EXTRACTIVE INDUSTRIES POLICY AND LEGAL HANDBOOK

ANALYSIS OF THE KEY ISSUES IN ZIMBABWE'S MINING SECTOR

Case study of the Plight of Marange and Mutoko Mining Communities

Zimbabwe Environmental Law Association (ZELA)

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"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". ***Article 21(1) of the 1981 African Charter on Human and Peoples' Rights***

"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". ***Article 22 of the 1981 African Charter on Human and Peoples' Rights***

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LIST OF ACRONYMS

ACHPR	African Charter on Human and People's Rights
AIPPA	Access to Information and Protection of Privacy Act
ACR	Africa Consolidated Resources
AIM	Alternative Investment Market
BSGR	Benny Steinmetz Group Resources Limited
CAMPFIRE	Communal Areas Programme for Indigenous Resources
CBNRM	Community Based Natural Resources Management
CCDT	Chiadzwa Community Development Trust
CSR	Corporate Social Responsibility
EESCR	Environmental, Economic, Social and Cultural Rights
EIA	Environmental Impact Assessments
EITI	Extractive Industries Transparency Initiative
EMA	Environmental Management Agency
ESCR	Economic, Social and Cultural Rights
RDC	Rural District Council
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
KPCS	Kimberley Process Certification Scheme
MMCZ	Minerals Marketing Corporation of Zimbabwe
SWF	Sovereign Wealth Funds
ZMDC	Zimbabwe Mining Development Corporation
ZIMCODD	Zimbabwe Coalition on Debt and Development
ZELA	Zimbabwe Environmental Law Association

FOREWORD

As we were busy writing the last Chapters of this book, the Minister of Finance in his National Budget Statement for 2011 reported that the mining sector in Zimbabwe had, by December 2010, contributed about 65% of the total national exports for the country and had surpassed other sectors such as agriculture and manufacturing.[1] It was also stated that for 2010 the major mineral exports that underpinned the recovery in exports performance were platinum which contributed US596.2 million, gold US$306.8 million, diamonds US$126 million and nickel US$52.2 million among others.[2] The growth in exports was attributed to increased investment in the sector in response to firming international mineral prices.[3] Top of the mineral resources for export in Zimbabwe are platinum, gold, chrome, copper, diamonds and nickel among others. The National Budget was presented to Parliament in November 2010. It was subsequently approved by Parliament in December 2010.

What is clear from the above extracts from the budget statement is that most minerals in Zimbabwe are being extracted for export either by multinational or local mining companies. It also shows the immense potential of minerals to contribute to economic growth and poverty reduction. However, the situation on the ground tells a different story. It is a story of poverty, corruption and mismanagement of mineral resources, starting from the underground mining pits to the air conditioned offices of government officials and mining company executives in Harare. Moreso, it is a story of environmental degradation and pollution of water systems, loss of livelihoods, forced evictions and relocations, drug shortages at rural hospitals and clinics, dilapidated school infrastructure, collapsed bridges and poor roads networks in areas where the mining companies are operating. There are gross violations of human rights especially environmental, economic, social and cultural rights of the people who live adjacent to mining areas.

Corruption is also rife. The sector has witnessed the emergency of some mining companies that have just sprung up and act like get-rich-quick outfits, paying bribes and offering kickbacks to horn their way into the lucrative mining sector such as alluvial diamond mining.[4] The bottom line is that natural resources are being exploited for the benefit of a few politically and economically connected individuals, a few state institutions and foreign nations to feed their insatiable markets with raw materials at the expense of all Zimbabweans. In that respect, foreign countries and companies benefit more than the domestic economy and the local communities. This is manifested by high

[1] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 243
[2] Ibid at page 243
[3] Ibid at page 243
[4] Ian Smillie (2010), Blood on the Stone; Greed, Corruption and War in the Global Diamond Trade, International Development Research Centre.

offshore retention, transfer pricing, minimal threshold for royalty payment, export of raw mineral wealth without value addition, low employment generation as a result of capital-intensive methods of production and policies of labour sub-contracting.[5] This situation is symptomatic of a general crisis in resource access, exploitation, distribution and utilisation commonly known as the natural resources curse or the natural resources paradox.[6] In Africa, millions of dollars often find their way into the pockets of corrupt state leadership and mining companies. The corrupt practices in turn reproduce despotic and dictatorial leadership that further constrain citizen rights in the extractive sector.[7]

Nevertheless, despite this gloomy picture, it has been observed that there is a new vitality in the Southern Africa region, evidenced by an increased number of civil society organisations and organised communities focussing on economic justice, and demanding equal distribution of revenues, better work conditions in the mines, protection of the environment and respect for human rights by mining companies.[8] By the same token, there are increasing demands for governments and the mining companies to be more transparent and accountable in managing mineral resources to ensure that the benefits flow to all people and not only to foreign nations and a few local elites.

In Zimbabwe the struggle has just started, the battles are many and will be tough, pitting civil society and communities often against government and mining companies. This tense relationship was aptly summed up by the African Initiative on Mining, Environment and Society (AIMES) when it stated that in a number of African mining countries, the state and its institutions are hostile towards citizens who are determined to defend national interests, environmental protection and human rights against violation by mining companies.[9] By the same token, there is increased use of state security agencies and other institutions to repress the people especially communities and civil society activists in order to create unfettered space and access to mining companies to exploit the mineral resources.[10]

In the above context, it is the legislators' duty to effectively assist civil society and communities in the fight to call government and mining companies to account for their economic, social, environmental and cultural impact on communities' livelihoods and rights based on their legislative, representation and oversight duties. Effective representation of the interests of local people is key to the development of pro-poor, pro-sustainable development policies and actions that will lead to poverty reduction and environmental sustainability. Parliament can serve as a bridge

[5] African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 23

[6] Claude Kabemba (2010), "South African Mining Companies in Southern Africa, Corporate Governance and Social Responsibilities". Published by the Southern Africa Resource Watch (SARW), page 13

[7] Ibid page 14

[8] African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 23

[9] Ibid

[10] ibid

between citizens and the state, and legislators are well positioned to represent the interests of their electors. Legislators should have the autonomy, authority, capacity, or personal conviction to effectively perform their representation roles in the extractive sector. They should act as the institutionalized voice of citizens and protector of democratic principles. They can perform this function by calling government and mining companies to be accountable on revenue generation, management and distribution, contract negotiation, access to information, displacement of local communities, environmental protection, community participation in mining and respect of human rights. These are the issues this book seeks to reveal and explain for the benefit of legislators.

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INTRODUCTION

This handbook constitutes one of the battles being fought by civil society organisations to promote and protect the rights of communities living adjacent to mining areas against the operations of extractive industries, the state and other individuals who violate their Environmental, Economic, Social and Cultural Rights (EESCR). Its objective is to assist legislators to further appreciate and build their knowledge on the key issues that they should focus on in carrying out their representative, oversight and legislative role in the extractive sector. The handbook seeks to explain some key concepts in the extractive sector and give policy and legal solutions within the context of recent developments in the sector in Zimbabwe. The main thrust is to promote and protect the EESCR rights of mining communities.

The handbook has a diverse foundational base from which the information was drawn by the authors. Firstly, it is anchored on the results of a research on the impact of extractive industries on the EESCR of communities in Marange and Mutoko where diamond and black granite mining operations are taking place respectively. The research was undertaken by the Zimbabwe Environmental Law Association (ZELA) in 2009. Secondly, the book is based on lessons learnt by the authors in implementing a project initiated by ZELA to build the capacity of legislators to effectively play their representative, legislative and oversight role in the extractive sector. Thirdly, the authors drew a lot of information from formal and informal discussions with government officials, lawyers, industry officials, bankers, community representatives and donor agencies over the past three years. These discussions were invaluable in gaining insight into the subject of community rights, revenue transparency, corporate social responsibility and environmental justice. Some of the thoughts and discussion points there from are included in this book. Fourthly, the handbook drew some lessons as well from the public interest litigation work of ZELA which has seen the organisation assisting communities affected by the operations of mining companies and state actions by taking legal action seeking for redress. Fifthly, the handbook draws a lot of information from extensive literature on the extractive sector.

The research that was undertaken by ZELA in Mutoko and Marange was meant to provide a platform for civil society to better understand the trials and tribulations of the poor women, men and youths in these resource rich areas caused by mining companies and government action. The research also established the level of legislative representation of EESCR of mining communities by the respective members of parliament. Mutoko has the world renowned black granite that is being extracted mainly for export by 11 local and foreign mining

companies. In Marange, diamond mining by state owned companies and foreign investors since 2006 has resulted in a lot of human rights violations. In both cases one of the key research questions was whether the local communities are deriving any tangible economic benefits from mining and what has been the impact of mining activities on community livelihoods from an environmental, economic, social and cultural rights perspective. Consequently, in both cases the research identified some of the major impacts of mining on the communities including environmental degradation, loss of land, water pollution, human rights violations and mere plundering of resources without any tangible benefits going to the communities. Instead when mining companies decide at their own volition to give back to the community, it will be donations of a few bags of food, fuel to local politicians or traditional leaders and other items that do not alleviate poverty.

The research was complimented by advocacy work that was aimed at influencing policy decisions in the extractive sector around community participation in mining, revenue generation and distribution, mining taxation, environmental degradation, corporate social responsibility and respect of human rights in mining communities. The target group for the project were legislators in the Mines and Energy Portfolio Committee and the Environment and Natural Resources Committee. The project sought to increase the legislators' knowledge of the impact of mining operations on communities. In essence, it sought to build a platform for engagement between the legislators and the communities. Legislators have a duty to call government and mining companies to account for their impact on the environmental, economic, social and cultural interests of communities living near mining areas. Therefore, within the above context, this handbook is meant to act as a guide to legislators to effectively play their legislative, representative and oversight role over government action and non-action in the extractive sector. It is also meant to demonstrate and expose cases of environmental, economic and social injustice happening in Marange and Mutoko for action by legislators. The hope is that this may then trigger legislative, political and community action to protect and promote the rights of communities living adjacent to other mining areas in Zimbabwe as the problems in Mutoko and Marange are a lens of the problems obtaining in the whole mining sector.

Drawing from the informal and formal discussions with various stakeholders, literature review and the public interest litigation cases, it is important to note that EESCR have continued to be relegated to the periphery in national discourse, implementation and resource allocation as civil and political rights are a preferred area of intervention in Zimbabwe. This is despite the equality and indivisibility of all human rights. The judiciary for example is not ready to defend the environmental, economic, social and cultural rights of communities as evidenced by the

decision of the High Court in a case involving the relocation of Chiadzwa villagers that was dismissed by the court on the grounds that it was not an urgent matter. Further, a number of critical issues in the extractive sector were noted such as lack of transparency and accountability by state institutions in awarding mining contracts, corruption by public officials, a poor and ineffective mining tax regime that has failed to generate enough revenue for the state, absence of a corporate social responsibility framework for mining companies to meaningfully plough back to communities, limited opportunities for community engagement in mining and gross violations of human rights by the state and mining companies especially in Chiadzwa diamond fields. These are issues the legislators should tackle as a matter of urgency if the mining sector is to meaningfully result in community development and national economic growth.

In the above context, the publication of this handbook acts as a strategy that can facilitate more responsible government and private sector actions and deliver justice to poor and vulnerable women, men and youths whose rights are being violated in mining areas. In great part, this is also a contribution to the fight against poverty and vulnerability in the country as it may trigger action for improved enforcement and implementation of environmental, economic, social and cultural rights with the help of legislators. The handbook may also be useful in helping to bring government and other actors to account for their actions. One of the problems this publication seeks to address is the fact that poor and vulnerable women, men and the youths in rural and urban areas, either individually or collectively, often lack adequate knowledge and resources to challenge government actions, decisions or laws as well as private sector actions that contravene their constitutional rights or the country's obligations under international law. Further, when it comes to defending themselves against overreaching government, too many citizens are afraid to call the government and the private companies to account for their actions. Hence the legislator can play a key role in that respect.

In terms of structure, the book is divided into 4 Chapters. The first Chapter outlines the conceptual background of economic, environmental, social and cultural rights and the human rights discourse in the context of the extractive sector. The Chapter positions Economic, Environmental, Social and Cultural Rights (EESCR) as human rights. The contribution of the mining sector to economic development is also outlined in the Chapter. Chapter 2 is a statement of the legal and policy framework on mining taxation, corporate social responsibility, community participation, mining contract negotiation and transparency and accountability and how these concepts interlink with the rights and interests of poor and vulnerable communities living adjacent to mining operations.

Chapter 3 profiles the case studies; the impact of mining operations on Marange and Mutoko communities. It states the major problems faced by these communities especially in the face of operations of extractive industries. More importantly, the Chapter identifies some of the environmental, economic, social and cultural problems being faced by people living in these two mining areas. The Chapter is a demonstration of the problems faced by mining communities across the country and in many other African societies. The relevance of these two case studies is that they can demonstrate to the legislators some of the practical aspects related to corruption, human rights abuses, environmental degradation and inequality in wealth generation and distribution in the mining sector.

Lastly, Chapter 4 states the policy and legal options and recommendations as well as next steps for decision makers especially parliamentarians to focus on. Major policy recommendations and options revolve around the reform of mining laws, promotion of transparency and accountability in the extractive sector, equitable revenue management and distribution and community participation in mining.

