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TOPIC

Critical analysis of the State`s duty to provide for the right to adequate housing to protect communities displaced by the extractives industry in Zimbabwe.

DECLARATION

I, Tawanda John Chakabva, hereby declare that this dissertation is my original work, and was done in accordance with the rules and regulations of the University of Zimbabwe for the Master of Laws (LLM) degree. This dissertation has never been submitted to any other university or institution.

This declaration is made on this 16th day of August 2020

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DEDICATION

I dedicate this dissertation to the Lord Almighty. We are His workmanship with a duty to use whatever gifts we have received to serve others. May this dissertation play its part in the eradication of the “natural resource curse”.

I also dedicate this dissertation to my beloved wife, mother, brothers and sisters. *(Tiriparwendo rwenyasha)*. I also dedicate this dissertation to my Late father and brother.

This degree is incomplete without my fellow classmates and friends. May we carry forward our debates into the legal fraternity and transform it towards world class standards.

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ACRONYMS, ABBREVIATIONS AND FULL CITATIONS

ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
CESCR	United Nations Committee on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights, 1966
CRC	United Nations Convention on the Rights of the Child, 1990
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women, 1979
CRPD	Convention on the Rights of Persons with Disabilities, 2008
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1969
ACHPR	African Charter on Human and Peoples` Rights
African Women`s Protocol	Protocol to the African Charter on Human and Peoples` Rights on the Rights of Women in African of 2003
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009
African Children`s Charter	African Charter on the Rights and Welfare of the Child, 1990
General Comment Number 3	CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23)
General Comment Number 4	CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23)
General Comment Number 7	CESCR General Comment Number 7, *The right to adequate housing* (Art.11.1): forced evictions: 20/05/97. Adopted at the Sixteenth Session in 1997
Basic Principles and Guidelines on Development-Based Evictions And Displacement	Basic Principles and Guidelines on Development-Based Evictions And Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18.

Constitution of Zimbabwe	Constitution of Zimbabwe Amendment (No.20) Act, 2013
Mines and Minerals Act	Mines and Minerals Act [Chapter 21:05]
Environmental Management Act	Environmental Management Act [Chapter 20:27]
Land Acquisition Act	Land Acquisition Act [Chapter 20:10]
Rural District Councils Act	Rural District Councils Act [Chapter 29:13]
Land Commission Act	Land Commission Act [Chapter 20:29]
Communal Lands Act	Communal Lands Act [Chapter 20:04]
Constitution of South Africa	Constitution of South Africa Act 108 of 1996
Constitution of Kenya	Constitution of Kenya, 2010

CHAPTER ONE
INTRODUCTION

1.1. INTRODUCTION

The **International Covenant on Economic, Social and Cultural Rights of 1966** (hereinafter referred to as the ICESCR) provides for the right to adequate housing as an element essential for guaranteeing an adequate standard of living.[1] According to *Byrne and Culhane*, the right to adequate housing obtains legitimacy from international consensus by States that the right is necessary for guaranteeing human dignity.[2] International human rights instruments require States to guarantee the right to adequate housing.[3] On the other hand, States are also desirous of pursuing economic interests by facilitating the creation and development of the extractives industry. This results in States being faced with a dilemma, as the extractives industry causes displacement of communities and violation of housing rights.[4]

According to Sigam and Garcia, the term "*extractives industry*" refers to *"processes that involve different activities that lead to the extraction of raw materials from the earth (such as oil, metals, minerals and aggregates), processing and utilization by consumers".*[5] This industry involves activities such as

[1] Article 11 (1) of the International Convention on Economic, Social and Cultural Rights (1966), and CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)
Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23). paragraph 1

[2] T Byrne & D P Culhane, *Right to Housing: An Effective Means for Addressing Homelessness*, The Edward V. Sparer Symposium Issue: Partnering against Poverty: Examining Cross-Disciplinary Approaches to Public Interest Lawyering, 2011. Vol 14 No. 3 University of Pennsylvania Journal of Law and Social Change 381.

[3] Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights; General Comment No. 4 (n1 above) paragraph 1

[4] Basic Principles and Guidelines On Development-Based Evictions And Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, A/HRC/4/18. paragraph 8

[5] C Sigam & L Garcia, *Extractive Industries: Optimizing Value Retention In Host Countries*, United Nations Conference on Trade and Development, New York and Geneva, 2012. 3. Accessed 8th of February 2020. https://unctad.org/en/PublicationsLibrary/suc2012d1_en.pdf

mining, quarrying and extraction of petroleum products, oil and gas.[6] To pave the way for these activities, communities may be forcibly relocated from their homes.[7] Displacement and relocation of people occurs as a result of the expropriation of residential or farmland to facilitate the extraction of raw materials. In such circumstances, people may be forcibly displaced from their homes and relocated to new sites, with or without provision of suitable alternative accommodation.[8] This phenomenon necessitates research on whether the laws of Zimbabwe that regulate the extractives industry appropriately guarantee the right to adequate housing for people who are forcibly displaced or evicted.

Constitution of Zimbabwe Amendment (No. 20) Act, 2013, (hereinafter referred to as the Constitution of Zimbabwe) does not provide for the right to adequate housing. It only makes provision for a national objective on "adequate shelter".[9] This is despite the International Covenant on Economic, Social and Cultural Rights of 1966, requiring States to *inter alia* adopt legislative measures to guarantee the right to adequate housing.[10]

The extractives industry in Zimbabwe is governed by the **Mines and Minerals Act [Chapter 21:05]** which *inter alia* gives miners rights to engage in mining. **The Environmental Management Act [Chapter 20:27]** also regulates mining activities and requires sustainable management of natural resources and provides norms that regulate and ensure environmental conservation. Land tenure in Zimbabwe is governed by numerous laws which include the **Constitution of Zimbabwe, Land Acquisition Act [Chapter 20:10]**, **Rural District Councils Act [Chapter 29:13]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]** which *inter alia* enunciate the State`s power to compulsorily acquire land, and the rights displaced persons have when land is acquired.

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[6] Sigam & Garcia, (n 5 above)

[7] J Giorgi & J Klos, *A review of the legal framework in Zimbabwe relating to the protection of IDPs*, Internal Displacement Monitoring Centre, 2014. 9. Accessed 8th of February 2020. https://www.internal-displacement.org/publications/a-review-of-the-legal-framework-in-zimbabwe-relating-to-the-protection-of-idps

[8] Basic Principles and Guidelines On Development-Based Evictions And Displacement (n 4 above)

[9] Section 28 of the Constitution of Zimbabwe

[10] General Comment No. 4 (n 1 above). Paragraph 8

This dissertation seeks to establish the nature of the doctrine underpinning the right to adequate housing, whether laws regulating the extractives industry in Zimbabwe comply with this doctrine, and how the adequacy of these laws may be improved to enhance the protection of communities who are displaced by the extractives industry.

1.2. BACKGROUND

The extractives industry in Zimbabwe has diverse operators who include individuals, government, and private companies. This industry is important for *inter alia* foreign currency generation, employment, and economic development.[11] For instance, in 2016, Zimbabwe contributed an estimate of 7.8% of the world's platinum production, 5.7% of the world's palladium, 1.7% of the world's diamond weight.[12] Zimbabwe was the world's fifth-ranked producer of palladium, third-ranked producer of platinum, and eighth-ranked producer of diamonds.[13] Despite the myriad of benefits to the economy of Zimbabwe, mining has resulted in the forced displacement of communities who are in occupation of land where minerals have been discovered.[14] An example is the Marange community who were relocated following the discovery of diamonds.[15] Some scholars and non-governmental organisations have noted that when communities are forcibly relocated there is inadequate provision of suitable alternative housing, which threatens the full enjoyment of property rights, family life, human health and human dignity.[16]

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[11] Zimbabwe Mining Potential Booklet, Ministry of Mines, 2018. 14. Accessed on the 15th of February 2020. https://miningzimbabwe.com/wp-content/uploads/2018/12/Mining%20Zimbabwe%20November%202018%20compressed.pdf

[12] JJ Barry, *The Mineral Industry of Zimbabwe.* 2016 Mineral Year Book, U.S. Geological Survey, 2020. 42.1. Accessed on the 8th of February 2020. https://prd-wret.s3.us-west-2.amazonaws.com/assets/palladium/production/atoms/files/myb3-2016-zi.pdf

[13] Barry (n 12 above)

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

[15] Madebwe & Mavusa (n 14 above) 292

[16] Giorgi & Klos (n 7 above). 72 -74.

1.3. PROBLEM STATEMENT

Zimbabwe is a party to international and regional human rights instruments such as the **International Covenant on Economic, Social and Cultural Rights (1966)**, the **African Charter on the Rights and Welfare of the Child (1990)**, and the **Protocol to the African Charter on Human and Peoples` Rights on the Rights of Women in African (2003)** which place an obligation on States to make provision for the right to adequate housing. The Zimbabwean Constitution does not guarantee the right to adequate housing but only provides for "adequate shelter" as a national objective, which is not fully justiciable as a standalone legal right and is limited to influencing policy decisions and law reform.[17] This makes it difficult for communities displaced by mining activities to enforce their right to adequate housing in courts.

The International Covenant on Economic, Social and Cultural Rights also provides that regardless of their level of development, States have a responsibility to ensure the satisfaction of the minimum core obligation that guarantees the realisation of the minimum essential levels of each of the rights enshrined in the Covenant.[18] According to the Committee on Economic, Social and Cultural Rights, "*a State in which any significant number of individuals are deprived of basic shelter and housing is prima facie failing to perform its obligations under the Covenant*".[19] The principle of 'minimum core obligation' is important in measuring compliance with treaty obligations and in determining when violations of economic, social and cultural rights occur. Zimbabwe is not meeting its minimum core obligation on the right to adequate housing as spelt out in the International Covenant on Economic, Social and Cultural Rights as numerous people have been displaced by mining without provision of suitable alternative housing.[20]

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[17] Section 28 of the Constitution of Zimbabwe, as read with section 8 of the Constitution of Zimbabwe.

[18] See United Nations Human Settlements Programme (UN-HABITAT), Office of the High Commissioner for Human Rights (OHCHR) (2002), *Housing Rights Legislation. Review of international and national Instruments*. United Nations Housing Progress Report No.1. 21. Accessed on 13 February 2020. https://www.ohchr.org/Documents/Publications/HousingRightsen.pdf

[19] General Comment No. 4 (n 1 above). paragraph 10

[20] Madebwe & Mavusa (n 14 above) 293-298

A further facet of this problem is that title to communal and State land vests in the State.[21]This has resulted in weak security of tenure, where people are easily displaced from their land.[22] The rights that are enjoyed by communities in communal areas and State land are not real rights, but rather, merely rights to use the land.[23] These rights include rights to engage in farming and build a homestead. Lack of title has resulted in the displacement of some communities without payment of fair compensation.[24] Furthermore, the State also has unlimited power to compulsorily acquire land held under title deeds without providing alternative housing and land.[25]

These problems necessitate research on the nature of Zimbabwe`s obligations under international human rights treaties which enunciate the nature of housing rights, and an assessment of whether Zimbabwe is complying with its obligations, and how the laws of Zimbabwe can be improved.

1.4. RESEARCH OBJECTIVES

The objectives of this research were to:-

- **i.** Establish the normative content of the right to adequate housing as provided for under international and regional human rights instruments;
- **ii.** Assess whether the Constitution of Zimbabwe and laws that regulate the extractives industry comply with international and regional human rights instruments in providing for the right to adequate housing for people who are displaced by the extractives industry; and
- **iii.** Establish necessary legal mechanisms through which the State can fulfil its duty to protect communities from violations of the right to adequate housing by the extractives industry.

[21] Section 4 of the Communal Land Act [Chapter 20:04].

[22]"*Extractive Industries Policy and Legal Handbook*". Zimbabwe Environmental Law Association, 2011. 21-22. Accessed on the 20th of February 2020. http://www.zela.org/publications/

[23] Extractive Industries Policy and Legal Handbook(n22 above) 21-22.

[24] Extractive Industries Policy and Legal Handbook(n22 above) 21-22.

[25] Section 72 of the Constitution of Zimbabwe.

1.5. MAIN RESEARCH QUESTIONS

This study is centred on an investigation of the following questions:-

1. What is the nature of the doctrine of the right to adequate housing?
2. Does Zimbabwe comply with principles embedded in international and regional human rights instruments in guaranteeing adequate housing for people who are displaced by the extractives industry?
3. Does legislation that regulates the extractives industry in Zimbabwe adequately protect the right to adequate housing for communities displaced by the extractives industry?
4. How can laws that regulate the extractives industry in Zimbabwe be improved to guarantee housing rights for displaced communities?

1.6. IMPORTANCE OF THE STUDY

This study examines the nature of the right to adequate housing and the adequacy of the laws of Zimbabwe in providing for the right to adequate housing. This study is important for law reform and is an invaluable contribution to the literature on the subject. This study also reviews whether Zimbabwe is complying with its international and regional human rights obligations in providing for the right to adequate housing. Furthermore, this study attempts to establish how to balance the State's obligation to protect displaced persons and national economic objectives underpinning the extractives industry. This is important as Zimbabwe is a nation endowed with vast mineral wealth, and it is reasonable to anticipate the continued displacement of people as a result of the extractives industry.

1.7. SCOPE OF THE STUDY

This dissertation assesses the adequacy of the laws in Zimbabwe in preventing and remedying violations of housing rights caused by the extractives industry and explores methods through which the law may be improved. The scope of this

study involves an assessment of whether Zimbabwe is complying with the **International Covenant on Economic, Social and Cultural**; principles in the **United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement**,[26] and the **African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa** (2009) (hereinafter referred to as the Kampala Convention), which provide minimum standards on the provision of alternative housing for communities displaced by the extractives industry.

The analysis canvasses constitutional provisions and statutes that regulate the extractives industry in Zimbabwe. These include the **Constitution of Zimbabwe**, the **Mines and Minerals Act [Chapter 21:05]**, **Environmental Management Act [Chapter 20:27]**, **Land Acquisition Act [Chapter 20:10]**, **Rural District Councils Act [Chapter 29:13]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]**. This dissertation explores and assesses the extent to which substantive and procedural mechanisms guaranteeing adequate housing have been incorporated into existing laws, identifies gaps in the legal framework, and establishes how those gaps can be resolved.

1.8. HYPOTHESIS

This dissertation is premised on the following hypothesis:-

- **i.** The State must protect communities from being arbitrarily evicted or displaced, and also prevent violation of the right to adequate housing which occurs as a result of the extractives industry.
- **ii.** The obligation on the State to guarantee the right to adequate housing requires legal provisions that extend beyond constitutional rights but which are also incorporated into Acts of Parliament.
- **iii.** The protection of people displaced by the extractives industry requires the State to guarantee the provision of effective legal remedies.

[26] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above).

1.9. METHODOLOGY

This dissertation is based on doctrinal research to ascertain the principles underpinning the right to adequate housing, and an analysis of whether the State is complying with its obligation to provide the right to adequate housing in laws that regulate the extractives industry in Zimbabwe. The dissertation is premised on a combination of problem-based doctrinal research and comparative legal research.

The research involves qualitative study, based on desk research centred on primary and secondary sources. There was an assessment of primary sources such as constitutions, statutes, international human rights instruments, and case law. The study also utilized key informant interviews drawn from the legal profession, community leaders in affected societies, miners, government representatives and leading academics who have relevant knowledge and experience. Secondary sources which were utilised include the analysis of journal articles, authoritative textbooks and publications by eminent jurists, scholars and previous studies by non-governmental organisations.

The approach involved an examination of international and regional human rights instruments to establish principles which formulate the right to adequate housing. A comparative study was also done between Zimbabwe`s legal system and the laws of other countries that have informative legal provisions, particularly South Africa and Kenya.

1.10. LIMITATIONS

Due to time limitations, this study was premised on desk research without fieldwork in affected communities which would have assisted in assessing the impact of the extractives industry on communities` housing rights. This study was also limited to case studies and surveys done by other organisations and persons whose objectives were different from the primary objectives of this study.

1.11. OVERVIEW OF CHAPTERS

This dissertation is divided into five chapters as follows:-

1.12. CHAPTER ONE: INTRODUCTION

This chapter demarcates the issues for research, the research objectives, underscores the importance of the study, sets out the methodology, limitations, and provides an overview of the chapters in the dissertation.

1.13. CHAPTER TWO: LITERATURE REVIEW ON THE RIGHT TO ADEQUATE HOUSING AND DISPLACEMENT BY THE EXTRACTIVES INDUSTRY

Chapter two contains a review of relevant literature by setting out the main theories, doctrines, and principles on the right to adequate housing. This chapter delineates the normative content of the right to adequate housing, and the typology of obligations with special focus on the duty of the State to provide a legal right to adequate housing. Chapter two also contains an examination of literature on how the right to adequate housing may be secured within the framework governing development-based evictions, and environmental rights. This chapter also contains a review of literature on the impact of mining on the right to adequate housing in Zimbabwe, and a synopsis of relevant laws in Zimbabwe that govern mining and land tenure.

1.14. CHAPTER THREE: METHODOLOGY

Chapter three contains the methodology employed in the research, documents the research approach, research design, and data collection methods that were employed. This chapter also contains an explanation on the nature of the desk study, that is, how primary and secondary data was collected and analyzed, and limitations in the authenticity of the sources.

1.15. CHAPTER FOUR: ANALYSIS OF LAWS GOVERNING THE EXTRACTIVES INDUSTRY IN ZIMBABWE

Chapter four is divided into two sections. The first section provides findings made during the research, and enunciates the gaps and lacunae in the laws of Zimbabwe. The second section contains an analysis of the findings.

This Chapter seeks to elucidate whether Zimbabwe complies with the **International Covenant on Economic, Social and Cultural Rights, the Basic Principles and Guidelines on Development-Based Evictions and Displacement, and the Kampala Convention**. The assessment pertains the **Constitution of Zimbabwe** and relevant Acts of Parliament. The analysis of the Constitution of Zimbabwe canvasses section 28 which provides adequate shelter as a national objective; section 71 of the Constitution on the right to property; section 72 of the Constitution on the right to agricultural land; and section 74 that provides for the freedom against arbitrary evictions. Acts of Parliament upon which this research was based are the **Mines and Minerals Act [Chapter 21:05]**, **Environmental Management Act [Chapter 20:27]**, **Land Acquisition Act [Chapter 20:10]**, **Rural District Councils Act [Chapter 29:13]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]**.

1.16. CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

Chapter five contains conclusions and recommendations on the research issues. This Chapter contains an assessment on whether the research has achieved the research objectives, as well as conclusions and recommendations on proposed changes to the laws of Zimbabwe. This chapter also highlights the writers` academic contribution and possible further research areas.

CHAPTER TWO

LITERATURE REVIEW ON THE RIGHT TO ADEQUATE HOUSING AND DISPLACEMENT OF COMMUNITIES

2.1. INTRODUCTION

This chapter contains a review of literature on the nature of the right to adequate housing and the mechanisms through which the right can be fulfilled in the context of displacement of communities as a result of the extractives industry. This chapter is divided into two sections. The first section contains the review of literature on the conceptual framework of the right to adequate housing under international human rights instruments. The second section contains the literature review on how housing rights can be fulfilled within the context of international standards applicable to the development-based evictions.

2.2. LITERATURE RESEARCH STRATEGY

The research strategy was premised on a structured approach, which involved the assessment of textbooks, journals, internet databases, case law, treaties and literature as stated below.

RESEARCH PROCESS

STAGE 1	Identified relevant sub-topics	The right to adequate housing under international human rights law; Sustainable development and the right to adequate housing; Natural resource governance and the right to housing; Zimbabwe`s obligation to provide for the right to adequate housing, the right to adequate housing and forced evictions by the extractives industry. Principles on mining-induced displacement
STAGE 2	Conducted searches using keywords or topics	Conducted manual research at the University of Zimbabwe library, and using internet-based sources. Read and analyzed journal articles from Zimbabwe, South Africa, Kenya, England, America, and other relevant jurisdictions.

