

DEPARTMENT OF POSTGRADUATE STUDIES

**THE APPLICATION OF THE UNITED NATIONS GUIDING
PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN
ZIMBABWE'S MINING SECTOR: PROSPECTS AND CHALLENGES**

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Abstract

The current problem in Zimbabwe is still maximum exploitation and exploration of mineral resources and lack of full recognition of community rights by both state and non-state actors. The exploitation of natural resources and the governance of natural resources have posed many challenges resulting in what has been termed the resource curse. The resource curse has been broadly described as a scenario where mineral resources provide a substantial basis for economic growth for states with these resources, yet the exploitation of these resources in these states is not translating into broad-based economic development for the benefit of the general populace. The question that arises is that are long-term human rights needs not being overlooked in search of short to medium-term economic gains through disregard of the duties to protect and respect human rights. Another question which arises is whether this is a sustainable mode of operation considering the finite nature of natural resources. This thesis aims to look at the mining sector in Zimbabwe and the opportunities for improving the extractive through the application of the United Nations Guiding Principles on Business and Human Rights. The data for this research was obtained from desktop research. Doctrinal and analytical research was used to come up with the findings and recommendations. The findings indicate that there is room and scope to fully implement the United Nations Guiding Principles on Business and Human Rights in the mining sector in Zimbabwe. This can lead to sustainable development through the promotion, protection, and respect of human rights.

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ACRONYMS

EMA- Environmental Management Act

OECD- Organisation for Economic Cooperation and Development

UNGPs/ Guiding Principles- United Nations Guiding Principles on Business and Human Rights

UNHCR- United Nations Human Rights Council

ZELA- Zimbabwe Environmental Law Association

ZIDA- Zimbabwe Investment and Development Agency

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Factual Problem

Undoubtedly, the mining sector in Zimbabwe is key to unlocking economic potential. With the vast mineral deposits present in the country, it is not surprising that the mining sector significantly contributes to the gross domestic product.¹ The large mineral deposits in Zimbabwe include minerals such as diamonds, lithium, coal and gold.² Whilst the value of mining is evident in achieving economic growth, mineral extraction has been associated with other social ills, which include environmental degradation, social and economic problems for mineral host communities leading to the question of the sustainability of such mining practices.³ Due to mining in the Manicaland region of Zimbabwe, the Marange communities, were affected.⁴ Relocations of communities from Chiadzwa to Arda Transau were recorded.⁵ 6 farms were purchased by Murowa diamond mining company and people were relocated to these farms to pave way for mining activities.⁶ The legislative framework governing the mining regime in Zimbabwe dates to 1895. The dictates of this law meant that it was crafted to ensure that the white colonialist settler would exploit mineral resources without any human rights considerations. The priority was maximum exploitation with very few external interferences. The context has significantly changed. Colonialism is no longer a present phenomenon, and international laws have developed over the years with wider considerations that benefit larger groups of the population as opposed to serving a few political elites.

¹ The mining sector accounts for about 12 per cent of the country's gross domestic product (GDP), due to the immense mineral deposits in the country.

² <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals>

³ G. Walser *Economic impact of world mining*, World Bank Group Mining Department, Washington, D.C., United States of America p. g 86

⁴ Mining communities were identified for relocation to pave way for diamond mining activities.

⁵ <https://allafrica.com/stories/202107260295.html> See also a case study on community land rights protections, <https://namati.org/news-stories/zelacasestudy/>. Approximately 4,321 people were relocated to pave way for diamond mining by companies to conduct their activities including Mbada Diamonds, Diamond Mining Corporation, Canadile, Anjin, Jinan, Rera Diamonds and Marange Resources.

⁶ <https://www.business-humanrights.org/en/latest-news/zimbabwe-families-company-clash-over-relocation/>

The unfortunate circumstance is that the mining legislation in Zimbabwe has not been reformed to match the contemporary issues on the ground. In the current context the operation of this law has led to a space riddled with conflict, some conflict even arising through the legitimate application of the law.⁷ With the economic downturn present in Zimbabwe it is not surprising that the mining sector is deemed the strongest link. The current problem in Zimbabwe is still maximum exploitation and exploration of mineral resources and lack of full recognition of community rights by both state and non-state actors. The exploitation of natural resources and the governance of natural resources in Zimbabwe have posed many challenges resulting in what has been termed the resource curse.⁸ The resource curse has been broadly described as a scenario where mineral resources can catalyse economic growth for states that are endowed with such natural resources, but the exploitation of such minerals does not translate into economic benefit that can contribute to sustainable development.⁹ Land degradation, air pollution, water pollution, reduction in soil fertility and loss of biodiversity have been associated with the natural resource extraction and exploitation.¹⁰ On the social front, there have been complaints of low wages, mining induced displacements, lack of relocation framework, inadequate compensation, child labour issues, abuse of workers' rights and, in some instances, unsafe working conditions in the mining areas.

⁷ The current legislative provisions surrounding mining in Zimbabwe are not aligned with the promoting community land rights and therefore strict application of the provisions results in human rights violations.

⁸ O Abe, *The feasibility of implementing the united nations guiding principles on business and human rights in the extractive industry in Nigeria*, Afe Babaola University: Journal of Sustainable Development, Law and Policy Volume 7:1: 2016 p. g 138 DOI: [10.4314/jsdlp.v7i1.7](https://doi.org/10.4314/jsdlp.v7i1.7)

⁹ This has been termed the *Dutch disease phenomenon* where there is a missing correlation between the natural resources available and the economic development of the country that hosts such minerals. The Dutch Disease Phenomenon | JDL Business. <https://jdlbusiness.com/es/index.php/2020/05/13/the-dutch-disease-phenomenon/>

¹⁰ J. M. Azcue, *Environmental Impacts of Mining Activities: Emphasis on Mitigation and Remedial Measures*. 1999 doi:10.1007/978-3-642-59891-3 https://books.google.com/books/about/Environmental_Impacts_of_Mining_Activiti.html?id=z6gBQAAQBAJ

1.2 Background

The country's economic potential is hinged on mineral resource wealth. Currently, the Government of Zimbabwe is pushing for economic development, which is centred around a capitalist model presented as '*Zimbabwe is Open for Business*'. This is not a surprising phenomenon as Zimbabwe's economy has not been performing as expected. *Zimbabwe is Open for Business* is a foreign policy that was developed under the new dispensation that is aimed economic recovery through reengagement, and the attraction of foreign investors.¹¹ Following the fast track land reform programme in Zimbabwe, the Open for Business policy is aimed at rewriting the wrongs of the previous regime late and indicating to the international world that Zimbabwe is capable of abiding by international norms and standards where property investments are concerned.¹² The fundamental issue for consideration is whether this model works effectively for environmental and human rights protection as well as sustainable development devoid of full application of the United Nations Guiding Principles on Business and Human Rights. The question that arises is that are long-term human rights needs not being overlooked in search of short to medium-term economic gains through disregard of the duties to protect and respect human rights. Another question which arises is whether this is a sustainable mode of operation considering the finite nature of natural resources. Further, what is the ultimate cost on the environment and the human rights of communities that are domiciled in these mineral-rich areas? With the demand for raw materials for various uses, Zimbabwe is strategically placed to provide raw materials and is poised to be one of the biggest exporters and a hub for mining investment.¹³ In the scramble to extract as much of the resource as possible, there is a risk of drawing from the gains of environmental protection and human rights to achieve quick economic gain through unsustainable mining practices. Mining comes at a large social and

¹¹ J Ndimande, K Moyo, '*Zimbabwe is Open for Business*': Zimbabwe's foreign policy trajectory under Emmerson Mnangagwa, Afro Asian Journal of Social Science, Volume IX, No II, Quarter II 2018, ISSN: 2229-5313

¹² *ibid*

¹³ Zimbabwe is aiming to achieve a US\$12 billion mining economy by 2023 through expansion of investments in the mining sector. <https://kubatana.net/2020/07/31/usd-12-billion-mining-economy-by-2023-what-are-the-key-enablers/>

environmental cost which requires strong regulation from the Government and positive actions from non-state actors to prevent these harms. The problem in the mining sector in Zimbabwe is that whilst the law is there, the state is not fulfilling its duty to protect human rights, and companies are also not fulfilling their duty to respect human rights.¹⁴ Consequently, communities are affected by various mining-related human rights violations without adequate access to remedy. For Zimbabwe, the presence of vast natural resource deposits presents an opportunity for economic development through investment in this sector. The mining sector presents the potential to catalyse economic growth for an economy which has been stagnating and facing a constant downturn.¹⁵ The problem is not in the extraction of mineral resources as the benefit of such extraction is without a doubt. The problem lies in the impact of the extraction owing to the legal and socio-economic framework within which the extraction takes place. Further, the conundrum not only lies with the mineral extracting companies but is also exacerbated by the institutions in place that are responsible for negotiating contracts, issuing mining licenses and inspections of mineral resource extraction activities. Their lack of sufficient capacity contributes to social problems in the mining sector in Zimbabwe.¹⁶ Businesses, if left unregulated, will maximise profits at all costs. Communities, on the other hand, should also understand the role that business plays in infrastructure and social service delivery. This balancing act can only be necessitated through the full implementation of the Guiding Principles on Business and Human Rights. The analysis will focus on the legislation that deals with the mining sector in Zimbabwe and environmental protection in Zimbabwe. The analysis will further investigate the UNGPs on business and human rights.

¹⁴ The laws affecting the mining sector in Zimbabwe include Mines and Minerals Act [Chapter 21:05], Explosives Regulations, Mining (General) Regulations, Mining (Managements and Safety) Regulations, Mining (Health and Sanitation) Regulations, Mines and Minerals (Custom Milling Plants) Regulations, Gold Trade Act [Chapter 21:03], Precious Stones Trade Act [Chapter 21:06], Environmental Management Act [Chapter 20:27], Environmental Regulations.

¹⁵ Zimbabwe's economy is plagued by high inflation and depreciation of the local currency.