CHAPTER 1

CONCEPTUAL BACKGROUND

Contribution of Mining to Economic Growth and Impact on Livelihoods

It is common cause that mining can contribute immensely to economic development and growth. Mineral resources have been important in the social and economic development of many countries in Africa.[11] Its contribution occurs on several interrelated layers; such as employment, foreign exchange generation, social infrastructure development and the fiscus.[12] In Zimbabwe, taking into account the suppressed economic growth over the years, mining became the fastest growing sector since 2009 with growth up from 33.3% in 2009 to an estimated 47% in 2010.[13] The sector contributed 4.9% of the GDP in 2009 and 65% of the country's exports in 2010.[14] This means the mining sector has the potential to trigger economic growth in Zimbabwe over the coming years as the country can capitalise on its abundant mineral resources such as diamonds, platinum, gold, chrome, coal and copper. This can be cemented by increased investment in the sector in response to firming international mineral prices.[15]

Extensive research in the mining sector has shown the causal nexus between a nation's mineral wealth and its potential to develop economically and raise the living standards of its citizens.[16] This entails that all things being equal, as the country's economy grows, so does the standard of living. The mining sector has potential to create jobs, bring in foreign direct investment and may result in development of infrastructure (roads, clinics, hospitals, houses and schools) as well as other social services. The provision of these services falls within the realm of economic, social and cultural rights. Further, as mining contributes to the treasury through mining taxation (royalties, corporate and others taxes), ideally the funds should be invested by the government in improving social services and infrastructure, hence improving national and community development. Therefore, in an ideal situation, such contribution to economic growth can lead to the fulfilment of environmental, economic, social and cultural rights.[17]

From the above, it should be noted that while the mining sector has the potential to contribute meaningfully to economic growth and community development, the sector has not yet managed to do so in the two case study communities of Mutoko and Marange. Furthermore, at the national level, mining taxation in Zimbabwe over the past years has not generated enough money for the fiscus, yet natural resources were being exported. The Ministry of Finance in its 2011 Budget Statement stated that royalties collected from precious metals amounted to a paltry US$20.7 million from sales of US$593.8 million during the period January to

[11] African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 56

[12] Chamber of Mines, (May-July 2010), "Mining Sector Contribution to the Economy", Chamber of Mines Journal

[13] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 43

[14] Ibid, at page 243

[15] Ibid at page 243

[16] see generally the global research project reported as, Breaking New Ground: The Report Mining, Minerals and Sustainable Development Project 2002 <http://www.iied.org/mmsd/finalreport/index.html>

[17] Tumai Murombo, (2009), " Conceptual Framework on Economic, Social and Cultural Rights in Southern Africa", in Securing Environmental, Economic, Social and Cultural Rights in the Natural Resources Sector: Country Experiences on Promoting Community Assets and Rights in the Mining Sector. Published by Zimbabwe Environmental Law Association (ZELA)

September 2010.[18] In order to generate more money for the fiscus the Ministry increased the royalties of gold from 4% to 4.5% and platinum from 4% to 5%.[19] For diamonds the royalty was increased from 10% to 15%. This was meant to ensure that at least the sector contributes significantly to economic growth.

Conversely, the extraction of minerals can also cause social and cultural destabilisation, and in some cases even violent conflict[20], hence the adage "resource curse". Further, mining by its nature is inherently destructive of the environment and may have negative social, economic and cultural impacts on communities. As mining companies embark on extracting minerals they take away valuable land from communities; degrade the quality of land, lead to deforestation, cause water and air pollution and siltation of rivers.[21]

In some instances, communities are forcibly evicted from their traditional homes and resettled elsewhere ostensibly to pave way for mining activities. However, in the process of eviction and resettlement, communities are often not consulted and their consent is not sought, hence they are denied access to information and participation. These forced evictions affect communities' rights to an adequate standard of living, right to housing and right to culture as community institutions, social cohesion and livelihoods are disrupted.[22]

The above scenario constitutes an assault on the economic, environmental, social and cultural rights of the poor women, men and youths living around mining areas. Violations of community rights in mining areas are mostly caused by the actions or non-action of the state and either local or multinational mining companies. In sum, the deep imbalance in the distribution of mineral wealth and the environmental destruction caused by mining activities continue to be a major cause of poverty and the source of tensions and conflicts of various levels of intensity which result in violation of a bundle of human rights.[23]

Defining Environmental, Economic, Social and Cultural Rights

It is vital therefore, at this point to state and explain the conceptual framework of Environmental, Economic, Social and Cultural Rights (EESCR). ESCR have their roots in the Universal Declaration of Human Rights. These rights protect people's claims or entitlements to economic, societal and cultural benefits. In 1966, the United Nations adopted the International Covenant on Economic, Social and Cultural Rights (ICESCR) which sought to protect economic, social and cultural rights. This was in addition to the International Covenant on Civil and Political Rights (ICCPR) of 1966 which protects civil and political rights. Some of the economic, social and cultural rights provided for in the ICESCR include the following; the right to an adequate standard of living that encompass adequate food, shelter, clothing, education, work

[18] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 283

[19] Ibid at page 283

[20] Mugabe J& Tumushabe, GW, 'Ecological Roots of Conflict in Eastern and Central Africa: Towards a Regional Ombudsman' in L. Zarsky, *Human Rights and the Environment, Conflicts and norms in a globalizing world* (2002) 241.

[21] Shamiso Mtisi (ed), 2009, Securing Environmental, Economic, Social and Cultural Rights in the Natural Resources Sector: Country Experiences on Promoting Community Assets and Rights in the Mining Sector, Zimbabwe Environmental Law Association (ZELA)

[22] ibid

[23] African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 4

(including safe working conditions), the right to form and join a trade union of one's choice and the right to social security.[24] At the continental level, the African Charter on Human and People's Rights (ACHPR) provides the framework for the realisation of economic, social and cultural rights and just like the ICESCR, it makes provision for the right to work, health, culture, housing and education among other rights.[25]

However, human rights have traditionally been grouped into three categories namely first, second and third generation rights.[26] First generation rights encompass civil and political rights which are mainly enjoyed on an individual basis. The main objective of civil and political rights is to protect the individual from the excesses of the state hence the reference to them as negative rights. The most distinctive feature of civil and political rights is that they are justiciable which means they are legally enforceable in a court of law. In Africa the extractive sector has contributed to the violation of civil and political rights in many ways. In some countries mineral resources like diamonds have been used to fund civil wars as the revenue is used to pay for weapons in rebel wars. As a result over the past two decades millions of people have died in wars that have been fuelled by or fought for diamonds.[27] This becomes part of what is called the resource curse. In some cases states, the political elite and mining companies collude to use revenue from mineral resources to suppress all basic freedoms and civil and political rights (right to life, freedom of movement, association, the right to vote and freedom of expression among others).

Second generation rights include economic, social and cultural rights. They are generally regarded as positive rights due to their requirement for the duty bearers (the state) to take positive action like the enactment of appropriate laws and policies, the development of programmes as well as the provision of resources that will result in the fulfilment or realisation of economic, social and cultural rights. The impact of the extractive sector on these rights is great as it is manifest in violations of the cultural and traditional systems of lives through displacement and relocation, poor work conditions in the mines and failure by mining companies to invest in community infrastructure that improves the health, education and standard of living of adjacent communities.

The third category of human rights is called third generation rights and these are also called solidarity or group rights. Unlike other rights, third generation rights emphasise on the group or the community hence the name solidarity or group rights. Their enjoyment and violations in many cases affect a community or a group. Examples of third generation rights include the right to development, the right to a clean and health environment, peace, self determination and the rights of minorities.[28] There is no

[24] Articles 6,7,8 , 11 and 13 of the ICESCR respectively

[25] Articles 15, 16 and 17 of the African Charter on Human and People's Rights respectively

[26] Karel Vasek, a professor of human rights is credited with the categorisation of human rights into generations. He made the proposal in 1979

[27] Ian Smillie (2010), Blood on the Stone; Greed, Corruption and War in the Global Diamond Trade, International Development Research Centre, page 25

[28] Farai George Chiweshe, Shupikayi Blessing Chimhini and Solomon Franck Sacco. Reference Book on Human Rights Monitoring and Enforcement Mechanisms , 2007.

international legal instrument that recognises third generation rights. What mainly exist are soft law declarations like the 1992 Rio Declaration on Environment and Development. However, despite the lack of an international legal instrument to back them, some countries have enshrined third generation rights such as environmental rights in their Constitutions making them justiciable.[29]

Environmental rights for example are key to human health and the protection and conservation of the environment and natural resources. They include the following; the right to live in an environment that does not cause harm to health[30] (accessing adequate and safe water, clean air and provision of proper sanitation facilities), the right to access environmental information, the right to participate in environmental decision making processes and the right to access justice when environmental rights are violated.[31] Most operations of mining companies impact negatively on environmental rights. As stated above mining by it nature is inherently destructive of the environment and it causes water pollution, air pollution and in many cases the right of people to use and benefit from their natural resources wealth is affected.

However, it is important to note that the division of human rights into categories is slowly losing momentum as a concept. This is because these rights are interlinked and interdependent at a more practical level. In other words, human rights, be they first, second or third generation rights are all important and must be treated in the same manner in terms of implementation and resource allocation. For example, the right to life which is a civil and political right can not be enjoyed in a dirty and polluted environment. A dirty and polluted environment will compromise the right to life. The interdependence of rights was brought to the fore by the 2008 cholera outbreak which claimed the lives of 4 000 people and infected many thousands. An analysis of the causes of the cholera outbreak shows that they were purely environmental. Firstly, the failure to provide clean water. Secondly the failure to remove refuse and thirdly the failure to repair burst sewer pipes. The failure to address these environmental problems which impact on the right to a clean and healthy environment affected the right to life which is a civil and political right. All this is against the background that environmental, economic, social and cultural rights have traditionally been viewed as not capable of being enforced in a court of law and that states can only fulfil them progressively as they require a lot of resources.

Judicial Enforcement of Economic, Social and Cultural Rights

One of the disturbing, but dying perceptions about ESCR has been that they are not enforceable in a court of law or justiciable. However, recent court rulings in other jurisdictions have shown that ESCR are indeed

[29] Examples include South Africa and Mozambique whose constitutions recognise the right to a clean and health environment.

[30] Section 4 of the Environmental Management Act (Chapter 20:27) includes some of these rights.

[31] The right of access to information, public participation in decision making and access to justice are recognized in Principle 10 of the Rio Declaration on Environment and Development of 1992.

justiciable. South African and Indian court decisions help to shed light on the judicial enforcement of economic, social and cultural rights which are poverty related rights. The courts in these countries decided a number of cases based on socio-economic rights such as access to housing, health care, food, water, social security and entitlement to natural resources wealth.

For example in the South African case of *Grootboom V Oostenberg* Municipality[32] the court pronounced the importance of food, clothing and shelter to human dignity, freedom and equality that should not be denied to people.[33] The case involved 900 people who alleged violation of their right to access adequate housing after they were evicted and settled on nearby land. In the case of *Hoffman V South African Airways*[34] the court decided that refusal to employ a person because he was HIV positive violated the right to equality and that people living with HIV must not be subjected to *"economic death"* through denying them equal opportunity in employment.

Recently, the South African Constitutional Court decided a case on the allocation of mineral prospecting rights pitting a tribal community against a company in the case of *Bengwenyama Minerals and Bengwenyama-Ye-Maswazi Council and others Vs. Genorah Resources (PTY) LTD and Minister of Mineral Resources and others.*[35] The case was based on the lawfulness of the grant to a company of mineral prospecting rights on land belonging to a community. A government department had granted a private mining company rights to prospect on the land without consulting or notifying the community. In turn the community also wanted to prospect for minerals on the land, but its application was ignored by the state. Therefore, the community approached the court seeking an order to set aside the granting of a prospecting right on their land to the company. The Constitutional Court accordingly, set aside the decision to grant the mineral prospecting right to the mining company. In reaching the decision the court *inter alia* stated that the community had been treated unfairly by the state as it had not been afforded a reasonable opportunity to make representations in relation to the application for prospecting by the company.

Although the court in this case did not make any direct reference to economic, social and cultural rights, the case itself is instructive and important in promoting and protecting these rights in communities living on land where mineral prospecting may take place. The case protects the rights of community landholders. Further, the case also recognizes the right of such communities to be involved in prospecting for minerals on their own land. All these issues are important in the debate on promoting environmental, economic, social and cultural rights. Therefore, to a larger extent the case turns on protecting the rights of a community to be informed about decisions related to extraction of minerals

[32] Constitutional Court of South Africa, CCT 11/00, 4 October 2000

[33] Mokate Lindiwe, Monitoring Economic and Social Rights in South Africa, South Africa Human Rights Commission accessed 25 August 2007, www.inwent.org/ef-texte/human_rights/mokate.htm

[34] Hoffman V South African Airways 2001 (1) SA 1 (CC)

[35] Constitutional Court of South Africa: Case CCT 39/10; (2010) ZAC 26. The case was decided on the 30th of November 2010.

resources and its participation in prospecting for minerals that can later result in economic benefits for the community. In Zimbabwe these rights have not been protected as will be outlined in Chapter 2 on the rights of communal residents versus those of mining companies.

Further, the Indian courts also made decisions that shows that environmental, economic, social and cultural rights are enforceable. In the constitutional case of *Olga Tellis and Others Vs Bombay Municipality Corporation* a municipality wanted to evict all pavement and slum dwellers from the City. The court ordered the State to implement its pledges to provide housing sites for the people and to delay evictions.[36] In *People's Union for Civil Liberties Vs Union of India and Others*[37] the Indian court upheld the right to food and affirmed that where people are unable to feed themselves adequately, the government has an obligation to provide food for them. Other judicial decisions based on economic, social and cultural rights in India include cases on the right to education[38] and the right to health.[39]

Drawing from the decisions by the South African and Indian courts, Kauffman (2007) concluded that these decisions demonstrated that economic and social rights provided in the Constitution have not remained empty promises. He candidly stated that through such decisions the courts have demonstrated their willingness to implement directly enforceable socio-economic rights. However, Bruce Porter (2000) thinks that the limit to a constitutional guarantee of a right against poverty could be a claim by government of scarce resources and competing needs.[40] Lack of resources as an *alibi* by governments has been the major constraints to the rights based approach. However, given the nature of African governments, it can be safely concluded that the relegation of economic and social rights as just guiding principles under the guise of lack of resources is a way of avoiding fulfilling their obligation and duty to provide services for the people as they are busy making wrong investments and development priorities. But the cases above are a good example of demonstrating the enforceability of ESCRs and these cases are applicable to the position of poor communities who are affected by operations of mining companies or government actions.

Relevance of Environmental, Economic, Social and Cultural Rights

It is also vital to note that environmental, economic, social and cultural rights are critical in the promotion, protection and fulfilment of rights of the greater majority of citizens in developing countries.[41] They are central to promoting sustainable development. This is because they have a bearing on all the indicators of poverty, hence they are suited to address the development needs of developing countries. In that regard, it has been said that environmental, social and economic justice issues are not best addressed by civil and

[36] Olga Tellis and Others Vs Bombay Municipality Corporation 1985 (2) Supp SCR 51; (1987) LRC (Const) 351 (Supreme Court of India).
[37] People's Union for Civil Liberties Vs Union of India and Others, (Supreme Court of India), 2001, Unreported, 2 May 2003.
[38] Mohini Jaini V State of Karnataka 1992 (3) SCC 666 (India Supreme Court)
[39] Pashchim Banga Khet Mazdoor Samity V State of Western Bengal (Supreme Court of India) 1996 4 SCC 37
[40] Bruce Porter (2000), Judging Poverty: Using International Human Rights Law To Refine the Scope of Charter Rights, (15 Journal of Law and Social Policy), Centre for Equality Rights in Accommodation , accessed 22 August 2007, www.equalityrights.org/cera/docs/poverty/htm
[41] Some are even of the view that in some instances, economic, social and cultural rights are even more important than civil and political rights. See Deprose Muchena " The Place of economic and social rights in human rights and development discourse". Open Space Volume II , Issue 4 , 2009.

political rights which are individualistic in their focus but by environmental, economic, social and cultural rights whose objective is to protect vulnerable members of society by focusing on group and community rights.[42] It should be noted that the immediate negative impact of mineral extraction in many communities are on the environment, culture, social life and livelihoods of the people living adjacent to mining areas. This means mining has a great impact on agricultural systems, water availability, access to other natural resources and on social living and culture.

