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An assessment of the regulatory legal and institutional framework of the mining industry in South Africa and Kenya for effective human rights protection: Lessons for other countries

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Summary: *The priorities of African governments regarding the extractive industry tend to focus on economic interests leading them to provide a conducive environment for investments by private entities. Furthermore, reforms in the industry are inclined to promote these priorities with less consideration for adequate protection for affected people and their environment, including protection from resulting social and environmental impacts. The result in economies endowed with mineral resources is that resources are poorly managed and the outcomes of exploitation of mineral resources are environmental*

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degradation, loss of lives, displacement, conflicts between companies and mining communities, protests against mining projects, and human rights violations. These problems in the long run slow down development and forestall its benefits because of poor regard for the concerns of affected people by the government and companies. Filling the gaps in extractive policies, particularly in the area of protection of communities and their environment affected by activities of the extractive industry, is essential to tackle the environmental and social outcomes of mining activities. In this article the legal and institutional framework regulating the mining industry in selected jurisdictions in Africa is examined to determine the extent to which they respond to the problems arising from the development of mineral resources, particularly the human rights violations caused by the adverse impacts of mining. Some lessons are drawn for the benefit of other countries. The article argues that some of these mining policies poorly encourage effective protection of affected communities, particularly human rights, in mining developments. The article proposes that mineral legal regimes need to be strengthened for the effective protection of affected people and their environment.

Key words: *mining industry; mineral resources; mining; mining policies; human rights*

1 Introduction

In Africa the extractive industry is a major source of revenue for the economies of countries endowed with various mineral resources.¹ These huge deposits of mineral resources in countries represent wealth capital where they are exploited sustainably. Mining, therefore, contributes significantly to the economic activity of several countries in both developed and developing countries.² There is no doubt that the exploration of solid minerals will generate economic benefits and contribute considerably to the development of a nation, but the benefits may be outweighed by social and environmental costs. Therefore, governments and other stakeholders need to be mindful of the negative impacts caused by the exploitation of mineral resources on the rights of host communities, the environment, and even the national economy in the long run. The mining industry, by its nature, has a massive footprint such as environmental, social,

1 K Tutu 'Improving the management of mineral resources for sustainable development in Africa' in T Afful-Koomson & K Owusu Asubonteng (eds) *Collaborative governance in extractive industries in Africa* (2013) 29.

2 P Crowson 'The resource curse: A modern myth?' in J Richards (ed) *Mining, society, and a sustainable world* (2009) 5.

and economic impacts.³ There is evidence that host communities are threatened by the dangers posed by the exploitation of mineral resources in some countries in Africa.⁴ This requires an adequate and effective response to reduce and avoid these negative effects. The Working Group on Extractive Industries, Environment and Human Rights Violations in Africa indicated that the increase in exploitation of natural resources on the African continent has given rise to the violation of human rights.⁵

A major problem is that the legal and institutional framework regulating the mining sector in some states on the African continent does not adequately cater for the protection of mining host communities and their environment. One reason is that governments in such states strive to attract investment in the sector and, therefore, take steps towards creating a conducive environment for non-state actors with less stringent laws to control their activities and protect communities and their environment. The effect is that host communities become poorer and their environment is left devastated. The absence of or poor national frameworks regulating the industry on the African continent, including the poor observance of human rights, results in human rights abuses by the operations of extractive industries.⁶

This article discusses mining and highlights the positive and adverse impacts of mining activities with instances. Most importantly, it considers how these adverse impacts are addressed in selected jurisdictions. It examines the legal and institutional regime governing the mining sector in selected jurisdictions in Africa, such as in South Africa and Kenya. Mining contributes significantly to the development of these countries. The mining law regimes are analysed to establish their contribution towards minimising adverse mining impacts and the avoidance of human rights violations. Although the Constitution is progressive towards the protection of human rights

3 Mining and Development 'Treasure or trouble? Mining in developing countries' World Bank and International Finance Corporation 2002 2, <http://siteresources.worldbank.org/INTOGMC/Resources/treasureortrouble.pdf> (accessed 30 August 2019).

4 Eg, in South Africa mining causes harm to host communities. See Centre for Environmental Rights et al 'The threats to human rights from mining and coal-fired power production in South Africa' 5 October 2016 para 1, <https://cer.org.za/wp-content/uploads/2016/10/2017-SA-UPR-submission-mining-and-HR-2016-10-5-final.pdf> (accessed 1 November 2019).

5 African Commission on Human and Peoples' Rights Working Group on Extractive Industries, Environment and Human Rights Violations, <https://www.achpr.org/specialmechanisms/detail?id=13> (accessed 25 March 2021).

6 African Commission on Human and Peoples' Rights State reporting guidelines and principles on articles 21 and 24 of the African Charter relating to the extractive industries, human rights and the environment, <https://www.achpr.org/presspublic/publication?id=75> (accessed 26 March 2021).

in both countries, and their mining laws aim for the sustainable development of mineral resources, the mining host communities still encounter problems caused by mining developments. The legal and institutional frameworks in the jurisdictions are analysed under main themes to consider the extent to which they ensure sustainable mining and the protection of host communities and prevent human rights abuses. Strengthening policies, plans and capacities are suggested in the article to ensure the effective legal protection of human rights and the environment. In order for mining to be sustainable, there is a need for recognition and effective protection of human rights.

2 Mining and its benefits in Africa

Mining contributes significantly to the economic growth of several countries endowed with vast mineral resources in Africa and it is a primary source of income in some of these countries. For instance, the mining industry in South Africa is described as the bedrock of the country's economy.⁷ The mineral industry in South Africa is largely supported by gold, diamonds, coal and platinum production and contributes significantly to the country's economy.⁸ The abundance of mineral resources introduced investment from mining companies operating on a large scale. The availability of mineral deposits opens up opportunities for export. The industry value of mining in South Africa was R452,67 billion (US \$33,17 billion) in 2017 and accounted for approximately 60 per cent of the country's exports by value for the year.⁹ In 2018 mining contributed R93 billion to fixed investment.¹⁰ In the 2017/2018 fiscal year, R7,6 billion was paid in royalties and the industry paid R22 billion in company taxes.¹¹ Mining contributed 7,3 per cent to the gross domestic product (GDP) in 2018 and the industry exported R312 billion worth of commodities.¹² The industry value of mining in South Africa was 452,67 billion (US \$33,17 billion) in 2017 and accounted for approximately 60 per cent of the country's exports by value for the year.¹³

7 South African Government 'Minerals and mining policy of South Africa: Green paper', <https://www.gov.za/documents/minerals-and-mining-policy-south-africa-green-paper> (accessed 1 November 2019).

