

**IMPROVING THE GOVERNANCE OF MINERAL RESOURCES IN AFRICA
THROUGH A FUNDAMENTAL RIGHTS-BASED APPROACH TO
COMMUNITY PARTICIPATION**

By

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Thesis submitted in accordance with the requirements for the degree of

Doctor of Laws

at the

University of South Africa

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AUGUST 2013

DEDICATION

To those affected communities all over the African continent that are still struggling to benefit from the exploitation of mineral resources and whose fundamental rights are still infringed.

DECLARATION

I declare that **IMPROVING THE GOVERNANCE OF MINERAL RESOURCES IN AFRICA THROUGH A FUNDAMENTAL RIGHTS-BASED APPROACH TO COMMUNITY PARTICIPATION** is my own original work and has not previously been submitted by me for a degree at another university. All primary and secondary sources used have been duly acknowledged.

KABANGE NKONGOLO Junior

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Date

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ACKNOWLEDGMENTS

In the course of writing this doctoral thesis, I have received tremendous support and assistance from many people. First and foremost, I am grateful to the Almighty God, who has continuously granted me good health and renewed my strength to achieve this work.

My special thanks also go to my supervisor, Professor André MBATA BETUKUMESU MANGU, for his critical advice and valuable guidance, and his tireless support in revising, correcting and maintaining accuracy in this thesis. This study could not have come to a successful conclusion without his invaluable comments and suggestions, though views expressed here are mine.

I am grateful to my father, Professor KABANGE NTABALA Clément, who since my early childhood has succeeded in generating in me the dream and necessary determination to go as far as possible in my pursuit of research in the legal field. Because he believed in me, he invested everything it took to bring me on the doctoral pedestal. I will always be grateful and proud of him. I also would like to express my gratitude to my mother MBOMBO KABANGE Cathy, for all her encouragement even when I was complaining about the difficulty of the work. I thank her for everything she has done for me since I was born. Furthermore, I am indebted and thankful to my wife NKIERI KABANGE Laetitia, for her love and the sacrifice she endured all these years. I could not have achieved this thesis without her support. Thank you so much. It would be unfair to stop here and not thank our daughter KABANGE IZAMBAY Angelina-Joyce who was born in the course of the achievement of this work and therefore, has somewhat endured the sacrifices made in the finalisation of my doctorate. No less gratitude goes to my brothers and sisters Jeanine, Rosette, Evelyne, Micheline, Joseph, Yvette and Thierry KABANGE who always encouraged me to persevere until the end, to Mr Rizwan Rawji and the Rawji Foundation that provided financial assistance in my first year of doctoral studies, to my church Champions of Faith, my colleagues and friends YAMULAMBA Godfrey, MUKOLO Jean-Paul, KANYANKOGOTE Steve, KENGA Benoit, KUDIMBANA Jimmy,

MBAKA Elvis, TSHIBANGU Tshitshi, MWAMBA Lys, MUFUTA Oliver and KABASU Chiqo, LUMBALA Yannick, for their unremitting support.

LIST OF ACRONYMS

AHSG	:	Assembly of Heads of State and Government
AMV	:	African Mining Vision
APRM	:	African Peer Review Mechanism
ATS	:	Alien Tort Statute
AU	:	African Union
CDA	:	Community Development Agreement
CERDS	:	Charter of Economic Rights and Duties of States
CSOs	:	Civil Society Organisations
DRC	:	Democratic Republic of Congo
EU	:	European Union
EITI	:	Extractive Industries Transparency Initiative
HIV/AIDS	:	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
ICC	:	International Criminal Court
ICCPR	:	International Covenant on Civil and Political Rights
ICESCR	:	the International Covenant on Economic, Social and Cultural Rights
ICJ	:	International Court of Justice
ICTY	:	International Criminal Tribunal for the former Yugoslavia
ICTR	:	International Criminal Tribunal for Rwanda
IFC	:	International Finance Corporation
ILO	:	International Labour Organisation
IMF	:	International Monetary Fund
KPC	:	Katangese Peoples' Congress
MDGs	:	Millennium Development Goals

MMSD	:	Mining, Minerals and Sustainable Development
MoU	:	Memorandum of Understanding
NGOs	:	Non-Governmental Organisations
NEPAD	:	New Partnership for Africa's Development
OAU	:	Organisation of African Unity
OECD	:	Organisation for Economic Co-operation and Development
PCIJ	:	Permanent Court of International Justice
UN	:	United Nations
UNCTAD	:	United Nations Conference on Trade and Development
UNDRH	:	Universal Declaration of Human Rights
UNDP	:	United Nations Development Programme
UNDRD	:	United Nations Declaration on the Right to Development
UNDRIP	:	United Nations Declaration on the Rights of Indigenous Peoples
UNECA	:	United Nations Economic Commission for Africa
UNESCAP	:	United Nations Economic and Social Commission for Asia and the Pacific
UN ECOSOC	:	United Nations Economic and Social Council
UNESCO	:	United Nations Educational, Scientific and Cultural Organisation
UNGA	:	United Nations General Assembly
v.	:	Versus

ABSTRACT

This study makes the assumption that community participation in the governance of mineral resources is a requirement of sustainable development and that through a fundamental rights-based approach, it can be made effective. The concern is that an affected community should not only be involved in the decision-making process, but its view must also influence the outcome in respect of whether or not a mineral project should take place and how it should address development issues at local level. It is assumed that this legal approach will improve mineral governance by bringing more transparency and accountability. In many African resource-rich countries, community participation has until now been practiced with more of a soft approach, with the consequence that it has been unable to eradicate the opacity existing in the management of revenues generated by mineral exploitation and also deal efficiently with the recurrence of fundamental rights violations in the mineral sector. Obviously, the success of the fundamental rights based-approach is not absolutely guaranteed because there are preconditions that must be fulfilled. The synergy between community participation and some relevant concepts like democracy, decentralisation, accountability, (good) governance and sustainable development must be well balanced for the participation process to bring positive outcomes. Also, because the fundamental rights based-approach is conceived here within the framework of the African Charter of Human and People's Rights, its normative and institutional components, despite the potential to make participation effective and successful, require that some critical challenges be addressed in practice. The study ends with the conclusion that the fundamental rights based-approach is appropriate to make community participation effective in the mineral-led development process taking place at local level, provided that its implementation is kept reasonable.

KEYWORDS:

Community participation, fundamental rights-based approach, governance, mineral resources, sustainable development, African Charter on Human and People's Rights

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Chapter one: Introduction

1.1 Background to the study

Africa's vast endowment of mineral resources has continuously nourished and offered the hope that the people living on this continent will experience rapid economic growth and attain development. From the pre-colonial period to the present day,¹ Africa has gradually been discovered as one of the richest continents with the largest reserves in the world of some important mineral resources.² Although the premise of mineral-led development³ does not find acceptance with all scholars,⁴ studies have demonstrated that where there is appropriate governance, the exploitation of mineral resources can generate large revenues that significantly boost economic growth and reduce poverty.⁵ Countries like the United

¹ The history of Africa reveals that by the end of the nineteenth century, traditional chiefs of African communities had already established commercial relations with Europeans in respect of certain mineral resources. In Tanganyika, for instance, the chief Msiri was involved in the commerce of ivory and copper. A similar trade in gold existed in the Lobi region of West Africa. However, the formal and large-scale exploitation of mineral resources in most African countries started during the colonial period with the creation of mineral companies owned by the colonials (Parker J. and Rathbone R. *African history: A very short introduction* (Gosport: Oxford University Press, 2007) 94-96 ; Stock R. *Africa South of the Sahara: Geographical interpretation* 2nd ed. (New York : Guilford Press, 2004)125 ; Ndaywel I. *Histoire générale du Congo* (Paris : Duculot, 1998) 388; Katja W. "Gold mining and Jula influence in precolonial southern Burkina Faso" (2007) 48 (3) *Journal of African history* 395-414; Association Africaine de Défense des Droits de l'Homme (ASADHO) "Rapport préliminaire sur l'exploitation illégale des ressources naturelles en RD Congo" in (2004) 004 *Supplément au périodique des droits de l'Homme* 1-25, 2).

² Platinum (60%), gold (42%), diamonds (88%), manganese (82%), cobalt (55%), phosphate (66%), chromium (44%) and aluminium (45%). See the See African Mining Vision 2050 (AMV) (2009) 3; available at <http://www.africaminingvision.org/> [accessed on 3/6/2013]

³ The use of "mineral-led development" as an expression throughout this study should not be interpreted as advocating a monolithic model of economy where the mineral industry is seen as the unique sector relevant for speeding up economic growth, but rather as one that plays a leading role in a diversified economy of a country largely endowed with mineral resources.

⁴ For a pessimistic view, see Auty RM. "Resource abundance, growth collapses and policy" in Auty RM. (ed.) *Resource abundance and economic development* (Oxford: Oxford University Press, 2002) 315-328; Sachs JD. and Warner AM. "Natural resource abundance and economic growth" (Harvard University, 1999); available at http://www.cid.harvard.edu/ciddata/warner_files/natresf5.pdf [accessed on 5/6/2011].

⁵ Jeschke M. "Extractive Industries Review" in Visser W. *et al.* (eds.) *The A to Z of corporate social responsibility* (Hoboken: John Wiley & Sons Ltd, 2010) 25; Lederman D. and Maloney WF. "Neither curse nor destiny: Introduction to natural resources and development" in Lederman D. and Maloney WF. (eds.) *Natural resources: Neither curse nor destiny* (Stanford University Press/World Bank, 2007) 3; Ferranti D. *et al.* *From natural resources to the knowledge economy: Trade and job quality* (World Bank, 2002) 4; World Bank "Strategy for African mining, mining unit, industry and energy division" in World Bank Technical Paper No 181 (World Bank, 1992) 3-4; the Report of the United Nations Economic and Social

States, Canada and Australia are known for the role played by mineral resources in the transformation of their economies.⁶ Thus, after several centuries of prospecting and exploitation,⁷ it was expected that the revenues generated by these diversified mineral resources should have provided African countries with sufficient means to offer a better quality of life to their peoples, enjoying all the benefits and opportunities available in the context of development. The ongoing situation is disappointingly far from that scenario. Despite large mineral endowments, too little has been achieved. The continent is still immersed in a blatant contrast between its immense mineral wealth and the abject poverty in which the majority of its people live.

Africa remains the developing region with the highest extreme poverty rate, with a considerable number of people living on less than one dollar per day.⁸ Many children are not schooled, while numerous young men and women are desperately wasting away in unemployment.⁹ As if that were not enough, the existence of a defective health system in many countries has hastened the spread of HIV/AIDS across the continent and this has

Council (UNECOSOC) on “The exploitation of mining in Africa” (E/ECA/CFSSD/6/7, September 2009) 2-3.

⁶ Despite disagreement among scholars on the extent to which mineral resources may have contributed to the development of these countries, it is at least acknowledged that this industry has played a role in the transformation process of these three societies. See Weber-Fahr M. “Mining and development: Treasure or trouble? Mining in developing countries” Research paper in the mining and development series (World Bank and International Finance Corporation, 2002) 3; Leveille E. “Natural resources: Unavoidable curse or manageable asset?” in (2009) *Journal of Politics & International Affairs* 108-125, 108-109; Power TM. *Digging to development? A historical look at mining and economic development* (Boston: Oxfam, 2002) 4; Szirmai A. *Dynamics of socio-economic development: An introduction* (Cambridge: Cambridge University Press, 2005) 283.

⁷ It has been reported that the oldest mines in the world are in Africa, like the Ingwenya mine in Swaziland, which was exploited 20000 years ago. AMV (2009) 10.

⁸ See the report of the United Nations Development Program (UNDP) “Poverty reduction and the Millennium Development Goals (MDGs)”; available at <http://www.undp.org/africa/poverty.shtml> [accessed on 3/2/2011].

⁹ See United Nations Educational, Scientific and Cultural Organisation (UNESCO) Institute of Statistics Fact Sheet “Out-of-school children: New data reveal persistent challenges”, available at http://www.uis.unesco.org/FactSheets/Documents/fs12_2011_OOSC_EN.pdf [accessed on 24/12/2010]; International Labour Organisation *Global employment trends for youth: Special issue on the impact of the global economic crisis on youth* (August 2010) 3-4.

significantly contributed to the hardships experienced by the peoples of Africa.¹⁰ The general socio-economic conditions under which African peoples live today are critical and it has become obvious that the long exploitation of minerals has not served as a catalyst for the transformation of African countries from underdeveloped to developed economies.

This failure to launch development, coupled with conflicts and fundamental rights abuses, has given credit in Africa to the thesis that an important endowment in mineral resources can be a curse.¹¹ Several scholars writing on the relationship between the mineral industry and development in developing countries have adopted an approach based on the “resource curse” theory.¹²

This latter theory rests on an observation according to which many resource-rich countries tend to perform more poorly in terms of sustainable economic growth than resource-poor countries.¹³

In the midst of this tragedy,¹⁴ the situation of local communities living around and that are directly affected by mineral projects is particularly alarming. It has become customary that, instead of being beneficial, the expansion of mineral activities in developing countries drains and causes a damaging effect on local communities.¹⁵ In many African countries, leaders of affected communities complain continuously that their communities

¹⁰ See UN Economic Commission for Africa(UNECA) “Report of the Commission on HIV/AIDS and governance in Africa” (2008); Moser G. and Ichida T. “Economic growth and poverty reduction in Sub-Saharan Africa”, IMF Working Paper WP/01/112 (August 2001) 15.

¹¹Ballard C. and Banks G. “Resource wars: The anthropology of mining” in (2003) 32 *Annual Review of Anthropology* 295.

¹² David GA. and Tilton JE. “Why the resource curse is a concern” (2008) *Mining Engineering* 29-32; Brunnschweiler CN. and Bulte EH. “The resource curse revisited and revised: A tale of paradoxes and red herrings” in (2008) 55(3) *Journal of Environmental Economics and Management* 248-264; Lederman and Maloney (2007); Kronenberg T. “The curse of natural resources in the transition economies” in 12 (3) (2004) *Economics of transition* 399-426; Mikesell RF. “Explaining the resource curse, with special reference to mineral-exporting countries” in (1998) 23(4) *Resources Policy* 191-199; Auty RM. *Sustaining development in mineral economies: Resource curse thesis* (New York: Routledge, 1993).

¹³ Mikesell, Id., 191; Kronenberg, Id., 399-400; Auty, Id., 1-3.

¹⁴ The tragedy is perceivable in the controversial fact that many African countries, despite their important mineral potential, appear on the IMF’s list of Heavily Indebted Poor Countries (HIPC). Of the forty countries listed in 2010, thirty-three were from Africa. See IMF Factsheet; available at <http://www.imf.org/external/np/exr/facts/hipc.htm>[accessed 24/12/2010].

¹⁵ De Echave J. “Dialogue processes: Evolution and stages” in *Conflict, consensus and dialogue in the mining sector* (International Development Centre, 2004) 4-6, 4; Ballard C. and Banks G. (2003) 289.

do not enjoy the benefits of mineral exploitation and that they are deprived of considerable portions of their land to the benefit of large-scale mineral companies without fair compensation.¹⁶ They contend that their share in the revenues received by the central government are not returned to them and that mineral activities are being conducted in a manner that causes serious degradation to their environment with factors like water pollution, deforestation and high levels of toxicity and pollution resulting from air emissions.¹⁷ In some countries, communities living around mineral areas have been exposed to violent conflicts over the control and exploitation of mineral resources.¹⁸ In general, many local communities affected by mineral projects have not so far gained significant benefits enough to build their economies.

¹⁶ See the case of communities living in Walikale, Mongbwalu and Ituri in DRC as reported by Bineta M. “RD Congo: A qui rapporte l’exploitation des mines?”; Available at www.syfia.info/index.php5 [accessed on 24/12/2010]. See also the discussion of the case of the Mambia community in Guinea, the Sanso and Gouaniaka communities in Mali and of the communities living in Missingir in Mozambique in Cotula L. “Legal tools for citizens’ empowerment, getting a better deal from natural resource investment in Africa: Highlights and lesson learned (2006-2009)” in the Report made in the context of a campaign organised by the International Institute for Environment and Development (2006-2009) 3.

¹⁷ For instance, in DRC it was reported that the exploitation of uranium that took place in the province of Katanga, precisely in the Shinkolobwe area, was extremely harmful to the surrounding communities because of high radiation levels. See Misabiko G. “Mine uranifère de Shinkolobwe: D’une exploitation artisanale illicite à l’accord entre la RD Congo et le groupe nucléaire français Areva” (ASADHO, 2009) 16, 18, 19, 21, 33-42. It should be remembered that the uranium used in the fabrication of the first nuclear bomb (the Manhattan Project) and that killed thousands of civilians in Hiroshima and Nagasaki in World War II was extracted from Shinkolobwe. This means that bad governance of this mineral resource represents a high risk not only for the gravely affected local communities, but for the whole international community. Devastating effects may well go beyond national borders. See also the case of the Sukuma community in Tanzania discussed in Kitula AGN. “The environmental and socio-economic impacts of mining on local livelihoods in Tanzania: A case study of Geita district” (2006) 14 *Journal of Cleaner Production* 409-410. Marcos rightly observes that these negative impacts have generated a sceptical attitude in affected communities towards mineral projects. Marcos A. “Unearthing governance: Obstacles and opportunities for public participation in mineral policy” in (ed.) Bruck CE. *The new “public”: The globalization of public participation* (Washington: Environmental Law Institute, 2002) 236.

¹⁸ See for instance, the case of communities living in Bomi (Liberian War: 1989-1996, 1999-2003), in Kivu (DRC Wars: 1996-1997, 1998-2003), in Cabinda (Angolan War: 1975-2001), in Kono and Tongo (Sierra Leone War: 1991-2002). See Olukoju A. *Culture and customs of Liberia* (Westport: Greenwood Publishing Group, 2006) 6; Eichstaedt P. *Consuming the Congo: War and conflict minerals in the world’s deadliest place* (Illinois: Lawrence Hill Books, 2011) 2; Malley-Morrison K. *State violence and the right to peace* (Westport: Greenwood Publishing Group, 2009) 64-67; Lincoln J. *Transitional justice, peace and accountability: Outreach and the role of international courts after conflict* (Abingdon: Routledge, 2011) 38.

It is common sense that people living in the area surrounding a mineral project may expect that the profits from the project would spark off prosperity that would help to realise their development. Benefits generated by the exploitation of mineral resources should contribute to the realisation of socio-economic rights¹⁹ in a sustainable manner. The major benefit that affected communities should draw from the exploitation of mineral resources is the improvement of their quality of life through the construction of such necessary infrastructure as hospitals, schools and roads, the creation of new job opportunities and the ability to finance other vital activities like agriculture and farming.²⁰ Added to this, is the necessity to protect and conserve the environment so that the development achieved can be sustainable and ethical.

The failure experienced by most African countries to achieve these development goals through the mineral industry reveals that the mere endowment of resources does not in itself unconditionally amount, or lead to the improvement of the socio-economic conditions of the poor. Devoted efforts must be made to channel the management of mineral resources towards the realisation of these development goals at local level. This is to assume that there is, indisputably, a bridge between possessing abundant mineral resources and the achievement of development; that bridge being the practice of governance which serves the function of catalyst. Decisions, policies and actions made in respect of the mineral industry determine the extent to which mineral resources may either enhance or hinder development.²¹ This challenges any attempt of absolutism in approaching the resource curse theory. Indeed, the establishment of a strong system of governance characterised by virtues such as transparency and accountability can reverse the resource curse in any resource-rich country. Therefore, what is relevant is to develop an optimistic approach which does not remain focused on this pejorative theory, but rather

¹⁹ Socio-economic rights are rights that create entitlement to the satisfaction of human social needs (food, water, health care, education, shelter ... etc.) and the amelioration of economic conditions of the poor. Mbazira C. *Litigating socio-economic rights in South Africa: A choice between corrective and distributive justice* (Cape Town: Pretoria University Law Press, 2009) 3; Brand D. "Introduction to socio-economic rights in the South African Constitution" in Brand D. and Heyns C. (eds.) *Socio-economic rights in South Africa* (Pretoria: Pretoria University Law Press, 2005)3.

²⁰ UN Economic and Social Commission for Asia and the Pacific *The contribution of transnational mining corporations to the Asia-Pacific region* (New-York: UNESCAP, 1992) 28.

²¹ Rees J. *Natural resources: Allocation, economics and policy* (Methuen, 1985) 56.

undertakes progressive reflections on how good governance practices can be generated in African countries enjoying significant resource endowment. It is with this perspective that the African Mining Vision (AMV) adopted by the African Union (AU) in 2009 contends that increasing the governance capacity of African countries in the context of a diversified economy and with appropriate institutions, knowledge and infrastructures can overturn the legacy that mineral resources are a curse, by optimising the positive inputs of their exploitation into the development process.²²

In respect of affected communities in Africa, their long exclusion from the decision-making process appears as a major reason explaining why the mineral sector has failed to launch economic development at local level. Decisions on mineral projects have generally remained confined to the context of the classic bilateral model (state/mineral company) which actually failed to capture the interests of these communities.²³ Obviously, this model of governance is undemocratic and illegitimate, because people directly affected by such decisions do not participate in the decision-making process. This is a defect that has long marked the history of the governance of mineral resources on the continent.

Although Africa has a long history of mineral exploitation, it was only between the 1980s and the start of the 1990s that the issue of local communities' entitlement to benefit from the mineral industry began to be formally contemplated.²⁴

During the pre-colonial period, African communities were organised and did not ignore the commercial value of mineral resources. The major economic activities at that time were characterised by the use of land for agriculture, farming and harvesting, and mineral resources were used both to make traditional weapons²⁵ and for commercial exchange²⁶

²² AMV (2009)14-29.

²³ See the case of affected communities mentioned previously, supra notes 15, 16 and 17. This experience is not only proper to Africa. In Latin America, the same binary model of mineral resources governance had disregarded interests of local communities. See De Echave (2004) 4.

²⁴ This assertion is inferred from initiatives that took place on the African continent between the 1980s and the 1990s which aim to put back people at the centre of development process in Africa people (see for instance the African Charter for Popular Participation in Development and Transformation (1990) (Hereinafter the Arusha Declaration)).

²⁵ See, for instance, the case of iron mining by the Khoi-Khoi group in Southern Africa in Fyle M. *Introduction to the history of African civilisation: Precolonial Africa* (Lanham/Oxford: University Press of America 1999) 58; the case of copper mining by the Bemba and Sanga groups in central Africa. Kikontwe

between communities or groups in order to obtain from one another goods that they were lacking. It is difficult to determine whether products exchanged for mineral resources really benefited the entire community during that period. In Latoki's view, the reverence due to the chief and all notables by members of the group does not favour the thesis of an equitable redistribution of wealth within the African pre-colonial society, simply because wealth was managed at the discretion of the leading caste and that, for such reason, it is doubtful that any member of the group could make them accountable.²⁷ Omorogbe takes the opposite view and affirms that during the pre-colonial period, people were participants in the process of making decisions in their community and they benefited from the trading of the community's resources.²⁸ The opposing views of these two scholars reveal that a blanket statement cannot fully describe the diversified situation of African communities during the pre-colonial period. Nonetheless, it is believed that the common reality in most African communities of that time is that, though traditional chiefs, elders and notables were highly venerated, their role was often to watch over, defend and protect the interests of the entire community, to secure the land that was generally conceived as a *res communis*,²⁹ against invasion or other disasters.³⁰ Thus, it can be assumed that they were entrusted with the responsibility to act as guarantors of the community's interests.

EG. La prise en compte des droits humains des populations dans les contrats miniers en RD Congo: Cas des Sanga de Kolwezi (Unpublished thesis/CIDEP Université ouverte, 2009) 1.

²⁶ Under the pre-colonial period, commerce in mineral resources was based on the "exchange principle" that consisted of one people exchanging what they had for what another people had. This is why, for instance, Ghana could exchange gold with Dahomey and the Ivory Coast for "aquaqua clothes". See Perbi A. "Slavery and the slave trade in pre-colonial Africa" Paper presented at the University of Illinois, USA (5/4/2001) 3.

²⁷ Latoki P-E. "La thèse de l'unité africaine traditionnelle: Ses dessous et ses conséquences sur l'Etat en Afrique" (2009) 14 *Cahiers de psychologie politique, revue d'information, de réflexion et de recherche* 1.

²⁸ Omorogbe Y. "The legal framework for public participation in decision-making on mining and energy development in Nigeria: Giving voices to the voiceless" in Zillma DN., Lucas AR. and Pring G. (eds.) *Human rights in natural resources development: Public participation in the sustainable development of mining and energy resources* (New York: Oxford University Press, 2002) 551.

²⁹ Egede E. *Africa and the seabed regime: Politics and international law of the common heritage of mankind* (London/New York: Springer 2011) 65; Kameri-Mbote A.P and Cullet P. "Law, colonialism and environmental management in Africa" (1997) 6 (1) *Review of European community and international environmental law* 25.

³⁰ Mahao NL. "Colonial rule and the transformation of chieftaincy in Southern Africa: A case study on Lesotho" in (2007) 2 *Speculum Juris* 207-208.

Actually, what renders tricky the question as to whether communities derived benefits from the profits of mineral exchange during the pre-colonial period is the presence of a class of slaves in many African communities.³¹ The existence of slavery in pre-colonial communities suggests that because some people were regarded as merchandise, they were automatically disqualified from any enjoyment of goods and commercial revenues belonging to the community. In the system of commercial exchange, the Asante Kingdom successfully obtained slaves from Nigerian and Benin communities in exchange for gold on a number of known occasions.³² Clearly, this was an unjustified³³ consecration of the concept of “inequality” which is drastically opposed to modern fundamental rights values supporting a democratic society, like freedom, equality and human dignity.³⁴

At the end of the nineteenth century, following the exploration of the continent previously undertaken by many Europeans, a new period of colonisation started in many African countries.³⁵ During this period, mineral resources were governed and managed according to the goodwill of colonisers who established firms³⁶ in many African countries that enjoyed extensive rights and facilities, the main objective of which was the provision and export of raw materials to industry in their home countries and to generate profits for their economies.³⁷ In this respect, colonisers imported into the African continent the European conception of the private right to property which was fundamentally opposed to the

³¹ Ciment J. *The Atlas of African-American history* (New York: Media Projects Inc., 2007) 11.

³² Perbi (2001) 3.

³³ Nowadays, it is generally admitted in many societies that a fundamental right, including the right to equality, may suffer some limitations, provided that they are justified on objective grounds. Currie I. and De Waal J. *The Bill of Rights handbook* 5thed (Wetton: Juta, 2008) 237.

³⁴ This is not to contend that democratic practices were totally absent from pre-colonial Africa, but the situation is well described by Nzongola’s reference to a “measure of democracy” to reflect the complex mix of both democratic and tyrannical practices that existed during that period and which should be seen, of course, within the context of the values of that time. See Nzongola GN. “The state and democracy in Africa” in Nzongola GN. and Lee MC. (eds.) *The state and democracy in Africa* (Harare/Trenton: Africa World Press, 1997) 10.

³⁵ For instance, colonisation started in 1830 in Algeria, in 1880 in Benin, 1885 in Botswana, in 1892 in Burkina Faso, 1884 Cameroun, 1885 in DRC.

³⁶ For instance, the exploitation of mineral resources was formally conferred between the end of the 1880s and the beginning of the 1900s to the following colonial companies: Union Minière du Haut Katanga (in DRC), The British South Africa Company in the then Rhodesia (in Southern Africa), the Royal Niger Company (in Nigeria), the Imperial British East Africa Company in East Africa (in Kenya). See Ndaywel (1998) 388; Omorogbe (2002) 553.

³⁷ Kameri-Mbote and Cullet (1997) 25.

communal approach to property that largely existed within many African communities.³⁸ What is noticeable about the colonial period was the construction of such infrastructure as roads, hospitals and schools, but these did not generally reach or serve the rural areas where a large percentage of the local communities lived.³⁹ The infrastructure was basically dictated by the economic interests of colonisers and their pretention to “civilise” Africans.⁴⁰ Obviously, the concern for affected communities during this colonial period was quasi-inexistent. African peoples no longer had access to the mineral resources and profits generated by their exploitation. Instead, they were subject to forced work. Being part of the entire population of the colony, affected communities were also denied the right to freely dispose of the country’s natural resources. This model of governance was undemocratic as it took the decision-making to the level of the metropole, far from African peoples themselves.⁴¹

As a result, a struggle to come out from under the shadow of colonisation and gain independence started in the 1950s. One of the leitmotifs supporting the claim of African leaders was the need for recognition of the right to self-determination as part of sovereignty and independence.⁴² The argument advanced by developing countries during discussions held at the United Nations (UN) was that, to ensure that natural resources profited the development of their peoples, developing nations had to be free to decide how and to what extent these resources were to be exploited.⁴³ Consequently, the UN

³⁸ Kameri-Mbote and Cullet (1997) 25.

³⁹ Grosse P. “Colonial migration and the law” in Podar P. *et al* (eds.) *A historical companion to post-colonial literatures: Continental Europe and its empires* (Edinburgh: Edinburgh University Press, 2008) 220; Ochola SA. *Minerals in African underdevelopment* (London: Bogle-L’Ouverture Publications Ltd, 1975) 134. For instance, Fonjong notes that in Cameroon, these infrastructures were made sometimes in the part of the country where they were not dictated by socio-economic needs. Fonjong N. *Transforming rural space through non-governmental efforts in northwestern Cameroon* (New York: Nova Science, 2007) 149.

⁴⁰ The colonisers’ ideology was well typified in Livingston’s formula of the three “C’s”: Christianity, Commerce and Civilisation”. Pakenham T. *The scramble for Africa* (New York: Random House, 1991) xxii.

⁴¹ National Research Council *Democratization in Africa: African views, African voices* (Washington: National Academy Press, 1992) 7.

⁴² Schrijver N. *Sovereignty over natural resources: Balancing rights and duties* (New York: Cambridge University Press, 1997) 6; Elian G. *The principle of sovereignty over natural resources* (Alphen aan den Rijn and Germantown: Sijthoff & Noordhoff International Publishers, 1979) 98.

⁴³ Schrijver (1997) 86. This is what is identified as the external right to self-determination, to mean the ability of people to free themselves against colonial or race oppression through either independence or secession.

recognised the right to sovereignty over natural resources as a principle of international law to allow developing countries to realise their development goals and improve the living conditions of their peoples.⁴⁴ Surprisingly, however, the position held by African political leaders was characterised by a certain duplicity manifested in two paradoxical attitudes depending on whether they were in the international forum or at the national level.

At the international level, they placed emphasis on the need to protect their countries' natural resources against foreign exploitation, as these resources were needed to serve the realisation of their people's development.⁴⁵ At the same time, at the national level, African political leaders requested their peoples to first consider political freedom and independence and not emphasise development that would, presumably, follow as a consequence.⁴⁶ This duplicity reveals the truth that African political leaders understood permanent sovereignty over natural resources as conferring them a discretionary power in the governance of their nations' resources and in the design of development plans.⁴⁷ This is why, a few years after gaining independence,⁴⁸ African peoples began to experience bitter disappointment as they witnessed their high expectations regarding their development falling by the wayside. They quickly found their own political leaders transforming into new oppressors, almost behaving like former colonisers through a

See Sterio M. "On the right to external self-determination: 'Selfistans', secession, and the great powers' rule" in (2010) 19(1) *Minnesota Journal of International Law* 137-176.

⁴⁴ Sovereignty and self-determination imply the right for a people to freely determine their political autonomy and to pursue their socio-economic development. But at the time the principle was consecrated in resolutions of the United Nations General Assembly (UNGA) (Resolutions 523 (VI), 626 (VII), 1803 (XVII), 3201 (S-VI), 3281(XXIX)), the true subject of this right was not clearly determined as these resolutions referred indistinctly to state, people and nations.

⁴⁵ Schrijver (1997) 82.

⁴⁶ Mangu AMB. "State legitimacy and leadership development in Africa" Paper presented at the 7th Africa Governance Forum *Building the Capable in Africa* UNDP/Ouagadougou, Burkina Faso (October 2007) 2.

⁴⁷ Duruigbo E. "Permanent sovereignty and peoples' ownership of natural resources in international law" in (2006) 38 *George Washington International Law Review* 35.

⁴⁸ The study will consider the 1960s as the end of the colonial period because by then many African colonies had gained their independence, followed later on by Angola, Cape Verde, the Comoros, Mozambique, São Tomé (1975), the Seychelles (1976), Djibouti (1977), Zimbabwe (1980), Namibia (1990) and South Africa (1994).

dictatorial and coercive system.⁴⁹ As the years passed, the rift between African peoples and their national political leaders became more perceptible, with only the elite dominant class having free access to resources of the state at the expense of ordinary people who continued to live in deepening poverty.⁵⁰

At the time when the Organisation of African Unity (OAU) was established in 1963, African heads of state and government did not give much attention to the need for a legitimate development agenda⁵¹ and fundamental rights issues appeared in the OAU Charter merely as general statements regarding the welfare and well-being of Africans.⁵² The OAU Charter did not proclaim either individual or people's rights. Although article 2 of the Charter contained a call to African states to promote cooperation between them and intensify their efforts to achieve a better life for African peoples, such a formulation was more a statement of intent than the recognition of a people's rights. The OAU was pre-occupied with more pressing issues such as unity, non-interference in internal affairs and liberation.⁵³ During this period, the paradigm of development was construed on the belief that a highly centralised state was the correct system for achieving economic development for the entire country.⁵⁴ The political system adopted by many African states rested on unified structures of administration that were exclusively accountable to the central government.⁵⁵ The mineral sector did not escape this highly centralised administration,

⁴⁹ Mangu (2007) 2; Ake C. *Development and democracy* (Washington: Brookings Institution Press, 1996) 4-5; Ake C. "The unique case of African democracy" (1994) 69 (2) *International Affairs* 240.

⁵⁰ Ake (1994) 240; Duruigbo (2006) 35-36.

⁵¹ A "legitimate development agenda" should be understood as a development agenda that has the adherence and support of the people concerned.

⁵² Mangu AMB. "The changing Human rights landscape in Africa: Organization of African Unity, African Union, New Partnership for Africa's Development and the African Court" (2005) *Netherlands Quarterly of Human Rights* 381; Ankumah EA. *The African Commission on Human and Peoples' Rights* (The Hague: Kluwer Law International, 1996) 4.

⁵³ See OAU Constitutive Act, Preamb. and art. 2. See also Mangu AMB. *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (Unpublished Doctoral thesis, University of South Africa, 2002) 2.

⁵⁴ McCarnet PL. "Reviving local government: The neglected tier in development" in McCarnet PL. (ed.) *The changing nature of local government in developing countries* (Toronto: University of Toronto Press, 1996) 3; Adejumobi S. "The African experience of popular participation in development" in Adejumobi S. and Olukoshi AO. (eds.) *The African Union and new strategies for development* (Amherst: Cambria Press, 2008) 102.

⁵⁵ Adejumobi (2008) 102.

because, having the desire to affirm their sovereignty over natural resources, many African governments had either nationalised or developed an advanced system of controlling interests in mineral companies.⁵⁶ The central government enjoyed the exclusive prerogative of deciding what was good or bad for the entire nation and affected communities had to abide by the will of rulers who were not democratically elected. The protection and promotion of the interests of affected communities throughout the exploitation of mineral resources were the least of the concerns of African governments. This is what makes Adejumobi to reach the general conclusion that “the post-colonial period has been marked by a steady erosion of faith in the power of the state to promote equitable development”.⁵⁷

In the early 1970s,⁵⁸ the issue of converting the potential of natural resources into effective means to build up sustainable development at the local level, progressively started to become an international concern⁵⁹ with discussions held at the UN sub-commission on the prevention of discrimination and protection of minorities, regarding the marginalisation that indigenous peoples were suffering within states.⁶⁰ The outcome of these discussions led to the establishment of a working group on indigenous populations by the UN Economic and Social Council through its resolution 1982/34.⁶¹ The mandate of this group was to determine the rights of indigenous peoples and to define standards of protection for these rights. One year later, at its meetings in 1983, the working group identified that

⁵⁶ See the World Bank “Strategy for...”, supra note 5, xi. After independence, many African countries created state owned companies to maintain a permanent control over the mineral industry. World Bank “Overview of state ownership in the global mineral industry: Long-term trends and future” Extractive Industry for Development Paper Series No 20 (World Bank, 2011).

⁵⁷ Adejumobi (2008) 109.

⁵⁸ In respect of the previous period, Brownlie observes that the lack of protection of group rights in international instruments (Universal Declaration of Human Rights (UNDHR 1948) and the two International Covenants of 1966) was consecutive to the belief that “group rights would be taken care of automatically as the result of the protection of the rights of individuals.” Brownlie I. “The rights of peoples in modern international law” in Crawford J. (ed.) *The rights of peoples* (Oxford: Clarendon Press, 1988) 2.

⁵⁹ At the national level, a similar concern was also dealt with at the same period in countries like Canada and Australia with regard to the right of Aboriginal peoples. For more precision, see Netttheim G. “Peoples’ and ‘populations’: Indigenous peoples and the rights of peoples” in Crawford J. (ed.) *The rights of peoples* (Oxford: Clarendon Press, 1988) 106.

⁶⁰ In the early 1980s, indigenous peoples were recognised as subjects of concern under international law by the UN that through resolution ECOSOC1892/34 established a working group on indigenous populations.

⁶¹ UN Doc.E/RES/1982/34, 9 May 1982, in UN Doc. E/1982/81, 26-27.

among the rights of indigenous peoples were the rights to land and to natural resources and socio-economic rights. This was a preamble to the recognition of people's rights at a level other than the national level.⁶² In the same vein, the UNGA adopted the Declaration on the Right to Development (UNDRD) in 1986, which underlines the peoples' right to freely pursue their economic, social and cultural development.

Most at the same time that new developments were taking place within the international community, the situation on the African continent started to shift as African political leaders attempted to restore their bond with their peoples through the adoption of the African Charter on Human and Peoples' Rights on 27 June 1981, which came into force on 21 October 1986.⁶³ Indeed, beside individual rights, the African Charter highlights peoples' rights.⁶⁴ This initiative seemingly demonstrated the will of African heads of state and government to re-position their people as the centre of their governments' concern. However, although a large and detailed reference to peoples' rights is made, its writers decided, because of the absence of a universally accepted definition, not to include a definition on the concept of "people" in the Charter.⁶⁵ This lack of a definition was likely to lead to uncertainty as to who the real bearers of these peoples' rights were.

Of course, it is obvious that a minimalist interpretation of the African Charter implied, at the least, an application of the concept to the whole population of a state. Nevertheless, later in the development of its jurisprudence the African Commission on Human and Peoples' Rights⁶⁶ has taken a maximalist approach including even local communities.⁶⁷ It

⁶² The outcome of the work done by the working group was the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), but this occurred only twenty-five years after the group had been established, namely on 13 September 2007. This was due mainly to the fact that certain states remained sceptical about giving recognition to certain kinds of indigenous rights, such as the right to self-determination and the control over natural resources. Furthermore, the Declaration is not legally binding under international law. Stidsen S. *The indigenous world* (Copenhagen: Igwa, 2007) 556-561.

⁶³ Hereinafter the "African Charter" or "Charter".

⁶⁴ Peoples' right to equality (art. 19), peoples' right to self-determination (art. 20), peoples' right to freely dispose of their wealth and natural resources (article 21), peoples' right to development (art. 22), peoples' right to national and international peace and security (art. 23) and peoples' right to environment (art. 24).

⁶⁵ See the report of the OAU ministerial meeting on the draft African Charter held in Banjul, The Gambia, from 9 to 15/6/1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II) 4.

⁶⁶ Hereinafter the "African Commission" or "Commission".

is noteworthy that because the African Charter has made a clear demarcation between the people and the state in the enumeration of peoples' rights, the sovereign power attached to any of these people's rights rests on the people and not the state acting through its government. This approach suggests, as underlined by Mbaye⁶⁸ and then Ouguargouz,⁶⁹ the idea that governmental policies may possibly clash with the interests of people.⁷⁰

Unfortunately, several years after the adoption of the African Charter, African political leaders have not yet accomplished much more for their peoples in terms of development. African people continue to suffer from abject poverty. In Adejumobi's view, this is because African political leaders of the post-colonial period have addressed the issue of development only at the level of rhetoric.⁷¹ This is particularly true in respect of the mineral industry where development-oriented governance remains illusory. Until now, there has been a widening gap between the goals supporting the peoples' right to dispose freely of their wealth and natural resources and the practice in the mineral sector. Despite promising discourses made by governmental officials, the over-centralisation of power and bad governance practices are still dominant in many African countries,⁷² to the extent that mineral projects and revenues generated through their exploitation continue to profit only a

⁶⁷ For jurisprudence, see African Commission *Communication 75/92 Katangese Peoples' Congress v. Zaire* (1994-1995) (Hereinafter the *Katangese* case) and more especially African Commission *Communication 276/2003 Centre for Minority Rights Development (Kenya) and Minority Rights Groups International on behalf of Endoris Welfare Council v. Kenya* (Hereinafter the *Endorois* case), where the African Commission made the following statement: "The African Commission is satisfied that the Endoris are a 'people', a status that entitles them to benefit from provisions of the African Charter that protects collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights – the right to preserve one's identity through identification with ancestral lands" (para.162).

⁶⁸ Mbaye K. *Les droits de l'Homme en Afrique* (Paris : Pedone, 1992) 29.

⁶⁹ Ouguergouz F. *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (Martinus Nijhoff Publishers, 2003) 286.

⁷⁰ The potential antagonism between government policy and the interests of the people was previously underlined in the Preamble to the Universal Declaration of People's Rights proposed in 1976 by a group of eminent individuals in Algiers (Hereinafter, the "1976 Algiers Declaration").

⁷¹ Adejumobi (2008) 109. The Lagos Plan of Action, and the Final Act of Lagos adopted in 1980, that addressed the issue of development within the continent were left aside probably for the same reason.

⁷² Despite recognition of decentralisation on paper, in practice, the centre tends to maintain important powers in the process of decision-making in many African countries. See Wunsch J.S. "Why has decentralization failed in Africa? Assessing the lessons of self-organized, local governance initiatives" Paper presented at a workshop on Political theory and policy analysis at IndianaUniversity, Bloomington (April 2008) 7-8.

portion of stakeholders, and exclude affected communities. Instead of transparency, the mineral sector remains characterised by corruption, opacity and mismanagement of funds in many of African resource-rich countries. For instance, in Nigeria it was reported that, despite the windfall revenue of an oil boom during the 1970s, the country had lost as much as \$380 billion between 1960 and 1999 because of corruption and mismanagement practices.⁷³ Similar situations are also found in other resource-rich countries like DRC, Zambia, Sierra Leone and Liberia.⁷⁴ Even in the implementation of the win-win principle advocated nowadays by all African resource-rich countries in negotiations of mineral agreements,⁷⁵ the central government fails at times to consider interests of affected communities. For instance, throughout the revision process of mineral contracts operated in DRC in 2009, the Congolese government failed to consider improvements needed in affected communities living conditions.⁷⁶

Adejumobi and Szablowski observe further that another major reason for the failure of African governments during the post-colonial period results from the externally driven development paradigm imposed by the World Bank on African countries through the structural adjustment programme.⁷⁷ This paradigm was construed on the assumption that in order for developing countries to emerge, they needed to attract and privilege their market to increase private and foreign investment.⁷⁸ This explains the flow of foreign direct

⁷³ Human Rights Watch “The Human rights impact of local government corruption and mismanagement in Rivers states, Nigeria” in Report Vol. 19 No 2 (A) (January 2007).

⁷⁴ Bryan S. and Hofmann B. *Transparency and accountability in Africa’s extractive industries: The role of the legislature* (National Democratic Institute for International Affairs, 2007) 36; Netherlands Institute for Southern Africa *The state vs. the people: Governance, mining and the transitional regime in the Democratic Republic of Congo* (Amsterdam: Niza, 2006) 29; Pedro MA. “Mainstreaming mineral wealth in growth and poverty reduction strategies” Economic Commission for Africa Policy Paper1 (ECA, 2005) 5.

⁷⁵ Kimani M. “Mining to profit Africa’s people: Governments bargain for ‘fair-deals’ that enhance development” in (2009) 23 *Africa Renewal* 4. The win-win principle simply means that the mineral agreement must be formulated in a manner that guaranteed the interest of each party interest.

⁷⁶ Kabange NCJ. “La révision par l’Etat des contrats conclus avec les personnes privées: Cas des contrats miniers en République Démocratique du Congo” (2010) 29 (1) *Cahiers Africains des Droits de l’Homme et de la Démocratie* 67-71.

⁷⁷ Adejumobi (2008)105; Szablowski D. *Transnational law and local struggle: Mining, communities and the World Bank* (Oxford: Hart Publishing, 2007) 27.

⁷⁸ Adejumobi, Id., 105; Szablowski, Id., 27.

investments into the African continent increasing from an annual average of half a billion during the 1986-1990 period to three and a half billion during the 1990s.⁷⁹

Even though the paradigm should not be undermined, as foreign direct investment brings advantageous capital flowing into the developing economies, with the possibility of transfer of technologies, it has so far served only the interests of the ruling class and of large scale multinational companies exploiting mineral resources in the African continent, without giving attention to the fundamental rights of affected communities. The paradoxical increase of foreign investment during the 1980s and 1990s and the continuing impoverishing social and living conditions of the affected communities, reveal that there was a serious governance problem of the mineral sector under the structural adjustment programme. At the beginning of the 1990s, African countries were urged by the World Bank to liberalise their mineral sector and to reduce the involvement of the state by re-designing their mineral legislation order to open up their markets to more foreign investment initiatives.⁸⁰ Credibility was blindly given to the idea that an increase in foreign direct investment would generate development. As a result, to attract the sympathy of foreign mineral investors, many African countries made provisions for considerably lower taxation, causing their public treasury to suffer a significant decrease in revenue.⁸¹ This raises the argument that the design and application of fiscal policies are critical to the cash flow that should come from mineral exploitation. The mineral sector is supposed to generate important revenues through taxes and royalties that should be used to fund development programmes and projects at national as well as local levels. It has been observed that in many developing countries, including those in Africa, large parts of fiscal

⁷⁹ See the Report of the UN Conference on Trade and Development (UNCTAD) "Foreign direct investment in least developed countries at a glance" UNCTAD/ITE/IIA/3 (2001) 2; Ajayi SI. "Introduction: A general overview" in Ajayi SI. (ed.) *Foreign direct investment in Sub-Saharan Africa: Origins, targets, impact and potential* (Nairobi: African Economic Research Consortium, 2006) 1.

