diversity, substantive fairness prevents stereotypes and dispossession associated with certain groups.

5.2.8 Right to an environment not harmful to health or well-being

The *Constitution of Zimbabwe* recognises environmental and other rights that are important to mine-host communities, such as the right to participate in cultural life[833] and the right to food and water.[834] In terms of environmental rights, section 73(1) of the *Constitution of Zimbabwe* provides that every person has a right to an environment that is not harmful to their health or well-being; the environment must be protected for the benefit of present and future generations. To give effect to the constitutional right to environment, the government enacted the *Environmental Management Act* 13 of 2002, which is discussed in section 5.4.5 below.[835] Environmental rights aid mine-host communities to assert claims for involvement and benefit accrual from mineral extraction, particularly as it relates to protection of their water and food sources and the land from the harmful impacts of the mining operations.[836] Although not formulated in these exact words, the right to an environment that is not harmful to health or well-being is guaranteed in international and regional regulatory instruments such as the *United Nations Declaration on Environment and Development* and the *African Charter on Human and Peoples' Rights*.[837]

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833 Section 63(b) of the *Constitution of Zimbabwe*. Sachs 1999-2000 *5 Review of Constitutional Studies* 44 explains that "special attention must be paid to the manner in which inequality systematically flows from patterns of disadvantage, subordination and dominance, which may exist outside of the measure under consideration. Thus, measures that happen to reinforce disadvantage are more likely to breach equality than those designed to overcome it."

834 Section 77 of the *Constitution of Zimbabwe* provides that "every person has the right to (a) safe, clean and portable water and (b) sufficient food. The state must take reasonable legislative and other measures, within the limits of the resources available to it to achieve the progressive realization of the rights."

835 See section 73(2) of the *Constitution of Zimbabwe*.

836 Although the right to environment is phrased as an individual right, it is also a group right, since pollution of the environment affects both the individual and communities.

837 See the *Declaration of the United Nations Conference on the Human Environment* UN Doc A/Conf.48/14/Rev.1 (1972); *United Nations Declaration on Environment and Development* U.N. Doc. A/CONF.151/26 (Vol. I) (1992), *Agenda 21* A/CONF.151/26 (Vol. II) (1992); *United Nation Conference on Sustainable Development* GA Res 66/288, UN Doc A66/288 (2012); *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* GA Res 70/1, UN Doc A70/1 (2015). A 1 of the *Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Convention) UN Doc ECE/CEP/43 adopted by the United Nations Economic Commission for Europe (UNECE) of 1998; A 3(8) of the *Convention on Environmental Impact Assessment in a Transboundary Context* (Espoo Convention) Doc. E.ECE. 1250 (1997; A 11 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*; A 11 para 1 of the 1988 *Additional Protocol to the American Convention on Human Rights*; A 24 of the *African Charter on Human and Peoples' Rights*. See also A 18 of the 2003 *Protocol to the African Charter on Human and Peoples" Rights on the Rights of*

5.2.9 Right to property, shelter and not to be arbitrarily evicted

The *Constitution of Zimbabwe* protects the right to shelter, property and the right not to be arbitrarily evicted.[838] The state and all government institutions and agencies are obliged by section 28 of the *Constitution of Zimbabwe* to take legislative and other measures to enable every person to have access to adequate shelter. The definition of property in section 71 is broad, as it includes any right or interest in property. Section 71(2) provides a right for every person to acquire, hold, occupy and use all forms of property, either individually or in association with others, in any part of Zimbabwe.[839] In terms of section 71(3), a person may be compulsorily deprived of their property only if it is done through a law of general application and if the deprivation is necessary for the public interest and for purposes of developing or using it for a purpose beneficial to the community.[840] The *Constitution of Zimbabwe* states that a law providing for compulsory deprivation must require the acquiring authority to give reasonable notice to everyone whose interest or right in the property would be affected.[841] Further, the state is required to pay fair and adequate compensation before an acquisition, or within a reasonable time thereafter. [842] In terms of section 74, no person "may be evicted from their home, or have their home demolished, without an order of the court after considering all the relevant circumstances."

The constitutional rights to property, shelter and protection against arbitrary evictions are remarkable in that they embed fundamental elements that connect with procedural justice and remedial justice when adequate notice and compensation are involved. The rights also

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Women in Africa, which states in A 18 that women "shall have the right to live in a healthy and sustainable environment."

838 See sections 28, 71(3)(a)(b)(i)(ii), 74 of the *Constitution of Zimbabwe*.

839 The rights of mine-host communities as gleaned from the *Communal Land Act* 20 of 1982 to access, occupy and use communal lands are property rights protected by the constitutional right to property. The South African Constitutional Court in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 24 regarded the interests of occupiers of the land for shelter as rights that should be equally protected in the same way as ownership rights such that no evictions should be undertaken before provision of suitable alternative accommodation.

840 Section 71(3)(a)(b)(i)(ii) of the *Constitution of Zimbabwe*.

841 Section 71(3)(c)(i)(ii) of the *Constitution of Zimbabwe*.

842 This proviso is subject to abuse in Zimbabwe as exemplified in the notices of eviction of host communities from their ancestral lands without compensation. See Statutory Instrument 50 of 2021 which ordered the eviction of the Shangaan people from Chilonga in Chiredzi and Statutory Instrument 188 of 2020 evicting the Tonga and Nambya from Botoka in Hwange. The communities lose negotiating power once evicted. See section 25 (2)(b) of the *Constitution of South Africa*, which is different as it states that the amount, time and manner of compensation should be agreed to in advance.

connect with requirements set out in international and regional regulatory instruments and guidelines such as the ACHPR, ICESCR, CEDAW, CERD and the *United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement*.[843] When viewed in the context of mineral extraction, the constitutional rights to property, shelter, protection against arbitrary eviction and these international and regional regulatory instruments provide mine-host communities with the legal basis for resisting relocations from the lands they inhabit in the absence of their involvement in decision-making. Further, the *Constitution of Zimbabwe* does not consider property rights as meaning ownership only. Instead, other interests that mine-host communities may have in land or minerals are included under the constitutional protection of property rights. In this way, the *Constitution of Zimbabwe* protects the rights and interests of mine-host communities in their lands and minerals in the form of the right of access, occupation for shelter and use for agriculture and other socio-economic benefits.

5.3 Policy framework pertaining to mine-host community involvement in and benefit accrual from mineral extraction

Despite efforts by the government to develop a comprehensive minerals policy since 2013, Zimbabwe does not yet have a formal and fully documented policy instrument.[844]

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[843] See A 14 of the *African Charter on Human and Peoples' Rights*; A 14(1)(2), A 15 and A 16(1) of ILO Convention No. 169 of 1989; A 17(1)(4) of UNDROP; A 26 of UNDRIP; paras 1 and 2 of the United Nations *Basic Principles and Guidelines on Development-Based Evictions and Displacement* U.N. Doc. A/HRC/4/18 Annex 1 (2007); *United Nations Guiding Principles on Internal Displacement* UN Doc E/CN.4/1998/53/Add.2 (1998); A 11(1) of the ICESCR; A 17 of the ICCPR; A 16 (1) and 27 (3) of the *Convention on the Rights of the Child*; A 14(2) (h) of the *Convention on the Elimination of All Forms of Discrimination against Women*; A 5 (d)(e)(v) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. See also A 17 of the *Universal Declaration of Human Rights*; A 21 of the *American Convention on Human Rights*; para 5 of the Committee on Elimination of Racial Discrimination *General Recommendation No. 23: Indigenous Peoples*, UN. Doc. CERD/C/51.Misc.13/Rev.4/1997. The *United Nations Committee on Economic Social and Cultural Rights General Comments 4- Right to Adequate Housing* (Art 11(1), ICESCR UN Doc E/1997/23 para 13 interpreted the right to adequate housing to include a state obligation to refrain from forced relocations except in exceptional circumstances and in accordance with international law principles. In the context of mineral extraction, the state is therefore obliged to ensure availability of alternative suitable accommodation and lands of equal or better quality where relocation of the mine-host community is inevitable.

[844] See Saunders "Contestation and Resource Bargaining in Zimbabwe: The Minerals Sector" 2017-13 United Nations Research Institute for Social Development (UNRISD) Working Paper, 8, who bemoans the failure by Zimbabwe to develop a comprehensive minerals policy despite the strategic significance of mining to national revenues, employment and socio-economic development.

However, the Zimbabwe Minerals Policy of 2013,[845] which is currently being considered by the government, sets out certain principles which, if developed further, will assist to ensure mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit.[846] The minerals policy is framed along the ideas, aspirations and positions taken in the *Africa Mining Vision*[847] and the *Constitution of Zimbabwe*. In line with the *Africa Mining Vision*, the preamble of the draft minerals policy states that it seeks to ensure that Zimbabwe's mineral resources are exploited equitably and optimally to attain broad-based sustainable growth and socio-economic development.[848] It further seeks to attain a mining sector that is inclusive and that facilitates and contributes to broad-based growth and development through mutually beneficial partnerships between the state and local communities to achieve balanced local and national development.[849]

As regards Zimbabwe's current legal and regulatory frameworks, the minerals policy interprets section 2 of the *Mines and Minerals Act* 38 of 1961 as vesting minerals in the President on behalf of the nation.[850] Further, the minerals policy states that mining legislation should ensure a representative minerals development board that advises the government and assists in the resolution of mining disputes.[851] However, the Zimbabwe Minerals Policy of 2013 indicates that the board should comprise government representatives, industry, labour, universities and selected appropriate experts.[852] Representatives of local communities are not mentioned, and the key functions of the board show an orientation towards state and private interests.[853] In this way, the Zimbabwe Minerals Policy of 2013 contradicts the idea of making the board representative of all interested and affected people, including of course mine-host communities.

To ensure distributive justice in the minerals and mining industry, the Zimbabwe Minerals Policy of 2013 seeks equitable distribution of benefits from mining activities to meet both

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845 Zimbabwe's Minerals Policy of 2013 is still in draft form.
846 http://www.mines.gov.zw.
847 Africa Mining Vision https://au.int/en/documents/20100212/africa-mining-vision-amv.
848 The Africa Mining Vision aims to ensure that mineral resources underpin broad-based sustainable growth and socio-economic development. *Zimbabwe Minerals Policy* 2013, 3.
849 *Zimbabwe Minerals Policy* 2013, 3-5.
850 *Zimbabwe Minerals Policy* 2013, 5.
851 *Zimbabwe Minerals Policy* 2013, 10.
852 *Zimbabwe Minerals Policy* 2013, 13.
853 *Zimbabwe Minerals Policy* 2013, 13.

current and future needs.[854] Mine-host communities are to derive regular and significant benefits from those operations. Benefit accrual for mine-host communities is to be achieved through measures such as local access to contracts in mining operations, access to employment, the provision of infrastructure for local use and resources for local education and skills development.[855] With regard to competing land rights and land use options, the Zimbabwe Minerals Policy of 2013 states that the government shall establish a framework for the evaluation and management of competing land-use options. This will involve recognition of the rights of other land users such as mine-host communities, development of procedures for identifying and consulting potentially affected communities and persons in addition to establishing appropriate compensation levels and resettlement options.[856]

The Zimbabwe Minerals Policy of 2013 also addresses issues of environmental stewardship and social responsibility. It seeks to ensure that development is based on the sustainable use of natural resources and sound management and incorporation of environmental and social costs or benefits in terms of project planning in both the public and private sectors. Section 73 of the *Constitution of Zimbabwe*, which provides a right to an environment that is not harmful to health and well-being, is emphasised in the Zimbabwe Minerals Policy of 2013. Consequently, the policy document states that no major mining operations will be permitted without an ESIA having been conducted, evaluated and approved by the government. The process of carrying out environmental and social impact assessments requires early consultations with the potentially affected persons and communities as well as public hearings.[857] It is a key obligation of government to ensure broad and more direct participation of all stakeholders to promote critical social acceptance of mineral projects. Mining companies and the government are required to develop and disseminate procedures to enhance effective consultation and participation.[858] The Zimbabwe Minerals Policy of 2013 lists expected outcomes including positive impacts on the environment and local communities and the development of sustainable artisanal mining operations.[859] The

854 *Zimbabwe Minerals Policy* 2013, 9.
855 *Zimbabwe Minerals Policy* 2013, 14.
856 *Zimbabwe Minerals Policy* 2013, 15.
857 *Zimbabwe Minerals Policy* 2013, 15-16.
858 *Zimbabwe Minerals Policy* 2013, 18.
859 *Zimbabwe Minerals Policy* 2013, 19.

policy instrument discussed in this section must be underpinned by a progressive legislative framework centred on involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.

5.4 The legislative framework for mine-host community involvement in and benefit accrual from mineral extraction

The principal legislation regulating mining in Zimbabwe is the *Mines and Minerals Act* 38 of 1961 coupled with the *Communal Land Act* 20 of 1982, *Rural District Councils Act* 8 of 1988, *Environmental Management Act* 13 of 2002 and the *Indigenisation and Economic Empowerment Act* 14 of 2007. Other ancillary legislation relevant to the subject of mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit are the *Land Acquisition Act* 3 of 1992, *Traditional Leaders Act* 25 of 1998, *Administrative Justice Act* 12 of 2004 and the *Freedom of Information Act* 1 of 2020.

5.4.1 Mines and Minerals Act *38 of 1961*

5.4.1.1 Ownership of mineral resources

The *Mines and Minerals Act* 38 of 1961, is one of Zimbabwe's colonial-era statutes that has remained intact with minor amendments over the years. Like other colonial legislation, it focusses on the maximisation of mineral extraction while giving inadequate attention to the impacts of the operations on the well-being of the mine-host communities.[860] To facilitate mineral extraction and curtail claims by mine-host communities, the *Mines and Minerals Act* 38 of 1961 separates ownership of minerals from ownership of the land on which the minerals are found. Section 2 of the *Mines and Minerals Act* 38 of 1961 vests ownership of minerals in the President, while the land inhabited by mine-host communities is also vested in the President through the *Communal Land Act* 20 of 1982 which is essentially the colonial-era *Tribal Trust Land Act* 6 of 1979, with a different title.[861] In

860 Murombo 2010 25 *SAPL* 580; Chekera and Nmehielle 2013 6 *AJLS* 93.

861 See sections 3 and 4 of the *Communal Land Act* 20 of 1982. It must be stated that section 2 of the *Mines and Minerals Act* 38 of 1961 combined with sections 3 and 4 of the *Communal Land Act* 20 of 1982 have far-reaching effects. The first effect is to make the President both the owner of communal

terms of section 2 of the *Mines and Minerals Act* 38 of 1961:

> The dominium in and the right of searching and mining for and disposing of all minerals, mineral oils and natural gases, notwithstanding the dominium or right which any person may possess in and to the soil on or under which such minerals, mineral oils and natural gases are found or situated, is vested in the President, subject to this Act.

The term "dominium" means ownership.[862] By vesting ownership of minerals in the President, section 2 of the *Mines and Minerals* Act 38 of 1961 discards the common-law rule that the landowner owns not only the land but also everything below and above it.[863] The provision strips mine-host communities and private landowners of any claim to unsevered mineral resources found on their lands, since ownership and rights to search, mine and dispose of minerals are vested in the President. This is irrespective of any rights or interests that mine-host communities may have over the land on which the minerals are found.

Vesting of minerals in the President contradicts international and regional regulatory instruments discussed in chapters 3 and 4 such as the ICCPR, ICESCR and ACHPR, all of which recognise, as demonstrated, that the right to permanent sovereignty over their natural wealth and resources resides in people, nations and the state.[864] In terms of the international and regional regulatory instruments, it is the people and by extension the mine-host communities who have a right to freely dispose of their natural wealth and

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land and the owner of minerals below the land. The second is that lands and other natural resources such as minerals on all communal lands including those of indigenous peoples as understood in international law, do not belong to the indigenous peoples but are vested in the President as was the case during the colonial era. In *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 21, the court held that the lands of the Shangaan indigenous peoples cannot be distinguished from other communal lands in Zimbabwe, therefore, they remain communal lands regulated by the *Communal Land Act* which vest these lands in the President. This ruling by the court is notwithstanding the inexorable international and regional regulatory instruments and case law preserving the ownership rights of indigenous peoples over their ancestral lands and natural resources. Further, section 10(3)(d) of the *Communal Land Act* permits mining to take precedence over any other alternative land use irrespective of the impacts on mine-host communities.

862 Vinuales 2011 17 *Global Governance* 206.

863 Common law principle of *cuis est solum* stands for "whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell."

864 See para 1 of *United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* of 1962; A 1(2) of the ICCPR and ICESCR and A 21 of the *African Charter on Human and Peoples' Rights.*

resources and in no case may they be deprived of this right.[865] Further, section 2 of the *Mines and Minerals Act* 38 of 1961 does not indicate whether the President owns or holds the mineral resources in his or her personal interest or in the interest and for the benefit of the people of Zimbabwe. However, in the case of *African Consolidated Resources and Others v Minister of Mines and Mining Development and Others,*[866] the High Court of Zimbabwe held that the President holds minerals for and on behalf of all citizens. This interpretation entails that the President only holds the minerals as a trustee and not as a proprietor. It follows from this interpretation that the President is just a custodian who holds minerals for and on behalf of mine-host communities, as part of the body of citizens. While the ruling introduced contentious issues of public trust[867] into the legal framework, it must be pointed out that the *Mines and Minerals Act* 38 of 1961 does not explicitly recognise mine-host communities' rights to or interest in the minerals on the lands they inhabit.

5.4.1.2 Composition of the Mining Affairs Board

The *Mines and Minerals Act* 38 of 15961 has created a Mining Affairs Board whose

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865 See para 1 of *United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* of 1962; A 1(2) of the ICCPR and ICESCR and A 21 of the *African Charter on Human and Peoples' Rights.*

866 *African Consolidated Resources and Others v Minister of Mines and Mining Development and Others* HH 205/2010, 19. The court held that "the President holds these rights in trust and on behalf of the citizens. The public, therefore, has a vested interest in who is registered to extract this national resource; how transparently was the registration of such rights conducted; who stands to benefit from the manner the rights in question are dealt with and so on. The list of such points of interest is not exhaustive." In the case of *Mugomba v Rimbo and Others* HH380/2016, 6 the High Court of Zimbabwe explains that "in terms of prospecting, the farmer has no right to refuse prospecting. All mineral rights are vested in the state and the farmer does not, therefore, own what is underneath. Without such ownership, it follows that the farmer cannot give permission. The farmer is only notified."

867 The public trust doctrine is a potent tool that can be utilised by mine-host communities to assert claims for involvement in and benefit accrual from mineral extraction. The cases of *African Consolidated Resources and Others v Minister of Mines and Mining Development and Others* HH 205/2010, 19 and *Chikutu and Others v Minister of Lands and Others* HH 02/2022 are the closest that the Zimbabwean legal system has come to recognising the public trust doctrine without further elaboration. See Van der Schyff 2010 13(5) *PER/PELJ* 123 on the concept of public trust. See also Sagarin and Turnipseed 2012 (37) *Annu. Rev. Enviro. Resour* 473 who states that public trusteeship requires the state to hold and preserve certain natural resources essential for survival, as custodian or trustee for present and future generations. The foundation of the notion of public trust is laid down in the works of renowned philosophers such as Locke in his *Second Treatise of Civil Government*, where he indicates that states act in fiduciary trust on behalf of their people. Pound *An Introduction to the Philosophy of Law* 111 explains the state's role in regulating natural resources as "a sort of guardianship for social purpose."

functions include approval of mining leases.[868] In terms of section 7(1)(2)(3) of the *Mines and Minerals* Act 38 of 1961, the board is comprised of the Secretary of the Ministry of Mines, Chief Government Mining Engineer, Director of Metallurgy, Director of Geological Surveys, representatives of the Chamber of Mines of Zimbabwe, the Commercial Farmers Union and the Institute of Chartered Accountants of Zimbabwe. Mine-host communities are excluded from this important decision-making body that deliberates on and makes decisions about mining with potentially adverse effects on their livelihoods.[869] Members of mine-host communities may only influence the decisions of the Mining Affairs Board if it decides to summon them to give any explanations using the provisions of section 11(1)(b) of the *Mines and Minerals Act* 38 of 1961, which grant the board powers to summon any landowner or person with an interest in matters considered by it. The discretionary nature of the provision entails that mine-host communities cannot make representations before the board without first being called upon to do so. This exclusion of representatives of these communities, who are affected the most by the decisions of this high-level regulatory body, contradicts requirements of procedural justice set out in chapter 2 for their involvement and participation as discussed in chapters 3 and 4 above. For instance, the requirement for citizens, therefore, including mine-host communities, to take part in the conduct of public affairs directly or through freely chosen representatives, is provided in Article 25(a) of the *ICCPR*, Article 21 of the *UDHR* and Chapter 23.2 of *Agenda 21* of the 1992 *Earth Summit*.[870] Exclusion from the Mining Affairs Board also violates the right of mine-host communities to decide their own cultural, social and economic development as espoused in the right to self-determination, as discussed in chapters 3 and 4 of this study.[871]

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868 Section 6 of the *Mines and Minerals Act* 38 of 1961.

869 Section 7(1)(2)(3) of the *Mines and Minerals Act* 38 of 1961.

870 See the United Nations Human Rights Committee (HRC), *CCPR General Comment No. 25: A 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, para 5.

871 See the *United Nations General Assembly Resolution 1803 on Permanent Sovereignty Over Natural Resources* of 1962; A 1(1)(2) of the ICCPR and ICESCR; A 1(1) of the *Declaration on the Right to Development* and A 20(1)(2)(3) of the ACHPR. The people's right to economic self-determination as it pertains to natural resources is enshrined in A 21 and 22 of the UDHR; *United Nations General Assembly Resolution 626, Right to Exploit Freely Natural Wealth and Resources*, UN Doc. A/RES/626 (1952); A 2 of *United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN Doc. A/RES/1514(XV) (1960); A 1(2) of the ICCPR and ICESCR; A 20 and 21 of the ACHPR. See also *United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the*

5.4.1.3 Consultation with mine-host communities during prospecting and pegging of mines

In terms of section 26(a)(b) of the *Mines and Minerals* Act 38 of 1961*,* all state land, communal land and private land are open to prospecting and pegging of mines. No notice or consultation with the landowner, occupiers or interested and affected parties is required when applying for ordinary prospecting rights.[872] In contrast, applicants for exclusive prospecting rights[873] and mining leases[874] are required to give notice that the application has been made, through a publication in the government gazette inviting the landowner and occupiers to submit their objections if any. While the holder of prospecting rights is required to give written notice to the landowner regarding their intention to enter the land to search for minerals, there is no obligation on the holder to consult the landowner before entering the land to search for the minerals.[875] Where prospecting is to be conducted on communal land, the landowner is the President represented by the Rural District Council for the area, while mine-host communities are mere occupiers.[876] Therefore, it is this council that is given notice of intention to prospect and not the mine-host community.[877]

United Nations, UN Doc. A/RES/2625(XXV) (1970); *United Nations General Assembly, Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23 (1993).

872 In terms of section 31(1) of the *Mines and Minerals Act* 38 of 1961 prospecting rights in Zimbabwe are granted as either an ordinary prospecting license or exclusive prospecting rights in the form of a special grant to carry out prospecting operations, or an exclusive prospecting order. Prospecting rights in the form of ordinary prospecting licenses are granted even before an applicant has identified the specific piece of land on which they wish to search for minerals. However, the award of a special grant to carry out prospecting operations or an exclusive prospecting order requires the applicant to identify the specific land over which the right is to be granted.

873 Section 91(2) of the *Mines and Minerals Act* 38 of 1961.

874 Section 138 of the *Mines and Minerals Act* 38 of 1961.

875 Section 27(1)(a) read with 38(1)(d)(2)(f) of the *Mines and Minerals* Act 38 of 1961. See the case of *Siyaseka Mining Syndicate v Seventh Day Adventist Church and Another* HH 457-2020, 5. See also *Mugomba v Rimbo and Others* HH380/2016, 6.

876 Section 38(1)(d)(2)(f) of the *Mines and Minerals Act* 38 of 1961. The term "occupier" in relation to land is defined in section 1 of the *Mines and Minerals Act* to mean "the person lawfully and actually using or possessing any land under and by virtue of any grant or agreement." Ideally, the *Mines and Minerals Act* 38 of 1961 should be amended to include provisions for notice and consultation with lawful occupiers which would of course include mine-host communities.

877 Section 38(1)(d)(2)(f) of the *Mines and Minerals Act* 38 of 1961. The reason why mine-host communities within an area covered by a Rural District Council are not given notice or consulted with respect to prospecting for minerals is that communal lands in Zimbabwe do not belong to the communities but is vested in the President and are administered by Rural District Councils established under the *Rural District Councils Act* 8 of 1988. See Open Society Institute for Southern Africa (OSISA) 2016 "Land, Biodiversity and Extractive Industries in Southern Africa: How Effective are Legal and Institutional Frameworks in Protecting People and the Environment?" https://www.eldis.org/document/A100153 which stresses that the government of Zimbabwe and mining

The implication for mine-host communities is that a prospecting right holder who has given written notice to the Rural District Council is entitled to enter any communal land to search for minerals without notifying or consulting with the mine-host community.[878] Further, the requirement for the prospecting right holder to give notice is not of much help to mine-host communities, since section 38(7) of the *Mines and Minerals Act* 38 of 1961 condones failure to follow procedure during pegging of mines. A mine that is pegged and registered without notice having been given to the Rural District Council is still legally held, in terms of section 38(7) of the *Mines and Minerals* Act 38 of 1961.[879] This provision undermines the requirement to give notice, as the resultant act is upheld by the law and is not reversible.[880]

It is apparent that the requirement for involvement of mine-host communities by means of notice and consultation in the processes for award and utilisation of natural resources such as minerals underpinned by the idea of procedural justice and international and regional regulatory instruments, notably the *ICCPR, UNDRIP, UNDROP* and *ACHPR*,[881] is not

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companies argue that they have no obligation to compensate mine-host communities since the land does not belong to the communities.

878 Having been stripped of ownership of their traditional and ancestral lands by the *Communal Land Act* 20 of 1982, rural communities in Zimbabwe have no rights in terms of the *Mines and Minerals Act* 38 of 1961 to consultation and involvement in mineral extraction on the lands they inhabit. Section 41(1)(3)(b) of the *Mines and Minerals Act* 38 of 1961, further entitles the prospecting right holder to commence drilling and excavations once the prospecting notice has been displayed on the land and a copy is delivered to the Rural District Council in case of prospecting on communal land.

879 Section 38(7) of the *Mines and Minerals Act* 38 of 1961 provides that, "where a mining location has been pegged by a person who has failed to give notice required by this section, the pegging of the mining location shall not be deemed to be invalid by virtue only of the failure to give such notice." See also section 153(b)(c) of the *Mines and Minerals Act* 38 of 1961 which states that the registration of a mining lease shall not be impeached on the grounds that the provisions of the Act were not followed and that land not open to prospecting was included the lease area. See the case of *Mugomba v Rimbo and Others* HH380/2016, 6, which confirms that failure to give notice does not invalidate the pegging of a mine and this position also applies to mines pegged on privately held land.

880 The imposition in section 38(8) of the *Mines and Minerals Act* 38 of 1961 of a fine or month's imprisonment for failure to give notice of prospecting and pegging is not helpful to mine-host communities, since the unlawful act is not reversible.

881 See A 25(a) of the ICCPR. Articles 5(c) and 15(a) of the DSDP provide that states are to take measures for effective participation of all elements of society, individually or through associations, in defining, preparation and execution of the goals, plans and programmes of social and economic development. A 15(b) of the DSDP further requires states to take measures to increase popular participation in economic, social and cultural life of the nation through, among other things, plans for community development. See also Articles 5, 15(2), 17(2), 18, 19, 23, 27, 32(2) of the UNDRIP; A 2(3) and A 10(1)(2) of the UNDROP; A 6(1) (2) and 15(1) of ILO Convention No. 169 of 1989 and A 21 of the *African Charter on Human and Peoples' Rights*. See the cases of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 and *African Commission on Human and Peoples' Rights v Republic of*

realised in the process for application for prospecting and mining rights set out in the *Mines and Minerals Act* 38 of 1961.

5.4.1.4 Consent processes during prospecting and pegging of mines

The instances where the prospecting right holder must obtain the consent of the landowner, that is, again, the Rural District Council, or the occupier, in this context, mine-host communities inhabiting communal land, before proceeding with prospecting and pegging of a mine are limited.[882] The written consent of the council and an occupier of communal land is only required when the prospecting operations are to be conducted, *inter alia*, within a portion of communal land whose extent does not exceed 100 hectares, or within communal land occupied as a village.[883] It must be pointed out that the consent required by the *Mines and Minerals Act* 38 of 1961 does not necessarily have to be free, prior and informed, the latter three requirements as set out in international legal and regional instruments such as the *ILO Convention* 169 of 1989, UNDRIP and the ACHPR.[884] It is mere consent and may therefore be forced, uninformed and obtained without affording sufficient time for consultations in accordance with the traditions and customs of

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Kenya (the Ogiek Case) Application No. *006/2012* Judgment 26 May 2017; *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 55; *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 32.

882 See section 31(1) of the *Mines and Minerals Act* 38 of 1961.

883 Section 31(1)(g)(ii) and (h) of the *Mines and Minerals Act* 38 of 1961. See other exceptions in section 31 of the *Mines and Minerals Act* 38 of 1961.

884 See A 32(2) of the UNDRIP; A 21(1)(2) of the *African Charter on Human and Peoples' Rights*. The state's obligation to obtain FPIC before adopting decisions relating to the extraction of minerals, oil, and timber among other projects affecting indigenous peoples is emphasised in the *Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Canada*, 22, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006). 178; *Comm. on the Elimination of Racial Discrimination, General Recommendation XXIII (51) Concerning Indigenous Peoples*, 3 A.I.L.R. 142, 143 (Mar. 1998). 179; *U.N. Comm. on Econ., Soc., and Cultural Rts. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, 12, U.N. Doc. E/C.12/1/Add.74 (Nov. 10, 2001) paras 12 and 33; UNCERD*, Consideration of Reports submitted by States Parties under A 9 of the Convention, Concluding Observations, Ecuador*, (Sixty Second Session, 2003) UN Doc. CERD/C/62/CO/2 (2003), paras 6 and 16. See also *CESCR Concluding Observations on Ecuador*, (32nd Session, 2004) UN Doc. E/C.12.1.Add.100 paras 12, 35; *Poma Poma v Peru* HRC Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (95th Session, 2009) paras 7.4, 7.6 where it is stated that mere consultation with indigenous peoples is insufficient and FPIC is required if their rights are to be protected. See *Dann v United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.116, Doc. 46 4 131 (2002). 183; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000), 184; *Yakye Axa Indigenous Community v Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Saramaka Peoples v Suriname*, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007) paras 134, 137. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 196.

the mine-host communities.

The right of mine-host communities to provide consent is particularly curtailed by section 31(1)(g)(iii) of the *Mines and Minerals Act* 38 of 1961, which empowers the Minister of Mines to override the consent processes and approve prospecting on lands that are not open to prospecting, if the minister deems that consent is being unreasonably withheld. The consent processes can also be overridden by the Mining Affairs Aboard where a prospector has applied to it for permission and it grants such permission after an enquiry and having heard arguments by both the prospector and the landowner or occupier.[885] Section 67(1) of the *Mines and Minerals Act* 38 of 1961[886] specifically states that this board may approve prospecting on the reserved communal lands if it is satisfied, after conducting a hearing, that minerals are likely to be discovered on the lands and that the prospecting operations will cause little or no interference with the rights of the occupier or landowner.[887]

5.4.1.5 Consultations and the granting of mining leases and special mining leases

While there is little protection for mine-host communities in terms of the procedures for granting prospecting, exploration licenses and mining claims, the *Mines and Minerals Act*

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885 Section 66 and 67(1)(i)(ii)(iii) of the *Mines and Minerals Act* 38 of 1961. Section 69(1) of the *Mines and Minerals Act* 38 of 1961 provides that the Mining Affairs Board may authorise more extensive prospecting operations after consultation with the landowner or occupiers if the results of the initial prospecting operations indicate that such extensive prospecting is needed. The board may also after consultation with the landowner or occupier of reserved ground, approve the extension of the period for the extensive prospecting operations if the initial period is about to expire.

886 Section 67(1)(i)(ii)(iii) of the *Mines and Minerals Act* 38 of 1961.

887 The Mining Affairs Board assesses whether the prospector's financial status is such that they can pay compensation in terms of section 80 if his operations cause damages to the occupier or landowner. In terms of section 67(2) (b) of the *Mines and Minerals Act* 38 of 1961*,* before approving the prospecting and pegging of a mine within reserved lands such as villages and within 100 hectares of inhabited communal land, the Mining Affairs Board may, upon request by the landowner or occupier, require the miner/ applicant to furnish a satisfactory guarantee for payment of compensation to the landowner or occupier for any damages resulting from the mining operations as per section 80 of the *Mines and Minerals Act* 38 of 1961*.* The same requirement for a guarantee for payment for damages is required in section 142(4) before granting of a mining lease by the Mining Affairs Board. Compensation is also payable under section 133 of the *Mines and Minerals Act* 38 of 1961 where a landowner or occupier of reserved land is injuriously affected by mining operations carried on an underground extension block whose underground boundaries overlaps into the reserved lands. Section 78(1) of the *Mines and Minerals Act* 38 of 1961 provides that a mining location registered on reserved ground under an order of the Mining Affairs Board may not be transferred to another person without the board's approval after consultation with the landowner and occupier.

38 of 1961 provides more appropriate protection when it comes to granting of mineral rights in the form of a mining lease or special mining lease.[888] In terms of section 138(a)(b) of the *Act*, the Minister of Mines is obliged, upon receiving an application for a mining lease, to publish the details of the application in the Government Gazette. The publication should include locations of the affected lands and invite members of the public and the landowner or occupier to submit, within thirty (30) days, their objections to the granting of the mining lease if they have any such objections. Objections received are considered by the Provincial Mining Director, the Administrative Court[889] or the Mining Affairs Board, depending on the nature of the objection.[890] It must be submitted that the thirty (30) day period set for notice and submission of objections is insufficient, as it does not allow enough time for members of mine-host communities to consult among one another in accordance with their own customs before lodging any objection.

Transfer of a mining lease from one miner to another requires the approval of the Mining Affairs Board after consultation with the landowner affected by the mining lease, and the transferee may be required to furnish a satisfactory guarantee for payment for damages that may be suffered by the landowner as a result of the mining operations.[891] The *Mines and Minerals Act* 38 of 1961 requires, in section 159(3)(e)(vii) and section 160(2)(c), as a pre-condition for granting of a special mining lease that the miner conducts an EIA and produce an environmental management plan. The mining development plan must also demonstrate proper environmental and safety considerations.[892] The applicant for a special

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888 A mining lease is issued in terms of section 135(1) of the *Mines and Minerals Act* 38 of 1961 to a holder of adjoining registered mining locations who wishes to amalgamate their separate mining rights. A special mining lease is issued in terms of section 135(1)(a)(b) of the *Mines and Minerals Act* 38 of 1961 *to* a holder of one or more contiguous registered mining locations who intends to develop a mine with the investment being "wholly or mainly in foreign currency and will exceed one hundred million United States dollars" and where the mine's output is intended mainly for export.

889 The Administrative Court of Zimbabwe was set up in terms of the *Administrative Court Act* 39 of 1979. It is a specialist court that deals mainly with civil cases of administrative nature such as the administrative decisions of local authorities and statutory regulatory bodies. Appeals against judgements of the Administrative Court are lodged directly with the Supreme Court of Zimbabwe.

890 Section 139 (1) (2)(3) of the *Mines and Minerals Act* 38 of 1961.

891 Section 149 (1) (2)(3) of the *Mines and Minerals Act* 38 of 1961.

892 Section 159 (3)(e)(vii) of the *Mines and Minerals Act* 38 of 1961 requires from the applicant for a special mining lease "a report on the anticipated impact of mining operations on the environment and any measures to be taken to assess, prevent or minimise such impact, including proposals for (a) the prevention or treatment of pollution; (b) the treatment and disposal of waste; (c) the protection of rivers and other sources of water; (d) the reclamation and rehabilitation of land disturbed by mining operations; and (e) monitoring the effect of mining operations on the environment."

mining lease is also required to provide "details of any insurance to be taken out against liability arising from mining operations, including liability for damage to the environment and injury to persons and property."[893] These requirements are not prerequisites for granting prospecting licences, exploration licenses and registration of mining claims and special grants.

Despite the requirements incorporated in the granting of mining leases or special mining leases, some identifiable weaknesses contradict international and regional regulatory instruments centred on involvement and benefit accrual by mine-host communities. One such weakness is that there is no requirement to obtain the consent of the landowner or occupier. Further, the requirements that are considered for a recommendation by the Mining Affairs Board to the Minister of Mines and the President for approval or rejection of an application for a special mining lease as set out in section 160(2) of the *Mines and Minerals Act* 38 of 1961 are skewed towards the interests of development at national level and not towards development of local communities. They do not mention the involvement in and benefit accrual by mine-host communities from the extraction of the mineral resource.[894] Regarding consultations pertaining to proposed transfer of a mining lease from one miner to another, the Mining Affairs Board is only required to consult landowners covered by the mining lease, and not occupiers. This means that, in the case of communal lands, only the rural district council, as the landowner, is consulted, and not the mine-host communities who are merely viewed to be occupiers.

As for commencement of mining operations, the High Court of Zimbabwe held in case of *Siyaseka Mining Syndicate v Seventh Day Adventist Church and Another* that:

> with regard to mining claims, it is not a legal requirement that the holder of a mining claim should consult or inform the holder of land rights (though this is

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893 Section 159(3)(e)(x) of the *Mines and Minerals Act* 38 of 1961.

894 Section 160(2)(a)(c)(d)(e)(h) of the *Mines and Minerals Act* 38 of 1961 provides that the Mining Affairs Board shall not recommend for approval of a special mining lease unless the board is satisfied that:
"(a) it would be desirable in the interests of the development of Zimbabwe's mineral resources for the application to be granted; and (c) the applicant's mining development plan takes proper account of environmental and safety factors; and (d) the applicant's programme of mining operations will ensure the efficient, timely and beneficial use of the mineral resources concerned; and (e) the applicant's proposals for the procurement and use of local goods and services and the employment of Zimbabwean citizens are satisfactory; and (h) it would be in the national interest for the applicant to be granted a special mining lease."

> desirable) before commencing exploitation of mineral rights, as long as the holder of mineral rights is acting within the scope of the provisions of legislation governing exploitation of mineral rights.[895]

In this case, the respondents who were the landowners interfered with *Siyaseka Mining Syndicate's* possession and occupation of its mine by destroying its temporary structures and preventing it from carrying out mining operations. The court ordered the respondents to return undisturbed possession of the mine to *Siyaseka Mining Syndicate* and not interfere with its mining activities.[896]

5.4.1.6 Residual rights of mine-host communities

The issue of those rights that mine-host communities have over the land once a mine is established, is addressed in section 179 of the *Mines and Minerals Act* 61 of 1961. Mine host communities retain the right to graze stock upon or cultivate the surface of their lands in so far as the grazing and cultivation does not interfere with the proper operation of the mine. This means that the communities lose their grazing and cultivation rights if such activities interfere with the mining operations. There is no mention of the mining right being suspended or cancelled if it interferes with the grazing and cultivation rights of the communities. In this regard, it is apparent that there is no intention of balancing the interests of the mining right holder and the rights of mine-host communities since the focus of the *Mines and Minerals Act* is to ensure maximum extraction of minerals.

5.4.1.7 Benefit accrual and compensation

Section 188 of the *Mines and Minerals Act* 38 of 1961, titled "payments to landowners," addresses compensation payable to landowners only, again excluding the occupiers. Upon application to the Mining Affairs Board, payments accrue to the landowner of communal land if mining operations have hindered the landowner from use of the surface of the land or a substantial portion of such land.[897] Since communal land in Zimbabwe is vested in the

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[895] *Siyaseka Mining Syndicate v Seventh Day Adventist Church and Another* HH 457-2020, 5. See also *Mugomba v Rimbo and Others* HH380/2016, 6.

[896] *Siyaseka Mining Syndicate v Seventh Day Adventist Church and Another* HH 457-2020, 8.

[897] Section 188(7) as read with section 188(2)(3)(4)(5)(6) of the *Mines and Minerals Act* 38 of 1961.

President who administers the land through rural district councils, the payments accrue to the council and not mine-host communities.[898] Mining companies pay a development levy in terms of section 96(1)(b) of *the Rural District Councils Act* 8 of 1988. The funds are paid into a district development fund established under the *District Development Fund Act* 58 of 1981 and is administered by the said councils.[899] The implication is that mine-host communities may only benefit indirectly in cases where a Rural District Council decides to apply the district development fund to initiate development projects on the lands inhabited by the communities. Additional funds accrue to the councils in terms of section 222(4)(a) as read with section 232(1)(a) of the *Mines and Minerals Act* 38 of 1961, from levies payable by miners of alluvial or eluvial of a designated mineral resource. In the case of royalties, the *Mines and Minerals Act* 38 of 1961 provides that miners shall pay a royalty to the government on all minerals extracted and sold from the mining location. There is no mention of mine-host communities.[900] It is apparent that the provisions do not embrace the requirements set in international and regional regulatory instruments on the aspect of

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898 Section 188(8) of the *Mines and Minerals Act* 38 of 1961 provides that a landowner shall not be entitled to payments for denial of use of the surface of the land or portion thereof if the landowner is a shareholder in the mining operations or is entitled to a share in the royalties due on the minerals produced by the mining operations. Rural District Councils as the owners of communal land will therefore not be entitled to compensation for diminution of the right to use of the land surface if they hold shares in the mining operation.

899 Section 4(1)(d) of *District Development Fund Act* 58 of 1981. In terms of section 3(2) of the *District Development Fund Act* 58 of 1981, the fund is vested in the Minister of Local Government, Rural and Urban Development who is also a trustee with sole management, control and use of the fund. Section 3(3) of the same Act provides that the fund shall be applied for development of communal land and to meet other development needs. The Minister of Local Government, Rural and Urban Development decides the development priorities in rural areas in consultation with the Minister of Agriculture as well as the Rural District Councils. Murombo 2010 25 *SAPL 581* queried this assumption that government authorities represent the interests of persons and communities within their jurisdictions. Government authorities are not rightfully placed to share the interests of the communities who are the people on the ground. The *District Development Fund Act* 58 of 1981 does not provide for direct consultation with the actual people residing on communal land who are the most interested and affected people by any developments on the land. See also sections 3(2), 4(a), 14(1)(a) of the *Sovereign Wealth Fund Act* 7 of 2014. Deposits into the Sovereign Wealth Fund come from mineral royalties among other sources. The main objective of the fund is to make secure investments for the benefit and enjoyment of future generations of Zimbabweans. It must be pointed out that the Sovereign Wealth Fund should ideally be used to mitigate the negative impacts caused by mining on mine-host communities, including environmental rehabilitation after mine closure but this is not provided in the legislation.

900 Sections 244-245 of the *Mines and Minerals Act* 38 of 1961. While section 245 of the *Mines and Minerals Act* 38 of 1961 provides that local authorities may only benefit directly from mining payments where the Minister of Mines has approved such benefits through a statutory instrument, there is no mention of mine-host communities benefiting directly or sharing in the royalties accrued from mining operations on the lands they inhabit.

benefit accrual and compensation to the affected mine-host communities.[901]

Mine-host communities may derive benefits from mineral extraction on the lands they inhabit should the government decide to utilise the provisions of section 398(1) of the *Mines and Minerals Act* 38 of 1961, which permits the President to acquire a mine or part thereof for public purposes or to benefit a section of the public. Section 398(1) of the *Mines and Minerals Act* 38 of 1961 provides that:

> the President may at any time, for the utilisation of any mining location for a purpose beneficial to the public generally, or to any section thereof, acquire either the whole or any portion of such mining location, or limit the rights enjoyed by the owner thereof under this Act.