8 Department of Minerals and Energy Republic of South Africa *South Africa's Mineral Industry 2001/2002* (2002) 1.

9 Africa Mining iQ 'Mining in South Africa', <https://www.projects iq.co.za/mining-in-south-africa.htm> (accessed 1 November 2019).

10 Minerals Council South Africa 'Facts and figures-pocketbook 2018' 8, <https://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures> (accessed 1 November 2019).

11 Minerals Council South Africa (n 10) 12.

12 As above.

13 Africa Mining iQ (n 9).

Kenya has different mineral resources, such as gold, iron ore, limestone and coal, and mining contributes significantly to the economy.¹⁴ The mining industry is one of the major employers in South Africa with more than 1 million people in mining-related employment and is the largest contributor by value to black economic empowerment.¹⁵ In 2018 mining contributed to employment in the country as 6,4 per cent of private non-agricultural employment and 4,7 per cent of total non-agricultural employment.¹⁶ Other opportunities include technology transfer and infrastructure, especially in communities where mining occurs.

The harmful effects caused by the operations of mining companies in affected communities with instances will be discussed in the next part.

3 Impacts of mining and their human rights implications

The adverse impacts of mining on people and the environment are enormous and should therefore be taken seriously. Although the extraction of resources will contribute to the growth of the economy, it also comes at a cost to the environment, community health and social outcomes, most of which are borne by mining host communities.¹⁷ Mining has a huge impact on the environment. Mining activities cause harm to humans and the environment in the affected areas. An outcome of these adverse impacts of mining activities is human rights implications. Human rights can be undermined by mining companies in the process of exploration and development of mineral resources. Mining releases toxic substances into the air and water, spills from power plants contaminate domestic water and cause air and water pollution, and ecosystems are destroyed. The estimates of the impacts of air pollution from coal-fired power stations on affected South Africans is reported as 2 239 deaths per year: 157 from lung cancer; 1 110 from ischaemic heart disease; 73 from chronic obstructive pulmonary disease; 719 from strokes;

14 Institute for Human Rights and Business 'Human rights in Kenya's extractive sector: Exploring the terrain' December 2016 14-15.

15 'Public regulation and corporate practices in the extractive industry: A south-south advocacy report on community engagement' The Mandela Institute, University of Witwatersrand 2017 19.

16 Minerals Council South Africa (n 10) 12.

17 Global Rights 'Protecting host community rights: An assessment report on extractive host communities in Nigeria', http://www.globalrights.org/ngn/wp-content/uploads/2016/08/Assessing_Community_Rights_Report.pdf (accessed 19 October 2019).

and 180 from a lower respiratory infection.¹⁸ Therefore, mining causes ill health and death in the communities that are the most vulnerable since they are located around the mines and coal-fired power plants and they breathe in toxic pollutants. These impacts cost the government over R30 billion annually through admissions to hospital and lost working days.¹⁹ These impacts threaten lives and expose people to harm, resulting in poor health, and loss of lives and livelihood. They violate rights to life, health, water, and a safe and healthy environment. Another impact caused by mining projects is the displacement of people, especially by moving affected communities to other locations.²⁰ Mining projects are mostly situated in remote areas and locations inhabited by local peoples where the environmental dangers are considerably high.²¹ The impacts caused by mining on traditional lands result in displacement and impacts that endanger livelihoods.²² For instance, an Australian company, Minerals Commodities Limited (MRC) proposed to mine titanium-rich sands at Umgungundlovu community of Xolobeni on the Wild Coast. The execution of the Xolobeni Mine Sands Project will affect five villages – Sgidi, Mtentu, Sikombe, Kwayana and Mdatya.²³ Residents protested against the project and organised themselves under the Amadiba Crisis Committee. They fear that the mining project will cause displacement of the people, destruction of their environment and take away their small-scale farming. Fertile agricultural lands become decreased with lower food production, violating the right to food. Mining activities affect cultural practices, violating people's right to culture. For example, in Mpumalanga, a wetland that was significant for its cultural and spiritual value to the Madadeni community, was destroyed in the construction of the

18 Centre for Environmental Rights 'Air pollution from coal power stations causes disease and kills thousands of South Africans every year, says UK Expert' 12 September 2017, <https://cer.org.za/news/air-pollution-from-coal-power-stations-causes-disease-and-kills-thousands-of-south-africans-every-year-says-uk-expert> (accessed 1 November 2019); M Holland 'Health impacts of coal fired power plants in South Africa' 31 March 2017, <https://cer.org.za/wp-content/uploads/2017/04/Annexure-Health-impacts-of-coal-fired-generation-in-South-Africa-310317.pdf> (accessed 1 November 2019).

19 Centre for Environmental Rights (n 18).

20 M Conde & P le Billon 'Why do some communities resist mining projects while others do not?' (2017) 4 *The Extractive Industries and Society* 684.

21 D Shapiro et al 'Natural resources, multinational enterprises and sustainable development' (2018) 53 *Journal of World Business* 6, D Kemp et al 'Just relations and company-community conflict in mining' (2011) 101 *Journal of Business Ethics* 95.

22 Shapiro et al (n 21) 6.

23 L Ledwaba 'Mining will remove the intestines of our land' *Mail & Guardian* 12 January 2018, <https://mg.co.za/article/2018-01-12-00-mining-will-remove-the-intestines-of-our-land> (accessed 30 August 2019).