STAGE 3	Read and reviewed all references. Selected relevant sources	Selected recent literature that was written within the last ten years, or most cited or peer-reviewed articles. Adopted most authoritative sources (such as from the United Nations treaty monitoring bodies, and the African human rights system), case law databases. (e.g. African Commission on Human and Peoples` Rights)
STAGE 4	Organized and synthesized data	Wrote as per section one and two below

SECTION ONE

2.3. THEORETIC FRAMEWORK

John Locke opined in "*Two Treatises on Government"* that the "law of nature" bestows upon individuals with rights to life, health, liberty and property which everyone is equally entitled to enjoy.[27] According to Locke, the sovereign has a fiduciary duty to respect and uphold rights, including through legislative power.[28] Locke posits that people are in a social contract with the government, and government must exercise oversight over the welfare of its citizens, and any act is wrong if it infringes peoples' rights.[29]

The natural law school has been challenged by positivists such as Bentham who stated that the idea of natural rights which originate from some source which is not the legal system itself is nonsense upon stilts, as there are no rights except those created by the legal system, and recognising a non-legal source for rights results in ambiguity.[30] Bentham further stated that the law is the "command of the sovereign", and remains law irrespective of its moral content.[31] Whilst positivism is useful in addressing the problem with enforcing non-legal norms, it is shallow in

[27] J Locke, *Two Treatises of Government, London*, Prepared by Rod Hay for the McMaster University Archive of the History of Economic Thought, 1823. 107. Accessed on 10th of February 2020. https://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf

[28] Locke (n 27 above) 162 -167.

[29] Locke (n 27 above) 107

[30] D Meyerson, *Understanding Jurisprudence*, Oxon and New York, Routledge-Cavendish, 2007. 138.

[31] Meyerson (n 30 above)

ensuring that States address issues of social justice and equity which are necessary for the welfare of citizens.

The social contract theory thus justifies limiting and regulating the power of the State and pursuing the welfare of citizens. Heard posits that natural law was instrumental in inspiring modern human rights, but he does not adopt the position of rights originating from some transcendental source.[32] He offers a more practical thesis that human rights are the product of international conventions.[33]

2.4. INTERNATIONAL TREATIES AND INSTRUMENTS ON THE RIGHT TO ADEQUATE HOUSING

Chenwi posits that the right to adequate housing has its origin in the **Universal Declaration of Human Rights** and was subsequently reaffirmed by various international and regional human rights instruments.[34] Article 25 of the **Universal Declaration of Human Rights of 1948** provides that everyone "*has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and necessary social services".*[35] According to Hannum, the Universal Declaration of Human Rights has become a source of rights that have been incorporated into the domestic laws of various countries.[36]

Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 (hereinafter referred to as the ICESCR) also provides that "*state parties to the present Covenant recognize the right of everyone to an adequate*

[32] A. Heard, "*Human Rights: Chimeras In Sheep's Clothing?* " https://www.sfu.ca/~aheard/intro.html. Accessed 10th of February 2020

[33] Heard (n 32 above)

[34] L Chenwi, *The right to adequate housing in the African regional human rights system: Convergence between the African Commission and South African approaches.* Law Democracy and Development Publication. 2013, Vol 12.343.

[35] Universal Declaration of Human Rights, Article 25(1).

[36] H Hannum, *The UDHR In National And International Law*. *Health and Human Rights, Fiftieth Anniversary of the Universal Declaration of Human Rights*, *3 No. 2 (1998) 146.* https://cdn2.sph.harvard.edu/wp-content/uploads/sites/125/2014/04/16-Hannum.pdf

standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions". Zimbabwe ratified this Covenant in 1991 and should thus provide for the right to adequate housing.[37] The provision of the right to adequate housing is necessary for all people, and there should be special mechanisms to protect vulnerable and marginalized groups such as children, women, and persons living with disabilities.[38] Such groups require special protection due to them being disproportionately affected by violations of the right to housing.

Other international treaties and instruments, drawn from a list published by the Office of the High Commissioner for Human Settlements[39] (as personally updated with regional instruments) that are relevant and reaffirm the right to adequate housing are stated hereunder.

Article 17 of the **International Covenant on Civil and Political Rights (1966**), requires that no person should be subject to unlawful and arbitrary interference with their homes. **The Convention on the Rights of the Child (1990)** (hereinafter referred to as the CRC), in Article 27, requires States to recognize *"the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development".* Article 14(2)(h) of the **Convention on the Elimination of all Forms of Discrimination against Women (1979)** (hereinafter referred to as CEDAW) requires States to ensure the eradication of discrimination of women in rural areas, and ensure they realise "*the right to enjoy adequate living conditions*".

Article 28 of the **Convention on the Right of Persons with Disabilities (2008)** (hereinafter referred to as CRPD) also requires the realisation of an adequate standard of living and the social protection of people who live with disabilities. Article 5 (e)(iii) of the **International Convention on the Elimination of All Forms**

[37] AK Tibaijuka, *Report of the Fact-Finding Mission to Zimbabwe to assess the extent and impact of Operation Murambatsvina*. United Nations Special Envoy on Human Settlements Issues in Zimbabwe, 2005. 57.

[38] Chenwi (n 34 above) 351-352.

[39] See United Nations Human Settlements Programme (UN-HABITAT), Office of the High Commissioner for Human Rights (OHCHR) (2002), *Housing Rights Legislation. Review of international and national Instruments* (n 18 above). 2-3.

of Racial Discrimination (1969) (hereinafter referred to as ICERD) prohibits discrimination on *inter alia* housing issues, on grounds which include ethnic origin, race, colour, or nationality.

Article 3 of the **International Labour Organisation, Indigenous and Tribal Peoples Convention, 1989** (No. 169) requires the protection of the human rights of indigenous and tribal people.

The **African Charter on Human and Peoples` Rights, 1981** (hereinafter referred to as the African Charter) does not have an express provision on the right to housing. Despite this, in the case of ***Social and Economic Action Centre and the Centre for Economic and Social Rights v Nigeria,***[40] (hereinafter referred to as the SERAC case) the African Commission on Human and Peoples Rights held that the right is implied from the combination of Articles 14, 16 and 18(1) protecting rights to the best attainable state of mental and physical health, the right to property, and the protection accorded to the family, which jointly forbid the wanton destruction of shelter because it adversely affects property, health, and family life.[41] Article 20(2) (a) of the **African Charter on the Rights and Welfare of the Child (1990)** (hereinafter referred to as the African Children`s Charter) also requires States to take appropriate measures to assist *"parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly concerning… housing"*. This provision is an obligation on States, directed at assisting parents and persons responsible for the upkeep of children.

**The Protocol to the African Charter on Human and Peoples` Rights on the Rights of Women in African (2003)** (hereinafter referred to as the African Women`s Protocol) also requires that there be "*equal access to housing and acceptable living conditions in a healthy environment*".[42]

[40] Communication 155/96, Social and Economic Action Centre and the Centre for Economic and Social Rights v Nigeria.

[41] SERAC case (n 40 above) paragraph 60.

[42] Article 16 of the Protocol to the African Charter on Human and Peoples` Rights on the Rights of Women in African of 2003.

Housing rights have also been recognised and advocated for in other fields apart from human rights, such as resource governance and environmental law. **Agenda 21 of 1992**,[43] **the Habitat Agenda of 1996**,[44] and the **Vancouver Declaration on Human Settlements of 1976** support the position in the **Global Strategy for Shelter (2000)** which provides that:-

> *"the right to adequate housing is universally recognized by the community of nations…All nations without exception, have some form of obligation in the shelter sector…All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage and destroy them."*[45]

In paragraph 61 of the Habitat Agenda of 1996, in which Zimbabwe participated, Governments accepted their responsibility to ensure the realisation of the right to adequate housing. Therein States further accepted obligations which *inter alia* include the enactment of legislation that ensures non-discrimination in the housing sector, the provision of legal security of tenure, equal access to land by all including women, adoption of policies to guarantee access to housing, and establishing monitoring mechanisms.

The right to adequate housing is also important within the framework of **Sustainable Development Goals (SDG)**.[46] SDG 1 requires an end to poverty in all its forms by 2030. Homelessness is a form of extreme poverty which results from displacement.[47] SDG 2 requires that steps should be taken to guarantee food security. Securing housing rights for rural communities in Zimbabwe engaged in

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[43] United Nations Conference on Environment & Development Rio de Janerio, Brazil, 3 to 14 June 1992 AGENDA 21, Chapter 7. Paragraph 7.6 Accessed 12th of February 2020. https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf

[44] Republic of Zimbabwe Country Report Habitat III. 5.; Zimbabwe participated in the Habitat Agenda of 1996.

[45] Point 13 of the Global Strategy for Shelter to the Year 2000.

[46] https://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf. Accessed 15th of February 2020

[47] B Terminski, *Development-Induced Displacement And Resettlement: Theoretical Frameworks And Current Challenges*. Geneva, May 2013. 31. Accessed 15th of February 2020 https://www.researchgate.net/publication/320907988_Development-Induced_Displacement_and_Resettlement_Theoretical_Frameworks_and_Current_Challenges

farming activities would help achieve this goal. SDG 11 also requires inclusive, safe, resilient and sustainable cities and human settlements.[48]

2.5. MEANING OF "ADEQUATE HOUSING"

Byrne and Culhane posit that the term "housing" is prone to ambiguity due to the various types of residential accommodation that qualify to be designated as a house.[49] They, however, agree that there is a need for a clear definition of the term "housing" for purposes of establishing violations.[50] The meaning of the term "housing" is best elucidated in *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)* by the Committee on Economic, Social and Cultural Rights.[51] General Comment Number 4 provides that the term "housing" should not be interpreted in a narrow manner that merely equates it with shelter which refers to having a place to live.[52] The correct approach should be to focus on the right to live somewhere *"in peace, security and dignity*".[53] General Comment Number 4 further requires that there should be the provision of "adequate housing" which entails "*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost*".[54] Essentially, legislation that seeks to provide for the right to adequate housing must focus not only on access to shelter but on adequate housing.

Housing rights are elaborated in General Comments by the United Nations Committee on Economic, Social and Cultural Rights. Bodig posits that *"General Comments"* are recommendations by treaty monitoring bodies which are "soft law" as they are not directly binding.[55] *Bodig*, however, recognises the importance of

[48] See also Habitat III, the U.N. Conference on Housing and Sustainable Urban Development, and its Resolution 66/207.

[49] Note 2 above, 380.

[50] Note 2 above, 380.

[51] CESCR General Comment No. 4 (n1 above)

[52] General Comment No. 4 (n 1 above). paragraph 7.

[53] General Comment No. 4 (n 1 above). paragraph 7.

[54] General Comment No. 4 (n 1 above).

[55] S Lagoutte , T Gammeltoft-Hansen and J Cerone , *Tracing the Roles of Soft Law in Human Rights*. Oxford University Press, 2016. 72.

General Comments in performing two primary functions which include promoting the implementation of economic, social and cultural rights, and identifying challenges that States face in implementing treaty provisions and assisting them in laying out the nature of their obligations and duties in light of contemporary challenges.[56]

2.6. NORMATIVE CONTENT OF THE RIGHT TO ADEQUATE HOUSING

General Comment Number 4 provides that the right to adequate housing is divisible into entitlements and freedoms.[57] "Entitlements" denotes access to housing which meets required minimum standards, whilst "freedoms" entail freedom from unjustified interference with peoples` families, homes, privacy, and the choice to determine where to establish a residence.[58] General Comment Number 4 also provides that the normative content of the right to adequate housing is also constituted of elements which include security of tenure, availability of services, affordability, accessibility, habitability, location, and cultural adequacy.

2.6.1. Security of Tenure.

This element requires that everyone, regardless of the form of housing, should be afforded legal protection against arbitrary and forced evictions, and whether the occupants own the land or do not.[59] Furthermore, States are required to be proactive and take immediate action aimed at guaranteeing legal protection to everyone.[60]

[56] Lagoutte , Gammeltoft-Hansen and Cerone (n 55 above) 73.

[57] General Comment No. 4 (n 1 above) paragraph 9

[58]General Comment No. 4 (n 1 above) paragraph 9

[59] General Comment No. 4 (n 1 above) paragraph 8

[60] General Comment No. 4 (n 1 above). paragraph 8. see also the African Commission on Human and Peoples` Rights Resolution on the Right to Adequate Housing and Protection from Forced Evictions-ACHPR/Res.231(LII)2012.

2.6.2. Availability

General Comment Number 4 also requires that houses must have facilities essential for comfort, good health, nutrition, and be safe.[61] There must be access to "*sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services*".[62]

2.6.3. Affordability

General Comment Number 4 also requires that the cost of housing should be affordable.[63] Housing-related costs should correspond with income levels, and housing finance or subsidies should be given to those unable to afford housing. General Comment Number 4 also requires that where natural materials are the main building materials, then the State should guarantee they are always available.[64]

2.6.4. Habitability.

"Habitability" entails the provision of housing that is appropriate for human habitation and has adequate physical space; and protection from adverse weather conditions or dangers to health, exposure to diseases and structural hazards.[65] The recommended approach is for houses to be consistent with Health Principles of Housing prepared by the World Health Organisation on the premise that unsafe and inadequate housing is associated with higher morbidity and mortality.[66]

2.6.5. Accessibility.

General Comment Number 4 also requires that houses be accessible to everyone, and policies and laws should also take into account disadvantaged

[61] General Comment No. 4 (n 1 above) paragraph 8 (b).

[62] General Comment No. 4 (n 1 above) paragraph 8 (b).

[63] General Comment No. 4 (n 1 above) paragraph 8(c)

[64] General Comment No. 4 (n 1 above) paragraph 8 (c)

[65] General Comment No. 4 (n 1 above) paragraph 8 (d)

[66] General Comment No. 4 (n 1 above) paragraph 8 (d)

groups such as children, elderly persons, persons living with disabilities, people who are ill and other groups whose circumstances justify prioritization.[67] It is also recommended that national policies should include access to land for landless and impoverished people.[68]

2.6.6. Location

General Comment Number 4 also requires that houses be built on locations which enable easy access to people's places of employment, and providers of social amenities such as healthcare and educational centres.[69] Furthermore, houses should not be built on polluted and dangerous sites which threaten human health.[70] This requirement epitomises the link between housing and environmental rights.

2.6.7. Cultural Adequacy

General Comment Number 4 also requires that policies and laws inculcate and respect cultural identity and diversity underpinning the manner of construction and materials used in building houses.[71] Though not expressly mention in General Comment Number 4, the context of African communities requires that regard be had to the communal nature of housing settlements in rural areas, where settlements are structured to support cultural ties, communal existence and extended family relations.

2.7. OBLIGATIONS OF THE STATE CONCERNING DISPLACED COMMUNITIES

Article 2 of the International Covenant on Economic, Social and Cultural Rights provides that:-

[67] General Comment No. 4 (n 1 above) paragraph 8 (e)

[68] General Comment No. 4 (n 1 above) paragraph 8(e)

[69] General Comment No.4 (n 1 above) paragraph 8 (f).

[70] General Comment No.4 (n 1 above) paragraph 8 (f).

[71] General Comment No.4 (n 1 above) paragraph 8 (g).

> *"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*[72]

States must therefore take deliberate action to ensure the progressive realisation of the right to adequate housing, subject to all available resources.

2.7.1. PROGRESSIVE REALISATION OF THE RIGHT TO HOUSING

General Comment Number 3 provides for the progressive realisation of rights, which involves a step by step approach towards the full and expeditious realisation of rights over time, without necessarily negating the obligation on States to take such action within their immediate power.[73] Retrogressive steps are generally not permitted, and when they occur, they must be fully justified "*by reference to the totality of the rights provided for in the Covenant and the context of the full use of the maximum available resources".*[74] Pertinent to this study is that paragraph 5 of General Comment 3 obligates States to adopt laws which result in a justiciable rights.

Forced evictions require immediate action from the State to prevent evictions. General Comment Number 7 by the Committee on Economic, Social and Cultural Rights, provides that in such instances, a State must prevent forced evictions or guarantee alternative accommodation if evictions occur.[75] This is particularly important when considering the interests of specific groups such as women,

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[72] Article 2(i) of the International Covenant on Economic, Social and Cultural Rights, 1966

[73]CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990 (Contained in Document E/1991/23). Paragraphs 1-3.

[74] General Comment Number 3 (n 73 above) paragraph 9.

[75] CESCR General Comment Number 7, *The right to adequate housing* (Art.11.1): forced evictions: 20/05/97. Paragraphs 9 and 15.

children, elderly persons, youth, and minority groups who suffer disproportionately as a result of forced evictions.[76]

2.7.2. MINIMUM CORE OBLIGATION

General Comment Number 3 requires that there be the provision of a minimum core to serve as a yardstick for the satisfaction of the minimum essential level of each right. Where many individuals in a country fail to enjoy rights in terms of this minimum level, then a State would be failing to satisfy its commitments.[77] The African Commission`s Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights provide that the minimum core obligation for the right to housing imposes three types of obligations upon States, which include the prevention of arbitrary evictions of people; ensuring security of tenure to all people regardless of whether they have title or do not; and guaranteeing the provision of basic shelter.[78]

Principle 18 of the United Nations Guiding Principles on Internal Displacement (2004) also requires the provision of basic shelter. Reference to basic shelter on its own is ambiguous. A less ambiguous provision is Principle 55 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement,[79] which provides that relocation sites must meet the criteria for adequate housing under international human rights law and specifically sets out the normative content of adequate housing similar to that in General Comment Number 4.[80]

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[76] General Comment Number 7 (n 75 above) paragraph 10.

[77] General Comment Number 3 (n 73 above) paragraph 10.

[78] Principle 17 of the African Commission On Human And Peoples' Rights Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights. Accessed on the 21st of February 2020.
https://www.achpr.org/public/Document/file/English/achpr_instr_guide_draft_esc_rights_eng.pdf

[79] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above).

[80] See normative content of the right explained on pages 27-29 above.

2.7.3. MAXIMUM AVAILABLE RESOURCES

General Comment Number 3 also provides that a State is also supposed to utilize all resources at its disposal,[81] and where domestic resources are inadequate States are required to solicit international assistance.[82] Equally, in times of severe resource constraints, whether precipitated by a process of adjustment, economic recession, or by other factors, then vulnerable members of society must be protected through relatively low-cost targeted programmes.[83]

2.7.4. NON-DISCRIMINATION

General Comment Number 3 also provides that States should ensure that there is no discrimination of any kind which negates or impedes the fulfilment of rights. Discrimination is prohibited, whether it is predicated upon considerations such as religion, gender, race, ethnicity, political affiliation or origin.[84]

2.7.5. NEED FOR REMEDIES

General Comment Number 3 also recommends judicial remedies which ensures justiciable rights.[85] This means economic, social and cultural rights are not just issues of policy but should be protected through competent and effective judicial remedies. The justiciability requirement is consistent with the view by numerous scholars who state that arguments such as the technical competence of courts, separation of powers, and non-availability of resources are not justifiable reasons for not having justiciable economic, social and cultural rights.[86] Specific remedies are discussed in the next section of this chapter, concomitant with the concept of displacement.

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[81] General Comment Number 3 (n 73 above) paragraph 10.

[82] General Comment Number 3 (n 73 above) paragraph 13.

[83] General Comment Number 3 (n 73 above) paragraph 12.

[84] Article 2(ii) of the ICESCR.

[85] General Comment Number 3 (n73 above) paragraph 5.

[86] A Nolan, B Porter & M Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal.2009.8-19* *https://www.researchgate.net/publication/228275150_The_Justiciability_of_Social_and_Economic_Rights_An_Updated_Appraisal*

2.8. LIMITATION OF THE RIGHT TO ADEQUATE HOUSING

An examination of international human rights instruments evidences that the right to housing is not absolute. Article 4 of the ICESCR allows the limitation of rights only if the limitation is provided for by law, for furthering the general welfare of society, and only if the limitation is compatible with the nature of the right. Paragraph 5 of General Comment Number 4 requires that the limitation of the right to adequate housing must pursue a legitimate aim, and be strictly necessary for the promotion of the general welfare in a democratic society. Maja highlights that the limitation of rights must be consonant with the proportionality principle, which requires that the means used to limit the right must be proportionate to the aim, and be the least restrictive method used.[87] In the case of ***Hatton v UK*** *No.36022/97(2003) (ECtHR) (13 August 1981) Ser A 44*, the European Court of Human Rights explained that the essence of the concept of proportionality is to ensure a fair balance is struck between the interests of the State and those of the individual.

