THE EFFECT OF MINING OPERATIONS IN CHIADZWA, ZIMBABWE AND MOGALAKWENA, LIMPOPO, SOUTH AFRICA, ON THE ENVIRONMENTAL HUMAN RIGHTS OF LOCAL COMMUNITIES

A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW, UNIVERSITY OF VENDA, IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

BY

MASEKESA LIBERTY KUDZAI

STUDENT NUMBER: 11585529

University of Venda

PREPARED UNDER THE SUPERVISION OF PROFESSOR GEORGE VUKOR-QUARSHIE, MR. CORNELIUS HAGENMEIER AND MS PULENG LETUKA AT THE SCHOOL OF LAW, UNIVERSITY OF VENDA, SOUTH AFRICA

2015

© University of Venda

University of Venda
Creating Future Leaders

DECLARATION

I, MASEKESA LIBERTY KUDZAI, hereby declare that this dissertation is my original work; that other works cited or used are clearly acknowledged; and that this work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: ..... Date: 13-04-15

Main Supervisor: Professor George Vukor-Quarshie, University Of Venda

Signed: ..... Date: 11/04/15

Co-Supervisor: Mr. Cornelius Hagenmeier, University of Venda

Signed: ..... Date: 11/04/15

Co-Supervisor: Ms Puleng Letuka, University of Venda

Signed: ..... Date: 11/04/15

© University of Venda

University of Venda
Creating Future Leaders

DEDICATION

I dedicate this work to my mother, Mrs Ruth Masekesa, my brother, Eliah and sister Joyleen, and to the memory of my dear father, Masekesa Elias. To the people of Chiadzwa and Mogalakwena who sacrificed their land, heritage and rights for mining operations to take place, there is still hope for the advancement and protection of your environmental, economic, social and cultural rights.

© University of Venda

UNIVERSITY OF VENDA

University of Venda
Creating Future Leaders

ACKNOWLEDGEMENT

This work would not have been a success had it not been for the tremendous amount of help I got from different people and institutions. To my academic supervisors, Professor George Vukor-Quarshie and Mr. Cornelius Hagenmeier, I am deeply indebted for your ethical guidance and contribution to this work. Your professional guidance, expertise and wisdom taught me how to question, critique and separate opinions from facts. Your insightful comments and criticisms throughout my work indeed brought out the best in me. I am also thankful to Mr PR Mawila, Professor Van der Walt and Dean A Lansink, whose unceasing goodness and humanity, made my years at the University of Venda (Univen) a treasured and memorable experience. I would also like to thank all my fellow academic friends: Timothy Manyise, Stewart Lee Kugara, Joseph Zanorashe Mundondo, Rodney Kudzai Zhandire, Tapiwa Agrippa Mhuru, Tapiwa Moses Mufakose, Tariro Musindo, Temitope Obisanya, for the encouragement, insights and smiles which kept me going when the going got tough during the time of this work. Special mention also goes to the respondents who spared their time to participate in this work. My gratitude also goes to my mother, brother, sister and fiancé for believing in me. You all proved to be my fountain of hope, strength and wisdom. At all times, I counted on you. I am deeply indebted to your support and faith in me as I journeyed through this long and arduous academic path. Last, but not least, this study and all the project work would not have been possible without the financial assistance of the University of Venda.

While thanking the above, the mistakes in this work are solely mine.

May the Lord Jesus bless you all!

© University of Venda

UNIVERSITY OF VENDA

University of Venda
Creating Future Leaders

LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR:	African Charter on Human and People's Rights, 1982
AJA:	Administrative Justice Act, Chapter (10:28) of 2004
AIPPA:	Access to Information and Protection of Privacy Act (Chapter 10:27) of 2002
APPA:	Atmospheric Pollution Prevention Act, 45 of 1965
AQA:	Air Quality Act 39 of 2004
CCDT:	Chiadzwa Community Development Trust
CEC:	Committee for Environmental Co-ordination
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
CBOs:	Community Based Organisations
CSOs:	Civil Society Organizations
DEA:	Department of Environmental Affairs
DEAT:	Department of Environmental Affairs and Tourism
DME:	Department of Minerals and Energy
DWAF:	Department of Water Affairs
ECHR:	European Convention on Human Rights
EIA:	Environmental Impact Assessment
EMA:	Environmental Management Act
FDI:	Foreign Direct Investment
GDP:	Gross Domestic Product
IAIA:	International Association for Impact Assessment
ICJ:	International Court of Justice
IHRL:	International Human Rights Law
IEL:	International Environmental Law
ILO:	International Labour Organisation
KP:	Kimberley Process
MISA:	Media Institute of Southern Africa
MMCZ:	Minerals Marketing Corporation of Zimbabwe
MPRDA:	Mineral and Petroleum Resources Development Act 28 of 2002
NEAF:	National Environmental Advisory Forum

© University of Venda

University of Venda
Creating Future Leaders

NEMA:	National Environment Management Act 107 of 1998
NGO(s):	Non-Governmental Organisation(s)
NWA:	National Water Act No 36 of 1998
OEL:	Occupational Exposure Levels
PAIA:	Promotion of Access to Information Act No 2 of 2000
Rio Declaration:	United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, (1992)
SADC:	Southern African Development Committee
SAHRC:	South African Human Rights Commission
SIA:	Social Impact Assessments
Stockholm Declaration:	United Nations Conference on the Human Environment in Stockholm (1972)
Universal Declaration :	Universal Declaration of Human Rights
UNECE:	United Nations Economic Commission for Europe
UNHRC:	United Nations Human Rights Committee
UNIVEN:	University of Venda
WHO:	World Health Organisation
ZMDC:	Zimbabwe Mining Development Corporation
ZELA:	Zimbabwe Environmental Law Association

© University of Venda

University of Venda
Creating Future Leaders

ABSTRACT

In most countries, mining is regarded as one of the important economic activities which contribute hugely to economic development. However, it has been scientifically acknowledged that if not properly carried out, mineral extraction potentially causes serious physical environmental damage, in terms of land conversion and degradation, habitat alteration and water and air pollution. These problems, in turn, often adversely affect the adjacent communities. In this vein, this study was aimed at examining the effect of mining activities on environmental rights of individuals and communities residing adjacent to mining areas with particular reference to the Chiadzwa mining area in Manicaland Province, Zimbabwe and the Mogalakwena mining area, Limpopo Province, South Africa. It seeks to address the need to develop and maintain appropriate regulatory regimes to manage issues relating to environmental degradation caused by the mining operations in mining areas like Chiadzwa and Mogalakwena in order to ensure that people living in the chosen areas may not suffer infringement of human rights as a result of harmful mining activities. The existing legal mechanisms that regulate international environmental human rights in the context of mining activities are utilised to assess, from a comparative perspective, the effectiveness of specific laws and policies put in place to protect the environmental rights of the communities under study. Additionally, the study analyses, compares and contrasts the prominent characteristics of the legal mechanisms, policies and systems that have been put in place by the two governments to protect, and promote the environmental human rights of the communities concerned. Doctrinal legal study and empirical study form the basis of the research methodology of this study. The study found that mining companies especially in Chiadzwa, in their desire to generate as much profit as possible, do not always comply with legal mechanisms and policies that seek to promote environmental human rights objectives. This has resulted in the infringement of fundamental human rights of the adjacent communities and people. The study also advances relevant recommendations which are meant to constructively contribute to law and policy reform in the two countries. In the final analysis the paper advocates that stakeholders in the mining communities under study should be empowered and educated to recognise the complementary and interdependent relationship between human rights and environmental health. If this intricate relationship is recognised, mining communities will not only derive economic benefits from the ongoing mining activities, but will also enjoy fundamental human rights including environmental rights.

UNIVERSITY OF VENDA

© University of Venda

University of Venda
Creating Future Leaders

Key Words

Adjacent communities, Chiadzwa, clean and healthy environment, environmental degradation, environmental human rights, Environmental Impact Assessment, fundamental human rights, mining operations, Mogalakwena, sustainable development

© University of Venda

University of Venda
Creating Future Leaders

TABLE OF CONTENTS

Declaration.....i
Dedication.....ii
Acknowledgement.....iii
List of abbreviations and acronyms.....iv
Abstract.....vi
Key words.....vii
Table of contents.....viii
List of tables.....xiii

CHAPTER ONE: INTRODUCTION.....1

1.1 Background Context of the Study.....1
1.2 Problem Statement and Substantiation.....3
1.3 Working Definitions.....5
1.4 Research Broad Aim and Specific Objectives.....8
1.4.1 Broad Aim.....8
1.4.2 Specific objectives.....8
1.5 Research Questions.....9
1.6 Literature Review.....9
1.7 Relevance and Justification of the Study.....13
1.8 Hypothesis.....14
1.9 Methodology.....14
1.9.1 Introduction.....14
1.9.2 Legal research.....15
1.9.2.1 Doctrinal 'Black Letter Law'.....15
1.9.3 Empirical research.....16
1.9.3.1 Population sample.....16
1.9.3.2 Sampling design.....17
1.9.3.3 Data collection methods.....18
1.9.3.4 Data analysis techniques.....20

© University of Venda

University of Venda
Creating Future Leaders

1.10 Ethical Considerations **20**
1.11 Research Scope Overview **21**
1.12 Limitations of the study **22**
1.12.1 Language and cultural barriers 22
1.12.2 Access to targeted participants 23
1.12.3 Cost 23

CHAPTER TWO: INTERNATIONAL HUMAN RIGHTS STANDARDS ON ENVIRONMENTAL HUMAN RIGHTS **24**

2.1 Introduction **24**
2.2 The Concept of Environmental Rights **24**
2.3 A brief overview of the Nature and development of Environmental Rights **25**
2.4 Substantive environmental rights implicit in human rights **26**
2.4.1 International Human Rights Law 27
2.4.1.1 UN International Covenant on Civil and Political Rights, 1966 28
2.4.1.2 UN International Covenant on Economic, Social and Cultural Rights, 1966 30
2.5 The concept of a Free-Standing Environmental Right **32**
2.5.1 A free-standing right to environmental quality under the global and regional levels 33
2.5.1.1 UN Conference on the Human Environment in Stockholm, 1972 35
2.5.1.2 Rio Declaration of the UN Conference on Environment and Development, 1992
2.5.1.3 The 1994 Ksentini Report 38
2.5.2 Customary International Law 39
2.5.2.1 State Practice 40
2.5.2.2 State's Sense of Legal Obligation 41
2.5.3 A free-standing right to environmental quality at the regional level 43
2.5.4 Legal obligations obtaining from international and regional conventions. 45
2.6 Procedural environmental rights **48**
2.6.1 Aceess to Environmental Information 50
2.6.2 Public Participation in Environmental Decisiom Making 51
2.6.3 Access to Justice in Environmental Matters 52
2.7 Chapter Conclusion **53**

© University of Venda

University of Venda

CHAPTER THREE: NATIONAL HUMAN RIGHTS STANDARDS ON ENVIRONMENTAL HUMAN RIGHTS 54

3.1 Introduction **54**

3.2 Substantive environmental rights in the context of Zimbabwe and South Africa **54**

3.2.1 A free-standing environmental right as a constitutional right 56

3.2.1.1 The position in Zimbabwe 57

3.2.1.2 The position in South Africa 59

3.2.1.3 Comparative analysis of the right 59

3.2.2 Environmental Protection within Existing Human Rights: Constitutional Provisions Relevant to the Environment 67

3.2.3 General environmental framework laws in South Africa and Zimbabwe 68

3.2.3.1 The position in Zimbabwe 68

3.2.3.2 The position in South Africa 70

3.2.3.3 Comparative assessment of EMA and NEMA 71

3.2.4 Sectoral Environmental Legislation in Zimbabwe and South Africa that advocate for a free-standing environmental human right 72

3.2.4.1 Water Quality Standards in Zimbabwe and South Africa 73

3.2.4.2 Effluent disposal and management in Zimbabwe and South Africa 77

3.2.4.3 Air Quality Standards in Zimbabwe and South Africa 78

3.2.4.4 Standards for Waste Management 79

3.2.4.5 Standards for Noise and Vibration Prevention/Minimasation 80

3.2.4.6 Mining Legislation 81

3.3 Procedural Environmental Rights in the context of Zimbabwe and South Africa **83**

3.3.1 Access to Environmental Information 84

3.3.1.1 The position in Zimbabwe 84

3.3.1.2 The position in South Africa 85

3.3.1.3 Comparative Assessment 86

3.3.2 Public Participation in Environmental Decision-Making 86

3.3.2.1 Common law principles in Zimbabwe 88

3.3.2.2 Common law principles in South Africa 89

3.3.3 Access to Justice in Environmental Matters 90

3.3.3.1 Judicial Review 90

3.3.3.2 Legal Standing 91

© University of Venda

University of Venda
Creating Future Leaders

3.3.3.3 Justiciability of environmental rights in Zimbabwe before and after the adoption of the 2013 Constitution.....92

3.4 Chapter Conclusion 93

CHAPTER FOUR: THE EFFECT OF MINING OPERATIONS THE ENVIRONMENTAL HUMAN RIGHTS OF LOCAL COMMUNITIES 94

4.1 Introduction 94

4.2 Substantive Environmental Rights of Local Communities 95

4.2.1 The destruction of land, forests and plants in Mogalakwena and Chiadzwa.....96

4.2.2 Waste production and management by mining companies.....98

4.2.2.1 The position in South Africa.....99

4.2.2.2 The position in Zimbabwe.....100

4.2.3 The right of access to water/the right to water.....102

4.2.3.1 The position in South Africa.....102

4.2.3.2 The position in Zimbabwe.....104

4.2.4 Noise and vibration standards in both Mogalakwena and Chiadzwa.....106

4.2.5 Air quality standards in Chiadzwa and Mogalakwena.....108

4.2.5.1 The position in South Africa.....109

4.2.5.2 The position in Zimbabwe.....110

4.3 Procedural Environmental Rights of Local Communities 112

4.3.1 The right of access to environmental information 112

4.3.1.1 Sources of information for the respondents..... 113

4.3.1.2 Summary on the awareness of environmental management legislation.....118

4.3.2 Participation in environmental decision-making 120

4.3.2.1 The position in Zimbabwe 120

4.3.2.2 The position in South Africa.....122

4.3.3 The right of access to justice in environmental matters 124

4.3.3.1 The position in Zimbabwe 126

4.3.3.2 The position in South Africa 129

4.4 Conclusion 131

© University of Venda

University of Venda

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.....132

5.1 Introduction.....132

5.2 Existing international legal mechanisms for the protection of environmental rights.....132

5.3 The right to a healthy environment as implied in human rights instruments.....133

5.4 The right to a healthy environment as part of customary international law.....134

5.5 Legal mechanisms and policies that have been put in place by the two governments.....134

5.6 The effect of mining operations on environmental human rights of local communities.....136

5.6.1 Substantive Environmental Rights.....136

5.6.2 Procedural Environmental Rights.....137

5.6.2.1 Access to environmental information.....137

5.6.2.2 Public participation in environmental decision-making processes.....139

5.6.2.3 Access to environmental justice.....141

5.7 Compliance level of the mining companies with national and international legislation.....141

5.8 Available remedies to the affected communities under national, regional and international human rights law in cases of environmental abuse.....144

5.9 Specific Recommendation to Zimbabwe.....145

5.10 Special recommendations.....145

5.10.1 The intergration of human rights and environmental protection.....145

5.10.2 The need to conduct further researches at respective research sites.....146

REFERENCES.....147

7 APPENDICES.....165

© University of Venda

University of Venda

LIST OF TABLES

TABLE PAGE

Table 1: A list of statutes adopted by South Africa and Zimbabwe to protect and enhance environmental quality and human rights.....55

Table 2: Respondents' responses to questions relating to issues affecting substantive environmental rights.....96

Table 3: Respondents' responses to questions relating to procedural environmental rights.....112

Table 4: Respondents' awareness of environmental management legislation.....118

© University of Venda

University of Venda
Creating Future Leaders

CHAPTETR ONE

INTRODUCTION

1.1 Background context of the study

Zimbabwe and South Africa are endowed with huge reserves of natural resources in general and mineral wealth in particular. For decades mining has remained at the heart of both countries' economies. Minerals and precious stones such as gold and copper are being exploited in commercial quantities, with diamond and platinum representing the most important minerals mined in Chiadzwa (also known as Marange) in Zimbabwe and Mogalakwena in South Africa respectively.

The Chiadzwa diamond field is located in Manicaland Province which is in the Eastern part of Zimbabwe. Alluvial diamonds were first discovered by a South African Diamond Mining Company known as De-Beers in 2002.[1] Between 2006 and 2008 there was '*a diamond rush*' in Chiadzwa which attracted tens of thousands of people who engaged in informal mining and trading in diamonds.[2] However, formal legal mining commenced in 2009 after the Ministry of Mines welcomed interested companies to enter into joint venture agreements to mine in Chiadzwa under the auspices of the Zimbabwe Mining Diamond Corporation (ZMDC).[3] It should be noted that ZMDC, Minerals Marketing Corporation of Zimbabwe (MMCZ), Marange Resources,[4] Mbada[5] and Anjin[6] are the chief producers of diamonds in Chiadzwa. Other companies include River Ranch and Murowa Diamonds.

---

[1] S Mtisi, M Dhliwayo & Makore 'Analysis Of The Key Issues In Zimbabwe's Mining Sector, Case study of the Plight of Marange and Mutoko Mining Communities' Extractive Industries Policy And Legal Handbook. *Zimbabwe Environmental Law Association* (ZELA), (2011) 39.

[2] It is estimated that at the peak of informal diamond mining in 2008 about 35 000 illegal artisanal miners from various provinces of the country flooded in Chiadzwa . It is also estimated that about 5 000 illegal diamond traders from countries such as Botswana, Mozambique, South Africa, Nigeria, the United Arab Emirates and Belgium descended on Chiadzwa. See O Katsaura 'Socio-cultural dynamics of informal diamond mining in Chiadzwa, Zimbabwe.' (2010) *Vol. 12. No. 6 Journal of Sustainable Development in Africa* 101–121.

[3] Presently Government participation in mining is through ZMDC, (formed in 1982) and through the Minerals Marketing Corporation of Zimbabwe (MMCZ, formed in 1992).

[4] Marange resource is owned 100% by ZMDC.

[5] Mbada is a 50-50 joint venture between the state-owned ZMDC and Grandwell Holdings Ltd., a subsidiary of Reclam.

[6] Anjin is a joint venture between Chinese company and a Zimbabwean company, Matt Bronze, which was issued with a licence to mine in 2009.

© University of Venda

University of Venda

It is speculated that the Chiadzwa diamond fields could be the world's largest and richest diamond deposit with the potential to contribute over 25% of the world diamond production.[7] The large stretch of Chiadzwa diamond field covers an area of 66 640 hectares.[8] It is estimated that the mine could last up to 30 years and the value of the diamond deposits is around US$800 billion.[9] According to the 2014 national budget, in 2013 diamond mining accounted for approximately 11 million carats of diamond production.[10] Diamond output is projected to increase to 12 million carats in 2014, benefiting from the recent removal of ZMDC from the sanction list by the European Union.[11] The mining sector is projected to grow by 11.4% in 2014 due to planned investments in diamond, gold, nickel, and coal.[12] Mining in general, and diamond mining in particular, is one of the main drivers of foreign direct investment (FDI) in Zimbabwe, and it is poised to remain so in the short to medium term.

Mogalakwena is a small community located 20 km northwest of the town of Mokopane and falls within the Limpopo Province's Waterberg District of South Africa.[13] Anglo Platinum is the largest platinum producer in South Africa which started its major operations in Mogalakwena Section (Limpopo)[14] in 1993.[15] Anglo Platinum mining company has its on-going mining operation in Sandsloot from which the Ga-Pila community was relocated to make way for mining operations. The company is also carrying out its platinum mining operations on Overysel and Zwartfontein farms from which the Motlhotlo community was relocated to make way for lucrative mining ventures.[16]

---

[7] 'Fabulous Wealth in Marange Diamonds', *The Times*, 8 August 2010. Available at http://www.timeslive.co.za/africa/2010/08/08/fabulous-wealth-in-marange-diamonds (accessed on 1 June 2014.)

[8] C Madebwe, V Madebwe & S Mavusa 'Involuntary displacement and resettlement to make way for diamond mining: The case of Chiadzwa villagers in Marange, Zimbabwe. (2011) *Vol. 1 No. 10 Journal of Research in Peace, Gender and Development* 292–301.

[9] 'The Marange diamond fields of Zimbabwe: An overview.' Sokwanele. 2011 available at: http://www.sokwanele.com/ system/files/The-Marange-Diamond-Fields-Report- Oct-2011.pdf. (accessed 13 February 2014).

[10] The 2014 National Budget Statement, Presented to the Parliament of Zimbabwe on 19 December, 2013 by Hon. P. A. Chinamasa, MP Minister of Finance & Economic Development 31.

[11] *ibid*

[12] *ibid.*

[13] Anglo Platinum Mogalakwena Mine (2009), General update on community issues 1, available at www.angloplatinum.com (accessed 6 February 2014).

[14] Mogalakwena section was formerly known as Potgietersrust Platinum Mine.

[15] L Farrell, E Mackres & R Hamann 'A Clash of Cultures (and lawyers): A case study of Anglo Platinum and its Mogalakwena mine in Limpopo, South Africa. *Corporate Governance In Africa Case Study Series: No 1 Unit for Corporate Governance in Africa*' (2009) 2.

[16] In 2007, the Ga Puka and Ga Sekhaolelo communities (collectively known as Motlhotlo) began moving from Overysel and Zwartfontein farms to Rooibokfontein and Armoede, respectively.

© University of Venda

University of Venda
Creating Future Leaders

Of all the mining sectors in South Africa, platinum production has experienced the most rapid growth. Between 2005 and 2007, the Anglo Platinum mining company reports that it had paid taxes and royalties to the South African government totaling R8.8 billion (£578 million).[17] In 2009 alone, large-scale platinum mining accounted for approximately 141,000 kg of platinum production. As a result, platinum mining in South Africa dominated the world's platinum production with 88% of global output in 2009.[18]

Undoubtedly, the mineral sectors in both Zimbabwe and South Africa have made noteworthy contributions to foreign exchange earnings and gross domestic product (GDP). The above statistics suggest that mining shows the immense potential of minerals to contribute to economic growth and poverty reduction. Unfortunately, the growth of mining is placing new pressures on both countries' environment. It should be noted that although mineral exploitation contributes to the livelihoods of many, it generally leaves negative effects on the physical environment, which may ultimately be detrimental to the human rights of surrounding communities.[19] Despite the fact that many companies are becoming increasingly aware of the consequences of their operations on the environment, they are yet to take interventional measures to prevent or remedy the effect of their operations. This study investigates the mining activities in Chiadzwa and Mogalakwena to determine their effect on environmental rights of the adjacent communities.

1.2 Problem Statement

The significance of mining cannot be ignored as the South African and Zimbabwean economies are heavily dependent on this industry. Minerals and precious stones such as gold and copper are being exploited in commercial quantities, with diamond and platinum representing by far the most important minerals mined in Chiadzwa and Mogalakwena respectively. Some writers have

---

[17] Anglo Platinum sustainable development report (2007) 34, available at www.angloplatinum.com (accessed 6 February 2014).

[18] M Abbas & Sharaky 'Mineral Resources and Exploration in Africa' (*Paper presented at the International Conference 'The Revolution of 25 January 2011 and the future of Egypt's relations with the Nile Basin State.' organised by the Cairo University, 30-31 May 2011*), available at http://african.cu.edu.eg/Dr_Abbas/Papers/Minerals_2011.pdf (accessed 6 February 2014).

[19] A S Wawryk 'International Environmental Standards In The Oil Industry: *Improving the Operations of Transnational Oil Companies in Emerging Economies'* (2002) *Vol.13 No.3,* University of Adelaide 1.

© University of Venda

University of Venda
Creating FutureLeaders

expressed the opinion that, when mining is the subject matter, the environment and human rights are never far behind.[20]

Mining activities appear to inevitably generate a conflict between national economic and developmental benefits on the one hand, and the protection of environmental human rights of individuals and communities adjacent to areas in which mining activities are being carried out, on the other hand. It has been scientifically acknowledged that if not properly carried out, mineral extraction potentially causes serious physical environmental damage, in terms of land degradation, water and air pollution.[21] These problems often adversely affect the adjacent communities and in turn, may infringe the environmental human rights of those communities as well as those of their individual members. In other words, the protection of the environment is justified on the grounds of its importance to the realisation of fundamental human rights and human survival.[22]

In response to identified problems in the areas of mineral exploitation, environmental management and human rights, both South Africa and Zimbabwe have established a vast array of national legislation, policies, and specialised institutions. However, the extent to which these governmental interventions reduce the adverse environmental and health effect in Chiadzwa and Mogalakwena is yet to be accurately determined. In other words, despite numerous governmental and industry initiatives to protect the environmental rights of the local communities, the practical effect of such protective measures are yet to be determined in the two countries under study.

Undoubtedly mining operations in Chiadzwa and Mogalakwena have had tremendous effect on civil, political, economic, social, cultural and environmental rights of the local communities. However, this study specifically focuses on environmental rights of the adjacent communities and individuals. This approach is based on the fact that fundamental human rights cannot be enjoyed in a dirty and polluted environment. Conversely, a hazardous environment

---

[20] G McMahon & F Remy 'Key Observations and Recommendations: Synthesis Case Studies, in Large Mines and the Community: Socioeconomic and Environmental Effects in Latin America, Canada and Spain' in G McMahon & F Remy *(ed) International Development Research Centre and the World Bank*' (2001) 22.

[21] A S Wawryk (note 19 above) 1.

[22] OW Pedersen 'European Environmental Human Rights and Environmental Rights: *A Long Time Coming? (2008) Vol. 21 No. 1, Georgetown International Environmental Law Review.* Available at SSRN: http://ssrn.com/abstract=1122289 (accessed 12 January 2013).

© University of Venda

University of Venda
Changing Minds, Changing Lives

compromises a wide spectrum of human rights such as the right to life and the right to health. Therefore, using Chiadzwa and Anglo Platinum Mogalakwena mines as case studies, the researcher strives to examine the effect of mining activities on environmental rights of the adjacent communities.

1.3 Working Definitions

1.3.1 Environment:

- In Zimbabwe the environment is defined as (a), the natural and man-made resources, physical resources, both biotic and abiotic, occurring in the lithosphere and atmosphere, water, soil, minerals and living organisms, whether indigenous or exotic and the interaction between them;
  (b) ecosystems, habitats, spatial surroundings or other constituent parts, whether natural or modified or constructed by people and communities, including urbanised areas, agricultural areas, rural landscapes, and places of cultural significance;
  (c) the economic, social, cultural or aesthetic conditions and qualities that contribute to the value of the matters set out in paragraphs (a) and (b).[23]

- In South Africa the environment is defined as the surroundings within which humans exist and that are made up of—
  (i) the land, water and atmosphere of the earth:
  (ii) micro-organisms, plant and animal life:
  (iii) any part or combination of (i) and (ii) and the interrelationships among and between them: and
  (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.[24]

[23] Section 2 of Environmental Management Act, Chapter 20:27 (EMA).
[24] Section 1(xi) of National Environmental Management Act 107 of 1998 (NEMA).

© University of Venda

1.3.2 Environmental human rights:

- An examination of existing literature and jurisprudence shows two possible approaches that have emerged to formulate the substantive environmental human rights norms. The first approach recognises the right to environment as an entitlement implied or derived from other recognised rights, centering primarily on the substantive rights to life, to health, and to respect for private and family life.[25] The second approach recognises substantive environmental rights as an entitlement autonomous unto itself, dependent on no more than its own recognition. In the words of Atapattu, "[t]he right to a healthy environment...denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognised in the international covenants."[26]

- The second type of environmental rights is procedural environmental rights. Swanson defines procedural rights as processes through which the substantive right can be enforced.[27] Procedural environmental rights include access to environmental information, participation in environmental decision-making, and access to justice in environmental matters.[28]

1.3.3 A clean and healthy environment:

- The phrase "clean and healthy environment" is used in this study to encapsulate the numerous adjectives that, either alone or in various combination, are used to identify or define this right, e.g., "adequate," "decent," "ecologically balanced," "resilient," "sustainable," and "viable" in addition to "clean" and "healthy."[29]

---

[25] H Burns, D Weston & A Bollier 'Regenerating the Human Right to a Clean and Healthy Environment in the Commons Renaissance' Manuscript Version 1.0., The University Of Iowa College Of Law (2011) 13, available at http://commonslawproject.org/sites/default/files/Regenerating%20Essay,%20Part%20I. (accessed 22 April 2013). See chapter 2 (*section 2.4*) below.

[26] S Atapattu, 'The Right to Life or the Right to Die Polluted: *The Emergence of a Human Right to a Healthy Environment Under International Law*' (2002) *16 Tul. Envtl. L.J. 65 at 73.* See chapter 2 (*section 2.5*) below

[27] E Swanson & E Hughes 'The Price of Pollution' *Edmonton: Environmental Law Centre* (1990) 206.

[28] See chapter 2 (*section 2.6*) below.

[29] Burns *et al* (note 25 above) 1.

© University of Venda

University of Venda
Creating Future Leaders

1.3.4 Mining:

- in Zimbabwe "mining" is legally defined as a any place, excavation or working whereon, wherein or whereby any operation in connection with mining purposes is carried on. The Act defines 'mining purposes' as the purpose of obtaining or extracting any mineral by any mode or method.[30]
- in South Africa it is legally defined as any operation or activity for the purposes of winning any mineral on, in or under the earth, water or any residue deposit, whether by underground or open working.[31]

1.3.5 Environmental degradation:

- "Environmental degradation" is defined as the deterioration of the environment through depletion of resources such as air; water and soil; the destruction of ecosystems and the extinction of wildlife.[32]

1.3.6 Environmental Impact Assessment (EIA):

- The International Association for Impact Assessment (IAIA) defines an environmental impact assessment as "the process of identifying, predicting, evaluating and mitigating the biophysical, social, and other relevant effects of development proposals prior to major decisions being taken and commitments made."[33]

1.3.7 Mining communities:

- For the purposes of this dissertation, the phrases "mining communities" and "adjacent communities" are used interchangeably referring to communities staying in and around mining areas. They refer to communities within which mining operations are taking place or communities near mining operations.

---

[30] Section 5(1) of the Mines and Minerals Act (*Chapter 21:05*).
[31] Section 1 of the Mineral Resources and Petroleum Resources Development Act 28 of 2002, (MPRDA).
[32] Johnson, D.L. *et al* 1997. Meanings of environmental terms. Journal of Environmental Quality 26: 581–589.
[33] Principle of Environmental Impact Assessment Best Practice." International Association for Impact Assessment. 1999.

© University of Venda

University of Venda
Creating Future Leaders

1.3.8 Mining operations

- For the purposes of this study "mining operations" is used to cover all aspects of metal production, including mine development, extraction, smelting, re-mining and waste management. [34]

1.3.9 Sustainable development:

- The World Commission on Environment and Development[35] defined "sustainable development" as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

1.4 Research Broad Aim and Objectives

1.4.1 Broad Aim

- To determine the effect of mining operations on the environmental rights of the communities adjacent to Chiadzwa and Mogalakwena mines.

1.4.2 Specific objectives

- To examine the existing international legal mechanisms for the protection of environmental rights of communities adjacent to mining areas.
- To examine and compare the legal mechanisms and policies that have been put in place by the two governments to protect, respect, and promote the environmental human rights of the concerned communities.
- To examine the compliance level of the mining companies in Chiadzwa and Mogalakwena with national and international legislation to achieve the aims and goals of a sound environment.

---

[34] A Warhurst 'Environmental Regulation, Innovation and Sustainable Development' in A Warhurst (ed), *Mining and Environment Cases Studies form the Americas, International Development Research Center, Ottawa, Canada* (1999)16.

[35] World Commission on Environment and Development (WCED) : Our Common Future, 1987 Oxford: Oxford University Press, 81.

© University of Venda

University of Venda
Creative Future Leaders

- To explore the available remedies to the affected communities under national, regional and international human rights law in cases of environmental abuse.

1.5 Research Questions

The study attempts to answer the following questions:

- What are the existing international legal mechanisms for the protection of environmental rights of communities adjacent to mining areas?
- What are the legal mechanisms and policies that have been put in place by the two governments to protect, respect, and promote the environmental human rights of the concerned communities?
- What are the environmental effects of mining activities on Chiadzwa and Mogalakwena communities?
- What is the compliance level of the mining companies in Chiadzwa and Mogalakwena with national and international legislation to achieve the aims and goals of a sound environment?
- What remedies are available to the affected communities under national, regional and international human rights law in cases of environmental abuse?

1.6 Literature Review

The issue of mineral exploitation in both Chiadzwa and Mogalakwena has attracted the attention of a number of human rights watchdog organizations, human rights activists, scholars, planners, and has featured prominently in media reports. The Human Rights Watch conducted a study entitled, 'Diamonds in the Rough: Human Rights Abuses in the Marange Fields of Zimbabwe'.[36] This study primarily focused on how the mining activities affected the first and second generation rights. It is well established that human rights have traditionally been categorised into three broad groups namely first generation or civil and political rights; second generation or

[36]Human Rights Watch (2009), *Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe*, New York: Human Rights Watch, available at http://www.observatori.org/paises/pais_82/documentos/zimbabwe0609web.pdf, (accessed 10 April 2012).

© University of Venda

University of Venda

socio-economic rights; and third generation environmental and cultural rights.[37] The present study goes beyond first and second generation rights. This is because limiting the study to first and second generation rights is inadequate since a clean and healthy environment is essential for the realization of other fundamental human rights. Therefore, this study investigates the mining activities in Chiadzwa to determine their effect on the right to a clean and healthy environment of the adjacent communities.

A study that was conducted by Mtisi[38] focused on how the mining operations in Chiadzwa and Mutoko affected human rights in general. This study also discussed the issue of relocation of the Chiadzwa communities. The researcher in this study did not examine how the right to a clean and sound environment, as advocated under international and national instruments, is affected by the mining operations in Chiadzwa. For example, the study did not examine section 73 of the Zimbabwean Constitution Amendment (No.20) 2013 which provides for the right to an environment that is not harmful to health or well-being. Thus, in order to determine the effect of the mining activities on environmental rights the present study examines the compliance level by the mining companies in Chiadzwa with national and international legislation to achieve the aims and goals of a sound environment.

Mwonzora's[39] is one of the scholars who also studied the effect of mining activities in Chiadzwa. His study was aimed at investigating the role and responses of human rights Non-Governmental Organizations (NGOs) in the relocation of the Chiadzwa communities that was carried out to pave the way for mining operations. The study focuses on the legal and non-legal strategies that were employed by the human rights NGOs to sue mining companies. This study mainly focused on the violation of the right to sustainable livelihoods and violation of the right to compensation and effective remedy to the relocated Chiadzwa communities. The researcher largely confined his study to the social unrest that resulted from the mining operations. No particular attention was given to the effect of the mining operations on the local communities' environmental rights

---

[37] Professor K Vasek is credited with the categorization of human rights into generations. *see* S Mtisi *et al* (note 1 above)16.

[38] Mtisi *et al* (note 1 above).

[39] G Mwonzora "Diamond Rush and the Relocation of the Chiadzwa Community in Zimbabwe, A Human Rights Perspective" Graduate School of Development Studies, MA dissertation *The Hague*: *The Netherlands* 2011.

© University of Venda

University of Venda

in that study. This present study addresses this gap by examining the effect of the mining operations on the environmental rights of Chiadzwa communities.

A study conducted by Global Witness in Chiadzwa[40] examined how the first generation human rights were affected by the mining operations in Chiadzwa. The study focused on how Zimbabwe failed to meet the minimum requirements set out in the Kimberley Process (KP)[41] because of the human rights abuses against civilians. Hundreds of people were killed, beaten, harassed, raped and forced to mine for the army and police. Although the study showed how human rights were violated in Chiadzwa, it did not examine how environmental rights were affected. Therefore, the present study goes beyond civil and political rights by specifically examining how the environment of the Chiadzwa communities was affected by the mining activities.

Another study conducted by the Metropolitan and Regional Planners,[42] discussed the effect of mining activities in Mogalakwena. However, this study did not fully explain the communities' human rights concerns as it only focused on the social unrest that resulted from the relocation that was carried out so as to pave the way for the mining operations. The researcher did not focus on the effect of mining operations on the local communities' right to an environment that is not harmful to their health or well-being, as established in section 24 of the Constitution of the Republic of South Africa Act 108 of 1996. This present study addresses this gap by examining the importance of the right to a healthy environment to one's health and wellbeing and further to the enjoyment of other human rights. This study also examines the compliance level by the Anglo Platinum company with national and international legislation to achieve the aims and goals of a sound environment.

---

[40] Global Witness:2010 Return Of The Blood Diamond The Deadly Race To Control Zimbabwe's New-Found Diamond Wealth Global Witness Limited, available at <http://www.globalwitness.org/library/return-blood-diamond-deadly-race-control-zimbabwes-new-found-diamond-wealth>, (accessed 02 September 2012).

[41] The Kimberley Process was set up about a decade ago in the wake of brutal diamond-fuelled conflicts in countries such as Angola, Sierra Leone and Liberia. It was set out to prevent the devastating trade in conflict diamonds, and address consumers' concerns that their diamond purchases were fuelling human rights abuses.

[42] http://www.mogalakwena.gov.za/docs/Town%20planning/MOGALAKWENA%20RELOCATION%20MANUAL Metropolitan and Regional Planners 2005 (accessed 1 July 2012).

© University of Venda

University of Venda
Creating Future Leaders

There is another study conducted by the Anglo Platinum Company in 2009 in response to South African Human Rights Commission (SAHRC).[43] This study was a follow-up on the recommendations that had been made by the SAHRC to improve resettlement practices and corporate social responsibility, in order to mitigate and avoid potential human rights violations in Mogalakwena. The study mainly focused on the socio-economic advancement that was made by the company in the communities concerned. For instance, the study dealt with some of the rights protected in section 26, 27, and section 29 of the South African Constitution which advocate for the provision of educational facilities, adequate housing, health care services, and appropriate social assistance. Although environmental rights can be subsumed under socioeconomic rights, the study was not carried out from that angle. The researcher did not address the view that socioeconomic rights and other fundamental rights can better be enjoyed in a clean and healthy environment. This present study addresses this gap by examining the effect of the mining operations on the environmental rights of Mogalakwena communities.

In another study that was conducted by Curtis under the auspices of Action Aid South Africa,[44] the author discusses the effect of Anglo Platinum mining operations on poor communities in Limpopo. Given the fact that Anglo platinum has got a number of operations in Limpopo, the author generalised the effect of Anglo Platinum mining activities in Limpopo as a whole. The study mainly examined how socio-economic and cultural rights were affected by the Anglo Platinum mining operations. The study did not consider the effect of mining activities on communities' rights to a clean and sound environment. The research was therefore, limited in scope as it did not consider the Ksentini Report[45] which established the "interdependent, complement and indivisible" relation between human rights and environmental rights. The present research closes this gap by specifically examining the environmental rights of the communities close to Anglo Platinum Mogalakwena mine.

---

[43] South African Human Rights Commission: Mining-related observations and recommendations: *Anglo Platinum, affected communities and other stakeholders, in and around the PPL mine, Limpopo*: Johannesburg South Africa. (2008).

[44] M Curtis 'Precious Metal: *The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa*' Action Aid South Africa (2008), available at <http://www.actionaid.org.uk/doc_lib/angloplats_miningreport_aa.pdf, (accessed on 02 September 2012).

[45] In 1989, a Sub-Commission of the United Nations Commission on Human Rights under the leadership of Mrs. Fatma Zohra Ksentini was assigned to study the possibility for a human right to environment. UN Doc. E/CN.4/Sub.2/1989/C23 (1989) (Ksentini Report).

© University of Venda

University of Venda
Creating Future Leaders

In the final analysis, much has been written about the effect of mining operations in Chiadzwa and Mogalakwena. There is literature that discusses how the aboriginal communities' human rights have been affected by mining operations. However, there is no research that has investigated the effect of mining activities on the environmental rights of Chiadzwa Diamond field and Anglo Platinum Mogalakwena mines. The available studies are either confined to the human rights concerns in Mogalakwena mines only or Chiadzwa. Moreover, the available studies are largely outdated. The present study attempts to fill the gap left in the literature by focusing on the effect of the mining activities in the two areas on environmental rights.

1.7 Relevance and Justification of the Study

Environmental conditions clearly help to determine the extent to which people enjoy their basic right to life, health, adequate food and housing, and traditional livelihood and culture. The purpose of this study is to highlight that although this fact has been appreciated internationally, domestic actions and implementation of protective measures for mining communities are often insufficient. The thrust of the study therefore is to explore the Zimbabwean and South African realities and advance the appreciation of this concept within the corpus of domestic laws and national Constitutions in order to protect fundamental rights of the communities under study. The study also develops relevant recommendations which are meant to constructively contribute to law and policy reform in the two countries.