Nkomati anthracite mine, without the community being consulted before the commencement of the construction.²⁴

Social conflict is another occurrence in mining communities in instances where mining companies and government officials refuse to obtain their consent or are secluded from active participation in decision-making processes regarding development or negotiations that concerns resettlement or the compensation for losing their land. For instance, in Kitui county, Eastern Kenya, where coal is mined in the Mui Basin, local communities claimed that their land had been grabbed without their knowledge and they did not participate in the negotiations regarding resettlement or the compensation to be paid for the loss of land.²⁵ In 2012 members of the community filed a petition in court against the Ministry of Energy, the Attorney-General and the mining company (Fenxi Mining Industry Company Limited) highlighting the violation of their rights under the Constitution, namely, their rights to public participation (article 10); to information (article 35); to private property (article 40); to a clean and healthy environment (articles 42 or 70); and the threat to health under the Constitution (article 43).²⁶ The petition, however, was dismissed but the defendants were required to continue their engagement with the local community and make available reasonable opportunities for public participation during the process of preparing an environmental impact assessment and the process of resettlement as outlined in the Benefits Sharing Agreement.²⁷

Furthermore, mining companies violate the right of access to information and the right to participation of communities in instances where they are denied access to necessary information of mining projects or are not consulted and involved in the decision-making process concerning the development of mineral resources on their land. For instance, it was reported that several communities complain that mining companies consult with their traditional leaders, enter into an agreement with the leaders without their awareness and any benefit to the community.²⁸ Companies rarely make accommodation to ensure that members of mine communities comprehend mining

24 Centre for Environmental Rights et al https://www.upr-info.org/sites/default/files/document/south_africa/session_27_-_may_2017/js14_upr27_zaf_e_main.pdf para 21 (accessed 29 March 2021).

25 Both ENDS et al 'Coal mining disrupts people's livelihood in Mui Basin, Kenya' November 2015, <http://www.ciel.org/wp-content/uploads/2017/11/Coal-mining-disrupts-peoples-livelihoods-in-Mui-basin-Kenya.pdf> (accessed 29 March 2021).

26 *Peter Makau Musyoka & Others v Ministry of Energy & Others* Constitutional Petition 305 of 2012.

27 The Mui Coal Basin Local Community (2015) EKLK para 140.

28 Centre for Environmental Rights et al (n 24) para 41.

projects and fully participate in those matters and they do not ensure that necessary information is made accessible to the community. Consultation and participation of mine host communities in development processes are significant but are usually not taken into account by the government and mining companies, in the long term leading to protests against projects and other problems. In instances where they are deprived of access to necessary information and meaningful consultation, communities cannot defend the rights threatened by mines and power plants, or exercise their rights to participate in government and to have effective remedies for rights violations.²⁹

Similar experiences of host communities include poor consultation of host communities in decision making; poor access to information about mining-related matters; environmental degradation; and poor access to remedies. In the next part mining laws in selected jurisdictions will be examined to determine their response to these issues.

4 Legal and institutional regimes governing the mining industry

In this part the relevant mining policies regulating the mining industries in South Africa and Kenya are examined to determine the extent to which these regulations ensure the protection of affected communities in the course of the exploitation of mineral resources. The relevant laws will be examined to determine the extent to which they incorporate human rights concerns. These laws are examined *vis-à-vis* themes such as social concerns, participation, consultation and engagement, compensation and access to remedies.

4.1 An examination of the existing regulatory framework in South Africa

Among the laws regulating the mining industry in South Africa are the 1996 Constitution;³⁰ the Mineral and Petroleum Resources Development Act of 2002 (MPRDA);³¹ the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry

²⁹ Centre for Environmental Rights et al para 6.

³⁰ The Constitution of the Republic of South Africa, 1996 (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

³¹ Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

2018 (Mining Charter);³² and National Environmental Management Act.³³ The South African Constitution recognises that mining must be carried out in a sustainable manner, which is affirmed in the right to a healthy environment.³⁴ The South African Constitution recognises a Bill of Rights which is a cornerstone of democracy in the country.³⁵ The state is mandated to respect, protect, promote and fulfil the rights in the Bill of Rights.³⁶ In addition, the National Environmental Management Act directs the state to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and to strive to meet the basic needs of previously disadvantaged communities.³⁷

The MPRDA is the main legislation governing the mining industry in South Africa and was enacted to give effect to the constitutional provisions in South Africa.³⁸ The Preamble affirms the obligation of the state to ensure ecologically-sustainable development; sustainable development of the resources, and promote economic and social development, which are also part of the objectives of the Act.³⁹ The National Environmental Management Act further states that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations.⁴⁰ Another mining regulation is the 2018 Mining Charter which gives effect to the objectives of the MPRDA. The discussion in this part will focus on these laws to determine the extent to which they address concerns such as the participation of communities, access of information, social concerns, environmental protection, access to remedies and compensation.

4.1.1 Consultation/community engagement/participation

Some provisions of the MPRDA encourage consultation with mining communities. The MPRDA provides that any person who engages in any mining-related activity must notify and consult with the owner or occupier of a mining area.⁴¹ The holder of a mining right is required to give an owner or occupier of land 21 days' written notice

32 The Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry 2018 (Mining Charter).

33 National Environmental Management Act 107 of 1998.

34 Sec 24(b).

35 Sec 7 1996 Constitution.

36 Sec 7(2).

37 Preamble National Environmental Management Act.

38 E van der Schyff *Property in minerals and petroleum* (2016) 139.

39 Sec 2(h) MPRDA.

40 Preamble National Environmental Management Act.

41 Sec 5(4)(c) MPRDA.

of their intention to exercise allocated rights.⁴² The acceptance of the application of mining right over land must be publicised within 14 days,⁴³ and interested or affected persons are to submit their comments on the application within 30 days of the notice.⁴⁴ These provisions on consultation do not give interested parties ample opportunity to participate effectively in decision-making processes concerning the application for mining on their land. The time allocated is short for effective negotiation between parties. Granting the application for mining rights before receiving comments may not accommodate the concerns of interested parties regarding the proposed project. These provisions indicate that mining agreements are between the government and mining companies without consideration of the affected people. Host communities and other stakeholders such as civil societies should be involved in the decision-making process from planning to implementation, including the monitoring of activities. The Court considered the importance of consultation in the case of *Bengwenyama Minerals*.⁴⁵ One of the issues considered was whether consultation was properly conducted by Genorah with Bengwenyama Minerals and the community in terms of the provisions of the Act.⁴⁶ The Court stated that a purpose of the consultation is the possibility of accommodation between the applicant for a prospecting right and landowner and must be engaged in good faith in order to reach an accommodation.⁴⁷ The aim of consultation is to provide landowners or occupiers with information useful for them to make an informed decision.⁴⁸ The Court declared that Genorah had failed to comply with the requirements of consultation under the Act.⁴⁹

Community engagement is encouraged through a trust and mine community development (MCD) which must be set up for affected communities. The Mining Charter provides that a trust must be set up for the benefit of host communities by the mining right holder according to the applicable legislation,⁵⁰ and will involve representation from host communities, community-based organisations, traditional authorities and mining companies.⁵¹ Also, a mining right holder is required to consult with relevant municipalities, host communities, traditional authorities and other affected stakeholders to identify

42 Sec 5A(c).

43 Sec 10(1)(a).

44 Sec 10(1)(b).

45 *Bengwenyama Minerals (Pty) Ltd & Others v Genorah Resources (Pty) Ltd & Others* 2010 ZACC 26.