The drawback in this provision is that it is discretionary, and this limits its utilisation for attainment of involvement in and benefit accrual by mine-host communities from mineral extraction on the land they inhabit. It would be more beneficial to adopt clear and non-discretionary provisions for accrual of benefits by mine-host communities based on the idea of distributive justice discussed in chapter 2 and as set out in international and regional regulatory instruments for instance, the *ICCPR* and *ICESCR, DRTD*, *ILO Convention* No. 169 of 1989, *UNDROP* and the *ACHPR* examined in chapters 3 and 4 above.[902]

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901 See A 1(2) of the ICCPR and ICESCR; A 15(2) of the *ILO Convention* No. 169 of 1989; A 21(1) of the *African Charter on Human and Peoples' Rights*. See also the *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018.

902 See A 1(2) of the ICCPR and ICESCR; A 21(1) of the *African Charter on Human and Peoples' Rights*; A 2(3) of the DRTD; A 15(2) of the *International Labour Organisation Convention* No. 169 of 1989, 1650 U.N.T.S 383; A 5(2) of the *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas* 2018 UN. Doc.A/RES/73/165/2018. See also *Committee on Elimination of Racial Discrimination, Concluding Observations: Bolivia*, UN Doc. A/56/18, (2001) para 335; *Committee on Elimination of Racial Discrimination, Concluding Observations: Bolivia*, UN Doc. A/66/18 (2012), para 43(7)(f); *CERD General Recommendation* No. 23: Indigenous Peoples (1997) A/52/18, annex V para 5. Benefit-sharing has also been referenced by Anaya *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc. A/HRC/15/37(2010) para 73; Stavenhagen *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* UN Doc. E/CN.4/2003/90, para 66; Stavenhagen *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, submitted pursuant to Commission Resolution 2005/51, Addendum: Progress Report on Preparatory Work for the Study Regarding Best Practices carried out to Implement the Recommendations contained in the Annual Reports of the Special Rapporteur* UN Doc. E/CN.4/2006/78/Add.4, para 11. See the cases of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No

5.4.2 Communal Land Act 20 of 1982

The position of mine-host communities is complicated by section 4 of the *Communal Land Act* 20 of 1982,[903] which vest ownership of communal land in the President of Zimbabwe, who then authorises occupation and use of the land for agriculture and housing through rural district councils and traditional leaders.[904] As indicated in section 5.4.1.1 above, the effect of the *Communal Land Act* 20 of 1982 is that mine-host communities in Zimbabwe who reside on communal land do not own both the land and the minerals in the land, and they may be dispossessed or evicted by the state at any time to make way for mineral

276/2003 paras 294, 295, 296; *Saramaka Peoples v Suriname* Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, para 130 and fn 128; 129, para 138 and fn 137; *Kalina and Lokono Peoples v Suriname* Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309 (Nov. 25, 2015), paras 197-198, 295.

903 The Act legalises inequality and colonial forms or means of resource deprivation or dispossession. It legislates the refusal to recognise that land was owned by black communities before the colonial era. The effect of the *Communal Land Act* is to entrench the subordinating treatment meted to black landless majority during the colonial era, who continue to suffer socio-economic disadvantages. Most importantly, the Act does not meet the aspirations for substantive equality in the *Constitution of Zimbabwe Amendment* (No.20) Act, 2013. Substantive equality requires that laws and policies do not reinforce the subjugation of communities already suffering socio-economic disadvantages. It recognises and accommodates socio-economic differences in a way that promotes, empowers and raises those most disadvantaged in society. Substantive equality requires laws that facilitate or create equality of opportunity, redistribution of socio-economic advantages and eradicates colonial barriers to the socio-economic development and well-being of the host communities. It would require secure land tenure on communal lands with the law fully recognising that communal land belongs to the people living on that land. This is missing from the *Communal Land Act* 20 of 1982 which only accords use rights to the communities.

904 Section 2 of the *Communal Land Act* 20 of 1982 defines the term "use" in relation to communal land to include "the erection of any building or enclosure, ploughing, hoeing, the cutting of vegetation, the de-pasturing of animals or the taking of sand, stone or other materials therefrom." Landownership rights confer on the state the right to decide between alternative land uses meaning that the state decides whether mining or any other economic activity should be undertaken on any piece of land. Nonetheless, host communities should have a right to notice and meaningful consultation whenever an activity such as mining which has adverse impacts on these rights is being considered. Rural District Councils are constituted in terms of the *Rural District Councils Act* 8 of 1988, while traditional leaders are constituted in terms of the *Traditional Leaders Act* 25 of 1998. Traditional leaders occupy strategic positions and roles which should result in better involvement in and benefit accrual by mine-host communities they represent. Section 5(1) *Traditional Leaders Act* 25 of 1998 states that traditional chiefs have the responsibility to ensure *inter alia* that land and natural resources are used and exploited according to the law and prevent the indiscriminate destruction of flora and fauna and generally prevent the degradation, abuse or misuse of land and natural resources. Despite their strategic position, traditional leaders' capacity to effectively represent their communities to ensure involvement and benefit accrual from mineral extraction is curtailed by the fact that they do not own the land and are overruled by Rural District Councils when community interests are at variance with those of the government. Section 282 of the *Constitution of Zimbabwe* imposes an obligation on traditional leaders to facilitate development in their areas. However, this constitutional mandate is undermined by the *Rural District Councils Act* 8 of 1988 in terms of which traditional leaders attend council meetings only as ex-officio members and do not have voting rights. In terms of section 60 of the *Rural District Councils Act* 8 of 1988, traditional leaders do not sit in the district development planning committees responsible for planning at the district level yet these plans may involve land development and relocations.

extraction.[905] In this way, the *Communal Land Act* 20 of 1982 effectively takes away permanent sovereignty over natural resources from the local communities and vests it in the President who is represented by Rural District Councils. This is contrary to international and regional regulatory instruments such as the *ICCPR, ICESCR* and the *ACHPR*,[906] that vest sovereignty over natural resources in the peoples and nations. Contentious issues arising from the *Communal Land Act* 20 of 1982 are whether the President has proprietary rights in communal lands or whether the land is held on behalf of the people of Zimbabwe, and who should be notified or consulted when a prospective miner intends to carry out prospecting, exploration or mining operations on the land. The *Communal Land Act* does not provide answers to these questions. Zimbabwe once explored these questions through the 1993 Land Tenure Commission (Rukuni Commission),[907] which was tasked to review the country's land tenure systems. The recommendation by the Rukuni Commission for the state to relinquish ownership of communal lands to traditional village communities was not implemented. The commission also recommended that the lands be surveyed, demarcated and registered in the names of the respective traditional rural communities. This recommendation was also ignored by the government.

In the case of *Chikutu and Others v Minister of Lands and Others*[908] the High Court of Zimbabwe held that the President does not own communal land in his personal capacity. However, the court did not explain the capacity in which the President holds these lands. Remarkably, even though the High Court of Zimbabwe in *Chikutu and Others v Minister of Lands and Others* acknowledges the colonial and racist parentage of the *Communal Land Act* which the court describes as an obnoxious legislation,[909] the court declined to recognise the communal land ownership rights of the Shangaan indigenous peoples. In the court's view, the government in its "infinite wisdom" decided to retain the provisions of the colonial *Tribal Trust Land Act* 6 of 1979, in the post-independence *Communal Land Act* 20 of 1982.[910] The court further indicated that the judiciary is not sufficiently qualified to

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905 Section 8(2)(b) of the *Communal Land Act* 20 of 1982.

906 See para 1 of the United *Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources and Wealth* of 1962; A 1(1)(2) of the ICCPR and ICESCR; and A 21 of the ACHPR.

907 The Report of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems under the Chairmanship of Professor M. Rukuni, 1993/94 (report made public 1995), Harare: Government Printers.

908 *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 21.

909 *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 19.

910 *Chikutu and Others v Minister of Lands and Others* HH 02/2022 paras 19 and 22.

provide a solution to the question of ownership of communal lands as it is a political question that should be answered through a commission of enquiry on the whole agrarian reform especially as it applies to communal lands.[911] In this way, the court in *Chikutu and Others v Minister of Lands and Others* missed an opportunity to unpack the question of land ownership rights of indigenous peoples in Zimbabwe in line with international and regional regulatory instruments as well as case law such as the Endorois[912] and Ogiek[913] discussed in chapter 3 and 4 of this study. As a result, contentions over communal landownership persist, and contrary to the idea of remedial justice discussed in chapter 2 above, mining companies in Zimbabwe often refuse to consult or compensate displaced mine-host communities for loss of land on the basis that land belongs to the President or the state and not the communities.[914]

In terms of section 10(2)(4) of the *Communal Land Act* 20 of 1982, the minister responsible for communal land may, after consultation with the relevant rural district council, set aside any portion of the communal land for any purpose that the minister deems to be in the interests of inhabitants or the public, or that will promote the development of communal land. It must be pointed out that the minister is obliged to consult only the Rural District Council and not the local communities before setting aside the land. Further, instead of the mine-host communities deciding that which is in their best interest or determining their development priorities, the minister is empowered to decide for them. In making the decision, the minister is at liberty to prioritise either the interest of the inhabitants and the general public or development projects such as mining, which may be at variance with the priorities and well-being of the inhabitants. There is no doubt that section 10(3)(d)(4) of the *Communal Land Act* 20 of 1982 is at variance with requirements set in international and regional regulatory instruments discussed in chapters 3 and 4 of

911 *Chikutu and Others v Minister of Lands and Others* HH 02/2022 para 19.

912 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003.

913 *African Commission on Human and Peoples' Rights v. Republic of Kenya* (the Ogiek Case) Application No. 006/2012 Judgment 26 May 2017.

914 See Open Society Institute for Southern Africa (OSISA) 2016 "Land, Biodiversity and Extractive Industries in Southern Africa: How Effective are Legal and Institutional Frameworks in Protecting People and the Environment?" https://www.eldis.org/document/A100153. The position taken by the mining companies is informed by section 187 of the *Rural District Councils Act* 8 of 1988, which states that compensation for communal land acquired for mining purposes should be paid to the Rural District Council administering that land. See also section 12(1)(c)(i)(ii) of the *Communal Land Act* 20 of 1982.

this study on the subject of consultation and determination of development priorities.[915] For instance, in terms of Article 32(2) of the UNDRIP, states must consult and cooperate in good faith with affected communities through their own representative institutions so as to obtain FPIC. This must be done prior to approval of any development project that affects the lives of the communities that have the right to give or withhold their consent.

Section 10(3)(d) of the *Communal Land Act* 20 of 1982 empowers the minister, through the publication of a notice, to order the persons occupying any communal land, excluding those who hold mineral rights, "to depart permanently with all their property from the land concerned within such reasonable period as the Minister shall specify in the notice."[916] Those who fail to depart from the land upon notice risk criminal prosecution and ejectment in terms of sections 10(7) and 16 of the *Communal Land Act* 20 of 1982.

The adverse effects of these provisions of the *Communal Land Act* 20 of 1982 appear in several cases involving forced relocation of rural communities. The case of *Marange Development Trust v The District Administrator Mutare District and Others,*[917] involved a dispute over the 48 hours' notice given to applicants pertaining to their impending relocation from their ancestral land in the diamond-rich Marange area to Arda Transau. The threatened eviction of rural communities consisting of the indigenous Tonga and Nambya villagers in Batoka in Hwange follows the gazetting of *Statutory Instrument* 188 of 2020: *Communal Land (Setting Aside of Land) (Batoka Township) Notice,* 2020 (SI 188 of 2020) which ordered villagers in Batoka, Hwange, Matabeleland North province of Zimbabwe to vacate their communal lands by 31 December 2020. This eviction was to pave way for the establishment of a new township situated on the southern bank of the

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915 See A 1(2) of the ICCPR and ICESCR; A 21(1)(5) and 22(1) of the ACHPR; A 2(3), 18, 19 and 32(2) of the UNDRIP and A 5(2)(c) of UNDROP. See also the *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* 2018, 20-24.

916 While affected mine-host communities may contest the notice period in the courts, the legislature could have explicitly stated the minimum notice period to avoid abuse of discretionary powers by the minister. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004 (4) SA 490 (CC) 45, the court indicated that a reasonable decision is one that considers a range of factors relevant to the decision such as the reasons for the decision, nature of competing interests involved and impact of the decision on the lives and well-being of those affected. Section 10(3)(d) of the *Communal Land Act* 20 of 1982 does not provide a platform for reasonable decision-making but rather the opposite.

917 *Marange Development Trust v The District Administrator Mutare District and Others* Unreported Judgment HC 12237/16.

Zambezi River and on the Boterekwa hills, which overlook Kariba Gorge and Lake Kariba. SI 188 of 2020 ordered the villagers to vacate the area within 150 days without giving them alternative land or any indication of compensation for the loss of their ancestral lands and properties.

The case of *Chikutu and Others v Minister of Lands and Others*[918] has put beyond doubt that the *Communal Land Act* serves to perpetuate colonial-style land dispossessions. The case which provides a detailed expose of the colonial dispossessions and their continuation in the contemporary state, was triggered by the gazetting of *Statutory Instrument* 50 of 2021: *Communal Land (Setting Aside of Land) (Chiredzi) Notice*, 2021 (SI 50 of 2021) and *Statutory Instrument* 51 of 2021: *Communal Land (Excision of Land) Notice*, 2021 (SI 51 of 2021). By means of SI 50 of 2021, the Government of Zimbabwe set aside 12 940 hectares of communal land inhabited by the Shangaan indigenous peoples of Chilonga villages in Chiredzi South District to grow lucerne grass, used as stock feed for dairy cattle. SI 50 of 2021 and SI 51 of 2021 are based on sections 6(1)(b) and 10(1)(a)(b) of the *Communal Land Act* 20 of 1982, which allows the government to convert communal land to state land or set it aside for any purpose, in this case rendering the Chilonga lands of the Shangaan people no longer part of the Chiredzi communal lands. Section 3 of SI 50 of 2021 specified that any person occupying or using the land other than a mineral right holder in terms of the *Mines and Minerals Act* 38 of 1961 should depart from the land permanently with all his or her property by "the date of publication of this notice, unless he or she acquires rights of use or occupation to the said land in terms of section (9)(1) of the *Communal Land Act*." Contrary to the notion of procedural justice as explained in chapter 2 above as requiring effective public participation, the statutory instrument that was gazetted without meaningful consultation of affected communities[919] who lived in the area since the 1830s did not give reasonable notice or mention alternative lands where the evicted people should go or any compensation for their losses.[920]

It must be noted that SI 50 of 2021 was first amended by Statutory Instrument 63A of

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[918] *Chikutu and Others v Minister of Lands and Others* HH 02/2022.

[919] Section 10(2) of the *Communal Land Act* only requires consultations with the responsible rural district council and there is no mention of the affected communities.

[920] Human Rights Watch https://www.hrw.org/news/2021/03/06/zimbabwe-thousands-villagers-facing-eviction.

2021 to change the planned project from lucerne production to establishment of an irrigation scheme and to strike out the requirement for occupiers of the land to immediately depart from the land. Although Statutory Instrument 72A of 2021 eventually repealed SI 50 of 2021, it set aside the same land for irrigation purposes meaning that the Shangaan people still face eviction. These threatened forced evictions[921] of the Shangaan, Tonga, and Nambya indigenous peoples are in violation of international and regional regulatory instruments discussed in chapters 3 and 4 of this study.[922]

5.4.3 Land Acquisition Act 3 of 1992

The *Land Acquisition Act* 3 of 1992 has similar effects as those of the *Communal Land Act* 20 of 1982 on mine-host communities in terms of the dispossession of their lands and mineral resources. In terms of the *Land Acquisition Act* 3 of 1992, the government may compulsorily acquire any rural land where the acquisition is reasonably necessary for the utilisation of the land and natural resources therein, among other reasons.[923] Rural land can therefore be acquired without the consent of the mine-host communities for purposes of extraction of minerals on the land. The procedure to be followed to effect a compulsory land acquisition involves the publication of a notice in the Government Gazette and in a newspaper circulating in the area in which the land concerned is situated.[924] There is no provision for consultation with the landowner or occupier and interested and affected communities other than an invitation to those who wish to contest the acquisition to submit a written objection within 30 days from the date of publication of the notice.[925] As indicated in 5.4.2 above, the period of 30 days to respond or raise objections is insufficient

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921 The phrase "forced eviction" is define in para 3 of the United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The Right to Adequate Housing (Art.11.1): Forced Evictions*, 20 May 1997, E/1998/22 as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection." Para 13 of General Comment 7 then emphasises the need for consultation with the affected people while para 14 emphasises the principles of reasonableness and proportionality.

922 See A 3(1)(a) of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (Kampala Convention) of 2009, which requires parties to "refrain from, prohibit and prevent arbitrary displacement of populations"; A 14 of the *African Charter on Human and Peoples' Rights* of 1982 is interpreted by the African Commission on Human and Peoples Rights in the Ogoni and Endorois cases discussed in chapter 4 above to recognise communal, traditional and collective ownership of land and protection from forced evictions.

923 Section 3(1)(b)(ii) of the *Land Acquisition Act* 3 of 1992.

924 Section 5(1)(a)(i)(ii)(iii) of the *Land Acquisition Act* 3 of 1992.

925 Section 5(1)(a)(i)(ii)(iii) of the *Land Acquisition Act* 3 of 1992.

for rural communities who have to consult internally using their traditional processes when they decide on whether to contest the proposed acquisition.

Once a compulsory acquisition has been put into effect, section 9(1)(a) of the *Land Acquisition Act* 3 of 1992 entitles the state to evict the landowner or occupier who remains in occupation of the acquired land, although section 16(a) of the same *Land Acquisition Act* 3 of 1992 obliges the state to pay fair compensation within a reasonable time for the acquired land.[926] Since communities residing on communal land do not own the land, as discussed in 5.4.2 above, they are only compensated for the loss of their personal property and not for the land itself or minerals at stake in the context of this study. It must be pointed out that the process of compulsory acquisition of land as expressed in the *Land Acquisition Act* 3 of 1992 contradicts the principles of remedial justice expressed in chapter 2 and provisions of the *ILO Convention* 169 of 1989, *ICESCR, UNDRIP, UNDROP* and *ACHPR* discussed in chapters 3 and 4 of this study, where these facilitate the involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.

5.4.4 Indigenisation and Economic Empowerment Act 14 of 2007

The preamble and section 2(1) of the *Indigenisation and Economic Empowerment Act* 14 of 2007 *(Indigenisation and Economic Empowerment Act)* provides that the objective of the Act is to involve indigenous Zimbabweans in the country's economic activities and ensure the equitable ownership of national resources.[927] The term "indigenous" Zimbabwean is defined in section 2(1) of the *Indigenisation and Economic Empowerment Act*. It encompasses (i) persons and descendants of such persons who before 18th April 1980 (the date Zimbabwe attained independence) were disadvantaged by unfair discrimination on the grounds of race and (ii) any enterprises owned or controlled by

926 Section 54 MPRDA requires compensation to be agreed on or be adjudicated by arbitration or the courts prior to the commencement of mining operations. See *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) para 92.

927 Zimbabwe enacted the *Indigenisation and Economic Empowerment Act* 14 of 2007 and the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 21 of 2010 with a view to empowerment of previously disadvantaged majority black population.

indigenous Zimbabweans.[928] This definition is so wide that it embraces almost all Zimbabweans except a few who were privileged by way of racial discrimination during the colonial era. It can be argued that the definition entitles mine-host communities who bore and continue to bear the burdens of mining operations to be involved in and derive socio-economic benefits from mineral extraction on the lands they inhabit.

To give effect to the indigenisation objective, section 3(1) of the *Indigenisation and Economic Empowerment Act* 14 of 2007 promoted distributive justice as it required, before 2018, that all foreign-owned mining companies cede not less than 51% of their shareholding or interest in local mining ventures to indigenous Zimbabweans.[929] Amendment of this section in section 42 of the *Finance Act* 1 of 2018 and section 36 of the *Finance Act* 2 of 2020 diluted the original stance of indigenisation. In terms of *Finance Act* 1 of 2018 only those foreign companies that mine platinum and diamonds are required to dispose of 51% of shares in their local mining ventures to indigenous Zimbabweans.[930] Section 36 of the *Finance Act* 2 of 2020 re-introduced the requirement that all foreign mining companies, irrespective of the type of mineral involved, should cede 51% of their local shareholding to indigenous Zimbabweans. However, implementation of the requirement is not immediate. The government reserved the right to decide which minerals require immediate compliance with the requirement.

In the endeavour to ensure that mine-host communities benefit from the extraction of mineral resources in their areas, the *Indigenisation and Economic Empowerment Act* 14 of 2007 provides for the establishment of community share ownership trusts for local communities[931] and this promotes the idea of distributive justice. Where foreign owned

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928 The term "indigenous" is not understood in Zimbabwe in the same way it is understood in international law. In fact, the *Constitution of Zimbabwe* does mention the term "indigenous peoples" or "indigenous communities," but nonetheless refers to indigenous Zimbabwean in section 295(1) without defining it. The term indigenous is thus generally used in Zimbabwe to refer to people of African descent whose predecessors inhabited the country prior to colonisation by the British in 1890. This can be deduced from the *Access to Genetic Resources and Indigenous Genetic Resource-based Knowledge* (Regulations) *Statutory Instrument* 61 of 2009, which defines an indigenous community as one comprising persons who inhabited Zimbabwe continuously since the time before the year 1890 and whose members share the same language or dialect or the same cultural values, traditions or customs."

929 *Indigenisation and Economic Empowerment (General) Regulations, Statutory Instrument* 21 of 2010.

930 Section 42(1)(c) of the *Finance Act* 1 of 2018.

931 See section 14(b) of the *Indigenisation and Economic Empowerment (General) Regulations, Statutory Instrument* 116 of 2010.

mining companies elect to dispose of shares to community share ownership trusts, the trust is required to utilise proceeds received from mining operations in their areas to ensure the accelerated development of the communities.[932] This provides a special opportunity for the involvement of these communities and benefit accrual for them from mineral resources in their areas. However, the drawback in the law is that it does not compel mining companies to dispose of any shares to community share ownership trusts.[933] The *Indigenisation and Economic Empowerment (General) Regulations* General Notice 114 of 2011 allows foreign mining companies to elect beneficiaries from a pool of designated entities to whom they wish to dispose of 51% of their shares. The designated entities include the National Indigenisation and Empowerment Fund (NIEF), Zimbabwe Mining Development Corporation (ZMDC), Statutory Sovereign Wealth Fund (SSWF) and share ownership schemes or trusts for employees, management or communities. In addition, section 36 of the *Finance Act* 2 of 2020 clarifies that a foreign-owned local mining venture can satisfy the indigenisation requirements by disposing 51% of its shares to any designated entity "with or without the participation of a community share ownership scheme."

It is apparent that the idea of indigenisation and empowerment has waned since 2018 with negative implications for distributive justice. That a foreign-owned local mining venture can satisfy the indigenisation requirement without the participation of a community share ownership scheme does not facilitate distributive justice through the involvement and accrual of benefits by mine-host communities from mineral extraction on their lands. Moreover, restricting economic empowerment provisions to prescribed minerals only takes away the right of mine-host communities to involvement in and accrual of benefit from mineral extraction in their areas, whereas this had been guaranteed before 2018 regardless of the type of the mineral involved. The fact that the government now has the discretion to prescribe which minerals require immediate compliance with the requirement for at least 51% local shareholding means that it can decide not to exercise the discretion at all, to the detriment of indigenous Zimbabweans including mine-host communities.

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932 See the 4th Schedule of section 16 of the *Indigenisation and Economic Empowerment Act* 14 of 2007.

933 See also section 14(b)(2) of the *Indigenisation and Economic Empowerment (General) Regulations* Statutory Instrument 116 of 2010.

5.4.5 Environmental Management Act 13 of 2002

The *Environmental Management Act* 13 of 2002 (EMA) was enacted to give effect to section 73(1)(a)(b) of the *Constitution of Zimbabwe*, which provides the right of everyone to an environment that is not harmful to health or well-being and to have the environment protected for the benefit of present and future generations by means of reasonable legislative and other measures. Consequently, the *Environmental Management Act* 13 of 2002 prohibits and imposes penalties for pollution of water, unlawful discharge of waste, hazardous substances and chemicals into the environment.[934] Further, it provides key environmental rights such as the right to a clean environment that is not harmful to health, the right to access to environmental information and the right to participate in the implementation of legislation and policies that prevent pollution.[935]

Section 4(1)(a) of the *Environmental Management Act* 13 of 2002 accords everyone a right to a clean environment that is not harmful to health. In the context of mineral extraction, it entails that mine-host communities have a right not to be exposed to the adverse environmental impacts of mining operations such as discharge of harmful pollutants into ground and surface water sources, the air and the land. It is apparent that the right to a clean environment that is not harmful to health, as guaranteed in the *Environmental Management Act* 13 of 2002, realises the requirements set in international and regional regulatory instruments such as the *United Nations Declaration on Environment and Development* of 1992, *UNDRIP, UNDROP, ICESCR* and the *ACHPR,*[936] which are pertinent to mine-host community involvement in and benefit accrual from mineral extraction their lands. This right can only be realised with the active participation of the mine-host communities in decision-making as well as implementation and monitoring of environmental safeguards. It must be pointed out that mine-host communities should not expect to be passive beneficiaries of a clean environment. Mining operations tend to seek the maximisation of extraction at the expense of environmental protection. This should be balanced through active community participation in environmental matters which is an element of procedural justice.

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934 Sections 57(1)(2), 70(1)(2), 73(1)(2) of the *Environmental Management Act* 13 of 2002.

935 Section 4(1) of the Environmental Management Act 13 of 2002.

936 See principle 10 of the *United Nations Declaration on Environment and Development* of 1992 and A 24 of the ACHPR.

Access to information is key to public participation in environmental decision-making. Therefore, section 4(1)(b) of the *Environmental Management Act* 13 of 2002 guarantees the right of citizens to environmental information, which gives effect to section 62(1) of the *Constitution of Zimbabwe* as well as international and regional regulatory instruments such as the *United Nations Declaration on Environment and Development* of 1992 and *ACHPR*.[937] Section 4(2)(d) of the *Environmental Management Act* 13 of 2002 reinforces the requirement to ensure access to environmental information by advocating for environmental education, environmental awareness and the sharing of knowledge and experience which, by extension, increases the capacity of communities to address environmental issues.[938] In the context of mineral extraction, active involvement of the mine-host communities in environmental matters requires the provision of information regarding the impacts of the operations so that the communities will be able to make informed contributions. Consultations with the communities should be preceded by an adequate notice providing sufficient information about the purpose of the consultation. The communities should, during the consultation process, be given adequate details relating to the purpose of the consultations, procedures to be followed, their rights and intended outcomes in tandem with the idea of procedural justice discussed in chapter 2 above.

The *Environmental Management Act* 13 of 2002 also emphasises putting people and their needs at the forefront of environmental management concerns.[939] Consequently, the right of citizens to participate in environmental matters is recognised in section 4(1)(c) of the Act, which guarantees the right to:

> participate in the implementation of the promulgation of reasonable legislative policy and other measures that—(i) prevent pollution and environmental degradation; and (ii) secure ecologically sustainable management and use of natural resources while

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[937] Regarding access to information, section 62(1) of the *Constitution of Zimbabwe* provides that "every citizen and media have the right to access to any information held by the State or government at any level, in so far as the information is required in the interest of public accountability." See Principle 10 of the *United Nations Declaration on Environment and Development* of 1992 and A 24 of the ACHPR.

[938] See sections 50(1) and 52(2)(g)(h)(i) of the *Environmental Management Act* 13 of 2002, which empower the minister responsible for the environment to impose an environmental levy on any persons whose activities impact on the environment and then utilise the fund to promote public awareness of environmental management issues among other activities.

[939] Section 4(2)(b)(c) of the *Environmental Management Act* 13 of 2002.

promoting justifiable economic and social development.[940]

Further, section 4(2)(c) of the *Environmental Management Act* 13 of 2002 explains that actions by all persons and government agencies that significantly affect the environment should promote the participation of all interested and affected parties in environmental governance and give all affected people "an opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation."[941] The reference to actions by "persons" in section 4(2)(c) of the *Environmental Management Act* 13 of 2002 can be interpreted as referring to both natural and juristic persons, thus making the principles applicable to mining companies. Further, section 136 of the *Environmental Management Act* 13 of 2002 requires environmental authorities to observe rules of natural justice in the execution of their duties and "take all reasonable steps to ensure that every person whose interests are likely to be affected by the exercise of the function is given an adequate opportunity to make representations in the matter."

An opportunity for consultations with mine-host communities is presented during the preparation of a national environmental plan. Section 87(1)(a)(b) of the *Environmental Management Act* 13 of 2002 empowers the minister responsible for the environment to consult authorities, agencies and persons that he or she deems to be necessary or desirable and who have relevant evidence, information or advice. Where mine-host communities are not consulted during drafting, they could raise objections in terms of section 89 of the *Environmental Management Act* 13 of 2002 when the draft national environmental plan is eventually published for public comments.[942] Section 95 of the *Environmental Management Act* 13 of 2002 obliges authorities at a local level to prepare their own environmental action plans based on the national environmental plan. The local

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940 Section 4(1)(e) of the *Environmental Management Act* 13 of 2002 states that development must be socially, environmentally and economically sustainable and thus subjects all actions by all persons and government agencies affecting the environment to the international law principle of sustainable development. Economic development through mineral extraction should therefore be balanced with social and environmental development of the mine-host communities and the nation.

941 Section 4(2)(c) of the *Environmental Management Act* 13 of 2002.

942 Section 89(a)(b) of the *Environmental Management Act* 13 of 2002 obliges the Minister of Environment to invite the public through a notice published in the government gazette and newspapers with wide circulation to submit comments, representations and objections if any within a period of 30 days after giving notice. Section 90(1)(b)(ii) of the *Environmental Management Act* 13 of 2002 obliges the Minister of Environment to carry out further consultations after receiving representations and objection after which the plan should be completed and published in terms of section 91 of the *Environmental Management Act* 13 of 2002 and availed for inspection by the public, free of charge.

authority environmental action plans are also subjected to public representations at the local level before they are adopted and implemented.[943] This presents another platform for mine-host communities to raise environmental issues related to mining at a local level. However, the fact that the minister has a discretion regarding whom to consult does not aid mine-host communities if he or she considers it undesirable to consult the communities. Consultations with local communities should rather be mandatory, so that they will have the opportunity to raise environmental issues related to mining on their lands.

Mandatory EIAs present further opportunities for consultation and involvement of mine-host communities in mining-related environmental issues. Section 97(1) of the *Environmental Management Act* 13 of 2002, as read with paragraph 7 of the First Schedule to the Act, makes it mandatory for mining companies to conduct an EIA before the commencement of mining operations. Paragraph 7 of the first schedule of the *Environmental Management Act* 13 of 2002 specifically mentions mineral prospecting, extraction of the minerals, ore processing and concentrating and quarrying among projects that require a prior EIA.[944] Section 97(5) of the *Environmental Management Act* 13 of 2002 explicitly prohibits any licensing authority from issuing a licence under any enactment and in respect of a project that requires a prior EIA if an EIA report in respect of the project has not been considered and approved by the environmental management agency. The implication of this injunction is to prohibit the awarding of mineral rights before an applicant has conducted an EIA that must be approved by the Environmental Management Agency.

In the case of *Debshan (Pvt) Ltd v Provincial Mining Director-Matabeleland South Province and Others*,[945] the High Court of Zimbabwe relied on section 97(1) of the *Environmental Management Act* 13 of 2002 without reference to section 97(5) of the same Act when it

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943 Section 95(3)(a)(b) of the *Environmental Management Act* 13 of 2002. Information pertaining to the impacts of the mining operations on the community, land use, water and other natural resources should be availed to communities during the consultative meetings.

944 Section 97(2) of the *Environmental Management Act* 13 of 2002 penalises any persons who knowingly implement a project in contravention of the requirement for an EIA. EIA reports are according to section 108 of the *Environmental Management Act* 13 of 2002 open for public inspection.

945 *Debshan (Pvt) Ltd v Provincial Mining Director-Matabeleland South Province and Others* HCB 11/2017, 6.

found that the mining regulatory authorities were prohibited from issuing a prospecting and mining license before approval of an EIA. When considered, sections 97(1) of the *Environmental Management Act* 13 of 2002 does not prohibit the issuing of licences. Instead, section 97(1) prohibits the exercise of the rights deriving from the licenses before an EIA is conducted and approved. It merely prohibits implementation of the projects and not the issuing of the licenses. The same argument remains valid even if the issuing of the licenses potentially leads to the implementation of prospecting and mining projects. Therefore, the court in *Debshan (Pvt) Ltd v Provincial Mining Director-Matabeleland South Province and Others*[946] should have relied on section 97(5) of the *EMA,* which specifically prohibits licensing authorities, such as mining regulatory authorities, from issuing licenses before an EIA has been conducted and approved.[947]

Section 100(3) (c) of the *Environmental Management Act* 13 of 2002 provides that, when it comes to considering whether to approve a project to which an EIA report relates, the Environmental Management Agency "may consult any authority, organisation, community, agency or person which or who, in his opinion, has an interest in the project." In the context of mineral extraction projects, this provision does not make it mandatory for the Environmental Management Agency to consult mine-host communities before approving an EIA report, and this does not aid the communities. The drawback in the EIA requirements relates to the minister's discretion to either consult communities or not do so when approving an EIA report. It is apparent that an effective EIA process must aim at the

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946 *Debshan (Pvt) Ltd v Provincial Mining Director-Matabeleland South Province and Others* HCB 11/2017, 6.

947 Sections 97(1) and 97(5) of the *Environmental Management Act* 13 of 2002 raise some pertinent questions. The first turns on the interpretation of the phrase "projects which must not be implemented" in section 97(1) of the *Environmental Management Act* 13 of 2002. While the actual activity of prospecting and mining can be considered to be projects, the issuing of a prospecting license or mining license cannot by any stretch of the imagination be considered to be a project. The issuing of these licenses cannot on their own be deemed as implementation of a project, even though their issuance can lead to implementation of prospecting and mining activities. It seems therefore that section 97(1) does not seek to prohibit the issuing of prospecting or mining licenses but rather the exercise of the rights deriving from these licenses, that is, the actual activity of prospecting and mining. The second question turns on the practicality, in the Zimbabwean context, of conducting an EIA for the purpose of applying for a prospecting license. In Zimbabwe, prospecting licenses are not necessarily issued for a specific piece of land identified before the application for the license, which entails that the license can be issued even before the holder thereof has identified the piece of land on which they wish to prospect. This allows the holder to freely move from one place to another within the applicable mining province searching for minerals. Only when the prospector has found some minerals on a specific piece of land do they apply for a mining right. It is therefore only practical to require an EIA at the point of applying for a mining right rather than at the point of applying for a prospecting license.

provision of environmental information and meaningful consultation and involvement of the affected communities in the decision-making process.[948] Communities must be involved in the actual designing, planning, programming or reviewing of the EIA process. Affected communities must be involved throughout the decision-making process to ensure that they have an opportunity to influence the decision.

5.4.6 Water Act 31 of 1998

By vesting all water in the President, the *Water Act* 31 of 1998 has similarities with the *Mines and Minerals Act* 38 of 1961 and the *Communal Land Act* 20 of 1982, which also vest minerals and communal land in the President.[949] Section 4(1) of the *Water Act* 31 of 1998 provides that "no person shall be entitled to ownership of any water in Zimbabwe and no water shall be stored, abstracted, apportioned, controlled, diverted, used or in any way dealt with except in accordance with this Act." Prohibition of private ownership of water protects the rights of mine-host communities to access, use and conservation of water resources in communal areas from competing and adverse impacts posed by mining operations on the water resources. However, just like minerals and communal lands, vesting of all water in the President denies peoples their permanent sovereignty over their natural resources,[950] unless the President is understood to hold the water as trustee for the benefit of all the people of Zimbabwe and not as his or her personal property.

The *Water Act* 31 of 1998 recognises that mining operations require the abstraction of water from streams, rivers, dams and underground reservoirs within local communities and this poses the risk of pollution to the water sources.[951] Consequently, the process for

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948 The *ILO Governing Body, 282nd Session, November 2001, Presentation under A 24 of the ILO Constitution, Ecuador* GB.282/14/2 as cited in "Indigenous and Tribal Peoples' Rights in Practice – A guide to the ILO Convention No. 169, ILO Programme to Promote ILO Convention Non 169 (PRO 169), International Labour Standards Department 2009, 111 states that a mere information meeting does not satisfy the consultation requirements in the ILO Convention.

949 Section 3 of the *Water Act* 31 of 1998.

950 See para 1 of the *United Nation General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* of 1962; A 1(2) of the ICESCR and ICCPR; A 21(1) of the ACHPR.

951 Section 2 of the *Water Act* defines pollution in relation to water as meaning "(a) such contamination or other alteration of the biological chemical or physical properties of the water, including changes in colour, odour, taste, temperature or turbidity; or (b) such discharge of any gaseous, liquid, solid or other substances into any water or public stream; as will or is likely to create a nuisance or render the water, as the case may be, detrimental harmful or injurious to the health, safety or welfare of the public

application and issuance of permits for the use of water for mining purposes is specifically provided for in the *Water Act* 31 of 1998.[952] It also closely regulates the usage of ground water and other sources for primary purposes[953] and the equitable and efficient allocation with a view to various needs, including rural communities and mining.[954]

The need for the involvement of the local people, including mine-host communities, in decision-making processes involving water usage is recognised in the *Water Act* 31 of 1998 which resonates with the ideas of distributive and procedural justice discussed in chapter 2 of this study. The government is, therefore, required to encourage the participation of interested and affected peoples including those found in rural, mining and agricultural sectors as to the development, exploitation and distribution of water resources; it must furthermore ensure that underprivileged communities have access to water.[955] In particular, section 25(1) of the *Water Act* 31 of 1998 obliges a water authority (such as a catchment council) to ensure that, before they proceed to determine water-related matters submitted to them, they are satisfied that "all persons who, in its opinion, have an interest which is […] likely to be adversely affected by the determination have been duly notified of the proceedings." In terms of section 25(2)(a)(b) of the *Water Act* 31 of 1998*,* any interested and affected persons may, during the determination of any matter submitted to a catchment council, appear before that council and make presentations. Section 48(1) of the *Water Act* 31 of 1998 requires the minister responsible for water resources, when exercising the powers conferred on him or her, to have due regard to the interests of occupants of communal land. In terms of section 48(2) of the *Water Act* 31 of 1998, the minister responsible for the administration of communal land:

> may nominate any fit person to represent the interests of the occupants of any communal land before the catchment council on the hearing of (a) any matter affecting the water supply of the communal land; or (b) any claim for the grant of a servitude […] over any portion of communal land.[956]

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or any section thereof or any consumer or user of the water or any birds, fish or other aquatic ecosystems, livestock or wild life."

952 See section 34(1)(3)(4) and 46(2)(a)(b) of the *Water Act* 31 of 1998.

953 Section 5(a)(b) of the *Water Act* 31 of 1998*.*

954 Section 6(1)(c) of the *Water Act* 31 of 1998*.*

955 Section 6(2)(c)(d) of the *Water Act* 31 of 1998.

956 Section 49 of the *Water Act* 31 of 1998 requires the minister responsible for the administration of communal land to first approve decisions of a catchment council affecting water supply for primary

While the idea of representations as set out in section 48(2) of the *Water Act* 31 of 1998 is noble and aligns with the concept of procedural justice, the fact that the minister "may" nominate community representatives to attend hearings means that the requirement is not obligatory but rather discretionary, and therefore does not adequately protect the interests of affected communities. The fact that persons have to be nominated by the minister to represent the interests of local communities is not satisfactory. The requirement set in international and regional regulatory instruments[957] is for communities to be represented by their own people in accordance with their own customs and traditions and not be represented by government functionaries.

5.4.7 Administrative Justice Act 12 of 2004

The *Administrative Justice Act* 12 of 2004 was enacted to give effect to section 68 of the *Constitution of Zimbabwe*. Since the minister responsible for mines and mineral development is an administrative authority as defined in the *Administrative Justice Act* 12 of 2004,[958] the process of granting of mineral rights is an administrative action.[959] It follows that, other than regulation under the *Mines and Minerals Act* 38 of 1961, the granting of mineral rights should comply with the *Administrative Justice Act* 12 of 2004. Section 3(1)(a) of the *Administrative Justice Act* 12 of 2004 provides the following:

> An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations[960] of any person shall act- (a) lawfully, reasonably and in a fair manner.

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purposes of the occupants of any communal land. While this may appear to protect the local communities, the fact that the approval has to be granted by the minister without the involvement of the local communities excludes them from the decision-making processes affecting them.

957 See A 2(3), 18, 19 and 32(2) of the UNDRIP and A 5(2)(c) of UNDROP.

958 Section 2(1)(c) of the *Administrative Justice Act* 12 of 2004.

959 Section 2(1) of the *Administrative Justice Act* 12 of 2004 defines an "administrative action" as "any action taken or decision made by an administrative authority."

960 The notion of legitimate expectations was considered in the South African case of *Langeni and Others v Minister of Health Services* 1988 (4) SA 93 (W) but later enunciated and incorporated into South African law by *Administrator, Transvaal and Others* v *Traub* 1989 (4) SA 731 (A). The court in Traub stated that "the legitimate expectation principle, instead of insisting that an individual be affected in his liberty, property or existing rights before he may be heard in his own interest, lays down that an individual who can reasonably expect to acquire or retain some substantive benefit, advantage or privilege must be permitted a hearing before a decision affecting him is taken. The proper question to ask in any given case is therefore whether the person complaining is entitled to expect, in accordance with ordinary standards of fairness, that the rules of natural justice will be applied." Feltoe *A Guide to Administrative and Local Government Law in Zimbabwe*, 57 explains that the doctrine may therefore be applied even in

In the context of mineral extraction, the rights, interests and legitimate expectations of mine-host communities arise from their ancestral occupation of the land and the fact that they are the most affected by adverse environmental as well as socio-economic impacts of mineral extraction on the land. Consequently, an administrative decision or action such as the award of mineral rights followed by dispossession of communal lands taken without consultation or involvement of the communities, violates the requirement for the administrative authority to act lawfully, reasonably and in a fair manner.[961] In this way, the *Administrative Justice Act* 12 of 2004 provides much-needed legal foundations for mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit.

Section 3(2)(a)(b) of the *Administrative Justice Act* 12 of 2004 aligns with the notion of procedural justice set out in chapter 2 above. The section explains that, for administrative action to be said to have been taken fairly, those who have rights, interests or legitimate expectations that may be affected by the action should have been given:

> "(a) adequate notice of the nature and purpose of the proposed action (b) a reasonable opportunity to make adequate representations and (c) adequate notice of any right of review or appeal where applicable."

It follows, therefore, that the awarding of mineral rights on and dispossession of the lands of mine-host communities where an adequate notice with sufficient details was not given

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the absence of a pre-existing right. In *Taylor v Minister of Higher Education and Anor* 1996 (2) ZLR 772 (S) 333-334, the court held that the application of the legitimate expectation doctrine is not confined to situations where the person affected can show that there is an established practice to grant a hearing; it applies in any circumstances where there is a legitimate expectation that the person will be consulted before the decision is taken. The court pointed out that the doctrine of legitimate expectation simply extended the principle of natural justice beyond the prior established rule that a person was only entitled to a hearing if he could show that a prior existing right had been infringed by a quasi-judicial body. The concept of legitimate expectation as enunciated in Traub is recognised in Zimbabwean case law. See *PF-ZAPU v Minister of Justice* 1985 (1) ZLR 305 (S); *Public Service Commission v Tsomondo* 1988 (1) ZLR 427 (S); *Logan v Morris NO and Anor* 1990 (2) ZLR 65 (S); *Health Professions Council v McGown* 1994 (2) ZLR 329.