Undoubtedly, much attention has been paid to the effect of mining operations on the Chiadzwa and Mogalakwena communities. However, an examination of existing literature shows that little research has been carried out with regard to the effect of mining activities on the environmental rights of the two relevant communities. This is what triggered and motivated the researcher to academically undertake this study in an environmental human rights perspective. Given that Zimbabwe has recently renewed its commitment to environmental protection through the inclusion of substantive environmental rights in its 2013 Constitution,[46] the available studies on environmental legislation and the effect of mining operations in Zimbabwe and specifically Chiadzwa need to be updated. The present study, therefore, attempts to fill the gap in the literature by focusing on the effect of the mining activities in Chiadzwa on environmental rights

[46] Section 73 of the Zimbabwean Constitution Amendment (No.20) 2013.

© University of Venda

University of Venda
Creating Future Leaders

in light of the newly adopted Constitution of Zimbabwe, and to make a contribution to Zimbabwe's quest to further align relevant legislation to its new Constitution.

1.8 Hypothesis

This dissertation is based on the premise that mining companies, in their desire to generate as much profit as possible from their operations, do not always comply with legal mechanisms and policies that seek to protect and promote environmental human rights objectives.

1.9 Methodology

1.9.1 Introduction

The researcher used both legal[47] and empirical studies.[48] This study is a mixed method design in that both qualitative and quantitative data was collected to investigate the effect of mining operations in the cases under study on environmental rights of local communities.[49] Quantitative data is presented in the form of numbers whereas qualitative data is presented in the form of words.[50] In this study, more emphasis was on qualitative approach, although quantitative data was used to expand qualitative findings. One of the identified advantages of mixed method is that it provides a better understanding of research problems which quantitative or qualitative approach alone cannot provide.[51] The research findings were explained and analysed using the human rights law framework based on the data gathered using doctrinal legal study as well as empirical study as outlined below.

---

[47] Legal research was carried out by way of a qualitative study.
[48] The study is more empirical since it is inspired largely by a field work. Empirical research was carried out by way of both qualitative and quantitative studies.
[49] Mixed method research is defined as: "a research design with philosophical assumptions as well as methods of inquiry. As a methodology, it involves philosophical assumptions that guide the direction of the collection and analysis of data and the mixture of qualitative and quantitative approaches in many phases in the research process. As a method, it focuses on collecting, analyzing, and mixing both quantitative and qualitative data in a single study or series of studies." Adopted from JW Creswell & VL Plano-Clark *Designing and Conducting Mixed Methods of Research* (2007) 5.
[50] JH McMillan & S Schumacher *Research in education: Evidence-Based Inquiry* (2006) 26.
[51] JW Creswell & VL Plano-Clark (n 49 above) 5.

© University of Venda

University of Venda
Creating Future Leaders

1.9.2 Legal research

1.9.2.1 Doctrinal 'Black Letter Law'

Legal research was carried out by way of a qualitative study. A doctrinal 'black letter law' approach involves profound scrutiny and descriptive analysis of relevant primary and secondary sources of data. Since this study adopts a normative human rights approach, pertinent primary sources including international instruments, legislation, policies and decided cases are scrutinised. The study carries out a content and interpretational analysis of international and regional human rights instruments especially those dealing with environmental regulation as well as sustainable protection of the environment.[52] The analytical approach is used to achieve the aims enumerated above for the purpose of understanding the key environmental rights instruments and also determining their utility in the context of the protection of the rights of the two mining communities under our present study.

The study analyses, compares and contrasts the prominent characteristics of the constitutions and domestic legislation that have been put in place by the two governments to respond to environmental and human rights problems. Laws in both jurisdictions that provide comparable variables for the study which enable a better understanding of the two countries' response to their environmental human rights challenges were discussed.[53] The available literature was also essential in analyzing the effect of mining activities on the right to a clean and healthy environment of the adjacent communities. As such, data was also elicited through secondary sources including books, journals and other relevant scholarly materials. Internet-based literature and newspaper reports were consulted where necessary in order to complement secondary data sources. However, a legal study was insufficient to fulfill the objectives of this study and for the purpose of applying it to the situation on the cases in question. It was therefore necessary to complement it by employing an empirical study.

---

[52] These include, *inter alia*, the Universal Declaration of Human Rights 1948 (Universal Declaration); the International Covenant on Civil and political Rights 1966 (ICCPR); International Covenant on Economic, Social and Cultural Rights 1966 (CESCR); the United Nations Conference on the Human Environment (Stockholm Declaration 1972); the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, (Rio Declarations 1992) and the African Charter on Human and Peoples' Rights (the African Charter 1981).

[53] The Water Act [Chapter 20:22] of 1998, Environmental Management Act Chapter 20:27 (EMA), and the Mines and Minerals Act [*Chapter 21:05*] for Zimbabwe were discussed. In the case of South Africa, the National Environmental Management Act 107 of 1998 (NEMA), Air Quality Act 39 of 2004, National Water Act No 36 of 1998 and the Mineral Resources and Petroleum Resources Development Act 28 of 2002, (MPRDA) were discussed.

© University of Venda

University of Venda
Creating Future Leaders

1.9.3 Empirical research

For the purposes of this study data was collected from Mogalakwena and Chiadzwa mining areas. Since the study is empirical in nature the researcher collected both qualitative and quantitative data from the respective research sites.

> "Mogalakwena mine is located 20 km northwest of the town of Mokopane and falls within the Limpopo Province's Waterberg District (DC36) and Mogalakwena Local Municipalities (one of six local municipalities that make up the district). The estimated population in the municipality, which is made up of 31 wards, is 300 000 people."[54]

> "Chiadzwa is a remote, dry, hilly area composing some 30 villages that are divided into two administrative wards (Mukwada, ward 29 and Chiadzwa ward 30). The combined population of the two wards is estimated to be 20 000. The nearest city, 100 kilometers to the northeast, is Mutare, the provincial capital of Manicaland; and to the south, the nearest town is Birchenough Bridge, about 60 kilometres away."[55]

1.9.3.1 Population sample

Population sample is defined as a portion of the population that has been selected and from whom data is collected for statistical purposes.[56] The significance of sampling lies in the fact that it enables the researcher to obtain a group of respondents who will be representative of the larger population. The researcher chose key existing population groups in the respective research sites to represent the population sample in this study. These include companies' personnel, government and NGO representatives that work with the local communities under study and some ordinary citizens in the respective research sites. The researcher, with the help of research assistants, visited the different places at the respective research sites where the potential respondents could be found.

---

[54] Anglo Platinum Mogalakwena Mine (note 13 above).
[55] Human Rights Watch (note 36 above) 12.
[56] JH McMillan & S Schumacker *Research in education: A conceptual introduction* (1997) 68-70.

© University of Venda

University of Venda
Creating Future Leaders

1.9.3.2 Sampling design

For the purposes of this study, the researcher employed both probability and non-probability methods as the sampling design for the study.[57]

(a) Probability sampling

Simple random sampling

Villages within which focus group discussions and interviews were conducted were randomly selected. The researcher determined the approximate number of villages in both Chiadzwa and Mogalakwena and then decided on the number that can be a true representative of villages in the cases under study. The villages were allocated specific numbers on cards which were mixed in a container and picked up randomly. As such 10 out of 30 villages near the mines were selected for the study. This procedure gave each village an equal probability of being selected.

(b) Non-probability sampling

Convenience sampling

Convenience sampling was employed in the randomly selected villages to come up with ten community members that participated under focus group discussions. The targeted participants in the sample were selected based on the ease of access. Conducting in-depth focus-group discussions with these respondents allowed the researcher to get a particular point of view on the effect of the mining activities on the communities' environmental rights. The findings were generalised for the whole community.

Purposive random sampling

Purposive random sampling was done for the key informants' interviews.[58] This sampling method ensured that all categories of the key informants in both cases are considered in the

[57] "In a probability sample each unit or element in the general population has an equal or known chance of being included in the sample. By contrast, it is not possible to determine the likelihood that an element of the population might be included in the sample if one employs a nonprobability sampling technique." Michael R. Leming. Research and Sampling Designs: Techniques For Evaluating Hypotheses, available at http://www.stolaf.edu/people/leming/soc371res/research.html (accessed on 18 August 2014).

© University of Venda

University of Venda

research. The key informants were drawn from the mining companies' personnel, government and NGO representatives that work with the local communities under study, and some ordinary citizens in the respective research sites. Respondents for interviews were randomly selected through picking cards which were either written 'YES' or 'NO'. If one picks a 'Yes' card, he/she would be selected to represent the category of respondents, and the opposite is true.

1.9.3.3 Data collection methods

Due to the mixed nature of the design, there was also a combination of the data collection methods to determine the effect of the mining activities on the environmental rights. The methods of data collection for this study included focus group discussions and interviews. Interview schedule (guide) contained questions pertinent to the research problem. In order for the researcher to obtain standardised responses, interview questions were the same as those for focus group discussions. Questions for the entire research were presented in two categories, that is, questions related to substantive environmental rights and questions related to procedural environmental rights.

Under substantive environmental rights all respondents in both cases were asked questions which related to their views on the following themes: (i) the destruction of land, forests and plants, (ii) air pollution, (iii) water pollution, (iv) noise and vibration pollution and (v) waste production. Respondents were also required to provide their views on the effect on mining operations on procedural environmental rights which include: (i) access to environmental information, (ii) participation in environmental decision-making and (iii) access to justice in environmental matters. The open-ended questions in both interviews and focus-group discussions gave respondents the opportunity to express their experiences, feelings and emotions. Respondents were able to supply relevant information to the research problem which enabled the researcher to assess the effect of mining operations on the environmental human rights of the local communities.

[58] It is contended that a careful, purposeful and relevant random selection of respondents is likely to produce better results than when the whole population is included. See JH McMillan & S Schumacker (n 56 above) 71.

© University of Venda

University of Venda
Creating Future Leaders

(a) Interviews

Interviews, according to Jonhson and Turner[59] are suitable for the provision of in depth information as the investigator seeks answers to a set of pre-conceived questions. Face to face interviews were carried out with key informants like the community leaders; government representatives; mining companies' personnel and also some individual community members who gave important information for the purposes of the research. The use of interviews as a research instrument allowed even the illiterate community members to respond to interview questions. Moreover, interviews enabled the researcher and his assistants to probe further or repeat questions during interviews for clarity about any human right or environmental issue.

(b) Focus Group Discussions

The researcher employed focus group discussions for data collection. Kumar[60] suggests that focus group discussion is a rapid assessment, semi-structured data gathering method in which a purposively selected group of people directly affected by an issue gather to discuss their concerns based on a list of key themes prepared by the researcher. This method was advantageous as it accommodated probing and also insider perspective. Focus group discussions were useful for exploring ideas that laid a foundation for the appropriate recommendations that include views of participants.

The researcher undertook population sampling and data gathering in Mogalakwena communities with the help of research assistance due to unique languages which the researcher barely understands. The researcher chose two young educated Mogalakwena individuals as research assistants. They helped with translation and mobilizing the community. Although the researcher is Shona proficient, research assistants were also needed in the case of Chiadzwa.

---

[59] Johnson and LA Turner *Hand Book of Mixed Methods in Social and Behavioral Research Stage (*2003) 309.
[60] K Kumar '*Conducting Focus Group Interviews in Developing Countries*.' A.I.D. Program Design and Evaluation Methodology (1987) Report No. 8. Washington, D.C.: U.S. Agency for International Development.

© University of Venda

University of Venda
Creating Future Leaders

1.9.3.4 Data analysis techniques

When all the data was collected, it was reduced and conceptualised in response to the research problem. As noted earlier on, the researcher collected and analysed the data both quantitatively (rating responses on predetermined scales) and qualitatively (developing themes). Questions for the entire research were presented in two categories, that is, questions related to substantive environmental rights and questions related to procedural environmental rights. The data was expressed as percentages of total responses on each environmental issue examined. A quantitative and qualitative interpretation was made. The researcher chose to quantify and express the data in percentages so as to provide a standard measure for ease of analysis and interpretation. It was from this interpretation that the researcher was able to evaluate the effect of mining operations at the respective research sites on environmental rights of local communities. As noted above, the research findings are explained and analysed using the human rights law framework based on the data gathered using both legal and empirical approaches.

1.10 Ethical Considerations

The research is based on empirical study conducted through exploration and data analysis pertaining to the effect of the mining activities on environmental human rights. For the purposes of the integrity of the study, all the journal articles, books, cases, legislation, internet sources and other relevant documents referred to in the study are acknowledged so as to avoid plagiarism and respect copyright laws.

This researcher is bound by UNIVEN policy research ethics which provide that the rights and welfare of all who participate as subjects in University research activities are of primary importance. Their rights must be protected by conscientious scrutiny in order to identify all foreseeable risks. It is also mandated that subjects should be afforded the opportunity to protect themselves and should participate only by consent, freely given after having received adequate information about the project in order to evaluate risks that may be encountered as well as the legal limitations to anonymity and confidentiality. Finally, subjects must be able to rely on the

© University of Venda

University of Venda
Creating Future Leaders

researcher to respect their privacy, to maintain their anonymous status and to keep confidential all data collected for the project.

With the help of a consent form, the researcher ensured that respondents have given informed consent and ensure confidentiality and anonymity of participants. The researcher complied with these laid down ethical principles for the purposes of obtaining anticipated data from the respondents.

1.11 Research Scope Overview

This study comprises of 5 chapters. Chapter 1 provides a general introduction to the entire study. It focuses on background to the study, problem statement, definitions, aims and objectives, research questions, literature review on the historical background on environmental rights in relation to the mining activities, hypothesis, methods of data collection; methods of data analysis, ethical considerations, research overview and limitations of the study. The chapter is aimed at setting the foundation and framework within which this study should be understood.

Chapter 2 outlines the development of environmental human rights and current legal mechanisms available that recognize the existence of international environmental human rights law. It examines forms in which substantive environmental rights are secured in the international legal system, and their development. The legal effect and the applicability of these instruments in Zimbabwe and South Africa are also discussed in this chapter. The chapter also shows that there are a range of procedural rights at the international level. The aim of this chapter is to provide an overview of the concept of environmental claims as a major legal innovation that addresses the complex relationship between human beings and the environment.

Chapter 3 establishes how both South Africa and Zimbabwe have responded to identified problems in the areas of mineral exploitation and environmental and human rights protection at the national level by establishing a vast array of national legal instruments, policies, specialised organs, and agencies. The chapter analyses, compares and contrasts the prominent characteristics of the legal mechanisms, policies and systems that have been put in place in the two jurisdictions to protect, respect, and promote the environmental human rights of the communities under study. The analytic approach in this chapter helps in understanding how the

© University of Venda

University of Venda

two communities under study could use national human rights law framework to defend their environmental rights during the mining operations.

Chapter 4 presents the findings and an analysis of the collected data is also made to so as to determine the effect of the mining operations on the aboriginal communities' environmental rights. While chapters 2 and 3 look at the laws in both jurisdictions that protect environmental rights, chapter 4 focuses on their implementation on the ground. An evaluation of the implementation of these laws helps in determining if efforts of governments in both jurisdictions ensure that citizens are not only stuck with relevant laws but that the laws are in fact used in practice to ensure the realization of their environmental rights. This chapter presents both quantitative and qualitative data which helps in evaluating the effect of mining activities on the environmental rights of individuals and communities residing adjacent to mining areas under study. Factors that affect the realization of environmental rights at the respective research sites are also discussed in this chapter.

Chapter 5 presents policy recommendations and general conclusions derived from the study. Conclusions are based on the assessment of the extent the mining companies in Chiadzwa and Mogalakwena practically respond to the relevant environmental management legislation for the protection and promotion of the environmental rights. In addition, best practices and future research directions are suggested here.

1.12 Limitations of the Study

1.12.1 Language and cultural barriers

The Mogalakwena communities have unique languages which the researcher barely understands because he is from a different language background. The researcher dealt with this limitation by choosing two undergraduate Mogalakwena individuals as research assistants. They helped with translation and mobilizing the community.

© University of Venda

1.12.2 Access to targeted participants

The main targeted participants of the study are the Chiadzwa and Mogalakwena communities and representatives of relevant Government Ministries. Appropriate community mobilizations were carried out so that the targeted participants 'buy into' the study and give informed consent. Bureaucracy and possibly tight schedules presented challenges and negative effect on time and availability to targeted respondents. However, efforts were made to persuade them to participate in the research.

1.12.3 Cost

The research involves case studies from two different countries therefore it virtually involved international travelling costs. Stipends for research assistants, meals, accommodation, printing and communication cost were of paramount importance for the purposes of this research. Failure to meet expected costs would adversely affect the execution and completion of the study. However, the researcher had a set-aside budget for the study. Negotiations were also made with the research assistants so that the stipends remain at a minimal.

© University of Venda

2 INTERNATIONAL HUMAN RIGHTS STANDARDS ON ENVIRONMENTAL HUMAN RIGHTS

2.1 Introduction

This chapter exposits the normative international framework for the purpose of understanding the key environmental rights instruments and determining their utility in the context of protection of the rights of the individuals. It examines the forms in which substantive environmental rights have been secured in the international legal system, and their development. The study also considers whether the right to a healthy environment can be implied in human rights instruments not expressly stipulating it. It discusses the legal effect and the applicability of these instruments in Zimbabwe and South Africa. The chapter proceeds by determining whether customary international law recognises the right to a healthy environment. The aim of the discussion in this chapter is to provide an overview of the concept of environmental claims as a major legal innovation that addresses the complex relationship between human beings and the environment. It then examines a new aspect of environmental rights commonly known as procedural environmental rights.[61]

2.2 The Concept of Environmental Rights

For any right to be enforceable, it must be sufficiently defined to permit a correlative remedy. In the case of "environmental rights," for which there is no unanimous definition, the lack of clarity regarding meaning and content leads to difficulties of enforcement. The term "environmental rights" is apparently elusive and controversial: elusive in the sense that there is no universal definition; controversial for the reason that stakeholders from the environmental sector define it from an eco-centric perspective (environment centered)[62] while the human rights constituency is

[61] There are a range of procedural rights at both international and domestic levels which include the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice in environmental matters.

[62] D Shelton 'Human Rights and the Evironment: *What Specific Environmental Rights Have Been Recognized?'* (2006) 35 *Denver Journal of International Law and Policy*, 129, 163 ("Moreover, recognizing a right to environment could encompass elements of nature protection and ecological balance, substantive areas not generally protected under human rights law because of its anthropocentric focus."); see J Bruckerhoff 'Giving Nature Constitutional

© University of Venda

University of Venda

predominantly anthropocentric (humans centered). It is in this context that defining the content of environmental rights becomes a challenge.

Lack of clear definition posses the challenge on the possibilities of enforcing environmental human rights.[64] At a minimum, "environmental right" could mean the right of individuals and peoples to an ecologically sound environment and sustainable management of natural resources conducive to sustainable development.[65] Some contend that environmental rights encompass three main areas: the right to act to protect the environment; the right to a clean and sound environment. The last is a procedural right as it helps in participating in environmental decision-making and access to justice. The definitional issues surrounding environmental rights may arguably have resulted from the progressive integration of international human rights and environmental law which have traditionally been conceived as distinct. The following section gives an overview of human rights and environmental rights jurisprudence.

2.3 A Brief Overview of the Nature and Development of Environmental Rights

International human rights law (IHRL) and international environmental law (IEL) have traditionally been envisaged as two independent and distinct rights. Whereas the United Nations Charter of 1945 marked the beginning of the modern international human rights law, the United Nations Conference on the Human Environment in Stockholm which adopted the Stockholm Declaration in 1972 is generally seen as the genesis of the modern international framework for environmental protection.[66] However, the development of concern for human rights and for the

---

Protection: *A Less Anthropocentric Interpretation of Environmental Rights*' (2008) 86 Texas Law Review 646 ("A less anthropocentric interpretation of constitutional environmental rights could be one, albeit small, component of national and international efforts to protect the wonders of nature for us and for the benefit of our children.")

[63] RS Abate '*Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 10 (2007), at 10 ("Existing sources of domestic and international law embrace a human-centered approach to environmental protection and recognise the connection between human rights and environmental protection. These mechanisms can serve as a viable foundation upon which to build a new system to recognise and protect international environmental human rights.")

[64] JR May and E Daly '*Vindicating Fundamental Environmental Rights Worldwide,* Oregon Review of International Law' (2009) Vol. 11, 381 ("The nearly unending scope of a human right to a quality environment can diminish judicial receptivity to enforcing such a claim. To some, the scope of definitional issues suggests that whether or not to recognise environmental rights is best left to a legislative body, not to courts, and therefore ought not to be addressed in judicially enforceable constitutional provisions.")

[65] J Razzaque 'Human Rights and the Environment: Developments at the National Level, South Asia and Africa' *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment* 14-16 January 2002 Geneva.

[66] FX Perrez, 'Human Rights and the Environment Proceedings of a Geneva Environment Network roundtable: *The United Nations Environment Programme for the Geneva Environment Network'* (2004).

© University of Venda

University of Venda
Creating Future Leaders

environment has been a key process which culminated from early 20th century.[67] Recent decades have witnessed a progressive integration of international human rights norms and environmental law.[68] However, this development poses many difficulties due to uncertainty as to, first, the extend of its application and, second, the potential conflict with existing international environmental law. Another area of possible uncertainty regards the perspective that a human right to a healthy environment could incorporate an intrinsic view of the environment.[69]

Because of the many complex issues that arise when these two seemingly distinct spheres of law interact, it is to be likely that there are different views on how to approach "human rights and the environment". An examination of existing literature and jurisprudence shows two possible approaches that have emerged to formulate the substantive environmental human rights norms.[70] The first approach recognises the human right to environment as an entitlement implicit within already-established human rights. The second approach recognises a free-standing right to environmental quality. These two approaches are conceptually distinct and have received different treatments in international instruments and judicial decision-making. This section will discuss in detail these two categories of substantive environmental rights and their implications for states, individuals and communities.

2.4 Substantive Environmental Rights Implicit in established Human Rights

Substantive environmental rights are distinguished as an entitlement implied or derived from other recognised rights, centering primarily on the substantive rights to life, to health, and to

---

[67] M Adebowale *et al* 'Environment and Human Rights: *A New Approach to Sustainable Development*' International Institute for Environment and Development (IIED), (2001) 1.

[68] Thorme contends that "[t]he idea of environment as a human right first emerged in the international arena in 1968 when the General Assembly of the United Nations recognised that technological changes could threaten the fundamental rights of human beings" in a U.N. General Assembly Resolution. See M Thorme 'Establishing environment as a human right. *Denver Journal of International Law and Policy*' (1991) *19*, 303. In the same vein, Gormley identifies the Council of Europe's Conservation Year in 1970 as an important precursor to the Stockholm Declaration, albeit with less international participation. See WP Gormley 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms. *Georgetown International Environmental Law Review' 3*, (1990) 98.

[69] L Horn 'The Implications of the Concept of Common Concern of A Human Kind on A Human Right to A Healthy Environment' *MqJICEL (2004) Vol.1 University of Western Sydney* 233.

[70] N Vlavianos 'The Intersection Of Human Rights Law And Environmental Law: *A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage'* (2012) Canadian Institute of Resources Law: Faculty of Law University of Calgary. At 4, available at http://www.cirl.ca/system/files/Nickie_Vlavianos-EN last accessed on 22 April 2013.

© University of Venda

University of Venda

respect for private and family life.[71] The identification and delineation of a distinct corpus of substantive environmental rights stem from the fact that environmental protection is intrinsically related to a number of other human rights within the international human rights law and comes out as both a precondition and an outcome of the enjoyment of many related rights.[72] In other words, a clean and healthy environment contributes to the fulfillment of the human rights and that the denial of a clean and healthy environment invariably impedes the enjoyment of other rights. Based on this position, the subsequent section analyses the content and implications of this right for individuals and communities as it has been appreciated at the international level.

2.4.1 International Human Rights Law

In the past decades, the international community has responded to identified problems facing the areas of human rights and development by adopting international legal instruments at the global and regional levels. Despite the fact that international human rights treaties[73] do not contain a free-standing environmental right, most international human rights bodies have accepted the interrelationship between environmental degradation and fundamental human rights. International wakefulness of environmental and human rights problems has expanded the civil, political, and socio-economic rights to encompass environmental element.[74] This conceptual approach is based on the fact that environmental rights should be deduced from other existing human rights, because human rights already have a strong institutional structure and could lead to an effective right to a clean environment.[75]

---

[71] Burns *et al* (n 25 above 13).

[72] UN General Assembly Resolution 45/94, Preamble § 3, 14 December 1990; Need to Ensure a Healthy Environment for the Well-Being of Individuals (UN Doc. A/45/49, at p. 178).

[73] See, for example, Universal Declaration, the ICCPR, and the ICESCR.

[74] For example, in the *Case Concerning the Gabcikovo-Nagymaros Project* Justice Weeramantry, of the International Court of Justice (ICJ), explained in his separate opinion that, "The protection of the environment is .... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." *See ICJ 1997 General List No. 92, 25 September 1997, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)* 91-92. This proposition is also reflected in the report for the Office of the High Commissioner for Human Rights in which it was stated that "While the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognise the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing." Adopted from UN HRC, Report of the OHCHR on the relationship between climate change and human rights, UN Doc. A/HRC/10/61, 15 January 2009, para. 18.

[75] MR Anderson 'Human Rights Approaches To Environmental Protection: An overview' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection'* Oxford: Clarendon Press. (1996).

© University of Venda

University of Venda

This study will only examine the international human rights instruments whose provisions have got the most immediate consequences for Zimbabwe and South Africa. There has been an explicit or implicit acknowledgment of the right to a healthy environment since the Universal Declaration of Human Rights in 1948 (Universal Declaration).[76] The Universal Declaration pioneered international human rights, although it is not a binding instrument. Nonetheless, with necessary recognition and continued adherence to its principles by states, the Universal Declaration has attained the status of customary international law. It calls upon members of the international community to respect the human rights. The rights in the Universal Declaration are fleshed out in the ICCPR and the ICESCR both of which were adopted in 1966 and entered into force in 1976.

There is no explicit human right to a clean environment in the Universal Declaration. Nonetheless, as shall be discussed below, international human rights bodies like the African Commission on Human and Peoples Rights and the Inter-American Commission on Human Rights have set a commendable standard for the interpretation of the already-established human rights in favor of environment related human rights. It would, therefore, be rational to aver that invoking fundamental human rights such as the rights to life, health, self-determination, food, and housing, provides a powerful base for ensuring state accountability for environmental issues. In other words, damage to the environment can impair and undermine fundamental human rights protected in the Universal Declaration, the ICCPR and the ICESCR, collectively known as the International Bill of rights. These international human rights instruments will be discussed below as they have the legal foundation for the exercise of the rights for environmental ends.

2.4.1.1 UN International Covenant on Civil and Political Rights (ICCPR) 1966

The ICCPR was adopted by the United Nations General Assembly in 1966 and entered into force in 1976. Zimbabwe became a state party to the ICCPR in 1991 and South Africa in 1998. The ICCPR generally covers civil and political rights which are generally categorised as 'first

[76] Kingham 'Human rights and Environmental rights: Implications of a 'right based' approach for mining in Australia' (Paper presented at the Queensland Environmental Law Association Conference 2003, 8 May 2003), available at http://www.sclqld.org.au/qjudiciary/profiles/fykingham/publications/ (accessed 24 April 2013).

© University of Venda

University of Venda

generation' rights. These rights are contained in most Bills of Rights of national constitutions worldwide. Like the Universal Declaration, the ICCPR makes no definite reference to the environment neither does it explicitly formulate environmental rights. Some provisions of the ICCPR may, however, be given wide connotation, to include a right to a clean environment. For example, Article 6 (1) of the ICCPR provides that, "Every human being has the inherent right to life." The right to life is entrenched in national constitutions in most parts of the world. It has been persuasively argued that environmental rights can be viewed as part of the well-established human rights norms, such as the right to life.[77] Therefore, the right to environment can be construed from the right to life.

This proposition is supported in a number of international, regional and domestic judicial decisions. Indeed the United Nations Human Rights Committee has confirmed that the right to life should not be narrowly construed.[78] In *EHP v. Canada*[79] the United Nations Human Rights Committee acknowledged the potential for environmental contamination to violate existing human rights. It was alleged in that case that the storage of nuclear waste in the community threatened their right to life. Even though the claim was found inadmissible due to failure to exhaust domestic remedies, the Committee stated that, "the present communication raises serious issues [under article 6(1)] with regard to the obligation of States parties to protect human life."[80] Generally it can be concluded that fundamental right to life is threatened by environmental degradation and hazardous wastes.[81] Therefore, the right to life may compel government agencies to take positive measures that ensure extension of life expectancy. This may, for example, include the provision of adequate living conditions like better drinking water and air pollution controls. Positive measures may also be taken for the abatement and prevention of pollution.

[77] This view is based on the assumption that a clean and healthy environment contributes to the fulfillment of the fundamental rights and that the denial of a clean and healthy environment invariably impedes the enjoyment of other rights. See generally Burns *et al* (n 25 above) 13.

[78] General comment 6.

[79] Human Rights Committee, 17th Sess., Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (27 October 1982).

[80] At para. 8.

[81] Klaus Toepfer, Executive Director of the United Nations Environment Programme, reflected this approach in his statement to the 57th Session of the Commission on Human Rights in 2001. See generally D Shelton 'Health and Human Rights Working Paper Series no 1 Human Rights, Health & Environmental Protection: Linkages in Law & Practice: A Background Paper for the World Health Organization.' London (2002) 3.

© University of Venda

UNIVERSITY OF VENDA

University of Venda
Creating Future Leaders

At the regional level, in the case of *Yanomami Indians v. Brazil*,[82] the Inter-American Commission on Human Rights found that petitioners' rights to life, to the preservation of health and well-being, among other rights, were violated when a highway constructed through Yanomami territory in Brazil brought diseases to the Yanomami people. Another regional body, the African Commission on Human and Peoples Rights, found Nigeria in violation of the right to life for permitting oil production in Ogoniland to take place with complete disregard for the environment or health of the local inhabitants resulting in daily discharges of toxic waste into rivers and nearby areas which,

> ". . . together with constant spillages from petroleum installations, resulted in water, land, and air pollution (environmental degradation) and seriously impaired the health of the inhabitants of that area, causing skin infections, and gastrointestinal and respiratory diseases, as well as increasing the risk of cancer and reproductive and neurological disorders."[83]

It is clear from these cases that the relationship between environmental protection and the enjoyment of human rights has been appreciated internationally and regionally.

2.4.1.2 International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966

The ICESCR was adopted by the United Nations General Assembly in 1966 and entered into force in 1976. Zimbabwe became a state party to the ICESCR in 1991. South Africa signed the ICESCR in 1994 but at the time of writing it has not ratified it.[84] Economic, social and cultural rights are commonly referred to as 'second-generation rights' or 'positive rights' due to their requirement for the duty bearers (the state) to take positive action that will result in their realization. As such, the state may enact relevant laws and policies; develop programs as well as provide resources that will result in the realization of these rights.[85] Like the Universal Declaration and the ICCPR, the ICESCR makes no definite reference to the environment neither does it explicitly formulate environmental rights. This shows that insufficient attention has been paid to environmental human rights by pioneering international human rights

---

[82] (1985) Inter-Am. Comm.H.R. No.7615, *Informe Annual de la Comisión Interamericana de derechose humanos: 1984-1985*, OEA/Ser.L.V/II.66/doc. 10 rev. 1.
[83] Communication Nº 155/96, African Comm. Hum. & Peoples' Rights, Done at the 30th Ordinary Session, held in Banjul, The Gambia from 1327 October 2001.
[84] Status of ratification of the ICESCR, available at http://www2ohchr.org/english/law/cescr.ratify.htm, (accessed 6 August 2013).
[85] Mtisi *et al.* (n 1 above)16.

© University of Venda

University of Venda
Creating Future Leaders

instruments. Perhaps this is because the pioneering international human rights treaties were drafted and adopted before environmental protection had become an international development agenda.[86]

Although the ICESCR does not explicitly formulate environmental rights, it can persuasively be argued that a healthy environment can possibly be treated as an economic or social right, comparable to those whose progressive attainment is promoted by the ICESCR.[87] This approach views certain socio-economic rights as essential elements to achieving environmental protection, which has as a principal aim in the protection of human health. In other words, 'second generation rights' may serve as legal basis for a right to a healthy environment, when interpreted in the environmental context.

Among the socio-economic rights contained in the ICESCR are the right to work under satisfactory conditions and the right to enjoy the best attainable state of physical and mental health[88] to which end the state parties are obliged to take the necessary measures to protect and ensure the health of their people. Article 7 of the ICESCR imposes a positive obligation on member states to recognise the right of everyone to the enjoyment of just and favorable conditions of work, which ensure, in particular, safe and healthy working conditions.[89] Arguably, these provisions may be given wide connotation, to include a right to a clean environment. In this regard, tribunals and commentators have acknowledged that environmental degradation may result in deprivations of the rights to health,[90] suitable working conditions,[91] adequate standard of living,[92] and culture.[93]

Human rights bodies like the UN Human Rights Committee and the Committee on Economic Social and Cultural Rights have adopted various General Comments that are pertinent to environment. The former noted in its General Comment 12 that states must adopt food safety

---

[86] Shelton and Kiss (n 167 above) 395.
[87] AE Boyle *UNEP Paper Revised* Human Rights and the Environment: A Reassessment University of Edinburgh and barrister, London. (2010) 1.
[88] Article 12(1).
[89] In terms of article 7 of the ICESCR, the state parties are called upon to recognise the right of everyone to the enjoyment of just and favorable conditions of work which ensure, inter alia, safe and healthy working conditions.
[90] Atapattu (n 26 above) 101.
[91] D Shelton 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28. 103, *Stanford Journal of International Law* 112.
[92] Atapattu (n 26 above) 102.
[93] D Shelton 'The Environmental Jurisprudence of International Human Rights Tribunals' in Picolotti & Taillant, (ed) *Linking Human Rights and the Environment*, Tucson, AZ: University of Arizona Press, (2003) 18-19.

© University of Venda

University of Venda

and other protective measures to prevent contamination through a bad environmental hygiene.[94] It also noted in General Comment 4 that housing should not be built on polluted sites nor in proximity to pollution sources that threaten the right to health of the inhabitants.[95] In General Comments 14 and 15, the Committee on Economic Social and Cultural Rights interpreted Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation; the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health.[96] It should be reiterated that although the CESCR failed to proclaim an explicit human right to environment, its provisions can persuasively be construed to imply substantive environmental rights which guarantee individuals the right to a specific quality of environment.

2.5 The Concept of a Free-Standing Environmental Right

The previous section focused on substantive environmental rights as an entitlement implied or derived from other recognised human rights. This section focuses on the second approach which recognises substantive environmental rights a free-standing right to a healthy environment. "The right to a healthy environment...denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognised in the international covenants."[97] This formulation of environmental rights obviates the need for the reinterpretation and mobilisation of existing human rights for environmental protection. The holder is entitled to a specific quality of environment.[98] The phrase 'clean and healthy environment' is frequently used to encapsulate the numerous adjectives that are used to identify or define this right. In addition to the word 'clean' and 'healthy,' other epithets employed in this context include: 'decent,' 'adequate,' 'ecologically balanced,' 'viable,' 'resilient,' and

---

[94] General Comment 12, E/C.12/1999/5.
[95] General Comment 4 of 13 December 1991, United Nations, Compilation, HRI/GEN/1/Rev.3, 63, para. 5. see Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment 14-16 January 2002, Geneva: Background Paper No. 2 : Human Rights and the Environment: Jurisprudence of Human Rights Bodies : Professor Dinah Shelton University of Notre Dame.
[96] AE Boyle 'Human Rights and International Environmental Law: *Some Current Problems*' London (2011) 5.
[97] Atapattu (n 26 above) 73.
[98] Turner (n 33 above) 6-7.

© University of Venda

University of Venda

'sustainable.'[99] Various international human rights instruments on the environment and national Constitutions have these different adjectives appended to the word 'environment.

2.5.1 A free-standing right to environmental quality under the global and regional levels

It is clear at this stage that not much attention has been paid to environmental human rights by international human rights instruments.[100] Whereas the United Nations Charter of 1945 marked the beginning of modern international human rights law, the Stockholm Declaration of 1972 is generally seen as the genesis of the modern international framework for environmental protection.[101] Thus international human rights law and international environmental law have traditionally been treated as two independent and distinct spheres of rights.

There is no international covenant, comparable to other leading human rights instruments,[102]that entrenches environmental rights. Since environmental rights are only explicitly protected in non-binding international instruments, there are no appropriate enforcement mechanisms to ensure their enforcement and implementation. As such, it is ambiguous as to how environmental rights violations should be addressed at the international level. This is different from fundamental rights entrenched in other leading human rights instruments such as the ICCPR, ICESCR which can be implemented or enforced through the United Nations Human Rights Committee (UNHRC) and the Committee on Economic Social and Cultural Rights respectively.

According to Hughes, the difficulty and delay involved in reaching consensus on the language of binding environmental treaties explains the predominance of "soft law"[103] instruments in

---

[99] Burns *et al.* (note 25 above) 1.

[100] Perhaps this is because the pioneering international human rights treaties were drafted and adopted before environmental protection came on to the international development agenda. See generally Shelton & Kiss (n 167above) 395.

[101] Perrez,F. X. (note 66 above)

[102] Some of the leading human rights instruments include the ICCPR and the ICESCR.

[103] 'Soft' international law consists of imprecise standards, generated by declarations adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'. See J Dugard *International law. A South African perspective* (2005) 36. Soft law is not directly enforceable in courts and tribunals. Despite the fact that it lacks legal status, there is a strong expectation that their provisions will be respected and followed by the international community. See generally E Filmer-Wilson & M Anderson*: Integrating Human Rights into Energy and Environment Programming: A Reference Paper* (2005) 15-16.

© University of Venda

University of Venda
Creating Future Leaders

international environmental law.[104] "The basic role of soft law is to raise expectations of conformity with legal norms, and to create uniformity in the interpretation of these norms."[105] Soft law can solidify into hard law over time, when these "expectations of conformity" bring about state practice ("accepted as law")[106] or through inclusion in binding conventions, and this has become a significant pattern in international environmental law.[107] In other words, with necessary recognition and continued adherence to soft law by states, they may have attained the status of customary international law. Therefore, given sufficient time and State recognition soft law develops into a hard or binding part of the legal framework.

The Stockholm and the Rio Declarations form the central part of this section. In some jurisdictions courts have referred to the Stockholm Declaration and to the Reo Declaration in order to emphasize their decisions.[108] According to Starke, "the decisions of state courts may, under the same principle as dictate the formation of customs, lead directly to the growth of customary rules of international law."[109] This shows that international environmental 'soft law' has an influence on the interpretation of rights. A number of provisions of these instruments addressing the human right to environment will be examined in this section as they have more than mere rhetorical force. In other words, soft law provisions are the likely forerunners to

---

[104] L A Hughes, 'Foreword: The Role of International Environmental Law in the Changing Structure of International Law' (1998) 10 *Georgetown International Environmental Law Review* 246.

[105] Hughes, (note 104 above) 246.

[106] *Statute of the International Court of Justice,* June 26, 1945, Can. T.S. 1945 No. 7, art. 38 (b), available at: International Court of Justice http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

[107] See generally Hughes, (note 104 above) 246.

[108] For example, in the Indian case of *R.L.E.K. Dehradum, v. State of U.P. AIR 1985 SC 652,* the Supreme Court dealt with the impact of mining in the Doon Valley region and through its orders impliedly recognised a new fundamental "right of the people to live in healthy environment with minimal disturbance of ecological balance."*(Pp.656 Para 12).* In this case, the Supreme Court considered a right to a healthy environment based in part on the provisions of the Stockholm Declaration. In the same vein, the Supreme Court of India shows, in the case of *M.C. Mehta, v. Union of India AIR 1988 SC 1037* that international environmental soft law has influence on the interpretation of rights. In that case the Court extensively cited the Stockholm Declaration and strengthened the then emerging fundamental right to environment in India. In this case the court gave preference to 'environment rights' over 'employment rights' and 'revenue generation concerns'. *See Para 4 (pp. 1038-1040).* On the other hand, the Supreme Court of Nepal considered a right to a healthy environment based in part on the provisions of the Rio Declaration. In the case of *Keder Bhakta Shrestha and Others v. HMG, Department of Transportation Management and Others, Writ No. 3109 (1999),* the Court upheld a decision of the government to prohibit the use of three-wheeler diesel engine *tempos* in the Kathmandu Valley. The court recognised that this decision interfered with the freedom to carry on a trade or business, but it considered that such interference was justified given the legitimate aim to guarantee the right to live in a healthy environment and to protect public health. The Court considered that the environment is interlinked with the right to life and therefore appropriate measures have to be taken for the protection of the environment. In 1994, the Rio Declaration was also cited in the *Law Society of India v. Fertilizer & Chemical Travancore Ltd. AIR 1994 Ker. 308.*

[109] JG Starke *Introduction to International Law* (1994) 48.