SECTION TWO

2.9. MINING AND DISPLACEMENT OF COMMUNITIES IN ZIMBABWE

The Office of the High Commissioner for Human Rights postulates that the development-based evictions are often carried out on arguments of serving the "public good", but are done without procedural guarantees or due process necessary to protect human rights including the right to adequate housing.[88] The extractives industry in Zimbabwe results in prodigious economic benefits which are fundamental in generating employment, foreign currency, and contributing to

[87] I Maja, *Limitation of human rights in international law and the Zimbabwean Constitution.* Zimbabwe Electronic Law Journal Volume I, 2016. https://zimlii.org/zw/journal/2016-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/limitation-human-rights-international-law-and

[88] United Nations Human Settlements Programme (UN-HABITAT), Office of the High Commissioner for Human Rights (OHCHR) (2002), *Housing Rights Legislation. Review of international and national Instruments*. (note 18).1. 21.

the Gross Domestic Product.[89] The potential value of the industry is exemplified by the policy launched by the Minister of Mines and Mining Development in 2019 titled "***Strategic Road to the Achievement of US$12 Billion By 2023***" which seeks to generate twelve billion United States dollars by 2023.[90] The mining industry contributes about 8 per cent of Zimbabwe`s Gross Domestic Product,[91] and generates employment for thousands of people across the country. The significance of mining has meant that it is central to the national economy, which gives it potential dominance over human rights issues. The extractives industry has resulted in the violation of housing rights and displacement, in a phenomenon described by scholars such as the "natural resource curse", where there is an inverse relationship between natural resource abundance and economic growth.[92]

Madebwe and Mavusa state that:-

> *"Displacement is an unintended negative externality of developmental projects. Displacement by development projects is the single largest cause of involuntary migration in the world. Cumulatively development projects rather than war cause the greatest population movement."*[93]

Downing highlights that mining-induced displacement poses risks to societal sustainability of host communities through their eviction and also results in loss of productive lands and assets, which results in impoverishment.[94] The Food and Agricultural Organisation also notes that expropriation of land may result in adverse impacts which include separation of families, and deprive displaced

[89] Zimbabwe Mining Potential Booklet, Ministry of Mines, 2018. 14. Accessed on the 15th of February 2020. https://miningzimbabwe.com/wp-content/uploads/2018/12/Mining%20Zimbabwe%20November%202018%20compressed.pdf

[90] G Marawanyika, "*Zimbabwe Unveils Plan for $12 Billion in Mineral Revenue by 2023*", Bloomberg News. Accessed 22 February 2020. https://www.bloomberg.com/news/articles/2019-10-14/zimbabwe-unveils-plan-for-12-billion-in-mineral-revenue-by-2023

[91] www.mines.gov.zw.

[92] V Polterovich, V Popov and A Tonis, *Resource abundance: A curse or blessing?* Department of Economic and Social Affairs Working Paper No. 93, 2010.1 .

[93] Madebwe & Mavusa (n 14 above) 292-301.

[94] TE Downing, *Avoiding New Poverty: Mining-Induced Displacement and Resettlement. Mining, Minerals and Sustainable Development*. 2002. 5. https://pubs.iied.org/pdfs/G00549.pdf

communities access to cultural sites, result in homelessness, and takes away access to resources necessary to sustain livelihood and community support.[95]

In Zimbabwe, the Marange community were displaced from the Chiadzwa diamond mines and relocated to ARDA Transau.[96] Makore in his dissertation,[97] posits that some of the families were relocated based on inadequate notices ranging from 24 hours to one month,[98] and many people did not consent to where they were being relocated to.[99] The affected persons were given one-hectare pieces of land which is less land than they previously had, and this land was not fertile for food production and inadequate for rearing livestock as they had previously done.[100] The water at the relocation site was also paid for, as the area is peri-urban, unlike the free water supply they previously had access to in their communal area.[101] Housing was also culturally inadequate, particularly for polygamous families who were given one household unit.[102]

Muchadenyika, Chatiza and Makaza posit that mining has robbed rural communities of prime agricultural land and housing.[103] Their study also notes how mining has resulted in the displacement of communities in Mutoko as a result of quarrying, without payment of compensation.[104] Furthermore, quarrying, mining and blasting have resulted in the death of animals and poses a danger to human life when near human settlements.[105] They also note the relocation of families in

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[95] FAO, *Compulsory Acquisition of Land and Compensation*, 2008. http://www.fao.org/3/i0506e/i0506e00.pdf

[96] Madebwe & Mavusa (n 14 above) 292-301

[97] T Makore, *The Impact of Mining Induced Voluntary Displacement: A Case Study of the Relocation of Chiadzwa Villagers by Marange Diamond Companies in Zimbabwe*. (Unpublished Dissertation, National University of Science and Technology, 2015.

[98] Makore (n 97 above) 48.

[99] Makore (n 97 above) 49.

[100] Makore (n 97 above) 51-52.

[101] Makore (n 97 above) 57.

[102] Makore (n 97 above) 58.

[103] D Muchadenyika, K Chatiza, F Nyaunga & D Makaza, "*When mining activities `come home': A Report of action research into the impact of the extractives sector on women in selected communities in Zimbabwe with a focus on mining"* . evelopment Governance Institute. 15-17. Accessed 25th of February 2020. https://zimbabwe.actionaid.org/sites/zimbabwe/files/impact_of_mining_on_women_research_2015.pdf

[104] D Muchadenyika, K Chatiza, F Nyaunga & D Makaza (n 103).21.

[105] D Muchadenyika, K Chatiza, F Nyaunga & D Makaza (n 103) 20.

Chimanimani to Springfield to make way for diamond mining, whereof such relocation took place when the new area had no schools, healthcare services, roads, and sufficient land.[106] Their study also established that mining has caused the pollution of rivers in Manicaland, which has resulted in people and animals who utilize such water sources suffering from skin diseases and miscarriages.[107]

According to the Extractive Industries Policy and Legal Handbook,[108] there is no proper legal framework which governs people displaced by mining.[109] This creates challenges for displaced communities to enforce their right to housing. Laws governing mining and land tenure should provide procedural and substantive guarantees for the right to adequate housing. Mining and land tenure are regulated by the **Constitution of Zimbabwe**, the **Mines and Minerals Act [Chapter 21:05]**, **Environmental Management Act [Chapter 20:27]**, **Land Acquisition Act [Chapter 20:10]**, **Rural District Councils Act [Chapter 29:13]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]**. These laws are examined in Chapter four.

The foregoing literature justifies the legal provision of the right to adequate housing and regulation of mining-induced displacement in Zimbabwe to protect affected communities.

2.10. INTERNATIONAL PRINCIPLES AND STANDARDS ON MINING-INDUCED DISPLACEMENT

The **United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement** constitute soft law drafted by the United Nations Special Rapporteur on adequate housing in 2007. They define forced evictions as:

> *"…acts and/or omissions involving the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and*

[106] D Muchadenyika, K Chatiza, F Nyaunga & D Makaza (n 103). 16-17
[107] D Muchadenyika, K Chatiza, F Nyaunga & D Makaza (n 103) 19-20

[108] Extractive Industries Policy and Legal Handbook (n 22) 23.

[109] Extractive Industries Policy and Legal Handbook (n 22 above) 23.

common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection."[110]

This definition is similar to that in **General Comment Number 7**.[111] **General Comment Number 7** also provides that legislation against forced evictions is necessary and should:-

"… (a) provide the greatest possible security of tenure to occupiers of houses and land, (b) conform to the Covenant and (c) are designed to control strictly the circumstances under which evictions may be carried out."[112]

General Comment Number 7 also requires special legal measures to protect children, women, young persons, elderly persons, indigenous people, ethnic and other minorities, and other vulnerable persons who may suffer considerably from forced evictions.[113]

The link between forced evictions and housing can be observed in the case of ***Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan***, where the **African Commission on Human and Peoples Rights** held that forced evictions violate both freedom of movement and the right to housing guaranteed in **t**he African Charter which are "*two sides of the same coin*".[114] In that decision, the African Commission held that a State would

[110]Basic Principles and Guidelines On Development-Based Evictions And Displacement (n 4 above) paragraph 4

[111] General Comment Number 7 (n 75 above) paragraph 3

[112] General Comment Number 7 (n 75 above) paragraph 9

[113] General Comment Number 7 (n 75 above) paragraph 10

[114] 279/03-296/05 Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) / Sudan, decided in 2009. paragraph 187.

have failed to abide by its human rights obligations to protect housing rights if it allows third parties to cause forced evictions and destruction of houses.[115]

2.11.1. WHEN ARE EVICTIONS PERMISSIBLE?

Principle 21 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement provides that evictions can only take place where they are to promote the general welfare of the population, with all evictions being regulated by law, and there is respect for human rights.[116] Furthermore, Principle 21 also provides that evictions must be reasonable, premised on the proportionality requirement, must ensure full and fair compensation and rehabilitation, as well as being in terms of the rest of the guidelines.

The Basic Principles and Guidelines on Development-Based Evictions and Displacement are structured relative to the stage of the displacement. This provides a practical method for protecting rights as this division takes into account the particular needs related to each stage.

2.11.2. PRINCIPLES APPLICABLE BEFORE EVICTION

Principle 37 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement provides that before eviction there should be:-

> *"…(a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable period for public review of, comment*

[115] Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (n 114 above), paragraph 166.

[116] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n4 above) Principle 21

on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities."[117]

2.11.3. PRINCIPLES APPLICABLE DURING AN EVICTION

The Basic Principles and Guidelines on Development-Based Evictions and Displacement and Displacement provide that during the relocation process, evictions should not violate human dignity,[118] or be discriminatory.[119] Principle 45 requires that government officials should be present during evictions, and Principle 46 provides that neutral observers should be allowed to monitor the process of eviction. This is important for transparency and accountability. Principle 47 requires that there be special steps to protect women and children.

Principle 49 requires that evictions should not be carried out at night or in bad weather, or before school examinations or elections.[120] These guidelines recognise that arbitrary evictions include displacements which alter the racial, religious or ethnic composition of the affected population and that forced evictions also displace indigenous persons from long-held land and resources. Furthermore, Principles 50 and 51 also prohibit the unlawful and arbitrary destruction, use or expropriation of property that would have been left behind.

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[117] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 37

[118] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 47.

[119] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 47.

[120] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 49.

2.11.4. PRINCIPLES APPLICABLE AFTER AN EVICTION

Principle 52 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement provides that after the eviction, relevant authorities must ensure there is the provision of, at the minimum, basic shelter and housing in a manner that is not discriminatory. Principle 55 of the requires that relocation sites must comply with the key elements which constitute adequate housing as specified in **General Comment Number 4**.[121]

Closely linked to housing, is resettlement. Principle 56 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement requires that no evictions should take place unless there is a comprehensive resettlement policy which is consistent with international human rights instruments. Relocation should be done in a manner that ensures that the prior, free and informed consent of affected persons is taken into account.[122] Principle 56 also requires that there should be equal protection of the rights of women, children, and other vulnerable persons, regarding their rights to property, alternative housing and access to resources.

2.11.5. REMEDIES

Part VI of the Basic Principles and Guidelines on Development-Based Evictions and Displacement and Displacement classify remedies into three broad categories, that is, (a) compensation; (b) restitution and return; and (c) resettlement and rehabilitation.

The Basic Principles and Guidelines on Development-Based Evictions and Displacement also provide that persons who may be subject to displacement should be afforded adequate, effective, and timely legal or other appropriate remedies to protect them from forced evictions.[123] Principle 59 underscores the

[121] General Comment Number 4 (n1) paragraph 8

[122] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4), Principle 56.

[123] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 17.

importance of the right to access justice through a fair hearing, legal representation, restitution, resettlement, rehabilitation and compensation.[124]

2.11.5.1 COMPENSATION

Principle 60 requires that there be payment of compensation that is fair and just for all losses suffered by displaced persons. The guidelines provide that compensation should be paid regardless of whether victims hold title or not.[125] Principle 60 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement further clarifies that the nature of compensation should be appropriate and proportionate to the gravity of the violation suffered", and cash compensation should not replace "*real compensation such as land and common property resources*". Where land is taken, it must be replaced by land of at least similar size, value, quality, or it must be better.[126]

2.11.5.2. RESTITUTION AND RETURN

The guidelines deal with restitution and return in principles 64 to 67. Essentially, where return to a site is possible, the State should ensure the voluntary return in safety and security, and people should be allowed to access property they left behind.

2.11.5.3. RESETTLEMENT AND REHABILITATION

Principle 68 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement provides that if returning to a location is not possible, due to considerations such as health, safety, or the promotion of the general

[124] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 59.

[125] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 61.

[126] Basic Principles and Guidelines on Development-Based Evictions And Displacement (n 4 above) Principle 60.

welfare, then displaced persons should be resettled elsewhere. This principle enunciates that resettlement must be "*in a just and equitable manner"* consistent with the international human rights law. The **African Commission on Human and Peoples` Rights`** *Resolution on the right to adequate housing and protection from forced evictions -ACHPR/Res.231(LII)2012 (para.5)* also provides that alternative housing provided to people should comply with adequate housing provisions in international and regional human rights standards.

These principles provide valid norms which are applicable for purposes of litigation as evidenced by analogous jurisprudence in the case of the ***African Commission on Human and Peoples' Rights v Kenya*** *(2013) 1 AFCLR 193* which epitomizes this position. In that case, the **African Court on Human and Peoples` Rights** held that "*the implementation of the eviction notices of the Government of Kenya will have far-reaching implications on the political, social and economic survival of the Ogiek Community as their eviction will lead to the destruction of their means of survival, their livelihoods, culture, religion and identity"*.[127]

2.12. AFRICAN PERSPECTIVES ON DISPLACEMENT OF PEOPLE (KAMPALA CONVENTION)

Article 3 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) (hereinafter referred to as the Kampala Convention) requires States to refrain from, prohibit or prevent arbitrary displacement of people, and ensure the accountability of State and non-State actors. **Article 4 (4) of the Kampala Convention** also expressly prohibits arbitrary displacement. **Article 4(5) of the Kampala Convention** also requires State parties to endeavour to protect communities who have special attachment to, and dependant on land, unless there are compelling and overriding public interests.

Article 10 of the Kampala Convention also requires governments to prevent development-induced displacement "*as much as possible*" by public and private

[127] *African Commission on Human and Peoples' Rights v Kenya* (2013) 1 AFCLR 193.

actors. According to Adeola, if this provision is to be subjected to a literal interpretation it is vague as "*what amounts to the greatest measure possible is unclear and only shrouds the content of this provision in ambiguity".*[128] She recommends that there be the adoption of a teleological approach where "arbitrariness" is determined by regard to due process requirements.[129] According to Adeola, Article 10 can be interpreted as requiring that a balance be struck between the development project and the rights of affected persons, which can be done through prior socio-economic and environmental impact assessments,[130] consultation of affected persons,[131] and consideration of alternatives to the development project together with persons who are likely to be displaced.[132] Her view is that such requirements would help minimize violation of the housing rights.

The Kampala Convention also requires that State parties ensure that people who are displaced be accorded "effective remedies".[133] Article 12 (2) recognizes that such remedies include compensation and reparations for any damages suffered as a result of displacement. The use of the term "effective remedies" appears to be meant to be all-encompassing to various forms of relief, as long as there is the remediation of the violation.

2.13. HOUSING AND ENVIRONMENTAL RIGHTS

The extractives industry involves activities such as prospecting, exploration, excavation, operation, decommissioning and repurposing of a mine which have direct and indirect impacts on the surrounding environment and communities.[134] Haddaway states that activities such as exploration, construction, and operation of

[128] R Adeola, *The Legal Protection of Development-Induced Displaced Persons in Africa*. African Journal of Legal Studies, Vol 10, 2017. 91–104.

[129] Adeola (n128 above) 96-97.

[130] Article 10(3) of the Kampala Convention.

[131] Article 10(2) of the Kampala Convention

[132] Article 10(2) of the Kampala Convention

[133] Article 12 of the Kampala Convention

[134] NR Haddaway, SJ Cooke, & P Lesser, *Evidence of the impacts of metal mining and the effectiveness of mining mitigation measures on social–ecological systems in Arctic and boreal regions: a systematic map protocol*. Environ Evid **8,** 9 (2019). https://doi.org/10.1186/s13750-019-0152-8

mines result in negative impacts which include the change in land-use; soil contamination, soil erosion, air and water pollution; destruction of biodiversity and deforestation.[135] Such adverse impacts make a case for enforcement of environmental rights. Environmental rights are essential in ensuring that housing is habitable. Houses must be safe and consistent with Health Principles of Housing prepared by the World Health Organisation on the premise that unsafe and inadequate housing is associated with higher morbidity and mortality rates.[136]

Environmental rights are premised on the concept of "sustainable development" which was defined in the **Brundtland Report** to mean "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs"*.[137] According to Purvis, Mao and Robinson, sustainable development involves striking a balance between three potentially conflicting values, that is, environmental, economic, and social interests, which is a notion with its origin in the Brundtland Report.[138]

The Brundtland Commission recognised that for the attainment of sustainable development there ought to be inter-generational equity, sustainable use of natural resources, and integration of environment and development.[139] Sustainable development is also premised on the need to give priority to the interests of the world`s poor.[140]

According to Choondassery, a rights-based approach exists at the core of sustainable development, which is a concept that provides the foundation for environmental justice.[141] The right to a clean, safe, and healthy environment is

[135] NR Haddaway, SJ Cooke, & P Lesser (n 134 above)

[136] NR Haddaway, SJ Cooke, & P Lesser (n 134 above)

[137] Brundtland Report: World Commission on Environment and Development, `*Our Common Future*`, Chapter 2: *Towards Sustainable Development*, Oxford University Press, 1987. Paragraph 1. Accessed on 13 February 2020. https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf

[138] B Purvis, Y Mao & D Robinson ,*Three pillars of sustainability: in search of conceptual origins.* Sustainability Science. 2018. Accessed on 22nd of February 2020. http://eprints.whiterose.ac.uk/136715/.