961 For instance, the notice periods given to the Shangaan people by *Statutory Instrument* 50 of 2021: *Communal Land (Setting Aside of Land) (Chiredzi) Notice*, 2021 (SI 50 of 2021) to immediately vacate their lands in Chilonga and the 150 days given to the Tonga and Nambya of Batoka in Hwange through *Statutory Instrument* 188 of 2020: *Communal Land (Setting Aside of Land) (Batoka Township) Notice*, 2020 do not satisfy the requirement for reasonableness and proportionality, especially in these cases involving rural communities and based on the state's constitutional and international law obligations. Giving notice of eviction without reference to alternative lands and compensation is also unreasonable.

is contrary to fair administrative decision making. Similarly, failure to provide mine-host communities with a reasonable opportunity to make representations through involvement in the decision-making process is contrary to fair administrative decision making. Such administrative decisions can be taken on review before the High Court by affected mine-host communities.[962] The High Court may (i) confirm or set aside the decision, (ii) refer the matter back to the administrative authority for reconsideration or (iii) give such directions as may be necessary or desirable to realise lawful, reasonable and fair administrative decision making.[963] When used in the context of mineral extraction on lands inhabited by mine-host communities, these provisions of the *Administrative Justice Act* 12 of 2004 align with the idea of remedial justice set out in chapter 2 above.

The downside of the *Administrative Justice Act* 12 of 2004 is that it also permits administrative authorities to depart from the requirements of acting lawfully, reasonably and fairly on the grounds that the decision or action was urgent and justifiable,[964] among other reasons, as stated in section 3(3) of the Act.[965] Authorities charged with the award and utilisation of mineral rights can be tempted to invoke section 3(3) of the *Administrative Justice Act* 12 of 2004 to the detriment of mine-host communities. It must be stated that no administrative action should be deemed urgent or justifiable to the

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962 Patel J in *Zindoga and Others v Minister of Public Service, Labour and Social Welfare and Another* 2006 (2) ZLR 10(H) at 13D-E stated that "it is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time-honoured precept of the common law embodied in the *audi alteram partem* rule and now codified in the *Administrative Justice Act* [Chapter 10:28]". See *Telecel Zimbabwe (Private) Limited v Postal and Telecommunications Regulatory Authority of Zimbabwe and Others*, HH/446/15 where Mathonsi J remarked that "the concept of administrative justice is now embedded in our Constitution. It provides the skeletal infrastructure within which official power of all sorts affecting individuals must be exercised."

963 Section 4(2)(a)(b)(e) of the *Administrative Justice Act* 12 of 2004.

964 The *PAJA,* discussed in 6.4.7 below*,* which is the comparable South Africa legislation does not have such exemptions.

965 Section 3 (3) of the *Administrative Justice Act* 12 of 2004 provides that:
An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if—
(a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
(b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including
(i) the objects of the applicable enactment or rule of common law;
(ii) the likely effect of its action;
(iii) the urgency of the matter or the urgency of acting thereon;
(iv) the need to promote efficient administration and good governance;
(v) the need to promote the public interest.

extent that compliance with the law ceases to matter. An illegal, unreasonable and unfair administrative action cannot be deemed to be in the public interest or good for efficient administration and governance. Neither is it desirable to exempt administrative authorities from providing reasons for their actions.[966] The exceptions permitted by section 3(3) of the *Administrative Justice Act* 12 of 2004 can therefore be challenged on constitutional grounds, as they contradict the administrative justice provisions of section 68 of the *Constitution of Zimbabwe*, among other provisions.[967]

5.4.8 Freedom of Information Act 1 of 2020

The *Freedom of Information Act* 1 of 2020 was enacted to give effect to sections 61 and 62 of the *Constitution of Zimbabwe*, which provides for freedom of expression and access to information.[968] Access to information is a key aspect when it comes to involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit. It is only through access to information that the communities can know of the proposed policy and legislative measures affecting them as well as any pending applications for mineral rights on their lands. Access to information such as EIAs and other reports enhances mine-host community awareness on issues dealing with harmful impacts of mining operations on them as well as the financial performance of the operations.

The definition of the term "entity" in section 2 of the *Freedom of Information Act* 1 of 2020 indicates the depth and extent of access to information envisaged by the Act. It is defined as a "private entity, public entity, public commercial entity or statutory office."[969] However, section 5 of the same Act only mentions public entities, public commercial entities and

966 See Feltoe 2004 11 *ZHRB* 106.

967 For instance, rule of law, fundamental human rights and freedoms, good governance, which includes transparency, justice, accountability and responsiveness, are listed as founding values and principles in section 3 of the *Constitution of Zimbabwe*.

968 Section 3(a) of the *Freedom of Information Act* 1 of 2020 states as one of its objectives "to give effect to the right of access to information in accordance with the Constitution." Section 62(1) of the *Constitution of Zimbabwe* provides that "every Zimbabwean citizen or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the State or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability."

969 Section 2 of the *Freedom of Information Act* 1 of 2020 further defines "private entity" to mean "an entity other than a public entity, public commercial entity or statutory office" while "public commercial entity" is defined to mean "a company or other commercial entity which is owned or controlled by the State or by a person on behalf of the State".

holders of statutory offices as having a legal duty to disclose information "in the interests of public accountability or that is required for the exercise or protection of a right." Public entities, public commercial entities and holders of statutory offices comprise, among others, government ministries and departments, local authorities, state-owned enterprises and parastatals. Section 19 of the *Freedom of Information Act* 1 of 2020 says that the Act does not prevent or discourage any entity from publishing or giving access to information where they can properly do so or where they are required to do so by law. Neither does it compel or encourage the entities to publish or give access to information. When analysed, the net effect of not mentioning private entities in section 5 of the *Freedom of Information Act* 1 of 2020 and not compelling any entities to publish or give access to information, as found in section 19 of the Act, is that private enterprises such as mining companies do not have a duty to disclose or give access to information. Mining companies can therefore publish or give access to information if they so wish or if they are required by some other law to do so. This legislative status does not promote access to information by mine-host communities, which would have enhanced their involvement in and benefit accrual from mineral extraction on the lands they inhabit. It could have been valuable if the *Freedom of Information Act* 1 of 2020 compelled access to information held by both public and private entities.

A person wishing to access information from public entities, public commercial entities and holders of statutory offices is required, in terms of section 7 of the *Freedom of Information Act* 1 of 2020, to submit a written request for the information and, if the request is approved, access should be granted within 21 days of the request.[970] Section 20 of the *Freedom of Information Act* 1 of 2020 provides that an entity may refuse to grant access to information only if the information falls within an exemption provided in the Act. One such exemption is disclosure of certain third-party information such as that provided by mining companies and held by the government.[971] Such information is exempted from disclosure by the government if it contains one or more of the following items:[972]

a) trade secrets of a (the) third party; or

[970] Section 8(1)(c) of the *Freedom of Information Act* 1 of 2020.
[971] Section 6(a)(b) of the *Freedom of Information Act* 1 of 2020.
[972] Section 22(1)(a)b)(c)(i)(ii) of the *Freedom of Information Act* 1 of 2020.

b) financial, commercial, scientific or technical information that is proprietary to a (the) third party, and the disclosure of which would be likely to cause harm to the commercial or financial interests of that third party; or

c) information supplied in confidence by a (the) third party the disclosure of which could reasonably be expected—
   (i) to put that (the) third party at a disadvantage in contractual or other negotiations; or
   (ii) to prejudice that (the) third party in commercial competition.

Section 22(2) of the *Freedom of Information Act* 1 of 2020 provides similar exemptions, where a request for access to information is directed to a private entity, thereby protecting its own information and information provided by third parties to the private entity.[973] It must be pointed out that the exemptions are so broad to the extent that it is difficult to come up with any information that would be useful to mine-host communities that is not exempted from disclosure. Where mine-host communities insist that government must disclose information provided by a third party such as a mining company, the information will remain exempt from disclosure until any right granted in terms of section 38 of the *Freedom of Information Act* 1 of 2020 to the third party (mining company) to "appeal the release of the information has expired or until any appeal lodged by the third party has been finally determined."[974]

It is important to point out that the restrictions to access information held by the government, as discussed above, do not apply where the requested information is already publicly available; the third party has consented to its disclosure to the applicant and the disclosure of the information would facilitate accountability and transparency of decisions taken by an entity.[975] However, the government is still allowed to refuse disclosure if the information consists of preliminary results of tests, research or investigations of misconduct or deception.[976] This entails that information provided by mining companies to the government is not automatically available for access by mine-host communities. The complicated process to obtain access to information pertaining to mining operations on lands inhabited by mine-host communities limits the involvement in and benefit accrual by those communities from mineral extraction on their lands. The legal framework should

973 Section 22(2)(a)b)(c)(i)(ii) of the *Freedom of Information Act* 1 of 2020.
974 Section 8(7) of the *Freedom of Information Act* 1 of 2020.
975 Section 22(3)(a)b)(c)(d) of the *Freedom of Information Act* 1 of 2020.
976 Section 22(3)(e) of the *Freedom of Information Act* 1 of 2020.

ensure simplified processes and requirements for access to information by mine-host communities in plain language that would be accessible for the communities. Ensuring that mine-host communities understand the mining industry through access to information facilitates their active participation and development of realistic expectations in terms of benefit accrual.

5.5 Concluding remarks on the Zimbabwean constitutional, policy and legislative framework for mine-host community involvement and benefit accrual from mineral extraction

Chapter 5 set out to determine how the requirements in international and regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction, as discussed in chapters 3 and 4, are attained in the Zimbabwean constitutional, policy and legislative frameworks. The chapter established that the requirements are realised through provisions in the *Constitution of Zimbabwe* which guarantee, *inter alia*, the right of citizens to shelter and property, the right not to be arbitrarily evicted, the right to environment and the right to access to information and administrative justice. Significantly, the *Constitution of Zimbabwe* recognises and seeks to empower marginalised communities through equitable development and sharing of national resources. For the constitutional provisions to have an impact at grassroots level, they require implementation through appropriate policy and legislative measures.

It must be pointed out that while some requirements are present, Zimbabwe's policy and legislative frameworks are largely inconsistent with international and regional regulatory instruments that pertain to mine-host community involvement in and benefit accrual from mineral extraction on their lands. Given this scenario, there is little that mine-host communities can utilise in the legislative provisions to underpin claims for involvement in and benefit accrual from mineral extraction on the lands they inhabit. Significantly, the government of Zimbabwe has essentially diluted the legislative provisions pertaining indigenisation that had the potential to empower mine-host communities through

community share ownership schemes in mining operations on the lands they inhabit.[977]

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Within the legislative framework, the *Environmental Management Act* 13 of 2002 and the *Administrative Justice Act* 12 of 2004 are the two statutes that contain provisions most consistent with international and regional regulatory instruments that promote mine-host community involvement in and benefit accrual from mineral extraction on their lands. With regard to the *Environmental Management Act* 13 of 2002, the provisions include the prohibition of mineral extraction projects without a prior approved environmental impact assessment, fostering the sustainable use of natural resources and putting the needs of people at the centre of environmental and developmental decisions. The *Administrative Justice Act* 12 of 2004 requires administrative authorities such as those responsible for award of mineral rights in Zimbabwe which affect the rights, interests or legitimate expectations of other people such as mine-host communities, to act lawfully, reasonably and in a fair manner. The downside of the *Administrative Justice Act* 12 of 2004 is that it also permits administrative authorities in section 3(3) to depart from the requirements of acting lawfully, reasonably and fairly on the grounds that the decision or action was urgent and justifiable among other reasons. Mining authorities may therefore invoke section 3(3) of the *Administrative Justice Act* 12 of 2004 to justify unlawful, unreasonable and unfair practices to the detriment of mine-host communities.

The *Mines and Minerals Act* 38 of 1961 was not crafted to facilitate mine-host community involvement in and benefit accrual from mineral extraction on their lands. The adverse provisions of the Act become even more acute when considered together with the *Communal Land Act* 20 of 1982 and the *Water Act* 31 of 1998. The *Mines and Minerals Act* 38 of 1961 vests ownership of minerals in the President not the people of Zimbabwe. In turn, the *Communal Land Act* 20 of 1982 and *Water Act* 31 of 1998 vest communal land and all water in the President, respectively. The recommendation by the Rukuni Land Tenure Commission of 1993 which advised the state to relinquish communal land to

[977] See section 42(1)(c) of the *Finance Act* 1 of 2018. See also the Commercial Farmers Union of Zimbabwe www.cfuzim.com/2020/09/23/indigenisation-law-ill-conceived-zanu-pf, quoting the media briefing of 22 September 2020 by Patrick Chinamasa (ruling party, ZANU-PF's spokesperson), where it is indicated that former President Mugabe's indigenisation law and policy was ill conceived, that it was only meant for political expediency and that the government of the day was in its rights in discarding such law and policy.

traditional rural communities was ignored by the government of Zimbabwe. This *status quo* weakens the claim of the people Zimbabwe to permanent sovereignty over their natural resources, and this contradicts key international and regional regulatory instruments such as the ICCPR, ICESCR and the *African Charter on Human and People's Rights*.

The chapter established that the notice and consultations provided in *the Mines and Minerals Act* 38 of 1961 are inappropriate and inadequate in many respects. For instance, when it comes to prospecting on communal lands and relating to ordinary mine rights, only Rural District Councils are given notice as landowners representing the President. Mine-host communities are considered mere occupiers and are therefore not notified except where the applicant is applying for a mining lease, special mining lease and an exclusive prospecting right which require that notice be given to members of the public, landowner and occupier.[978] Where consultations happen, they are often conducted at a high-level involving district administrators and traditional leaders and not members of mine-host communities. Without a clear legal provision in the *Mines and Minerals Act* 38 of 1961 that all members of mine-host communities are entitled to be consulted, the right is not realised. Even those opportunities given for the affected people are ineffective because of the short period of 30 days within which they have to lodge their objections. In addition, the current methods for providing notices to mine-host communities, that is, local newspapers and government gazette are inadequate and not suitable since the communities rarely see them. This makes the 30-day period for comments and objections impossible to attain. Mine-host communities are expected to submit their comments and objections if any without proper consultation and information contained in the applications themselves. When it comes to ordinary mining rights, section 38(7) of the *Mines and Minerals Act* 38 of 1961 even condones failure to follow procedure during pegging of mines such that a mine that is pegged and registered without notice to the Rural District Council in this respect, shall not be set aside.

It was also established that the requirement for consultation and to obtain the consent of the landowner or the occupier is limited to instances where the mine is to be located

[978] See section 138 of the *Mines and Minerals Act* 38 of 1961.

within a portion of communal land whose extent does not exceed 100 hectares, or within communal land occupied as a village. The *Mines and Minerals Act* 38 of 1961 does not mention that this consent must be free, prior and informed. It can therefore be obtained by force and without disclosure of sufficient information that enables the community to accept the mining project knowingly and voluntarily. Added to this, compensation provisions of the *Mines and Minerals Act* 38 of 1961 provide compensation payable to landowners only and thus excludes mine-host communities who are mere occupiers.

The study established that while the *Indigenisation and Economic Empowerment Act* 14 of 2007 is a potent instrument for mine-host community involvement in and benefit accrual from mineral extraction on their lands, it has been watered down such that empowerment targets can be attained without the participation or accrual of benefits to mine-host communities. This hampers the involvement and benefit accrual by mine-host communities from mineral extraction on their lands.

This chapter demonstrated that free, prior and informed consent is not enshrined in the Zimbabwean policy and legislative frameworks. This gap and the exclusive ownership of all rural communal land in Zimbabwe by the state is the root cause of the suffering experienced by mine-host communities who do not have much say when it comes to land use management. It must be stated that this lack of landownership by mine-host communities does not take away their other rights and entitlements, such as the right not to be deprived of their means of subsistence and to an environment not harmful to health and well-being that are emphasised in international and regional regulatory instruments. It is therefore pertinent to look to international and regional regulatory instruments and South Africa which has a similar historical background, for guidance around the Zimbabwean instruments. Chapter 6 discusses the South African constitutional, policy and legislative frameworks for purposes of comparing and drawing some lessons for Zimbabwe as to how South Africa is adopting and realising the principles of distributive justice, procedural justice and remedial justice as well as requirements set out in international and regional regulatory instruments directed at mine-host community involvement in and benefit accrual from mineral extraction on their lands.

CHAPTER 6

REVIEW OF THE SOUTH AFRICAN CONSTITUTIONAL, POLICY AND LEGISLATIVE FRAMEWORKS

6.1 Introduction

Chapter 6 discusses the South African constitutional, policy and legislative frameworks centred on involvement and benefit accrual by mine-host communities from mineral extraction. Through a comparative analysis the chapter identifies key similarities and differences between the South African and Zimbabwean frameworks. From this, some lessons that Zimbabwe may utilise in reforming its own frameworks are extracted. South Africa is considered to be a suitable benchmark because of the common background it shares with Zimbabwe, that is, colonisation, segregation and dispossession of black people of their land and minerals, which were meant to ensure that blacks become providers of labour only and not participants in ownership of the means of production. The colonial governments in the two countries utilised similar prejudicial policies and regulatory instruments[979] for expropriating land and minerals on those lands from the black populations. The democratic post-colonial governments in both countries aim to redress past injustices and ensure equitable access to mineral resources through constitutional, policy, legislative and other measures premised on the ideas of distributive justice, procedural justice and remedial justice. It is imperative to determine, in the context of this study, how the aspirations of the local communities who suffered the unjust dispossession of their lands and mineral resources in the two countries are now being accommodated.

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[979] The common law principle of *cuius est solum, eius est usque ad coelum et ad inferos* effectively alienated blacks from access to minerals after losing their lands to the white minority. Samantha 2014 44 *ENVTL.L.REP.NEWS AND ANALYSIS* 10310, 10313 interpreted the *cuius est solum* principle to mean "whoever owns the soil, it is theirs all the way up to Heaven and down to Hell." The case of *Union Government v Marais and Others* 1920 AD 240, 246 upheld the *cuius est solum* principle and asserted that "the owner of land is owner not only of the surface but of everything legally adherent thereto, and also of everything contained in the soil below the surface." With respect to South Africa, some of the key land dispossession and segregation legislation include the *Natives Land Act* 27 of 1913, *Native Trust and Land Act* 18 of 1936, *Natives Resettlement Act* 19 of 1954 and the *Black Communities Development Act* 4 of 1984.

It must be noted that the quest for national economic development in the aftermath of the liberation struggles has seen more extractive development projects especially on communal lands leading to development-induced dispossessions and displacements in both Zimbabwe and South Africa. Consequently, Zimbabwe can draw lessons from South Africa on how to respond to this new challenge. Lessons are required especially on how to balance national economic development through mineral extraction on the one hand and respect for human rights, including the socio-economic development of the mine-host communities, on the other. Legal principles centred on involvement and benefit accrual by mine-host communities that have been developed in South Africa will likely influence the views of the Zimbabwean courts when called upon to determine similar matters. South Africa also has persuasive judicial precedence pertaining to involvement and benefit accrual by mine-host communities from mineral extraction that Zimbabwe can draw lessons from.[980] Section 46(1)(c)(e) of the *Constitution of Zimbabwe* particularly mandates the courts to consider or have regard to foreign and international law when interpreting the declaration of rights.

6.2 South African constitutional framework

6.2.1 Introduction

The 1955 Freedom Charter of South Africa declared that, on the attainment of freedom, mineral resources will be returned to their rightful owners, the people of South Africa as a whole.[981] The apartheid regime had successfully stifled access to mineral resources by the

[980] The persuasive judicial precedents include *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* [1999] 1 ALL SA 2004 (T); *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC); *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC); *Bengwenyama Minerals (Pty) Ltd and Others v Minister for Mineral Resources and Others* [2014] 4 ALL SA 539 (SCA); *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* [2015] 1 ALL SA 261 (SCA); *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC); *Baleni and Others v Minister of Mineral Resources* 2019 (2) SA 453 (GP); *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP).

[981] See the Freedom Charter Adopted at the Congress of the People at Kliptown, Johannesburg on June 25 and 26 1955, Collection number AD 1137, 2013 *Historical Papers Research Archive, Johannesburg*.

majority of South Africans through exclusionary landownership.[982] Since the ownership of minerals was coupled to ownership of land, and landowners were permitted to sell rights to unsevered minerals on their land to third parties, the resulting skewed mineral rights regime, just like landownership, contributed to unequal distribution of wealth in South Africa.[983] The *Constitution of South Africa* of 1996 acknowledges these past injustices and list four objectives for adopting the *Constitution*, that is, healing past divisions, improving the quality of life of all citizens, establishing a society based on democratic values, social justice, fundamental human rights and equal protection of every citizen by law.[984] Consequently, the achievement of equality and promotion of human rights and freedoms are foundational values of the Republic of South Africa.[985]

Substantive and procedural rights provided in the *Constitution of South Africa* that apply to involvement and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit include the right to equality, coupled with a state duty to promote broad-based socio-economic empowerment;[986] human dignity;[987] an environment that is

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982 See *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 1 where the court indicated that "the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty." In *Mashavha v President of the Republic of South Africa and Others* 2005 (2) SA 476 (CC) para 51, the Constitutional Court of South Africa explained as follows: "Our history is well known. It is one of colonisation, apartheid, economic exploitation, migrant labour, oppression and balkanisation. Gross inequalities were deliberately and legally imposed as far as race and geographical areas are concerned." See also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 SA 744 (CC) paras 5-7.

983 Van der Schyff 2012 64 *New Contree* 13.

984 Preamble to the *Constitution of South Africa*.

985 Section 1(a) of the *Constitution of South Africa*. Section 2 of the *Constitution of South Africa* says that the constitution is the supreme law, obligations it imposes must be fulfilled and any legislation or conduct that contradicts it is invalid. The state's obligation to respect, protect, promote and fulfill fundamental human rights and freedoms which is a key principle of international law is recognised in section 7(2) of the *Constitution of South Africa*. In terms of section 8(1) of the *Constitution*, the Bill of Rights in the constitution binds the state and all state organs while section 8(2) extends the binding effect to all persons whether natural or juristic if and to the extent that it is applicable. Binding juristic persons, in this case mining companies, to give effect to the Bill of Rights is an effective tool for ensuring the realisation of the socio-economic rights of mine-host communities through involvement in and benefit accrual from mineral extraction on the lands they inhabit.

986 Section 9 of the *Constitution of South Africa*. The equality clause contains connotations of a substantive, interventionist and redistributive, transformative idea of equality which advocates equalisation of power and wealth. The court is *Khosa v Minister of Social Development: Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC) para 74 explains that "decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society."

not harmful to health and well-being;[988] land restitution;[989] access to information[990] and just administrative action.[991]

The current section examines these key constitutional rights and obligations, while sections 6.3 and 6.4 below discuss the constitutional objectives, rights and obligations entrenched in the South African policy and legislative frameworks relevant to mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit.

6.2.2 Equality and empowerment of historically disadvantaged persons

Equality,[992] is an inextricable element of social justice discussed in chapter 2 of this study.[993] The *Constitution of South Africa* identifies equality in as both a constitutional

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987 Section 10 of the *Constitution of South Africa*. The concept of dignity does not only involve protection from harm to personal rights but also from forms of domination, marginalisation and material disadvantage. Dignity should be seen as embracing claims for participation in decision-making on matters that impact people's livelihoods. Denial of involvement and benefit accrual from mineral extraction on their lands affects the dignity of mine-host communities in material respects such that it must be considered to be a denial of dignity and equality.

988 Section 24 of the *Constitution of South Africa*. Of note is the obligation to protect the environment and attainment of "ecologically sustainable development and use of natural resources" while promoting "justifiable economic and social development." De Wet and Du Plessis 2010 10(2) *AHRLJ* 363 state that the term health "seems to refer to protection against environmental conditions that would negatively affect human health, such as excessive air and water pollution and exposure to toxic substances. Well-being seems to refer to environmental conditions that are not necessarily harmful to human health but that may otherwise negatively affect the interests that people hold in the environment, such as…the spiritual or religious value attached to a sacred forest."

989 Section 25 of the *Constitution of South Africa*.

990 Section 32 of the *Constitution of South Africa*.

991 Section 33 of the *Constitution of South Africa*.

992 Equality is guaranteed in regional and international regulatory instruments. See A 7 of the UDHR and A 3 of the *African Charter on Human and Peoples' Rights*.

993 Social justice and equality are prominent themes in the *Constitution of South Africa*. Social justice is recognised and entrenched through, *inter alia,* the right to equality and corrective action to address historical inequalities and injustices through affirmative action (section 9), human dignity (section 10) and just administrative action (section 33). The South African courts also endorse the notion of social justice. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 1, where it is stated that the "people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone." In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 25, the Constitutional Court of South Africa states that, of course, "democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework." See also *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) paras 21-22 where Langa DP stated that the "Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the

value and a right.[994] Therefore, the state is required to promote the attainment of equality through legislative and other measures aimed at protecting or advancing persons or categories of such persons who were disadvantaged by unfair discrimination.[995] Section 9(1)(2) of the *Constitution of South Africa* states the following:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;[996]
> (2) Equality includes the full and equal enjoyment of all rights and freedoms.[997] To

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democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

994 See section 9 of the *Constitution of South Africa*. The Constitutional Court of South Africa in *Fraser v Children's Court Pretoria North and Others* 1997 (2) SA 218 (CC) para 20 states that "there is no doubt that the guarantee of equality lies at the very heart of the Constitution." The right to equality has both distributive and remedial effects. It is remedial in supporting restitution and compensation to redress past wrongs, inequalities and disadvantage. It is re-distributive by guaranteeing equal access to means of production and equal access to benefits derived from natural resources and wealth.

995 The endeavour to redress historical and racial inequalities in South Africa is emphasised in other legislative instruments other than the MPRDA. See sections 2(j), 18(5) and 31(1) of the *Marine Living Resources Act* 18 of 1998. Section 2(j) states that the Act seeks to "restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry." See also preamble and chapters 4 and 5 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 84, Ngcobo J states that section 2(j) of the *Marine Living Resources Act* 18 of 1998 has both a "remedial and prophylactic effect. It is remedial in that it eradicates the effects of past discrimination. It is prophylactic in that it prevents the Minister's decisions, which are non-discriminatory on their face, from reinforcing and perpetuating the exclusionary effects of past discrimination."

996 The case of *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) explains this provision to mean that the same laws should be applied equally to all persons, and no one should be denied the protection of the law. In his separate supporting judgment in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) para 83, Ngcobo J observed in the context of the fishing industry that the equal protection and benefit of law entails addressing historical imbalances and attainment of equity. Dlamini 2002 27 (2) *JJS* 16 commented that equality before the law demands equality of process, "which requires that persons be equally represented on the legislative bodies and that each person is granted equal concern and respect when the law is formulated or applied. Equal protection of the law encompasses laws which give benefits and prohibit people being subordinated by or disadvantaged through the law." The argument is that equality before the law does not begin after the promulgation of the law but before and during its formulation and application. This is a key finding for mine-host communities that have often suffered due to prejudicial laws pertaining to the award of mineral rights which are formulated without consultation and their concerns being heard and then applied without due regard to their adverse effects on the communities.

997 Section 9(2) of the *Constitution of South Africa* has been interpreted as remedial and restitutionary equality. The Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 61, 67 states that the requirement to take legislative and other measures designed to protect or advance those disadvantaged by unfair discrimination, envisages remedial equality. In the context of mineral extraction, the MPRDA and Mining Charters are the legislative and other measures designed to ensure remedial and restitutionary equality as envisaged in section 9(2) of the *Constitution of South Africa*.

> promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.[998]

Dlamini explains that this equality clause seeks to establish an egalitarian society in which all South Africans are treated with dignity and self-worth.[999] The right is accorded to "everyone," thus including the country's indigenous peoples and rural communities faced with mineral extraction on their lands.[1000] It means that no group of people can be excluded from enjoying the right to equality. Section 9(1) of the *Constitution of South Africa* resonates with formal equality where citizens are accorded the same treatment, as based on the Aristotelian conception of equality discussed in chapter 2 of this study, which emphasises that like cases be treated alike.[1001] The equality clause in section 9(2) of the *Constitution of South Africa* is formulated on the basis of the notion of substantive equality,[1002] which seeks to overcome and address structural, social and economic inequalities through material equality,[1003] in contrast with formal equality.[1004] To attain

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998 Liebenberg and Goldblatt 2007 23 *SAJHR* 342 explain that the right to equality in section 9(2) of the *Constitution of South Africa* is the bedrock for the enjoyment of other rights. Therefore, the existence of equality is seen through the full and equal enjoyment of other rights which, in the context of mineral extraction, includes equal access to mineral resources or benefits thereof, involvement and public participation in decision making. The right to equality is violated when some groups are made to bear disproportionate burdens or lack equal access to natural resources. According to Albertyn and Goldblatt 1998 14 *SAJHR* 249, equality requires the "eradication of systemic forms of domination and material disadvantage … towards the development of opportunities which allow people to realise their full human potential within positive social relationships."

999 Dlamini 2002 27 (1) *JJS* 14.

1000 De Wet and Du Plessis 2010 10(2) *AHRLJ* 369 explain that "the protection of the way of life of indigenous people as a manifestation of their culture requires a limitation of the economic exploitation of their natural habitat, the prevention of pollution of their environment, as well as the eradication of the consequences of such pollution."

1001 See Okharedia 2005 6(2) *Phronimon* 12.

1002 See *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) 16 paras 16, 60-61, where the court explains that although substantive equality is not expressly stated in the Constitution of South Africa, the expression entails that merely having statutory provisions eliminating unfair discrimination is not sufficient. This is because discriminations of the past are so rooted in the South African society and require remediation through the enactment of tangible equality, hence the remedial and restitutory measures recognised in section 9 of the *Constitution of South Africa*. See also *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

1003 Zongwe 2016 31 (1) *SAPL* 38 states that substantive equality is a heavier conception of equality that is "concerned with the impact of laws or policies on groups already suffering social, political or economic disadvantage; accommodating peoples' differences; recognising diversity; eliminating social barriers and helping to achieve an equal distribution of social goods. According to that view, the results of a given rule weigh far more than its mere form."

1004 In *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1999 (1) SA 6 (CC) 16 the Constitutional Court of South Africa stated that section 9 of the Constitution does not "envisage a passive or purely negative concept of equality; quite the contrary." The substantive notion of equality manifest in the provisions on redressing the wrongs of the past.

equality, the notion of substantive equality would require redistribution of wealth to those deprived and dispossessed, so that their lives are materially raised to a level equal to those previously privileged by colonialism and apartheid.[1005] Therefore, unlike formal equality, which is concerned with process, recognition and accountability, including equal concern, respect and meeting of basic needs, substantive equality is transformative and concerned with substance, that is, redistribution, redress of historical wrongs and eradication of actual real-life socio-economic inequalities.[1006] This is a far-reaching perspective of equality that seeks the transfer of means of production to the people and redistribution of costs and benefits, for instance, of mineral extraction on lands of mine-host communities in line the with the ideas distributive justice, procedural justice and remedial justice examined in chapter 2 above. When considered in the context of mineral extraction, equality requires that no group of people must be made to bear a disproportionate share of the burdens of extraction of mineral resources. Equality would also require that those most affected by mineral extraction receive a greater share of the rewards of such operations on their lands. Consequently, denying mine-host communities' involvement in decision-making in matters affecting them and denial of a share in the rewards of mineral extraction in proportion to the harms they suffer, is a manifestation of an unequal and unjust political, legal and socio-economic system.

Various distributive justice, procedural justice and remedial justice tools connected to the constitutional right to equality can be identified. It is apparent that the deliberate protection and promotion of mine-host communities through the preferent community

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[1005] Formal equality does not bring equality when considered in the socio-economic context involving land and mineral rights, because not all people are on the same socio-economic level. In the context of land and mineral rights, redistributive interventions should be used to attain equality. In the case of the *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 112 O'Reagan J exclaimed, "insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality."

[1006] See Albertyn 2018 34 (3) *SAJHR* 442, 456-457. Albertyn explains that substantive equality recognises that equality is not the same as a formal requirement of equal treatment. Thus, when observed, it should be realised that, unlike formal equality, substantive equality goes further by demanding concern and reversal of the actual adverse impacts or results of existing socio-economic class structures, eradication of disadvantage, impoverishment and subordination. Formal equality, instead, retains existing socio-economic class structures by treating all people as equal, thus not intervening to fundamentally dismantle the dominant and entrenched socio-economic *status quo* brought by colonialism and apartheid.

prospecting rights[1007] is a product of section 9(2) of the *Constitution of South Africa*.[1008] The same can be said regarding restoration of lands through the *Restitution of Land Rights Act* 22 of 1994 *(RLRA)* to those communities dispossessed by the apartheid regime as well as protection of informal land rights holders by the *Interim Protection of Informal Land Rights Act* 31 of 1996 *(IPILRA)* to be discussed in sections 6.4.4 and 6.4.5 below. Advancement of the black population through the *Broad-Based Black Economic Empowerment Act* 53 of 2003 *(BBBEEA)*, the mining charter for the minerals and mining industry and social and labour plans to be discussed in section 6.4.3 below have also been instrumental towards the realisation of the obligations imposed on the state by section 9(2) of the *Constitution of South Africa*. It must be pointed out that although an equality clause is embedded in section 56 of the *Constitution of Zimbabwe*, the country's legal frameworks do not have tools in the same form as preferent community prospecting rights or restitution of the land ownership rights of rural local communities, among others. These regulatory instruments emanating from the right to equality in the South African legal system, can be adopted by Zimbabwe with appropriate modifications to suit the local social context.

6.2.3 Right to environment

The right to environment consists of two parts: the first is the right conferred on everyone in section 24(a) of the *Constitution of South Africa* "to an environment that is not harmful to their health or well-being." The second is defined in terms of section 24(b) of the *Constitution of South Africa*, which guarantees everyone the right to:

> have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[1007] See section 104 of the MPRDA which is discussed in 5.4.1. Unlike substantive equality embed in section 9(2) of *the Constitution of South Africa*, formal equality accords similar and non-preferential treatment as it assumes that all people are at the same level and ignores the actual social and economic disparities. The effect of formal equality is to reinforce rather than eradicate inequalities.

[1008] Exclusion from decision making and denial of rewards of mineral extraction are some of the structural determinants of inequality in the context of mineral extraction on lands inhabited by mine-host communities.

Du Plessis explains that, while section 24 of the *Constitution of South Africa* is a people-centred environmental right, clarifying the meaning of the terms environment,[1009] health, well-being and sustainable development[1010] brings a better understating of the actual entitlements that accrue to vulnerable people in terms of this right.[1011] Health is considered by the World Health Organisation to embrace not only the absence of disease but also physical, mental and social well-being.[1012] Pollution and exposure to hazardous substances impact people's state of health, because human health is intimately linked to the state of their environment.[1013] The purpose of section 24 of the *Constitution of South Africa* is, therefore, to ensure that the environment where people live does not become harmful to their physical and mental health. The term "well-being" is generally identified with people's welfare, quality of life,[1014] "a good or satisfactory condition of existence [and] a state characterised by health, happiness and prosperity."[1015] Well-being is

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1009 Section 1(1)(xi) of the *NEMA* defines the term environment as follows:
"environment" means the surroundings within which humans exist and that are made up of
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing;

1010 Du Plessis 2011 27 *SAJHR* 296 explains that the well-being of people includes enjoyment of a sustainable livelihood. The international law concept of sustainable development is incorporated in section 24(iii) of the *Constitution of South Africa* as a component of the notion of well-being. Section 24(4)(ii) then permits the exploitation of natural resources such as minerals to promote justifiable social and economic development that caters for both the present and future generations. Mineral extraction promotes socio-economic development if the minerals are used to transform the lives of the people for the better and not for the worse.

1011 Du Plessis 2011 27 *SAJHR* 292.

1012 Saracci 1997 314 *BMJ* 1409.

1013 Du Plessis 2018 34(2) *SAJHR* 199. See *Minister of Health and Welfare v Woodcarb (Pty)* 1996 (3) SA 155 (N) which affirms that the right to health and well-being is infringed when people are subjected to air pollution through industrial activity. See the case of Trustees for the time being of *Groundwork Trust and Another v Minister of Environmental Affairs and Others* 2022 ZAGPPHC 2.

1014 Donald 2020 31(1) *Stell LR* 72.

1015 Du Plessis 2018 34(2) *SAJHR* 193. In *HTF Developers v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 18 the court explained that although "well-being" is open-ended and manifestly […] incapable of precise definition," it is important to clarify its meaning to enable environmental authorities to understand their constitutional obligations. In *Fuel Retailers Association of Southern Africa v Director-General –Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 44 the court associated well-being with socio-economic development as recognised in the *United Nations Declaration on the Right to Development*, GA Res 41/128, UN Doc A41/128 (1986), which defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population." In this sense, well-being encompasses people's capacity to attain socio-economic development such that derailment of such capacity entails harm to their well-being. The case of *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC) para 63 associates people's health and well-being with restoration of their lands. In the case of *Kloof Conservancy v Government of the*

dependent on the environment where people live and is connected to their social, spiritual, cultural and economic interests or attachments.[1016] That the spiritual, cultural or psychological attachment that people have with their land and environments is a constituent component of their well-being is well recognised.[1017] It follows, therefore, that forced relocations of mine-host communities from natural habitats and ancestral lands and living in degraded or contaminated environments are harmful to their well-being.[1018] Poverty also impacts the well-being of a community. Shelton[1019] explains that "poverty is not merely about income and wealth but encompasses the capability of an individual or group to access the various elements that contribute to well-being." In the context of mineral extraction, decisions that restrict the accrual of benefits by mine-host communities from mineral extraction on their lands are harmful to their well-being in that they contribute to growing conditions of poverty for them. Well-being must therefore be interpreted in a way that includes considerations for the alleviation of disproportionate burdens and ensuring benefit accrual by mine-host communities.

When section 24 is read with section 7(2) of the *Constitution of South Africa* pertaining to the state's duty to respect, protect and fulfil the rights set out in the Bill of Rights,[1020] it

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Republic of South Africa and Others ZAKZDHC 22-10-2014 para 116 health and well-being are associated with protection of biodiversity and natural ecosystems. Glazewski *Environmental Law in South Africa* Butterworths, 2000, 86 explains that the term well-being "encompass the essence of environmental concern, namely a sense of environmental integrity; a sense that we ought to utilise the environment in a morally responsible and ethical manner."

[1016] See Donald 2020 31(1) *Stell LR* 67; Du Plessis 2011 27 *SAJHR* 295; Du Plessis *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* 2009 LLD Thesis, North-West University 348.

[1017] See Donald 2020 31(1) *Stell LR* 67-68; Du Plessis 2011 27 *SAJHR* 295; Kotze and Du Plessis 2010 *Journal of Court Innovation* 166-167. For instance, indigenous peoples depend on the natural environment for food, medicines, and cultural survival. The destruction of these environments is detrimental to their well-being.

[1018] See *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393 (E) 649 in which the court held that being in an environment contaminated with hydrogen sulphate and offensive odours is harmful to health and well-being. In *HTF Developers v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) para 18, the court explained that the right "does not confine itself to protection against conduct harmful to health but seeks also by, *inter alia*, the promotion of conservation and ecologically sustainable development, to ensure an environment beneficial to our well-being."

[1019] Shelton *Using Law and Equity for Poor and the Environment, in Poverty Alleviation and Environmental Law* 14.

[1020] The duty to respect, protect and fulfil human rights is applicable to mining companies by virtue of section 8(2) of the *Constitution of South Africa*, which states that a provision in the Bill of Rights "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed in the right." The reference in section 24(b)(iii) of *Constitution of South Africa* to "secure ecologically sustainable development and use of natural

becomes apparent that the state is obliged to refrain from interfering with the enjoyment of the environmental rights in section 24. It follows that the state must refrain from actions and decisions that cause harm or are potentially harmful to people's health and well-being. The state should also prevent third parties (through legislative and other measures) from interfering with the rights. The duty to fulfil human rights requires from the state to assist people or communities to realise and enjoy their right to an environment not harmful to health and well-being. When applied in the context of mineral extraction, the duty to respect the environmental rights in section 24 of the *Constitution of South Africa* entails that the state should refrain from taking decisions centred on award and utilisation of mineral resources that result in or have the potential to cause harm to the health and well-being of mine-host communities. Examples of such decisions include those taken without the involvement of the mine-host communities and resultant benefits accruing to them. Donald[1021] explains that "participation of individuals in environmental decision making which affects them and their communities should be valued and promoted as integral to their continued well-being." Therefore, lack of participation is harmful to a community's well-being. A state's obligation to protect[1022] mine-host communities from actions potentially harmful to their health and well-being entails, *inter-alia*, safeguarding the communities from mining operations that are harmful to the land, air and water resources essential for their survival.

To fulfil or ensure the realisation of the right to environment as provided in section 24 of the *Constitution of South Africa*, the *National Environmental Management Act* 107 of 1998 *(NEMA)* was enacted. The *NEMA*, which is discussed in 6.4.9 below, sets out environmental principles, including public participation, and states that decision making

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resources while promoting justifiable economic and social development" entails that mining should be permitted if it leads to justifiable economic and social development. It also entails that mining, although it leads to economic and social development, is not justifiable where it does not occur in tandem with ecologically sustainable development and use of natural resources. The decision to grant mining rights must be such that it promotes development which meets present needs without prejudicing the ability of future generations to meet their own needs. This reasoning was buttressed in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 paras 33-34, where the court held that "pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns."

1021 See Donald 2020 31(1) *Stell LR* 73.

1022 Section 24(b) of the *Constitution of South Africa.*

"must take into account the interests, needs and values of all interested and affected parties."[1023]

South African courts also emphasise the importance of environmental protection to the enjoyment of other human rights.[1024] In the case of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*,[1025] (Fuel Retailers case) the court states that:

> development cannot subsist on a deteriorating environmental base - unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development […] [the environment] is vital to the enjoyment of the other rights contained in the Bill of Rights, indeed it is vital to life itself. It must be protected for the benefit of the present and future generations.

The court further indicated that it was apparent from section 24(b)(iii) of the *Constitution of South Africa* that environmental rights should be balanced with socio-economic development where sustainable exploitation and use of natural resources are essential to environmental protection.[1026] It can therefore be said that the right to environment as pronounced in the *Constitution* and as reinforced by the *NEMA* provides the legal basis for the involvement of mine-host communities in decision making on matters centred on the governance of their lands and mineral extraction on those lands, as they are the ones

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[1023] Section 2(4)(g) of the *NEMA*.

[1024] See *Fuel Retailers Association of Southern Africa v Director-General –Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC); *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC); *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* [1999] 2 All SA 381 (A); *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA); *Earthlife Africa (Johannesburg) v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP).

[1025] *Fuel Retailers Association of Southern Africa v Director-General –Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 44. See *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* (2007) ZACC 25 para 60.

[1026] See *Fuel Retailers Association of Southern Africa v Director-General –Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) paras 33, 44, 45. The cases of *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 4.

most affected by the adverse environmental impacts of mining.[1027] Section 73(1) of the *Constitution of Zimbabwe* provides a right to an environment not harmful to health or well-being couched along the same lines as 24 of the *Constitution of South Africa.* Those South African judicial precedents that have examined this right are therefore of persuasive value when it comes to interpretation of the same right imbedded in the *Constitution of Zimbabwe*.