¹⁶ C. Okoloise, Afe Babaola, *Humanising investments in the extractive industries in Africa*, University Journal of Sustainable development law and policy, Vol 11, 2020 p. g 113

1.3 Literature review

Businesses typically focus on profit. Businesses dislike any binding regulations until it sees their necessity or inevitability. Governments often support the preferences of corporations domiciled in their countries and/or compete for foreign investment.¹⁷ The earlier UN human rights treaties, such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR), did not specifically address state duties regarding business.¹⁸ The United Nations Guiding Principles of on Business and Human Rights (UNGPs) are a set of guidelines which were designed for States and companies to prevent, address and remedy human rights abuses committed in business operations.¹⁹ They were proposed by UN Special Representative on business and human rights, Professor John Ruggie, and endorsed by the UN Human Rights Council in June 2011.²⁰ In the same resolution, the UN Human Rights Council established the UN Working Group on business & human rights.²¹ The Guiding Principles on Business and Human Rights are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;²²

¹⁷ J. Ruggie, F John, *Business and Human Rights: The Evolving International Agenda*, Kennedy School of Government - Harvard University June 2007 p. g 5

¹⁸ Ibid p. g 14

¹⁹ The UN Guiding Principles on Business and Human Rights can be found here: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

²⁰ Introduction to the UN Guiding Principles on Business & Human Rights. <https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/>

²¹ Ibid

²² note 18, ibid

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.²³

The 1972 United Nations Conference on the Human Environment in Stockholm marked the beginning of a new era of global cooperation on environmental issues.²⁴ The premise of environmental protection where mining is concerned is premised on the general principles of environmental law in the Stockholm Declaration. These principles include the *principle of sovereignty, the prevention principle, and the principle of sustainable development*.

The principle of sovereignty

This is a fundamental principle which provides that states have sovereign rights over their natural resources. Second, states should not damage the environment. Sovereignty essentially denotes power, rights, control, and dominance over the natural resources that are found in a country. Former colonial States such as Zimbabwe support this principle owing to the colonial history and the ability to control the resources for the wider benefit of society as opposed to a few colonial elites. The principle of state sovereignty is not unqualified, and the state's general duty is not to cause environmental damage to the environment of other states. The United Nations Rio Declaration of 1992 states that: "*states have, in accordance with principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.*"²⁵ In locations beyond the boundaries of national sovereignty, the notion of the common heritage of mankind applies.

²³ <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr-en.pdf>

²⁴ Stockholm and the Birth of Environmental Diplomacy. <https://www.iisd.org/articles/deep-divide/stockholm-and-birth-environmental-diplomacy>

²⁵ United Nations Convention on the Rio Declaration of Environment and Development, June 15, 1992, principle 2. 31 See also Principle 21 of the Stockholm Declaration.

The Prevention Principle

The protection of the environment is of serious concern where there are competing interests to develop the economy, which can be done at the environmental safeguards. To assist this delicate equilibrium is Principle 21 of the Stockholm Declaration. Principle 21 provides that States, in accordance with the principles of international law, have the right to exploit their natural resources pursuant to their own environmental policies but, however, have the responsibility to ensure that such exploitation of mineral resources does not cause damage to the environment of other States or areas beyond the limits of its jurisdiction.²⁶

The prevention principle should be differentiated from the duty to avoid environmental harm. Preventive measures are thus intended to avert risks for which the cause-and-effect relationship is already known. Under this new rule, a state is under the obligation to prevent damage within its own jurisdiction. Preventing environmental harm is cheaper, easier, and less environmentally dangerous than reacting to environmental harm that already has taken place. The prevention principle is the fundamental notion behind laws regulating the generation, transportation, treatment, storage, and disposal of hazardous waste.

The preventive principle is a proactive strategy that allows action to be taken to protect the environment at an early stage; by so doing, it becomes a matter of preventing damages before they occur rather than repairing after the damage is done.²⁷ The essence it corroborates the statement that it is better to prevent harm than repair. The prevention of environmental harm and the reduction, limitation, or control of behaviours that may result in such harm are the primary objectives of the preventive principle. According to the preventive principle, environmental harm must be anticipated and prevented before it occurs. The preventative principle, which states that a state has a duty to protect the environment within its borders, calls for action to be taken as soon as possible, ideally before damage has been done.²⁸ According to the preventative principle, which states that states have an

²⁶ Principle 21 of the Stockholm Declaration

²⁷ www.eea.europa.eu

²⁸ Client Earth Communication, *“What are Environmental Principles?”* 2019.

obligation to take measures to protect the environment under their control, action must be taken as soon as feasible and, wherever possible, before damage has already been done. An extensive body of domestic environmental protection legislation that establishes authorisation procedures, as well as adoption of international and national commitments on environmental standards, access to environmental information, and the requirement to conduct environmental impact assessments in relation to the conduct of certain proposed activities, supports the preventive principle in order for this to occur.²⁹ Therefore, this concept puts an obligation on the state to ensure that actions within its jurisdiction do not impair the environment of other states or places outside the borders of its national jurisdiction.

Legislative history of the preventive principle

The historical case known as the “Trail smelter case” which was decided by the International (Arbitral) Court in 1941, can be considered as a first reference.³⁰ In the Trail smelter case, there was a smelter located in the village of Trail, British Columbia, Canada, near the United States border, on the Columbia River, where zinc and lead were being smelted in large quantities since 1896. At the time the decision was made, 5000 to 7000 tons of sulphur dioxide were being emitted monthly, causing severe damage to agriculture, forests, and private property in the United States.³¹ The tribunal in deciding the case held that,

*“..... under principles of international law, as well as the law of the USA, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence, and the injury is established by clear and convincing evidence....”*³²

²⁹ All Answers Ltd, 'Preventative Action Principle and Sustainable Principles' (Lawteacher.net, July 2022) <<https://www.lawteacher.net/free-law-essays/international-law/the-preventative-action-and-sustainable-principles-international-law-essay.php?vref=1>> accessed 31 July 2022.

³⁰ United States v Canada, Arbitral Tribunal (11 March 1941)

³¹ *ibid*

³² note 30, *ibid*

The preventative concept is the driving force behind legislation governing the production, transportation, treatment, storage, and disposal of hazardous waste. and thus, the preventive principle was the foundation of the Basil Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal of 1989, which sought to minimise the production of hazardous waste and to combat illegal dumping.³³

Sustainable Development Principle

The principle of sustainable development has been defined by the 1987 Brundtland Report as a development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The concept of sustainable development is difficult to apply in many instances, primarily because the results of long-term sustainability analyses depend on the resources focused upon. For example, a forest that will produce an indefinite supply of timber may not be able to maintain local bird populations. However, as represented in international accords, sustainable development consists of at least three components: (i) intergenerational fairness, and (ii) sustainable use of natural resources environment and development integration The fourth principle of the Declaration of Rio is similarly informative. Environmental protection must be an integral part of the development process if there is to be sustainable development, and environmental protection cannot be viewed in isolation.³⁴

For sustainable development to occur, there must be an efficient utilization of natural resources to increase the standard of living of the general population throughout time. This necessitates the existence of systems or procedures for the utilization of these resources, taking into account environmental, economic, and social issues. This is accomplished by promoting sustainable development through direct government actions. The formation of policy and legislation governing natural

³³ www.britannica.com

³⁴ Turkey: Principles Of International Environmental Law And Effects Of Electric Vehicle
<https://www.mondaq.com/turkey/clean-air-pollution/971384/principles-of-international-environmental-law-and-effects-of-electric-vehicle>

resource management in Zimbabwe should be predicated primarily on sustainable development.

Domestication into national laws

In Zimbabwe, the preventive principle, principle of sustainable development and the principles of state sovereignty are codified in the Constitution of Zimbabwe (2013) under Section 73³⁵ and the Environmental Management Act (EMA)³⁶ which provides under Section 4 states that there must be the promulgation of reasonable legislative policy and other measures that prevent pollution and environmental degradation.³⁷ This same provision is also provided for in the supreme law of the land.³⁸

1.4 Research Questions

1. What are the legal obligations of state and non-state actors in the mining sector in Zimbabwe?
2. What is the nature of the problems in the mining sector that give rise to human rights issues?
3. What is the normative framework created by the UNGP?
4. How can the UNGP be applied to respond to human rights issues in the mining sector?
5. What recommendations can be made to enhance the protection of human rights in the mining community?

1.5 Methodology

The research utilises desktop the desktop research method. Desktop research makes use of existing data which is gathered and consolidated for research purposes. Desktop research is formulated using material that is available on websites, data

³⁵ Constitution of Zimbabwe, Section 73 (1) (b) (i).

³⁶ Environmental Management Act [*Chapter 20:27*]

³⁷ Ibid, Section 4 (1) (c) (i).

³⁸ Ibid, note 35.

from completed surveys and public libraries.³⁹ This dissertation, therefore, employs the analysis of relevant legislation and literature to dissect core issues on the United Nations Guiding Principles on Business and Human Rights. This was done using relevant secondary data from textbooks, case law, legislation, constitution, regional and international covenants, and principles.

1.6 Limitation of the Study

The application of the United Principles of Business and Human Rights is wide in scope and nature. This research will therefore be limited to the application of these principles in the mining sector in Zimbabwe for the promotion of human rights, environmental protection, and sustainable development.

1.7 Chapter Synopsis

Structurally this thesis will consist of five chapters as described below:

Chapter 1: Introduction and Background

This chapter will introduce and give a background to the study. It will give an overview of the mining sector in Zimbabwe, the obligations of the state and mining companies in Zimbabwe.

Chapter 2: Socio-economic problems in the mining sector in Zimbabwe

This Chapter will evaluate the nature of the problems in the mining sector in Zimbabwe that give rise to human rights issues.

Chapter 3: The normative framework of the UNGP on Business and Human Rights

This Chapter will be a doctrinal analysis of the normative framework created by the UNGP on Business and Human Rights.

Chapter: 4 Challenges and Gaps in implementation of the United Nations Guiding Principles on Business and Human Rights in the mining sector in Zimbabwe

³⁹ <https://www.questionpro.com/blog/desk-research/>

This chapter will give a detailed overview and analysis of the mining legal regime in Zimbabwe together with associated laws starting with the Constitution as well as subsidiary-related legislation. The analysis will establish whether there are opportunities.

Chapter 5: Conclusion

This Chapter provides a summation of the arguments in the preceding 4 chapters before making conclusions and recommendations. The recommendations will provide practical steps on how the United Nations Guiding Principles on Business and Human Rights can be applied in Zimbabwe's mining sector, coupled with the necessary application, implementation, and enforcement for environmental protection as well as sustainable development.