⁸⁰ See World Bank "Strategy for African mining ..." (1992).

⁸¹ Kimani (2009) 4; see the report of the Open Society Institute of Southern Africa (OSISA), Third World Network Africa, Tax Justice Network Africa, Action Aid International and Christian Aid "Breaking the curse: How transparent taxation and fair taxes can turn Africa's mineral wealth into development" (London, 2009) 9-10; available at http://www.taxjustice.net/cms/upload/pdf/TJN4Africa_0903_breaking_the_curse_final_text.pdf [accessed on 28/6/2011]; Bijlsma B. "Governing mining in Africa: African perspectives, state initiatives and international standards" Report made as part of a project of the International Alliance on Natural Resources in Africa" (IANRA, January 2011) 3-4.

income come directly from the mineral sector.⁸² As Bresser-Pereira rightly warns, a government that is unable to tax adequately cannot successfully satisfy the socio-economic demands and needs of its people.⁸³ It is within the package of taxes and royalties received by the government that affected communities should have found their portion of funds to finance development activities and projects. With a lowered level of tax revenue during that period, coupled with bad governance practices and the absence of a legal system to safeguard their share, affected communities in most African countries have been deprived of considerable financial means to realise their development.

It is important also to observe that the liberalisation regime of the mineral sector promoted by the World Bank policy had accommodated foreign investments in a political milieu of adversity and unrest where fundamental rights violation was almost the norm, with the result that, instead of being beneficial to African peoples, many of them have turned into unethical activities. Despite the movements for freedom and independence across the continent in the 1960s, the general context of post-colonial governance remained characterised by long periods of oppressive dictatorship and military rule in many African countries until the early 1990s that abused the fundamental rights of their peoples.⁸⁴

Taking advantage of the shift that occurred in the international arena at the end of the Cold War in the late 1980s, African countries embarked on a new movement advocating democracy as the appropriate model of governance all over the continent. Authoritarian regimes were rejected and a period of transition to democracy was launched in many African countries during the 1990s.⁸⁵ According to Nzongola-Ntalaja, the struggle for democracy was aimed at radically changing the poor conditions under which the people

⁸² Weber-Fahr (2002) 2.

⁸³ Bresser-Pereira LC. *Democracy and public management reform* (Oxford: Oxford University Press, 2004) 128. This is true not only for socialist but also capitalist countries, where a minimum of social services financed by the government also exist (see the case of primary education in the United States).

⁸⁴ Nwabueze B. *Constitutional democracy in Africa* Vol. 4 (Ibadan: Spectrum Books Ltd, 2004) 255-305. Tar describes this reality through the picture of a cross by asserting that prior to the democratic reforms of the 1990s, authoritarian regimes governed the continent from Algeria to DRC and from Benin to Kenya, while the South of the Continent was subject to the apartheid regime. See Tar UA. "The challenges of democracy and democratization in Africa and middle East" (2010) 3 (2) *Information, society and justice* 82.

⁸⁵ Levitsky S. and Way LA. *Competitive authoritarianism: Hybrid regimes after the Cold War* (Cambridge: Cambridge University Press, 2010) 3.

lived by improving their material and social welfare.⁸⁶ This assertion takes root in and expresses the permanent desire of African peoples to build up sustainable development under a participative system of governance.⁸⁷ While claims for democratisation were made within national jurisdictions, initiatives were also taken at the regional level.

It is in this context that, at the request of some non-governmental organisations (NGOs) and grassroots organisations, the African Charter on popular participation in development and transformation was adopted at a conference held in Arusha in February 1990.⁸⁸ In this document, participants to the conference approached democracy in the context of sustainable development as a concept that requires what they called “popular participation”.⁸⁹ This concept was defined as:

the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits.⁹⁰

The aim of the conference was to reach a consensus on what should be the role of popular participation in the process of Africa’s development and transformation.⁹¹ Making a general statement on the management of resources within the continent, participants acknowledged that resources needed to be re-directed first to the satisfaction of the critical needs of African peoples in a sustainable manner; and to this end, every people must be

⁸⁶ Nzongola-Ntalaja (1997) 13.

⁸⁷The desire for popular democracy in the process of development had already been expressed in art. 11 of the 1976 Algiers Declaration that provides: “Every people has the right to choose its own economic and social system and pursue its own path to economic development freely and without any foreign interference”. Refuting the thesis that democracy had been imposed on African countries, Salim Ahmed, a former General Secretary of the OAU emphasised the fact that the process of democratisation was the logical outcome of the long yearning of African people, demonstrated during the period of anti-colonial struggle, to have more say in determining how they should be governed. See the address by HE Dr Salim Ahmed, Secretary General of the OAU to the International Conference on Africa, Africa 40, London, 29 October 1997, as quoted by Murray R. *Human rights in Africa: From the OAU to the African Union* (New York: Cambridge University Press, 2004) 74.

⁸⁸ Besides representatives of African governments and UN agencies, the conference regrouped over five hundred participants representing diverse organisations of civil society, including NGOs, grassroots organisations, peasant associations and others.

⁸⁹ Art.11 of the Arusha Declaration.

⁹⁰ Id.

⁹¹ Para.1 of the Arusha Declaration Preamble.

empowered through effective participation in a development agenda that is human-centered.⁹² In the natural resources area, the new paradigm implied that affected communities were entitled to participate and express their views in respect of any project that directly affected their livelihoods and development.⁹³ Unfortunately, this participatory approach to development did not match the African mining strategy developed by the World Bank in 1992.⁹⁴ Despite recognising its relevance,⁹⁵ in practice the World Bank did not give much consideration to popular participation in the African mineral sector, therefore leaving room for illegitimacy. As observed by Campbell, the World Bank only consulted a group of eighty mineral companies, leaving aside decision-makers and the representatives of affected communities.⁹⁶

In fact, there was a clear antagonism between the vision shared in the Arusha Declaration that regarded the involvement of people at grassroots as crucial to the process of development, and the World Bank's free highway to liberalisation for the inflow of foreign investment in minerals as the main determinant of economic growth.⁹⁷ The Arusha Declaration explicitly disapproved the structural adjustment programmes (SAPs) monitored by the World Bank and the International Monetary Fund (IMF) in the following terms:

We also wish in this regard to put on record our disapproval of all economic programmes, such as orthodox Structural Adjustment Programmes, which undermine the human condition and disregard the potential and role of popular participation in self-sustaining development.⁹⁸

Such a pronounced opposition explains partially why the Arusha Declaration did not enjoy favour, because many African governments felt implicitly constrained to adhere to the

⁹² Arts. 9-11 of the Arusha Declaration.

⁹³ Adejumobi (2008) 106.

⁹⁴ The World Bank "Strategy for ..." (1992).

⁹⁵ The World Bank *Government and development* (Washington: World Bank, 1992) 1.

⁹⁶ Campbell B. "Revisiting the reform process of African mining regimes" in (2010) *Canadian Journal of Development Studies* 201.

⁹⁷ Ibhawo B. "Structural adjustment, authoritarianism and Human Rights in Africa" (1999) XIX (1) *Comparative Studies of South Asia, Africa and the Middle East* 160.

⁹⁸ Art. 9 of the Arusha Declaration.

SAPs. As a result, the liberal regime promoted by the World Bank in the 1990s produced poor performance in many African countries.⁹⁹ In the absence of an effective model of democratic governance in many African countries, the World Bank's liberal regime took place under the negative influence of previous authoritarian regimes. Governments continued to demonstrate little political will and commitment to foster development and were characterised by violent repression of protests, corruption, contract opacity, mismanagement of royalties for their personal profit and passivity toward the environmental damage caused by full exploitation.¹⁰⁰ In such a context, foreign mineral companies easily took maximum advantage of the liberalisation and deregulation of the mineral sector by conducting their operations in a manner careless of fundamental rights.¹⁰¹ Not only were foreign investors willing to work with regimes that had poor fundamental rights records, but they themselves have been accused of having infringed on fundamental rights in certain cases.¹⁰² Consequently, instead of providing benefits to African countries, the increase in foreign mining investments was generally detrimental.¹⁰³

Because of their belief in the new paradigm of governance, advocating the implication of those affected by decisions on development matters, NGOs and grassroots organisations did not give up their struggle. This was evidenced for instance, by a complaint lodged before the African Commission in 1996 by two NGOs on behalf of the Ogoni communities alleging that the Nigerian government and its external partners, Shell, involved in oil production in Ogoniland, had *inter alia* violated the fundamental right of the Ogonis to freely dispose of natural resources, because they did not receive significant benefits from the deal, and the oil had been exploited without prior consultation with them and without

⁹⁹ Mkandawire PT. and Soludo CC. *Our Continent, Our Future: African Perspectives on Structural Adjustments* (Trenton: Africa World Press, 2009) 51.

¹⁰⁰ Kimani (2009) 4-5; Campbell (2010) 29; Bryan S. and Hofmann B. (2007) 8, 15-16; Lange S. "Gold and governance: Legal injustices and lost opportunities in Tanzania" (2011) *African Affairs* 2; see also Human Rights Watch, *supra* note 72.

¹⁰¹ See the International Institute for Environment and Development *Breaking new ground: The report of the Mining, Minerals and Sustainable Development* (London: IIED, 2002) 188.

¹⁰² *Id.*, 188.

¹⁰³ See the case of communities previously mentioned, *supra* notes 15-17; Kimani (2009) 4-5.

regard to their environmental rights.¹⁰⁴ In this case which has become a landmark decision on the continent, the African Commission did not confine the concept “people” to the whole population of the country, but also applied it to these local communities and found that the government of Nigeria had favoured the devastation of the well-being of the Ogonis through a systematic violation of articles 21 and 24 of the African Charter.¹⁰⁵ The relevance of this decision was *inter alii* its demonstration of the fact that the interests of an affected community may at times be crushed by decisions and actions taken by the government in the course of its governance of natural resources. This is a solid argument for the defense of the necessity to associate local communities in the governance of mineral resources to the extent they are affected by a particular project.

With the intensification of pressure by NGOs and grassroots organisations, African governments, international organisations and mineral companies finally acknowledged that the participation of affected communities has become a relevant factor in the governance of natural resources and the better achievement of development goals at local level.¹⁰⁶

At the UN, recognition of the paradigm had already been made in the Rio Declaration in 1992, where states were required to facilitate the participation of their citizens in the decision-making process in respect of environmental issues.¹⁰⁷ However, as previously underlined, the attitude of African governments during the 1990s was not positive towards this requirement. Further recognition of the paradigm was made in a document entitled “Programme of Action for the Least Developed Countries”, that was adopted at a UN conference held on 20 May 2001, where a strong emphasis was placed on the relevance of

¹⁰⁴ See African Commission Communication 155/96 *SERAC & CESR v. Nigeria* paras. 2 and 55 (Hereinafter the *Ogoni* case).

¹⁰⁵ See the *Ogoni* case, *supra* note 104, para. 58.

¹⁰⁶ The recognition of community participation as relevant in the governance of natural resources is definitely the result of the combined efforts of international NGOs and grassroots organisations sharing the same goals such as the need for social justice, the protection of health and the environment and sustainable development. See articles 2 and 9 of the Arusha Declaration. Their efforts have been consolidated throughout by the 1992 Declaration of Rio on the environment and development where popular participation was pointed out as relevant to environmental protection (Principle 10). See also McCay BJ. “Community and the commons: Romantic and other views” in Agrawal A. and Gibson CC. (eds.) *Community and the environment: Ethnicity, gender, and the state in community based conservation* (New Brunswick: Rutgers University Press, 2001) 183-184.

¹⁰⁷ Rio Declaration, Principle 10.

popular participation in the process of development.¹⁰⁸ The programme of action rested on the idea that efforts have to be made to establish an effective institutional, legal and regulatory framework for popular participation and for close cooperation among all stakeholders.¹⁰⁹ The World Bank also emphasised on the new paradigm of governance by supporting the principle that local communities must benefit from projects that affect them. In this respect, this institution undertook to work not only with governments, but to include affected communities and ensure, through best practice, that they profit as much as possible from such projects.¹¹⁰ The World Bank even published a participation source book where it explicitly acknowledges that the participatory approach can “improve projects, contribute to the development process, and help the poor”.¹¹¹

In the Constitutive Act of the AU that replaced the Organisation of African Unity (OAU) in 2001, African governments explicitly declare in article 3(g) that one of the objectives of the Union is to promote “popular participation”.¹¹² Further recognition of the paradigm was made in the document establishing the New Partnership for Africa’s Development (NEPAD), adopted in 2001 by AU member states and in which it is acknowledged that “many African governments did not empower their people to embark on development initiatives” and that one of the aims of the NEPAD is to promote “people-centred development”.¹¹³ The NEPAD expressly recognised the participation of all stakeholders as a key objective in the development process.¹¹⁴ In the document of the African Peer Review Mechanism (APRM) that aims to evaluate the implementation of the NEPAD in African countries, emphasis is put on the participation of all stakeholders in the process of

¹⁰⁸ UNGA Programme of Action for the Least Developed Countries, Third Conference on the Least Developed Countries, Brussels, Belgium, 14-20 May 2001 A/CONF.191/11 (8 June 2001).

¹⁰⁹ Id. 9-11.

¹¹⁰ For the World Bank group management response see “The World Bank group and extractive industries” the Final report of the extractive industries review Vol.1 (World Bank, 2003).

¹¹¹ See the World Bank *The World Bank Participation Sourcebook* (World Bank, 1996) xi.

¹¹² See also para.10 of the preamble and art. 3(h) of the Arusha Declaration where African governments emphasise their determination to promote and protect human and peoples’ rights in accordance with the African Charter and other relevant human rights instruments.

¹¹³ See NEPAD, Base document (October 2001).

¹¹⁴ NEPAD “APRM Objectives, standards, criteria and indicators” NEPAD/HSG IC-03-2003/APRM/Guideline/OSCI I (2003) 23.

assessment¹¹⁵ and the use of indicative criteria as to “what is being done to create an enabling environment for meaningful popular participation in all forms and levels of governance?”¹¹⁶ In 2002, the Extractive Industries Transparency Initiative (EITI) was launched by the United Kingdom’s Prime Minister Tony Blair, with the aim of improving governance in resource-rich countries through the publication and verification of payments made by companies and revenues received by governments from the exploitation of oil, gas, and mineral resources.¹¹⁷ This initiative, to which many African countries adhere, emphasises on the process of evaluation, the necessity for all stakeholders, including civil societies, to participate in the review of the EITI process.¹¹⁸ Later on, in 2007, at the 8th Ordinary Session of the AU Assembly, the members adopted the African Charter on Democracy, Elections and Governance that directs state parties to implement the principle of an “effective participation of citizens in democratic and development processes and in governance of public affairs.”¹¹⁹ More specific is the participatory approach formulated in the 2009 AMV where African states contend that new contractual arrangements and legal instruments to facilitate the participation of affected communities, as well as new revenue distribution mechanisms for sharing portions of centrally collected rents, are to be considered as responses to the challenges posed by the contemporary approach to

¹¹⁵ See NEPAD “Country self-assessment for the African Peer Review Mechanism” 8; available at <http://afrigap.gaportal.org/es/resources/detail/country-self-assessment-for-the-african-peer-review-mechanism> [accessed on 15/2/2011]; APRM/Base document (2003) 2-5. “Stakeholders” refers to those persons, groups or institutions who are either directly affected by a project or having interests in the project with necessary powers to influence, negatively or positively its outcome. See the World Bank definition as commented by Long C. *Participation of the poor in development initiatives: Taking their rightful place* (Earthscan 2001)14-16. See also the handbook published by the International Finance Corporation (IFC) *Stakeholder engagement: A good practice handbook for companies doing emerging markets* (Washington: IFC 2007) 10.

¹¹⁶ See NEPAD, supra note 114, 5.

¹¹⁷World Bank “Implementing the Extractive Industries Transparency Initiative: Applying early lessons from the field” (World Bank 2008) ix; available at http://siteresources.worldbank.org/INTOGMC/Resources/implementing_eiti_final.pdf [accessed on 15/6/2011].

¹¹⁸EITI Rules, including validation (EITI 2011) 20, 30; available at

http://eiti.org/files/EITI_Rules_Validations_April2011.pdf [accessed on 15/6/2011].

However, after analysing the approach developed by the EITI, it seems that this initiative envisages the participation of affected communities only indirectly through the channel of civil society organisations.

¹¹⁹ See art.3 of the African Charter on Democracy, Elections and Good Governance (2007) (Hereinafter the “African Charter on Democracy”).

development.¹²⁰ Though the AMV recognises that several factors influence the success of the mineral industry, for instance, the pricing on the international commodity market, it puts an emphasis on the need for good governance practices that should involve the participation of affected communities.¹²¹

The impact of the paradigm of community participation has been so significant that even multinational companies have started to affirm their commitment to engage in discussion with affected communities. After the *Ogoni* case was finalised by the African Commission, the Shell company that was involved in the matter, started to shift its approach and recognised that it had to adopt a participatory approach and collaborate with local communities affected by its activities in order to realise development projects.¹²² In 2000, nine of the largest mineral companies initiated a two year project known as Mining, Minerals and Sustainable Development (MMSD) through the World Business Council for Sustainable Development and under the supervision of the International Institute for Environment and Development with the aim of setting out how best the mining sector may contribute to the attainment of sustainable development.¹²³ In the final report of the project, it was rightly pointed out that:

Ensuring that mechanisms are in place to enable local communities to play effective roles in decision-making is one of the greatest challenges in mining's ability to contribute to sustainable development at the local level.¹²⁴

Community participation plays an important role. It is responsive to many concerns, namely, transparency in the management of revenues, the legitimacy of mineral agreements, environmental conservation and the realisation of socio-economic rights within affected communities. It is a tool that enables them to be partakers of their own development in a sustainable way. However, for almost more than a decade that there has

¹²⁰ See AMV (2009) 16, 27.

¹²¹ Id. 27.

¹²² Shell "Global memorandum of understanding"; available at http://www-static.shell.com/static/nga/downloads/pdfs/briefing_notes/gmou.pdf [accessed 16/2/2011].

¹²³ International Institute for Environment and Development "Project document: MMSD – Introduction" (2002) 4-5; available at <http://pubs.iied.org/pdfs/G00892.pdf> [accessed 3/3/2011].

¹²⁴ International Institute for Environment and Development "Project document: MMSD – Final Report" (2002) 199; available at <http://pubs.iied.org/pdfs/G00901.pdf> [accessed 3/3/2011].

been consensus on the relevance of community participation from all the actors involved in the African mineral sector, the effective implementation of the paradigm is still latent in many African countries and often remains a simple statement of intent.

1.2. Research problem and subject matter of the study

Though consensus has been reached among all stakeholders about the relevance of community participation, the standard at which the paradigm needs to be enforced is still unclear.¹²⁵ Thus far, international donor agencies, states and mineral corporations tend to express a preference for a soft approach which generally amounts to a process deprived of formal means of constraint to consider views of people affected by the project even after having conducted consultations. For instance, the World Bank has expressed the view that the involvement of affected communities in extractive industry projects must not result in the power to veto, but rather simply be a process of free, prior and informed consultation.¹²⁶ As a consequence, there have been cases where projects were deemed damaging after consultation with affected communities, but which still received the *quietus* of the government and the World Bank. For instance, despite opposition by affected communities and organisations of civil society, a project to construct 300 oil wells in Chad and a 1070 km pipeline to the Atlantic coast of Cameroon, was approved by the World Bank in 2001.¹²⁷ Paradoxically, after ten years, the promise of achieving development for communities living around the area has remained unmitigated.¹²⁸ Instead of poverty

¹²⁵ Community participation aims at avoiding conflicts between stakeholders in the sense that its outcome is to explore and find common interests between them. Nanmpila T. Assessing community participation: The Hudare informal settlement, unpublished LLM Dissertation (University of Stellenbosch, 2005) 15.

¹²⁶ See the World Bank Group management response (2003) v.

¹²⁷ Nguiffo S. and Breitkop S. "The Chad Cameroon oil and pipeline project: Putting people and the environment at Risk" (September 1999); available at http://www.edf.org/documents/728_ChadCameroon_pipeline.pdf [accessed 16/2/2011].

¹²⁸ Jaén AC. "Lessons from the failure of Chad's oil revenue management model" (ARI); available at http://www.realinstitutoelcano.org/wps/wcm/connect/8473080041b87f3a9de5ffe151fccd56/ARI12-2010_Colom_Chad_Oil_Revenue_Management_Model.pdf?MOD=AJPERES&CACHEID=8473080041b87f3a9de5ffe151fccd56 [accessed on 16/2/2010].

alleviation, affected communities have been displaced without adequate compensation.¹²⁹ This is why McBeth observes that though international economic institutions have commonly contended that the overall operations they support bring prosperity and have a positive impact on the enjoyment of fundamental rights, they have been criticised for their support of large scale infrastructure projects that evict local people, violate their right to housing and affect their livelihoods, as well as violating many other rights.¹³⁰ A similar situation occurred in DRC in respect of an aluminum smelter project that BHP Billiton agreed upon with the central government for five billion US dollars in the province of Bas-Congo in 2010. In spite of the rejection and calls to halt this project by NGOs, because of its lack of benefit to the local communities directly affected, both parties decided to continue with the project.¹³¹ Fortunately, two years later, the company decided at its own discretion not to continue with the project which was still at a very early stage.¹³²

All these cases are illustrative of the fact that the importance of community participation is reduced to a simple formality characterised by the mere fulfillment of the duty to consult. Even where the law makes their consent a prior condition for the launching of mineral operations, this requirement has generally been disregarded or undermined by the government.¹³³ As clearly summarised by Katy and Mamen:

Community consultation processes are often proposed as useful instruments because they can empower local communities to influence decisions on mining projects. Yet

¹²⁹ Olowu D. *An integrative rights-based approach to human development in Africa* (Cape Town: Pretoria University Law Press, 2009) 252; Alao A. *Natural resources and conflicts in Africa: The tragedy of endowment* (New York: University of Rochester Press, 2007) 88.

¹³⁰ McBeth A. "Human rights in economic globalization" in Joseph S. and McBeth A. *Research handbook on International Human rights Law* (Cheltenham/Northampton: Edward Elgar, 2010) 139.

¹³¹ See NGOs call for a Moratorium on BHP Billiton's Congo Smelter. Available at <http://www.internationalrivers.org/en/node/6058> [accessed on 27/12/2010].

¹³² Sydney Morning Herald "BHP scraps plans for Congo smelter" (2012); available at <http://www.smh.com.au/business/bhp-scraps-plans-for-congo-smelter-20120216-1ta7h.html> [accessed on 4/6/2013].

¹³³ See the case of Zambia and Nigeria as explained in Chapter two.

despite such potential, many mining consultation processes serve as a smokescreen, lacking substance and creating the illusion of democratic process.¹³⁴

The consequence is that affected communities are often unable to exercise real control over the government and the mineral corporation as regards the due consideration to be given to their fundamental rights. This is a misleading approach to the paradigm and the negation of the crucial reality that community participation is at the heart of any people-centred process intended to realise development at local level.¹³⁵ In fact without effective involvement, community participation is rendered meaningless since there is no guarantee that the views expressed by affected communities will be considered and have an impact on the outcome of the decision-making process.

To ensure that the governance of mineral resources is effectively oriented to the achievement of sustainable development within affected communities, it is important that these communities be involved and participate throughout the life cycle of the mineral project (negotiation, execution and closure) with the possibility of opposing any decision or action taken by other stakeholders that can have devastating effects on their welfare. As correctly underlined by Marocs, affected communities must be given the opportunity to learn about the impact of the mineral project before operations begin, to express their views in the decision-making process and to access effective remedies where damages occur.¹³⁶ By participating actively, they will be able to direct mineral activities affecting their livelihood towards development objectives in their areas.

At this stage, the softness with which the participatory approach has been applied requires that a more effective strategy be developed. This is because under the current approach, mineral projects do not easily capture the demand of affected communities for respect of their fundamental rights. Even the concept of Community Development Agreement (CDA)

¹³⁴ Katy G. and Mamen W. "Community consultation in mining: A tool for community empowerment or for public relations?" 251 25 (1) *Mining indigenous lands* 1; available at <http://www.culturalsurvival.org/ourpublications/csq/article/community-consultation-mining> [accessed on 4/3/2011].

¹³⁵ Art.8 of the UNDRD.

¹³⁶ Marcos A. (2002) 236.

instituted in some African countries¹³⁷ as a strategy for affected communities' participation is often loose with for instance royalties and financial benefits being considered more as donations rather than lawful entitlements of these communities by virtue of their fundamental rights.¹³⁸ It has been contended that despite the benefits it can bring, if the CDA is to be considered as a formal agreement, the legal stipulations that it often includes can negatively impact on the relationship between stakeholders by fostering a counter productive environment of mistrust, uncertainty and confusion as to the role of each party, with a dependency on the mineral company which goes beyond rational limits.¹³⁹ However, as will be seen later, the relative success experienced in South Africa and the difficulty of enforcement in Nigeria¹⁴⁰ demonstrate that, unless approached as a binding agreement rather than a soft law instrument, there is no guarantee that this strategy will provide more effectiveness to participation and compell other stakeholders to give due respect to communities' fundamental rights in the development process. Ribot aptly explains the significant difference in the ways participation may be approached, contending that powers that are delegated as privileges can easily be withdrawn, while those that are transferred as rights are hardly taken away.¹⁴¹ This study proposes a paradigm shift away from a soft model of participation to one that will be binding under a fundamental rights-based approach, with the possibility of enforcement before quasi-judicial and judicial bodies. This shift towards what can be defined as a binding approach implies that affected communities should have access to legal mechanisms through which they can constrain other stakeholders to consider their views on how mineral projects should profit their sustainable development. These mechanisms may imply formalising the

¹³⁷ See for instance, the case in South Africa and Nigeria.

¹³⁸ Environmental Resource Management "Mining Community Development Agreements– Practical experiences and field studies Final report for the World Bank" (2010) 78; available at http://siteresources.worldbank.org/INTEXTINDWOM/Resources/CDA_Report_FINAL.pdf [accessed on 15/6/2013]

¹³⁹ World Bank *Mining Community Development Agreements Source Book* (Washington: World Bank, 2012) 9.

¹⁴⁰ The analysis is made in Chapter two for South Africa, in respect of the binding character of the agreement entered to between the Bafokeng community and the mineral company Impala and for Nigeria, in respect of General Memorandum of Agreements concluded between oil companies and communities in Nigeria Delta which are generally non-binding.

¹⁴¹ Ribot JC. "Democratic decentralization of natural resources: Institutional choice and discretionary power transfers in Sub-Saharan Africa" in van de Walle N, Ball N. and Ramachandran V. (eds.) *Beyond structural adjustment: The institutional context of African development* (Palgrave Macmillan 2004) 174.

relationship between stakeholders in the form of a contract which is legally binding and approaching judicial bodies to seek enforcement of affected communities' fundamental rights. By interacting with other stakeholders from a fundamental rights perspective, affected communities may influence the decision-making process by organising their opposition against any negative elements in the governance of mineral resources from a legal perspective. In other words, other stakeholders will not only be obliged to make them part of discussions on any mineral project, but also be bound to consider their views. This is what is meant by "effectiveness of community participation" throughout this study. However, an important question remains as to how the legal implications of a fundamental rights-based approach to community participation must be apprehended in the specific context of a mineral-led development.

The answer to this question requires contextualising participation in the ongoing predominant discourse on development which sees the appropriation of the development process by the people concerned as a relevant factor.¹⁴² This approach generally qualified as "people-centred development" rests on the view that "only the affected people themselves can define what they consider to be improvements in the quality of their life"¹⁴³ and that for such a purpose "they need to be empowered to participate in the development process."¹⁴⁴ The aim is clearly to avoid a technocratic determination of policies, decisions and projects, and rather to achieve an integration of the local driving force in the development process in respect of every initiative made by the government or other stakeholders, that have a direct influence on the affected communities' livelihood.¹⁴⁵ This approach of empowering affected communities to effectively take part in the development

¹⁴² See UNDP "People centred-development: Empowered lives – Nations resilient" (2010) 10; available at http://www.undp.org/annualreport2011/downloads/undp_AR_2010-2011_ENGLISH.pdf [accessed 2/8/2012]; Vlaenderen H. and Neves D. "Participatory action research and local knowledge in community contexts" in Hook D. (ed.) *Critical psychology* (Cape Town: University of Cape Town, 2004) 450; Chaturevedi P. *Energy, environment and sustainable development* (Concept Publishing Company, 2003) 167; Dalal-Clayton B. and Bass S. *Sustainable development strategies* (Earthscan, 2002) 33; Sinha P. *Sustainable development* (Anmol Publications 1998) 2; Schenck CJ. and Louw H. "People-centred perspective on people-centred community development" in Vivekananda F.(ed.) (1995) 10(2) *Journal of Social Development in Africa*, 81-91.

¹⁴³ Vlaenderen and Neves, Id., 427.

¹⁴⁴ Ibid.427.

¹⁴⁵ Andreassen BA. and Marks SP. "Introduction" in Andreassen BA. and Marks SP. (eds.) *Development as a Human right: Legal, political and economic dimensions* 2nd ed. (Oxford: Intersentia, 2010) xxvi.

process goes hand in hand with another contemporary approach which, from a legal perspective, perceives development as a process in which policies and programmes are formulated in consideration of the duty to respect and fulfill fundamental rights.¹⁴⁶ This is what is known as the fundamental rights-based approach to development which means that the development process is carried out with due regard to fundamental rights standards and that the fulfillment of these rights becomes a vital goal of development efforts.¹⁴⁷ In this respect, the fundamental rights-based approach to community participation appears as a component of the fundamental rights-based approach to development and implies a double dimension.

In its first dimension, it commands that community participation be regarded as a fundamental right rather than a simple formality which at times takes on the appearance of a favour granted to local communities. This is in order to provide a certain degree of empowerment to affected communities in the governance of mineral resources in as far as their development is concerned. This implies that affected communities would not merely be consulted, but have for instance the right to exercising control over the financial bargaining and the management of revenues and ensuring that mineral companies demonstrate sufficient commitment with regard to the social and environmental impacts of their operations. This approach clearly has the benefit of making their participation more effective and meaningful.

In its second dimension, it implies that community participation would constitute the channel through which affected communities would advocate and contend other fundamental rights relevant to achieving mineral-led development in their neighbourhoods. In this regard, the observation made by Du Plessis deserves particular attention in so much as this scholar rightly points out that some fundamental rights are rendered useless when they are not accompanied by a formal mechanism of participation for rights holders in the

¹⁴⁶ Boesen KJ. and Sano HO. "The implications and value added of a human rights based approach" in Andreassen BA. and Marks SP. *Development as a Human right: Legal, political and economic dimensions* 2nd ed. (Oxford: Intersentia, 2010) 50-51.

¹⁴⁷ Sengupta A. "The human right to development" in Andreassen BA. and Marks SP. *Development as a human right: Legal, political and economic dimensions* (Oxford: Intersentia, 2010) 16-17; Olowu (2009) 16.

process of their implementation.¹⁴⁸ For instance, it is through participation that affected communities may ensure that a particular mineral project is respectful of their environmental right through its life cycle. The fundamental rights-based approach to community participation will help them during the discussion, execution and closure of any mineral project to make sure that development goals are promoted and secured.¹⁴⁹

The view has been expressed that development must come before fundamental rights may be safeguarded.¹⁵⁰ However, drawing from the Chinese experience, it is taken for granted that a development process that takes place without due regard to fundamental rights cannot generate real development for the large majority of the poor. Despite the impressive economic growth experienced by China, this country is still counted among developing countries.¹⁵¹ Factors like inequalities and fundamental rights violations have led to the failure of the process of redistributing wealth within the Chinese society, with a continued and pronounced gap between the poor and the rich.¹⁵² Under the binding approach, fundamental rights give voice to human suffering in the development process. Their visibility is raised and they serve as the legal basis on which claims for improvement may be submitted.¹⁵³ This implies that mineral policy and decisions on projects taken in the course of the development process must necessarily fit within the prospect of fulfilling fundamental rights. For this purpose, standards defined under a fundamental rights-based approach would help to assess the extent to which societal norms and institutions are set up

¹⁴⁸ Du Plessis A. “Public participation, good governance and fulfillment of environmental rights” in (2008) 2 Potchefstroomse *Elektroniese Regsblad (PER)* 3.

¹⁴⁹ This is what some scholars qualify as the “community right to prior consent”. Bass S. *et al. Prior informed consent and mining: Promoting sustainable development of local communities* (Washington: Environmental Law Institute, 2004)1-5.

¹⁵⁰ Njenga FX. “The African debt problem: Legal and institutional dimensions” (1994) 2 *African Yearbook of International Law* 95-107; McMorrow M. “Global poverty, subsistence rights, and consequent obligations for rich and poor states” in McCarthy-Arnolds E., Penna DR. and CruzSobrepenna DJC. (eds.) *Africa, human rights and the global system* (Westport: Greenwood Press, 1994) 437-60; Roberston AH. *Human rights in the world: An introduction to the study of the international protection of human rights* (1982) 8-9 as quoted by Olowu D. (2009) 69.

¹⁵¹ Meagher C. “China's fifth modernization: The enduring hope for democratic governance” in Kinsman J. and Bassuener K. (eds.) *A diplomat's handbook for democracy development support* 2nd ed. (Washington: Council for a Community of Democracies, 2008) 98.

¹⁵² *Id.*, 98.

¹⁵³ Panda BP. *Human rights, development and environmental law* (New Delhi: Academic Excellence, 2007) 8.

to achieve development goals which forcefully include the respect of these rights, and the extent to which the practices in mineral governance conform with the obligations imposed by these rights.¹⁵⁴ Sengupta points out that this approach would avoid a situation of inequality in as much as the equitable distribution of benefits remains at the heart of a development process that is rights-based.¹⁵⁵ The distortion between both concepts is no more conceivable since development itself is being now regarded as a fundamental right.¹⁵⁶

Viewed from this perspective, it is clear that community participation must cease to be approached as a simple formality, but rather as a legal tool that empowers affected communities with the ability to advocate and promote governance of mineral resources oriented towards the achievement of development goals. Nevertheless, if the fundamental rights-based approach must be formally implemented, it needs to find support in the provisions of at least one legal instrument to which affected communities may resort and seek enforcement.¹⁵⁷

In this respect, if one adheres to the view that fundamental rights from a vertical perspective, aimed at protecting people (individually or collectively) against abuse of power by their governments, then it may be contended that the African Charter qualifies largely in as much as it represents an empowering instrument in the people-government relationship. Though controversies still exist worldwide as to the origin of fundamental rights,¹⁵⁸ it is established that in post-colonial Africa, people's rights emerged from a clash

¹⁵⁴ Panda (2007) 26.

¹⁵⁵ Sengupta (2010) 16. See also Bryan and Hoffman (2010) 19.

¹⁵⁶ Sengupta, Id., 15.

¹⁵⁷ This is because when a fundamental right is not entrenched in a legal instrument, its protection is hard to achieve before a court or any independent body. Even for fundamental rights that may naturally exist such as the right to life or the right to freedom, their protection requires legal provisions designed for that purpose. For more discussions on this point, see Latour X. and Pauvert B. *Libertés publiques et droits fondamentaux* 2nd ed (Paris: Studyrama, 2008) 23.

¹⁵⁸ Ishay M. *The history of human rights: From ancient times to the globalization era* (University of California Press, 2008) 3-7; Mahoney J. *The challenge of human rights: Origin, development, and significance* (Berkeley/Los Angeles: Wiley-Blackwell, 2007) 1.

between African peoples and their political rulers.¹⁵⁹ As mentioned previously, it must be kept in mind that peoples' interests can at times be crushed by governmental policy, decisions or actions, and that it is something that often happens in the African mineral sector with regard to affected communities' interests and fundamental rights.¹⁶⁰ Thus, being the unique instrument on the continent that refers largely to peoples' rights, the African Charter represents the appropriate normative framework that legally empowers affected communities to defy fundamental rights violations that may occur in their relationship with the government, either at the level of the center or at the local one, depending on arrangements made within each country. Under the binding approach, fundamental rights entrenched in the African Charter should work as a tool in the hand of affected communities to make the state responsive and accountable to their own will.¹⁶¹ Because affected communities are included in the concept of "people",¹⁶² provisions of the African Charter may be used by them to oppose any governmental policy, decision or action that compromises their best interests and fundamental rights in the mineral sector.

From a horizontal perspective, the fundamental rights entrenched in the African Charter may also function as a mechanism to challenge activities of mineral companies which threaten the safety and the developmental needs of the people affected.¹⁶³ This was the case that the *Ogonis* brought before the African Commission.¹⁶⁴ However, since the norms of international law have historically developed only in respect to the conduct of states,¹⁶⁵ it remains an open question whether the provisions of the African Charter may be applied

¹⁵⁹ Mangu AMB. "What future for Human and peoples' rights under the African Union, New Partnership for Africa's Development, African Peer-Review Mechanism and the African Court?" in (2004) 29 *South African Yearbook of International Law* 137-138.

¹⁶⁰ See the *Ogoni* case, supra note 104, the *Endoris* case, supra note 67, and other cases mentioned previously, supra notes 15-17. See also generally, the view expressed in the 1976 Algiers Declaration.

¹⁶¹ Dresso SA. "Peoples' rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?" Paper presented in connection with the Research Paper Series (RPS) of the South African Institute for Advanced Constitutional, Human Rights and International Law, RPS No 6, 14; available at http://www.saifac.org.za/programmes/res_papers.htm [accessed 4/7/2011]. See also the 2010 UNDP report, supra note 142, 10.

¹⁶² See the statement made by the African Commission in the *Endoris* case, supra note 67.

¹⁶³ Dresso, supra note 161, 16.

¹⁶⁴ See the *Ogonis* case, supra note 104.

¹⁶⁵ Bridgeford TA. "Imputing human rights obligations on multinational corporations: The ninth circuit strikes again in judicial activism" in 18 (2003) *American University International Law Review* 1014-1015.

directly to mineral companies operating in African countries. At present, international law in this area only consists of soft law prescriptions suggesting a certain type of conduct to corporations in respect of fundamental rights.¹⁶⁶ The provisions of these guidelines are not binding upon corporations.¹⁶⁷ Nevertheless, as will be demonstrated in the course of this study, the problem is not really whether fundamental rights obligations for multinational companies exist, but rather who should be accountable for their violation. Under a right-based approach to development, it makes sense that foreign mineral corporations should have fundamental rights obligations towards affected communities since the principle that the fundamental right to development of a legal person or group necessarily creates corresponding duties for others.¹⁶⁸ However, the approach developed by the African Commission in the *Ogoni* case stipulates that African governments are the ones to be held liable for fundamental rights abuses committed by multinational corporations operating within their territory.¹⁶⁹ This is seen as a result of the state's obligation to "protect", which implies the duty to take positive measures to ensure that non-state actors do not infringe on fundamental rights.¹⁷⁰ Though this approach is somewhat limiting,¹⁷¹ its rationale resides in the fact that it is the government that regulates the entrance of multinational mineral companies into the country and determines the condition upon which these entities must exercise their activities.

With regard to both these vertical and horizontal perspectives, the African Charter is particularly suitable to support the fundamental rights-based approach because its enforcement machinery offers a double level of jurisdiction where affected communities

¹⁶⁶ UN Code of Conduct on Transnational Corporations (1984); International Labour Organization (ILO) Tripartite Declaration of Principles (1977); Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises (2011).

¹⁶⁷ Sornarajah M. *The international law on foreign investment* (Cambridge University Press, 2010) 151-152; Bridgeford (2003) 1015.

¹⁶⁸ Panda describes it as an obligation to facilitate and enhance human development. Panda (2007) 25.

¹⁶⁹ See the *Ogoni* case where the Nigerian government was made liable for its failure to prevent Shell from violating fundamental rights of the Ogonis. *Ogoni* case, supra note 104, para. 58.

¹⁷⁰ See the *Ogoni* case, supra note 104, paras. 46, 57; see also the African Commission's principles and guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, adopted by the African Commission at its 48th Ordinary Session (10-24/11/2010) 11.

¹⁷¹ This is known as the "due diligence". The limiting aspect of this approach is discussed in the chapter 3 of this study.

may seek enforcement. Before reaching regional mechanisms of enforcement, affected communities are required first to exhaust domestic remedies, if available.¹⁷² This naturally broadens the different avenues that they can take to make their voices heard in respect of mineral projects having direct implications on their welfare. Despite criticisms levelled at the African Commission,¹⁷³ the African Charter enforcement machinery is preset to offer disadvantaged people, including affected communities, a forum where they are empowered to challenge the bad behaviour and practices of the government and other stakeholders in respect of their fundamental rights.¹⁷⁴ This ability was reinforced with the establishment of an African Court with the power to deliver decisions that are binding upon states.¹⁷⁵

Moreover, the African Charter qualifies as an appropriate legal instrument to promote a fundamental rights-based approach because it goes along with the NEPAD objectives. In respect of the sustainable development process in the context of the NEPAD, the APRM has adopted the African Charter as a main standard of fundamental rights.¹⁷⁶ Provisions of the African Charter should serve in the monitoring of the development process to assess the extent to which fundamental rights relevant to the NEPAD objectives are respected and fulfilled by African States.

¹⁷² Art.56 (5) of the African Charter.

¹⁷³ The African Commission has been criticised for its lack of independence. Malcolm E. and Murray R. "The state reporting mechanism of the African Charter" in Malcolm E. and Murray R. (eds.) *The African Charter on Human and Peoples' Rights: The system in practice 1986 – 2006* 2nd ed. (Cambridge: Cambridge University Press, 2008) 57.

¹⁷⁴ In the present context of many African countries, the opportunity for an independent and impartial judiciary is more available at a regional level than at a national level where judges are often unwilling or fear to render a decision condemning the government or political rulers for fundamental rights abuses.

¹⁷⁵ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998); Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83 (v), adopted on July 4-5, 2005; Decision on the single legal instrument on the merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec. 196 (XI) June 30-July 1, 2008; Protocol on the Statute of the African Court of Justice and Human Rights (2008). Pending the coming into force of the 2008 Protocol, the African Court of Human and Peoples' Rights continues to fill judicial functions.

¹⁷⁶ NEPAD, *supra* note 115, 5, 13-14, 21-24.

Lastly, it is also noteworthy that *all* African states are party to the African Charter, which gives this instrument a complete jurisdiction over the continent.

This study is built on the argument that community participation will be more effective under a fundamental rights-based approach. It stands on the belief that affected communities will significantly benefit from mineral resources if they are legally empowered to participate at different stages in the process of their governance, which includes steps like the decision on mineral projects, the sharing of revenues, the realisation of development projects and the closure of the mine. Therefore, the fundamental rights-based approach should help create the necessary conditions for improving the governance of mineral resources in connection with the achievement of development goals within affected communities. However, the implementation of the paradigm is not without challenges.

The fact that another stakeholder has to be added to the traditional binary relationship¹⁷⁷ with enough power to influence the governance of mineral resources implies that profound changes need to take place. The normative framework and the functioning of institutions in the mineral sector must be reoriented in many African countries to support an effective participatory model. The approach to development adopted by many African countries since independence, did not express much concern for how societal norms and institutions impact on the outcome of the development process.¹⁷⁸ Campbell rightly points out that the way the African mineral sector is to be reoriented at present is dependant on the values advanced within the legal system of each country, to the extent that these values condition the choice of development strategies, the model of participation and the responsibilities and powers bestowed on stakeholders.¹⁷⁹ In this respect, there is no doubt and it is taken for granted nowadays, that all African countries at least at a rhetorical level, adhere to “democracy”, “decentralisation” and “accountability” as key values that create conducive conditions for achieving development. Adherence to these values has been consecutive to

¹⁷⁷ As described by Ballards and Banks, the binary relationship is one that involves the government and the mineral company. Ballards and Banks (2003) 289. Nevertheless, due to the relevant role the World Bank plays in the design and the implementation of mineral policies and projects, it may also be considered among the stakeholders.

¹⁷⁸ Ake (1996) 13.

¹⁷⁹ Campbell (2010) 199.

the ideological shift on the continent and the democratisation process launched after the end of the Cold War in late 1980s.¹⁸⁰ Until now, the democratisation process remains to be fully realised in many African countries. In the mineral sector in particular, peoples still struggle to have access to resources and to share in the benefits of those resources in many countries richly endowed with minerals. This is either because their management is still over-centralised by the government¹⁸¹ or because the sector is still dominated by private interests or ownership.¹⁸² No matter the approach adopted by each country regarding the ownership of mineral resources,¹⁸³ it is obvious that people are entitled to share in benefits flowing from the mineral industry in the process of achieving development. This is particularly true for affected communities that are the first to be subjected to the impact of mineral companies' activities, and so it would be unfair to keep them outside the governance process. The exclusion of people from the governance of mineral resources has generally been inspired by such anti-values as inequality, injustice and selfishness with the consequence that, wherever experienced, mineral activities have always generated conflict and violence, infringements of fundamental rights, misery and poverty.¹⁸⁴ Therefore, it becomes indisputable that for the governance of mineral resources to contribute to the

¹⁸⁰ Constitutions adopted by African countries after 1990 all entrenched provisions that advocate a democratic model of governance, with decentralisation of power and accountability of rulers. See, for instance, ss. 19 and 40 the South African Constitution (1996); ss. 1, 109 and 112 of the Zambian Constitution (1996); ss. 3 and 146 of the Tanzanian Constitution (1998); ss. 7 and 9 of the Nigerian Constitution (1999) and ss. 2, 3, 5 of the DRC Constitution (2006).