6.2.4 Property rights and land reform

Section 25 of the *Constitution of South Africa* recognises the unjust deprivation of the property rights of black communities through racial discrimination during the apartheid era. Therefore, based on the ideas of distributive justice, procedural justice and remedial justice explained in chapter 2 above, section 25 of the *Constitution of South Africa* seeks to redress past racial imbalances in the area of land ownership by laying the foundations for the nations' land reform programme and protection of property rights.[1028]

South Africa's land reform programme comprises three pillars namely redistribution, restitution and tenure security.[1029] Land re-distribution, which is the first pillar, is based on the concept of distributive justice. It stems from section 25(5) of the *Constitution of South Africa* which mandates the state to take legislative and other measures to create conditions that enable South Africans to access land on an equitable basis. The focus of land re-distribution is to redress the unequal distribution of land between the white minority and black majority emanating from the apartheid era.[1030] The second pillar, that is

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[1027] Section 39(2) of the *Constitution of South Africa* states that, "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[1028] In terms of section 25(1), no one "may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." This protection applies against deprivation of all forms of property rights. It can be argued in the context of mineral extraction that the granting of a mining right over land that is already under use or occupation essentially amounts to a deprivation of property rights in that the ability of the owner or lawful occupier to exercise their rights over the land will be substantially limited.

[1029] See Kloppers and Pienaar 2014 17(2) *PER/PERJ* 677.

[1030] Legislation enacted to attain land redistribution include the *Upgrading of Land Tenure Rights Act* 112 of 1991; *Land Reform: Provision of Land and Assistance Act* 126 of 1993; *Distribution and Transfer of Certain State Land Act* 119 of 1993; *Upgrading of Land Tenure Rights Amendment Act* 34 of 1996; *Transformation of Certain Rural Areas Act* 94 of 1998 and the *Spatial Planning and Land Use Management Act* 16 of 2013.

land restitution, has its roots in the concept of remedial justice. This is encapsulated in section 25(7) of the *Constitution of South Africa* which provides that persons or communities dispossessed of property after 19 June 1913[1031] through racially discriminatory laws or practices are entitled to restitution of those properties or to equitable redress. To give effect to this constitutional mandate, the legislature enacted the *Restitution of Land Rights Act* 22 of 1994 *(RLRA).* In the case of *Alexkor Ltd and Another v Richtersveld Community and Others,*[1032] the Constitutional Court of South Africa examined communal land rights based on the *RLRA* and constitutional right to property and held that the community was entitled to restitution of both their land and minerals embedded in the land.

The third pillar of South Africa's land reform programme is tenure security and this is introduced by section 25(6) which seeks to ensure that persons and communities whose land tenure[1033] were insecure due to the apartheid discriminatory laws and practices be given secure tenure through legislative reform. This is reinforced by section 25(9) of the *Constitution of South Africa* which mandates the government to enact legislation to achieve the required security of tenure.[1034] Insecure land tenure for the majority black

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[1031] The colonisation of South Africa begun in 1652 by the Netherlands through the Dutch East India Company who were later replaced by the British between 1795 and 1961. In 1961, the country became a republic independent from Britain and ruled by white Afrikaner supremacists until 1994. Apartheid existed in South Africa between 1948 and 1994 as a policy or system of racial segregation or discrimination. See Oliver and Oliver 2017 73(3) *HTS Teologiese Studies/ Theological Studies* 1-8. The significance of the year 1913 lies in that it represents the date when the *Natives Land Act* was enacted by the colonial regime in South Africa to give legislative form to the process of dispossession of blacks of their land that had been on-going since the colonisation of the country. The *Natives Land Act* 27 of 1913 restricted black land ownership to 7 percent of the country, later increased to 13 percent by the *Native Trust and Land Act* of 1936. These statutes ensured the forceful mass removal of blacks from their land into poor homelands and township.

[1032] *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

[1033] In *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 1, Madlanga J opened his judgement with words quoted from one old man named Petros Nkosi to the effect that "the land, our purpose is the land; that is what we must achieve. The land is our whole lives: we plough it for food; we build our houses from the soil; we live on it, and we are buried in it. When the whites took our land away from us, we lost the dignity of our lives: we could no longer feed our children; we were forced to become servants; we were treated like animals […]. In everything we do, we must remember that there is only one aim and one solution and that is the land, the soil, our world." The land is their whole lives, and this is why the law should protect the right of these communities to decide what happens on their land.

[1034] Security of tenure constitutes the legal relationship that people have with their land that enables them to live in security, peace and dignity. See South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 17 https://sahrc.org.za/home/21/files/SAHRC Mining. See also United Nations Human Rights Council, Resolution A/HRC/25/54(2013): Raquel Rolnik, *Report of the Special Rapporteur on*

South Africans is the direct result of dispossession of their lands through the *Natives Lands Act* 27 of 1913 and the *Native Trust and Land Act* 18 of 1936 among other colonial and apartheid legislation. Black settlements called homelands were created to accommodate the dispossessed blacks. The blacks did not own land in these homelands as these were owned and administered through a trust system by government institutions such as the South African Development Trust.[1035] This system meant that black South Africans could not buy and hold land in their own right, but instead, the land was held in trust for them.[1036] Although the *Abolition of Racially Based Land Measures Act* 108 of 1991 repealed the *Natives Lands Act* 27 of 1913 and the *Native Trust and Land Act* 18 of 1936, the trust system remained. Section 12 of the *Abolition of Racially Based Land Measures Act* 108 of 1991 contained transitional measures for phasing out the trust system by empowering the President to transfer trust lands to any person, state department or institution. Since the transfer of trust lands to blacks has not been fully accomplished, the trusteeship system is still a hallmark of the insecure communal tenure governance in South Africa.[1037] In addition, although South Africa enacted legislation to advance tenure security for those who dwell and work on farms,[1038] there is no substantive legislation to secure the land rights of people living in the former rural homelands, other than the *IPILRA*.[1039] This *status quo* does not promote secure land rights in communal areas where insecurity is often heighted when valuable mineral resources are being discovered in such areas.

Section 25 of the *Constitution of South Africa* is important in that it is not limited to land

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Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context para 5.

1035 Clark and Luwaya "Communal land Tenure 1994-2017: Commissioned Report for the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, and Initiative of the Parliament of South Africa" Land and Accountability Research Centre 2017, 5.

1036 See Kloppers and Pienaar 2014 17(2) *PER/PERJ* 683.

1037 Weinberg "The Contested Status of Communal Land Tenure in South Africa" Institute for Poverty, Land and Agrarian Studies 2015, 18 states that land in former homelands is mostly owned by the government of South Africa, held in trust by the state on behalf of black communities who were once prohibited from owning land.

1038 See the *Land Reform (Labour Tenants) Act* 3 of 1996 which protects farm workers residing on farms from eviction. The *Extension of Security of Tenure Act* 62 of 1997 provides protection against eviction for those people who occupy informal township areas with the consent of the owner. See also the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

1039 Weinberg "The Contested Status of Communal Land Tenure in South Africa" Institute for Poverty, Land and Agrarian Studies 2015, 6. While *IPILRA* is very useful and key to tenure security, it is in its current form, only meant to give interim measures while a permanent solution is being developed. To enhance protection of communal tenure, South Africa could make the *IPILRA* a substantive legislation and enact regulations in terms of the statute to strengthen the legal protection of informal land rights.

reform. It also paves the way for reform to bring about equitable access to mineral and water resources.[1040] Section 25(8) of the *Constitution of South Africa* provides that no provision in this section "may impede the state from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination…" This provides the constitutional foundations for reform of mineral and water rights which is given effect in the *Mineral and Petroleum Resources Development Act* 28 of 2002 *(MPRDA)* and *National Water Act* 36 of 1998 *(NWA)* respectively.

When the *Constitution of Zimbabwe* is compared with provisions in the *Constitution of South Africa* discussed above, it becomes apparent that it does not sufficiently protect communities previously dispossessed of their land during the colonial era and who today suffer insecure land tenure on communal lands they reside on. The insecurity of these communities is heightened when valuable mineral resources are discovered on these lands. No restitution of previously dispossessed lands is provided for and there is no clear obligation on the Zimbabwean state to provide the communities with secure land tenure. No Zimbabwean legislation is comparable to section 25(6) of the *Constitution of South Africa* and the *IPILRA* in terms of protection of the land tenure of communities dispossessed of the land during the colonial era. This gap can be filled by adoption of these specific provisions and their incorporation into Zimbabwean legislation after appropriate refinements to suit the domestic political and socio-economic conditions.

[1040] Equitable access and empowerment of previously disadvantaged South Africans is also emphasised in the *Precious Metals Act* 37 of 2005. Precious metals are identified in the Act as gold and platinum. In terms of section (1)(a)(b) of the *Precious Metals Act* 37 of 2005*,* the regulator, when it considers any application for the grant of a licence, permit or certificate for exploitation of precious metals must consider (a) promotion of equitable access and (b) have regard to the requirements of the broad--based socioeconomic empowerment *Charter* developed in terms of section 100 of the *MPRDA*. Section 2(a)(b)(d) of the *Precious Metals Act* 37 of 2005 states that the South African Diamond and Precious Metals Regulator must ensure that the exploitation and development of precious metals is in the best interest of the people of South Africa, promote equitable access and advances broad based socio-economic empowerment. Section 6(2) of the *Precious Metals Act* 37 of 2005 requires any decision taken in terms of the Act to be in accordance with provisions of the *PAJA*, thus recognising the right to just administrative action.

6.2.5 Protection from arbitrary evictions

Section 26(1)(3) of the *Constitution of South Africa* ensures procedural justice by guaranteeing citizens access to adequate housing facilities and protection from arbitrary eviction from their homes and without a court order.[1041] This constitutional provision can be utilised to protect mine-host communities faced with development-based evictions. Protection from arbitrary eviction ensures that the government does not evict mine-host communities without following due process including adequate notice, consultations and provision of alternative accommodation and lands. The *Interim Protection of Informal Land Rights Act* 31 of 1996 (*IPILRA*) is part of the legislative measures envisaged in section 26(2) of the *Constitution of South Africa*, which is meant to ensure the realisation of the right to housing and protection against arbitrary evictions. The Constitutional Court of South Africa in the case of *Government of the Republic of South Africa and Others v Grootboom and Others*[1042] held that section 26(3) of the *Constitution of South Africa* obliges the state to guarantee the people's rights to housing and that no projects even those that bring economic benefits to the community should be undertaken in violation of the rights of the communities. This obligation imposed on the state is irrespective of communities having only use rights and not ownership of the property or land. Other legislation enacted pursuant to the constitutional requirement to protect citizens against arbitrary evictions include the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998[1043] and the *Extension of Security of Tenure Act* 62 of 1997.[1044] Sections 28, 71 and 74 of the *Constitution of Zimbabwe* provide for the right to property, shelter and not be arbitrarily evicted couched along the same lines as those in the *Constitution of South Africa.* Therefore, no need arises for refinement of the stated

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[1041] Sachs *Advancing Human Rights in South Africa* 1st ed 69-70 argues that "everyone is entitled to a spot on this earth where he or she can feel safe and be inviolable, sheltered not only from the elements but from the unwanted intrusions of other people ... Everyone should be guaranteed land or other space on which to have a home and enjoy personal privacy."

[1042] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC). See also *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

[1043] The Act prohibits unlawful eviction and provides procedures for the eviction of unlawful occupiers from land in a fair manner.

[1044] The Preamble of the Act states that it seeks to "promote the achievement of long-term security of tenure for [lawful] occupiers of land."

Zimbabwean constitutional provisions when compared with similar provisions in the *Constitution of South Africa.*

6.2.6 Right to access to information

The right to access to information is guaranteed in section 32(1)(a)(b) of the *Constitution of South Africa*, which states that everyone has the right to access any information held by the state and another person where such access is required for the exercise or protection of any right.[1045] To give effect to the right to information, the state is obliged by section 32(2) of the *Constitution* to enact national legislation, and this was fulfilled by the enactment of the *Promotion of Access to Information Act 2 of 2000 (PAIA)* which is discussed in 6.4.7 below. This legislation is remarkable in that it gives mine-host communities a right to access information held by private mining companies where such information is required to exercise or protect their rights such as the right to an environment not harmful to health and well-being. These legislative instruments support claims by mine-host communities for access to EIAs and information relating to award of mineral rights on their lands. ln this way, they become involved in determining the direction of their development. Section 62 of the *Constitution of Zimbabwe* examined in 5.2.5 above, provides a right to access to information that is comparable to that provided in the *Constitution of South Africa* in that both apply to information held by the state and juristic persons such as mining companies. The difference comes when legislation enacted by the two countries to give effect to this right are compared. As demonstrated in 5.4.8 above, Zimbabwe's *Freedom of Information Act* 1 of 2020 does not provide a right to access to information held by juristic persons such as mining companies. This statute can be amended to give access to information held by juristic persons along the same lines as South Africa's *Promotion of Access to Information Act 2 of 2000*.

6.2.7 Right to administrative justice

The right to administrative justice is guaranteed in section 33(1) of the *Constitution of*

[1045] Access to information is a prerequisite for meaningful participation by host communities in mineral extraction on the lands they inhabit. The right to access to information is protected by A 19 UDHR, A 19 of ICCPR and A 9 ACHPR.

South Africa, which states that everyone "has the right to administrative action that is lawful, reasonable and procedurally fair." The state is mandated in terms of section 33(3) to enact legislation to give effect to the right to administrative justice. In compliance with the constitutional mandate, the state enacted the *Promotion of Administrative Justice Act (PAJA)* 3 of 2000, which regulates the exercise of power by administrative bodies and officials. The *PAJA* particularly requires procedural fairness concerning administrative action affecting the general public. In the context of mineral extraction on lands inhabited by mine-host communities, procedural fairness would entail application of the *audi alteram partem*[1046] rule, as codified in the *PAJA*, which gives the communities a right to be involved in decision making, the right to reasonable notice and consultations and the right to give comments and make representations where their rights and interests are involved.[1047] The *PAJA* is further discussed in section 6.4.7 below. It must, however, be pointed out that section 68(1) of the *Constitution of Zimbabwe* provides a more elaborate right to administrative justice than that set out in the wording of section 33(1) of the *Constitution of South Africa* as it says that administrative conduct must also be prompt, efficient, proportionate, impartial and both substantively and procedurally fair. On that basis no modifications to section 68(1) of the *Constitution of Zimbabwe* are necessary when compared to similar provisions in the *Constitution of South Africa*.

[1046] In *Taylor v Minister of Education and Another* 1996 (2) ZLR 772, 780A-C Gubbay CJ stated that "the *maxim audi alteram partem* expresses a flexible tenet of natural justice that has resounded through the ages […]. In traditional formulation it prescribes that when a statute empowers a public official or body to give a decision that prejudicially affects a person in his liberty or property or existing rights, he or she has a right to be heard in the ordinary course before the decision is taken."

[1047] In *Director: Mineral Development Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) para 20, a community environmental interest group opposed the granting of a mining license for open cast coal mining based on various reasons, the key one being their right to administrative justice in the form of the right to be heard before a decision is made, where the decision impacts their substantive right to an environment not harmful to health and well-being guaranteed by section 24 of the *Constitution of South Africa*. The court held that the right to be heard is involved "by virtue of the enormous damage that mining can do to the environment and ecological systems. What has to be ensured when an application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs." The right to reasonable notice and consultation before a decision is made has been recognised by the courts in other cases relating to, *inter alia,* housing, legislative matters and industrial activity and environmental protection. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); *Fuel Retailers Association of Southern Africa v Director-General –Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC); *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC).

6.2.8 Right to internal self-determination

Section 235 of the *Constitution of South Africa* recognises the right of the South African people to self-determination. However, it goes further to recognise the right to internal self-determination by communities sharing a common cultural and language heritage.[1048] This recognition of internal self-determination is important for the protection of indigenous peoples and traditional communities in South Africa. The right of mine-host communities that are especially comprised of indigenous peoples, to internal self-determination, is guaranteed in international and regional regulatory instruments such as the *ILO Convention* 169 of 1989, *ICCPR* and the *ICESCR*, as has been indicated. In these instruments, internal self-determination is understood to entail a right of communities to freely pursue their economic, social, cultural and economic development. Therefore, in the context of mineral extraction on the lands inhabited by mine-host communities, the right to internal self-determination guarantees the communities a right to be involved in decision making centred on their development priorities and the accrual of benefits from the extraction of the mineral resources. In contrast, the *Constitution of Zimbabwe* does not expressly provide the right to internal self-determination by communities sharing a common cultural and language heritage and only comes close to recognising internal self-determination in those provisions centred on devolution of governmental power and responsibilities.[1049] Zimbabwe can utilise the South African example, which expressly recognise the right to self-determination, so as to bring Zimbabwe's constitutional and legislative frameworks closer to requirements set in international and regional regulatory instruments, such as the Article 1(1) of the ICCPR and ICESCR.

6.2.9 Public participation and involvement in legislative processes

Citizens are entitled to participate in public affairs, including those impacting on their

[1048] Section 235 of the *Constitution of South Africa*, specifically states that "the right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation."

[1049] See section 264(1)(2)(a)(d)(e) of the *Constitution of Zimbabwe.*

livelihoods, such as law-making processes.[1050] In South Africa, public participation[1051] is a legislated right established by section 59(1)(a) of the *Constitution of South Africa*,[1052] which requires the National Assembly to facilitate public involvement in its processes and those of its committees.[1053] A broad scope for public participation is further contained in provisions that guarantee and encourage participation in local government and policy making, namely the right to equality (section 9), human dignity (section 10), language and culture (section 30), public access to and involvement in the National Council of Provinces (section 72(1)) as well as public access to and involvement in provincial legislatures

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1050 See *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC), which pertains the role of the public in the law-making process and the failure of parliament to facilitate public involvement in legislative matters. In this case, the Constitutional Court of South Africa states at paras 112-117 that South Africa's democracy has both representative and participatory elements and this requires parliament to ensure effective public participation in the legislative processes. The court in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* 2006 (2) SA 311 (CC) para 111 states that "the Constitution calls for open and transparent government and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The principles enunciated in these cases find equal application to participation by mine-host communities in the context of mineral extraction. An interpretation that the host communities must be involved in decision making not only grants protection of their other constitutional rights but also accords with requirements set out in international and regional regulatory instruments pertaining to mine-host community involvement in and benefit accrual from mineral extraction.

1051 *The New Shorter Oxford English Dictionary* 5th ed, 2109 defines participation as "taking part with others (in an action or matter); […] the active involvement of members of a community or organization in decisions which affect them".

1052 Public involvement in legislative processes is guaranteed in sections 59(1)(a), 72(1)(a) and 118(1)(a) of the *Constitution of South Africa*. Section 57(2) and 116(2) of the *Constitution of South Africa* obligates the legislature at national, provincial and local level to discharge their law-making functions with due consideration to representative and participatory democracy and public involvement. Section 152(1)(e) obligates the local government to encourage community involvement in matters pertaining to local governance. These provisions create a basis for mine-host community involvement in the deliberations pertaining to mining and other legislation and policy decisions that affect them. Section 195(e)(g) of the *Constitution of South Africa* states that one of the basic values and principles of public administration is encouraging the public to participate in policy making and fostering of transparency through the provision of timely, accessible and accurate information. See section 33 of the *PAJA*.

1053 The obligation placed on the legislature to facilitate public participation was affirmed in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) and in *Matatiele Municipality v President of the Republic of South Africa and Others* 2006 (5) SA 47 (CC). The court in *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 116.1 – 116.2 explains that "for the conduct of a legislative body to be considered reasonable in respect of meeting the constitutional requirements for public involvement in sections 59, 72 and 118 of the Constitution, the following two aspects must be met: (i) The relevant legislative body must provide meaningful opportunities for public participation in legislative-making procedures. This would include making sufficient effort to ensure that the public has adequate information informing them of their right to be involved in such decision-making procedures and the different avenues through which they can participate; and (ii) The relevant legislative body must take measures to ensure that persons interested in participating are given a meaningful and effective opportunity to be heard and their views must be actually considered by members of the legislature." See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelitsha Homes* 2010(3) SA 454 (CC).

(section 118) and values and principles of public administration (section 195).[1054]

6.3 *South African policy frameworks as they pertain to involvement and benefit accrual by mine-host communities from mineral extraction*

To give effect to obligations imposed on the state by the constitution, the government of South Africa introduced fundamental policy measures. In the context of mineral extraction, it introduced the *Minerals and Mining Policy for South Africa* of 1998 (henceforth the *Minerals and Mining Policy*), which contains the policy positions of the South African government regarding the minerals and mining industry in the country. The six main themes covered in the policy are (i) business climate and mineral development, (ii) participation in ownership and management (iii) people issues, (iv) environmental management, (v) regional cooperation and (vi) governance.[1055] This section will only focus on those provisions of the policy document relevant to the subject of mine-host community involvement in and benefit accrual from minerals on the lands they inhabit.

The *Minerals and Mining Policy* reiterates the constitutional mandate to undertake land and mineral rights reforms to redress past racial discrimination so as to ensure that citizens access the resources on an equitable basis, while these natural resources must benefit all the people of South Africa.[1056] That permanent sovereignty over natural resources resides with the state is emphasised in the policy, a position that the government of South Africa derives from Article 21(1) of the *United Nations Charter of Economic Rights and Duties of States* of 1974.[1057] The government stated that its long-term objective is to ensure that mineral rights vest in the state on behalf of and for the benefit of all South Africans.[1058] This objective was subtly incorporated as custodianship in the *MPRDA* without using the direct language employed in the *Minerals and Mining Policy.*[1059] The ownership of mineral

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1054 See also *White Paper on Local Government*, 1998, which requires community participation in setting the goals for local development.

1055 The main themes encompass various sub-themes. In terms of structure, the policy explains the government's intentions on each theme, required policy measures, views received during the consultations and then the government's policy position.

1056 *Minerals and Mining Policy* para 1.3.6.1.

1057 *Minerals and Mining Policy* para 1.3.6.1 (i); *United Nations Charter of Economic Rights and Duties of States* UN GA Res 29/3281, UN Doc A/9/3281 (1974).

1058 *Minerals and Mining Policy* para 1.3.6.1 (ii).

1059 Sec 3(1) of the *MPRDA*.

resources in South Africa, as discussed in detail in 6.4.1.3 below, is important to claims by mine-host communities when it comes to involvement in and benefit accrual from mineral extraction on the lands they inhabit. Mine-host communities seek to assert ownership over mineral resources either as a constituent element of their ownership of their traditional lands or generally as citizens of South Africa to whom the resources belong.[1060]

The *Minerals and Mining Policy* acknowledges that past racial discrimination inhibited the black population from participating in the ownership of mining operations, as in other economic sectors. Therefore, the objective of the government of South Africa, as expressed in the *Minerals and Mining Policy*, is to ensure participation by the black population in the ownership and management of the mining industry and to ensure equality through focussed policies of black economic empowerment.[1061] The government followed up this policy commitment with the enactment of the *BBBEEA*, which is discussed in section 6.4.3 below.

In terms of the *Minerals and Mining Policy*, the development of host communities is to be achieved by requiring mining companies to comply with local development objectives,[1062] consider the needs of mine-host communities when carrying out operations[1063] and ensure the continued availability of useful infrastructure after mine closure.[1064] These objectives are given effect in the *MPRDA* and *BBBEEA*, particularly by means of the Mining Charter for the South African mining and minerals industry as well as the social and labour plans. These instruments are discussed in section 6.4.3 below.

The *Minerals and Mining Policy* reiterates the constitutional right to an environment not harmful to health or well-being and to have the environment protected for the benefit of present and future generations.[1065] Protection of these rights requires the adoption of appropriate and reasonable legislative and other measures. In particular, the government has to ensure that the environmental cost of mineral extraction is not passed on to mine-

1060 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).
1061 *Minerals and Mining Policy* paras 2.1(i)(ii), 2.2, 2.4 (ii)(a).
1062 *Minerals and Mining Policy* para 4.4 (vi).
1063 *Minerals and Mining Policy* para 4.4 (vi).
1064 *Minerals and Mining Policy* para 4.4 (vi).
1065 *Minerals and Mining Policy* para 4.1 (v).

host communities.[1066] Achieving this objective requires increased public participation in decision making and ensuring effective environmental impact assessments (EIA) among other measures.[1067] The government committed, in the *Minerals and Mining Policy*, to ensure equitable and effective consultation with interested and affected parties to ensure public participation in decision making; to apply the *audi alteram partem* rule in all decision-making processes and to ensure access to information in accordance to constitutional requirements.[1068] Legislation enacted to give effect to these policy objectives are the *IPILRA, PAJA, PAIA* and *NEMA.*

South Africa drafted, debated and adopted a minerals and mining policy within four years of the end of apartheid. This shows the urgency of the requirement for a minerals policy that, *inter alia,* provides guidance on matters centred on exploitation of minerals with the involvement of and for the benefit of mine-host communities, among other citizens. As demonstrated in section 5.3 above, forty-two years after attaining independence from colonial rule, Zimbabwe is yet to develop a comprehensive minerals policy.[1069] Zimbabwe should consider following the South African example in this regard.

6.4 *South African legislative framework relating to involvement and benefit accrual by mine-host communities from mineral extraction*

The *MPRDA* is the major legislation regulating mining in South Africa, and it seeks to ensure equitable access by all South Africans to mineral and petroleum resources. Other legislation that reinforces mine-host community involvement in and benefit accrual from mineral extraction in South Africa are the *Broad-Based Black Economic Empowerment Act* 53 of 2003 *(BBBEEA)*; *Restitution of Land Rights Act* 22 of 1994 *(RLRA)* and the *Interim Protection of Informal Land Rights Act* 31 of 1996 *(IPILRA)*. Other legislation such as the *National Environmental Management Act* 107 of 1998 *(NEMA)*; *Promotion of Administrative Justice Act* 3 of 2003 *(PAJA)* and the *Promotion of Access to Information Act* 2 of 2000 *(PAIA)* also incorporate key interventions for mine-host communities.

1066 *Minerals and Mining Policy* para 4.1 (v).
1067 *Minerals and Mining Policy* para 4.1 (v)(b)(c).
1068 *Minerals and Mining Policy* para 4.4 (v).
1069 Zimbabwe does not have a formal and fully documented minerals policy. Its minerals policy of 2013 is still in draft form.

6.4.1 Mineral and Petroleum Resources Development Act 28 of 2002

6.4.1.1 Introduction

The apartheid government ensured systemic marginalisation of black South Africans. This was achieved by, *inter-alia*, precluding blacks from holding mineral rights and conducting mining operations as a way of excluding them from ownership of the means of production and participation in the mainstream economy.[1070] Legislation that regulated access to and exploitation of mineral resources was discriminatory along racial lines and did not recognise claims to minerals by black communities.[1071] It is against this background that the equality clause in section 9 of the *Constitution of South Africa* imposes obligations on the government to redress historical inequalities[1072] through legislative and other measures

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[1070] Mostert *Mineral Law: Principles and Policies in Perspective* 30-33. Dispossession of black communities in South Africa begun as early as 1847 with the Griquas of Griqualand, Batswana of the area known as the diamond fields and later Kimberley, and the Richtersveld community of Namaqualand, who were dispossessed of their land bearing diamonds. The *Natives Land Act* of 1913 initiated major dispossessions by setting aside approximately 7% of the country's land for use and occupation by black South Africans, while the rest of the land was reserved for whites. The colonial legislation tied ownership of mineral rights with landownership, thereby excluding the dispossessed black majority from access to mineral resources and participating in the mining industry as mine owners. See *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras 3, 4, 6, 7, 13; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1; *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 2; *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

[1071] Mostert *Mineral Law: Principles and Policies in Perspective* 33; *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras 3, 4, 6. The South African Constitutional Court in *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 1 explains that landlessness, exclusion and poverty meant that black people were unable to participate in and benefit from exploitation of mineral resources.

[1072] See *Brink v Kitshoff* 1996 (4) SA 197 (CC) para 40. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) at para 74, Ngcobo J (concurring with a unanimous court) noted that "our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result ...The effects of discrimination may continue indefinitely unless there is a commitment to end it." In *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 31, the Constitutional Court expressed that the Constitution and in particular section 9 embraces substantive equality and measures to redress existing inequality. The court held that the equality clause would be meaningless in the absence of positive commitment to uproot the barriers to equality. In *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) the court stated that "the Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The *Mineral and Petroleum Resources Development Act* (Act) was enacted amongst other things to give effect to those constitutional norms. It contains provisions that have a material impact on each of the levels referred to, namely that of individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to this country's bounteous mineral

such as the *MPRDA*, which seeks to redress historical socio-economic inequalities[1073] through distributive and remedial measures such as BBBEE and meaningful participation of historically disadvantaged South Africans in the mining and minerals industry. Regulations made under the *MPRDA*, particularly the *Mineral and Petroleum Resources Development Regulations (MPRDR)* of 2004 (as amended) reinforce the legislative provisions aimed at opening the mining and minerals industry to historically disadvantaged South Africans.

6.4.1.2 Objectives of the MPRDA

The *MPRDA* lists nine transformative objectives in section 2 of the Act that can be summarised as ensuring equitable access by all South Africans to mineral and petroleum resources;[1074] eradicating all discriminatory practices that perpetuate racial inequalities in the minerals and mining industry;[1075] sustainable development;[1076] social welfare and BBEE.[1077] Through these objectives the *MPRDA* seeks to achieve distributive, remedial and procedural justice in the South African minerals and mining industry.[1078] Most importantly, section 2(d) states that the Act seeks to "substantially and meaningfully expand

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resources." In *South African Police Service v Solidarity obo Barnard* (2014 (6) SA 123 (CC) para 35 the court considered restitution or affirmative measures as steps towards substantive equality in order to protect and empower those who were subjected to injustices in the past.

1073 Van der Schyff *Property in Minerals and Petroleum* (2016) 5.

1074 Section 2(c) of the *MPRDA*. The *MPRDA* gives effect to section 25(4)(a) of the *Constitution of South Africa*, which requires implementation of remedial measures to bring about equitable access to all natural resources of the country. See UNDP Human Development Report 1995 http://www.hdr.undp.org that explains the concept of equity by saying that people "must have access to equal opportunities. All barriers to economic and political opportunities must be eliminated so that people can participate in, and benefit from, these opportunities."

1075 Section 2(d) of the *MPRDA*.

1076 Section 2(e) (h) of the *MPRDA.* Zachariah and Sooryamoorthy *Science in Participatory Development. The Achievements and Dilemmas of a Development Movement: The Case of Kerala* 22-23 explain that development should not take place at any cost but be balanced with three other equally important objectives, namely environmental protection, fair and equitable distribution or redistribution of resources so that the less advantaged have a fair share of society's wealth and participate fully in the economy and the opening of opportunities for participation in society's political and other activities by everyone.

1077 Section 2(d) (f) (i) of the *MPRDA*. A connection with the themes of the 1955 Freedom Charter of the African National Congress (ANC) can be established when the objectives of the MPRDA are analysed. Key themes in the Freedom Charter that resonate with the *MPRDA* objectives are that (i) the people shall govern, (ii) all national groups shall have equal rights, (iii) the people shall share in the country's wealth, (iv) land shall be shared among those who work it and (v) all shall be equal before the law. These themes form the vision in the Freedom Charter aimed at ensuring redistribution of the wealth of the land and minerals resources through legislative and other measures, which include the *MPRDA* among others.

1078 The case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 paras 26-35 affirms that the *MPRDA* is a remedial legislation that seeks to deal with the injustices of the past.

opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral [...] resources."[1079] Section 2(c)(f)(i) further states that the *MPRDA* seeks to ensure that mining contributes to the socio-economic development of the local communities. These objectives can be interpreted as seeking direct involvement of mine-host communities through the award of mineral rights and accrual of benefits from mineral extraction on their lands. Attainment of the objectives is facilitated through the *Broad-Based Socio-economic Charter for the South African Mining Industry* (henceforth *Mining Charter*), and social and labour plans and the codes of good practice for the South African mining industry, among other measures. The scorecard published in the *Codes of Good Practice* assesses the contribution by mining companies in the formulation of integrated development plans, their cooperation with the government towards the implementation of these plans in mine-host communities and their level of engagement with local communities and major labour-sending area communities.

The objectives set out in the *MPRDA*, particularly those centred on opening up the mining and mineral industry to previously disadvantaged citizens and empowering mine-host communities are consonant with international and regional regulatory instruments such as Article 1 of the *ICCPR* and *ICESCR*, Article 15 of the *ILO Convention* 169 of 1989, Article 21 of the ACHPR and Articles 1 and 2(8) of the *SADC Protocol on Mining.* In this respect, the *MPRDA* objectives, when compared to Zimbabwe's *Mines and Minerals Act*, present a valuable example as the later does not provide clear-cut objectives relevant to mine-host community involvement in and benefit accrual from mineral extraction, as demonstrated in chapter 5 above. Key provisions of the *MPRDA*,[1080] such as the vesting of minerals

[1079] See also para 4 of the Preamble of the *MPRDA*. The term "historically disadvantaged persons" is defined in section 1 of the *MPRDA* to mean those persons or communities (including associations and companies owned or control by such persons) who were disadvantaged by unfair discrimination before promulgation of the *Constitution of South Africa*. The term "community" is defined in section 1 of the *MPRDA* to mean "a coherent social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law." See also the preamble of the *United Nations Declaration on the Right to Development* that defines development as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom."

[1080] The key provisions of the *MPRDA* that ensure involvement and benefit accrual by mine-host communities include (i) section 6(1), which requires administrative action taken in terms of the *MPRDA*

resources in the people of South Africa, where the state acts as the custodian[1081] as well as notification and consultation with landowners and lawful occupiers,[1082] preferential mineral rights for host communities[1083] and broad-based economic empowerment,[1084] are discussed below.

6.4.1.3 Ownership of South Africa's mineral resources

The *MPRDA* acknowledges that the mineral resources of South Africa belong to the nation and that the state is the custodian of these resources.[1085] The state's custodianship of the nation's mineral resources is reinforced and elaborated in sections 2(b) and 3(1)(2) of the *MPRDA*, while section 2(a) asserts the state's right to exercise sovereignty over all mineral resources within its territory.[1086] Section 3(1) provides that "mineral and petroleum resources are the common heritage of all the people of South Africa and the state is the custodian thereof for the benefit of all South Africans."[1087] The powers bestowed on the

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to be in consonance with the requirements of lawfulness, reasonableness and procedural fairness set out in the *PAJA*; (ii) section 17, which permits the minister, on issuing of a prospecting right, to request the holder to give effect to section 2(d) of the *MPRDA* pertaining to empowerment of those historically disadvantaged; (iii) section 19(2)(d), which requires the holder of a prospecting right to comply with the terms and conditions of the prospecting right as well as applicable provisions of the *MPRDA* and any other applicable law; (iv) section 23(1)(h), which requires the minister to grant a mining right if the granting of such right will further the empowerment objects referred to in section 2(d) and (f) of the *MPRDA;* (v) section 25(2)(d) and (f), which require the holder of a mining right to comply with the relevant provisions of the MPRDA, the terms and conditions of the mining right and any other relevant law. This provision entails compliance with, for instance, the consultation and consent provisions set out in the *IPILRA.* Section 25(2)(h) requires holders of mining rights to submit prescribed annual reports with details pertaining to the extent of the holder's compliance with empowerment provisions of section 2(d)(f) as well as the *Mining Charter* and the Social and Labour plans.

1081 Section 3 of the *MPRDA*.

1082 Sections 5(4), 10(1)(b), 16(4)(b), 22(4)(b), 27(5)(b) and 39 of the *MPRDA*.

1083 Section 104 of the *MPRDA*.

1084 Section 100 of the *MPRDA*.

1085 Para 2 of the preamble of the *MPRDA*. The court in *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) para 10 explains that placing mineral resources in the hands of the nation as a whole is a key aspect when it comes to achieving the objective of eradicating discrimination and redressing historical inequalities.

1086 Section 3(2)(a)(b) of the *MPRDA*, which deals with the state's powers to regulate mineral resources is an expression of the state's sovereignty or control over natural resources recognised in section 2(a) of the Act. The case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 paras 32-33 refers to the principle of permanent sovereignty over natural resources, particularly that, at its birth between 1952 and 1962, permanent sovereignty over natural resources was seen as a right of peoples instead of the state. See Visser 1988 21(1) *CILJSA* 77.

1087 See para 2 of the preamble. Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development* 28 of 2002 LLD Thesis, North-West University (2006) 237, describes this provision as one of the most controversial clauses of the *MPRDA*. Badenhorst and Mostert 2007 2 *TSAR* 478 explain that the state did not become the owner of mineral resources, as custodianship cannot be

state as custodian are set out in section 3(2)(a)(b) to include the power to grant, issue, refuse, control, administer and manage various mineral rights and prescribe and levy fees to be payable in terms of the *MPRDA*.[1088] The terms used in section 3(1) avoid referring to the state as the owner of mineral resources and this could have been meant to circumvent claims of expropriation of mineral rights. Neither does section 3(1) expressly state that mineral resources are owned by the people of South Africa. Instead, the resources are regarded to be the people's common heritage.[1089] These elusive terms have been a subject of much contestation among South African scholars.[1090] Even South African courts have not expressed themselves definitively regarding ownership and custodianship of mineral resources.[1091] Nonetheless, the phrases "common heritage" and "belong to" can be

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understood to mean the same thing as ownership. Therefore, the sovereign right of the state over natural resources is fiduciary in nature and not proprietary. The notion that natural resources constitute the heritage of all the people of South Africa and that these resources must be managed and exploited for the benefit of the present and future generations of all South Africans is also emphasised in section 2 of the *NWA*, section 2(4)(o) of the *NEMA*, and the preamble and section 2(b)(j) of the *Marine Living Resources Act* 18 of 1998.

1088 See Badenhorst and Elizabeth 2005 26 (3) *OBITER* 508- 517 for a detailed discussion of the rights and duties bestowed on the state as custodian of South Africa's mineral resources.

1089 Section 3(1) of the *MPRDA.*

1090 See Dale *et al South African Mineral and Petroleum Law* (2005) 4, 121-123; and Van der Vyer 2012 *De Jure* 133 whose perspective, as rooted in private law, is that the *MPRDA* did not vest minerals in the state nor the people and that reference to the nation's mineral resources in section 3(1) is legally incorrect since neither the nation nor peoples have legal personality that qualifies them to hold property. This view is at odds with the spirit of the *MPRDA*, which introduced state custodianship for the benefit of all South Africans. Badenhorst and Mostert 2007 2 *TSAR* 476 and Badenhorst 2004 22 (2) *JENRL* 218-223 advocate the second perspective, which says that section 3(1) of the *MPRDA* abolished the common law principle of *cuius est solum* and vested unsevered mineral resources in the state with a *proviso* that the state holds the minerals as a custodian for the benefit of all South Africans. Van der Schyff *The Constitutionality of the Mineral and Petroleum Resources Development Act* 28 of 2002, LLD Thesis, North-West University 2006, 104 suggested that section 3(1) of the *MPRDA* converted minerals resources into *res publicae* or public thing/ property with the state assuming not private ownership but regulatory control of the mineral resources in public ownership for the benefit of the whole nation. Van der Schyff 2008 *TSAR* 757 also argued that the notion of custodianship introduced the concept of public trust into South African mineral law and as trustee, the state is under a legal obligation to use the minerals (trust property) for the specified purpose only which is for the benefit of all the people of South Africa.

1091 In *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 para 67, the Orange Free State High Court was not definitive on ownership of unsevered minerals, except to state that "the MPRDA leaves no doubt that mining rights in respect of minerals which have not been mined have been taken out of private hands, and that such rights vest in the custodianship of the state." To stress that custodianship does not amount to ownership, the court in *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 (13 December 2007) para 38 drew an analogy with fisheries and held that the fact that the state is custodian of the country's fisheries does not entail that the fisheries belong to the state. See *De Beers Consolidated Mines Limited v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy and Another* (1590/2007) [2008] ZAFSHC 40 para 6; *Joubert and Others v Maranda Mining Company (Pty) Ltd* [2009] 4 All SA 127 (SCA) para 2; *Meepo v Kotze and Others* 2008 (1) SA 104 (NC) 114A-B; *Bengwenyama-Ya-Maswazi Community and Others v Genorah Resources (Pty)*

understood to mean that the mineral resources are owned by the people of South Africa. This dovetails with the position in international and regional regulatory instruments such as *United Nations General Assembly Resolution* 1803, *ICCPR, ICESCR* and the *ACHPR*,[1092] that vest natural resources in the people. Custodianship and the state's sovereignty over mineral resources can be understood to mean that the state is only a steward of the resources and has regulatory power over the resources for the benefit of all South Africans.[1093]

Despite the contestation of the phrases "belong to" and "common heritage" and the word "custodianship," the *MPRDA* requires the exploitation of mineral resources to be done for the benefit of the people of South Africa and that there must be equal access and empowerment of historically disadvantaged South Africans. Since mineral resources belong to the people of South Africa including mine-host communities, section 3(1) of the *MPRDA* entails that the latter should be involved in and accrue benefits from extraction of minerals on the lands they inhabit. The state is specifically instructed to manage the resources for the benefit of all the people of South Africa, which resonates with the *United Nations*

Ltd and Others [2011] (4) SA 113 (CC) para 4; *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP) para 49; *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) para 86; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) paras 25, 68; *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) para 50; *Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another* 2014 (2) SA 603 (CC) paras 10, 44; *Baleni and Others v Minister of Mineral Resources* 2019 (2) SA 453 (GP) paras 42-43; *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 51-53. These cases show that the question of ownership of mineral resources is still not settled definitively.

[1092] See para 1 of the *United Nations General Assembly Resolution* 1803 *on Permanent Sovereignty Over Natural Resources* of 1962; A1 (2) of the ICCPR and ICESCR; A 21 of the *African Charter on Human and Peoples' Rights*.

[1093] The state as a custodian has certain duties and responsibilities towards the South African people and these are captured in the commitments in the preamble of the *MPRDA*, the objectives in section 2 and the provisions of sections 3 and 5. In terms of section 2(a), the state has an internationally recognised right to exercise permanent sovereignty over mineral resources. This position is repeated in para 1(a) of the *Mining Charter* 2018, which sets as one of the objectives of the *Mining Charter* "the affirmation of the internationally recognised principle of State sovereignty; its right to exercise authority and make laws within its boundaries; over the life of its country-including all its mineral wealth." This right has been understood in international law to entail the state's right to exercise control or authority over natural resources within its territory to the exclusion of all other states. Para 1 of the *United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* of 1962, while affording states wide discretion to dispose of their resources, however, prescribes the context within which such sovereignty must be exercised, that is, it is to be conducted in the interest of their national development and of the well-being of the people of the state concerned. This is reinforced in A 21(1) of the *African Charter on Human and Peoples' Rights* which states that sovereignty over natural resources shall be exercised in the exclusive interest of the people. People's mineral ownership is a powerful instrument through which the benefits of mineral resources can be secured for the people.

General Assembly Resolution 1803 of 1962, *ICCPR, ICESCR* and the *ACHPR*.[1094]

In vesting minerals in the people of South Africa with the state as custodian, the *MPRDA* presents learning points for Zimbabwe whose *Mines and Minerals Act* 38 of 1961 vest mineral resources in the President.[1095] The recognition in the *MPRDA* of the people's rights over mineral resources and the fact that the resources must be exploited for the benefit of the people support mine-host community involvement in and benefit accrual from mineral extraction. Any other vesting of minerals contrary to this serves to stifle such involvement and benefit accrual by weakening the peoples' claims to mineral resources.