CHAPTER 2: SOCIO-ECONOMIC PROBLEMS IN THE MINING SECTOR IN ZIMBABWE

2.1 Introduction

The exploitation of natural resources and the governance of natural resources in Africa have posed many challenges resulting in what has been termed the “*resource curse*”.⁴⁰ The resource curse has been broadly described as a scenario where mineral resources provide a substantial basis for economic growth for states with these resources, yet the exploitation of these resources in these states is not translating into broad-based economic development for the benefit of the general populace.⁴¹ Exploitation of minerals results in negative impacts on the environment, which include soil contamination, air pollution, loss of biodiversity and landscape disturbance.⁴² On the social front, there have been complaints of low wages, abuse of workers’ rights and, in some instances, unsafe working conditions in the mining areas.

2.2 Labour rights violations

In South Africa, a classic case of conflict between mine workers and the mining company is the Marikana incident. In this instance, 44 people died, and over 70 people sustained injuries.⁴³ The strike was a result of a labour dispute mainly workers and the mining-affected community not receiving dividends because of a lack of good corporate behaviour.⁴⁴ In Nigeria, Ken Saro- Wiwa was executed for advocating for the rights of the Ogoni people over the exploitation of oil in the Ogoni Region. Zimbabwe has not been spared from social and economic issues arising out of the exploitation of mineral resources. There are clear legal provisions regarding

⁴⁰ O Abe, (n 8 above) p.g 138

⁴¹ Ibid, (n 9 above), This has been termed the *Dutch disease phenomenon* where there is a missing correlation between the natural resources available and the economic development of the country that hosts such minerals.

⁴² J. M. Azcue (n 10 above)

⁴³ J F Boëttger, M. Rathbone, 2016. “*The Marikana Massacre, labour and capitalism: Towards a Ricoeurian alternative*”. KOERS – Bulletin for Christian Scholarship, 81(3). Available at: DOI:[10.19108/KOERS.81.3.2263](https://doi.org/10.19108/KOERS.81.3.2263) p.g 2

⁴⁴ Ibid.

socio-economic rights, such as labour rights in Zimbabwe. The Constitution of Zimbabwe provides for labour rights in Section 65 which clearly stipulates that every person has the right to participate in collective job action, fair and safe labour practices and standards, join trade unions and be paid a fair and reasonable wage.⁴⁵ Despite this provision, reports have been made of abuse of workers' rights by Chinese-owned mining companies with allegations of the shooting of workers, unpaid salaries, and unsafe working conditions for mine workers. In 2020, 2 mine workers in Gweru were allegedly shot by their Chinese employer and sustained injuries having complained about unpaid salaries.⁴⁶ In the granite mining sector in Mutoko, reports have been made of low wage short- term contracts which result in job insecurity for the workers as well as long working hours outside of the gazette time of 208 hours per month.⁴⁷

2.3 Occupational health and safety standards violations

The very nature of mining activities is beset with dangers and hazards. On the 6th of June in 1972, 426 miners died due to a series of underground explosions in Hwange.⁴⁸ Over the years, mining companies continue to be riddled with issues to do with occupational health and safety in their mining operations. In 2020 the auditor general's report revealed that they were poor occupational, health and safety issues in six provinces in Zimbabwe.⁴⁹ Whilst the sector is regulated by various legislative instruments, including the Mines and Minerals Act, Statutory Instrument 72 of 1989 on explosive regulations, Mining health and sanitation regulations, the Zimbabwe National Occupational Health and Safety policy and Statutory Instrument 109 of 1990 on Mining Safety Regulations, there have been violations in the mining sector.

⁴⁵ See Section 65 of the Zimbabwean Constitution.

⁴⁶ <https://www.business-humanrights.org/en/latest-news/zimbabwe-shooting-of-local-workers-by-chinese-mine-owner-shows-systematic-and-widespread-abuse-watchdog-says/>

⁴⁷ J Tsabora and D Chidarara, *From Mountains of Hope to Anthills of Despair, Assessment of human rights risks in the extraction and production of natural stone in Zimbabwe*, September 2021 p. g 32

⁴⁸ <http://www.mineaccidents.com.au/mine-accident/178/wankie-no-2-colliery-explosion> This disaster indicated the need for occupational health and safety standards in the mining sector.

⁴⁹ The report is available here http://www.veritaszim.net/sites/veritas_d/files/Auditor-General%20Report%20on%20the%20Management%20of%20Occupational%20Health%20and%20Safety%20in%20Mining%20Operations%20by%20the%20Ministry%20of%20Mines%20and%20Mining%20Development.pdf

Through this report by the Auditor General, it was revealed that the Ministry of Mines which is responsible for carrying out mine inspections was not effectively carrying out its mandate as a result there was a lack of promotion and protection of the health and safety of workers in the mining sector leading to accidents in incidences violating various rights. This 2020 audit report further revealed that there was inadequate monitoring and enforcement of occupational health and safety in the various provinces with mining activities and that the mining inspectors were unable to conduct tests to detect gas content or ventilation in the mining environments, which posed a risk for the workers in these environments.⁵⁰

2.4 Community Land Rights violations

Whilst mining contributes to national development through a direct contribution to the national fiscus, there are several social problems and human rights violations that occur where mining takes place. There have been devastating consequences for mining-affected communities in Zimbabwe. Mining by its very nature takes up large expanses of land. As a result, some of the land that is required for the mining ventures to take place may already have inhabitants. These inhabitants in most circumstances have an established way of life and have various rights to the land depending on where they are situated. In Zimbabwe, the majority mining activities take place in rural areas where communities are situated on communal land. In terms of the Communal Land Act⁵¹, communal land vests in the President.⁵² In terms of the same Act, the Minister has the power to set aside communal land for certain purposes which include irrigation schemes, the establishment of a township, village, industrial area or business centre.⁵³ Community rights where communal land is involved are inherently weak. There is no security of tenure on communal land as communities situated on such land have no ownership of the land. The land can only be transferred through traditional social structures that follow tradition and

⁵⁰ Ibid

⁵¹ [Chapter 20:04]

⁵² Section 4 of the Communal Land Act provides that Communal Land shall be vested in the President, who shall occupied and used in accordance with the Communal Land Act.

⁵³ Section 10 of the Communal Land Act [Chapter 20:04]

customs.⁵⁴ Communal land is open for prospecting as provided for by Section 26 of the Mines and Minerals Act, further increasing the vulnerability of communities domiciled on communal land. Exacerbating the position of mining-affected communities is the fact that the Mines and Minerals Act does not obligate mining companies to provide any form of compensation where such communities have been displaced because of the mining ventures. Despite provisions that prohibit prospecting 450 metres from homesteads, the impact of mining can still be felt by communities in areas outside of the stipulated homestead area.⁵⁵ Inhabitants of communal land carry out agricultural and pastoral activities on land that is outside of their homesteads. Where communities are not displaced because of mining, the operations of mining ventures, depending on the type of mining being carried, continue to have an impact on society. These include deforestation, loss of agricultural land and/ or water pollution. Before mining is carried out, large areas of land are cleared which can lead to soil infertility due to loss of land cover. The land thus becomes unproductive where any agricultural practices are intended to be carried out.⁵⁶

2.5 Environmental Degradation

Mining by its very nature causes damage to the environment. Some of the impacts related to natural resource exploitation include accelerated soil erosion, soil deterioration and soil desiccation. Soil degradation is a gradual decline in the soil's natural fertility and production, whereas soil desiccation is the increasing drying and hardness of the soil. Increased soil Erosion is the quick loss of soil and the degradation of valuable land by forces such as heavy precipitation, surface runoff,

⁵⁴ Zimbabwe Environmental Law Association, *Community Land Rights and Mining -Induced Displacements in Zimbabwe* 2021, p.g 16

⁵⁵ See Section 38 and 26 of the Mines and Minerals Act [Chapter 21:05]

⁵⁶ Emmanuel AY, Jerry CS, Dzigbodi DA. *Review of Environmental and Health Impacts of Mining in Ghana*. J Health Pollution. 2018 Mar 12;8(17):43-52. doi: 10.5696/2156-9614-8.17.43. PMID: 30524848; PMCID: PMC6221437 p .g 48

and high winds. These issues are caused by the loss of the soil's vegetative cover by humans, i.e., forest clearance.⁵⁷

Zimbabwe attaches high significance to environmental conservation that the concepts of environmental stewardship are included in the nation's ultimate legislation, the 2013-adopted Constitution. This Constitution features a particular clause entitled "Environmental Rights".⁵⁸ It also refers to sustainable development and the need to protect the environment for future generations. It grants everyone the right to an environment that is safe for their health and welfare. The Environmental Management Act, [Chapter 20:27] (EMA) establishes environmental rights and management principles. The EMA grants each individual the right to a clean, non-hazardous environment. In addition, it requires the implementation of appropriate legislative regulations and other measures to prevent pollution and environmental degradation, to ensure ecologically sustainable management and use of natural resources, and to foster sustainable economic and social growth. In accordance with Sections 97 and 99 of the EMA, an Environmental Impact Assessment (EIA) must be issued prior to the commencement of any mining project. In its Vision 2030⁵⁹, the government of Zimbabwe stated that, in support of environmental protection, it would ensure sustainable mining by stakeholders through a well-governed mining sector that is ethically inclusive, environmentally friendly, socially responsible, and valued by neighbouring communities. This is done to guarantee that the mining industry accepts responsibility for any damage it may do to the environment by repairing and rehabilitating it after mining operations. Zimbabwe has made great achievements in guaranteeing environmental protection, as seen by its apparently solid legal structure in this respect, as evidenced by the aforementioned clear legislative framework on environmental protection. The mining industry has created so much environmental deterioration as a result of the difficulty of enforcing environmental laws. The 2002 EMA established the

⁵⁷ A Clinton, A. C Budnukaeku, *Environmental Degradation its Impact on Natural Resources Depletion*, Journal of Environmental Science and Public Health 5 (2021): 50-55.