¹⁸¹ For instance, this is the case in DRC, Nigeria, and Zambia where the authority to take major decisions in the sector is vested in members or departments of the central government (ss. 9-10, 12, 16 Law No 007/2002 referred to as the DRC Mineral Code (2002), ss. 4-5 of the Nigeria Minerals and Mining Act (2007), and ss. 3 and 83 of the Zambia Mines & Minerals Act 31 of 1995).

¹⁸² This is the case in South Africa where private ownership is still ruling the sector, to the extent that the ANC Youth League (ANCYL) is continuously demanding the nationalisation of the mineral resources as a means to ensure that South African people would share the nation's wealth. ANCYL Discussion Document "Towards the transfer of mineral wealth to the ownership of the people as a whole: A perspective on nationalisation of mines" (February, 2010); available at http://us-cdn.creamermedia.co.za/assets/articles/attachments/25571_nationalisation_of_mines_document-feb_2010.pdf [accessed 6/9/2011]; Dale M. "Comparative international and African mineral law as applied in the formation of the new South African mineral development legislation" in Bastida E., WaeldeTW., Warden-Fernández J. (eds.) *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 824.

¹⁸³ In this respect, one can consult the report by the World Bank (2011).

¹⁸⁴ For instance, this has been the case with the *Ogoni* people in Nigeria, the war in the eastern part of DRC (1998-2003) and of Black people in South Africa who have been excluded from mineral ownership during the apartheid regime.

achievement of development goals, African countries need to adopt a democratic and decentralised model of management, with legal mechanisms to hold public and private actors accountable. This implies that the fundamental rights-based approach to community participation can only be conceived and viable in the context of a democratic society, where affected communities share a certain degree of power and are able to make political rulers as well as other stakeholders accountable. Therefore, among the first issues to be addressed in this study is how democracy, decentralisation and accountability must be designed to match community participation viewed from a perspective based on fundamental rights in the context of mineral activities that take place within or around affected communities. This investigation of the interconnection between participation and these three values is instrumental to the search for a system of good governance. This is because the ultimate finality of decisions and actions taken in the governance of mineral resources should presumably be reaching and achieving development goals. Therefore, since the three fundamental values are examined here from the perspective of their providing support for more effective community participation, their close relationship with the paradigm values requires that norms and institutions governing the mineral industry be made up of principles attached to each of them. This is basically what is missing in the model of governance that currently exists in many African resource-rich countries, with the consequence that it makes community participation insignificant and inefficient at preventing bad governance practices.¹⁸⁵

Then, as this study is based on fundamental rights, the second issue to address should be to determine legal mechanisms that should be available to affected communities in a democratic society to enforce all fundamental rights relevant to make their participation effective and meaningful in the development process. Because the legal approach developed in this study is undertaken within the realm of the African Charter, the core of the problem becomes whether, and how, this instrument and its enforcement machinery may fill the gap and reshape the governance of mineral resources in African countries by making community participation really effective in the development process. This implies

¹⁸⁵As will be demonstrated in reference to certain case studies, the extent to which these three values are embedded in the relationship between affected communities and other stakeholders is minor and insignificant, so there is still uncertainty, confusion and arbitrary practices.

that the African Charter and its enforcement machinery must be efficient to enhance democracy, decentralisation and accountability in the mineral sector and to support the participation of affected local communities in the decision-making process in consideration of their fundamental rights and development goals. The challenge for the African Charter and its enforcement machinery is to serve as solid ground for the fundamental rights-based approach to community participation in the governance of mineral resources, with the aim of achieving development. This problem has two implications.

From a normative perspective, this implies that the African Charter should provide for community participation and give content to democratic principles that would allow affected communities to enjoy the power necessary to make their view be considered, and make other stakeholders accountable in respect of their interests and rights. This means that through the provisions of the African Charter, affected communities must be able to participate in decision-making (first dimension) and then use the opportunity to participate as a means through which they will enforce other fundamental rights in the pursuit of sustainable development (second dimension). Provisions of the African Charter should facilitate the full exercise of community participation in both its first and second dimensions and thus, give more freedom to affected communities to express and enforce their choices in respect of mineral projects foreseen within their areas. Nevertheless, it is indisputable that the interpretation of the African Charter provisions that are directly relevant to community participation, will confront questions or issues related to ideological and practical considerations attached to democracy, decentralisation and accountability.

In concrete terms, consideration for democracy raises the question as to whether it is direct democracy or representative democracy that should be adopted to allow community participation in the governance process in the mineral sector. Though it has been contended that direct democracy is possible only where people are few in number as in ancient Athens,¹⁸⁶ and that for this reason it may function as a participatory mechanism within local communities, it has been found that in practice two major difficulties commonly arise. The first difficulty concerns the way decisions have to be taken, meaning

¹⁸⁶ Hansen M.H. *The tradition of ancient Greek democracy and its importance for modern democracy* (Copenhagen: Danske Videnskabernes Selskab, 2005) 45; Mair L. *Safeguards for democracy* (The New Africa Library, 1961) 2.

whether decisions should be made according to a consensual or a majoritarian method of decision-making. While Smith observes that the exercise of direct democracy without legal safeguards leads to the suppression of minority voices by the dominant majority,¹⁸⁷ Rono and Aboud point out the difficulty experienced by certain local communities in reaching a consensual decision in their assemblies, with facts like absence of co-ordination, conflict of leadership and opposing views.¹⁸⁸ The second difficulty stems from the fact that many African countries are still characterised by a significant level of illiteracy within affected communities and the question has been asked whether or not it would be wiser to let community participation take place on an exclusively representative basis.¹⁸⁹ The reason for this suggestion is that it would be easier to choose representatives from among the elite, that are educated and have the necessary knowledge and capacity to defend the interests of the community. But this is far from being the best solution, because as Smith observes, local elites are also capable of behaving with carelessness towards the interests and rights of the community.¹⁹⁰ Rupture between representatives and the community is also conceivable at the local level of governance, especially when they do not show commitment to working for the good of their community, but rather for their own interests. The question here is: which form of democracy the affected communities may contemplate under the provisions of the African Charter?

The effectiveness of a democratic model of governance is also dependent on accountability. Community participation would be meaningless if affected communities could not compel other stakeholders to consider their views and make them accountable in respect of their fundamental rights and interests in the mineral-led development process.¹⁹¹ Provisions of the African Charter and institutional arrangements for their enforcement need to be scrutinised to determine whether they can help affected communities make the

¹⁸⁷ Smith ML. "The uneasy balance between participation and representation: A local direct democracy in the Czech Republic" in Schiller T. (ed.) *Local democracy in Europe* (Wiesbaden: Vs Verlag, 2011) 33.

¹⁸⁸ Rono PK. and Aboud AA. "The role of popular participation and community work ethic in rural development: The case of Nandi district, Kenya" in (2003) 18 (2) *Journal of Social Development in Africa* 92.

¹⁸⁹ Pandey VC. *Education: Planning and human development* (Delhi: Isha Books, 2003) 20-22.

¹⁹⁰ Smith (2011) 6.

¹⁹¹ Thörlind R. *Development, decentralization and democracy: Exploring social capital and politicization in the Bengal region* (Copenhagen: Nordic Institute of Asian Studies, 2000) 34-35.

government and mineral corporations accountable. This discussion forcefully enters the scope of the analysis of vertical and horizontal applicability of the Charter.

As to decentralisation, since there is no unanimity on a single model, issues to consider involve the extent to which power must flow to affected communities and the level at which they must participate for community participation to be effective in the governance of mineral resources.¹⁹² Because decentralisation is a matter of degree, Zieligski makes a distinction between pure and mixed models.¹⁹³ This scholar describes the pure model as a single level model which operates without any central authority and which implies the existence of more than one centre of decision-making, whereas the model is mixed when decentralised structures are interspersed with some measure of centralisation at some levels.¹⁹⁴ For the purpose of this study, the model of decentralisation that is envisaged is one that is in anyway inclusive of affected communities, one that empowers them to such an extent that they are able to influence the governance of mineral resources towards the objective of realising development goals.¹⁹⁵ This is because, as observed by the United Nations Development Programme (UNDP), most decentralisation initiatives in Africa have demonstrated little commitment to engage local communities in the decision-making process.¹⁹⁶ Therefore, the challenge for the African Charter is also to demonstrate how far

¹⁹² Jain RB. "Public administration, bureaucracy and development in the Third World: Emerging paradigm of good governance at the threshold of the 21st century" in RB. Jain (ed.) *Governing development across culture: Challenges and dilemmas of an emerging sub-discipline in political science* (Farmington Hills: Verlag Barbara Burdich, 2007) 60.

¹⁹³ Zieligski JG. "Centralisation and decentralisation in decision-making" (1963) 3 (3) *Economics of planning* 196-208.

¹⁹⁴ Id., 196, 199.

¹⁹⁵ Avilés Irhola DL. *Popular participation, decentralisation, and local power relations in Bolivia* (Göttingen :Cuvillier, 2005) 29.

¹⁹⁶ See UNDP "Local governance and poverty reduction in Africa" Concept paper of the Fifth African Governance Forum held in Maputo Mozambique (23-25 May, 2002) 27. See also Hartmann C. and Crawford G. "Conclusion: Decentralisation – No shortcut to development and peace" in Hartmann C. and Crawford G. (eds.) *Decentralisation in Africa: A pathway out of poverty and conflict?* (Amsterdam University Press 2008) 248-249; McCammon R. *et al.* "Botswana resource sector overview 2007/8" in Report made on the behalf of Capital Resources (Pty) Limited (2008) 21.

its provisions may be relied on to seek reform and the creation of an appropriate framework through which affected communities may exercise their participation.¹⁹⁷

At the institutional level, what challenges the African Charter and its enforcement machinery is to efficiently influence the functioning of national structures involved in the governance of mineral resources in such a manner as to make community participation effective and guarantee the respect of affected communities' fundamental rights in the development process. This requires a regular check on the extent to which the provisions of the African Charter are given effect in the domestic system, and on how far government representatives in the mineral sector behave and fulfill their duties with due regard to the fundamental rights of affected communities. It is clear that the best situation is when the provisions of the African Charter have explicitly been translated into domestic law.¹⁹⁸ This is because government officials often tend to be more aware of national legislation.¹⁹⁹ However, at present this may not constitute a valid excuse because, no matter the system (dualistic or monistic),²⁰⁰ the African Charter has been ratified by all African countries.²⁰¹ This implies that the African Commission can at least fulfill its mandate in all resource-rich countries to prevent and cure the infringement of fundamental rights of affected communities. Concerning the African Court, since the 1998 protocol has not been adhered to by all African countries, its jurisdiction remains yet limited to only certain countries. As will be seen, its ability to deliver binding decisions is a big opportunity for the protection of individuals and collective fundamental rights, but its restricted access remains a serious handicap.

¹⁹⁷ This analysis will be particularly useful to South Africa where people press for access to mineral resources.

¹⁹⁸ Viljoen F. *International Human rights law in Africa* (Oxford: Oxford University Press, 2007) 566. For instance, see the case of the Nigerian domestic law as related by Uzoukwu LI. *Constitutionalism, Human rights and the judiciary in Nigeria*, (Unpublished Doctoral thesis – Unisa, 2010) 213.

¹⁹⁹ Viljoen (2007) 566.

²⁰⁰ In a monistic system, provisions of international treaties that have been ratified by a country are automatically part of the national law of that country. But, in a dualistic system, these provisions need to be explicitly incorporated into the domestic legal system through an Act of Parliament. See Viljoen (2007) 530, 536.

²⁰¹ See The AU "List of countries which have signed, ratified/acceded to the African Charter on Human and People's Rights"; available at <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> [accessed 8/9/2011].

Obviously, community participation will affect the relationship between the government and affected communities. The African Commission as well as the African Court will have the critical task of finding the right balance between the views of these communities and government decisions and actions. Of course, this study does not intend to assume that the fundamental rights-based approach to community participation should consecrate a political right to self-determination that would lead an affected community to become an independent state.²⁰² Despite promoting the affected communities' fundamental right to participation, the study rests on the view that the government must continue to play its fundamental role of coordinating the national economy and of ensuring an equal redistribution of wealth within the society.²⁰³ As demonstrated by experience, there may be tension as well between affected communities and the central government in the struggle to control the benefits that flow from the mineral exploitation.²⁰⁴ In this respect, the challenge for the African Charter enforcement mechanisms is to get equilibrium between the imperative of upholding fundamental rights of affected communities and the need to respect the minimum autonomy of any government to decide public matters.

All the above are part of the issues that this study intends to deal with. An in-depth analysis dedicated to each one of them should provide an answer to the major question of whether and, if yes, how the fundamental rights-based approach envisaged under the provisions of the African Charter would make community participation more effective and contribute to improving the governance of mineral resources throughout the development process launched at the local level.

²⁰² Even though that may be the case if exclusion from governance is persistent. See the *Katangese's people's* case, supra note 67, para.6. See also the recent case of Soudan, where the Comprehensive Peace Agreement (CPA) as a solution to the armed conflict motivated by *inter alia* the fight to have control over revenues of oil exploitation has led to a referendum separating South Sudan as an independent country from the North in January 2011. For more details on the CPA, see the report of the US Committee of Foreign Affairs/House of Representatives on "South Sudan: The Comprehensive Peace Agreement on Life Support" 110th Congress, 1st Session (US Government Printing Office, Washington, January 2007).

²⁰³ This is because benefits generated by mineral resources must not only flow at local level, but profit the entire nation.

²⁰⁴ See the case of communities living in the Niger Delta as described by Human Rights Watch and Obi. Human Rights Watch *The Niger Delta: No democratic dividend* (22 October 2002); available at <http://www.unhcr.org/refworld/docid/45d2f73a2.html> [accessed on 19/2/2013]; Obi C. "Oil Extraction, dispossession, resistance, and conflict in Nigeria's oil-rich Niger Delta" (2010) 30 (1-2) *Canadian Journal of Development Studies* 229.

1.3 Aims and significance of the study

This study aims to demonstrate that governance in the mineral sector can be improved at the local level in many African resource-rich countries through the effective participation of affected communities, and that such effectiveness can be better guaranteed under a fundamental rights-based approach, rather than under the soft formula promoted thus far by other stakeholders.²⁰⁵ As such, it is part of the general efforts devoted in research to promote good governance in Africa. The objective here is to provide some insights into the critical issue of bringing good governance practices into the mineral sector, which can be better achieved through a model of community participation that is really effective, respectful of fundamental rights and oriented towards the realisation of development goals.

The issue of effectiveness in respect of community participation is of such capital importance in the process of governance since emphasis is generally put on the need for empowerment and control over resources. The AMV explains the delicacy of this issue of mineral governance in respect of affected communities, warning that since mineral deposits have finite lives, the economy of any local community which is made essentially dependent on them could grind to a halt as years pass by if the use and management of this community's share of revenues is not properly planned ahead.²⁰⁶ The empowerment of affected communities is generally regarded as an ingredient of good governance and as a relevant factor to generate a sound management of resources.²⁰⁷ As such, Couto considers that effective participation is achieved through a complete form of empowerment and that:

The most complete form of empowerment involves a group taking control of some aspects of decision-making, implementation, planning or production, or entering partnership with those previously in complete authority. This form of participation would also involve direct representation of the groups ... and entails a political change in the control of authority and resources.²⁰⁸

²⁰⁵ See, for instance, the World Bank approach developed in the background of this study.

²⁰⁶ See the AMV (2009) 23.

²⁰⁷ Karuhanga E. "Local self-governance and the right of people to development" in Rothchild DS. (ed.) *Strengthening African local initiative: Local self-governance, decentralisation and accountability* (Hamburg: Giga, 1996) 49.

²⁰⁸ Couto RA. "Empowerment" in Marturano A. and Gosling J. (eds.) *Leadership: The key concepts* (London/New York: Routledge, 2008) 54, 55.

As for Pearse and Stiefel, effective participation refers to:

organised efforts to increase control over resources and regulative institutions in given social situations, the part of groups and movements of those people hitherto excluded from such control.²⁰⁹

Along the same lines, this study wants to demonstrate that these objectives of empowerment and control over resources can be better reached through a fundamental rights-based approach supported by the provisions of the African Charter and its enforcement machineries.²¹⁰ Indeed, this study stands on the belief that by relying on the fundamental rights entrenched in this legal instrument, affected communities will be legally empowered to take the necessary actions during the decision-making process and thus, exercise a level of control over the governance of mineral resources, at least to the extent to which they are concerned. This will inevitably increase accountability and transparency and, therefore, improve the system of governance. The study wants to demonstrate that because development is largely dependent on the way natural resources are managed, community participation in the mineral sector is to be viewed as a relevant means to ensure that the needs and priorities of affected communities are highlighted and that the government and other stakeholders not only effectively consider their views, but also that decisions and actions in the sector are respectful of their fundamental rights at all stages of governance.

Actually, because positive actions can only be taken from a position of power,²¹¹ this study wants to underline the difference that community participation under a fundamental rights-based approach will make in the search for more effective participation by empowering people to influence policy, decisions and actions in the mineral sector.

²⁰⁹ Pearse A. and Stiefel M. "Inquiry into participation: A research approach" UN Research Institute for Social Development (UNRISD), Geneva (1979) as quoted by Nkunika AIZ. "The role of popular participation in programmes of social development" in (1987) *Journal of Social Development in Africa* 2, 20.

²¹⁰ Here, a special emphasis needs to be placed on the fact that empowerment of affected communities would result, for instance, in their ability to bring a case before a court and get their people's rights to economic self-determination, to freely dispose of wealth and natural resources, to development or to respect for the environment enforced in the mineral sector. They will have the ability to contend the illegality of a mining project, to ask for revision or cancellation of mining agreements. This is a significant advancement in the research for an effective participatory approach.

²¹¹ Nkunika (1987) 20.

This study is significant for all parties to the trilateral relation that should be developed in the context of a mineral project under a participatory model of governance. For affected communities, the study is relevant as it seeks to develop a more efficient strategy for their participation in the decision-making process of mineral projects with due respect to their fundamental rights. Therefore, they surely should have an interest in such a study. As to the government, the study in so far as it can help them to adopt a new orientation which best matches the welfare of their peoples by shaping and upgrading their policy according to the implications that a fundamental rights-based approach has for governance of mineral resources. Mineral companies should also have an interest in this study because the successful inclusion of affected communities in the decision-making process will help prevent tension that may arise from communities' opposition and thus cause delays in the commencement of the project. This study is innovative in that it addresses the issue of community development through the governance of mineral resources from a new perspective, one based on fundamental rights. The newness of this approach resides in the fact that contrary to the current approach which rests on a soft perception on how community participation should take place, it promotes a process in which other stakeholders are bound to consider affected communities' views as it is consecutive to their fundamental rights. Not only does it underscore the necessity to apply the norms of international human rights law in the area of extractive industry but it emphasises the effectiveness that community participation will enjoy if it takes a rights-based approach rather than the traditional non-binding process used so far. Many studies on the subject have stressed the relevance of community participation or its finality, but the question of its effectiveness has not constituted a major focus in the literature.²¹²

Therefore, the originality of the study is lodged in its research into a potentially effective model of community participation from a perspective of international law on fundamental rights, symbolising an exploration of the role that the African Charter and its enforcement

²¹²See developments made under the literature review section below.

machineries can play in the African mineral sector, an area where fundamental rights' norms have not always been welcomed.²¹³

Considering the context of African countries where mineral resources have not yet served as a catalyst for development, and taking into account the main objective laid out in the AMV,²¹⁴ this study intends contributing to scientific efforts made in the area of social sciences to find out how legal theories may address and provide concerted solutions to societal problems raised by the exploitation of mineral resources in African rural areas. Of course, the legal solutions propagated in this study must not be regarded as exclusive, they need to be approached in a holistic perspective, with consideration of solutions developed and proposed by other branches of social sciences such as, for instance, sociology, political science and psychology.²¹⁵

1.4 Scope and delimitation

As mentioned previously, this study focuses only on community participation as a means to empower affected communities to effectively partake part in the management of mineral resources, in order to improve governance throughout the development process with due respect to fundamental rights. The focus here is on effectiveness, namely, the ability of affected communities to influence the outcome of the decision-making process of mineral

²¹³ In the African context, the reluctance towards the application of fundamental rights norms results from the fact that the exploitation of mineral resources has often been accompanied with extensive violence and infringement of rights. See the *Ogoni* case where the Nigerian government and Shell were accused of using military force as a means of oppression. See also the case of the conflict in the DR Congo, Soudan, Sierra Leone, Liberia and Angola. See the *Ogoni* case, supra note 103; Tull DM. *The reconfiguration of political order in Africa: A case study of North Kivu* (Hamburg: Institute of African Affairs, 2005) 194; Patey LA. "Crude days ahead? Oil and the resource curse in Sudan" (2010) *African Affairs* 1-2; Harris G., Lewis N. and Santos ED. "Demobilisation and reintegration" in Hariis G. (ed.) *An economic and political analysis* (London: Routledge 1999) 160.

²¹⁴ The main objective defined by the AU in the African Mining Vision 2050 is to foster an exploitation of mineral resources that is "[t]ransparent, equitable and optimal to underpin broad-based sustainable growth and socio-economic development". AMV (2009) 3; but, for the purpose of this study, this main objective is approached only in respect of the situation of local communities that are directly affected by mineral projects.

²¹⁵ See for instance, Rono and Aboud who, from a sociological standpoint, underline the work ethic as a relevant factor in making community participation effectively realise development in rural areas; Rono and Aboud (2003) 81, 89. See also Sheleff LS. *Social cohesion and legal coercion: A critique of Weber, Durkheim, and Marx* (Amsterdam: Rodopi, 1997) 315-316; Kesan JP. and Shah RC. "Shaping code" Illinois Public law and legal theory Research papers series, Research paper No. 02-18 (September 2002) 1.

projects impacting on their livelihood. Due to the large flexibility that characterises the participatory models developed thus far and the lack of its efficiency caused by the large discretion that governments and other stakeholders enjoy in the consultative process with local communities, this study exclusively adopts the fundamental rights-based approach as standard. This is because of the strong conviction that the possibility of judicial enforcement will provide an appropriate platform for more effective participation.²¹⁶ Since the African Charter stands as the legal foundation of this study, the analysis is limited to how far its provisions and enforcement machineries may support this fundamental rights-based approach to community participation in the mineral sector.

In addition, although natural resources refer to a vast range of resources, this study is limited to mineral resources. This is motivated not only by the fact that many African economies are dependent on the mineral sector,²¹⁷ but the study purports to significantly contribute from a theoretical viewpoint to the advancement of one main objective of the AMV, which is to develop a mineral sector that serves to improving livelihoods and realising development in rural areas.²¹⁸ In other words, while it is true that the benefits of the mineral industry must flow at both national and local levels, this study will limit its analysis to the situation of affected communities that are directly affected by the exploitation of mineral resources. Also, it appears relevant to determine what is covered here under the concept of mineral resources. They may be defined from a geocentric point of view or from an economic perspective. From a geocentric point of view, mineral resources are regarded as any natural occurring inorganic bodies in the form of either solids or liquids found within or upon the earth and that display chemical compositions and crystalline structures, but are non-renewable.²¹⁹ With this perspective, the emphasis is put on the natural origin of mineral resources. But for economists, the approach goes beyond the natural occurrence of the resource. They consider that material extracted from

²¹⁶ Szablowski (2007) 122.

²¹⁷ See the case of DRC, Nigeria, Sierra Leone, South Africa and Zambia as explained below.

²¹⁸ See the AMV (2009) 3.

²¹⁹ Kip J. "Characteristics of the industrial mineral sector" in Kogel JE., Trivedi NC. Baker JM. and Krukowski ST. (eds.) *Industrial minerals and rocks commodities: Markets and uses* (Littleton: SME, 2006) 3; US National Research Council *Solid-earth science and society* (Washington: National Academy Press, 1993) 149; Shepard CU. *Treatise on mineralogy* (New Haven: B.L Hamlen 1852) 2-3.

the earth must in addition have a current or potential economic value.²²⁰ Therefore, this study wants to combine the two perspectives and considers that mineral resources include here both solid²²¹ and liquid resources found within or upon the earthly area where affected communities live and that may engender economic benefits to them. Oil is often distinguished from mineral resources in many domestic laws, but its consideration here is necessitated by the need to analyse the *Ogoni* case which involves oil exploitation in the Niger delta and represents a landmark decision on the continent as regards the exploitation of natural resources.

Moreover, in the course of this study, only the post-colonial period will be considered, at the expense of the previous periods. Not that the study is reluctant to discuss the existence of fundamental rights in previous pre-colonial and colonial periods,²²² but including them will make the scope of the research project too large; adding to this the fact that the debate concerning community participation in the context of development has only emerged in recent decades.²²³

As regards the geographical scope, it would be too ambitious to attempt to study the case of affected communities in all fifty four African countries. Though the analysis remains a general one, particular attention will be given to the following resource-rich countries: DRC, Nigeria, South Africa and Zambia. This focus was chosen because, in the aforementioned countries, mineral resources account for the main source of their export earnings,²²⁴ but with poor benefits for local communities affected by extractive operations.

²²⁰ US National Research Council, Id., 149.

²²¹ This implies that even oil is comprehended in the scope of what this study considers as mineral resources.

²²² For developments on the existence of human rights in pre-colonial and colonial periods, see Mbondenyi MK. Investigating the challenges in enforcing international human rights law in Africa: Towards an effective regional system (Unpublished Doctoral thesis, Unisa 2010) 22-26.

²²³ See developments made under the literature review section below.

²²⁴ It is reported that mineral fuels account for an average of 90 % of export earnings for Nigeria, while diversified mineral resources represent an average of 80% of export earnings for DRC, 50% of export earnings for Zambia and South Africa. International Business Publications *Export-Import Trade and Business Directory African countries: Mining and mineral industry opportunities handbook* (Washington: International Business Publications, 2011) 9; Chamber of Mines of South Africa Annual Report “Towards sustainable growth and development” (2009-2010) 31; available at <http://www.bullion.org.za/content/?pid=70&pagename=Annual+Reports> [accessed on 5/1/2011]; Edwards L.

This is not to be viewed as an assertion that the contextual situation is the same for all these countries. Nevertheless, the fact that African countries all share “democracy”, “decentralisation” and “accountability” as key values in the development process and that they are all parties to the African Charter, makes room for the contention that the rights-based approach to community participation can be envisaged as a standard solution. As some scholars have aptly pointed out, consideration for fundamental rights prevails over the contextual differentiation existing between societies.²²⁵ This is why Panda asserts that anywhere and at any time, if fundamental rights are not secured, the basic development of people would get throttled and the concerned society would plunge inevitably into a deep moral and material morass.²²⁶ Therefore, this study remains a general one in so far as it concerns the situation in affected communities in the African mineral sector, but it will refer to DRC, Nigeria, South Africa and Zambia at times to demonstrate or illustrate certain facts and issues that need to be addressed to improve the governance of mineral resources all over the continent.

1.5 Literature review

A review of the literature has revealed that there is enough published material available to undertake this study successfully. A number of scholars have written about community participation.

This section will highlight the major trends observed within the literature and then identify questions that have not yet been addressed by scholars in this field. This should

and Alves P. “South Africa’s export performance: Determinants of export supply” Working Paper Series No. 95 of The Africa Region Working Paper Series produced at the initiative of the World Bank in collaboration with South African researchers (December, 2005) 10; World Bank Report “Mining and development...”, supra note 5, 17.

²²⁵ Fagan A. *Human rights: Confronting myths and misunderstandings* (Cheltenham/Northampton: Edward Elgar Publishing, 2009) 52-55; Kaime T. *The African Charter on the rights and welfare of the child: A socio-legal perspective* (Cape Town:PULP, 2009) 46; BellLS., NathanAJ. and PelegI. “Introduction: Culture and Human rights” in BellLS., NathanAJ. and PelegI. (eds.) *Negotiating culture and human rights* (New York: Columbia University Press, 2001) 1-5; Duquette D. “Universalism and relativism in human rights” in Reidy DA. and Sellers MNS. (eds.) *Universal Human rights: A moral order in a divided world* (Rowman and Littlefield Publishers, 2005) 59-62.

²²⁶Panda (Lanham: 2007) 7.

help capture the extent to which this study intends to enrich and contribute to the advancement of knowledge.

1.5.1 Major trends in the literature

Two major trends have been identified within the legal scholarly literature on governance in Africa and the situation of affected communities in the mineral sector.

First of all, drawing from the failure of the model of governance developed just after the 1960s' independence movements, a number of scholars have reflected on the situation of people in Africa²²⁷ and reached the conclusion that there can be a clash between the priorities of the central governmental and those of the people, and that for this reason, government representatives cannot be fully entrusted as the only reliable guardians of the peoples' rights and interests. To some extent, people need to take charge of their own destiny.

Falk, a proponent of of the Universal Declaration of the Rights of Peoples adopted in Algiers in 1976, has been more explicit on this view when asserting that:

It becomes clear that governments cannot be entrusted with the role of serving as the guardian of fundamental human rights ... A first step is for people to insist upon their own legitimacy as a source of rights, even against the state".²²⁸

Governance in Africa remains characterised in general by a break between people and their political rulers, and because people are the main beneficiary of sovereignty, their rights and interests must enjoy priority in all government actions.²²⁹

Kiwanuka observes that the concept "people" may be used in contradiction to the state, for the purpose of protecting the fundamental rights of collectivities.²³⁰ This scholar underlines that this approach becomes critical when interests of the people and those of

²²⁷ Ouguergouz (2003) 286; Kiwanuka RN. "The meaning of 'people' in the African Charter of Human and People's Rights" in McCorquodale R. (ed.) *Self-determination in international law* (Aldershot: Ashgate, 2000) 282; Falk R. *Human rights and state sovereignty* (Holmes & Meir Publishers, 1981) 189-190; Mbaye (1992).

²²⁸ Falk, Id., 189-190. Hereinafter the "Algiers Declaration".

²²⁹ In the writings of these scholars, one can easily find that there is a close symbiosis between the terms "state" and "government" that represent the same reality.

²³⁰ Kiwanuka (2000) 282.

the state diverge.²³¹ Writing on fundamental rights in Africa, Mbaye notes that peoples' rights are often recognised instead of the rights of the state that acts simply as a general administrator.²³² Addressing the issue of the real subject of peoples' rights in article 21 of the African Charter, Ouguergouz points out that the state exercises sovereignty over natural resources in the name of the people by virtue of the delegation of power and that if exercising that power compromises the interests of the people, sanctions and actions for recovery must be initiated by the affected people.²³³

This trend has also been developed in the writings of scholars focusing on natural resources. For instance, Nelson, reflecting on the decades that immediately followed the 1960 period of independence in most African countries, observes that the central government has often misused natural resources and favoured an appropriation of public revenues by private patronage.²³⁴ The paradox between the fact that many African states are resource-rich countries and the poor governance characterised by a culture of rent-seeking and corruption, which prevails in their societies has offered an empirical platform on which the resource curse theory has been tested.²³⁵ Ako and Uddin discuss the issue of the "resource curse" and consider that this phenomenon has affected good governance in Nigeria and elsewhere in Africa where a minority of political elites has gained control of political power, whether autocratically or democratically, and form governments consisting of what they call a "kitchen cabinet" or "inner caucus" that mismanages public funds generated by natural resources.²³⁶ All three scholars agree that this type of governance threatens particularly the livelihood of local communities that are directly dependent on natural resources.²³⁷ But as observed previously, the resource curse theory

²³¹Id. 282.

²³²Mbaye K. (1992) 29.

²³³ Ouguergouz F. (2003) 286-287.

²³⁴ Nelson F. "Introduction: The politics of natural resources governance in Africa" in Nelson F. (ed.) *Community rights, conservation and contested lands: The politics of natural resources governance in Africa* (Washington: Earthscan, 2010) 4.

²³⁵ Wohlmunt K. *Africa: Commodity dependence, resource curse and export diversification* (Berlin: Lit, 2007); Karl TL. "Oil-led development: Social, political, and economic consequences" Cleveland CJ. (ed.) *Encyclopedia of Energy* (Boston: Elsevier 2004) 661-6664.

²³⁶Ako R. and Uddin N. "Good governance and resource management in Africa" in Botchway FN. (ed.) *Natural resource investment and Africa's development* (Edward Elgar Publishing, 2011) 26-27.

²³⁷ Nelson (2010) 4; Ako and Uddin, Id., 27.

can be challenged through the implementation of good governance practice and should not be regarded as an absolute to which Africa is damned forever. This is a specific characteristic of this study in so far as it wants to demonstrate that through community participation the governance of mineral resources at the local level can be freed from the resource curse theory. Discussing specifically the situation of affected communities in the mineral sector, Kimani reaches the same conclusion as Ako and Uddin and describes the situation as follows:

Local communities, moreover, often have little say in how mining contracts and codes are formulated, even though their livelihoods are the most affected.²³⁸

This divorce between affected communities and their rulers in the mineral sector has engendered another major trend within the academic literature. It rests on the firm conviction that community participation in the mineral sector is relevant and ultimately needed to promote and protect the fundamental rights and interests of affected communities in the exploitation of mineral resources and achievement of development goals. This is seen as a practice that contributes to good governance by providing the opportunity for transparency in the management of mineral resources and the benefits that they generate.²³⁹

Scholars like Bass, Keita, Djibré, Traoré, Dembele, Samassekou, Doumbo, Kimani, Pring and Feldman all agree on the view that there is an increasing demand for effective community participation in the mineral sector as it is a critical element in the process of realising sustainable development.²⁴⁰ After reviewing the World Bank policy developed

²³⁸ Kamani (2009) 4.

²³⁹ Vlaenderen and Neves (2004) 445-464.

²⁴⁰ Bass (2004) vii, 2; Keita A. *et al. Legal tools for citizen empowerment: Increasing local participation and benefit in Mali's mining sector* (London: IIED, 2008); Kamani, Id., 4.; Pring GR. "The law of public participation in mining and resources development"; available at <http://www.yasni.de/ext.php?url=http%3A%2F%2Fwww.initiativeforpeacebuilding.eu%2Fresources%2FThe+Law+of+Public+Participation+in+Mining.pdf&name=George+Rock&cat=filter&showads=1> [accessed on 5/11/2011]; Feldman I. "The stakeholder convergence: Public participation and sustainable business practices" in *The new "public": The globalization of public participation* (Environmental Law Institute, 2002) 53. See also Correa HD. "Prior consultation as an indicator of sustainable development" Research paper in Mining and sustainable development series: Conflict, consensus and dialogue in the mining sector (International Development Centre, 2004) 5; De Echave (2004) 4; González P. and Echavarría C. "Conflict,

during the 1980s and 1990s, Campbell reached the conclusion that the responsibility to define, monitor and enforce norms and standards to apply to the mineral sector rests upon the national government as well as affected communities.²⁴¹ Gao, Akpan and Vanjik insist on the fact that in the settlement of issues that may arise between foreign companies and affected communities, national governments must promote negotiating acceptable solutions, rather than imposing their will upon local communities.²⁴² Moody insists on the principle that a mineral project should only take place where affected communities have given their fully informed prior consent and that their consent would amount to nothing if it does not embrace the power to say “no”.²⁴³ This conventional wisdom on community participation is well summarised by Aidara who contends that:

Communities should be able to review mining contracts, find out how much revenue has been generated and how, and on what it is being spent, and have access to information about all other impacts of a mining operation.²⁴⁴

Nevertheless, an opposite view is also encountered within the literature. Wälde goes on to reject participation as a means of control for affected communities, considering that it bears the risk of insurgency, of ethnic strife and domination, of drug dealing and organised criminality and that, for such reasons, participation should only be conceived in

consensus and dialogue in the mining sector” Research paper in Mining and sustainable development series: Conflict, consensus and dialogue in the mining sector (International Development Centre, 2004) 3.

²⁴¹ Campbell B. “Conclusion: What development model? What governance agenda?” in Campbell B. (ed.) *Mining in Africa: Development and regulation* (London/Ottawa/Uppsala: Pluto, IDRC and Nordiska Afrikainstitutet, 2009) 252.

²⁴² Zhiguo G., G. Akpan and J. Vanjik “Public participation in mining and petroleum in Asia and the Pacific: the Ok Tedi case and its implications” in Zillman D., Lucas A. and Pring GR. *Human rights in natural resources development-public participation in the sustainable development of mining and energy resources* (New York: Oxford University Press, 2002) 692.

²⁴³ Moody R. “Environment impact of mining: Social, economic and health impacts of mining on communities and human settlement” in *Mining, development and social conflicts in Africa* (Accra: Third World Network Africa, 2001) 137-138.

²⁴⁴ This view was expressed by Aidara in his position as the West Africa extractive industry programme coordinator for the UK-based NGO Oxfam. See Kimani (2009) 4.

the context of a general integration of ethnic and social forces in the structure of the state.²⁴⁵

This position is open to debate as it would be illogical for people who are the first to endure the consequences of bad decisions and policies taken by state representatives not to enjoy the ability and means to make their voice heard and their views considered to prevent or redress any disadvantageous decision. Though Wälde's approach is founded on a genuine fear of having community participation used as a pretext to promote secessions within resource-rich countries, a look at the work of the African Commission²⁴⁶ would suggest that under the African Charter system, it is possible to avoid or prevent such deviationist practices. Compared to the huge amount of literature supporting community participation as a means to empower affected communities, this approach represents a minor view.

The major trend developed by the above-mentioned scholars supports the view that community participation is likely to avoid conflict, find common interests and provide the mineral project with real legitimacy. Bass, Corre, González, Echavarría and Echave have expressly underlined that prior consultation of affected communities represents a relevant strategy to prevent and manage conflict between different parties to a mineral project.²⁴⁷ Community participation is generally advocated by the selected scholars as responsive to the need for a platform where affected communities may engage in discussion with state representatives and other stakeholders to find common interests in mineral projects, instead of having an authoritarian model of governance that is careless of affected communities' interests and needs. As a general conclusion, Schwarte notes that:

Good natural resources management therefore depends on participatory, transparent, open and accountable governance that ensures the effective

²⁴⁵ Wälde T. "International standards: A professional challenge for natural lawyers" in Bastida E., Wälde T. and Warden-Fernández J. *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 232.

²⁴⁶ In the Katangese, Ogoni and Endoris cases, the African Commission has successfully settled issues that opposed communities to their own state without any secession.

²⁴⁷ Bass *et al.* (2004) 2; Correa (2004) 5; De Echave (2007) 4; González and Echavarría (2004) 3.

participation of the public in the preparation and implementation of environmental policies, legal frameworks, plans and projects.²⁴⁸

All the above view shall for the establishment of a democratic system of governance in the mineral sector where affected communities would have a word to say in respect to their rights and interests. But taking into consideration the generalised situation of poverty that prevails across the African continent, the review of the literature has quickly revealed the ambiguity raised by the school of thought that considers development as a precondition for establishing a true democracy in any society.²⁴⁹ This latter approach implies that a successful democratisation of the mineral sector is conditioned by the achievement of a certain level of development within affected communities. Though this issue of relationship between democracy and development is discussed later on in this study, a question that directly comes to mind is what then would be the type of governance under which development would be achieved if democracy is to come afterwards. Another school of thought exists with such scholars as Adejumobi, Ake, Anyang Nyong'o, Mangu, Nzongola-Ntalaja, Przeworski and Zeleza²⁵⁰ who take a different stance and whose views tend to support the assumption that development does not absolutely precondition the establishment of some measure of democracy.

1.5.2 Questions insufficiently addressed in the existing literature

Several scholars have insisted on the need for community participation in the governance of natural resources in general and mineral resources in particular. However, the major issue on which the literature is not sufficiently informative concerns the strategy to make community participation really effective. Scholars tend to advocate community participation without much reflection on how it should be enhanced or enforced in

²⁴⁸ Schwarte C. "Public participation and oil in Uganda" Paper No 138 produced in the Gatekeeper Paper Series published by the International Institute for Environment and Development (December 2008) 4.

²⁴⁹ See the "modernization theory" as explained in Mangu (2002) 191.

²⁵⁰ Adejumobi (2008); Ake (1996); Anyang Nyong'o P. "Political instability and the prospect of democracy in Africa" (1988a) *Africa Development*, XII (1)71-86; Anyang Nyong'o P. "A rejoinder to the comments on democracy and political instability" *Africa Development*, XIII (3) 83-87; Mangu, Id.; Nzongola-Ntalaja (1997); Przeworski A. *et al. Democracy and development: Political institutions and well-being in the world, 1950-1990* (New York: Cambridge University Press, 2000); Zeleza PT. "Introduction: The struggle for human rights in Africa" in (ed.) Zeleza PT. *Human rights, the rule of law and development in Africa* (Piladelphia: University of Pennsylvania Press, 2004) 1-20.

practice. Most of them have failed to really propose a model in this regard. This is a gap that this thesis intends to fill by suggesting a fundamental rights-based approach as a suitable strategy to make community participation effective and meaningful in the mineral sector.

Moreover, few scholars have approached community participation from a legal perspective²⁵¹ and even where such an approach has been embraced there has not been a substantive development in respect of what should be the content of community participation in the mineral sector. An exception is Bass who has developed her understanding of what should be the right to prior consent that local communities should enjoy in every mineral project.²⁵²

In the same vein, scholars have generally failed to give close attention to the possible application of provisions of the African Charter in the extractive industry, especially in connection with the situation of affected communities. Most of the writings published by African scholars generally comment on the *Ogoni* case²⁵³ which remains the major and most well known case of the African Commission dealing with the extractive industry. Nevertheless, a considerable number of scholars have generally discussed and promoted the rights-based approach to development, emphasising the importance of fundamental

²⁵¹ The reason may be that community participation has been developed by many scholars more as a sociological concept, leaving aside the possibility for the concept to enjoy a legal dimension. Few exceptions include scholars like Pring GR. and Y. Noé “The emerging international law of public participation affecting global mining, energy, and resources development” in Zillman D., Lucas A. and Pring GR. *Human rights in natural resources development-public participation in the sustainable development of mining and energy resources* (New York: Oxford University Press, 2002) 14; Feldman (2002)53; Bass (2004); Correa (2004) 5.

²⁵² Bass (2004).

²⁵³ Olowu D. “Evaluation of Shell's approach to conflict resolution in the Niger Delta” (2010) 10 (3) *African Journal on Conflict Resolution* 75-100; Tareri A. “A rights-based approach to indigenous minorities: Focus on the Urhobo and Ogoni peoples of the Niger Delta in Nigeria” in Emiri F. and Deinduomo G. (eds.) *Law and petroleum industry in Nigeria: Current challenges : Essays in honour of Justice Kate Abiri* (Lagos: African Books Collective, 2009) 275-306; Nwobike J.C. “The African Commission on Human and Peoples’ Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria*” (2005) 1 (2) *African Journal of Legal Studies* 129-146; Coomans F. “The Ogoni case before the African Commission on Human and Peoples’ Rights” in (2003) 52 *International and Comparative Law Quarterly* 749-760; Skogly SI. “Complexities in human rights protection: Actors and rights involved in the Ogoni conflict in Nigeria” in (1997) 15 *Netherlands Quarterly of Human Rights* 47-60.

rights in the process of achieving development. Among them, Osibanjo, using the military regimes in Nigeria as an example, rejects the argument that it may be necessary to compromise fundamental rights in order to realise rapid economic development.²⁵⁴ Tlakula contends that gross violations of fundamental rights are inimical to sustainable development and that it cannot be nurtured in countries where the rule of law does not exist and where people are marginalised and live in degrading conditions.²⁵⁵ Olowu insists on the need to link fundamental rights to development discourses and considers that the fulfillment of fundamental rights is part of the process of achieving development.²⁵⁶ Other scholars like Andreassen, Boesen, Eide, Marks, Osmani, Panda, Sano, Sen, Sengupta hold relatively the same view and support a rights-based approach to development.²⁵⁷

Finally, some other questions that have been neglected within the literature relate to the models of democracy and decentralisation that would best foster and make effective community participation. Nonetheless, there is plenty of literature that addresses general issues related to democracy and decentralisation and accountability that may contribute to the discussion of these questions in this study.²⁵⁸ The present research will consider this

²⁵⁴ Osinbajo Y. "Human rights, economic development and the corruption factor" in Zelza PT. (ed.) *Human rights, the rule of law and development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 121.

²⁵⁵ Tlakula P. "Human rights and development" in Zelza T. (ed.) *Human rights, the rule of law and development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 109.

²⁵⁶ Olowu (2009) 7.

²⁵⁷ Andreassen and Marks (2010) xxiii-xxxx; Boesen JK. and Sano H-O. "The implications and value added of a Human-rights based approach" in Andreassen BA. and Marks SP. (eds.) *Development as a Human right* (Oxford: Intersentia, 2010) 45-70; Eide A. "Human rights-based development in the age of economic globalization: Background and prospects" in Andreassen BA. and Marks SP. (eds.) *Development as a Human right* (Oxford: Intersentia, 2010) 275-314; Osmani SR. "Globalization and the human rights approach to development" in Andreassen BA. and Marks SP. (eds.) *Development as a Human Right* (Oxford: Intersentia, 2010) 315-337; Panda (2007); Sen A. "Human rights and development" in Andreassen BA. and Marks SP. (eds.) *Development as a Human right* (Oxford: Intersentia, 2010) 3-12; Sengupta A. "The Human right to development" in Andreassen BA. and Marks SP. (eds.) *Development as a Human right* (Oxford: Intersentia, 2010) 13-44.