Zimbabwe ratified both the ICESCR and the ACHPR and is therefore obliged to put measures in place that will result in the realisation of economic, social and cultural rights by its citizens. The state and other actors have a duty to respect and fulfil these rights in the extractive sector. However, the country has not been very good at implementing and taking measures to promote the realization of these rights due to various reasons including mere violations of these rights by state institutions, limited resources, lack of judicial activism and lack of political will. All these rights are relevant to the communities in Mutoko and Marange as they depend on natural resources for their livelihoods. The obligation to protect these rights lies on the state and the mining companies. On the other hand, all decision makers including legislators have the responsibility and duty to promote the economic, social and cultural interests of their communities. The legislature is the arm of the state through which citizen's interests are in principle brought into national decision making processes. Without effective legislative representation, communities' interests are largely ignored.

[42] Marius Pieterse . Beyond the Welfare State: Globalisation on the Neo-Liberal Culture and the Constitutional Protection of Social and Economic Rights in South Africa. Stell Law Review pp 1-26, 2003

CHAPTER 2

THE POLICY AND LEGAL FRAMEWORK FOR COMMUNITY PARTICIPATION, MINERAL RIGHTS ACQUISITION AND REVENUE MANAGEMENT

The purpose of this Chapter is to explain a number of different conceptual, legal, policy, ideological and even practical aspects that are critical in the mining sector and have implications on the rights of communities living within the precincts of mining areas. These aspects include community participation in the mining sector, revenue management (especially transparency and accountability), mining taxation, mining contract negotiation and corporate social responsibility in the mining sector. These aspects should be understood by legislators and other decision makers to enable them to effectively play their oversight, legislative and representation roles on issues related to the extractive sector.

The mining sector has often been associated with the flow of mineral resources from the mines to foreign markets. This is because some minerals are extracted for export and only get to meaningfully benefit foreign countries and markets than the local population. A few examples of minerals that are extracted for export in Zimbabwe include platinum, diamonds, copper, nickel, chrome and black granite. In that respect, mining companies especially from South Africa, Mauritius, India and China have been heavily investing in the platinum and diamond mining sector in the country.[43] The question in that regard is to what extent has the local population participated in the mining sector and have they derived any economic benefits to reduce poverty and assist in the realisation of environmental, economic, social and cultural rights.

In this section community participation entails many aspects such as engagement in mining operations, job opportunities, participation in decision making processes, access to information on mining operations and even access to justice. What is trite at this point is to take note of the different gaps that exist in the current mining legislation that may hinder community participation. Below is an outline of the major legal and policy gaps in promoting community participation in mining to reduce poverty and help address the economic, social and cultural problems being faced by communities living adjacent to or within mining areas.

Land Tenure and Compensation: Communities Displaced by Mining Operations

The Mines and Minerals Act (Chapter 21:05) does not protect the rights of communities. Firstly, the Act is old and perpetuates the colonial legacy and still greatly affects communal land rights. In terms of land ownership and establishment of mining

[43] Shamiso Mtisi and Mutuso Dhliwayo (2010), A Citizen's Guide to Understanding Ecological Debt, Zimbabwe Coalition on Debt and Development (ZIMCODD); ZIMPLATS and MIMOSA are notable players in the platinum mining, while Anglo-American also operates UNKI Mines for platinum

operations, the Mines and Minerals Act in Section 188 (2) provides for the payment of compensation by holders of mining rights to private land owners where a mining location is established. In that respect, the rights of private land owners are protected since the law gives them the right to claim payment as compensation for being denied the right to use and enjoy his/her property/land.[44]

However, the position is different for communal residents who do not own the land on which they use for agricultural purposes, settlement and pasture. Section 188 (7) states that the Rural District Council (RDC) will act as the land owner if the mining location is on communal land and the payment will be made to the District Development Fund. The local authorities as the planning authorities are expected in turn to use the money for development of the area under their jurisdiction. It is through the provision of such infrastructure that the communal people are expected to benefit from the payments by miners. However, the situation on the ground has shown that many RDCs have not prioritised community development projects and have not ploughed back the monies they get from mining companies to assist communities.

The Act also provides for other payments that can be made by miners to local authorities. In terms of Section 255 t*he Minister may by statutory instrument require any miner of a registered mining location, to pay a specified sum at specified intervals to any local authority within whose area the registered mining location is situated. This is also meant to ensure that mining companies contribute to development in rural areas.* Except in the case of Mutoko where mining companies are paying levies, it is not very clear how many mining companies are paying a levy for the land to RDCs as required by the law. However, in Mutoko, granite mining companies have been resisting payment of levies charged by the local authority under the pretext that they are very high (*see case study on Mutoko*). The case was referred to the High Court and it is still pending.

The existing legal position makes it very difficult for communal residents to directly receive compensation and payment from mining companies in a situation where minerals are discovered at a persons' homestead, field or grazing land. This is because communal residents do not own the land. The land is owned by the state in terms of the Communal Lands Act (Chapter 20; 04). All communal land is vested in the President and it is managed on his behalf by RDC. The law only gives the communal people *usufruct rights* or use rights in respect of land for agriculture, housing and pasture.[45] The situation on the ground is that the state holds de jure [legal] ownership over land in rural areas, while the rural communities and individuals *exert* de facto [factual or on the ground] rights.

[44] Maxwell Maturure (November 2008), A Review of the Legislative and Policy Framework for Community Based Natural Resources Management in the Mining Sector; Study Commissioned by the CBNRM Forum.

[45] Section 2 of the Communal Lands Act namely the right to plough, to cultivate the land, to graze animals and to build houses among others.

Cumulatively, this situation leaves communities in mining areas vulnerable to evictions and displacement by mining companies who may in most cases just pay the local authorities and start removing people without giving them any direct compensation. The rights of private land owners are better protected. Further, what also make the position of local communities in mining area vulnerable is that in some cases the government itself instead of protecting the people, is involved in mining operations through government owned mining companies and engages itself in pushing the people out of their traditional homes. The situation in Marange is most apposite in that respect.

Relocation and Provision of Basic Services

As noted earlier, mining operations often result in displacement of communities, hence affecting and changing their way of life, social fabric, economic activities and culture, as they will be resettled elsewhere. Research into displacement have found nine other potential risks that deeply threaten sustainability; these include joblessness, homelessness, marginalization, food insecurity, loss of common lands and resources, increased health risks, social disarticulation, the disruption of formal educational activities, and the loss of civil and human rights.[46]

While there is no specific law that protects the rights of displaced communities at the national level, there are internationally accepted standards that may help the state or mining companies to achieve justice and equity in dealing with communities that are evicted or displaced for purposes of development projects. The United Nations Committee on Economic, Social and Cultural Rights made comments on forced displacement of people. General Comment 7 of the United Nations Committee on Economic, Social and Cultural Rights recommends consultations with the affected people, reasonable notice of relocation and updates to the people by government officials about the process.[47] Further, the Committee in Comment 7 also stated that evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.[48]

In addition, in 2007, the United Nations Special Rapporteur on Adequate Housing also developed the Basic Principles and Guidance on Development-Based Evictions and Displacement.[49] The purpose of the Principles was to guide states on how to deal with cases of involuntary displacement and evictions and ensuring compliance with international law and standards as well as respecting the rights of affected population. The Basic Principles call states to ensure that evicted or displaced people are provided with just compensation, shelter and housing, food, water and sanitation,

[46] Theodore E. Downing, (April 2002), **Avoiding New Poverty: Mining-Induced Displacement and Resettlement,** International Institute for Environment and Development (IIED) page 3
[47] ***UN Office of the High Commissioner for Human Rights, "The right to adequate housing (Art.11.1): forced evictions" (05/20/1997), CESCR General comment 7. (General Comments);*** Sixteenth session, 1997
[48] Ibid Clause 16 of Comment No. 7
[49] http://issuu.com/unhousing/docs

medical facilities and livelihood sources and education among others. Further, the people should be consulted and notified before they are evicted and should be given the opportunity to seek legal redress or representation. These issues are critical in the mining sector.

The issue of consultation has its basis in provision of information. Access to information and public participation in decision making processes is very critical as proclaimed in Principle 10 of the Rio Declaration on Environment and Development. Most displacements that have taken place in mining areas in Zimbabwe have not been predictable, open and fair and have not resulted in the just treatment of the evicted or displaced people. It is always assumed that whenever one is displaced they should not be left in a worse of position than he/she was. Except in a few cases, this has been the norm in Zimbabwe. The case of Marange will reveal the approach used by mining companies to relocate the villagers from the diamond mining areas.

Community Participation in Mining and Indigenisation

In an ideal situation direct or indirect community participation in mining may result in communities deriving economic benefits from mining activities. This can happen in a situation where the people themselves participate as small scale miners or receive royalties from mining companies. Such benefits may then lead to the realisation of economic and social rights.

While Zimbabwe prides itself as one of the model countries in promoting Community Based Natural Resources Management (CBNRM) programmes especially through the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) in the wildlife sector, the country has not yet managed to effectively do the same in the mining sector. Instead the mining sector has been punctuated by half measures and is still a preserve of multinational, regional and local companies.

In 1991 the Mining (Alluvial Gold) (Public Stream) Regulations (Statutory Instrument 275 of 1991) were promulgated to allow the issuance of special grants to Rural and District Councils (RDCs) for the exploitation of alluvial gold deposits on public streams for the benefit of locals, but these regulations were later repealed. This has lead many communal people to become illegal and nomadic miners. For the average villager the process of acquiring mineral rights is complex and expensive, hence many people engage in illegal mining activities. While some small-scale miners are operating around the country they normally do not have the organisation, capital, equipment and know-how to fully tape the wide mineral base in the country. By 2005, it was estimated that over 600 000 people were directly involved in illegal gold panning activities along 5 000 km of Zim-

babwe's major rivers that include Mazowe, Angwa, Muzvezve, Insiza, and Bubi rivers.[50] In 2006 -2007 it was estimated that more than 15 000 illegal miners and dealers descended on Chiadzwa diamond fields.

Currently, the acquisition of mining rights is restricted to individuals, companies and partnerships of not more than six persons in terms of Section 61 (1) of the Mines and Minerals Act. The limitation of partnerships to only six persons who can be registered as joint holders of a mining location may restrict the entry of communal people who in most cases act in varying group dimensions.[51] The grouping can have a traditional set up (family relations in a locality), administrative in nature (village or ward structure) or a combination. This limits community participation.[52]

Additionally, local communities are not involved in the decision making bodies such as the Mineral Affairs Board that issues mining rights. This function is the preserve of the Minister at the advice of a few elitist groups. The situation in the country perfectly fits what the African Initiative on Mining, Environment and Society (AIMES) noted in one of its policy statements when it pointed out that while artisanal mining has a long history in many African communities and still serves as a major source of employment for the youths, the current policies for small scale mining are not adequate and where there are policies for the sector the procedure remains cumbersome to enable small scale miners to operate effectively and efficiently.[53]

Although there are efforts to amend the Mines and Minerals Act to try and deconstruct the colonial legacy in the mining sector, the reform process has been very slow. In that regard, the government in 2007 came up with a Mines and Minerals Amendment Bill that sought to significantly change the mining sector especially on indigenisation and economic empowerment of historically disadvantaged groups. Sections 411 to 415 of the 2007 version of the Amendment Bill are based on the need for the indigenous people and even the state to acquire 51% of shares in mining companies. The Bill defines indigenous Zimbabweans as any person who before the 18th of April 1980 was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendent of such a person and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of the members or hold the controlling interest. Although the intention to indigenise may be good, the challenge is whether communities that are affected by mining activities would be able to get any shares. The fear is that these may be captured by the elites. The Bill is still on the shelves though.

However, the debate on indigenisation and economic empowerment has been given new momentum and impetus through the passage of the Indigenisation and Economic Empowerment Act (Chapter 14:33) and the

[50] Maxwell Maturure (November 2008), A Review of the Legislative and Policy Framework for Community Based Natural Resources Management in the Mining Sector; Study Commissioned by the CBNRM Forum.

[51] ibid

[52] ibid

[53] African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 19

Indigenisation and Economic Empowerment (General) Amendment Regulations (SI 116 of 2010). The Act and regulations have a lot of implications on the mining sector although they are not administered by the Ministry of Mines and Mining Development. Instead they fall under the Ministry of Indigenisation and Economic Empowerment and Youths. The regulations for example requires all foreign owned business entities whose capital value stands at more than $500 000 to ensure that at least 51% of their shares are relinquished to local Zimbabweans.

In terms of community participation, the most relevant provisions in the Indigenisation and Economic Empowerment (General) Amendment Regulations is the option for businesses to give some shares to *community share ownership schemes or Trusts* in terms of Section 14B. The regulations define community as residents of a Rural District Council, ward(s) or distinct community of persons whose natural resources are being exploited by a business. The regulations state that a community share ownership scheme or trust may be taken into consideration when assessing the extent to which a foreign owned business has achieved the minimum indigenization and empowerment quota.

The import of these regulations is that companies or businesses may give some shares to community trusts as part of efforts to indigenize. The monies accruing to the community share scheme or Trust should be applied for schools, hospitals, clinics, dipping tanks, road maintenance and water works among other community projects. These regulations also apply to the mining sector. In an ideal situation the provision of these social services and community projects may lead to the fulfilment of economic, social and cultural rights.

The implementation of these regulations is still a subject of debate in government circles especially in the mining sector. On the one hand, there are people who feel that these regulations are counterproductive as they may stifle investment in the mining sector. Further, there are others who see the indigenisation regulations as a ploy by politicians especially those in ZANU PF to grab mining companies and other foreign owned businesses. On the other hand, there are people who see the regulations as the only opportunity for local Zimbabweans to take control of the means of production and advance community development.