46 *Bengwenyama Minerals* (n 45) para 26.

47 *Bengwenyama Minerals* para 65.

48 *Bengwenyama Minerals* para 66.

49 *Bengwenyama Minerals* para 68.

50 2.1.4.1.2 Mining Charter 2018.

51 2.1.4.1.3.

the development needs of host communities.⁵² The trust provides for a host community development programme⁵³ published in two common languages in the community.⁵⁴ Hence, host communities are recognised as stakeholders in mining development. The Charter states that mine communities are an essential part of mining development which requires a balance between mining and their socio-economic development needs.⁵⁵ Hence, to keep the social licence to operate, a mining right title holder must contribute to a mine community development (MCD).⁵⁶ Concerning the MCD, the title holder consults with mining communities and other stakeholders to identify their developmental priorities to be contained in the prescribed and approved social and labour plan of the title holder.⁵⁷ In order to promote human resource development, a mining right holder is required to invest in skills development to achieve the aim of the Charter, which includes producing a skilled work force that will meet the demands of a modern industry; developing skills that will improve employment prospects of historically disadvantaged persons; and developing entrepreneur skills to improve the livelihoods of people.⁵⁸

4.1.2 Access to information

Section 32 of the 1996 Constitution affirms the right to access any information held by the state and any other person and that is required for the protection of any rights.⁵⁹ National legislation is required to be enacted to give effect to that right.⁶⁰ Therefore, national mining policies are expected to ensure that stakeholders have access to relevant information useful to make an informed decision.

4.1.3 Access to remedies and compensation

According to section 34 of the 1996 Constitution, everyone can have any dispute decided before a court or independent and impartial tribunal or forum.⁶¹ The regional manager considers issues in instances where the land owner or occupier refuses to permit a mining right

52 2.1.4.1.4.

53 2.1.4.1.5.

54 2.1.4.1.7.

55 2.5.

56 2.5.

57 2.5.1.

58 2.3.

59 Secs 32(1)(a) & (b) 1996 Constitution.

60 Sec 32(2).

61 Sec 34 1996 Constitution.

holder to enter the land, gives unreasonable demands in return for access to the land, or cannot be found where the holder of right needs to apply for access.⁶² The MPRDA provides for arbitration and access to court on mining matters particularly in instances where the holder of a mining right and land owner or occupier fails to reach an agreement on the compensation payable for any loss or damage.⁶³ Compensation can be determined through arbitration under the Arbitration Act⁶⁴ or by a court where parties fail to reach an agreement.⁶⁵

4.1.4 Environmental protection

The Constitution affirms everyone's right 'to an environment that is not harmful to their health or well-being'.⁶⁶ It further affirms the right of everyone to the protection of the environment for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation, and ensure ecologically-sustainable development and use of natural resources while promoting justifiable economic and social development.⁶⁷ The National Environmental Management Act directs the state to respect, protect, promote and fulfill environmental rights.⁶⁸

The MPRDA gives effect to section 24 of the 1996 Constitution regarding the protection of the environment by preventing degradation and destruction to the environment. An applicant for a mining right must ensure that 'mining will not result in unacceptable pollution, ecological degradation or damage to the environment and that he has provided financially and otherwise for the prescribed social and labour plan'.⁶⁹ The applicant must ensure that they can comply with the relevant provisions of the Mine Health and Safety Act⁷⁰ and they are not in contravention of any provision of MPRDA.⁷¹ The Minister must refuse a mining right if the application does not meet the requirements.⁷² Before the Minister can grant a mining right,

62 Secs 54(1)(a)-(e) MPRDA.

63 Sec 54(4) MPRDA.

64 Arbitration Act 42 of 1965.

65 Sec 54(4) MPRDA.

66 Sec 24(a) 1996 Constitution.

67 Sec 24(b).

68 Preamble National Environmental Management Act.

69 Secs 23(1)(d) & (e) MPRDA.

70 Act 29 of 1996.

71 Sec 23(1)(g) MPRDA.

72 Sec 23(3).

environmental assessment,⁷³ environmental management plan⁷⁴ and guidelines under the National Environmental Management Act⁷⁵ must be provided by the applicant. However, the Act did not include impacts of environmental degradation on persons that are likely to be affected by mining operations. Mining operations adversely impact the environment including the people located around the mine. The Court gave interpretation to section 24 of the Constitution and pointed out that the provision recognises the obligation to promote justifiable economic and social development which is essential to the well-being of human beings.⁷⁶ According to the Court, to protect the environment, development needs to consider the costs of environmental destruction. Thus, there is a link between environment and development.⁷⁷ The Constitution 'contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.'⁷⁸ It was mentioned further that the protection of the environment is crucial to the enjoyment of other rights in the Bill of Rights and to life and that it is the court's duty to ensure that the responsibility to protect is observed.

4.1.5 Social concerns

In addition to the protection of fundamental rights and freedoms in the Constitution, the objectives of the MPRDA promote equitable access to resources;⁷⁹ substantial and meaningful expansion of opportunities for historically-disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;⁸⁰ employment and advancing the social and economic welfare of all South Africans,⁸¹ and ensuring the development of resources in an ecologically-sustainable manner.⁸² The Act protects marginalised people and provides that the Minister can grant a

73 Sec 39(1).

74 Sec 39(2).

75 Sec 37(1)(a).

76 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management & Others (Fuel Retailers case)* 2007 ZACC 13 para 44. The Preamble to the Declaration on the Right to Development adopted by General Assembly Resolution 41/128 of 4 December 1986 describes development as 'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population'.

77 *Fuel Retailers* (n 78) para 44.

78 *Fuel Retailers* (n 78) para 45.