²⁵⁸ Ake (1994); Hansen (2005); Hartmann G. and Crawford C. "Introduction: Decentralisation as a pathway out of poverty" in Crawford G. and Hartmann C. (eds.) *Decentralisation in Africa-A pathway out of poverty and conflict?* (Amsterdam: Amsterdam University Press, 2008); Karuhanga (1996); Nzongola-Ntalaja (1997); Smith (2011); Reilly S. *Design, meaning and choice in direct democracy: The influences of petitioners and voters* (New York: Ashgate 2010); Susan S. "Constraints on the implementation of decentralisation and implications for poverty reduction-The case of Uganda" in Crawford G. and Hartman

literature to discuss in particular the interactions between community participation and the concepts of democracy, decentralization and accountability.

Therefore, this study intends to enrich the literature on the issue of community participation by providing an in-depth analysis of how the concept of a fundamental rights-based approach should be properly conceived under the African Charter and applied to improve the governance of mineral resources; and thus best satisfy the interests and fundamental rights of affected communities. This exercise would imply not only discussing questions that have already drawn the attention of legal scholars, but also those that have been neglected.

1.6 Research questions

This study will deal with a number of questions, including the following:

1. What should the appropriate definition and content of community participation under the fundamental rights-based approach be? Since the study upholds the idea that participation is not only a fundamental right, but also the means through which affected communities may seek enforcement of other fundamental rights in the mineral sector, the concern should be directed towards establishing the implications that this double dimension has for the definition of the concept. What is community participation as a fundamental right? How the exercise of some other fundamental rights are linked to the essence of community participation as a means in the pursuit of sustainable development goals in mineral resources governance?
2. What, in substance, is the difference between the fundamental rights-based approach to community participation and the soft approach?
3. How should the fundamental rights-based approach to community participation be conceived in resources-rich African countries in relation with the three key values (democracy, decentralisation and accountability) in order to build up good governance

C. (eds.) *Decentralisation in Africa: A pathway out of poverty and conflict?* (Amsterdam: Amsterdam University Press, 2008) ; Thörlind (2000); Zieligski (1963); Avilés Irhola (2005); Mattes R. "Controlling power: Africans' views on governance, citizenship and accountability" in (eds.) Claasen M. and Alpin-Lardié C. *Social accountability in Africa: Practitioners' experiences and lessons* (Cape Town: Idasa/Ansa, 2010) 8-24; Mair L. *Safeguards for democracy* (Nairobi: The New Africa Library, 1961) 2.

and achieve development? How far and at which levels must affected communities participate? Which prerogatives should they enjoy in the decision-making process? Who are the people that are accountable to them? And what should the extent of such accountability be?

4. How far the fundamental rights-based approach will influence relations between all stakeholders and balance the asymmetry of power to empower affected communities with enough influence to accept or reject a mineral project during the negotiation process?
5. What are the provisions of the African Charter that support the fundamental rights-based approach to community participation and how should they be interpreted?
6. How would affected communities make use of the African Charter enforcement mechanisms to have their fundamental rights respected throughout the governance of mineral resources? What is the consideration that should be given to provisions of the African Charter by national courts which are the first instance of enforcement? What should be the appropriate attitude of national judges in the role to protect affected communities against fundamental rights violations by the government and mineral corporations?
7. How to enhance the capacity building of affected communities to empower them with the knowledge of their fundamental rights in the African Charter and how they can use its enforcement bodies to secure their rights and interests?
8. To what extent are government officials and other stakeholders likely to comply with decisions issued by the African Charter enforcement machinery upholding the claim of affected communities?
9. What are the improvements that the fundamental rights-based approach to community participation, conceived through the African Charter system, would assumedly bring to the governance of mineral resources within resources-rich African countries?

1.7 Hypotheses and expected findings

Since the 1960s' movement of independence, the fallacy of an approach relying exclusively on the government as the protector of the people's interests has been progressively perceptible in many African countries.²⁵⁹ If until 1990, dictatorships and authoritarian systems of governance existing all over the continent could partly provide an explanation for this breach, it has become paradoxical that despite the democratisation process initiated in most African countries, African people still struggle to see their fundamental rights and developmental needs prioritised by African rulers in the governance of the country.

In this context, the current situation of affected communities in the mineral sector appears clearly to be one consequence of this general issue confronting the governance of African countries. Instead of enjoying profits brought by the exploitation of mineral resources, these communities continue to suffer dispossession of their land without fair compensation. Environmental degradation, unemployment and lack of necessary infrastructure like homes, schools and hospitals,²⁶⁰ in surrounding areas of a mineral project often create tension which at times degenerates into conflict and war.²⁶¹ In fact, this situation stands as a reflection at the local level of the continued distortion that took place following the 1960s' decade of independence, between the people's aspirations and the behaviour of African political rulers. Despite ideological changes and rhetorical shifts made in the political discourse all over the continent in 1990 and thereafter, and even despite the

²⁵⁹ Apart from the *Ogoni* and *Endoris* cases, another illustration of the divorce that can exist between affected communities' interests and those of the government is perceptible in the recent revision of mining agreements conducted in the Democratic Republic of Congo by the minister in charge of the mineral sector. Not only were affected communities or their partners in the civil society, NGOs and grassroots organisations, not partakers of this process, but also the ground on which the government reviewed those agreements was more a concern to increase financial bargain. The assessment of social and environmental impact within affected communities was only made up of what were the written undertakings of mineral companies at the time of the conclusion of the contracts, and of their own discretionary declaration of what they had "achieved". See Ministère des mines "Rapports 1 et 2 des travaux de la Commission de Revisitassions des Contrats Miniers" (DRC, Novembre 2007); Available at <http://minicongo.cd> [accessed on 17/2/2011].

²⁶⁰ See the case of communities previously mentioned, *supra* notes 15-17; Kimani (2009) 4-5.

²⁶¹ See the case of DRC (Wars: 196-197, 1998-2003), and Nigeria (Conflict in the Ogoni land in 1996). Especially in DRC, the control over mineral resources in certain parts of the eastern region is still held by groups of rebels.

existence of norms protecting fundamental rights,²⁶² the attitude of African governments tends to remain unchanged, or rather to move very slowly towards effectively considering the interests and rights of affected local communities in the negotiation of mineral agreements.²⁶³

As a result, there is a permanent threat to affected communities arising from the failure of the policies applied and actions taken by many African governments, which put them in danger of seeing their potential for development noticeably diminished after the exhaustion of mineral resources and pollution of the environment.²⁶⁴ This state of affairs make the current need for affected communities to be part of what Zeleza describes as the struggle for developmental democratic states, with African people longing for a system of governance that can offer them not only political freedom, but also economic well-being.²⁶⁵ Since the model of governance of mineral resources applied at present in many resource-rich African countries remains overcentralised and does not fully secure the fundamental rights of affected communities, the remedy to the situation calls for an empowerment of these communities through a model of participation that would enable them to act as the agents of their own development in the mineral sector and to watch out for the behaviour of other stakeholders in respect of their fundamental rights.

Though none can fully predict the future and what success might lie ahead, this study dares to risk an optimistic view under a rights-based approach to community participation. Because the main emphasis is on “a fundamental rights-based approach to community participation as an improving element in the governance of mineral resources”, this study stands in stark contrast with the Afro-pessimism²⁶⁶ found elsewhere in studies undertaken

²⁶² This fact is simply demonstrated by the adherence of all African countries to the African Charter.

²⁶³ See developments discussed in the background of the study.

²⁶⁴ Weber-Fahr (2002) 2.

²⁶⁵ Zeleza (2004) 6.

²⁶⁶ The Afro-pessimism thesis rests on the conviction that Africa is irremediably damned to regression and chaos because several decades after the continent’s independence, its economic situation has grown worse rather than better. Herlitzius *EM.A comparative analysis of the South African and German reception of Nadine Gordimer's, André Brink's and J.M. Coetzee's works* (Münster: LIT Verlag, 2005) 224.

in Africa during the 1990s.²⁶⁷ Here, the concern is not to adopt a pejorative attitude or the traditional fatalism that often characterises the discourse on the future of Africa, but rather to find a positive way forward.²⁶⁸ This study agrees totally with the view expressed by Nanjira according to which, for Afro-pessimism to end, African people themselves have to take action to improve their economic conditions and achieve development.²⁶⁹ This scholar is right when he points out that:

Economic power in Africa cannot and shall not succeed unless it is people-based: there must be a bottom-up approach whereby the African people are engaged and involved in all the stages of their development and are empowered to participate sufficiently and appropriately in the decision making and procedures on issues affecting their daily lives.²⁷⁰

Therefore, the major working hypothesis of this study is that by promoting community participation from a fundamental rights-based approach instead of by a simple consultation, it would be more effective and provide local communities with the legal means to enforce their views, secure their interests and fundamental rights, and thus improve the governance of mineral resources through resistance to negative elements in the development process taking place at local level. The main hypothesis is built on the belief that a rights-based approach will make community participation really effective and improve the system of governance in the African mineral sector.

This emphasis on a fundamental rights-based approach to community participation is particularly relevant to the mineral sector that has to contribute systematically to the

²⁶⁷ See for instance Olukoshi A. "State, conflict, and democracy in Africa: The complex process of renewal" in Joseph. R (ed.) *State, conflict and democracy in Africa* (1999); Kaplan RD. "The coming anarchy: How scarcity, crime, overpopulation, tribalism, and disease are rapidly destroying the social fabric of our planet" in (1994) 273 (2) *Atlantic Monthly* 44-76; Harden B. *Africa: Dispatches from a fragile continent* (New York: Houghton Mifflin, 1991); Rembe NS. "The system of protection of human rights under the African Charter of Human and Peoples' Rights: Problems and prospects" in (1991) 12 (6) *Human and People's Rights Monograph Series* 3.

²⁶⁸ One can agree with Zeleza that "If [the] African story is anything to go by ... African peoples will continue to fight for better modes of governance and development ...". Zeleza (2004) 6.

²⁶⁹ Nanjira DN. *African foreign policy and diplomacy: From antiquity to the 21st century* (Santa Barbara: Greenwood Publishing Group, 2010) 492.

²⁷⁰ Nanjira (2010) 493.

achievement of development in Africa. It has become accepted nowadays among Africanist scholars that the concept of development is inevitably linked to the concept of fundamental rights in as much as both are essentially concerned with human conditions and seek to enhance their capacity to enjoy a higher standard of living.²⁷¹ This implies not only that true development cannot take place without respect for fundamental rights, but also that people need to be empowered to participate in any process that aims at improving their living conditions. This assertion opens the door to the second hypothesis.

Since the study rests on the African Charter, the subsequent hypothesis to be tested is that the provisions of this legal instrument and its enforcement machinery can efficiently support the rights-based approach to community participation and bring the expected improvement in the governance of mineral resources throughout the development process that takes place at local level. Of course, as will be seen, few cases on natural resources have been brought before the African Commission in the last thirty years of adopting the African Charter. Nevertheless, the main focus of this study is to assess the real potential of the African Charter system to enhance community participation in the mineral sector.

Finally, another hypothesis to be investigated touches on the relationship between community participation and the three key values previously mentioned in the context of this fundamental rights-based approach. It consists of the notion that the rights-based approach to community participation is only conceivable under democratic conditions, within a decentralised mode of governance and with the possibility for affected communities to make other stakeholders accountable. It is assumed here that there is interdependence between community participation and these concepts and that they are obliged to all co-exist together for the development process to be complete.²⁷²

The findings and conclusions of the study are expected to confirm these above-mentioned hypotheses.

1.8 Methodology

²⁷¹Olowu (2009) 5; Zeleza (2004) 6, Murray (2004) 238.

²⁷² Avilés Irhola (2005) 29; Thörlind (2000) 34-35; Aidoo A. "Democracy without Human rights?" (1993) 15 (4) *Human Rights Quarterly* 705.

In an article published in 2010, Coomans, Grünfeld and Kamminga contend that the legal literature is poor in books that specifically focus on the research methodology in the field of fundamental rights, and that could be recommended to a doctoral student.²⁷³ If this assertion can be verified worldwide, the researcher must mention here the great opportunity that the University of South Africa's Library and Research Space have offered to this study by providing abundant resources on the topic of research methodology, enough to overcome the difficulty pointed out by these scholars.²⁷⁴

This study makes use of a number of research methods, those usually identified as exclusively belonging to the legal realm (the black-letter or doctrinal method and the international and comparative laws method) and those borrowed from other disciplines (the historical method, the philosophical method and the empirical method).

Though it is true that legal and non-legal methods have evolved separately, an integrative approach developed between the 1960s and 1970s where legal realists and socio-legal scholars started to reflect on the gap between "law in books" and "law in action".²⁷⁵ As rightly observed by MacConville and Chui, the addition of research methods used by other disciplines has the merit and relevance to broaden the scope of legal research in terms of its theoretical and conceptual framework and, thus, increase the possibility of generating empirical evidence to answer research questions.²⁷⁶

In the context of the legal research undertaken in this study, the link between the non-legal and legal methods used, resides in the fact that both converge to serve the aim of analysing community participation in the governance of mineral resources from a rights-based approach.²⁷⁷ This has precisely the advantage of making the research methodology of this study fully complete and well equipped to address the identified issues in connection with this innovative perspective that emphasises respect for fundamental rights.

²⁷³ Coomans F. *et al.* "Methods of Human rights research: A primer" (2010) 32 *Human Rights Quarterly* 180.

²⁷⁴ All resources used under the research methodology section have been found there.

²⁷⁵ MacConville M. and Chui WH. "Introduction and overview" in MacConville M. and Chui WH. (eds.) *Research methodology in law* (Edinburgh: Edinburgh University Press, 2007) 5.

²⁷⁶ MacConville and Chui, *Id.*, 5; see also Coomans *et al.* (2010) 180-181.

²⁷⁷ Galligan DJ. "Legal theory and empirical research" in Cane P. and Kritzer HM. (eds.) *The Oxford handbook of empirical legal research* (Oxford: Oxford University Press, 2010) 979.

1.8.1 Research methods traditionally attached to the legal field

1.8.1.1 The black-letter or doctrinal method

The black-letter or doctrinal method is a legal research method that focuses on and scrutinises primary sources of law that involve legal instruments and to a certain extent, their interpretation in case law, with the aim to find out what the law is in a particular case and how legal reasoning and doctrines have been developed throughout the jurisprudence to resolve legal problems.²⁷⁸

This research method is of great use to the outcome of this study in as much as it allows an analysis of legal instruments relevant to this study, particularly the provisions of the African Charter. This is helpful to find out how the African Charter enforcement machineries have dealt with and decided on cases involving the issue of community participation.

Nonetheless, the use of the black-letter or doctrinal method will be incomplete if it does not review the secondary sources constituted by books and journal articles. This is because, as observed by Rowe, secondary sources refer to and explain the law, statutes and cases.²⁷⁹ Despite the original and innovative character of this study, it is a fact that in the social sciences, extensive use is made of the work of others.²⁸⁰

The differentiation between both types of sources is important to this study in the sense that in the first case, primary sources serve to state what the law is (*lege lata*), in spite of what one thinks it should be (*lege ferenda*), while in the latter case, secondary sources are used to criticise or support a particular view or interpretation.²⁸¹

²⁷⁸ Chynoweth P. "Legal research" in Knight A. and Ruddock L. (eds.) *Advanced research methods in the built environment* (Oxford: John Wiley and Sons, 2008) 29-30; Partington M. "Research" in Opeskin B.R and Weisbrot D. (eds.) *The promise of law reform* (Sydney: Federation Press, 2005) 136.

²⁷⁹ Rowe SE. "Legal research, legal writing, and legal analysis: Putting law school into practice" in (2000) 29 *Stetson Law Review* 1196.

²⁸⁰ Mangu (2002) 79.

²⁸¹ Dobinson I. and Johns F. "Qualitative legal research" in McConville M. and Hong Chui W. *Research methodology for law* (Edinburgh: Edinburgh University Press, 2007) 23; Coomans *et al.* (2010) 185.

1.8.1.2 International law and comparative law as tools for legal research²⁸²

The review of the legal studies that in these last years have questioned the achievement of development through the mineral sector in Africa, demonstrates that international and comparative laws have been increasingly used to undertake research.²⁸³ McConville and Chui consider that this phenomenon results from a combination of three factors, namely, the growing influence of international and supra-national legal materials, the increasing need for legal scholars to have a look at materials from diverse jurisdictions and the requirements made by contemporary law schools to have their students engage in critical thinking.²⁸⁴

In the context of this study, a reference to the international law is made compulsory by the fact that the fundamental rights-based approach to community participation is undertaken under the provisions of the African Charter and its enforcement machineries. The African Charter is an international treaty and as such, its interpretation and application calls for reference to international standards. To resort to international standards is regarded as a better method to strengthen respect for fundamental rights whenever standards developed at the domestic level are weak.²⁸⁵

As to the comparative method, it serves to analyse the situation of affected communities in domestic legal systems that have been targeted (DRC, Nigeria, South Africa and Zambia).

²⁸² Both approaches are naturally different. While international law refers to the body of norms that govern the relationship between states, comparative law concentrates on the analysis of two or more national legal systems. The role that both of them can play in providing solutions to issues raised within a domestic system has become so evident that, for instance, section 39 (1) of the South African Constitution (1996) recommends that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law and may consider foreign law.

²⁸³ Bastida *et. al.* (eds.) (2005); Hilson GM. (ed.) *Small-scale mining, rural subsistence and poverty in West Africa* (Rugby: Practical Action Publishing, 2006); Campbell B. (ed.) *Regulating mining in Africa: For whose benefit?* (Göteborg: Nordic Africa Institute, 2004).

²⁸⁴ MacConville and Chui (2007) 6-7.

²⁸⁵ Stavenhagen R. "Cultural rights and human rights: A social science perspective" in Pitarch P., Speed S., Solano XL. (eds.) *Human rights in the Maya region: Global politics, cultural contentions, and moral engagements* (Durham: Duke University Press, 2008) 41 (25-88); Galligan D. and Sandler D. "Implementing Human rights" in Halliday S. and Schmidt P.D. (eds.) *Human rights brought home: Socio-legal perspectives on human rights in the national context* (Oxford: Hart Publishing, 2004) 36-37; Ramcharan BG. "Substantive law applicable" in Ramcharan BG. (ed.) *International law and fact-finding in the field of human rights* (The Hague: Martinus Nijhoff Publishers, 1982) 27 .

In this respect, the view expressed by Venter deserves particular attention. This scholar usefully points out that comparability may consist in either the proximity of legal problems, mechanisms and solutions or their complete diversity.²⁸⁶ Since in this study, the effectiveness of community participation appears to be a shared problem across the African continent and because the fundamental rights-based approach is envisaged as a common solution to improve the governance of mineral resources, the emphasis here is clearly much more on the proximity or similarity of situations found in these selected countries. At the AU Conference held in 2011, it was observed that African countries have diverse development experiences in the mineral field, but yet share common impediments.²⁸⁷ Nevertheless, because the study is one that concerns the entire continent, some relevant facts found in any African legal system are at times included in the discussion as well. This implies that, despite the reference to the realities and facts found in African countries mentioned throughout this study, the research remains concerned with the general situation of affected communities all over the continent. In addition, the comparative method is also used to apprehend developments made even in non-African legal systems in respect of some issues addressed in the study. This is the case of the horizontal application issue which has been extensively dealt within the United States of America (US) legal system. This comparative approach with non-African legal systems also takes the discussion to the point where it becomes questionable whether there might be an opportunity for affected communities to use the avenue of extraterritorial jurisdiction under the exhaustion of local remedies rules. Finally, the comparative approach commands a look to developments made in other regional systems, namely the European system and the Inter-American one, which because of their anteriority, have had forcefully to address some of the challenges facing their young counterpart, the African system.

1.8.2 Research methods borrowed from other disciplines: historical, philosophical and empirical approaches

²⁸⁶ Venter F. *Constitutional comparison: Japan, Germany, Canada and South Africa as constitutional states* (Lansdowne: Juta & Co., 2000) 18.

²⁸⁷ AU “Minerals and Africa’s development an overview of the report of the international study group on” (AU Conference of ministers responsible for mineral resources development, 2011).

Legal research undertaken in *abstracto* will seldom produce valid knowledge.²⁸⁸ This is why plural or mixed research methods, provided they are useful, need to be used to enlighten the research and pave the way to a valid and reliable outcome.²⁸⁹ It is in this respect that the historical method serves to understand the real reach of the African Charter provisions, to seize the historical context in which they have been adopted and how they have been interpreted through the Charter enforcement machineries.²⁹⁰

This is of great relevance, because, as observed by De Cruz, legal history is the precondition to the critical evaluation of the law and facilitates the understanding of how legal concepts operate.²⁹¹ To bring out a progressive element from a system of law necessitates having the knowledge of what were the foundational grounds on which that system was built and upon which the system itself has evolved.²⁹² Practically, this implies that historical factors allow an understanding of how the concept of the fundamental rights-based approach to community participation may be developed under the African Charter and how it should operate in the mineral sector within resource-rich African countries. In this respect, the review of the jurisprudence developed under the African Charter system is particularly significant, because as Lenoble and Maeschalck point out, reconstructing the conditions under which a judgment or a legal decision has been implemented reveals the conditions and extent to which governance by law is possible.²⁹³

The historical method has already been employed at the outset of this study to provide the background to the study.

Christian attempts to define the philosophical method as a process of learning how to ask and re-ask²⁹⁴ questions, of how to relate materials, and of where to get the most reliable

²⁸⁸ Venter (2000) 18.

²⁸⁹ Coomans *et al.* (2010) 185.

²⁹⁰ Knight A. and Ruddock L. *Advanced research methods in the built environment* (Oxford: John Wiley and Sons, 2008) 31.

²⁹¹ De Cruz P. *Comparative law in a changing world* (London: Routledge, 1999) 10.

²⁹² Sreedharan E. *A manual of historical research methodology* (Trivandrum: Centre for South Indian Studies, CSIS, 2007) 8.

²⁹³ Lenoble J. and Maeschalck M. *Democracy, law and governance* (Farnham/Burlington: Ashgate Publishing Ltd., 2010) 20.

²⁹⁴ [*Sic*].

and recent information in order to shed light on identified issues.²⁹⁵ If this definition can be relatively acceptable, it is however necessary to bear in mind that philosophical reasonings are not neutral at all.²⁹⁶ They always consist of the ideals and values to which one adheres to, especially where the philosophical method is deemed relevant to the legal field.

Scholars who have tried to describe its role in the legal sphere ascertain that one of its main concerns touches on how law is to be understood in relation to morality.²⁹⁷ In this regard, philosophical reasoning can be used to support or reject legal arguments, depending on moral values that are advocated.²⁹⁸ Thus, for the purpose of this study, the philosophical method is used to analyse the values supporting the fundamental rights-based approach to community participation in its perspective of improving the governance of mineral resources.

The empirical research method rests on the principle that findings must be based on observation and the conclusions drawn from evidence.²⁹⁹ Though this is the traditional pathway used by the natural and applied sciences,³⁰⁰ it has become accepted that the social sciences are also in need of empirical evidence in their development.³⁰¹ Despite the fact that these latter sciences are basically made up of theories, it is now contended that they must generate principles that may be tested and verified empirically.³⁰² However, the extent to which social science must make use of the empirical method this research remains uncertain. In the legal field for instance, Epstein and King observe that the term

²⁹⁵ Christian JL. *Philosophy: An introduction to the art of wondering* (Belmont: Cengage Learning, 2008) xix.

²⁹⁶ This is well illustrated by the competing schools of thought that exist within societies. For instance, we have socialism *versus* capitalism or realism *versus* idealism.

²⁹⁷ Wacks R. *Philosophy of law: A very short introduction* (New York: Oxford University Press, 2006) xiii; Tebbit M. *Philosophy of law: An introduction* (Abingdon/New York: Routledge, 2000) 3; Julius S. *Legal system and lawyer's reasoning* (Stanford: University Press, 1964) 7-8.

²⁹⁸ See the case of homosexuality and abortion as described by Hare. Hare RM. *Essays on philosophical method*, Vol. 275 (Berkeley: University of California Press, 1972) 99.

²⁹⁹ Cohen L., Manion L. and Morrisson K. *Research methodology in education* (Abingdon: Routledge, 2007) 11.

³⁰⁰ For instance, Chemistry, Astronomy and Physics.

³⁰¹ See for instance, the case of Political Science as described by Mangu (2002) 81-82. See also Cramer D. *Introducing statistics for social research* (London: Routledge, 1994) 1.

³⁰² Cohen *et al.* (2007) 13; Cramer, Id., 1.

“empirical” has come to be given a narrow meaning in American legal scholarship, accounting merely for “statistical techniques or quantitative data”.³⁰³ These scholars stress the fact that a broader approach must be embraced in the legal academic community and should include qualitative analysis,³⁰⁴ with data collected from diverse sources, including for instance legislation or case law, interviews or surveys.³⁰⁵

In the context of this study, the empirical research method was mainly used to achieve a qualitative research. Interviews were conducted with³⁰⁶ individuals living within a community or an area affected by mineral activities in DRC (precisely, in the Katange province where many communities are found around mineral sites), in Nigeria (in the Nigeria Delta area), in Zambia (Kabwe and Ndola) and in South Africa (Witwatersrand). Except for Nigeria where interviews were conducted through phone calls, in all other countries, the questionnaire was administered in person. With a total of 1200 people interviewed, the questionnaire asked about: whether people believe it is important that affected communities participate in the negotiation of ore project, whether such participation is seen as a requirement of democracy, whether all members of the affected community should be consulted or just their representatives, whether a right of veto should be recognised to affected communities to reject mineral projects that violate their fundamental rights, whether the African Charter and its implementation mechanism are well known by members of the affected communities and whether they know how to approach the African Commission and the African Court.

Without necessarily establishing a statistical analysis, the aim of the survey was to find whether affected communities believe that a fundamental rights-based approach to community participation as supported by the African Charter could make their

³⁰³ Epstein L. and King G. “The rules of inference” in (2002) 69 *University of Chicago Law Review* 1-2.

³⁰⁴ While quantitative analysis consists of collecting numerical data, the qualitative analysis focuses on non-numerical data to get an understanding of a particular phenomenon of interest. Bloomberg LD. and Volpe M. *Completing your qualitative dissertation: A roadmap from beginning to end* (Sage Publications, 2008) 12.

³⁰⁵ Epstein and King (2002) 2-3.

³⁰⁶ Questionnaires may also be used in the context of qualitative methods. See Wood P. and Pratt N. “Qualitative research”, available at <http://www.edu.plymouth.ac.uk/resined/qualitative%20methods%20/qualrsh.htm#Questionnaires> (accessed 24/3/2012).

participation more effective and improve the governance of mineral resources in the continent. Nevertheless, quantitative data are also given reference in terms of information collected from documents released by public institutions such as governments or international organisations and by credible non-state actors like NGOs or grassroots organisations.

What is important to underline here is the fact that the study intends to respect the rules of inference³⁰⁷ on which Epstein and King have repeatedly placed an emphasis.³⁰⁸

1.9 Difficulties encountered in the completion of the thesis

The general experience is that every research project always somehow faces challenges in connection with its realisation. This has been evidenced in the process of completing this thesis through some difficulties to access information. In this respect, the difficulties have arisen especially in respect of countries targeted here as benchmarks. Indeed, except for Nigeria and South Africa for which there is relatively enough scholarly published material on the conditions of affected communities in the mineral sector of these countries, analyses on DRC and Zambia had to rely essentially on reports from international governmental organisations such as the UN and AU, and from NGOs. Nevertheless thanks to the vast collection of books at the University of South Africa library, this difficulty was alleviated as some scholarly publications from both countries on the issue could be finally found. The firm desires to reach the finishing line and overcome difficulties that arose on my way to the conclusion have been the leitmotiv that always revitalised me every time my inner-being felt like giving up.

1.10 Outline of the study

This study consists of five chapters. The first one sets out the content of the research by providing a background on the problematic issue of community participation in Africa. It deals with the main focus of the thesis, literature review, and methodology adopted in the

³⁰⁷ Inference consists in deriving logical conclusions from evidence and reasoning.

³⁰⁸ Epstein L. and King G. "Building an infrastructure for empirical research in the law" in (2003) 53 *Journal of Legal Education* 311–320; Epstein L. and King G. "Empirical research and the goals of legal scholarship: A response (A Reply)" in (2002) 69 *University of Chicago Law Review* 191-198; Epstein and King (2002) 19, 29-37.

research. Chapter two is a discussion of the theoretical considerations on community participation and related concepts. It proceeds to a confrontation between the soft approach to community participation and the fundamental rights-based one to bring forth the difference this latter approach can make in the search for more effectiveness in community participation. This confrontation is preceded by an analysis of community participation defining the aims that it pursues to achieve. This analysis is important to seize the critical role that community participation plays in a development process that is people-centered and why it should be effective enough to make the view of affected communities considered. Then, the chapter attempts to capture how best key factors like democracy, decentralisation, governance and mineral resources must be apprehended in relation to community participation. The chapter demonstrates that in the pursuit of sustainable development, the interactions between these factors and community participation must be properly matched for the mineral industry to give positive inputs. Chapter three assesses the fundamental rights-based approach and the extent to which it can be used under the normative and institutional component of the African Charter. Through developments made these last years in the African system, it analyses the chances of a successful application of the approach and the possibility to improve governance of mineral resource in the best interest of affected communities. Chapter four is devoted to discuss practical aspects which represent challenges to the successful implementation of the fundamental rights-based approach. Chapter five which is the conclusion, provides answers to questions raised at the outset and provides a basis for further research work in order to address other issues which obviously could not all be dealt with in a single study of limited scope.

Chapter two: Theoretical considerations on community participation and related concepts

2.1 Introduction

This chapter deals with the content of community participation under the fundamental rights-based approach and discusses the relationship between community participation and some relevant concepts; especially democracy, decentralisation and accountability. However, because the relations between them do not happen abstractly, it was deemed necessary to add to the analysis of (good) governance and sustainable development, as these are the highest ideals that underpin the *raison d'être* of community participation in a society where the improvement of human beings' living conditions remains the main concern.

2.2 Community participation

Several definitions of community participation are encountered in the literature. However, most of them are simplistic in that they only define the concept according to the need to have members of a community involved in the decision-making process. Pring and Siegele observe that the concept "participation" is rarely defined other than by simply meaning "implication" and that its understanding may vary considerably according to different societies and cultures.³⁰⁹ Darial, Zacharia and Rajpal view the variety of existing definitions as underlying not only the risk of confusion in the understanding of the concept, but also the importance attached to the participatory approach these last years.³¹⁰ Most definitions tend to focus on aims attached to participation and use them as an argument to advocate the establishment of a participatory mechanism, without explaining how it should function. In connection with legislative drafting, Du Plessis observes that laws and policies in different countries, even when they stress the need for participation, often fail to give an

³⁰⁹ Pring G. and Siegele L. "The law of public participation in global mining" in Bastida E., Wälde T. and Warden-Fernández J. (ed.) *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 266.

³¹⁰ Dayal R. *et al. Management in government* (New Delhi: KM Rai Mital, 1996) 75.

exposé of meaningful tools to effectively achieve community involvement in practice.³¹¹ Only a few approaches within the literature have been identified here with what can be qualified as a formalistic dimension. They contain a formal element that helps determine the type of participation that is foreseen. In practice, two sets of formal definitions are encountered, namely, the one that does not attach a binding outcome to the participatory process and the one that approaches participation not as a mere formality to be fulfilled, but more as a process through which views of participants should influence the final decision. It is in the latter group that the fundamental rights-based approach to participation fits in.

From these preceding developments, definitions of community participation can be systematically classified into the three following categories: definitions based on the aims attached to participation, definitions uplifting a soft approach in terms of the considerations given to the views of affected communities and definitions promoting a binding approach. But before reviewing each category, one should bear in mind that the concept “community participation” is drawn from the wider concept of popular or public participation.³¹² This is why when exploring different definitions contained in the literature, what matters most is the meaning that has been attached to the concept of participation. It is this concept that actually is the keyword in so far as it describes what participants do or are supposed to do, depending on the level at which they are involved (international, national or local). In this respect, Darial, Zacharia and Rajpal observe that it is the reach and importance of a decision that should determine the level at which participation must take place within a country.³¹³ They stress that while all the people of the country are called to be involved in matters of national importance, decisions of lesser scope forcefully restrain the extent of participation, with local matters being dealt with at local governance level.³¹⁴

³¹¹ De Plessis A. “Public participation, good governance and fulfilment of environmental rights” (2008) 2 *PER* 7.

³¹² Midgley J. “Community participation: History, concepts and controversies” in Midgley J., Hall A., Hardiman M. and Narine D. (ed.) *Community participation, social development and the state* (London: Methuen and Co, 1986) 13.

³¹³ Dayal *et al.* (1996) 77-78.

³¹⁴ *Id.*, 77.

The term community itself is generally used to identify a group of people sharing something in common which could either be the fact that they are in the same geographical area or the fact that they have a common interest.³¹⁵ But in practice, both factors are often combined to identify an existing community. This is why, for the purpose of this study, affected communities are considered those local communities found in African countries, living in a mineral area and whose livelihood is (or is likely to be) directly affected by ongoing mineral activities. In the same vein, it is also relevant to note the criterion that was developed in the *Endorois* case by the African Commission, which is the “distinctiveness” that should exist for a group of individuals to be identified as “people”. These distinctive features are *inter alia* a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy or suffer from the deprivation.³¹⁶ The World Bank uses the term “qualified community”, but in a specific context, to mean a community that is identified among the principal beneficiaries of a CDA.³¹⁷

In practice, the identification process of affected communities must be carefully conducted to avoid conflict between communities as was the case in Niger Delta. It was observed that communities which found themselves excluded while sharing similar characteristics with those selected, resorted to threats and violence.³¹⁸

2.2.1 Definitions based on aims attached to participation

Darial, Zacharia and Rajpal define community participation as a process that actively and meaningfully involves members of a local community in the decision-making process for the setting of community goals and the allocation of resources to achieve them and in the voluntary execution of projects and programmes put in place to that end.³¹⁹

³¹⁵ World Health Organisation (WHO) Community participation in local health and sustainable development: Approaches and techniques, European sustainable development and health series 4 (2002 WHO) 9.

³¹⁶ See the case of the Endoris community in Kenya, *supra* note 66, para 151.

³¹⁷ World Bank (2012) 19.

³¹⁸ Faleti A. “Challenges of Chevron’s GMOU implementation in Itsekiri Communities of Western Niger Delta” Boutiller Proceedings of the Conference on Conflict and Violence in Nigeria (2008) 24.

³¹⁹ Dayal *et al.* (1996) 76.

Another definition is given by Armitage who regards community participation as a process by which communities act in response to public concerns, voice their opinions about decisions that affect them, and take responsibility for changes to their community.³²⁰

According to Lish, community participation amounts to the involvement of members of a local community in the decision-making process and in implementing programmes; sharing the benefits of development programmes and their involvement in efforts to evaluate such programmes.³²¹

These three definitions that are used here by way of illustration share a common characteristic which is their emphasis on the aims of participation. After scrutinising each definition, one easily comes up with a clear idea of what community participation should achieve in practice, namely the expression of the community members' opinions regarding what the objectives that need to be realised should be, how financial resources to achieve the defined objectives must be allocated, how members of the community must share in the benefits and how they perceive or assess policy, programmes and projects (proposed or already established thereto) against those defined objectives. The aims attached to participation in these definitions match those that were defined in the Arusha Declaration, where it was stated that participation requires:

re-direction of resources to satisfy, in the first place, the critical needs of the people, to achieve economic and social justice and to emphasize self-reliance on the one hand, and, on the other hand, to empower the people to determine the direction and content of development, and to effectively contribute to the enhancement of production and productivity that are required.³²²

In the context of mineral activities within affected communities, definitions based on the aims have several important implications that deserve to be explained one by one in the

³²⁰ Armitage as quoted by Mathbor GM. *Effective community participation in coastal development* (Monmouthshire: Monmouth University, 2008) 8.

³²¹ Lisk F. "Popular participation in basic-needs oriented development planning" in (1981)6 (1) *Labour and society*, as quoted by Nkunika (1987) 20.

³²² S. 9 of the Arusha Declaration.

following paragraphs. In the context of this study, the sum of these implications is what may be considered as the best interests of affected communities.

2.2.1.1 Mineral projects should comply with objectives defined in affected communities which generally encompass social, economic and environmental aspects

On this specific point, Darial, Zacharia and Rajpal hold that the involvement of community members in the determination of objectives is the first and most important stage, as it allows them to properly consider their specific situation and set up relevant issues that need to be addressed.³²³ They conclude that in so doing, community members are able not only to determine possible alternative solutions, but also at the same time, restrict or exclude options that they do not find suitable.³²⁴ Practically, this means that when a mineral company wants to establish its activities in the area, it must get in touch with members of communities that would be affected by their activities and discuss the project with them with due regard to sustainable development objectives existing in these communities. It is only when the mineral project complies with these objectives and is accepted by these communities that it should be executed. But this approach pre-supposes that before the arrival of the mineral company, local communities must have already agreed on some basic development objectives, which as mentioned previously, should include social, economic and environmental aspects.

This procedure has the advantage of providing a measure of legitimacy to the mineral project. A project that respects and considers development objectives of affected communities is likely to succeed because of the large adhesion and support of community members. Far from being the case, the situation in many African countries correspond with cases where central government decides on projects which in its view are better for local communities, without any care of what the aspirations of members of the community concerned are.³²⁵ Experience demonstrates that where mineral activities take place without

³²³ Dayal *et al.* (1996) 77.

³²⁴ *Id.* 77.

³²⁵ *Ibid.*, 76.

effective participation of affected communities, social unrest often occurs. One of the well known examples in Africa is the case where the Ogoni communities opposed the Nigerian government in connection with the exploitation of oil in the Niger Delta Ogoniland before the African Commission.³²⁶ The communities complained that the exploitation of the oil by Shell with the blessing of the government did not serve their welfare and had negative consequences like environmental degradation causing health problems, contamination of food sources and the destruction of houses.³²⁷ Several supporters of the Movement for the Survival of the Ogoni peoples had been attacked by Nigerian security forces for “their non-violent campaign in opposition to the destruction of their environment by oil companies.”³²⁸ Beeson Sara Wiwa, who was the president of this movement, was hanged in 1995 by the military government of Sani Abacha.³²⁹

Government policy and programmes in the mineral sector cannot afford to bypass community participation. In fact, as underlined by Bryan and Hofman, governments that have a sense of accountability face two major challenges that involve on the one hand, the necessity to create a business climate that attracts private investments in the extractive industry, while on the other hand, they must address policy issues dealing with the impact of this industry on affected communities.³³⁰ The government policy and programmes must always provide space and necessary arrangements for affected communities to determine their development goals at local level. They should also think of how mineral investments should be undertaken in their areas to such an extent that they contribute to the fulfillment of these goals. Obviously, these community objectives must not contradict the nationally defined objectives, but must follow the general guidelines designed by central government while at the same time enjoying enough flexibility to allow affected communities to adopt

³²⁶ See *Ogoni* case, supra note 104.

³²⁷ *Id.*, paras 50-53, 59-66.

³²⁸ *Ibid.*, para. 7.

³²⁹ Ezetah CR. “International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma” in (1997) 19 *Loyola of Los Angeles International and Comparative Law Review* 811.

³³⁰ Bryan S. And Hofman B. *Transparency and accountability in Africa's extractive industries: The role of the legislature* (Washington: National Democratic Institute for International Affairs, 2007) 19.

their own approach on certain aspects directly linked to their local realities and which cannot be the same all over the country.³³¹

2.2.1.2 Financial revenues generated by mineral activities should be allocated to the realisation of community objectives in line with priorities defined by affected communities

This is another aim that community participation must achieve. Affected communities must be able to receive necessary funds from the mineral exploitation that will help them realise their objectives. The royalties should be paid either directly to those communities or alternatively indirectly through the central government, provided in this latter case they are transferred back in a transparent way and without delay.³³²

The contention that affected communities must enjoy financial gain generated by mineral exploitation does not mean *per se* that they are entitled to all the royalties, but only to a share, which amount or percentage varies from country to country.³³³ In the case of the South African Bafokeng community, the legal wrangle against Impala in the 1990s implied a claim by this community for an increase of royalties.³³⁴ After the out of court settlement had been reached in 1999, royalties payable to the Bafokeng were increased from 14, 9425 percent for the first and second platinum concessions and 16 percent for the third platinum concession to 22 percent.³³⁵ This has enabled the community to increase its financial capacity and establish a sovereign wealth fund (Royal Bafokeng Holdings), an investment entity entrusted with the responsibility to oversee the growth of the community's income and fund development projects.³³⁶ Members of affected communities should get the

³³¹ Mbile P. "The Korup National Park revisited" (eds.) Diaw MC., Aseh T. and Prabhu R. *In search of common grounds: Adaptive collaborative management in Cameroon* (Bogor: CIFOR, 2009)179.

³³² Otto J. *et al. Mining Royalties- A global study of their impacts on investors, governments and civil society* (Washington: The World Bank, 2006) 4.

³³³ Burns L. and Krever R. "Taxation of income from business and investment" in Thuronyi (ed.) *Tax law design and drafting* Vol. 2 (Washington: International Monetary Fund, 1998) 597-681.

³³⁴ Manson A. and Mbenga B. "The richest tribe in Africa': Platinum-mining and the Bafokeng in South Africa's North West Province 1965-1999" (2003) 29 (1) *Journal of Southern African studies* 28.

³³⁵ *Id.* 28.

³³⁶ Oomen B. "Mc tradition in the new South Africa: Commoditified custom and rights talk with Bafokeng and the Bapedi" in (eds.) Benda-Beckman FV, Benda-Beckman KV. and Griffiths AMO. *Mobile people, mobile law: Expanding legal relations in a contracting world* (Aldershot/Burlington: Ashgate publishing 2005) 100.

maximum benefits that can be drawn from the mineral project. This implies that financial benefits become meaningful only when they fully serve the realisation of other types of benefits which includes socio-economic projects directly connected to the development goals. These projects often imply the construction of roads, schools, hospitals and many other infrastructures that are profitable to the community. The Bafokeng appear so far to be an exception among many affected communities on the African continent as they have largely succeeded to fund many development projects. Hospitals, schools and shopping centres have been built and a bursary system was established to stimulate students towards acquiring skills that should benefit the community.³³⁷ However, representatives of mineral companies generally argue that since they are non-elected bodies, they cannot replace the government with regards to its own assignments.³³⁸ Mineral companies:

would prefer paying taxes to an efficient government administration that is able to deliver social services at all levels. However, this is rarely the case for developing countries, where the situation requires that the mining industry commit additional funds for social uplift in the areas that they operate.³³⁹

Apart from royalties, mineral companies often have to invest more money into the affected communities for them to be able to develop their programmes. Actually, the situation would be less complicated where such expenses were deductible for income tax purposes. This is because deduction would allow mineral companies to offset the expenses they incur for such projects. But this is not often the case.³⁴⁰

2.2.1.3 Mineral projects should be evaluated before the commencement, during the execution and at the closure in accordance with standards matching the sustainable development of affected communities

Communities first need to agree with the mineral company on the best way to achieve the project, then follow up whether the standards they have agreed upon are respected during

³³⁷ Oomen, Id., 98.

³³⁸ MMSD Project Report of the Experts Meeting on Human Rights Issues in the Mining and Minerals Sector No 222 (WBCSD/IIED, April 2002) 4.

³³⁹ Otto *et al.* (2006) 205.

³⁴⁰ Id.

execution, and finally ensure that the land is rehabilitated at the end of the operations. Before the commencement, affected communities should be able to check whether the project is compatible with environmental requirements and development objectives they want to achieve. During the execution, they should be able to interact with the mineral company to verify whether the project is still in line with what was agreed at the beginning and whether or not it is relevant to proceed with some adjustments. In this regard, a report prepared by the company unilaterally should be avoided as such a procedure carries the risk of distorting the evaluation with ambiguity, exaggeration or omission.³⁴¹ For instance in the Niger Delta, Shell reported in 2005 that it was improving the management of waste disposal, but once in the field, Amnesty International noticed a significant rise of the quantity discharged to surface water.³⁴² Regarding the closure of the mine, the issue is particularly sensitive because as mentioned previously, a mineral resource is exhaustible and its exploitation will come to an endsome day. Therefore, mineral companies must make sure that after the exploitation is over, the land is returned in conditions that would allow the pursuit of other useful activities, like for instance agriculture and farming. According to Limpitlaw:

To close a mine successfully, a trilateral consultation and problem solving process is required between mining companies, governments and communities. This process needs to commence at the design stage of the project. If conducted effectively, closure can be the mechanism by which capital generated through mineral extraction is transferred to future generations.³⁴³

This view is relevant in so far as it emphasises the necessity to address the issue of mineral site closure by having affected people involved in the discussion, but also as it insists on the need to consider the sustainability question of what is transferred to the next generation. Actually, both elements underline the key relationship between community

³⁴¹Emel J. *et al.* “Problems with Reporting and Evaluating Mining Industry Community Development Projects: A case study from Tanzania” (2012) 4 *Sustainability* 257-277.

³⁴²Amnesty international, “Nigeria: Petroleum, pollution and poverty in the Niger delta” (2009) 61; Available at <http://www.amnesty.org/en/library/asset/AFR44/017/2009/en/e2415061-da5c-44f8-a73c-a7a4766ee21d/afr440172009en.pdf> [accessed on 1/3/2013]. 18.