6.4.1.4 Duty to consult with the landowner or lawful occupier, interested or affected parties

The duty of an applicant for a prospecting right, mining right or mining permit to notify, consult with and accommodate landowners, lawful occupiers or otherwise interested and affected parties is set out in sections 5A(c), 10(2), 16(4(b), 22(4)(b) and 27(5)(a)(b) of the *MPRDA* read with regulation 3 of the *Mineral and Petroleum Resources Development Regulations* of 2004 (henceforth *MPRDR*) enacted in terms of section 107 of the *MPRDA*.[1096]

Section 5A(c) of the *MPRDA* provides that, prospecting, mining, exploration or any other operations cannot be conducted on any land unless the applicant or mineral rights holder

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[1094] See para 1 of the *United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources* of 1962; A 1(2) of the ICCPR and ICESCR; A 21(1) of the *African Charter on Human and Peoples' Rights*.

[1095] As shown in chapter 5 above, section 2 of the *Mines and Minerals Act* 38 of 1961 is inconsistent with international and regional regulatory instruments that guarantee the right of people to permanent sovereignty over their natural resources.

[1096] Section 15(1) of the *MPRDA* also requires a holder of a reconnaissance permission who wishes to enter the land to first produce the permit and consult with the landowner or lawful occupier of the land. See also sections 69(2), 74(4)(b), 79(4) (b) and 83(4)(a) of the *MPRDA* pertaining to the duty to consult and accommodate when it comes to extraction of petroleum resources. The duty on the state to ensure meaningful consultation is explained in *Bengwenyama Minerals (Pty) Ltd and Other v Genorah Resources (Pty) Ltd* 2011 (4) SA 113(CC); *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA); *Earthlife Africa (Johannesburg) v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP); *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* [1999] 2 All SA 381 (A); *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC).

has given at least 21 days' notice to the landowner or lawful occupier of the land.[1097] Where the state has received an application for a prospecting right, mining right or permit, it is required in terms of section 10(1) of the *MPRDA* that interested or affected parties[1098] be notified that an application has been made in respect of the land. Section 10(1)(b) requires the state to call upon the interested and affected parties to submit comments or objections that they may have. Any objections received are considered by the Regional Mining Development and Environmental Committee which then advises the Minister of Mineral Resources and Energy regarding the appropriate course of action.[1099] Sections 16(4)(b) and 22(4)(b) of the *MPRDA* relate to notice and consultation upon acceptance of applications for prospecting rights and mining rights respectively, but prior to the granting of relevant rights. Upon accepting an application for a prospecting right, the state is required by section 16(4)(b) of the *MPRDA* to advise the applicant to notify in writing and consult with the landowner, lawful occupier or any other affected party, and submit the results of such consultations within 30 days.[1100] In terms of section 22(4)(b) of the *MPRDA*, which regulate applications for a mining right, an applicant whose application for mineral rights has been accepted by the regional manager of the Department of Mineral Resources and Energy is required to "notify and consult with interested and affected

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[1097] Section 5(4)(c) of the *MPRDA* of 2002 prohibited the carrying out of prospecting or mining activities without notifying and consulting with the landowner or lawful occupier. However, the *Mineral and Petroleum Resources Development Amendment* No. 49 of 2008 expunged the entirety of section 5(4) and replaced it with section 5A, which removed the consultation requirement. The removal of consultation in the amendment was a regression. See *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) para 92 (fn76).

[1098] In *SA Soutwerke v Saamwerk Soutwerke* 2011 (4) ALL SA 168 (SCA), the Supreme Court of Appeal held that "affected party" refers to any person whose socio-economic conditions might be directly affected by the mining operations, such as persons who earn a living in the immediate environment where mining operations are to be conducted. The court explained that an "interested party" is one with a lawful interest in the land on which a mining right is sought. The DMRE's Consultation Guidelines identifies "interested and affected parties" to include, while not being limited to, host communities, landowners, traditional authority, land claimants and lawful occupiers, the Department of Land Affairs, and any other person (including on adjacent and non-adjacent properties) whose socio-economic conditions may be directly affected by proposed prospecting or mining operations as well as the local municipality and, further, the relevant government departments, agencies and institutions responsible for the various aspects of the environment and for infrastructure which may be affected by the proposed project.

[1099] Section 10(2) of the *MPRDA*.

[1100] Although the case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 involves two mining companies, it affirms at para 13 an aspect important to host communities, that is the legal requirement for applicants for prospecting rights to notify and consult with the landowner and interested and affected parties. The state is required by section 16(4)(b) of the *MPRDA* to advise the applicant to notify and consult with the landowner and interested and affected parties and submit the results of such consultations as a pre-condition for the granting of prospecting rights. The court held that failure to notify and consult with the landowner and interested and affected parties violates both the *MPRDA* and the *PAJA*.

parties within 180 days from the date of the notice." Pertaining to applications for a mining permit, section 27(5)(b) of the *MPRDA* provides that the state should upon accepting the application, advise the applicant to notify and consult with the landowner, lawful occupier and other affected parties and submit the results of such consultations within 30 days.

While the *MPRDA* must be commended for providing for notification and consultation with the landowner or lawful occupier, interested and affected parties, the timelines provided in the Act for completion of the consultation processes are short and inconsistent with the requirements set out in international and regional regulatory instruments, particularly where indigenous peoples are involved. For instance, the *ILO Convention* 169 of 1989 and *UNDRIP*[1101] require that consultations should be performed in accordance with the customs and traditions of the communities. Further, despite the consultation provisions in the *MPRDA*, South Africa has experienced some administrative challenges, mainly, the failure to meet the requirements for consultation (inadequate notice to landowners) and lack of access to information by mine-host communities.[1102] This stems from the failure of the *MPRDA* to indicate how the consultation process is to be carried out.[1103] Consequently, the scope of the consultation process has only been developed in case law and guidelines of the Department of Mineral Resources and Energy (DMRE).[1104] According to the DMRE's *Guidelines for Consultation with Communities and Interested and Affected Parties*, the applicant for prospecting or mining rights must, among other things:[1105]

> (i) identify and notify the landowner, lawful occupier, interested and affected parties and retain the proof of notice, (ii) in case of prospecting, inform the landowner, lawful occupier, interested and affected parties in sufficient detail of what the

[1101] See A 6(1)(2) of the ILO Convention 169 of 1989; A 19 and A 32(2) of the UNDRIP.

[1102] See Humby 2012 15(4) *PER/PELJ* 169; Wits-CER-*Mining-Litigation-Review*-6-December-2011. The DMRE's Consultation Guidelines provide a broad and general definition of what constitutes consultation, that is, "a two-way communication process between the applicant and the community or interested and affected party wherein the former is seeking, listening to, and considering the latter's response, which allows openness in the decision-making process".

[1103] The *MPRDA* does not indicate the exact persons to be consulted in the case of a community, particularly whether consulting with the traditional leader or traditional council will suffice and the level at which involvement or standard of consultation with communities is required.

[1104] *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC); *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA); *Director Mineral Development Gauteng v Save the Vaal Environment* 1999 (2) SA 709 (SCA) 718; *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC). The Bengwenyama set the good faith standard but fell short of declaring that the consultation process requires free, prior and informed consent.

[1105] http://www.dmr.gov.za/Portals/0/consultation_guideline.pdf.

> prospecting operation would entail (iii) consult with landowner, lawful occupier, interested and affected parties with a view to reach an agreement regarding the prevailing environment and possible impacts of the proposed operations, (iv) record the outcomes of the consultation meetings in the form of minutes or recordings and (v) describe the information that the applicant provided to interested and affected parties and list their views or concerns.

The Northern Cape High Court held in *Meepo Yase Chaba v Kotze and Four Others*[1106] that the requirements for consultation set out in the *MPRDA* seek to strike a rational balance between the rights of the prospecting right holder and the rights of the landowner. The court further indicated that the purpose of consultations was to alleviate possible serious inroads made into the property rights of the landowner.[1107] Therefore, the sections providing for consultation between an applicant and a landowner should be widely construed. This is because consultation is the only prescribed means by which a landowner is to be advised of the impact prospecting operations may have on other forms of land use such as farming.[1108]

In *Joubert and Others v Maranda Mining Company (Pty) Ltd,*[1109] the Supreme Court of Appeal endorsed the ruling in *Meepo Yase Chaba v Kotze and Four Others* and reiterated that the legislative requirements pertaining to consultation between the landowner and the holder of prospecting and mining rights are meant to minimise the impact of the invasion of the rights of the landowner. The court explained that the mining right holder is only entitled to enter the land concerned after complying with provisions pertaining to consultation with the landowner, lawful occupiers or interested and affected parties.[1110]

[1106] *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC) pars 13-13.1.

[1107] *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC) pars 13-13.1. In reversing the award of prospecting rights to Meepo (the applicant), the court held that section 5(4)(c) of the *MPRDA* required that, before granting of a prospecting right and commencement of prospecting activities, the applicant must give proper notice to the landowner of the intention to enter the land for purposes of prospecting, followed by a consultative process and this had not been done. However, as discussed earlier, section 5(4)(c) of the *MPRDA* was amended by the *MPRDA Amendment* of 2008, which retained the requirement for notice but removed the requirement for consultation.

[1108] *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC) pars 13.1-13.2. See also *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) para 12.

[1109] *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) paras 12-13. See also *Director Mineral Development Gauteng v Save the Vaal Environment* 1999 (2) SA 709 (SCA) 718.

[1110] *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) para 13.

The Constitutional Court of South Africa further examined and clarified the requirements for consultation in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others,* [1111] and set a judicial precedent on consultation, preferential rights of mine-host communities and environmental considerations in the granting of prospecting rights. In this case, the community contended that Genorah Resources, contrary to section 16(4)(b) of the *MPRDA*, had not consulted with the Bengwenyama-ye-Maswati Tribal Council, who represented the Bengwenyama community.[1112] In terms of consultation, the High Court had ruled that the test for compliance with the *MPRDA* consultation requirements was just awareness.[1113] It ruled that, since Genorah Resources had communicated with the Bengwenyama's traditional leader and made him aware of its intention to apply for a prospecting right, sufficient consultation in compliance with section 16(4)(b) of the *MPRDA* had occurred.[1114] The Constitutional Court differed on the level of consultation required and set the standard higher by stating that the compliance test is good faith consultation. This is consistent with the requirements set in international and regional regulatory instruments such as the *ILO Convention* No. 169 of 1989 and UNDRIP.[1115] When it came to determining the test for compliance, the Constitutional Court considered the impact of prospecting rights and stated that they represent:

> a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen (and the notice and consultation requirements) indicated a serious concern for the rights and interest of the landowner and lawful occupiers in the process of granting prospecting rights.[1116]

[1111] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC). The case, which was first decided in the Transvaal High Court, was appealed all the way to the South African Constitutional Court. See Humby 2012 15 (4) *PER/PELJ* 166-188.

[1112] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2010 3 ALL SA 577 (SCA) paras 5, 9. A representative of Genorah Resources had merely visited the traditional leader of the Bengwenyama-ye-Maswati, Kgoshi Nkosi, and left a prescribed consultation form which the traditional leader never signed. Bengwenyama Minerals (Pty) Ltd was the investment arm of the Bengwenyama-ye-Maswati Tribal Council.

[1113] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008) paras 28-30.

[1114] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008) paras 28-38.

[1115] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 65. See A 6 (2) of the *ILO Convention* No. 169 of 1989; A 19 and A 32(2) of the UNDRIP.

[1116] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) paras 63-64. See *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* 1996 (4) SA 499 (AD) 509B.

The Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[1117] further explained that the consultation requirements in the *MPRDA* served two general purposes. The first is to see if some accommodation can be reached between the applicant for a prospecting right and the landowner pertaining to interference with the landowner's right to use the property.[1118] The second is to provide the landowner or lawful occupier with sufficient information centred on the prospecting operations, which should put them in a position to make an informed decision as to whether to object to the application or launch an appeal or review.[1119] The court emphasised that the landowner had to be informed "in sufficient detail" regarding that which the prospecting operations entailed, so that they could assess the impact of such operations.[1120] The ruling by the court exposed the tendency by mining companies to conduct symbolic consultations where they simply leave a form for the landowner to complete, with no intention to meaningfully engage mine-host communities. Whether the consent of the landowner or lawful occupier is a requirement was not considered, as this was not argued by the parties.

Consent was considered in the cases of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[1121] and *Baleni and Others v Minister of Mineral Resources and Others*,[1122] which are discussed in 6.4.5 below. The two cases clarified that, in a case in which the land is held by a community holding informal or customary land rights, the consultation process must be stringent, as the *IPILRA* requires community consent in addition to the consultation required under the *MPRDA*.

1117 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) par 65.

1118 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 65. The court highlighted that, although the *MPRDA* does not necessarily require the parties to reach an agreement, the consultations under the *MPRDA* required an engagement in good faith with a view to achieving some accommodation.

1119 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 67.

1120 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 67. Froneman J, explained at para 65 that "the consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair."

1121 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC).

1122 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

The *Mines and Minerals Act* 38 of 1961 which is the principal mining legislation in Zimbabwe does not provide for consultation with interested or affected parties and it must be amendment to include such consultation requirements. This will assist Zimbabwe to resolve its persistent challenge of balancing the rights of holders of minerals rights with those of mine-host communities.

6.4.1.5 Preferential rights for mine-host communities

When it enacted the *MPRDA,* the legislature was cognisant of the fact that mine-host communities previously dispossessed of their land during apartheid may wish to exploit the minerals on their lands. Consequently, section 104(1) provides preferential rights for mine-host communities towards prospecting on community-owned lands or lands yet to be registered in the name of the community concerned.[1123] The *MPRDA* allows mine-host communities to be granted prospecting and mining rights on their land ahead of other applicants if they meet requirements set in section 104(2) of the Act, which includes showing that the rights will be used for the development of the community.[1124] In terms of section 104(4), no preferential rights will be granted where a prospecting right or mining right has already been issued to a third party over the same land.

The Constitutional Court of South Africa was called upon to decide on the issue of preferent community prospecting rights in the case of *Bengwenyama Minerals (Pty) Ltd*

[1123] The reference in section 104(1) of the *MPRDA* to land to be registered in the name of the community considers the possibility that communities have land claims pending at the Land Claims Court in terms of the *Restitution of Land Rights Act*. The South African Constitutional Court in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 3 explains that the *MPRDA* gives effect to the constitutional mandate to promote equitable access to the nation's mineral resources and expansion of opportunities for historically disadvantaged South Africans to enter the mining industry. The court therefore explained in para 30 that, "when interpreting a provision of the Act any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is inconsistent with the object of the Act."

[1124] Section 104(2) of the *MPRDA* sets the following requirements for communities to be granted preferential rights to prospect on their lands: (i) proof that the right will be used to contribute to the development and social upliftment of the community concerned, (ii) submission of a development plan indicating the manner in which the right will be exercised, (iii) proof that envisaged benefits of the project will accrue to the community in question and (v) proof that the community has access to technical and financial resources to exercise such a right.

and Others v Genorah Resources (Pty) Ltd and Others.[1125] The Bengwenyama community had through their company, Bengwenyama Minerals (Pty) Ltd, submitted a direct application for prospecting rights based on section 16 of the *MPRDA* and not preferent community prospecting rights in terms of section 104. The community only relied on the provisions of section 104 in their arguments before the courts and, on that basis, the High Court and the Supreme Court of Appeal ruled against Bengwenyama Minerals, as they determined that the community raised the issue as an after-thought.[1126] The Constitutional Court differed and relied on section 3 of the *PAJA* to uphold the community's rights.[1127] In the Constitutional Court's view, since the DMRE was aware of the community's intention to obtain prospecting rights on its land, it had a duty to inform the community regarding section 104 rights and the potential adverse effect to those rights if they did not exercise the rights before a decision on Genorah Resources' application was made.[1128] The community should have been given an opportunity to make representations and bring a section 104 application before a decision was made on the section 16 application made by Genorah Resources.[1129] In the end, the Constitutional Court set aside the prospecting rights granted to Genorah Resources, based mainly on its findings on consultations and preferent

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[1125] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC). See Olivier NJJ, Williams C, Badenhorst PJ "Competing Preferent Community Prospecting Rights: A Nonchalant Custodian?" 2017 20 *PER / PELJ* 1-34.

[1126] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008) para 11; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Supreme Court of Appeal, Case No 71/09, 31 March 2010) para 18.

[1127] Section 3(1)(2)(b) of the *PAJA* provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Procedural fairness entails, *inter -alia*, giving the affected party adequate notice of the nature and purpose of the action and a reasonable opportunity to make representations. The Bengwenyama argued that the community had preferential rights to prospect on their land in terms of section 104 of the MPRDA, that they had submitted their application for prospecting rights and that they had a right to make representations and be heard in terms of section 3(2)(b) of the *PAJA* before the DMR granted the rights to Genorah Resources.

[1128] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 71, 73-74.

[1129] See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 73, where the Constitutional Court stated that "these provisions of the Act create a special category of rights for these communities, in addition to their rights as owners of the land, namely, to apply for a preferent right to prospect on their land. It is only where a prospecting right has already been granted on communal land that the preferent right may not be granted. It therefore appears to me that any application for a prospecting right under s 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under s 104 of the Act, materially and adversely affects that right of a community. Before a prospecting right in terms of s 16 may be granted under those circumstances, the community concerned should be informed by the department of the application and its consequences, and it should be given an opportunity to make representations in regard thereto. In an appropriate case that would include an opportunity to bring a community application under s 104 prior to a decision being made on the s 16 application."

community prospecting rights.[1130]

Other general provisions supporting the involvement and benefit accrual by mine-host communities are section 9(1)(2) of the *MPRDA*, which states that, when applications for the same mineral are considered in respect of the same land and received on the same date, the state must give preference to an application for mineral rights received from historically disadvantaged persons. This provision enables mine-host communities to get the benefit of obtaining mineral rights ahead of other applicants, because they have been historically disadvantaged, and this facilitates their entry into the mining industry. In terms of section 12(1)(4) of the *MPRDA*, the minister may assist historically disadvantaged persons to conduct prospecting or mining operations. Factors to be considered before extending the assistance to the applicant include the need to promote equitable access to the nation's natural resources and transform the ownership structure of the minerals and mining industry.[1131] The idea of preferent community prospecting rights can be adopted through legislative reform in Zimbabwe to facilitate mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit. [1132]

6.4.1.6 Broad Based Black economic empowerment (BBBEE) objectives

Section 17(1)(f) of the *MPRDA* provides that the Minister of Mineral Resources and Energy must grant an application for prospecting rights if the applicant has given effect to the objects referred to in section 2(d) regarding compliance with BBBEE requirements. This section was incorporated through the *MPRDA* Amendment Act 49 of 2008. Before the

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[1130] Bengwenyama Minerals moved quickly to submit a new preferent community prospecting rights application after the Constitutional Court ruling, but it was again mishandled by the DMRE, prompting the *Bengwenyama* to once again approach the Supreme Court of Appeal, which overturned the decision of the DMRE in *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* [2014] 4 All SA 539 (SCA). In this case the court replaced the decision of the DMRE with an order awarding exclusive preferent community prospecting rights to the *Bengwenyama-Ya-Maswazi Community.* The Supreme Court of appeal in *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* [2014] 4 All SA 539 (SCA) paras 60-61 held that "the Constitutional Court's concerns about land dispossession and redress and that communities deserved to be assisted to claim what is rightfully theirs cannot be discounted" and the DMRE's decision to ignore these concerns was startling.

[1131] Section 12(3)(a)(c) of the *MPRDA*. See Kgoale and Odeku 2019 8 *JRGE* 1412-1413.

[1132] The Zimbabwean constitutional, policy and legislative frameworks do not provide community preferent rights in the provisions regarding application for and award of mineral rights. Consequently, mineral rights are awarded on lands inhabited by mine-host communities without any regard for their interests in minerals under their lands.

amendment,[1133] only section 17(4) of the *MPRDA* permitted the minister to request[1134] an applicant for prospecting rights to implement BBBEE objectives detailed in section 2(d) of the *MPRDA* as a condition for award of prospecting rights. The *MPRDA* Amendment Act 49 of 2008 further introduced section 23(2A), which reads:

> If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.[1135]

The implication of section 23(2A) of the *MPRDA* is that the minister can introduce into the mining right itself such conditions that are necessary in his view to protect the rights of mine-host communities, including involvement and benefit-sharing. This protects mine-host communities, irrespective of whether the communities are in support or against mining operations on their lands. In terms of section 23(1)(h), as read with section 23(3) of the *MPRDA*, the state will not grant a mining right if it does not further the objects set out in section 2(d)(f) pertaining to BBBEE and social development in conformity with the *Mining Charter* and applicable social and labour plans that pertain to empowerment and development of mine-host communities and labour-sending areas. Similarly, a mining right holder has an obligation, during the subsistence of the mining right, to comply with the requirements of the social and labour plan and the environmental management

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[1133] The *Mineral and Petroleum Resources Development Amendment Act* 49 of 2008 (MPRDAA) became effective on 7 June 2013 (GN R14 *GG* 36512 of 2013-05-31).

[1134] The court in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* 2016 (1) SA 306 (SCA) paras 15,16, 17 explained that the word "request" in the context of section 17(4) of the MPRDA means to "politely or formally ask (someone) to do something" and that this is not different from a demand or requirement. A request comes as the first step in the process of attaining mandatory compliance with the BBBEE requirements in section 2(d) of the *MPRDA*, which is a pre-condition for award of prospecting rights (under section 16 read with section 17(4) of the *MPRDA*) and mining rights (under section 23(1)(h) of the *MPRDA*). The court stated that BBBEE requirements in section 2(d) of the MPRDA are affirmative action provisions meant to redress the historical exclusion of black South Africans and to facilitate equitable access to the mining and minerals industry. In the absence of compliance with the stated BBBEE requirements, the DMRE is entitled to cancel the prospecting right. The ruling in *Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd* pertaining to BBBEE as a precondition for award of both prospecting and mining rights is embraced in Badenhorst 2016 *De Jure* 168-181; Van Niekerk and Mudimu (2019) 30 *Stell LR* 281-298.

[1135] Section 1 of the *MPRDA* defines the term "community" as "a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions 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." This definition entails that the communities are interested and affected parties that must be consulted in terms of section 10 and 22 of the *MPRDA*.

programme.[1136] The mining right will not be renewed at its expiry if it is established that the mining right holder did not comply with the requirements of the social and labour plan and the approved environmental management programme.[1137] These provisions of the *MPRDA* were put in place to protect the rights of mine-host communities that are linked to their land and to reverse the wrongs of apartheid that trampled these rights. The social and labour plans and the *Mining Charter* for the South African Minerals and Mining Industry are discussed in 6.4.3.3 below.

When compared with the *MPRDA*, economic empowerment of the majority black people was not the objective of the colonial government when it enacted Zimbabwe's *Mines and Minerals Act* 38 of 1961 which is still the country's principal mining legislation. Therefore, as demonstrated in chapter 5 above, the mining sector in Zimbabwe has not empowered the majority black people especially those living in communal lands. Zimbabwe's *Mines and Minerals Act* 38 of 1961 can be amended to capture the objective to empower the citizens of the country and especially mine-host communities who often suffer disproportionation burdens of mineral extraction on the lands they inhabit.

6.4.1.7 Right to access to information

The right to access to information, as protected under section 32(1), and the right to administrative justice protected in section 33(1) of the *Constitution of South Africa*, facilitate greater public participation in decision-making processes. These rights are vital to the process of the awarding of prospecting and mining rights on lands inhabited by mine-host communities. Section 29(a), (b) and (c) of the *MPRDA* ensures access to the necessary information to achieve the objectives of the Act by empowering the minister to direct any applicant or holder of a prospecting right, mining right, mining permit, retention

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[1136] Section 25(2) (e) (f) of the *MPRDA*. The mining right holder is also obliged by section 25(2)(h) to submit annual report providing details of the holder's compliance with the provisions of section 2(d) and (f) of the *MPRDA*, requirements of the *Mining Charter* and social and labour plans. Section 28(2)(c) requires a similar annual return from holders of mining permits. Section 2(d) and (f) of the of the *MPRDA* pertain substantial and meaningful expansion of "opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources" and the promotion of employment and social and economic advancement of all South Africans.

[1137] Section 24(3)(c)(d) of the *MPRDA*.

permit as well as any owner or lawful occupier of land subject to the above rights to submit any specified information. The state may, in terms of section 30(1)(a)(b) of the *MPRDA*, disclose the information so received to any person, thus including mine-host communities, so as to achieve any of the objectives set out in section 2(c),(d) and (e) of the *MPRDA* or to give effect to the right of access to information as set out in section 32 of the *Constitution of South Africa*.[1138] The *MPRDA* provisions that protect the right of mine-host communities to access information facilitate the informed involvement of the communities in the process of decision-making centred on the award and utilisation of mineral rights on their lands. The weakness of the right to access to information as provided in the *MPRDA* is that the access is not automatic. Those seeking to access information must follow the onerous process set out in the *PAIA* which is discussed in section 6.4.7 below.

6.4.1.8 Minerals and Mining Development Board

The Minerals and Mining Development Board (MMDB) is addressed in section 57 of the *MPRDA.* The MMDB plays a critical role around advising the Minister of Minerals and Energy on various issues, including sustainable development of the country's mineral resources, the transformation of the mining industry, resolution of disputes and attainment of the objectives of the *MPRDA*.[1139] Given the important role of the MMDB, the composition of this board must reflect the interests of various stakeholders in the mineral and mining industry. Consequently, section 59(2)(f)(g) of the *MPRDA* requires that one person from a non-governmental organisation and two representing relevant community-based organisations should be appointed as members of the MMDB. Ideally these organisations should represent the interests of mine-host communities. These appointments are important for community involvement and participation in key decision-making bodies, as they use their membership to draw attention to the interests of and issues affecting mine-host communities. The involvement of community-based organisations on the membership of the Minerals and Mining Development Board holds an important example for Zimbabwe whose Mining Affairs Board does not include representatives of mine-host communities

[1138] Section 2(c)(d) of the *MPRDA*.
[1139] Section 58(1)(a)(c) of the *MPRDA*.

among its membership.[1140]

6.4.1.9 Right to appeal administrative decisions

In terms of section 6(1) of the *MPRDA*, the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) also addresses administrative processes and decisions pertaining to mineral and petroleum resources. This means that the authority bestowed by section 3(a)(b) of the *MPRDA* on the Minister of Minerals and Energy to grant, issue, refuse, control, administer and manage various mineral rights must be exercised in conformance with the principles of administrative justice as set out in the *PAJA*. Section 6(1) of the *MPRDA* shows these principles to include lawfulness, reasonableness and procedural fairness. These principles are important to mine-host communities, who often suffer procedural injustices related to notification and consultations when faced with prospecting and mining on their lands. A decision to grant a prospecting or mining right on lands inhabited by mine-host communities without consulting them will thus fall foul of the principles of lawfulness, reasonableness and procedural fairness.

Section 96(1)(a)(b) of the *MPRDA* provides a right for affected and interested persons whose rights or legitimate expectations have been materially and adversely affected or who are aggrieved, to appeal any administrative decision made in terms of the *MPRDA*.[1141] Remarkably, section 96(1) of the *MPRDA* is phrased widely, so as to include rights and legitimate expectations. It must be pointed out that it is both a right and a legitimate expectation of all mine-host communities that they should be involved in and accrue benefits from mineral extraction on the lands they inhabit. The legitimate expectation arises from their ownership, in exceptional cases, or lawful occupation and use of the land,

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[1140] As demonstrated in section 5.4.1.2 above, the Zimbabwean legislative framework does not provide for representation of mine-host communities in an important decision-making body of this nature.

[1141] Appeals against decisions by a Regional Manager or an officer are handled by the Director-General, while appeals against the Director-General's decisions are handled by the Minister of Mineral Resources and Energy. Since the minister is the highest level in the internal remedies, an appeal against his or her decisions goes directly to the courts. Section 96(3) of the *MPRDA* requires the aggrieved persons to first exhaust the internal remedies provided in section 916(1) before approaching the courts. In exceptional circumstances, where a court deems it in the interest of justice, an aggrieved person is entitled in terms of section 7(2)(c) of the *PAJA* to directly approach it for a remedy without first exhausting the internal remedies laid out in section 96 of the *MPRDA*.

and they are interested or affected parties who bear a major burden of mineral extraction in the form of environmental damage, health risks and other social ills.[1142]

6.4.1.10 Resettlement of affected communities

Section 25(6) of the *Constitution of South Africa* lays the foundations of the framework for resettlement of mining affected communities in South Africa.[1143] This constitutional provision states that a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to legally secure tenure or comparable redress. In addition, to the constitutional foundations, the DMRE *Guidelines for Consultation with Communities and Interested and Affected Parties,* discussed in 6.4.1.4 above, that were developed to give effect the requirements of sections 10(1)(b), 16(4)(b), 22(4)(b) and 27(5)(b) of the *MPRDA*, prescribe that consultation reports lodged by applicants for prospecting and mining rights must include a description of the most appropriate ways of carrying out the mining operations while accommodating issues raised in the consultation process. This requirement encompasses plans for resettlement of affected communities where necessary. Based on these foundations, the DMRE developed the *Mine Community Resettlement Guidelines* of 2022 which were gazetted on 30 March 2022 which outline the process and requirements that an applicant for or holder of prospecting and mining rights or permits should comply with where the exercise of such rights will result in physical displacement of affected communities, landowners and lawful occupiers from their land.

The *Mine Community Resettlement Guidelines* of 2022 sets out some key principles upon which resettlement of mine affected communities shall be based. Among these principles is meaningful consultation,[1144] protection of existing rights of affected landowners, lawful

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[1142] Compensation is therefore payable by a mining company to a host community in terms of section 54(3) of the *MPRDA* if the state concludes that the community has suffered or will suffer loss or damage as a result of reconnaissance, prospecting or mining on the land. Section 55(1) requires the state to pay compensation to the landowner or lawful occupier when it decides to expropriate any land for mining purposes.

[1143] The term resettlement is defined in the *Mine Community Resettlement Guidelines* of 2022 to mean the "displacement and relocation of landowners, lawful occupiers, holders of informal and communal land rights, mine communities and host communities as a result of planned or operational mining activities."

[1144] Para 5.1(a) of the *Mine Community Resettlement Guidelines* of 2022.

occupier and communities,[1145] provision of sufficient notice and access to information,[1146] avoidance of resettlement and mitigation of impacts where resettlement is unavoidable.[1147] The principles require an applicant or holder of a prospecting right, mining right or mining permit to provide affected landowners, lawful occupiers and communities an opportunity to be heard and to "obtain clear, accurate and understandable information about all the proposed mining activity or implications of a decision on resettlement."[1148] The principle of meaningful consultation also requires that (i) a determination be made regarding the possibility of some accommodation or co-existence between the applicant or holder of mineral rights and the landowner (ii) opportunities be made available for clearing any misunderstandings and that (iii) procedural fairness of the administration of the resettlement as required by the *PAJA* is given effect.

The *Mine Community Resettlement Guidelines* of 2022 state that resettlement of communities as a result of mining operations must result in the restoration and improvement of their livelihoods as well as enable them to share in the benefits of the mining project, for instance, through employment and business opportunities within the operations as well as compensation for any losses to their property and livelihoods.[1149] To achieve this objective, the resettlement process must be based on three key documents namely the Resettlement Plan,[1150] Resettlement Action Plan[1151] and Resettlement Agreement.[1152] These documents must be developed by the applicant or mining right holder in meaningful consultation with the affected communities, landowners and lawful occupiers.[1153] The documents must be lodged with the DMRE for noting.[1154] It can be argued that the guidelines should rather explicitly state that the documents shall be considered in the decision whether to grant prospecting rights, mining rights or a mining permit.

[1145] See para 5.1(c) of the *Mine Community Resettlement Guidelines* of 2022.
[1146] See para 5.1(d) of the *Mine Community Resettlement Guidelines* of 2022.
[1147] See 5.1(e) of the *Mine Community Resettlement Guidelines* of 2022.
[1148] Para 7.1 of the *Mine Community Resettlement Guidelines* of 2022.
[1149] See paras 9.1 and 9.3(a)(f) of the *Mine Community Resettlement Guidelines* of 2022.
[1150] Para 10 of the *Mine Community Resettlement Guidelines* of 2022.
[1151] Para 11 of the *Mine Community Resettlement Guidelines* of 2022.
[1152] Para 12 of the *Mine Community Resettlement Guidelines* of 2022.
[1153] Para 5.1(a) of the *Mine Community Resettlement Guidelines* of 2022.
[1154] Para 12(4) of the *Mine Community Resettlement Guidelines* of 2022.

In terms of the *Mine Community Resettlement Guidelines* of 2022*,* the Resettlement Plan should provide details relating to *inter alia,* project description, impact analyses, consultation mechanism and implementation timeline,[1155] while the Resettlement Action Plan provides the details of the steps to be followed to attain the goals of the resettlement plan. On its part, the Resettlement Agreement records commitments made by the applicant or mining right holder together with the obligations and rights of the parties to the agreement. The guidelines further provide that where mining activities may result in the relocation of affected communities, such operations shall not commence until a resettlement agreement is concluded.[1156] It can be observed that once signed by the parties, the Resettlement Agreement together with the Resettlement Plan and Resettlement Action Plan are legally binding on those parties in terms of the law of contracts and thus become critical instruments for protecting and advancing the rights of mine-host communities. In contrast to the above, Zimbabwe does not have any specific guidelines or statutory instruments designed for consultation with and resettlement of mining affected communities. The South African *Guidelines for Consultation with Communities and Interested and Affected Parties and Mine Community Resettlement Guidelines* present a good example that Zimbabwe can utilise in reforming its own policy and legislative frameworks centred on mine-host community involved in and benefit accrual from mineral extraction. The guidelines can be enacted in legislative instruments to give them binding force.

6.4.2 Mineral and Petroleum Resources Development Regulations, 2020 (MPRDR 2020)

Section 107(1) of the *MPRDA* empowers the Minister of Mineral Resources and Energy to make regulations related to the exploitation of minerals. The minister gazetted the *Mineral and Petroleum Resources Development Regulations,* 2004 (MPRDR) on 23 April 2004.[1157] The *MPRDR* have been amended over the years to accommodate various changes with the latest amendment being the *Amendment to the Mineral and Petroleum Resources*

[1155] See paras 10.5.1, 10.5.2 and 10.5.4 of the *Mine Community Resettlement Guidelines* of 2022.
[1156] Para 9.2 of the *Mine Community Resettlement Guidelines* of 2022.
[1157] *Mineral and Petroleum Resources Development Regulations*, 2004 (MPRDR) published under GN R527 in GG 26275 of 23 April 2004.

Development Regulations, 2020 (MPRDR 2020).[1158] The *MPRDR* 2020 promotes participatory rights in line with the idea of procedural justice by broadening the obligation to consult landowners, lawful occupiers and interested and affected parties by moving a step forward from mere consultation to meaningful consultation.[1159] Regulation 1 was amended by the *MPRDR* 2020[1160] to define meaningful consultation: the mineral right applicant should have:

> in good faith facilitated participation in such a manner that reasonable opportunity was given to provide comments by the landowner, lawful occupier or interested and affected party in respect of the land subject to the application about the impact the prospecting or mining activities would have to his or her right of use of the land by availing all relevant information pertaining to the proposed activities enabling these parties to make an informed decision regarding the impact of the proposed activities.

The definition of interested and affected parties was revised in regulation 1 in the *MPRDR* 2020, by extending the list to include mine communities, landowners or lawful occupiers, traditional councils, land claimants with pending claims in terms of the *RLRA,* holders of informal land rights as defined in section 1 of the *IPILRA* and any other person whose socio-economic conditions may be directly affected by the proposed or existing prospecting or mining operation.[1161] Mine communities are then defined as those located where mining takes place, major labour-sending areas and adjacent communities within a local municipality, metropolitan municipality or district municipality.[1162] The all-encompassing definition of interested and affected parties ensures that no mine-host community is left out from the protection accorded by the regulations.

[1158] *Amendment to the Mineral and Petroleum Resources Development Regulations, 2020* Government Gazette Notice: GN R420 in GG 43172 of 27 March 2020.

[1159] Sections 10(1)(b), 16(4)(b), 22(4)(b) and 27(5)(b) of the *MPRDA* do not require meaningful consultation but mere consultation with landowners or lawful occupier, interested and affected parties.

[1160] It must be pointed out that this definition of meaningful consultation conforms to the remarks of the South African Constitutional Court in the case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 65, which says good faith and informing host communities in sufficient detail are the standards for consultation.

[1161] Regulation 1(d) *MPRDR* 2020. Also included in the definition of interested and affected parties are "natural or juristic or an association of such persons with a direct interest in the proposed or existing prospecting or mining operation or who may be affected by the proposed or existing prospecting or mining operation." The inclusion of juristic persons or associations of interested and affected persons follows the guidance provided in *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* [2014] 4 All SA 539 (SCA) 45-46, where the Supreme Court of Appeal ruled that a community can lawfully exercise its preferent rights to prospect on its land using a company as an investment vehicle.

[1162] Regulation 1(c) of the *MPRDR* 2020.

The *MPRDR* 2020 inserted regulation 3A(1), which requires that the meaningful consultation with landowners, lawful occupiers and interested and affected persons contemplated in sections 16(4)(b), 22(4)(b) and 27(5)(a) of the *MPRDA* be conducted in terms of the public participation process set out in the *Environmental Impact Assessment Regulations*, 2014 (EIA Regulations). The concept of meaningful consultation is therefore now directly linked to public participation processes carried out during environmental impact assessments.[1163] The *MPRDR* 2020 further introduced an option for the DMRE's regional manager to participate in the meaningful consultation process as an observer. The purpose of the participation by the DMRE observer is to ensure that the consultation process is meaningful and in compliance with the regulations.[1164] Attainment of this objective can be enhanced further if the participation of the DMRE observer is made obligatory rather than remaining optional.

Regarding consultations for Social and Labour Plans (SLPs),[1165] the *MPRDR* 2020 provides that an applicant should consult meaningfully with communities and interested and affected persons around the contents of social and labour plans so as to ensure that these will address the relevant needs and are aligned with updated integrated development plans.[1166] The holder of a mining right is required to convene a minimum of three meetings per annum with communities and interested and affected persons so as to update them regarding progress on implementation of the approved social and labour plans.[1167] Further, besides English, a mining right holder is to publish the approved social and labour plans in one other dominant official language commonly used in the mine-host community within

[1163] Similarly, consultation required for a permit application for a prospecting right, mining right and mining permit as well as applications under the social and labour plan (SLP) process must be conducted in terms of the public participation process prescribed in the EIA regulations promulgated in terms of section 24(5) of the *NEMA*). Further, the contents of an EIA report required in Regulation 50(f) of the *MPRDR* 2020 must include, among other things, "details of the engagement process of interested and affected persons followed during the course of the assessment and an indication of how the issues raised by interested and affected persons have been addressed." This compels mining companies to ensure involvement and participation of host communities.

[1164] Regulation 3A(2) of the *MPRDR* 2020.

[1165] Amended Regulation 42 of the *MPRDR* 2020 states that an application for a mining right must be accompanied by a social and labour plan. In terms of Regulation 41 of the MPRDR 2020, the objective of the plan is to ensure, *inter alia*, that mining operations contribute towards the socio-economic development of host communities.

[1166] Amended Regulation 42(3) of the *MPRDR* 2020. This must happen within 180 days from the date of receiving notification of acceptance for a mining right from the Regional Manager. This process must take place in accordance with the process prescribed in the EIA Regulations.

[1167] Amended Regulation 45 of the *MPRDR* 2020. The outcomes of these meetings must form part of the annual report.

30 days of approval. The approved social and labour plans must be made available on the mining company's website, in local libraries and schools, municipal offices and traditional council offices.[1168] These plans are to be reviewed by the mining right holder every five years from the date of approval in meaningful consultation with mine-host communities and interested and affected persons.[1169] The social and labour plans and other documents are therefore public documents that must be automatically accessible by members of the public. As demonstrated in chapter 5 above, Zimbabwe does not have statutory provisions providing detailed requirements for consultations with mine-host communities. These consultation provisions of the *MPRDR* 2020 offer lessons that Zimbabwe can utilise fruitfully when it comes to reforming its own legislative framework so as to ensure the optimal involvement in and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit.

6.4.3 Broad-Based Black Economic Empowerment Act 53 of 2003 (***BBBEEA***)

6.4.3.1 Introduction

The *Broad-Based Black Economic Empowerment* Act 53 of 2003 (*BBBEEA*), as amended by the *Broad-Based Black Economic Empowerment Amendment Act* 46 of 2013, confirms in its Preamble the constitutional obligation to promote the realisation of the right to equality and to intensify broad-based and effective participation of historically disadvantaged persons in the national economy.[1170] The *BBBEEA* states that the rationale for embarking on broad-based black economic empowerment is to reverse the harm caused by colonial rule and apartheid, which made access to productive resources dependent on race, resulting in the exclusion of the vast majority of the population consisting of black South

[1168] Amended Regulation 46A (a)(b)(i)(ii)(iii) of the *MPRDR* 2020. The availability and content of the approved Social and Labour Plans must be announced, in local radio stations and local newspapers.

[1169] Amended Regulation 46B (a) of the *MPRDR* 2020.

[1170] See section 9(1)(2) of the *Constitution of South Africa*, which provides that "everyone is equal before the law and has the right to equal protection and benefit of the law" and "equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievements of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken."

Africans from ownership of the means of production.[1171] BBBEE is therefore defined in section 1 of the *BBBEEA* to mean "the economic empowerment of all black people including women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic strategies."[1172] It is apparent that the objectives of the *BBBEEA* are underpinned by the ideas of remedial justice and distributive justice discussed in chapter 2 above, which seek restoration and re-distribution of economic resources.

In terms of the *BBBEEA,* the South African government seeks to facilitate broad-based black economic empowerment by, *inter alia,* increasing ownership and management of enterprises by communities, workers and cooperatives[1173] and empowering rural and local communities through access to economic activities, land, infrastructure and skills training.[1174] To attain these objectives, the *BBBEEA* establishes a legal framework for facilitating the BBBEE, the formulation and introduction of transformation charters and the issuing of codes of good practice to enhance the involvement, participation and accrual of economic benefits to Historically Disadvantaged South Africans (HDSAs).[1175] Section 9(1)(e) of the *BBBEEA* specifically provides for the development of Codes of Good Practice and Transformation Charters for each economic sector in South Africa. This requirement is subsumed in section 100(1)(b)(2)(a) of the *MPRDA*, which empowered the government to introduce a Code of Good Practice and a Broad-Based Socio-Economic Empowerment Charter with specific targets for the entry of HDSAs into mining, ensuring that they would benefit from the exploitation of the country's mineral resources.[1176] The government

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[1171] See paras 1 and 2 of the preamble to the *BBBEEA* and para 1 of the preamble of the *Mining Charter* 2018 regarding the systemic marginalisation and prevention of the majority of South Africans from meaningful participation in the mainstream economy.

[1172] BBBEE is defined in the preamble of the MPRDA to mean, among other things, strategies to initiate or facilitate the socio-economic development of host communities.

[1173] Section 2(c) of the *BBBEEA.*

[1174] Section 2(f) the *BBBEEA.* See also section 1 of the *BBBEEA*, which states that broad-based black economic empowerment will be achieved through among other means by "facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises."

[1175] The *Mining Charter* 2004 para 2 defines historically disadvantaged South Africans as referring "to any person, category of persons or community, disadvantaged by unfair discrimination before the *Constitution of the Republic of South Africa*, 1993 (Act No. 200 of 1993) came into operation." The MPRDA section 1 defines them to be "any person, category of persons or community, disadvantaged by unfair discrimination before the constitution took effect."