79 Sec 2(c) MPRDA.

80 Sec 2(d) MPRDA.

81 Sec 2(f) MPRDA.

82 Sec 2(h) MPRDA.

mining right if granting such right will further the objects referred to in sections 2(d) and (f) following the Charter and the prescribed social and labour plan (SLP).⁸³ Information to be provided in the environmental assessment and management plan includes the assessment and evaluation of the impact of the proposed prospecting or mining operation on the environment, socio-economic conditions of persons that are likely to be affected, and any national estate.⁸⁴ However, the Act does not provide further details on the socio-economic conditions of persons that are likely to be affected by mining operations. The National Environmental Management Act identifies inequality in the distribution of wealth and resources and poverty as outcomes of environmentally-harmful practices.⁸⁵ Elaboration on the effects of mining activities on affected communities is needed. The members of the affected communities suffer the effects of the environmental impacts. Therefore, it is necessary to consider and address these effects in the laws.

Furthermore, coupled with the trust and MCD which must be set up by mining companies to address the developmental needs of host communities, a mineral title holder is required to submit SLP⁸⁶ and comply with the requirements of the prescribed SLP before a mining right is granted.⁸⁷ A mineral title holder must submit the prescribed annual report dealing with the extent of the holder's compliance.⁸⁸ Granting the right will expand opportunities for historically-disadvantaged persons and promote the employment and welfare of citizens.⁸⁹ The objectives of SLPs are primarily to promote employment and advance the social and economic welfare of all South Africans; contribute to the transformation of the mining industry, and ensure a contribution by holders of mining rights towards the socio-economic development of the areas in which they are operating.⁹⁰ The SLP regulation fails to require that the plan be disclosed to the public and mining communities that are beneficiaries. Although the SLP aims to benefit mine workers and mining host communities, the MPRDA and its regulations lack provisions on an obligation on mining companies or the government to disclose SLPs to the public.⁹¹ This prevents the monitoring of the implementation and compliance with the plan by stakeholders. Therefore, the gap may allow companies to evade

83 Sec 23(1)(h) MPRDA.

84 National estates are those included in sec 3(2) of the National Heritage Resources Act 25 of 1999 except those in subsecs (i), (vi) and (vii).

85 Preamble NEMA.

86 Sec 2(1)(h).

87 Sec 25(2)(f).

88 Sec 25(2)(h).

89 Secs 23(1)(h) & 2(d) & (f).

90 Regulation 41 of the MPRDA.

91 'Public regulation and corporate practices in the extractive industry' (n 15) 20.

their responsibility to carry out their obligations with regard to SLPs under the law.

The developmental needs of a community are important, but social concerns such as displacement, resettlement, loss of livelihood, settlement of disputes and prevention of conflicts need to be considered and addressed in the laws.

4.1.6 Institutional framework regulating mining in South Africa

The Department of Mineral Resources (DMR) assumes the custodianship of all mineral resources in South Africa on behalf of its citizens. The DMR seeks to promote and regulate the minerals and mining sector for transformation, growth and development, and to ensure that all South Africans derive sustainable benefit from the country's mineral wealth.⁹² Mining is regulated by three branches, namely, the Mineral Policy and Promotion Branch; the Mineral Regulation Branch; and the Mine Health and Safety Inspectorate. The Mine Health and Safety Inspectorate was established by the Mine Health Safety Act, 1996⁹³ to protect and safeguard the health and safety of mine employees and affected mining communities.⁹⁴ The function of the Mineral Regulation Branch is to regulate the minerals and mining sector to promote economic growth, employment, transformation and sustainable development.⁹⁵ The branch is responsible for the administration of prospecting rights, mining rights, mining permits and compliance with the MPRDA, including environmental management. The Mineral Policy and Promotion branch is responsible for formulating mineral-related policies and helps to promote the mining and minerals industry of South Africa to make it attractive to investors.⁹⁶ The Minister is required to ensure sustainable development of the mineral resources within a framework and promote economic and social development.⁹⁷

92 Department of Mineral Resources: Republic of South Africa, <https://www.dmr.gov.za/about-dmr/overview> (accessed 25 March 2021).

93 Act 29 of 1996.

94 Department of Mineral Resources 'Mine health and safety', <https://www.dmr.gov.za/mine-health-and-safety/overview> (accessed 25 March 2021).

95 Department of Mineral Resources 'About mineral regulations', <https://www.dmr.gov.za/mineral-regulation/overview> (accessed 25 March 2021).

96 <https://www.gcis.gov.za/sites/default/files/MineralResources.pdf> (accessed 25 March 2021).

97 Sec 3(3) MPRDA.

4.2 Examination of the mining laws and institutions in Kenya

Among the laws regulating the mining industry in Kenya are the 2010 Constitution⁹⁸ and the Mining Act.⁹⁹ The Constitution contains provisions on fundamental human rights, social and environmental rights including the obligations of companies and the government. Human rights are one of the national values and principles of governance in the country which is binding on all state organs, state and public officers and all persons.¹⁰⁰ The Constitution is progressive towards the protection of fundamental human rights and freedoms such as the rights to life;¹⁰¹ non-discrimination;¹⁰² human dignity;¹⁰³ access to information;¹⁰⁴ property;¹⁰⁵ a clean and healthy environment;¹⁰⁶ health;¹⁰⁷ adequate housing;¹⁰⁸ adequate food;¹⁰⁹ clean and safe water;¹¹⁰ participation in cultural life;¹¹¹ and freedom from torture.¹¹² It recognises and protects groups of people who are likely to be endangered by the activities of the extractive sector. According to the Constitution, the Bill of Rights is binding on all state organs and all persons.¹¹³ Furthermore, the Constitution guarantees the sustainable use of resources. Under the constitutional provisions, the state is under an obligation to ensure the sustainable exploitation and management of the environment and natural resources and ensure the equitable distribution of the benefits.¹¹⁴ Besides, other parties must ensure the sustainable development of natural resources.¹¹⁵ Land must also be held and managed sustainably in accordance with principles such as sustainable and productive management of land resources.¹¹⁶ These provisions inform the mining laws regulating the mining industry in Kenya.