One can also state that the fact that the regulations pay particular attention to community development issues especially the formation of community trusts and the need to develop infrastructure is a positive development that may ensure that communities at least have an opportunity to derive economic benefit from mining operations. The provision of community infrastructure and participation in mining may result in the realisation of economic, social

and cultural rights. However, the major concern with the regulations is the overbearing power of RDCs in the formation of some of the community trusts as they have been given a lot of powers. It may be vital that the role of RDCs be reduced to advisory only as most have been capturing resources that are meant for communities and failing to deliver service to the people.

In the debate on community participation in mining, it is vital again to relate the South African case of *Bengwenyama Minerals and Bengwenyama-Ye-Maswazi Council and others Vs. Genorah Resources (PTY) LTD and Minister of Mineral Resources and others.*[54] The case is instructive as the Constitutional Court protected the rights of a community against the state and private sector interests in the issuance of mineral prospecting rights on land belonging to the community without consultation of the community. The community had also applied for prospecting rights but the application had been ignored by the state. The effect of the court decision was that it allowed the community to prospect for minerals on its own land and strengthened the calls for community participation in mining. The case revolves around the protection and enforcement of the economic, social and cultural rights of vulnerable communities against state and private sector interests.

Assessment of Environmental Impact of Mining Operations and Community Participation

In terms of environmental protection and conservation the applicable law is the Environmental Management Act (Chapter 20:27). The Act imposes a duty on "persons" to protect the environment. Mining companies are also covered in this respect. The Act makes it a crime for any person to pollute water, air and the environment. It requires every generator of effluent or solid wastes to put in place measures to prevent or reduce pollution and environmental degradation from their activities. The Environmental Management Act contains a section that outlines environmental rights. In particular, Section 4 (1) provides the following rights; every person has a right to live in an environment that does not cause harm to health, the right to access environmental information and the right to participate in environmental decision making processes. However, the problem with the rights in the Environmental Management Act is that they are just meant to act as a guide to government actions.[55] This means they may not be enforceable in a court of law, unless if the judiciary practices what is called judicial activism in interpreting the environmental laws. Communities in mining areas may therefore face problems in claiming these rights in the courts.

One of the key tools that may be used to promote public participation in environmental decision making and planning in the mining sector are Environmental Impact Assessments (EIAs). Mining is one of the projects for which an EIA should be done before mining operations start. In terms of

[54] Constitutional Court of South Africa: Case CCT 39/10; (2010) ZAC 26. The case was decided on the 30th of November 2010.

[55] Section 4 (3) states that the rights and principles serve as the general framework within which plans for the management of the environment shall be formulated; and serve as guidelines for the exercise of any function concerning the protection or management of the environment in terms of this Act or any other enactment; and guide the interpretation, administration and implementation of any other law concerning the protection or management of the environment.

Section 97 of the Environmental Management Act as read with the First Schedule mining companies are required to undertake an EIA and apply for an EIA Certificate to the Environmental Management Agency (EMA). The EIA is a planning tool that can be used to assess the potential social, environmental, economic and cultural impacts of a project. The EIA report should also state the different measures that will be adopted by the mining company to address the problems identified. The process of carrying out an EIA should involve community consultations and participation to assess how the proposed mining project for example may affect their environmental, economic, social and cultural needs and interests. This process therefore, can be used by mining companies to respond to the needs of the community.

However, it should be noted that carrying out an EIA itself does not automatically translate into environmental protection and fulfilment of community expectations as many companies have been ignoring their EIA commitments. Further, the fact that EIAs are carried out by proponents or the mining company in this respect makes it a less effective mechanism through which community rights can be guaranteed because in most cases the company may choose measures to address environmental harm or negative impact on community livelihoods that are less costly to it, despite the fact that EMA has power to reject an EIA report. In addition, the EIAs provisions have been difficult to implement and monitor for EMA due to lack of both financial and human resources as well as political interference. Political interference takes place in situations where state owned mining companies are involved. An example is in Chiadzwa where Mbada and Canadile had started mining operations without undertaking EIAs. However, they later carried out EIAs after EMA raised concern.

Mining Rights and Contract Negotiation

The Mines and Minerals Act provides the legal framework within which mining rights are acquired in Zimbabwe. The Act identifies about six principal titles for mining and exploration and these are; Exclusive Prospecting Orders (EPO) and Special Grants for exploration in reserved areas. For mining the titles are; claims, Special Grants (for coal and energy minerals), mining leases and special mining leases. In terms of the licencing authority, while some of the mining titles above are issued by the Permanent Secretary in the Ministry of Mines after an application is made to the Mining Affairs Board, some are issued by the President. The licencing system in Zimbabwe has been viewed as complex and not very transparent.

In Section 7, the Act prescribes the government offices that should be represented in the Board as well as others such as the Chamber of Mines and Commercial Farmers Union and the University of Zimbabwe. This prescription is retrogressive. There is need to ensure that

the composition is based on professional field or a particular discipline such as finance, economics, law, environment, agriculture and land management or mining. Further, the Board does not include civil society and community interests.

In awarding mining rights, one of the critical issues is contract negotiation. A mining contract or agreement establishes the rights and obligations between the state and the foreign or local investor. The contract may be in the form of a mining lease, special grant or a special lease. In other situations the state may enter into shareholding agreements with private investors for mining. If the state enters into a shareholders agreement with an investor, the parties will agree on a number of issues including the shareholding structure, the sharing of profits and dividends, the distribution of management fees if any and other duties and rights of the parties thereof. Consequently, unless if the revenue and profit distribution structure envisaged in the mining contracts and shareholders agreements between the state companies and the investors are fair and in the interest of the nation, the state may not get enough money from the mineral resource. If the state fails to negotiate a good deal, it means the communities affected by mining operations will not be protected and the state will not be able to generate enough revenue from mining to fulfil the economic, social and cultural rights of the people. Mining contracts should therefore have provisions that protect the rights of communities especially on displacement, environmental protection and participation in mining if possible.

In Africa there is very limited capacity within governments to negotiate good mining contracts especially with multinational companies.[56] In most cases the multinational companies have skilled personnel and negotiators while governments do not. Mining companies may bring consultants, bankers, economists and lawyers to the negotiating table and often outnumber government negotiating teams.[57] Further the companies have access to contract databases for comparative purposes. Since mining contracts are in many cases run for a number of years, it is important to make sure that the country negotiates a good deal at the outset. Often governments find themselves renegotiating mining contracts after realising that the initial contracts were not beneficial to the country and the communities, but the mining companies or corrupt officials. Examples of the Democratic Republic of Congo (DRC) and Liberia are telling in the renegotiation of mining contracts.

In the DRC the government had to review about 61 mining contracts that were signed during the wars of plunder (1996 -2002) and during the transition process (2003 - 2006).[58] A leaked World Bank report confirmed that the country's mines had been hastily sold without knowledge of their value and to companies without the experience and financing to actually run, manage and operate

[56] African Union (February 2009), Africa Mining Vision

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

[58] Peter Rosenblum and Susan Maples (2009), Contracts Confidential: Ending Secret Deals in the Extractive Industries, Revenue Watch Institute, page 50

industrial mines.[59] The contract review process in the DRC also resulted in the disclosure of these contracts by the government as well as renegotiation. The contracts were not in favour of the interest of the country, hence renegotiation.

In Liberia, the government of Ellen Jonathan Sirleaf also embarked on a review and renegotiation of mining contracts. A case in point was the renegotiation of the Mittal Steel's multi-million dollar iron ore contract which was originally negotiated with a corrupt transitional government in Liberia and had favoured the mining company. The renegotiated contract, although still weak has increased fiscal benefits to Liberia and increased government rights and protections especially over critical infrastructure such as rail and ports.[60]

Mining Taxation

The state can realize revenue from the mining sector through mining taxation or by holding shares in mining companies. There are various taxes that constitute revenue streams and resource rents in the mining sector. The following revenue streams are always important sources of money for the state; royalties, corporate tax, additional profit tax, exploration fees, local authority levies, and environmental fees among many others normally levied on mining operations by different government departments. Of all these, royalties constitute the most significant contribution to state coffers but this depends on the levels or percentages of the royalties. Ideally, such revenue from mining operations should then be used to develop the country and eliminate poverty.

The tax regime in Zimbabwe is set out by law and in particular the Mines and Minerals Act and the Income Tax Act. The Income Tax Act makes provision for different mining taxes by mining companies. Royalties are paid in terms of *sect*ion 15(2)(fiii) of the Income Tax Act. However, it should be noted that there are allowable deductions in terms of Section 15 of the Income Tax Act. These are deductions allowed in determination of taxable income. These relate to activities of mining companies such as buildings, machinery, equipment among others. During preproduction stages the allowable deductions for mining companies include construction of buildings, crushers, housing for employees, school, hospital, nursing home and clinic, housing for staff at a mine school, hospital etc, passenger motor vehicles, sales of minerals and ores produced. What this means is that the law gives mining companies some concessions in the payment of taxes as an incentive.

Tax incentives is one of the major problems facing many African countries in the sense that governments give mining companies special dispensations and subsidies in the form of tax breaks, unwarranted customs and excise duty exemptions. This phenomenon is commonly known as the race to the bottom.

[59] Ibid at 50

[60] Ibid 52

The race to the bottom results in narrowing not only the tax net but also employment opportunities while encouraging capital flight.[61] The question is always whether the mining companies themselves reciprocate this incentive by doing more for the community? Or are some of the corporate social responsibility projects that we see not an attempt to get tax deductions under the guise of Corporate Social Responsibility?

The tax levels for the mining sector at the moment in Zimbabwe is as follows; corporate tax is paid at the rate of 25% of taxable income and PAYE ranges from 0% -35%. While Value Added Tax is levied at 15%, the fact that most minerals are being exported result in VAT being chargeable at 0% hence all mining companies are claiming refunds on monthly basis.[62] For royalties, the Ministry of Finance in its 2011 National Budget Statement increased the royalties of gold from 4% to 4.5% and platinum from 4% to 5%.[63] For diamonds the royalty was increased from 10% to 15%. For Chrome ores and Chrome Fines, in order to encourage value addition, an export tax of 15 % is levied on the value of gross exports proceeds of ores and fine. Another mining tax is called additional profit tax. This tax is levied on holders of Special Mining Leases. It is charged over and above normal Income Tax and is based on net accumulated cash position. This is in terms of Section 33 as read with the 23rd schedule of the Income Tax Act. However, as acknowledged by the Minister of Finance during his Mid-Term Fiscal Policy Review Statement in July 2010, the mining tax regime is not very satisfactory and is unsustainable. For example, the royalties collected from precious metals during the period January to September 2010 amounted to a paltry US$20.7 million from sales of US$593.8 million.[64] What this means is that the revenue being received by the state in the form of taxes is not enough to contribute significantly to the immediate needs of the country and the communities living in poverty. The other taxes and levies paid by mining companies are normally absorbed by other government departments and do not go to the Consolidated Revenue Fund but for the operations of those government departments. An example is the environmental fee which is paid to the Environmental Management Agency and goes to the Environment Fund for purposes of environmental conservation and the local authority levy which goes to the Rural District Councils.

The thin tax base in the mining sector makes it very difficult for the country to fulfil the environmental, economic, social and cultural rights of expectant communities and the nation as a whole. Further, at the moment there is no scope for communities that suffer from the health and safety problems as well as human rights abuses from mining companies to directly benefit from the royalties or any other taxes paid by mining companies as these are deposited into the Consolidated Revenue Fund. The inspiring example of the Royal Bafokeng

61 African Initiative on Mining, Environment and Society (AIMES), Ending the Race to the Bottom: A Collection of Statements of the African Initiative on Mining, Environment and Society, 2002, 2004 and 2009, page 44

62 ZIMRA Officials during a presentation at the Multistakeholder Conference

63 Ministry of Finance, 2.0011 National Budget Statement, presented on 25 November 2010. Page 283

64 Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 283

Community in South Africa which is getting royalties and participates in platinum mining comes to mind. The Royal Bafokeng community in Rustenburg managed to force Impala Platinum to pay them royalties after long court battles dating back to the 1980s. The community owns the land on which platinum is being mined. By 1999 the Royal Bafokeng and Impala Platinum reached an agreement which resulted in royalties payable to the Bafokeng being increased to 22 per cent of taxable income of Impala.[65] In addition, the Bafokeng would receive one million shares in Impala Platinum Holdings, thus enabling them to participate in the growth potential of the group. Further, the Bafokeng could nominate one person to sit on the Board of Impala Platinum. However, the road was bumpy for them as they had to fight legal battles with a powerful mining company. The community has managed to develop infrastructure including the Royal Bafokeng Stadium which hosted some of the 2010 FIFA world cup matches and other social services using the revenue from the royalties and this has resulted in community development.

State Participation in Mining

Apart from mining taxation, the state can also realise revenue from direct participation in mining or by holding shares/equity in mining companies. In Zimbabwe the Zimbabwe Mining Development Corporation (ZMDC) is the government investment arm in the mining sector. It has the responsibility and mandate to develop the mining sector and even establish mining operations. The mining development activities of ZMDC should be for the national interest as contemplated by Section 20(b) of the Zimbabwe Mining Development Corporation Act (Chapter 21:08). This means whatever investment is done by the ZMDC should benefit the people of Zimbabwe and should contribute to national economic development, which in turn should uplift the lives of people. The ZMDC can operate some mines either in partnership with other investors or on it own.

On the other hand, the Mineral Marketing Corporation of Zimbabwe (MMCZ) is another government owned company responsible for marketing minerals. In terms of the law the sole marketing and selling agent for all minerals in Zimbabwe is the Minerals Marketing Corporation of Zimbabwe (MMCZ). This is in terms of the Minerals Marketing Corporation of Zimbabwe Act (Chapter 21:04) in Section 20 (a), (b), (d). The function of the MMCZ places it at the centre of ensuring that minerals resources for the country are sold and marketed at a premium and realise profit for the country.

While the state through ZMDC is involved in various mining projects around the country, one of the most controversial mining projects in which the state is involved in is diamond mining in Marange. The state through Marange Resources Private Limited the investment vehicle of ZMDC in the diamond

[65] Andrew Manson and Bernard Mbenga, (2003), *'The Richest Tribe in Africa':Platinum-Mining and the Bafokeng in South Africa's North West Province, Journal of Southern African Studies, Volume 29, Number 1, March 2003,* (University of the North West)

mining sector, entered into joint mining ventures with Grandwell Holdings and Core Mining and Minerals Limited to form Mbada and Canadile respectively two companies that are mining diamonds in Marange. The Joint Venture (JV) arrangements are such that the state holds 50% while the private investors also holds 50% of the shares in each of the companies. This means that the state will also get a share of the profits and dividends.