[1176] Section 100(2)(a) of the *MPRDA* provides that the *Broad-Based Socio-Economic Empowerment Charter* for the South African Mining Industry "must set out, amongst others how the objects referred to in

fulfilled this mandate when it initiated the first *Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry* of 2004 (*Mining Charter* 2004).[1177] The challenge with Codes of Good Practice is, however, that they are mere guidelines which makes them difficult to implement since they are based on voluntary compliance.

In comparison to South Africa, Zimbabwe enacted the *Indigenisation and Economic Empowerment Act* 14 of 2007 with the objective of involving the majority black Zimbabweans in the country's economic activities through equitable ownership of national resources. However, this legislation has been neglected and its objectives diluted by the government of Zimbabwe through amendments introduced in the *Finance Act* 1 of 2018 and *Finance Act* 2 of 2020. As demonstrated in 5.4.4 above, these enactments removed community share ownership as a requisite for fulfilment of indigenisation requirements and ensured that implementation of economic empowerment in the mining sector is done at the sole discretion of the government of Zimbabwe. The objectives of black economic empowerment can only be attained if the government of Zimbabwe commits to full implementation of the *Indigenisation and Economic Empowerment Act* 14 of 2007.

6.4.3.2 The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (Mining Charter 2004 and 2010)

From its inception in 2004, the *Mining Charter* echoed the fact that past discrimination had resulted in the exclusion of mine-host communities from the mainstream economy, and there was therefore a need to redress historical and social inequalities.[1178] The objectives of the *Charter* included integrated socio-economic development for mine-host communities.[1179] Consequently, mining companies were assessed on their engagement, consultation with mine-host communities and implementation of integrated development

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section 2(c), (d), (e), (f) and (i) can be achieved." The targets pertain ownership, management, skills development, procurement, beneficiation, socio-economic development of communities and the socio-economic development of historically disadvantaged South Africans.

1177 *Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry*, 2004 (GNR 1639, GG 26661 of 13 August 2004). See also the *Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* 2010 (GNR 838, GG 33573 of 20 September 2010).

1178 See preamble of *Mining Charter* 2004.

1179 *Mining Charter* 2004 para 2.

plans in the communities.[1180] The 2010 *Mining Charter* also highlighted the link between mining companies' social license to operate and their contribution to community development, which requires collaboration with mine-host communities in terms of identifying projects within the ambit of the needs of the community; this would be their contribution to community development.[1181]

South Africa has a mechanism for assessing the implementation of the *Mining Charter*. On the positive side, the assessments conducted in 2010 and 2015 revealed that a mining charter negotiated with mining companies, and not imposed on them, is a useful tool for ensuring the transformation of the mineral industry to ensure mine-host community involvement and benefit accrual.[1182] However, the assessments also revealed some challenges, especially that the majority of mine-host communities continued to live in abject poverty and that companies often disguised corporate social responsibility projects as part of the legislated community development projects.[1183] It was also shown that high levels of consultation by companies with communities did not necessarily co-relate to proposed and implemented community development projects.[1184] Projects were often not linked to the identified specific needs of affected communities. The assessments also highlighted that companies might have been tempted to take a narrow empowerment approach that involved handpicked individuals who were then disguised as representing the broader interest of the mine-host community.[1185] To ensure that the interest of mine-host communities are not trumped in these and other ways, the court in the case of *Mining Affected Communities United in Action (MACUA) and Others v Chamber of Mines and Others*,[1186] held that organisations representing mine-host communities should be included

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1180 *Mining Charter* 2004 para 2; *Mining Charter Score Card* 2004.

1181 *Mining Charter* 2010 para 2.6.

1182 See the Mining Charter Impact Assessment Report 2009 http://www.dmr.gov.za. See also the Assessment of the *Broad-Based Economic Empowerment Charter* for the South African Mining Industry 2015 http://www.dmr.gov.za.

1183 Mining Charter Impact Assessment Report 2009 10 http://www.dmr.gov.za. See also preamble to the Mining Charter 2018 for a summary of the challenges highlighted in the Mining Charter Impact Assessment Reports of 2009 and 2015.

1184 Mining Charter Impact Assessment Report 2009 10 http://www.dmr.gov.za.

1185 Mining Charter Impact Assessment Report 2009 11 http://www.dmr.gov.za.

1186 *Mining Affected Communities United in Action (MACUA) and Others v Chamber of Mines and Others* (unreported judgement, High Court, Gauteng Division, Pretoria, Cased No. 71147/17). The Pretoria High Court found that there had not been meaningful engagement with mining-affected communities in the drafting of the *Mining Charter* 2017. The court ordered that the community representatives should have timeous access to all the relevant information and meeting venues. Further, engagement with the

in the review process for the draft *Mining Charter* of 2017. The ruling secured the right of mine-host communities to be effectively involved in the *Mining Charter* review process and formulation of future mining charters and, therefore, in decision-making processes on the laws and policies that will affect them. The *Mining Charter* of 2004 as amended in 2010 and 2017 has since been repealed by the *Mining Charter* of 2018, which seeks to correct weaknesses identified in the assessments of 2010 and 2015.[1187]

6.4.3.3 Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (*Mining Charter* 2018)

The *Mining Charter* 2018 is relevant to existing mining rights, pending mining rights applications, new mining rights in terms of the *MPRDA* as well as existing and new permits and licences issued in terms of the *Diamond Act* and *Precious Metals Act*.[1188] Among its objectives, the *Mining Charter* 2018 seeks the following items:

> (b) To deracialise ownership patterns in the mining industry through redress of past imbalances and injustices;
> (c) To substantially and meaningfully expand opportunities of Historically Disadvantaged Persons to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
> (f) To enhance the social and economic welfare of South Africans so as to achieve social cohesion.

The six elements constituting the *Mining Charter* 2018 are ownership, mine community development, housing and living conditions, employment equity, procurement supplier and enterprise development and human resources development.

It is important to note that some provisions of the *Mining Charter* 2018 have since been nullified and set aside by the case of *Minerals Council of South Africa v Minister of Mineral*

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communities should be conducted in languages commonly used by them and that they should be given an opportunity to make proposals regarding the contents of the charter instead of being asked to respond to the state's proposals only. The communities should have meaningful and effective opportunity to be heard and their concerns should be considered and addressed.

1187 See para 11 of the *Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry*, 2018 (*Mining Charter* 2018) GG 41934 of 27 September 2018). The revised *Mining Charter* issued in 2017 was challenged in court by the mining industry, host communities and human rights activists based on inadequate consultation among other reasons.

1188 *Mining Charter 2018* para 7.1.

Resources and Energy and Others.[1189] The case involved a dispute over the law-making powers of the Minister of Mineral Resources under section 100(2) of the *MPRDA* and, therefore, whether the *Mining Charter* 2018 is law or a mere policy instrument with no direct binding effect of its own.[1190] The Minerals Council of South Africa argued that the provisions of the charter that imposed prescriptive requirements and sanctions for non-compliance showed that the Minister had gone beyond policy making and was making subordinate legislation.[1191] Such action has no foundation in section 100(2) of the MPRDA which mandates the Minister to develop a Mining Charter as a pact between the state and the mining industry where they committed to empower HDSA. In response, the Minister of Mineral Resources argued that the Mining Charter constituted binding subordinate legislation designed to achieve the transformational objects of the *MPRDA*.[1192] The court held that although section 100(2) of the *MPRDA* mandates the Minister of Mineral Resources to develop the *Mining Charter*, that section did not give the Minister law-making powers.[1193] Consequently, the court held that the *Mining Charter* 2018 is not subordinate legislation but rather a policy instrument that only provide guiding principles.[1194] This entails that the *Mining Charter* 2018 does not give rise to legally binding obligations. Its provisions only bind holders of mining rights to the extent that the Minister has lawfully incorporated them into a mining right. The court in *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* set aside those provisions of the *Mining Charter* 2018 dealing with targets for ownership, procurement, supplier and enterprise development together with penalties and enforcement provisions.[1195] Provisions dealing with employment equity, human resource development, mine community development, and housing and living conditions were not set aside. These provisions bind mining rights holders when incorporated as terms or conditions in a specific mining right

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1189 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP).

1190 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 7.

1191 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 9.

1192 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 8, 43.

1193 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 59.

1194 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 59.

1195 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 68.

issued by the DMRE.

Among those provisions of the *Mining Charter* 2018 that have not been set aside, community development[1196] remains the most relevant to this study. Mining companies are required to identify community development needs with the participation of the communities, traditional leaders, affected stakeholders and relevant municipalities.[1197] Consultations by the mining companies must include mine-host communities, traditional leaders, affected stakeholders and relevant municipalities when they identify developmental priorities of mine-host communities for incorporation in approved social and labour plans to be implemented by the mining companies.[1198] Further, approved mine-host community development programmes must be published in at least two languages commonly used by the communities.[1199] A trust or similar vehicle made up of persons representing mine-host communities and mining companies shall be responsible for the "community development programme, fund distribution and governance of the equity equivalent benefit."[1200]

Apart from the *MPRDA*, *MPRDR* and the *Mining Charter* 2018 that directly regulate mineral extraction, mining is indirectly regulated by other legislation pertaining to the environment, water, informal land rights, administration of justice, access to information and land redistribution. The legislation, as discussed below, create further room for community participation and involvement where mineral extraction is involved, thereby providing ample lessons for Zimbabwe.

1196 Para 2.5.3 of the *Mining Charter* 2018.

1197 Para 2.1.4.1.4 of the *Mining Charter* 2018.

1198 Para 2.5.1 and 2.5.4 of the *Mining Charter* 2018. Para 2.1.4.2 states that commitments by mining companies in their social and labour plans as per section 23 of the *MPRDA* shall be treated separately from community development programmes approved and administered by the community trust or similar vehicle. A document on social and labour plans will be one of three key documents that mining applicants need to draft and submit to the Department of Mineral Resources and Energy (DMRE) when applying for a mining right. It outlines how the establishment of the mine will improve life for an affected community and address their needs.

1199 Para 2.1.4.1.7 of the *Mining Charter* 2018.

1200 Paras 2.1.4.1.3 and 2.1.4.1.5 of the *Mining Charter* 2018.

6.4.4 Restitution of Land Rights Act 22 of 1994

The *Constitution of South Africa* incorporates provisions that protect the right to property which is of paramount importance to mine-host communities constituting rural/communal or traditional communities. In particular, section 25(1) of the *Constitution of South Africa* stresses that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." The right to property protects rural/ communal or traditional communities from past racially motivated decisions and practices that arbitrarily dispossessed blacks of their lands and mineral resources, resulting in legally insecure tenure.[1201]

The *Restitution of Land Rights Act* 22 of 1994 *(RLRA)* was enacted to give effect to the right to property in section 25 of the *Constitution of South Africa*, particularly with a view to redressing past land dispossessions in tandem with the notions of distributive and remedial justice explained in chapter 2 above. To this end, the *RLRA* allows communities dispossessed of land after 19 June 1913 (the date when the Native Land Act was enacted to dispossess black communities) to lodge claims for restoration of their land, which may include land where mining operations are currently ongoing or where mining rights have been issued.[1202] Land claims are first lodged with the Commission on Restitution of Land Rights which reviews applications for the restitution of land rights, investigates the merits of such applications and, where suitable, mediates and settles land disputes. Disputes that cannot be settled by this commission are referred to the Land Claims Court and other

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[1201] Section 25(5)(6)(7) of the *Constitution of South Africa*, provides that:
(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.
(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

[1202] The *Native Land Act* 27 of 1913 and *Native Trust and Land Act* 18 of 1936 are among a host of regulatory instruments that underpinned the apartheid policy and were instrumental in the dispossession of traditional black communities of their land without compensation and their segregation and confinement to native homelands (Bantustans). Through these legislative instruments, blacks were deprived of the right to own and manage their own lands. Black communities could only indirectly own land if they entered into a trust arrangement with a government official or, as in the case of the Bafokeng, a priest. See Mitchell A, Moalusi L, Van der Want M *et al* 2012 112 *Journal of the South African Institute of Mining and Metallurgy* 151.

higher courts, which can order restitution of the land rights, compensation or any other redress.

In *Alexkor Ltd and Another v Richtersveld Community and Others,*[1203] the Constitutional Court of South Africa upheld the community's right to its land and mineral resources found on that land. This recognition of traditional lands belonging to communities ensures that the communities are involved in and accrue economic benefits from mineral extraction on the lands. The communities can benefit from mining operations in terms of ownership or royalties and from the implementation of social and labour plans. The Royal Bafokeng is an example of a traditional community that has benefited immensely from mineral resources on its lands through its shareholding in Impala Platinum Holdings, which is exploiting platinum on lands owned by the community.[1204] The Royal Bafokeng Holdings (RBH) was established by the community in 2006 to manage its investments. Rural villages constituting the Royal Bafokeng have benefited immensely from social development programmes such as clean water, schools, clinics, tarred roads and community halls and sports facilities.[1205] Zimbabwe, in comparison, does not have legislative mandatory restitution of land rights of communities dispossessed of their land during the colonial error, and can therefore utilise lessons from South Africa's *RLRA* when it comes to restitution of land rights of communities dispossessed during the colonial era.

6.4.5 Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA)

The *IPILRA* developed from section 25(5)(6)(7) of the *Constitution of South Africa* which seeks to protect and provide communal as well as informal land rights holders equitable access to land, while securing land tenure. The *IPILRA* was therefore enacted to protect those communities who only had informal land rights due to the historical denial of their

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[1203] In *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 62. The Richtersveld community was dispossessed of their indigenous rights to their land prior to 1913. In this case, racial discrimination lay in the failure to recognise and afford protection to the Richtersveld's indigenous ownership, while the apartheid regime was protecting the registered titles of white settlers. The Richtersveld community was, in this way, deprived of its indigenous land rights in a racially discriminatory manner.

[1204] Cook 2013 113 *Journal of the Southern African Institute of Mining and Metallurgy* 62.

[1205] Cook 2013 113 *Journal of the Southern African Institute of Mining and Metallurgy* 63-65; Kloppers and Du Plessis 2008 26(1) *JENRL* 114.

customary land title by the apartheid regime.[1206] Section 1(1) of the *IPILRA* defines "community" as "any group or portion of a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group." The word "person" is then defined to include a community or part thereof, meaning those provisions referring to persons equally refer to the community.[1207] The phrase "informal right to land" is defined in the same section as including the use and occupation of or access to land in terms of any tribal, customary or indigenous law or practice of a tribe. The key provision in the *IPILRA* is section 2(1), which provides that no person may be deprived of an informal land right without their consent.[1208] Section 2(2) of the *IPILRA* stresses that a person can be deprived of land or rights thereto held on a communal basis in accordance with the custom and usage of that community. It must be pointed out that consent is still required as per section 2(1), even where the deprivation occurs in terms of the customs and traditions of the community, which entails that section 2(2) is subordinate to section 2(1). Further, involvement in decision-making is entrenched in section 2(4) of the *IPILRA* in terms of which it shall be deemed that the custom and usage of a community requires that:

> a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.

The overall effect of the *IPILRA* underpinned by the idea of procedural justice discussed in chapter 2 above, is that it imposes additional requirements to be complied with before the award of mineral rights on communal lands. This was confirmed in *Maledu and Others v Itereleng Bakgatla Mineral Resources*[1209] and *Baleni and Others v Minister of Mineral*

[1206] The *Interim Protection of Informal Land Rights Act* 31 of 1996 (IPILRA) was meant to provide some form of protection until a statute dealing with communal land under tribal authority could be formulated. The *Communal Land Rights Act* 11 of 2004 (CLARA) was supposed to subsume the *IPILRA* but, the CLARA was declared unconstitutional in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC). As a result, the South African government has been extending the validity period of the *IPILRA* every year with a view to finally enacting a permanent Act. See Badenhorst and Van Heerden 2019 136 (2) *SALJ* 326-327.

[1207] Section 1(1) of the *IPILRA.*

[1208] The *IPILRA* clarifies in sections 2(1) and 2(4) that no one may be deprived of his or her informal rights centred on land unless it is through the *Expropriation Act* 63 of 1975, any valid land expropriation legislation or through custom that is endorsed by a majority of the community members.

[1209] *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC).

Resources.[1210] The courts in the two cases made important pronouncements as to whether the consent of the community is required for the granting of mining rights on their land, the level of community consent required and whether the *IPILRA* is subordinate to the *MPRDA.* The Constitutional Court of South Africa ruled in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[1211] that, before awarding mineral rights in terms of the *MPRDA*, the Minister of Mineral Resources and Energy must obtain the full and informed consent of the mine-host communities who hold informal land rights, while mere consultation with the communities would not suffice. The court held that communities holding informal land rights in terms of the *IPILRA* may not be deprived of land without their consent, and deprivation was widely interpreted to include interference with the use, enjoyment or exploitation of property.[1212] Prospecting and mining activities fall within the ambit of the broad meaning of "deprivation," as these activities effectively deprive communities of their right to use, enjoy and exploit their land.[1213] The Constitutional Court of South Africa explained that the purpose of consultation with the lawful occupier is to determine whether some accommodation is possible between the applicant for a mining right and the lawful occupier insofar as the interference with the lawful occupier's rights to use the property is concerned.[1214]

1210 *Baleni and Others v Minister of Mineral Resources* 2019 (2) SA 453 (GP). Developments in international and regional regulatory instruments are embracing the idea that the FPIC is also available to local communities with customary ownership and rights to land. See the *African Commission: Resolution on a Human Rights-Based Approach to Natural Resources Governance*, ACHPR/Res.224 (LI) 2012; World Bank *Environmental and Social Framework* 2017: Sub-Saharan African Historically Underserved Traditional Local Communities.

1211 *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC).

1212 *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) para 96. See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57, which defines deprivation as "any interference with the use, enjoyment or exploitation of private property." See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 32, where it is stated that "whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation […], at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation." Applied in the mineral rights context, the Constitutional Court of South Africa explains in *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) para 102 that, "given the invasive nature of a mining right, there can be no denying that when exercising her rights, the mining right holder, would intrude into the rights of the owner of the land to which the mining right relates. And the more invasive the mining operations are the greater the extent of subtraction from a landowner's dominium will it entail."

1213 *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) paras 98-99, 102.

1214 *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) paras 78-79. See also the case of *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others* [2019] 1 All SA 176 (KZP), where the court held that the importance of the notification and consultation with

In *Baleni and Others v Minister of Mineral Resources and Others*, the Pretoria High Court followed the precedent set in *Maledu and Others v Itereleng Bakgatla Mineral Resources*, and held that the award of mineral rights on land inhabited by mine-host communities who were subjects of the *IPILRA* required the consent of the communities.[1215] The court reasoned that the granting of mineral rights under the *MPRDA* constituted a deprivation for the purposes of the *IPILRA*, as mining goes beyond ordinary restrictions on use and enjoyment of property, such that it activates the requirement for consent in terms of *IPILRA*.[1216] This interface between the *MPRDA* and the *IPILRA* means that, before the award of mineral rights, community consent must be given through a majority decision at a meeting convened upon sufficient notice to consider the proposed award of the mineral rights. Further, the community members should be given a reasonable opportunity to participate in the decision-making process.[1217]

The court in *Baleni and Others v Minister of Mineral Resources and Others* ruled that the *MPRDA* and *IPILRA* should be read together and not be interpreted and applied in isolation, as both statutes aimed to redress colonial land dispossession and inequalities.[1218] The court emphasised the importance of interpreting all legislation to promote the "spirit, purport and objects of the Bill of Rights" and afford all "remedial legislation" such as the *MPRDA* and *IPILRA* a purposive interpretation that will uphold the transformative objects in the *Constitution of South Africa*.[1219] Zimbabwe does not have legislation that protects those communities who have informal land rights as a result of colonial dispossession of their lands. Considered in this context, Zimbabwe's rural communities basically hold informal land rights. Zimbabwe can, therefore, adopt the measures imbedded in the

affected parties was to enable the parties an opportunity to make representations on matters affecting them and to seek reasons for the decision taken.

1215 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) para 55. Meyer 2020 (23) 2020 (23) *PER / PELJ* 11.

1216 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) paras 58-60.

1217 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

1218 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) para 40.

1219 See Badenhorst and Van Heerden 2019 136 (2) *SALJ* 305-327. In *Maledu and Others v Itereleng Bakgatla Mineral Resources* 2019 (2) SA 1 (CC) para 103, the court ruled that the awarding of mining rights did not nullify rights granted by the *IPILRA*, as each statute must be read in a manner that permits each to serve its underlying purpose. The court found that the existence of a mineral right does not itself extinguish the rights of a landowner or lawful occupier. The court echoed the sentiments that the *IPILRA* seeks to protect traditional communities by ensuring that communities have a right to decide what should happen to the land in which they have an interest and that it offers communities legal protection to assume control over and deal with their land according to customary law and usages practised by them.

IPILRA to reform its legislative framework, especially the *Communal Land Act* 20 of 1982 which is discussed in section 5.4.2 above.

6.4.6 Promotion of Administrative Justice Act 3 of 2000 (PAJA)

Before enactment of the *PAJA*, fairness of administrative decisions was measured through the lens of the common law rules of natural justice, namely the *audi alteram partem* ("hear the other side") and the *nemo judex in sua causa* ("no one can be a judge in their own cause").[1220] These rules require that people adversely affected by a decision are made aware of the decision-making, that they should have prior notice of the impending decision, that they are given an opportunity to participate in the decision-making and to state their case so as to influence the decision before an impartial decision maker.[1221] These common-law rules that promote the idea of procedural justice as discussed in chapter 2 above, are codified in the *PAJA.*[1222] The *PAJA* is rooted in section 33(1)(3) of the *Constitution of South Africa*, which provides a right to administrative action that is lawful,[1223] reasonable[1224] and procedurally fair, and which imposes a duty on the state to

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[1220] Baxter *Administrative Law* 1984 538 states that the rules of natural justice serve to ensure accurate and informed decision making and that decisions are made in the public interest.

[1221] Murcott *Procedural Fairness* in Quinot *et al* Administrative Justice in South Africa: An Introduction 2nd ed 166.

[1222] In the case of *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 625, Sachs J affirmed that consultation and involvement are part of South Africa's national values.

[1223] The case of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56 confirms that an administrative action must arise from an empowering provision or be authorised by an existing law for it to be lawful.

[1224] In *Bel Porto School Governing Body and Others v Premier of the Western Cape Province and Another* 2002 (3) SA 265 (CC) para 155, Mokgoro J and Sachs J in their minority judgement remarked that the *Constitution of South Africa* "prohibits administrative action which, however meritorious in its general thrust, is based on exclusionary processes, applies unacceptable criteria and results in sacrifice being borne in a disproportionate and unjustifiable manner, the more so if those who are most adversely affected are themselves from a disadvantaged sector of the community." The court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) paras 44-45 explained that an unreasonable decision is one that a reasonable decision maker would not make. The court lists factors relevant in determining whether a decision is reasonable or not and these include, *inter alia*, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Devenish et al *Administrative Law and Justice in South Africa* (2001), 379 identifies the common law criteria for establishing reasonableness of an administrative action as follows: (i) no person may be subjected to an obvious injustice, (ii) administrative power must be exercised in a way that those affected by it be oppressed as little as possible and (iii) power must not be exercised in an arbitrary or ridiculous manner and (v) there must be no discrimination between groups or classes of people in the exercise of administrative power.

enact legislation to give effect to this right.[1225] The Constitutional Court of South Africa in *Zondi v MEC for Traditional and Local Government Affairs and Others*[1226] explained that the:

> PAJA was enacted pursuant to the provisions of s 33, which requires the enactment of national legislation to give effect to the right to administrative action. PAJA therefore governs the exercise of administrative action in general. All decision-makers who are entrusted with the authority to make administrative decisions by any statute are therefore required to do so in a manner that is consistent with PAJA. The effect of this is that statutes that authorise administrative action must now be read together with PAJA unless, upon a proper construction, the provisions of the statutes in question are inconsistent with PAJA.

In terms of section 1(a)(i)(ii) of the *PAJA,* an "administrative action" is a decision taken or any failure to take a decision by an organ of state exercising a power or performing a public function in terms of the constitution or any legislation that directly affects the rights of any person.[1227] Section 3 of the *PAJA* regulates administrative action affecting individuals, while section 4 is activated where the administrative action affects a group or the public. In the context of the present study, the award of mineral rights on lands inhabited by mine-host communities is subject to regulation under both sections 3 and 4 of the *PAJA*, since both individual members and mine-host communities as a collective can be affected by the award of mineral rights. It is a requirement in terms of section 3(1) of the

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1225 Procedural fairness of administrative action is measured in terms section 33 of the *Constitution of South Africa* and sections 3 and 4 of *PAJA*. See *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 82. The Constitutional Court of South Africa in *Minister of Health and Another NO v New Clicks (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) paras 111, 625, 627 stated that the *Constitution of South Africa* 1996 seeks to attain participatory democracy in which "the right to speak and be listened to is part of the right to be a citizen in the full sense of the word […] and the right to have a voice on public affairs is constitutive of dignity."

1226 *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) par 101. The court explains in para 112 that "the right to notice before an adverse decision is made is a fundamental requirement of fairness. Notice provides a person affected with the opportunity to make representations as to why an adverse decision should not be made. It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations."

1227 Section 33(1)(2)(3) of the *Constitution of South Africa* and section 1(a)(i)(ii) of the *PAJA* only mention rights as the subject of protection from adverse administrative action. However, section 3(1) of *PAJA* expands the protection to include legitimate expectations. These provisions are narrow if compared to the provisions of section 68(2) of the *Constitution of Zimbabwe*, which lists rights, freedoms, interests and legitimate expectations as the subjects of protection against adverse administrative action. Further, section 68(1) of the *Constitution of Zimbabwe* requires administrative conduct to not only be procedurally fair but also substantively fair.

PAJA that administrative actions that materially and adversely[1228] affect the rights[1229] or legitimate expectations[1230] of any person should be procedurally fair. While section 3(2)(a) of the *PAJA* states that the circumstances of each case determine that which can be said to be a fair administrative procedure, section 3(2)(b)(i)-(v) sets out a list of the attributes of a fair procedure:

(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;[1231]

[1228] Murcott *Procedural Fairness* in Quinot *et al* Administrative Justice in South Africa: An Introduction (2nd ed 2021) 169 observes that the terms "materially and adversely" in section 3(1) of *PAJA* have the effect of narrowing the application of procedural fairness standards to administrative action, while this erodes constitutional values such as accountability, openness and responsiveness. To avoid this narrowing effect, the Constitutional Court of South Africa in the case of *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 31 interpreted the term "materially" to entail that procedural fairness standards will be applied to an administrative decision unless the effect of the decision is trivial.

[1229] In *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) para 43, the Constitutional Court interpreted "rights" under section 3(1) of *PAJA* in such a way as to include "legal entitlements that have their basis in the constitutional and statutory obligations of government."

[1230] The concept of legitimate expectation was incorporated as part of South African law in the landmark case of *Administrator Transvaal v Traub* 1989 (4) SA 731 (A), 759D, 761E. Instead of insisting that a person must first be affected before being heard, the legitimate-expectation principle asserts that a person who reasonably expects to acquire or retain a benefit, advantage or privilege must be heard before a decision affecting him is taken. The case of *National Director of Public Prosecutions v Phillips and Others* 2002 (4) SA 60 (W) para 28 explains the legal requirements for a legitimate expectation, namely (i) the expectation must be reasonable and (ii) the expectation must arise from a clear and unambiguous representation or be induced by the decision-maker who has got the relevant competences or legal standing to make or induce such expectation. Traditionally, as established in *Administrator Transvaal v Traub* 1989 (4) SA 731 (A), 7561, a prior promise or a regular practice by the administrator was the source of a legitimate expectation. However, the court in *Nortje v Minister van Korrektiewe Dienste* 2001 (3) SA 472 (SCA) para 14 followed a broader approach, which finds a legitimate expectation in the severity of the impact of the decision on the affected person. The court in *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC), para 216 asserts that to ask, "the question whether there is a legitimate expectation to be heard in any particular case is, in effect, to ask whether the duty to act fairly requires a hearing in that case." The Constitutional Court of South Africa in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) para 35 asserted that a legitimate expectation can arise from a mere "privilege or benefit which it would be unfair to deny [a] person without giving him or her a hearing." In the context of mineral extraction, a decision that violates rights to preferent treatment or which disappoints the legitimate expectation of host communities to be heard can be set aside on the grounds of procedural unfairness as in the case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

[1231] In *Sokhela and Others v MEC for Agriculture and Environmental Affairs (Kwazulu-Natal) and Others* 2010 (5) SA 574 (KZP) paras 53, 55, the court states that "where a person has a right to be heard before a decision is taken it is important that whatever the form of the hearing, the subject matter of the hearing or opportunity to make representations is made clear to the affected parties in order that the right to make representations may be effective." In this case, it was alleged that affected parties had been afforded an opportunity to be heard because they had been called to a meeting before the decision adversely affecting them was taken. However, the court reasoned that, since the affected parties were not informed at that meeting that its purpose was to afford them an opportunity to make representations, and the decision-maker did not disclose concerns that might result in an adverse decision, the meeting did not amount to a reasonable opportunity to make representations.

(iii) a clear statement of the administrative action;
(iv) adequate notice of any right of review or internal appeal, where applicable; and
(v) adequate notice of the right to request reasons …

Section 4 of the *PAJA* stipulates that, where the administrative action materially and adversely affect the rights of members of the public, an administrator may, for the purposes of upholding the right to procedurally fair administrative action, hold a public inquiry or give notice to the public providing an opportunity to submit their comments, the latter which the administrator must consider when he or she makes the decision.[1232] Section 6 of the *PAJA* further provides for judicial review of administrative action through the courts or by a tribunal. Some of the grounds for review listed in section 6(2) are unfairness in the procedure used in taking the decision,[1233] arbitrary or capricious actions,[1234] an administrative action that contravenes the law or is not authorised by empowering legislation[1235] or that it is not rationally connected to the purpose of the empowering legislation.[1236]

The powers of the state through the Minister of Mineral Resources and Energy in terms of section 3(2)(a) of the *MPRDA* to grant, issue, refuse, control, administer and manage mineral rights fit within the definition of administrative action and the term "decision"[1237] in section 1 of the *PAJA*. Section 6(1) the *MPRDA,* therefore, acknowledges that principles of administrative justice apply to the regulation of mining in South Africa by providing that subject to the *PAJA*, any administrative process conducted, or decisions taken in terms of the *MPRDA* must be taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. The key points emanating from section 6(1) of the *MPRDA* are that it operates subject to the *PAJA* and not contrary to or above it and the principles of lawfulness, reasonableness and procedural fairness apply to

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1232 Section 4(1)(a)(b) and 4(3)(a)(b) of the *PAJA*.
1233 Section 6(2)(c) of the *PAJA*.
1234 Section 6(2)(e)(vi) of the *PAJA*.
1235 Section 6(2)(f)(i) of the *PAJA*.
1236 Section 6(2)(f)(ii) (bb)of the *PAJA*.
1237 The term "decision" is defined in section 1 of the *PAJA* to include decisions relating to
(a) making, suspending, revoking or refusing to make an order, award or determination;
(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
(c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument.

administrative processes or decisions taken in terms of the *MPRDA* such as the granting, issuing, refusal, control, administration and management of various mineral rights and permits.[1238] Therefore, decisions requiring notifications and consultations with interested and affected parties, for instance in terms of sections 5, 10, 16, 22 and 27 of the *MPRDA*, stand to be set aside on review if the decisions are taken contrary to its objectives and without regard to the principles of lawfulness, reasonableness and procedural fairness.

In the case of *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others,*[1239] the decision to permit coal mining activities in protected wetlands was set aside on review based on failure to observe the provisions of section 3 and 4 of *PAJA* and failure to take into account the interests of local communities and environmental principles set out in section 2 of the *NEMA*. The *PAJA* was instrumental in the decision of the Constitutional Court of South Africa in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*;[1240] where Froneman J, made extensive reference to the *PAJA*, as follows:

> [T]he community was entitled to adequate notice of the nature and purpose of the administrative action that was proposed in relation to the Genorah application (Section 3(2)(b)(i) of *PAJA*). It was entitled to a reasonable opportunity to make representations in relation to the Genorah application (Section 3(2)(b)(ii) of *PAJA*). Once the administrative decision was taken the community was entitled to a clear statement of the administrative action (Section 3(2)(b)(iii) of *PAJA*). It was entitled to adequate notice of any right to a review or internal appeal (Section 3(2)(b)(iv) of *PAJA*) It was entitled to adequate notice of the right to request reasons in terms of section 5 of *PAJA* (Section 3(2)(b)(v) of *PAJA*). It was entitled to reasons (Section 5 of *PAJA*). None of this was done or complied with by the Department and, finally, the community's appeal was ignored for four months before it was told to bring a review application in court. This is not the way government officials should treat the citizens they are required to serve.

The case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* stands out as an important judicial precedent for Zimbabwean courts when faced with similar cases pertaining to mine-host community involvement in and benefit

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[1238] Section 3(2)(a) of the *MPRDA.*

[1239] *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP).

[1240] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 80.

accrual from mineral extraction on their lands.

6.4.7 Promotion of Access to Information Act 2 of 2000 (PAIA)

Access to information is a right that is underpinned by the idea of procedural justice discussed in chapter 2 and guaranteed in international[1241] and regional regulatory instruments,[1242] discussed in chapters 3 and 4 above. The right to access to information is important for the realisation and protection of other constitutional rights of mine-host communities. To be effective, the rights of mine-host communities to participate in decision making and share in the benefits of mineral extraction on their lands rely on access to information.[1243] Therefore, requirements in international and regional regulatory instruments pertaining to involvement and benefit accrual by mine-host communities from mineral extraction are realised through constitutional and legislative provisions that entrench access to information.

The *Constitution of South Africa* provides in section 32(1)(a)(b) for the right of everyone to access any information held by the state and any other person when it is required to

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[1241] See A 19 of the *UDHR*, which guarantees the right to seek, receive and impart information and ideas; A 19(2) of the *ICCPR*; Principle 10 of the *United Nations Declaration on Environment and Development* of 1992. The case of *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance (VEJA)* 2015 (1) SA 515 (SCA) para 71 confirms that the South African legislature recognises the importance of consultation and public participation in matters affecting the environment in accordance with international instruments such as principle 10 of the *United Nations Declaration on Environment and Development* of 1992 pertaining to access to information and the *Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters* UN Doc ECE/CEP/43 (1998) (Aarhus Convention).

[1242] See A 9 of the *African Charter on Human and Peoples' Rights* guaranteeing the right to receive information; the *African Commission on Human and Peoples' Rights Model Law on Access to Information in Africa*, 2013; Principle 10 of the *United Nations Declaration of Environment and Development*; A 4-5 of the *Aarhus Convention* which provides the right of the public to seek information from public authorities and to be informed, and the obligation of the authorities not only to provide the information on request but also to actively collect and disseminate information of public interest.

[1243] See *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance (VEJA)* 2015 (1) SA 515 (SCA) where the court upheld the respondents' right to access the applicants' EIA document required to protect and exercise the right to an environment not harmful to health and well-being as stipulated in section 24(a)(b) of the *Constitution of South Africa*. The court recognised at para 71 the importance of public participation in environmental matters pertaining to mining. Access to information thus comes first in time before the realisation of most constitutional rights since the exercise of these rights depends on access to full and accurate information. That the right to participate in decision-making depends on awareness and access to information is attested to by Principle 10 of the *United Nations Declaration on Environment and Development* of 1992, which affirms that states "shall facilitate and encourage public awareness and participation by making information widely available."

exercise or protect any right.[1244] The phrase "any other person" means that the right to access information also applies to information held by juristic persons such as mining companies.[1245] The *Promotion of Access to Information Act* 2 of 2000 (PAIA)[1246] was enacted to give effect to this right provided in section 32(2) of the *Constitution of South Africa*.

In the mining context, the *MPRDA* states that any administrative process must not only be conducted or taken within a reasonable time but should also follow the *PAJA* and the principles of "lawfulness, reasonableness and procedural fairness." This provision implicates the requirement for access to information for mine-host communities, since a decision cannot be procedurally fair if interested and affected parties have no access to information regarding all short-term and long-term risks and benefits of proposed and on-going mining operations on their lands.[1247] Through access to access information, mine-host communities are better positioned to meaningfully participate and derive benefits from mineral extraction on the lands they inhabit.

Mine-host communities in South Africa have utilised the constitutional right to access to information and the *PAIA* to press the state and mining companies to avail information pertaining to applications for mineral rights and mining and related operations that impact

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[1244] See also preamble of the *Promotion of Access to Information Act* 2 of 2000. See Kotze and Du Plessis 2014 47 *VRU* 463 explaining that the right to information entitles people individually and collectively to access information held by public authorities responsible for the regulation of mining and to information held by mining companies where the information is required for purposes of exercising or protecting their rights. Such information may include pollution or emissions data relevant for the protection of the right to an environment not harmful to health and well-being.

[1245] Section 8 of the *Constitution of South Africa*. The court in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) para 20 explained that the phrase "another person" suggests a person other than the state and is on the face of it wide enough to apply to a natural and juristic person. Section 3(a)(b) of the *PAIA* states that the Act applies to records of both public and private bodies. See sections 11 and 50 of the *PAIA.*

[1246] The preamble of the *PAIA* states that it was enacted "to give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights; and to provide for matters connected therewith." Section 9(e) of the *PAIA* list among the objects of the Act that it seeks "to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone in order to, *inter alia*, "effectively scrutinise, and participate in, decision-making by public bodies that affects their rights." Section 50(1)(a) of the *PAIA* guarantees access to any records held by private entities if the records are required for the exercise or protection of any rights. In terms of section 53(2)(d) of the *PAIA*, the person requesting access must identify the right they seek to exercise or protect and explain why they require the record.

[1247] CER 2016 *ZERO HOUR Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* 66.

or may impact their environment[1248] and socio-economic well-being. Court judgments have shown that the state and mining companies do not willingly avail information to mine-host communities, yet communities are the most affected by mining operations on their lands.[1249] The Bengwenyama-ye-Maswazi had to utilise the *PAIA* after the DMRE refused them access to information pertaining to competing applications for prospecting rights on their land.[1250] The information enabled the community to successfully defend their rights to meaningful consultation and to exercise preferent community prospecting rights through the courts up to the Constitutional Court.[1251]

The case of *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance*[1252] concerned the denial of access to information pertaining to the environmental impact of the iron and steel processing plants operated by ArcelorMittal South Africa. In this case, the Vaal Environmental Justice Alliance (VEJA), a community-based organisation, sought access to the company's EIA documents to prove that the company was dumping hazardous materials at its major steel plant waste disposal site. As it upheld the right to access to environmental information, the court explained that, before the advent of constitutional democracy in South Africa, a secretive and unresponsive culture prevailed in public and private bodies, often resulting in abuse of power and human rights violations. The court stressed the need for corporate transparency concerning environmental issues and stated that "corporations operating within our borders […] must be left in no doubt that, in relation to the environment in circumstances such as those under discussion, there is no room for secrecy and that constitutional values will be enforced."[1253]

1248 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice* Alliance 2015 (1) SA 515 (SCA).

1249 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice* Alliance 2015 (1) SA 515 (SCA).

1250 Humby 2012 15(4) *PER/PELJ* 180.

1251 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] 3 All SA 577 (SCA); *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC); *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* [2014] 4 All SA 539 (SCA).

1252 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA).

1253 *Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA) para 82.

Criticisms raised against reliance on the *PAIA* process to access mining information relate to the length and complexity of the process, whose effect is to derail the right to information. The net effect of requiring mine-host communities to follow the *PAIA* procedures for access to information is to restrict them from exercising their constitutional rights, which depend, for their effective realisation, on access to information.[1254] The case of *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others*[1255] interpreted the law regulating access to information by mine-host communities in South Africa in a profound way that eases these challenges.[1256] The case concerned the rights of the community to access the application for mining rights made in terms of section 22 of the *MPRDA*. To ensure adequate and meaningful consultation, the mine-host community required documents filed together with the application for mining rights in the absence of which they could not meaningfully interact with the applicant mining company and the DMRE, because they would not know what is stated in the application. The court held that mine-host communities have a right to access application documents lodged with the DMRE for the award of mineral rights on the lands they inhabit to properly exercise their right to comment, to object to the mineral right application if they so wish and to participate in the application processes for mineral rights.[1257] The court further held that the applicants as interested and affected parties are entitled to access mineral rights application documents as of right, as based on sections 10(1) and 22(4) of the *MPRDA* upon request to the DMRE, without having to go through the *PAIA* procedures and this facilitates meaningful consultations.[1258] The judgement in the Baleni case is remarkable in that mine-host communities can now automatically access information upon request to the DMRE and mining companies without having to follow the *PAIA* process, whose complexity and length do not permit the communities to meet the

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1254 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) paras 48, 87.

1255 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP).

1256 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP).

1257 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) para 4.

1258 *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) para 117(1). Section 23 (2A) of the *MPRDA* reads: "If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community."

short timelines for notice, consultation and filing of comments and objections provided in the *MPRDA*.[1259]

Lessons can be learned from South Africa with respect to access to information. Firstly, the legislation that operationalises the constitutional right to access to information must unequivocally provide this right as applicable to information held by both the state and juristic persons such as mining companies so as to facilitate meaningful involvement of mine-host communities and their accrual of socio-economic benefits from mineral extraction.[1260] Secondly, access to information by mine-host communities must be automatic upon request to the regulatory authorities and mining companies without following lengthy and complicated procedures, whose effect is to essentially deny the communities the benefits of the right to access to information such as meaningful involvement, consultation, benefit accrual or even FPIC in applicable cases.

6.4.8 National Environmental Management Act 107 of 1998 (NEMA)

Section 24 of the *Constitution of South Africa* provides that everyone has the right to an environment that is not harmful to their health or well-being, and:

> have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The state is further enjoined by the *Minerals and Mining Policy for South Africa* of 1998 to

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[1259] *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) para 49 indicates that the application process for access to information in terms of the PAIA, including the internal appeal process in the event of rejection of a request, takes more than 30 days. This makes it impossible for host communities who intend to file comments and objections against the award of mineral rights to actually prepare and submit an objection all within 30 days required for instance by sections 10(1)(b) and 16 4(b) of the *MPRDA*.

[1260] As shown in chapter 5 above, the *Constitution of Zimbabwe* provides a right to access to information held by the state and private entities, where such information is required for the exercise or protection of any constitutional rights. However, this constitutional right is not concretised in Zimbabwe's *Freedom of Information Act* 1 of 2020, which does not explicitly provide a right to access to information held by private entities. What the *Freedom of Information Act* 1 of 2020 does is to merely encourage private entities such as mining companies to disclose information voluntarily or when requested.

ensure that South Africa's minerals are utilised sustainably and in consistence with national environmental policy and standards.[1261] It also stresses principles that seek to ensure sustainable extraction of minerals, namely equitable and effective consultation with interested and affected parties, a right to appeal all decision-making and respect for and inclusion of local development objectives.[1262]

The *National Environmental Management Act* 107 of 1998 stems from section 24 of the *Constitution of South Africa*, and in section 2 it pronounces the management principles applicable to actions that have a significant impact on the environment.[1263] The principles include pursuit of equitable access to environmental resources and benefits,[1264] promotion of the participation of all interested and affected parties in environmental governance[1265] and ensuring that the interests, values and needs of all interested and affected parties are taken into account in decision making.[1266]

In the context of mineral extraction, the principles set out in the *NEMA* promote mine-host community involvement in and benefit accrual from mineral extraction on their lands by providing the communities a greater degree of control of the lands and natural resources

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1261 Para 4.4 *Minerals and Mining Policy for South Africa*, 1998

1262 Para 4.4 *Minerals and Mining Policy for South Africa*, 1998.

1263 This provision entails involvement and participation by interested and affected parties in mining activities because mining has a major impact on the environment. Section 24(4)(a) of the NEMA specifically requires that the investigation, assessment and communication of potential environmental impacts must ensure, with respect to every application for environmental authorisation, *inter alia,* that "public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures." Detailed provision for public participation is also included in the EIA Regulations promulgated in terms of the NEMA. In terms of the Regulations 41, 42 and 43, as read with Annexures 1 and 2 of the *EIA Regulations* of 2014, an environmental assessment practitioner must, in relation to an application for environmental authorisation (i) conduct at least the public participation process set out in the EIA Regulations, (ii) open and maintain a register of all interested and affected parties, (iii) consider all comments and representations received from interested and affected parties following the public participation process and (iv) provide interested and affected parties with an opportunity to comment on any reports prepared in relation to the basic assessment or scoping and EIA processes.