Aside from the Constitution, the Mining Act of 2016 is the main legislation regulating the mining industry in Kenya. Under the Mining Act, conditions to obtaining a mineral right include the protection of

98 Constitution of Kenya, 2010.

99 Mining Act 12 of 2016.

100 Sec 10.

101 Sec 26.

102 Sec 27.

103 Sec 28.

104 Sec 35.

105 Sec 40.

106 Sec 42.

107 Sec 43(1)(a).

108 Sec 43(1)(b).

109 Sec 43(1)(c).

110 Sec 43(1)(d).

111 Sec 44.

112 Sec 29(d).

113 Sec 20.

114 Sec 69(1)(a).

115 Sec 69(2).

116 Sec 60(1)(c).

mineral interests and the environment; community development; the safety of mining operations; and the health and safety of workers.¹¹⁷ Mining is required to be carried out reasonably and responsibly in a way that does not adversely affect the interests of other mineral title holders and landowners.¹¹⁸ The discussion in this part focuses on these laws to determine the extent to which they address concerns such as participation of communities, access to information, social concerns, environmental protection and access to remedies.

4.2.1 Participation, consultation, access to information and community engagement

Participation of the people, integrity, transparency and accountability are part of the national values and principles of governance which are binding on all state organs and individuals.¹¹⁹ The state is required to put in place affirmative action programmes to ensure the participation and representation of minorities and marginalised groups in governance and other spheres of life.¹²⁰ The Constitution encourages public participation in the management, protection and conservation of the environment.¹²¹ However, the Constitution does not elaborate on the nature of public participation.¹²² It is expected that other spheres of life will include the extractive sector which will encourage the participation of these groups in projects that occur on their land. Individuals and communities that seek to enforce their right to public participation in the court will be required to prove how their right was infringed upon and the remedies they seek.¹²³

Access to information is encouraged by the Constitution and the Mining Act. Article 35 of the Constitution affirms the right of every citizen to access of information held by the state and other persons and information required for the exercise or protection of any right or fundamental freedom.¹²⁴ The state is under an obligation to publish and publicise necessary information that affects the nation.¹²⁵ All mineral agreements are required to be made accessible to the public

117 Secs 42(1)(a)-(e) Mining Act 2016.

118 Sec 44.

119 Secs 10(2)(a) & (c).

120 Sec 56(a).

121 Art 69(1)(d) 2010 Constitution.

122 Institute for Human Rights and Business 'Human rights in Kenya's extractive sector' 27, https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf (accessed 1 July 2020).

123 *Pasred Youth Group/Forum & Others v Attorney-General & Others* Petition 621 of 2014; Institute for Human Rights and Business (n 122) 27.

124 Arts 35(1)(a) & (b) 2010 Constitution.

125 Art 35(3).

subject to article 35 of the Constitution and other written law.¹²⁶ The cabinet secretary is required to ensure access to information and that the mineral agreements be made available on the website of the Ministry.¹²⁷

The cabinet secretary who receives the application for a mineral right notifies the owner or occupier of land with mineral deposits, the community and relevant county government.¹²⁸ The cabinet secretary circulates the notice of application by publishing it in a widely-circulated newspaper.¹²⁹ The notice is published in the *Gazette* for 21 days and in the office of the county government where the land is located.¹³⁰ Individuals or communities may object to the granting of a prospecting¹³¹ or mining licence¹³² within 21 and 42 days respectively. The publication of the notice of application for mineral right serves as information to the public. However, the number of days given for notification and objection is not sufficient. Interested parties should be given ample time and opportunity to acquire knowledge about the project and to respond accordingly. They need to have access to the necessary information to inform their consent to give their land away for mining purposes.

Express consent of the owner of private land or community land must be obtained before prospecting or mining rights can be granted.¹³³ The Act allows for the compulsory acquisition of land if consent is 'unreasonably withheld' or if the withholding of consent is considered 'contrary to the national interest'.¹³⁴ This implies that there is no right to veto mining projects but rather open and meaningful dialogue between companies and affected communities must take place in all cases.¹³⁵

Affected communities are allowed to raise objections against the granting of the licence. However, the level of participation provided in the Act may not suffice as communication between these parties is necessary to avoid conflict in the future. Host communities require strategic engagement with government and mining companies on

126 Sec 119(1) Mining Act 2016.

127 Sec 119(2).

128 Sec 34(1).

129 Sec 34(2).

130 Sec 34(3)(b).

131 Sec 34(4)(a).

132 Sec 34(4)(b).

133 Secs 37 & 38.

134 Sec 40.

135 'Human rights in Kenya's extractive sector: Exploring the terrain' 36-37, https://www.ihrb.org/uploads/reports/IHRB%2C_Human_Rights_in_Kenyas_Extractive_Sector_-_Exploring_the_Terrain%2C_Dec_2016.pdf (accessed 12 March 2019).

mining-related matters. In *Friends of Lake Turkana Trust v Attorney-General & Others* the Environment and Land Court in Nairobi reasoned as follows:¹³⁶

Such public participation can only be possible where the public has access to relevant information and is facilitated in terms of reception of views. It is the view of this Court that access to environmental information is therefore, a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities on the environment.

Hence, access to relevant information is necessary to enhance participation in decision making.

4.2.2 Environmental protection

The Constitution affirms the right to a clean and healthy environment which includes environmental protection for the benefit of present and future generations.¹³⁷ The Constitution ensures the protection management of the environment.¹³⁸ Both state organs and other parties should collaborate to protect the environment.¹³⁹ The state is under an obligation to establish systems of the environmental impact assessment (EIA), environmental audit and monitoring.¹⁴⁰ The state must also 'eliminate' activities that can endanger the environment¹⁴¹ and use the environment and natural resources for the benefits of citizens.¹⁴² A mineral title holder is required to comply with any law on the protection of the environment.¹⁴³ A mining licence is granted subject to obtaining an EIA licence, social heritage assessment and approval of environmental management plan.¹⁴⁴ The law focuses primarily on environmental protection, hence, an environmental impact assessment is required. The EIA focuses on identifying and addressing mining impacts on the environment. Therefore, the EIA may not identify or consider human rights impacts since it is not explicitly required to address the impacts.

¹³⁶ ELC Suit Co 825 of 2012 (19 May 2014).

¹³⁷ Sec 42(a).

¹³⁸ Secs 69(1)(a) & (d).

¹³⁹ Sec 69(2).

¹⁴⁰ Sec 69(1)(f).

¹⁴¹ Sec 69(1)(g).

¹⁴² Sec 69(1)(h).

¹⁴³ Sec 176(1).

¹⁴⁴ Sec 176(2).