© University of Venda

University of Venda
Creating Future Leaders

binding international legal obligations in this area. As such, there is a strong expectation that their provisions will be respected and followed by the international community.[110]

2.5.1.1 The United Nations Conference on the Human Environment in Stockholm 1972 (Stockholm Declaration)

The international community's commitment to protect and enhance the environmental quality found expression in the decisions taken at the Stockholm Conference. The Stockholm formulation clearly refers to a fundamental right to adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.[111] There are two schools of thought with respect to the phraseology of Principle 1 of the Stockholm Declaration. The first school of thought is of the view that Principle 1 proclaims an environmental right as implicit within other human rights. The other school of thought is of the view that Principle 1 proclaims a free-standing right to a clean and healthy environment.

Scholars who subscribe to the first school of thought acknowledge that the phrasing used in Principle 1 of the Stockholm Declaration suggests that an environmental right may be considered implicit within the 'right to life. It is in this view that Principle 1 is considered not to formally proclaim a free-standing right such as the right to a clean and healthy environment. Instead, the statement may be more precisely interpreted to mean that a clean and healthy environment is "necessary to enjoy other basic human rights"[112] According to Shelton, the conference failed to proclaim an explicit human right to environment, although it shows the concern of the international community for environmental matters.[113] According to Gunther Hanndl,[114] sometimes Principle 1 of the Stockholm Declaration has been mistaken to imply a "human right to the environment". Hanndl[115] further contends that various proposals for a direct

---

[110] See Filmer-Wilson (note 103 above) 15-16.
[111] Principle 1 of the Stockholm provides that, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for the present and future generations."
[112] Atapattu (n 26 above) 74.
[113] D Shelton 'Environmental Rights. People's rights.' In P Alston (ed) *Oxford, Oxford University Press*: (2001) 195.
[114] G Hanndl '*The United Nations Conference on the Human Environment in Stockholm, June 16, 1972, and the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, June 14, 1992 United Nations.*' (2008) available at: http://untreaty.un.org/cod/avl/ha/dunche/dunche.html *(accessed 24 May 2013).*
[115] Hanndl (n 114 above).

© University of Venda

University of Venda
Creating Future Leaders

and thus unambiguous reference to an environmental human right were rejected at the Stockholm conference. Atapattu observes:

> It is ironic that at the time of the Stockholm Conference, the United States which vehemently opposed the inclusion of a similar right twenty years later in the Rio Declaration proposed the inclusion of a specific right to a clean environment in the Stockholm Declaration. The formulation proposed by the United States reads as follows: "Every human being has a right to a healthful and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of man." The conference participants, particularly those from developing countries, however, preferred the indirect formulation in Principle 1; therefore, the American formulation was rejected.[116]

Despite the fact that a number of scholars contend that the Stockholm Declaration recognised only a link between environment and existing human rights, the Travaux Preparatoires of the Committee of the United Nations Conference on the Human Environment suggest that the draft of the Stockholm Declaration "was based on the recognition of the rights of individuals to an adequate environment."[117] According to Collins, the human right to environment first appeared on the international law scene in Principle 1 of the 1972 Stockholm Declaration.[118] In addition, some writers opine that Principle 1 of the Stockholm Declaration acknowledges a right to environmental quality, with a concomitant responsibility to "protect and improve the environment."[119] It is contended that Principle 1 contains an "expansive statement of environmental rights."[120] Literally interpreted, it can persuasively be argued that Principle 1 protects a substantive environmental right since it guarantees individuals the right to a specific quality of environment. As such, Principle 1 is very explicit of the right to a clean and healthy environment.

---

[116] Atapattu, (n 26 above) 74-75.

[117] Preparatory Committee for the United Nations Conference on the Human Environment, 77, U.N. Doc.A/Conf.48/PC/17 (1972), cited in LE Rodriguez-Rivera, 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 Journal on International Environmental Law and Policy 1, at 17.

[118] LM Collins 'Are We There Yet? *The Right to Environment in International and European Law'* (2009) *Vol 3: No 2* at 131.

[119] George (Rock) Pring. 'International Environmental and human rights law affecting mining law reform: Presented *at the mining law seminar Northern Institute for Environmental and Minority law (NIEM) Arctic Center*, University of Lapland Rovaniemi, Finland 25-26 September 2008 At 28. See also S Nijhawan 'A Human Right to a Clean Environment?' 2nd essay: MA International Studies and Diplomacy (2004) 7.

[120] N Popovic, 'In Pursuit of Environmental Human Rights: *Commentary on the Draft Declaration of Principles on Human Rights and the Environment'* (1995-1996) *Columbia Human Rights Law Review* 504.

© University of Venda

University of Venda

2.5.1.2 Rio Declaration of the UN Conference on Environment and Development (Rio Declaration 1992)

In 1992 the international community emphasised the inextricable link between human rights and environmental protection at the UN Conference on Environment and Development. Both Zimbabwe and South Africa are signatories to the Rio Declaration. Principle 1 of the Rio Declaration provides that:

> "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

Writers express doubts as to whether a human right to a clean environment is implied by the provisions of this Declaration since it focuses on the right to sustainable development.[121] Shelton suggests that the Rio Declaration does not contain a substantial and explicit right to a clean environment.[122]

Hanndl contends that Principle 1 of the Rio Declaration has sometimes been mistaken to imply a "human right to the environment."[123] He further contended that this Declaration is less suggestive of such a right as it merely stipulates that human beings "are entitled to a healthy and productive life in harmony with nature."[124] Kiss and Shelton[125] are of the view that environmental issues were relegated to a secondary status due to the emphasis on development. It is, however, clear that the Rio Declaration expressed the relationship between human rights and environmental protection largely in procedural terms. The rights to (i) access to environmental information, (ii) participation in environmental decision-making, and (iii) access to justice in environmental matters formed the focus of the Rio Declaration. This new aspect of environmental rights will be discussed later in this chapter.[126]

---

[121] Nijhawan (119 above) 5.
[122] Shelton (n 113 above) 196.
[123] Hanndl (n 114 above).
[124] *Ibid*.
[125] AC Kiss & D Shelton *International Environmental Law* (1991) 44.
[126] See section 2.6 below.

© University of Venda

University of Venda
Creating Future Leaders

2.5.1.3 The 1994 Ksentini Report

Shelton points out that failure by the Rio Declaration to give greater emphasis to human rights was indicative of uncertainty and debate about the proper place of human rights law in the development of international environmental law.[127] Hanndl notes that after the Rio declaration the idea of "a human right to an adequate" or "healthy environment" failed to garner general international support, and was not enshrined in any international covenant.[128] However, among non-binding instruments, there is a more recent development which contains the right to a healthy environment.[129] A Draft Declaration of Principles of Human Rights and the Environment that accompanied Mrs. Ksentini's 1994 final report on the possibility for a human right to environment, explicitly recognises this right.[130] Examples of free-standing environmental rights in terms of the Draft Declaration include:

a) the right to a secure, healthy and ecologically sound environment;
b) freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, wellbeing or sustainable development;
c) the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems;
d) the right to the highest attainable standard of health free from environmental harm;
e) the right to safe and healthy food and water adequate to their wellbeing;
f) the right to a safe and healthy working environment;
g) the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.[131]

The Draft Declaration has not entered into force yet, although it was intended by Ksentini to "serve as a basis for the United Nations to adopt a set of norms consolidating the right to a satisfactory environment"[132] This perhaps may be because of continued arguments over the

---

[127] D Shelton '*What Happened in Rio to Human Rights?'* (1992) Vol. 3 No 3, *Y. B International Environmental Law* 82.
[128] Hanndl: (note 114 above).
[129] Turner (note 33 above) 6-7
[130] The Ksentini Report (n 45 above) 74.
[131] *Ibid.*
[132] C Dommen 'Claiming environmental rights: Some possibilities offered by the United Nations' human rights mechanisms: *Georgetown International Environmental Law Review*' (1998) 1.

© University of Venda

degree of legal authority vested in this document as it seeks to codify right to a healthy environmental at the international level. Therefore, the status of the Draft declaration would not be sufficient to grant a reliable human right to environment.[133] It can, however, be persuasively argued that since the Draft declaration is one of the highly significant instruments that seek to codify right to a healthy environment, its provisions may have attained the status of customary international law.

2.5.2 Customary International Law

There are two broad arguments as to whether a free-standing environmental right has gained the status of customary international law. The first school of thought argues that although not there yet, the right may be evolving as a principle of customary international law.[134] It is contended that customary international law is promising when it comes to establishing a binding international human right to a clean and healthy environment. The second school of thought argues that this right has emerged as a principle of customary international law.[135] Since a free-standing environmental right has not yet been entrenched into an international covenant, it is contended that there is a possibility that such a right is part of customary international law.[136]

Customary international law is an important source of international law with respect to human rights. It derives its authority from Article 38 (1) of the Statute of the International Court of Justice (ICJ). In the *Gulf of Maine Case*,[137] the Chamber of the ICJ defined customary international law, as comprised of a set of rules "whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas." Two major elements of customary international law that can be derived from this definition are (i) state practice, *(usus)* and (ii) a state's sense of legal obligation *(opinion juris)*. In order to determine whether a free-standing

---

[133] Nijhawan (n 119 above) at 9.
[134] D Shelton (n 91 above) 103.
[135] LE Rodriguez-Rivera, 'Is the Human Right to Environment Recognized under International Law? It Depends on its Source' (2001) 12 *Colombia Journal of International Environmental Law* 1.
[136] S Glazebrook 'Human Rights and the Environment: *Victoria University of Wellington Law Review*' (2009) 40 VUWLR 293, 3.
[137] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada. v. United States)*, 1984 I.C.J. 246 (Judgment of Oct. 12) [Gulf of Maine Case] at 299.

© University of Venda

environmental right has gained the status of customary international law, it is necessary to determine if the two elements are met.

2.5.2.1 State Practice (*usus*)

According to Dugard, *usus* is the objective element required for the existence of customary international law.[138] In terms of this element customary international law can be discerned by a general repetition by States of similar international acts over time (State practice). In evaluating the extent of State practice, Glazebrook suggests that it is important to look at treaties, domestic legislation and case law, decisions of international dispute settlement bodies and international organizations, the statements of diplomatic representatives or ministers and the opinions of government lawyers and also international declarations.[139]

It has constantly been noted in this study that the right to a healthy environment has not been entrenched in any international covenant. However, the protection of the environment appears to be of paramount importance to the international community. The existence of a number of international environmental law instruments (covering issues ranging from biodiversity conservation to air pollution) indicates state practice evidencing customary international law.[140] Furthermore, the Stockholm Declaration[141] and the Draft Declaration are some of the highly significant international soft law instruments that recognise the right to a healthy environment. Support for a right to a healthy environment can also be found within regional human rights instruments such as the African Charter on Human and Peoples' Rights (ACHPR) and the Protocol of San Salvador.[142]

State practice with respect to the right to a healthy environment may also be seen at the national level. Principle 1 of the Stockholm Declaration has inspired many national constitutional

---

[138] Dugard (n 103 above).
[139] Glazebrook (n 136 above) 3.
[140] Rodriguez-Rivera, (n 135 above) 27.
[141] The Stockholm Declaration and the Draft Declaration were discussed above in sections 2.5.1(a) and 2.5.1(c) respectively.
[142] See for example, the ACHPR Rights, opened for signature 27 June 1981, (entered into force 21 October 1988). Article 24.states that, "all peoples have the right to a general satisfactory environment favorable to their development." The African Charter is discussed in full in section 2.5.3 below. See also the *Protocol of San Salvador*, opened for signature 17 November 1988; (entered into force 16 November1999) Art 11 states that "everyone shall have the right to live in a healthy environment and to have access to basic public services."

© University of Venda

University of Venda

provisions since the early 1970s recognising the right to environment as a fundamental right under domestic law.[143] As of 2010, out of 142 national constitutions 125 contain provisions that are explicitly related to environmental human rights.[144] John Lee argues that this trend represents consistent state practice sufficient to evidence an emerging customary norm.[145] In other words the provisions of national constitutions enacted pursuant to a perceived international legal obligation may also constitute state practice giving rise to customary international law.[146]

2.5.2.2 State's sense of legal obligation (*opinio juris*)

Second, positive evidence that States have acted in a certain way because there is a sense of legal obligation to do so is also required (*opinio juris sive necessitatis*).[147] According to Glazebrook, there are two approaches to determining the existence of *opinio juris*.[148] First, its existence is either presumed by the courts based on consistent practice, consensus in literature or on the previous determinations of the courts or other international tribunals.[149] Second, positive evidence of the acceptance of the legal obligation is required.[150] As stated above, a number of states recognise the right to a healthy environment in their national constitutions. Entrenching constitutional rights "are strong indicators of national *opinio juris* and represent the highest level of national law operating as a *lex suprema*."[151] According to John Lee, the prevalence of environmental rights in domestic constitutions is strong evidence of the emergence of the right to environment as a principle of customary international law.[152]

---

[143] For an overview of such constitutional provisions, see, e.g., the report of the UN Commission on Human Rights, *Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, Annex III.
[144] C Jefford 'Constitutional Environmental Human Rights: *A Descriptive Analysis of 142 National Constitutions*' (2013) 2.
[145] J Lee, 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283.
[146] *Ibid.*
[147] See *Sea Continental Shelf* (1969) ICJ Rep 44 at 77.
[148] Glazebrook (n 136 above) 3.
[149] In the *Gulf of Maine* case [1984] ICJ Rep 293 – 4 at [91] – [93] previous decisions of the International Court of Justice were the basis for consensus regarding international customary law.
[150] In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14 at [207] it was held that positive evidence that the State believed itself to be bound was required. According to H Lauterpacht, state practice should be seen as arising from a sense of legal obligation unless proved otherwise – see discussion in Sand, 'The Evolution of International Environmental Law' in D. Bodansky, J. Brunnée & E. Hey, eds., The Oxford Handbook of International Environmental Law (2007) 146 - 147.
[151] OW Pedersen, (n 22 above) 111.
[152] Lee, (n 145 above) 339.

© University of Venda

It may persuasively be argued that the mere constitutionalisation of the right to a healthy environment is on its own, not a sufficient evidence of *opinio juris*. As a result, it would be necessary to consider the justiciability of such constitutional right, its enforcement by the courts and its incorporation into legislation.[153] Bridget suggests that without evidence of widespread implementation and enforcement within domestic legal systems, it seems unlikely that a customary right could be established at the international level.[154] In addition to national constitutional provisions, the widespread enactment of domestic environmental protection legislation may indicate evidence of customary international law (where such laws are enacted in response to a perceived international legal obligation), or a general principle of law (where *opinio juris* is lacking).[155]

One should remember that the thrust of this dissertation is to explore the Zimbabwean and South African realities. The constitutions in the two jurisdictions recognise substantive environmental rights as a free-standing right to environmental quality.[156] Interestingly, environmental clauses in both constitutions are almost couched in the same language.[157] The environmental clauses in these countries' constitutions are only considered here to the extent of examining how a free-standing environmental right has possibly emerged as a principle of customary international law, binding on all nations.[158] In addition to national constitutional provisions, the respective countries also have a body of environmental protection legislation and policies.[159] In South Africa, lawyers are stressing the right to a healthy environment and the judiciary is developing constitutional jurisprudence around it.[160] It should be noted that constitutional environmental law in Zimbabwe is still a new area of jurisprudence that arguably

---

[153] L Bridget 'Environmental rights or a right to the environment? Exploring the nexus between human rights and environmental protection' (2012) Vol. 8 No. 1, *Macquarie Journal of International and Comparative Environmental Law 43.*

[154] Bridget (note 179 above) 43.

[155] Lee, (note 171 above) 316-318.

[156] See section 24 of the South African Constitution Act 108 of 1996. See also Section 73 of the Zimbabwean Constitution Amendment (No.20) 2013.

[157] Both Constitutions state that everyone has the right –

a) to an environment that is not harmful to their health or well-being; and

b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that

i) prevent pollution and ecological degradation;

ii) promote conservatism; and

iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[158] Environmental clauses in these Constitutions will be discussed in full in chapter 3 (*section 3.2.1*) below.

[159] See chapter 3 (*sections 3.2.3* and *section 3.2.4*) below.

[160] See generally chapter 3 (*section 3.2.1.3)* below.

© University of Venda

University of Venda

may still be lacking judicial experience and precedence. However, it is hoped that the judiciary will interpret and enforce this right just as in any other country with constitutional environmental rights.

An examination of literature and jurisprudence shows positive evidence of the two essential elements of customary international law. As such, given the abundance of state action in the form of international and national environmental laws, it can persuasively be argued that a free-standing environmental right should be considered as part of customary international law. This would mean that it would be binding on nation states even without their consent.

2.5.3 A free-standing right to environmental quality at the regional level: The African Charter on Human and Peoples' Rights, June 26, 1981 (The ACHPR)

At the regional level, this section focuses on the ACHPR in order to determine whether it contains a human right to a clean and healthy environment.[161] Zimbabwe and South Africa ratified it in 1986 and 1996 respectively. Article 16 guarantees to every individual the right to enjoy the best attainable state of physical and mental health. In addition, Article 24 states that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development." In spite of the fact that a human right to environment is explicitly proclaimed in the ACHPR, some scholars are of the view that Article 24 does not have the status of a human right due to its indeterminate character and context.[162] Some scholars regard Article 24 of the ACHPR as a "third generation human right".[163] This category of human rights is regarded as controversial in itself,[164] and its status is not definite yet.[165] As a result, the enforceability of

---

[161] The ACHPR was adopted 1981.

[162] JG Merrills 'Environmental Protection and Human Rights: Conceptual Aspects. Human Rights Approaches to Environmental Protection.' in AE Boyle and MR Anderson (ed) *Oxford, Oxford University Press*: (1996) 9.

[163] It should be noted that Article 24 does not actually recognise the right to environment as an *individual* human right, but rather as a collective right, vested in peoples. See generally P Sieghart *The International Law of Human Rights* (1990) 376.

[164] Third generation rights include those such as the right to peace, to sustainable development, self determination to share in the common heritage of humankind. These are rights that affect whole societies or groups of people rather than just individuals. This category puts much concentration on groups or communities of people rather than just individuals hence they are labeled solidarity or group rights. In many cases, their enjoyment and violation affects a community or a group. *see* O C Ruppel "Third Generation Human Rights and the Protection of the Environment in Namibia" (2008) Human Rights and the Rule of Law in Namibia (Eds. N Horn & A Bösl) Macmillan Publishers, Windhoek 20 at 103, available at http://www.unam.na/centres/hrdc/5_thirdgeneration_human_rights_and_the_protection_of_the_enviroment_in_Namibia,(accessed 22 April 2013).

[165] Nijhawan S. (n 119 above) 7.

© University of Venda

Article 24 had been criticised, leading to arguments that it was merely an expression of programmatic aspirations.[166] The above views indicate that Article 24 cannot be seen as an effective right to a clean and healthy environment.

Despite the above criticisms, it is clear that the ACHPR explicitly proclaims a human right to environment. According to Shelton and Kiss, the ACHPR was the first international human rights instrument that contains both a right to health and a right to a quality environment.[167] According to Boyle[168] "[n]o other treaty contains anything directly comparable." The right contained in Article 24 of the ACHPR was front and center in *SERAC v Nigeria* also known as the *Ogoni* case.[169] This case has attracted much comment and is considered here to the extent of examining the realisation of article 24 of the ACHPR by the African Commission. In this case, the communication alleged that the petroleum development activities of the Nigerian state and Shell Oil in Ogoniland were carried out without regard for the health or environment of the local communities in violation of several articles of the ACHPR, including Article 24.

The African Commission in this case ruled in favor of *SERAC* which represented the Ogoni people. Nigeria was ultimately held to be in violation of Articles 16 and 24 of the ACHPR. The Commission noted that in spite of Nigeria's right to produce oil, the state failed to offer adequate protection to local inhabitants in accordance with sustainable development and human and environmental rights.[170] The Commission reasoned that "an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health."[171] It was also held that the state has obligations in terms of

[166] AE Boyle 'The Role of International Human Rights Law in the Protection of the Environment' in AE Boyle & MR Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996) 46.
[167] A Shelton & A Kiss *Judicial Handbook on Environmental Law UNEP* (2005) 31.
[168] AE Boyle 'Human Rights or Environmental Rights? A Reassessment'18 *Fordham Environmental Law Review* (2007) 5.
[169] *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 51 (ACHPR 2001). Communication 155/96 (*The Ogoni Case*).
[170] The African Commission on Human Rights found Nigeria in violation of the right to life for permitting oil production in Ogoniland to "[take] place with complete disregard for the environment or health of the local inhabitants . . .," resulting in daily discharges of toxic waste into rivers and nearby areas which, ". . . together with constant spillages from petroleum installations, resulted in water, land, and air pollution (environmental degradation) and seriously impaired the health of the inhabitants of that area, causing skin infections, and gastrointestinal and respiratory diseases, as well as increasing the risk of cancer and reproductive and neurological disorders." Adopted from *The Ogoni case* (n 169 above).
[171] Para. 51. See generally KSA Ebeku 'The Right to a Satisfactory Environment and the African Commission' (2003) *3 African Human Rights Law Journal* 163.

UNIVERSITY OF VENDA LIBRARY
© University of Venda

University of Venda

Article 24 of the ACHPR to take reasonable measures "to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources."[172]

In light of the case discussed above, Article 24 affirms the reality of the right to a healthy environment in the ACHPR. Therefore, assuming that Article 24 of the ACHPR has no human right status is far-fetched. Notably, the Ogoni case marked a significant moment in regional environmental rights jurisprudence because it was, according to Ebeku,[173] "the first time the [African] Commission expanded on the meaning, interpretation and scope of the right to a satisfactory environment provided in the African Charter." The importance of the environmental rights in the ACHPR and the Commissioner's decisions lies, *inter alia,* in the fact that most African states face the challenge of balancing the *desideratum* of exploiting nation's natural recourses along prudential and utilitarian guidelines for the nation's benefit and protecting the environmental rights of the concerned communities. Therefore, states have to strike a meaningful balance between ensuring environmental rights and conservation of the environment and honestly maintain it. This conceptual approach is significant not only for states like South Africa that are engaged in implementing their constitutional environmental provisions, but also for states like Zimbabwe whose constitutions have recently acknowledged the profound importance of protecting the environment for safeguarding environmental rights.

2.5.4 Legal obligations obtaining from international and regional conventions.

Given that rights trigger obligations and responsibilities, rights cannot be addressed without raising questions of who has the obligation and what the implications of these obligations are. Ruppel[174] points out that, the right to a healthy environment imposes a duty on the governments

---

[172] *See* paras. 52-53. The Commission indicated that development activities must be followed by appropriate measures that do not materially harm fundamental human rights of local communities and the environment upon which they depend. The Commission noted that there was need for a "comprehensive cleanup of lands and rivers damaged by oil operations;" the preparation of environmental and social impact assessments (EIA and SIA); and provision of information on health and environmental risks and "meaningful access to regulatory and decision-making bodies." (See Para. 69). Despite the fact that Nigeria was held to be in violation of Articles 16 and 24 of the ACHPR and the result was considered a victory for the Ogoni people, decisions made by the African Commission are non-binding and there is scant evidence to suggest that conditions in the Niger Delta have improved. See Ebeku (n 171 above) 164-5.

[173] Ebeku (n 171 above) 161.

[174] Ruppel (n 164 above) at 103.

© University of Venda

to: (a) refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment, (b) prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment, and (c) adopt the necessary measures to achieve the full realization of the right to a healthy environment.[175] This is because where a legal right exists the, jural correlative duty must manifest on the other side of the legal coin.

Under international human rights law it is increasingly accepted that states have obligations and duties to respect, to protect and to fulfill human rights.[176] The African Commission in the *Ogoni* case[177] distinguished these obligations.[178] The development of the classification of states obligations has influenced the drafting of national constitutions. For example, both the South African and Zimbabwean Constitutions provide that the state must respect, protect, promote and fulfill the rights set out in the constitutional Bill of Rights.[179] States obligations is used as an analytical tool for the elaboration and better understanding of treaty obligations and it can help to determine whether a State's action, policy and practice are in accordance with its obligations under international human rights law.

States' *obligation to protect* human rights against third party abuse lies at the very core of the international human rights law. The obligation to protect requires states to prevent human rights abuses by third parties.[180] Therefore, states have the primary role in preventing and addressing corporate-related human rights abuses.[181] For example, the state must adopt legislation to guarantee that non state actors adhere to labor standards. The state must also monitor compliance levels by these non-state actors and make provisions of effective remedies in cases of violation.[182] This obligation may help to reconcile the often fraught relationship between companies and communities on the issue of human rights.

---

[175] Ibid.
[176] *The Ogoni Case* (n 169 above) para 45-47.
[177] The case was discussed in section 2.5.3 above.
[178] The Commission indicated that: "Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfill these rights." see para 44.
[179] See section 44 of the Zimbabwean Constitution. See also the Constitution of the Republic of South Africa of 1996, Section 7(2).
[180] K Drzewicki 'Internationalisation of human rights and their jurisdiction' in R Hanski & M Suksi (ed) *An introduction to the international protection of human rights* (1999) 31.
[181] The UN "Protect, Respect and Remedy" Framework for Business and Human Rights (2010) 2.
[182] The Ogoni Case (n 169 above) para 46.

© University of Venda

University of Venda

The *obligation to respect* requires state parties to refrain from directly or indirectly interfering with the enjoyment of fundamental rights.[183] As the primary duty-bearers under international human rights law, states should respect right-holders, individuals as well as groups, their freedoms, autonomy, resources and liberty of action.[184] For example, a State may not arbitrarily evict people from their homes. States may also take measures to prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment.[185] States should set up proper regulatory frameworks and monitoring mechanism to ensure that private actors are behaving the way required by international human rights instruments.[186]

The *obligation to fulfill* requires states to take positive steps in order to realise the direct enjoyment of a fundamental right.[187] It is rational to argue that, in environmental context, states must adopt necessary legislative, administrative, budgetary, judicial and other measures[188] to achieve the full realization of the right to a healthy environment.[189] In other words, the obligation to fulfill requires states take the necessary measures such as introducing environment and industrial hygiene standards into national legislation to ensure that healthy standards are met.[190] It was succinctly put in the Ogoni case that specific actions required of States in fulfilment of Articles 16 and 24 of the Charter include:

> "ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities."[191]

From the discussion above, it is clear that states' obligations may either be positive or negative. It is however contended that, government efforts to respect, protect, and fulfill environmental

---

[183] *Ibid.*
[184] *Ibid.*
[185] Ruppel (n 164 above) 103.
[186] The obligation to respect requires state to regulate non-state actors to ensure that healthy standards of environmental and industrial hygiene are maintained. See generally Filmer-Wilson & Anderson (n 103 above) 16.
[187] The Ogoni Case (n 169 above) para 47.
[188] Drzewicki (n 180 above) 31.
[189] Ruppel (n 164 above) 103.
[190] Filmer-Wilson & Anderson: (n 103 above) 17.
[191] Para. 54.

© University of Venda

University of Venda

human rights may be hampered by resource constraints, which arguably include the physical parameters of the world, in addition to the economic, political, and financial ones.[192] This approach gives environmental rights a comparable status to socio-economic rights whose realization is dependent upon the availability of resources. The CESCR has also used the classification of obligations in its General Comments on the right to food, the right to health and the right to education.[193]

In general, member states to international human rights treaties are obliged not only to respect the observance of rights but also to guarantee their existence against infringement by third parties and state actors. States' obligations are particularly important in environmental context, where most operations causing harm are undertaken by both third parties. As a result, cases brought before international dispute settlement bodies usually assert state responsibility based on failure to regulate or enforce laws rather than on pollution resulting directly from state conduct.[194] In cases where a state fails to take suitable steps to prevent, investigate, punish and redress corporate company's abuse, it would have breached its international human rights law obligations.

The preceding section discussed the human right to environment as an entitlement implicit within already-established human rights and as a free-standing right, the following section focuses on environmental rights as a procedural right.

2.6 Procedural Environmental Rights

The second type of environmental rights is procedural environmental rights. Swanson defines procedural rights as processes through which the substantive right can be enforced.[195] Procedural environmental rights describe the opportunities and abilities of individuals to participate in the policy-making process on issues pertaining to the environment. In other words, these rights enable the affected communities or individuals to challenge activities causing or that may cause environmental damage. They also help in ensuring that those who are

[192] Jefford (n 144 above) 5.
[193] See General Comment No.12, UN Doc. E/C.12/1999/5; General Comment No.13, UN Doc. E/C.12/1999/10 and General Comment No.14, UN. Doc. E/C.12/2000/4 respectively.
[194] See, generally the Ogoni Case (n 169 above).
[195] E Swanson & E Hughes The Price of Pollution '*Edmonton: Environmental Law Centre*' (1990), 206.

© University of Venda

University of Venda

responsible for environmental damage and held accountable. In countries that lack comprehensive environmental laws and resources to implement and enforce those laws, procedural environmental rights play an essential role in protecting individuals from environmental damage.[196] Although the procedural aspect is decisive in enforcing rights by legal means, it does not substitute the substantive content of the norm, but acts more like an instrumental right by giving the structural framework necessary for the realisation of the substantive right to the environment as well as other basic rights.[197] In other words, procedural rights alone cannot guarantee environmental protection.[198] Therefore, there is a complementary and interdependent relationship between substantive and procedural environmental rights.

Procedural environmental rights include access to environmental information, participation in environmental decision-making, and access to justice in environmental matters.[199] These rights support transparency, openness, participation, and accountability that form the basis of environmental management. There are a range of procedural rights in international human rights instruments which are relevant to environmental protection. These include the rights, rights of freedom of expression, freedom to seek, receive and impart information, participation in government and effective remedies for violations of rights.[200] In spite of the fact that these international instruments do not explicitly address environmental issues, their provisions can be teleologically interpreted in the environmental context in order to have better environmental decision-making and enforcement.

The protection afforded to procedural environmental rights has increased in scope and number since the adoption of Principle 10 of the Rio Declaration on Environment and Development.[201] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental

---

[196] Shelton (note 91 above) 171.
[197] P Cullet 'Definition of an Environmental Right in a Human Rights Context: *Netherlands Quarterly of Human Rights*' (1995) vol. 13 No.1 at 37.
[198] MR Anderson (note 75 above at 10).
[199] Collins (n 118 above) 10.
[200] See Articles 19, 25 and 2 of the ICCPR respectively.
[201] Principle 10 of the Rio Declaration provides that: "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and *the opportunity to participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings,* including redress and remedy, shall be provided.'

© University of Venda

University of Venda

Matters[202] (Aarhus Convention) also stresses procedural environmental rights at the regional level. The Aarhus Convention is widely ratified in Europe and has had significant influence on the jurisprudence of procedural environmental rights. Its importance can best be explained by recalling the most important case of *Taskin v. Turkey (The Taskin case).*[203] Despite the fact that Turkey was not a member state to the Aarhus Convention, that did not stop the Strasbourg Court from reading Aarhus rights into the European Convention on Human Rights (ECHR), in a particularly extensive form.[204] This instrument categorically sets the three pillars of procedural environmental rights as discussed below:

2.6.1 Access to environmental information (Articles 4 and 5)

This right denotes "the ability of citizens to obtain environmental information in the possession of public authorities. Environmental information includes information about air and water quality, for example, and information about whether any hazardous chemicals are stored at a nearby factory."[205] Public bodies or private persons are obliged to provide all the information required and collect and disseminate them and in a timely and transparent way. There are also exceptional circumstances in which information may also be withheld if its release could harm the environment.[206] Generally, the right to information is reflected by the duty to provide adequate information about environmentally harmful activities. According to Shelton and Kiss[207] this right is a precondition to effective public participation in decision making and to monitoring governmental and third parties' activities.

Various international human rights instruments generally contain the right of access to information or a corresponding state duty to inform. This right is contained in the Universal

---

[202] This is known as the Aarhus Convention, adopted in June 1998 and entered into force on 30 October 2001.
[203] *Taskin v. Turkey* 42 EHRR (2006) 50. In this case the applicants alleged that both the granting by the national authorities of a permit to operate a goldmine using the cyanidation process and the related decision-making process had violated their right to respect for private and family life and to a fair trial under Articles 6 and 8 of the European Convention. It was considered that participation in the decision-making process by those likely to be affected by environmental nuisances will be necessary for compliance with Article 8 of the ECHR (which provides for the right to respect for private and family life) and Article 6 of the Aarhus Convention. It was held that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8". See para 8.
[204] *The Taskin Case*, para 99.
[205] E Petkova *et al* '*Closing the Gap: Information, Participation and Justice in Decision Making for the Environment*' (2002) 15.
[206] Article 4 (4).
[207] Shelton & Kiss (n 167 above) 29.

© University of Venda

University of Venda

Declaration[208] and the ICCPR.[209] Regional human rights treaties, such as the African Charter, also contain the rights to information.[210]

2.6.2 Public participation in environmental decision making (Articles 6-8)

This right is defined as "the opportunity for citizens to provide informed, timely and meaningful input and influence decisions on general policies, strategies and plans at various levels and on individual projects that have environmental impact. Individuals may, for example, engage in electoral processes, testify at hearings and meetings, serve on advisory committees, have direct contact with public officials, express views and opinions through the media, or engage in some form of protest action."[211] Public bodies or private persons should make arrangements to enable the public to comment on, for example, plans and programmes relating to the environment, or proposals for projects affecting the environment. Information must be provided to the public on the final decisions and the reasons for it. The government has the duty to provide the public an opportunity to participate in relevant procedures to make known its views and concerns on prevention and preparedness measures.

Although not in environmental terms, the right to public participation is included in various international and regional human rights instruments such as the Universal Declaration,[212] the ICCPR,[213] and the African Charter.[214]

---

[208] See Article 19 of the Universal Declaration which provides that, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[209] Article 19 (2) of the ICCPR which provides that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[210] Article 9 (1) provides that, "Every individual shall have the right to receive information."

[211] Petkova (n 205 above) 15.

[212] Article 21 (1) provides that (1) "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." In other words the Declaration confirms the right of everyone to take part in the governance of his country.

[213] Article 25 confirms the right of everyone to (a) "To take part in the conduct of public affairs, directly or through freely chosen representatives."

[214] Article 13 (1) provides that, "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."

© University of Venda

University of Venda

2.6.3 Access to justice in environmental matters (Article 9)

Some writers contend that access to justice is perhaps the most important procedural right in the enforcement of environmental rights.[215] The public should have access to a court of law and/or another independent and impartial body, to challenge the substantive and procedural legality of any decision, act or omission. Thus, any person who felt that their fundamental rights including the right to a healthy environment have been infringed or threatened by conducts of private individuals or the State can institute legal proceedings in any of the courts depending on the circumstances of the case for appropriate relief. The government has the duty to provide access to administrative and judicial remedies which may be used to stop illegal harmful activities. These procedures must be "fair, equitable, timely and not prohibitively expensive." According to Shelton and Kiss[216] equal access to national remedies is regarded as another way of implementing the polluter pay principle because it tends to expand the scope of polluter accountability.

The right of access to justice is also widely expressed in international and regional human rights instruments. The Universal Declaration,[217] CCPR,[218] and the African Charter[219] guarantee this right. It should be reiterated that although the procedural rights in the international instruments do not explicitly address environmental issues, they can be reformulated and expanded in the context of environmental protection.[220]

---

[215] WT Olenasha 'The Enforcement of Environmental Rights: A Case Study of the New South African Constitutional Dispensation' unpublished MA dissertation, University of Pretoria (2001) 24.

[216] Shelton & Kiss (n 167 above) 30.

[217] Article 8 provides that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[218] Article 2 (3) of the ICCPR provides that "Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

(c) To ensure that the competent authorities shall enforce such remedies when granted.

[219] Article 7 (1) provides that, "Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force."

[220] Shelton (note 91 above) 17.

© University of Venda

University of Venda
Creating Future Leaders

2.7 Chapter Conclusion

This chapter has indicated that international human rights treaties do not contain a free-standing environmental right. However, these instruments could be theoretically construed in favor for a human right to environment. The study indicated that most international human rights bodies have accepted the interrelationship between environmental degradation and fundamental human rights. It has been noted that the international instruments that offer a basis for a human right to environment are either not in force or are part of the environmental soft law whose obligations are not legally binding. However, it was shown that with necessary recognition and continued adherence to principles of these declarations by states, they may have attained the status of customary international law. It has persuasively been argued that the abundance of state action in the form of international and national environmental laws, including constitutional provisions recognising the right to a healthy environment, confirm that the right to environment has emerged as a principle of customary international law. The study has shown that there is no central authority or institution through which environmental rights could be vindicated or enforced at the international level.

At the regional level, the study has shown that a human right to environment is explicitly proclaimed in the ACHPR. Environmental rights claims at the regional level can be enforced through petitioning the African Commission to recognize the violation of well-established human rights by means of environmental degradation. The study has also indicated that under international human rights law, it is increasingly accepted that states have obligations and duties to respect, to protect and to fulfill human rights. Lastly, this chapter examines the second type of environmental rights commonly known as procedural environmental rights. A range of procedural rights at the international level which includes the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice in environmental matters have been discussed. It has been indicated that these rights are instrumental to the realisation of substantive environmental rights.

© University of Venda

University of Venda
Creating Future Leaders

CHAPTER THREE

3 NATIONAL HUMAN RIGHTS STANDARDS ON ENVIRONMENTAL HUMAN RIGHTS

3.1 INTRODUCTION

This chapter builds up from the conceptual framework outlined in the previous chapter which has exposited the normative international framework approach for the purpose of understanding the key international environmental rights instruments and determining their utility in the context of protection of the rights of communities and their individuals. In this chapter, the research focuses on domestic laws and policies put in place by both Zimbabwean and South African governments with a view of implementing and complying with international standards. The chapter analyses, compares and contrasts the prominent characteristics of the legal mechanisms, policies and systems that have been put in place in the two jurisdictions to protect, respect, and fulfill the environmental human rights of the communities under study.

The chapter helps in understanding how both countries have responded to identified problems in the areas of mineral exploitation and environmental and human rights protection at the national level by establishing a number of national legal instruments, policies, and agencies. It also analyses the efficacy of these standards which, once met, can serve to certify a degree of responsible conduct on the part of the mining companies. This analytic approach helps in understanding how the two communities under study may use national human rights law framework to ascertain, frame, claim and assert their environmental rights during the mining operations. The remaining part of this chapter focuses on the other category of environmental rights, that is, procedural environmental rights.

3.2 Substantive Environmental Rights in the Context of Zimbabwe and South Africa

Both countries have produced a number of policies and laws to give meaning to environmental rights. It is arguable that a discussion of environmental rights at State level could involve an

© University of Venda

examination of pertinent domestic environmental and human rights legislation in order to determine the extent to which they expressly or impliedly accord recognition to the right. These include laws about water, air quality, waste management, the extraction of natural resources and protecting biodiversity. Herebelow a Table is provided table which contains a list of relevant environmental statutes showing the two countries' commitment to protect and enhance the environmental quality and human rights.

Table 1: A list of statutes adopted by South Africa and Zimbabwe to protect and enhance environmental quality and human rights

Sector	South Africa	Zimbabwe
1. Fundamental human rights	The Constitution of the Republic of South Africa of 1996	The Constitution of Zimbabwe Amendment (No. 20) Act, 2013
2. General environmental framework laws	National Environmental Management Act 107 of 1998 (NEMA)	Environmental Management Act, Chapter 20:27 (EMA)
3. Air quality standards	Air Quality Act 39 of 2004 (AQA)	Environmental Management Act Chapter 20:27 (EMA),
4. Water quality standards	National Water Act No 36 of 1998 (NWA)	Water Act [Chapter 20:22] of 1998
5. Mineral exploitation	Mineral Resources and Petroleum Resources Development Act 28 of 2002, (MPRDA)	Mines and Minerals Act [*Chapter 21:05*].