1264 Section 2(4)(d) of the NEMA.

1265 Section 2(4)(f)) of the NEMA provides that "the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."

1266 Section 2(4)(g) of the NEMA. Section 2(4)(k) states that "decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law." The implication of these provisions is that interested and affected people such as mine-host communities cannot be denied participation in decision-making that will impact their lives.

therein. Mine-host communities are further protected from the adverse social and environmental burdens associated with mineral extraction on their lands through participation in decision making in environmental matters. Section 2(2) and (3) of the *NEMA* specifically state that people and their needs must be at the forefront of the concerns for environmental management.[1267] The needs of mine-host communities can only be key to concerns for environmental management if they are involved in decision making. This fundamental principle aids mine-host communities by focussing government environmental policies and strategies on meeting the needs of the people ahead of any other interests such as those of mining companies. In this way, the well-being of mine-host communities is not sacrificed in the name of economic development, by ensuring that it is at the centre of all considerations during the life of the mine and after mine closure.[1268]

It must be pointed out that the *NEMA* complements the *MPRDA* by creating space for participation and consultation by mine-host communities in mineral extraction through provisions for community or public participation and consultation for EIAs and award of water use licenses, regulation of environmental pollution and damage from mineral extraction.[1269] This complementary approach[1270] can also be seen in the *MPRDR* 2020,

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[1267] See *Company Secretary of ArcelorMittal South Africa v Vaal Environmental Justice Alliance* [2015] 1 All SA 261 (SCA) para 62.

[1268] Section 37(1)(a)(b) and 37(2) of the MPRDA adopts the principle of sustainable development and emphasises that the planning and implementation of prospecting and mining must integrate social, economic and environmental factors so that exploitation of mineral resources serves present and future generations, which indubitably includes serving mine-host communities.

[1269] Section 38(1)(b) of the MPRDA requires mineral rights holders to provide information relating to the environmental impacts of their operations in compliance with section 24(7) of the NEMA.

[1270] In the South African context, in order to conduct mining activities a mineral rights holder must obtain (i) a mining right in terms of section 23(1) of the MPRDA, (ii) an environmental approval in terms of section 39 of the MPRDA, (iii) an environmental authorisation in terms of section 24 of NEMA, (iv) a water use license in terms of section 22(1)(b) of the NWA and (v) a change of land use permission from agricultural and or conservation purposes to mining in terms of section 26(4) of the *Spatial Planning and Land Use Management Act* 16 of 2013 (SPLUMA). The issuance of these authorisations is subject to public participation, which entails the involvement of mine-host communities in decision-making centred on mineral extraction on the lands they inhabit. The written permission of the Minister of Environmental Affairs and Minister of Mineral Resources is required in terms of section 48(1)(b) of the NEMPAA, where the proposed mining area falls within a protected/ environmental conservation area. Section 48(4) of the NEMPAA states that the ministers, when they consider prospecting and mining in a protected area, "must take into account the interests of local communities and the environmental principles referred to in section 2 of the *National Environmental Management Act*, 1998." See *Mining and Environmental Justice Community Network of South Africa and Others v Minister of Environmental Affairs and Others* [2019] 1 All SA 491 (GP) paras 11.6.1 and 11.6.2, where failure to properly consider the interests of local communities was considered to be a ground for review of a decision to permit mining in a

which specifically link consultation with interested and affected parties in the award of mineral rights and the formulation and review of social and labour plans to the procedures for public participation set out in the *EIA Regulations* of 2014 enacted under sections 24(5) and 44 of the NEMA.[1271] After considering EIA reports and environmental management plans submitted by an applicant, the regulatory authorities will not grant prospecting and mining rights if the prospecting or mining will result in unacceptable pollution, ecological degradation or damage to the environment.[1272] It is therefore imperative for an applicant for prospecting and mining rights that they follow and comply with the requirements for community or public participation and consultation when conducting environmental impact assessments. In the case of *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others,*[1273] the court held that interested and affected parties have a right to be heard before a decision is made "by virtue of the enormous damage mining can do to the environment and ecological systems." The court further explained that:

> what has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising

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protected area. The court at para 11.11 enunciates that "a failure to take South Africa's international responsibilities relating to the environment into account and a failure to take into account that the use and exploitation of non-renewable natural resources must take place in a responsible and equitable manner would not satisfy the "higher level of scrutiny" necessary when considering whether mining activities should be permitted in a protected environment or not."

1271 See the *National Environmental Management Act (107/1998): Environmental Impact Assessment Regulations*, 2014. Section 39(3)(b)(i)(ii) of the MPRDA states that preparation of the environmental management programme or plan shall involve investigating, assessing and evaluating the impact of the proposed prospecting or mining operations on the environment and the socio-economic well-being of any person who might be directly affected. See sections 17(5), 18(3)(c), 23(5), 24(3)(d) and 27(5)(a) of the MPRDA, as read with section 39(3) of the MPRDA. The case of *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) confirms that the MPRDA and NEMA co-exist harmoniously and that the MPRDA does not "trump" all other legislation potentially applicable to mining including NEMA. In *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156, the Constitutional Court of South Africa set aside the issuance of environmental authorisations granted without sufficient public participation in the form of comments on the final environmental impact assessment. The court found that non-disclosure of relevant information pertaining to the final EIA report for the construction of a prototype of a new design nuclear power plant violated section 36 of the now repealed *Environmental Conservation Act* 73 of 1989, section 3(2)(ii) and 6 of PAJA, and Regulation 3(1)(a)(f) of the *EIA Regulations* of 2014. The court at para 76 took the position that the decision-maker must have the full information pertaining to submissions of interested parties and that they must properly consider the submissions.

1272 Section 17(1)(c) and 23(1)(d) of the MPRDA. The Constitutional Court of South Africa confirmed in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 77 that environmental considerations play a vital role in the granting of prospecting rights.

1273 *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* [1999] 1 ALL SA 2004 (T) para 20.

> the ability of future generations to meet their own needs (the criterion proposed in the Brundtland Report: World Commission on Environment and Development, 'Our Common Future' Oxford University Press 1987).

It is apparent that the *NEMA* and the *EIA Regulations* of 2014 entail mine-host community involvement and benefit accrual from mineral extraction on their lands by emphasising principles that are consistent with requirements set out in international and regional regulatory instruments such as the *United Nations Declaration on Environment* of 1972, *World Commission on Environment and Development* (the Brundtland Report) and the *United Nations Declaration on Environment and Development* 1992. The same principles are embedded in the *United Nations Declaration on Environment and Development Agenda* 21, *United Nation Conference on Sustainable Development* of 2012, the *United Nations General Assembly Resolution on Transforming Our World: The 2030 Agenda for Sustainable Development* of 2015 and the *African Charter on Human and Peoples' Rights*.[1274]

6.5 Concluding remarks on the South African constitutional, policy and legislative frameworks for mine-host community involvement in and benefit accrual from mineral extraction

Chapter 6 examined the South African constitutional, policy and legislative frameworks in order to draw lessons that may help Zimbabwe to realise the requirements set out in international and regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands. The common background that Zimbabwe shares with South Africa based on colonisation, segregation and dispossession of black people of their land and minerals makes South Africa a suitable source for such lessons.

[1274] In *MEC: Department of Agriculture Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC) para 25, the court affirmed that principles set out in section 2 of NEMA "endorse and promote an approach to the environment that is consistent with international norms." See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) paras 44-49, which chronicles the development of sustainable development from the *Stockholm Declaration* of 1972, *World Commission on Environment and Development* (the Brundtland Report) and the *Rio Declaration* of 1992.

The chapter established that section 25(8) of the *Constitution of South Africa* provides the constitutional mandate for land, water and related reforms. In the mining context, the *MPRDA* was enacted to bring about equitable access to mineral resources. To make this possible, all mineral resources in South Africa are subsumed under the custodianship of the state for the benefit of all South Africans. Custodianship, as presented in the *MPRDA* and interpreted by the courts, does not make the state the owner of mineral resources, as the resources belong to the people of South Africa.[1275] The state is therefore a mere conduit for equitable redistribution of mineral resources and benefits derived therefrom, among the citizens.

This chapter argued that applicants for mineral rights must identify and consult with the landowners, lawful occupants, mine-host communities and interested and affected parties. The consultations with mine-host communities are intended to enable the parties an opportunity to make representations on matters affecting them and see if an accommodation of their interests can be achieved. Significantly, notification and consultations have been elevated to meaningful consultation by the *MPRDR* 2020 and further reinforced through progressive interpretation of the *IPILRA* in the landmark cases of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* and *Baleni and Others v Minister of Mineral Resources*. These two important cases adopted and applied requirements in international and regional regulatory instruments pertaining to mine-host community involvement in and benefit accrual from mineral extraction on their lands. For instance, to justify its decision, the court in the case of *Baleni and Others v Minister of Mineral Resources* made specific references to *General Recommendation* 23 of the *CEDAW*, ICESCR, *General Comment* 21 of the CESCR, the HRC decision in *Angela Poma Poma v Peru* and provisions of the *African Charter*.[1276]

Mine-host communities in South Africa also enjoy community preferent rights. This means that an application submitted by the community is preferred ahead of those submitted by other applicants when it comes to award of mineral rights on their lands. This is in addition to the requirement for the government to obtain "full and informed" consent from mine-

[1275] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 51-53; *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 68, 80.

[1276] See *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) paras 78-82.

host communities holding informal land rights before granting mining rights.[1277] In this way, South Africa, through its constitutional, policy and legislative frameworks and progressive interpretation of the law by the courts, is entrenching and cementing principles set out in international and regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction.

The South African Human Rights Commission explains that South Africa's regulatory framework explained in this chapter has potential to facilitate sustainable and equitable utilisation of the nation's mineral resources.[1278] However, some weaknesses in the framework must be pointed out. In particular, there is a disjuncture between the good intentions in the constitutional, policy and legislative frameworks and the lived realities of mine-host communities in the country.[1279] These communities continue to suffer significant levels of poverty and inequality. This, according to the South African Human Rights Commission, tends to reinforce "the notion that the benefits of mining operations disproportionately favour mining companies and the state, and are often to the detriment of local communities."[1280] The disconnection and shortcomings are explained in various reports by the DMRE,[1281] South African Human Rights Commission,[1282] and the South African (Parliamentary) Portfolio Committee on Mineral Resources,[1283] among others.[1284]

1277 See *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*; *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

1278 South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 1 https://sahrc.org.za/home/21/files/SAHRC Mining.

1279 See ActionAid South Africa "Mining in South Africa - Whose Benefit and Whose Burden? Social Audit Baseline Report 2018" 12, https://internationalwim.org/iwim-reports/whose -benefit-and-whose-burden-social-audit-baseline-report/.

1280 South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 1 https://sahrc.org.za/home/21/files/SAHRC Mining. See also the *South African (Parliamentary) Portfolio Committee on Mineral Resources Report on Public Hearings on the Mining Charter*, 5 June 2013.

1281 See the Mining Charter Impact Assessment Report 2009 11 http://www.dmr.gov.za; *Mining Charter Impact Assessment Report* of 2014 http://www.dmr.gov.za; *Mining Charter Impact Assessment Report* of 2015 http://www.dmr.gov.za.

1282 South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 1 https://sahrc.org.za/home/21/files/SAHRC Mining.

1283 See the *South African (Parliamentary) Portfolio Committee on Mineral Resources Report on Public Hearings on the Mining Charter*, 5 June 2013.

1284 The 2016 report by the Centre for Environmental Rights and the 2018 report of the South African Human Rights Commission pointed out that the majority of mine-host communities in South Africa remain in poverty, access to mining information is difficult while inequality abounds. See Centre for Environmental Rights 2016 "Zero Hour Poor Governance of Mining and the Violation of Environmental

The DMRE *Mining Charter Impact Assessment Report* of 2009 indicated significant non-compliance by the mining industry against the objectives to redress historical, social and economic inequalities; ensure the entry into and active participation of HDSA into the mining industry and to allow such South Africans to benefit from the exploitation of mining and mineral resources. The report concluded that "the intended benefits flowing from the mining industry fall significantly below the expectations and aspirations of the majority of South Africans as intended by the Charter."[1285] Despite amendments to the Mining Charter in 2010 to deal with the shortcomings of the *Mining Charter* of 2004, the *Mining Charter Impact Assessment Report* of 2014 found that the spirit of the Mining Charter had not been fully embraced and the majority of mining communities in South Africa continued to live in abject poverty.[1286] A further *Mining Charter Impact Assessment Report* of 2015 revealed low participation by mine-host communities with limited benefits accruing to them.[1287]

The South African Human Rights Commission also decreed the inconsistent legal compliance by mining companies and the DMRE.[1288] One such gap is in the mining license application process in which the DMRE sometimes disregard rights and protections provided to other interested and affected parties such as municipalities and local communities in key legislation such as the *SPLUMA* and *IPILRA*. This can be seen in the case of *Maccsand (Pvt) Ltd v City of Cape Town and Others*[1289] which pitted the *MPRDA* and legislation governing municipal planning and land use management. The case of

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Rights in Mpumalanga" http://www.cer.or.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf. See also South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018 https://sahrc.org.za/home/21/files/SAHRC Mining. See also Rutlegde 2019 72 *South African Journal of Social and Economic Policy* 34-39.

1285 *Mining Charter Impact Assessment Report* of 2009 11 http://www.dmr.gov.za.

1286 *Mining Charter Impact Assessment Report* of 2014 http://www.dmr.gov.za.

1287 Only 36% of mine right holders had attained the mine development target and most mining companies did not contribute to the social fund created for purposes of improving socio-economic conditions in mining communities. See the *Mining Charter Impact Assessment Report* of 2015 http://www.dmr.gov.za.

1288 South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 15 https://sahrc.org.za/home/21/files/SAHRC Mining.

1289 *Maccsand (Pvt) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC). While the judgment was made in terms of the repealed *Land Use Planning Ordinance* 15 of 1985, the principles set out in the judgment equally apply in the context of the *SPLUMA*.

Baleni and Others v Minister of Mineral Resources and Others[1290] also shows that the DMRE ignored provisions of the *IPILRA* when granting mining rights on land occupied and used by the Xolobeni community. Therefore, the continued discovery of minerals in communal areas in South Africa often threaten the land rights of the communities because mining activities have proceeded without adequate consultation and the prior informed consent of the landowners.[1291]

This study also argued that although the *IPIRLA* provides some protection for communities faced with development projects such as mining, the legislation is only a temporary measure which has been renewed since 2006. To entrench protections for vulnerable communities, the *IPIRLA* should be upgraded to a permanent legislation and regulations should be made in terms of the Act to provide detailed protections for communities affected by mining and other development projects. In addition, the *MPRDA* should be amended to make compliance with the *IPIRLA* provisions a requirement for granting of prospecting and mining rights.[1292] The *MRPDA* should also be amended to make it a legislative requirement for those directly affected by mining to share equitably in the benefits in terms of revenue and business opportunities created by mineral extraction on their lands.[1293] This must not be left to the *Mining Charter.* The downside of the *status quo* is that the case of *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*[1294] clarified that the *Mining Charter* is a policy and not legislative instrument, and on that basis, it does not create legally binding obligations. The provisions of the *Mining Charter* only become binding on a mining rights holder in cases where such provisions are specifically incorporated in a mining right granted by the DMRE.

As regards access to information, the *MPRDA* should be amended to specify the minimum information that must be shared with affected communities before a decision on granting

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1290 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP) para 40.

1291 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

1292 See South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 15 https://sahrc.org.za/home/21/files/SAHRC Mining.

1293 See the South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 15 https://sahrc.org.za/home/21/files/SAHRC Mining.

1294 *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP).

of mining rights is made.[1295] Such minimum information should include the full prospecting and mining rights application, EIA reports, Social and Labour Plans (SLPs), site plans and work programmes. The absence of a specific statutory provision specifying this minimum information undermines the intended transformative impact of the MPRDA and SLPs as the DMRE tends to provide access to the documents through the arduous *PAIA* process.[1296]

The *Mine Community Resettlement Guidelines* of 2022 provide procedures for relocation of mine-host communities in South Africa. The guidelines also indicate that mining operations shall not commence prior to signing of a resettlement agreement stating the amount of compensation. However, the *MPRDA* does not have these two provisions which raises questions regarding their efficacy. Ideally, the provisions should be imbedded in section 54 of the *MPRDA* so that they do not remain in policy instruments only and outside enforceable legislative instruments. Resettlement provisions and sanctions for non-compliance should be detailed in hard law instead of remaining in the *Mining Charter* and guidelines whose legal force has been diminished following the case of *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*.[1297]

While opportunities for consultation and involvement of mine-host communities are provided in the *MPRDA, EIA Regulations* of 2014*, MPRDAR* of 2020*, DMRE Consultation Guidelines*, *DMRE Resettlement Guidelines* of 2022, short and inadequate consultation timeframes undermine the effectiveness of the consultation process. For instance, interested and affected parties have thirty (30) days for submission of comments or objections to a prospecting or mining right application. In addition, the interested and affected parties are not provided the documents that comprise the mining right application thus effectively forcing them to make submissions in ignorance. Since the DMRE tends to only provide access to documents through the *PAIA* process, it means the 30 days period for comments or objections expires before mine-host communities even access the

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[1295] See the South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018, 15 https://sahrc.org.za/home/21/files/SAHRC Mining.

[1296] South African Human Rights Commission: Report on the National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa 2018 para 94-95 https://sahrc.org.za/home/21/files/SAHRC Mining.

[1297] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP).

documents. These weaknesses entail that free, prior and informed consent is not fully realised in the South African policy and legislative frameworks.

Although South Africa's constitutional, policy and legislative frameworks for involvement and benefit accrual by mine-host communities from mineral extraction on their lands are not entirely perfect, lessons can be drawn to reform the Zimbabwean framework, as has been demonstrated in this chapter. In this vein, chapter 7 discusses the findings of the study for the purposes of drawing some lessons directed at reforming Zimbabwe's constitutional policy and legislative frameworks centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

7.1 Background

Minerals are finite non-renewable resources. Extraction of minerals in lands inhabited by mine-host communities is therefore expected to involve the communities and deliver better living conditions, infrastructure and jobs for them.[1298] However, abundant mineral resources have often not translated into increased national economic growth and the betterment of the well-being of citizens and mine-host communities, as has been amply illustrated in the present study.[1299] This predicament characterised as the "resource curse" or "paradox of plenty" has not spared mineral endowed Zimbabwe where mine-host communities continue to live in poverty, while they are surrounded by abundant mineral resources. This background underpins the research question of this study which focusses from a legal perspective on the discourse aimed at the betterment of the well-being of mine-host communities in Zimbabwe through involvement in and benefit accrual from mineral extraction on their lands.

7.2 Re-visiting the research question and objectives

The research question that forms the basis and focus of this study is how the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction as contained in applicable international and regional regulatory instruments are realised in the Zimbabwean constitutional, policy and legislative frameworks. To address the research question, the study set the following objectives, which were addressed in various chapters:

1. To provide a detailed theoretical exposition of the connection between social justice

[1298] The requirement for involvement and benefit accrual by mine-host communities is not based so much on their ownership of the mineral resources on their lands, but rather largely on the negative impacts of mining that they are required to endure.

[1299] See sections 5.2.2, 5.4.2 and 6.5, above.

and mine-host communities with special focus on mine-host community involvement in and benefit accrual from mineral extraction (see Chapters 1 and 2);

2. To distil applicable principles pertaining to mine-host community involvement in and benefit accrual from mineral extraction contained in applicable international regulatory instruments (see Chapter 3);

3. To unpack applicable principles pertaining to mine-host community involvement in and benefit accrual from mineral extraction contained in applicable regional regulatory instruments (see Chapter 4);

4. To conduct an assessment of the Zimbabwean constitutional, policy and legislative frameworks pertaining to the extraction of mineral resources to determine how the frameworks realise the principles pertaining to mine-host community involvement in and benefit accrual from mineral extraction, as gleaned from international and regional regulatory instruments (see Chapter 5);

5. To conduct a comparative overview of the South African constitutional, policy and legislative frameworks pertaining to mine-host community involvement in and benefit accrual from mineral extraction so as to determine whether lessons can be distilled from how South Africa realised the requirements extracted from international and regional regulatory instruments. What makes the comparative overview important is that Zimbabwe and South Africa share not only territorial borders but also a common history of colonisation. The two countries have a common history of marginalisation of the black majority and dispossession of their natural resources through prejudicial policies and regulatory instruments, as has been indicated in this study (see Chapter 6); and

6. To highlight strengths and shortcomings in the current Zimbabwean constitutional, policy and legislative frameworks pertaining to the extraction of mineral resources with special reference to mine-host community involvement in and benefit accrual from mineral extraction and make recommendations based on these findings and lessons.

7.3 Research findings

As each chapter of this study explored the respective dimensions of the research question, a set of findings were distilled. These findings have been used to generate recommendations and knowledge that inform the future research agenda.

Chapter 2 of the study established that the three theories of social justice, namely distributive, procedural and remedial are pertinent to the question of justice when it comes to the award and utilisation of mineral rights on lands inhabited by mine-host communities. The discussion resulted in further questions, one of which is what conception of distributive justice, ensures the ideal distribution of the benefits of mineral resources among mine-host communities, mining companies and other citizens. Consequently, three conceptions of distributive justice, namely those of the utilitarian, egalitarian and libertarian, were discussed. The study found that the utilitarian conception of distributive justice propagates the greatest happiness for the greatest number of citizens, even if that means sacrificing a few members. When applied in the context of mineral extraction on lands inhabited by mine-host communities, the utilitarian conception of distributive justice legitimises the exploitation of mineral resources for the benefit of the whole nation, even if mine-host communities have to bear a disproportionate burden in terms of socio-economic and environmental costs. On its part, the libertarian perspective legitimises the exploitation of minerals without the mine-host communities' involvement or accrual of socio-economic benefits if the minerals belong to the state and not the communities. The study established that the egalitarian perspective of distributive justice prescribes equal concern for all citizens, without sacrificing some for the benefit of others. Inequality is only permissible where it benefits the least advantaged members of society. When applied in the context of mineral extraction on lands inhabited by mine-host communities, the egalitarian perspective legitimates the re-distribution of wealth, accrual of benefits and involvement of the mine-host communities in decision making that affects their livelihoods. The study established that egalitarianism is the conception of distributive justice that ensures the ideal distribution of the benefits of mineral resources among mine-host communities, mining companies and other citizens. In the same vein, a just distribution of the costs and rewards of mineral extraction occurs where the mine-host communities are

not made to bear a disproportionate share of the burdens but are accorded socio-economic benefits commensurate with the burdens that they have to bear due to mineral extraction on their lands.

Chapter 2 further considered the contribution of procedural and remedial justice to the understanding of the question of award and utilisation of mineral rights on lands inhabited by mine-host communities, while particularly focussing on the involvement and benefit accrual. The chapter found that pure procedural justice prescribes effective involvement and participation by citizens when it comes to making decisions on matters affecting them. Consequently, the notion of procedural justice legitimises the involvement of mine-host communities when it comes to making decisions pertaining to extraction of minerals on their land. Where the rights of mine-host communities relating to their involvement and accrual of benefits from mineral extraction are violated, remedial justice is implicated. Remedial justice prescribes, *inter alia*, the restitution of expropriated lands and compensation for damages suffered by mine-host communities.

Chapter 3 set out to extract requirements from international regulatory instruments that support the involvement in and accrual of benefits by mine-host communities from mineral extraction on their lands. The chapter organised the relevant instruments into three strands, namely the sovereignty rights, human rights and the environmental rights and sustainable development approaches. In the case of the sovereign rights approach, the study found that mine-host communities' involvement in and benefit accrual from mineral extraction on their lands are supported by instruments that establish the right of peoples and nations to economic self-determination and permanent sovereignty over their natural resources. The right to permanent sovereignty over their natural resources entitles peoples who, among others, comprise mine-host communities, to freely use, enjoy and dispose of their natural resources. The terms "people" and "peoples" have been interpreted in international instruments to mean either the state, indigenous peoples, local communities or the whole population of the state. Consequently, the terms accommodate claims by mine-host communities to minerals on their lands, irrespective of whether they are indigenous, ethnic or local rural communities. States are also required in terms of the sovereign rights approach to use their sovereignty over natural resources in the interest of

and for the benefit of their people. In the context of mineral extraction, the right to economic self-determination and the right to permanent sovereignty over natural resources entitles citizens and mine-host communities to participate in decision making when it comes to mineral extraction on their lands. Ultimately, citizens and mine-host communities are entitled to participate in the design, implementation and evaluation of policy, legislation and other measures pertaining to mineral extraction. They must enjoy the proceeds of exploitation of mineral resources without undue constraints from international investment agreements signed by the state. International regulatory instruments that established peoples' entitlement to economic self-determination and to their natural resources and wealth as a matter of their sovereignty separate from state sovereignty include, *inter alia,* the *Charter of the United Nations, United Nations General Assembly Resolution* 1514 of 1960*, United Nations General Assembly Resolution* 1803 of 1962, *United Nations General Assembly Resolution* 2158 of 1966 and the *United Nations General Assembly Resolution* 2692 of 1970.

Chapter 3 also found that the award and utilisation of mineral rights on lands inhabited by mine-host communities, with particular focus on involvement and benefit accrual, are anchored by international regulatory instruments that characterise intra-state allocation of natural resources as primarily a matter of human rights rather than sovereignty. In this respect, natural resources are central to the spiritual and cultural identity, values, subsistence and survival of mine-host communities, especially when these are made up of indigenous peoples. Therefore, human rights regulatory instruments such as the *ICCPR, ICESCR, CEDAW, ICERD*, the *ILO Convention* 169 of 1989, *DRTD, UNDRIP* and the *UNDROP* protect fundamental human rights of mine-host communities. These rights include that of self-determination,[1300] that of freely using and disposing of natural resources,[1301] the right not to be deprived of means of subsistence,[1302] the right to information,[1303] the right to participate in the conduct of public affairs[1304] and the right to development, as protected under the *DRTD*.[1305] Mine-host communities also have

[1300] A 1(1) of the ICCPR and ICESCR.
[1301] A 1(2) of the ICCPR and ICESCR.
[1302] A 1(2) of the ICCPR and ICESCR.
[1303] Principle 10 of the *United Nations Declaration on Environment and Development* of 1992.
[1304] A 25 of the ICCPR.
[1305] See A 1(1) of the DRTD.

participatory rights in ownership, possession and use of lands and in the benefits of natural resources in terms of Article 15 of the *ILO Convention* 169 of 1969 and Article 32 (2) of the *UNDRIP*. In terms of Articles 2(3), 18, 19 and 32(2) of the UNDRIP and Article 5(2)(c) of *UNDROP*, consultations with mine-host communities must be conducted in good faith, in accordance with their customs and traditions and through their own representative institutions which entrenches procedural justice elements. According to Article 1(2) of the *ICCPR* and *ICESCR* peoples may dispose of their natural resources for their own benefit meaning that they have the right to decide whether to dispose their natural resources and wealth and under what terms and conditions. In the same vein, Article 1(2) of the *ICCPR* and *ICESCR* declares that a people can in no instance be deprived of their means of subsistence. Within the context of mineral extraction, this means that people for whom minerals act as their means of subsistence cannot be deprived of these resources. Similarly, those people who enjoy rivers for fishing, lands for agriculture or forests for hunting as their means of subsistence cannot be deprived of these resources to pave way for mineral extraction. This prohibition against deprivation of means of subsistence is applicable even when the people have no title to the lands and even in those cases where the deprivation stands to benefit the whole nation. In this way, when applied in the context of mineral extraction, the human rights approach diminishes any utilitarian ideas when it comes to the award and utilisation of mineral rights on the lands inhabited by mine-host communities.

The environmental rights approach, as discussed in Chapter 3, maintains that the requirement for involvement in and benefit accrual from mineral extraction can be supported by focussing on the environmental rights of mine-host communities. These include the right to an environment that is not harmful to health and well-being,[1306] the right to participate in decision making in environmental matters,[1307] the right to share in the benefits of exploitation of natural resources and the right to sustainable development.[1308] Chapter 3 established that the right to development as a basis for the involvement in and benefit accrual from mineral extraction has two elements. The first is

[1306] See the *Declaration of the United Nations Conference on the Human Environment*, 1972; the *United Nations Declaration on Environment and Development*, 1992 and the *Declaration of the United Nations Conference on Sustainable Development* 2012.

[1307] Principle 10 of the *United Nations Declaration on Environment and Development*, 1992.

[1308] A 2(3) of the DRTD.

participation in the development process and the second is enjoyment of the benefits of development. This entails that both the means (process and procedures) of attaining development and the outcomes themselves (related to the well-being of the people) are key elements of the right to development. In the context of mineral extraction, the human right to development demands both procedural and substantive justice in the award and utilisation of mineral rights when it comes to involvement in and benefit accrual by mine-host communities from mineral extraction on their lands. Put together, the international regulatory instruments discussed in Chapter 3 provide a special benchmark or barometer for assessing the manner in which the requirements contained in the instruments centred on mine-host community involvement in and benefit accrual from mineral extraction are realised in the Zimbabwean constitutional, policy and legislative frameworks. The discussion proved the assumption that there is growing international consensus on the need for mine-host community involvement in and benefit accrual from mineral extraction.

Chapter 4 of the study set out to dissect applicable regional regulatory instruments in order to establish a benchmark or barometer for evaluating how Zimbabwean constitutional, policy and legislative frameworks attain the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction. It discussed mine-host community involvement in and benefit accrual from mineral extraction through instruments from the Organisation of American States (inter-American system) and the African region. The choice of the two regions was based on their similarities pertaining to treatment of some human rights as collective. The chapter focussed on two human rights instruments under the Inter-American human rights system that relate to mine-host community involvement in and benefit accrual from mineral extraction on their lands. These are the *American Declaration on the Rights and Duties of Man* of 1948 (*American Declaration*) and the *American Convention on Human Rights* of 1969 (*American Convention*). The chapter established that the inter-American human rights system relies primarily on protection of the right to property provided in Article 23 of the *American Declaration* and Article 21 of the *American Convention*. On this basis, the chapter asserted the requirement for mine-host community involvement in and benefit accrual from mineral extraction on their lands. This requirement was put to test in several cases brought before the Inter-American Commission on Human Rights and the Inter-American Court of Human

Rights. By analysing the case law, Chapter 4 found that it is not entirely ownership of land that entitles mine-host communities to consultation, participation and benefit sharing from the proceeds of mineral extraction on their lands. Rather, it is the disproportionate damage and harm that mine-host communities are exposed to and the negative impact of mining on their subsistence that qualifies them for involvement and benefit sharing. This perspective corrects arguments linked to state ownership of lands and minerals and shifts attention to the adverse impacts of mineral extraction on the subsistence of mine-host communities. It was demonstrated that the requirement for involvement and benefit accrual applies regardless of the type of mine-host community involved: indigenous, tribal, a minority and/ or a local rural community.

Analysis of the case law of the Inter-American Commission on Human Rights and Inter-American Court of Human Rights engendered the following findings:

(i) Involvement of mine-host communities in decision making pertaining to minerals on their lands is enhanced through environmental and social impact assessments.

(ii) Environmental and social impact assessments, consultation, involvement, participation and benefit sharing are standard requirements regardless of who owns the lands on which mineral extraction projects are planned.

(iii) Mine-host communities have substantive rights to own, use, control, occupy and develop lands and natural resources, including minerals, as based on their right to culture and to exist as a distinct people.[1309]

(iv) Exploitation of minerals on indigenous lands should be permitted only under exceptional circumstances,[1310] that is, the minerals should first be designated to be strategic and necessary for national security or development and the extraction should be done in cases of great national interest. The entities undertaking the mineral extraction should first obtain the consent of the indigenous peoples.

(v) The right to property as protected under Article 21 of the *American Convention* extends to lands and natural resources thereon held under customary tenure regimes.[1311] As a

[1309] In *Xákmok Kásek Indigenous Community v Paraguay, Judgment*, Inter-Am.Ct. H.R. (ser. C) No. 214, (Aug. 24, 2010) para 86.

[1310] *Yanomami Peoples v Brazil*, Case 7615, Inter-Am. Comm'n H.R., Report No. 12/85, OEA/Ser.L./V/II.66, doc. 10 rev. 1 (1985), paras 7- 10.

[1311] *Mayagna (Sumo) Awas Tingni Cmty. v Nicaragua,* Judgment, Inter-Am.Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001) para 148.

result of indigenous customary practices, the Inter-American Commission and Inter-American Court found that possession of the land is sufficient basis for indigenous communities who lack real title to property of the land, to obtain official recognition of their indigenous ownership of the lands.[1312] Those indigenous peoples dispossessed of their lands have a right to restitution.[1313]

(vi) Protection of indigenous property rights requires the state to obtain the FPIC of indigenous communities before decisions are made that will impact their traditional lands.[1314]

(vii) Free, prior and informed consent is a requirement in concessions for large-scale mining operations in indigenous lands or for cases involving large-scale projects with a major impact on the host community.[1315]

(viii) Natural resources found on and within the territories and that are protected by Article 21 of the *American Convention* are only those natural resources traditionally used and necessary for the very survival, development and continuation of the way of life of indigenous and tribal peoples.[1316] The mine-host community's mineral rights would thus be protected if the minerals are traditionally used and essential for the subsistence of the community.

(ix) The state can restrict the use and enjoyment of the lands and territories if this does not amount to a denial of the peoples' traditions and customs and when it does not deny their survival as a tribal community.[1317] To ensure that the mining concessions do not amount to a denial of the survival of a people as a tribal or indigenous group, the state must ensure their effective involvement in decision-making in accordance with their customs and ensure that no concession is issued unless and until an ESIA has been conducted, while it must also be ensured that the community will receive reasonable

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[1312] *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128. *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* para 151.

[1313] *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Judgement of 29 March 2006 Series C No 146 IACHR 2 para 128.

[1314] *Maya Indigenous Communities v Belize,* Case 12.053, Inter-am. C.H.R., Report No. 40/04, OEA/Ser.L/V/Ii.122, Doc. 5 Rev. 1 (2004) para 142.

[1315] *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 136-137.

[1316] *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct. H.R. (ser. C) No.172, (Nov. 28, 2007)* para 122; *Yakye Axa Indigenous Community v Paraguay* paras 124 and 137; *Sawhoyamaxa Indigenous Community v Paraguay* paras 118, 121.

[1317] *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* paras 124, 128.

benefit from extraction projects within their territory.

(x) The duty to consult arises immediately, that is, once it is determined that the activity will have potential adverse impacts on the people. Consultation with affected people should be performed in good faith, in accordance with the customs and traditions of the peoples, at the early stages of a development and not be left to the tail end.[1318] The state must disseminate information to the community and ensure that the people are informed of the possible risks, including those related to environment and health, so that they accept the development knowingly and voluntarily.[1319] It is the state that should carry out the consultation and not the extractive company.[1320] A consultation process that is not genuine and participatory but merely meant to fulfil legal requirements (that is, box-ticking) does not suffice.[1321]

When it comes to the African regional system, Chapter 4 established that there are several regulatory instruments relevant to the question of mine-host community involvement in and benefit accrual from mineral extraction on their lands. These instruments include the *African Charter on Human and Peoples' Rights* of 1982, *the African Union Convention for the Protection and Assistance of Internally Displaced Persons* of 2009; *African Youth Charter* of 2006 and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003. Other important instruments include the *Africa Mining Vision*; the *African Commission on Human and Peoples' Rights:* Resolution 224 of 2012 *on a Human Rights-Based Approach to Natural Resource Governance; African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment* of 2018; and the Resolution on the *Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector* of 2017. Important instruments at the African sub-regional level include the *ECOWAS Directive on the*

1318 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 133.

1319 *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* para 133.

1320 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 paras 187 and 298. See A 19, 36(2), 38 of UNDRIP; A 6(1), 15(2) of ILO Convention 169 of 1989; *Saramaka Peoples v Suriname, Judgment, Inter-Am. Ct.H.R. (ser.C) No.172, (Nov. 28, 2007)* paras 102, 129 and 131; *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 para 167.

1321 *Kichwa Indigenous People of Sarayaku v Ecuador (2012) Inter-AmCourt HR* (Ser C) No 245 paras 167,186 and 200.

Harmonization of Guiding Principles and Policies in the Mining Sector of 2009, the *Protocol of the International Conference of the Great Lakes Region Against the Illegal Exploitation of Natural Resources* of 2006, and the *SADC Protocol on Mining* of 1997.

It is apparent in Chapter 4 that the *African Charter on Human and Peoples' Rights* of 1982 is the principal African regional legal instrument that has implications for mine-host community involvement in and benefit accrual from mineral extraction on their lands. The key provisions of the Charter in the context of mineral extraction on lands inhabited by mine-host communities are Article 14 which addresses the protection of the right to property; Article 21(1) on the right of peoples to freely dispose of their natural wealth and resources; Article 22 on the right to economic, social, and cultural development and Article 24 on the right to a satisfactory environment suitable to development. These provisions have been expounded in the *African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment* of 2018 as guaranteeing the right of mine-host communities to involvement and accrual of benefits from mineral extraction on their lands.

Chapter 4 established that Article 21 of the *African Charter on Human and Peoples' Rights* of 1982 which addresses the right of peoples to freely dispose of natural resources contains provisions similar to Article 1 of the *ICCPR* and *ICESCR*. However, Article 21(1) of the *African Charter* goes further than Article 1 of the *ICCPR* and *ICESCR* as it regards peoples of the state as the only exclusive beneficiaries of the exploitation of natural resources. The people/citizens are entitled under Article 21(2) of the *African Charter* to seek recovery or compensation if they are dispossessed of their natural resources, and this works out to be some form of remedial justice for dispossessed communities.

Chapter 4 further established that in order to realise the right of women to live in a healthy environment and to sustainable development, Articles 18(2)(a) and 19(b) of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* of 2003 obliges states to take all appropriate measures to ensure effective participation by women in the planning, management and preservation of the environment as well as

implementation and evaluation of development policies and programmes. When applied in the context of decision-making in the award and utilisation of minerals rights, this entails the involvement and benefit accrual by women in mine-host communities from mineral extraction on their lands. On its part, the *African Youth Charter* of 2006 seeks the involvement of the youth in decision making as well as accrual of benefits from development programmes and projects. It especially emphasises the right of the youth to participate in the design, implementation and evaluation of national development plans and environmental policies including conservation of natural resources.[1322] This would, in the context of mineral extraction on lands inhabited by mine-host communities, entail that youths in these communities should be involved in processes centred on the award and development of mineral resources in their areas.

Chapter 4 also found that the *Africa Mining Vision* of 2009 seeks to balance local and national interests and ensure that mine-host communities are equipped with alternative livelihoods post-mine closure. The *Africa Mining Vision* also affirms the right of mine-host communities to FPIC and encourages states to ensure accrual of benefits to local communities through revenue-sharing arrangements, local employment and infrastructure development.[1323] These same requirements are affirmed in the *African Commission on Human and Peoples' Rights:* Resolution 224 of 2012 on a Human Rights Based Approach to Natural Resource Governance[1324] and the *Resolution on the Niamey Declaration on ensuring the upholding of the African Charter in the Extractive Industries Sector* of 2017.[1325]

Analysis of the case law of the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights engendered the following findings:

(i) Any limitations imposed on the right to property enshrined in Article 14 of the *African Charter on Human and Peoples' Rights* of 1982 must be strictly proportionate with and necessary for the intended rewards and involve the least

[1322] A 14(1)(2)(4), A 16(1) and A 19(2)(d) of the *African Youth Charter.*
[1323] Africa Mining Vision, 45.
[1324] Para II of the *African Commission Resolution 224 of 2012 Regarding the Human Rights Based Approach to Natural Resource Governance*.
[1325] Para 1(a)(b)(d) and (e) of the *Resolution on the Niamey Declaration on ensuring the upholding of the African Charter in the Extractive Industries Sector* ACHPR/Res. 367 (LX) 2017*.*

restrictive measures possible.[1326] This entails that any restrictions on the use and enjoyment of lands by mine-host communities must be the least onerous, strictly necessary and proportionate to the benefits that would accrue to them and the nation. The upheaval and displacement of mine-host communities from their ancestral lands and the denial of their rights to natural resources on those lands must not be disproportionate to any public need served by the development projects.[1327] An eviction carried out by force and that threatens the economic, social and cultural survival of the mine-host community also fails the proportionality test.[1328]

(ii) The right to property enshrined in Article 14 of the *African Charter* may only be encroached upon in the interest of the public or community and in compliance with the provisions of appropriate laws. The African Commission on Human and Peoples' Rights interpreted this requirement as subjecting state interference with property rights to the standards of both national and international law.[1329] Therefore, it is not sufficient for the state to argue that the eviction and dispossession of mine-host communities of their ancestral lands is consonant with its domestic legislation.

(iii) The state has a duty to protect communities with special attachment to, and dependency on land due to their distinct culture and spiritual values from being displaced from such lands.[1330]

(iv) Popular participation is a fundamental right of people to partake fully and effectively in the decision-making processes impacting their lives.[1331] This requires their involvement in the design and development of policies and programmes and in equitably sharing of development benefits.[1332] Notably, mine-host communities must be involved in making the decisions regarding the developments impacting

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[1326] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 212.

[1327] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 214.

[1328] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 218, 235.

[1329] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 219.

[1330] Article 4(5) of the *African Union Convention for the Protection and Assistance of Internally Displace Persons (Kampala Convention)* of 2009.

[1331] Para 10 of the *African Charter for Popular Participation in Development and Transformation* E/ECA/CM.16/11(1990).

[1332] Para 11 of the *African Charter for Popular Participation in Development and Transformation* E/ECA/CM.16/11(1990).

their lands and survival and be informed regarding the risks of the operations.[1333]

(v) The obligation imposed on the state to respect, protect and fulfil human rights also applies in the context of extraction of natural resources on lands inhabited by mine-host communities.[1334]

(vi) The state is obliged by Article 16 of the *African Charter on Human and Peoples' Rights* of 1982 to refrain from directly or indirectly threatening the health and environment of citizens through contamination of water, soil and the air.[1335] Therefore, possible alternatives to a proposed development project must be explored in consultation with affected communities and an ESIA must be conducted prior to its implementation.[1336]

(vii) The deprivation of the right of the people to freely dispose of their wealth and natural resources violates their right to economic, social and cultural development guaranteed under Article 22 of the *African Charter*.[1337] Failure to ensure effective involvement or participation of mine-host communities and failure to ensure benefit-sharing also violates the right to development, which is guaranteed in Article 22 of the *African Charter on Human and Peoples' Rights* of 1982.[1338]

(viii) Development and investment projects with a major impact on the host communities impose a duty of the state to consult with the affected community and also obtain their free, prior and informed consent in accordance with their customs and traditions.[1339] Notably, extraction of minerals impacts other natural resources such as the waterways necessary for the survival of mine-host communities. This imposes a duty on the state to consult with them regarding the award and utilisation of mineral rights within their lands and to ensure that they derive benefits

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1333 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001)

1334 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 44. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 191.