4.2.3 *Social concerns*

According to the Constitution the state is under an obligation to protect minority and marginalised groups. Human dignity, equity, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised are all part of the national values and principles of governance of the state which are binding on all state organs, state and public officers and all individuals.¹⁴⁵ In addition to the protection of the rights and freedoms, the state is under an obligation to design programmes to ensure their participation and representation in governance and all spheres of life;¹⁴⁶ the provision of special opportunities in educational and economic fields;¹⁴⁷ access to employment;¹⁴⁸ developing their cultural values, languages and practices¹⁴⁹ and having reasonable access to water, health services and infrastructure.¹⁵⁰ Cultural values are promoted by the Constitution.¹⁵¹ Also, land held by communities is protected by the Constitution based on ethnicity, culture or similar interest.¹⁵² Community land includes land registered by law in the name of representatives under law;¹⁵³ land transferred to a community by process of law;¹⁵⁴ land declared by an Act of Parliament;¹⁵⁵ land used for forest, grazing or shrines;¹⁵⁶ ancestral lands;¹⁵⁷ and land lawfully held as a trust by county governments.¹⁵⁸ Such land cannot be disposed of or used except as determined by legislation.¹⁵⁹ The holder of a mineral title must employ and train the citizens of Kenya.¹⁶⁰ The Mining Act further provides that in employment, the mineral title holder should give preference to community members and citizens;¹⁶¹ provide social investment for local communities;¹⁶² and implement a community development agreement.¹⁶³ However, the CDA was not defined but may be prescribed in regulations. In the Mining Act, the displacement of communities is recognised as an impact of mining in the definition of a community. The Mining Act defines a community as a group of

¹⁴⁵ Art 10(2) 2010 Constitution.

¹⁴⁶ Art 56(a) 2010 Constitution.

¹⁴⁷ Art 56(b).

¹⁴⁸ Art 56(c).

¹⁴⁹ Art 56(d).

¹⁵⁰ Art 56(e).

¹⁵¹ Art 11.

¹⁵² Art 63(1).

¹⁵³ Art 63(2)(a).

¹⁵⁴ Art 63(2)(b).

¹⁵⁵ Art 63(2)(c).

¹⁵⁶ Art 63(2)(d)(i).

¹⁵⁷ Art 63(2)(d)(ii).

¹⁵⁸ Art 63(2)(d)(iii).

¹⁵⁹ Art 63(4).

¹⁶⁰ Sec 46(1) Mining Act 2016.

¹⁶¹ Sec 47(1).

¹⁶² Sec 47(2)(f).

¹⁶³ Sec 47(2)(g).

people living around an exploration and mining operations area or a group of people who may be displaced from land intended for exploration and mining operations.¹⁶⁴ The Constitution addresses important concerns such as the protection of culture, ancestral land, and cultural values, and poor accessibility to water, health services and infrastructure. These concerns are not given further elaboration in the mining law which mentions displacement and addresses the employment of community members. Social concerns should be articulated in the mining policies to safeguard the interests of the marginalised and members of the community.

4.2.4 Access to remedies

Social justice is one of the national values and principles of governance of the state binding on all state organs and officers and all persons.¹⁶⁵ The Constitution promotes access to justice for individuals who are wronged or whose right to a healthy environment is violated. Persons whose right to a clean and healthy environment is being or likely to be infringed and violated can apply to the court for redress.¹⁶⁶ Disputes can be resolved by the application of law and must be decided in a fair and public hearing before a court, independent and impartial body or tribunal.¹⁶⁷ Every administrative action must be 'expeditious, efficient, lawful, reasonable and procedurally fair'.¹⁶⁸ The state must ensure that all persons have access to justice and fees must be reasonable and must not hinder access to justice.¹⁶⁹ Under the Mining Act, any dispute that involves a mineral right may be determined by the cabinet secretary,¹⁷⁰ through process of mediation or arbitration,¹⁷¹ or in a court of competent jurisdiction.¹⁷²

4.2.5 Institutional framework regulating mining in Kenya

Minerals are vested in government as administered by the Commissioner of Mines and Geology under the authority of the Minister (now cabinet secretary) in charge of minerals and mining. The cabinet secretary is responsible for the administration of the Mining Act.¹⁷³ The cabinet secretary is supported by the principal secretary

164 Sec 4 Mining Act 2016.

165 Art 10 2010 Constitution.

166 Art 70.

167 Art 50(1).

168 Art 47(1).

169 Art 48.

170 Sec 154(a) Mining Act 2016.

171 Sec 154(b).

172 Sec 154(c).

173 Sec 12(1).

and, as provided in the Mining Act, the commissioner of mines and geology is the chief technical advisor to the cabinet secretary. The cabinet secretary must respect and be guided by the values and principles in the Constitution (articles 10, 66(2), 69(1)(a) and (h), 201(c) and (d) and 232) including the principles of leadership and integrity in the Constitution.¹⁷⁴ These provisions imply that the cabinet secretary must be guided by human rights, non-discrimination, human dignity, good governance, transparency and accountability and sustainable development. In addition to those mentioned in article 10, others include ensuring the enactment of legislation by Parliament that ensures that investments in property benefit local communities and their concerns; ensuring the sustainable utilisation of the environment and natural resources for the benefit of Kenyan citizens, principles of public finance that involves equitable sharing of the burdens and the benefits of the use of resources between present and future generations and usage of public money prudently and responsibly, and principles of public service such as the efficient, effective and economic use of resources.¹⁷⁵

5 Useful lessons for other countries

Some lessons may be drawn from the mining policies and sustainable practices in both countries. First, other countries in Africa can draw lessons from the constitutional statement on the application of human rights to mining. The Constitutions of both countries are progressive in respect to the protection of human rights and socio-economic rights and affirm the responsibility of the state towards the protection of human rights. The Kenyan Constitution further affirms the responsibility of both the state and other parties towards human rights as it states that the Bill of Rights is binding on all state organs and all persons. Therefore, parties such as mining companies have a responsibility to respect human rights. In the Constitutions of both countries, the state must ensure sustainable exploitation and management of the environment and natural resources. The provision on the right to a clean and healthy environment in the Constitutions includes the protection of the environment for the benefit of future generations. In addition to the responsibilities of the state, the Kenyan Constitution further provides that other parties are obligated to ensure the sustainable development of natural resources and the protection of the environment. In Kenya, human rights and sustainable development are listed as part of the national values and principles of governance in the Constitution.