While information from the ground in Marange show that there are many more companies being brought into Marange to mine diamonds, it is not clear who the shareholders of these companies are. For example, the Chinese are involved through a company called Anjin, whose shareholding structure is secretive, while it is also rumoured that the Russians have also secured mining rights. The diamond mining operations in Marange are secretive and it is difficult to assess who else has been awarded a contract besides Anjin, Canadile and Mbada. There are also reports of another company called "PURE DIAMONDS" operating in Marange whose ownership is not yet known.

It should be stated that although the state had entered into a joint venture with Core Mining to form Canadile, the ongoing criminal cases against the directors of Canadile for misrepresenting facts about their financial position and guarantees has put the agreement on ice. Most of the officials of the company have been declared *persona non-grata*. This situation has left the state through ZMDC running the operations of Canadile. However, the case is still before the High Court as the Core Mining is contesting the takeover. The case nevertheless, exposes the secretive practices in the diamond mining sector.

The major question on state participation in the diamond sector has always been whether the joint venture arrangements will eventually result in substantial revenue and payments into the Consolidated Revenue Fund and whether the mining agreements are in the national interest as contemplated by Section 22 (b) of the Zimbabwe Mining Development Corporation Act (Chapter 21:08). It is also questionable if the arrangements will also benefit the local community in Marange.

The situation in Marange is complicated by the involvement of various state institutions and entities, whose hands are dipped in the diamond mining issue and these have traditionally had leaking and porous accounts. The state investment arm is Marange Resources Private Limited which is also an investment vehicle of ZMDC. On the other hand, the Mineral Marketing Corporation of Zimbabwe (MMCZ) is another government company responsible for marketing minerals. In this matrix, the profits or dividends will be paid to Marange Resources Private Limited first. Then Marange Resources will pay dividends to ZMDC. In turn ZMDC will pay dividends to its sole shareholder which is the State. If MMCZ

played a role in the sale of diamonds it will also claim some share of the revenue as commission for marketing or facilitating the sale. What may happen at every turn is that each institution will subtract from the dividend and resource depletion fees some monies to pay for operations and management costs before the revenue reaches the Consolidated Revenue Fund. It is obvious there are cost implications to this multi-layered system which may not be proper for a struggling economy. This long chain of institutional involvement exposes the revenue to potential leakages and further deductions that will result in the state receiving less revenue than people expect.

What the above situation reveals is that state participation in mining has a lot of challenges as it may open opportunities for corrupt officials to plunder national resources and wealth. In the end the nation and communities will be deprived of potential revenue, unless if appropriate and effective measures that ensure transparency and accountability in the management of revenue and awarding of mining contracts are put in place.

Transparency and Accountability in the Mining Sector

The mining sector in Africa has been plagued by corruption, violent and sometimes subtle conflicts, greed, secrecy and human rights violations. The importance of promoting transparency and accountability in the sector cannot be over-emphasised. In turn transparency and accountability are functions of democracy and good governance. In simple terms, transparency requires governments, mining companies and other actors in the extractive industries to be open about their operations, decisions or actions that have either a negative or positive impact on community interest, national development or sustainable development. Accountability entails that government or the extractive industries are held responsible for their actions by citizens using various means after accessing information.

Transparency and accountability in the extractive sector may be achieved by proactive consultation of the public or affected communities, access to information and access to justice. In particular, providing communities and the general public information about mining contracts entered into by the state and investors and disclosing the revenue and payments in the mining sector are critical steps in promoting transparency and accountability in the extractive sector. As a result, there are widespread assumptions that transparency and accountability of public administration is necessary for sustainable economic develop-ment and the achievement of socioeconomic rights.[66] However, one of the primary obstacles to transparency is what is often known as an asymmetry of information in that govern-ments and public officials tend to know much more than citizens and hold onto information as a source of power.[67]

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

[67] ibid

In issuing mining rights, a transparent system of awarding contracts and making them public or disclosing them may signal to the public that companies and government have nothing to hide, that they honour citizens rights of access to information (contracts) and that they respects citizens rights to have a say in how resources are used.[68] Some of the advantages of transparency through disclosure of mining contracts are that; citizens' suspicion of hidden horrors will decrease and this will create better relations with communities and making mining contracts publicly available may act as a disincentive for government officials to negotiate bad deals as the public will be watching.[69]

Further, if contracts are made to be publicly available this can assist in the monitoring of compliance with the contractual terms. Even local communities and the general public can monitor environmental compliance or other commitments made by mining companies.[70] This can then ensure that local communities can inform or pressurise the relevant authorities to address the problem or the community can take necessary measures to fight non-compliance through litigation or other advocacy actions. There are a few examples of African countries that have committed to contract disclosure in the oil and mining sector and these include the Democratic Republic of Congo, Liberia and Ghana.[71]

Applying the standards above to the mining sector in Zimbabwe, the gap is wide. For instance the diamond mining sector has been shrouded in secrecy in a number of ways. Firstly, the selection of investors was done in secret and the right tender procedures were not followed when the foreign investors were chosen to partner the ZMDC. However, it has since emerged that one of the foreign investor called Core Mining and Minerals misrepresented facts in order to get the licence and the officials are facing criminal charges. Even the Minister of Finance stated that there is no clarity over those awarded contracts with reports of serious lack of transparency on the part of Canadile.[72] Secondly, the contracts or agreements signed with the foreign investors were not made public and this left people speculating about the contents and terms of the mining contracts. Many people do no know the revenue and expenditure streams as well as the obligations of the parties and whether the mining concessions are in favour of the country.

The opaqueness of the diamond mining activities and revenue streams have not stopped speculation. In 2010 a lot of confusing reports about the actual revenue generated from the sale of diamonds in August and September 2010 were issued.[73] In August and September 2010, the auction of diamonds was made public, but the preceding sales were conducted in secret. Even the Ministry of Finance is not aware of the whereabouts of some of the revenue realised from some diamond sales. In his 2011 National Budget Statement the Minister made

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

[69] Ibid at page 17

[70] Ibid at page 17

[71] Ibid at page 47

[72] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 49

[73] The Ministry of Finance however reported that the first and second diamond sales in August and September of 2010 generated a total of US$85 million, out of this amount accruals to Government were around $41 million. However, the statement makes reference to delays in remittances of royalties, commission and VAT on commission by the MMCZ from the second sale. Originally it was reported by government officials in the media that sale had generated $72 million, then a few days later it was reported to be $45 million before it was again reported to be US$56 476 194,04

reference to a third sale of diamonds for which his Ministry was still waiting for revenue receipts for incorporation into the Consolidated Revenue Fund.[74] The fact that the Ministry had not been given receipts of such sales points to a troubled sector where there is lack of transparency and accountability by state institutions involved.

The confusing reports about earnings from mining are symptomatic of a state in which there is limited space for effective and efficient disclosure of revenue and payments from the mining sector. Yet quick and comprehensive disclosure of mining payments and revenue may promote transparency and accountability, thus eliminate speculation and the spreading of false information. The Minister of Finance correctly stated that the opaqueness with regards to the mining of diamonds and resultant realisations can only serve to raise false expectations and public alarm over the extent of the perceived leakages.[75] In order to correct this the Ministry of Finance has been calling for an audit of diamond sale revenues. This was after it had been reported that Treasury had so far got US$62,1 million while ZMDC and MMCZ gave different figures and indicated that Treasury got US$174,2 million.[76]

What is also worrying about the diamond mining operations is the unwillingness by government to allow the Parliamentary Portifolio Committee on Mines and Energy to visit Marange communities and observe what is happening. This situation indicates that the executive is not willing to have its actions scrutinised. The Committee has been at the forefront of calling for transparency and accountability in the diamond mining sector. Three times in 2008 and 2009, the Committee has been denied entry into Marange. The government also seem not to be interested in having open debate and dialogue with the public, legislators and civil society on what is happening in Marange.

The major hindrance to access to information and contract disclosure in many jurisdictions are the often wide claims of confidentiality by the State and investors over the mining agreements which scupper the practical application of the concept of transparency and accountability. In many cases where government and companies refuse to disclose contracts, corruption may be the cause, in the sense that disclosure of the contract to the public may expose gaps in competence, embarrassing oversights or awkward compromises.[77] Secrecy hides incompetence, mismanagement and corruption from the public.[78] In some cases government officials may use confidentiality clauses excessively to insulate government from public inquiries into its decisions and operations and to shield other government agencies and officials from investigations.[79] Governments and companies may fear that disclosure will lead to second guessing and calls for renegotiation of contracts. Nevertheless, the most legitimate arguments for secrecy insist on the need for protection of commercially sensitive information for an investor.

[74] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 53

[75] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010

[76] THE HERALD, Wednesday 16 February 2011.

[77] Peter Rosenblum and Susan Maples (2009), Contracts Confidential: Ending Secret Deals in the Extractive Industries, Revenue Watch Institute, page 13

[78] ibid

[79] Ibid at page 26

Restrictive access to information laws and practices are also promoting the decay in the mining sector. The scope of the access to information provisions in the Constitution of Zimbabwe is limited. Section 20 of the Constitution of Zimbabwe envisages a willing giver and willing receiver situation in so far as provision of information is concerned whilst it does not afford an obligation on the giver to do so. This means government and the Ministry of Mines in this respect will not be bound to provide the public with information unless members of the public go to their offices and request for the information or unless it is information that should be published in terms of the law.

The main legal instrument on access to information in Zimbabwe is the Access to Information and Protection of Privacy Act (AIPPA) (Chapter 10:27). Section 5 of the Act thereof gives; *"every person the right of access to any record in the custody of or under the control of a public body subject to the exclusions in the First Schedule of the Act'.* This means that the Ministry of Mines, ZMDC or MMCZ as public bodies are obliged to comply with the Act in regard to access to information. The provisions of the Act can be utilized to obtain information on written application on the granting of mining rights as well royalties payable. So far there is no reported case of any person who has applied to the ZMDC, Ministry of Mines or MMCZ or other government departments to request for mining contracts.

Corporate Social Responsibility in the Mining Sector

Simply put Corporate Social Responsibility (CSR) refers to the responsibilities of the business sector to surrounding communities, customers, workers and the nation. It has traditionally been an issue of moral willingness by businesses to assist (self regulation by business entities or ethical behaviour) or to do good for communities affected or impacted in one way or another by its operations. It is also defined as the decision making and implementation process that guides all company activities in the protection and promotion of human rights, labour and environmental standards within its operations and in its relations to the societies and communities where it operates.[80] CSR has therefore variously been further treated as corporate responsibility, corporate citizenship, responsible business, sustainable responsible business or corporate social performance.[81]

It is important to note that many business operations confuse corporate social responsibility with philanthropy and/or handouts to communities.[82] This means CSR is not about cash or in-kind donations that do not change the lives of people or the community. It should instead result in projects that change and develop communities such as irrigation schemes, schools, clinics, hospitals, income generating activities such as small-scale mining. Some of the reasons why CSR is relevant are; while mining companies make

[80] Bench Marks Foundation (2003), Principles for Global Corporate Responsibility: Bench Marks for Measuring Business Performance

[81] Wikipedia http://en.wikipedia.org/wiki/Corporate_social_responsibility

[82] Bench Marks Foundation (2009) Corporate Social Responsibility in the Diamond Mining Industry in Botswana, De Beers, Botswana and the Control of a Country, Policy Gap 5,

profits by exporting minerals, communities are often left in poverty, polluted environments, and may result in human rights violations. CSR is also good for good neighbourliness between communities and mining companies. CSR therefore constitutes an opportunity for mining companies to promote environmental, economic, social and cultural rights of communities living adjacent to mining operations.

At the moment Zimbabwe does not have a specific legislation that deals with CSR. However, aspects of CSR can be drawn from various pieces of legislation. If we are saying CSR is about health, environment, economic empowerment, social rights etc, then these are recognized in various Acts in which duties are imposed on mining companies or other business operations. But the question is whether the obligations on these entities are strong to trigger actions on the part of mining companies to embark on projects that change the lives of the local communities, the worker, the customers and the nation as a whole. For example the Environmental Management Act has certain provision that may trigger CSR activities by mining companies such as the need to carry out Environmental Impact Assessments and the need for companies to take measures to reduce air and water pollution as well as environmental damage. Even the Mines and Minerals Act in section 269 has other aspects that can be interpreted as relating to corporate social responsibility. There is a requirement on mining companies to protect open workings such as shafts, open surface workings and excavations upon abandonment to ensure the safety of persons and stock (livestock). Moreso, Section 24(1) (b) of the Environmental Management (Effluent and Solid Waste Disposal Regulations, SI 6 of 2007 also requires mining companies to rehabilitate the environment 12 months after cessation of operations. These provisions can be used to advance the argument that corporate social responsibility is already part of the law.

Other legal requirements that can be interpreted as CSR are in the Labour Relations (HIV and AIDS) Regulations, SI 202 of 1998 in the health sector. The regulations call upon all employers to provide their employees with education and information relating to the promotion of safe sex and risk reducing measures, about the transmission of HIV, the prevention and spread of HIV and AIDS and counseling facilities. The fact that a company can provide HIV/AIDS support to employees and their dependents also gives a good account of the company's corporate social responsibility activities. The regulations also apply to the operations of mining companies.

However, the above legal requirements that may be interpreted as satisfying the requirements of CSR are often ignored and not implemented by mining companies. For example, not many mining companies make good their promises to communities as identified in the EIAs. In addition, many companies treat CSR as a moral obligation and therefore, they may just decide not to give back to communities.