1335 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* ACHPR Com No 155/96 (2001) para 52.

1336 A 10 of the *African Union Convention for the Protection and Assistance of Internally Displaced Persons* (Kampala Convention) of 2009

1337 *Democratic Republic of Congo v Burundi, Rwanda and Uganda* Comm Communication No. 227/99 20th Annual Activity Report of the African Commission; annex IV, 111 para 95, 111.

1338 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 228.

1339 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 291.

therefrom.[1340]

(ix) The right to development has both procedural and substantive dimensions. A violation of either the procedural or substantive element constitutes a violation of the right while fulfilling only one of the two dimensions does not satisfy the right to development. The right to development must be realised in an equitable, non-discriminatory, participatory, accountable, and transparent manner.[1341] Ultimately, development should result in the empowerment of the affected local communities.[1342] In this way the right to development is realised when the capabilities and choices of the affected communities are increased or improved.[1343]

Chapter 5 set out to determine the manner in which the requirements of international and regional regulatory instruments discussed in Chapters 3 and 4 are realised in the Zimbabwean constitutional, policy and legislative frameworks pertaining to mine-host community involvement in and benefit accrual from mineral extraction. An analysis of the *Constitution of Zimbabwe* found that it does contain progressive provisions that should be turned into legislation and policies to ensure involvement and benefit accrual by mine-host communities from mineral extraction on the lands they inhabit. The *Constitution of Zimbabwe* provides for the state's duty to respect, protect and fulfil human rights, equitable development and sharing of national resources, recognition and empowerment of marginalised communities, the right to access to information, the right to consultation, the right to administrative justice, the right to an environment that is not harmful to health or well-being and the right to property, shelter and not to be arbitrarily evicted from one's home.

The chapter further established that despite the progressive provisions in the *Constitution of Zimbabwe*, the policy and legislative frameworks do not realise most of the requirements set in international and regional regulatory instruments pertaining to mine-

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[1340] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 paras 14,228, 266-267.

[1341] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 277.

[1342] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 283.

[1343] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, ACHPR Com No 276/2003 para 283.

host community involvement and benefit accrual from mineral extraction. This is partly due to the continued existence of colonial pre-independence legislation such as the *Mines and Minerals Act* 38 of 1961 while some post-independence legislation such as the *Communal Land Act* 20 of 1982 merely replicate the colonial *Tribal Trust Land Act* 6 of 1979. Mine-host communities in Zimbabwe inhabiting communal lands do not have secure land tenure, as the lands are vested in the President, thus interpreted as belonging to the state, which controls it through rural district councils and traditional leaders. Without secure land tenure, mine-host communities are exposed to the dispossession of the land at any time to pave way for extraction whenever valuable minerals are found on the land. Further, the evicted mine-host communities rarely receive financial compensation or lands of similar quality and extent.

Chapter 5 found that the rights that mine-host communities in Zimbabwe have over the land they inhabit are those of occupation and use. The insecurity of these rights resides in the ability of the state to abrogate them at any time so as to make way for mineral extraction. Further, the legislative provisions regarding ownership of mineral resources in Zimbabwe leave doubt as to whether the minerals are owned by the President or the state, or whether minerals belong to the people of Zimbabwe. The same holds for water resources in Zimbabwe. The vesting of natural resources in someone other than the people of Zimbabwe diminish their claims to the natural resources. An analysis of the Zimbabwean policy and legislative frameworks further revealed that the notice and consultation requirements that would ensure mine-host community involvement in decision making pertaining to the award and utilisation of mineral rights are either non-existent or not well developed in Zimbabwe. The mining legislation in Zimbabwe only requires from the applicant for ordinary prospecting rights to notify the landowner. No notice is required to be given to any other interested and affected parties. In the case of communal land, the landowner in Zimbabwe is the President as represented by rural district councils. Except in a few instances, pertaining to land smaller than 100 hectares in extent or land occupied as a village, there is no legal requirement to notify and consult the communities who inhabit the land or to obtain their free, prior and informed consent when applying for ordinary prospecting and mining rights. These observations show that mine-host communities are severely exposed to mining activities and are not involved in the decision-making process

pertaining to mineral extraction on the lands they inhabit.

With respect to accrual of socio-economic benefits, Chapter 5 found that, in Zimbabwe, the communities impacted by mineral extraction rarely obtain meaningful social and economic benefits. The only legislation that provides some benefit accrual for mine-host communities in Zimbabwe is the *Indigenisation and Economic Empowerment Act* 14 of 2007 and its applicable regulations, yet this legislation is falling into disuse due to amendments ushered by the *Finance Act* 1 of 2018 and the *Finance Act* 2 of 2020. The net effect of these amendments is that indigenisation can be achieved legally without mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit.

Chapter 5 further established that mine-host communities in Zimbabwe do not have access to information regarding planned and on-going mining projects on the lands they inhabit, especially as regards information relating to adverse environmental and social impacts. While the *Constitution of Zimbabwe* provides a right to access information held by the state and juristic persons such as mining companies, the *Freedom of Information Act* 1 of 2020 does not make it mandatory for juristic persons to provide access to information. Further, mine-host communities are currently not represented on the Mining Affairs Board, which is one of the highest decision-making bodies regulating mineral extraction in Zimbabwe. Mine-host communities are therefore unable to access information relating to the exploration and exploitation of minerals on their lands, as they are not represented on this board. This takes away their right to participation in the formulation and implementation of policy and in decision-making processes affecting them.

Chapter 5 revealed moreover that there is a gap or misalignment between the *Mines and Minerals Act* 38 of 1961 and the *Environmental Management Act* 13 of 2002 when it comes to participation of mine-host communities in decision making around environmental matters. While the *Environmental Management Act* 13 of 2002 prohibits regulatory authorities such as the Ministry of Mines and Mining Development from issuing prospecting licenses where there is no EIA certificate, the *Mines and Minerals Act* 38 of 1961 allows issuing of such licenses without EIAs. Prospecting and mining rights are being granted

without these crucial documents, leaving the process to be carried out at the tail end or only when the Environmental Regulatory Authority sanctions a miner for not having carried out an EIA. The study found that provisions of the *Environmental Management Act* 13 of 2002 which require an EIA to be conducted at the rights application stage are impracticable within the ambit of the current legislative framework and practice for application and award of ordinary prospecting rights in particular. Ordinary prospecting rights are currently awarded under section 20(1) the *Mines and Minerals Act* 38 of 1961 immediately upon payment of a prescribed fee and they authorise the prospector to search for minerals on any piece of land within a mining district. This makes it impracticable to require environmental impact assessments at the stage of application for ordinary prospecting rights.

Chapter 5 also demonstrated that the *de facto* status of mining in Zimbabwe is that it is viewed as superior to alternative land uses. There are no provisions in the *Mines and Minerals Act* 38 of 1961 that require mining regulatory authorities to consider the development priorities of mine-host communities before awarding of mining rights. The provisions in section 31 of the *Mines and Minerals Act* 38 of 1961 pertaining to land that is not open to prospecting and pegging of mines do not adequately resolve the challenge. Mining, therefore, trumps alternative land uses, especially on communal lands inhabited by mine-host communities. For instance, grazing land and sites of spiritual significance to mine-host communities are not listed in section 31 of the *Mines and Minerals Act* 38 of 1961 as land that is not open to prospecting and pegging of mines. Added to this, Zimbabwe's legislative framework does not in the context of relocations, require mining companies and mine-host communities to reach an agreement regarding the nature and amount of compensation prior to the granting of a mining license, commencement of mining operations or the relocation itself.

Finally, Chapter 5 established that Zimbabwe does not have a fully documented and publicly accessible mining and mineral development policy. Instead, the Minerals Policy of 2013 is still in draft form. Consequently, ascertaining Zimbabwe's minerals policy in the absence of a distinct official policy document is a difficult and speculative exercise involving skimming through legislation, administrative practices of government and

statements by government officials. This study has shown that one of the reasons why Zimbabwe is failing to transform its abundant mineral resources into enhanced economic growth and the well-being of citizens and mine-host communities is the country's weak and generally obsolete policy and legislative frameworks. Forty-two years after independence, Zimbabwe still has in its statute books legislation enacted during the colonial era, which were aimed at serving the interests of the colonial government and foreign extractive companies and not the majority people of Zimbabwe.

Chapter 6 offered a review of the South African constitutional, policy and legislative frameworks for mine-host community involvement in and benefit accrual from mineral extraction on the lands they inhabit. The goal of the review was to establish points of comparison and see if there were any lessons for Zimbabwe to be gleaned from the South African constitutional, policy and legislative frameworks. The chapter found that the *Constitution of South Africa*, just like the *Constitution of Zimbabwe*, guarantees the rights to equality,[1344] human dignity,[1345] an environment that is not harmful to health and well-being,[1346] property, including land restitution,[1347] access to information[1348] as well as just administrative action.[1349] The major difference between the two constitutional frameworks related to the right to property. In particular, section 25(6) of the *Constitution of South Africa* seeks to ensure that communities whose land tenure was insecure due to colonial and apartheid discriminatory laws and practices are given security of tenure through legislative reform. In terms of section 25(7), those persons or communities dispossessed of property after 19 June 1913 through racially discriminatory laws or practices are entitled to restitution of that property or equitable redress. When it comes to mineral resources, section 25(8) of the *Constitution of South Africa* decrees that no provision in the section prevents the government from undertaking land, water and related reform and this provides the constitutional mandate for reform of mineral rights which is given effect in the *MPRDA*. When the *Constitution of Zimbabwe* is compared with this, it becomes clear that it does not sufficiently protect communities previously dispossessed of their land

[1344] Section 9(1)(2) of the *Constitution of South Africa*.
[1345] Section 10 of the *Constitution of South Africa*.
[1346] Section 24 of the *Constitution of South Africa*.
[1347] Section 25 of the *Constitution of South Africa*.
[1348] Section 32 of the *Constitution of South Africa*.
[1349] Section 33 of the *Constitution of South Africa*.

during the colonial era and who today suffer insecure land tenure on communal lands they reside on. No restitution of previously dispossessed lands is provided for in the *Constitution of Zimbabwe* and there is no obligation on the state to provide the communities with secure land tenure.

Chapter 6 found that South Africa has a fully documented minerals policy produced after wide debate and consultation with citizens. The *Minerals and Mining Policy for South Africa* of 1998 reiterates the constitutional mandate to undertake land and mineral rights reforms to redress past racial discrimination and ensure that citizens access the mineral resources on an equitable basis, while these natural resources must benefit the people of South Africa. The objective of the government of South Africa as expressed in the *Minerals and Mining Policy for South Africa* of 1998 is to ensure participation by the black population and mine-host communities in the ownership and management of the mining industry and ensure equality through focussed policies of BEE. The development of host communities is to be achieved by requiring mining companies to comply with local development objectives,[1350] considering the needs of the communities when carrying out operations[1351] and ensuring the continued availability of useful infrastructure after mine closure.[1352]

Significantly, chapter 6 further established that South Africa's *MPRDA* sets out nine transformative objectives in section 2 of the Act which include equitable access by all South Africans to mineral and petroleum resources,[1353] eradicating all discriminatory practices that perpetuate racial inequalities in the minerals and mining industry,[1354] sustainable development,[1355] social welfare and broad-based economic empowerment.[1356] Through these objectives, the *MPRDA* seeks to achieve distributive, remedial and procedural justice in the South African minerals and mining industry.[1357] Section 2(d) of the *MPRDA* states that the Act seeks to "substantially and meaningfully expand

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1350 *Minerals and Mining Policy* para 4.4 (vi).
1351 *Minerals and Mining Policy* para 4.4 (vi).
1352 *Minerals and Mining Policy* para 4.4 (vi).
1353 Section 2(c) of the *MPRDA*.
1354 Section 2(d) of the *MPRDA*.
1355 Section 2(e) (h) of the *MPRDA.*
1356 Section 2(d) (f) (i) of the *MPRDA*.
1357 The case of *De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd and Others* (3215/06) [2007] ZAFSHC 74 paras 26-35 affirms that the *MPRDA* is a remedial legislation that seeks to deal with the injustices of the past.

opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral resources."[1358] Section 2(c)(f)(i) further states that the Act seeks to ensure that mining contributes to the socio-economic development of the mine-host communities. These objectives point to the direct involvement of mine-host communities in the mining and minerals industry through the award of mineral rights and accrual of benefits from mineral extraction on their lands. Attainment of these objectives is facilitated through the *Broad-Based Socio-economic Charter for the South African Mining Industry* (*Mining Charter*), social and labour plans and the codes of good practice for the South African mining industry, among other measures. The case of *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others*[1359] has, however, clarified that the *Mining Charter* is not a legislative instrument but policy which provides guidance during implementation of the transformational objectives of the *MPRDA*. Therefore, no legally binding obligations are created by the *Mining Charter* until its provisions are incorporated into a mining right issued by the DMRE.

It was also established in chapter 6 that the legislative framework in South Africa vest mineral resources in the people or nation, while the state acts as the custodian of the resources for the benefit of all South Africans.[1360] Minerals are to be exploited for the benefit of all the people of South Africa, coupled with equal access and empowerment of historically disadvantaged South Africans. The *MPRDA* presents these learning points for Zimbabwe, whose *Mines and Minerals Act* controversially vests mineral resources in the President, which is inconsistent with international and regional regulatory instruments. The recognition of the people's ownership of mineral resources promotes mine-host community involvement in and benefit accrual from mineral extraction, while vesting minerals in the President serves to stifle such involvement and benefit accrual by weakening the peoples' claims to the resources.

[1358] See also para 4 of the Preamble of the *MPRDA*.

[1359] *Minerals Council of South Africa v Minister of Mineral Resources and Energy and Others* 2022 (1) SA 535 (GP) para 59.

[1360] Sections 2(b) and 3(1)(2) of the *MPRDA.*

Chapter 6 demonstrated that South Africa's legislative framework recognises the duty of an applicant for a prospecting right, mining right or mining permit to notify, consult and accommodate landowners, lawful occupiers or otherwise interested and affected parties. In terms of section 5A(c) of the *MPRDA*, prospecting, mining, exploration or any other operations cannot be conducted on any land unless the applicant or mineral right holder has given notice to the landowner or lawful occupier of the land. Where the state has received an application for a prospecting right, mining right or permit, it is required in terms of section 10(1) of the *MPRDA* that interested or affected parties be notified that an application has been made in respect of the land. Section 10(1)(b) requires the state to call upon the interested and affected parties to submit comments or objections that they may have. Sections 16(4)(b) and 22(4)(b) of the *MPRDA* focus on the matters of notice and consultation upon acceptance of applications for prospecting rights and mining rights respectively but before the granting of relevant rights. The state is required by section 16(4)(b) of the *MPRDA*, upon accepting an application for a prospecting right, to advise the applicant that they should notify in writing and consult with the landowner, lawful occupier or any other affected party and submit the results of such consultations within 30 days. In terms of section 22(4)(b) of the *MPRDA*, which regulates applications for a mining right, an applicant whose application for mineral rights has been accepted is required to "notify and consult with interested and affected parties within 180 days from the date of the notice." Pertaining applications for a mining permit, section 27(5)(b) of the *MPRDA* provides that the state should, upon accepting the application, advise the applicant to notify and consult with the landowner, lawful occupier and other affected parties and submit the results of such consultations within 30 days.

Chapter 6 illustrated that the scope of the consultation process has further been developed not only in guidelines issued by the DMRE but also in case law. Major case law around this include *Meepo Yase Chaba v Kotze and Four Others*,[1361] where it was held that consultation provisions in the *MPRDA* should be widely construed since it is the only prescribed means whereby a landowner is to be apprised of the impact prospecting

[1361] *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC) pars 13-13.1.

operations may have on other forms of land use such as farming.[1362] The case of *Joubert and Others v Maranda Mining Company (Pty) Ltd*[1363] affirmed that the mining right holder is only entitled to enter the land concerned after having complied with provisions pertaining to consultation with the landowner, lawful occupiers or interested and affected parties. The landmark case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*[1364] set a judicial precedent when it comes to the matters of consultation, preferential rights of mine-host communities and environmental considerations in the granting of prospecting rights. Here the Constitutional Court of South Africa upgraded consultation requirements from mere awareness[1365] to consultation in good faith[1366] so that the landowner has to be informed "in sufficient detail" regarding that which the prospecting operations entail, so that they can assess the impact of such operations.[1367] The *MPRDR* 2020 further broadened the obligation to consult landowners, lawful occupiers and interested and affected parties by moving from mere consultation to meaningful consultation.[1368] It was further clarified in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[1369] and *Baleni and Others v Minister of Mineral Resources and Others*[1370] that, where the land is held by a community holding informal or customary land rights, the process requires not just consultation but also community consent.

Chapter 6 found further that the South African legislative framework provides for preferent community prospecting rights. These are set out in section 104 of the *MPRDA.* They entail that community rights to prospect on their own lands should be considered ahead of those

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1362 *Meepo Yase Chaba v Kotze and Four Others* 2008 (1) SA 104 (NC) pars 13.1-13.2. See also *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) para 12.

1363 *Joubert and Others v Maranda Mining Company (Pty) Ltd* 2010 (1) SA 198 (SCA) paras 12-13. See also *Director Mineral Development Gauteng v Save the Vaal Environment* 1999 (2) SA 709 (SCA) 718.

1364 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC). The case which was first decided in the Transvaal High Court was appealed all the way to the South African Constitutional Court. See Humby 2012 15 (4) *PER/PELJ* 166-188.

1365 *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (unreported judgment, Transvaal Provincial Division, Case No 39808/2007, 18 November 2008) paras 28-30.

1366 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 65. See A 6 (2) of the ILO Convention 169 of 1989; A 19 and A 32(2) of the UNDRIP.

1367 *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 67.

1368 Sections 10(1)(b), 16(4)(b), 22(4)(b) and 27(5)(b) of the *MPRDA* do not require meaningful consultation but *mere* consultation with landowners or lawful occupier, interested and affected parties.

1369 *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC).

1370 *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

of any other applicant on the same land.[1371] The chapter expounded other general provisions that reinforce involvement in and benefit accrual by mine-host communities. For instance, section 9(1)(2) of the *MPRDA* requires the state to give preference to an application for mineral rights received from historically disadvantaged persons if the application is received on the same date as that of other applications. This provision enables mine-host communities to obtain mineral rights ahead of other applicants because they are historically disadvantaged, thus facilitating their entry into the mining industry. In addition to these instruments, section 12(1)(4) of the *MPRDA* empowers the Minister of Mineral Resources and Energy to assist historically disadvantaged persons to conduct prospecting or mining operations in order to promote equitable access to the nation's natural resources and to transform the ownership structure of the minerals and mining industry.[1372]

Chapter 6 found that South Africa's BBBEE has, over the years, become a key tool for empowerment of mine-host communities. Section 17(1)(f) of the *MPRDA* provides that the Minister of Mineral Resources and Energy must grant an application for prospecting rights if the applicant has given effect to the objects referred to in section 2(d) regarding compliance with BBBEE requirements. Section 23(2A) of the *MPRDA* then empowers the Minister to impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the host community. A mining right will not be granted if it does not further BBBEE objectives and social development in conformity with the *Mining Charter* of 2018 and the relevant social and labour plans that pertain to empowerment and development of mine-host communities and labour-sending areas.[1373] Similarly, a mining right will not be renewed at its expiry if it has been established that the mining right holder did not comply with the BBBEE requirements.[1374]

Chapter 6 examined section 57 of the *MPRDA* which establishes a Minerals and Mining Development Board (MMDB) and found that the composition of the board includes a

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[1371] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) paras 71, 73-74.
[1372] Section 12(3)(a)(c) of the *MPRDA*.
[1373] See section 23(1)(h) as read with section 23(3) of the *MPRDA*.
[1374] Section 24(3)(c)(d) of the *MPRDA*.

person from a non-governmental organisation and two persons representing relevant community-based organisations.[1375] These persons should ideally represent the interests of mine-host communities. Regarding consultations for social and labour plans,[1376] the *MPRDR* 2020 require from an applicant for mineral rights that they consult meaningfully with communities and interested and affected persons.[1377] A mining right holder is also required to convene a minimum of three meetings per annum with communities so as to update them regarding progress on implementation of the approved social and labour plans.[1378] Further, a mining right holder must publish the approved social and labour plans in English and one other dominant official language commonly used in the mine-host community within 30 days of approval. The approved plans must be made available on the mining company's website, in local libraries, in municipal offices and in traditional council offices.[1379] The plans are to be reviewed by the mining right holder every five years from the date of approval in meaningful consultation with mine-host communities and interested and affected persons.[1380]

The chapter emphasised that, apart from mining legislation, South Africa also has other legislative instruments that promote mine-host community involvement in and benefit accrual from mineral extraction on their lands. The legislature enacted the *IPILRA* to provide tenure security for those residing in communal areas with informal land rights as mandated by section 25(6) of the *Constitution of South Africa.* The *NWA* was also enacted to give effect to reform to water and other related reforms as directed by section 25(8) of the Constitution of South Africa. The legislature passed the *Restitution of Land Rights Act* 22 of 1994 in order to redress past land dispossessions as mandated by section 25(7) of the *Constitution of South Africa*. The *Restitution of Land Rights Act* 22 of 1994 allows communities who were dispossessed of land after 19 June 1913 (the date when the *Natives Land Act* 27 of 1913 was enacted to dispossess black communities) to lodge claims for restoration of their land. This may include land where mining operations are currently

[1375] Section 59(2)(f)(g) of the *MPRDA*.
[1376] Amended Regulation 42 of the *MPRDR* 2020 states that an application for a mining right must be accompanied by a social and labour plan.
[1377] Amended Regulation 42(3) of the *MPRDR* 2020.
[1378] Amended Regulation 45 of the *MPRDR* 2020. The outcomes of these meetings must form part of the annual report.
[1379] Amended Regulation 46A (a)(b)(i)(ii)(iii) of the *MPRDR* 2020.
[1380] Amended Regulation 46B (a) of the *MPRDR* 2020.

on-going or where mining rights have been issued. The Constitutional Court of South Africa held in *Alexkor Ltd and Another v Richtersveld Community and Others,*[1381] that the community owned both the land and mineral resources in that land.

Chapter 6 established that the *IPILRA* is another legislative instrument available within South Africa that seeks to protect and provide communal as well as informal land rights holders equitable access to land while securing land tenure. In terms of section 2(2) of the *IPILRA*, deprivation of land or rights held by informal land rights holders must be done in accordance with the custom and usage of the community. It must be pointed out that consent of the affected community is still required as per section 2(1) even where the deprivation is in terms of the customs and traditions of that community. Overall, the *IPILRA* imposes additional requirements to be complied with before the award of mineral rights on communal lands. On its part, the *PAIA* gives effect to section 32(2) of the *Constitution of South Africa* pertaining to the right to access to information. However, the case of *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others*[1382] interpreted the law that regulates access to information by mine-host communities in South Africa in a profound way by asserting that interested and affected parties are entitled to access mineral rights application documents upon request to the DMRE as a right, as based on sections 10(1) and 22(4) of the *MPRDA* without having to go through the *PAIA* procedures.[1383] The judgement in the *Baleni* case is remarkable in that mine-host communities can now automatically access information held by the DMRE and mining companies without having to follow the *PAIA* process, whose complexity and length does not permit the communities to meet the short timelines for notice, consultation and filing of comments and objections provided in the *MPRDA*.

7.4 Recommendations for reform

This study has shown that Zimbabwe's current policy and legislative frameworks for mineral extraction are not sufficiently designed to deliver meaningful involvement and

[1381] In *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 62.

[1382] *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP).

[1383] *Baleni and Others v Regional Manager Eastern Cape Department of Mineral Resources and Others* [2020] 4 All SA 374 (GP) para 117(1).

socio-economic benefits for mine-host communities, as the focus within their ambit has remained on facilitating mineral extraction with little attention to the well-being of the communities. Governments often focus on overall national developmental gains as opposed to local and community needs and benefits and this is based on the utilitarian conception of distributive justice which is prejudicial to the well-being of mine-host communities.

As demonstrated in this study, utilitarian and libertarian conceptions of justice do not aid mine-host communities' involvement in and benefit accrual from mineral extraction on their lands. This is because these strands of distributive justice focus on a distribution of resources in society that maximises the happiness or justifies the interests of other citizens and the state even if this is at the expense of the mine-host communities who are directly affected by mining activities on their lands. It is egalitarianism, instead, that supports mine-host communities by emphasising that a just distribution of resources in society is the one that work to the benefit of the least advantaged. This means that the distribution of the proceeds of mineral extraction should benefit mine-host communities more than other stakeholders since they bear a disproportionate burden of the mining activities on lands they inhabit. When it comes to procedural justice, processes or procedures that are just and fair must be followed when decisions centred on the award and utilisation of minerals on lands inhabited by mine-host communities are being made. Such processes and procedures are underpinned by adequate notice and meaningful consultation with mine-host communities and their participation according to their customs and traditions, when decisions that affect their livelihood are being made. On its part, remedial justice require that wrongs suffered by mine-host communities as a result of mineral extraction on their lands be redressed by such means as compensation and restitution of their lands. This underlies recommendations for reform of the Zimbabwean constitutional, policy and legislative frameworks going forward.

Based on this and findings stated in 7.3 above, it is possible to make the following recommendations for reform:

(i) *Recognition and or restitution of communal land ownership rights through amendment of the Constitution of Zimbabwe and the* Communal Land Act 20 of 1982 *or enactment of a new statute*

To ensure secure land tenure, there is a need to restore communal lands to their customary communal ownership, and this should, by extension, include the minerals on the land. Zimbabwe should revisit the recommendations of the 1993 Land Tenure Commission (Rukuni Commission),[1384] which reviewed its land tenure systems. The Commission recommended that the state should relinquish ownership of contemporary communal lands to traditional village communities and have the land surveyed, demarcated and registered in the name of these communities. Legislation must therefore be enacted in order to legally recognise these land ownership rights of traditional/ customary communities. This study, therefore, recommends that the *Constitution of Zimbabwe* be amended to adopt provisions similar to section 25 of the *Constitution of South Africa*, which provide restitution or compensation for communal lands confiscated during the colonial and apartheid era. Along the same lines, Zimbabwe should amend the *Communal Land Act* 20 of 1982 to recognise the land rights of communities dispossessed of their land during the colonial era and provide a framework for the restitution or compensation for the lands. The present study recognises that it may no longer be possible to restore the exact dispossessed lands due to various reasons including the land reform programme carried out by Zimbabwe from the year 2000. Where restoration of exact lands is no longer possible, the law should recognise the current land holdings of the traditional village communities *in lieu* of their previous lands and guarantee no further dispossessions. The *Constitution of South Africa* sets a precedent for this when it pertinently obliges the state to ensure that persons and communities whose land tenure is insecure due to past racial discrimination have their lands restored to them, obtain compensation or are otherwise provided secure land tenure. To realise the constitutional requirement for restitution of communal land rights, South Africa enacted the *RLRA*, and communities such as those in the Richtersveld have benefited immensely as the community's land rights now include rights to sharing the proceeds of minerals found on

[1384] The Report of the Commission of Inquiry into Appropriate Agricultural Land Tenure Systems under the Chairmanship of Professor M. Rukuni, 1993/94 (report made public 1995), Harare: Government Printers.

the land concerned.

(ii) *Protection of informal/unregistered communal land rights through amendment of Zimbabwe's* Communal Land Act 20 of 1982 *or through new legislation*

There is need for interim measures before restoration of communal land ownership rights is undertaken. The interim measures should protect informal/unregistered communal land rights in Zimbabwe by borrowing protections under the *IPILRA* introduced by South Africa in 1996. Most importantly, deprivation of informal/unregistered land rights without the free, prior and informed consent of the holders of such rights must be prohibited through an amendment of Zimbabwe's *Communal Land Act* or through completely new legislation dealing with communal tenure security. The value of protection of informal/unregistered land rights, especially in the context of mineral extraction on lands inhabited by mine-host communities, is demonstrated by the South African cases of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another*[1385] and *Baleni and Others v Minister of Mineral Resources and Others*,[1386] discussed in 6.4.6.2 above. Lessons from the two cases include that the award of mineral rights does not on its own abrogate the informal/unregistered land rights of mine-host communities. The consent of the communities is needed.

(iii) *Recognition of the people's ownership of mineral resources through amendment of the* Mines and Minerals Act 38 of 1961 *or through a new legislation in its stead*

The current legislative provision regarding ownership of mineral resources in Zimbabwe leaves doubt as to whether the minerals are owned by the President, the state or the people of Zimbabwe, as has been indicated in chapter 5. The same goes for land and water resources in Zimbabwe. It has been shown in chapter 5 that vesting of minerals in the President weakens the claim of citizens to these resources and to the proceeds derived from their disposal. There is a need for the *Mines and Minerals Act* 38 of 1961 or new legislation regulating mines and minerals to unequivocally state that the mineral resources

[1385] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC).

[1386] *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).

of Zimbabwe belong to her people and that the resources should be managed by the state only in its role as a custodian acting for the benefit of and in the exclusive interest of the people. In this way, the legislative framework will give the people of Zimbabwe, including mine-host communities, the requisite effective protection of their ownership of mineral resources and their right to freely dispose of natural resources in line with the requirements set out in international and regional regulatory instruments such as paragraph 1 of the *United Nations General Assembly Resolution* 1803 of 1992, Article 1(2) of the ICCPR and ICESCR, Article 21 of the ACHPR and the *African Commission's State Reporting Guidelines and Principles on Articles 21 and 24 of the ACHPR*.

(iv) *Provision of requirements for notice, consultation, consent and benefit accrual in the* Mines and Minerals Act 38 of 1961*,* Communal Land Act 20 of 1982 *and other applicable legislation*

The *Mines and Minerals Act* 38 of 1961*, Communal Land Act* 20 of 1982 and other applicable legislation must be amended to incorporate requirements for notice, meaningful consultation and FPIC, along the same lines as South Africa's *MPRDA* and *IPILRA,* and the *UNDRIP, UNDROP, CEDAW, ICERD* and the ACHPR. An applicant for a prospecting right must notify the landowner or lawful occupier of the land while and applicant for a mining right must be required to notify and consult landowners, lawful occupiers as well as interested and affected parties. The applicant for mineral rights must submit the results of the consultations carried out with the mine-host community before award of mining rights. This requirement will protect mine-host communities, who are currently not protected by any legislation requiring notification and meaningful consultation. The proposed legislation must state that exploration, prospecting or mining cannot be conducted on any land unless the applicant or mineral right holder has given notice to the landowner and lawful occupier. To mitigate the negative impacts of mining concessions on mine-host communities, the legislation should discard the current 30 days notice and objection regime that has been demonstrated in this study as inadequate and as being the reason for ineffective consultation processes. Rather it should provide that these communities must be consulted in accordance with their customs and traditions. The legislation must specify the steps to be taken in consulting and to obtain the consent of affected

communities, including the list of those consulted and proof of such consultation and their consent. In addition, the legislation must provide that no mining right should be issued without an approved ESIA and that mine-host communities are entitled to revenue sharing and other benefits in the form of employment, local business opportunities and infrastructure development.

(v) *Inclusion of provisions in the* Mines and Minerals Act 38 of 1961 *for automatic access to information by mine-host communities*

Zimbabwe's *Mines and Minerals Act* 38 of 1961 should be amended to include provisions for automatic access to information by mine-host communities as regards award of mineral rights on their lands and pertaining all adverse environmental and social impacts of proposed and on-going mining operations. The disclosure process must not follow the *FIA* procedures that take a long time before access is eventually granted which undermines the purpose of the consultation process. The legislation should specify the minimum information that must be shared with affected communities as a pre-requisite for granting of mining rights. Such information must include the full mining right application, EIAs, environmental management plans, environmental monitoring reports and resettlement plans prepared by government and mining companies. This information must be easily accessible to the communities and the public in an appropriate format and language that enables them to assess how the mining operations will impact their environment and their livelihood. Currently, all this information is not automatically available to mine-hosts communities in Zimbabwe. Further, mine-host communities are not represented on the Mining Affairs Board, which is a top decision-making body regulating mineral extraction in Zimbabwe. The composition of the Mining Affairs Board must be changed to include mine-host community representatives. This will ensure that the interests of these communities are discussed at the highest level of decision making. Mine-host communities will also be able to access information regarding the exploration and exploitation of minerals on their lands if they are represented on the Mining Affairs Board. The information so received will enhance participation in the formulation and implementation of policy and decision-making processes affecting them.

(vi) *Development of capacity for alternative income generation*

Consistent with the imperative of sustainable development, the government must, in consultation and with the participation of mine-host communities, identify, design and develop alternative income generating projects that will last beyond mine closure. Some of the benefits from mineral extraction should be used to develop these alternative income-generating projects. When legally recognised, benefit-sharing can be used to create financial resources for mine-host communities to pursue alternative development priorities that will empower them beyond mine closure, in line with the principles of sustainable development. The South African *Mining Charter* of 2018 and social and labour plans are instructive in this respect.

(vii) *Amendment of the* Mines and Minerals Act 38 of 1961 *and the* Communal Land Act 20 of 1982 *to include provision of compensation*

The *Mines and Minerals Act* 38 of 1961 and the *Communal Land Act* 20 of 1982 should be amended to include provisions for fair and adequate compensation for communities evicted to make way for mining operations. Those communities who are not evicted suffer environmental and other damages caused by mining. They must also be compensated for the damages suffered. Both physical and non-physical damages such as loss of income must be compensated, unlike the current situation where communities are compensated for their dwellings only. Compensation must not be confused with benefit-sharing, as the two are different. Compensation is meant to cater for damages suffered, whereas benefit-sharing is maintained in consideration of the people's right to the mineral resources and to benefit from their exploitation.

(viii) *Amendment of the* Mines and Minerals Act 38 of 1961 *and the* Environmental Management Act 13 of 2002 *to harmonise and clarify the requirements for EIA*

Public participation in environmental matters is critical as it ensures comprehensive appraisal of mining projects and provides an opportunity for affected communities to express their concerns. The gap between the *Mines and Minerals Act* 38 of 1961 and the

Environmental Management Act 13 of 2002 regarding whether an EIA is required at the stage of application for prospecting and mineral rights or before the commencement of mining operations, must be closed. The current practice under section 20(1) the *Mines and Minerals Act* 38 of 1961 is to award ordinary prospecting rights immediately upon payment of a prescribed fee. This makes it impracticable to require an EIA at the stage of application for ordinary prospecting rights since these rights are awarded without connection to any piece of land. The most practical approach is to insert provisions in the *Mines and Minerals Act* 38 of 1961 that require an EIA at the stage of award of ordinary mining rights.[1387] Currently the law does not have a requirement to conduct an EIA before ordinary mining rights are granted. The *Environmental Management Act* 13 of 2002 must also be amended to indicate that an EIA is only required at the mining right application stage, instead of the application stage for ordinary prospecting rights.

(ix) *Priority of land use*

The *de facto* status of mining in Zimbabwe is that it is viewed to be superior to alternative land uses. The trumping of other land uses by mining is not ideal, since not all mining operations yield benefits to the nation and mine-host communities. Some operations fail for various reasons, including low-grade ore that renders the project economically unviable. However, by the time the project fails, it would have destroyed the livelihoods of mine-host communities and the prospect of alternative land-uses. The provisions in section 31 of the *Mines and Minerals Act* 38 of 1961 pertaining to land that is not open to prospecting and pegging of mines do not adequately resolve the challenge of trumping of alternative land uses by mining, especially on communal lands inhabited by mine-host communities. For instance, grazing land and sites of spiritual significance to mine-host communities are not listed in section 31 of the *Mines and Minerals Act* 38 of 1961 as land that is not open for prospecting and pegging of mines. Therefore, provisions must be incorporated in the *Mines and Minerals Act* 38 of 1961 to oblige mining regulatory authorities to consider alternative land uses and the development priorities of mine-host communities through consultation with the communities before awarding mining rights.

[1387] The requirement to conduct an EIA as part of the application for mining rights is already provided in section 159(3)(vii) of the *Mines and Minerals Act* 38 of 1961 in respect of the award of a special mining lease and it should be the same for other types of mining rights such as mining claims.

(x) *Strengthening of Parliament's oversight role*

It must also be a requirement in the *Mines and Minerals Act* 38 of 1961 that all foreign investment agreements signed by the government should include protection of the rights of mine-host communities and benefit accrual. The *Mines and Minerals Act* 38 of 1961 must specify that major mining concessions (special mining leases and mining leases) negotiated by the government are subject to review, debate and approval by Parliament, which must consult or involve mine-host communities in the review process before the contracts are signed or a mining license issued and then published. Parliamentary oversight should result in publication of quarterly reports that inform the public regarding the applications received as well as the number and types of rights and leases granted by the government.

(xi) *Drafting of a comprehensive mining and mineral development policy for Zimbabwe*

The present study established that Zimbabwe does not have a fully documented and publicly accessible mining and mineral development policy. The minerals policy document of 2013 is still in draft form. Zimbabwe should prioritise the drafting and adoption of a comprehensive mining and mineral development policy that will protect the interests of the nation, citizens, communities, environment and investment. The mining and mineral development policy expresses a nation's objectives, priorities and expectations from the mining sector of the economy. It also outlines the broad principles that provide the foundation for the legislative framework regulating the mining sector, including principles pertaining to mine-host community involvement and benefit accrual.

(xii) *Drafting of comprehensive principal mining legislation*

The colonial era *Mines and Minerals Act* 38 of 1961 was not crafted to benefit the majority people of Zimbabwe. This statute has been amended several times since 1961 without changing its core purpose of maximising mineral extraction for the benefit of mining right holders at the expense of host-communities and the generality of citizens. Instead of grappling with this statute through further amendments, Zimbabwe must consider

developing a new mining legislative regime that explicitly recognise mine-host communities as key stakeholders in the development and exploitation of the country's mineral resources.

(xiii) *Drafting of comprehensive regulations and guidelines*

To complement a new mining legislative framework recommended above, Zimbabwe should draft and adopt comprehensive regulations and guidelines. These include regulations and guidelines on mine-host community relocation, resettlement, compensation and consultation. Aspects centred on community development and benefit accrual should be included in the regulations and guidelines. The regulations and guidelines dealing with relocations should specifically provide that no relocation should be approved unless it is unavoidable and is conducted in meaningful consultation with the affected communities. Compensation for affected communities must be negotiated and agreed upon prior to the relocation. This strengthens their bargaining power in negotiations with mining companies intending to exploit mineral resources on those lands. Compensation must include both tangibles such as dwellings and intangibles such as loss of income and resources such as lands for cultivation and grazing, access to water and cultural sites. The affected communities must be offered suitable alternative land and living conditions equal to or better than that prior to the relocation.

(xiv) *Drafting of a monitoring and evaluation framework and appropriate indicators*

The existence of legislation does not on its own translate to an effective regulatory framework. This is because the legislative requirements can be ignored by mining authorities and mining companies at the implementation stage. This realisation points to the need for drafting and adoption of an effective monitoring and evaluation framework with appropriate indicators for compliance.

(xv) *Training programme for officials*

The lack of implementation of existing policy and legislative requirements can point to lack of awareness among mining officials. Training programmes for mining officials to raise awareness and knowledge of the various policy and legislative prescriptions should be conducted on a regular basis.

(xvi) *Capacitation of mine-hosting communities and other groups potentially affected by exploration, prospecting and mining*

Communities affected by mining require capacitation in terms of awareness of their rights when faced by mineral extraction on their lands. Awareness raising programmes should be conducted in mining affected communities through radio programmes, community meetings and campaigns.

7.5 Answering the research question of the thesis

The research question that formed the basis for this study was the manner in which the requirements pertaining to mine-host community involvement in and benefit accrual from mineral extraction as contained in applicable international and regional regulatory instruments are realised in the Zimbabwean constitutional, policy and legislative frameworks. The study found that the constitutional framework realises the requirements set out in international and regional regulatory instruments. The common features in the constitutional framework and the international and regional instruments discussed in the study include, *inter alia,* guarantees of equitable development and sharing of natural resources, recognition and empowerment of marginalised communities, the right to access to information, the right to consultation, the right to an environment that is not harmful to health or well-being and the right to property.

The study established, however, that apart from the *Environmental Management Act* 13 of 2002 and the *Administrative Justice Act* 12 of 2004, Zimbabwe's policy and legislative frameworks do not realise most of the requirements set out in international and regional

regulatory instruments pertaining to the involvement in and benefit accrual by mine-host communities from mineral extraction.

An evaluation of South Africa's constitutional, policy and legislative frameworks further engendered the finding that requirements set out in international and regional regulatory instruments can be imbedded in the domestic policy and legislative instruments dealing with, *inter alia,* minerals, land rights, environment and information. The examples gleaned from the South African context help to improve understanding of the requirements set in international and regional regulatory instruments relevant to mine-host community involvement in and benefit accrual from mineral extraction on their lands. From this angle, the response to the research question is that the Zimbabwean constitutional framework realises the requirements set in international and regional regulatory instruments pertaining to mine-host community involvement in and benefit accrual from mineral extraction. However, Zimbabwe's policy and legislative frameworks do not realise most of the requirements set in the international and regional regulatory instruments. It is imperative for all three arms of government namely the legislature, executive and judiciary to ensure that the policy and legislative frameworks implicating the award and utilisation of mineral rights on lands inhabited by mine-host communities with particular focus on involvement and benefit accrual are aligned with the *Constitution of Zimbabwe* as well as applicable international and regional regulatory instruments. The reason for the disjuncture between the *Constitution of Zimbabwe* and the legislation applicable to the award and utilisation of mineral rights is that the bulk of the legislation has a colonial and racial background, having been conceived during the colonial era to serve the interests of the colonial government and a privileged few instead of the majority black population of Zimbabwe, and not yet replaced with appropriate legislation.

7.6 Research hypothesis

The study has proven the hypothesis that Zimbabwe's policy and legislative frameworks do not optimally realise the principles set out in the international and regional regulatory instruments centred on mine-host community involvement in and benefit accrual from mineral extraction on their lands. The same has not been proven when it comes to

Zimbabwe's constitutional framework. In fact, Zimbabwe's constitutional framework realises the principles set out in the international and regional regulatory instruments that underpin mine-host community involvement and benefit accrual from mineral extraction on the lands they inhabit.

7.7 Future research agenda

With respect to regional regulatory instruments, the present study only considered instruments from the Organisation of American States (OAS/Inter-American system) and Africa. It would be useful to consider regulatory instruments of the European and ESIAN human rights systems. This will advance the discourse by providing a complete global view and focussing research on human rights instruments from the regions that have dominated investment on land-based projects in Africa. It would be of further use to explore the developments pertaining to involvement and benefit-sharing at the inter-state level when a natural resource such as gas straddles across one or more state borders, or where a natural resource considered as a common heritage of humanity is involved, such as extraction of mineral resources of the outer space, for instance, the moon or other planets and those of the Arctic and Antarctica, the seabed (within the territorial zone as well as the economic zone of individual countries) and international oceans. In addition, comparative country studies would advance the well-being of mine-host communities in other parts of Africa.

7.8 Concluding remarks

Mine-host communities are the most affected by mining operations and often are the biggest losers in the extractives equation, in terms of costs and benefits. This entitles them to the rights set out in domestic, regional and international law that pertains involvement and accrual of benefits from mineral extraction. They require clarification of the nature and content of the obligations of the state and non-state actors, where these obligations are relevant to the award and utilisation of mineral rights on their lands, including the question of involvement and benefit accrual.

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