³⁴³ Limpitlaw D. “Mine closure as a framework for sustainable development” Paper presented at a conference organised at the University of the Witwatersrand (8-10 March 2004) 2.

participation and sustainable development. The involvement of the affected communities regarding this closure issues impose a pro-active approach to governance rather than a re-active one. This is because the severe consequences that mineral site closure may have, require that actions should have been planned and foreseen long before closure.³⁴⁴

On the one hand, closure may have severe environmental consequences. The nature of certain mineral resources and the high degree of transformation their exploitation has on the soil surface may cause pollution of the environment which may persist several years after the mineral site has been closed.³⁴⁵ As a result, where the closure of a mineral site is not properly planned and achieved, the life of affected communities' members is jeopardised by all the re-active effects that mineral exploitation usually bring.³⁴⁶ Unfortunately, land rehabilitation is a critical issue that has often been neglected in the classic binary relation involving only the government and mineral companies. In developing countries, it has been reported that mineral companies allocate insignificant amounts of money to rehabilitate the land.³⁴⁷ Some African countries have provisions addressing this issue in their mineral legislation. For instance, in South Africa, sections 42 and 43 of the Mineral and Petroleum Resources Development Act, 2002 oblige mineral companies to make financial provision for rehabilitation upon cessation of mineral activities, and they remain responsible for any environmental liability, pollution or ecological degradation, and the management thereof, until a closure certificate is issued.³⁴⁸ But in practice, many African governments have not been successful in implementing this rehabilitation requirement. Of course though, as in South Africa, a guarantee of

³⁴⁴ *Id.*

³⁴⁵ Limpitlaw D. *et al.* "Post-mining rehabilitation, land use and pollution" Paper presented at the Colloquium: Sustainable Development in the Life of Coal Mining, Boksburg (13/7/2005) 1.

³⁴⁶ See the case of the Kabwe lead zinc mine and smelter (Broken Hill) in Zambia and the Transvaal and the Witbank Delagoa Bay colliery in South Africa where the failure to properly close have generated serious pollution and health issues. See Limpitlaw (2004) 1, 3; Plumlee G., Morman S. and Seal B. "Human Health Aspects of Mineral Deposits and Mining, 4; Available at http://mn.water.usgs.gov/projects/tesnar/2011/Presentations/Plumlee_TESNAR_lecture.pdf [accessed on 27/3/2012].

³⁴⁷ Kimani (2009) 4.

³⁴⁸ Mineral and Petroleum Resources Development Act No 28, 2002. See also ss. 114 and 115 of the Nigerian Mineral and Mining Act (2007), arts. 15 and 42 of the DRC mineral code (2002), ss. 116 and 123 (4) of the Zambia Mines and Mineral development Act (2008).

rehabilitation is often requested elsewhere as a pre-condition of acquiring a mineral licence,³⁴⁹ the low level of taxation which is used as an incentive strategy to attract private investors³⁵⁰ and the rate of corruption in the public sphere that is still high in many African countries,³⁵¹ often deprive the state of the necessary funds to rehabilitate the land in the post-mining operation. Rehabilitation is very expensive. In South Africa, the auditor general reported in 2009 to the parliament that the cost of rehabilitating abandoned mines was estimated at 30 billions of Rand and in 2012, the minister in charge of mines faced parliament blames for failing to rehabilitate abandoned mines between 2010 and 2012, and for not having plans to do so between 2012 and 2013.³⁵² To avoid such a situation, money needs to be secured long before closure of the operation. Accordingly, since a corrupt government cannot be trusted with the protection of communities' fundamental rights and interests at local level, affected communities should take part in discussions and receive a clear explanation on how the land will be rehabilitated and on how financial resources for this purpose will be secured. In case they are denied the opportunity to participate and express their concerns, they should take legal action to compel both the government and the mineral company to seriously address this issue of rehabilitation.

On the other hand, if the closure of a mineral site is not planned ahead, it will result in severe economic consequences. For instance, job loss has been reported as one of the challenges brought by mine closure, that needs to be properly considered. Especially for mineworkers, the hope of re-employment in other sectors is small, as they have skills that are specific to the mineral field.³⁵³ In South Africa, the World Bank predicted a loss of

³⁴⁹ Clark AL. and Clark JC. "An international overview of legal frameworks for mine closure" UNESCAP Policies, Regulatory Regimes and Management Practices for Investment Promotion and Sustainable Development of mineral resources Sector in Economies in Transition and Developing Countries of East and South-East Asia (2000) 69.

³⁵⁰ Campbell (2010) 202-203.

³⁵¹ Africa All Party Parliamentary Group "Report: The other side of the coin: The UK and corruption in Africa (2006) 15; Available at http://www.taxjustice.net/cms/upload/pdf/other_side_of_the_coin_PDF.pdf [accessed on 20/June/2012].

³⁵² Blaine "No mine rehabilitation plan" (2012); Available at <http://www.bdlive.co.za/national/science/2012/09/17/no-mine-rehabilitation-plan> [accessed on 11/6/2013].

³⁵³ Research Report of the Centre for Development Support, Towards a post-mining economy in a small town: Challenges, obstacles and lessons from South Africa (CDS, 2006) 4.

38041 jobs because of the closure of nine mineral companies between 2002 and 2014.³⁵⁴ In fact, the need of affected communities to keep on enjoying benefits brought by mineral exploitation coupled with the imperative to pass a positive inheritance to future generation are part of the sustainability aspect of the development. Therefore, they must participate in discussions with other stakeholders on potential solutions for maintaining a sustainable situation even after closure.

Ultimately, the abovementioned definitions are relevant as they provide clear indications on aims attached to the participation of affected communities. Wherever community participation cannot achieve these aims in the mineral sector, it becomes useless and meaningless. This is why several reflections on the subject have reached the conclusion that community participation is a means that serves the achievement of objectives defined in the development process. This view initially proposed in the African Charter for popular participation³⁵⁵ was echoed by Adejumbi who contended that through community participation, members of the affected community are made both the agency and the end of development.³⁵⁶ It is the means through which they would ensure that all the aims explained above are achieved. But community participation is also viewed as an end.³⁵⁷ This is to be discussed extensively in connection with democracy, because in this context, it appears to be an expression of this latter concept.

Despite the relevance of definitions based on the aims, it is unfortunately their failure to mention which form or nature community participation must take in order to be effective and achieve those aims, that makes them limited. From their formulation, it is not always easy to determine whether the definition given sees participation from a binding perspective or from a soft one. It is not enough to state that participation must take place, but a more complete definition should reflect which type of participation is considered.

³⁵⁴World Bank “It’s not over when it’s over: Mine closure around the world” Mining and development series (World Bank and International Finance Corporation. 2002) 19.

³⁵⁵ s. 10 of the African Charter for popular participation,.

³⁵⁶ Adejumbi (2008) 100; See also Pring G. and SiegeleL. “The law of public participation in Global mining” Bastida E., Wälde T. and Warden-Fernández J. *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 267.

³⁵⁷Adejumbi, Id., 100.

2.2.2 A soft approach to community participation

The World Bank defines community participation as:

a process through which stakeholders influence and share control over development initiatives, decisions and resources which affect them.³⁵⁸

The formal dimension of this definition results from the fact that participation is identified here by the Bank as a power shared by stakeholders throughout the process of participation. However, there appears to be an irreconcilable contradiction that one can be considered at the same time as a stakeholder, but without having a real power to influence and control the decision-making process of development initiatives. Though it is clear in the language of the World Bank that affected communities are included among stakeholders that must be empowered in the decision-making process, there is nonetheless much controversy in the Bank's interpretation of what the nature of such power should be. Concerning the specific case of these communities, the World Bank has explicitly mentioned that this power to control development programmes and to influence the decision-making process can never amount to a veto power.³⁵⁹ This means that the Bank does not foresee a situation where affected communities can impose their view on other stakeholders. What constitutes a paradox in this respect is the fact that at the same time the World Bank has recognised that affected communities constitute what it has called "primary stakeholders". The Bank has justified such primacy by the fact that these communities are often poor and marginalised and therefore likely to be the most affected of all stakeholders.³⁶⁰ Past experiences have sufficiently demonstrated that these communities are the most negatively affected in respect of their fundamental rights and interests. Because stakes are not the same for all parties, and affected communities are the most exposed, the question is why they should not enjoy such power to stand against any project that threatens their fundamental rights and interests.

³⁵⁸ *The World Bank operation evaluation department "Participation in development assistance" 209 (2001) Précis, 1*; Long C. *Participation of the poor in the development initiatives: Taking their rightful place* (Sterling: Earthscan, 2001) 14.

³⁵⁹ See the World Bank Group management response (2003) v.

³⁶⁰ *The World Bank (2001) 4*; Long (2001) 14-15.

The World Bank itself, after a review of 164 projects, has reached the conclusion that the non inclusion of affected communities in the decision-making process has very often resulted in inappropriate and unworkable projects.³⁶¹ It seems that what matters more to the World Bank is simply to obtain the adhesion of affected communities in projects that the Bank itself assesses to be “good and relevant”. Adejumobi describes this World Bank approach as a tendency to emphasise a participatory model where the necessity for marginalised groups and interests is advocated in the discourse on community programmes and activities, but in a manner that does not significantly alter the existing power relations between stakeholders.³⁶² For instance, as already observed, in the Chad Cameroon oil and pipeline project, the World Bank gave its approval and support to the project despite opposition by affected communities and organisations of civil society.³⁶³ What is the most surprising is that this acquiescence of the Bank was given despite the fact that the environmental assessment did not comply fully with the World Bank’s own environmental regulation.³⁶⁴ It was reported that the project would destroy biodiversity and natural reefs.³⁶⁵ This behaviour of the Bank is in stark contrast to its statement that it would only support projects that have the broad support of affected communities.³⁶⁶ In fact there is a difference between the discourse of the Bank and what is done in practice. While on a rhetorical note, the World Bank asserts that good consultations are those that enable affected communities to effectively take part in the establishment and execution of projects and thus, it undertakes to foster the empowerment of communities to monitor projects that affect them,³⁶⁷ however, its practice is far from corresponding to those asserted ideals.

How would community participation be effective if affected communities could not enforce their views and take a stand against projects that threaten their rights and

³⁶¹ Zazueta A. *Policy hits the ground: Participation and Equity in environmental policy making* (Washington: World Resources Institute, 1995) 7.

³⁶² Adejumobi (2008) 99.

³⁶³ Nguiffo and Breitkop (1999).

³⁶⁴ The World Bank OP 4.01 - Environmental Assessment (Operational Policy adopted in January 1999).

³⁶⁵ African Forum on Debt and Development “The contribution of Oil to Debt and under-development in Africa: The case of Chad-Cameroon Pipeline Project” AFRODAD Research Paper (2007) 23, 23-26.

³⁶⁶ See the World Bank Group management response (2003) 4.

³⁶⁷ The World Bank Group management response (2003) 5.

interests? As Limpitlaw aptly warns, expectations of affected communities should not be raised to unrealistic levels and any excessive focus on compensation must be cautiously managed.³⁶⁸ Yet, the risk of exaggerating expectations is rendered high in Africa by the fact that many Africans living in rural areas are illiterate and uneducated. Their perception of what needs to be done can sometimes be excessive. But as will be demonstrated later, this is not an argument to reject community participation and refuse even to make it compulsory. In cases where there are conflicting interests and views, and parties are not able to reach consensus, it is a mistake to consider that the final views should be that of stakeholders that are in a position of enforcing their decisions, for instance mineral companies, the government or international donor agencies.³⁶⁹ Actually, a balanced approach should always be considered and this could easily be achieved by a third party that would be neutral. This is why the recourse to an independent judicial or quasi-judicial body is promoted in this study because it is presumably a third party that is likely to guarantee that a balanced outcome is reached. Courts or quasi-judicial bodies are presumably “impartial” and as such, in a better position to measure the rationality of claims made by all parties, including affected communities. In this context, wherever communities’ expectations and claims are found to be legitimate and rational, they would be backed up by these bodies, but where they exceed expectations, they would simply be ignored. Even where members of affected communities do not have an appropriate educational background, they often have information about the general situation prevailing in the community and therefore, can easily explain to other stakeholders what the problems within their community are and how best they think it should be tackled.³⁷⁰

The controversial dimension of the World Bank’s perception on what community participation should be, has weakened and slowed down efforts that this institution devised to enhance good governance practices in the extractive industry. Evaluating

³⁶⁸ Limpitlaw (2004) 6.

³⁶⁹ Conflicting views are unavoidable. As Zazueta aptly observes, “Sooner or later, various stakeholders’ interests will diverge or conflict in participatory processes. Because participation not only brings marginal groups into policy-making but also builds their capacities to voice their needs and concerns effectively, the process almost always entails changes in power relations.” Zazueta (1995) 13.

³⁷⁰ Zazueta, Id., 9.

commitments of the World Bank in connection with its undertakings in 2004, Lawrence and Reisch conclude that little has been done and that the Bank has failed to clearly and consistently apply its own policy.³⁷¹ Clark also reaches the same conclusion, asserting that, though a set of binding policies governing the broad areas of Bank activities exists, including mitigation of the social and environmental impacts, there is a gap between the rhetoric and the implementation of the policy framework.³⁷² The World Bank has generally supported the institution of the CDA but without a clear conceptualisation of its legal nature of being binding or not.³⁷³ In fact, the binding or non-binding nature of this type of agreement is generally unclear due to the fact that different terms are used to name it (Community Development Initiatives, Exploration Agreements, Impact Benefit Agreements, Global Memoranda of Understanding...)³⁷⁴ Where it has been clothed with a binding character, it has produced relative success. Though not formally named “CDA”, the agreement between the Bafokeng community and the mineral company Impala entered to in 1999 has brought some positive outcomes to the development of this community.³⁷⁵ After ten years (1989-1999) of legal wrangling, both parties finally reached an out of court agreement increasing royalties due to the community at 22 percent and opening the board of the mineral company to Bafokeng’s representatives.³⁷⁶ In fact, here the agreement has established a trust fund in which the Bafokeng Community through its representatives has entered into a joint-venture with the mineral corporation with the aim to channel revenues generated by the exploitation of platinum to the achievement of development objectives defined by the community.³⁷⁷ As a result over the years, relevant infrastructures of development have been built.³⁷⁸ However,

³⁷¹ Lawrence S. and Reisch N. “The World Bank Group, The Extractive Industries Review (Eir) and Governance: Evaluating the Bank Group’s implementation of its commitments” Paper published by the Bank Information Center (Bic 2006) 1.

³⁷² Clark DL. “The World Bank and Human Rights: The need for greater Accountability” (2002) 15 *Harvard Human Rights Journal* 206-207.

³⁷³ *Environmental Resource Management* (2010) 8.

³⁷⁴ *Id.* 8.

³⁷⁵ Here, the success is deemed relative because despite positive inputs in the development process, there is yet a profound disparity in the social conditions of the community’s members.

³⁷⁶ Manson and Mbenga (2003) 45.

³⁷⁷ *Environment Resource Management* (2010) 20.

³⁷⁸ Oomen (2005) 98.

since entitlement to royalties and other benefits for the Bafokeng resulted from their right to land ownership through which they succeeded to obtain from the government a “preferent right to prospect and mine”,³⁷⁹ it is clear that the situation of this community is quite exceptional comparatively to many other South African local communities which generally do not possess the same right.³⁸⁰ The disparity between mineral landowners and the rest of the population in accessing benefits generated by mineral resources is what has prompted the call for nationalisation in post-apartheid.³⁸¹ In Nigeria, the CDA has been practically labeled as Memorandum of Understanding (MoU). Contrarily to the Bafokeng trust fund agreement, the MoU is not binding. Chevron and Shell have used it to establish a relationship with communities in the Niger Delta.³⁸² But because of the gap between development objectives defined and the poor performance in practice, reluctance to pursue this kind of agreement has arisen. For instance, in 2012 representatives of the Benikrukru community deliberately refused to renew the MoU with Chevron.³⁸³ To avoid uncertainty regarding the legal nature of commitments made by the mineral company, it would be desirable that the CDA be considered as a legally binding instrument through which affected communities would enforce their fundamental rights in development initiatives arising from the mineral project. It is predictable that as long as a general reluctance will continue to be displayed towards a binding approach, the effectiveness of community participation will continue to suffer from looseness and expectations of affected communities will remain a pipe dream throughout projects that it coordinates.

³⁷⁹ The recognition of a preferent right is provided under s. 104 of the Mineral and Petroleum Development Act (2002) only to communities that enjoy registered ownership on the land concerned by mineral exploitation.

³⁸⁰ Oomen (2002) 96-98.

³⁸¹ ANC YL Discussion Document “Towards the transfer of mineral wealth to the ownership of the people as a whole: a perspective on nationalisation of mines”(February, 2010); Available at http://us-cdn.creamermedia.co.za/assets/articles/attachments/25571_nationalisation_of_mines_document-feb_2010.pdf [accessed 6/9/2011].

³⁸² Ukiwa U.O. *et al.* “Reclaiming politics and reforming governance: Options for sustainable peace and development in Niger Delta” in (eds.) Ukaga O., Ukiwo U.O.O. and Ibaba IS. *Natural resources, conflict, and sustainable development: Lessons from the Niger Delta* (New York/Abingdon: Routledge 2012) 164.

³⁸³ Nigeria World News “Tension over renewed GMoU in Delta” (2012); Available at <http://www.nigeria-news-world.com/2012/11/tension-over-renewed-gmou-in-delta.html> [accessed 13/6/2013].

2.2.3 A binding approach to community participation under a rights-based approach

Until now, few approaches have regarded community participation as a binding process with the view to guarantee its effectiveness in practice. Though the promotion of community participation is now considered with more enthusiasm worldwide, its implementation remains the hardest part of the puzzle to put in place. In this respect, a binding approach appears suitable as it enables affected communities to oblige other stakeholders to give a proper consideration to their voices and opinions. It is actually in this latter category that the fundamental rights-based approach promoted in this study should be viewed. This is simply because it supposes that affected communities possess some existing fundamental rights on which they can rely to control and influence the process of decision-making affecting them. Some of the few identified authors that have considered community participation under a rights-based approach are Fidlman, Correa, Bass, Parikh, Roman, Czebiniak, Filbey and Pring.³⁸⁴

Fidlman considers participation as a “right” enjoyed by people in the process of decision-making that could affect their lives.³⁸⁵

Drawing from the International Labour Organisation’s (ILO) Convention 169, Correa observed that:

prior consultation is a formally acknowledged right, an instrument for social and political participation of indigenous people and ethnic groups...³⁸⁶

Indeed, prior consultation of indigenous people is entrenched as a fundamental right in the ILO Convention 169. However, a closer look at this instrument will remove one from the scope of this study; also the fact that only one African country is part to this

³⁸⁴ This is surely not an exhaustive list, it simply represents those authors that have been identified in the literature review.

³⁸⁵Feldman (2002) 53.

³⁸⁶Correa (2004) 5.

Convention, does not allow further interest.³⁸⁷ Nevertheless, there is at least an interest in discussing the exact meaning of the right to prior consultation.

It seems that the idea behind this concept is that affected communities must be consulted before any mineral project impacting on them is undertaken. Correa observes that in preliminary stages, a formal meeting involving all parties (government, mineral companies and affected communities) must take place and lead to the adoption of protocols covering the relevant subject matter of the consultation process and the agreement on procedures and participating stakeholders.³⁸⁸ Then, at the final stage, stakeholders, including affected communities, must share decision-making on proposals outlined in previous stages through a formalised declaration and agreement on the pertinence, feasibility or not of the project, the adjustments to be made if necessary, compensation to be paid to the communities and the commitment and responsibilities of each party throughout the execution of the project.³⁸⁹

If this description of Correa adequately reflects on what prior consultation should be, it remains however questionable whether it fully corresponds to what effective participation should be. In this regard, Whitman and Mamen contend that participation and consultation should not be approached as synonymous terms, because this latter concept tends to be weak particularly in the mineral sector, as it mostly fails to explicitly require that contributions of stakeholders be incorporated in decision-making and that as such, it is often used by mineral companies and governments as a tokenistic process to placate affected communities and to avoid criticism about decisions that have already been foreseen.³⁹⁰

The remarks made by these scholars are of major importance because prior consultation does not necessarily mean that the view of communities that have been consulted will

³⁸⁷ Among African countries, only the Central Africa Republic has ratified this Convention (3/8/2010).

³⁸⁸ Correa (2004) 5.

³⁸⁹ *Id.*, 5.

³⁹⁰ Whitman G. and Mamen K. *Meaningful consultation and participation in the mining Sector? A review of the consultation and participation of indigenous peoples within the international mining sector* (Ottawa: North-South Institute, 2002) 51-52, 59, 60, 64.

be taken into consideration. Therefore, if participation has to be matched to the right to prior consultation, it will merely be a procedural right but without core substance.

This can be qualified as a minimalist approach suggesting that mineral companies and the government will only have a legal obligation to formally consult affected communities, without necessarily considering their views. Such an approach will bear a similar result with the World Bank approach where the necessity to run the participation of affected communities is stressed, but without a consistent outcome attached to the process. Apart from a substantive requirement, a procedural dimension needs to be added to make community participation really effective. This is why one would find the concept used by Bass, Parikh, Roman, Czebiniak and Filbey more appropriate. Instead of a right to prior consultation, these scholars speak of the right to prior informed consent and consideration of what it refers to:

the right of a local community to be informed about mining operations on a full and timely basis and to approve a mining operation prior to the commencement of operation. This includes participation in setting the terms and conditions addressing the economic, social, and environmental impacts of all phases of mining and post-mining operations.³⁹¹

Defined like this, community participation not only implies a legal obligation for other stakeholders to consult affected communities, but also to consider the view of these communities in decision making in so far as the execution of the project is rationally depending upon their approval. The same approach was adopted by the African Commission in the *Endorois* case, but without clearly explaining what the implications were.³⁹² This can be considered as a maximalist approach to community participation under a fundamental rights-based perspective which includes a double dimension made up of both procedural (consultation) and substantive (consideration of views) rights.³⁹³

³⁹¹ Bass *et al* (2004) 3.

³⁹² See the *Endorois* case, *supra* note 103, para. 291.

³⁹³ A substantive right is a right whose existence and content is established in the formulation of a legal provision, while a procedural right refers to the legal process offers by the law for the enforcement of the recognised right. See Ako RT. “Enforcing environmental rights under the Nigeria’s 1999 constitution: The localisation of human rights in the Nigeria Delta region” in De Feyter K., Parmentier S., Timmerman C. and Ulrich G. (eds.) *The local relevance of Human rights* (New York: Cambridge University Press, 2011) 280.

In this respect, it is relevant to stress that prior consent must not be requested only for the commencement of the mineral project, but affected communities should also express their approval for future projects or programs consecutive to the main project, such as those related to development initiatives. The World Bank has pointed out that free prior and informed consent must not be confused with the CDA.³⁹⁴ Though this is correct, the link between both institutions is such that the CDA will presumably be easily designed and implemented where the relationship between the mineral company and affected communities is built on a formal acceptance of the mineral project by members of these communities.³⁹⁵ As such, if the initial approbation of the project was given in a binding form, there is no reason why other agreements that are consecutive to such an approval cannot as well possess the same character. This is formally the approach embraced in the Nigeria Mineral law which requires the consent of the owner or occupier of the land prior to the license being granted to the mineral company and then adds that any CDA will be binding between parties.³⁹⁶ But unfortunately, this is far from being the case in practice because the government has often used its discretionary power to bypass landowner's or occupier's prior consent³⁹⁷ and oil companies in the Niger Delta have been building their relationship with affected communities on MoU which are not binding.³⁹⁸ Actually, the CDA should enjoy such a binding authority to display the consent to a development project, but only to the extent that it represents the views largely shared by the community concerned. In Zambia as well where the mineral legislation required prior consent of the chief of the village or community concerned, this requirement has been disregarded in the establishment of mineral projects.³⁹⁹ This

³⁹⁴ Environmental Resource Management (2010) 75.

³⁹⁵ The case of the Bafokeng in South Africa, though not formally built on an CDA but rather a joint-venture agreement, provides an illustration of how cooperative the relationship between the company and the community in development projects can become smooth when the mineral project find the consent of its members.

³⁹⁶ Ss. 100 and 116 (5) of the Nigeria Minerals and Mining Act (2007).

³⁹⁷ S. 22 (2) of the the Nigeria Minerals and Mining Act (2007).

³⁹⁸ RTI International *et al.* "GMOU Participatory Stakeholder Evaluation: a joint evaluation of the Global Memoranda of Understanding between Chevron, community organizations and state governments in the Niger Delta" (2008) 12; Available at

http://cbuilding.org/sites/default/files/GMOU_Evaluation_Final.pdf [accessed on 20/6/2013].

³⁹⁹ S. 127 (c) of the Zambia Mines and Mineral Development Act No 7 (2008).

was for instance the case with the privatisation of the Zambia Consolidated Copper Mines in 2000 which led to the establishment of the Kansanshi mine, causing displacement of the people. The mine was reported to be established through a consultation process that was inadequate to such an extent that no compensation was provided to affected communities.⁴⁰⁰ Nevertheless there is apparently a dynamic of change initiated by the government elected in 2011 which recently took two major decisions, commanding a mineral corporation, first to halt its operations because of the risk of affecting communities' health by acid mist, and then to include CSOs and those affected communities in meetings to discuss the issue.⁴⁰¹

The binding approach is also supported by Pring who made the assertion that international "hard" law on fundamental rights⁴⁰² is applicable to the mineral sector and that treaties adopted in the wide context of sustainable development somehow offer opportunities for community participation to impact on mineral projects.⁴⁰³ It is in this context that the African Charter is used in this study to analyse, as the main fundamental rights treaty for the continent, to what extent it can support a rights-based approach to community participation and make it really effective in the mineral sector. At the procedural level, the provisions of the African Charter should be able to make participation compulsory and happening in conditions that are fair and transparent for affected communities, while at the substantial level, the Charter must enable affected communities to have their opinion considered in the decision-making process in respect of the achievement of development objectives, of which due respect of fundamental rights are part.

⁴⁰⁰ Boocock CN. "Environmental impacts of foreign direct investment in the mining sector in Sub-Saharan Africa" (ed.) Chung C. *Foreign direct investment and environment: lessons from the mining sector* (Paris: OECD, 2002) 27.

⁴⁰¹ The decision was taken in 2012, one year after the holding of general elections. See Lee R. "News big step forward for mining in Zambia" (2012); Available at <http://www.osisa.org/economic-justice/zambia/big-step-forward-mining-zambia> [accessed on 20/6/2012].

⁴⁰² International hard law is made of treaties and conventions whose provisions are compulsory.

⁴⁰³ Pring, *supra* note 238, 14; Pring G. "International environmental and human rights law affecting mining law reform" Paper presented at the mining law seminar organised by the North Institute for Environmental and Minority law (NIEM) in Rovaniemi Finland (25-26/9/2008); Available at http://arcticcentre.ulapland.fi/docs/NIEM_mining_Pring_paper.pdf [accessed on 20/6/2013].

Thus for the purpose of this study, community participation is approached as a fundamental right in itself and at the same time as a means to implement other fundamental rights that are relevant for the achievement of aims attached to the participatory process, that all converge to the realisation of sustainable development.

2.3 Content of community participation under the fundamental rights-based approach

Community participation is viewed here as a fundamental right itself and as a means to enforce other fundamental rights that are relevant to the sustainable development process of affected communities. As such, one cannot attempt to describe its content without first apprehending the notion of fundamental rights.

2.3.1 Definition of fundamental rights

Before defining the concept of fundamental rights, one can legitimately wonder why this study does not rather use the concept of human rights. As a response to such a concern, it is assumed here that the notion of fundamental rights can be somehow equivalent to the one of human rights.⁴⁰⁴ But as will be demonstrated, the human rights concept is sometimes defined restrictively to such an extent that it fails to include some rights that are also fundamental to human beings. Peterson puts it clearly when observing for instance that in the view of some analysts, group rights are not part of human rights.⁴⁰⁵ In this case, the term “fundamental rights” seems more appropriate because it can be broadly interpreted, without any restriction, providing only that the right at hand has the characteristic of being fundamental.

In so far as fundamental rights can be approached as human rights, one needs to note that these latter rights are generally perceived as rights that derive from the inherent dignity attached to every human being.⁴⁰⁶ Historically, human rights have remained for a long time

⁴⁰⁴ On this specific point, one can see Alex R. “Discourse theory and fundamental rights” in Menedez JA. and Eriksen EO. *Arguing fundamental rights* (Dordrecht: Springer, 2006) 15-23.

⁴⁰⁵ Jones P. “Human rights, group rights, and peoples' rights” in (1999) 21 (1) *Human Rights Quarterly* 80.

⁴⁰⁶ Azinge E “Millstone Decision on Human Rights” in A U. Kalu and Y Osinbayo (ed.) *Perspective on Human Rights*(Lagos: Federal Ministry of Justice, 1992)197; Para. 1, Preamble of International Covenant on Civil and Political Rights (1966).

an issue strictly within national jurisdiction,⁴⁰⁷ that is until the end of the 1940's, when they became internationalised.⁴⁰⁸ A study of old societies demonstrated that most of them possessed a system of law made up of legal instruments protecting human rights. Among the most widely known are for instance the Charter of Cyrus (539 BC) and the Hamourabi Code (1772 BC) in Babylonia that protected rights such as property, liberty and security;⁴⁰⁹ the work of Sages (2050-1780) in Egypt which secured the right to property for both men and women;⁴¹⁰ the Magna Carta (1215) and the Habeas Coprus Act (1679) in England that granted some relevant rights such as the rights to freedom and to not be imprisoned except by order of a court; the Virginia Declaration of Rights (1176) in the United States which established inherent rights of men and inspired other later instruments like the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and the Citizen (1789).⁴¹¹ At the global level, the process of human rights' internationalisation, as Azinge recalls it, is traceable to some international instruments which recognised the need to promote and preserve human rights for the ultimate attainment of world peace after the Second World War.⁴¹² But yet, there is no universal and unanimous adherence to what human rights are. Factors such as nations' ideological traditions and interests, and many other considerations generate different views and approaches varying from one country to another.⁴¹³

⁴⁰⁷ See for instance The Magna Carta 1215 in England, The French Declaration of 1789, ...

⁴⁰⁸ Human rights emerged as a subject of concern within the international law jurisdiction after the end of second war.

⁴⁰⁹ Robertson AH. and Merrils JG. *Human rights in the world: An introduction to the study of international protection of human rights* 4th ed. (Manchester: Manchester University Press, 1996) 7.

⁴¹⁰ Kaplan LC. *Politics and Government in Ancient Egypt* (Kaplan: Rosen Classroom, 2004) 14.

⁴¹¹ Fleiner T. and Fleiner LRB *Constitutional democracy in a multicultural and globalised world* (Heidelberg: Springer 2009) 135-136, 140-142, 144-145.

⁴¹² Azinge E (1992) 200; Internationalization of human rights through modern treaties founded its origins in the United Nations Charter (See the Preamb. and art. 1 (3) of the Charter) and later in the UDHR.

⁴¹³ Reichert E. "Human Rights: An examination of universalism and cultural relativism" in (2006) 22 (1) *Journal of comparative social welfare* 23-36; Gordon LP. *The evolution of International Human rights visions seen* (Philadelphia: University of Pennsylvania Press, 1998) 230; An-Nàim AA. "Problem of cultural legitimacy for human rights" in Deng FM *Human rights in Africa: Cross cultural perspectives* (Washington: Brookings Institution Press, 1990) 331-367.

The unanimity between states clearly disappears when one seeks to define, clarify and prioritise specific human rights.⁴¹⁴ In fact, it is not the existence of human rights that is questioned, but disagreements concerning their content. The divergence clearly started at the time following the adoption of the UDHR. While Western nations prioritised what have been called “first generation rights”, namely civil and political rights, communism stated and their allies stressed the importance of “second generation rights”, also known as socio-economic rights.⁴¹⁵ As a result, both camps could not agree on a single document that would entrench all of these rights, and two Covenants were thus adopted, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Nowadays, there is also another category of rights known as the “third generation rights”, but this is also not unanimously accepted. These rights are generally described as solidarity rights that take the form of people’s rights or groups’ rights.⁴¹⁶ They have been born from the works of Mbaye who made a significant contribution to the establishment of the people’s right to development at international level and Vasak who is actually the proponent of the dividing theory of human rights into generations.⁴¹⁷ Vasak justifies the three generations of human rights by the three relevant values advocated during the French revolution of 1789, namely liberty-equality-fraternity.⁴¹⁸ Following this approach, Vasak contends that civil and political rights correspond to the need for liberty, while socio-economic and cultural rights respond to a call for equality and solidarity and people’s rights fill the gap for fraternity.⁴¹⁹ Unfortunately, if civil and political rights find acceptance by almost all countries regarding their view of human rights, this is not yet the case for socio-economic and cultural rights and people’s rights, for which there is still much dissenting opinions. Socio-economic rights have been rejected by Western liberal countries as being

⁴¹⁴ Crumper P “Introduction: The history of International Human Rights Law” in Hegarty A. and Leonard S. (eds.) *Human Rights: an agenda for the 21st century* (London/Sydney: Cavendish, 1999) 1.

⁴¹⁵ Crumper (1999) 6-7.

⁴¹⁶ Algan B. “Rethinking ‘third generation’ human rights” in 1 (1) (2004) *Ankara Law Review* 124; Académie de droit international *Receuil des cours (Collected courses)* (La Haye: Martinus Nijhoff Publishers, 1998) 115.

⁴¹⁷ M’Baye K. “Le droit au développement comme un droit de l’Homme” (1972) 5 *Revue des droits de l’Homme* 503; M’Baye (1992) 29; Vasak K. “Human rights: A thirty year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights” (1977) 30 *UNESCO Courier* 11.

⁴¹⁸ Algan (2004) 124.

⁴¹⁹ Id.

justiciable and enforceable rights on the ground that, contrary to civil and political rights, which impose mainly negative duties, their fulfillment impose positive duties upon the government.⁴²⁰ As to solidarity or people's rights, their recognition at universal level has been opposed by western countries again because of a presumed fear to have many "unenforceable" rights in the corpus of human rights.⁴²¹ This is what may perhaps explain that though the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007 and consecrated solidarity's rights, it is not a legally binding instrument under international law.⁴²²

In the African context, the OAU Charter was the first regional instrument that dealt with the protection of human rights in the continent. However, it contained very little reference to the concept of human rights and made reference to the protection of human rights as well as general statements regarding the welfare and well being of Africans.⁴²³ Under both domestic and international pressure, African leaders adopted the African Charter in 1986 which is the major instrument aimed at protecting human and peoples' rights on the continent. But even among African countries, the perception of human rights is not the same. While civil and political rights are regarded by all as a component of human rights, the view is still divergent especially concerning the said second generation of human rights. For instance, while South Africa is at present a country that is world renowned for its body of jurisprudence that treats socio-economic rights as judicially enforceable rights, many other African countries continue to regard these rights as non enforceable by a court.⁴²⁴

Therefore, to avoid this endless debate, often inspired by ideological motivations and other subjective reasons, this study has chosen to take a shortcut by resorting to the concept of "fundamental rights". This has the advantage of flexibility in the design of what the content

⁴²⁰ Nolan A, Porter B and Langford M "The justiciability of social and economic rights: An updated Appraisal" Centre for Human Rights and Global Justice Working Paper No. 15 (2007) 7.

⁴²¹ Académie de droit international (1998) 115.

⁴²² See in this respect Stidsen (2007) 556-561.

⁴²³ Ankumah EA. *The African Commission on Human and Peoples' Rights* (1996) 4; the OAU Charter did not entrench individual rights for African people.

⁴²⁴ Countries like Namibia, Ghana, Malawi, Nigeria have entrenched socio-economic rights as directive principles rather than justiciable rights.. See for instance, the specific argument of the Nigerian government in *SERAP v. Nigeria and Universal Basic Education Commission*, No. ECW/CCJ/APP/0808.

of human rights is by accommodating any school of thoughts. It may be the liberal conception of human rights or the socialist one, as long as the right at hand is regarded as being fundamental, it would be included in the list. This approach almost coincides with Martínez's understanding of fundamental rights when asserting that:

Nowadays, it can be said that fundamental rights help ... moral goal by setting up areas of autonomy where human beings can act freely-civil rights-; setting up channels for the participation in power-political rights; removing all hindrances that sustain discrimination and promoting the conditions to make possible a substantive equality-economic, social and cultural rights. In short, if I have to qualify briefly the function of fundamental rights at this first level of morality, I would say that they set up the conditions for an egalitarian liberty... fundamental rights shape the main content of the public ethic of modernity which contributes to the development of everyone's private morality by means of its transformation into law.⁴²⁵

It is therefore a reconciling concept, the only puzzle remaining, to determine what the meaning of the word “fundamental” in the context of this study is. On this latter point, Alexy has noticed three tendencies in approaches developed as to rights that are to be regarded as fundamental.⁴²⁶ The first one that this scholar qualifies as formal, considers that fundamental rights are rights that have been entrenched in the constitution of a country.⁴²⁷ As to the second tendency that is said to be substantive, fundamental rights are only rights that citizens possess against the state.⁴²⁸ The third one that is qualified as procedural, considers that fundamental rights are rights which are so important that their protection cannot be left only to representatives in parliament, but requires the involvement of courts in order to translate them into positive law.⁴²⁹ As this study agrees with this scholar, all three tendencies are not mutually exclusive; rather they coexist in a genuine theory of fundamental rights.⁴³⁰ Fundamental rights (even for those that are regarded as natural rights) are often found in relevant legal instruments (constitutions, international treaties or conventions, special legislation entrenched for that purpose...), and aim to safeguard their beneficiaries in either a

⁴²⁵ Martínez GPB. “Fundamental rights: Between morals and politics” in 14 (1) (2001) *Ratio Juris* 70.

⁴²⁶ Alexy R. “Discourse theory and fundamental rights” in Mendéz AJ. and Eriksen EO. (eds.) in *Arguing fundamental rights* (Dordrecht: Springer 2006) 16.

⁴²⁷ *Id.*, 16.

⁴²⁸ Alexy attributes this approach to Smith C. and Forsthoff E. *Ibid.*, 16.

⁴²⁹ *Ibid.*, 17.

⁴³⁰ *Ibid.*, 17.

negative or positive dimension against any potential perpetrator (state or private persons) and needs judicial enforcement as a guarantee for their respect or remedy.

This study finally adheres to Zemanek's conclusion in his course at the Hague Academy of International law where he suggests that in the midst of different conceptions, what is important, is to ensure, as far as possible, the uniform application of fundamental rights that have been accepted in an international convention.⁴³¹ Adherence to this view is justified here by the fact that the research work is based on the provisions of a supranational instrument, namely the African Charter, which makes it easy to identify fundamental rights that have been largely accepted on the continent and that are likely to make community participation effective in the management of mineral resources. This is particularly relevant in so much as the African Charter has embraced an integrative approach instead of a separatist one, by including all three generations of rights as enforceable rights, with the consequence that it is a legal instrument in a position to serve as a broad platform upon which all fundamental rights of affected communities, no matter the generation in which they are classified, may be safeguarded in the mineral sector. When looking at its designation, the presentation of the Charter as being one on "human and peoples' rights" suggests that each type constitutes a distinctive category of rights. Therefore, the concept of fundamental rights makes it easy to include any human or people's right in the scope of the analysis, provided that it is relevant to enforce community participation in the mineral sector.

Fundamental rights are consequently defined here as all rights contained in the African Charter that are relevant to support community participation and improve governance of mineral resources in Africa in respect of affected communities welfare. Nonetheless, though this study adheres to the interdependence theory between all fundamental rights as ascertained in article 5 of the Vienna Declaration and Program of Action adopted by the UN in 1993,⁴³² it would not be possible to look at all rights entrenched in the African Charter, but only those that have demonstrably a direct incidence on the subject matter of the study. Those selected here include the fundamental right to freely participate in government procedures as

⁴³¹ Académie de droit international (1998) 116.

⁴³² Art. 5 of section 1 of the Vienna declaration and programme of action (14-25 June 1993), UN World Conference on Human Rights in Vienna, UN Doc.A/Conf. 157/23 12/7/1993.

stated in article 13, the fundamental right to receive information in article 9, the fundamental right to self-determination in article 20, the fundamental right to freely dispose of wealth and natural resources in article 21, the fundamental right to socio-economic development in article 22, the fundamental right to environment in article 24 and the fundamental right to have his cause heard in article 7.⁴³³

2.3.2 Community participation as a fundamental right

Should community participation be approached as a fundamental right, to understand its content would require an examination of its philosophical foundation. In this respect, the need for community participation in Africa appears as a resultant of peoples' general demand for democratic governance in the process towards the realisation of development objectives.⁴³⁴ Indeed, the main contention is that because power belongs to the people that they need to exercise a certain influence and control on public matters that have a direct incidence on their livelihood.⁴³⁵ Therefore, the deduction could easily be made if democracy itself could be considered as a fundamental right. In this case, the fundamental right to participate would simply stand as a component of the fundamental right to democracy. However, the simplicity of such reasoning is challenged by arguments that refuse to see democracy as a fundamental right. Cohen contends that democracy cannot be regarded as being part of fundamental rights because the protection of this type of rights may as well exist in societies which are not necessarily democratic.⁴³⁶ Though the remark made by this scholar is pertinent, it is more appropriate to the discussion on the relationship between democracy and fundamental rights rather than the analysis of what the essence of democracy is when approached from a pure legal perspective. Here the challenge is not to compare how fundamental rights are accommodated by different systems of governance, including democracy, but rather to establish whether democracy as a concept can itself be somehow regarded as a fundamental right. If at least such an analysis can be made in respect of

⁴³³ Enumeration of these rights is done not following the order of articles in the African Charter, but according to the respective role they play in relation to community participation.

⁴³⁴ Nzongola-Ntalaja (1997) 13.

⁴³⁵ See the Arusha Declaration.

⁴³⁶ Cohen J. "Is there a Human right to democracy?" in Synowich, D. (ed.) *The Egalitarian Conscience* (Oxford: Oxford University Press, 2005) 227-228, 230,233,246.

participative democracy, it appears undeniable that at least under this perspective it is a fundamental right. This is because major fundamental rights' instruments at the international level entrenches the fundamental right to participate in the government.⁴³⁷ This latter fundamental right is the legal foundation on which people participation is grounded in democratic systems. Unfortunately cultural relativism, traditions and other factors have been taken as pretexts to reject the view that all the rights contained in these instruments have the nature of fundamental rights, a selective analysis being advocated as the best approach. This is the case of Cohen's approach that made the claim that only some substantial range of rights found in international human rights' instruments are among fundamental rights.⁴³⁸ It is in this context that though included in international instruments, this scholar reaches the conclusion that the right to participative democracy is not a fundamental right because it is not a value shared world wide.⁴³⁹ His conclusion results from the following hypothesis:

Suppose...that democratic ideas lack substantial resonance in the political culture, or the history and traditions of the country. Then the value of collective self-determination itself recommends resistance to the idea that the political society should be required to meet the standard expressed in a principle of equal basic liberties, even if we think that that standard represents the truth about justice.⁴⁴⁰

However, two arguments refute Cohen's objection. The first one is found in his own perception of fundamental rights. When defining fundamental rights as rights that are owed by all political societies in light of basic human interests and the characteristic threats and opportunities that political societies present to those interests, Cohen seems to overlook the fact that democracy as well may be among the range of these rights in a given society, in case it has "substantial resonance in the political culture, or the history and traditions of the country" in this society". Actually, instead of a generalising approach on the legal nature of democracy, Cohen's hypothesis implies that, depending on the political values proper to each society, democracy may be regarded as a fundamental right in a particular country,

⁴³⁷ Art.21 of the UNDHR, art.25 of the ICCPR, art.3 of the Protocol No 1 to the European Convention on Human rights, art.13 of the African Charter.

⁴³⁸ Cohen (2005) 230.

⁴³⁹ Id., 235.

⁴⁴⁰ Ibid., 235.

while not enjoying the same status in another one. If this relativist approach has to be adopted, Cohen's assertion that democracy is not a fundamental right cannot be taken as an absolute, because depending on the case, the concept can possess this nature.

Secondly, the ratification by many countries of most international instruments entrenching the right to participative democracy implies under international law that no matter the approach developed at domestic level, provisions for these instruments would be overpowering. Such primacy results from article 27 of the Vienna Convention on the Law of Treaties which explicitly provides that a country "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." But in practice, if this rule is easily to oppose in countries with a monistic system, this is not the case for countries with dualistic systems where provisions for an international instrument need to be further incorporated into the domestic legal system through an Act of Parliament.⁴⁴¹ Nonetheless, this Vienna Convention rule consolidates what has been the view of Zemanek according to which countries must support the uniform application of fundamental rights that have been accepted in international instruments.⁴⁴² It is in this respect that democracy and subsequently, community participation are fundamental rights at least in the African context because the right to participate directly or indirectly in the government is expressly acknowledged in article 13 of the African Charter.

Also, it would be misleading to reduce the study of community participation as fundamental right to an analysis undertaken in isolation. As one would easily agree with Cohen this time, the application of some fundamental rights requires an interpretation that goes beyond abstract language found in the instrument,⁴⁴³ and involves the essence of other fundamental rights to facilitate their apprehension. It is in this respect that one may wonder how the fundamental right to community participation may be applied if affected communities are not able to access relevant information and then have judicial support to obtain remedies where necessary. The answer to this question leads to the conclusion that the rights to access information and justice are prerequisites for an effective implementation of community

⁴⁴¹ Viljoen (2007) 530,536.

⁴⁴² Académie de droit international (1998) 115.

⁴⁴³ Cohen (2005) 230.

participation under a fundamental rights-based approach. Concerning the first one, Breillard observes that “the right to be informed comes first before any form of participation. One cannot contribute efficiently if one is not sufficiently informed.”⁴⁴⁴

As to access to justice, it has been pointed out that the right serves as a means to protect and enjoy other fundamental rights because it aims at obtaining remedies from judicial or quasi-judicial bodies.⁴⁴⁵

Therefore, when analysing the fundamental right to community participation under provisions of the African Charter, chapter four will look not only at the right to participate in the government in article 13, but as well as the right to access information in article 9 and the right for one to have his/her cause heard in article 7 which both back up the process towards effective participation.