⁵⁸ See Section 73 of the Constitution of Zimbabwe

⁵⁹ The blueprint document is available here <http://www.zim.gov.zw/index.php/en/government-documents/category/1-vision-2030>

Environmental Management Agency (EMA), which is responsible for administering and enforcing all current environmental statutes. Unfortunately, the Agency does not get appropriate financing, and this has been the primary cause for its inability to implement and enforce environmental protection regulations. In addition, in transferring responsibility to the Agency, EMA did not account for the fact that different government departments continue to be responsible for enforcing certain environmental laws; as a result, there has been a duplication of duties and a variety of fine structures for the same violation.

Several resource-rich communities have recorded exploration of natural resources that has had adverse impacts on the community. Scientists and community monitors assessed the water quality of the Deka River in Hwange in Zimbabwe by analysing whether there was an impact of the downstream coal mining occurring in the area. The Deka River is a livelihood source for community members through fishing, providing water for livestock and a direct source of fresh water due to lack of functioning drinking water boreholes.⁶⁰ The results revealed that the sources of the water pollution were from acid mine drainage, illegal mining activities and illegal dumping of wastewater by active mines.⁶¹ This water pollution poses a serious risk to human and increases the vulnerability of ecosystems. Whilst there are many actors in the area who contribute to the pollution of the river, what is apparent is that there is limited environmental protection enforcement on all these actors which include corporate actors. In Manicaland, there was a discovery that livestock had died due to pollution of water in the Save, Odzi and Singwizi rivers through contaminated substances discharged by mining companies in the area.⁶²

2.6 Corruption in the mining sector

Corruption is a social ill that continues erodes at sustainable development in Zimbabwe. Corruption has been defined as the abuse of entrusted power for private

⁶⁰ D Ruppen et al, *Community-Based Monitoring Detects Sources and Risks of Mining-Related Water Pollution in Zimbabwe* <https://doi.org/10.3389/fenvs.2021.754540>

⁶¹ Ibid

⁶² <https://reliefweb.int/report/zimbabwe/1000-cattle-die-mining-pollution>

gain.⁶³ This occurs when those in public office carry out activities that are aimed at private benefit through acts such as bribes. Where there is an abundance of natural resources and the absence of transparency and accountability mechanisms, there is a ripe environment for corruption. Certain risk factors have been identified as compounding corruption in the natural resource sector. These risk factors include⁶⁴:

- Corporate opacity- this occurs where there is a lack of or inadequate disclosure of financial data relating to extractive operations.⁶⁵
- Poor governance environment - this occurs where there are weak or insufficient governance structures to warrant transparency and accountability.⁶⁶
- Lack of contract disclosure and transparency- this occurs when the awarding of contracts is unclear, and there are limited opportunities for the public to scrutinize the contracts that are awarded.⁶⁷
- Foreign investment in the sector- where the host country of mineral resources does not have adequate domestic investment to exploit natural resources, it will look for foreign investment to exploit the resources. This may create an opportunity for transnational corruption using brokers and middlemen to finalise natural resource extraction contracts.⁶⁸

⁶³ <https://www.transparency.org/en/what-is-corruption>

⁶⁴ Marie Chene, *Corruption in natural resource management in Mongolia*, Transparency International, Anti- Corruption Resource Centre, , p. g 3. See also Marshall, I, *A survey of corruption issues in the mining and mineral sector*, International Institute for Environment and Development, 2001

⁶⁵ Ibid, Adapted from Marshall, I, *A survey of corruption issues in the mining and mineral sector*, International Institute for Environment and Development, 2001.

⁶⁶ ibid

⁶⁷ ibid

⁶⁸ Ibid

- Value of natural resources- the commercial value of natural resources makes them highly attractive which can result in expropriation and other corrupt activities.
- Weak legal framework- implementation gaps, Inconsistent policy, and legislative provisions

2.7 Poor community consultation

Before mining projects take place, there is a requirement in terms of the Environmental Management Act where an environmental impact assessment should be done.⁶⁹ In terms of this process, the Director General will issue a certificate in respect of the mining project after the submission of an environmental impact assessment report.⁷⁰ The environmental impact assessment report gives a detailed description of the project, activities, project site, the likely impact of the project on the environment, the methodology used to compile the report and measures to be taken by the developer to mitigate adverse environmental effects.⁷¹ The environmental impact assessment reports are compiled by consultants who must have the necessary aptitude regarding existing legal and procedural requirements to be complied with in order for a certificate to be issued for the project to proceed. These consultants are drawn from an approved list of the Environmental Management Agency. The apparent weakness of the environmental impact assessment process is that it overemphasizes environmental protection over other socio-economic issues that are intrinsic to the mining-affected communities resulting in an inadequate social analysis. These include issues of ancestral land where there are graveyards, social amenity provision, compensation where there is the displacement of communities and the increase in other social ills such as the transmission of sexually transmitted diseases and child labour and/ or marriages when the mining activities begin to take place. When this takes place, the overall

⁶⁹ The Environmental Management Act [Chapter 20:27] in the First Schedule also lists other projects that require an environmental impact assessment reports. These include dams, forestry, power generation, tourist developments and waste treatment disposal.

⁷⁰ See Section 97 of the Environmental Management Act [Chapter 20:27]

⁷¹ See Section 99 of the Environmental Management Act [Chapter 20:27]

assessment of the impacts of the project becomes one-sided, leading to the current problems being faced in the mining communities today. These present the gaps which result in a negative impact on human rights of communities.

2.7 Inadequate corporate social responsibility

It is trite that Zimbabwe does not have explicit corporate social responsibility (CSR) legislation, particularly in the mining sector. Specifically, those facets of CSR that pertain to the promotion and fulfilment of socioeconomic rights. Nevertheless, the Community Share Ownership Scheme or Trust provisions of the Indigenisation and Economic Empowerment Act [Chapter 14:33] have been noted as instances of CSR that is governed by law. Prior to the 2018 Amendment through the Finance Act, Section 3 of the Indigenisation and Economic Empowerment Act allowed a business to possess 51 percent of shares in cooperation with a Community Share Ownership Scheme or Trust. By virtue of Statutory Instrument 116 of 2010, the Indigenisation and Economic Empowerment (General) (Amendment) Regulations, 2010 (No. 2), three types of share ownership schemes were established: the Employee Share Ownership Scheme, the Management Share Ownership Scheme, and the Community Share Ownership Scheme or Trusts.⁷² In accordance with the government's indigenisation policy, all firms were expected to have a fifty-one percent (51 percent) shareholding in the hands of indigenous people through a variety of programs. This provision was, however, weakened by the Amendment to the Act under sections 42 of the Finance Act 2018 and 36 of the Finance Act 2019.

Functioning democracies need resources to discharge their democratic mandates. Also, under international human rights law, states have a duty to protect, promote and fulfil social, economic, and cultural rights which can be derived from mining tax. At the core of mining tax is the obligation to take appropriate measures towards the full realization of economic, social and cultural rights to the maximum of their

⁷² See the SILVERIA HOUSE POLICY Brief available here <https://silveirahouse.org.zw/wp-content/uploads/2021/09/Silveria-House-CSOT-Policy-Brief-2.2021.pdf>

available resources.⁷³ The reference to “resource availability” reflects a recognition that the realisation of these rights can be hampered by a lack of resources and can be achieved only over a period of time.⁷⁴ To mobilise resources for government expenditure and provision of public service, governments have probably been taxing mines ever since governments began taxing economic enterprises.⁷⁵ Taxation is thus a means of determining how the earnings from mining ventures are divided between the firms and the government. Minerals in the SADC area significantly contribute to the country’s prosperity and development. To acknowledge the significance of the mining industry in Southern Africa, the Southern African Development Community (SADC) created the Protocol on Mining in 1997, which entered into force in 2000. The Protocol on Mining was designed to give a framework for SADC member states to use in developing their mining fiscal regimes, allowing each member state to adapt the framework to its own country’s individual requirements and situation. Royalties, Profit Taxes- Corporate Income Tax, Dividends, Bonuses, Customs charges, Value-Added Tax (VAT), and Withholding Taxes, among others, are examples of taxes levied against mining businesses in the SADC mining industry. When compared to other nations in Southern Africa, Zimbabwe’s mining tax policy is viewed as relatively competitive.⁷⁶ The Corporate Income Tax (CIT) rate is within international and regional norms at 25% which differs from Zambia where the CIT charged on income earned on mining operations is 30%.⁷⁷ While the diamond royalty rate in Zimbabwe is 15% and in Botswana it is 10%.⁷⁸ The royalty rate for platinum in is 10% and ranges from 1%-5% for gold producers in Zimbabwe. In Botswana, the royalty rate for all precious metals (gold, platinum, silver etc.) is a flat 10%. Botswana sets its royalty rate for all other minerals and mineral products at 3% while

⁷³ UNHROHC,

<https://www.ohchr.org/en/issues/escr/pages/whataretheobligationsofstatesonescr.aspx>

⁷⁴ Ibid

⁷⁵ WIDER Working Paper 2017/75 *The taxation of extractive industries: Mining*

<https://www.wider.unu.edu/sites/default/files/wp2017-75.pdf>

⁷⁶ ZELA Domestic Resource Mobilisation in Zimbabwe’s Mining Sector: Enablers and Inhibitors (2016) p. g 5

⁷⁷ P. Jourdan, G. Chigumbira, I. Kwesu and E. Chipumho, *Mining Sector Policy Study*, Zimbabwe Economic Policy Analysis and Research Unit (2012)

⁷⁸ Ibid

in Zimbabwe, this varies from 1% charged for coal to 2% charged for base (copper, tin, and zinc) and industrial metals.⁷⁹

Despite the implementation of mining taxation systems, the growth and development of wealthy mining nations in Southern Africa have been constantly threatened by a variety of political, social, administrative, and in some cases legal obstacles.⁸⁰ This, however has not translated to meaningful development on the ground.