[139] Brundtland Report (n 137) paragraphs 1-10

[140] Brundtland Report (n 137 above)

[141] Y Choondassery, *Rights-based Approach: The Hub of Sustainable Development,* Vol 8 No 1 Discourse and Communication for sustainable Education,17-23.

supportive of adequate housing as it ensures that houses are not built on or proximate to sites that constitute a danger to human health and life consistent with the normative requirements of adequate housing in General Comment 4.[142]

Environmental rights were influenced by the **United Nations Conference on Environment and Development of 1992** which came up with the **Rio Declaration**. The Declaration provides important norms which, when implemented, minimize negative consequences of mining on human settlements and human health. These principles include the precautionary principle which provides that lack of scientific certainty should not be a basis for postponing cost-effective measures of preventing environmental degradation. Principle 11 of the Rio Declaration places a duty on governments to take steps aimed at preventing environmental degradation within the limits of its jurisdiction through appropriate regulatory, administrative and other measures. This entails that there ought to be appropriate environmental legislation that guarantees the right to a safe and healthy environment. An important tool is an environmental impact assessment which is a decision-making tool employed to assess the consequences of human activity on the environment, to evaluate alternative approaches, and to incorporate prevention, mitigation and monitoring measures.[143]

2.14. CONCLUSION

This chapter established that the Government of Zimbabwe is bound by the ICESCR and many other treaties to provide for the right to adequate housing in legislation and policies. The Kampala Convention and the Basic Principles and Guidelines on Development-Based also require that laws should prohibit arbitrary evictions. Evictions should only be permitted if in the public interest, and when they do not violate housing rights of persons whom are displaced by development

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DOI: 10.1515/dcse-2017-0012 Accessed on 12 February 2020.
https://content.sciendo.com/view/journals/dcse/8/2/article-p17.xml?language=en

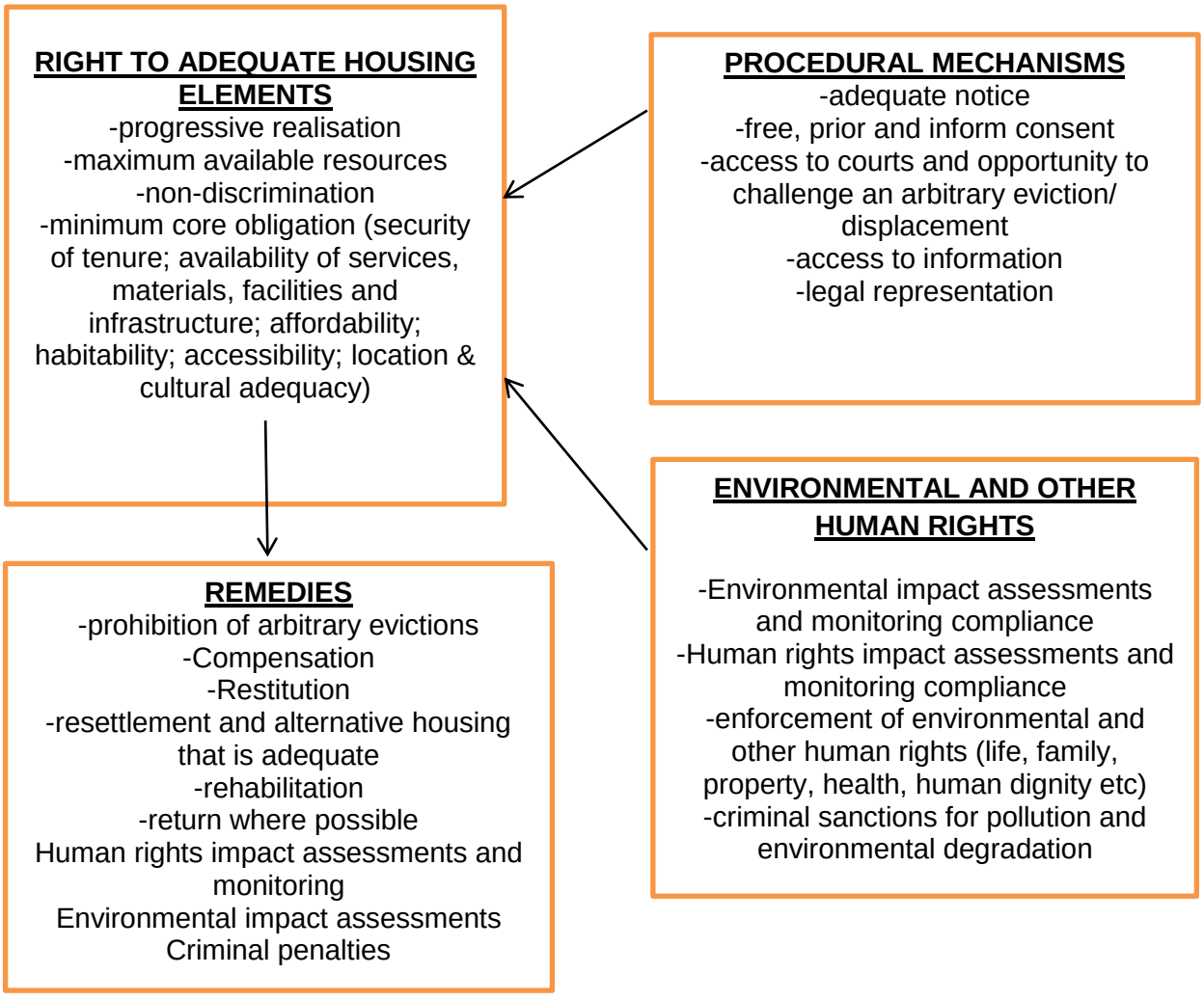
[142] General Comment Number 4 (n1) paragraph 8

[143] Food and Agriculture Organisation. Environmental Impact Assessment, Guidelines for FAO Field Projects. 2011.1. http://www.fao.org/climatechange/29103 02e9a33753ffc325da1e25250c06c927b.pdf accessed 25 May 2020

projects. In this regard, the State is the primary duty bearer in ensuring that the right to adequate housing is not violated by mining companies and entities, though miners must respect the right.

The role of legislation in fulfilling the right to adequate housing can be summarized as stated in the following diagram:-

The Right to Adequate Housing In Respect Of Communities Displaced By the Extractives Industry



It was also established that General Comment Number 4 provides that the right to adequate housing is constituted of the freedom from arbitrary eviction and entitlements to access housing. Housing means more than shelter, and focus should be on fulfilling the minimum core obligation which denotes normative

standards such as habitability; accessibility; security of tenure; affordability; availability of services, materials, facilities and infrastructure; cultural adequacy; and location near centres of employment, and providers of social amenities. The State is obligated to ensure the progressive realisation of the right to adequate housing subject to maximum available resources, and in a manner that is not discriminatory.

It was also established that the right to adequate housing is also indivisible and interrelated with other economic, social and cultural rights, and civil and political rights. Essentially, enforcement of environmental rights is crucial in protecting human life, health and property. The foregoing literature also underscores the importance of prior human rights and environmental impact assessments before projects are undertaken.

In a nutshell, the above literature reveals the importance of having a justiciable right to adequate housing, where affected persons can access remedies which include prohibition of arbitrary evictions, restitution, compensation, resettlement, and returning after the project is complete.

CHAPTER THREE

METHODOLOGY

3.1. INTRODUCTION

This Chapter outlines the methodology employed in the research to gather and analyse data. The study was premised on a qualitative design which employed qualitative data collection and analytical methods. The study was premised on a combination of problem-based doctrinal research and comparative legal research. Hutchinson defines doctrinal research as research that establishes rules governing a particular legal category, analyses the relationship between rules, establishes areas of difficulty, and at times predicts possible future developments.[144] This study ascertains the normative content of the right to adequate housing, and establishes whether the Government of Zimbabwe has made appropriate provision for the right in laws that regulate the extractives industry consistent with international human rights instruments. Challenges within the current framework were identified and there was an exploration of possible alternative approaches. To augment the process of analysis, comparative legal research was employed by comparing the Zimbabwean laws with those from other jurisdictions such as South Africa and Kenya.

The study sought to address the following research questions:-

1. What is the doctrine underpinning the `right to adequate housing?
2. Does Zimbabwe comply with principles in international and regional human rights instruments in guaranteeing adequate housing for people who are displaced by the extractives industry?
3. Does legislation that regulates the extractives industry in Zimbabwe adequately protect the right to adequate housing for communities displaced by the extractives industry?

[144] T Hutchinson & N Duncan, Defining And Describing What We Do: Doctrinal Legal Research, Vol 17 *Deakin Law Review*, 101.

4. How can laws that regulate the extractives industry and land tenure in Zimbabwe be improved to guarantee housing rights for displaced communities?

3.2. RESEARCH APPROACH

The research approach was guided by a human rights-based approach. The Special Rapporteur on adequate housing explains that this approach requires that the right to adequate housing should be provided for as a legal right that is enforced using effective remedies, premised on non-discrimination, rights-based participation, and accountability of both State and non-State actors.[145] Essentially, a human-rights based approach is a conceptual framework that advocates for the inclusion of human rights, such as the right to adequate housing within domestic law.

3.3. RESEARCH DESIGN

A qualitative study was employed given that the study is an assessment of the purpose, nature, and doctrine of the right to adequate housing. The study assessed the doctrine underpinning the right to adequate housing, the extent of domestic compliance with international human rights instruments, and also engaged in a comparative analysis with other jurisdictions.

Key informant interviews were carried out, as well as a desk review of primary and secondary sources. These methods were adopted because they were compatible with the nature of the study, which was exploratory in nature. The study explored the adequacy of the laws of Zimbabwe in providing for the right to adequate housing and appropriate procedural mechanisms which entrench a human rights-based approach.

[145] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination. Part IV, General Assembly A/HRC/37/53, 2018. Accessed 21 April 2020. https://www.undocs.org/A/HRC/37/53

3.4. TARGET POPULATION

Thirteen people were interviewed who were drawn from lawyers, community leaders from affected communities, miners, and leading academics. The target population was premised on obtaining a balanced perspective from various stakeholders who include academics, lawyers, miners, and displaced persons who have knowledge, experience and skills to contribute to the study. The distribution of persons interviewed was is follows:-

Lawyers who specialize in human rights	3
Persons displaced by extractives	3
Miners	3
Academics (who specialize in human rights and natural resources law)	2
Non-governmental organisations	2

3.5. KEY INFORMANT INTERVIEWS

Due to the study being premised on the examination of human rights law, purposive and convenient sampling techniques were employed. Simion[146] defines "purposive sampling" as the process by which the target group is selected for a specific purpose. The target group was selected based on their occupation, knowledge and experience in mining, human rights and natural resources governance issues. The objective was to obtain diverse perspectives. Lopez and Whitehead define "convenience sampling" as research that is carried out on a sample determined by the accessibility of people, location, time, and willingness. Convenience sampling was employed due to the need to obtain as much data as possible within a short space of time. Data was collected to the point of saturation where no new data was emerging.[147]

[146]K Simion, Qualitative and Quantitative Approaches to Rule of Law Research. International Network to Promote the Rule of Law, July 2016.

[147] V Lopez, D Whitehead, *Sampling data and data collection in qualitative research, Nursing & Midwifery Research: Methods and Appraisal for Evidence-Based Practice*. Chapter 7, Elsevier - Mosby ,2013.124.

Data was collected through key informant interviews from people who have knowledge and experience about the right to adequate housing and violations perpetrated by mining entities, and challenges in land tenure and mining laws. Interviews were done face to face and also by telephone. They served two purposes, that is, establishing areas that needed further comprehensive desk research, and widening the scope of analysis of relevant fundamental concepts and legal provisions.

The interviews were premised on an outline script with open-ended questions, which addressed the following questions:

Questions

1. Are you aware of the right to adequate housing?
2. Can your explain the meaning of the right to adequate housing?
3. From your experience do mining activities violate this right?
4. How do such violations occur?
5. Do you know of communities in Zimbabwe that have been displaced by mining activities?
6. Have displaced communities been provided with suitable alternative housing?
7. Do you think there is adequate provision of the right to adequate housing in the following laws:-
    i. **The Constitution of Zimbabwe, 2013**;
    ii. **The Mines and Minerals Act [Chapter 21:05],**
    iii. **Mines and Mineral Amendment Bill (HB 19, 2015)**,
    iv. **Environmental Management Act [Chapter 20:27**],
    v. **Communal Lands Act [Chapter 20:04],**
    vi. **Land Acquisition Act [Chapter 20:10],**
    vii. **Rural District Councils Act [Chapter 29:13]**, and
    viii. **Land Commission Act [Chapter 20:29].**
8. What mechanisms do you think can be adopted to guarantee the right to adequate housing for communities displaced by the extractives industry?

9. From your experience or knowledge, is there provision of effective remedies for violations of the right to housing for displaced communities?
10. Do you have any other relevant recommendations to improve housing for displaced communities?

The data obtained from key informants was documented using note-taking and tape recording. The data was compiled and analysed in terms of themes. It is pertinent to highlight those responses varied according to the class of persons being interviewed. Displaced persons exhibited a lack of knowledge of key legal provisions and blamed the State for failing to provide appropriate laws. Displaced persons also attributed their plight to the fusion of politics with mining, which has resulted in illegal mining, and lack of accountability by the State and Miners. Small-scale miners exhibited ignorance of their obligations; they were more concerned about profit. Having regard to the doctrinal nature of this dissertation, the most instructive data was collected from lawyers, academics and members of Non-Governmental Organisations. There was a general lack of knowledge of foreign legislation which provides a better model. Representatives from large companies who were targeted were non-committal.

3.6. DESK STUDY

The study utilised a combination of an internal and external desk study of primary and secondary sources. Internal desk study utilised textbooks on the right to adequate housing and extractives. There is limited contemporary information on the subject at the University of Zimbabwe library. To address this, recourse was had to external sources through a largely internet-based process.

3.6.1. Primary Sources

Primary sources included treaties, constitutions, statutes, international human rights instruments, and court judgments. Primary sources were drawn from Zimbabwe, South Africa, and Kenya. These assisted with benchmarking. South

Africa and Kenya were chosen on the basis that the Constitution of Zimbabwe was moulded drawing lessons from these countries, save for the right to adequate housing, which is not provided for in Zimbabwe. These countries have also developed specific laws that regulate the right to housing and displacement by development projects. South African jurisprudence was also instructive due to its rich case law on the right to adequate housing.

The study reviewed, but was not limited to the following laws:-

Zimbabwe

- **Constitution of Zimbabwe,**
- **Mines and Minerals Act [Chapter 21:05],**
- **Mines and Mineral Amendment Bill (HB 19, 2015),**
- **Environmental Management Act [Chapter 20:27],**
- **Communal Lands Act [Chapter 20:04],**
- **Land Acquisition Act [Chapter 20:10],**
- **Rural District Councils Act [Chapter 29:13], and**
- **Land Commission Act [Chapter 20:29]**

Compliance with international standards was done using the following:-

International and Regional Instruments

- **International Covenant on Economic, Social and Cultural Rights,**
- **African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 2009**
- **The Basic Principles and Guidelines on Development-Based Evictions and Displacement, 2007**

Benchmarking was done using, but not limited to the following:-

South Africa

- **Constitution of South Africa Act 108 of 1996**
- **Prevention of Illegal Eviction from Unlawful Occupation of Land Act No. 19 of 1998**

- Case law

Kenyan

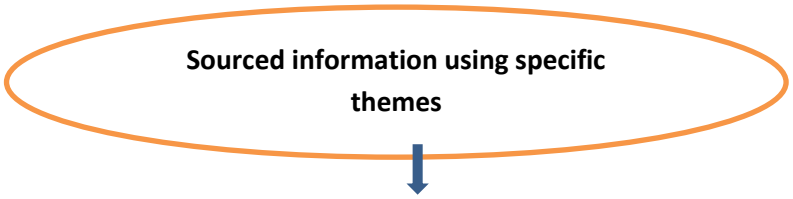
- **The Constitution of Kenya, 2010**
- **Prevention, Protection And Assistance To Internally Displaced Persons And Affected Communities Act, 2012**
- Case law

3.6.2. Secondary Sources

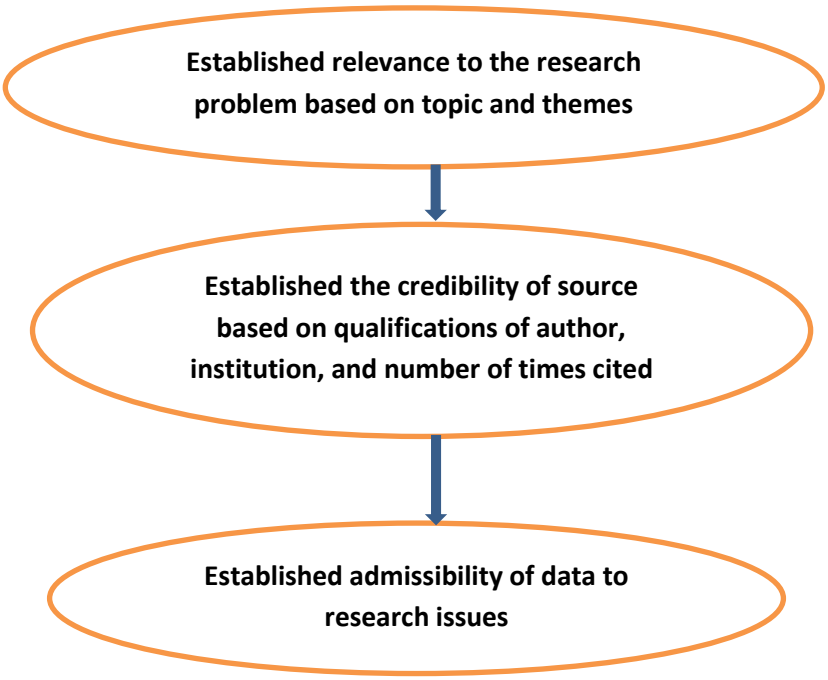
Hoey posits that secondary sources are useful mainly to locate issues in the study within the corpus of existing literature.[148] Secondary sources that were utilised in this study include journal articles, authoritative textbooks, and publications by eminent jurists, scholars, and previous case studies by non-governmental organisations. The research involved the review of secondary sources to establish commentaries and articles which provide an analysis of the right to adequate housing in Zimbabwe and other informative jurisdictions. There was also the consideration of documents, primarily relating to South Africa, Kenya, India, and other jurisdictions. Secondary sources were also located which provide a commentary on international and regional instruments on the right to housing and how the right can be incorporated into domestic law.

Data mining was done using the following steps:-

Method for the inclusion of secondary sources



[148] BA Hoey, A Simple Introduction to the Practice of Ethnography and Guide to Ethnographic Fieldnotes, Marshall University Digital Scholar, 2014.1–10. Accessed on the 2nd of March 2020.. https://www.cedarnetwork.org/wp-content/uploads/2016/06/Wasserfall-Intro-to-ethnography.pdf.



3.7. DATA ANALYSIS

Marshall and Rossman provide that the process of data analysis involves the creation of order, structure, and meaning to a mass of data that has been collected.[149] It is thus the process of creating information from data that allows the making of relevant conclusions. This study employed deductive reasoning, premised on the application of the social contract theory, as well as the testing of hypothesis. The hypothesis upon which the study was premised includes the need for the State to provide for the right to adequate housing for communities displaced by the extractives industry. The analysis was to establish the extent to which the laws of Zimbabwe guarantee the right to adequate housing, which ensures that communities are protected from violations by the extractives industry.

The study also employed thematic content analysis. This is the analysis of documents premised on themes. Themes used include, "constitutional right to adequate housing in Zimbabwe", "mining and land rights in Zimbabwe", "forced

[149] C Marshall, GB Rossman, *Designing Qualitative Research*. 3rd Edition, Sage Publications, 1999. 150.

evictions in Zimbabwe", "compensation for forced evictions caused by mining in Zimbabwe", "mining and environmental rights", and "the adoption of the right to housing by courts in Zimbabwe". A comparative study was also done predominantly premised on South African and Kenyan law. Research findings were then made from the data that was analysed. Research findings are stated in the next chapter.

3.8. LIMITATIONS

This study was premised on qualitative as opposed to quantitative research. The research does not comprehensively explore the magnitude of adverse impacts of the extractives industry on housing rights in Zimbabwe. The research was only premised on establishing concepts and reviewing laws in Zimbabwe.

The research employed key informant interviews where a limited number of people were interviewed due to time considerations. Whilst informative views were obtained from the sample, there is the possibility of divergence with larger samples. Community leaders interviewed appeared less knowledgeable of specific human rights instruments and laws but were informed on factual developments on the impact of some mining operations. Lawyers and academics were helpful in providing vital concepts and norms relating to the right to adequate housing, violations, and possible remedies. Small-scale miners were ignorant of their obligations and seemed to place responsibility on the government to enforce human rights.

Essential data for doctrinal research was obtained through the desk review of journal articles and United Nations databases. There is, however, very limited literature on the provision of the right to adequate housing in Zimbabwe. This means there is still limited scholarly discourse essential to building a rich database on the subject. Useful information was obtained from the Zimbabwe Environmental Lawyers Association database and published articles by a few scholars.

Analysis of the Mines and Mineral Amendment Bill shows it has been pending for approval for a substantial period without approval due to criticism by various

stakeholders, including miners. The delay in the Bill becoming an Act of Parliament means that focus on this Bill may end up being merely academic.

3.9. ETHICAL CONSIDERATIONS

This research was conducted in terms of research ethics stated herein. Simion underscores that observing research ethics is necessary when there are human participants as they could face "*physical, legal, or political risks for discussing issues of rule of law"*.[150] Simion further recommends that data collection should always involve trust and open communication between the researcher and the participants.[151] Research ethics employed included voluntary participation. Informed consent was also obtained coupled with guarantees of confidentiality of participants' identities and their organisations. Where examples are used in this research, a consent form was signed by the participant to use the data, but such use respected the informant`s confidentiality. This was particularly necessary due to the sensitive nature that has characterised the discourse between mining and human rights in Zimbabwe. Every effort was also made to ensure that the data obtained is accurate as possible through verification with independent literature where possible.