CHAPTER 3

CASE STUDIES: MARANGE & MUTOKO

MARANGE DIAMOND MINING: IMPACT ON COMMUNITY RIGHTS

Alluvial diamonds in Marange Communal area in Manicaland Province were first discovered by De-Beers in 2002. However, De Beers appears to have lost interest in the discovery. It is estimated that the current area of focus for diamond exploration and mining in Marange is about 66 640 hectares held under 4 special grants that belong to the Zimbabwe Mining Development Corporation (ZMDC) a government owned company.[83] However, part of the deposit is legally contested between government and Africa Consolidated Resources (ACR). Geologists explain that the ore consists of sand, gravels and pebbles with minor portions of boulders of conglomerates.[84]

Originally the government owned ZMDC had been mining in Chiadzwa, but their operations were equated by many people to atrisanal mining as it had no equipment and capacity. Later the government issued mining rights to two companies to mine diamonds in Marange namely; Mbada Mining Private Limited which is a joint venture between the ZMDC and Grandwell Holdings from Mauritius and Canadile Mining Private Limited another joint venture between ZMDC and Core Mining and Minerals from South Africa. These joint ventures are pegged at 50%-50% for each partner. A Chinese company called Anjin was also issued with a licence to mine in 2009. The shareholding structure of Anjin is not so clear. There are also rumours that two more companies owned by the Russians and Chinese under an investment arm called SINO-Zimbabwe are setting base in the area to mine diamonds. Reports from the ground also indicate that there is a new company called "PURE DIAMONDS in the area. However, the shareholding structures of these companies are not very clear. What is also not clear is whether the state has got any shares in the companies. The major problem is that the operations of these companies have been kept a closely guarded secret. It is more likely that more companies will be granted mining rights in Marange. Nevertheless, the operations of the state and mining companies in Marange have had tremendous impact on the environmental, economic, social and cultural rights of the local residents.

Human Rights Violations

The diamond mining operations in Marange were preceded by chaos in 2006 - 2008. When villagers discovered that there were diamonds they also started to dig as artisanal miners. It is estimated that more than 15 000 people from across the country and other foreign countries descended on Marange to

[83] Abbey Chikane, (21 March 2010), Fact Finding Mission Report for the Kimberely Process Certification Scheme.
[84] ibid

mine and deal in diamonds. The result was a free for all situation. Some villagers made a lot

at a farm where social amenities are not adequate. The relocation exercise has greatly affected the villagers as it has resulted in food insecurity, loss of common lands and resources, increased health risks, social disarticulation, the disruption of formal educational activities.

The relocation exercise does not show genuine concern for the lives of the people by the mining companies and the government. What is also shocking is that government and mining companies (Mbada and Canadile) had agreed to set aside $5 million each for resettlement of the community as part of investment, but it appears this money is not available as some government officials state that they will only be able to provide adequate compensation, housing and other amenities once they start fully trading diamonds.

In addition, the people have not been effectively consulted about the levels of compensation and the timeframe of relocation has made it difficult for people to plan and to grow crops as they are not sure when the resettlement will be done. The social services (boreholes for water, school and clinic) at the resettlement site can not sustain such a massive number of families. Further, the area where the people are being relocated is a few kilometres from Mutare city centre. This

[85] Partnership Africa Canada (June 2010), Diamonds and Clubs, The Militarised Control of Diamonds and Power in Zimbabwe

[86] See Reports by Global Witness and Partnership Africa Canada: www.globalwitness.org/media_library_detail.php/996/en/return_of_the_blood_diamond_the_deadly_race_to_con

means the people are being forced to live an urban life and this will definitely change their way of life and traditional systems.

Besides the issue of relocation and the curtailment of the freedom of movement, the community is also not sure whether it will be allowed to participate in small-scale alluvial diamond mining activities. Government is not yet clear on how it will select small scale miners to work on marginal diamond mining areas in Marange. Since many families will be relocated there is fear that they will not benefit from the diamonds at all. A few luck villagers were however employed by the mining companies although a lot more are bitter that they have been sidelined particularly by Anjin, the Chinese company that is alleged to be bringing workers from China, hence depriving the local youths of employment opportunities. There are also reports that mining companies employ people from ZANU PF structures only. It should also be noted that although it is still early days in the extraction of diamonds, so far the resource has not yet resulted in improvement in infrastructural developments in the community. The schools still have no books, clinics have no drugs and the roads are still in a poor state.

Litigating Economic Social and Cultural Rights in Chiadzwa

As a strategy to protect the rights of the Chiadzwa community in the face of human rights violations, ZELA assisted the community to take legal action on the issue of relocation, compensation, the limitation of freedoms of movement through the ban of public transport. Below are some of the cases on Chiadzwa being handled by ZELA;

Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others (HC 6334/09)

ZELA assisted a community based organization called Chiadzwa Community Development Trust (CCDT) to file an urgent High Court application against mining companies and government departments (HC 6334/09). In that case the community was seeking an order to stop the respondents namely; *Mbada Mining Private Limited, Canadile Mining Private Limited, the Zimbabwe Mining Development Corporation, Minister of Mines and Mining Development* and the *Minister of Local Government, Urban and Rural Development* from evicting or relocating any persons from Chiadzwa until there was an agreement on the levels of compensation for displacement. However, the urgent court application was dismissed by the High Court. The High Court stated that the case cannot be treated as an urgent case since diamond mining had been ongoing in the area two years before the case was brought to court. Further, the court also stated that the Chairman of the Chiadzwa Trust lacks locus standi to represent the community or the community at large. However, six months after the judgment the first families were relocated from Chirasika village without being given any

compensation, except $1000 each family as what the government and mining companies called a disturbance allowance and groceries for one month. The effect of the court decision is that since the court failed to see the urgency of the matter and failed to uphold the need to promote class action, it gave a licence to the state and mining companies to relocate the families without making any consultations or reaching agreement with the people, except using coercion and threats. It also means that even the judiciary is not ready to protect the economic, social and cultural rights of communities against the operations of mining companies and government. The courts that are expected to be the last bastion in protecting the environmental, economic, social and cultural rights of the poor are failing to do so.

Malvern Mudiwa and Others vs. The Co-Ministers of Home Affairs and Others (HC. 6337/09)

ZELA also assisted the Chiadzwa Community Development Trust represented by its Chairman Mr. Malvern Mudiwa to file another case in the High Court of Zimbabwe (HC. 6337/09) seeking a court order to compel the state to remove the soldiers from Marange as they were committing a lot of human rights violations. In that case the community is seeking an order to stop the *Zimbabwe Republic Police, the Zimbabwe National Army and the Ministry of Homes Affairs* from prohibiting public transport from plying routes in the Chiadzwa area and to remove the army from the area as it has been accused of committing human rights violations and allegedly involvement in smuggling diamonds. The case is however, still pending. The case was filed in December 2009.

State vs. Malvern Mudiwa

In October 2010, Malvern Mudiwa the Chairman of Chiadzwa Community Development Trust was arrested by the police in Mutare. He was charged with causing criminal nuisance on allegations of organizing meetings for the people of Chiadzwa to resist displacement from the diamond mining area. The case is still pending in the Magistrate Court in Mutare. ZELA is assisting giving him legal assistance.

Non-compliance with Environmental standards by diamond mining companies

From an environmental perspective one of the worrying aspect about diamond mining in Marange is that mining companies had started operations without complying with applicable environmental legislation and principles. In particular Mbada and Canadile started mining without carrying out Environmental Impact Assessments (EIA) as required by the Environmental Management Act (Chapter 20:27). EIAs are a very important planning tool that reveals the potential environmental, economic, social and cultural impacts of proposed projects such as mining and

possible mitigation measures. However, the companies only complied with this legal requirement after the Environmental Management Agency had raised concern. This clearly shows disregard of environmental requirements. Reports from Chiadzwa also indicate that a lot of dams in the area are silting as a result of alluvial diamond mining operations by mining companies. It has also been reported that Odzi River is being polluted and silted by the operations of Canadile.[87]

Diamond mining operations have also affected the cultural interests and rights of the people in Marange. There are reports of divisions amongst the traditional leadership. These divisions are allegedly being fuelled by mining companies and government officials who approach some traditional leaders and give them gifts of diamonds and exclude others. Further, the proposed relocation will greatly destroy family ties, friendships and customs in the area as the people will be relocated to a peri-urban area near Mutare which will entail cultural and social changes. While these divisions persist the mining companies will export the diamonds and realize huge profits from the sale of the diamonds. The situation in Chiadzwa illustrates the agony of a community under siege as more and more mining companies will get mining licences and disregard the environmental, economic, social and cultural rights of the people in pursuance of profit from natural resources extraction.

Marange Diamonds and the Kimberly Process Certification Scheme

In response to reports of gross human rights violations, diamond smuggling and leakages through syndicates in Marange, the Kimberley Process Certification Scheme (KPCS) send in a Review Mission to Zimbabwe in June 2009. The KPCS is a scheme that was set up in 2003 to stop trade in blood diamonds or conflict diamonds whose proceeds will be used by rebel groups to buy arms. The KPCS has some minimum standards that should be complied with by member states. One of the requirements is that no rough diamond would be traded internationally anywhere without an accompanying certificate of origin from the government of the exporting country.[88]

The purpose of the Review Mission was to investigate alleged abuses and smuggling. This was despite the fact that many KPCS members state that the KP is not a human rights organisation, and therefore should not be concerned about human rights violations in member states but about conflicts caused by rebel groups using diamonds. In its first report the KP Mission confirmed the violence in the diamond fields and concluded that Zimbabwe was not compliant with the Kimberly Process minimum requirements. The KP and Zimbabwe later on agreed on a Joint Work Plan in Namibia in 2009 that was meant to ensure that Zimbabwe complies with the KP minimum standards. A major element of the

[87] Reports to the Zimbabwe Environmental Law Association (ZELA) by local villagers in Nenhowe area in Nyanyadzi (May 2010)

Joint Work Plan was the Supervised Export Mechanism which required diamonds from Marange to be only exported after prior examination and certification by a KP appointed Monitor. Abbey Chikane, a South African and former Chair of the KPCS was appointed as the Monitor.

Some of the elements of the Joint Work Plan that Zimbabwe was expected to implement before it was allowed to trade include; phased de-militarisation of the diamond fields, identification of diamond resource areas, improving the security at mining operations of Canadile and Mbada, identifying more investors and stopping smuggling of diamonds through Mozambique. The workplan also included education of the local community about the dangers of smuggling and the need to engage small scale miners in diamond mining operations.

In August 2010 and having made some progress, Zimbabwe was allowed to conduct two auctions of diamonds by the KP in St Petersburg. Nevertheless, at the time of writing this handbook, negotiations are still continuing about whether the country should be allowed to conduct unsupervised exports after the KP meeting in Israel in November 2010 failed to produce an agreement.

In the above context, the question one has to ask is whether the KP system can help advance the economic, social and cultural rights of the people of Chiadzwa and Zimbabwe generally. So far the KPCS has not yet reformed its mandate so that it can explicitly tackle and treat diamonds produced in areas or countries where the state or other actors are committing human rights violations as constituting blood diamonds. The KP Civil Society is fighting to ensure that the mandate of the KP is expanded to include human rights issues. Given the problems in recognition of human rights by the KP it may even be more difficult for the system to expand its mandate to stop trade in diamonds where the environmental, economic, social and cultural rights of communities have been violated.

It is important that the country is allowed to export diamonds so that the revenue will help to trigger economic growth, provided there is transparency and accountability in managing the revenue from diamonds sales. It is of paramount importance for all stakeholders to build pressure on the state and the mining companies, some of which are shady to ensure that the benefits flow to all the people and not just a few individuals and mining companies. In the same vein, it is equally important that the country implements the outstanding issues in the Joint Work Plan and continues to comply with all KPCS minimum requirements. In that regard, there is need for the country to further make progress on phased demilitarisation, identification of resource areas, come up with a plan on small scale mining and plug the existing loopholes that facilitate smuggling and formation of syndicates.

However, an important development was that

[88] Ian Smillie (2010), Blood on the Stone; Greed, Corruption and War in the Global Diamond Trade, International Development Research Centre, page 191

in 2010 during a meeting of the KP in St Petersburg, it was agreed that in order to improve monitoring of the implementation of the elements of the Joint Workplan, the KP Civil Society Coalition was supposed to appoint a Local Focal Point in Zimbabwe. The role of the Local Focal Point is to assist the KP Monitor in monitoring the implementation of the Joint Work Plan. The St Petersburg Agreement states that the Local Focal Point should be granted full and unfettered access to the diamond fields in Marange. These measures will ensure that the rights of the local people are respected as violations will be reported to the KP. Mr. Shamiso Mtisi of the Zimbabwe Environmental Law Association was appointed as the Coordinator of the Local Focal Point which is made up of 7 civil society organisations namely; Centre for Research and Development (CRD), Zimbabwe Environmental Law Association (ZELA), Crisis Coalition, NANGO, Zimbabwe Lawyers for Human Rights (ZLHR), Counselling Services Unit and Women's Coalition. This group will at least assist the KP. It is also likely that the organisations will promote the environmental, economic, social and cultural rights of the community as they monitor the situation in Marange.

Plundering the Nations' Mineral Resources

Recent developments and reports on Canadile have somehow increased the long held suspicion that the diamond mining sector may be pervaded by crooks and corrupt people. It has emerged that Core Mining and Minerals had allegedly been awarded the mining rights through misrepresentations. The officials at Canadile are facing criminal charges for allegedly lying that Core Mining and Minerals was a special purpose vehicle of global mining giant Benny Steinmetz Group Resources Limited (BSG Resources), when it was not.[89] The case is pending before the courts.

Deliberations and investigations by the Parliamentary Portfolio Committee on Mines and Energy into the awarding of the diamond mining contracts also exposed failure by the ZMDC officials to undertake a proper due diligence on Core Mining and Minerals in South Africa where it is registered. Further, some ZMDC officials have also been arrested and are being charged of fraud and misappropriation of funds. These developments indicate a troubled sector where opportunists and crooks may be having a field day. It has also been reported that the Chiadzwa diamond saga has complex plots and sub-plots as it involves a chain of companies and individuals with a shady past and whose records are difficult to trace.[90] Some of the directors are alleged to have been involved in the blood diamond trade in the DRC, Angola and Siera Leone.

MUTOKO BLACK GRANITE MINING: IMPACT ON COMMUNITY RIGHTS

Mutoko Rural District lies in the North-Eastern

part of Zimbabwe. The District is rich in black granite a type of rock that is used for decorating buildings, making floor tiles, toilet and kitchen walls and sinks as well as tombstones. Black granite mining in Mutoko started in the early 1970s. Currently, there are more than 11 companies mining black granite in the area. Of these two are foreign owned. It has been reported that about 98% of the black granite mined in Mutoko is for export to Italy, South Africa, Germany, Spain, United Kingdom, China, Japan, Malaysia, Singapore, Argentina, the United States and Canada.[91] This demonstrates the importance of the black granite stone to customers in other countries. Further, while some of the granite is used in the local industry for making tombstones and other less specialised purposes, most of the granite is exported through Mozambique.