⁷⁹ Ibid

⁸⁰ ZELA, *Regional Research on Pointed, Relevant and Technical Alternatives to Current Mining Fiscal Regimes*, 2021

CHAPTER 3: THE NORMATIVE FRAMEWORK OF THE UNGP ON BUSINESS AND HUMAN RIGHTS

3.1 Guiding Principles on Business and Human Rights: “Protect, Respect and Remedy” Framework

The expansion of transnational business activities reflected the need for some form of regulation of business owing to the rise of the impact of business on human rights.⁸¹ This phenomenon drew the attention of the United Nations.⁸² The Guiding Principles do not create fresh obligations at international law but expound the existing practices and standards. The guiding principles give a comprehensive understanding of the requirements, outlining the gaps and development opportunities.⁸³ In addition, they are reasonable and simple to implement since they outline the procedures that States and enterprises must take. The core characteristic of the United Nations Guiding Principles on Business and Human Rights (UNGPs) is that they do not impose new obligations under international law; rather, they provide direction on how to fulfil the obligations to safeguard and respect human rights.⁸⁴

The UNGPs are based on three linked pillars: the State's obligation to protect its citizens from rights abuses by third parties, the corporate responsibility to respect the human rights of citizens in their activities, and the availability of recourse in cases of human rights violations. These UNGPs establish a global framework for preventing and redressing human rights breaches that result from economic activities. Extensive research was conducted to inform the development of the framework, which includes discussions with diverse sector players, including

⁸¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework 21 March 2011, p.g 3
https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf

⁸² Ibid

⁸³ Ibid n 81, paragraph 14

⁸⁴ SAI, *Pillars in practice, Advancing the United Nations Guiding Principles on Business and Human Rights in the Zimbabwe Mining Sector*, p. g 11

communities, government institutions, and businesses.⁸⁵ The UNGPs are a useful structure that provides guidance to the state (through the duty to protect and provide a remedy) and business (through the duty to respect). They essentially characterise the interaction of business and states, thereby providing relevant guidance on policy, conduct, and the necessary regulatory framework for the respect and promotion of human rights.

The Guiding Principles are grounded in recognition of:

- (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The principles apply to all states and all businesses, both transnational and non-transnational, irrespective of their size, sector, location, ownership, and structure. Globalization has produced governance gaps between the scope and influence of economic forces and actors and the capacity of society to handle their negative repercussions. These governance gaps are the core cause of the current conundrum between business and human rights. These governance deficits create a favourable climate for unethical behaviour by businesses of all types without appropriate punishment or compensation. How to reduce and finally eliminate disparities in human rights is the primary issue.⁸⁶ Some states like Zimbabwe lack the institutional capacity to enforce national laws and regulations against businesses operating in their jurisdictions.

⁸⁵ n 81 above, p.g 4

⁸⁶ J Ruggie, *United Protect, Respect and Remedy, A Framework for Business and Human Rights Report of the Special Representative of the Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, 2008

The UNGPs are key to unlocking sustainable development and sustainable mining practices in Zimbabwe. Due to the interconnected nature of the 3 pillars, they should be read and understood both collectively and as individual guidance points for state and non-state actors.⁸⁷

3.2 The State duty to protect human rights

As highlighted earlier, the UNGPs are premised on 3 pillars, namely the state duty to protect, the corporate responsibility to respect and the access to effective remedy. These three pillars contain operational principles as well as foundational principles. The operational principles are aimed at providing guidance on how actions can be taken by either the state or corporate entities whilst the foundational principles outline the fundamental aspects of the UNGPs.⁸⁸

One of the guiding principles of the UNGPs is that states must safeguard against violations of human rights on their own territory. States are obligated to prevent violations of human rights by third parties, including corporations, on their territory or under their control. The first principle is that states have an inherent responsibility to guarantee that private actors acting inside their borders are subject to the rule of law. The sufficiency of state protection is assessed based on its "coherence," "consistency," and "operationalization." This entails implementing effective policies, laws, rules, and adjudication in order to prevent, investigate, punish, and rectify such abuse. The State's responsibility to protect is a norm of behaviour, which implies that they will be in violation of their international human rights law commitments if they fail to investigate, punish, prevent, or remedy violations of human rights by private actors. To better implement the need to safeguard human rights, States should enforce laws that require private enterprises to respect human rights, and regularly examine the sufficiency of such legislation and fix any gaps. The principles apply to all states and all corporate organizations, whether multinational or not, regardless of their size, sector, location, ownership, or structure. Globalization has produced governance gaps between the breadth and

⁸⁷ General Principles of the Guiding Principles, p. g 6

⁸⁸ n 86 above, p. g 12

influence of economic forces and actors and the capacity of society to handle their negative repercussions. These governance gaps are the core cause of the current business and human rights problem. These governance inadequacies produce a permissive atmosphere for wrongdoing by enterprises of all types, without proper sanctions or restitution. How to narrow and eventually bridge the disparities in human rights is our primary issue.⁸⁹ States must ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights.⁹⁰ It is the State's duty to ensure that the laws in place are clear and facilitate transparency and accountability in a procedural manner aimed at the promotion of human rights. Principle one mandates that States must take preventive measures. It must be noted that States must enact laws that regulate business conduct either directly or indirectly to ensure the respect of human rights. These laws include those relating to the protection of the environment, labour, fraud, corruption, property and direct the governance structures of businesses.⁹¹

The main limitation to States implementing their duty to protect human rights from abuses by corporate players is the fear that taking a hard line against these corporate actors can cause these players to take their foreign investment to other jurisdictions. As such States, especially in developing countries like Zimbabwe, are unwilling to act robustly by enacting the necessary laws and policies that promote the respect of human rights.⁹² The apparent failure of a State to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significantly affects the protection of human rights.⁹³ It is imperative for States to provide guidance to corporate actors on respecting human rights by indicating expected outcomes and help share best practices such as human rights due

⁸⁹ United Nations Guiding Principles on Business and Human Rights, Principle 3 (a)

⁹⁰ Ibid, Principle 3 (b)

⁹¹ See commentary to principle 3 of the Guiding Principles

⁹² Deva S, *Guiding Principles on Business and Human Rights: Implications for Companies European Company Law*, Vol. 9, No. 2, 2012 p. g 103

⁹³ n 91 above

diligence, environmental protection, and gender equality.⁹⁴ The inclusion of non-state actors as human rights protectors and stakeholders, such as multinational corporations, might require a doctrinal shift in the way we think about the protection of human rights.

3.2.1 State and business nexus

There is a risk of human rights abuses where business enterprises are owned by the state or receive considerable financial services from the State. In the mining sector in the mining sector in Zimbabwe, this is a common occurrence where there are public-private partnerships between the State and third parties. Public-private partnerships (PPPs) are aimed to deliver public assets and public services and are defined as agreements between the government and one or more private partner.⁹⁵ PPPs are also important as they encourage investment whilst assisting in service delivery.⁹⁶ In the Zimbabwean legislation, PPPs are provided for in the Zimbabwe Investment and Development Agency Act.⁹⁷ In terms of this Act, a PPP agreement is defined to mean an agreement between a contracting authority and a counterparty that is approved in terms of the Act.⁹⁸ The value of PPPs is undeniable and in

⁹⁴ Ibid

⁹⁵ This is a definition by the Organisation for Economic Cooperation (OECD). It further defines that this agreement sets out that the private partners deliver a service in line with government objectives whilst the private partner also benefits on their profit objectives.

⁹⁶ See the AMPG Public- Private Partnership (PPP) Certification Guide

⁹⁷ Zimbabwe Investment and Development Agency Act [Chapter 14:37]

⁹⁸ Ibid, Part I of the Fourth Schedule to the ZIDA Act. The Section provides that “*an agreement between a contracting authority and a counterparty, approved under this Act, in terms of which—*
(a) the counterparty undertakes to perform a contracting authority’s function on behalf of the contracting authority for a specified period; and
(b) the counterparty receives a benefit for performing the function by way of—
(i) compensation from funds appropriated by Parliament; or
(ii) funds obtained by way of loan by the contracting authority; or
(iii) user levies; or
(iv) revenue generated from the project: or
(v) any combination of the foregoing; and
(c) the counterparty is liable for the risks arising from the performance of its function; and
(d) public resources may be transferred or made available to the counterparty”

Zimbabwe there were PPPs formed for the purposes of diamond mining in Chiadzwa. The Zimbabwe Mining Development Corporation (ZMDC), a parastatal was given the mandate to engage third parties for diamond exploration and mining in Zimbabwe.

It is important for the State to take necessary steps to ensure that there are no human rights abuses in such circumstances. The proximity of the state in such instances may lead to human rights abuses, and there is a crucial need to enforce mechanisms for transparency, scrutiny, accountability, and oversight over these institutions to ensure that there is respect of human rights.⁹⁹ Closely linked to issues of state and business nexus is the need for contractual transparency where there is a high risk of human rights violations where the business enterprise takes place in the mining sector. Due to the nature of the activities taking place and the possible infringement of existing human rights, contractual transparency becomes a key factor to ensure that there is adequate oversight over the implementation of the contract whilst there is promotion of human rights.¹⁰⁰ It must be noted that the State continues to have its international obligations at law even where it contracts third parties execute contractual mandates. Legislative provisions are therefore necessary to promote the state duty to protect human rights.¹⁰¹

3.2.2 Policy coherence

Another major function of the State when it comes to protecting human rights is to ensure that there is policy coherence between the different agencies and institutions of government at every level that are working to fulfil human rights obligations the lack of policy coherence can lead to human rights violations it is therefore necessary for the state to ensure that the various departments working in the sector specifically the mining sector have policy consistency and policy coherence. A particular instance in Zimbabwe was the no questions asked policy in gold buying and gold selling in the mining sector in Zimbabwe. This policy whilst it was intended to curb gold leakages and decriminalise activities of artisanal and small- scale miners that are not covered

⁹⁹ United Nations Guiding Principles on Business and Human Rights, Principle 4

¹⁰⁰ Ibid, Principle 5

¹⁰¹ See commentary to Principle 5

in the current Mines and Minerals Act,¹⁰² it, unfortunately promoted gang violence in the mining sector in Zimbabwe. In addition, large scale miners began to evade royalties by presenting themselves as artisanal and small-scale miners at the point of selling their gold productions.¹⁰³ Essentially, the necessary due diligence processes for gold buying and selling were no longer complied with. Consequently, another policy introduced by the Ministry of Finance regarding the national currency for Zimbabwe led to further gold leakages as the black market was a favourable trading place for gold and other minerals as this provided a lucrative return on investment as opposed to selling on the official market.