© University of Venda

3.2.1 A free-standing environmental right / constitutional right

The right to a healthy environment has found increasing recognition at the national level in several national constitutions and laws. The constitutionalisation of environmental rights is one of the strategies that may be employed to achieve sustainable development and environmental protection in developing countries.[221] Both South Africa and Zimbabwe have enshrined a substantive right to a healthy environment in their national constitutions. National constitutions are the supreme laws of the respective countries, and laws or conducts inconsistent with them are invalid.[222] They both contain Bill of Rights, which are cornerstones of both democracies.[223] All the rights in the Bill of Rights must be respected, protected and fulfilled. In cases where the rights cannot be fulfilled immediately, reasonable steps should be taken to promote actions through which their progressive realisation can be achieved. In both jurisdictions, all organs of the State must respect, protect, promote and fulfill the rights in the Bill of Rights.[224]

The Zimbabwean law, in common with South African legal system, considers that fundamental human rights are not absolute and may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[225] Limitation clauses in both Constitutions give a clear and practical guide to limiting fundamental human rights. The clauses require that the following factors should be taken into account when determining the limitation of one's rights: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose. In the words of May,[226] in most constitutional regimes, environmental rights are not absolute and may be limited or overcome in at least three situations, all of which pertain equally to the enforcement of other constitutional rights:

a) the environmental right may be limited if it conflicts with another right, such as the right to life or a non-derogable right like the right to dignity.

---

[221] T Murombo 'The Utility Of Environmental Rights To Sustainable Development In Zimbabwe: A Contribution To The Constitutional Reform Debate' (2011) 11 *African Human Rights Law Journal* 121.
[222] Section 2 of the South African Constitution; see also Section 2 of the Zimbabwean Constitution.
[223] Chapter 2 of the South African Constitution; see Chapter 4 of the Zimbabwean Constitution.
[224] Section 7 of the South African Constitution; see also Section 44 of the Zimbabwean Constitution.
[225] Section 36 of the South African Constitution; see also sections 86 and 87 of the Zimbabwean Constitution.
[226] May & Daly (note 64 above) 424.

© University of Venda

University of Venda
Creating Global Leaders

b) Second, the environmental right, like almost all other rights, is usually subject to a proportionality test; that is, the right may be limited if the limitation is proportionate to the need.

c) the right may resist vindication where it is not deemed an individual right, but an obligation on the State. In that situation, a court may order the government to develop a plan for environmental protection, but will not find that a government or private action has violated a particular plaintiff's right to a healthy environment.

Therefore, on face value, not every infringement of environmental rights is unconstitutional. A conduct that would, for instance, look as if it violates environmental rights can be justified if there are undertaken to give effect to a superior goal.[227] For example, if a community is relocated by the state for development purposes (like for mining operations to take place), legal proceedings to stop it may not succeed despite the fact that the environment is threatened by such a move. Therefore, if a court finds that an environmental right has been violated or threatened, it will then determine if the infringement is justified by the limitation clause. In other words, the limitation clause puts a ceiling on environmental rights if it is constitutionally justifiable to do so. In order to understand the nature and extent of a person's environmental rights as guaranteed in both jurisdictions' constitutions, an in depth analyses of the same follows hereunder.

3.2.1.1 The position in Zimbabwe

Below is a framework of key constitutional provisions that pertain to Zimbabwean environmental law. Worth mentioning is the 1979 Lancaster House Constitution, which was recently repealed by the 2013 Constitution. Murombo[228] describes the Lancaster House Constitution as a 'cease fire'[229] Constitution. Its Bill of Rights[230] is contended to have been ineffective and shallow. It is somehow surprising to note that the Lancaster House Constitution did not explicitly provide for the right to a healthy environment as a fundamental right. Therefore, this right was not

---

[227] Olenasha (n215 above) 52.
[228] Murombo (n 221 above) 122.
[229] It is contended that the 1979 Lancaster House Constitution was a document produced out of negotiations to end the liberation war, hence it contains many unfortunate compromises as Britain gave its former colonies constitutions which had little by way of human rights protection. The Constitution has a Declaration of Rights which was effectively used by the Supreme Court in the late 1980s and early 1990s to advance human rights generally.
[230] The Declaration of Rights is found in sections 11 to 26 of the Constitution.

© University of Venda

represented in the highest level of national law. This is against the backdrop of Zimbabwe's long history in developmental projects, *inter alia*, mining operations, which potentially adversely affect the environment and human rights. A glimpse reference to environmental matters only appeared in Article 16 (1).[231] Although the Lancaster House Constitution did not explicitly provide for the right to a healthy environment as a fundamental right, it is argued that it remains quite relevant in this study. Its importance lies in the fact that before the adoption of the 2013 Constitution mining operations in Chiadzwa have been carried out under its auspices as enshrined in section 73 which reads as follows:

> (1) Everyone has the right –
> a) to an environment that is not harmful to their health or well-being; and
> b) to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that-
> i) prevent pollution and ecolcgical degradation;
> ii) promote conservation; and
> iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
>
> (2) The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right set out in this section.

According to May,[232] "It has become quite fashionable to include environmental provisions in new or revised constitutional texts along with provisions protecting other second, third, and fourth generation rights." Zimbabwe has recently shown its commitment to environmental protection through the inclusion of environmental rights in its 2013 Constitution. This Constitution recognises substantive environmental rights as a free-standing right to environmental quality.

---

[231] 'Subject to section 16A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –
a) requires –
(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilization of that or any other land –
A. for resettlement for agricultural or other purposes; or
B. for purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or …'

[232] May & Daly (n 64 above) 380.

© University of Venda

University of Venda
Creating Future Leaders

3.2.1.2 The position in South Africa

In South Africa, environmental rights first appeared in the 1993 Interim Constitution. It is provided in section 29 that, 'Every person shall have the right to an environment which is not detrimental to his or her well being.' This right was, however, formulated in a limited way.[233] It was then expanded in section 24 of the 1996 Constitution which replaced the 1993 Interim Constitution. The 1996 Constitution recognises substantive environmental rights as a free-standing right to environmental quality. Section 24 does so in the following words:

(1) Everyone has the right –
  a) to an environment that is not harmful to their health or well-being; and
  b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
    i) prevent pollution and ecological degradation;
    ii) promote conservatism; and
    iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

3.2.1.3 Comparative analysis of the right

It is interesting to note that environmental clauses in both constitutions are couched almost in the same language. In South Africa, lawyers are stressing the right to a healthy environment and the judiciary is developing constitutional jurisprudence around it. Given the fact that constitutional environmental law in Zimbabwe is still a new area of law that may still be lacking judicial experience and precedent as compared to South Africa,[234] the Zimbabwean judicial system should use the leverage on interpretation in the Bill of Rights[235] to give effect to the right to environment. As such it must consider international law when interpreting and applying the relevant environmental law.[236] Again, the judiciary may also consider foreign law in terms of section 46(1)(e) of the Constitution.[237] According to May[238] countries with constitutional courts

---

[233] LJ Kotze 'The South African Environment and the 1996 Constitution: *Some Reflections on a Decade of Democracy and Constitutional Protection of the Environment:*' (2007) 34.

[234] Environmental rights in the Zimbabwean Constitution have not been considered in any litigation at the time of writing.

[235] See generally section 46 of the Constitution.

[236] Section 46(1)(c) of the 2013 Constitution provides that when interpreting the Bill of Rights, a court tribunal, forum, or body must take into account international law and all treaties and conventions to which Zimbabwe is a party.

[237] The section provides that when interpreting the Bill of Rights, a court tribunal, forum, or body may consider relevant foreign law.

© University of Venda

University of Venda

such as South Africa seem to be more inclined and better equipped to give substance to constitutionally entrenched fundamental environmental rights provisions. As such, the Zimbabwean judiciary may, for instance, find guidance in the South African model for the implementation and enforcement of human rights.[239] The South African jurisprudence on environmental rights should be exemplary and should motivate changes not only in Zimbabwe, but in other developing countries.

(a) The ranking of the right

Environmental rights in both constitutions are afforded the same status as other fundamental human rights contained in the constitutions. Therefore, a balancing of rights will be mandatory where competing interests and norms are concerned. In the context of South Africa, this reflection is made in the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs (hereinafter referred to as BP Southern Africa case).*[240] It was pointed out in this case that section 24 is "on par with the right to freedom of trade, occupation, profession and property entrenched in sections 22 and 25 of the Constitution." It is further noted in this case that, "[t]he balancing of environmental interests with justifiable economic and social development is to be conceptualised well beyond the interests of the present living generation."[241] Given the similarities of environmental rights clauses in both constitutions, it is arguable that the conceptual approach followed in the *BP Southern Africa case* is quite relevant and applicable to Zimbabwean cases as well.[242] As a result, environmental rights and fundamental rights need to be balanced against one another in cases where they are found completing.

---

[238] May & Daly (n 64 above) 380.

[239] The judiciary in Zimbabwe when interpreting and applying the relevant environmental law it may consider South African Case law in terms of section 46 of the Constitution which provides that when interpreting the Bill of Rights, a court tribunal, forum, or body may consider relevant foreign law.

[240] 2004 (5) SA 124 (W).

[241] As above at 143.

[242] The judiciary in Zimbabwe when interpreting and applying the relevant environmental law it may consider South African Case law in terms of section 46 of the Constitution which provides that when interpreting the Bill of Rights, a court tribunal, forum, or body may consider relevant foreign law.

© University of Venda

University of Venda

(b) The right to an environment that is not harmful to health or well-being

Environmental clauses in both Constitutions amplify one's right to an environment that is not harmful to one's wellbeing. In the context of the South African Constitution, Glazewski contends that that the environmental clause is negatively phrased in that it confers a right to an environment, which is not detrimental to health, rather than simply a right to a clean and healthy environment.[243] This contention is also applicable in the case of Zimbabwe since the environmental clauses are couched in almost the same language.[244] It is persuasively contended that the right recognizes that pollution is inevitable in an industrialised society. Therefore, the right allows for some measure of development which may involve a certain degree of pollution as long as this pollution is not harmful to one's health or well-being.[245] It is in this context that May[246] generally argues that "fundamental environmental rights ... raise problems of depth: how much degradation is permissible before a violation is said to occur? What is the benchmark from which no more pollution is permissible?"

Statutorily, there are no provisions in both jurisdictions that clarify on what activities constitute an environment that is not harmful to one's health or well-being. It is, however, ideal to turn to South African court cases and foreign jurisprudence that have endeavored to determine when environmental degradation can sufficiently constitute a health hazard to the local communities or individuals. In the South African case of *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another,*[247] the generation of smoke by a company involved in wood-burning contributed to atmospheric pollution. This was regarded by the court as an infringement of the rights of its neighbours' to "an environment which is not detrimental to their health or well-being."[248] The court reached at this conclusion despite the fact that the company had taken some steps in order to reduce the degree of emission. In this case the testimony of expert witnesses was used to establish that the smoke and noxious gases generated by the company resulted in air

---

[243] J Glazewski *Environmental law in South Africa* (2005) 187.
[244] See section 24 of the South African Constitution and also section 73 of the Zimbabwean Constitution.
[245] Kotze (n 233 above) 34.
[246] May & Daly (n 64 above) 412.
[247] 1996 (3) SA 155 (N). Hereinafter referred to as *Save the Vaal case.*
[248] As above at164. This right was interpreted in relation to section 29 of the interim Constitution of the Republic of South Africa Act 200 of 1993.

© University of Venda

pollution which was a threat to the right to a clean and healthy environment of the neighbouring residents.[249]

The South African jurisprudence has also accepted the position that the constitutional right to a clean and healthy environment could be infringed upon without any precise allegations of injury. This was evidenced in the case of *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others.*[250] In this case, Sasol Mining applied to the Director of Mineral Development Gauteng[251] for authorisation in the form of a section 9 mining licence in terms of the Minerals Act 50 of 1991. Save the Vaal[252] raised environmental objections to the granting of the licence. In this case, Save the Vaal's concerns were chiefly of an environmental nature.[253] The substantive rights or interests it relied on were the environmental right enshrined in section 24 of the Constitution. The court dismissed the appeal with costs and Sasol Mining did not proceed with any mining operations in the area. This case reveals that protection may be sought from the courts not only when any development project violates, but also when it threatens to violate the environment. Such protection can be sought in spite of the fact that there is no direct injury on human health established. In this case, there was no direct evidence of activities harming the health and well-being of local communities and their member was submitted to the court since as the mining operations had not started.

In the context of South Africa, the scope of the right to environmental 'well-being' is also reflected in the case of *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products and others* (Hereinafter referred to as the *Hichange case*).[254] Hichange Investments was the owner of land adjacent to that of Cape Produce, whose tannery business produced a number of chemical waste products. The applicant alleged that harmful gases from the tannery were discharged in the atmosphere, and were causing not only an offensive odour but also the

---

[249] As above at 163.
[250] 1999 (2) SA 709 (SCA).
[251] Sasol Mining was the holder of extensive mineral rights, including those in respect of an area comprising three farms in the Sasolburg district. Para 2.
[252] The first respondent '*Save the Vaal*' is an unincorporated association whose members own property and live along the Vaal River. According to its written constitution, its object is to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations. Para 4.
[253] It was raised that open-cast mining in the area would, *inter alia*, (a) destroy the Rietspruit Wetland; (b) fauna and flora would be threatened; (c) pollution caused by noise, light, dust and waste would adversely affect the 'spiritual, aesthetic and therapeutic qualities associated with this area'; water quality would be affected; and (d) property values would decrease. Para 6.
[254] 2004 2 SA 393 E.

© University of Venda

rapid and uncontrollable corrosion of metal structures and equipment on its property. It was also alleged that such gases were prejudicial to the health and well-being of individuals on the applicant's premises and those in Port Elizabeth. At issue was, among others, the interpretation of section 28 of NEMA which contains the term "significant pollution".[255] The court referred to section 24 of the Constitution in interpreting the phrase "significant pollution." It was found that the right to well-being is relevant in the pollution context since it incorporates a sense of environmental integrity which obliges one to use the environment in a "morally responsible, considered and ethical manner."[256]

In another South African case of *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd and Others*[257] the court held the manufacturing activities carried out by the respondent resulted in pollution and, that pollution was "harmful to one's health and well-being." The court relied on a list of similar complaints raised by individual applicants, the most common of which were headaches, infected sinuses, coughing, respiratory problems, as well as irritations of the nasal passages (resulting in nose bleeds), the eyes and the skin (resulting in rashes).[258]

(c) The environmental obligations in terms of the constitutions

'reasonable legislative and other measures'

In the context of environment, states have the obligation to give legal protection to everyone through the creation of legislation that prevents pollution and ecological degradation; promote conservation; and secure ecological sustainable development and the use of natural resources while promoting justifiable economic and social development. In the South African context, the responsibility to take 'reasonable legislative and other measures' was fleshed out in the case of

---

[255] It states that: 'Every person who causes...significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment.'

[256] *Hichange case* at 80.

[257] (10083/2008) [2009] ZAWCHC 6.

[258] Some of the applicants referred to the constant invasive creosote odours emitted during the respondent's manufacturing process and necessitate the closing of all windows and outside doors and also restrict any open air activities such as braaiing, gardening and the drying of washed clothing.Para 43.

© University of Venda

Government of the Republic of South Africa and Others v Grootboom and Others.[259] In compliance with this responsibility, the South African the government has initiated the promulgation of new laws to protect the environment. NEMA, MPRDA, AQA, the NWA and other legislation that protect communities' environmental rights were passed. These Acts will be discussed later in this chapter.[260]

In the context of Zimbabwe, the EMA, Water Act and other complementary legislation have been passed to protect the environment and environmental rights. It should however be noted that these Act were in operation before the adoption of the new Constitution.[261] In terms of paragraph 4 of the Sixth Schedule to the new Constitution, all existing laws continue to be in force but must be construed in conformity with the same. However, in his Opening Speech on the First Session of the Eighth Parliament of Zimbabwe, President Mugabe has shown the government's commitment to align various pieces of legislation to the new Constitution. The President succinctly indicated that there was need to come up with legislation to give legal underpinnings to the new structures and institution provided for in the new Constitution.

'reasonable [...] other measures'

The environmental clauses in the two constitutions expressly oblige the States to take "reasonable" legislative and "other measures" to protect the environment against harmful activities that may be associated with social and economic development. In the context of environmental rights, this responsibility was fleshed out in the South African case of *BP Southern Africa.* It was stated that:

> "Measures adopted by the State must be capable of facilitating the realisation of the right. However, the precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must,

[259] 2000 11 BCLR 1169 (CC). Hereafter referred to as the *Grootboom* case. It was stated in paragraph 42 that: "The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations."

[260] See generally (*sections 3.2.3* and *3.2.4*) below.

[261] *Ibid.*

© University of Venda

University of Venda
Creating Future Leaders

> however, ensure that the measures the respondent are reasonable. It is the Court's duty to subject the reasonableness of these measures to evaluation while constantly keeping in mind that courts are generally ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community." [262]

Ferreira contends that it may be possible to oblige juristic persons to protect the environment through "other measures."[263] This would, therefore, means that the use of the words "other measures" in the two constitutions could result in the duty of environmental protection extending to juristic persons such as the mining companies in the two cases under our present study.

(d) Further provisions in the Zimbabwean Constitution

Unlike the South African environmental clause, the Zimbabwean environmental clause further provides in section 73(2) that, "[t]he State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right set out in this section." Arguably, environmental rights in the Zimbabwean Constitution, like socio-economic rights found in the CESCR, are qualified in the latter by Article 2(1) to be implemented "progressively" and "to the maximum of available resources."[264] Therefore, the obligation in terms of the section 73 can be defined in three dimensions: (a) to take "reasonable legislative and other measures"; (b) "within the limits of the resources available" (d) "to achieve the progressive realisation" of the right. The first dimension was discussed above, that is, the obligation to take "reasonable legislative and other measures."

'within the limits of the resources available'

In South Africa, the Constitutional Court has attempted give meaning to this qualification in the context of socio-economic rights. It was held in the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* that:

---

[262] *BP Southern Africa case* (note 240 above) 23.
[263] Ferreira 'Constitutional Values and the Application of the Fundamental Right to a Clean and Healthy Environment to the Private-Law Relationship' (1999) *SAJELP* at 177.
[264] Article 2(1) of the ICESCR states that, "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

© University of Venda

University of Venda
Creating Future Leaders

> "the obligations imposed on the state by section 26 and section 27 in regard to access of housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled." [265]

Apparently, the obligations imposed on the state by this clause are dependent upon the availability of the resources. Arguably, the state may not be in violation if it fails to address environmental rights due to lack of resources. However, it is established that the unavailability of resources does not relieve a state of the "core minimum obligations." The concept of 'core minimum obligations' is adopted from the CESCR. The Committee on ESCR, which is responsible for supervising and monitoring the implementation of the CESCR, stated in General Comment 3 that:

> "....a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential level of each of the rights is incumbent upon every State party. Thus, for example a State party in which any significant number of individuals is deprived of essential food staffs, of essential primary healthcare, of basic shelter and housing, or of the most basic form of education is, *prima facie,* failing to discharge its obligations under the Covenant." [266]

As such, where a state cannot meet the full realisation of a right due to a lack of resources, it must at least try to meet a certain minimum level content of the right. The state bears the onus to prove that it has deployed its available resources to the maximum extent with a view to at least satisfying the minimum obligation as a matter of priority. In cases where resources are in short supply, the state still has the obligation to "strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances".[267]

It has constantly been noted in this study that environmental rights in the Zimbabwean Constitution have not been interpreted in any litigation at the time of writing. Arguably, the judiciary would sooner or later be required to define the minimum essential level that the

---

[265] See the case of *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC) par 11.
[266] See the UN Committee on Economics, Social and Cultural Rights, General Comment 3 1994 par 10.
[267] J De Waal & G Currie Erasmus *The Bill of Rights handbook* (2001) 425.

© University of Venda

environmental rights in section 73 guarantee. The State will be in violation of section 73 when it fails to prioritise its use of its resources so as to meet its core minimum obligations.

'progressive realization of the right'

The meaning of "progressive realization" was summarised by the Committee on ESCR in the context of socio economic rights.[268] The Committee pointed out that the ultimate objective of the Covenant is the "full realisation" of the rights.[269] Arguably, since the realisation of the environmental rights in section 73 is subjected to the condition of progressiveness, this implies that its "full realisation" may generally not be achieved within a short space of time due to lack of resources. However, this condition does not alter the obligations on the state to take measures that are within the limit of its resources as soon as possible to ensure the realisation of the right. As such, the state has the onus to prove that it is making progress toward full realization of environmental rights in section 73 of the Constitution.

3.2.2 Environmental Protections within Existing Human Rights: Constitutional Provisions Relevant to the Environment

It has been argued in this dissertation that substantive environmental rights are also recognised as implicit within already-established human rights.[270] Therefore, in addition to the explicit substantive environmental right contained in the two countries' constitutions, various other fundamental human rights clearly subsume various obligations related to a clean and healthy environment. Other relevant human rights including the right to equality;[271] human dignity;[272] life;[273] property[274] can be expansively interpreted to include the right to a healthy environment. These substantive human rights are relevant to the effective administration of the two countries'

---

[268] "... the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant, which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal." Adopted from General Comment No 3 *The nature of states parties' obligations (art 2, para 1 of the Covenant)* (5th session, 1990) [UN Doc E/1991/23] para 9.

[269] MCR Craven '*The International Covenant on Economic, Social and Cultural Rights: A perspective on its development*' (1995) 128.

[270] See generally chapter 2 (*section 2.4*) above.

[271] See section 9 of the South African Constitution. See also Section 56 of the Zimbabwean Constitution.

[272] See generally sections 10 of the South African Constitution; See also section 51 of the Zimbabwean Constitution.

[273] See generally sections 11 of the South African Constitution; See also section 48 of the Zimbabwean Constitution.

[274] See generally sections 25 of the South African Constitution; See also section 71 of the Zimbabwean Constitution.

© University of Venda

University of Venda
Creating Future Leaders

current environmental regulatory framework, integrated environmental management and also environmental decision making. In addition, the two Constitutions provide procedural rights that can also be mobilised for environmental protection. These include the right of access to information,[275] the right to administrative justice;[276] limitation of rights[277] and the enforcement of rights.[278] These rights will be analysed later in this chapter to determine their application in the protection of the environment.[279]

3.2.3 General environmental framework laws in South Africa and Zimbabwe

Apart from the Constitutions of the two countries which generally apply in all circumstances, there is a vast array of laws which expressly relate to the environmental and human rights protection. Both countries within their legislative framework have provided extensively for safeguard measures to protect the environment and human rights. In this respect, both jurisdictions have adopted EMA and NEMA respectively. Although these Acts set out general requirements for environmental protection and environmental governance, they do not cover each and every environmental aspect. They are, thus, laws of general application and these require content and clarity to be given to their application in specific environmental contexts. It is in this context that they are labeled framework laws that will be complemented by other laws and policies that are consistent with them.[280]

3.2.3.1 The position in Zimbabwe

In Zimbabwe, EMA is the framework environmental law. The purpose of this piece of legislation is to provide for the sustainable management of natural resources and protection of the environment and the prevention of pollution and environmental degradation. EMA makes provisions for the formulation of environmental quality standards, (e.g. air, water, noise,

---

[275] See section 32 of the South African Constitution, see also section 62 of the Zimbabwean Constitution.
[276] See section 33 of the South African Constitution; see also section 68 of the Zimbabwean Constitution.
[277] See section 36 of the South African Constitution; see also Sections 86 and 87 of the Zimbabwean Constitution.
[278] See section 38 of the South African Constitution; see also section 85 of the Zimbabwean Constitution.
[279] See generally *section 3.3* below.
[280] Section 3(2) of EMA provides that, "[i]f any other law is in conflict or inconsistent with this Act, this Act shall prevail."

© University of Venda

effluents, waste and hazardous substances).[281] It is also vital to note that this Act defines environment, pollution, hazardous substance, waste and noxious or offensive gas. Section 4(2) lays down principles that must be taken into consideration when persons and government agencies, make decisions regarding the environment. The Act sets up a high powered Environmental Management Agency,[282] the National Environmental Council,[283] and the Environment Management Board[284] with wide ranging powers. The rules and procedures of EIA are also guided by this Act. EMA recognizes substantive environmental rights as a free-standing right to environmental quality. Section 4 clearly states that:

4(1) Every person shall have a right to—

(a) a clean environment that is not harmful to health; and
(b) access to environmental information; and
(c) protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that
(i) prevent pollution and environmental degradation; and
(ii) secure ecologically sustainable management and use of natural resources while promoting justifiable economic and social development.

Generally, the Act provides that every person should have a right to a clean environment that is not harmful to health, access to environmental information and to protect the environment for the benefit of present and future generations. However, the predicament with the rights in EMA is that it tends to reflect environmental norms as a policy directive.[285] Policy directives are intended to influence governmental decision-making but are generally "not enforceable by citizens who are aggrieved by environmental degradation,"[286] unless if the judiciary practices judicial activism in interpreting the environmental laws. The injusticiability of this right may

---

[281] It repealed various Acts including the Natural Resources Act [Chapter 20:13], the Atmospheric Pollution Prevention Act [Chapter 20:03], the Hazardous Substances and Articles Act [Chapter 15:05].
[282] Section 9.
[283] Section 7 – 8.
[284] Section 11.
[285] Section 4 (3) states that the environmental rights and principles of environmental management shall:

(a) serve as the general framework within which plans for the management of the environment shall be formulated; and
(b) 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
(c) guide the interpretation, administration and implementation of any other law concerning the protection or management of the environment.

[286] May (note 269 above) 116.

© University of Venda

University of Venda
Creating Future Leaders

explain the reason why there is little to non-reported environmental related case law in Zimbabwe. However, this is against the backdrop of Zimbabwe's long history in developmental projects, *inter alia*, mining operations, which potentially adversely affect the environment and human rights.

3.2.3.2 The position in South Africa

In South Africa, NEMA creates the fundamental legal framework that gives effect to the environmental right guaranteed in section 24 of the 1996 Constitution. NEMA sets out the fundamental environmental principles[287] some of which are derived from the Constitution and international law. NEMA also reconfirms the state's position as the 'guardian' of the environment on behalf of its citizens.[288] It also categorizes the 'persons' who can be held accountable for pollution or ecological degradation as including an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.[289] The term persons in this section can broadly be interpreted to include private law juristic persons like mining companies.

NEMA provides that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles. Sustainable development is one of the principles at the center of NEMA.[290] This principle must be taken into consideration when government departments make decisions regarding the environment.[291] Under this principle, State authorities must evaluate the social, economic and environmental impacts of developmental activities (for example, mining) that may significantly affect the environment. This Act makes provision for the establishment of two advisory and co-ordinating bodies, that is, the National

---

[287] Section 2 of NEMA.
[288] Glazewski (n 243 above) 135.
[289] Section 28(2) of NEMA.
[290] Section (1)(1)(xxix) of NEMA provides that sustainable development is 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.'
[291] Section 2(1) of NEMA.

© University of Venda

Environmental Advisory Forum (NEAF)[292] and the Committee for Environmental Co-ordination (CEC).[293] The national Department of Environmental Affairs (DEA) is the responsible agency for the enforcement of NEMA.

3.2.3.3 Comparative assessment of EMA and NEMA

Both countries' general environmental framework laws cover as much scope as possible, ranging from land-use planning and development, natural resources, environmental management, waste management,[294] pollution control,[295] access to information,[296] public participation,[297] licensing,[298] biodiversity issues and institutional arrangements.[299] Both Acts provide the general environmental principles that should be followed in environmental management.[300] Among other principles, the following apply to the activities of all persons and all government agencies in environmental management: the responsibility to protect the environment for the benefit of present and future generations; an integrated approach to the management of the environment;[301] recognition of the importance of placing people and their needs first;[302] promotion of the participation of all interested and affected parties in environmental governance;[303] and the requirement that development must be socially, environmentally and economically sustainable.[304]

In terms of both pieces of legislation, communities must be made aware of environmental aspects through environmental education and the sharing of knowledge and experience in order

[292] NEMA provides for the establishment of NEAF in Part 1 of Chapter 2. This forum was established in 2005. The aim of NEAF is to advise the Minister on any matter concerning environmental management and governance, specifically the setting and achievement of objectives and priorities for environmental governance, and appropriate methods of monitoring compliance with the principles set out in section 2 of the Act.

[293] NEMA provides for the establishment of CEC in Part 1 of Chapter 2. The Committee has the responsibility to promote the integration and coordination of environmental functions by the relevant organs of state and in particular, to promote the purpose and objectives of environmental management plans.

[294] See section 69-72 of EMA; see also section 2(4)(iv) of NEMA.

[295] See section 4(2)(g) of EMA, see also section 27 of NEMA.

[296] See section 4(1) (b) of EMA; see also section 31(1) of NEMA.

[297] See section 4 of EMA; see also section 2 (4) (f) of NEMA.

[298] See section 60-62 of EMA; see also section 7(3) (c) of NEMA.

[299] See section 7-11 of EMA; see also section 3-7 of NEMA.

[300] See section 4 of EMA; see also section 2 of NEMA.

[301] See section 2(4)(b) of NEMA; see section 4(2)(a)of EMA.

[302] See section 2(2) of NEMA; see also section 4(2)(b) of EMA.

[303] See section 4 of EMA, see also section 2 (4) (f) of NEMA.

[304] See section 2(3) of NEMA; see also section 4(2)(e) of EMA.

UNIVERSITY OF VENDA LIBRARY

© University of Venda

to increase its capacity to address environmental issues.[305] Another guiding principle common in both enactments for the management of the environment is that anticipated negative impact on the environment and on people's environmental rights shall be prevented, and where they cannot be prevented, they should be minimised and remedied.[306] These Acts also integrate international environmental principles such as the precautionary principle[307] and polluter pays principle.[308]

The Environmental Management Agency and the National Department of Environmental Affairs (DEA) are the responsible agencies for the implementation and enforcement of EMA and NEMA respectively. These agencies have wide ranging responsibilities, *inter alia,* developing and enforcing compliance with environmental policy; the formulation of quality standards on air, water, soil, noise, vibration, radiation and waste management; developing and enforcing an integrated and comprehensive regulatory system. The efficacy of these agencies in executing their duties will be determined in the next chapter.

3.2.4 Sectoral Environmental Legislation in Zimbabwe and South Africa that advocate for a free-standing environmental human right

Natural resources such as air, water, and soil are essential to all forms of life. Some writers contend that these natural resources are much more important than money and economic

[305] See section 4(2)(d) of EMA; see also section 2 (4) (h) of NEMA.
[306] See section 4(2)(f) of EMA, see also section 28 of NEMA.
[307] A common definition of the precautionary principle is found in the Rio Declaration: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation." The precautionary principle denotes that when human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or minimize that harm. See generally Section 2(4) (a) (iiv) NEMA requires "that a risk-averse and cautious approach [be] applied, which takes into account the limits of current knowledge about the consequences of decisions and actions."
[308] The polluter pays principle denotes that in cases of discharge of excessive pollutants, the expenses incurred on remedial measures to prevent, control and minimize environmental pollution can be recovered from such person. Section 2(4) (p) NEMA states that the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment. See also section 4 (2)(g) of EMA which states that "any person who causes pollution or environmental degradation shall meet the cost of remedying such pollution or environmental degradation and any resultant adverse health effects, as well as the cost of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects."

© University of Venda

infrastructure.[309] It has constantly been noted in this study that a free-standing environmental human right advocates for access to clean water, air, and soil that are free from toxins or hazards that threaten human health. Both Zimbabwe and South Africa have put in place a number of environmental legislation that regulates these natural resources as they are the essential components of a free-standing environmental human right.[310]

In addition to NEMA which has been discussed above,[311] South Africa has enacted many laws including NWA; AQA and the MPRDA to regulate the essential components of a clean and healthy environment. Besides the EMA discussed in the previous section,[312] Zimbabwe has also enacted Water Act, Mines and Minerals Act, and other Acts concerned with the protection of the essential components of a clean and healthy environment. These sectoral laws are going to be examined below as they are aimed at preventing environmental harm and most importantly protect the essential components of a clean and healthy environment.

3.2.4.1 Water Quality Standards in Zimbabwe and South Africa

Access to clean water is one of the essential components of the right clean and healthy environment. Water pollution constitutes a threat to health of all living things and has the potential of affecting the availability of water if its usage is not regulated.[313] Mining is one activity that potentially threatens the quality and availability of water, if water use in the mining industry is not regulated. Environmental rights place duties on the government to prevent the contamination and ensure conservation of water resources.[314] Both countries have statutory provisions to prevent or minimize water pollution.

(a) The position in Zimbabwe

In terms of section 77 of the Zimbabwean Constitution every person has the right to safe, clean and portable water. The state is mandated to take all reasonable legislative and other

---

[309] GIP Darsini, V Sowbhagyarani & KU Devi *'Human Rights Approach towards Pollution free Environment Department of Law'* (2010) 1.
[310] See *sections 3.2.3 and 3.2.4* above.
[311] See *section 3.2.3* above.
[312] See *section 3.2.3* above
[313] F Mohomed 'Environmental rights afforded to the residents affected by mining activities: A Case Study in Hondeklip Bay' unpublished Masters Dissertation University of South Africa, 2011, 6.
[314] Ruppel (n 164 above) 107.

© University of Venda

measures, within its available resources to achieve the progressive realisation of this right. Besides the Constitution, legislative norms geared at protecting water resources in Zimbabwe include the Water Act and EMA.[315] The Water Act is the primary legislation for the regulation and protection of water resources in Zimbabwe and the Ministry of Water Resources and Development is the responsible implementing agency. In terms of the Water Act, there is no private ownership of water resources in Zimbabwe.[316]

EMA also offers a holistic approach towards protecting water resources in Zimbabwe. It is an offence in terms of EMA to discharge or apply poison or toxic, noxious or obstructing matter, radioactive waste or other pollutants into the aquatic environment. It is also an offence to permit or instruct another person to dump or discharge such matter into the aquatic environment in contravention of water pollution control standards.[317]

Section 194 of the Mines and Minerals Act provides that the right of any miner to the use of any public water for purposes other than primary purposes shall be regulated by the Water Act. It is further provided by the Mines and Minerals Act that private water may be taken free of charge by a miner from any source of supply existing upon State land which is both unalienated and unoccupied, under such conditions as may in each case be fixed by the President.[318] It is provided also that the use of any private water on private land may be acquired by a miner based upon the terms and conditions as may be mutually agreed upon between such miner and the owner of the private water.[319] Any agreement between a landowner and a miner as to the use of private water may be reduced to writing and registered at the office of the mining commissioner.

---

[315] EMA Section 57.

[316] Section 4 (1) No person shall be entitled to ownership of any water in Zimbabwe and no water shall be stored, abstracted, apportioned, controlled, diverted, used or in any way dealt with except in accordance with this Act. (2) Subject to this Act, a permit issued in terms of this Act shall confer upon its holder a right to the use of water in accordance with the permit.

[317] EMA section 57(7) If a person is found guilty of polluting water he/she will be liable to the following; (a) sentenced to five years in prison or to pay a fine or to both the fine and imprisonment; (b) held responsible for; paying the cost of removing any poison, toxic, noxious or obstructing matter, radioactive waste or other pollutants; (c) pay the cost of restoring the damaged environment which may be incurred by a government agency.

[318] Section 193 of Mines and Minerals Act.

[319] As above, section 191.

© University of Venda

University of Venda
Creating Future Leaders

(b) The position in South Africa

Section 27 of the Bill of Rights guarantees everyone the right to have access to sufficient food and water. NWA is the primary legislation that governs water quality standards in South Africa. It is recognised in the Preamble of the Act that water is a natural resource that belongs to all people. This Act also appoints the National Government as public trustee of South Africa's water resources.[320] NWA governs the way in which people acquire the right to use water and provides for just and equitable access to water resources. The aims of NWA are to promote equitable access to water resources, to meet the basic human needs of present and future generations, facilitate social and economic development and reduce and prevent pollution of water resources. National government, acting through the Minister and Department of Water and Environmental Affairs, is responsible for achieving the aims of the Act. The owner or person in control of the water resource has the responsibility of avoiding pollution of water resources. Such a person has strict liability in respect of any damage caused by such pollution for the clean-up and remedial expenses and for any benefit that the person has derived from the pollution.[321]

In terms of the Water Services Act "basic water supply" is defined as "the prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene"[322] In terms of the government regulation, issued by the Department of Water Affairs and Forestry (DWAF), section 3, states that -

> 3. The minimum standard for basic water supply services is -
> (a) the provision of appropriate education in respect
> (b) a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month -
> (i) at a minimum flow rate of not less than 10 litres per minute;
> (ii) within 200 metres of a household; and
> (iii) with an effectiveness such that no consumer is without a supply for more than seven full days in any year.[323]

---

[320] Section 3(1).
[321] Section 20 of NWA.
[322] Section 1(iii) of the Water Services Act 1997. See also section 9(1)(a) which empowers the Minister of Water Affairs and Forestry to prescribe compulsory national standards relating to the provision of water services.
[323] Regulations Relating to Compulsory National Standards and Measures to Conserve Water (8 June 2001) No R 509.

© University of Venda

The above standards were confirmed by the Constitutional Court judgment in the case of *Mazibuko*[324] which concerned the right of access to sufficient water entrenched in section 27 of the Constitution.

(c) Comparative assessment

It is arguable that the environmental rights enshrined in the constitutions of the two jurisdictions are closely related to the right of access to sufficient water. It is imperative at this stage to determine the right's normative basis, its scope and content. While section 27 of the South African Constitution provides for a "right to have access to," water, section 77 of the Zimbabwean Constitution provides for a "right to water." In the words of Gabru,[325] the "access to" qualification[326] imposes the responsibility only to those without the means to ensure access to water.[327] The "right to water" is an unqualified obligation of the state or duty to provide water on demand. Can the "right to have access to water" in the context of South Africa be interpreted as broader as the "right to water" in the context of Zimbabwe?

Due to the infancy of the Zimbabwean Constitution, the Zimbabwean judiciary has not yet given official meaning to the phraseology of "the right to water". However, it is necessary to consider international law concerning the "right to water" as this may guide the interpretation of the Zimbabwean right. The Committee on Economic Social and Cultural Rights (CESCR) has described the content of "the right to water."[328] It was expressed in General Comment No 15 that the quantity of water available for each person should correspond to World Health Organisation Guidelines (WHO). In that context, WHO Guidelines quantify basic access to water as 25 litres per person per day, which is the lowest level to maintain life over the short term. It was further provided in the General Comment that the water services and supply required to meet the right to water must be available, physically and economically accessible, and of acceptable quality.[329] It can persuasively be argued that the "right to have access to water" in

---

[324] *Mazibuko v The City of Johannesburg and Others* 2010 (3) BCLR 239 (C).
[325] N Gabru *'Some Comments on Water Rights in South Africa' Per /PELJ* (2005) Vol. 8 No.1, North-West University (Potchefstroom) 13.
[326] Rather than 'the right to…'
[327] See in this regard *Government of South Africa v Grootboom (*n 259 above*)* par 21, 24, 31, 35 and 38.
[328] General Comment No 15 (2002) - The Right to Water (26 November 2002) UN Doc E/C 12/2002/11.
[329] The General Comment provides that the right to water falls within the category of guarantees necessary to secure an adequate standard of living (article 11) and is inextricably related to the right to health (article 12) of the ICESCR

© University of Venda

the context of South Africa[330] and the "right to water" in the context of Zimbabwe have similar normative basis, scope and content. Therefore, the difference between the wording of this right in the two constitutions is not significant. Both states have obligations to realise progressively the right and, must respect, protect and fulfil the right to water.

3.2.4.2 Effluent disposal and management in Zimbabwe and South Africa

The use of water may result in environmental pollution by releasing effluent and chemicals into water bodies and underground water. This reduces the quality and quantity of fresh water resources available for use and, in some countries, has reduced the availability of water for local communities.[331] Both Zimbabwe and South Africa have got statutory provisions for the effluent disposal and management.

(a) The position in South Africa: Effluent disposal in terms of NWA regulations

The Department of Environmental Affairs: Directorate Pollution Control is the responsible agency in terms of National Water Act Regulations 704 for the regulation and monitoring of waste disposal in South Africa. Section 7 of the National Water Act Regulations 704 requires the owner or manager of any undertaking to prevent the pollution, or further pollution of water resources, including changes to the physical (e.g. temperature, sediment load) and chemical (e.g. nutrient status) qualities of water for downstream users. The Water Use Licence referred to in the National Water Act Regulations 704 relates to effluent disposal as well as water use.

(b) The position in Zimbabwe: Effluent disposal in terms of EMA.

The Water (Waste and Effluent Disposal) Regulations of 2000, which are associated with the Water Act, specify what quality is acceptable in terms of effluent released into rivers. In terms of EMA, the Environmental Management Board is the responsible agency for the regulation and monitoring of waste disposal in Zimbabwe. In terms of EMA, undertakings which may discharge

---

[330] Mazibuko v The City of Johannesburg and Others 2010 (3) BCLR 239 (C)

[331] DK Twerefou 'Mineral Exploitation, Environmental Sustainability and Sustainable Development in EAC, SADC and ECOWAS Regions: African Trade Policy Centre Work in Progress' (2009), No.79 *Economic Commission for Africa* 12.