Documentary sources that are relied upon are those that are published. Where such documents or publications are used, they are acknowledged. Most of the secondary data used in this research is freely available on the internet. According to Tripathy, there is implied consent for use of internet sources that are freely available on the internet, subject to the requirement that the source must be acknowledged.[152]

[150] K Simion, (n 146 above) 35.

[151] K Simion (n 146 above) 35

[152] JP Tripathy, *Secondary Data Analysis: Ethical Issues and Challenges. Iranian Journal of Public Health Vol 42 No.12 , 2013.* Accessed on the 3rd of March 2020 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4441947/.

This research is the exclusive work of the researcher and involves no plagiarism. The study respects publications by other authors who have written related articles by acknowledging their work where it was used.

3.10. CONCLUSION

This chapter outlines the research methodology, research methods, and design. This chapter outlined the qualitative methods employed in the research process, provided key documents reviewed, limitations, and ethical considerations, stated the research findings and the analytical process. The research findings are contained in the next chapter.

CHAPTER FOUR

ANALYSIS OF LAWS GOVERNING THE EXTRACTIVES INDUSTRY IN ZIMBABWE

4.1. INTRODUCTION

This chapter is divided into two sections. The first section outlines findings made during the research and the second section contains an analysis of the findings. This chapter contains an assessment of whether the Government of Zimbabwe is fulfilling its obligation in providing for the right to adequate housing for communities displaced by the extractives industry. The findings and analysis contained herein are premised upon a review of the Constitution of Zimbabwe and legislation that governs the extractives industry. Regards was had to the **Mines and Minerals Act [Chapter 21:05]** which *inter alia* provides the statutory framework for the acquisition and exercise of mining rights; the **Land Acquisition Act [Chapter 20:10]**, **Rural District Councils Act [Chapter 29:13]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]** which regulate land tenure In Zimbabwe. An examination was also undertaken on the adequacy of environmental impact assessments provided for in the **Environmental Management Act [Chapter 20:27]** in protecting housing rights**.**

4.2. SECTION ONE: FINDINGS

This section documents findings on the extent to which the laws of Zimbabwe have domesticated the right to adequate housing as provided for in international treaties and conventions. The findings contained herein also canvass the conflict between holders of mining rights and people in the occupation of land where minerals are discovered. Findings were also made on whether the laws of Zimbabwe governing the extractives industry adequately regulate evictions, compensation, and adequately provide for environmental impact assessments. This research also delves into whether there is need for a special public body to

coordinate the activities of various public authorities in guaranteeing the right to adequate housing for people who are displaced by the extractives industry.

4.3. DOMESTICATION OF INTERNATIONAL TREATIES AND CONVENTIONS

Zimbabwe ratified or assented to the following treaties that require the State to protect, respect, promote and fulfil housing rights, namely:-

TREATY	YEAR ZIMBABWE RATIFIED/ ASSENTED
ICESCR	1991
ICCPR	1991
CRC	1990
CEDAW	1997
CRPD	2013
African Charter	1986
African Children`s Charter	1995
ICERD	1991
African Women`s Protocol	2008
Kampala Convention	2013

The consequence of ratification of these treaties is enunciated in Article 26 of the **Vienna Convention on the Law of Treaties of 1969** which provides that a treaty is binding on parties to it and must be performed in good faith, in terms of the

pacta sunt servanda principle.[153] Furthermore, section 34 of the **Constitution of Zimbabwe** also makes it peremptory to domesticate and incorporate into domestic law all international conventions, treaties, and agreements to which Zimbabwe is a party.

International treaties can become part of the laws of Zimbabwe premised on three approaches which include incorporation through an Act of Parliament,[154] amendment of the Constitution,[155] or adoption during judicial interpretation.[156] An analysis of all three approaches is contained below.

4.4. DOMESTICATION OF THE RIGHT TO ADEQUATE HOUSING IN THE CONSTITUTION OF ZIMBABWE FOR THE BENEFIT OF ALL PEOPLE

Zimbabwe does not have an explicit constitutional right, within the **Declaration of Rights**, that expressly provides for the right to adequate housing for the benefit of all people. Section 28 of the **Constitution of Zimbabwe** contains a national objective on access to **"adequate shelter"** which requires the State to take reasonable legislative measures, within the limits of available resources, to enable every person to have access to adequate shelter. In the case of ***Zimbabwe Homeless Peoples` Association and Others v Minister of Local Government and National Housing and Others SC94-2020*** *[hereinafter referred to as the Zimbabwe Homeless Peoples Association case]*, the Supreme Court emphasized that the national objective on adequate shelter is not equivalent to a constitutional right as it is not strictly justiciable as stand-alone legal provision. It only guides the

[153] In *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs N.O. &* Others CCZ-12-15, the Constitutional Court confirmed the applicability of the *pacta sunt servanda* principle on the Government of Zimbabwe.

[154] Section 327 (2)(b) of the Constitution of Zimbabwe.

[155] Section 328 of the Constitution of Zimbabwe.

[156] Section 327(6) of the Constitution of Zimbabwe, which requires courts and tribunals to interpret legislation in a manner that is consistent with international convention, treaties or agreements which are binding in Zimbabwe. Furthermore, section 46 (1) (c) of the Constitution of Zimbabwe also requires that international treaties and conventions be taken into account by courts and tribunals when interpreting human rights provisions under the Declaration of Rights.

court in the interpretation of the State obligations when considering other laws.[157] The exception is section 81(1) (f) of the Constitution of Zimbabwe which provides partial compliance with international standards by providing for the right to shelter for children. Gaps exist in protecting adult persons who do not have children, people who were displaced before the enactment of the current Constitution of Zimbabwe in 2013, or those who are facing housing challenges in the absence of formal eviction proceedings.

Zimbabwe`s failure to provide a constitutional right guaranteeing access to adequate housing exists despite previous criticism and recommendations by international human rights bodies. In 2007, the **African Commission on Human and Peoples Rights` C*oncluding observations on the second periodic report of the Republic of Zimbabwe*** recommended that Zimbabwe must provide for justiciable economic, social, and cultural rights in its Constitution and laws.[158] In 2005, the report by the **United Nations Special Envoy on Human Settlements Issues** in Zimbabwe also noted that "*Operation Murambatsvina*" had displaced an estimated one hundred and thirty-three thousand households and rendered many people homeless,[159] which necessitated better legal protection. Furthermore, in 2011, the ***Report of the Working Group on Universal Periodic Review*** documented a recommendation by Spain that Zimbabwe should establish effective remedies to end the lack of decent housing and proper resettlement for people who had been displaced in Marange by the extractives industry.[160]

[157] Zimbabwe Homeless Peoples Association and Others v Minister of Local Government and Others SC94-2020.8.

[158] Concluding Observations on the Second Periodic Report of the Republic of Zimbabwe presented to the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, 2007.

[159] Tibaijuka (n 37 above) 32.

[160] Report of the Working Group on Universal Periodic Review, paragraph 95.65. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/174/78/PDF/G1117478.pdf?OpenElement. Accessed on 15th March 2020.

4.5. SPECIAL CONSTITUTIONAL PROTECTION OF WOMEN, CHILDREN, ELDERLY PERSONS, AND PERSONS LIVING WITH DISABILITIES

The **Constitution of Zimbabwe** also fails to provide mechanisms that offer special protection to ensure women, persons living with disabilities, and elderly people are given priority in the realisation of housing rights. This is despite the Government of Zimbabwe having ratified treaties that require the provision of an adequate standard of living and housing for women,[161] elderly persons,[162] and persons living with disabilities.[163] Legal shortcomings in guaranteeing housing rights for women resulted in the **Committee on the Elimination of Discrimination against Women**, in its **"Concluding observations on the sixth periodic report of Zimbabwe**,[164] noting that rural women continue to be disadvantaged in accessing land for housing and other purposes on equal footing with men. They recommended that improvements be made in ensuring women access housing and other social amenities necessary for an adequate standard of living.[165]

Unlike other groups, section 81 (1) (f) of the **Constitution of Zimbabwe** partially protects children and adults who take care of children, by providing a right to shelter for children under the age of eighteen years. The challenge is that section 81 of the Constitution of Zimbabwe mentions "shelter" and not "adequate housing". This is inconsistent with **General Comment Number 4** which requires the provision of "adequate housing" as opposed to "shelter".[166]

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[161] CEDAW, Article 14(2)(h); and the African Women`s Protocol, Article 16

[162] ICESCR, Article 11; and CESCR General Comment Number. 6: The Economic, Social and Cultural Rights of Older Persons.

[163] CRPD, Article 28.

[164] Committee on the Elimination of Discrimination against Women Concluding Observations on the sixth periodic report of Zimbabwe, 2020. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/ZWE/CO/6&Lang=En. Accessed 10th of May 2020

[165] Committee on the Elimination of Discrimination against Women Concluding Observations (n 163 above)

[166] General Comment Number 4 (n 1 above) paragraph 7.

4.6. MINING AND LAND RIGHTS

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The **Mines and Minerals Act [Chapter 21:05]** vests all rights in minerals, oils, and gases in the President of Zimbabwe.[167] This Act does not provide for a human rights-based framework to guide the Executive`s discretion when awarding or repossessing mining rights, as there is no legal requirement to consider the impact on the right to adequate housing of people who are in occupation of land.

The **Mines and Minerals Act [Chapter 21:05]** also breeds conflict between miners and occupants of the land, as miners are empowered to enter and prospect on land open for prospecting, peg blocks, and engage in mining.[168] The Act also breeds conflict by arbitrarily prioritizing mining over the rights of farmers and requiring that grazing and cultivation must not interfere with mining operations.[169] Holders of prospecting licenses are also empowered to exercise surface rights to use water, firewood, and erect temporary accommodation.[170] This causes invasion of privacy, competition for resources, and diminution of housing and land rights held by the owners and occupants of the land.

The **Mines and Minerals Act [Chapter 21:05]** also fails to bestow occupants of land with first preference in mining resources discovered on their land. This fosters displacement of occupants of land in favour of third parties. The Parliament of Zimbabwe has also noted that people who occupy communal and State land tend to be more vulnerable to displacement, as there are perceptions that they should be re-located if minerals are discovered.[171]

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[167] Section 2 of the Mines and Minerals Act [Chapter 21:05].

[168] Section 27 of the Mines and Minerals Act [Chapter 21:05].

[169] Section 179 of the Mines and Minerals Act [Chapter 21:05]

[170] Section 29 of the Mines and Minerals Act [Chapter 21:05.

[171] Parliament of Zimbabwe, Report and Analysis of the Mines and Minerals Amendment Bill.7. Accessed 15th of March 2020
file:///C:/Users/Admin/Downloads/Report_on_the_Mines_and_Minerals_Amendment_Bill%20(4).pdf

4.7. EVICTIONS

Section 74 of the **Constitution of Zimbabwe** prohibits arbitrary evictions and requires that all forced evictions should be subject to judicial oversight. Based on the ***Zimbabwe Homeless Association case***, this provides an opportunity for courts to protect due process requirements and ensure the provision of the right to alternative housing.[172] The weakness within the legal framework is that there is no statute which has been created to implement this freedom and guarantee the provision of alternative housing for the protection of people who are victims of forced evictions.

The State also wields substantial power to compulsorily acquire or dispossess communities of land for mining and other purposes without requiring the provision of alternative housing. This is inconsistent with international and regional human rights instruments,[173] and the national objective on access to adequate shelter provided for in section 28 of the Constitution of Zimbabwe. It was observed that the **Communal Lands Act [Chapter 20:04]** vests ownership of communal land in the President of Zimbabwe,[174] and communities only have rights to use the land for residential, pastoral, and agricultural purposes.[175] As a result, the Act permits the State to easily dispossess communities of their land, and there is no provision therein requiring the provision of alternative housing. The **Land Commission Act [Chapter 20:29]** also allows the President to repossess State land which is under leasehold tenure for mining purposes.[176] When this occurs there is no legal requirement for the provision of alternative housing and land. The State also wields a lot of power to acquire land held under title deeds for mining purposes in terms of the **Land Acquisition Act [Chapter 20:10]**.[177] Upon acquisition, there is also no requirement on the State to provide alternative housing and land.

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[172] Zimbabwe Homeless Association case (note 157). 13.

[173] Article 11 of ICESCR, Principle Basic Principles and Guidelines On Development-Based Evictions And Displacement (n 4 above) Principle 55, General Comment Number 7(n 75 above), General Comment Number 4 (n 1 above), and Kampala Convention (n 119 above) Article 10

[174] Section 4 of the Communal Lands Act.

[175] Extractive Industries Policy and Legal Handbook.(n 22 above) 21-22.

[176] Section 27 of the Land Commission Act.

[177] Section 8 of the Land Acquisition Act.

Regardless of the nature of the land tenure, the legal framework also fails to provide for the voluntary return of people to their homes once mining processes are complete.

4.8. COMPENSATION

This study established that there are serious flaws in the compensation framework across all land tenure systems. This study established that the **Mines and Minerals Act [Chapter 21:05]**, [178] **Land Acquisition Act [Chapter 20:10]**,[179] **Communal Lands Act [Chapter 20:04],**[180] and the **Land Commission Act [Chapter 20:29]**,[181] all provide for monetary compensation but do not provide for compensation in the form of alternative housing and land of equivalent size, value, and quality. This is contrary to the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** which require that monetary compensation should not replace real compensation in the form of land and common property resources.[182]

Monetary compensation is not guaranteed in every instance when there has been a forced eviction. Scholars such as Pasipamire note that because communities occupying State and communal land do not have title deeds they suffer limitations in claiming compensation for pastures, farmland, and other common property resources when they are evicted from their homes.[183] In this regard, the Communal Lands Act fails to ensure that compensation is just and fair.[184]

[178] Sections 80 and 133 of the Mines and Minerals Act which provide for compensation for injury suffered as a result of mining activities.

[179] Sections 20 and 21 of the Land Acquisition Act which provide for compensation upon compulsory acquisition of land.

[180] Section 12 of the Communal Lands Act which provides for compulsory repossession of communal land.

[181] Section 27 of the Land Commission Act which provides for compulsory repossession of State land..

[182] Basic Principles and Guidelines On Development-Based Evictions And Displacement (n 4 above) Principle 60

[183] S Pasipamire. "*The Black Gold Of Mutoko" An Investigation Into The Financial And Social Impacts Of Black Granite Mining In Mutoko*. Zimbabwe Environmental Lawyers Association, 2014. Accessed 15th of April 2020. http://www.zela.org/publications/?cp_all=3

[184] Section 12 of the Communal Lands Act

Section 72 (2) of the **Constitution of Zimbabwe**, and the **Land Acquisition Act**,[185] also permit the compulsory acquisition of agricultural land held under title deeds without payment of any compensation whatsoever, save for land owned by indigenous Zimbabweans and under bilateral agreements with other Governments.[186] In the case of **Mike Campbell (Private) Limited and Others v Zimbabwe SADC (T) 2-2007,** the SADC Tribunal held that such a provision that fails to provide for compensation for acquired land is inconsistent with international law.[187]

Land tenure laws, specifically, the **Land Acquisition Act**,[188] the **Land Commission Act**,[189] and the **Communal Land Act** also do not entrench payment of compensation before eviction. The ramifications can be observed from the case of **Marlvin Mudiwa and Others v. Mbada Mining Private Limited and Others HC 6334-09** where the court found it difficult to bar eviction without the payment of compensation.[190] This flaw has its roots in section **71(3)(c)(i) of the Constitution of Zimbabwe** which is flexible and permits payment of fair and adequate compensation before the acquisition or within a reasonable time after the acquisition of land.

An examination of the **Mines and Minerals Act**, [191] the **Land Acquisition Act**,[192] the **Land Commission Act**,[193] and the **Communal Land Act** also evidences the absence of a special fund to meet compensation claims for housing and property losses when land is compulsorily acquired for mining purposes.

[185] Sections 20 and 21 of the Land Acquisition Act.

[186] Section 295 of the Constitution of Zimbabwe, 2013

[187] Mike Campbell (Private) Limited and Others v Zimbabwe SADC (T) 2/2007.

[188] Sections 20 and 21.

[189] Section 27 of the Land Commission Act.

[190] M Dhliwayo. *A review of Zimbabwe`s Draft Minerals Policy*. Zimbabwe Environmental Lawyers Association, 2014. 14.

[191] Section 80 and 133 of the Mines and Minerals Act.

[192] Sections 20 and 21.

[193] Section 27 of the Land Commission Act.

4.9. ENVIRONMENTAL IMPACT ASSESSMENTS

Section 97 as read with the First Schedule of the **Environmental Management Act [Chapter 20:27]** does not provide for environmental impact assessments when there is the acquisition of land or change in land-use from agricultural to mining. This is contrary to international human rights law which requires that holistic eviction-impact assessments be undertaken before development-based evictions.[194] This means people are displaced without adequate planning and provision of alternative housing.

ABSENCE OF COORDINATION IN THE FUNCTIONS OF RELEVANT PUBLIC AUTHORITIES

There is an absence of a special public body or institution which coordinates the activities of the various public officials in the prevention and remediation of violations of housing rights when mining-induced evictions occur. [195] The need for a public body to monitor, and coordinate prevention and remediation strategies is an obligation under Article 2 (3) (b) of the **Kampala Convention** which requires States to establish a public authority or body responsible for coordinating the activities of internally displaced persons.

4.10. JUDICIAL APPROACH IN ADOPTION OF HOUSING RIGHTS FROM INTERNATIONAL TREATIES AND CONVENTIONS

A review of court judgments in Zimbabwe which dealt with forced evictions as a result of mining activities, development projects, and forced evictions in general reveals a radical shift in favour of protecting the right to housing. An analysis of cases which interpreted the Constitution of Zimbabwe since 2013, particularly ***Marange Development Trust v The District Administrator Mutare District and Others HC 12237-16; City of Harare v Makungurutse & Others SC 46-18; and Hanna Housing Consortium v City of Harare HH 503-18***; ***Dusabe & Anor v City Of Harare & Ors HH 114-16, and Together As One Housing Coop v City***

[194] Basic Principles and Guidelines On Development-Based Evictions And Displacement (n 4 above) Principle 32, and Kampala Convention, Article10 (3).

[195] Giorgi & Klos (n 7 above) 16.

of Harare and Nyatsime Beneficiaries Trust & 11 Others v Chitungwiza Municipality HH 101-16*,* shows that courts were robust in preventing arbitrary evictions solely premised on the due process requirement that the evictions were unlawful because they had not been subject to judicial oversight. Therein, the courts did not consider international treaties and conventions. As a result, the courts did not embrace the normative content of the right to adequate housing, or adopt the requirement that there be provision of alternative housing consistent with the minimum core obligation.

In **Zimbabwe Homeless Peoples Association and Others v Minister of Local Government and National Housing and Others SC 94/2020**, the Supreme Court confirmed the justiciability of the right to shelter for children as provided for in section 81(1)(f) of the Constitution of Zimbabwe. Therein, the Supreme Court also enunciated that courts must ensure that victims of forced evictions are not only evicted in terms of the law, but are also guaranteed access to alternative shelter after eviction.[196] Unlike previous court decisions where no regard was had to international treaties, the court considered the Convention on the Rights of the Child and the African Children`s Charter. The court failed to have regard to the International Covenant on Economic, Social and Cultural Rights, and General Comment Number 4 which is the principal interpretation guide on the right to adequate housing. General Comment Number 4 distinguishes “adequate housing” from “shelter”. Due to this failure, the concept of “adequate housing” is still alien to Zimbabwean jurisprudence.