Policy coherence is a necessary factor that should effectively be implemented by States. States in their duty to protect human rights, through their different arms, should aim to develop and implement policies that are coherent and conjointly supportive to attain sustainable development.¹⁰⁴

3.2.3 Maintaining adequate domestic policy space

Principle 9 of the UN guiding principles on business and human rights clearly provides that states should maintain an adequate domestic policy which meets the human rights obligations when it's pursuing business-related policy objectives, which can be done through either investment treaties or contracts.¹⁰⁵ For countries such as Zimbabwe, which rely on mining to revive the economy, it is not surprising that this policy opened a huge portal that could result in extensive human rights violations. The Zimbabwe is Open for Business policy was aimed at re-engagement and opening opportunities for investments in the mining sector. Principle 9 provides guidance for how such policies should be treated where economic agreements involving the State are concluded. It specifically guides that states should continue to maintain its ability to regulate investor conduct whilst protecting human rights. Here

¹⁰² The Gold Trade Act provides that anyone found in possession of gold without a gold buying or gold mining licence liable to a criminal offence.

¹⁰⁴ OECD, Policy Coherence for Sustainable Development

¹⁰⁵ United Nations Guiding Principles on Business and Human Rights, Principle 9

stabilization clauses need to be critically scrutinized as they can impact human rights if host States do not take this into critical consideration. Stabilisation clauses are clauses found in investment contracts that are aimed at minimising the risk of changes in regulation for investors.¹⁰⁶ The reason behind stabilisation clauses is to control risk in capital intensive projects such as mining.¹⁰⁷ These clauses require States to look at a holistic picture outside of just attracting investments but also environmental and human rights concerns. The balancing act is more difficult where the host country is a developing country, and the economy is dependent on investment to achieve any form of development goals. Where this happens, and there are no effective control mechanisms, there may not be adequate remedies where human rights violations take place. If these stabilisation clauses are not dealt with or crafted properly, there can be the unintended effect of placing investors in a position where they are shielded from any form of development obligation. States in their duty to protect human rights must strive to balance protecting investors interests whilst ensuring that there is respect for fundamental human rights and freedoms of the citizens including protection of the environment.¹⁰⁸

3.3 The corporate responsibility to respect human rights

The inclusion of non-state actors as human rights protectors and stakeholders, such as multinational enterprises and multinational corporations, presented a doctrinal shift in the way human rights protection is conceived.¹⁰⁹ In 2000, the United Nations introduced the Global Compact which was a policy initiative providing a practical guideline for responsible business conduct. The Global Compact included principles such as:

¹⁰⁶ K Gehne, R Brillo, *Stabilisation clauses in international investment law: Beyond balancing and fair and equitable treatment*, Working Paper No 2013/46, 2014

¹⁰⁷ *ibid*

¹⁰⁸ *Ibid*, States cannot give investors rights which they do not have. State sovereignty does not give States rights that are outside those recognized at international law.

¹⁰⁹ S.D Bachmann V. Pereira, 'Corporate human rights responsibility and multinationality in emerging markets - a legal perspective for corporate governance and responsibility', *Int. J. Business Governance and Ethics*, Vol. 9, No.1, p. g 58

- Businesses must promote and respect the preservation of internationally declared human rights and avoid complicity in human rights violations¹¹⁰
- Businesses should support a precautionary approach to environmental challenges;¹¹¹
- Businesses must strive against corruption in all its manifestations, including extortion and bribes.¹¹²

Self-regulation was the initiative's main flaw in terms of its execution. Self-regulation is the process through which a business promulgates and undertakes to abide by a set of ethical standards or a code of conduct. Prior to the Guiding Principles, the United Nations Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Respect to Human Rights existed.¹¹³ The Norms were drafted in the style of a human rights convention, which stipulates that almost every human right imposes a wide variety of obligations on virtually every organization. Insinuating that human rights legislation already directly extended to companies, these led to the dispute surrounding the link between corporations and human rights.¹¹⁴ The Norms offered the prospect that they may influence the evolution of human rights legislation, either by acting as the foundation for a subsequent treaty or by offering a declaration of the law around which interpretation and practice could coalesce.¹¹⁵

The fundamental idea underpinning the obligation of corporations to protect human rights is that commercial organizations must respect human rights. This requires that

¹¹⁰ Ibid, Principle 2

¹¹¹ Ibid, Principle 7

¹¹² Ibid, Principle 10

¹¹³ Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev. 2 (2003). For the Sub-Commission's commentary on the Norms, see Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/38/Rev. 2 (2003).

¹¹⁴ Knox J, *The Ruggie Rules: Applying Human Rights Law to Corporations The UN Guiding Principles on Business and Human Rights*, Wake Forest University, Legal Studies Paper No. 1916664 p. g 3

¹¹⁵ Ibid p. g 4

they refrain from violating the human rights of others and redress any negative human rights consequences in which they are involved.¹¹⁶ Notably, this principle exists independently of states' capacity and willingness to fulfill their own human rights obligations; therefore, business enterprises must continue to comply with national laws and regulations in order to protect human rights. To achieve this principle, businesses are expected to undertake commitments that contribute to the promotion of human rights; if they fail to do so, they should be liable for human rights violations.¹¹⁷

3.3.1 The duty to respect internationally recognized human rights

Business enterprises are expected to respect internationally recognized human rights such as those expressed in the international Bill of Rights.¹¹⁸ The Universal Declaration of Human Rights (UDHR) is a landmark document in the evolution of human rights. It was proclaimed in 1948 as a common standard of achievements for all nations.¹¹⁹ It is a cornerstone text in international human rights law and lays out the fundamental rights and freedoms of all human beings that nations must respect. On the basis of the UDHR, two significant international treaties were established: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (ICESCR). Businesses in Zimbabwe are expected to be familiar with the provisions of the African Charter on Human and People's Rights. Other regional human rights protection regimes in Africa enhance the UN's human rights protection. The African Union has developed the African system of human rights (AU). The African Charter on Human and People's Rights is the key regional human rights document in Africa (African Charter). It possesses an extensive array of rights, including the collective rights of peoples. At its 51st Ordinary Session, held from 18 April to 2 May 2012 in Banjul, Gambia, the African Commission approved a Resolution on a Human Rights-Based Approach to Natural Resources Governance. This resolution was specific to natural resource exploitation in Africa. The resolution urges the government to guarantee that human

¹¹⁶ Principle 11 of the United Nations Guiding Principles on Business and Human Rights

¹¹⁷ See principle 11 commentary

¹¹⁸ See principle 12 of the United Nations Guiding Principles on Business and Human Rights

¹¹⁹ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

rights are respected in all aspects of natural resources exploration, extraction, hazardous waste management, development, governance, international cooperation, investment agreements, and trade regulation.¹²⁰

3.3.2 The duty to respect human rights applies to all forms of business

The duty to respect human rights is applicable to all forms of business enterprises; this means that regardless of the size or the sector ownership or structure of the business enterprise, the responsibility applies to each enterprise in that they should not adversely impact human rights.¹²¹ Whilst it is generally accepted that the larger the size of the company the more the capacity it may have to implement certain policies that promote human rights, this does not exonerate small business enterprises from being cooperating such policies in their operations.¹²² In order to determine if a corporation respects human rights, there should be essential human rights-oriented acts that are purposeful and focused. This consists of human rights due diligence processes, policy commitments for the respect of human rights, and other internal activities to reduce or remedy any negative impact on human rights it has.

3.3.3 Policy Commitment

As the basis for embedding their responsibility to respect human rights, business enterprises should adopt a policy statement that: (a) Is approved at the highest level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; and (c) Specifies the enterprise's human rights expectations of personnel, business partners, and other parties directly linked to its operations, products, or services.¹²³

¹²⁰ Olawuyi, D. S, *The emergence of right-based approaches to resource governance in africa: False start or new dawn*, Sustainable Development Law & Policy, 2015, p. g 13

¹²¹ Principle 14 of the United Nations Guiding Principles on Business and Human Rights

¹²² Ibid, Principle 14 commentary

¹²³ Policy Commitment: UN Guiding Principles Reporting Framework.

<https://www.ungpreporting.org/reporting-framework/governance-of-respect-for-human-rights/policy-commitment/>

3.3.4 Human rights due diligence

The obligation to respect human rights compels businesses to avoid producing or contributing to adverse human rights consequences via their own operations and to redress such impacts when they do arise.¹²⁴ Businesses must avoid or reduce harmful human rights consequences that are directly related to their activities, goods, or services through their commercial contacts, even if they did not cause such impacts.¹²⁵ In accordance with this idea, "business relationships" encompass relationships with business partners, companies in its value chain, and any other non-State or State entity directly related to its business operations, goods, or services.¹²⁶ Due diligence is essential to human rights protection responsibilities. To implement due diligence, firms design and implement rules and principles suited to their size and situation.¹²⁷ Human rights due diligence should be begun as early as feasible in the establishment of a new activity or connection, according to the principle's commentary on how due diligence should be implemented.¹²⁸ Human rights risks can be exacerbated or minimized via the structure of contracts and other agreements, and they can be inherited through mergers and acquisitions. When mining businesses are merged or purchased, it is usual for legacy difficulties to be inherited. Risk assessments are required throughout the duration of a mining project's life cycle. Despite the fact that businesses may have secured an environmental impact assessment certificate at the outset of a project, the context in which they operate is always changing, necessitating ongoing monitoring.¹²⁹

3.3.5 Remediation

When a corporation detects such a scenario, whether through its human rights due diligence process or other methods, its obligation to respect human rights compels

¹²⁴ Principle 13 of the United Nations Guiding Principles on Business and Human Rights

¹²⁵ Ibid

¹²⁶ See Principle 13 commentary of the United Nations Guiding Principles on Business and Human Rights

¹²⁷ Principle 15 of the United Nations Guiding Principles on Business and Human Rights

¹²⁸ See commentary to Principle 17 of the United Nations Guiding Principles on Business and Human Rights

¹²⁹ See commentary to Principle 18

it to engage in remedial efforts, either independently or in collaboration with other actors. Principle 31 specifies that operational-level grievance procedures for individuals potentially harmed by the commercial enterprise's actions can be an effective way of facilitating rectification if they satisfy certain key characteristics.¹³⁰

The Guiding Principles assert that corporations must avoid, reduce, and, when necessary, redress human rights violations they cause or contribute to. Businesses must attempt to prevent or reduce any negative effects associated with their operations, goods, or services, even if they were caused by their suppliers or business partners. The need to respect applies to all international human rights enshrined in the Universal Declaration of Human Rights.¹³¹