© University of Venda

effluents or other pollutants or have been discharging effluents or other pollutants shall submit to the Environmental Management Board accurate information about the quantity and quality of such effluent or other pollutants.[332] EMA provides that all effluents and pollutants from industries should be discharged into an existing sewerage system in terms of a licence issued by the responsible local authority.[333]

3.2.4.3 Air Quality Standards in Zimbabwe and South Africa

When air becomes contaminated by toxic fumes or dust particulates, people who breathe it are injured, perhaps even killed. The right to a healthy environment requires air quality that does not threaten human health. Air quality may be threatened if care is not taken to prevent atmospheric pollution by mining activities. Both countries have statutory provisions to prevent or minimize air pollution.

(a) The position in Zimbabwe

In order to effectively protect the environment, the Zimbabwean government has passed the EMA which repealed various Acts including the Atmospheric Pollution Prevention Act [*Chapter 20:03*]. Sections 64- 67of EMA provide for licencing of emissions. The Act provides that every owner or operator of a trade or any establishment should have a licence to emit a substance which causes or that is likely to cause air pollution. To issue a licence the Environmental Management Board looks at possible effects of the emission on air quality, consider existing licences affecting the same air resource and consider the needs of residents, human settlements and other industrial and commercial activities. The Act also regulates emission by motor vehicles and other conveyances in section 68. In terms of section 63, it is an offence to emit any substances which cause air pollution in contravention of set emission standard.[334]

---

[332] Section 58.
[333] EMA Section 59(1).
[334] EMA Section 63(2). The emission constitutes an offence if it is in excess of the prescribed amount for a particular source. If a person is found guilty of this offence he/she will be sentenced to; (a) five years in prison or less or a fine or both such fine and such imprisonment; (b) pay the cost of removing the pollution and any cost that may be incurred by a government agency in restoring the environment as a result of the pollution; (c) give to other affected people (third parties) reparation, restoration, restitution or compensation after determination by a court.

© University of Venda

University of Venda
Creating Future Leaders

(b) The position in South Africa

Air quality standards in South Africa are governed by AQA which repealed the Atmospheric Pollution Prevention Act 45 of 1965. The object of the Act is to improve air quality and prevent air pollution through a number of measures that include setting standards for controlling, managing and monitoring air quality, and establishing penalties and fines for people who do not comply with the Act. In other words, the AQA was promulgated to, inter alia; regulate air quality in order to protect the environment and the communities exposed to air pollution. Municipalities are the responsible agencies for the monitoring of the air quality standards.

3.2.4.4 Standards for Waste Management

Industrial processes, for example, mining are associated with the production of large quantities of waste. Moreover, the type of mineral extracted, as well as the size of the mine determine the amount of waste produced.[335] Usually, environmental health hazards resulting from resource exploitation and the disposal of foreign wastes affect local communities. Undoubtedly, issues related to environmental degradation such as pollution and hazardous waste-directly violate the right to health.[336] Both Zimbabwe and South Africa have got statutory provisions to minimize waste production.

(a) Standards for Waste Management in Zimbabwe (Section 69 of EMA)

EMA makes provisions for the formulation of environmental quality standards on waste disposal. In terms of EMA no person is allowed to discharge or dispose of any waste that will cause pollution of the environment or make people ill.[337] Any person who intends to transport wastes within Zimbabwe or to operate a wastes disposal site or plant, or to generate waste of a prescribed type and quantity shall apply for a waste licence to the Environmental Management Board for the grant of an appropriate waste licence.[338] In other words, no one is allowed to transport any waste without a valid licence issued by the Board to transport the waste. Every

---

[335] C D Da Rosa & JS Lyon 'Golden Dreams, Poisoned Streams: *How Reckless Mining Pollutes America's Waters and How We Can Stop It.*' Washington, DC: Mineral Policy Center, (1997).
[336] Filmer-Wilson, Anderson: (n 103 above) 15.
[337] EMA, section 70.
[338] Section 71 of EMA.

© University of Venda

person whose activities generate waste shall ensure measures essential to minimise wastes through treatment, reclamation and recycling.[339] Waste should be disposed of at a waste disposal site in terms of a licence.

(b) Standards for Waste Management in South Africa: National Environmental Management: Waste Act 59 of 2008

The Act was promulgated generally, to give effect to section 24 of the Constitution in order to secure an environment that is not harmful to health and well-being. In its preamble, the Act acknowledges that waste management practices in many areas of the Republic are not conducive to a healthy environment and the impact of improper waste management practices are often borne disproportionately by the poor. Moreover, the act recognizes that sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of.

3.2.4.5 Standards for Noise and Vibration Prevention/Minimisation

Mining is one activity that potentially leads to the emissions of noise and vibration pollution into the environment if care is not taken to prevent the same by mining companies. Both Zimbabwe and South Africa have statutory provisions to prevent or minimize noise and vibration pollution.

(a) The position in Zimbabwe: (Sections 79 – 81of EMA)

In terms of EMA no person is allowed to emit noise and pollution in excess of the recommended emission standards. The Standards and Enforcement Committee recommend minimum standards to be prescribed for the emissions of noise and vibration pollution into the environment as are necessary to preserve and maintain public health and the environment.[340] Exemption to exceed the standard noise levels can be issued upon a request for a temporary permit for activities such as fireworks, demolitions, firing ranges and specific heavy industry

[339] Section 70(3).
[340] Section 79 of EMA.

© University of Venda

undertakings.[341] Imprisonment, fine or both sanctions can be imposed on any person in contravention of emission standards.[342] Offenders may also be obliged to render to third parties affected by the offence such reparation, restoration, restitution or compensation as may be determined by court upon application by such third parties.[343]

(b) The position in South Africa

In South Africa, standards for noise, blasting, vibration and shock are set in terms of the MPRDA and the Mine Health and Safety Act, 29 of 1996. These Acts contain standards that relate to noise emissions associated with mining and quarrying. Department of Mineral Regulation (DMR) is responsible for monitoring the implementation of this legislation. Permits are required for noise emissions and blasting. Unlike EMA for Zimbabwe, NEMA does not explicitly set noise standards. This Act defines 'pollution' as any change in the environment caused by, inter alia, noise.[344] It provides that pollution of the environment must be avoided, or where it cannot be altogether avoided, it must be minimised and remedied.[345] This provision may be read to also imply noise pollution.

3.2.4.6 Mining Legislation

Both countries have enacted laws that are meant to minimize the potential environmental dangers of mineral operations without imposing excessive cost burdens on the industry and thereby jeopardizing its economic viability. Mines and Minerals Act for Zimbabwe and MPRDA for South Africa are considered to be broad in scope as they consolidate the country's various laws relating to minerals.

---

[341] Section 81of EMA.
[342] As an indication that Zimbabwe takes the enforcement of its environmental laws seriously, sections 57, 63, 70 and 80 of EMA provide for severe criminal sanctions against violators. Imprisonment, fine or both sanctions can be imposed on any person in contravention of emission standards.
[343] EMA Section 63(3)(b).
[344] Section 1(1).
[345] Section 4(a)(ii) of NEMA.

© University of Venda

(a) The position in South Africa: Mineral Resources and Petroleum Resources Development Act 28 of 2002 MPRDA

The promulgation of the MPRDA shows one of the positive approaches by which South Africa has reformed the mining industry. In the words of Murombo, MPRD 'has been hailed as a revolutionary piece of law promoting sustainable mining and black economic empowerment.'[346] More importantly, this Act was promulgated to make provisions for, amongst others, give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development.[347] Any mining activity in South Africa requires a mining authorisation in terms of section 39 of the MPRDA. EIA process must be carried out before mining operations kick-start. The Act is administered by the Department of Minerals and Energy. Although the MPRDA does not contain specific rights afforded to communities affected by mining activities, it deals with mining companies' obligations in dealing with, for example, pollution and environmental degradation that could be harmful to one's health and well-being.

(b) The position in Zimbabwe: Mines and Minerals Act [*Chapter 21:05*]

In Zimbabwe, the Mines and Minerals Act administered by the Ministry of Mines and Mining Development, was promulgated to inter alia, regulate the acquisition of mining rights and prospecting for and extraction of minerals. It also governs the administration of trade and dealing in mineral resources. The mining operations in Zimbabwe should be done according to the Mines and Minerals Act to which the companies prescribe. Issues to do with the environmental concerns are mentioned in section 159 in which an applicant for a special mining lease should furnish to the mining commissioner a report on the anticipated impact of mining operations on the environment and any measures to be taken to assess, prevent or minimize such impact, including proposals for the prevention or treatment of pollution; and the treatment and disposal of waste; the protection of rivers and other sources of water; and the reclamation

[346] T Murombo 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation' (2013) Vol. 9 No.1, *Law, Environment and Development Journal* 41.
[347] Section 2(h) of the MPRDA.

© University of Venda

and rehabilitation of land disturbed by mining operations; and monitoring the effect of mining operations on the environment.[348]

(c) Comparative assessment

In contrast to MPRDA, for South Africa, which provides that resources should be developed in an ecologically sustainable manner while promoting justifiable social and economic development,[349] the Mines and Minerals Act, for Zimbabwe, does not contain sustainable development provisions. Given the fact that the term "environment" is only mentioned 4 times in the Mines and Minerals Act, it can be concluded that its main purpose is unrelated to environmental management. In the words of Murombo, "South Africa only recently changed the mining code to incorporate sustainability. In Zimbabwe the mining laws remain premised on the colonial models hell-bent on efficient extraction and trade in mineral resources."[350] The extent to which the mining companies in the two countries comply with the environmental clauses in the mining legislation they subscribe to is going to be ascertained in the next chapter.

3.3 Procedural Environmental Rights in the context of Zimbabwe and South Africa

The preceding section discussed substantive environmental rights in the context of both Zimbabwe and South Africa, the following section focuses on the other category of environmental rights, that is, procedural environmental rights. Content and implications of this right for individuals and communities have been analised in chapter 2 above.[351] It should be mentioned that although the procedural rights in the two constitutions do not explicitly address environmental issues, they can by implication, be interpreted in the environmental context in order to have better environmental decision-making and enforcement. As stated in the previous chapter, procedural environmental rights include access to environmental information, participation in environmental decision-making, and access to justice in environmental matters.

---

[348] 159(2)(e)(vii)
[349] Section 2(h) of the MPRDA.
[350] Murombo (n 346 above) 39.
[351] See chapter 2 *(section 2.6.)*.

© University of Venda

University of Venda
Creating Future Leaders

These rights are going to be discussed in the context of South African and Zimbabwean legislation.

3.3.1 Access to Environmental Information

The right of access to information is important to the realisation of the right to a healthy environment. Content and implications of this right for individuals and communities have been analised in chapter 2 above.[352] Albeit subject to limitations, the right of access to information is protected as a fundamental right in the both Zimbabwe and South Africa.[353] This right can, therefore, be claimed on constitutional basis in both countries. Despite the fact that this right does not specifically refer to the environment, it is nevertheless relevant to environmental concerns. Therefore, this right must be reformulated and expanded in the context of environmental protection.

3.3.1.1 The position in Zimbabwe

Before the promulgation of the 2013 Zimbabwean Constitution, the right of access to information was scantly protected in section 20 of the 1979 Lancaster House Constitution.[354] Despite the fact that this section made provision for the right to freedom of expression, it did not sufficiently guarantee and protect this right as envisaged in key human rights instruments such as the African Charter. Arguably this would leave room for Zimbabweans to infer on what their entitlements are under this section. Worse still, Section 20 (2) imposed wide limitations to the enjoyment of the same rights.

Zimbabwe has recently shown its commitment to expanding access to information through the inclusion of access to information clause in section 62 of the 2013 Constitution. The Constitution states that every citizen of Zimbabwe or permanent resident, including juristic persons and the Zimbabwean media, has the right of access to any information held by the state or by any institution or agency of government. This right is not absolute as section 62(4) provides that legislation that should be enacted to give effect to this right may restrict access to information in

---

[352] *Ibid.*
[353] See section 62 of the Zimbabwean Constitution and also section 32 of the South African Constitution.
[354] Section 20(1) provided for the right '….to receive and impart ideas and information without interference…'

© University of Venda

the interest of defence, public security and profes[illegible] confidentiality. However such restriction should be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

The general legislation geared at protecting this right in Zimbabwe is Access to Information and Protection of Privacy Act [Chapter 10:27] (AIPPA) of 2002.[355] This Act sets out detailed procedures which must be followed in order to obtain access to information. This act was in operation before the adoption of the new Constitution. In terms of the Sixth Schedule to the new Constitution, this Act continues to be in force but must be construed in conformity with the same.[356] However, it should be noted that there is need to come up with new legislation aligned to the new Constitution which promotes the right of access to information.

3.3.1.2 The position in South Africa

The Constitution of the Republic of South Africa guarantees the right of access to information in Section 32(1). Section 32(1) of the South African Constitution states that everyone has the right of access to any information held by the State or by another person that is required for the exercise and protection of other rights. There is a Constitutional obligation that the state enacts enabling legislation to fully realize this right. As such, the Promotion of Access to Information Act No 2 of 2000 (PAIA) was enacted to give effect to the constitutional right of access to information. Where a request is made in terms of the Act, the body to which the request is made is obliged to release the information, except where the Act expressly provides that the information may or must be withheld.[357] PAIA was described by Kaitira Kandji of the Media Institute of Southern Africa (MISA) as providing clear and detailed procedures for accessing a very broad range of both private and public information. He noted that: "The exemption provisions are reasonable and subject to a public interest test and it provides a mechanism for oversight and monitoring which should ensure continued improvements and refinements as the Act begins to have an impact in South Africa."[358]

---

[355] AIPPA was amended by the Access to Information and Protection of Privacy Amendment Act 5 of 2003.
[356] In terms of Part 4 of the Sixth Schedule to the new Constitution.
[357] Section 70: This Act should be read with the Protected Disclosures Act 26 of 2000.
[358] K Kandji: Programme Manager- MISA in a paper presented at a workshop: Media and Corruption: Raising the Bar, May 29 –June 3, Park Plaza Hotel, Sandton, South Africa.

© University of Venda

3.3.1.3 Comparative Assessment

It is contended that in the Southern African Development Committee (SADC) region, only South Africa and Zimbabwe have enacted access to information legislation.[359] PAIA and AIPPA are the principal enactment that flesh out and assure this right in South Africa and Zimbabwe respectively. It should be noted that these two framework laws are not concerned specifically with the environment, but they give content to environmental rights and issues. In other words, these enactments should be considered when dealing with all environmental issues. Where a person has established a clear right of access to information, failure to grant such access constitutes an infringement of the constitutional right.

NEMA and EMA specifically deal with access to environmental information.[360] These Acts support the view that the public should be allowed to have access to environmental information for them to actively participate in decision-making processes that involve their environmental rights. For example, the public has the right to know in advance about possible plans for the expansion of mining operations in their community and they have the right to inform decision-makers if they are against such developmental project.

3.3.2 Public Participation in Environmental Decision-Making

Environmental issues involve a lot of administrative work, for instance the granting of permits, authorizations, orders and licenses and the approval of Environmental Impact Assessment.[361] Environmental conflicts often arise as a result of the unfair or incorrect use of administrative decision-making powers. However, administrative justice seeks to ensure public protection against abuse of state power, promote public participation in decision making and ensures that administrators are answerable to the public they are meant to serve.[362] Therefore, in making

---

[359] An Analysis of Weaknesses in Access to Information Laws in SADC and in Developing Countries. A report prepared by Mzi Memeza for the Access to Information Programme of the Freedom of Expression Institute (FXI).
[360] It is provided in section NEMA 31(1)(a) that, 'every person is entitled to have access to information held by the State and organs of state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances; organs of state are entitled to have access to information.' See section 4 (1) of EMA (20:27) states that every person shall have a right of access to environmental information.
[361] Murombo: (n 221 above)144.
[362] Kotze (n 233 above) 50.

© University of Venda

decisions about the environment, just administrative action envisages that concerns of the interested and affected parties must be listened to before giving permission for an activity that may significantly affect the environment. Content and implications of the right to public participation in environmental decision making processes for individuals and communities have been analised in chapter 2 above.[363]

At the national level, the right to public participation in environmental decision making processes is implied in the right to just administrative action protected in both countries constitutions.[364] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) and Administrative Justice Act, Chapter [10:28] of 2004 (AJA) for South Africa and Zimbabwe respectively, contain standards for public participation where administrative action is concerned. Summarily both AJA and PAJA require: (a) an administrator to act lawfully and reasonably, and to follow fair procedures when making decisions;[365] (b) an administrator to give adequate reasons for their decisions;[366] (c) an administrator to inform people about their rights to appeal or review and to request reasons.[367] Both Acts also give members of the public the right to challenge administrative decisions in court on a number of grounds.[368] They also lay down the procedures that must be followed by people seeking judicial review.[369] These Acts make it obligatory for public bodies that exercise administrative action to give the public the opportunity to be heard on matters of public concern.

Both PAJA and AJA prescribe general procedures for the performance of administrative action affecting the public generally. They are thus laws of general application and, as such, require content and clarity to be given to their application in specific public administrative contexts.[370] In the context of environment, NEMA and EMA which are South Africa and Zimbabwe's primary environmental framework legislation, contains several provisions that directly relate to public participation in environmental issues. For example, it is provided in both Acts that, the

---

[363] See chapter 2 *(section 2.6)*.
[364] See section 33 of the South African Constitution. See also section 68 of the Zimbabwean Constitution. Despite the fact that this right does not specifically refer to the environment, it is nevertheless relevant to environmental concerns. Therefore, this right must be reformulated and expanded in the context of environmental protection.
[365] See generally section 2 of PAJA; see also sections 3 and 6 of AJA.
[366] See generally section 5 of PAJA; see also sections 3 and 6 of AJA.
[367] See generally section 3(2) of AJA; see also section 3(2) of PAJA.
[368] See generally section 6 of PAJA; see also section 4 of AJA.
[369] See generally section 7 of PAJA.
[370] Although these Acts are not concerned specifically with the environment, they give content to environmental rights and issues. As such, they should be considered when dealing with all environmental issues.

© University of Venda

participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation,[371] and participation by vulnerable and disadvantaged persons must be ensured.[372] In the context of Zimbabwe, the Mines and Minerals Act states that there must be no prospecting on any portion of communal land without the consent of the occupier of the land concerned.[373]

The principles of common law in both Zimbabwe and South Africa still afford guidance as to the standards for public participation where administrative action is concerned.

3.3.2.1 Common law principles in Zimbabwe

In Zimbabwe, the Lancaster House Constitution of 1979 which was in operation before 2013 did not contain a just administrative action clause. Although administrative rights were not represented in the highest law of the land, they formed part of the Common law rules of natural justice.[374] The *audi alteram partem* principle is one of the two principles of natural justice in terms of which everyone has a right to be heard where his or her interests could be affected by an administrative action.[375] This principle can be employed to raise objections to an administrative action which may adversely affect concerned parties' environmental rights and interests. Particularly, it can be raised in cases where the public would not have been given the opportunity to raise objections to administrative action. It was held in the Zimbabwean case of *Ford v Law Society of Rhodesia*[376] that one of the requirements of this principle is that a party

---

[371] See generally section 4 of EMA, see also section 2 (4) (f) of NEMA.
[372] Section 2 (4) (f) of NEMA.
[373] Section 31(1).
[374] According to Feltoe, "[t]he principles of natural justice embody fundamental notions of procedural fairness and justice. As applied to administrative decisions, these principles seek to ensure that such decisions are only taken after fair and equitable procedures have been adhered to. In essence natural justice tries to guarantee that the parties who will be affected by the decisions receive a fair and unbiased hearing before the administrative tribunals reach their decisions. By required adherence to standards of procedural fairness, not only is justice seen to be done, but also these principles assist tribunals to reach substantively correct decisions. If the principles are observed, decisions are reached only after the tribunals have been informed of facts relevant to their determinations and decisions are reached on an objective evaluation of the evidence ..." Adopted from G Feltoe *A Guide To Zimbabwean Administrative Law* (1987) 23.
[375] See for a detailed discussion on the application of the principle, D M Pretorius 'The Outsider and Natural Justice: A Re-examination of the Scope of Application of the *Audi Alteram Partem* Principle,' *Tydskrif vir Hedendaagse Romeins Hollandse Reg* no. 63 (2000): 93-110.
[376] 1977 (2) RLR 40 (A).

© University of Venda

should be given reasonable notice of an awaiting hearing. Factors such as the seriousness and complexity of the case determine the reasonableness of the amount of notice given in any particular case. In the Zimbabwean jurisdiction, no case could be identified that specifically deals with public participation in environmental decision making. It is recommended that Zimbabwe find guidance for the implementation and enforcement of the right to public participation in environmental decision-making in the South African model.

3.3.2.2 Common law principles in South Africa

The common law principle of *audi alteram partem* equally forms part of the South African Common law. In South Africa, case law has shown that most disputes concerning the environment arise as a result of the carrying out of administrative duties. This principle was at the center in *Save the Vaal case*.[377] The legal question on appeal was whether concerned parties, wishing to oppose an application by the holder of mineral rights for a mining licence are entitled to raise environmental objections and be heard by the Director, who is the official designated to grant or refuse such licence. The court confirmed the respondent's submission that the *audi alteram partem* principle should have been applied by the Director.[378] As such, the respondents had the right to raise objections and concerns to the responsible authorities. The Court stated that:

> ...the application of the [*audi*] rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the *Brundtland Report*) ...Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[379]

---

[377] Note 250 above.

[378] It was submitted that the rule comes into operation whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting a person in his or her liberty or property or existing *rights* or *interests*, or whenever such a person has a legitimate expectation of a hearing, unless the statute expressly or by necessary implication indicates the contrary, or unless there are exceptional circumstances which would justify a court in not giving effect to it. Para 9.

[379] Para 20.

© University of Venda

As a result, the court dismissed the appeal with cost. Sasol Mining did not carry out its mining operations in the area. This case shows how administrative action should be taken. This case indicates that government authorities should not undermine the significance of public participation in licensing proceedings. Mining licences should not only be negotiated in high offices neglecting the role of the local communities that can potentially be affected by environmental effects that may result. The case highlights the need to always consult with the affected communities before initiating any developmental project that potentially affects their environment rights and interests. In other words, interested and affected parties should be given the appropriate opportunity to comment or raise objections in decision making processes that may affect the environment. The case also shows the need to ensure sustainable development by the government and mining companies. Although this case was centered on the common law rules of natural justice, PAJA develops and clearly defines the content and scope of South Africa's administrative justice system. In cases of conflict PAJA prevails.

3.3.3 Access to Justice in Environmental Matters

It has been indicated in this chapter that Constitutions in both jurisdictions under study guarantee the right to an environment that is not harmful to human health or well-being. Therefore, everyone has this basic right and may institute legal proceedings to protect it. The content and implications of access to justice in environmental matters for individuals and communities have been analised in chapter 2 above.[380] This section discusses the available avenues in both states' legal systems that enable interested parties to approach the courts and use the law as a remedy to enforce their environmental rights. It is contended that legal standing and judicial review are the two important components of access to justice.[381] These two components are going to be discussed in the next section.

3.3.3.1 Judicial Review

Access to justice includes the power of courts to review government's actions and omissions and the right to appeal against decisions made by the same with. In other words, courts have

[380] See chapter 2 (*section 2.6.)*
[381] Olenasha (n 215 above) 24.

© University of Venda

inherent powers to review administrative actions [illegible] where such decisions fail to meet the requirements of justice and fairness. Judicial review can be used as a means to challenge administrative actions that are environmentally harmful.[382]

3.3.3.2 Legal Standing

An interested party who seeks to bring fundamental environmental right claims must ensure that they have standing to bring the claim.[383] Once the applicant is in the court with a claim in public interest, the most important question for the court is to determine whether the applicant should be allowed access to the judicial process. South African law, in common with Zimbabwean legal system, formerly adhered to common law rules of legal standing. Under common law, the circumstances that determine a person's legal standing include that the person must have some legal right or recognised interest must be at stake; the right or interest must be direct; and the right or interest must be personal.[384] It is contended that this common law rule of legal standing has sometimes incapacitated people wanting to raise an environmental issue, from approaching the courts because they lacked sufficient personal interest in the matter.

Besides common law rules, legal standing in Zimbabwe was also scantly protected by the 1979 Lancaster House Constitution.[385] However, Zimbabwe has recently expanded access to justice through the inclusion of legal standing clause in section 85 of 2013 Constitution. It is stated that,

> (1) Any of the following persons, namely-
>
> (a) any person acting in their own interests;
>
> (b) any person acting on behalf of another person who cannot act for themselves;
>
> (c) any person acting as a member, or in the interests, of a group or class of persons;
>
> (d) any person acting in the public interest;

---

[382] For example, judicial review can be used to interdict mining activities that are environmentally harmful.

[383] May & Daly (n 64 above) 434.

[384] The Court must be satisfied that one's interest in the relief sought satisfies the following criteria: (a) a direct interest that is not too remote from the relief sought; (b) a substantial interest that is not too abstract or academic; (c) a real interest not a hypothetical one; (d) a sufficient or patrimonial interest. See generally the Zimbabwean case of *Kachingwe and Others V the Minister of Home Affairs and Others (2005) AHRLR 288 (ZwSC 2005) Para 29.*

[385] Section 24(1) of the Constitution provides that any person who alleges that the Declaration of Rights has been, is being, or is likely to be, contravened in relation to him that person may apply to the Supreme Court for redress.

© University of Venda

(e) any association acting in the interests of its members;

is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this chapter has been, is being or is likely to be infringed and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

This clause is couched in the same language as section 38 of the South African Constitution which affords legal standing to people acting in their own interest, acting on behalf of other persons, acting as member of a group or class of persons or acting in the public interest.[386] In South Africa, section 32 of the NEMA reiterates the provisions of section 38 of the 1996 Constitution in the context of environmental law. The South African model Africa shows the increased access to courts in environmental matters since individuals, associations,[387] NGOs[388] and environmental authorities[389] have been able to institute legal proceedings in order to protect the environment in the public interest. An individual from a particular group can represent the interests of the whole group. In the same vein, it is logical to point out that if the concerned parties do not have sufficient funds to pay the legal costs, they can approach an NGO to institute legal proceedings.

3.3.3.3 Justiciability of environmental rights in Zimbabwe before and after the adoption of the 2013 Constitution

It has constantly been noted in this study that the Lancaster House Constitution did not explicitly provide for the right to a healthy environment as a fundamental right. A free standing right to environmental quality was only provided in terms of section 4 of EMA.[390] However, the predicament that the general public could face in trying to enforce this right is that it tends to

---

[386] See sec 38 of the Constitution Act 108 of 1996.

[387] See sec 38 of the Constitution; see also *'Save the Vaal' case* in which the respondent, unincorporated environmental association successfully instituted action on behalf of the concerned citizens.

[388] See for example, *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 3 SA 1095 Tk.; *and Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 C.

[389] See for example, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006 5 SA 333 W; and also *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 3 SA 155 NPD.

[390] See *section 3.2.3.1* above.

© University of Venda

reflect environmental norms as a policy directive.[391] There was no enforceable obligation on the part of the state to guarantee rights of this status. In other words access to justice on environmental rights could be impeded by the status of the same. It should be acknowledged that Zimbabwe has recently included environmental rights in its 2013 Constitution. For the meantime, environmental rights in the 2013 Constitution have not been considered in any litigation in Zimbabwe. On face value, the general public may not face challenges in claiming this right in the courts since they are constitutionalised and, therefore, represented in the highest level of national law. Therefore, only time will judge if the general public is going to benefit from this constitutional right.

3.4 Chapter Conclusion

This chapter focused on environmental rights categories in the context of South Africa and Zimbabwe. The study has indicated that both South Africa and Zimbabwe have enshrined a substantive right to a healthy environment in their national constitutions. The content and implications of this right for individuals and communities have been analised. The study has shown that both Zimbabwe and South Africa have put in place a number of environmental legislation that support a free-standing environmental human right. It has analised, compared and contrasted the prominent characteristics of the legal mechanisms, policies and systems that have been put in place by the two governments to protect, respect, and promote the environmental human rights. The study also discusses the second category of environmental rights, that is, procedural environmental rights. It was indicated that although the laws that protect procedural rights in the two constitutions do not explicitly address environmental issues, they can by implication, interpreted in the environmental context.

[391] Policy directives are intended to influence governmental decision-making but are generally not enforceable by citizens who are aggrieved by environmental degradation, unless if the judiciary practices judicial activism in interpreting the environmental laws.

© University of Venda

4 THE EFFECT OF MINING OPERATIONS ON THE ENVIRONMENTAL HUMAN RIGHTS OF CHIADZWA AND MOGALAKWENA LOCAL COMMUNITIES

4.1 INTRODUCTION

This chapter draws insights gained through the legal research presented in chapters 2 and 3. This chapter evaluates the effect of mining activities on the environmental rights of individuals and communities residing adjacent to mining areas with particular reference to the Chiadzwa mining area in Zimbabwe and the Mogalakwena mining area in South Africa. The previous chapter concluded that there are sufficient laws to which the affected communities may take recourse. The efficacy, or otherwise, of the legal framework established for the enjoyment of fundamental human rights in the two jurisdictions will be tested in this chapter to determine if they promote the goals they were supposed to achieve.

The chapter also examines the compliance levels by the governments and mining companies with national and international instruments to achieve the aims of balancing the *desideratum* of exploiting the nations' natural resources along prudential and utilitarian guidelines for the nation's benefit and protecting the environmental rights of the communities who live near the mining sites. Thus, data was gathered from Mogalakwena and Chiadzwa mining areas where focus group discussions and face-to-face interviews were held with stakeholders including community members, local authorities, NGOs and mining companies' personnel. In other words, this chapter examines the extent to which constitutionally embedded environmental rights have met the promise of ensuring a right to a healthy environment in communities under our present study.

Three hundred respondents were targeted to participate in this study, one hundred and fifty from each research site. However, some respondents at the respective research sites did not manage to participate. One hundred and forty-four (144) respondents in Chiadzwa and one hundred and forty-one (141) respondents in Mogalakwena participated in this study. Explanations of the analysis will be done using mixed method. The data was collected both

© University of Venda

qualitatively and quantitatively.[392] The researcher tabulated data collected from the respondents. The data was expressed as percentages of total responses on each environmental issue examined. The researcher chose to express the data in percentages so as to provide a standard measure for ease of analysis and interpretation. Since the study is comparative in nature, data collected form Mogalakwena and Chiadzwa was pulled together where appropriate, but discussed separately where warranted. This may help to avoid unnecessary repetition where responses are similar or where they can better be analysed and interpreted simultaneously. It should be noted that conclusions and recommendations are going to be deduced from data presentation, analysis and interpretation.

4.2 Substantive Environmental Rights of Local Communities

It has consistently been stated in the previous chapters that environmental protection is intrinsically related to a number of other human rights within the international human rights law and comes out as a precondition to the enjoyment of many related rights.[393] As far as substantive environmental rights are concerned, communities at the respective research sites are entitled to a clean and sound environment such as generally pollution-free water, air and other material supplies for full enjoyment of life and health.[394]

Questions for the entire research were presented in two categories, that is, questions related to substantive environmental rights and questions related to procedural environmental rights. Under substantive environmental rights, all respondents in both cases were asked questions which related to their views on: (i) the destruction of land, forests and plants, (ii) air pollution, (iii) water pollution, (iv) noise and vibration pollution and (v) waste production. The last section of this study required the respondents to provide their views on the effect on mining operations on procedural environmental rights which include: (i) access to environmental information, (ii) participation in environmental decision-making and (iii) access to justice in environmental matters.

---

[392] The research methodology was detailed in chapter 1 (*section 1.9*) above.
[393] See generally chapter 2 *(section 2.4)* above.
[394] This contention has made the back-bone of the legal research in chapter 2.

© University of Venda

Table 2: Respondents' responses to questions relating to issues affecting substantive environmental rights

Understanding the impact of mining operations on the environment	Air pollution	Water pollution	Noise and vibration pollution	The destruction of land, forests & plants	Waste production	those who did not know any risks
Mogalakwena	43%	32%	43%	46%	60%	6%
Chiadzwa	48%	70%	54%	58%	68%	8%

Respondents' views were sought in both Chiadzwa and Mogalakwena with respect to the effects of surface mining activities in their communities. More than 50% of the respondents in both cases showed insight of 'most' of the environmental risks associated with mining operations in their communities. A smaller percentage of respondents in Mogalakwena (6%) and Chiadzwa (8%) noted that they were unaware of any environmental risks associated with mining operations. When asked about specific environmental risks, respondents in both case cited the pollution of air, water, soil and noise pollution. They also noted waste production and the destruction of land, forests and plants. It should be noted that most respondent in both cases who raised concerns about a particular environmental risk (for example air pollution), were also likely to raise concerns on other risks (for example water pollution).

4.2.1 The destruction of land, forests and plants in Mogalakwena and Chiadzwa

Substantive environmental rights encompass the right to protection and preservation of the air, soil, water, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.[395] The destruction of land, forests and plants, for example, during mining operations may compromise the realisation of this right.[396] Under this section,

[395] The Ksentini Report (n 45 above) 74. See also chapter 2 *(section 2.5.1.3)* above.
[396] Surface mining is an environmentally damaging process which may transform the natural landscape, creating open spaces in the ground and generating heaps of rock wastes, mine tailings. This phenomenon is clearly exemplified in Chiadzwa and Mogalakwena where companies are conducting surface mining.

© University of Venda

University of Venda
Creating Future Leaders

respondents' views were sought to evaluate the effects of the destruction of land, forests and plants on the rights of individuals and communities residing adjacent to mining areas.[397]

Respondents at the respective research sites were asked to respond the questions related to the environmental risks associated with mining operations in their communities. They noted that the extraction phase has virtually resulted in the destruction of vegetation, in form of natural forest or crop, and has radically altered the natural landscape in their areas. Respondents in each case were also asked about the likelihood that the destruction of land, forests and plants by the mining companies had resulted in health problems. A greater percentage of respondents in Chiadzwa (58%), than in Mogalakwena (46%), noted that the destruction of land, forests and plants is likely to have caused health problems.

When asked to respond the questions related to the causes of the destruction of land, forests and plants respondents in both cases quoted that the use of heavy machinery by the mining companies. It was cited that the use of heavy machinery results in massive clearance of natural forests, vegetation and the top soil in the mining areas. The researcher observed during field work in both cases that open spaces created due to open cast mining may predispose the mining premises to wind erosion. Findings seem to indicate that heavy winds and excessive temperatures in the two mining areas may incapacitate natural vegetation to develop without human intervention.

Asked what interventional measures mining companies are taking to reduce risks associated with the destruction of land, forests and plants, responses indicated that they are carrying out rehabilitation processes in mined out areas. Interviewed mine workers in both cases noted that volumes of wastes generated by the massive clearance of natural forests, vegetation was used to rehabilitate the mined out areas. This measure is two-fold in that it deals with waste problem that may threaten human health and also land degradation at the same time. Although it is ideal to use such waste for land reclamation, observations by the researcher during field work indicated that the land will never be given its natural look.

[397] Laws established in both jurisdictions to protect these principal components of the environment have been discussed in chapter 3 under substantive environmental rights.

© University of Venda

Efforts by the mining companies to address the problems of land degradation were also assessed. Mine workers responded to questions relating to their views on the compliance level with national legislation to achieve the aims and goals of a sound environment. Responses to this question indicated that mining companies are endeavouring to comply with their respective national environmental legislation to which they subscribe by carrying out rehabilitation processes in mined out areas. The responses also suggested that these efforts by mining companies have helped in ensuring healthy working conditions for mine workers and also the health of the communities at large.

Asked about the effectiveness of the interventional measures taken by the mining companies, more than 50% of the respondents in Chiadzwa and less than 50% of the respondents in Mogalakwena indicated that they are not contented by the 'inadequate' rehabilitation efforts by the mining companies. Those who indicated the ineffectiveness of the efforts by mining companies noted that the measures are only limited to re-grading the land to fill in the excavated pits. Responses in both cases indicated that nothing has been done about re-afforestation or biological restoration of the rehabilitated land.

Based on the responses with respect to the destruction of land, forests and plants, the conditions in both cases could lead to ecological degradation of the ecosystem and also affects the aesthetic of the mining areas that influence human health and well-being. This study argues that, mining operation in both cases and 'the inadequate rehabilitative efforts' by the mining companies may adversely affect the local communities' rights pertaining to their spiritual, aesthetic and therapeutic life. In other words, mining operations in both cases under our present study have generally left negative effects on the physical environment, which ultimately may be detrimental to the health and well-being of the local communities.

4.2.2 Waste production and management by mining companies

Mine waste is another cause of concern in both cases under study. It can be persuasively argued that when invoking the right to a clean and sound environment, issues associated with environmental degradation and hazardous waste directly compromise this right. This section determines if mining companies at the respective research sites dispose of industrial waste in

UNIVERSITY OF VENDA LIBRARY

© University of Venda

an environmentally sound manner as envisaged by the laws.[398] This section also evaluates the effects of waste production and disposal on individuals and communities adjacent to the mining areas. When asked about the industrial wastes produced during mining operations, respondents in both cases noted hazardous and non-hazardous wastes.[399] Respondents were asked about the likelihood that waste production by the mining companies had resulted in health problems. A greater percentage of respondents in Chiadzwa (68%), than in Mogalakwena (60%), noted that waste production is likely to cause health problems.

4.2.2.1 The position in South Africa

Respondents in Mogalakwena were asked to respond to questions relating to the types of industrial wastes produced during mining operations. A greater percentage of respondents (60%), noted both hazardous and non-hazardous waste types found at the mining site.[400] In terms of National Environmental Management,[401] sustainable development requires that the generation of waste is avoided, or where it cannot be avoided, that it is reduced, re-used, recycled or recovered and only as a last resort treated and safely disposed of. When asked what interventional measures were adopted to deal with both hazardous and non-hazardous wastes, mine workers acknowledged that different departments in the company and other outside companies collect waste for recycling.[402] Interviewees contended that this measure reduces the quantity of waste sent to landfill. The company has also constructed a number of plant tailings dams for hazardous waste disposal.

When asked about the effectiveness of the interventional measures taken by the mining company, most of them indicated a negative response and less than half of the respondents responded positively. In other words, a greater percentage of the respondents (60%) contended

---

[398] Laws that regulate waste production and management in both jurisdictions have been discussed in chapter 3 under substantive environmental rights.

[399] Generally it should be noted that the type of mineral extracted, as well as the size of the mine determines the amount of waste produced.

[400] Some of the hazardous waste include oil sludge or spilled oil; expired or spilled chemicals/reagents; lead oxide; empty chemical containers; used radioactive sources; sludge; sample waste from the labs; waste contaminated by hazardous substances; items contaminated with oil; oil and degreaser drums, *inter alia*. Respondents also noted the general waste rock as non-hazardous wastes.

[401] Waste Act 59 of 2008.

[402] It was noted that most of the hazardous wastes produced by the company are collected by Oil Separation Services. At oil separation services these wastes are re-used, recycled or recovered and sold.

© University of Venda

University of Venda
Creating Future Leaders

that interventional measures taken by the mining company were inadequate to dispose of waste in an environmentally sound manner. Respondents noted that waste sites for the mining company are characterised by overburdened dumps. They expressed concern about the rehabilitation efforts adopted by the mining company. They noted that the mining company has not taken measures to rehabilitate the waste dumps and dust from these dumps has either resulted in or could result in air pollution. This condition likely causes health problems to the local communities.

These respondents also noted that the stockpiles of waste are too steep for the development and survival of any seed plant. Apparently, the unpleasant landscape affects or may adversely affect on the local communities rights pertaining to their well-being and aesthetic qualities associated with these areas. In addition, the transformation of the natural landscape, the creation of open spaces in the ground and the generation of heaps of rock wastes could adversely affect tourism in the area. This would ultimately affect the economy of Mogalakwena.

4.2.2.2 The position in Zimbabwe

Respondents in Chiadzwa were asked to respond to questions relating to the types of industrial wastes produced during mining operations. A greater percentage of respondents (68%), noted both hazardous and non-hazardous waste types found at the mining site.[403] When asked what interventional measures were adopted to deal with non-hazardous wastes, respondents noted that the same is used to rehabilitate the mined out areas. This study argues that this measure is two-fold in that it deals with waste problem and also land degradation at the same time. Although it is ideal to use such waste for land rehabilitation, the land will never be given its natural look.

EMA provides that all effluents and pollutants from industries should be discharged into an existing sewerage system.[404] When asked what interventional measures were adopted to deal with hazardous wastes, mine workers acknowledged that companies have constructed some

[403] Some of the hazardous waste include oil sludge or spilled oil; slam water from mineral clean-ups; expired or spilled chemicals/reagents; chemicals such as *Fesi* used for cleaning up of the gem; empty chemical containers; tailin8gs such as fine sand from power screens and waste contaminated by hazardous substances. General non-hazardous waste found in mining premises includes waste rock and also volumes of wastes generated by massive clearance of natural forests, vegetation and the top soil.

[404] EMA Section 59(1).