The operations of granite mining companies in Mutoko have been a source of conflict between the companies and the villagers for a long time as mining has caused a lot of environmental, economic, social and cultural damage. The mining companies have not invested in any meaningful infrastructural development in the community as the roads, schools and hospitals are in a poor state. Granite mining has also caused great

[89] Moses Chingoma, Owen Munemo and Mufaro Hove, (Friday 10 December 2010) ZIMONLINE, www.zimonline.co.za

[90] ibid

environmental degradation. The miners blast mountains to extract the granite rocks and leave huge pits that have resulted in deaths of people and livestock. Further, the haulage trucks that carry granite from Mutoko to Harare leave behind a lot of dust and make noise while the blasting causes vibrations that have been reported to be causing houses to crack especially school buildings and houses along the road.

The Environmental Management Agency has also been reporting that most of the companies are not complying with the requirements of the environmental impact assessments (EIA) as prescribed by the environmental laws. Cultural sites like graves and scared places have not been spared as well as the miners blast sacred mountains in the areas where traditional rituals used to be practised by the local population. There are also cases of families being relocated, losing pastures and agricultural land to mining operations.

While the companies are generating a lot of wealth from Mutoko, they have so far failed to take concrete and sustainable measures to ensure that at least the villagers get something from the resources found in their area. Such measures may include building more schools, dams, repairing the roads and hospitals for the community as an act of corporate social responsibility. It has also been reported that in 2009 for example Mutoko District produced about 121 000 metric tones of black granite worth US$12.1 million and yet the mines were only prepared to pay a paltry US$18 400 to the District Council in levies.[92]

Currently, the granite mining companies are involved in a legal dispute with the Mutoko Rural District Council over non-payment of levies for extraction of granite in the area. The basis of the dispute is that the local authority had resolved to increase the levy and charge US$1000 per unit of production of the black granite. However, the miners are insisting on paying the old levy of US$400. The case was still pending in the High Court by the time of publication of this book. The case illustrates the intransigency of mining companies. This situation has resulted in the Chief Executive Officer of Mutoko RDC stating that "*the people of Mutoko are not even getting peanuts from the miners but shells of the peanuts.*"[93] What the mining companies have only been doing as part of corporate social responsibility is donating food, fuel and other items during national days like the Independence day and the Heroes Day celebrations.[94] This means their corporate social responsibility activities do not change the lives of people and Mutoko Centre has not developed.

CHAPTER 4

POLICY AND LEGAL OPTIONS AND RECOMMENDATIONS

Having analysed the legal, policy and practical aspects of the mining sector in Zimbabwe through the lens of the operations of diamond

[91] Peter Sigauke (CEO Mukoto District) (October 2010), Mutoko Community Perspectives on Issues surrounding the mining of Black granite; Paper presented at the Book Café during the Debt Week campaign organized by the Zimbabwe Coalition on Debt and Development (ZIMCODD).

[92] ibid

and black granite mining companies, it is important to come up with a number of policy and legal options and recommendations that can be adopted by decision makers and in particular members of Parliament to help advance the environmental, economic, social and cultural rights of mining communities. These policy and legal options are not exhaustive, but they represent some of the critical issues that members of parliament should focus on in promoting democratic reforms and good governance in the extractive sector. Below is an outline of the policy and legal options that should be pursued;

Measures to Promote Transparency and Accountability

Constitutional Reforms

An issue that parliamentarians should immediately focus on is to ensure that the ongoing constitutional reform process includes debate on transparency and accountability in the natural resources sector.

[93] ibid
[94] ibid

The new Constitution of Zimbabwe should include as one of its founding principles the aspect of transparency and accountability in the management of natural resources revenue and payments. This may at least help in promoting transparency and accountability in the mining sector.

Further, the Constitution should guarantee the right of communities living in natural resource rich areas to derive economic, social and cultural benefits from natural resources. In that context, the Constitution should protect the environmental, economic, social and cultural rights of people and these ought to be inserted in the Bill of Rights section to make them enforceable and justiciable.

In terms of implementation, once the constitutional reforms are successful they should be bolstered by the creation of strong institutional frameworks that are provided with enough financial, human resources and technical support to do their work. These reforms may help to promote the rights of poor women, men and youths in mining communities like Marange and Mutoko. The law should make it possible for the communities to approach the courts and have their rights enforced against violations either by government actions or inaction as well as against the operations of mining companies. To give full meaning (enforcement) to the proposed constitutional rights, the judiciary should also be ready to practice judicial activism in helping the poor people to get redress when their rights are violated by government or mining companies.

Joining the Extractive Industry Transparency Initiative (EITI)

Zimbabwe can also benefit a lot by joining or at least adopting internal measures that are in consonance with the Extractive Industry Transparency Initiative (EITI). The EITI was launched in 2002 as an international initiative aimed at improving transparency and accountability in countries rich in non-renewable extractive resources-oil, gas and minerals.[95] The EITI is a multi-stakeholder voluntary initiative that calls for disclosure of mining revenues earned by governments and payments made to government by mining companies to the public. In terms of EITI, governments should ensure that all material revenue and payments from mining are published to the public in a publicly accessible, comprehensive and comprehensible manner. In simple terms governments and mining companies are encouraged to publish what they pay and what they earn respectively. The rationale behind the EITI was to eliminate corruption, conflicts and poverty, otherwise termed the 'resource curse'.

The EITI has principles which espouse the following; prudent use of wealth from resources for economic growth and poverty reduction, recognition of the sovereign duty of governments to use wealth for benefit of citizens and national development and the need for public understanding of government

revenue and expenditure, public financial accountability and management by government and mining companies, respect of contracts and laws and the fact that financial transparency attracts domestic and foreign direct investment. Further, the EITI recognizes the accountability of government to all citizens for the stewardship of revenue streams and public expenditure and consistent disclosure of payments and revenues by government and gas, oil and mining companies. In order to promote transparency there should be participation of stakeholders who are the government, mining companies, multilateral organizations, financial organizations, investors and non-governmental organizations. Once a country has decided to join the EITI it will be subjected to a validation process to assess if it complies with the requirement or criteria.

In terms of approaches adopted by countries in implementing EITI, it is vital to quote an observation that was made by Revenue Watch Institute;

> *"Although EITI has minimum standards, implementing countries have taken very different approaches to adopting the initiative. Some countries have stuck rigorously to the basic EITI standards, while others have built on those standards to develop more transparent EITI programmes. Others have extended EITI to encompass companies involved in other sectors than oil, gas and mining."*[96]

In the context of the EITI, two methods of dealing with transparency and accountability issues in the mining sector are suggested. Firstly, government should think seriously about joining the EITI wholesale and join other countries like Mozambique, Zambia, Liberia, Ghana among others that have already joined or are in the process of implementing EITI. The second alternative is for the government to adopt legislative and policy measures or reforms that will promote transparency and accountability by domesticating the basic principles of EITI that suit the situation in Zimbabwe. These measures will ensure that the right of communities to benefit from mineral resources are realised. The people should be aware of the revenue being generated from mining operations. However, it is important to acknowledge that the Ministry of Finance has already recognised the importance of joining the EITI. In his National Budget statement for 2011, the Minister of Finance recommended that government should follow the guidelines of the Extractive Industry Transparency Initiative (EITI), so as to promote transparency in the mining sector.[97]

Role of Parliamenst

It is also recommended that government should proactively disclose mining contracts or agreements for public debate and that parliament should effectively debate the contracts before they are concluded or signed. Noteworthy, Section 111B of the Constitution

[95] Revenue Watch Institute (December 2008), EITI Beyond the Basics, page 9
[96] Ibid at page 9

of Zimbabwe gives power to Parliament to approve any convention, treaty or agreement concluded by or under the authority of the President with a foreign state, international organisation, foreign organizations, corporations or entities or one which imposes fiscal obligations upon Zimbabwe.[98] However, treaties and conventions can only become part of Zimbabwean law if they are incorporated into law under an Act of Parliament. It is apparent that the above position gives powers to legislators to approve treaties and agreements that may be entered by the executive with foreign organisations or corporations or other States even in the mining sector. The approval process is a vital tool for calling the executive to account.

Parliamentarians should use the opportunity afforded by section 111B of the Constitution to effectively debate and approve some treaties or agreements that are based on mineral resource extractive or the exploitation of other natural resources. In Liberia for example parliamentarians are given contracts for review as parliament is required to ratify investment contracts which are negotiated by the executive.[99] This is to ensure that parliament plays a role in assessing the potential economic benefit of the mining agreements to the country. Parliamentarians should play an oversight role over the use and distribution of revenue from diamond mining by the state. Additionally, parliamentarians should be granted unfettered access to all mining sites and to government officials so that they can better perform their oversight, representation and legislative role in the mining sector. (Also see Section on Review of existing mining contracts).

Voluntary Reporting by Mining Companies

The mining industry should also be encouraged to come up with voluntary reporting and disclosure systems and mechanisms. The objective will be to report and disclose the revenue and payments made to government. In the same vein, it will be important for extractive industries to persuade government to disclose mining contracts that are otherwise protected by confidentiality clauses. This is because in many cases parties to a mining contract can disclose by consent or unilaterally pursuant to the law.

Mining Rights and Contracts

Awarding Mining Rights to Investors

The process of awarding mining rights should be more transparency and efficient. The due diligence assessments should be done by independent people who have the technical expertise, or rather a multi-disciplinary team. It is important for the contracting and licencing process to ensure that the country and the affected communities benefit while the private investor also benefits. The major issue of concern at the moment in Zimbabwe is whether the existing institutional framework for licencing is effective in terms of allocation of mining rights, monitoring and enforcing the laws. This means there is need to relook at the

[97] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 245

[98] See Section 111B (1) (a), (b) and (2) (a) and (b)

[99] This is in terms of Article 34 (f) of the Constitution of the Republic of Liberia

composition of the Mining Affairs Board. The system should be staffed by people who are knowledgeable and competent, as well as those who can represent the interest of communities affected by mining operations. Further the authority should be independent, with checks and balances in place to ensure transparency and accountability, through promoting access to registers and other data as well as contract disclosure.

Review of Existing Mining Contracts

It is recommended that all mining contracts that were signed over the past 15 years or even earlier should be reviewed in a fully participatory and transparent manner to assess if they benefit the country and more importantly the communities. If they do not benefit the country and communities they should be renegotiated or amended. Civil society and communities as well as other stakeholders like parliamentarians must be involved in the review and renegotiation process. Parliamentarians should be at the forefront of demanding for the review of mining contracts in Zimbabwe.

In particular the diamond mining agreements signed with foreign investors or where state owned companies are in partnerships should all be reviewed. The allegations of corruption and mismanagement in Marange calls for such an approach. This will be the only surest way of assessing if community rights are protected and making sure that the country benefits from the mineral resources. The DRC and Liberia are examples of countries that reviewed mining contracts that were signed by corrupt governments with mining companies.[100]

Some of the issues that can be assessed as part of the review in the mining contracts includes; management of the project if it is a joint venture between the state and a private company, expenditure requirements, employment requirements, training, health and safety standards, environmental protection and mitigation measures, payment of taxes, dividend and capital repatriation, revenue distribution, reporting and accounting standards, compensation to local communities and community development obligations (Corporate Social Responsibility) among other issues.[101] Further, as suggested by the Minister of Finance the revenue from mining companies in Marange should be audited. All State Institutions involved - ZMDC, ZIMRA, MMCZ and the Treasury, should be subjected to the audit to assess what is happening.

Mining Contract Negotiation

In order to ensure that government companies like ZMDC, MMCZ, Marange Resouces an others enter into profitable ventures and get better deals it is important to engage the right people to negotiate the contracts. There is nothing as frustrating for a nation as signing a bad deal that may result in mortgaging non-renewable natural resources like diamonds, platinum, gold and chrome. Many African countries lack the expertise to negotiate good contracts and end up reversing them years

later after realizing it was a bad deal and after failing to realize enough revenue. Conversely, foreign mining companies do a lot of research and have capacity and the experts to negotiate mining contracts. Mining companies realize the value by managing to negotiate favourable and profitable deals. Therefore, if the State decides to go into business through mining partnerships it should negotiate from a business and professional perspective as well. Those who negotiate mining contracts should be fully capacitated, skilled and resourced to do so.

Further, in contract negotiation and licensing, it may help the country to come up with a *model mining contract* with terms and conditions that ensure that the rights of communities are protected and that the country benefits from the contract. The model contract should clearly set out the mining company's rights, obligations and liabilities in relation to the community and this may enhance the aspects of corporate social responsibility and promotion of the environmental, economic, social and cultural rights of mining communities.

In this process the role of the legislators should be to play an oversight role and in some cases if mining agreements are based on the passage of an Act of Parliament to incorporate a treaty or agreement with a foreign state or corporation, effectively contribute and ensure that the legal framework includes provisions that enhance transparency and accountability. Parliamentarians should exercise their legislative role through motions, questions and answer sessions, or through written questions to the executive on the status of such agreements. Moreover, parliamentarians should exercise an oversight role by calling the relevant government departments and mining companies to appear before them to give evidence on matters of national interest in the extractive sector such as the mining contracts and compliance with the terms and conditions therein.

Revenue Generation and Community Participation in Mining

Mining Taxation Regime

Since mining taxation has been one of the major source of revenue for the state, it is important that the state adopts a more equitable mining taxation model that is not offensive to market principles. It should be noted that most minerals are being exported, yet they are non-renewable. As a result there is need to ensure equity and realise the value of this mineral through taxation before the minerals are exhausted. However, some tradeoffs should be made between different objectives such as the desire to attract investment, maximize government revenue and enhance developmental impact of mining. A balance is needed because if mining taxes are too high the investors may not come

[100] In the DRC about 61 mining contracts that were signed during the war and the transitional period were reviewed and some were amended, while in Liberia a mining contract that was signed by the transitional government with Mittal Steel was also reviewed and renegotiated.

[101] Peter Rosenblum and Susan Maples (2009), Contracts Confidential: Ending Secret Deals in the Extractive Industries, Revenue Watch Institute, page 20

and if taxes are too low, government may not get enough revenue from mining operations.