2.3.3 Community participation as a means to guarantee other fundamental rights

As mentioned previously, the second dimension of community participation under the rights-based approach implies that it functions as a means through which other fundamental rights that are relevant to the realisation of sustainable development are to be protected in the course of mineral exploitation. But as observed above, it would not be possible to look at all fundamental rights entrenched in the African Charter. Though one way or another, all of them can have their own importance, only those that focus directly on development objectives and without which community participation would be rendered meaningless in the process towards sustainable development through mineral exploitation, are the ones considered in this study. Therefore, the list includes the right to the environment in article 24 which is traditionally viewed an imperative for development that is sustainable; the right to economic-self determination in article 20; the right to freely dispose of wealth and natural resources in article 21 and the right to socio-economic development in article 22, which all

⁴⁴⁴ Breillard M. “Direct democracy in Britain: Citizens’ empowerment or political cosmetics? in Schiller T. (ed.) *Local direct democracy in Europe* (Wiesbaden: Vs Verlag, 2011) 175.

⁴⁴⁵ Global Alliance Against Traffic in Women (GAATW) “The right to access to justice”; Available at http://www.gaatw.org/atj/index.php?option=com_content&view=article&id=105&Itemid=116 [accessed 4/5/2012].

aim at empowering people to take their destiny in their own hands throughout the development process.

Particularly, in respect of the right to freely dispose of wealth and natural resources in article 21, one open-ended question is who should really be regarded as the owner of mineral resources. This is very important because it determines the extent to which people may claim their right to exercise control over mineral transactions. Actually, the recognition of their ownership is supposed to consolidate their position to claim free disposal of mineral resources. Unfortunately, the positions adopted by countries are really divergent. The situation varies from a state's ownership,⁴⁴⁶ people's ownership⁴⁴⁷ or a mix of state-people⁴⁴⁸ or people-private ownership.⁴⁴⁹ Such disparity of positions unfortunately does not always support the relevant role that people must play in the management of natural resources. But as observed by Haysom and Kane, the most important question is finally who controls the natural resources sectors and manages benefits generated from it.⁴⁵⁰ In this respect, since all African countries are part of the African Charter, it seems that the approach adopted in this instrument must prevail, according to which the disposal of natural resources is regarded a fundamental right of African peoples. No matter the approach adopted by each country regarding the ownership of mineral resources, it is obvious that people are entitled to resort to benefits flowing from the mineral industry in the process of achieving development.

2.4 Community participation and related concepts

2.4.1 Community participation and democracy

A complete analysis of the relationship between community participation and democracy implies a discussion at the two levels of its dimensions, namely community participation as

⁴⁴⁶ DRC Constitution (2006) s. 9, Nigeria Constitution (1999) s. 44.

⁴⁴⁷ Ghana Constitution (1992) s. 257(6).

⁴⁴⁸ Ethiopian Constitution (1995) s. 40 (3).

⁴⁴⁹ See the case of South Africa where despite the ownership of the people being acknowledged, the sector remains dominated by a small group of private owners. See The Mineral and Petroleum Resources Development Act, 28 of 2002, s. 3(1).

⁴⁵⁰ Haysom N. and Kane S. "Negotiating natural resources for peace: Ownership, control and wealth-sharing" Paper presented at the Center for Humanitarian Dialogue in Lausanne (2009) 8.

an end and as a mean.⁴⁵¹ But as a prerequisite to the analysis, it is important to circumscribe the understanding of democracy in the context of this study.

Several definitions of democracy exist, but one of the most famous is that of the former President of the United States, Abraham Lincoln (1809-1865). According to Lincoln, democracy stands as the “government of the people, by the people and for the people”.⁴⁵² Often, this concept is well understood in opposition to other forms of government such as monarchy, aristocracy or oligarchy where absolute power is vested in either an individual or a small group of persons who do not legitimately reflect the choice of the people. Though Lincoln’s definition does not explain unequivocally in substance what a democratic government is, it has the merit of bringing out the central idea that, contrary to other forms, the people must be at the heart of government actions, and that the outcome of the decision-making process must reflect the expression of their will.⁴⁵³

What is particularly interesting in this definition is the three dimensions that Lincoln attached to the concept. In this first dimension which looks at democracy as the government of the people, the definition places the emphasis on the ownership of power and authority. This simply means that in a democracy, the power and authority to decide belong to the people, with the consequence that wherever they are not able to exercise it directly by themselves, those who qualify to act on their behalf, have to be genuinely mandated or delegated by the people themselves. This latter requirement is based on a legitimacy concern which in itself forms the philosophical foundation of elections in a system of representation. Because decisions relating to the formulation and implementation of public policies are to be made by those who have been democratically elected, officials who run the country must be individuals that were chosen during a fair and transparent

⁴⁵¹ Adejumbi (2008) 100; Pring G. and Siegele L. “The law of public participation in global mining” *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 267-268; Mirafab F. “The perils of participatory discourse: Housing policy in Postapartheid South Africa” in (2003) 22 *Journal of Planning Education and Research* 227.

⁴⁵² Caso A. *We the people-Formative documents of America’s democracy* (Boston: Branden Publishing, 2011) iv.

⁴⁵³ Lane JE. and Ersson S. *Democracy a comparative approach* (New York: Routledge, 2003) 2.

ballot.⁴⁵⁴ But it remains an open question whether this requirement must be contemplated as absolute. This is actually the theoretical objection generally raised against judicial review by courts when it comes to decisions made by the two other branches, contending that it would be undemocratically to have judges who are not elected, to question decisions of representatives who have been democratically elected.⁴⁵⁵

Though such an approach appears to be grounded on a rational argument, the truth is that in any genuine democratic system, the judiciary plays a vital role as courts are established with the aim to *inter alia* protect the fundamental rights of people; adding to this the fact that every member of the executive is not necessarily chosen and appointed from the list of those who are elected. As will be discussed after exploring the definition, this democratic requirement of legitimacy through election raises a serious challenge in affected communities where members' representation is still held through traditional chieftaincy acquired by heredity. The objection is that if a system of representation is to be adopted for the mineral resources governance at the local level, then members of an affected community must enjoy the right to have representatives that they have democratically chosen themselves. This stands as a strategy to ensure their participation at least indirectly.

The second dimension, democracy as the government by the people, is linked to the first one in that as the power belongs to the people, it should actually be exercised by the people themselves. This hypothesis is generally fulfilled in a system of direct or participative democracy like the one that existed in old Greece (Athens) where people themselves were directly partakers of the decision-making process. But because in a modern state, such a direct involvement of the people is not always possible, this second dimension should be broadly interpreted to include even the system of indirect democracy. This would imply that not only representatives are chosen by the people through a fair and transparent electoral process, but also that decisions and actions they take definitely reflect the will of

⁴⁵⁴ Marquez E. *My country and my people* (Quenzon City: Rex Book Store, 1998) 115.

⁴⁵⁵ For more insights on the different views, one can read Zurn CF. *Deliberative democracy and the institution of judicial review* (New York: Cambridge 2007) 132-134.

the people.⁴⁵⁶ In other words, when participating in the governance of the country directly or indirectly through representatives, the people must be able to enjoy the same results, namely to have what they want respected and implemented in respect of their development objectives. Therefore, it is clear that participation must be envisaged beyond a simple exercise of choosing representatives. Peoples must also enjoy possibilities to exercise a control over their representatives in the course of their mandate. In a representative system, it is not always obvious to assert unequivocally what the will of the people is, because once elected, representatives tend to make decisions and act according to what they believe themselves correspond to the desires of the people.

There is therefore a permanent risk of rupture in any representative system when people chosen to act and decide in the interest of the people fail to do so. Such a rupture is actually what caused the early crisis of legitimacy between African leaders⁴⁵⁷ and their people a few years after the 1960 round of independence.⁴⁵⁸ This risk of rupture is often attenuated in democratic systems through the institution of exceptional mechanisms such as referendums,⁴⁵⁹ petitions or even the possibility to have access to judicial remedies that can provide redress wherever any member of the government may have misbehaved or acted contrary to the best interest of the people.

It also is questionable whether “government by the people” can be taken as an absolute principle because sometimes there are matters that are of high technicality that they require a certain expertise. Noveck notes that “there is the belief that the public does not possess as much expertise as people in the government.”⁴⁶⁰ However, even in this case, what is

⁴⁵⁶ This is actually one of the ultimate precondition upon which representatives are often re-elected, despite the fact that ethnic considerations play as well an important role in the African context. Marquez E. (1998) 115.

⁴⁵⁷ Though many African leaders who fought for decolonisation of Africa during the 1950s and 1960s were not elected, they were trusted by their own people because they identify themselves in the fight for independence.

⁴⁵⁸ Mangu (2007) 2; Ake (1996) 4-5; Ake (1994)240.

⁴⁵⁹ Lane and Ersson (2003) 6.

⁴⁶⁰ Noveck BS. “The single point of failure” in Van Der Hof S. and Groothuis MM. (eds.) *Innovating Government: Normative, policy and technological dimensions of modern government* (The Hague: Springer, 2011) 92.

relevant for people is to get the proper explanation of what needs to be done, wherever necessary, or be able to request it.

What is important above all is to ensure that mechanisms are in place to guarantee that the people's profound aspirations are reflected in the final stage of the decision-making process. As underlined in the previous chapter, this is the main dimension that is at present lacking in the mineral sector of many African countries. Either participation is non-existent or it is so insignificant and powerless that it hardly leads to the fulfillment of affected communities' aspirations. This requirement goes in line with the third dimension which regards democracy as a government for the people. It is the highest objective of a democratic system that all governmental decisions and actions must converge towards the realisation of the people's general interests, meeting their needs and expectations. As pointed out by Knight, Chigudu and Tandon, in the view of citizens, the fulfillment of their basic needs is an ingredient of a good society.⁴⁶¹ In every democratic system, members of government have the duty to serve the people's interests, rather than their own selfish interests.⁴⁶² At times, they can only do so by consulting the people to find out what their views are on important issues raising a concern within the society.

The third dimension is so relevant because it suggests that any decision or action that threatens or violates the interests of the people must be discarded. In the context of this study, it implies that project in the African mineral sector that fails to uplift the best interests of affected communities should not be implemented. If an update is not possible, then the project should simply be put aside.

These three above dimensions found in Lincoln's definition are the crossroads where different conceptions of democracy overlap. No matter the manner in which institutions and principles are organised in respective countries, any conception of democracy is forcefully made of at least one of these three dimensions. Considering the way decisions

⁴⁶¹ Knight B., Chigudu H. and Tandon R. *Reviving democracy* (London/Sterling: Earthscan publication, 2002) 63.

⁴⁶² Marquez (1998) 115.

are taken, there is what scholars call majoritarian democracy where all decisions are taken by the use of a simple majority (51%).⁴⁶³ This majoritarian model of democracy is opposed to other types such as the one where democracy is built upon the unanimity rules;⁴⁶⁴ the consociational democracy which considers that the simple majority rule leads to the neglect of minorities in so-called divided societies (e.g ethnic cleavage) and that consensus should be institutionalised as the decision-making format through all kind of rules that lead to power sharing;⁴⁶⁵ the elitist democracy where a group of elites acquire the power to decide by means of competitive struggle for the people's vote and whose power may be limited through the use of institutions such as referendums and mechanisms set in the constitution to avoid that elitism becomes a fascism or totalitarian regime.⁴⁶⁶

There is also a distinction made between types of democracies base on the economic ideology adopted in a country. Thus, on the one hand there is the social democracy which reflects a model of democracy adopted by countries with a socialist background and which emphasises on the role of the state to ensure equality and social justice between citizens in a context where national common interests are given pre-eminence over individual ones.⁴⁶⁷ On the other hand is the liberal democracy where the intervention of the state is limited in the private sphere to actions like, for instance, protecting an individual's freedom against invasion by the group or other individuals, preserving law and order, enforcing private contracts and favouring competitive markets.⁴⁶⁸

What is common to all these models, is the fact that one way or another, they all claim to give pride of place to the people. In present days, one of the widespread models among many nations is the constitutional democracy. This is a model that combines both the

⁴⁶³ Lane and Ersson (2003) 3.

⁴⁶⁴ See the view of Buchman as explained by Lane and Ersson (2003) 4.

⁴⁶⁵ See the view of Lijphart as explained by Lane and Ersson, Id., 5.

⁴⁶⁶ See the view of Schumpeter as explained by Lane and Ersson, Ibid., 5.

⁴⁶⁷ Hinnfors J. *Reinterpreting social democracy: A history of stability in the British Labour Party and Swedish Social Democratic Party* (Manchester: Manchester University Press, 2006) 23-26; Pinkey R. *Democracy in the third world* (Colorado: Lynne Rienner publishers, 2003) 13.

⁴⁶⁸ Lumumba Kasongo T. "The problematics of liberal democracy and democratic process: lessons from deconstructing and building African democracies" in Lumumba Kasongo T. (ed.) *Liberal democracy and its critics in Africa: Political dysfunction and the struggle for progress* (New York: Zed Books, 2005) 8-9.

respect for rule of law and the active participation of people in the decision-making process according to principles established in the constitution. Here, democratic rules are defined in the constitution which is the supreme law of the country and whose provisions bind and limit everyone, from the highest state authorities to citizens. In this model, constitutional rules organise the framework and process through which decisions taken either by the exercise of direct democracy (majority in general referendum) or indirect democracy (parliamentary majority) should be regarded as valid.⁴⁶⁹ Limitations imposed by the constitution in such a context are traditionally referred to as constitutionalism, which is generally presented as a set of constitutional rules and procedures that restrain power and discretion of the government to avoid arbitrary and unfair decisions and actions by government.⁴⁷⁰ But, beyond this traditional approach to constitutionalism, there is the positive and substantive conception which emphasises values more and of which respect and protection of fundamental rights are parts.⁴⁷¹ What is particularly relevant in modern constitutional democracy is the fact that rhetorically fundamental rights of citizens are given high consideration, to such an extent that they are entrenched in the constitution. This is what Ivison qualifies as a “rights-based constitutionalism.”⁴⁷² In Mangu’s view, “rights promoted by such constitutionalism are not only individual and first-generation rights, but also collective, second and third-generation rights.”⁴⁷³ Most African countries have in their constitutions and legislation, provisions that define fundamental rights and duties of citizens, especially in their relation to their government and public officials. Unfortunately, in practice most of these rights are not given effective consideration in the mineral sector of many African countries when it comes to addressing the situation of affected communities.⁴⁷⁴

⁴⁶⁹ Mangu AMB. “Challenges to constitutionalism and democratic consolidation in Africa” (2005) 24 (3) *Politeia* 315-334.

⁴⁷⁰ Magstadt TM. *Understanding politics* 9th ed. (Boston: Wadsworth, 2011) 80.

⁴⁷¹ Mangu AMB. “Challenges to constitutionalism...” (2005) 319.

⁴⁷² See Ivison as quoted by Mangu AMB “Challenges to constitutionalism....” (2005) 318.

⁴⁷³ *Id.*, 319.

⁴⁷⁴ In this regard, one should refer to the historical background made in the Chapter one.

What is relevant to keep in mind at the end of this section is that the real dilemmas in the context of this study touch on which form of democracy would be appropriate between an indirect democracy and a direct democracy and, in case this latter form is to be adopted, through which decisional-mechanism (majority, unanimity or consensus rule) affected communities would express their views in the governance of mineral resources. Because direct democracy is in substance rooted in the principle that people must get involved in the decision-making process of public-matters, the temptation would be great for one to quickly conclude that it is the appropriate form to sustain community participation in the African mineral sector. But as will be demonstrated later, a mid-path approach seems the best solution to adopt in order to have a system of governance that is balanced. Such a balance would be necessary to prevent or attenuate negative aspects of both systems. This is why most modern democratic regimes are made of rules that mix different elements of direct democracy with those of indirect democracy, with the view to guarantee citizens the enjoyment of their fundamental rights.⁴⁷⁵ This mixed approach corresponds to the practice found in the Niger delta and the South African Bafokeng community. Because, the number of villages affected by the project is at times high, the company establishes discussions with representatives while these latter ones return and discuss relevant questions in their respective group or village with all members.⁴⁷⁶

Now that a general perception of democracy in this study has been reviewed, its relation to community participation can easily be discussed both as an end and as a means. The question relates to the relationship with democracy to be established under these two perspectives.

2.4.1.1 Community participation as an end and democracy

Firstly, in its perspective as an end, one should notice that participation is the essence of democracy.⁴⁷⁷ Indeed, the second dimension of Lincoln's definition adopted in this study

⁴⁷⁵ Colombo A. *The principle of subsidiary and European citizenship* (Milano: Vito e Pensiero, 2000) 27.

⁴⁷⁶ Faleti (2008) 11-12.

⁴⁷⁷ Rueschemeyer D., Rueschemeyer M. and Wittrock B. "Conclusions: Contrasting patterns of participation and democracy" in Rueschemeyer D., Rueschemeyer M. and Wittrock B. (ed.) *Participation and Democracy East and West: Comparisons and Interpretations* (New York: M.E. Sharpe, 1999) 282.

suggests that democracy is the government by the people. This has the triple implication that the power belongs to the people, and that it should actually be exercised by themselves and that wherever the people are not able to exercise it directly, those who qualify to do it on their behalf must be mandated or delegated by them. Viewed like this, democracy corresponds to participation as an end because this latter becomes a finality of the former and requires that institutional arrangements be provided with participatory mechanisms through which the people are empowered to define or discuss policy, programmes or even projects and make sure that decisions and actions taken reflect their will. Contextualised in the mineral sector, this requirement means that institutional mechanisms must exist through which affected communities would enjoy the opportunity to democratically exercise their prerogatives in respect of mineral projects, either by themselves or through representatives that they have freely chosen and to such extent that they may be impacted. This is what several scholars have called the democratisation of natural resources governance to mean the process through which the past authoritarian model of management must give way to the devolution of power to communities that enables them to effectively influence decision-making at local level.⁴⁷⁸ In this respect, the main issue to reflect on is what the appropriate form of democracy is in order to make community participation more effective in mineral activities taking place at local level?

The kind of participation and the extent to which it must be allowed is a challenge faced by all democratic regimes.⁴⁷⁹ In old societies, democracy has been generally conceived as a direct involvement or participation by people.⁴⁸⁰ But nowadays, this form is said to be impossible to realise because of the large size of modern states and also the complexity

⁴⁷⁸ Nelson F. "Conservation and citizenship: Democratizing natural resource governance in Africa" in (2010) 17 *Policy Matters* 233-234; Rihoy E. and Maguranyanga B. "Devolution and democratisation of natural resource management in southern Africa: A comparative analysis of CBNRM policy processes in Botswana and Zimbabwe" Commons southern Africa occasional paper series No.18 Centre for Applied Social Sciences University of Zimbabwe (March 2007) 2.

⁴⁷⁹ Simth (2011) 33.

⁴⁸⁰ See the case of the old Greece and also the institution of "community palaver" existing in pre-colonial Africa. Hansen (2005) 2; National Research Council (U.S.) *Democratization in Africa: African views, African voices : summary of three workshops* (National Academies, 1992) 7.

attached to some issues of public interest.⁴⁸¹ Regarding this objection, a contemporary argument has emerged according to which no matter the country size, direct democracy can be realised thanks to new technologies.⁴⁸² This solution is less applicable to African countries where many people in rural areas yet struggle to have access to new technologies. Nevertheless, direct democracy is still feasible at the local level where people are not many in number as in the ancient Athens.⁴⁸³ But even in this case, the complexity of some matters challenges the direct involvement of people at the local level. As previously mentioned, at times there is the presumption that officials serving in the government have much more expertise than ordinary people.⁴⁸⁴ This concern is particularly relevant in the context of African rural communities because technical aspects encountered in mineral projects require a certain level of education. Numbers of people within these communities are still uneducated and there is a risk to compromise on the *raison d'être* of community participation. Though one may agree with Kimani that affected communities must scrutinise all relevant aspects of mineral agreements,⁴⁸⁵ it is a fact that they need to acquire the minimum knowledge that would enable them to do it appropriately. Otherwise, the blind application of democratic principles in the decision-making process would lead to a negative outcome. In this respect, Stevens contends that the substance of democracy is not just about translation of public opinion into decision and that:

making by the majority can in fact be undemocratic when the majority of citizens are uninformed about particular issues and about the likely consequences of the policies or laws that they are supporting.⁴⁸⁶

Affected communities need not only possess the necessary information but also have a clear understanding of what the implications of mineral projects are. They must first be aware of what their fundamental rights are, then be able to evaluate the extent to which

⁴⁸¹ Schiller T. "Local direct democracy in Europe" in (ed.) Schiller T. *Local direct democracy in Europe* (Wiesbaden: Vs Verlag, 2011) 9.

⁴⁸² Van de Donk Wim BHJ and Tops PW. "Ovrell or Athens? Informatization of democracy and the future of demomocracy? A review of literature in van de Donk Wim BHJ., Snellen ITM. (eds.) *Orwell in Athens: A Perspective on Informatization and Democracy* (Amsterdam: IOS Press, 1995) 16.

⁴⁸³ Hansen M.H. (2005) 45; Mair (1961) 2.

⁴⁸⁴ Noveck (2011) 90.

⁴⁸⁵ Kimani (2009) 4.

⁴⁸⁶ Stevens D. "Deliberative democracy, public policy and effective citizens participation" (2008) *Bioethics Matters* 3.

these rights are given consideration in the project and learn how they should claim them whenever they are infringed or not fulfilled.

Therefore because of the major problem of illiteracy existing in many African countries, there is a great temptation to argue that indirect democracy is the appropriate arrangement within which community participation must take place.⁴⁸⁷ In the view of the World Bank, having all members of the affected community at the negotiation table is impractical. The Bank's suggestion is that only representatives should be involved in close discussions with other stakeholders, while the whole community should wait for public meetings in which their leaders report to them.⁴⁸⁸ However, even in this case, at the stage of representation, there are also serious dilemmas. Firstly, it has been observed that for outsider actors like multinational corporations, it is not always easy to identify the appropriate representatives of the community because of different factors like for instance political considerations, ethnicity and gender.⁴⁸⁹ Secondly, there is the fact that representatives may be subjected to corruption. For instance, it has been noticed that where representation has been carried out by traditional chiefs, affected communities have gradually developed a certain distrust of their representatives who they have accused of being corrupted to keep quiet regarding projects that are opposed to their rights and interests.⁴⁹⁰ In 2010, Shell and its subsidiaries were found liable under US law and paid fines of up to 48 million US dollars for being involved in transactions where money was used to bribe Nigerian officials.⁴⁹¹ Moreover, at the early stage of MoUs implementation, members of the Niger Delta communities involved in these agreements complained that profits were only flowing to the leaders

⁴⁸⁷ Noveck (2011) 90.

⁴⁸⁸ World Bank (2012) 42.

⁴⁸⁹ Id., 42.

⁴⁹⁰ Akabzaa T. 'Exploitation minière au Ghana : Répercussion sur le développement économique et la réduction de la pauvreté' in Campbell B. (ed.) *Ressources minières en Afrique: Quelle réglementation pour le développement?* (Quebec: Presses de l'Université de Quebec, 2010) 35. See also the case of communities living in Walikale in DRC. UNDP "Territoire de walikale/Rapport de consultation (5-8 Mai 2008)" 27; Available at <http://www.cd.undp.org/Downloads/rapport/walikale%20consultation%20report%20final2.pdf>, [accessed on 20/6/2012].

⁴⁹¹ Essex Business and Human rights projects "Corporate liability in a new setting: Shell and the changing landscape for the multinational oil industry in the Niger Delta" (2013) 28-30; Available at http://www.essex.ac.uk/ebhr/documents/niger_delta_report.pdf [accessed on 15/6/2013].

instead of benefiting the whole mass of the people.⁴⁹² Later on, when Chevron tried to change its approach by acting through established Community Regional Development Councils,⁴⁹³ traditional leaders started to complain that they felt marginalised and openly claimed losing homage payments and direct contact with the company.⁴⁹⁴ This example just illustrates how sensitive the issue is and how risky it may be to have a system that is exclusively representative.

The conducting of interviews and research questionnaires undertaken in this study has revealed that people living around mineral sites all agree that an affected community must participate. Views are however divergent as some contend that the whole community must be involved in discussions and decisions because they are the ones suffering indirect effects of mineral exploitation, while others contend that for practical reasons, participation should only take place under the auspices of communities' representatives that have been chosen.

Actually, despite its inconveniencies, direct democracy remains the best system in which affected communities may effectively share a feeling of taking a real involvement in the decision-making process. But because in the present context of Africa and because of the technical nature of certain issues, a balance needs to be found with indirect democracy. This equals what Ouguerouz identifies as a "semi-direct democracy" which means a system that combines both types of democracy, where power is exercised by representatives, but with the possibility in certain circumstances of having direct intervention by affected people.⁴⁹⁵ This is the position embraced in this study. Affected communities should work through their representatives on aspects which appear complex, but their members must be provided with the possibility to directly discuss aspects that do not require much understanding⁴⁹⁶ and to hold accountable *a posteriori* their representatives in respect of decisions that have been taken. Nevertheless, even in such a balanced system, another issue to solve would be the mode of decision whenever members of affected communities participate directly. Here, the

⁴⁹² Faleti (2008) 12.

⁴⁹³ These are structures established by Chevron in 2006 through which it interacts with communities. They are run by people appointed from these communities and no more traditional representatives. Faleti, Id., 20.

⁴⁹⁴ Ibid. 24.

⁴⁹⁵ Ouguerouz (2003) 176; see also Du Plessis who contend that representative democracy needs to be supplemented sometimes by the direct involvement of citizens. Du Plessis (2003) 7.

⁴⁹⁶ Example, how royalties are supposed to be allocated to development projects.

easiest way is to first attempt to find consensus, and then if this fails, recourse to majority rule, but always with the possibility for minorities to seek redress *inter alia* before a judicial body in case the majority decision is abusive. As to the unanimity rule, it must be set aside because the possibility to reach a unanimous point of view is always limited in every human society or group. In the same vein, the practicability of direct participation is also dependent on whether or not the number of members in a given community is not very high. Otherwise, it might delay the decision-making process and thus negatively impact on the national investment climate.

To successfully achieve the empowerment of people at the grassroots level, organisations that work closely with affected communities (for instance, political parties, CSOs and international donor agencies) must help communities to acquire the necessary knowledge that will enable them to watch over their rights and interests in the governance process regarding mineral resources. As will be seen later in this study, on the continental scale, the African Commission has a promotional mandate to inform African peoples of rights included in the African Charter and to make them aware of what the enforcement procedures at their disposal are.⁴⁹⁷ This should be used as a relevant tool to increase the level of literacy all over the continent, especially with regard to the protection of fundamental rights in the mineral sector. This is part of the capacity building process of affected communities.

2.4.1.2 Community participation as a means and democracy

The relationship with democracy results from the fact that this latter system is the better one under which the goals attached to participation can be achieved. Ako and Uddin aptly observe that it is within a politically democratised context that equity, accountability, participation and freedom are best guaranteed or at least promoted.⁴⁹⁸ As mentioned previously, community participation must supposedly generate the community members' opinions regarding what should be objectives that need to be realised, how resources to achieve them must be allocated, how members of the community must share in benefits and how they perceive or assess mineral projects proposed or already established against those defined objectives.

⁴⁹⁷ Art. 30 of the African Charter.

⁴⁹⁸ Ako R. and Uddin N. "Good governance and resource management in Botswana FN. (ed.) Africa" in *Natural resources investment and Africa's Development* (Cheltenham: Edward Elgar Publishing, 2011) 24.

Obviously, this is possible only in a system where the freedom of expression is guaranteed.⁴⁹⁹ Actually, when one considers the fact that community participation as envisaged here rests on an approach based on fundamental rights, it is clear that it would be viable only in a system that is supportive of fundamental rights. It has been contended that a clash between democracy and fundamental rights may exist in that the former can sometimes limit the latter.⁵⁰⁰ The proponent of this view, Gould, gives the example of capital punishment that is still applied in the USA as a result of democratic freedom and which constitutes a blatant violation of the fundamental right to life.⁵⁰¹ Though this remark is relevant, it is not enough to establish incompatibility between both concepts. Actually, in a comparative perspective, one should quickly notice that conditions to achieve an effective and meaningful participation, and the aims attached to it, are more fulfilled in a democratic regime than in authoritarian regimes. Indeed, not only the experience demonstrates that fundamental rights' violations have been less present in democratic regimes than in authoritarian ones, the freedom of expression which is at the root of participation is guaranteed only under democratic principles.⁵⁰² Therefore, community participation can be best achieved preferably in a democratic system.

2.4.2 Community participation and decentralisation

Community participation can effectively take place only in a country where governance is decentralised. This is because the concept of community participation as approached in this study implies that power is bestowed upon affected communities to express and enforce their views and to protect their rights and interests in mineral projects. A study made by a group of researchers under the auspices of the UNDP led them to the conclusion that participation is

⁴⁹⁹ In the Arusha Declaration, it has been contended that “for people to participate meaningfully in their self-development, their freedom to express themselves and their freedom from fear must be guaranteed” s. 17.

⁵⁰⁰ Gould CC. *Globalizing democracy and human rights* (Cambridge: Cambridge University Press 2004) 185.

⁵⁰¹ *Id.*, 185.

⁵⁰² Johnson DT. and Zimring FE. *The next frontier: National development, political change, and the death penalty in Asia* (New York: Oxford University Press, 2009) 345.

efficient when practiced through institutionalised channels and that effective commitment to participation produce positive results.⁵⁰³

As for democracy, several attempts to define the concept of decentralisation exist. Livack, Ahmad and Bird define the decentralisation as “the assignment of fiscal, political and administrative responsibilities to lower levels of governments.”⁵⁰⁴ Crawford and Hartmann consider that the notion “entails the transfer of power, responsibilities and finance from central government to sub-national levels of government at provincial and/or local levels.”⁵⁰⁵ These scholars all share the view that decentralisation is not easy to define because it may take different forms and dimensions. While Livack, Ahmad and Bird observe that a wide variety of institutional arrangements may be encompassed under the label of decentralisation and operate at the same time within a country,⁵⁰⁶ Crawford and Hartmann point out that one main controversy in understanding decentralisation since the 1980s relates to the issue of whether the concept should be limited to the vertical dimension including the transfer of some power, competencies and resources from the centre to the local level, or should it also embrace the horizontal dimension that involves dispatch of power, competencies and resources at a specific level of government.⁵⁰⁷

In the midst of all this ambiguity, what needs to be kept in mind is the main idea that no matter the form of decentralisation that is arranged in a particular country, it always implies the transfer of authority with some degree of autonomy from the centre of government to another level that is much lower.⁵⁰⁸ It is also important to notice that decentralisation must not be confused with the concept of deconcentration. This is because deconcentration implies that

⁵⁰³ Work R. “The role of participation and partnership in decentralised governance: A brief synthesis of policy lessons and recommendations of nine country case studies on service delivery for the poor” (UNDP 2006) 12; available at

<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan006230.pdf> [accessed on 15/6/2013].

⁵⁰⁴ Livack J. *et al.* *Rethinking decentralization in developing countries* (Washington: World Bank Publications, 1998) 4.

⁵⁰⁵ Crawford G. and Hartmann C. “Introduction: Decentralisation as a pathway out of poverty” in Crawford G. and Hartmann C. (eds.) *Decentralisation in Africa-A pathway out of poverty and conflict?* (Amsterdam: Amsterdam University Press, 2008) 1.

⁵⁰⁶ Livack *et al.* (1998) 4.

⁵⁰⁷ Crawford and Hartmann (2008) 8.

⁵⁰⁸ Livack *et al.* (1998) 4.

the central government does not release some of its responsibilities, but only exercises them through its regional or provincial branches. Public officers that hold power in such a context at local level are not autonomous and independent; they merely represent and act on behalf of the central government. In this case there is no real transfer of authority, but simply a representation of the central government at the local level.⁵⁰⁹ But decentralisation always involves a real transfer of authority to local level, to such an extent that local governments enjoy some degree of autonomy vis-à-vis the central government in the decision-making of certain particular matters. Livack, Ahmad and Bird observe that the said decentralisations that have taken place in many unitary countries are in reality deconcentration because they have not been accompanied by a transfer of power to local governments.⁵¹⁰ Meynen and Doornbos make the same observation and affirm that in a number of recent examples, especially in West African countries, decentralisation often amounts to a selective deconcentration of state functions under the continued control of the centre.⁵¹¹ Many African countries have recognised decentralisation on paper, but the central government practically maintains important powers and a high degree of control at local level.⁵¹² Regarding the four countries selected in this study, though they all have well established local governments, the effective implementation of decentralisation principles as a means to tackle poverty issues is still an ongoing challenge in all of them because of the continuous tendency of the center to maintain a considerable control over local matters. Even in South Africa which is often considered as an example of relative success in this area, it has been noticed that because of the African National Congress' desire to ensure central government control over the development planning processes in rural and urban areas, there has been a stark contrast between the governance theory that emphasises decentralisation within the constitution⁵¹³ and

⁵⁰⁹ Id.

⁵¹⁰ Ibid. (1998) 4.

⁵¹¹ Meyen W. and Doorbos M. "Decentralizing natural resources management: A recipe for sustainability and equity?" in Ribot J.C. and Larson A.M. (eds.) *Democratic decentralization through a natural resource lense* (London: Routledge, 2005) 242. See also Olowu D. "Decentralization in Africa: Appraising local government revitalization in Nigeria" in Nzongola-Ntalaja G. and Lee MC. *State and democracy in Africa* (Harare/Trenton: Africa Words Press, 1997) 165.

⁵¹² Wunsch (2008) 7-8; Meyen and Doorbos, Id., 242; Olowu, Id., 165. Few exceptions include countries like for instance, South Africa, Uganda, and Mozambique.

⁵¹³ Ss. 151-164 of the South African Constitution (1996).

the high degree of interference in local government matters.⁵¹⁴ In Nigeria, it was pointed out that local governments have so far played a minor role in economic development matters, with minimal or no input in planning or implementation of development projects, and the state and federal agencies being dominant.⁵¹⁵ In Zambia, despite a good performance in decentralisation of the public health sector, interference by the central government in revenue resources due to city councils has been a serious concern for the fiscal capacity of local entities.⁵¹⁶ As to the situation in DRC, the central government and local governments are still fighting about the 40% of national resources that provinces are supposed to retain according to article 175 of the 2006 Constitution.⁵¹⁷

Depending on the manner and the extent to which authority and power are transferred, decentralisation is often viewed under the subtypes of devolution and delegation.⁵¹⁸ If it is generally accepted that devolution corresponds to political decentralisation,⁵¹⁹ it is unclear from these scholars' writings what the equivalent for delegation is. In this regard, Gregersen, Contreras-Hermosilla, White and Phillips regard delegation as a component of administrative decentralisation.⁵²⁰ Moreover, while Livack, Ahmad and Bird support the existence of a fiscal decentralisation as a subtype, Crawford and Hartmann consider that it is not a third one, but just a cross cutting element of political and administrative decentralisations.⁵²¹

Delegation is actually a mid-path to full decentralisation in that it implies the transfer of authority and power for decision making to local governments or organisations that are not

⁵¹⁴ US Agency for International Development "Comparative assessment of decentralisation in Africa: South Africa desk study" (June 2010) 5, 6 and 10; Available at: http://pdf.usaid.gov/pdf_docs/PNADX211.pdf [accessed on 19/68/2013]

⁵¹⁵ Id., 8.

⁵¹⁶ Hampway G. "The limits of decentralisation in urban Zambia" (2008) 19 *Urban forum* 355.

⁵¹⁷ Ngoma-Binda P., Otemikongo Mandefu Yahisule J. And Moswa Mombo L. *République Démocratique du Congo Démocratie et participation à la vie politique: Une évaluation des premiers pas dans la IIIème République* (Johannesbourg : Afrimap/Osisa 2010) 221-223.

⁵¹⁸ Livack *et al.* (1998) 4.

⁵¹⁹ Crawford and Hartmann (2008) 8; Livack *et al.* (1998) 4; Gregersen H. *et al.* "Forest governance in federal systems: an overview of experiences and implications for decentralization" paper presented at a workshop on decentralization in forestry in Interlaken Switzerland (27-30 April 2004) 4.

⁵²⁰ Gregersen H. *et al.*, Id., 4.

⁵²¹ Livack *et al.* (1998) 4; Crawford and Hartmann (2008) 9.

wholly under central government control, but that are definitely accountable to it.⁵²² In this type, local governments enjoy a high degree of autonomy, but they are not fully independent because they must report to the central government in connection to the general objectives and guidelines defined by the centre.⁵²³ Fiscal decentralisation implies that the power to tax, previously held by the central government, is partially transferred to local governments within the country.⁵²⁴ This subtype is particularly relevant in a developmental model of decentralisation because it enables local communities to mobilise or generate funds through their local structures to achieve sustainable development initiatives. Put in the context of mineral exploitation, it implies that mineral companies would start paying a part of the royalties directly to affected communities, instead of them waiting for a retrocession from central government. The suitability of such mechanisms is discussed in the coming section addressing the relationship between decentralisation and community participation. Political decentralisation or devolution constitutes the highest level of decentralisation in as much as the central government transfers the power and authority for decision-making to “quasi-autonomous units of local governments”.⁵²⁵ Here local governments, without reaching the level of political self-determination, enjoy a greater autonomy than in the delegation, with the consequence that they have for instance, enough discretion to raise their own revenues and make investment decisions.⁵²⁶

It is important to note that the *leitmotiv* of decentralisation in the field of natural resources resides in developmental reasons. Its supporters generally contend that decentralisation contributes to the sustainable management of resources and to poverty alleviation in so far as it enhances the effective participation of marginalised groups in decision-making and thus, creates an opportunity for good governance practices through the possibility to make rulers accountable.⁵²⁷ It increases efficiency, participation and good practices that lead to a better

⁵²² Livack *et al.*, Id, 5-6.

⁵²³ *Ibid.*, 5-6.

⁵²⁴ Gregersen *et al.* (2004) 4.

⁵²⁵ Livack *et al.* (1998) 6.

⁵²⁶ *Id.*, 6.

⁵²⁷ Larson AM. and Ribot JC. “Democratic decentralisation through a natural resources lens” An introduction” in Ribot JC. and Larson A.M. (eds.) *Democratic decentralization through a natural resource lense* (London:Routledge, 2005) 2.

and more sustainable management of natural resources and thus, to poverty alleviation.⁵²⁸ This means that it is a relevant element in the process toward improving the governance of natural resources because it is set to contribute to the achievement of sustainable development within African countries. Southgate and Hitzhusen note that in many third world countries, the involvement of affected communities in decision-making before implementation has not taken place because government officials often operate on a level which effectively separates them from these communities, a situation which, they rightly conclude, precludes effective dialogue.⁵²⁹ In the field of natural resources, Larsen and Ribot note that decentralisation hardly occurs in developing countries, either because of central government resistance or because of the failure of local entities receiving powers to be accountable for.⁵³⁰ This has been particularly true in respect of the mineral sector where for very long most African governments have promoted a high centralised system of governance, seeing it as a way to affirm their sovereignty over natural resources.⁵³¹ In Nigeria, Zambia and the DRC the mineral sector is still under considerable control of the central government, with the consequence that local communities still struggle to have access to natural resources and profits they generate because management is still overcentralised.⁵³² Particularly in Nigeria, though the Mineral Act requires the consent of the owner or occupier of the land prior to the deliverance of a mineral license, the governor of the province in which the mineral rights are to be granted enjoy the discretion to revoke any right of occupancy within sixty days of the granting in accordance with section 28 of the Land Use Act, otherwise the license can be granted with exclusion of the land concerned.⁵³³ In Zambia also, though the mineral law requires prior consent of the head of the community, the practice has often failed to consider this aspect, the government being the one having final say on the approval of

⁵²⁸ Id., 2.

⁵²⁹ Southgate DD. and Hitzhusen FJ. "Economic analysis of renewable conservation in the third world" in Southgate DD. and Disinger JF. (eds.) *Sustainable resource development in the third world* (Boulder and London: Westview Press, 1987) 89.

⁵³⁰ Larson and Ribot (2005) 1.

⁵³¹ See the World Bank "Strategy for African Mining" Technical paper (World Bank, 1992) xi. After independence, many African countries created state owned companies to maintain a permanent control over the mineral industry. World Bank (2011).

⁵³² In these countries, the authority to take major decisions in the sector is vested in members or departments of the central government (ss. 9-10, 12, 16 of the DRC mining code (2002), ss. 4-5 of the Nigeria Minerals and Mining Act (2007), 9, ss. 3,83 of the Zambia Mines & Minerals Act No 31 (1995).

⁵³³ See ss. 22 (2) and 100 of the Nigeria Minerals and Mining Act (2007).

mineral projects.⁵³⁴ In South Africa, despite the high prevalence of private ownership of mineral resources,⁵³⁵ the central government exercises a dominant influence in the granting of licenses.⁵³⁶ However, there is an exception established in section 104 of the Mineral and Petroleum Resources Development Act (2004) where a community may request and obtain from the minister in charge of the mineral sector a preferent right to prospect or mine, provided that the land is or is to be registered in its name and that the exercise of the right will be used to promote development and social upliftment in the said community. If this right is granted, the community will be the one dealing directly with the mineral company. As already observed, it is thank to this mechanism that the Bafokeng community has been able to establish its control over the exploitation of platinum by Impala in the post-apartheid era. However, this mechanism is not satisfactory at all because it may easily establish discrimination between affected communities as those unable to prove ownership on the land would not enjoy the same right.

This general state of affairs in mineral resource-rich countries easily opens the door to conflict between affected communities and their rulers whenever fundamental rights are not considered in projects.⁵³⁷ The possibility of such antagonism explains that what was sought in the Arusha Declaration was actually the transfer of the over-centralised power from the centre to the majority of people at the grass root level, with the intention to foster development. Participants to the Declaration observed that the political context of socio-economic development has been characterised by impediments to the effective participation of the overwhelming majority of the people in social, political and economic development, with the consequence that the motivation of the African people to contribute their best to the development process has been severely constrained and curtailed.⁵³⁸ In this regard,

⁵³⁴ Boocock CN. (2002) 27. However, as already pointed out the commitment to shift its approach was express by the Zambian government in its decisions against Mopani Copper Mine in which it was decided that affected communities and CSOs must be included in the renegotiation rounds. Lee R (2012).

⁵³⁵ Two third of mineral rights are privately owned, the remaining part being vested in the State. See Mbedi information service “Mining in South Africa: Overview”; Available at <http://www.mbedi.com/indy/mining/af/sa/p0005.htm> [accessed on 22/2/2012].

⁵³⁶ Ss. 14, 17 and 104 of the South African Mineral and Petroleum Resources Development Act 28 of 2002.

⁵³⁷ The best illustration is still the *Ogoni* case where the Nigerian government chose to prioritise the interests of the oil company instead of protecting those of its people.

⁵³⁸ Arusha Declaration s. 6.

decentralisation was said to be a prerequisite for effective participation, because it creates avenues for initiatives and actions from people at the grass root level.⁵³⁹ Nowadays, most African countries adhere to the Arusha Declaration discourse, however the issue of fiscal decentralisation remains part of the puzzle where African countries have applied diverse solutions, with a great tendency to maintain funds centralised at the national level.⁵⁴⁰ In DRC, Nigeria and Zambia, royalties are paid directly to the central government,⁵⁴¹ while in South Africa a hybrid system is used with the possibility of part of the money being paid directly to the affected community.⁵⁴² No matter what the explicit arrangements made in the legislation of these countries are, the final report of the MMSD has reached the conclusion that weak local governance and complex fiscal disbursement mechanisms at the central level makes it difficult for affected communities to obtain funds which should serve the realisation of development projects.⁵⁴³ For instance, in Nigeria, a study made by the African Network for Environment and Economic Justice noted that before 2000, only three to five percent of royalties were returned to the affected communities, and that only after this time the portion was revised upward to reach 13 percent.⁵⁴⁴ The same report noticed that, at times there was no clear indication of how the money was utilised.⁵⁴⁵ Because similar situations exist in other African countries, including the four ones studied here, there is now a high demand for restructuring to provide clear and transparent mechanisms for affected communities to have access to funds needed to finance their development.⁵⁴⁶ Which institutions should intervene in the management of royalties and how affected communities' priorities in development should be considered, are the critical challenges facing the issue of restructuring. Mineral

⁵³⁹ Arusha Declaration, s. 23, para. 3.

⁵⁴⁰ Otto *et al.* (2006) 201.

⁵⁴¹ Decree n° 038/2003 regulating the application of the DRC Mineral code (2003) ss. 526-527; Zambia Mines and Minerals Act No 31 (1995) ss. 66 and 67; Nigeria Minerals and Mining Act (2007) s.33.

⁵⁴² Mineral and Petroleum Resources Development Act 28 of 2002, s. 104.

⁵⁴³ International Institute for Environment and Development "MMSD final report (2002)" 210, Available http://www.sdsg.org/wp-content/uploads/2011/06/MMSD-Final-Report_Local-Communities-Mines.pdf [accessed on 25/2/2013].

⁵⁴⁴ African Network for Environment and Economic Justice *Oil of poverty in Niger Delta* (Benin City: ANEEJ 2004) 14-15.

⁵⁴⁵ *Id.*, 14-15.