4.11. SECTION TWO- ANALYSIS OF FINDINGS

This section contains an analysis of the extent to which there has been domestication of international principles and minimum standards on the right to adequate housing in Zimbabwe. The assessment was predicated upon comparative legal research based on laws from other countries, particularly South Africa and Kenya. This section also contains an analysis on the extent to which laws governing the extractives industry and land tenure guarantee the right to

[196] Zimbabwe Homeless Peoples Association case (note 157). 12-18

adequate housing, adequately regulate forced evictions, and ensure that just and fair compensation is paid to persons who are affected by mining-induced evictions. There is also an assessment of the adequacy of environmental legislation in providing prior impact assessments when there is a change in land-use and when mining-induced evictions occur. The last part of this section elucidates the need for a special public body to guarantee the provision of the right to adequate housing when mining-induced evictions are imminent.

4.12. DOMESTICATION OF THE RIGHT TO ADEQUATE HOUSING IN THE CONSTITUTION FOR THE BENEFIT OF ALL PEOPLE IN ZIMBABWE

The Constitution of Zimbabwe does not provide an explicit constitutional right universally applicable to all people that guarantees access to adequate housing. *Ex facie*, this weakens the "justiciability` of the right to adequate housing as some segments of society are limited in accessing constitutional remedies in terms of section 85 of the Constitution of Zimbabwe. "Justiciability" refers to the process by which courts exercise powers of judicial review and guarantee the protection of peoples` human rights.[197] The Black`s Law dictionary defines justiciability as the extent something is "*capable of being heard and adjudicated upon*".[198] A justiciable right to adequate housing is a requirement in terms of the *CESCR* General Comment Number 3, which requires justiciable judicial remedies.[199] **Currie and de Waal** posit that the essence of constitutional remedies is that they are extraordinary in nature by being forward-looking, vindicating the Constitution for the benefit of everyone, and guaranteeing non-recurrence of violations as the judiciary is empowered to strike effectively at the source of the violation.[200]

[197] J Miller & A Diver. *Justiciability of Human Rights Law in Domestic Jurisdictions*. Springer International Publishing, 2016. 27-28.

[198] Blacks Law Dictionary, https://dictionary.thelaw.com/justiciability/

[199] General Comment Number 3 (n 73 above) paragraph 5

[200] I Currie, & J. de Waal, *The Bill of Rights Handbook*. Sixth Edition, Juta and Company Pty Limited, 2015.181. See also *Fose v Minister of State Security* 1997 (3) SA 786 (CC) paragraph 19 where the court said it can" fashion new remedies" to secure the protection and enforcement of rights.

Instead of a constitutional right, section 28 of the **Constitution of Zimbabwe** contains a national objective on "access to adequate shelter", which provides that:-

> *"The State and all institutions and agencies of government at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter."*[201]

Section 28 of the Constitution of Zimbabwe was interpreted in the case of the ***Zimbabwe Homeless Peoples Association.***[202] Therein the Supreme Court emphasized that national objectives are not strictly justiciable as stand-alone legal provisions, but rather guide the court in the interpretation of the State obligations when considering other laws.[203] National objectives are therefore symbiotic with constitutional rights such as the freedom from arbitrary eviction. Section 8 of the **Constitution of Zimbabwe** also articulates the significance of national objectives in providing guidance in the formulation and implementation of laws, guiding policy decisions, and in establishing the obligations of the State in terms of the Constitution and other laws. Section 28 of the **Constitution of Zimbabwe** thus has a secondary influence on court judgments and is dependent upon the existence of other justiciable legal provisions.[204] This is contrary to the requirement for fully justiciability economic, social, and cultural rights.[205] Section 28 of the Constitution of Zimbabwe is also inconsistent with international minimum standards as it does not mention or provide for the concept of progressive realization. This is a requirement in terms of the **ICESCR**.[206] This provision also speaks of "reasonable steps" and does not address compliance with the minimum core obligation which is a standard required by **General Comment Number 3**.[207]

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[201] Section 28 of the Constitution of Zimbabwe.

[202] Zimbabwe Homeless Peoples Association case(note 157)

[203] Zimbabwe Homeless Peoples Association case (note 157).8.

[204] A Moyo. Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights.

Lund:Raoul Wallenberg Institute of Human Rights and Humanitarian Law, 2019.42.

[205] General Comment Number 3 (n 67 above) paragraph 9.

[206] Article 2 of the ICESCR.

[207] General Comment Number 3 (n 73 above) paragraph 9.

The foregoing evidences the fact that section 28 of the Constitution of Zimbabwe has serious flaws that make it inconsistent with international treaties and instruments.

Zimbabwe can draw lessons from South African and Kenya, which provide for justiciable constitutional rights guaranteeing access to adequate housing for all people. Section 26 of the **Constitution of South Africa, 1996** provides a justiciable right that ensures all people have access to adequate housing whilst also prohibiting arbitrary evictions. It states:-

> "**Housing**
>
> 26. (1) Everyone has the right to have access to adequate housing.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

In the case of ***Government of the Republic of South Africa and Others v Grootboom and Others,*** the South African Constitutional Court held that section 26 of the South African Constitution establishes a justiciable right which requires the Government to take positive action to meet the housing needs of those living in extreme poverty, are homeless, or live in intolerable housing.[208] **Section 43 (1) of the Constitution of Kenya, 2010** also provides a justiciable constitutional right for everyone to have "*accessible and adequate housing…*" In the case of ***John Kabui Mwai & 3 Others v Kenya National Examination Council and Others***, the Kenyan Court applied this provision to guarantee the provision of alternative housing to people who had been evicted.[209]

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[208] 2000 (11) BCLR 1169 (CC); see also *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) which held that socio-economic rights are justiciable.

[209] John Kabui Mwai & 3 Others v Kenya National Examination Council and Others [2011] eKLR.

In the case of ***Zimbabwe Homeless Peoples Association and Others v Minister of Local Government and National Housing and Others SC 94/2020,*** the Zimbabwean Supreme Court adopted the South African approach in the Grootboom case, and used it as a basis to define the meaning of section 28 of the Constitution of Zimbabwe.[210] The court held that people who are victims of forced evictions should be provided with alternative housing or shelter based on what is reasonable taking into account the limits of the State`s resources.[211] Despite the progressive nature of this decision, Zimbabwe is yet to embrace principles guaranteeing adequate housing consistent with General Comment Number 4 which requires the provision of the right to "adequate housing" and not just shelter.[212] "Shelter" is a narrower conception of the right and merely entails a roof over a person`s head regardless of any minimum standard. "Adequate housing" is richer as it entails adequate privacy, space, security, lighting, ventilation, basic infrastructure, and location near workplaces and providers of social amenities.[213] Furthermore, though the Zimbabwean Supreme Court`s decision is commendable and human rights-oriented, the challenge is that it is not premised on an explicit constitutional right but is predicated on the whims of judicial interpretation. Judicial precedents are prone to reversal at any time without regard to majoritarian views, unlike constitutional rights.

The absence of a universally applicable constitutional right also means that in terms of existing jurisprudence not everyone is protected. Adults without children who were either displaced before the enactment of the current Constitution of Zimbabwe in 2013, or those who are facing housing challenges in the absence of formal eviction proceedings may fail to access justice. Justiciability of the right to adequate housing is, therefore, best guaranteed by an explicit constitutional right, which is universally applicable to all people, and in every circumstance.

[210] Zimbabwe Homeless Peoples Association case (note 157).11-13
[211] Zimbabwe Homeless Peoples Association case (note 157).40.
[212] General Comment Number 4 (n 1 above), paragraphs 7-8.
[213] General Comment Number 4 (n 1 above), paragraph 7.

4.13. SPECIAL CONSTITUTIONAL PROTECTION OF WOMEN, CHILDREN, ELDERLY PERSONS, AND PERSONS LIVING WITH DISABILITIES

Zimbabwe is obligated in terms of international and regional treaties to provide special legal protection to women,[214] elderly persons,[215] and persons living with disabilities.[216] The absence of special constitutional mechanisms that offer special protection to these groups exhibits serious shortcomings in the domestication of the right to adequate housing. This means that Zimbabwe is failing to discharge its obligation in terms of the various treaties. It is also noteworthy that the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** requires special laws to protect these groups because they are more vulnerable to the adverse consequences of forced evictions, which intensify inequality, social conflict, and segregation.[217] **General Comment Number 7** also recognizes that women, children, persons with disabilities, and elderly people suffer disproportionately when subjected to forced evictions, and require special protection.[218]

Regarding children, **section 81 (1)(f) of the Constitution of Zimbabwe** only protects children, and families with children, by providing a constitutional right on access to shelter. In the case of the **Zimbabwe Homeless Peoples Association**, the court recognized the justiciability of this provision. The challenge is that this provision is not consistent with **General Comment Number 4** which requires the provision of the right to adequate housing as opposed to shelter. "Shelter" merely means a place to live, yet adequate housing entails "*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities*".[219]

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[214] Convention on the Elimination of all forms of Discrimination Against Women, Article 14(2)(h); and the African Women`s Protocol, Article 16.

[215] ICESCR, Article 11; and CESCR General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons.

[216] Convention on the Rights of Persons Living with Disabilities, Article 28.

[217] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) paragraph 7.

[218] General Comment Number 7 (n 75 above) paragraph 10

[219] General Comment Number 4 (n 1 above) paragraph 7.

This would provide a basis for provision of the minimum core obligation regarding the right to adequate housing. Section 81 (f) of the **Constitution of Zimbabwe** is thus inappropriately worded and consequently falls short of the requirement to guarantee the right to access "adequate housing" for children.

The possibility of having special constitutional rights is exemplified by **section 21(3) of the Constitution of Kenya**, which places a duty on the State to address the needs of women, children, people living with disabilities, elderly persons, and other vulnerable members of society in the implementation of all constitutional rights. The existence of a similar provision in the **Constitution of Zimbabwe**, coupled with an explicit constitutional right on adequate housing would ensure the justiciability of the right to adequate housing and offer better protection to women, children, people living with disabilities, elderly persons, and other vulnerable members of society.

4.14. JUSTIFICATION FOR PROVIDING THE RIGHT TO ADEQUATE HOUSING IN STATUTES THAT REGULATE THE EXTRACTIVES INDUSTRY

The provision of the right to adequate housing in Acts of Parliament emanates from Zimbabwe`s obligation under international law to provide for effective domestic remedies for violation of housing rights. **General Comment Number 3** requires the provision of effective judicial remedies.[220] The **Basic Principles and Guidelines On Development Based Evictions and Displacement** also require the provision of adequate, effective, and timely legal remedies.[221]

The need to protect the housing rights of communities in Acts of Parliament regulating the extractives industry also finds support in the doctrine of constitutional avoidance and ripeness. This doctrine requires the exhaustion of statutory remedies before the Constitution can be invoked to resolve

[220] General Comment Number 3 (n 73 above) paragraph 9.

[221] Basic Principles and Guidelines On Development Based Evictions and Displacement (n 4 above) Principle 17

disputes.[222] In **Sports and Recreation Commission v Sagittarius Wrestling Club and Another**, the Supreme Court highlighted that:-

"…*courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights.*"[223]

Housing rights must, therefore, be protected in Acts of Parliament governing mining and land tenure, where mining and land tenure rights are derived.

4.15. MINING AND LAND RIGHTS

The **Mines and Minerals Act [Chapter 21:05],** vests rights in all minerals, oils, and gases in the President of Zimbabwe.[224] Miners can acquire rights to engage in exploration by obtaining prospecting licenses and exclusive prospecting orders. Prospecting licences allow the holder to search for any mineral on State and Communal Land, and land held under title deeds where mining rights were reserved in favour of the State.[225] Exploration is antecedent and inseparable from mining.[226] Mining is premised on miners obtaining licences for general mining claims,[227] mining leases,[228] special mining leases,[229] and special grants.[230]

When rights are given to miners, the **Mines and Minerals Act** does not make it mandatory for the Minister or President to consider housing rights of those in occupation of land. The Act also does not give preference mining rights to

[222] *Chawira & 13 Others v Minister, Justice Legal & Parliamentary Affairs &* Others CCZ 3/2017

[223] *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) at 505G

[224] Section 2 of the Mines and Minerals Act

[225] Section 20, 87 and 26 of the Mines and Minerals Act.

[226] *Mount Grace Farm (Pvt) Ltd v Jumua Metals & Minerals & Another* HH 844-19.

[227] Covers a small area with a single block or several contiguous claims grouped into a block of mining claims.

[228] See Section 135 of the Mines and Minerals Act.

[229] See Section 159 of the Mines and Minerals Act, is for large scale mining.

[230] Section 302 of the Mines and Minerals Act. Issue by the President for mining of coal, oil, or natural gas.

landowners and occupiers even if they also want to engage in mining.[231] In the case of **Mount Grace Farm (Pvt) Ltd v Jumua Metals & Minerals & Another HH 844-19**, the High Court noted how mining rights are intrusive and disruptive of rights of people in occupation, particularly the rights of those in occupation of small pieces of land. Miners are empowered to enter the land, prospect on land open for prospecting, and peg blocks.[232] Holders of prospecting licenses are also awarded surface rights to use water, firewood, erect temporary accommodation, and bring equipment.[233] This reduces land that is available to occupants and compromises the adequacy of space for farming purposes. In the ***Mount Grace case***,[234] the court also noted that when exploitation of minerals occurs, this results in excavations where open pits become death traps to livestock and blasting results in noise which may make it impossible for farmers to continue residing on their land or engage in meaningful farming operations.[235] This results in the forced displacement of landowners and occupants.

The conflict between farmers and miners is also exacerbated by section 179 of the **Mines and Minerals Act** which provides that mining takes precedence over farming activities being undertaken by landowners and people in occupation of such land. In **Satond Investments (Private) Limited v Munashe Shava HH 336-18**, the High Court held that "*where two competing rights on a piece of land exist, one of a miner and a farmer, the farmer's rights are subordinate or should accede to the miner's rights. The farmer can only exercise his rights as long as such exercise does not interfere with the mining activities*".

Though the Mines and Minerals Act provides for landowners and occupants of land consenting to prospecting on their land,[236] refusal by people in occupation of communal and State land is compromised because they do not own the land. Such communities only have rights to use the land for residential, pastoral, and

[231] *Stonefields Mining (Pvt) Ltd. v Mudimbu & Another* HH 129-16 court disregarded who owned the land and resolved a mining dispute in favour of a third party.

[232] Section 27 of the Mines and Minerals Act.

[233] Section 29 of the Mines and Minerals Act.

[234] HH-844-19

[235] See also Extractive Industries Policy and Legal Handbook.(n 22 above) 47.

[236] Section 31 of the Mines and Minerals Act.

farming purposes.[237] The State holds *dejure* ownership rights, which means their refusal to consent to mining activities is insignificant and they can easily be removed from the land.[238] In this regard, holders of title deeds are better protected as it is more cumbersome for the State to first acquire land in terms of the Land Acquisition Act.[239]

The **Mines and Minerals Act** attempts to protect housing rights by providing for land not open for prospecting.[240] This includes the prohibition of prospecting within four hundred and fifty metres from a principal homestead,[241] and on land under cultivation for a period of three years.[242] The **Mines and Minerals Amendment Bill HB 19, 2015**, carries forward these provisions.[243] This approach is ineffective as land would have been occupied and the resulting competition for space, water, firewood, as well as blasting and dangers posed by open pits may compromise the ability of the landowners or occupants to remain in occupation. Though the Act provides for disputes between landowners and miners being referred to the Administrative Court,[244] this means occupants of land have to challenge invasion by miners when infringements are already occurring. The right to challenge the process in the Administrative Court is also problematic because this court only has one judge which compromises access to justice for people in various locations across Zimbabwe.[245]

A better model is for preference rights to be awarded to occupants of the land. South Africa`s **Mineral and Petroleum Resources Development Act No. 28 of 2002** gives communities preference mining rights over their land which helps promote participation, economic inclusion, and sustainable mining practices. The

[237] Extractive Industries Policy and Legal Handbook.(n 22 above) 21-22

[238] T Dhlakama, "Legal Policy and Institutional Frameworks for Community Land Rights in the Wake of Development Projects in Zimbabwe, Challenges and Way Forward" Zimbabwe Environmental Lawyers Association, 2017.6-8

[239] Section 8 of the Land Acquisition Act.

[240] Section 31 of the Mines and Minerals Act.

[241] Section 31 of the Mines and Minerals Act.

[242] Section 30 of the Mines and Minerals Act.

[243] Section 70 of the Mines and Minerals Amendment Bill.

[244] Section 32 of the Mines and Minerals Act.

[245] https://www.jsc.org.zw/adminjudge

inclusion of preference rights in the Zimbabwean Act would limit the intrusive nature of mining rights which results in competition for space and resources. Furthermore, the South African Act also requires that before prospecting or mining commences, there must be consultation of affected persons and if parties fail to agree, then the matter is referred to the Regional Mining Development and Environmental Committee which considers if the exercise of mining rights is justified.[246] This ensures a human rights-based approach by being proactive in the provision of administrative remedies in protecting security of tenure and housing rights. Chapter 2 of the South African Act also incorporates principles such as sustainable development and equitable access to resources, which have been used to litigate and protect communities from displacement and infringement of housing rights.[247]

4.16. EVICTIONS

Section 74 of the **Constitution of Zimbabwe** entrenches the freedom against arbitrary eviction as a justiciable constitutional right. It states that:-

> *"No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances."*

The purpose of section 74 of the **Constitution of Zimbabwe** is to allow the judiciary to exercise oversight and regulate forced evictions, and is a method that ensures people have access to judicial relief. This is consonant with the **Basic Principles And Guidelines On Development-Based Evictions And Displacement** which define forced evictions as *"…the coerced or involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources… without the provision of, and access to, appropriate forms of legal or other protection".*[248] Despite the presence of this

[246] Section 10 of the South African Mineral and Petroleum Resources Development Act No. 28 of 2002

[247] Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others CCT 39/10. 15.

[248] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) para 4

constitutional freedom, no statute exists to expound and guarantee the freedom against arbitrary eviction. This is necessary having regard to the fact that the Constitution is silent on what constitutes an arbitrary eviction. In the **Zimbabwe Homeless Peoples Association case**, the Supreme Court attempted to cure this defect by enunciating that when courts exercise oversight over forced evictions, they should not only focus on due process requirements such as whether people who are being evicted were given adequate notice and were consulted, but should also consider whether people have been provided with access to alternative shelter.[249] Despite the progressive nature of the court`s decision, such a precedent is not cast in stone and is capable of being reversed by future judgments having regard to the fact that the Supreme Court is not bound by its own decisions, [250] and also in light of the absence of an explicit constitutional right which expressly protects the right to adequate housing.

A special Act of Parliament is necessary to guide the exercise of judicial discretion, also having regard to the principle of constitutional avoidance. In South Africa for instance, to give effect to the freedom from arbitrary eviction in **section 26 of the Constitution of South Africa**, their Legislature enacted the ***Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) No. 19 of 1998***. This Act requires that all evictions must first pass through the courts, and courts are empowered to make a value judgment premised on whether the eviction is appropriate having regard to the circumstances of the occupation, the period of occupation, and the availability of suitable alternative accommodation.[251]

Forced evictions also result due to the lack of security of tenure.[252] **General Comment Number 4** elucidates the concept of security of tenure as placing an obligation on the State to guarantee legal protection against forced evictions for everyone, regardless of the form of accommodation and whether the occupants hold title or not.[253] Security of tenure is derivable from "land tenure" which refers to

[249] Zimbabwe Homeless Peoples Association case (note 157).13-18.
[250] Supreme Court Practice Directive of 1981, 1981 ZLR 417.
[251] Section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) No. 19 of 1998.

[252] General Comment Number 7 (n 69 above) para 1.

[253] General Comment Number 4 (n 1 above) para 8 (a)

rules governing who owns the land, has access to it, and can exercise control over its use.[254] Where land tenure rules are weak this exposes holders of rights in land to compulsory acquisitions and dispossession of rights,[255] and negates realisation of the right to adequate housing.