© University of Venda

waste disposal infrastructure on their premises for the disposal of hazardous wastes produced. In principle this would ensure a healthy environment. These responses show that companies adopted initiatives to minimise hazardous wastes as required by the law.

However, when asked about the effectiveness of the interventional measures taken by the mining companies to deal with hazardous waste, a greater percentage of the respondents (68%) contended that the interventional measures taken by the mining company were inadequate deal with hazardous wastes generated. According to the mine workers interviewed, though slime dams were constructed to discharge effluent from the diamond processing facilities, sometimes the same flows to and pollute Odzi and Save Rivers. This ultimately leads to pollution, siltation and coloration of these water sources which supply water to Buhera, Chipinge, Mutare West, and Chimanimani communities. According to a study conducted by ZELA[405] the concentrations of iron and chromium on most of the sampled sites in Odzi and Save Rivers exceeded WHO limits as well as effluent standards set by Zimbabwean legislation. As such, the health and well-being of communities that depend on river water for domestic purposes are at risk of iron poisoning which results from excessive iron intake as well as cancer.[406]

In light of the above, mining companies in both cases have, to a less extent, endeavoured to ensure a clean and healthy environment, by adopting a number of initiatives to minimise the effects of mine waste they produce.[407] However, since mining companies in Chiadzwa sometimes discharge toxic waste in rivers, it shows that it is still a long way to go before mining operations become an environment friendly industry in that area. Since a greater percentage of respondents in both cases feel that wastes production is likely to have caused health problems, it therefore, appears that more needs to be done in both cases so as to deal with waste production and disposal which is affecting the local communities' environmental rights.

---

[405] Zimbabwe Environmental Law Association (ZELA) 'Report on the scientific investigation of the impact of Marange diamond mining operations on water quality in the Save and Odzi rivers: Including assessment of the health, environmental and livelihoods impacts.' 2012.

[406] The downstream communities affected by water pollution include Buhera, Chipinge, Mutare West, and Chimanimani.

[407] It should be noted that the purpose of the relocation processes done in both Chiadzwa and Mogalakwena were not only meant to open way for mining companies but also to minimise the negative effects associated with open pit mining operations. In other words, the relocation of these communities was, *inter alia*, meant to avoid or reduce health hazards that are associated with waste.

© University of Venda

4.2.3 The right of access to water/the right to water

The right to a healthy environment requires water that is free from toxins or hazards that threaten human health.[408] Mining is one activity that potentially threatens the quality and availability of water, if water use in the mining industry is not regulated. Under this section, respondents' views were sought to evaluate the effect of mining operation on water to the rights of individuals and communities residing adjacent to mining areas. This section will not only evaluate how mining companies in both cases ensure the realisation of to the right of access to sufficient water to the affected communities but also how mining operations affect the quality of water in the surrounding communities.[409]

4.2.3.1 The position in South Africa

This section evaluates how the mining company in Mogalakwena ensures the realisation of to the right of access to sufficient water to the affected communities. Responses from both interviews and focus group discussions indicated that before the relocation of the communities that were in and around the mining area, the company made provisions for the conditions that would ensure access to sufficient water as required by the Constitution.[410] Respondents also acknowledged that during relocation of the affected communities the company continued to daily supply clean water even to families that had refused to relocate. It was also noted that the company engaged with Mogalakwena Municipality to ensure continued access to clean drinking water to the affected communities. Respondents also acknowledged that the company did not only drill boreholes and water points but also constructed a purification plant where water harvested from rivers is treated.

---

[408] Water pollution potentially affected a plethora of other fundamental rights of local communities enshrined under various national and international human rights instruments, for example the right to health and the right to life. This view is based on the assumption that access to clean water is intrinsically related to a number of other human rights within the international human rights law and comes out as a precondition for the enjoyment of many related rights. In other words, access to clean water contributes to the fulfilment of human rights and that the denials of access to clean water invariably impedes the enjoyment of other rights.

[409] Laws that regulate the right of access to water, and water quality standards in both jurisdictions have been discussed in chapter 3 under substantive environmental rights.

[410] This right was discussed in full under substantive environmental rights in chapter 3 above. It is arguable that the environmental rights enshrined in section 24 of the Constitution are closely related to the right of access to sufficient water. Moreover, section 27 of the Bill of Rights guarantees everyone the right to have access to sufficient water.

© University of Venda

When asked if they were getting sufficient clean water which amounts to 25 litres per person per day,[411] a greater percentage of respondents acknowledged that the efforts made by the mining company and the government departments could ensure access the said amount of water. Respondents acknowledged that water could be accessed in short distances. This shows that the company endeavoured to comply with both national and international standards. It was, moreover, acknowledged that all houses that were constructed by the mining company for the affected communities are in Mogalakwena were equipped with piped water flushing toilets. Through its efforts to ensure access to clean drinking water, the company showed that environmental responsibilities and health of the host communities were some of its priorities.

However, despite efforts by the mining companies together with government departments in Mogalakwena, a smaller percentage of respondents raised concerns with respect to the inadequate maintenance of the boreholes. It was reported that some of the boreholes have broken down. Some respondents cited water supply as a problem as they alleged that sometimes water supply is interrupted unpredictably. If these allegations are true, then it seems as if more needs to be done in order to ensure access to water to the affected communities in Mogalakwena.

It has been noted above that mining operations do not only affect the accessibility of water but also its quality in the affected communities. This section evaluates how mining operations affect water quality in Mogalakwena. Mining operations in Mogalakwena can potentially cause water pollution. Respondents in Mogalakwena were asked about the likelihood that water pollution by the mining companies had resulted in health problems. A smaller percentage of respondents (32%), noted that water pollution is likely to have caused health problems. Some respondent in the Mapela community noted that there are greenish substances found in their water sources which they attributed to the mining operations. These substances are said to be affecting water quality especially to those who depend on ground water for domestic use. When asked to respond to these allegations, mining officials responded that they were not aware of such substances.

---

[411] The Committee on Economic Social and Cultural Rights (ICESCR) has described the content of 'the right to water.' It was expressed in General Comment No 15 that the quantity of water available for each person should correspond to World Health Organisation Guidelines (WHO). In that context, WHO Guidelines quantify basic access to water as 25 litres per person per day, which is the lowest level to maintain life over the short term. These standards have been fully unpacked in chapter 3 under the right to access sufficient water. See generally chapter 3 *(section 3.2.4.1 (c))* above.

© University of Venda

To determine if the mining company in Mogalakwena is complying with both national and international water quality standards, the researcher relied on the data[412] taken by the mining company from two surface water monitoring points in Groot Sandsloot River in Mogalakwena.[413] Data from the upstream surface water monitoring point indicated that although concentrations of most pollutants fell within the national standards, sodium which is deleterious to the quality of water consistently exceeded national standards.[414] Sample tests taken from the downstream show that while some of the concentrations of pollutants fall within the limits of the South African guidelines,[415] some exceeded the same.[416] Despite the fact that a small percentage of respondents was concerned that the mining company was causing water pollution, responses indicate that the company is endeavouring to comply with the national water quality standards.

4.2.3.2 The position in Zimbabwe

This section evaluates how mining companies in Chiadzwa ensure the realisation the right of access to sufficient water to the affected communities. Before the adoption of Zimbabwe's new Constitution, the level to protection of the right to water was lower.[417] As such, the government and mining companies had a latitude to embark on the relocation process without due regard to the provisions that would allow access to sufficient water to the affected communities. More than 50% of respondents in Chiadzwa noted that at first there was water scarcity in Adar Transau where the affected communities were relocated to. It is arguable that struggle to access adequate water is a serious environmental human rights issue.[418] However, minimal efforts were to some extent made after the relocated households had been denied the right to 'access to adequate water for a while.

---

[412] Anglo American Limited Mogalakwena Mine – Final Environmental Impact Assessment and Environmental Management Plan Report for the Proposed Diversion of Groot Sandsloot River project (2013).
[413] Samples were taken from both the upstream and the downstream monitoring points. The downstream monitoring point is in close proximity to Ga-Masenya community in Mogalakwena.
[414] Anglo American Limited Mogalakwena Mine (note 412 above) 27.
[415] See the South African Drinking Water Quality Standards (SANS 241;2005).
[416] Calcium, magnesium, sulphate and nitrate exceeded the identified resource protection (IRP) value. It was presumed that the elevated concentrations were contributed by mining blasts pits which contribute to nitrates in the water. It was also presumed that the elevated concentrations resulted from human activities since the sampling point was close to a settlement. Anglo American Limited Mogalakwena Mine (note 412 above) 27.
[417] This right was discussed in chapter 3 under substantive environmental rights.
[418] This view is based on the fact that access to clean water is one of the essential components of the right clean and healthy environment. Arguably, the condition above shows that the relocation to Adar Transau Farm had tremendous effects on fundamental human rights of local communities and their members.

© University of Venda

University of Venda
Creating Future Leaders

When asked if they were getting sufficient clean water which amounts to 25 litres per person per day as per the international standards,[419] a smaller percentage of respondents acknowledged that the efforts made by the mining companies and the government departments could ensure access the said amount of water. It was acknowledged that, mining companies in Chiadzwa did not only drill boreholes and water points for every four households, but also constructed a purification plant where water harvested from Odzi River is treated. Boreholes that were installed enable communities to fetch fresh water within a distance of 100 metres. Companies also provide water to schools, clinics and other amenities. These efforts shows that the companies endeavoured to comply with both national and international standards.

It should be reiterated that mining operations do not only affect the accessibility of water but also its quality in the affected communities. This section evaluates how mining operations in affect water quality in Chiadzwa. A greater percentage of respondents noted that the government and mining companies in Chiadzwa are not doing enough in terms of addressing the right of access to sufficient and clean water issue.

A greater percentage of respondents in Chiadzwa (70%), noted that mining operations in Chiadzwa have resulted in the pollution of water sources which supply water to Buhera, Chipinge, Mutate West, and Chimanimani communities. When asked about the causes of water pollution, respondents were quick to note that it was effluent discharged by the mining companies. Mine workers noted that though tailing storage facilities were established, they were inefficient to deal with water pollution. It was noted that sometimes tailings flow back to Odzi and Save Rivers. Respondents were asked about the likelihood that water pollution by the mining companies had resulted in health problems. More than 50% of the respondents feel that that water pollution is likely to have caused health problems. According to some focus group discussions with community members, skin rash, diarrhoea and fever are some of the prevalent diseases in the down-stream communities.

The study made use of the scientific sample tests that were recently conducted on water quality by the University of Zimbabwe (UZ) on behalf of Zimbabwe Environmental Law Association on

[419] See generally chapter 3 *(section 3.2.4.1 (c))* above.

© University of Venda

University of Venda
Creating Future Leaders

ten (10) sites in Odzi and Save Rivers.[420] The study showed that the concentrations of iron and chromium on most of the sampled sites exceeded WHO limits as well as effluent standards set by Zimbabwean legislation.[421] Although Zimbabwe has strong codified laws regulating water quality standards, conditions in Chiadzwa contravene both domestic and internationally recommended standards.[422] The study concluded that health and well-being of communities that depend on river water for domestic purposes are at risk of iron poisoning which results from excessive iron intake as well as cancer.

Even though water transported to downstream communities is rendered unsafe, a greater percentage of respondents noted that mining companies are not doing good enough to provide alternative sources of water in the form of boreholes or other alternatives. In light of the above, monitoring of heavy metal pollution is very critical in future to avoid health hazards to local communities that result from dirty and polluted water. In addition, more needs to be done in order to ensure access to clean water to the affected communities in Chiadzwa.

4.2.4 Noise and vibration standards in both Mogalakwena and Chiadzwa

Other forms of pollution associated with surface mining activities in both cases are noise pollution and vibrations.[423] This section determines if mining companies at the respective research sites meet the minimum standards prescribed for the emissions of noise and vibration pollution into the environment.[424] Respondents' views were also evaluated on the effects of noise and vibration pollution on individuals and communities residing adjacent to mining areas.

Respondents in each case were asked about the likelihood that noise and vibration pollution had resulted in health problems. A greater percentage of respondents in Chiadzwa (54%), than

---

[420] Zimbabwe Environmental Law Association (ZELA) 'Report on the scientific investigation of the impact of Marange diamond mining operations on water quality in the Save and Odzi rivers: Including assessment of the health, environmental and livelihoods impacts.' 2012.

[421] Nickel concentrations were detected but were less than the international standards. Other metals like arsenic, copper, cadmium, lead, manganese and mercury were also tested in water; they were, however, below the detection limit on all the sampled sites.

[422] It is an offence in terms of section 57 of the EMA to discharge or dump any poison or toxic, noxious or other pollutants into the aquatic environment in contravention of water pollution control standards. In terms of section 4(2) of the EMA, negative impact on the environment and on people's environmental rights must be minimised and remedied in cases where they cannot be prevented.

[423] Respondents in both cases under our present study cited these forms of pollution as a result of mining operations.

[424] Laws that regulate noise and vibration standards in both jurisdictions have been discussed above in chapter 3 (section 3.2.4.5).

© University of Venda

University of Venda
Creating Future Leaders

in Mogalakwena (43%), noted that noise and vibration pollution is likely to have caused health problems. The researcher probed further during the interviews and focus group discussions to find out what were some of the health problems likely to have been caused by noise pollution. Respondents in both cases were concerned about hearing problems that may result in the long-run despite the companies' efforts to minimize noise and blasting effects.

When asked to respond to questions relating to the sources of noise pollution and vibration in both cases, the respondents noted the use of heavy machinery, air blasts and vibration from blasting. In both cases respondents pointed out that heavy machinery like caterpillar motor grades and motor vehicles are used for mining and processing the minerals. Those who were concerned about health risks associated with noise and vibration noted that mining companies in both cases operate for 24hours per day. It was noted that heavy machinery used by these companies and operation of the concentrator plants generate annoying noises throughout the night. Local communities also cited noise pollution which they attributed to the vehicles that pass through their communities to the mining areas.

In the case of Mogalakwena, the researcher depended on the scientific sample tests that were recently conducted on noise levels by the mining company[425] to determine the compliance level by the mining company.[426] As such, Nerscho Company was commissioned by Anglo American Platinum Limited to conduct a scientific noise study in April 2013.[427] The study showed that the noise levels recorded during day time were significantly lower than the Occupational Exposure Levels (OEL). Although mining operations inevitably produce noise, the survey shoes that noise levels at the actual site are below the national and international guidelines. Adversely, the noise level exceeds the OEL during the night.

Unlike in Mogalakwena, it was difficult to determine if mining companies in Chiadzwa were conforming to national and international noise level standards since there were no scientific noise studies carried out. However, since greater percentage of respondents in Chiadzwa (54%), than in Mogalakwena (43%) feel that that noise and vibration pollution is likely to have

---

[425] Anglo American Limited Mogalakwena Mine (n 412 above).

[426] The results of the study are useful to determine the mining company's compliance level with international standardised levels and South African legislation (Occupational Health and Safety Act, Act 85 of 1983, the Environmental Conservation Act, Act 73 of 1989 as well as the South African National Standard (SANS 10103:2008)).

© University of Venda

University of Venda
Creating Future Leaders

caused health problems, more needs to be done in Chiadzwa in order to mitigate negative effects of noise pollution on the health and well-being of local communities.

It should be noted that the purpose of the relocation processes done in both cases were, *inter alia*, meant to minimise the negative effects associated with open pit mining operations. Noise and vibration pollution are some of those negative effects. Responses in Mogalakwena indicated that more than half of the respondents feel that that noise and vibration pollution is unlikely to have caused health problems. Responses seem to indicate that due to their remoteness from the mining areas, only smaller percentage of respondents cited incidents of noise pollution. However, in Chiadzwa only less than half of the respondents feel that that noise and vibration pollution is unlikely to have caused health problems.

It goes without saying that constant noise destroys the spiritual, aesthetic and therapeutic qualities associated with an area.[428] In light of the above, if the term well-being is interpreted to refer to intangible qualities of the environment,[429] then it is likely that the mining companies, especially in Chiadzwa, are threatening or infringing individuals' and communities' constitutionally enshrined environmental rights.

4.2.5 Air quality standards in Chiadzwa and Mogalakwena

Environmental rights require air that does not threaten human life of health.[430] Air quality may be threatened if care is not taken to prevent atmospheric pollution by mining activities. This section determines if mining companies at the respective research sites meet the minimum emission standards prescribed. During field work, it was discovered in both cases under study that there was potential for the mining companies to generate gaseous and particulate pollution, which could negatively affect air quality at the local level.[431] Surveys were carried out at the respective research sites to determine environmental health effects of air pollution on local communities.

---

[428] See generally *Save the Vaal case. See generally chapter 3 section 3.2.1.3(b).*

[429] According to my literature review, there is jurisprudence on the intangible qualities of the environment. These qualities may include aspects like; *inter alia*, spiritual, historical, cultural values of an area.

[430] When the air becomes contaminated due to emission of airborne particulate matter such as toxic fumes or dust particulates, it may threaten human health.

[431] Laws that regulate air quality standards in both jurisdictions have been discussed in chapter 3 (section 3.2.4.3), under substantive environmental rights.

© University of Venda

University of Venda
Creating Future Leaders

Respondents in each case were asked about the likelihood that air pollution had resulted in health problems. A greater percentage of respondents in Chiadzwa (48%), than in Mogalakwena (43%), feel that that air pollution is likely to have caused health problems. The researcher probed further during the interviews and focus group discussions to find out what were some of the health problems likely to have been caused by air pollution. Respondents in both cases expressed worries about fever, colds which they usually contract. Some mine workers pointed out cancer, tuberculosis and other respiratory conditions that could be suffered from in a long term due to continued inhalation of contaminated. However, there have not been serious cases reported in both cases under study.

4.2.5.1 The position in South Africa

It was noted during interviews with some of the mine workers at Mogalakwena that the main pollutants generated during mining operations include nitrogen oxides, sulphur dioxide, particulate emissions and other volatile organic compounds. Some respondents also noted that dust is generated during blasting and offloading of waste rock at the waste rock dumps. Other identified sources of dust include tailings dams, crusher plants and gravel roads. A smaller percentage of respondents in Mogalakwena (43%), feel that that air pollution is likely to have caused health problems.

The mining company has obligations in terms of section 28 of NEMA to take reasonable measures to prevent or minimise anticipated negative effects of air pollution on the environment and on people's environmental rights. As such, interviewed mine workers were asked to respond to questions relating to methods used by the company to minimise air pollution. Mine workers acknowledged that the company uses dust suppression sprays on its premises not only to reduce air pollution but also to improve air quality. The researcher confirmed during field work that all existing roads to the mine are tarred. It was noted that the gravel roads in Mogalakwena were occasionally sprayed in order to suppress dust caused by wind and vehicles

Responses also indicated that the company adopted an Air Quality Management Plan in 2010. When the researcher probed further during interviews it was indicated that the Plan does not only identify activities which result in atmospheric emissions which have or may have a significant detrimental effect on the environmental rights of local communities, but also

© University of Venda

University of Venda
Creating Future Leaders

addresses the management and monitoring of air quality. According to a mine worker interviewed, the company occasionally carries out some assessments to identify the significant emission sources and tries to ensure better air quality management.

The researcher depended on the scientific sample tests that were recently conducted on air quality by the mining company in Mogalakwena to determine the compliance level by the mining company.[432] The samples are significant as they help to determine if the mining company is meeting its legal obligations to prevent or minimise anticipated negative effects of air pollution on the environment and on people's environmental rights. It is noted that the company has 14 dust monitoring sites at the mine. Sample tests are usually performed in accordance with procedures set out by the South African Nation Standards. The survey showed that dust levels are generally below national and international guideline values. However, the levels increase during the during the winter season.

When asked about the effectiveness of the interventional measures taken by the mining company, a smaller percentage of the respondents (43%) contended that dust-suppression measures being implemented were inadequate to prevent atmospheric pollution of dust. These responses indicate that the mining company in Mogalakwena generally endeavoured to comply with this obligation.

4.2.5.2 The position in Zimbabwe

On air pollution some respondents in Chiadzwa indicated that dust from haulage trucks has been a cause of concern since the beginning of mining operations in their communities. Mining companies also do not dispute that their operations cause air pollution. Caterpillar motor graders used by the mining companies were noted by both mine workers and community members as the other sources of air pollution. It was noted that they often raise dust as they often grade access roads. Dust pollution also results from activities like site clearance, open-pit drilling and blasting and truck loading. In addition to dust pollution, respondents noted that toxic gases emitted by heavy trucks and machinery make up additional sources of atmospheric

[432] Anglo American Limited Mogalakwena Mine (2013).

© University of Venda

University of Venda
Creating Future Leaders

pollution. A smaller percentage of respondents in Chiadzwa (48%) feel that that air pollution is likely to have caused health problems.

Unlike in Mogalakwena, it was difficult to determine if mining companies in Chiadzwa were conforming to national and international air quality standards. When asked if the company was complying with both national and international air quality standards, mine workers responded that the amount of gasses released in the air were difficult to measure, for example, determining the amount of dust generated during mining operations. When the researcher probed further during interviews what standards were used by the company, it was responded that the company uses emission estimates based on internationally accepted standards. These approximations were used as a standard to determine and improve the mining companies' performance. According to a mine worker interviewed, the mining companies do not have evidence of air quality standards, identification of criteria pollutants, a centrally coordinated monitoring and reporting systems. This response suggests why scientific air quality data was not accessible to the researcher for the purposes of this study.

When asked if there were interventional measures adopted to reduce air pollution and to improve air quality, mine workers noted that mining companies try to mitigate dust emissions by occasionally spraying of haulage roads within the premises of the mining field. It should be noted that this interventional measure is also employed in Mogalakwena. Like in Mogalakwena, the researcher discovered during field work that Anjin and Mbada companies in Chiadzwa constructed tarred roads in the resettlement area. They also maintain and renovate access roads in and around Chiadzwa. Asked how they deal with gases generated by other additional sources of air pollution, interviewed mine workers noted that companies often service their machines so that they perform well especially digesting all the fuel during the operations. When asked about the effectiveness of the interventional measures taken by the mining companies, a smaller percentage of the respondents contended that dust-suppression measures being implemented were inadequate to prevent atmospheric pollution of dust.

© University of Venda

University of Venda
Creating Future Leaders

4.3 Procedural Environmental Rights of Local Communities

The previous section evaluated the effect of mining operations in both mining areas under study on substantive environmental rights of local communities. This section evaluates the effect of mining operations on the second category of environmental rights, that is, procedural environmental rights.[433] As stated in the previous chapter, procedural environmental rights include (i) access to environmental information, (ii) participation in environmental decision-making, and (iii) access to justice in environmental matters.[434] Under this section, respondents' views were evaluated on these three principal elements of procedural environmental rights.

Table 3: Respondents' responses to questions relating to procedural environmental rights

Concerns about infringement of procedural environmental rights	Concerns about the right of access to environmental information	Concerns about the right to participate in environmental decision-making processes	Concerns about the right of access to justice in environmental matters
Mogalakwena	35%	38%	41%
Chiadzwa	63%	65%	75%

4.3.1 The right of access to environmental information

This section focuses on the effect of mining operations on the right of access to environmental information. Laws established at international and national levels related to the enjoyment of this right in the two jurisdictions have been fully discussed in chapters 2 and 3 under procedural environmental rights. Respondents' views were evaluated with respect to the right of access to

[433] Procedural environmental rights and the laws that protect them have been fully unpacked in chapters 2 and 3, (*sections 2.6 and 3.3)* respectively.

[434] It has constantly been noted in this study that procedural environmental rights describe the opportunities and abilities of individuals to participate in the policy-making process on issues pertaining to the environment and to voice their objections to environmental damage and hold the responsible party to account.

© University of Venda

University of Venda

environmental information. A greater percentage of respondents in Chiadzwa (63%), and a smaller percentage in Mogalakwena (35%), are concerned about access to environmental information in their mining areas.

4.3.1.1 Sources of information for the respondents

Mining companies and government agencies in both countries have the obligation to disclose information in the public interest if there was a substantial violation or if an imminent environmental hazard exists.[435] It should be noted that access to environmental information may allow the public to actively participate in decision-making processes that involve their environmental rights. Respondents in both cases were asked how these stakeholders make the information available to the communities whose environmental rights can be affected by its activities. A greater percentage of respondents in Mogalakwena, and a smaller percentage in Chiadzwa noted that the two stakeholders make information available through newspaper advertisements, placement of public notices, conducting environmental awareness campaigns and conducting public information sharing meetings for most of their proposed development projects.

(a) The position in South Africa

This study established that the Anglo Platinum mining company in Mogalakwena obtained its licence in a prescribed manner.[436] According to the company, during application processes it engaged different Government departments including (Mineral Resources, Environmental Affairs and Water Affairs) for environmental authorisations.[437] The company held successive meetings with the affected communities and their leadership with respect to relocation and its

[435] Chapter 3 (*section 3.3.1*) of this dissertation discussed these obligations.

[436] The operations in Mogalakwena are based on a lease agreement reached with the traditional leadership for use of the area, including a number of villages. According to the company "The mine has, leased certain portions of the farms Overysel, Zwartfontein and Vaalkop for the remaining economic life of the mine in return for payment of an initial lump sum rental of R1,200,000 (1993 terms) and an annual rental (initially R5,000), escalating at 10% each year and now at R58,000. Anglo Platinum has also established a trust for community development whereby 0.75% (R95 million) of the mine's annual estimated operating costs for the remaining life of the mine was paid into the trust at net present value. These payments will cease when the mine closes. These lease payments are paid to an account of the Local Magistrate Court for the benefit of the Mapela Tribal Authority and are based on the agricultural potential of the land. This lease gives PPL the exclusive right to the surface portions covered by the lease." Adopted form 'Anglo Platinum, *The Facts*' at 10, available at www.angloplatinum.com.

[437] See generally, Anglo Platinum Mogalakwena Mine (n 13 above).

© University of Venda

University of Venda

intended operations in the areas.[438] According to interviews and focus group discussions conducted, a greater percentage of respondents confirm these engagements. These respondents acknowledged that during these negotiation processes, the company and government authorities made information available through newspaper advertisements, placement of public notices, conducting environmental awareness campaigns and conducting public information sharing meetings.[439] Respondents also acknowledged this media as a means of communication on most of the company's proposed development projects today.

The company's personnel acknowledged that the company takes different steps to ensure that at least the affected community members understand the processes that are involved in the mining company's project. It was noted that through EIAs the company conducts public information sharing meetings with the concerned communities before the development of any proposed project that potentially affects their environmental rights. When asked to respond to questions related to some of the occasions on which information was made available through the abovementioned media, a greater percentage of respondents from the affected communities noted the following projects: (a) a river diversion; (b) a new waste site; (c) a road re-alignment and upgrade; (d) a new tailings retreatment plant; and (e) a proposed ore transport system which may be a conveyor belt, a cable belt or a rail line. Responses in Mogalakwena show that the company precedes the development of any proposed project by conducting EIA processes which virtually necessitate the realisation of the right of access to information to the affected communities.

The company also publishes information on regular monitoring findings on its website.[440] Researches, Sustainable Development Reports and EIA reports for mining operations are public information available on this website.[441] According to interviews and focus group discussions, community members are aware that they can get such information from the company. Mining

[438] As above.

[439] With respect to relocation of the affected communities, respondents generally confirmed that mining companies in collaboration with government authorities reached agreements with the affected communities. These agreements specified all aspects of the new places of relocation including new houses and compensation payable.

[440] Web updates are available at www.angloplatinum.com.

[441] Despite the company's efforts, responses indicated that internet access is not easily accessible to the rural Mogalakwena areas, therefore, very few people are able to access the internet. Moreover, low computer literacy in the area and the high costs of computers and subscription fees which are not always affordable incapacitate most community members from accessing the internet in the internet cafes.

© University of Venda

University of Venda
Creating Future Leaders

workers interviewed noted that although members of the public do not approach the company for information from regular monitoring, if approached, the company is, however, prepared to give the information. It was noted that one of the reasons why community members do not approach the company for information is general ignorance on the importance of such information especially to their environmental human rights.

Based on the responses, this study argues that the modes of disseminating information used by the mining company and government authorities, generally, enable the affected communities in Mogalakwena to obtain information that may ensure the realisation of their environmental rights. Responses also confirm that efforts by the company and government authorities provide opportunities to the affected communities to present their comments and recommendations to the mining company and this enables them to participate in the development processes that affect their environmental rights. Responses also indicate that the company makes major efforts to meet its national and international obligation to disclose information in the public interest if an imminent and serious public safety or environmental risk exists.[442]

(b) The position in Zimbabwe

As pointed out above, mining companies and government agencies have employed a number of methods of disseminating information in Chiadzwa. Mining companies in Chiadzwa are of the view that they provide the public with adequate environmental information which enable them to exercise other rights. Like in Mogalakwena, mining companies and government agencies in Chiadzwa make information available to the affected communities through newspaper advertisements, placement of public notices, conducting environmental awareness campaigns and conducting public information sharing meetings. When asked to respond to the questions related to the effectiveness of these methods, only a small percentage of the respondents noted that generally the mining companies and government agencies make efforts to provide them with adequate information in most of the processes that affect their environmental rights.

[442] The relevant laws have been discussed fully under procedural environmental rights in chapters 2 and 3 respectively.

© University of Venda

University of Venda
Creating Future Leaders

One of the fundamental pillars that may be employed to ensure the realisation of the right of access to information is EIA.[443] When asked if EIAs were conducted by mining companies before they start their projects, almost all the respondents from community members gave a negative response.[444] It was noted that mining companies in Chiadzwa started their operations without certificates showing that EIA had been carried out.[445] These responses indicate that before the beginning of mining operations, the local communities were not adequately informed of the perceived violations or imminent environmental hazards that could result from the companies' operations.[446] This study argues that mining companies' conduct in carrying on their operations without the necessary EIA certificates as envisaged by the legislature to ensure environmental harms is avoided, or minimised, interfered with the individuals' and communities' environmental rights.

A greater percentage of respondents noted that the government and mining companies in Chiadzwa are not doing enough in terms of ensuring access to information to the affected communities. They noted that they were concerned about the inaccessibility of mining companies' information on regular monitoring findings, when they even exist. They also noted that they were unable to access information that would tell them whether companies comply with environmental quality standards. When asked to respond to an open ended question about how they first learned about the environmental effect of mining operations in their areas, some noted that it was through personal experiences. Respondents noted the inaccessibility of environmental information on water quality from mining companies and government agencies. When mining operation began in Chiadzwa respondent noted that they were not informed if the water was still safe to their health and well-being. Those who continued using the water for domestic use suffered from different diseases like diarrhoea and skin rash. Respondents, however, acknowledged that NGOs like ZELA have helped them to access information about water quality and other environmental information.

---

[443] EIA is a necessary planning tool that gives an indication of how mining companies would address potential environmental, social and economic effects of a proposed project. When a company applies for a large-scale mining concession from the Government, it is mandatory to submit an EIA report in terms of EMA.

[444] It is an offence in terms of Zimbabwe's EIA policies for the mining companies to start their mining operations without a certificate showing that an environmental impact assessment has been carried out.

[445] These responses indicate that social, economic and environmental effects of mining activities were inadequately considered and that the affected communities were not adequately consulted and given the opportunity to participate in decisions that affect their rights were made.

[446] EIA processes were only conducted later, after the operations had already begun.

© University of Venda

University of Venda
Creating Future Leaders

Respondents were also concerned about the inaccessibility of mining companies' EIA reports and Environmental Plans which are supposed to be public documents. For the purposes of this study, the researcher did not manage to secure copies of these documents from the companies. When the researcher wrote to Mbada mining company requesting for copies of these documents, it was responded that the company was not in a position to assist.[447] The researcher again wrote to the Mining Affairs Board and Environmental Management Agency requesting for copies of these documents. Unfortunately, these authorities did not respond to the request. The researcher's experience illustrates some of the challenges that community activists and human rights defenders face in their endeavours to fight for the affected communities' environmental rights against violations by the government authorities and mining companies.

The responses above indicate that mining companies and government authorities in Chiadzwa have not often met their constitutional mandate to provide adequate information to the affected communities on environmental issues. As such, more needs to be done by the mining companies in Chiadzwa in order to meet their national and international obligation to disclose information to the affected communities. If major efforts are made then the affected communities would be enabled to participate in the development processes that affect their environmental rights.

[447] No reasons were given for this response.

© University of Venda

University of Venda
Creating Future Leaders

4.3.1.2 Summary on the awareness of environmental management legislation by respondents in both cases

Table 4: Respondents' awareness of environmental management legislation

Awareness of environmental legislation	Respondents who read environmental legislation	Respondents to whom environmental legislation was explained	Respondents who acknowledged the availability of environmental awareness programmes
Chiadzwa	14%	63%	70%
Mogalakwena	19%	67%	74%

When asked if they read any environmental management legislation, a greater percentage of respondents indicated a negative response and a smaller percentage of the respondents responded positively. Various reasons surfaced during field work as to why a greater percentage of the respondents did not read the environmental management legislation. Some respondents cited the inaccessibility of the environmental management legislation while some cited illiteracy which incapacitates them from reading and understanding laws written in English. Another reason was general ignorance about the significance of such legislation to the exercise of their environmental rights. However, a small percentage of respondents acknowledged that it was through NGOs[448] that they have managed to access and read some environmental management legislation. According to these respondents, copies of legislation are usually distributed during workshops and environmental awareness programmes conducted by these NGOs in their respective communities.

Respondents in each case were also asked if any environmental management legislation had been explained to them. A greater percentage of respondents in both cases acknowledged that

[448] ZELA and Action Aid South Africa were acknowledged in the case of Chiadzwa and Mogalakwena respectively.

© University of Venda

University of Venda
Creating Future Leaders

some of the environmental management legislation had been explained to them. It was acknowledged that Community Based Organisations (CBOs)[449] that have been formed in both mining areas have been helping in explaining some environmental management legislation to the affected community members.[450] According to respondents, environmental management legislation had been explained to them on issues concerning relocation, public participation in mining activities, environmental degradation, and human rights violations. In the case of Mogalakwena, respondents acknowledged that companies which are usually hired to conduct EIA processes for the company[451] usually engage with the affected communities and explain the relevant environmental management legislation. These responses indicate that stakeholders should increase their levels of environmental awareness campaigns in these rural communities as it may be more effective than letting the community members to read English written legislation on their own. There is also need to translate the environmental management legislation from English to local languages so as to ensure a wide coverage.

When asked if there were any environmental awareness programmes in their respective communities, a greater percentage of respondents indicated a positive response and a smaller percentage of the respondents responded negatively. It was acknowledged that NGOs took the lead in imparting information to the affected communities through environmental awareness campaigns and public information sharing meetings. Despite these efforts by NGOs, research has shown that a greater percentage of respondents still show general ignorance of the content of environmental rights and the laws that protect them.[452] For example, in focus group discussions that were held, respondents were asked what environmental rights are, more than 50% of them were unable to do so. They were not aware of a close relationship between

[449] Chiadzwa Community Development Trust was acknowledged in the case of Chiadzwa. Respondents in Mogalakwena acknowledged Relocation Committees, Task Teams and Development Committees as instrumental in explaining environmental management legislation to the affected communities.

[450] Respondents noted that this exercise is done by CBOs in a bid to help individuals and communities to fight for their rights against government authorities and mining companies.

[451] For example, the SRK Consulting (South Africa) (Pty) Ltd

[452] Despite a positive response by a greater percentage of respondents that environmental awareness programmes were available in their communities, it was noted that these programs did not involve all the people whose environmental rights could be affected by the mining operations. This is based on the fact that not all the affected community members attend these programs because of general ignorance about the significance of these programs to the exercise of their environmental rights. Some respondents indicated that such programmes were carried out on a very low scale.

© University of Venda

University of Venda
Creating Future Leaders

environmental right and other basic human rights.[453] Therefore more needs to be done to educate the affected communities on their environmental rights. There is also need to emphasize the indivisibility and interdependence of all human rights. Stakeholders in the mining areas should inform the affected communities that they cannot enjoy fundamental human rights without enjoying adequate protection of their environmental rights.

4.3.2 Participation in environmental decision-making

This section evaluates public participation in environmental decision-making processes at the respective research sites. The legal regime established at the international and national levels to the enjoyment of this right in the two jurisdictions have been fully discussed in chapters 2 and 3 under procedural environmental rights. Local communities in both cases were asked about their levels of participation in activities or development projects by the mining companies that may significantly affect the environment. A greater percentage of respondents in Chiadzwa (65%) than in Mogalakwena (38%) noted that they did not always have the opportunity to participate in most of the activities or development projects by the mining companies that may significantly affect their environmental rights.

4.3.2.1 The position in Zimbabwe

Although Zimbabwe's mining legislation stipulates that there must be no prospecting on any portion of communal land without the consent of the occupier of the land concerned,[454] a greater percentage of respondents in Chiadzwa noted that consent concerning mining projects was neither free, nor informed especially when the operations began in 2009. This condition was aggravated by the fact that EIA processes which may ensure public participation in decision making processes were not conducted in Chiadzwa before mining operations began. According to members of the relocated families who were interviewed, no adequate consultations were done by the mining companies and government authorities before the relocation. A greater percentage of the respondents (65%) noted that government authorities in collaboration with

[453] For example, they did not know that a clean and healthy environment contributes to the fulfillment of human rights and that the denial of a clean and healthy environment invariably impedes the enjoyment of other rights.
[454] Section 31(1) of the Mines and Minerals Act

© University of Venda

University of Venda
Creating Future Leaders

mining companies merely approached them to inform them of decisions they had made to conduct mining operations in their area and to inform them that they were going to be relocated to pave way for these operations. It was also noted that the compensation they received were government-imposed, they were non-negotiable.

One interviewee noted that the affected communities are not often given the appropriate opportunity to raise any objections in decisions which may likely affect the environment. This view was confirmed by a greater percentage of respondents who noted that their interests, concerns or comments on most of the proposed projects in their communities were often disregarded by the mining companies. It was noted, for example, that in spite of communities concerns and objections to the continuation of some of the proposed development projects, the projects are carried out nevertheless. It was also noted that since the public could not always actively participate in decision-making processes, this has often led to the endorsement of decisions that favour interest of the government and mining companies rather than the affected communities. These respondents contended that they have had little, if at all, input in determining if mining operations should take place in their communities.[455]

Respondents noted that the responsible authorities like EMA do not often exercise their legislative powers in protecting rights of affected communities. It was alleged that responsible authorities do not often ensured adequate consultation between mining companies and the affected communities. According to ZELA, despite its wide-raging powers, the Environmental Management Agency, which is responsible for monitoring and implementing EMA, only ordered mining companies in Chiadzwa to carry out EIAs long after the operations had begun. It was, however, noted that the challenges that the Environmental Management Agency[456] might have met in implementing and monitoring EIA processes include lack of scientific data, human and financial resources to support the EIA processes, insufficient skilled manpower to support the EIA processes and political interference. Political interference may follow in cases where the state directly or indirectly participates in mining operations. In Chiadzwa, the chief producers of

[455] Respondents also cited that consultations that are usually done by the mining companies and government authorities are sorely meant to inform them of the already-made-decisions. One interviewee noted that that only final decisions made by the mining companies and the responsible authorities are public information.

[456] As noted in the previous chapter, the Environmental Management Agency is the responsible agency for the implementation and enforcement of EMA. It has wide ranging responsibilities, *inter alia,* developing and enforcing compliance with environmental policy as well as developing and enforcing an integrated and comprehensive regulatory system.

© University of Venda

diamonds are directly connected to the government. Research findings confirm that the government participates in mining operations through ZMDC,[457] MMCZ, Marange Resources,[458] Mbada[459] and Anjin[460]

Responses in Chiadzwa confirmed that mining companies and the government authorities have not complied with both national and international standards[461] that require the public to be consulted and given the opportunity to participate in decisions that affect their rights were made.[462] Although diamond mining may significantly affect the environment, the affected communities and their members are not always given adequate opportunity to raise their issues, present comments and recommendations to the decision-makers and participate in the development process. This study argues that the above condition interfered with environmental rights of individuals and local communities.

4.3.2.2 The position in South Africa

As noted above, when Anglo Platinum mining company was applying for its mining licence it made successive meetings with the affected communities and their leadership with respect to relocation and its intended operations in the areas.[463] According to interviews and focus group discussions held, a greater percentage of respondents confirm these engagements. Section 21 companies, task teams and CBOs were formed to actively participate and also represent the affected communities.[464] These respondents acknowledged that during these negotiation processes, the company in collaboration with government authorities reached several

---

[457] Presently Government participation in mining is through ZMDC, (formed in 1982) and through the Minerals Marketing Corporation of Zimbabwe (MMCZ, formed in 1992).
[458] Marange resource is owned 100% by ZMDC.
[459] Mbada is a 50-50 joint venture between the state-owned ZMDC and Grandwell Holdings Ltd., a subsidiary of Reclam.
[460] Anjin is a joint venture between Chinese company and a Zimbabwean company, Matt Bronze, which was issued with a licence to mine in 2009.
[461] Under international law, the State is required to carry out good faith prior consultations and obtain free consent from affected communities. The specific international laws were discussed in chapter 2 of this study.
[462] According to section 31(1) of the Mines and Minerals Act, there must be no prospecting on any portion of communal land without the consent of the occupier of the land concerned. See also section 4 of EMA, which provides that the participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation.
[463] Anglo Platinum Mogalakwena Mine (n 13 above).
[464] As above.