⁵⁴⁶ Williams D. "Use royalties for communities" (21/2/2013); Available at <http://www.timeslive.co.za/thetimes/2013/02/21/use-royalties-for-communities> [accessed on 25/2/2013]; African Network for Environment and Economic Justice (2004) 3; Bineta M., *supra* note 15; Campbell (2010) 204.

companies prefer to pay a portion of royalties directly to affected communities, as these funds are deductible, rather than commit additional funds for social upliftment. However, these companies are at times afraid of such direct payments as it is fraught with trouble and conflicts that could easily lead to political instability.⁵⁴⁷ Faced with such a risk, it is important that arrangements made in African countries find the right balance in order to avoid situations of conflict, while ensuring that affected communities exercise a certain degree of control over what should be their share and enjoy *per se* necessary resources to fund their development projects. Control of royalties by affected communities is very important in any arrangement, particularly because of the high propensity to corruption widely encountered in the mineral sector of many African countries. The MMSD final report suggests that “revenue distribution should be decided through equitable decision-making structures involving representatives of the affected stakeholder groups.”⁵⁴⁸ Because of the opaque situation existing in the management of mineral revenues of many African countries, when the EITI was launched in 2002, a new rule which obliged its member states to publish what they received from mineral corporations was established.⁵⁴⁹ Recent country reports reveal that Nigeria received 68,442,328,000.00 US\$ for 2011, DRC 875,938,727.00US\$ and Zambia 758,825,945.00US\$.⁵⁵⁰ But South Africa is not yet part of this initiative. What is unfortunate about these reports is the fact that they contain no information as to how much was returned to affected communities and whether part of these funds were used to support development within these communities.

All the above remarks lead one to observe that wherever the central government continues to exercise strong control over the decision-making process and ensuring service delivery at local level, one cannot speak of decentralisation. Moreover, wherever local representatives fail to properly fulfill their mandate to be accountable to local communities, it is quite impossible for the decentralisation process to bear a positive outcome because such a situation leads undeniably to a rupture between local government and members of the local community. Concerning mineral revenues, there is structural work to be done in African

⁵⁴⁷ Otto *et al.* (2006) 205, 207.

⁵⁴⁸ International Institute for Environment and Development, *supra* note 542, 211.

⁵⁴⁹ EITI rules (2011).

⁵⁵⁰ EITI countries reports. Available at <http://eiti.org/countries> [accessed on 25/2/2013].

resource-rich countries if one really wants to see fiscal revenues from the mineral sector benefit development within affected communities. Decentralised structures through which affected communities may access benefits generated by the mineral industry must be clearly defined and their functioning well regulated. But in any case, despite the imperative of community participation and no matter the form of decentralisation that has been adopted by a country in respect of mineral resources governance, the central government must see to it that the equilibrium is maintained between different provinces or communities in the process of development. This is because all areas of a country are not always endowed with the same quantity of mineral resources, tension may arise between communities as it has been the case in the Niger Delta.⁵⁵¹ As aptly underscored by Limpitlaw, while the mineral industry can have positive insights into the development processes, there is, however, in the absence of proper redistribution, the risk that benefits accrue only to a small portion of the population and generate what can be seen as “islands of development”.⁵⁵² This is why community participation as envisaged in this study must not lead to the full autonomy of affected communities in the development process. Their development objectives must fit in the general development process of the country, and for this the central government must necessarily play the role of a referee. The situation is well described in UNDP’s words that conclude that:

it is imperative that governments address the challenge of balancing these somewhat contradictory realities in a manner that recognizes both the virtue of devolution of power, authority and resources to lower levels and the importance of realizing the mundane goals of national development as defined by central authorities.⁵⁵³

The implementation of community participation through decentralisation must therefore strictly adhere to this necessity to maintain a general balance between local interest and those of the whole country.

⁵⁵¹ See the case of communities living in the Niger Delta as described by Human Rights Watch and Obi. Human Rights Watch “The Niger Delta: No democratic dividend (22 October 2002); Available at: <http://www.unhcr.org/refworld/docid/45d2f73a2.html>[accessed 19 February 2013]; Obi C. “Oil extraction, dispossession, resistance, and conflict in Nigeria’s Oil-Rich Niger Delta” 30 (1-2) (2010) *Canadian Journal of Development Studies* 229.

⁵⁵² Limpitlaw (2004) 7.

⁵⁵³ UNDP “Local governance and poverty...(2002) 30.

2.4.3 Community participation and accountability

In democratic systems, when people choose their rulers, it is with the hope that they will act and work towards settling issues and challenges faced within the society. This not only implies that they must work for their people's interests, but also that they must demonstrate competency and be ready to justify their decisions. Thus, accountability should be understood as the process through which individuals or institutions holding power take responsibility and provide explanations for their decisions and actions, with positive or negative sanctions being attached depending on what the consecutive results are.⁵⁵⁴ Community participation serves accountability because it puts people that are affected by decisions in a position to control whether decisions taken by their rulers are consistent with their fundamental rights and best interests. Accountability is actually viewed as part of government responsiveness because it supposes that some individuals have acted on the behalf of some others and that these latter want to check whether things have been done correctly.⁵⁵⁵ It is the tool that the people use to assess the responsiveness and effectiveness of their government. According to Arat, the extent to which a government is responsive and effective to meet popular demands is likely to either reinforce or weaken its legitimacy.⁵⁵⁶ The more rulers implement policies and decisions that respect and secure fundamental rights and interests of people, the more they sustain their legitimacy. On the contrary, such legitimacy is threatened and may even totally disappear despite the fact that individuals holding power emerged from elections.⁵⁵⁷ In as much as community participation is a bottom-up exercise, one should notice that it implicitly has a connection with the notion of social accountability which includes the idea of social mobilisation in order to influence government priorities in public matters having a direct influence on socio-economic conditions.⁵⁵⁸

⁵⁵⁴ Claasen M. and Lardiés CA. "Introduction" in Claasen M., Lardiés CA. and Ayer V. (eds.) *Social accountability in Africa- Practitioners experiences and lessons* (Cape Town: Idasa/Ansa 2010) 2.

⁵⁵⁵ Thörlund (2000) 34.

⁵⁵⁶ Arat ZF. *Democracy and human rights in developing countries* (London: Lynne Rienner Publishers, 1991) 6.

⁵⁵⁷ See the case of Tunisia where the 2009 national elections has not prevented the President Ben Ali and members of his government from being removed through the 2011 revolution simply because they had lost legitimacy in the eyes of Tunisians.

⁵⁵⁸ Newell (2006) 47.

The relationship between community participation and accountability is more perceivable in a system of indirect democracy because in a direct system, people are normally not supposed to be represented and therefore there should be no one to make accountable. But this does not mean that accountability cannot co-exist with a participatory system. Indeed, in a system where representative and participative arrangements are both made and balanced, affected communities can make their representatives accountable in the follow up process of resolutions they have adopted directly themselves in connection with a mineral project.⁵⁵⁹ Practically, it is easier to make rulers accountable in local government rather than in central government, because the more distant the decision-making process is removed from affected communities, the more difficulties are experienced in exercising control.⁵⁶⁰ This is where democracy and decentralisation support community participation as they take decision-making closer to affected communities through the possibility of having a local government that is directly accountable to them. In this connection, Smoke asserts that the ability of influencing public matters that affect them directly, empowers people and gives them a real sense of control and autonomy.⁵⁶¹ But as mentioned previously, this also requires building the capacity of these communities to such extent that they should be able to use existing tools through which they may make their rulers accountable.⁵⁶²

It is also important to note that in a decentralised system, accountability has two different dimensions. Members of the local government should be held accountable to members of local communities under their jurisdiction,⁵⁶³ and local governments need cooperation (for instance, expertise, information, financial support and approval of projects...) from the centre

⁵⁵⁹ Blair H. "Participation and accountability at the periphery: Democratic local governance in six countries" (2000) 28 (1) *World Development* 27.

⁵⁶⁰ See the case previously underlined of high centralisation in most African countries after the 1960s of independence.

⁵⁶¹ Smoke P. "Decentralisation in Africa: Goals, dimensions, myths and challenges" (2003) (23) *Public Administration and Development* 9.

⁵⁶² Guthrie T., Ndlovu N., Wanjiru R. And Chiwangu P. "Developing civil society's budget monitoring capacity of HIV and AIDS resources in Southern and Eastern Africa" in Claasen M., Lardiés CA. and Ayer V. (eds.) *Social accountability in Africa- Practitioners experiences and lessons* (Cape Town: Idasa/Ansa 2010) 155.

⁵⁶³ Blair (2000) 27. This is what Ribot qualifies as democratic decentralisation. Ribot (2004) 160-162.

in order to achieve major objectives defined at local level.⁵⁶⁴ Without the relay of the centre, local authorities will experience much difficulty in easily and quickly achieving their assignments. This is what is known in the South African decentralisation system as the principle of “cooperative governance”.⁵⁶⁵

It is also questionable whether the concept of accountability may be extended to the relationship between affected communities and other stakeholders including mineral companies first and then, international partners like, for instance, the World Bank and the African Development Bank. In this regard, Gaventa contends that through accountability, not only will the government shift from clientelistic practices to more transparency and inclusiveness, but companies are also likely to behave more responsibly in terms of their social, environment and ethical obligations.⁵⁶⁶ If one opts for an affirmative answer, such a position would implicitly suggest the view that provisions of the African Charter may not only enjoy a vertical application, but a horizontal one as well. Since it is a fundamental rights-based approach that is promoted here, it would imply that not only the state, but other stakeholders as well must be made accountable in respect of obligations laid down in the African Charter. It seems accurate to underline at this stage, the fact that in any case, it is the state or governments responsibility that matters first, because all other stakeholders, mineral companies as well as international partners, cannot perform within the country without permission from government officials. Moreover, because one of the philosophical foundations upon which the idea of accountability rests, is the belief that as people are the ones who choose their rulers and hand over power to them in deciding and acting on their behalf, as a counterpart, they must also be entitled to make them accountable. Thus, because the relationship between other stakeholders and the people is not the result of such a similar process, it would be inaccurate to establish the foundation of their accountability on the same level ground as of the state. If they are to be made accountable, such accountability should be put in a secondary position because it is government officials from whom the people have to

⁵⁶⁴ Larson and Ribot (2005) 6; Thörlind (2000) 34.

⁵⁶⁵ US Agency for International Development (2010) 19.

⁵⁶⁶ Gaventa J. “Forward” in Newell P. and Wheeler J. (eds.) *Rights, resources and the politics of accountability* (New York: Institute for Development Studies, 2006) xiv.

directly demand accountability. But this remark does not *de facto* imply that they should be less responsible in case damages.

Therefore, the priority in dealing with the issue should in practice be given to the search of mechanisms through which members of affected communities may hold their rulers accountable in the mineral sector. Several mechanisms may be established to make office-bearers accountable. These mechanisms vary according to arrangements made in each country. Therefore, depending on different countries, one may find specific institutions set up to conduct audits (see for instance, the *Cour de comptes* and *Chambres regionales de comptes* in African countries that have inherited from the French system);⁵⁶⁷ or the existence of a provincial Assembly with representatives that may hold members of the executive accountable for their acts and decisions; or an established Ombudsman who investigates people's complaints regarding bad governance practices reflected in decisions and actions of rulers,⁵⁶⁸ or quasi-judicial or judicial bodies qualified to exercise judicial review of governmental decisions and actions.⁵⁶⁹

Among all these mechanisms of accountability, it is obvious that this study is more interested in quasi-judicial and judicial means, because one should remember that the emphasis here is more on the fundamental rights-based approach grounded on the African Charter. By relying on these legal tools, affected communities should be able to force their rulers to provide responses to their concerns.⁵⁷⁰ The perspective is to find out how the African Charter enforcement machineries may help affected communities to make their rulers accountable

⁵⁶⁷ Yonaba S. "L'expérience africaine du modèle français du contrôle juridictionnel des finances publiques: traits communs et diversité" (2008) 101 *Revue française des finances publiques* 61-77; Saïdj L. "Le modèle des cours des comptes : Traits communs et diversité" 101 (2008) *Revue française des finances publiques* 45-60.

⁵⁶⁸ Chibwana EDA. "The role of an Ombudsman in ensuring an accountable public service- Malawi's experience" in Claassen M., Lardiés CA. and Ayer V. (eds.) *Social accountability in Africa- Practitioners experiences and lessons* (Cape Town: Idasa/Ansa 2010) 87.

⁵⁶⁹ At least one of these mechanisms is present in all the four countries, namely South Africa with for instance the existence of an audit committee for each municipal council (s 166 (1) of the local government: municipal finance management Act 56 of 2003); Nigeria with general auditors of local governments s 125 of the Nigeria Constitution (1999)); DRC with the *Cour de Comptes* and the *Conseil d'Etat* (judicial body with power to cancel government administrative decisions)(arts. 155 and 178 of the DR C Constitution (2006); Zambia with the general auditor for local government (s. 52 of The local government Act 1991).

⁵⁷⁰ Newell (2006) 13.

regarding mineral projects. The African Commission and the African Court should be able to function as institutions at which affected communities may resort to influence and exercise a certain level of control over rulers in the mineral sector through the enforcement of their fundamental rights; otherwise they will appear useless in the search for more effectiveness in community participation. Their potential to fulfill this function is assessed in the next chapter.

2.4.4 Community participation and governance

The concept of governance has enjoyed multiple approaches, generally influenced by the perspectives under which it has been analysed.⁵⁷¹ Turton and Hattingh observe that governance as a concept is complex because several factors influence its definition and its understanding.⁵⁷² These scholars define governance as:

A process of informed decision-making that enables trade-offs between competing users of a given resource so as to balance protection with beneficial use in such a way as to mitigate conflict, enhance equity, ensure sustainability and hold officials accountable.⁵⁷³

Another definition that is widely known is that of the World Bank, according to which Governance is “the manner in which power is exercised in the management of a country’s economic and social resources for development.”⁵⁷⁴

Reflecting on the subject, Börzel and Risse explain that governance refers to both structure and process.⁵⁷⁵ In terms of structure, governance relates to the range of institutions and actors

⁵⁷¹ Chhotray V. and Stoker G. *Governance theory and practice A cross-disciplinary approach* (London: Palgrave Macmillan 2009) 3; Bovaird T. and Löffler E. “Understanding public management and governance” in Bovaird T. and Löffler E. (eds.) *Public management and governance* 2nd ed. (London: Routledge, 2009) 8; Turton AR. And Hattingh J. “The trialogue revisited: *Quo vadis* governance? In Turton AR., Roux DJ., Hattingh GA. Maree *Governance as a trialogue: Government-society-science transition* (Berlin: Springer-Verlag, 2007) 337.

⁵⁷² Turton and Hattingh, Id., 337. For instance, while Bovaird and Löffler emphasise on the demarcation between public management and public governance, the World Bank’s approach tend to include public management has a component of governance. See Bovaird and Löffler (2009) 4-7; Wold Bank *Governance-The Wold Bank’s experience* (Washington: World Bank, 1994) 4.

⁵⁷³ Turton and Hattingh (2007) 338.

⁵⁷⁴ Wold Bank *Governance and development* (Washington: World Bank, 1992) 1.

within the state who exercise the power to decide.⁵⁷⁶ As a process, the notion refers to all steps taken and how they are coordinated to produce decisions on matters of public interest.⁵⁷⁷ When making a comparison between Turton and Hattingh's definition and the one of the World Bank, though structural and procedural aspects are found in both, one can easily detect that the previous one focuses more on the way structures or actors involved in governance must function, emphasising for instance the imperative of accountability, while the second one concentrates more on what the outcome of the process, namely the development should be. Both approaches are complementary because successful results cannot be expected from the process if structures and actors do not move in an appropriate manner. Thus, from both the manner in which established structures function and what the outcome of the process is, governance can be assessed as good or bad. In Africa, because of the long experience of bad governance, governance has now come to be associated with "good governance" in the AU standard discourse. NEPAD which seeks to achieve high standards of governance describes the concept as being made up of good political governance, good economic governance and good corporate governance.⁵⁷⁸ The African Charter on Democracy also reiterates the same approach.⁵⁷⁹ The three components are globally seen as pillars of good governance.⁵⁸⁰

Initially, discussions on good governance enhanced its importance across the continent from the late 1980's due to the fact that the concept started to be emphasised in the conditionality

⁵⁷⁵ Börzel TA. and Risse T. "Governance without a state: can it work?" in (2010) 4 *Regulation & Governance* 114.

⁵⁷⁶ Id. 114.

⁵⁷⁷ Ibid. 114.

⁵⁷⁸ NEPAD "Governance in Africa's development: progress, prospects and challenges" (2007) 4; Available at http://www.sarpn.org/documents/d0002935/APF_Governance_NEPAD_Nov2007.pdf [accessed on 15/6/2013].

⁵⁷⁹ Arts. 32 and 31.

⁵⁸⁰ Political governance, is associated with conditions under which principles of democracy, transparency, accountability, integrity, respect for fundamental rights and the rule of law are implemented within the society, economic governance with the process through which economic and financial prosperity are enhanced to address issues of economic growth and poverty reduction; and corporate governance with the management of a corporation with regards to the best interests of its shareholders. NEPAD "Governance in Africa ...", supra note 577, 9-10; Akokpari JK. "The AU, NEPAD and the promotion of good governance in Africa" (2004) 13(3) *Nordic Journal of African Studies* 246; Tirole J. "Corporate governance" (2001) 69 (1) *Econometrica* 1.

developed by the IMF and the World Bank.⁵⁸¹ At present, it can be assumed that through the NEPAD, African countries have developed their own perception of what good governance should be, that it cannot be contended that it is an externally imposed concept.⁵⁸² Thus, following the NEPAD approach, good governance:

involves the creation of the conducive socio-economic, legal, political and institutional environments to foster the state's material strength; to free people from the evils of abject poverty, preventable diseases, ignorance, squalor and idleness; to provide the citizenry with the voice to choose those who rule over them, to hold those in power accountable when they do not work for the greater good, to demand transparent structures and to fight down socially regressive policies, and to treat every citizen equal without regard to gender, race, ethnicity, religion, and creed.⁵⁸³

What is important to note in this definition is that good governance is about creating appropriate conditions for the delivery of expected results.⁵⁸⁴ This implies that governance becomes useful only in as much as it produces positive and effective results and that structural arrangements must be preset for such a purpose. All arrangements and actions that could be made in any system of governance would be meaningful only in so much as they can produce high quality results. This latter quality is in practice determined by the relation with development objectives. This is what made the World Bank further assert that “good governance is synonymous with sound development management.”⁵⁸⁵

There cannot be good governance where development objectives are not given priority when dealing with public matters. It is in this respect that, community participation can be interpreted as one element that creates conducive conditions for affected community to

⁵⁸¹ World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (Washington: World Bank, 1989); NEPAD (2007) 4.

⁵⁸² However, the people's ownership of the NEPAD has been a subject of criticism because the process of its adoption did not involve the mass of Africans. It is seen as a compromise between African leaders and western countries. Roussel JTK *The politics in and around governance in the New Partnership for Africa's Development* (LLM Thesis, 2005) 51.

⁵⁸³ NEPAD (2007) 6.

⁵⁸⁴ Abdellatif A. “Governance and its relationship to democracy and economic development” Paper presented at the Global Forum III on Fighting corruption and safeguarding integrity in Seoul/Korea Ministry of Justice (20-21/5/2003), 3; 1-27; available at <http://notunprojonmo.com/wp-content/uploads/2011/06/GG-Demo-and-Economic-gov.pdf> [accessed on 15/12/2012].

⁵⁸⁵ World Bank (1992) 1.

exercise an influence on mineral resources governance towards the achievement of their sustainable development.⁵⁸⁶

Obviously in the context of a people-centered development, good governance should lead to the participation of the people in the decision-making process because their involvement is regarded as a key factor that significantly contributes to development.⁵⁸⁷ This people-centered model matches the NEPAD's vision which promotes a triangular relation between democratic governance, peace/security and development as the way forward for Africa.⁵⁸⁸ Since community participation is part of a model of governance that is democratic, a successful participation of affected communities reduces the risk of conflict between stakeholders throughout the realisation of the mineral project and other related development projects. This state of affairs guarantees some measure of peace and security in the mineral-led development process which is somehow a part of the sustainable development process of the whole country. Moreover because the main objective is to achieve development goals, the claim for affected communities' involvement is in line with the global African vision which seeks to improve governance under the NEPAD. The APRM which was established as a mechanism of self-assessment by African countries requires that countries indicate what arrangements are made to facilitate people's participation in all forms and levels of governance.⁵⁸⁹ Unfortunately, country's reports have failed so far to mention the state of community participation in the mineral sector.⁵⁹⁰

The African Charter on democracy also emphasises participation as a core ingredient of good governance, requesting state parties to promote citizen participation in the development process through appropriate structures.⁵⁹¹ The UNDP goes along with this and contends that "good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in

⁵⁸⁶ Ako and Uddin (2001) 24.

⁵⁸⁷ Vlaenderen and Neves (2004) 427.

⁵⁸⁸ NEPAD (2007) 5.

⁵⁸⁹ NEPAD "Country self-assessment...", supra note 114, 8.

⁵⁹⁰ A look to countries' annual progress reports is available at <http://aprm-au.org/e-library> [accessed 15/6/2013].

⁵⁹¹ Art. 30.

decision-making over the allocation of development resources.”⁵⁹² This particular element can be deduced from Turton and Hattingh’s definition when they referred to “a trade-off between competing users of resources”. Since affected communities are the ones whose livelihood is dependent on natural resources found within the area they live, it would be misleading trying to make “a trade-off” without their inclusion in the process of governance. Knight, Chigudu and Tandon rightly observe that in a democratic regime, good governance actually rests on three key principles that put the people at the centre of the system: People must be the ones to say what government should be doing, what they should be doing themselves and what other organisations should be doing to contribute to the improvement within the society.⁵⁹³

Unfortunately, despite the praises of the democratic virtues in constitutions, these three principles are far from being applied in most African countries, especially in respect of the mineral sector.⁵⁹⁴ Bad governance practices are still recorded more than the good ones in many African countries. Therefore there is a permanent need to improve the system and uplift good governance on a daily basis through effective democratic practices. If the fundamental rights-based approach as embraced in this study can make community participation in the mineral sector operate at these three levels, the expectation to improve the system and finally establish good governance can be high.

Community participation can improve governance of mineral resources at local level because it is the channel through which affected communities double-check whether standards and goals defined for their communities are respected before the commencement, during the execution and at the closure of the mineral project.⁵⁹⁵ With regard to financial aspects, because mineral resources should allegedly provide the government with necessary funds to achieve development goals, community participation would enable affected communities to

⁵⁹² UNDP “Governance for Sustainable human development”, Policy paper (1997) 4; Available at <http://gis.emro.who.int/HealthSystemObservatory/Workshops/WorkshopDocuments/Reference%20reading%20material/Literature%20on%20Governance/GOVERN~2.PDF> [accessed on 2/3/2012].

⁵⁹³ Knight B. *et al.* (2002) 131.

⁵⁹⁴ See developments made in the Chapter three.

⁵⁹⁵ UNDP (1997) 591, 4; Vlaenderen and Neves (2004) 427.

access information on royalties, what the share to be paid back to communities is, and in which priority order the amount received is to be allocated to various existing development projects. This search for transparency in financial management is one of the key objectives in the NEPAD's approach to good economic governance.⁵⁹⁶ Since top-down governance has been associated with inertia, rent-seeking behaviour, corruption and unequal distribution of revenues, participation which lays at the foundation of the bottom-up management system is regarded today as a key element that makes governance better.⁵⁹⁷ Therefore, institutions should exist and function properly to allow affected communities to exercise a degree of control on decisions and actions envisaged by other stakeholders.

Affected communities should, together with other stakeholders, take responsibility for the achievement of development objectives. Because they have often been marginalised in the decision-making process, their participation needs to be guaranteed through a fundamental rights-based approach to such extent that it will obliged other stakeholders not only to consult them, but also to consider their positions in the decision-making process. This does not mean that a people-centered model of governance should promote people participation at the expense of other stakeholders' rights and interests. Stakeholders' relationship must be characterised by mutual good faith. All of them, including the people affected, must be able to bring valuable inputs to the table in order to find a balance in the development process.

This is the type of governance that Ballard and Banks qualify in the mineral sector as a "three-legged or triad stakeholder model."⁵⁹⁸ But, though affected communities should leave space for other stakeholders in decision-making, they must be the ones having a greater influence on the outcome, because as mentioned previously, in democratic governance, people must be the ones to say what government should be doing, what they should be doing themselves and what other organisations should be doing to contribute to the improvement

⁵⁹⁶ NEPAD (2007) 10.

⁵⁹⁷ Neiland CBA. *From Participation to Governance: A critical review of the concepts of governance, co-management and participation, and their implementation in small-scale inland fisheries in developing countries : a review prepared for the challenge program on Water and Food* (Colombo: The World Fish Center, 2006) 25; NEPAD (2007) 10.

⁵⁹⁸ Ballard and Banks (2003) 289.

within the society.⁵⁹⁹ Such involvement of people should lead to more transparency, accountability and respect for the rule of law, which are ingredients of good governance.⁶⁰⁰

2.4.5 Community participation and sustainable development

Development is sometimes associated with mere economic progress or growth.⁶⁰¹ But as aptly underlined by Brookfield, this approach is not correct.⁶⁰² Whenever economic growth does not bring positive impacts and changes for the people, it becomes meaningless to them. Several approaches to development can be taken but an in-depth discussion here would be long and the study would lose its focus. In an attempt to summarise every tendency, Sumner and Tribe observe that the concept can be approached in three ways, namely “development as a long-term process of structural societal change or transformation”, “development as a short-to medium-term outcome of desirable targets” and “‘development’ as a dominant ‘discourse’ of Western modernity”.⁶⁰³ These scholars share the view that different existing approaches on development should at least fit within one of these categories, though they warn that overlapping schools of thought may exist.⁶⁰⁴ They observe that dimensions attached to the concept are extremely diverse, to such an extent that it is often regarded from the following perspective: economic, political, legal and institutional structures, technologic, environmental, religious, artistically or cultural.⁶⁰⁵

No matter the different perspectives from which development may be approached, a genuine definition will always include two elements. On the one hand, since development supposes that a process is taking place, it will always imply that people involved in that process shift from a given socio-economic situation to another one. On the other hand, development always brings a positive impact. No one can ever speak of development where there is no positive change or transformation. Wherever development takes place,

⁵⁹⁹ Knight *et al.* (2002) 131.

⁶⁰⁰ UNDP Governance for Sustainable Human Development..., *supra* note 592, 4.

⁶⁰¹ Hahnel R. *Green Economics: Confronting the ecological crisis* (New-York: M.E Sharpe 2011) 36, 40; Brookfield HC. *Interdependent development* (London: Methuen, 1975) xi.

⁶⁰² *Id.*

⁶⁰³ Sumner A. and Tribe MA. *International development studies: theories and methods in research and practice* (London: Sage Publications Ltd, 2008) 11-16.

⁶⁰⁴ Sumner A. and Tribe MA (2008) 11.

⁶⁰⁵ *Id.*

the current situation must be much better than the previous one. However, divergences have appeared in practice in the way scholars and societal actors apprehend and interpret these two elements. This is why four decades ago Brookfield could already conclude that “development is what it has come to mean in the hand of numerous writers of very different persuasion.”⁶⁰⁶

Sustainable development is, at least at a rhetorical level, the standard of development accepted worldwide at present. Auty and Brown observe that it has become the guiding principle of institutions with a focus on development issues.⁶⁰⁷ Although the origin of the concept is not unequivocally established,⁶⁰⁸ the first definition of the concept was given in 1987 by the UN World Commission on Environment and Development led by Brundtland. The consensus among the members of the international community to opt for sustainable development as the standard was officially reached at the UN Conference on Environment and Development held in Rio de Janeiro in 1992, where up to 178 government representatives adopted what is known as the Rio Declaration. In the same vein, African countries have made an important step by adopting the Declaration on the NEPAD in 2001 which identified the challenges to sustainable development specific to the African context and which established the principles that governments should follow in order to reduce and eradicate poverty. But, NEPAD did not define the concept of sustainable development. In 2002, South Africa hosted the world summit on sustainable development in Johannesburg where commitment to achieve sustainable development goals was again expressed by government representatives.

⁶⁰⁶ Brookfield (1975) xi.

⁶⁰⁷ Auty RM. and Brown K. “An overview of approaches to sustainable development” in Auty RM. and Brown K. (eds.) *Approaches to sustainable development* (London: Routledge, 1997) 1.

⁶⁰⁸ While Veon considers that the concept of sustainable development emerged from the Declaration of the UN Conference on Human Environment adopted in Stockholm in 1972, Kwessi contends that the roots of the concept can possibly be retraced to a report elaborated by the Club of Rome that same year, entitled “Limits to development”. Veon JM. “Sustainable development”, Available at <http://www.womensgroup.org/SUSD.html> [accessed 12/11/2011]; Prah KK. “Catch as catch can: Obstacles to sustainable development in Africa” in Ukaga O. and Afoaku OG. (eds.) *Sustainable development in Africa: A multifaceted challenge* (Trenton: Africa World Press, 2005) 12.

The definition given by the Brundtland Commission regards sustainable development as “a development which meets the need of the present without compromising the ability of future generations to meet their own needs.”⁶⁰⁹ While Ukpore observes that the Brundtland Commission’s definition is the most commonly accepted, Arko-Cobbah contends that the concept has been much used in international circles without clearing up the numerous ambiguities attached to this term.⁶¹⁰ The difficulty of seizing the in-depth substance of this concept is shared by another scholar who draws the conclusion that “sustainable development has proved hard to define and even harder to put into practice.”⁶¹¹

Thus far, the main emphasis has been put on the sustainability that must characterise development. This has led to the development of two major ideas in the literature. Scholars like Becchi, Mathis and Sabour have pointed out that a true development must be measured through different generations.⁶¹² This view stands as the result of the above-mentioned definition given by the Brundtland Commission which seeks to secure opportunities of development for future generations as well. The widely accepted interpretation of the concept regards sustainable development as socio-economic development mixed with environmental concerns is followed.⁶¹³ But in the historical evolution of the development concept, the adoption of “sustainable” development as the new standard has raised the question of its compatibility with the economic growth theory

⁶⁰⁹ World Commission on Environment and Development *Our common future* (Oxford: Oxford University Press, 1987) s. 3, para. 27.

⁶¹⁰ Arko-Cobbah A. “Promoting sustainable development in Africa: Civil society and access to information” Paper presented at the World Library and Information Congress: 76th IFLA General Conference and Assembly (10-5/8/2010) 1. Ukpore BA. “Sustainable development in Nigeria: Roles of women and strategies for their improvement” (2009) 10 (4) *Journal of Sustainable Development in Africa* (2009) 269.

⁶¹¹ Esty DC. “Bridging the trade-environment divide” in (2001) 15 (3) *Journal of Economic Perspectives* 118.

⁶¹² Becchi, P. “Our responsibility towards future generation” in Mathis K. (ed.) *Efficiency, sustainability, and justice to future generations* (Dordrecht/ Heidelberg/London/New York: Springer 2011) 77–96; Mathis K. “Future generation in Jhon Rawl’s theory of justice” in in Mathis K. (ed.) *Efficiency, sustainability, and justice to future generations* (Dordrecht/New York: Springer 2011) 97-112; Sabour SAA. “Sustainable development in oil extraction: The rights of future generations” in Larsen BA. (ed.) *Sustainable development research advances* (New York: Nova, 2007) 235–253.

⁶¹³ Auty and Brown (1997)1-2; Gosh N. “The road from economic growth to sustainable development: How was it traversed?” SSRN Paper in Political institutions and Economic growth (2008) 11.

which has been long advocated as the path to reach development.⁶¹⁴ On this issue, views have been also divergent. For instance, a group of academics known as the club of Rome put forward the limits of the growth theory, predicting disaster for humankind unless natural resource-depleting economic and technological progress were abandoned, while an opposing view by a scholar like Gosh contends that economic growth is indeed part of sustainable development.⁶¹⁵ Another view is the one of Ortiz that finds both concepts as incompatible.⁶¹⁶ All these divergent opinions reveal one reality which is that economic growth and sustainable development may possibly clash. This is the case when economic growth systematically damages the environment or ecological system.⁶¹⁷

Economic growth should be pursued, but not at the cost of sustainability. This is why in its report entitled “Our common future”, the Brundtland Commission agreed that “both concepts may be compatible, provided that the content of economic growth reflects the broad principles of sustainability and non-exploitation of others”.⁶¹⁸ Classically, this means that in the context of sustainable development, economic growth is relevant only in so far as it takes into consideration the protection of the environment which is relevant not only for present but also future generations. While Ortiz contends that economic growth is not relevant for sustainable development in developed countries,⁶¹⁹ at least this is not the case for African countries that are still in a developing process. Thus, in the African context, economic growth remains an important element in the race to achieve sustainable development, but not at any cost. As the mineral industry plays an important role in achieving economic growth, it is necessary that its operations adhere to a strict respect for sustainability. It would be wrong to conceive that mineral operations may effectively lead to true development in Africa if they are accompanied by fundamental rights abuses. As already mentioned previously, inequalities and fundamental rights violations are the main factors

⁶¹⁴ Prime A. *The right to development* (New Delhi: Sage publications, 2004) 57; Adelman I. *Theories of economic growth and development* (Stanford: Stanford University Press, 1961) 1.

⁶¹⁵ Gosh (2008) 10-11.

⁶¹⁶ Ortiz AE. “Economic growth and sustainable development: An incompatibility in practice”; Available at <http://globaltransition2012.org/2012/03/economic-growth-and-sustainable-development-an-incompatibility-in-practice/> [accessed 22/9/2012].

⁶¹⁷ Gosh (2008) 10-11.

⁶¹⁸ Ortiz (2012) 615.

⁶¹⁹ Id..

that have led to the failure of development efforts within the Chinese society to such extent that the gap between rich and poor continues to be pronounced.

Sustainability requires that economic growth takes place with due respect for environmental rights.⁶²⁰ However, in terms of human rights, it seems that the understanding of the concept needs to be broadened. Indeed, as Afoaku aptly observes, sustainable development is a multifaceted concept which should be approached in a holistic way rather than in terms of a model that is simplistic and reductionist.⁶²¹ The development model must be people-centered⁶²² and encompass all aspects relevant to improving human well-being in a sustainable manner. As a result, it is not correct to limit the discussion on sustainability exclusively to environmental rights considerations. Such an approach would stand in stark contradiction to the theory of interdependence between fundamental rights.⁶²³ Beside the environmental rights, there are other fundamental rights that are directly relevant to sustainable development. For instance, how would African peoples be aware of the environmental impact of any project that is about take place if they cannot use their fundamental right of access to public information?⁶²⁴ Arko-Cobbah held that the “importance of information is being accepted more and more as a critical component in being able to understand the integration of the environment and development. Information is further needed to implement and monitor sustainable development...”⁶²⁵ On the other hand, damages caused to the environment infringe on other fundamental rights, like for instance, the rights to health and life. In some African countries, communities living in the vicinity of areas exploited for mineral and oil, experience serious degradation of the environment,

⁶²⁰ Meagher (2008) 98.

⁶²¹ Afoaku OG. “Linking democracy and sustainable development in Africa” in Ukaga O. and Afoaku OG. (eds.) *Sustainable development in Africa* (Bloomington: Africa World Press 2005) 33.

⁶²² UNDP “People centred-development...”, supra note 142, 2.

⁶²³ Boesen KJ. and Sano HO. “The implications and value added of human rights-based approach” in Andreassen BA. And Marks SP (eds.) *Development as a Human right: Legal, political and economic Dimensions* 2nd ed. (Oxford: Intersentia. 2010) 50-51.

⁶²⁴ Art.9 of the African Charter.

⁶²⁵ Arko-Cobbah (2010) 3.

including water pollution and high levels of toxicity that pose deadly threats to the right to life and to health.⁶²⁶

From all the above discussion, sustainable development is defined in this study as a multifaceted development that meets the socio-economic needs of the present, without compromising the ability of future generations to meet their own needs, with due and permanent respect given to fundamental rights at all stages of the development process. This broadened definition implies that sustainable development is to be analysed here as a fundamental right for the present generation as well as future ones, but also that the analysis should include all other fundamental rights directly relevant to the sustainability in the development process of affected communities.

In connection with the subject matter of this study, it is interesting to note that at the UN Conference held in Rio de Janeiro in 1992, participation in the decision-making process of those affected by decisions involving environmental and other social concerns was said to be a fundamental precondition for the achievement of sustainable development.⁶²⁷ If community participation has to improve governance of mineral resources, such improvement must be assessed in respect of the extent to which development objectives are achieved. These objectives should not to be considered only with a short term perspective, but more with a long one because sustainability requires that the needs of present generations must be met, without compromising the ability of future generations to meet their own needs. In this regard, two critical questions are raised in the literature review. The first one concerns whether the exploitation of mineral resources indeed leads to development. The second one draws attention to the relationship between democracy and development. Because community participation is the result of democratisation within the mineral sector, the debate as to whether or not democratic governance is relevant to achieve the development process becomes relevant.

⁶²⁶ See for instance, the *Ogoni* case, supra note 104, and the case of the Sukuma community in Tanzania in Kitula (2006) 409-410.

⁶²⁷ S. 2 of Chap. 23 of the Agenda 21/UN Conference on Environment and Development (Rio de Janeiro 3-14 June 1992) UN Doc.A/CONF.151/26, Resolution 1, Annex II.

On the first issue, views diverge to the extent that while some agree on the positive insights of mineral resources in the development process, others consider that abundance of these resources is a curse for resource-rich countries. The conventional wisdom has generally been that mineral resources endowment constitutes a great opportunity for development as it is likely to provide the government with considerable fiscal revenues through taxes and royalties and leads to the construction of necessary infrastructure and the transfer of technologies and skills.⁶²⁸ But far from being unanimous, this thesis has been rejected by a school of thought which considers that vast mineral resource endowment is a curse for resource-rich countries characterised by negative impacts on the development process such as internal conflicts, political instability and fundamental rights abuses.⁶²⁹ Auty, one of the proponents of this school, perceives the curse at two different levels when contending that:

not only may resource-rich countries fail to benefit from a favourable endowment, they may actually perform worse than less well endowed countries.⁶³⁰

This assertion firstly means that looking at individual resource-rich countries, they have not significantly benefited from the abundance of resources they possess, and secondly that compared to countries that are poorly endowed with resources, their growth tends to be slower than the latter.⁶³¹ Taking the example of Korea and Japan that are not richly endowed with mineral resources, Sachs and Warner make the following observations:

Even if natural resources are no longer a decisive advantage to economic growth, it is surely surprising that they might pose an actual disadvantage. Is there a curse to easy riches?⁶³²

Several attempts to understand and explain this negative relationship between resource abundance and slow economic growth have been formulated by scholars supporting this

⁶²⁸ Weber-Fahr (2002) 1-2; Sideri S. and Johns S. "Introduction" in Sideri S. and Johns S. (eds.) *Mining for development in the third world: Multinational corporations, state enterprises and the international economy* (New York: Pergamon Policy Studies, 1980) 6.

⁶²⁹ Ballard and Banks (2003) 295.

⁶³⁰ Auty RM (1993) 1.

⁶³¹ Auty draws such a conclusions after examining the performance of 85 countries between 1960-1993. Sachs and who also reached the same conclusions have empirically survey 97 developing countries between 1970-1989. Auty, Id., 1-10; Sachs and Warner (1999) 4.

⁶³² Sachs and Warner (1999) 2.

thesis. Facts like poor investment in human capital and education,⁶³³ absence of appropriate and stable institutions,⁶³⁴ damage caused to the environment,⁶³⁵ rent-seeking behaviour⁶³⁶ are some of the causes identified. But when summed up, all these different factors take one back to the issue of governance. This is because all of them are in fact the result of a weak and bad system of governance.⁶³⁷ As pointed out at the outset of this study, the mere endowment of resources does not in itself unconditionally amount or lead to the improvement of socio-economic conditions of the poor.

Depending on how the sector is governed, the exploitation of mineral resources can either advance or hinder the achievement of sustainable development objectives. After reviewing 51 mineral resources-rich countries, a study made by the World Bank has come to the conclusion that good performance depends mostly on institutional stability, good management of revenues and an appropriate regulation of the mineral sector.⁶³⁸ Good governance practices forcefully represent the catalyser through which the exploitation of mineral resources by resource-rich countries should contribute significantly to the achievement of development.⁶³⁹ Unfortunately, wherever bad governance practices dominate, there is no middle path, the mineral industry will have more adverse effects than positive ones.

What generally matters in most developing countries is their high reliance on mineral resources exports to boost their economy. In such a context, rulers are likely to seek more profits for themselves and feel more comfortable to govern in a sphere where corruption is in full swing.⁶⁴⁰ Moreover, they tend to promote a monolithic approach to development, with the consequence that the mineral sector is given more consideration and priority at the

⁶³³ **Auty RM.** "Introduction and overview" in Auty RM. (ed.) *Resource abundance and economic development* (Oxford: Oxford University Press 2002) 10.

⁶³⁴ Power (2002) 30.

⁶³⁵ Auty "Introduction and..." (2002) 10.

⁶³⁶ Sachs and Warner (1999) 4; Kronenberg (2004) 6-8; David and Tilton (2008) 30.

⁶³⁷ Ako and Uddin (2011) 26-27.

⁶³⁸ Weber-Fahr (2002) 1-2.

⁶³⁹ Rees (1985) 56.

⁶⁴⁰ Sarraf M. and Jiwani M. "Beating the resource curse: The case of Botswana" Research paper No 24753 presented at the World Bank Environment Department (October 2001) v.

cost of all others. For instance, this is what explains why many African countries have a slightly smaller weighted agricultural export share than mineral product exports.⁶⁴¹ Actually, because of the exhaustible nature of mineral resources and because of environmental costs, the mineral industry would do better to contribute to development in the context of a diversified economy.⁶⁴² Resource-rich countries must be able to reinvest funds collected from the mineral sector in other sectors or industries that bear relatively stable and long-term benefits to the economy.

Therefore, if the curse thesis is to be embraced, such a curse must be perceived at the level of (bad) governance and not the mere endowment of resources. In this connection, community participation indeed stands as a relevant ingredient in the sustainable development process because the involvement of citizens in decision-making is aimed at improving the quality of governance thanks to prior consent, control and accountability, all serving to safeguard affected communities against anti-development practices.

Through community participation, affected communities should be able to advocate a mineral exploitation that fits within the development process that is integrative rather than exclusive and destructive of other relevant sectors such as farming and agriculture. Communities should be able to fight rent-seeking behaviour, mismanagement of funds, corruption and environmental destruction by relying on legal mechanisms available to them in order to uplift and protect their fundamental rights and interests.

As to the relationship between democracy and development, the modernisation school actually contends that development is a precondition for the establishment of democracy. This implies that as a democratic exercise, participation can be successful only where a certain level of development already exists. Among precursors of the modernisation theory, one should identify Smith and Marx. Despite the fact that the former belonged to the capitalist school of thought and the latter to the communist one, they have come to the same

⁶⁴¹ World Bank World Development Report: Agriculture for Development (World Bank, 2008); Murison K. *Africa South of the Sahara* 33rd ed. (London: Europa Publications, 2004) 4.

⁶⁴² UNECA Minerals and Africa's development an overview of the report of the international study group on Africa's mineral regimes Report of the AU Conference of ministers responsible for mineral resources development held in Addis Ababa in December 2011, 9-10.

conclusion that modernisation or technological innovation is the basis of human progress.⁶⁴³ More explicit on the issue, Marx considered that the orientation of values shared by people shift in connection with socio-economic development, contending that ideology changes as the socio-economic base changed.⁶⁴⁴

Building on the foundation laid down by the modernisation theory precursors, Lipset in 1959 described the relationship between development and democracy through the following assertion: “the more well-to-do a nation, the greater the chances that it will sustain democracy”.⁶⁴⁵ Since then, this statement has become famous and stands as the motto summarising the conventional wisdom of the modernisation theory.⁶⁴⁶ However this theory could not escape criticism and re-examination.

One of the prominent critics in recent years emanated from the work of Przeworski and Limongi who started by confronting two hypotheses, seeking to find out whether development engenders democracy or whether it just sustains it.⁶⁴⁷ They qualify the first hypothesis as “endogenous”, while they consider the second one as “exogenous”.⁶⁴⁸ After analysing the situation in up to 135 countries between 1950-1990 they come up with the conclusion that, it is the exogenous version that is true, while the endogenous is wrong.⁶⁴⁹ This latter conclusion that is also shared by many other scholars⁶⁵⁰ is accurate in as much as there is no “formal” requirement in terms of development for the establishment of democratic principles within a society. As contended by Mangu, democracy has been established in some countries found in developing regions in a social context of economic

⁶⁴³ Inglehart R. and Welzel C. *Modernization, Cultural Change, And Democracy: The Human Development Sequence* (New York: CambridgeUniversity Press, 2005) 16-17.

⁶⁴⁴ Id., 17.

⁶⁴⁵ Lipset SM. “Some social requisites of democracy: Economic development and political legitimacy” (1959) 1 (53) *American Political Science Review* 75.

⁶⁴⁶ Wucherpfennig J. and Deutsch F. “Modernization and democracy: Theories and evidence revisited” (2009) 1 *Living Reviews in Democracy* 1.

⁶⁴⁷ Przeworski A. and Limongi F. “Modernization theories and facts” (1997) 49 *World Politics* 155-183, 156-157.

⁶⁴⁸ Id., 157.

⁶⁴⁹ Przeworski and Limongi (1997) 166-167; Przeworski *et al.* (2000) 92-101.

⁶⁵⁰ Adejumbi (2008); Ake (1996); Anyang Nyong’o (1988) 71-86; Anyang Nyong’o “A rejoinder to the comments...” 83-87; Mangu (2002) 192, Nzongola Ntalaja (1997); Zeleza (2004) 1-20.

and social hardship.⁶⁵¹ This assertion is supported by other Africanist scholars like Nzungola who has aptly observed that in the African social context, the struggle for democracy is aimed at radically changing the poor conditions under which the people lived, by improving their material and social welfare. Zeleza observed that, with the light of the autocratic character of the structural adjustment programme and its rejection by the popular mass of Africans, the fight for democracy in Africa was the result of the people's cumulative demand not only for political change, but also economic change, claiming new conditions of social life.⁶⁵²

Nowadays, it would be misleading to support the modernisation theory that development stands as a precondition for the establishment of democracy. This is because such a theory raises a question that has not been convincingly answered by proponents of this school: What would then be the type of governance under which development would be generated if democracy is to follow? Even Smith and Marx who agree on the role played by modernisation in the societal changes, have failed to agree on what is the best pathway to modernity.⁶⁵³

Actually, the modernisation theory can only stand in the context of the development process that lacks a human dignity dimension. This is because where people are at the centre of the development, as envisaged in this study, the development process must necessarily include the respect of fundamental rights. Contrary to an authoritarian system, fundamental rights are better protected, or rather less abused in democratic regimes.⁶⁵⁴ This is what probably makes Anyang Nyong'o reverse the modernisation theory and contend that democracy is a *sinequa non* condition for development.⁶⁵⁵ The same position is the one shared in the NEPAD where African leaders asserted that development is impossible in the absence of true democracy, respect for fundamental rights, peace and good governance.⁶⁵⁶

⁶⁵¹ Mangu (2002) 192.