Businesses must have the proper policies and procedures in place in order to fulfil their commitment to respect. The Guiding Principles describe three aspects of this obligation.¹³² First, businesses must adopt a policy commitment to fulfil their responsibilities to protect human rights. Second, they are required to do continuing human rights due diligence to detect, avoid, mitigate, and account for their human rights impacts. Lastly, they must have systems in place to facilitate the correction of any negative human rights consequences they create or contribute to. Human rights due diligence refers to the process of detecting and resolving the human rights consequences of a company's activities, goods, and supplier and business partner networks. Human rights due diligence should involve reviews of internal processes and systems, as well as contact with external organizations possibly affected by the organization's operations.¹³³

¹³⁰ Remediation: UN Guiding Principles Reporting Framework.
<https://www.ungpreporting.org/reporting-framework/management-of-salient-human-rights-issues/remediation/>

¹³¹ Ibid

¹³² The Un Guiding Principles On Business And Human Rights An Introduction.
https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf

¹³³ Ibid

3.4 Access to remedy

The State is obligated to defend against human rights violations relating to business. In this context, states must provide, by judicial, administrative, legislative, or other appropriate measures, that individuals affected have access to adequate remedies when such abuses occur on their territory and/or under their authority. Access to effective remedies involves both procedural and substantive elements. States should take necessary actions to improve the efficacy of domestic judicial procedures when addressing business-related human rights violations, including evaluating methods to minimize legal, practical, and other relevant hurdles that might prevent access to justice.¹³⁴ Access to effective remedy has both procedural and substantive aspects. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical, and other relevant barriers that could lead to a denial of access to remedy.¹³⁵ Under this pillar, States should consider measures to enable access to effective non-State grievance procedures that address human rights abuses associated to business. A grievance mechanism can only be effective if the people it is designed to serve are aware of it, have faith in it, and are able to utilize it.¹³⁶

¹³⁴ Principle 25 of the United Nations Guiding Principles on Business and Human Rights

¹³⁵ Ibid, Principle 27 of the United Nations Guiding Principles on Business and Human Rights. See also Access to Remedy - Shift. <https://shiftproject.org/resource/un-guiding-principles-on-business-and-human-rights/access-to-remedy/>

¹³⁶ Business and human rights litigation in Latin America: Lessons from practice <https://www.business-humanrights.org/en/from-us/briefings/business-and-human-rights-litigation-in-latin-america-lessons-from-practice/>

CHAPTER 4: CHALLENGES AND GAPS IN IMPLEMENTATION OF THE UNGP ON BUSINESS AND HUMAN RIGHTS IN ZIMBABWE

4.1 Introduction

The mining sector has already been identified as an important driver of economic growth and development in Zimbabwe. Increased economic growth in mining has been associated with the rapid expansion of activities in natural resource extraction. While offering some parts of the population new economic opportunities, such economic strategies are also associated with significant human rights risks. Violations include those of a civil, political, environmental, economic, social, and cultural rights nature, that is, forced evictions or displacement, violations of rights to free, prior, and informed consent for land transfers, and disputes over compensation for loss of land. Air and water pollution linked to industrial, extractive, or infrastructure projects, or the disruptive impacts of such projects on river or forest systems upon which the livelihoods of many communities continue to rely, have frequently been linked to negative health and economic consequences for local populations.¹³⁷ Threats to the lives and safety of human rights defenders, such as community members, environmental activists, etc., who have frequently been subjected to violence, arbitrary arrest, and criminal prosecution, have also been a growing source of worry.

4.2 Existing challenges and gaps

Up to forty different minerals, including platinum, chrome, gold, coal, and diamonds, are mined in Zimbabwe's mining sector, which accounts for around 12 percent of the country's gross domestic product as of 2021.¹³⁸ With roughly 2.8 billion tons of platinum group metals and 10 billion tons of chromium ore, Zimbabwe boasts the second-largest platinum deposit and high-grade chromium ores in the world,

¹³⁷ <https://melbourneasiasreview.edu.au/obstacles-to-implementing-the-un-guiding-principles-on-business-and-human-rights-in-southeast-asia/>

¹³⁸ <https://www.trade.gov/country-commercial-guides/zimbabwe-mining-and-minerals#:~:text=Zimbabwe's%20top%20minerals%20include%20gold,coal%2C%20diamonds%2C%20and%20lithium.>

respectively.¹³⁹ Natural resources are indispensable for satisfying fundamental human needs and other morally significant pursuits.¹⁴⁰ It is therefore not surprising that natural resources are protected in the supreme legislation of the country. The Constitution of Zimbabwe which was promulgated in 2013 provides for fundamental rights and freedoms as well as national objectives and founding provisions that are aimed at guiding state actors and non- state actors. The founding values and principles include the principle of good governance which bind the State and all institutions and agencies at every level.¹⁴¹ The principles of good governance also envisage transparency, justice, accountability, responsiveness, equitable sharing of natural resources and due respect for vested rights.¹⁴² Chapter 2 of the Constitution elucidates the national objectives that are aimed at guiding the State and all institutions and agencies of government at every level in formulating and implementing laws.¹⁴³ Regarding natural resources, the State is enjoined to ensure that local communities benefit from the resources in their areas.¹⁴⁴

The impact of the UNGPs in Zimbabwe is contingent on civil society's ability to mobilize around human rights problems. The political structure and democratic history of Zimbabwe have a significant impact on the capacity of civil society to exert effective pressure on corporations to follow the UNGPs. Through the support, control, and repression of civil society organizations, there is a continuous contraction of civic space. In Zimbabwe, the Human Rights discourse is occasionally maligned on the assumption that it serves a regime change objective; thus, risks to civil society freedoms and security have increased. In this environment, K Macdonald¹⁴⁵ states that continued progress toward implementation of the business and human rights agenda requires a continuous emphasis on developing and

¹³⁹ *ibid*

¹⁴⁰ P Gúmplová, *Normative View of Natural Resources—Global Redistribution or Human Rights-Based Approach?*, *Hum Rights Rev* 22, (2021). <https://doi.org/10.1007/s12142-021-00615-3>

¹⁴¹ See Section 3 of the Constitution of Zimbabwe

¹⁴² *Ibid*, Section 3 (2) (g), (j) and (k).

¹⁴³ *Ibid*, Section 8 (1)

¹⁴⁴ *Ibid*, Section 13 (4)

¹⁴⁵ K, Macdonald (n 137 above)

preserving political and civic venues through which pro-rights actors inside and outside the state may exert substantial pressure for change.¹⁴⁶

According to the UNGPs, companies are obligated to promote the framework's principles. The capacity of commercial interests to influence or capture state regulatory processes depends on a variety of characteristics, such as state regulatory competency, business-state relationships, and cultures of corruption or regulatory capture. State-business ties constrain the impact of international human rights standards. Reflecting the structural needs of policy regimes geared toward fostering export development and Foreign Direct Investment, such obstacles are frequently exacerbated by a greater official responsiveness to business interests. On the other hand, according to K Macdonald Human rights norms are more likely to be supported when there are strong state-society ties between rights-oriented civil society groups and political and bureaucratic actors sympathetic to human rights norms, or when there are strong ties to international organisations or foreign governments incorporating rights agendas into their diplomatic engagements and development cooperation programmes.¹⁴⁷ Consumers, civil society organisations, banks and international financial institutions all have the ability to play a significant role in mobilizing pressure for substantial UNGP implementation, in addition to strengthened regulatory actions by governments.

The UNGP framework requires nations to safeguard their populations from human rights violations by corporations. Businesses should respect human rights, and all victims of human rights abuses by corporations must have access to an effective remedy. It has been asserted that the UNGPs were not designed to rely on their own implementation structures, but rather to catalyze cascading processes of dissemination and learning via scattered institutional processes.¹⁴⁸ The implementation of UNGPs has varied significantly across different countries and regions, particular progress can be noted in Europe, where numerous governments have adopted National Action Plans(NAPs) on Business and Human Rights, and the

¹⁴⁶ [ibid](#)

¹⁴⁷ n 137 above

¹⁴⁸ [ibid](#)

European Commission has announced plans to introduce legislation mandating corporate human rights due diligence.¹⁴⁹ The same cannot be said for developing countries such as Zimbabwe. There were efforts to commence the NAP for Zimbabwe, but it has not found much traction on implementation. This process, as envisioned by the UNGP on business and Human Rights places the Government at the forefront of policy formulation clearly articulating state priorities and planned actions to support the implementation of the UNGPs.

4.3 Lack of transparency in the mining sector

Transparency and accountability are fundamental concepts at the core of the UN Guiding Principles on Business and Human Rights. The observance of Access to information and Information disclosure legislation is essential. Concerning disclosure of company policies for managing human rights impacts, there are generally low levels of implementation, and this extends beyond Zimbabwe to other jurisdictions, as determined by a study that questioned the extent to which the most prominent listed companies in ASEAN countries had implemented UNGP guidelines pertaining to disclosure of company policies for managing human rights impacts.¹⁵⁰ Traditionally, challenges to the implementation of UNGPs have primarily been a lack of opportunities for effective dialogue and learning between various stakeholders. However, in the recent discourse on the subject matter, according to the book: *Business and Human Rights in Southeast Asia, Risk and the Regulatory Turn* a contrasting explanation for varied implementation outcomes, which often receives less emphasis in scholarly conversations about UNGP implementation, focuses on configurations of the market, political and civil society pressure to respond to international human rights standards.¹⁵¹ In Southeast Asia, where recognition and implementation of the UNGPs have varied widely among enterprises, nations, and

¹⁴⁹ K Macdonald (n 137 above)

¹⁵⁰ <https://article30.org/wp-content/uploads/2019/05/Human-Rights-Disclosure-in-ASEAN-Full-Report.pdf>

¹⁵¹ M Mohan, C Morel, *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn*, Taylor & Francis, 2014 available here

https://books.google.com/books/about/Business_and_Human_Rights_in_Southeast_A.html?id=U5SbBAAAQBAJ

sectors, the relevance of such sources of pressure as predictors of implementation results is readily apparent.¹⁵²

4.4 Inadequate corporate sustainability reporting in the mining sector

The mining industry is dominated by state-owned and non-state-owned corporations. Sustainability reporting is the method through which a firm provides information about its performance in areas other than financials. Among these are environmental and social concerns, as well as the corporate governance culture of the firm. Due to the inherent destructiveness of mining, there is a need for information on other environmental factors. This higher quality of reporting allows for greater openness and the creation of goals for attaining sustainable development.