© University of Venda

University of Venda

agreements with the affected communities which specified all aspects of the new places of relocation.[465] It has constantly been noted in this study that public participation is an integral part of EIA processes. EIAs in terms of NEMA were conducted.[466] According to the mining company, the general legal requirement for public participation and prior consultation usually starts during EIA processes. These EIA processes were confirmed by a greater percentage of respondents in Mogalakwena.

When respondents' views were sought with respect to their levels of participation in activities or development projects by the mining companies that may significantly affect the environment, a greater percentage of the respondents in Mogalakwena gave a positive response. When asked about other activities or development project the affected communities participated in, a greater percentage of respondents noted the mining company's projects like: (a) a river diversion; (b) a new waste site; (c) a road re-alignment and upgrade; (d) a new tailings retreatment plant; and (e) a proposed ore transport system which may be a conveyor belt, a cable belt or a rail line.[467] The company's personnel noted that as EIA processes were carried out on these projects, the company to become aware of environmental issues and concerns raised by communities.[468]The above responses by a greater percentage of respondents confirm that consultations in Mogalakwena provided opportunities to the affected people to present comments and recommendations to the decision-makers and participate in the development processes. The above condition also shows that the company in Mogalakwena has endeavoured to meet the EIA requirements in terms of National Environmental Management Act which require public participation.

The company's personnel also indicated that the company employs local professional consultants, on any proposed project, who are proficient with local languages together with firms experienced with relocations. These local professional consultants make sure that the whole

[465] Agreements reached covered aspects to do with new houses and compensation payable.
[466] According to Farrell *et al*, " When mining operations started in Mogalakwena the company conducted EIAs as part of its early planning process for the development of the Sandsloot open pit on the farm Sandsloot 236 KR. This was carried out by SRK Consulting (South Africa) (Pty) Ltd. When the company wanted to expand its operations in the Motlhotlo community, it conducted EIA processes to determine the potential social and environmental impacts from the proposed open pit." (n 15 above) 2.
[467] Respondents acknowledged that the company has been carrying out successive meetings from 2011 on these projects.
[468] They noted that some of these concerns have been addressed in the projects' EIA reports.

© University of Venda

University of Venda

planning, consultation, negotiation process is clarified to the affected communities and they help in reaching one-on-one agreements with each affected household. These assertions were confirmed by a greater percentage of respondents interviewed. The above responses confirm that the process of ensuring public participation has enabled the company to become aware of issues and concerns raised by the communities and these concerns were taken into account and at least addressed. Based on the above responses, this study argues that compliance procedures by the mining company in Mogalakwena are, to a greater extent, consistent with the international and national standards which advocate for the participation of the affected communities in decision making processes that affect their environmental rights.

However, a smaller percentage of respondents in Mogalakwena noted that although government authorities and the mining company have made efforts to consult with them on some projects, the consultations are not sustained as the development progresses since the decisions made in the later stages of a project are made without the involvement of the affected communities. Despite this concern, it should be noted that just administrative action advocates that the concerns of the public must be listened to *before* giving permission for an activity that may significantly affect the environment. Responses in Mogalakwena indicate that responsible authorities and the mining company have often made arrangements that enable the affected communities to comment on, for example, plans or proposals for projects affecting the environment. Nonetheless, the applicable laws as discussed in chapter 3 above[469] do not oblige that consultations should be sustained as the development progresses.

4.3.3 The right of access to justice in environmental matters

The right of access to justice in environmental matters denotes that any person who felt that his or her right to a healthy environment has been infringed or threatened by conducts of private individuals or the State can approach the courts for appropriate relief. Chapters 2 and 3[470] of this dissertation have discussed this right and the laws that are meant to ensure its realisation. The focus of this section is to assess the right of access to justice in environmental matters in Chiadzwa and in Mogalakwena. Respondents' views were evaluated on the right of access to

[469] *Section 3.3.2*
[470] *Sections 2.6 and 3.3.3 supra.*

© University of Venda

University of Venda
Creating Future Leaders

justice in environmental matters. A greater percentage of respondents in Chiadzwa (75%) and a smaller percentage in Mogalakwena (41%) are of the view that, despite environmental risks associated with mining operations, government Agencies have not provided adequate access to justice to the affected communities.

When asked to respond the questions related to the predicaments they face with respect to access to justice, respondents cited lack of financial support,[471] hesitation,[472] and general ignorance.[473] This study argues that general ignorance shown by respondents in both cases incapacitates them form demanding their environmental rights. In other words, an uninformed populace is often incapacitated from using national human rights law to ascertain, claim and assert their right to a healthy environment during the mining operations.

Lack of financial support was also cited to be a contributory factor as to why the communities do not often launch cases against the 'powerful' mining companies. As such respondents in both cases were asked whom they do approach with environmental concerns for help. A greater percentage of respondents in both cases alleged that if they directly approach the companies with their concerns they felt that the companies would do nothing to address them. However, they noted that they usually approach Development Committees and Community Development Trusts in Mogalakwena and Chiadzwa respectively. In Chiadzwa, it was also noted that the respondents approach public interest organisations such as ZELA with their concerns. These public interests organisations have been assisting the poor communities under our present study not only with legal advice, but also finance to institute legal actions against mining companies.

---

[471] They cited lack of financial support to launch cases against mining companies and government authorities.

[472] In the case of Chiadzwa a greater percentage of respondents noted that they were hesitant to openly challenge state-related mining activities.

[473] In spite of the fact that local communities are exposed to the effects of environmental degradation and pollution, there has not been any case brought to courts of law which directly involve the right to a clean and healthy environment. In both cases this may be because of the general ignorance of the content of environmental rights and the laws that protect them. In focus group discussions that were held in both cases, respondents were asked to explain what environmental rights are, the majority of them were unable to do so. They were also asked if they knew any national laws and agencies that protect environmental, the majority of them did not know.

© University of Venda

University of Venda
Creating Future Leaders

4.3.3.1 The position in Zimbabwe

In the case of Chiadzwa, a greater percentage of respondents were concerned about failure by government authorities to provide access to administrative and judicial remedies which may be used to stop or reduce harmful activities in their communities. Some interviewees contend that government authorities are failing to stop the mining companies from contaminating Chiadzwa water resources.[474] Some respondents also noted that, notwithstanding their wide powers to control and minimise waste disposal into the environment, both the Environmental Management Agency and the Ministry of Water Resources and Development have not fully exercised lawful powers conferred to them to protect the affected communities.

(a) Chiadzwa legal actions

On litigation, respondents in Chiadzwa were asked what happens to the companies when they violate or fail to adhere to environmental law principles. A smaller percentage of respondents acknowledged that mining companies were prosecuted but a greater percentage of them indicated that they were not always prosecuted. Three prominent unreported cases brought before the court concerning mining issues in Chiadzwa include: *Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others,*[475] *Malvern Mudiwa and Others vs. The Co-Ministers of Home Affairs and Others*[476] and also the case of *State vs. Malvern Mudiwa.*[477] Although the cases did not explicitly deal with environmental rights, this study argues that such rights were implicit. These cases are going to be summarised below.

Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others Case

In this case the legal action sought a provisional order interdicting the respondents from relocating Chiadzwa community until there was a written agreement relating to the

[474] As noted above, though slime dams were constructed to discharge effluent from the diamond processing facilities, sometimes the same flows to and pollute Odzi and Save Rivers. This ultimately leads to pollution, siltation and coloration of these water sources which supply water to Buhera, Chipinge, Mutare West, and Chimanimani communities. Even though water transported to downstream communities is rendered unsafe, a greater percentage of respondents noted that mining companies are not doing good enough to provide alternative sources of water in the form of bore holes or other alternatives.

[475] (HC 6334/09).

[476] HC. 6337/09.

[477] CRB 3750/10. Available at http://www.zela.org/index.php?option=com_content&view=article&id=11&Itemid=85 (accessed on 10 July 2014).

UNIVERSITY OF VENDA
LIBRARY

© University of Venda

University of Venda
Creating Future Leaders

compensation payable to the affected communities. The interdict was also sought to stop the respondents from conducting mining operations until they had been granted EIA licenses in accordance with EMA. The High Court, however, dismissed this urgent court application. It was held that since diamond mining had been on-going in the area two years before the case was instituted, the same cannot be treated as an urgent case. The judge reasoned that the applicants should have raised the failure to carry out an EIA when the mining operations started, rather than two years later under an urgent application procedure. This case seems to indicate that the rules of procedure took precedence over the merit of the matter presented before the courts. This study argues that there was miscarriage of justice as the Zimbabwean judicial system condoned mining companies' non-compliance with the law.[478]

The court also stated that the applicants lacked *locus standi* to represent the community or the community at large.[479] Since the court failed to uphold the need to promote class action, the effect of this ruling is that it gave a leeway to government authorities and mining companies to relocate the affected communities without their contribution to the making of such a decision. This study argues that legal standing in the Lancaster House Constitution, which was in operation then, resulted in challenges that affected the community's efforts to successfully protect and defend their rights in the courts of law. Section 24(1) of the Lancaster House Constitution provided that any person who alleges that the Declaration of Rights has been, is being, or is likely to be, contravened in relation to him that person may apply to the Supreme Court for redress. The section did not, as is the case in South Africa,[480] specify how different categories people or entities may institute legal proceedings in a court of law. Lack of clarity on legal standing rules in that Constitution resulted in denying the affected communities and citizens their right to access justice. As a result, the communities (third parties) did not benefit much from the legal assistance which was meant to protect and defend their rights. However, as discussed in chapter 3 above,[481] it should be noted, that Zimbabwe has recently expanded access to justice through the inclusion of legal standing clause in section 85 of 2013 Constitution. Despite the fact that the Constitution now gives standing to a wide array of

[478] In terms of EMA mining companies were supposed to have conducted EIA processes.
[479] Newman Chiadzwa and Malvern Mudiwa, the Chairperson and Vice Chairperson of Chiadzwa Community Development Trust were standing on behalf of the affected communities.
[480] Section 38 of the South African Constitution affords legal standing to people acting in their own interest, acting on behalf of other persons, acting as member of a group or class of persons or acting in the public interest.
[481] See *section 3.3.3.2.*

© University of Venda

University of Venda
Creating Future Leaders

persons, individuals and the affected communities in Chiadzwa have not yet instituted legal proceedings in a court of law based on section 85.

State vs. Malvern Mudiwa Case

In this case the accused was charged with causing criminal nuisance.[482] The charge arose as the accused had mobilised communities to resist their eviction and relocation from the mining area before compensation issues had been discussed and agreed. The accused as a community representative had incited the affected communities to resist relocation until provisions for decent accommodation and social and health amenities had been made for the affected families at Arder Transau. Through the legal assistance given to the accused by ZELA, the State withdrew its case against him before the trial due to lack of evidence. It should be noted that the accused was arrested and charged yet the affected communities were resorting to the legal system to protect and defend its rights.[483] This case shows some of the challenges faced by community activists when exercising their rights and in their involvement in public interest litigation.

Of the few cases that were brought before the court, the judicial system that is supposed to protect the rights of communities and their members was, however, used otherwise. The law was otherwise used as tool to silence and compel the affected communities to submit to the decisions made by the government authorities and mining companies, most of which decisions disregarded the concerns of the local communities.[484] The cases summarised above seem to indicate that if the affected communities in Chiadzwa approached the courts with explicit environmental rights issues, the courts were improbably prepared to protect or defends them. This researcher argues that courts in Zimbabwe did not do any better in protecting the rights of

[482] The accused was charged with causing criminal nuisance under Section 46 of the Criminal Law (Codification and Reform) Act (Chapter 9:23).
[483] The role of ZELA in public interest litigation cannot be overemphasised. It has been assisting the poor Chiadzwa communities not only with legal advice, but also finance to institute legal actions against mining companies. ZELA has shown its commitment to face ramifications that befall the affected communities as a result of challenging government authorities and mining companies.
[484] For example in the case of *Malvern Mudiwa and Others vs. Mbada Mining Private Limited and Others,* discussed above, the Court condoned the continuation of mining operations without EIA certificates. It has constantly been noted in this study that EIA is a necessary planning tool that gives an indication of how mining companies would address potential environmental, social and economic effects of a proposed project.

© University of Venda

University of Venda
Creating Future Leaders

the affected communities and their members against imminent relocation which implicated their environmental rights and a vast of other fundamental rights.

4.3.3.2 The position in South Africa

With respect to prosecution of the mining company, respondents in Mogalakwena were asked what happens to the company when it violates or fails to adhere to environmental law principles. A greater percentage of respondents in Mogalakwena acknowledged that it was sometimes prosecuted. It was noted, for example that Richard Spoor, an attorney acting on behalf of the affected communities, instituted various cases before courts seeking orders to stop mining operations in Mogalakwena on various grounds.[485] However, all the cases were dismissed on different grounds. Some of the cases are going to be summarised below.

In the case of *Machoga,*[486] the application sought an order to interdict the mining company from continuing its mining operations on Overysel and Zwartfontein farms.[487] The applicants alleged that Anglo Platinum's mining operations restricted the community's access to arable lands and impacted on the ability to graze of the community's livestock. The applicants also alleged that they had residential rights, cultivation rights, grazing rights and rights of access to the said farms.[488] The case was dismissed as the judge pointed out that the company had been in occupation of the farms since 2001 and that the community had not conducted any ploughing activities since 2001.[489] In the case of *Masubelele*[490] the applicants alleged that they have been spoliated[491] by the mining company as a result of its mining operations on Overysel and

[485] Some of the cases include: *Machoga et al* Case No. 13498/06 : TPD; *Masubelele et al* Case No. 13499/06 : TPD; *Tshaba et al* Case No. 13872/06 : WLD; *Makgamatho et al* Case No. 25224/06 : WLD; *Makgamatho et al* Case No. 026871/06 : WLD; *Makgamatho et al* Case No. 2687/06 : WLD; *Setseta v Mphela* Case No. 1526/07 : WLD; *Makgalemele et al* Case No. 1293/09 : TPD

[486] *Machoga et al* Case No. 13498/06: TPD.

[487] This case was launched on an urgent basis in form of a class action against the mining company. The company was only given one day's notice to prepare its defence.

[488] The applicants relied on the Interim Protection of Informal Land Rights Act, 31 of 1996.

[489] The judgement was given judgment on the 18th of July 2006 by Justice Mavundla.

[490] *Masubelele et al* Case No. 13499/06: TPD.

[491] A spoliation action is instituted when a person's peaceful and undisturbed possession or use of property is unlawfully interfered with.

© University of Venda

University of Venda
Creating Future Leaders

Zwartfontein farms.[492] The applicants attached a supporting list of about 350 persons.[493] Richard Spoor, the legal representative, did not make follows ups on the case.

In a different case of *Tshaba,*[494] the applicant sought a court order for mining company to stop its mining operations in Mogalakwena.[495] An order was also sought for the company not to remove certain graves until the necessary permits were obtained.[496] The case was, however, withdrawn immediately before the hearing. In the case of *Makgamatho*[497] the applicants sought relief to, stop mining operations in Mogalakwena. They also sought an order declaring that they have certain lawful rights in respect of some designated arable crop fields. However, the applicants did not pursue application. In a different case of *Setseta*,[498] the applicants sought an order for restoration of possession of certain crop fields.The application was dismissed by Justice Moshidi on the basis that it was not urgent.

Of the cases that the affected communities brought to court in Mogalakwena, there was no case that specifically dealt with environmental rights. However, the fact that the affected communities were able to access the courts with a number of petitions should be acknowledged. It is more probable that if the affected communities approach the courts with their environmental rights problems, the courts are prepared to protect or defend them. Although all the cases brought before the court were dismissed, the above responses indicate that the affected communities and their members as right holders have managed to exercise their rights to approach courts to defend and claim some of their rights. As such, the question whether the communities and their members in succeeded in their cases or not is a different thing altogether.[499]

---

[492] This was a class action court case, instituted on an urgent basis together with the application sought in the case of *Machoga* discussed above.

[493] It was established that about 107 were duplicated names; about 14 were names of people who had deceased a long time before the application. Some names belonged to persons who had actually not given their consent to be included in the application.

[494] *Tshaba et al* Case No. 13872/06 : WLD.

[495] This application was instituted on an urgent basis by Headman Tshaba, on behalf of the Ga-Tshaba community. The applicant exercised his constitutional right in terms of section 38(c) as he was 'acting as a member of, or in the interest of, a group or class of persons.'

[496] The papers contained infirm averments and broad prayers aimed at stopping the company's legitimate mining activities.

[497] *Makgamatho et al* Case No. 026871/06: WLD.

[498] *Setseta v Mphela* Case No. 1526/07: WLD.

[499] The concerned Mogalakwena communities managed to exercise third party litigation and class action as they claimed and defended communities' rights and entitlements using the courts. Although the communities lost all the cases due to legal technicalities, they managed to exercise their legal standing in terms of section 38 of the Constitution to claim their rights

© University of Venda

University of Venda
Creating Future Leaders

4.4 Chapter Conclusion

This chapter has assessed the effect of mining activities on the environmental rights of individuals and communities residing adjacent to mining areas with particular reference to the Chiadzwa and the Mogalakwena mining areas. The chapter was divided into two sections. The first section dealt with the effect of mining operations on substantive environmental rights of local communities. Under substantive environmental rights the chapter has revealed that mining operations at the respective research sites have caused serious physical environmental damage, in terms of land degradation, water, air and noise pollution. There is a general perception that environmental effect of mining operations in both cases infringe on environmental human rights of the local communities. The responses indicate that this general perception is higher in Chiadzwa than in Mogalakwena.[500]

The second section of this section dealt with the effect of mining operations on procedural environmental rights of local communities. There is a higher perception in Chiadzwa than Mogalakwena that mining companies together with government authorities infringe on their procedural environmental rights of local communities. These include the right to (i) access to environmental information, (ii) public participation in environmental decision making processes and, (iii) access to justice in environmental cases.[501] The next chapter gives succinct and comprehensive conclusions derived from the study on the environmental human rights effect of mining operations in both cases.[502]

[500] See generally chapter 4 (*section 4.2 above).* See also chapter 5 *(section 5.6.1)* which makes a succinct conclusion on the effects of mining operations on substantive environmental human rights of the local communities.
[501] See generally chapter 4 (*section 4.3) above.* See also chapter 5 *section 5.6(b)* which makes a succinct conclusion on the effects of mining operations on procedural environmental human rights of the local communities.
[502] See generally chapter 5 (*section 5.6)* below.

© University of Venda

University of Venda
Creating Future Leaders

CHAPTER FIVE

5 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This study evaluated the effect of mining activities on the environmental rights of individuals and communities residing adjacent to mining areas with particular reference to the Chiadzwa mining area in Zimbabwe and the Mogalakwena mining area in South Africa. Having analysed the mining operations in Mogalakwena and Chiadzwa, the researcher came up with a number of conclusions, legal options and recommendations that can be pursued by the two governments and the mining companies in order to advance the environmental rights around the mining communities. The conclusions are also based on the assessment of the extent to which the mining companies and the governments in both jurisdictions practically respond to the relevant environmental management legislation for the promotion and protection of the environmental rights. In addition, best practices and future research directions are suggested in this chapter. It is imperative to note that the conclusions are based on both legal[503] and empirical studies carried out by the researcher.[504] Conclusions and recommendations are going to be pulled together to avoid unnecessary repetition.

5.2 The existing international legal mechanisms for the protection of environmental rights

The study has established the inadequacy of the international human rights law framework in protecting environmental rights.[505] It was highlighted that there is no international covenant, comparable to other leading human rights instruments,[506] that entrenches environmental rights

[503] Legal research was carried out by way of a qualitative study. See generally chapters 1, 2, and 3 of this study. In these chapters the researcher relied on related work of other writers.
[504] The study is more empirical since it is inspired largely by a field work. Empirical research was carried out by way of both qualitative and quantitative studies. See generally chapter 4 of the study.
[505] See generally chapter 2 (*section 2.5.1)* above.
[506] Some of the leading human rights instruments include the ICCPR and the ICESCR.

© University of Venda

University of Venda
Creating Future Leaders

in a single document. The study indicated that environmental rights are only explicit in non-binding international instruments.[507]

The study has also shown that there is no central authority or institution through which environmental rights could be vindicated or enforced at the international level.[508] This is different from fundamental rights entrenched in other leading human rights instruments such as the ICCPR, ICESCR which can be enforced through the United Nations Hunam Rights Committee and the Committee on Economic, Social and Cultural Rights respectively. As such, remedies that exist for the affected communities under international human rights law in cases of environmental abuse are not easily accessible.[509]

It is recommended that the international community should revisit the environmental human rights law regime and establish an international covenant that entrenches environmental rights in a single document. Such instrument should be comparable to other leading human rights instruments such as the ICCPR, ICESCR. These efforts would ensure legal certainty in as far as environmental rights are concerned.

There is also a need for the international community to create a central compliance mechanism comparable to those established by the leading human rights instruments. This development would enable the affected communities to easily access remedies that exist under international human rights law in cases of environmental abuse.

5.3 The right to a healthy environment as implied in human rights instruments

The study has shown that there are two possible approaches that have emerged to formulate the substantive environmental human rights norms. One of the approaches recognises the right to environment as an entitlement implied in human rights instruments that do not expressly stipulate it.[510] Both Zimbabwe and South Africa are members to these human rights instruments.

---

[507] The Stockholm Declaration, the Rio Declaration and A Draft Declaration of Principles of Human Rights and the Environment are some of the non-binding instruments protecting environmental rights.
[508] See generally chapter 2 (*section 2.5.1)* above.
[509] It should be remembered that one of the objectives of the study was to explore the available remedies for the affected communities under international human rights law in cases of environmental abuse.
[510] See generally chapter 2 (*section 2.4)*. Some of the instruments include the ICCPR, ICESCR and the Universal Declaration.

© University of Venda

University of Venda
Creating Excellence

It was indicated, for example, that the right to life can be interpreted to give effect to environmental rights.[511]

5.4 The right to a healthy environment as part of customary international law

The study has shown that there are two schools of thought with respect to the question whether a free-standing environmental right has gained the status of customary international law.[512] The first school of thought argues that this right has not yet attained the status of customary international law but it may be evolving as a principle of the same. The second school of thought argues that this right has emerged as a principle of customary international law. Based on the examination of existing literature and jurisprudence, the study has persuasively argued that a free-standing environmental right should be considered as part of customary international law.

5.5 Legal mechanisms and policies that have been put in place by the two governments

It was established that both South Africa and Zimbabwe have adopted relevant national legal instruments, policies and agencies that are meant to respond to identified problems in the areas of mineral exploitation and environmental and human rights protection.[513] The study has shown that constitutional environmental law in Zimbabwe is still a new area of jurisprudence that arguably may still be lacking judicial experience and precedence.[514]

In order to practically apply this right in the context of Zimbabwe, the judiciary should define its scope and content through the interpretation of the law. To achieve this objective, there is need for the government to ensure that law enforcing agencies[515] are well trained on environmental

---

[511] The second approach recognises a free-standing right to environmental quality. See generally chapter 2 (*section 2.4 - 2.5).*
[512] See generally chapter 2 (*section 2.5.2).*
[513] See chapter 3 above.
[514] See generally chapter 3 (*section 3.2.1.3)* above.
[515] For example, judges, magistrates, prosecutors, the police and other justice delivery officers.

© University of Venda

University of Venda
Creating Future Leaders

issues. As a result, these agencies will be able to understand and fully appreciate the importance of the environment to the realisation of a range of fundamental human rights.[516]

It is also recommended that the judiciary should use the leverage on interpretation in the Bill of Rights[517] to give effect to the right to environment. As such, the Zimbabwean judiciary may, for instance, draw guidance in the South African model for the implementation and enforcement of human rights.[518] As such, the South African jurisprudence on environmental rights is exemplary and should motivate changes not only in Zimbabwe, but in other developing countries as well.

The study has noted that a significant portion of the legislation that protects the environment and environmental rights has long been in operation before the adoption of the new Constitution.[519] The legislature must be put under pressure to enact more laws, in light of the new Constitution, that give effect to environmental rights and the improvement of the environmental regulatory framework that has already been put in place. It is recommended that special legislation be enacted to incorporate and define, *inter alia*, the following elements:

- the scope and content of the constitutional environmental rights and the institutions and/or mechanisms available to implement or enforce them.
- the State's responsibilities which are manifested in three dimensions in the environmental rights clause.[520] These responsibilities include: (a) the responsibility to take "reasonable legislative and other measures"; (b) "within the limits of the resources available"; and (d) "the progressive realisation" of the right.[521]

---

[516] They will, for instance, be able to understand that a clean and healthy environment contributes to the fulfillment of the human rights and that the denial of a clean and healthy environment invariably impedes the enjoyment of other rights.

[517] See generally section 46 of the Constitution.

[518] The judiciary in Zimbabwe when interpreting and applying the relevant environmental law it may consider South African Case law in terms of section 46 of the Constitution which provides that when interpreting the Bill of Rights, a court tribunal, forum, or body may consider relevant foreign law.

[519] These laws are still binding in terms of paragraph 4 of the Sixth Schedule to the new Constitution, which points out that all existing laws continue to be in force but must be construed in conformity with the same. See chapter 3 above in general.

[520] Section 73(2) states that, "The State must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of the right set out in this section."

[521] See generally *section 3.2.1.3(c)*. The researcher endeavoured to define these obligations in terms of international law and foreign law.

© University of Venda

University of Venda

- the principle of sustainable development,[522] precautionary principle[523] and the polluter pays principle.[524]

There are a range of procedural rights in the Zimbabwean Constitution which are relevant to environmental protection.[525] These include the right of access to information,[526] right to administrative justice[527] and the right to fair hearing.[528] These rights *impliedly* address environmental issues. It is recommended that a special legislation be enacted to *explicitly* define the scope and content of these rights in the in an environmental rights perspective, for instance: (i) access to environmental information, (ii) participation in environmental decision-making and (iii) access to justice in environmental matters.

5.6 The effect of mining operations on environmental human rights of local communities

5.6.1 Substantive environmental rights

This section summarises the findings on the effect of mining operations in Chiadzwa and Mogalakwena on environmental human rights of local communities. As far as substantive environmental rights are concerned, communities under study are entitled to a clean and sound environment, including water, air and other material supplies, all of which should be generally free from pollution and other elements which are hazardous to their health or well-being. The study established in chapter 4 that mining operations at the respective research sites are associated with serious physical environmental damage, in terms of (i) the destruction of land,

---

[522] Sustainable development generally denotes "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." See World Commission on Environment and Development (note 35 above) 81.

[523] A common definition of the precautionary principle is found in the Rio Declaration: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."

[524] The polluter pays principle denotes that in cases of discharge of excessive pollutants, the expenses incurred on remedial measures to prevent, control and minimize environmental pollution can be recovered from such person.

[525] These rights were discussed in Chapter 3 *(section 3.3)* above

[526] Section 62 of the Constitution

[527] Section 68 of the Constitution

[528] Section 69(3) states that "Every person has the right of access to courts, or to some other tribunal or forum established by law for the resolution of any dispute."

© University of Venda

forests and plants,[529] (ii) air pollution,[530] (iii) water pollution,[531] (iv) noise and vibration pollution[532] and (v) waste production.[533] Mining operations have adversely affected the adjacent communities and in turn infringed their environmental human rights as well as the rights of their individual members. Responses indicated that the extent of violation of substantive environmental rights is worse in Chiadzwa than in Mogalakwena. This is due to the fact that the mining company in Mogalakwena is generally more determined than those in Chiadzwa to limit the release of contaminations and other elements, which diminish the public's health and well-being set out under national and international standards.[534]

Recommendations on the effect of mining operations in Chiadzwa and Mogalakwena on substantive environmental human rights of local communities are covered in section 5.7 below.

5.6.2 Procedural environmental rights of local communities

With respect to procedural environmental rights, this study has shown that unlike in Mogalakwena, mining companies in Chiadzwa generally do not comply with both international and national standards. This was indicated by the concerns raised by respondents with respect to (i) access to environmental information, (ii) public participation in environmental decision making processes, (iii) access to justice in environmental cases.

5.6.2.1 Access to environmental information

The study has shown that the company in Mogalakwena makes major efforts to meet its national and international obligation to disclose information in the public interest if an imminent

---

[529] See chapter 4 *section 4.2.1.*
[530] See chapter 4 *section 4.2.5.*
[531] See chapter 4 *section 4.2.3.*
[532] See chapter 4 *section 4.24.*
[533] See chapter 4 *section 4.2.2.*
[534] It should be acknowledged that in response to some of the environmental effects of their operations, mining companies have generally adopted interventional measures to mitigate the adverse environmental, health and other effects on local communities. Some of the industry initiatives meant to deal the environmental effects of mining operations generally include resettlement of the affected communities; land rehabilitation; the use of silencers to mitigate noise pollution; dust suppression to mitigate noise pollution; the construction of waste disposal infrastructure for the disposal of hazardous waste and provision of alternative sources of drinking water like bore holes to the affected communities.

© University of Venda

University of Venda

and serious public safety or environmental risk exists.[535] It is recommended that the mining company and government authorities should maintain this requirement as it does not only give the affected communities fair opportunities to express their informed consent, but also adequate opportunity to participate in the development processes that affect their environmental rights.

The study has shown that, unlike in Mogalakwena, information about environmental quality is difficult to access in Chiadzwa.[536] Although the Zimbabwean Constitution and other legislation guarantee the right to information,[537] the dissemination of environmental information to Chiadzwa communities remains very poor.[538] This condition is aggravated by the fact that the majority of Chiadzwa community members are illiterate. For the realisation of the right to information in Chiadzwa, there is need for the Government to establish the appropriate machinery that involves all stakeholders like mining companies,[539] NGOs and CBOs.[540] All relevant environmental information gathered by these stakeholders must be made widely available in a format that is understood by ordinary members of the public.[541] Copies of such public documents should be put in public places like post offices and local libraries.

Research has shown that a greater percentage of respondents in both cases show general ignorance of the content of environmental rights and the laws that protect them.[542] There is need for stakeholders not only to redouble their effort to educate communities about their constitutional/environmental rights and the institutions and/or mechanisms available to implement or enforce them, but also about the existence and functions of the various human rights institutions. It is also recommended that Environmental agencies in both countries should prepare summaries of the EIAs and related documents so that the communities can access them. This may help community members to understand the meaning and content and implications of their human rights in general and environmental rights in particular. This can also

---

[535] See generally chapter 4 (*section 4.3.1.1 (a)*) above.
[536] See generally chapter 4 *(section 4.3.1.1(b))* above.
[537] See generally chapter 3 (*section 3.3.1.1)* above.
[538] See generally chapter 4 (*section 4.3.1.1(b))* above.
[539] The public should be enabled to access mining companies' information on regular monitoring findings on water, air, noise quality standards.
[540] Personnel in Agencies, NGOs and CBOs that deal with information in the affected communities should be trained to understand the content and scope and implications of the right of access to information.
[541] Not only should the laws be published in English, but also in local dialects.
[542] See general Chapter 4 above (*section 4.3.1.2.)*

© University of Venda

enable the affected communities to give informed consent to any development program by mining companies.

The study acknowledged that NGOs took the lead in imparting information to the affected communities through environmental awareness campaigns and public information sharing meetings.[543] Despite these efforts by NGOs, the research found out that a greater percentage of respondents still show general ignorance of the content of environmental rights and the laws that protect them. Environmental education and information programmes need to be a combined effort by government agencies, mining companies, NGOs and CBOs. These programmes should constantly be carried out in order to educate and train communities on environmental management concerns.

5.6.2.2 Public participation in environmental decision-making processes

The study has established that local communities in Mogalakwena are frequently afforded the opportunities to participate in decision making processes that affect their environmental rights.[544] It is recommended that the mining company and government authorities maintain such a standard as it gives the affected communities adequate opportunity to raise their issues, present comments and recommendations to the decision-makers and participate in the development processes. If this standard is maintained then the affected communities will always be able to negotiate with the mining companies on fairer terms.

Unlike in Mogalakwena, research findings established that major decisions in Chiadzwa are often made without broad public contribution and consideration of environmental concerns.[545] Government authorities and mining companies do not recognise local communities in Chiadzwa as legitimate stakeholders in decision-making processes. As a result, the affected communities and their members are not always given adequate opportunity to raise their issues, present comments and recommendations to the decision-makers or participate in the development processes.

---

[543] *Ibid.*
[544] See generally Chapter 4 (*section 4.3.2.2* above.
[545] See generally Chapter 4 (*section 4.3.2.1* above.

© University of Venda

University of Venda
Creating Future Leaders

Government authorities and mining companies in Chiadzwa should not undermine the significance of public participation in licensing proceedings. It is, therefore, recommended that government authorities should not negotiate mining contracts in high offices thereby neglecting the role of local communities. As such, there is need for the Zimbabwean Government and mining companies to always consult with the affected communities before initiating any developmental project that potentially affects their environment rights and interests. These stakeholders should provide the affected communities with adequate prior notice of prospective mining licenses and EIA reports in a manner that the later understands. This would give potentially affected communities fair opportunities to give their informed consent.

The study has shown that there is political interference in Chiadzwa since the state directly participates in mining operations.[546] The involvement of the Government in mining operations may lead to discriminate application of the law, and may give immunity to mining companies in cases of violation. For example, mining companies were not sanctioned for violation of EMA and EIA principles that advocate for the EIA processes to be conducted before mining projects begin.[547] As such, there is need for political will on the part of law enforcement agencies to objectively and effectively implement laws despite the political implications.

The study has noted that EIA processes which may ensure public participation in decision making were not conducted in Chiadzwa before mining operations began.[548] Despite its wide-raging powers, the Environmental Management Agency, which is responsible for monitoring and implementing EMA, only ordered mining companies in Chiadzwa to carry out EIAs long after the operations had begun. There is need for the Environmental Management Agency in Zimbabwe to revise its policies on how and when EIAs should be conducted by mining companies. It is recommended that the Ministry of Environment and Tourism in Zimbabwe should support the Environmental Management Agency with financial resources and sufficient skilled manpower to support the EIA processes.

---

[546] See generally chapter 1 *(section 1.1)* above.
[547] See generally chapter 4 (*section 4.3.2.1* above.
[548] *Ibid.*

© University of Venda

University of Venda
Creating Future Leaders

5.6.2.3 Access to environmental justice

Lack of financial support and general ignorance were cited as some of the predicaments the affected communities face with respect to access to justice.[549] There is need for courts to be made accessible to ordinary members of the public in terms of cost and court procedures. For example, in the case of Zimbabwe, the courts should adopt less stringent requirements of *locus standi* to enable the affected communities and individuals with environmental concerns to be heard before the courts.[550] There is also need for the establishment of institutions such as Legal Aid Clinics to provide legal assistance, including legal representation, to the affected communities in cases of environmental rights violation. Education is also a necessary tool that enables the affected communities to use national human rights law to ascertain, claim and assert their environmental rights during the mining operations.

One of the impediments to improving pollution in both cases under study is the currently ineffective system of punishing polluting firms. In my humble opinion, "time is up" for the criminalization of environmental pollution as a human rights violation and a crime against the environment. Research findings established that when affected communities have environmental concerns they seek redress only in formal courts.[551] There are no courts or tribunals that particularly specialise on environmental issues. There is need for the creation of independent specialised environmental law courts or tribunals that deal with environmental matters. These courts or tribunals should strive to ensure impartiality, independency, and transparency and they should appropriately sanction mining companies in cases of non-conformity with the environmental quality standards.

UNIVERSITY OF VENDA
LIBRARY

5.7 Compliance level of the mining companies with national and international legislation

The study has shown that, despite legal mechanisms and policies that have been put in place by Zimbabwe in order to promote a sound and healthy environment, the implementation and

[549] See generally chapter 4 (*section 4.3.3)* above.
[550] The judiciary should ensure that procedural requirements do not unnecessarily hinder or delay cases against mining companies.
[551] See generally chapter 4 (*section 4.3.3*) above.

© University of Venda

enforcement of these laws is weak and very [illegible] Chiadzwa.[552] In other words, there is generally a poor compliance level by the mining companies in Chiadzwa, with national and international legislation to achieve the aims and goals of a sound environment.[553] The study has shown that, unlike in Mogalakwena, companies in Chiadzwa do not regularly monitor water, air, vibration and noise.[554] Mining company in Mogalakwena generally puts more effort than those in Chiadzwa to limit the release of toxic chemicals and other materials as per the legally accepted national standards.[555]

Based on the above findings, the hypothesis that mining companies, in their desire to generate as much profit as possible, do not always comply with legal mechanisms and policies that seek to promote environmental human rights objectives was more justified in the case of Chiadzwa than Mogalakwena. It is recommended that the mining company in Mogalakwena should maintain the standard of regularly monitoring water, air, vibration and noise pollution and publishes information on findings on its website.[556]

There is need for the Zimbabwean government to establish effective supervision mechanisms to monitor the compliance level by the mining companies with national and international standards to achieve the aims and goals of a sound environment. If supervision mechanisms are established, they should require mining companies to regularly monitor water, air, vibration and noise pollution to avoid associated health hazards. Companies found in contravention of the applicable laws and responsible for environmental degradation should be held accountable and immediately address the environmental concerns of individuals and local communities.

---

[552] See generally chapter 4 above. It was indicated that, despite these interventional measures, local communities still complain about the incidence of land degradation and pollution of various forms which pose health hazards on them. It was shown that environmental and health effects of mining operations, especially in Chiadzwa continue to remain a huge problem.

[553] See generally chapter 4 above.

[554] See generally chapter 4 (*section 4.2)* above.

[555] It should be acknowledged that in response to some of the environmental effects of their operations, mining companies have generally adopted interventional measures to mitigate the adverse environmental, health and other effects on local communities. Some of the industry initiatives meant to deal the environmental effects of mining operations generally include resettlement of the affected communities; land rehabilitation; the use of silencers to mitigate noise pollution; dust suppression to mitigate noise pollution; the construction of waste disposal infrastructure for the disposal of hazardous waste and provision of alternative sources of drinking water like bore holes to the affected communities.

[556] Web updates are available at www.angloplatinum.com.

© University of Venda

University of Venda

There is need for mining companies in both cases to generally endeavour to limit the release of toxic materials in water, air and land to the barest minimum. It is also recommended that the two governments commission independent investigations into past and on-going environmental effect of mining operations in both cases under study. Before methods of operation are developed, mining companies should acknowledge the need to prioritise health and well-being of local communities.

The study established that the extraction phase has virtually resulted in the destruction of vegetation, in the form of natural forest or crop, and has radically altered the natural landscape in their areas.[557] It also noted the ineffectiveness of the rehabilitative efforts by mining companies since they are only limited to re-grading the land to fill in the excavated pits. Nothing has been done about re-afforestation or biological restoration of the rehabilitated land. There is need for mining companies to put more efforts by taking measures aimed at restoring the degraded lands to their original state after mining operations. These may include re-afforestation. These rehabilitative efforts by the mining companies should reduce harm to local communities' rights pertaining to their well-being and spiritual, aesthetic and therapeutic qualities associated with these areas. This may also ensure the availability of land particularly to farmers for agricultural purposes in future.

The study has shown that most of the water resources in the communities under study have been polluted with toxic chemicals produced by mining companies.[558] Since health and well-being of communities that depend on river water for domestic purposes are at risk due to water pollution, government authorities in both cases should require that mining companies continue providing alternative sources of water in the form of boreholes or other alternatives. There is also need for the government authorities to oblige mining companies to regularly maintain these alternative sources of clean water.

Monitoring of heavy metal pollution is very critical in future to avoid health hazards to local communities that result from dirty and polluted water. More needs to be done in Chiadzwa in terms of adopting sound legal mechanisms and policies that may promote environmental human

[557] See chapter 4 (*section 4.2.1).*
[558] See chapter 4 (*section 4.2.3)* above. The study has shown that water pollution is worse in Chiadzwa than Mogalakwena.

© University of Venda

rights objectives. There is also need for stakeholders in the communities under study to educate the public about health hazards associated with continued use of polluted water for domestic purposes.

5.8 Available remedies to the affected communities under national, regional and international human rights law in cases of environmental abuse

The remedies to the affected communities under the international human rights law in cases of environmental abuse were discussed above.[559] The study has established that one of the strategies that has clearly been most successful in enforcing environmental rights claims at the regional level is that of petitioning the African Commission to recognize the violation of well-established human rights by means of environmental degradation.[560] However the affected communities under study can only gain access to the African Commission after all local remedies have been exhausted.