Zimbabwe's land tenure system is a mixture of various tenure systems which include communal tenure, leasehold tenure, and freehold tenure.[256]

Communal land tenure is regulated in terms of the **Communal Lands Act [Chapter 20:04]** which gives effect to customary land tenure in terms of African customs and values.[257] The **2012 Zimbabwe Census Report** established that forty-six percent of Zimbabwe`s total population resides on communal land. The **Communal Lands Act** vests all communal land in the President of Zimbabwe, and it is managed by Rural District Councils on the President`s behalf.[258] Communities only have "use rights" which relate to the use of the land for residential, pastoral, and agricultural purposes, and there is no provision for private ownership of land.[259] Communities may easily be dispossessed of land and evicted from their homes by the President, [260] Minister,[261] and Rural District Council, for mining and other purposes. In such circumstances, the Act fails to require the provision of suitable alternative housing. The **Communal Lands Act** gives people who are being displaced the right to claim alternative land.[262] The provision in the Act is inconsistent with Principle 60 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement**, which requires that when land has been compulsorily acquired, it must be replaced by land commensurate in size, value, quality, or the land must better. The **Act** also fails to provide for consultation of affected persons, but rather, provides for

[254] Dhlakama, (n 238 above). 6-7.

[255] Dhlakama, (n 238 above). 7.

[256] Dhlakama, (n 238 above)

[257] Section 8(2) of the Communal Lands Act

[258] Section 4 of the Communal Lands Act.

[259] Extractive Industries Policy and Legal Handbook.(n 22 above) 21-22.

[260] Section 6 (1) (b) of the Communal Lands Act.

[261] Section 10 of the Communal Lands Act.

[262] Section 12 of the Act

consultation of the Rural District Council.[263] This is contrary to Article 10 of the **Kampala Convention,** which requires consultation and consideration of feasible alternatives in consultation with affected persons. **Dhlakama** also avers that because occupants of communal land do not have title deeds, the State has no obstacle in allocating the land to private investors and miners without the consent of occupants.[264] It is contended that the regulatory framework governing communal land tenure is unjustifiably weak and perpetuates the colonial legacy where indigenous people were not given title deeds and had to continuously depend on the State. The **Communal Lands Act** also does not offer any special protection to women, children, elderly people, and persons living with disabilities contrary to the obligation on the Government of Zimbabwe after having ratified treaties that require the protection of these segments of society. The **Communal Lands Act** is inconsistent with **section 28 of the Constitution of Zimbabwe**, which requires that adequate shelter should be provided to all people.

Leasehold tenure is regulated in terms of the **Land Commission Act [Chapter 20:29]** which governs State land**.** State land vests in the President.[265] The Minister is empowered to award leases, permits, and offer letters that gives effect to leasehold tenure.[266] The importance of this Act is that it is meant to give effect to the State`s resettlement policy of redressing colonial injustices, which is the **Fast Track Land Reform Programme** which saw the creation of A1 farms, A2 farms, and ninety-nine-year leases.[267] Permits, offer letters and ninety-nine year leases only result in a right to occupy the land, and security of tenure is weak as the State is empowered to repossess land at any time. When this occurs, there is no provision in the Act for consideration of feasible alternatives in consultation with affected persons, and the provision for alternative housing or alternative land as required by Principles 55 and 56 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement**. The **Land Commission Act** has also not been aligned with section 28 of the **Constitution of Zimbabwe**, which requires that adequate shelter be provided to everyone.

[263] Extractive Industries Policy and Legal Handbook.(n 22 above) 15.

[264] Dhlakama, (n 238 above). 9.

[265] Section 3 of the Land Acquisition Act
[266] Section 23 of the Land Commission Act
[267] Section 2 and Part V of the Land Commission Act

Freehold tenure is where land ownership is vested in a natural or juristic person by a title deed in terms of the **Deeds Registries Act [Chapter 20:05]**. In ***Silberberg and Schoeman`s The Law of Property,*** it is provided that the rights derivable from a title deed create "real rights" which allow the holder to enforce them against the world if the property is dealt with in a manner inconsistent with his or her control.[268] The weakness in Zimbabwe`s legal system is that security of tenure has been eroded by amendments to the **Land Acquisition Act [Chapter 20:10]** and section 72 of the **Constitution of Zimbabwe** which allow the State to compulsorily acquire land for *inter alia* resettlement purposes and the exploitation of natural resources.[269] Acquisition of land results in the cancellation of the title deed. Real rights are now eroded; as no compensation is payable save for improvements effected before the acquisition of the land, and affected persons are barred from approaching a court save for the determination of the question of compensation for improvements.[270] Compensation for the land is only payable to indigenous Zimbabweans, and land held under bilateral agreements with other Governments.[271] This constitutes serious erosion of security of tenure offered by a title deed, as the law allows the State to take away private property without payment of compensation or accountability. Furthermore, the law does not expressly guarantee consideration of feasible alternatives in consultation with affected persons and is thus inconsistent with the Kampala Convention.[272] The law also fails to guarantee the provision of suitable alternative accommodation. Evictions are thus permissible without payment of compensation and provision of alternative housing, which violates the right to adequate housing as provided for in the **ICESCR,** and the national objective on adequate shelter in section 28 of the **Constitution of Zimbabwe**.

The **Land Acquisition Act [Chapter 20:10], Rural District Councils Act [Chapter 29:13], Land Commission Act [Chapter 20:29], and the Communal**

[268] PJ Badenhorst, J Pienaar & H Mostert, Silberberg and Schoeman`s Law of Property, Butterworths, 4th Edition.32.

[269] Section 72(2) of the Constitution of Zimbabwe.

[270] Section 72(3) of the Constitution of Zimbabwe.

[271] See section 295 of the Constitution of Zimbabwe.

[272] Kampala Convention, Article 10.

Lands Act [Chapter 20:04] also fail to provide for the safe and voluntary return of people to their homes once mining is complete. Principles 64 and 65 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** requires that when return is possible, the State should guarantee the voluntary and safe return of people to their homes and places of origin. These Acts are therefore not consistent with international minimum standards and do not contemplate that the extractives industry may be temporary, and there are instances where people may desire to return to their places of origin.

4.17. COMPENSATION

`Compensation` is defined as the process of paying for damages, making amends, or indemnification of losses suffered by another person.[273] Compensation has its foundation in section 71 (3) of the **Constitution of the Zimbabwe** which requires the payment of "fair and adequate compensation" for the acquisition and diminution of property within a reasonable period.[274] The **Basic Principles and Guidelines on Development-Based Evictions and Displacement** recommend that compensation should be just and fair, payable regardless of whether victims hold title or not, should be paid proportionate to the gravity of the violation suffered, and cash compensation should not substitute real compensation in the form land and common property resources.

The laws of Zimbabwe provide for various types of compensation with the applicable law being dependent on the nature of the loss and land tenure system. Any landowner or occupant can claim compensation for injuries caused by mining operations in terms of the **Mines and Minerals Act**.[275] The **Communal Lands Act** allows claims for compensation for diminution or dispossession of rights held in communal land where there has been a failure to agree on compensation or a failure to obtain alternative land.[276] The **Land Commission Act** only allows

[273] Blacks Law dictionary, 2nd Edition https://thelawdictionary.org/compensation/. Accessed 25 May 2020

[274] Section 71(3) (c)(ii) of the Constitution of Zimbabwe.

[275] Section 80 and 133 of the Mines and Minerals Act

[276] Section 12 of the Communal Lands Act.

compensation for improvements made to State land.[277] The **Land Acquisition Act** generally provides for compensation to owners of land held under freehold tenure.[278]

This study established that the **Mines and Minerals Act**, [279] **Land Acquisition, Act**,[280] and the **Land Commission Act,**[281] only provide for cash compensation and do not provide for non-monetary compensation. This challenge has its origin in section 71 of the **Constitution of Zimbabwe,** which only focuses on payment of monetary compensation. Losses incurred by communities due to displacement are not always quantifiable in monetary terms.[282] Access to housing depends on access to land that may not always be readily available on the market. Payment of money would not be useful in guaranteeing access to alternative housing. Acts of Parliament must thus provide for alternative land and housing as a mandatory pre-condition for the State to evict people. Zimbabwe can learn from Kenya, where their **Prevention, Protection, and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010** expressly prohibits eviction until there is the provision of alternative basic shelter.[283]

Section 12 (1) (c) (ii) of the **Communal Lands Act** provides for monetary compensation and provision of alternative land. Monetary compensation is only payable is there is consent, or where no alternative land is available. The weakness is that the Act does not provide for compensation for common property resources such as pastures.[284] This is inconsistent with the **Basic Principles and Guidelines on Development-Based Evictions and Displacement,** which require that compensation should also take into account loss of access to common property resources.[285] This challenge emanates from the failure of section 12 of

[277] Section 27 of the Lands Commission Act.

[278] Section 20 and 21 of the Land Acquisition Act

[279] Section 80 of the Mines and Minerals Act.

[280] Sections 20 and 21 of the Land Acquisition Act

[281] Section 27 of the Land Commission Act.

[282] Dhlakama, (n 238 above) 34

[283] Section 6(3) of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010.

[284] Pasipamire (n 183 above)

[285] Terminski (n 47 above)

the **Communal Lands Act** to give guidance on how compensation is to be quantified. Though the **Communal Lands Act** gives people who are being evicted the right to claim alternative land,[286] this does not comply with Principle 60 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** which requires that when land is acquired it must be replaced by land commensurate in size, value, and quality, or the land must better. This threatens the adequacy of housing space and the fairness of the relocation.

An examination of the **Mines and Minerals Act**,[287] **Land Acquisition Act**,[288] the **Land Commission Act**,[289] and the **Communal Land Act,**[290] revealed that they do not entrench payment of compensation before eviction. This problem has its genesis in section 71(3)(c)(ii) of the **Constitution of Zimbabwe** which gives latitude to pay compensation after the property is acquired or within a reasonable time thereafter. In **Marlvin Mudiwa and Others v Mbada Mining Private Limited and Others HC 6334/09,** the court found it difficult to bar an eviction without prior payment of compensation.[291] This exposes people to eviction without payment of compensation they may desperately need to cater for their personal needs immediately after an eviction. There is, therefore, a need to amend the laws to guarantee payment of compensation before eviction. Zimbabwe can also draw lessons from the **Kenyan Mining Act [Chapter 306]** which allows the Minister to suspend mining operations if compensation payments are not made.[292] This expedites the payment of compensation for losses suffered.

Section 72 (2) of the **Constitution of Zimbabwe**, and the **Land Acquisition Act**,[293] also provide for the compulsory acquisition of agricultural land for the exploitation of natural resources without payment of compensation for the acquired land. Compensation for the land is only payable to indigenous

[286] Section 12 of the Communal Land Act.

[287] Section 80 of the Mines and Minerals Act.

[288] Sections 20 and 21.

[289] Section 27 of the Land Commission Act.

[290] Section 12 of the Commnal Lands Act

[291] See also Dhliwayo (n 190 above) 14.

[292] Section 26(5) of the Kenyan Mining Act.

[293] Sections 20 and 21 of the Land Acquisition Act.

Zimbabweans, and land held under bilateral agreements with other Governments.[294] The implication is that people may be evicted without payment of compensation for land, which is contrary to international obligations, and such acquisitions may render people homeless. Section 72 of the **Constitution of Zimbabwe** violates housing and property rights by failing to guarantee that displaced persons access both alternative housing and compensation. This is inconsistent with Article 11 of the **ICESCR** which requires protection of the right to adequate housing as a corollary for an adequate standard of living. Section 72 of the Constitution also violates Articles 4 and 10 of the **Kampala Convention,** which prohibits arbitrary evictions, and this provision also falls short of the **CRC, CRPD**, and **African Women`s Protocol** in guaranteeing the right to adequate housing for children, persons living with disabilities, and women respectively. In the case of **Mike Campbell (Private) Limited and Others v Zimbabwe SADC (T) 2/2007**, the SADC Tribunal held that a law that fails to provide compensation for acquired land is inconsistent with international law. There is, therefore, a need to amend the Constitution of Zimbabwe so that it complies with international human rights law.

An examination of the **Mines and Minerals Act**, [295] **Land Acquisition Act**,[296] **Land Commission Act**,[297] and the **Communal Land Act** also evidences the absence of a special fund to meet compensation for housing and property losses when land is compulsorily acquired for mining purposes. Zimbabwe can learn from Kenya, where their **Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010** establishes a special fund to cater for the housing needs of people who would have been subject to internal displacement.[298] Such a fund would capacitate the Government of Zimbabwe in financing the provision of houses and infrastructure such as roads, water, sewer, educational, and health facilities.

[294] Section 295 of the Constitution of Zimbabwe

[295] Section 80 and 133 of the Mines and Minerals Act

[296] Sections 20 and 21 of the Land Acquisition Act

[297] Section 27 of the Land Commission Act

[298] Section 15 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010

4.18. ENVIRONMENTAL IMPACT ASSESSMENTS

An environmental impact assessment is a decision-making tool employed to assess the consequences of human activity on the environment, to evaluate alternative approaches, and to incorporate prevention, mitigation, and monitoring measures.[299] The **Environmental Management Act [Chapter 20:27]** is weak in protecting the right to adequate housing as it does not require environmental impact assessments when there is a change in land-use or acquisition of farmland. This is inconsistent with Principle 32 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement,** which requires holistic eviction-impact assessments before development-induced evictions are undertaken. Article 10 (3) of the **Kampala Convention** also places an obligation on the Government of Zimbabwe to ensure that environmental and socio-economic impact assessments are undertaken before a project commences. The ramification is that the **Land Acquisition Act [Chapter 20:10], Rural District Councils Act [Chapter 29:13], Land Commission Act [Chapter 20:29], and the Communal Lands Act [Chapter 20:04]** allow forced evictions and displacement of people without adequate consideration of how many people are affected, how they are affected, what type of alternative housing is necessary, and where people shall be resettled. This is a serious flaw within the legal framework which results in the violation of the right to adequate housing and good governance. Zimbabwe could learn from Kenya, where their **Environmental Management and Co-ordination Act, Chapter 387** requires that all activities which result in major changes in land-use should not be undertaken unless there is an environmental impact assessment.[300]

[299] Food and Agriculture Organisation. Environmental Impact Assessment, Guidelines for FAO Field Projects. 2011.1. Accessed on the 25th of May 2020 http://www.fao.org/climatechange/29103 02e9a33753ffc325da1e25250c06c927b.pdf

[300] Second schedule of the Environmental Management and Co-ordination Act, Chapter 387

4.19. COORDINATION OF THE ACTIVITIES OF RELEVANT GOVERNMENT AUTHORITIES

Zimbabwe does not provide a special body that monitors forced evictions and mining-induced displacement. The failure to have a special body is a serious flaw in the legal framework regulating mining-induced displacements as there is no coordination in the prevention of forced displacements and violation of housing rights. **Section 3 (1) of the Constitution of Zimbabwe** recognizes that Zimbabwe is founded upon the principle of good governance. The absence of a public body to prevent and manage displacement *ex facie* violates the principle of good governance. Furthermore, the activities of public officials who include the Minister of Mines and Mining Development; the Minister of Lands, Agriculture and Rural Resettlement; the Minister of Environment, Water and Climate; the Minister of Local Government, Rural and Urban Development; and the Prosecutor General lack coordination. The need for a public body that coordinates public functions is derived from **Article 2 (3) (b) of the Kampala Convention** which requires States to establish a public authority or body responsible for monitoring and coordinating prevention and remediation strategies for the benefit of internally displaced persons. Zimbabwe could draw lessons from Kenya where their **Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010** establishes a National Consultative Coordination Committee on Internally Displaced Persons. This committee is constituted of secretaries from relevant government Ministries, the Attorney General, Director of Public Prosecutions, non-State actors, and Chairpersons of the Human Rights and Land Commissions.[301] The Kenyan approach ensures good governance by creating a specialist body that coordinates the activities of various public authorities.

[301] Section 12 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010

4.20. ADOPTION OF THE RIGHT TO ADEQUATE HOUSING BY COURTS IN ZIMBABWE

`Adoption` refers to the process by which courts adopt principles in international treaties when resolving cases where the treaties have not been transformed and/or adapted within the domestic legal order.[302] The competency of courts to consider international treaties and conventions is derivable from **section 46 (1)(c) of the Constitution of Zimbabwe** which makes it peremptory for Courts to consider treaties and conventions to which Zimbabwe is a party when interpreting the Declaration of Rights. The Court has no discretion in such instances.[303] Furthermore, **section 326 (7)** of the Constitution of Zimbabwe also requires courts to adopt any reasonable interpretation of legislation that is consistent with a treaty or convention that is binding on Zimbabwe.

There are very few cases that have dealt with the right to adequate housing in respect of people being displaced by the extractives industry in Zimbabwe under the current constitutional dispensation. The case of **Marange Development Trust v The District Administrator Mutare District and Others HC 12237/16** which barred the eviction and destruction of Tinoengana Village in Chiadzwa was resolved by consent and no judgment was issued.

Research also canvassed cases that deal with forced evictions in general. Cases that were considered include ***City of Harare v Makungurutse & Others SC 46-18; Hanna Housing Consortium v City of Harare HH 503-18***; ***Dusabe & Anor v City Of Harare & Ors HH 114-16, and Together As One Housing Coop v City of Harare and Nyatsime Beneficiaries Trust & 11 Others v Chitungwiza Municipality HH 101-16***. In all these cases, courts were robust in preventing

[302] Venice Commission. Report on the Implementation of International Human Rights Treaties In Domestic Law and The Role Of Courts, adopted by the Venice Commission at its 100th plenary session,2014. 9.

[303] A Moyo, "*Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights"*. 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe, held at Cresta Lodge, Harare, Zimbabwe, on 5 December 2016, under the Zimbabwe Human Rights Capacity Development Programme. Accessed 25 May 2020. https://zimlii.org/content/constitutional-analysis-interpretation-clause-zimbabwean-declaration-rights-0

arbitrary evictions solely premised on the due process requirement, and that the evictions were unlawful because they had not been subject to judicial oversight. Therein, courts did not consider international treaties and conventions or directly embrace principles that define the normative meaning on the right to adequate housing. The consequence is that the courts limited there capacity to develop domestic jurisprudence and align it with international treaty bodies. Zimbabwean courts are yet to adopt or prescribe that all forced evictions must only be carried out where there has been provision of alternative housing which is consistent with the minimum core obligation.

In the case of **Zimbabwe Homeless Peoples Association and Others v Minister of Local Government and National Housing and Others SC 94-2020**, the Supreme Court not only considered due process requirements such as the need for reasonable notice and consultation, but also the right to obtain alternative shelter when forced evictions are imminent.[304] The Supreme Court reversed a decision by the High Court which had stated that section 81(1)(f) of the Constitution of Zimbabwe does not provide a justiciable right to adequate housing.[305] Furthermore, unlike previous court decisions, the court was progressive in considering the Convention on the Rights of the Child and the African Children's` Charter in establishing the State`s obligations when forced evictions are imminent.[306] The flaw in this decision is that the court did not consider the International Covenant on Economic, Social and Cultural Rights and General Comment Number 4 which articulate the normative content of the right to adequate housing. Though the court`s decision helps require the provision of alternative housing or shelter, the court missed the opportunity to adopt the normative principles on "adequate housing" which are provided for in **General Comment Number 4,** which is the principal interpretation guide on the right to adequate housing. General Comment Number 4 requires the provision of "*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities*".[307] It was possible for the Supreme Court of Zimbabwe to

[304] Zimbabwe Homeless Peoples Association case (note 157). 13 & 44
[305] Zimbabwe Homeless Peoples Association case (note 157).3.
[306] Zimbabwe Homeless Peoples Association case (note 157). 6.
[307] General Comment Number 4 (n 1 above) para 7.

adopt this approach as section 28 of the Constitution of Zimbabwe requires the State to guarantee the provision of “adequate shelter”.