Sustainability reporting is a requirement in Zimbabwe for listed companies under Statutory Instrument 134 of 2019. In Zimbabwe, there is a growing incidence of public-private partnerships (PPPs) where the State partners with a third party to carry out mining ventures. Despite the identity of the mining corporation, whether it is a purely state-owned venture, a PPP or an independent corporate venture, there is inadequate sustainability reporting. Unfortunately, some of these mining companies are not listed on the Zimbabwe Stock Exchange. This may be due to incapacity to fulfil the requirements for listing, or the nature of the mining venture set up. Pressure from the markets to comply with international human rights norms significantly varies between companies depending on the dominant sources of project financing. The ultimate consequence of this is that they escape some sources of public pressure to which publicly listed companies are subject to. Considering the scale and extent of mining ventures in Zimbabwe, and the large numbers of artisanal and small-scale miners, there is an apparent gap when it comes to this form of reporting.

4.4 Lack of reform of the existing legislation

¹⁵² n 137 above <https://melbourneasiasreview.edu.au/obstacles-to-implementing-the-un-guiding-principles-on-business-and-human-rights-in-southeast-asia/>

The main legal framework governing mining and mining activities is the Mines and Minerals Act. This legislative instrument is due for a revamp as it does not tally with the contemporary developments that have been occurring in the mining sector in Zimbabwe. The main argument behind the amendment is that the Act is no longer consistent with the obtaining reality on the ground. The law was crafted in 1961 where Zimbabwe was a colony and the agenda of the colonialist settlers was maximum extraction of natural resources, protection of private property interests and disregard of the rights of the black indigenous settlers. Several arguments have been posited for the amendment of the Mines and Minerals Act. These include:

- **Regulating the Formal Bidding Process for Mining Contracts**

To introduce improved regulation of formal bidding processes, there is need to provide that when two or more competing applications for any mining contract, right or title are received on the same day, those applications are to be treated as received simultaneously. The provision can also include subsections that specifically cover the requirements regarding applications made pursuant to an invitation to tender and proposes details for how such applications shall be evaluated. Evaluation can then be concluded with a report and recommendation to the Board, who will then make a final determination on the tender award, taking into account the evaluation report and other key considerations. The final award must be disclosed to enhance transparency and accountability.

- **Introduction of an electronic mining cadastre system**

An electronic cadastre system is a computer-based and up-to-date land information system that contains a record of interests in land, such as the rights, constraints, and duties of landowners. The lack of an electronic cadastre system is a key obstacle to the control of mining in Zimbabwe at present. Due to a lack of appropriate mapping, artisanal miners frequently intrude and commence illicit mining on lawfully registered claims, resulting

in a great number of disputes.¹⁵³ The system is manual and poorly administered. As a result of the fact that new claims are being filed on top of previous ones, there have been a number of ownership conflicts.¹⁵⁴ Other difficulties associated with the manual information recording system include:

- difficulties with revenue collection due to the management of manual documents;
- poor quality of paper-based data to the extent that some information becomes difficult to read over time
- limited spatial data availability;
- limited license data across the country; and difficulties engaging stakeholders.

- Increased Parliamentary Oversight

Parliament should actively investigate mining sector contracts. Where Parliament receives mining sector reports from the Ministry of Mines, it is anticipated that Parliamentary scrutiny and debate would then be undertaken within Parliamentary sittings and/or by one or more Parliamentary committees established for that purpose. Setting the express parameters for how Parliament might exercise scrutiny would probably require explicit, comprehensive standalone legislation.

The Labour Act is another legal instrument impacting the mining in Zimbabwe in relation to the UNGPs on Business and Human Rights. There are proposals to amend the Labour Act, which will significantly impact the mining sector in Zimbabwe. As the mining sector has been riddled with reports of violations of workers' rights, the amendment can bring welcome changes to the sector. The draft Bill proposes to amend Section 2 of the Act by including the definitions of "gender-based violence and harassment" and "violence and harassment". The addition of these definitions expands the protection given to employees from the actions of their employers or other employees in instances where these violations have been taking place. Another proposed amendment is that of Section 11 (Employment of young persons) by

¹⁵³ Adopt cadastre system to eliminate conflicts, ZELA urges mines ministry <https://cite.org.zw/adopt-cadastre-system-to-eliminate-conflicts-zela-urges-mines-ministry/>

¹⁵⁴ Southern Africa Resource Watch (SARW), *Artisanal miners robbed in broad daylight: Zimbabwe gold monopoly as a conduit to canalize forex and cannibalize bodies*.

increasing the penalty for a person found guilty of conducting child labour from two to ten years with a view to providing a more deterrent sanction given the backdrop of increasing trade sanctions on goods produced in child labour prone markets such as the mining sector in Zimbabwe.

Chapter 5: Conclusion and Recommendations

5.1 Introduction

The need for mining to contribute to national economic growth is undeniable. With the abundance of natural resources in Zimbabwe, it is necessary to exploit the natural resource for sustainable development. The exploitation of the mineral resources, however, should be guided by the parameters of the UNGPs on business and human rights.

5.2 Summary of Major Arguments

Undoubtedly, mining comes at a large environmental and socio-economic cost if it is not implemented within parameters that are aimed at promoting sustainable development. Where a developing country has vast mineral resources, a weak regulatory framework and an ailing economy, there is a strong chance that businesses that are contracted to carry out natural resource exploitation will negatively impact the human rights of citizens in the country. The potion to cure these ills lies in the UNGPs. The UNGPs are a fundamental instrument in regulating business conduct, especially in the mining sector. Their value lies in their comprehensive and elucidatory nature that provides State and non- State actors with the practical steps they need to take to ensure that they are protecting and respecting human rights, respectively.

5.3 Summary of Main Findings

In Zimbabwe, it is very apparent that there are major human rights violations that are occurring in the mining sector owing to the gaps in the legislative framework that regulates this sector. The sector is also riddled with corruption, occupational health and safety violations, inadequate corporate social responsibility, environmental degradation, and labour rights violations. Whilst these social ills are adequately documented the policy and legislative gaps facilitate the continuance of these violations. As such, only mining companies listed on the stock exchange are bound by the regulations on ESG reporting whilst most of the mining sector

enterprises continue to operate outside of these parameters. The economic situation in the country further contributes to the desperate need for investors in the mining sector and with the aims of fulfilling the targets set for the mining economy, the State is prioritizing investor interests and the expense of long-term sustainable development goals.

5.4 Recommendations

5.4.1 Expand the regime for civil remedies for communities

The conflict that arises in mining affected communities arises from the lack of adequate civil remedies to deal with environmental and human rights violations. It is necessary to provide for civil remedies where there are these kinds of violations resulting from mining activities.

5.4.2 Addressing regulatory gaps

By amending key legislation in Zimbabwe, the UNGP principles are effectively implemented as a well-crafted law that provides duties, obligations and remedies and penalties, fulfilling all pillars of the framework. This includes the amendment of Acts such as the Mines and Minerals Act, the Labour Act, the Environmental Management Act, and laws relating to community land rights protection.

5.4.3 Enactment of a law to mandate contract transparency and disclosure in awarding mining contracts

There is a need for public disclosure of contracts for the complete assessment of the implementation of the UNGPs, particularly the duty of the state and the corporate responsibility to respect human rights. This can only be facilitated where there is contract transparency that further facilitates accountability. Contract negotiation processes between a host State and a business investor in the mining sector must be clear so that there is easy identification of risks which can be avoided and/ or mitigated.

5.4.5 Mainstreaming the UNGPs for increased awareness by various stakeholders, including key government institutions

By mainstreaming UNGPs, there is the likelihood of an increased understanding of the UNGPs amongst the various stakeholders. This would facilitate the bridging of the gap between legislative and policy provisions and the actual implementation of these principles.

5.4. 6 Development of a code of conduct for investors through regulations to the ZIDA Act

Whilst the ZIDA Act is currently functional and provides for clauses aimed at guiding investors, there is a need for the development of a code of conduct for investors in the mining sector in Zimbabwe. This code of conduct can be made part of the existing legislation through the enactment of regulations that outline what is expected of investors, including those in the mining sector. In this way, there is the implementation of the UNGPs in a practical manner that is easy to track performance.

5.4.7 Establishment of a department for ESG reporting within the Zimbabwe Investment Development Agency

Mining investors who obtain licences through the Ministry of Mines and have complied with the requirements of the ZIDA Act still find a loophole to escape issues of ESG reporting if they are not listed on stock exchanges that mandate them to report on such. An ESG department within the ZIDA will assist in monitoring the investors in the mining sector and mandate them to take into consideration ESG issues.

5.4.8 Establishment of ESG certification as a precondition before granting an export licence

By making an ESG certification a precondition for granting an export licence, there is a guarantee that ESG requirements are being followed and implemented by the

mining companies operating in Zimbabwe. This is an effective way to ensure that the corporate duty to respect human rights is being complied with beyond the inception of the mineral extraction activities.

5.5 Conclusion

For Zimbabwe, the presence of vast natural resource deposits presents an opportunity for economic development through investment in this sector. The mining sector presents the potential to catalyse economic growth. The problem is not in the extraction of mineral resources as the benefit of such extraction is without a doubt. The problem lies in the impact of the extraction owing to the legal and socio-economic framework within which the extraction takes place. The problem not only lies with the mineral extracting companies. The problem is exacerbated by the institutions in place that are responsible for negotiating contracts, issuing mining licenses and inspections of mineral resource extraction activities. Their lack of sufficient capacity contributes to social problems in the mining sector in Zimbabwe.¹⁵⁵ Businesses, if left unregulated, will maximise profits at all costs. Communities on the other hand, should also understand the role that business plays in infrastructure and social service delivery. This balancing act can only be necessitated through the full implementation of the Guiding Principles on Business and Human Rights.

¹⁵⁵ C Okoloise, (n 116 above) p .g 113

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