At the local level the study has shown that any person who felt that his or her right to a healthy environment has been infringed or threatened by conducts of private individuals or the State can theoretically approach the courts for relief.[561] Despite the fact that communities in both cases have been exposed to the effects of environmental degradation and pollution, the study has established that there has not been any case brought to courts of law which directly involved the right to a clean and healthy environment.[562] The study has shown that public interests organisations such as NGOs and CBOs played a very significant role in trying to help the affected communities in their struggle to access environmental justice. However, public interests organisations were unsuccessful in most cases.[563] Practically, access to justice, at least in Zimbabwe is not always possible.[564] The study found that communities, with particular emphasis

---

[559] It was noted that remedies that exist for the affected communities under international human rights law in cases of environmental abuse are not easily accessible. See *section 5.2* above

[560] See generally chapter 2 (*section 2.5.3)* above.

[561] See generally chapter 3 (*section 3.3.3)* above, see also chapter 4 (*section 4.3.3)* above.

[562] Lack of financial support and general ignorance, were some of the predicaments to access to justice. However, the fact that the affected communities on some occasions were able to access the courts with a number of petitions should be acknowledged. The question whether the communities and their members in succeeded in their cases or not is a different thing altogether.

[563] See generally chapter 4 *(section 4.3.3).*

[564] See generally chapter 4 *(section 4.3.3.1).*

© University of Venda

on Chiadzwa, are generally only stuck with rele[illegible] since these laws are, in fact, poorly implemented in practice to ensure the realization of their environmental rights.

5.9 Specific Recommendation to Zimbabwe

It has been shown that currently there are about seven mining companies operating in Chiadzwa.[565] The area has now become a heavy industrial site. It is recommended that government agencies should make conscious efforts to reduce the rate at which mining licences are granted to mining companies in Chiadzwa. There is need for the issuance of licenses to be subjected to conditions. For example, applicants should be denied a license unless they have shown the potential or capability to comply with the applicable environmental laws. For the purposes of protecting the environment and communities interests, mining licenses should be revoked for non-compliance by mining companies. This is significant because in spite of numerous governmental and industry initiatives, adverse environmental effect of mining operations continue to remain a huge problem to the local communities.

5.10 Special recommendations

5.10.1 The integration of human rights and environmental protection

The study has acknowledged the relational concept between environmental degradation and human rights violation.[566] This concept is not fully appreciated in both cases under our present study.[567] There is need for policy and decision-makers in the two jurisdictions to prioritise the incorporation of principles of human rights and environmental protection on natural resource development. In other words, there is need for mining companies and government agencies to ensure that the right to development is balanced with the right to a clean and healthy environment.[568] Stricter conditions should also be imposed on mining companies so that minerals enhance economic development and environmental human rights simultaneously.

---

[565] See chapter 1 (*section 1.1).*
[566] See generally chapter 2 (*section 2.4)* above.
[567] See chapter 4 in general and (*section 4.2.1)* above.
[568] The two countries should not prioritize economic investment by the mining companies. On the other hand, mining companies should not prioritize development of the countries' economy since the need for environmental protection is likely disregarded.

© University of Venda

Unless the stakeholders in the mining communities are educated and empowered to recognize an intricate relationship between human rights and environmental health, it will be difficult to achieve long term sustainable development of the two countries' mineral resources. If the complementary and interdependent relationship between these two aspects is recognised, mining communities will not only derive economic benefits from these mining activities, but also enjoy their fundamental human rights including environmental rights.

5.10.2 The need to conduct further researches at the respective research sites

Undoubtedly mining operations in Chiadzwa and Mogalakwena have had tremendous effect on civil, political, economic, social, cultural and environmental rights of the local communities. It was, however, impossible to deal with all human rights issues effectively in the context of the two mining areas. It is, therefore, recommended that governments and other institutions should fund higher institutions for further researches on the effect of mining operations on civil, political, economic, social, cultural and environmental rights of local communities.

© University of Venda

University of Venda
Creating Future Leaders

6.1 Primary Sources

6.1.1 International Human Rights Instruments, General Comments and Concluding Observations

1. Aarhus Convention, adopted in June 1998 and entered into force on 30 October 2001.

2. Committee on Economics, Social and Cultural Rights, General Comment 3 (1990) UN Doc HRI/Gen1/Rev 1, 1994.

3. Committee on Economic, Social and Cultural Rights, General Comment 3 on the nature of states parties obligations of 1990, contained in document E/1991/23.

4. Committee on Economic Social and Cultural Rights, *General Comment 4 of 13 December 1991, United Nations, Compilation, HRI/GEN/1/Rev.3.*

5. Committee on Economic Social and Cultural Rights, General Comment 12, E/C.12/1999/5.

6. Committee on Economics, Social and Cultural Rights, General Comment no. 13, UN Doc. E/C.12/1999/10.

7. Committee on Economic, Social and Cultural Rights, General Comment no. 14, UN. Doc. E/C.12/2000/4.

8. Committee on Economics, Social and Cultural Rights, General Comment General Comment No. 15 (2002) - The Right to Water (26 November 2002) UN Doc E/C 12/2002/11.

© University of Venda

University of Venda
Creating Future Leaders

9. International Covenant on Civil and Political Rights, adopted 16 December 1966 by General Assembly Resolution 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171, entered into force on 23 March1976.

10. International Covenant of Economic, Social and Cultural Rights, adopted on 16 December 1966 by General Assembly Resolution 2200 A (XXI), (1966) UN Doc A/6316, entered into force on 3 January 1976.

11. Preparatory Committee for the United Nations Conference on the Human Environment, 77, U.N. Doc.A/Conf.48/PC/17 (1972).

12. Protocol of San Salvador, opened for signature 17 November 1988.

13. Statute of the International Court of Justice, June 26, 1945, Can. T.S. 1945 No. 7

14. The report of the UN Commission on Human Rights, *Human Rights and the Environment*, UN Doc. E/CN.4/Sub.2/1994/9, Annex III.

15. The UN "Protect, Respect and Remedy" Framework for Business and Human Rights (2010) 2.

16. Universal Declaration of Human Rights adopted by General Assembly Resolution 217A (III), (1948) UN Doc A/810.

17. United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, (1992).

18. United Nations Conference on the Human Environment in Stockholm (1972).

19. United Nations General Assembly Resolution 45/94, Preamble § 3, 14 December 1990; Need to Ensure a Healthy Environment for the Well-Being of Individuals (UN Doc. A/45/49).

© University of Venda

University of Venda
Creating Future Leaders

20. United Nations Human Rights Committee, 17th Sess., Communication No. 67/1980, U.N. Doc. CCPR/C/OP/1 at 20 (27 October 1982).

21. UN Doc. E/CN.4/Sub.2/1989/C23 (1989) (Ksentini Report).

6.1.2 South African National Legislation

1. Air Quality Act 39 of 2004.

2. Constitution of the Republic of South Africa Act 108 of1996.

3. Constitution of the Republic of South Africa Act 200 of 1993.

4. Mineral Resources and Petroleum Resources Development Act 28 of 2002, (MPRDA).

5. National Environmental Management Act 107 of 1998.

6. National Water Act 36 of 1998.

7. Promotion of Access to Information Act No 2 of 2000.

8. Promotion of Administrative Justice Act 3 of 2000.

9. Water Services Act 108 of 1997.

6.1.3 Zimbabwean National Legislation

1. Administrative Justice Act, Chapter [10:28] of 2004.

© University of Venda

University of Venda
Creating Future Leaders

2. Access to Information and Protection of Privacy Act [Chapter 10:27] of 2002.
3. Access to Information and Protection of Privacy Amendment Act, 2003, No. 5 of 2003.
4. Constitution of Zimbabwe Amendment (No.20) 2013.
5. Environmental Management Act, Chapter 20:27 (EMA.
6. Mines and Minerals Act [*Chapter 21:05*].
7. Water Act [Chapter 20:22] of 1998.

6.1.4 South African and Zimbabwean Cases Referred To

1. *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 719 (SCA).
2. *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 2 SA 393 E.
3. Kachingwe and Others V the Minister of Home Affairs and Others (2005) AHRLR 288 (ZwSC 2005).
4. *Mazibuko v The City of Johannesburg and Others* 2010 (3) BCLR 239 (C).
5. *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another* 1996 (3) SA 155 (N).
6. *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006 5 SA 333 W.
7. *Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC).

© University of Venda

University of Venda
Creating Future Leaders

8. *Sasol Oil (Pty) Ltd and Another v Metcalfe No* 2004 (5) SA 161 (W).

9. *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 1 SA 765 (CC).

10. *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 3 SA 1095 Tk.

11. *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 C.

6.1.5 Cases from other Jurisdictions

1. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada. v. United States)*, 1984 I.C.J. 246 (Judgment of Oct. 12) [Gulf of Maine Case] at 299

2. ICJ 1997 General List No. 92, 25 September 1997, *Case Concerning The Gabcikovo-Nagymaros Project* (Hungary/Slovakia).

3. *Keder Bhakta Shrestha and Others v HMG, Department of Transportation Management and Others*, Writ No. 3109 (1999).

4. *Law Society of India* v. *Fertilizer & Chemical Travancore Ltd.* AIR 1994 Ker. 308.

5. *M.C. Mehta v. Union of India and others, AIR* (1988) SC 1115.

6. R.L.E.K. Dehradum, v. State of U.P. AIR 1985 SC 652.

7. *Sea Continental Shelf* (1969) ICJ Rep 44.

8. *Taskin v. Turkey* 42 EHRR (2006).

© University of Venda

University of Venda
Creating Future Leaders

9. The *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (1986) ICJ Rep 14.

10. *The Social and Economic Rights Action Centre and Centre for Economic and Social Rights v Nigeria* (2001) AHRLR 51 (ACHPR 2001). Communication 155/96.

11. *Yanomami Indians v. Brazil* (1985) Inter-Am. Comm.H.R. No.7615, *1984-1985*, OEA/Ser.L.V/II.66/doc. 10 rev. 1.

6.2 Secondary Sources

6.2.1 Books

1. Creswell JW & Plano-Clark VL *Designing and Conducting Mixed Methods of Research* (2007).

2. De Waal & G Currie Erasmus *The Bill of Rights handbook* Forth Edition (2001) Juta & Co, Cape Town, South Africa.

3. Dugard J. *International law. A South African Perspective* Third Edition (2005) Juta & Co, Cape Town, South Africa.

4. Feltoe G. *A Guide to Zimbabwean Administrative Law,* Third Edition (1987).

5. Glazewski J *Environmental Law in South Africa* Second Edition (2005) Butterworth.

6. Johnson and Turner L.A. *Handbook of Mixed Methods in Social and Behavioural Research Stage* (2003) Thousand Oaks.

7. Kidd M *Environmental Law: A South African Guide* (1997) Juta and Co. Cape Town, South Africa.

UNIVERSITY OF VENDA
LIBRARY

© University of Venda

University of Venda
Creating Future Leaders

8. Kiss AC and Shelton D *International Environmental Law* (1991) Graham & Trotman, London.

9. McMillan JH & Schumacker S *Research in Education: A Conceptual Introduction*, Fourth Edition (1997) New York: Longman.

10. McMillan JH & Schumacher S *Research in education: Evidence-Based Inquiry* (2006).

11. Shelton D. and Kiss A. *Judicial Handbook On Environmental Law* (2005) *UNEP*.

12. Starke JG *Introduction to International Law* (1994).

13. Swanson E & Hughes E *The Price of Pollution* (1990) Environmental Law Centre, Edmonton.

6.2.2 Chapters in Books

1. Anderson MR 'Human Rights Approaches To Environmental Protection: An overview' in AE Boyle & MR Anderson (eds) *Human rights approaches to environmental protection* (1996) Oxford: Clarendon Press.

2. Boyle AE 'The Role of International Human Rights Law in the Protection of the Environment' in AE Boyle and MR Anderson (eds) *Human Rights Approaches to Environmental Protection* (1996).

3. De Waal, Currie I & Erasmus G *Bill of Rights Handbook* De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4th ed Juta Lansdowne (2001).

4. Drzewicki K 'Internationalisation of human rights and their jurisdiction' in R Hanski & M Suksi (ed) *An introduction to the international protection of human rights* (1999).

© University of Venda

University of Venda
Creating Future Leaders

5. Merrills JG 'Environmental Protection and Human Rights: Conceptual Aspects. Human Rights Approaches to Environmental Protection.' in AE Boyle and MR Anderson (ed) Oxford, Oxford University Press: (1996).

6. McMahon G and Remy F 'Key Observations and Recommendations: Synthesis Case Studies, in Large Mines and the Community: Socioeconomic and Environmental Effects in Latin America, Canada and Spain' in McMahon G and Remy F Ottawa, *(ed) International Development Research Centre and the World Bank*' (2001).

7. Pretorius DM 'The Outsider and Natural Justice*: A Re-examination of the Scope of Application of the Audi Alteram Partem Principle*,' *Tydskrif vir Hedendaagse Romeins Hollandse Reg* no. 63 (2000).

8. Ruppel O.C. 'Third Generation Human Rights and the Protection of the Environment in Namibia' (2008) Human Rights and the Rule of Law in Namibia (Eds. N Horn & A Bösl) Macmillan Publishers, Windhoek.

9. Sand 'The Evolution of International Environmental Law' in *Bodansky D Brunnée J & Hey E, eds., The Oxford Handbook of International Environmental Law* (2007).

10. Shelton D 'Environmental Rights. People's rights.' in Alston P (ed) *Oxford, Oxford University Press*, (2001).

11. Shelton D 'The Environmental Jurisprudence of International Human Rights Tribunals' in Picolotti & Taillant, (ed) *Linking Human Rights and the Environment*, Tucson, AZ: University of Arizona Press, (2003).

12. Warhurst A 'Environmental Regulation, Innovation and Sustainable Development' in Warhurst A (ed*), Mining and Environment Cases Studies form the Americas, International Development Research Center, Ottawa, Canada,* (1999).

© University of Venda

University of Venda
Creating Future Leaders

6.2.3 Journal Articles

1. Abate RS *Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 10 (2007).

2. Abbas M Sharaky, Mineral Resources and Exploration in Africa (*Paper presented at the International Conference 'The Revolution of 25 January 2011 and the future of Egypt's relations with the Nile Basin States' organised by the Cairo University, 30-31 May 2011*).

3. Adebowale M Environment and Human Rights: A New Approach to Sustainable Development: International Institute for Environment and Development (IIED), (2001).

4. Atapattu 'The Right to Life or the Right to Die Polluted: *The Emergence of a Human Right to a Healthy Environment Under International Law*' (2002) *16 Tul. Envtl. L.J. 65.*

5. Boyle AE 'Human Rights or Environmental Rights? A Reassessment'18 Fordham Environmental Law Review (2007).

6. Bridget L 'Environmental rights or a right to the environment? Exploring the nexus between human rights and environmental protection' (2012) Vol. 8 No. 1, *Macquarie Journal of International and Comparative Environmental Law.*

7. Bruckerhoff JJ 'Giving Nature Constitutional Protection: *A Less Anthropocentric Interpretation of Environmental Rights*' (2008) 86 Texas Law Review 646.

8. Collins, Are We There Yet? The Right to Environment in International and European Law Volume 3: Issue 2.

9. Craven MCR 'The International Covenant on Economic, Social and Cultural Rights*: A perspective on its development*' (1995).

© University of Venda

10. Cullet P 'Definition of an Environmental Right in a Human Rights Context: *Netherlands Quarterly of Human Rights'* (1995) vol. 13 No.1.

11. Dommen C 'Claiming environmental rights: Some possibilities offered by the United Nations' human rights mechanisms. *Georgetown International Environmental Law Review*,' (1998) 11.

12. Ebeku KSA 'The Right to a Satisfactory Environment and the African Commission. *African Human Rights Law Journal'*, (2003) *3.*

13. Ferreira 'Constitutional Values and the Application of the Fundamental Right to a Clean and Healthy Environment to the Private-Law Relationship' (1999) *SAJELP.*

14. Farrell L Mackres E and Hamann R: (2009) A Clash of Cultures (and lawyers): A case study of Anglo Platinum and its Mogalakwena mine in Limpopo, South Africa. Corporate Governance In Africa Case Study Series: No 1 Unit for Corporate Governance in Africa, Bellville, South Africa.

15. Filmer-Wilson E Michael Anderson: Integrating Human Rights into Energy and Environment Programming: A Reference Paper London (2005)

16. Gabru N Some Comments on Water Rights in South Africa: Per /PELJ 2005 *Vol* (8) *No* 1, North-West University (Potchefstroom).

17. George (Rock) Pring. 'International Environmental and human rights law affecting mining law reform: Presented *at the mining law seminar Northern Institute for Environmental and Minority law (NIEM) Arctic Center*, University of Lapland Rovaniemi, Finland (25-26 September 2008).

18. Glazebrook S 'Human Rights and the Environment: *Victoria University of Wellington Law Review:*' (2009) 40 VUWLR 293.

© University of Venda

University of Venda
Creating Future Leaders

19. Gormley WP 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms. *Georgetown International Environmental Law Review*' (1990) 3.

20. Horn L 'The Implications of the Concept of Common Concern of A Human Kind on A Human Right to A Healthy Environment' MqJICEL (2004) Vol. 1 University of Western Sydney.

21. Hughes LA 'Foreword: The Role of International Environmental Law in the Changing Structure of International Law' (1998) 10 Geo. Int'l Envtl. L. Rev.

22. Jefford C Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions (2013).

23. Katsaura O 'Socio-cultural dynamics of informal diamond mining in Chiadzwa, Zimbabwe.' (2010) *Vol. 12. No. 6* Journal *of Sustainable Development in Africa.*

24. Kotze LJ 'The South African Environment and the 1996 Constitution: *Some Reflections on a Decade of Democracy and Constitutional Protection of the Environment*:' (2007).

25. Kumar K '*Conducting Focus Group Interviews in Developing Countries.*' A.I.D. Program Design and Evaluation Methodology (1987) Report No. 8. Washington, D.C.: U.S. Agency for International Development.

26. Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law.*

27. Leming MR Research and Sampling Designs: Techniques For Evaluating Hypotheses, available at http://www.stolaf.edu/people/leming/soc371res/research.html (accessed on 18 August 2014).

© University of Venda

28. Madebwe C, Madebwe V & Mavusa S involuntary displacement and resettlement to make way for diamond mining: The case of Chiadzwa villagers in Marange, Zimbabwe. (2011) *Vol. 1 No 10 Journal of Research in Peace, Gender and Development.*

29. May RJ and Daly E '*Vindicating Fundamental Environmental Rights Worldwide,* Oregon Review of International Law' (2009) Vol. 11.

30. Mtisi S, Dhliwayo M & Makore G 'Analysis Of The Key Issues In Zimbabwe's Mining Sector, Case study of the Plight of Marange and Mutoko Mining Communities' Extractive Industries Policy And Legal Handbook. *Zimbabwe Environmental Law Association* (ZELA) (2011).

31. Murombo T 'Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation', (2013) Vol. 9 No.1 *Law, Environment and Development Journal.*

32. Murombo T The Utility Of Environmental Rights To Sustainable Development In Zimbabwe: A Contribution To The Constitutional Reform Debate (2011) 11 *African Human Rights Law Journal.*

33. Nijhawan S *A Human Right to a Clean Environment?* 2nd essay: MA International Studies and Diplomacy (2004).

34. Pedersen, OW. 'European Environmental Human Rights and Environmental Rights: *A Long Time Coming? (2008) Vol. 21 No. 1, Georgetown International Environmental Law Review.*

35. Perrez FX 'Human Rights and the Environment Proceedings of a Geneva Environment Network roundtable: *The United Nations Environment Programme for the Geneva Environment Network'* (2004).

UNIVERSITY OF VENDA LIBRARY

© University of Venda

University of Venda

36. Popovic N 'In Pursuit of Environmental Human Rights: *Commentary on the Draft Declaration of Principles on Human Rights and the Environment'* (1995-1996) *Columbia Human Rights Law Review* 27.

37. Razzaque J Human Rights and the Environment: Developments at the National Level, South Asia and Africa *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment'* 14-16 January 2002 Geneva.

38. Rodriguez-Rivera LE 'Is the Human Right to Environment Recognised Under International Law? It Depends on the Source' (2001)12 Colo. J. Int'l Envtl. L. & Pol'y.

39. Shelton D 'Human Rights and the Evironment: *What Specific Environmental Rights Have Been Recognized?'* (2006) 35 *Denver Journal of International Law and Policy*.

40. Shelton D (2002) Health and Human Rights Working Paper Series no 1 Human Rights, Health & Environmental Protection: Linkages in Law & Practice: A Background Paper for the World Health Organization. London.

41. Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991) 28. 103, *Stanford Journal of International Law.*

42. Shelton D What Happened in Rio to Human Rights? (1992) Vol. 3 No 3, Y. B International Environmental Law.

43. Thorme M 'Establishing environment as a human right. *Denver Journal of International Law and Policy*' (1991) *19*.

44. Twerefou DK 'Mineral Exploitation, Environmental Sustainability and Sustainable Development in EAC, SADC and ECOWAS Regions: African Trade Policy Centre Work in Progress' (2009), No.79 *Economic Commission for Africa* 12.

© University of Venda

University of Venda
Creating Future Leaders

45. Vlavianos N 'The Intersection Of Human Rights Law And Environmental Law: *A Symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage'* (2012) Canadian Institute of Resources Law: Faculty of Law University of Calgary: Canada.

46. Wawryk AS 'International Environmental Standards In The Oil Industry: *Improving the Operations of Transnational Oil Companies in Emerging Economies'* (2002) *Vol.13 No.3,* University of Adelaide.

6.2.4 Papers and Reports

1. Abbas M & Sharaky 'Mineral Resources and Exploration in Africa' (Paper presented at the International Conference 'The Revolution of 25 January 2011 and the future of Egypt's relations with the Nile Basin State.' organised by the Cairo University, 30-31 May 2011), available at http://african.cu.edu.eg/Dr_Abbas/Papers/Minerals_2011.pdf (accessed 6 February 2014).

2. 'Anglo Platinum, The Facts' at 10, available at www.angloplatinum.com.

3. Anglo American Limited Mogalakwena Mine – Final Environmental Impact Assessment and Environmental Management Plan Report for the Proposed Diversion of Groot Sandsloot River project (2013).

4. Anglo Platinum Mogalakwena Mine 'General Update on Community Issues November' *Anglo Platinum* Johannesburg South Africa (2009) 1 available at <http://www.angloplatinum.com/investors/invest_sub/press_def.asp?CategoryID=13&Related=true> *(accessed 02 September 2012)*

5. Anglo Platinum Sustainable Development Report (2007) 34, available at www.angloplatinum.com (accessed 6 February 2014).

© University of Venda

University of Venda

6. Burns H. Weston David A. Bollier (2011) Regenerating the Human Right to a Clean and Healthy Environment in the Commons Renaissance, Unpublished Manuscript: Version 1.0. The University Of Iowa College Of Law pg 13 available at http://commonslawproject.org/sites/default/files/Regenerating%20Essay,%20Part%20I. (accessed 22 April 2013).

7. Boyle AE '*Paper Revised Human Rights and the Environment: A Reassessment'* UNEP, University of Edinburgh and barrister, London. (2010) 1.

8. Curtis M 'Precious Metal: The Impact of Anglo Platinum on Poor Communities in Limpopo, South Africa' Action Aid South Africa (2008), available at <http://www.actionaid.org.uk/doc_lib/angloplats_miningreport_aa.pdf, (accessed on 02 September 2012).

9. Global Witness (2010) Return of The Blood Diamond the Deadly Race to Control Zimbabwe's New-Found Diamond Wealthhttp://www.globalwitness.org/library/return-blood-diamond-deadly-race-control-zimbabwes-new-found-diamond-wealth> *(accessed 02 September 2012).*

10. Human Rights Watch '*Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe'*, (2009) 12, New York: Human Rights Watch available at <http://www.observatori.org/paises/pais_82/documentos/zimbabwe0609web.pdf>

11. Hanndl G (2008) The United Nations Conference on the Human Environment in Stockholm, June 16, 1972, and the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, June 14, 1992 United Nations. available at: http://untreaty.un.org/cod/avl/ha/dunche/dunche.html.

12. Kingham, 'Human rights and Environmental rights: Implications of a 'right based' approach for mining in Australia' (Paper presented at the Queensland Environmental Law Association Conference 2003, Surfers Paradise, 8 May 2003). Available at

© University of Venda

University of Venda

http://www.sclqld.org.au/qjudiciary/profile/Wilgram/publications/ (accessed 24/8/2013).

13. Metropolitan and Regional Planners 2005 http://www.mogalakwena.gov.za/docs/Town%20planning/MOGALAKWENA%20RELOCATION%20MANUAL (accessed 1 July 2012).

14. National Treasury Republic of South Africa 22 February 2012 budget review available at http://web.up.ac.za/sitefiles/file/40/2012%20Budget%20review (accessed 24 June 2012)

15. South African Human Rights Commission: Mining-related observations and recommendations: *Anglo Platinum, affected communities and other stakeholders, in and around the PPL mine, Limpopo*: Johannesburg South Africa. (2008).

16. The 2014 National Budget Statement, Presented to the Parliament of Zimbabwe on 19 December, 2013 by Hon. P. A. Chinamasa, MP Minister of Finance & Economic Development 31.

17. Zimbabwe Environmental Law Association (ZELA) 'Report on the scientific investigation of the impact of Marange diamond mining operations on water quality in the Save and Odzi rivers: Including assessment of the health, environmental and livelihoods impacts.' 2012.

6.2.5 Dissertations

1. Mohomed F Masters Dissertation: Environmental rights afforded to the residents affected by mining activities: A Case Study in Hondeklip Bay: Unpublished MA dissertation, University of South Africa (2006).

© University of Venda

University of Venda

2. Mwonzora G 'Diamond Rush' and the Protection of the Chiadzwa Community in Zimbabwe, A Human Rights Perspective' Graduate School of Development Studies, MA dissertation *The Hague*: *The Netherlands* (2011).

3. Olenasha WT 'The Enforcement of Environmental Rights: A Case Study of the New South African Constitutional Dispensation' unpublished MA dissertation, University of Pretoria (2001).

6.2.6 News Papers

1. 'Fabulous Wealth in Marange Diamonds', The Times, 8 August 2010. Available at http://www.timeslive.co.za/africa/2010/08/08/fabulous-wealth-in-marange-diamonds (accessed on 1 June 2014).
2. 'The Marange diamond fields of Zimbabwe: An overview.' Sokwanele. 2011. Available at: http://www.sokwanele.com/ system/files/The-Marange-Diamond-Fields-Report- Oct-2011.pdf. (accessed 13 February 2014).

6.2.7 Websites visited

1. http://www.unam.na/centres/hrdc/5_thirdgeneration_human_rights_and_the_protection_of_the_enviroment_in_Namibia

2. http://www.globalwitness.org/library/return-blood-diamond-deadly-race-control-zimbabwes-new-found-diamond-wealth

3. http://www.mogalakwena.gov.za/docs/Town%20planning/MOGALAKWENA%20RELOCATION%20MANUAL

4. http://commonslawproject.org/sites/default/files/Regenerating%20Essay,%20Part%20I

5. http://www.zela.org/index.php?option=com_content&view=article&id=11&Itemid=85

© University of Venda

University of Venda
Creating Future Leaders

6. http://www.observatori.org/paises/pais_82/documentos/zimbabwe0609web.pdf

7. http://www.foei.org/en/resources/publications/climate-justice-and-energy/2000-2007/human_rights.pdf/view

8. http://www.actionaid.org.uk/doc_lib/angloplats_miningreport_aa.pdf

9. http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

10. http://untreaty.un.org/cod/avl/ha/dunche/dunche.html

11. http://www.sokwanele.com.

12. www.angloplatinum.com.

© University of Venda

University of Venda
Creating Future Leaders

APPENDIX A

THE EFFECT OF MINING OPERATIONS IN CHIADZWA, ZIMBABWE AND MOGALAKWENA, LIMPOPO, SOUTH AFRICA, ON THE ENVIRONMENTAL HUMAN RIGHTS OF LOCAL COMMUNITIES.

Informed Consent form

1. Introduction

I am Mr. Masekesa L. K., studying at the University of Venda. I am doing research on the environmental rights effect of mining operations taking place in this community. I am going to give you information and invite you to be part of this research. You do not have to decide today whether or not you will participate in the research. Before you decide, you can talk to anyone you feel comfortable with about the research. This consent form may contain words that you do not understand. Please ask me to stop as we go through the information and I will take time to explain.

2. Purpose of the study

Mineral extraction potentially causes serious physical environmental problems, and those problems, in turn, often adversely affect the adjacent communities. The research is carried out so as to find out how the mining operations affect the environmental rights of residents in communities adjacent to the mines.

3. Type of Research Intervention

This research will involve your participation in a group discussion that will take about one and a half hour or a one hour interview.

© University of Venda

4. Participant Selection

You are being invited to take part in this research because we feel that your experience as a resident in the communities adjacent to mining operations can contribute much to our understanding and knowledge on the purpose of the study indicated above.

5. Procedures

We are asking you to help us learn more about the effect of mining operations on your environmental rights. We are inviting you to take part in this research project. If you accept, you will be asked to take part in a discussion with 10 other community members. This discussion will be guided by some appointed research assistants or myself. The group discussion will start with me, or research assistants making sure that you are comfortable. We can also answer questions about the research that you might have. Then we will ask you questions about the mining operations in your community and give you time to share your knowledge. The questions will be about mining in your community, how it is perceived, who people go to for help and the extent to which their petitions have been addressed.

In the case of interviews you are asked to participate in an interview with me or another interviewer. During the interview, I or another interviewer will sit down with you in a comfortable place at the centre. If it is better for you, the interview can take place in your home or a friend's home. If you do not wish to answer any of the questions during the interview, you may say so and the interviewer will move on to the next question. No one else but the interviewer will be present unless you would like someone else to be there.

6. Potential risks / discomforts and their minimization

There is a risk that you may share some personal or confidential information or that you may feel uncomfortable talking about some of the issues. You do not have to answer any question or take part in the discussion/interview/survey if you feel the question(s) are too personal or if talking about them makes you uncomfortable.

© University of Venda

7. Compensation for participation

You will not be provided any incentive to take part in the research.

8. Potential benefits

There will be no direct benefit to you, but your participation is likely to help us find out more about the effect of mining activities on the communities' environmental rights.

9. Confidentiality

The research being done in the community may draw attention and if you participate you may be asked questions by other people in the community. We will not be sharing information about you to anyone outside of the research team. Codes will be used instead of names to protect anonymity. Only the principal researcher will know what your code is. It will not be shared with or given to anyone except the Research and Publication Committee.

In the case of focus group discussions, we will ask you and others in the group not to talk to people outside the group about what was said in the group. We will, in other words, ask each of you to keep what was said in the group confidential. All personal information about you will be kept confidential. When the study is completed, all information linking participants' names to the study will be destroyed and your name will not be used in any report.

10. Participation and withdrawal

You may stop participating in the [discussion/interview] at any time that you wish. I will give you an opportunity at the end of the interview/discussion to review your remarks, and you can ask to modify or remove portions thereof, if you do not agree with my notes or if I did not understand you correctly.

© University of Venda

11. Questions and concerns

If you have any questions, you can ask them now or later. If you wish to ask questions later, you may contact Masekesa L. K. / 071 075 0043 / libertykudzai@gmail.com. This proposal has been reviewed and approved by The University of Venda Research and Publication Committee, which is a committee whose task it is to make sure that research participants are protected from harm. You can also contact Professor George Vukor-Quarshie on 0159628433 or at George.Vukor-Quarshie@.univen.ac.za for more information about this research.

12. Signature

I have read and fully understand the consent form. I sign it freely and voluntarily. A copy of this form has been given to me.

Signature of Participant _____ Date _____

I certify that I have personally explained this document before requesting that the participant signs it.

Signature of Researcher _____ Date _____

© University of Venda

University of Venda
Creating Future Leaders

APPENDIX B: SECTION A

Interview Questions: Local Community members

The effect of Mining Operations on the Environmental Human Rights of Local Communities

Mining activities their effect on the environment

1. Do you have any idea about mining activities in your community?
2. If 'yes', what method(s) of extraction is/are used by the mining companies? (e.g. open cast, underground, mechanized, semi-mechanized or manual).
3. Do you think the methods of operation by the mining company have some effects on the natural environment? If 'yes', what are some of the effects?

Land, forests and plants

1. Do mining operations threaten or affect land, forests and plants in your community?
2. If 'yes', give examples of how mining operations threaten or affect land, forests and plants.
3. Do you think the destruction of land, forests and plants by mining companies causes health problems?
4. What are some of the health problems that are likely caused by the destruction of land, forests and plants during mining operations?
5. Have the mining companies made attempts to reduce the destruction of land, forests and plants during their operations? If 'yes', what are some of the measures being undertaken?
6. Are the efforts satisfactory and effective?

Air quality

1. Do you think mining operations threaten or affect air quality in your community?

© University of Venda

University of Venda
Creating Future Leaders

2. If 'yes', give examples of how mining operations threaten or affect air quality in your community?
3. What the main pollutants generated during mining operations?
4. Do you think air pollution by mining companies causes health problems?
5. If 'yes' what are some of the health problems that are likely caused by air pollution?
6. Have the mining companies made attempts to reduce air pollution generated during their operations? If 'yes', what are some of the measures being undertaken?
7. Are the efforts aimed at reducing air pollution satisfactory and effective?

Water quality

1. Do mining operations threaten or affect the source of water supply to the community?
2. If 'yes', give examples of how mining operations threaten or affect the source of water supply to the community.
3. Do you think the mining companies contribute to water pollution?
4. Do you think water pollution by mining companies causes health problems?
5. If 'yes' what are some of the health problems that are likely caused by water pollution?
6. Have the mining companies made attempts to reduce water pollution during their operations? If 'yes', what are some of the measures being undertaken?
7. Are the efforts aimed at reducing water pollution satisfactory and effective?

Noise and vibration pollution

1. Do you think the mining companies contribute to noise and vibration pollution?
2. If 'yes', give examples of how mining operations contribute to noise and vibration pollution in your community.
3. What are the sources of noise pollution and vibration pollution?
4. Do you think noise and vibration pollution by mining companies cause health problems?
5. If 'yes', what are some of the health problems that are likely caused by noise and vibration pollution?
6. Have the mining companies made attempts to reduce noise and vibration pollution generated during their operations? If 'yes', what are some of the measures being undertaken?

© University of Venda

University of Venda
Created Future Leaders

7. Are the efforts aimed at reducing noise and vibration pollution satisfactory and effective?

Waste production and management by mining companies

1. Do you think waste produced during mining operations causes health problems?
2. What are some of the health problems that are likely caused by waste produced during mining operations?
3. Have mining companies made attempts to reduce waste produced during their operations? If 'yes', what are some of the measures being undertaken?
4. Are the efforts aimed at dealing with waste satisfactory and effective?

Access to environmental information

1. Are you aware of any environmental management legislation in this country?
2. Have you ever read any environmental legislation? If 'yes' name them.
3. Has any environmental legislation been explained to you?
4. Do you think the affected communities are aware of existing environmental legislation?
5. Do you have any knowledge on whether community members have appropriate access to information concerning the environment that is held by public authorities or mining companies, including information on hazardous materials and activities in their communities?
6. Are there any environmental awareness programmes within your community? If 'yes', do you attend them?
7. Who conducts environmental awareness programmes within your community?
8. Do you agree that methods used to effect environmental legislation in your community are effective?

Access to justice in environmental matters

1. Whom do you approach with environmental concerns for help?
2. To what extent have community members' petitions been addressed?
3. Is access to judicial and administrative proceedings available to community members?

© University of Venda

University of Venda
Creating Future Leaders

4. Do you know whether the mining companies have been prosecuted on environmental related issues?
5. What predicaments do you face with respect to access to justice?

Participation in environmental decision-making

1. Before the beginning of mining activities in the present area, were there any people living in the mining site? If 'yes', were they, to your own knowledge given compensation?
2. If 'yes', were they resettled by the mining companies or the government or did they have to fend for themselves?
3. Do citizens have the opportunity to participate in decision-making processes on their environmental concerns which arise from mineral extraction?
4. Explain what the mining companies are doing to maintain a good relationship with the adjacent communities.



© University of Venda

University of Venda
Creating Future Leaders

APPENDIX B: SECTION B

Interview Questions: Mining Companies Personnel

The effect of Mining Operations on the Environmental Human Rights of the Local Communities

Mining activities their effect on the environment

1. What method(s) of extraction is/are used by the mining companies? (e.g. open cast, underground, mechanized, semi-mechanized or manual).
2. Do you think the methods of operation by the mining company have some effects on the natural environment? If 'yes', what are some of the effects?

Land, forests and plants

1. What types of machinery are used by the mining company?
2. Do mining operations threaten or affect land, forests and plants in your community?
3. If 'yes', give examples of how mining operations threaten or affect land, forests and plants.
4. Do you think the destruction of land, forests and plants by mining companies causes health problems?
5. What are some of the health problems that are likely caused by the destruction of land, forests and plants during mining operations?
6. Have the mining companies made attempts to reduce the destruction of land, forests and plants during their operations? If 'yes', what are some of the measures being undertaken?
7. Are the efforts satisfactory and effective?

Air quality

1. Do you think mining operations threaten or affect air quality in your community?
2. If 'yes', give examples of how mining operations threaten or affect air quality in your community?

© University of Venda

University of Venda
Creating Future Leaders

3. What the main pollutants generated during mining operations?
4. Do you think air pollution by mining companies causes health problems?
5. If 'yes', what are some of the health problems that are likely caused by air pollution?
6. Have the mining companies made attempts to reduce air pollution generated during their operations? If 'yes', what are some of the measures being undertaken?
7. Are the efforts aimed at reducing air pollution satisfactory and effective?
8. Do you think mining companies are complying with both national and international air quality standards?

Water quality

1. What is the source of water the mining companies use for washing of equipment, washing sand/stones, dust control, gardens, human use etc?
2. Do you think the mining companies contribute to water pollution?
3. If 'yes', do you think water pollution by mining companies causes health problems?
4. If 'yes' what are some of the health problems that are likely caused by water pollution?
5. Have the mining companies made attempts to reduce water pollution during their operations? If 'yes', what are some of the measures being undertaken?
6. Are the efforts aimed at reducing water pollution satisfactory and effective?

Noise and vibration pollution

1. Do you think the mining companies contribute to noise and vibration pollution?
2. If 'yes', give examples of how mining operations contribute to noise and vibration pollution in your community.
3. What are the sources of noise pollution and vibration pollution?
4. Do you think noise and vibration pollution by mining companies cause health problems?
5. If 'yes', what are some of the health problems that are likely caused by noise and vibration pollution?
6. Have the mining companies made attempts to reduce noise and vibration pollution generated during their operations? If 'yes', what are some of the measures being undertaken?
7. Are the efforts aimed at reducing noise and vibration pollution satisfactory and effective?

© University of Venda

University of Venda
Creating Future Leaders

8. Do you think mining companies are complying with the minimum standards prescribed for the emissions of noise and vibration pollution into the environment?

Waste production and management by mining companies

1. What industrial waste is being generated during mineral activities?
2. How is such industrial waste disposed of?
3. Are disposal methods effective?
4. Do you think waste produced during mining operations causes health problems?
5. If 'yes', what are some of the health problems that are likely caused by waste produced during mining operations?
6. Do you think mining companies are complying with national legislation to achieve the aims and goals of a sound environment?

Access to environmental information

1. Do you think mining companies are aware of environmental legislation which help to control their operations.
2. Are you aware of any environmental management legislation in this country?
3. Have you ever read any environmental legislation? If 'yes' name them.
4. Has any environmental legislation been explained to you?
5. Do you have any knowledge on whether the community members have appropriate access to information concerning the environment that is held by public authorities or mining companies, including information on hazardous materials and activities in their communities?
6. Are there any environmental awareness programmes within your community? If 'yes', do you attend them?
7. Who conducts environmental awareness programmes within your community?
8. Do you agree that methods used to effect environmental legislation in your community are effective?

© University of Venda

University of Venda
Creating Future Leaders

Access to justice in environmental matters

1. Is access to judicial and administrative proceedings available to community members?
2. Do you know whether the mining companies have been prosecuted on environmental related issues?
3. To what extent have community members' petitions been addressed?

Participation in environmental decision-making

1. Before the beginning of mining activities in the present area, were there any people living in the mining site? If 'yes', were they, to your own knowledge given compensation?
2. If 'yes', were they resettled by the mining companies or the government or did they have to fend for themselves?
3. Do citizens have the opportunity to participate in decision-making processes on their environmental concerns which arise from mineral extraction?
4. Explain what the mining companies are doing to maintain a good relationship with the adjacent communities.

© University of Venda