4.21. CONCLUSION

From the foregoing findings and analysis, it is evident that Zimbabwe is not meeting its obligations under international and regional human rights instruments.[308] Zimbabwe is failing to meet its obligations by not providing a justiciable right to adequate housing protecting all people within the **Declaration of Rights**. Zimbabwe is also failing to protect women, children, elderly persons, and persons living with disabilities by failing to provide special laws that protect these sectors of society. Though section 28 of the **Constitution of Zimbabwe** has a national objective on adequate shelter, this provision is limited because it cannot be enforced as a stand-alone constitutional right. Despite this flaw, Zimbabwean courts have gradually embraced the need to prevent arbitrary evictions, and in the recent judgment in the **Zimbabwe Homeless Peoples Association** case,[309] the Supreme Court adopted the requirement in international treaties that people who are affected by forced evictions must be provided access to alternative housing or shelter. Zimbabwean courts have failed to adopt principles articulated in General Comment Number 4 which requires that regard be had to adequate housing and not just shelter. The current jurisprudence is therefore still shallow.

It was also established that although the **Constitution of Zimbabwe** provides for the freedom from arbitrary eviction and a national objective on adequate shelter, laws regulating mining and land tenure have not been aligned with this provision. There is also an absence of a special law that expounds on the freedom from arbitrary eviction, which would augment the protection of communities who are displaced by the extractives industry.

[308] ICESCR, ICCPR, CRC, CEDAW, CRPD, African Charter on Human and Peoples Rights, African Children`s Charter, ICERD, African Women`s Protocol, and the Kampala Convention.

[309] SC-94-20

It was also observed that the State wields substantial power to acquire land and allocate mining rights in the absence of peremptory provisions for the State to consider the housing rights of people who face eviction. The **Land Acquisition Act**, the **Land Commission Act,** and the **Communal Land Act** do not provide for a human rights-based approach as they do not recognize principles that entrench the right to adequate housing. Furthermore, these laws are not consistent with international minimum standards which require the provision of security of tenure; alternative housing and land; payment of prompt, fair, and adequate compensation; and the prompt, free, prior and informed consent of affected people.

It was also established that the **Mines and Minerals Act** prioritizes mining over the rights of owners and occupants of the land. The Act unfairly gives third parties mining rights to utilize land and other resources which results in conflict between miners and farmers. There is also no provision for environmental impact assessments upon changes in land-use from farming to mining which limits the capacity of the State to prevent violation of housing rights. It was also established that the monitoring of mining-induced displacement and protection of housing rights is inhibited by the absence of a specialist body to monitor and coordinate prevention and remediation strategies.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

5.1. INTRODUCTION

This chapter contains a summary of the research findings on whether laws that govern the extractives industry in Zimbabwe adequately provide for the right to adequate housing. This chapter also contains recommendations on improving the laws of Zimbabwe, further research areas, and conclusions derived from the research.

5.2. SUMMARY OF FINDINGS

This research was premised on an analysis of the doctrine underpinning the right to adequate housing and the protection of communities who are displaced by the extractives industry in Zimbabwe. The study was premised on addressing four inquiries. The first inquiry was to establish the doctrine and normative content of the right to adequate housing within the context of displacement of communities by the extractives industry. The second was to establish how laws that regulate the extractives industry can guarantee the right to adequate housing. The third was to analyse and assess if principles contained in international and regional human rights instruments have been incorporated into the **Constitution of Zimbabwe** and legislation that regulates the extractives industry. The fourth was to establish how laws that regulate the extractives industry and land tenure in Zimbabwe can be improved to guarantee housing rights for displaced communities.

This research established that the doctrine and normative content of the right to adequate housing is elucidated under international human rights law. It was established that Zimbabwe is bound by the **ICESCR** and many other international and regional treaties to provide for the right to adequate housing in its laws.[310]

[310] Article 11 of the ICESCR, Article 17 of the ICCPR, Article 27 of the CRC, Article 14(2) of the CEDAW, Article 28 of the CRPD, African Charter on Human and Peoples Rights ars per the SERAC case, Article 20(2)

This is a binding obligation in terms of international law,[311] and the **Constitution of Zimbabwe**.[312] The right to adequate housing is elucidated in *General Comments* by the **Committee on Economic Social and Cultural Rights** and is constituted of the freedom from arbitrary eviction and the entitlement to access adequate housing.[313] Housing means more than shelter, and focus should be on ensuring affordability; accessibility; security of tenure; availability; habitability; location near centres of employment and providers of social amenities; and cultural adequacy.[314] The State must ensure the progressive realisation of the right to adequate housing, subject to available resources, and in a manner that is not discriminatory.[315] Furthermore, the State is required to ensure the satisfaction of the minimum core obligation of the right to adequate housing.[316]

The **Kampala Convention,**[317] and the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** also require that laws prohibit arbitrary evictions.[318] Forced evictions should only occur when there are overriding public interests. When evictions occur, the State should guarantee the provision of suitable alternative housing consistent with international minimum standards.[319] Furthermore, displaced communities must have access to effective remedies which include challenging an arbitrary eviction, compensation, resettlement, and voluntary return after the project.[320] The law should also ensure there is provision

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of the African Children`s Charter, Article 5 of the ICERD, Article 16 of the African Women`s Protocol, and Article 10 of the Kampala Convention.

[311] Article 26 of the Vienna Convention.

[312] Section 34 of the Constitution of Zimbabwe.

[313] General Comment Number 7 (n 75 above)

[314] General Comment Number 4 (n 1 above) para 8.

[315] General Comment Number 3 (n 73 above)

[316] General Comment Number 3 (n 73 above) para 10; Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principle 55

[317] Kampala Convention, Articles 4 and 10

[318] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principle 55

[319] Kampala Convention in Article 10, CESCR, General Comment Number 7 (n75 above); and Principle 55 of the Basic Principles and Guidelines on Development-Based Evictions and Displacement.

[320] General Comment Number 3 (n 73 above) paragraph 5, Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Part VI

of human rights and environmental impact assessments;[321] free, prior and informed consent of displaced communities; and access to courts.[322]

Analysis of the laws of Zimbabwe revealed that the **Constitution of Zimbabwe** fails to adequately protect communities displaced by the extractives industry. The absence of an explicit right guaranteeing access to "adequate housing" protecting everyone, within the Declaration of Rights, compromises the justiciability of access to suitable alternative housing in terms of the minimum core obligation required by international treaties and instruments.[323] The **Constitution of Zimbabwe** and legislation also inadequately protect women, elderly persons, and people living with disabilities, as there is no special legal protection offered to these groups. Furthermore, though there is a constitutional right for children to access shelter, it is improperly provided for as it should have referred to adequate housing. Shelter merely entails a place to live,[324] whereas adequate housing goes beyond just shelter and entails "*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities*".[325]

Though the **Constitution of Zimbabwe** provides for the freedom from arbitrary eviction, laws regulating mining and land tenure have not been aligned with this provision. There is also an absence of a special law that gives effect to this freedom.

It was also noted that land tenure laws in Zimbabwe, that is, the **Constitution of Zimbabwe**, **Land Acquisition Act [Chapter 20:10]**, **Land Commission Act [Chapter 20:29]**, and the **Communal Lands Act [Chapter 20:04]** result in insecure tenure by giving the State significant power to acquire land and displace

[321] Kampala Convention in Article 10

[322] Kampala Convention in Article 10, and Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principle 37

[323] Article 11 of the ICESCR, the African Commission`s Principles And Guidelines On The Implementation Of Economic, Social And Cultural Rights, and Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principle 55

[324] General Comment Number 4 (n 1 above) para 7 and 8.

[325] General Comment Number 4 (n 1 above) para 7.

people without provision of fair compensation or suitable alternative housing. The State has unrestrained power to compulsorily acquire land held under all land tenure systems without a positive requirement to guarantee adequate housing for displaced communities.

The **Land Acquisition Act**, **Land Commission Act,** and the **Communal Land Act** do not provide a human rights-based approach that requires the exercise of Executive decision-making to consider the right to adequate housing. Laws governing the extractives industry are not consistent with international minimum standards that require the provision of alternative housing, land; and payment of prompt, fair, and adequate compensation for all property losses.

Research also established that the **Mines and Minerals Act** prioritizes mining over the rights of occupants of the land, and gives mining entities the right to utilize land and other resources which fosters conflict between miners and farmers. There is also no provision for environmental impact assessments upon acquisition of farmland which compromises the ability to assess and plan for forced evictions. It was also established that the monitoring of mining-induced displacement and protection of housing rights is constrained by the absence of a special public body to monitor and coordinate prevention and remediation strategies.

Comparative analysis with other jurisdictions, particularly Kenya and South Africa, established that these countries have specific laws that can provide valuable lessons to Zimbabwe. In Kenya, their **Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010** provides a coordinated approach in dealing with displacement as a consequence of development projects. Development-induced displacements are expressly prohibited unless justified by overriding public interests.[326] Displacement is only permissible after exploration of feasible alternatives in consultation with affected persons, and after the provision of alternative basic shelter.[327] The Act also

[326] Section 6(3) of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010
[327] Section 9 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010

makes it peremptory that the prior, free, and informed consent of affected persons must always be sought before the displacement.[328] The Kenyan Act also establishes a National Consultative Coordination Committee on Internally Displaced Persons which is constituted of various government authorities and coordinates prevention and protection strategies to prevent internal displacement.[329]

South Africa has the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) No. 19 of 1998**. The Act gives courts oversight over all evictions.[330] Courts are required to make a value judgment whether an eviction is appropriate having regard to the circumstances of the occupation, the period of occupation, and the availability of suitable alternative accommodation.[331]

Despite gaps in the legal framework, it was also established that Zimbabwean courts have been proactive in prohibiting forced evictions premised on due process requirements.[332] This was extended in the **Zimbabwe Homeless Peoples Association case** wherein the Supreme Court also held that the State must ensure that alternative shelter is provided when forced evictions are imminent.[333] Shortcomings still exist as the courts have not fully adopted the concept of adequate housing which is prescribed in General Comment Number 4. Court judgments are also a weak method in protecting housing rights as they can be reversed at any time. The Legislature should intervene and amend laws that regulate the extractives industry and guarantee access to alternative housing consistent with General Comment Number 4 which requires the provision of "*adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to*

[328] Section 8(3) of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010
[329] Section 2 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010
[330] Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) No. 19 of 1998
[331] Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) No. 19 of 1998
[332] City of Harare v Makungurutse & Others SC 46-18; Hanna Housing Consortium v City of Harare HH 503-18; Dusabe & Anor v City Of Harare & Ors HH 114-16, and Together As One Housing Coop v City of Harare and Nyatsime Beneficiaries Trust & 11 Others v Chitungwiza Municipality HH 101-16.
[333] Zimbabwe Homeless Peoples Association case (note 157). 13 & 44

work and basic facilities".[334] Furthermore, the Legislature should be proactive and not wait for the courts to fill in gaps as laws are usually interpreted by Government officials and affected communities before the commencement of court proceedings.

5.3. FURTHER RESEARCH AREAS

This study provided a general overview on the meaning of the right to adequate housing and the challenges which communities face. There is limited analysis on the effect of displacement of specific social groups. Further research can also be undertaken on how to guarantee the right to adequate housing specifically for women, children, persons living with disabilities, and elderly persons. Further research can also be undertaken on how housing rights can be protected through environmental rights. Quantitative research can also be carried out relating to the impact of the extractives industry on the right to adequate housing.

5.4. RECOMMENDATIONS

5.4.1. DOMESTICATION OF THE RIGHT THROUGH A CONSTITUTIONAL RIGHT

It is axiomatic that the Constitution is the supreme law of Zimbabwe. As a result, the best method in guaranteeing the right to adequate housing for all is through an explicit constitutional right within the Declaration of Rights. Lessons can be drawn from section 26 of the **Constitution of South Africa**, which provides a right on access to adequate housing for everyone. Express mention of adequate housing and not just shelter would also assist Zimbabwe in the provision of the minimum core obligation prescribed under the **ICESCR**.[335]

Furthermore, the **Constitution of Zimbabwe** and the legislation governing the extractives industry should also offer special protection to women, elderly persons,

[334] General Comment Number 4 (n 1 above) para 7.

[335] General Comment Number 3 (note 73 above)

children, and persons living with disabilities. This would ensure compliance with international obligations under various treaties.[336] This is also consistent with the 2007 **African Commission`s c*oncluding observations on the second periodic report of the Republic of Zimbabwe*** which recommended that Zimbabwe must provide justiciable economic, social and cultural rights in its Constitution and laws.[337]

5.4.2. MINING RIGHTS AND LAND RIGHTS

To minimize conflict between farmers and miners stemming from the intrusive nature of mining and surface rights, there is a need to amend the **Mines and Minerals Act** and incorporate provisions that award preference mining rights to local communities who occupy land where minerals are discovered.[338] Third parties should be required by law to enter into joint ventures with host communities. Where rights are awarded to third parties, this should be done as a matter of last resort and when the host communities have been provided with suitable alternative housing consistent with the minimum core obligation.

The Mines and Minerals Act must also be amended to empower the State to awarded, suspended, or withdraw mining rights having regard to infringements on the right to adequate housing.

5.4.3. FORCED EVICTIONS

There is a need for the Legislature to enact a special Act to give effect to **section 74 of the Constitution of Zimbabwe** and elucidate the concept of what constitutes an arbitrary eviction. It is contended that evictions without prior

[336] Note 310 above.

[337] Concluding Observations on the Second Periodic Report of the Republic of Zimbabwe presented to the 41st Ordinary Session of the African Commission on Human and Peoples' Rights, 2007. paragraph 21 and 29th to 30th May 2007.

[338] South Africa`s Mineral and Petroleum Resources Development Act No. 28 of 2002 gives communities preference in obtaining mining rights over their land which helps promote participation, economic inclusion, and sustainable mining practices.

payment of compensation and the provision of alternative adequate housing constitute arbitrary evictions. Zimbabwe could model its laws drawing lessons from the Kenya where their **Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2010** expressly bars evictions until there is provision of adequate basic shelter. In this vain, Zimbabwe should domesticate the **Basic Principles and Guidelines on Development-Based Evictions and Displacement.** This would guarantee that affected communities are given adequate notice, are consulted, and are only displaced when it is unavoidable. Furthermore, this would ensure there is adherence to comprehensive resettlement schemes which foster the provision of adequate housing and access to land of similar size, value, quality, or better. Such a law should also be premised on effective remedies such as payment of fair compensation; resettlement; restitution; and voluntary return.

There is also need to restore security of tenure offered by title deeds. The **Land Acquisition Act** should be amended to prevent the compulsory acquisition of land for development purposes without payment of compensation. There is also a need to improve security of tenure across all land tenure systems. This can be done by providing title deeds to occupants of communal and State land, through amending the **Communal Lands Act** and the **Land Commission Act** respectively. This would ensure that rights under all land tenure systems are protected based on the Roman-Dutch conception of "real rights", where rights are enforceable against everyone.[339]

5.4.4. COMPENSATION

There is need to amend mining and land tenure laws to ensure that compensation is just and fair, payable before eviction, paid regardless of whether victims hold title or not, and is proportionate to the gravity of the violation suffered.[340] Cash compensation should not substitute real compensation in the form of land and

[339] PJ Badenhorst, J Pienaar & H Mostert, *Silberberg and Schoeman`s Law of Property*, Butterworths, 4th Edition.32.
[340] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principles 60-63

common property resources.[341] This should be done through amendments to the **Mines and Minerals Act**,[342] **Land Acquisition Act**,[343] **Land Commission Act**,[344] and the **Communal Land Act** to incorporate the aforementioned compensation standards. Another approach is that compensation for losses emanating from forced evictions should be regulated in terms of a special Act of Parliament which domesticates principles in the **Basic Principles and Guidelines on Development-Based Evictions and Displacement,**[345] where the aforementioned compensation standards are derived.

The Minister of Mines and Mining Development should also be empowered by law to suspend the operation of mining entities when there has been a serious violation of housing rights, or a failure to provide people with alternative housing that is adequate.

Compensation can also be guaranteed through the establishment of a special fund in which mining companies and the State pool resources, which can be used to facilitate the development of infrastructure, alternative housing, and the development of social amenities.

5.4.5. SPECIAL AUTHORITY TO REGULATE DEVELOPMENT-INDUCED EVICTIONS

There is need to establish a special public body which coordinates prevention and protection strategies to manage housing challenges experienced by people who are affected by development-based evictions. Members of this authority should include the Minister of Mines and Mining Development; Minister of Lands, Agriculture and Rural Resettlement; the Minister of Environment, Water and Climate; and the Minister of Local Government, Rural and Urban Development,

[341] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principles 60-63

[342] Section 80 of the Mines and Minerals Act.

[343] Sections 20 and 21 of the Land Acqusition Act.

[344] Section 27 of the Land Commission Act.

[345] Basic Principles and Guidelines on Development-Based Evictions and Displacement (n 4 above) Principles 60-63

and members of the Land Commission and Human Rights Commission. The Committee could also maintain a database which documents all development-induced evictions and the particulars of affected people and remediation efforts being undertaken in each case.

5.4.6. ENVIRONMENTAL IMPACT ASSESSMENTS

There is need to amend the **Environmental Management Act** to provide for environmental impact assessments for changes in land-use or when mining-induced evictions are imminent. Such assessments would prevent forced evictions which violate housing rights. This would ensure that the laws of Zimbabwe are compliant with Article 10 of the **Kampala Convention** and Principle 32 of the **Basic Principles and Guidelines on Development-Based Evictions and Displacement** which require eviction impact assessments before projects are undertaken.

5.4.7. ENHANCING LITIGATION AND JUDICIAL INTERPRETATION OF THE RIGHT TO ADEQUATE HOUSING

To improve access to justice, there is a need for judicial officers and lawyers to undergo training on international treaties and conventions which provide for the right to adequate housing, particularly, the **International Covenant on Economic, Social and Cultural Rights, the Kampala Convention, the General Comments Number 4 and 7, and the Basic Principles and Guidelines on Development-Based Evictions and Displacement**. This recommendation is premised on the fact that few cases are being lodged, and also due to the divergence of opinion on the justiciability of housing rights as evidenced by the different positions taken by the Supreme Court and High Court in the adjudication of the Zimbabwe Homeless Peoples` Association case.[346]

[346] Zimbabwe Homeless Peoples Association case (note 157). 3-5 & 36

5.5. PERSONAL ACADEMIC CONTRIBUTION

The writers` contribution is that there is a need for a special Act of Parliament that regulates development-based evictions and domesticates the **Basic Principles and Guidelines on Development-Based Evictions and Displacement**. This Act of Parliament would domesticate relevant principles that are supposed to regulate forced evictions and coordinate the functions of relevant ministries and stakeholders in preventing arbitrary evictions. This Act should also require the provision of alternative housing that is adequate whenever mining-induced displacements and evictions occur. The Act would also establish a special fund for the provision of housing needs and establish a special public authority that regulates forced evictions caused by mining activities.

Furthermore, it is the writer's contribution that regulation of housing rights must be emboldened by empowering the Minister of Mines and Mining Development with the power to suspend mining licences until there has been the provision of alternative housing for affected communities.

5.6. CONCLUSION

The purpose of this study was to establish the doctrine underpinning the right to adequate housing, and whether laws regulating the extractives industry in Zimbabwe comply with principles required by international human rights law. This study managed to establish that Zimbabwe is bound by numerous treaties to provide for the right to adequate housing.[347] It was also established that guaranteeing the right to adequate housing entails the establishment of a substantive right and procedures that are contained in the **Constitution of Zimbabwe**, mining laws, and land tenure laws. This chapter summarizes the need for an explicit right to adequate housing in the **Constitution of Zimbabwe**; the need for a special Act of Parliament to regulate development-based evictions; amendment of land tenure laws to provide security of tenure and housing rights;

[347] Note 310

and development of financial mechanisms that channel funds towards the provision of housing needs of displaced persons.

The dominant theme is that displacement as a result of the extractives industry should be regulated consistent with the **ICESCR**, the **Kampala Convention**, and the **Basic Principles and Guidelines on Development-Based Evictions and Displacement**. People who are displaced should have effective remedies that guarantee adequate housing, compensation, resettlement, and can voluntarily return to their homes after a project is complete. Laws that regulate the extractives industry should balance human rights and economic interests by *inter alia* guaranteeing the right to adequate housing. This would avoid continued criticism by international human rights treaty monitoring bodies, and also guarantee that the State is fulfilling its duty to provide for the right to adequate housing in laws that regulate the extractives industry in Zimbabwe.

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