¹⁷⁴ Secs 5 & 12(2).

¹⁷⁵ Secs 66(2), 69(1)(a) & (h), 201(c) & (d) & 232.

This implies that human rights and sustainable development should guide resource governance. Therefore, drawing from the example of the Kenyan Constitution, in addition to state responsibility, there is a need for the emphasis on the responsibility of non-state actors such as mining companies to respect and fulfil human rights and ensure the sustainable development of mineral resources. Similar to the provisions of the Kenyan Constitution, human rights should be listed as one of the principles that guide resource governance in the mining industry. This will create a platform to access and identify human rights that can be affected in the course of mining, as well as the adverse impacts of mining on human rights, and find possible solutions to the impacts. These provisions will also provide the basis to hold the government and mining companies accountable for their wrongful acts and violations.

Second, other countries can draw a lesson from the provision of the Constitution of Kenya, where the state is required to publish and publicise necessary information that affects the nation.¹⁷⁶ Subject to article 35 of the Constitution, which affirms the right to access information, all mineral agreements must be accessible to the public.¹⁷⁷ These provisions imply that affected communities and other stakeholders should have access to relevant information concerning mining projects. Therefore, communities and stakeholders must be provided with the necessary information concerning mining developments in their area and they must comprehend the information.

Third, access to remedies is important for victims to challenge the bad conduct of companies. Both countries promote access to justice in their Constitutions. In Kenya the state must ensure that all persons have access to justice and a barrier such as unreasonable fees must not impede access to justice. Individuals can bring actions before a court for infringement of their right to a clean and healthy environment. In South Africa, in addition to the court, an independent and impartial tribunal is encouraged. The courts have encouraged victims by granting them access to court and ensuring that they obtain justice. Other countries can draw lessons from the role played by the courts through judicial interpretations in interpreting provisions in the laws and statutes as an approach to give effect to social change. The courts have played their role by providing further explanations, thereby filling the gaps in some of the mining legislation. Effective remedies such as judicial and non-

176 Art 35(3) 2010 Constitution.

177 Sec 119(1) Mining Act 2016.

judicial remedies will be required to ensure that affected people have access to justice. Therefore, governments should facilitate access to judicial or non-state complaint mechanisms of redress against violations of human rights of this community committed by mining companies. Barriers to access to remedies should also be eliminated to ensure that victims have access to justice. Judges must become active and creative in contributing to the development in the area of mining and human rights in other countries. Judges must be trained to enable them to expand their knowledge in the field. A good understanding of the issues relating to human rights concerns in the mining industry will inform the judgments pronounced by judges. This will in the long run encourage the institution of related actions in court by victims or other stakeholders after having exhausted all dispute mechanisms and where the court is their last remedy.

Fourth, as in the provisions of the Kenyan Mining Act, mining policies must ensure that the officials of institutions governing the mining industry should be guided by principles of human rights, good governance and sustainable development. Policies can be passed to make provision for such.

6 Recommendations and conclusion

In addition to the previous recommendations, the mining laws need to be reviewed to adequately accommodate the participation of stakeholders in the decision-making processes involving mining projects. Similar to the provisions of the Kenyan Constitution, mining policies should encourage public participation, integrity, transparency and accountability and principles of governance. The policies should encourage public participation in the management, protection and conservation of the environment and extend such to matters related to mining developments. Express provisions in the mining laws regarding the participation of mine host communities are lacking. The mining laws fail to give affected parties ample opportunity to negotiate on mining on their lands and fail to recognise them as important stakeholders in the negotiation of proposed mining operations. Therefore, there is a need to strengthen mining policies to accommodate mine communities and ensure their adequate participation in the decision-making process on developments that exist on their land. Their participation should be required in the planning, implementation and monitoring activities of the projects since they are particularly affected. This will guarantee their access to information on important aspects of the project which will empower them to challenge the mining company. To promote participation, mining policies will need to be strengthened to encourage

transparency in the industry. Therefore, states must take legislative measures to ensure public participation in decision making in the development of mineral resources in host communities. Also, state governments should take legislative measures to ensure access to information and free, prior and informed consent of concerned communities in mining development projects. This will inform the consent of host communities in mining projects on their lands. The consent of a community counts and in as much as the state is adamant about acquiring land for mining purposes, the interests of those that will be affected should be considered and safeguarded by the state.

Social concerns such as conflict, displacement and resettlement of communities, loss of farmlands and livelihood, loss of ancestral land and culture should be taken into consideration in the planning of a mining project. For instance, in Kenya community land, land used for grazing or shrines and ancestral lands are protected under the Constitution. The definition of the community by the Mining Act recognises the displacement of a community, which is good but should include other adverse impacts of mining activities they suffer. The impact assessment of mining activities should identify the impacts on members of a host community. The mandatory EIA focuses primarily on environmental impacts and may poorly consider the socio-economic impacts of mining, including the human rights impacts. Therefore, the EIA in the national legislation needs to be reviewed to accommodate social concerns and human rights impacts of mining activities. The advantage of that is to identify human rights impacts alongside environmental impacts to enable mining companies and experts to find solutions to the problems. A human rights impact assessment will therefore need to be integrated with the assessment of the impacts of mining projects to determine human rights impacts and proffer solutions to tackle the problems.

Furthermore, state parties are urged to collaborate with the Working Group on Extractive Industries to address human rights violations that occur in their territory. To address human rights abuses in the extractive industries, the African Commission on Human and Peoples' Rights adopted Resolution ACHPR/RES 148 (XLVI) 09 and established the Working Group on Extractive Industries. The Working Group has carried out regional consultations on extractive industries, environment and human rights violations in Southern, East and Central Africa. The Group also travelled on a mission to Marikana, South Africa, because of the incidents at the mine which resulted

in the deaths of approximately 44 people, and attended a public hearing of the Marikana Commission of Inquiry (May 2013).¹⁷⁸

The realisation of these recommendations in mining laws and policies for substantial benefits will require collaboration between the government, companies, civil societies, non-governmental organisations, the society and the relevant community. The government should therefore build the capacity of these groups to participate in mining-related matters and to be involved in community engagement to guide parties in the decision making.

178 African Commission on Human and Peoples' Rights Working group on extractive industries, environment and human rights violations, <https://www.achpr.org/specialmechanisms/detailmech?id=13> (accessed 26 March 2021).