The overriding principle in mining taxation should be national economic and community development. In his 2011 National Budget, the Minister of Finance stated that royalties for diamonds will be pegged at 15% while for platinum will be at 4.5%. While this is a good start, it is recommended that the royalties for alluvial diamonds which do not require a lot of capital expenditure in acquiring mining equipment than kimberlite diamond mining, the royalties be raised to 20%. This will at least generate more revenue for the country, than foreign companies that just come to the country to scratch the surface for the alluvial diamonds. What justifies this position is that the resource is non-renewable and less costly to extract. At the moment no one is very clear of the actual quantities of diamonds in Chiadzwa, although different figures are being coined with some reports saying that Zimbabwe will contribute 25% of the world's diamond production. This calls for the need to realise more just in case the diamond deposits are not as massive as expected. The government is finding it very expensive to carry out an assessment of the quantity of diamonds. Therefore, in the interim government should capitalise by raising the rate of royalties being paid by mining companies operating in Chiadzwa. The concessionary rates for taxes and other incentives that are given to mining companies should be done so fairly, guided by the need to generate enough money for the state to serve the economic, social and cultural interests of the people.

Creation of Inter-Generational Fund

In his Mid-term Fiscal Policy statement in July 2010, the Minister of Finance had proposed the establishment of an Inter-Generational Fund into which some proceeds from the mining sector will be deposited for future generations. This is a noble proposal. The world over many natural resource rich countries have established what are called Sovereign Wealth Funds (SWF) that are meant to support government savings and promote an intergenerational transfer of resources or to build savings for future generations. The sovereign fund is a state owned investment fund. The concept is therefore not new and some lessons should be learnt from different countries such as Botswana and its Pula Fund made up of revenue from diamonds and other minerals, Norway which used oil revenue to create the Norway Government Pension Fund Global, Kuwait has a Reserve Fund for Future Generations from oil revenue, Libya has an Oil Reserve Fund, while Nigeria has an Excess Crude Account from oil revenue.

However, what should be noted is that while the idea of creating an Inter-Generational Fund from mining revenue and payments is noble, in most cases such funds are created in situations where the government has budgetary surpluses and have little or no international debt. Creating the Fund in the

immediate future may not work properly in Zimbabwe, until the macro-economic environment has improved and government has managed to effectively manage the economy with budgetary surplus and having cleared the huge international debt. The other potential problem with the creation of such a fund is that in many countries where they have been created, there is lack of transparency and accountability on investment decisions and the purpose of investment. The challenge for Zimbabwe is to ensure that the country does not create a fertile ground for corrupt elements to loot funds from mineral resources.

Community Participation in Mining and Indigenisation

In order to promote community participation in mining and ensure that benefits go the local communities, various options can be pursued. The starting point is how to make use of the Indigenisation and Economic Empowerment Regulations and implementing them in a systematic way that does not result in the manipulation of local communities by mining companies, Rural District Councils or the elites. The powers given to RDCs to facilitate the formation of community share ownership schemes may perpetuate the problems associated with RDCs and other government departments and may stifle community participation. What is important in all cases is to ensure that the community makes the decisions and not the RDC or mining companies. The role of RDCs in the formation of the trusts should be re-looked at and streamlined, so that they may only act as advisers to the community trusts and do not play an active role. The regulations should be implemented in a fair and transparent manner. Further, it is important to ensure that these regulations do not act as a disincentive to investment in the sector.

In the diamond mining sector, the 2009 Kimberely Process Joint Work Plan for Zimbabwe imposes a duty on the state to develop a framework or plan for involvement and participation of small-scale miners in diamond mining in Marange. What is important to recommend in this respect is that it will make sense for the communities in Marange to be involved and participate in small-scale mining than for other people from far away Districts to go into Chiadzwa and get mining rights or licences as small-scale miners. It is the people most affected by mining operations and whose livelihoods have been disturbed who should be considered first. In that respect, parliamentarians should ensure transparency and accountability in the allocation of licences for small-scale mining in Chiadzwa for diamond mining. This can be achieved by making sure that Parliament analyses the proposed Small-Scale Mining Policy that the government may come up with. The licences should not be captured by the elites, but by the people of Marange. The definition of community should also include those who have been resettled at ARDA

TRANSAU. This group of people should have a share in small-scale mining operations.

Further, once communities in Marange for example are involved in mining as artisanal miners or as small scale miners, the diamond mining companies may act as the market for diamonds from the community or small-scale miners. But there is need to ensure that they offer fair and competitive prizes to ensure that the small scale miners or artisanal miners do not circumvent the big companies and start feeding the illegal diamond market in violation of the Kimberely Process Certification Scheme standards. Therefore, it is important that if the community gets a licence it should be well organised and adopt systems that will ensure compliance with Kimerely Process requirements and do not lead to leakage and smuggling of diamonds in contravention of Kimberely Process Certification Scheme standards.

The other option to pursue in some cases may include paying royalties to communities in mining areas. It is vital that the community itself gets a share of the mining business either through adoption of the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) model or through allocation of community land that the community can lease to a private operator and get a share from the profits. There are many examples of communities around the world receiving royalties from mining companies. The inspiring example of the Royal Bafokeng Community in South Africa which receives royalties from and sit in the Board of Impala Platinum which is mining platinum on their land comes to mind. People should be empowered and derive immediate benefits and not wait for investment in infrastructure by the state, which may not come or may take many years to come. The percentage of royalties can be worked out depending on the mineral type and the projected duration of mineral extraction and production.

Corporate Social Responsibility

Members of Parliament should consider supporting initiatives that promote Corporate Social Responsibility or Corporate Responsibility or Investment by mining companies. This means ensuring that mining companies plough back into the community from which they are extracting minerals. The best way to ensure that mining companies stick to their promise to deliver on CSR is to legislate or pass a law that requires them to carry out CSR projects in the community. The Indigenisation and Economic Empowerment Regulations provides for CSR activities that can be done by community trusts using support from mining companies, but it does not impose a direct duty on mining companies to carry out these activities such as building schools, hospitals, clinics, bridges, roads and other infrastructural developments required in rural mining areas. Further, companies may decide to indigenise by giving

shares to their employees and not the community as the regulations lays out different options that can be adopted by companies in their quest to indigenise.

In playing their oversight role and legislative role, members of parliament should also call on government to enter into mining contracts that incorporate aspects of Corporate Social Responsibility as part of the duties and obligations of mining investors. For example each mining company can be required to form a community sustainability fund that will go towards community projects. This will complement what is already in the Indigenisation regulations. What will also be important for parliamentarians to do in order to promote CSR activities is to pass laws or policies that compel mining companies to disclose their budget allocations for CSR activities. This should then be compared against the net profits made from the extraction and trading of minerals by the company. Each mining company can be required to develop its own CSR framework or plan to assist communities.

The concept of value addition in the mining sector may also help to create employment. Industries for processing some of the minerals into finished goods should be located near the resource extraction area. For example the proposed diamond centre to be built in Harare can be built in Mutare near Chiadzwa where the diamonds are mined so that the town develops and employment is created for the local population.

Position of Relocated/Displaced Communities

Given the problems villagers living in communal lands have been facing on relocation and compensation for displacement, it is important that further research is done to identify the legal and administrative challenges on compensating communities affected by mining operations. This includes assessing the various factors that should be taken into account in compensating communities. Such a research should then inform legislators about the various policy and legal measures to call for. Some guidelines may be developed to assist the government evaluators. An independent and fair mechanism can be put in place to ensure that justice is done to relocated families.

However, in the interim, the state and mining companies should comply with international standards on relocation. In particular, the people to be relocated should be consulted and kept informed about the plans of government. They should also be given adequate notice before they are relocated and must be provided with all the basic social services such as adequate shelter, water, schools, clinics, agricultural services and inputs and the means to start a new life. The mining companies in Chiadzwa should make good their promise that they will avail funds for relocation. The rights of relocated families should be protected. The fear is that these

people may soon be ignored by the government and the mining companies that were instrumental in relocating them. The companies should have a continual obligation to support those who were relocated. The area should not be left to be a squatter camp.

Legal Reforms in the Mining Sector

Proposed Diamond Law

In the 2011 National Budget Statement the Minister of Finance proposed the passage of a Diamond Act. He stated that the Act will deal with the following issues; state ownership of alluvial diamonds, criteria for selection of investors, definition of policing and anti-smuggling standards, role of ZIMRA in collection and monitoring of diamond revenue, environmental issues, compensation to displaced mining communities and creation of the diamond Generation Fund.[102] Further, the proposed Act will provide for the establishment of a Diamond Fund.

The passage of a Diamond Act will be a positive step to ensure that appropriate legislative and institutional measures are put in place to trigger proper exploitation and management of this important national resource. The passage of a diamond specific legislation will not be unique to Zimbabwe. There are many African countries that have passed legislation to regulate the exploitation and trade of diamonds including their exportation and importation. Examples include Ghana which has a Diamond Act, Botswana has Export and Import of Diamonds Regulations and a Diamond Cutting Act while South Africa has a Diamond Export Levy Act and a Diamonds Act. However, what is critical in Zimbabwe is to put in place legislative measures and enforce them. It has always been the case that laws are put in place, but are not implemented. There will be need to build the human and financial resources to implement these legal measures.

The creation of a Diamond Fund will also be a good idea if the right conditions for the management and distribution of the revenue are put in place. What is important is to ensure that this will not result in the creation of a fund that will be pillaged. The necessary measures to eliminate corruption and mismanagement of such funds will be vital. The long term and short-term purpose for which the funds will be used should be clearly defined.

Amending the Mines and Minerals Act

It should be noted that the government has for a long time been considering the merits and demerits of introducing the long awaited Mines and Mineral Amendment Bill. In 2007 for example the Bill was gazetted but it was never introduced in Parliament. Discussions are still continuing within government circles. The Mines and Mineral Amendment Bill seeks to introduce a number of reforms in the mining sector. Some of the critical issues are; restructuring the system of issuing mining

[102] Ministry of Finance, 2011 National Budget Statement, presented on 25 November 2010. Page 245

rights, indigenisation of the mining sector, inclusion of environmental impact assessment reports as a requirement before mining rights holders are granted a certificate of inspection and establishment of an Environmental Rehabilitation Fund.

What Parliamentarians should be able to do in this respect is to read and understand the import of the Bill and be able to critique it on various aspects. Some of the issues that members of parliament should call for inclusion in the Bill include; making Corporate Social Responsibility a legal issue in the mining sector, provisions that ensure that communal residents displaced by mining operations receive adequate compensation and are notified and consulted on the relocation exercise, protection of the environment as well as the economic, social and cultural rights of communities. Further, the Bill should cement some of the provisions of existing pieces of legislation that seek to protect the rights of mining communities as well as ensuring that they participate in mining activities and derive economic benefits.

Most importantly, the bill should make provision for adoption of measures that ensure transparency and accountability in the management of revenue from mining operations as well as in the awarding of mining contracts. Contract disclosure is also critical as well as providing scope for Parliament to review mining contracts. The government should also consider the inclusion of some of the elements of transparency and accountability that form part of the Extractive Industries Transparency Initiative (EITI). This is because the implementation of EITI is also based on the passage of laws that promote access to information and disclosure on mining revenue and payments. These amendments should also be supported by the repeal or amendment of legislation that stifles access to information such as the Access to Information and Protection of Privacy Act (AIPA). The amendment can also include provision for the adoption of a model mining contract that can be used by government officials or state institutions whenever they are negotiating a new mining deal.

Lastly, it is recommended that a complete overhaul of the existing Mines and Mineral Act would be proper given the extensive nature of the proposed amendments.

Establishment of an Environmental Court

In order to ensure that environmental cases are handled professionally and to promote environmental justice, it is proposed that Environmental Courts be set up. These would be specialised courts that can be operationalised within the existing court system by making sure that all environmental cases are handled by people with knowledge of environmental justice issues. The current situation where the judiciary is averse to environmental cases is not desirable.

Compliance with International Standards

Compliance with the Kimberly Process Certification Scheme Requirements

In order to ensure that the Kimberly Process Certification Scheme further allows more exports of diamonds and Zimbabwe is allowed to freely trade like other countries, the government should religiously implement the Joint Work Plan adopted in Namibia in 2009 or any other agreement that may be adopted in future. While the KP Plenary meeting held in Jerusalem in November 2010 did not produce any agreement, there seems to be consensus that in many respects the country has complied with the KP minimum requirements, but there are many outstanding issues that should be addressed. These issues include the need to demilitarise the diamond fields in phases, coming up with a plan to curb smuggling of diamonds into Mozambique and participation of small-scale miners in diamond mining.

Further, the Local Focal Point mechanisms for civil society that will assist the KP monitor should be allowed to do its work to monitor the implementation of the Joint Work Plan without any hindrance and this includes visiting Marange diamonds fields. In that regard, it is recommended that the KP should allow more exports of diamonds from Chiadzwa, while Zimbabwe concurrently makes a commitment to fulfil and address the outstanding issues.

In the long term, in order to ensure transparency and accountability and to enhance monitoring of compliance with the KP minimum requirements, it is further recommended that Zimbabwe should establish a permanent multi-stakeholder group. The multi-stakeholder group should be composed of local independent and competent people whose function will be to monitor the diamond mining activities around Marange especially the issue of smuggling, human rights violations and small scale mining among others.

Decision makers in Zimbabwe are also encouraged to support the reform process in the Kimberley Process to make it better. Such reforms include, making sure that the KP expands the definition of conflict or blood diamonds to include those from regions where gross human rights violations have taken place i.e. civil, political, environmental, economic, social and cultural rights. Moreso, the country should also support the setting up of a secretariat for the KPCS. There is also need for the KPCS to end its veto arrangements and replace it with a voting system and also an independent, accountable, arms length review mechanism.[103] These measures among others will make the KP better and should be supported by decision makers in Zimbabwe. Those who represent the country in KPCS meetings should be called before parliament to explain their positions. Parliament can use its powers to summon them.

Working with Civil Society and Communities

In order to effectively legislate, play an oversight role and represent the interests of the nation and mining communities, Members of Parliament and other decision makers are encouraged to work very closely with civil society organisations and the affected communities. On the one hand, civil society organisations do a lot of research work on the extractive or mining sector that can be useful in engendering debate in the mining sector and in shaping national policy processes. CSOs can also enhance the capacity of legislators to analyse proposed laws and policies through capacity building projects. Additionally, they may as well link legislators to communities through outreach programmes that will ensure that legislators interact with mining communities and this will enable them to debate from an informed position. On the other hand, communities can assist legislators to identify priority areas of focus in mining areas. The legislators should visit mining communities and get their story first hand. This will all improve the policy making processes.

[103] Ian Smillie (2010), Blood on the Stone; Greed, Corruption and War in the Global Diamond Trade, International Development Research Centre, at page 203

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