⁶⁵² Zeleza (2004) 5.

⁶⁵³ Inglehart and Welzel (2005) 16.

⁶⁵⁴ Baumgartner SP. "Does Access to Justice Improve Countries' Compliance with Human Rights norms? An empirical study" (2011) 44 *Cornell International Law Journal* 445, 448.

⁶⁵⁵ Anyang Nyong'o (1988) 83-87.

⁶⁵⁶ NEPAD (2003) para. 79.

Without fully embracing either this latter view or the modernisation theory, this study stands on the view that though there is a kind of interdependence between both factors with regard to sustainability; if development does not precondition the establishment of democracy, at least this latter is likely to be consolidated in countries where some levels of development have already been achieved. At the same time, democracy is not the perfect, but the suitable system of governance under which sustainable development is to be achieved, because this latter type of development puts people, individually or collectively, at the centre of the process, requiring respect for their fundamental rights such as environmental and socio-economic rights. This is why one should agree with Adejumobi that: “development cannot be sustainable except when predicated on popular participation and democratic values”.⁶⁵⁷

Therefore, democracy as a core value that sustains the community participation, makes this latter a relevant element of the sustainable development process. Affected communities should democratically participate in the governance of mineral resources to allow them to achieve development objectives relevant to their livelihood.

2.5 Conclusion

The analysis undertaken in this chapter has demonstrated that “community participation” has become the key element concerning every major issue related to the achievement of sustainable development at local level. As such the way it is conceived and its interactions with other concepts that play a relevant role in the development process, have to be well adjusted in order to reach sustainable results in the governance of mineral resources. In this regard, among different perspectives, the fundamental rights-based approach to community participation appears to be the best theoretical approach to bring effectiveness in the search to involve affected communities in the decision-making process. This is simply because it makes participation binding and not optional and as such offer the opportunity to affected communities to enforce their views and secure their best interests at all stages of the mineral project. As demonstrated, this approach to community participation is only feasible where the governance is democratic, decentralised, accompanied with mechanisms to make rulers

⁶⁵⁷Adejumobi (2008) 97.

accountable and where sustainable development is the standard contemplated. With the high centralisation of the sector still prevailing in many African resource-rich countries and the failure to properly consider the prior consent of affected communities, even where established by mineral law, the next chapter will discuss the potential of the African Charter system to support the fundamental rights based-approach and make it applicable to the African mineral sector.

Chapter three: Community participation and the normative content of the African Charter

3.1 Introduction

As stressed earlier, the fundamental rights-based approach has two normative dimensions: community participation as a fundamental right and community participation as a channel to enforce other fundamental rights relevant to good governance and sustainable development in the mineral sector. Therefore, this chapter seeks to scrutinise and analyse relevant fundamental rights laid out in the African Charter on which affected communities may practically rely on to make their participation effective and secure their fundamental rights in a mineral project. One critical issue in this regard is the question as to what should be the reach of fundamental rights entrenched in the African Charter: Should they be limited to the sole vertical application or rather extended to the horizontal application?

3.2 Review of the normative aspects

3.2.1 The first dimension: Community participation as a fundamental right

The analysis here focuses on the provisions of the African Charter that are decisive to implement community participation in mineral governance. In this regard, provisions that have been identified include the fundamental right to freely participate in the government in article 13, the rights to receive information, to express and disseminate one's opinions in article 9 and the right to have one's cause heard in article 7.

3.2.1.1 The right to freely participate in the government

3.2.1.1.1 Scope of the right

Article 13 (1) of the African Charter provides that:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

It was inspired by article 21 of UNDHR, which provides that “Everyone has the right to take part in the government of his country, directly or through freely chosen representatives”. It attempts to provide understanding of how participation should be conceived in a democratic system. As underlined in chapter two, though participation was acknowledged as a necessity, most approaches developed thus far have been simplistic in that they only define the concept according to the need to have members of a community involved in the decision-making process, without underling the binding dimension that this exercise should take on. As a result, there has often been great reluctance to consider participation as a legal obligation (see for instance, the World Bank’s radical rejection of the “veto”).⁶⁵⁸ The soft approach implemented so far is actually paradoxical to the perspective embodied in international instruments on fundamental rights, of which article 13 (1) of the African Charter is also part of.⁶⁵⁹ Because “participation” is formulated there as a fundamental right, it stands as a legal obligation and its implementation is therefore compulsory and not optional for other stakeholders. Practically, the implication is that holders of the right must get involved in the decision-making process and enjoy a certain level of power that would help them to advocate and secure their best interests. In fact, the fundamental right in article 13 makes democracy alive in so much as people are offered the possibility to influence the outcome of the decision-making process. In democracy, the fundamental right to participate in government serves as a tool that allows people to be included in matters of public importance with the view to prevent any outcome that may threaten their best interests.⁶⁶⁰ But what is the real reach of this fundamental right in terms of its holders? Are affected communities also entitled to claim the fundamental right to participation as entrenched in article 13 of the Charter?

The African Charter consists of both individual and collective rights. It is in the latter category that people’s rights that apply to groups and communities are found. Concerning the fundamental right to participate in the government in article 13 (1), it has been formulated as an individual right. This provision starts by the expression “every citizen”.

⁶⁵⁸ The World Bank Group management response (2003) 7.

⁶⁵⁹ See for instance art. 21 of the UNDHR, art. 25 of the ICCPR, art. 3 of the Protocol 1 to the European Convention on Human rights that all entrenches participation as a “fundamental right”.

⁶⁶⁰ Horowitz DL. “Democracy in divided societies” (1993) 4 (4) 4 *Journal of Democracy* 18.

This formulation has the double implication that, on the one hand, it is a right that rights originally designed for individuals rather than a group, and, on the other hand, a right that is solely reserved to individuals who are citizens of the country where participation to the government is envisaged. Therefore, the question that may be asked is: because the fundamental right to participate in government has an individual dimension, can an affected community which is obviously a group, rely on it?

As will be demonstrated in the review of the jurisprudence of the the African Commission, this fundamental right has been granted an extensive interpretation to such an extent that affected communities are entitled to claim their effective participation in the governance of mineral resources. But, the practical question is, how?

Before reviewing the jurisprudence and answering this question, it is worthy to note with Ougeurgouz that the reach of this fundamental right includes not only direct democracy, but also indirect and semi-democracies.⁶⁶¹ This means that the right can be exercised directly or indirectly or even in a mixed system, depending on arrangements made within a particular society. But as already mentioned in the previous chapter, this study advocates the middle path (semi-democratic participation) as the best model that can fit within the current situation of affected communities in the African mineral sector.

3.2.1.1.2 Interpretation of the right in the jurisprudence of the African Commission

The right to participate in the government has been mentioned in many cases submitted before the African Commission. But in most cases, it has been in connection with matters concerning individuals rather than a group or community.⁶⁶² Moreover, this right has been discussed more in its dimension as a fundamental right to vote and stand for election. This is probably what led Bojosi to observe that formally, states are required to do no more beyond

⁶⁶¹ Ougeurgouz (2003) 176.

⁶⁶² African Commission Communication 246/02 *Mouvement Ivoirien des droits humains (MIDH) v. Cote d'Ivoire* paras. (2008) 78-79; African Commission Communication 251/02 *Lawyers of Human Rights v. Swaziland* (2005) (Hereinafter the *Lawyers of Human Rights* case) para. 62; African Commission Communication 97/93014 (2000) *John K. Modise v. Botswana* para (Hereinafter the *John K. Modise* case) para. 97; African Commission Communication 147/95-149/96 *Sir Dawda K. Jawara v. Gambia* (The (2000) (Hereinafter the *Dawda* case) para. 67.

the facilitation of free, fair and periodic elections.⁶⁶³ This view would be accurate only in so far as the fundamental right to participate in the government can be reduced to the ability to vote and stand for election. But because in practice this fundamental right should go beyond these exercises, such an interpretation appears limited. For instance in a context of direct democracy, people do not need to choose representatives to decide on their behalf. In this case, the need for election disappears, while the one for participation still subsists. Furthermore, even where representatives are to be chosen, the fundamental right to participate in the government should imply also the possibility for the people to check on decisions made on their behalf after elections and make their representatives accountable at any stage of governance. The argument here can be deduced from the similitude made by the African Commission between the concept of “government” and “governance” in *Lawyers of Human Rights v. Sudan*.⁶⁶⁴ Interpreting article 13 (1), the African Commission observed that “political parties are one means through which citizens can “participate in governance”.”⁶⁶⁵ Thus, if “participate in the government” equals “participate in governance”, it becomes clear that this fundamental right must enjoy an extensive interpretation because, as defined in this study, governance is not only concerned with structural aspects that include institutions and actors who exercise the power to decide within the state, but also with all steps taken and how they are coordinated to produce decisions on matters of public interest.⁶⁶⁶ Therefore, to reduce the understanding of the fundamental right to participate in the government simply to a right available only during an electoral process would be prejudicial to citizens as it will prevent them from getting involved in decision-making on non-electoral matters. They will not enjoy full packages of opportunities that democratic governance is supposed to offer in terms of participation.

Along the same line, Bojosi rightly observes that the restrictive interpretation of this fundamental right bears the dangers that some ethnic subgroups may not be adequately

⁶⁶³ Bojosi KN. “Towards an effective right of indigenous minorities to political participation in Africa” in (ed.) Dresso S. *Perspectives on the rights of minorities and indigenous rights in Africa* (Pretoria: PULP, 2010) 281-296; 288.

⁶⁶⁴ *Lawyers of Human Rights* case, supra note 662.

⁶⁶⁵ *Id.*, para. 53.

⁶⁶⁶ Börzel and Risse (2010) 114.

represented in the government as a result of the election outcome.⁶⁶⁷ In fact, the statement of this scholar who advocates a broad interpretation as to who are the holders of this fundamental right, seems to read in the provision of article 13 (1) the fact that groups are also concerned with the enjoyment of this right. Without embracing the issue of “adequacy” in representation, the African Commission decision in *Katangese Peoples’ Congress (KPC) v. Zaire*⁶⁶⁸ provided an affirmative answer to the question. People or groups can indeed claim their fundamental right to participate in the government as an entity. In the *Katangese* case, Moke, a leader of the KPC, the only political party at that time representing the people of Katanga, brought a collective demand before the African Commission trying to rely on provisions of the African Charter to achieve the independence of Katanga.⁶⁶⁹ Deciding on the merits of the case, the African Commission held that:

in the absence of evidence that the people of Katanga are denied the right to participate in government (...), Katanga is obliged to exercise a variant of self determination that is compatible with sovereignty and territorial integrity of Zaïre.⁶⁷⁰

What is interesting to note here is that the African Commission argument rested on the view that violation would have occurred if the Katangese people were “denied the right to participate in government”.⁶⁷¹ In other words, the African Commission interpreted this fundamental right as applying to the Katangese as a “people”. The certainty about this comes from the fact that the African Commission, when developing its line of reasoning, made a direct link with the exercise of self-determination which is entrenched as a people’s right. Actually, on the one hand, the view of the African Commission suggests that if the Katangese people were really denied participation in the government, then as a “people”,

⁶⁶⁷ Bojosi (2010) 288.

⁶⁶⁸ The *Katangese* case, supra note 67.

⁶⁶⁹ The fact that the Communication was initiated by one individual does not alter the fact that it was a collective demand made on the behalf of the Katangese peoples. Thus, in acting in his capacity as the KPC president, it is clear that Moke could somehow involve the Katangese people in his demand. In the *Endorois* case, the African Commission has clearly established that the question of whether certain members of a local community may ascertain communal rights on behalf of the group is a question that is settled by the internal arrangements of that community. *Endoris* case, supra note 67, para 162. This means that at the level of the African Commission and the African Court, there is the possibility to have one individual demand which includes collective interests.

⁶⁷⁰ See the *Katangese* case, supra note 67, para 6.

⁶⁷¹ the *Katangese* case, supra note 67, para 6.

they would have qualified to exercise the variant of self-determination that leads a group of peoples to become independent and form a new state. The African Commission statement may lead to the general deduction that article 13 can enjoy a collective application as well and be relied on by groups or communities to take part in decisions having a direct impact on them. Affected communities can indeed rely on the provisions of this article to claim a fundamental right to participate in the governance of mineral resources.

3.2.1.2 The rights to receive information and to express and disseminate one's opinions

3.2.1.2.1 Scope of the rights

Article 9 of the African Charter provides that “Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.”

The rights contained in this provision are actually interdependent. Indeed, it is quite difficult to express and disseminate one's opinion without having the appropriate information. This is what explains the fact that this fundamental right is analysed under the first dimension which looks at community participation as a fundamental right. It is assumed here that information is part of the process of participation. If affected communities must participate in mineral policy and projects, they are supposed to express views on relevant questions in connection to their welfare and livelihood with the view to secure their rights and interests. For such a purpose, they need to be provided with the appropriate information. In 2002, the African Commission adopted a declaration of principles on freedom of expression in Africa where it asserted that the fundamental rights in article 9 are particularly critical when the information sought is necessary for the exercise or the protection of any of the fundamental rights in the Charter.⁶⁷² Actually, freedom to access information is a key element that brings transparency and accountability in governance, it enables citizens to perceive how public affairs are managed and facilitates the exposure of any form of corruption;⁶⁷³ it constitutes a powerful

⁶⁷² ACHPR /Res.62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa (2002) (Hereinafter “African Commission declaration of principles”) para. IV 2.

⁶⁷³ Maputo Declaration: Fostering freedom of expression, access to information and empowerment of people (UNESACO, 3/52008) para.6.

tool by which people may check how far their fundamental rights and interests are given priority in the governance.

If community participation must be equalized to a right to prior informed consent, affected communities should dispose of relevant information concerning the mineral project for which they are called to express their view.⁶⁷⁴ In this regard, Ward explained that:

for a process to be informed, all parties involved, including the state, private industry, and the affected indigenous peoples, must have access to and share accurate information regarding potential impacts of a project...⁶⁷⁵

Thus, if affected communities have to express and disseminate their opinions in the governance of mineral resources, the disclosure of information is compulsory. Nevertheless, since the fundamental rights in article 9 have been given an individual dimension as well, the question will raise also as to whether affected communities are entitled to rely on them as a group. In addition, some other important issues to deal with are whether access to information and freedom of expression are regulated in the national law in accordance with standards developed by the African Commission and then whether the African Charter can be used as a tool to claim information from private parties such as mineral corporations. The answers to these questions determine how far the holders of these fundamental rights in article 9 can go in requesting information and expressing their views in connection with governance of public matters.

The fundamental rights to receive information, to express and disseminate one's opinions that have been enshrined also as individual rights were identified as well by the African

⁶⁷⁴ Anaya J. "Indigenous peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights indigenous peoples have in lands and resources" (2005) 22 (1) *Arizona Journal of International & Comparative Law* 16.

⁶⁷⁵ Ward T. "The right to free, prior, and informed consent: Indigenous peoples' participation rights within International Law" (2011) 10 (2) *Northwestern Journal of International Human Rights* 83.

Commission as a cornerstone of democracy.⁶⁷⁶ This is obviously because freedom of expression is the *sine qua non* condition for the existence of any democracy.

According to Somovia, to inform and be informed is a social need that is an essential component in the improvement of mankind and in a society's capacity for development.⁶⁷⁷ This statement implies that information is not only a need for individuals but also for a group or community of people in their quest for the achievement of developmental goals. Somovia even goes further in comparing information to health, food, housing, education and employment because as these latter needs, it plays a relevant role in the realisation of development.⁶⁷⁸ As to the expression or dissemination of information, though it stands as a seed of freedom of expression which actually is a fundamental right that is practically exercised at the level of each individual or human being, the fact that identity or similarity of opinion may exist between several people makes it possible to bring out a collective expression or dissemination of opinion. This double dimension of freedom of expression is well explained by Verpeaux who points out that:

Freedom of expression possesses the specific characteristic of being an individual right which stems from every one's spiritual freedom but which is conceivable only for communication with others. It then has a collective or public dimension. It necessarily has a collective dimension because expression means something only if addressed to others.⁶⁷⁹

Verpeaux's remarks imply that expression of opinion is necessarily part of an issue or debate that interests a group of people. This is particularly true in respect of a majoritarian model of democracy where the view of the majority emerges from an addition of individual opinions that converge.

⁶⁷⁶ Resolution on Freedom of Expression and the Upcoming Elections in Zimbabwe, The African Commission on Human and Peoples' Rights (the African Commission) meeting at its 42nd Ordinary Session held from 15 - 28 of November 2007, in Brazzaville, the Republic of Congo.

⁶⁷⁷ Somovia J. "Democratization of communication: From minority social monopoly to majority social representation" in (1981) 2 *Development dialogue* 23.

⁶⁷⁸ *Id.*, 23.

⁶⁷⁹ Verpeaux M. *Freedom of expression: In constitutional and case law* (Strasbourg: Council of Europe 2010) 32.

Making a comment in respect of communities' environmental rights in Zambia, the World Bank observes that effective consultations between stakeholders require *inter alia* having access to background information related to the health and environmental impacts of different sources which may have caused pollution in the past.⁶⁸⁰ This assertion demonstrates the important role that individual fundamental rights may play in the implementation of other fundamental rights in their collective dimension. Nevertheless, before reviewing the jurisprudence of the African Commission in support of this collective dimension of the rights, one important remark needs to be made. This is related to the formulation of article 9. Actually the fact that this article requires the exercise of the right to express or disseminate opinions to be "within the law" is likely to circumscribe the reach of this right because such a formulation constitutes what is often described as a "claw back clause".

Claw back clauses are the ones that permit the state to limit fundamental rights *ab initio* within provisions of domestic law and without underlying circumstances within which these rights may be restricted. This wide discretion conferred to national legislation is uncommon compared to other international instruments on fundamental rights where one finds instead derogation clauses that allow the state to limit only certain rights during the time of war or public emergencies (see for instance article 4 of the ICCPR, article 15 of the ECHR). Under derogation clauses, some rights, for instance, the right to life and the right to freedom from torture and inhuman treatment, are declared non-derogable in all circumstances while precise conditions and legal requirements are set up for permissible derogation for others rights.⁶⁸¹ As aptly observed by Hansungule, there is little or even no room for arbitrariness under derogation clauses due to precisions they offer, while under claw-back clauses opportunities for abuses are there

⁶⁸⁰ World Bank "ZCCM Investment Holdings Plc. Zambia-Copperbelt Environment Project: Environmental Impact Assessment E539" (World Bank, 2002) 9; Available at http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/03/05/000112742_20040305152701/Rendered/INDEX/E5390vol.2.txt [accessed 20/6/2013].

⁶⁸¹ See arts. 2 and 3 of the ECHR and the UN ECOSOC Siracusa principles on the limitation and derogation of provisions in the ICCPR, Annex UN Doc E/CN.4/1984/4 (1984) paras. 58-60.

because of the considerable discretion afforded to the state.⁶⁸² But in practice, as reflected in the work of the African Commission, some provisions of the Charter may be used to attenuate the negative effects of claw-back clauses. First of all, the African Commission had the opportunity to determine that:

The only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in article 27.2, that is that the rights of the Charter ‘shall be exercised with due regard to the rights of others, collective security, morality and common interest’.⁶⁸³

Commenting on article 27 (2), Ougeurgouz observes that since the aim of this provision is to reconcile the exercise of fundamental rights in the Charter with the protection of certain relevant interests, it would be wrong to place any other limitations that are not necessary to protect the said interests.⁶⁸⁴ This view seems accurate in so far as, the interpretation of article 27 (2) given by the African Commission suggests that limitations that do not fulfil this purpose are “illegitimate”.⁶⁸⁵ But practically, this interpretation of the African Commission is not a totally satisfactory solution because several reasons may be brought forward by the government under the labels of “collective security”, “morality” and “common interest”. The interpretation of interests as enumerated in article 27 (2) of the African Charter must be very strict to avoid abuses by African governments. This is why the second restriction to claw-back clauses found in the work of the African Commission is of great relevance. Using the opportunity to rely on general rules and principles of international law offered by the African Charter in its articles 60-61, the African Commission has specified that national authorities should not enact provisions which restrict fundamental rights and freedoms in the Charter contrarily to

⁶⁸² Hansungule M. “Towards a more effective African system of human rights: ‘Entebbe proposals’” Paper presented at the First International Conference on: The application of the death penalty in Commonwealth Africa organized by the British Institute of International and Comparative Law (10-11/5/2004 Entebbe, Uganda) 3.

⁶⁸³ African Commission Communication 105/93, 128/94, 130/94, 152/96 *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria* (Hereinafter the *Media Rights Agenda* case) para.68.

⁶⁸⁴ Ougeurgouz (2003) 433.

⁶⁸⁵ The *Media Rights Agenda* case, supra note 683, para. 69.

international law standards.⁶⁸⁶ This implies that any restriction that stands in stark contrast to developments made in international law customs, conventions and jurisprudences related to fundamental rights, should not be acceptable. In this respect, the principle developed within the UN may be of considerable importance concerning the right to information. Indeed, according to the principles endorsed in 2000 by the UN Special Rapporteur on the issue:

A refusal to disclose information may not be based on the aim to protect Governments from embarrassment or the exposure of wrongdoing; a complete list of the legitimate aims which may justify non disclosure should be provided in the law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest.⁶⁸⁷

More specifically, in its Declaration on Principles on Freedom of Expression in Africa, the African Commission emphasised that “Any refusal to disclose information shall be subject to appeal to an independent body and/or the courts.”⁶⁸⁸

These two principles suggest that, under international standards, reasons for a refusal of disclosure must be strictly enumerated within the national legislation, that in no case they should aim at hiding a wrongdoing and that they may be subject to an appeal before a quasi-judicial or a judicial body.

Also, concerning the reach of the right to information in article 9, though it is basically public information held by the state that is primarily targeted, the African Commission has underlined the principle that information held by private bodies (for instance mineral companies) must also be accessible whenever they are necessary for the exercise or protection of any right.⁶⁸⁹ This presages some measures of horizontal applicability of

⁶⁸⁶Id. para. 64-65.; African Commission Communication 101/93 (1995) *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v. Nigeria* (Hereinafter *Nigerian Bar Association* case) para. 16; African Commission Communication 48/90-50/91-52/91-89/93 *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* para. 80.

⁶⁸⁷ Report of the Special Rapporteur, Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44.

⁶⁸⁸ African Commission Declaration of principles para. IV (2).

⁶⁸⁹ Id.

fundamental rights contained in the African Charter. In Zambia, a lack of clarity on the procedure that the mineral company used to select community projects was perceived by the Kyafukuma community in Solwezi as a barrier to their development, to such an extent that one of its members contended that projects realised by the firm represented a drop in the ocean compared to revenues it generated.⁶⁹⁰ More specially, because of the relevant role that NGOs have played in the advocacy of affected communities in Africa, an open-question is whether they can legitimately request information from the state or private organisations whenever they stand for the cause of anyone of these communities. This happened with Amnesty International which at several occasions requested information from mineral corporations, but without success.⁶⁹¹ As a result, this international non-profit organisation has come up with the conclusion that mineral companies are often reluctant to disclose information on how their activities will affect people.⁶⁹² Amnesty International describes the situation in the following words:

While some information may legitimately be considered confidential, companies frequently take the approach that they will not disclose data unless required to by law. Amnesty International found a general reluctance among companies to disclose information on the environmental and social impacts of their operations. Although companies claim to have undertaken studies on a range of such important issues as health and fisheries, these studies are rarely made available. [A company X]⁶⁹³ claimed to have undertaken studies on marine resources and to have commissioned a study called ‘Air Quality, Precipitation and Corrosion Studies of Qua Iboe Terminal (QIT) Flares and Environs’. Amnesty International asked [company X] for copies of these studies but did not receive them. In 2006, [a company Y] reportedly carried out a study that looked at the impact on marine life of wastewater disposed of at sea. Amnesty International could not find this study and received no response from [company Y] to a request for a copy. During an interview with Amnesty International in Port Harcourt on 1 April 2008, [company Y] claimed to have studies that looked at a range of impacts of oil operations, which the company said it would supply. Amnesty International never received any of these studies. In response to a request for information from Amnesty International, [a company z] claimed that it

⁶⁹⁰ Ngosa F. and Van Alstine J “Seeking benefits and avoiding conflicts: A community-company assessment of copper Mining in Solwezi, Zambia” (2010) 19; available at <http://www.lse.ac.uk/geographyAndEnvironment/research/Sustainable%20Synergies/Publications/Zambia%20Community-Company%20Assessment.pdf> [accessed on 10/6/2013].

⁶⁹¹ Amnesty International “Nigeria: Petroleum, pollution and ...”, supra note 342, 61 .

⁶⁹² Id.

⁶⁹³ It is not the aims of this study to expose the image of any multinational corporation operating in mining.

had to have permission from the Nigerian National Petroleum Company (NNPC) and the Department of Petroleum Resources (DPR), the partner organization and regulator respectively, in order to release environmental data. When Amnesty International asked if NNPC or DPR had ever refused to allow [company z] to provide communities or NGOs with environmental data, the company said they did not believe so, but that was apparently because they had never asked NNPC or DPR if they could release such information. [Company z] has operated in the Niger Delta almost half a century.⁶⁹⁴

This description by Amnesty is just indicative of strained relations that generally exist between companies and NGOs in the extractive industry. In this respect, what is obvious thus far is that if NGOs would be entitled to request the disclosure of information, it would only be as the result of the fact that they are acting on behalf of the holders of these fundamental rights, namely affected communities. How far they can act in this regard enters in the scope of the general discussion in the coming section dedicated to the analysis of the *locus standi*.

3.2.1.2.2 Interpretation of the right in the jurisprudence of the African Commission

The fundamental rights in article 9 of the African Charter have been referred to more in connection with prisoners detained for the purpose of banning them from expressing a political opinion.⁶⁹⁵ What is interesting to notice in the African Commission jurisprudence is the fact that fundamental rights contained in this article have also been given a collective application. In one case, the African Commission explicitly underlines that the intimidation and arrest or detention of journalists for articles published and questions asked, deprives not only the journalists of their right to freely express and disseminate their opinions, but also the public, of the right to information, which is a breach of the provisions of article 9.⁶⁹⁶ By using the word “public”, one can assume that a collective dimension was developed by the Commission in so much as the etymology of this word always refers to a group of people. When the public or people receive information, this is with the aim to use it for some purpose. Among them is often the expression of their approval or disapproval of government policy on what has been or is to be done within the society. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*, the African Commission pointed out that freedom of expression was vital to

⁶⁹⁴ Amnesty International “Nigeria: Petroleum, pollution and ...”, supra note 342, 61-62.

⁶⁹⁵ See the *Dawda case*, supra note 662, para. 65; Amnesty International, Id., para78.

⁶⁹⁶ See the *Dawda case*, Id., para 65.

the participation in the public affairs of the country.⁶⁹⁷ In the context of this study, this assertion implies that community participation is impossible without members of the affected community enjoying the possibility to exercise their fundamental rights in article 9. Though the African Commission did not refer directly to article 9 in the *Endorois* case, it explicitly mentioned that affected communities must give an “informed” consent in matters that are critical to their welfare.⁶⁹⁸ Therefore, the collective dimension of the fundamental rights entrenched in article 9 comes from the fact that decisions affecting a community require the opinions of individuals that are part of that community, either through direct or indirect democratic channels.⁶⁹⁹

Unfortunately, as aptly observed by Olaniyan, the fundamental rights in article 9 are the less respected in developing regions simply because seeking or attaining the truth regarding public matters is wrongly interpreted as inherently injurious to the government.⁷⁰⁰ In Africa, most of time, it has been fundamental rights’ activists who have been victims. Just by way of illustration, beside the case of Ken Sarro-Wiwa in the Niger Delta already mentioned, there is the case of Floribert Chebeya in DRC who was mysteriously killed by some members of the police because he was advocating fundamental rights.⁷⁰¹ This case which has become well known all around the world has left behind a landmark of how freedom of expression is yet disregarded by some African governments. Doing a comparative approach, Olaniyan has found that provisions in article 9 are less specific than those found in article 19 of the ICCPR and article 13 of the American Convention of Human Rights that both refer to the right to “seek” information. Olaniyan concludes that such a formulation is better because it suggests the obligation of the government to provide information upon the request of citizens.⁷⁰² Though Olaniyan’s observation points to a relevant issue in terms of drafting, if the only distinction between the African Charter formulation and the one found in these instruments lies in the use

⁶⁹⁷ African Commission *Communication* 140/94, 141/94, 145/94 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria* (1999) (Hereinafter the *Media Rights Agenda* (2) case) para. 36.

⁶⁹⁸ See the *Endorois* case, *supra* note 67, para. 291.

⁶⁹⁹ This is simple to apprehend in the context of direct democracy, but in case of indirect democracy, the dilemma is how one would be sure that the view of the representative is shared by the community, at least in its majority.

⁷⁰⁰ Olaniyan K. “Civil and Political Rights to freedom of expression in the African Charter: Articles 8-14” in (eds.) Evans M. and Murray R. *The African Charter on human and people’s rights: The system in practice 1986-2006* (Cambridge: Cambridge University Press, 2008) 220.

⁷⁰¹ Human Rights Watch World report 2011: Events of 2010 (HWR, 2011) 107-108.

⁷⁰² Olaniyan (2008) 220.

of “receive information” instead of “seek information”, then there is no fatal deficiency in the African system. This is simply because no matter which one of these formulations is adopted, a natural deduction commands that the recognition of a fundamental right to an individual or group of persons automatically creates in turn an obligation in that those to whom the law applies are compelled to abide by it.⁷⁰³ Thus, it naturally follows that whenever government agencies or private organisations possess information that is pertinent to the well-being of citizens, they are obliged, except in the cases mentioned above, to release and put it at their disposal. In practice, the African Commission has adopted a resolution that addresses this shortcoming. This is the resolution adopted in 2002 on the declaration of principles on freedom of expression in Africa, where provision is clearly made that everyone has the right to access information held by public and private bodies.⁷⁰⁴ This implies in practice that affected communities are by law empowered to request information not only from their government, but also from any third party, including mineral companies, provided the information sought is necessary for the exercise or protection of any fundamental rights. Moreover, recently some NGOs participated in a forum just before the 51th session of the African Commission where they made some recommendations to this institution in the form of a Resolution on Access of Information in Africa.⁷⁰⁵ In this document, they clearly specified that access to information is to seek and receive information from public and private bodies.⁷⁰⁶ Actually instead of focusing on the debate between “receive information” and “seek information”, the real drafting issue of article 9 lies in the inclusion of the “claw-back clause” as already mentioned previously.

Before closing this subsection, it is interesting to underline one statement made by the African Commission in *Huri – Laws v. Nigeria*.⁷⁰⁷ The Commission has specified that in the regulation of fundamental rights in article 9, African governments should not infringe on any of their other obligations under the African Charter.⁷⁰⁸ This assertion implies that despite the existence of a

⁷⁰³ Panda (2007) 25; Donnelly J. *Universal human rights in theory and practice* (Ithaca/New York: Cornell University Press, 2003) 34.

⁷⁰⁴ African Commission Declaration of principles para. 3. In 2004, a special rapporteur on Freedom of Expression was established at the 36th ordinary session through resolution 71.

⁷⁰⁵ TRES/002/4/2012 Resolution on access to information in Africa.

⁷⁰⁶ TRES/002/4/2012 Resolution on access to information in Africa 1.

⁷⁰⁷ African Commission Communication 25/98 *Huri - Laws v. Nigeria* (2000).

⁷⁰⁸ *Id.* para 48.

claw-back clause, access to relevant information regarding mineral projects should not be refused or hidden from affected communities anytimetheir other fundamental rights guaranteed in the Charter are infringed on or threatened.

3.2.1.3 The right to a fair trial

3.2.1.3.1 Scope of the right

In terms of article 7 (1):

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

This provision of the African Charter establishes the fundamental right to have his/her cause heard before a national judicial or quasi-judicial body, which in other terms is referred to as the right to a fair trial.⁷⁰⁹ By entrenching this fundamental right, the African Charter has sought to reiterate the ideal asserted previously by the OAU founding fathers according to which justice was one of the essential objectives for the achievement of African peoples' aspirations.⁷¹⁰ Since community participation now appears among such aspirations, and is being contemplated by affected communities as a means to redress their marginalisation in the bilateral model of mineral resource governance (state-mineral company), it is obvious that legal avenues which may serve to fulfill this aspiration and provide a feeling of justice to communities must be explored. In practice, the right to a fair trial is made of a twofold component. On the one hand, it implies the right to defend oneself when accused and to have legal assistance in a proceeding that is fair and public before a competent, independent and impartial body. This can be seen as a passive dimension in so much as in this case, the exercise of the right will only happen once its holder is sued. On the other hand, the right is built on the possibility to have access to justice

⁷⁰⁹ See the African Commission Resolution on the right to recourse and fair trial adopted at its 11th ordinary session in Tunis, Tunisia, in March 1992; Henys C. *Human rights law in Africa* (The Hague: Kluwer Law International, 1996) 199.

⁷¹⁰Ouguergouz (2003) 132.

and bring a claim alleging violation of a fundamental right in the African Charter. This is the active dimension known as the right to access justice,⁷¹¹ the one with which community participation is more concerned.

Affected communities should be able to approach the court if their fundamental right to participation is not respected by the state and the mineral corporation. In this case, access to justice becomes a key strategy through which they can secure a space for their opinions regarding the mineral project.⁷¹² Baumgartner observes that for individuals as well as groups, litigation is one important way through which they make their preferences count.⁷¹³ Thus, access to justice will make it possible for affected communities to claim before the court that their exclusion from the decision-making process by other stakeholders is a violation of the fundamental right in article 13 of the African Charter. It is obvious that for such a strategy to be efficient, community participation as well as access to justice must be considered as fundamental rights. The ultimate goal in this fundamental-rights based approach is to obtain a remedy before the court once it is established that the right at hand has been violated.⁷¹⁴ This is what prompted the International Court of Justice to assert in the *Barcelona Traction* case (*Belgium against Spain*) that fundamental rights also include the protection against the denial of justice.⁷¹⁵ Thus, providing affected communities with a fundamental right to participation, but without an option to access court can easily lead to a denial of justice. This is because, they will possess the right but without formal legal means to enforce it. It has been further observed that the more a country grants access to domestic courts, the more likely it is to comply with its international law obligations related to fundamental rights.⁷¹⁶ It is believed that if the outcome of the litigation is favourable to the complainant, it will have a general deterrence effect in that any potential perpetrator will be reluctant to commit a violation in future.⁷¹⁷ In so far as this

⁷¹¹ Baumgartner (2011) 457.

⁷¹² Francioni F. "The rights of access to justice under customary international law" in (eds.) Francioni F. *Access to justice as Human rights Rights* (New York: Oxford University Press, 2007) 3.

⁷¹³ Baumgartner (2011) 455.

⁷¹⁴ Principles and guidelines on the right to a fair trial and legal assistance in Africa, African Commission, Doc/os (xxx) 247; in (eds.) Starmer k. and Christou TA. *Human Rights manual and sourcebook for Africa* (London: BIICL 2005) 1300.

⁷¹⁵ *Barcelona Traction, Light and Power Company, Ltd (Belgium v. Spain)* ICJ Report (1970) 147.

⁷¹⁶ Baumgartner (2011) 455.

⁷¹⁷ *Id.*, 455-456.

remark may be accurate, it implies that the more courts would reach the conclusion that the fundamental right to community participation was infringed on, the more other stakeholders would become reluctant in the future to exclude affected communities and ignore their views as regards mineral projects. This confirms the relevance of the right to access justice as a key factor that can make community participation really effective.

Providing further explanation on the substance of article 7, the African Commission in section C of the Principles and Guidelines on the right to a fair trial and legal assistance adopted in 2005 asserted that:

- (a) Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.
- (b) The right to an effective remedy includes:
 1. access to justice;
 2. reparation for the harm suffered;
 3. access to the factual information concerning the violations.

This provision of the guidelines emphasises once again the capital role that information, access to justice and remedies may play in the legal efforts to make participation effective through the African Charter normative framework. Nevertheless, an abusive use of access to justice should be avoided by affected communities in so far as it may create a negative impact in the investment climate in that companies can develop reluctance to invest in the country if they feel that litigation has become the golden rule even for small misunderstandings that can be settled amicably.⁷¹⁸ Therefore, whenever they are approached, enforcement machineries face a challenge to reach a decision which balances both sides' interests which all are relevant in the development process of the country. This exercise is so sensitive that judges or referees must be aware of the big responsibility that rests on their shoulders when deciding a case. Unfortunately it has happened in Nigeria that judges decided to make interests of investors prevail, considering for instance that economic interests should be prioritised over environmental rights.⁷¹⁹

⁷¹⁸ Frynas JG. "Social and environmental litigation against transnational firms in Africa" (2004) 42 (3) *Journal of Modern African studies* 378.

⁷¹⁹ Temitope R. "The judicial recognition and enforcement of the right to environment: differing perspectives from Nigeria and India" (2010) 423*NUJS Law Review* 435; Frynas JG. "Legal change in Africa: Evidence from oil-related litigation in Nigeria" (1999) 43 (2) *Journal of African Law* 122.

Since article 7 consecrates an individual right, it is also questionable if affected communities as a group are entitled to resort to it. Furthermore, it remains enigmatic whether the restriction regarding the *locus standi* before the African Court can be reconciled with the fact that access to justice is a fundamental right for its holders. Of course, one may object that the provisions of article 7 only concern remedies sought before national jurisdictions. However, as will be seen when discussing the exhaustion of local remedies rule, actions brought before regional courts adhere to the principle of subsidiarity and reflect therefore a prolongation of the need to satisfy the demands of justice where national courts have failed to do so. Thus, if the right in article 7 can be claimed in respect of primary organs of enforcement (national courts), it would not be reasonable to consider that this should not be the case with regard to subsidiary bodies (regional enforcement machineries).⁷²⁰ Though Francioni points out that access to justice is a fundamental right only in the context of domestic law and that a rule of customary international law supporting the same approach for international proceedings does not exist yet,⁷²¹ the fact remains that the declarative system established by the protocols is likely to promote discrimination among Africans because some will be able to approach the African Court and others not, depending on what the position is in the country they want to sue.

Article 7 is a fundamental right vested in individuals and which can be involved in a passive or active way in the protection of their entitlement to a fair trial. Obviously, it is clear that individuals who are members of an affected community can exercise it on their own behalf; but whether this fundamental right can be claimed by the community as a whole remains a formal challenge because it is not part of collective rights entrenched in the African Charter. In this respect, it appears that the same remark that was made in respect of article 13 is also valid here. As demonstrated in the *Katangese* case, the fact that one member of a group can be entitled to bring a case on the behalf of the entire community makes it possible to support a collective application of this right as well. In this situation, the individual is not exercising access to justice in his own interest, but in the best interest of the group whose a fundamental right has been allegedly violated. Since the need for justice can exist for an individual as well as an entity

⁷²⁰ The subsidiarity of regional bodies in fundamental rights litigation is explained later under the section on local remedies exhaustion.

⁷²¹ Francioni (2007) 41.

made of a group of peoples, it is logical to assert that the right to access to justice must also enjoy a collective dimension. This is particularly true when one considers that access to justice is part of the rule of law through the imperative for states to establish an independent and impartial judiciary.⁷²² In other words, if access to justice is not granted, how would one be able to assess the extent to which a court is independent and impartial? Therefore, it appears paradoxical to conceive that a country whose system of governance rests on the rule of law may afford to judicially protect individuals' rights but fail to provide such a possibility for collective rights.

3.2.1.3.2 Interpretation of the right in the jurisprudence of the African Commission

Article 7 has been interpreted in the jurisprudence of the African Commission very often in its passive dimension. In many cases, it was the fact that the victim was either unfairly tried in the court or arrested without being prosecuted that led to the violation of the right. In the *Dawda* case where a former president of Gambia brought accusations of terror and arbitrary actions against the military government which overthrew its government by a coup in 1994, the fact that the minister of interior could detain anyone without trial for up to six months, and could extend the period *ad infinitum* was found by the African Commission to be an infringement of article 7(1) (d) of the Charter.⁷²³ In *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi*, the fact that persons on the behalf of whom the communications were brought had been detained for up to 12 years either without a trial taking place in some cases, or with a trial that had taken place before a traditional court, but without legal representation in other cases, was considered by the African Commission as a violation of article 7.⁷²⁴ There have been cases also where article 7 was dealt with by the African Commission in its active dimension. For instance, in *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v. Nigeria* where the complainant protested against a decree

⁷²²Ouguergouz (2003) 134.

⁷²³ See the *Dawda* case, supra note 662, para.61.

⁷²⁴ African Commission Communication 64/92-68/92-78/92_8 AR *Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi* (1993) paras. 9-10. For the passive dimension of the right, see also African Commission Communication 71/92 *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Zambie* (1996) paras. 30-31.

which organised the Nigerian Bar Association and as such, prohibited recourse to court, the African Commission found that the said decree violated article 7 as it deprived individuals from access to justice.⁷²⁵ Though no case has so far been brought before the African Commission in which an affected community was refused access to justice, it is predictable that if such a situation occurred, the Commission and even the African Court would find a violation of article 7. Therefore, article 7 is critical in the protection of fundamental rights of affected communities in the mineral field. It offers them a viable option to make their views considered whenever other stakeholders deny them the right to participate effectively in decisions related to a mineral project.

3.2.2 The second dimension: Community participation as a channel to emphasise other fundamental rights

Under this section, the main objective is to demonstrate how community participation can serve as the means through which affected communities should exercise other fundamental rights which are directly relevant for the realisation of sustainable developments objectives through the mineral exploitation.

3.2.2.1 The right to self-determination

3.2.2.1.1 Scope of the right

Article 20 of the African Charter provides that:

All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

⁷²⁵ See the *Nigerian Bar Association* case, supra note 686, para. 14. See also African Commission 60/91 *Constitutional Rights Project (in respect of Wahab Akamu, G. Adegas and others) v. Nigeria* (1995) paras. 12-14.

All peoples shall have the right to the assistance of the States parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

The fundamental right to self-determination is now considered a customary principle of international law.⁷²⁶ In respect of developing regions, including Africa, this right was originally conceived as a reaction to the past colonial dominion.⁷²⁷ In this regard, a document was adopted in the UN on the declaration of the Granting of Independence to Colonial Countries and Peoples in 1960 where it was asserted that:

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.⁷²⁸

This quote expresses the predominant view that led to the abolition of colonialism in Africa, but also raises another issue, which is the self-determination perception beyond colonisation as reflected in some scholars' writings. While Cassese has observed that the right to (external) self-determination for colonial people ceases to exist under customary international law, once colonialism is banished,⁷²⁹ Fodella contended that it remains an open question whether the right to self-determination can be applied to small groups like indigenous peoples.⁷³⁰ Fodella's concern is raised by the fact that the "peoples" to which the concept of self-determination refers are not defined in legal terms in related international instruments.⁷³¹

⁷²⁶ Fodella A. "International law and the diversity of indigenous people" (2006) 30 *Vermont Law Review* 576; Cassese A. *Self determination of peoples: A legal reappraisal* (Cambridge: Cambridge University Press, 1996) 66-67

⁷²⁷ Dresso S. "Peoples' rights under the African Charter on Human and Peoples' Rights: Much ado about nothing?" Paper presented in connection with the Research Paper Series programmes of the South African Institute for Advanced Constitutional, Human Rights and International Law, RPS No 6, 14; 17.

⁷²⁸ S. 1 of the UNGA Resolution 1514(XV): Declaration on the granting of independence to colonial countries and peoples, 14 December 1960.

⁷²⁹ Cassese (1996) 101.

⁷³⁰ Fodella (2006) 576.

⁷³¹ *Id.*, 576-577.

If one adopts a restricted view, it is clear that the fundamental right to self-determination would not apply to communities living within a country, simply because initially it was conceived as the legal basis to support national liberation movements in colonised countries. Moreover, even in such a restrictive approach, Cassese's view remains debatable because if the right to self-determination has to cease in any way whatsoever for people that succeeded to gain independence, the consequence would implicitly be that they should return to colonial rulership that would again determine their political choices and socio-economic options. Indeed, the concept of independence is contingent on the one of self-determination in that the former cannot exist without the implementation of the latter. Independence is conditioned by the continual exercise of self-determination.

Actually, Ozdën and Golay's remark brings more light to the debate in demonstrating that an extensive perception of self-determination fits better in the post-colonial context. These scholars aptly observe that the restatement of the fundamental right to self-determination in the ICCPR, the IESCR and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states, respectively in 1966 and 1970 implies that it was extended to all peoples, colonised or not.⁷³² This is correct insomuch as the rationale under which these international instruments were adopted goes beyond the concept of colonisation to more generally even regulate the relationship between states that are already independent. This is also true in respect of the African Charter, because the context within which this right was included in this instrument is one where most African countries were already free from colonialism (1981).⁷³³ The certainty about this can be drawn from the second subsection of article 20 of the African Charter where reference is made not only to "colonised people", but also to "other oppressed peoples". Otherwise, if one really supports the view of Cassese,⁷³⁴ it is still possible to contend that self-determination remains relevant within independent states with regard to

⁷³² Ozdën M. and Golay C *The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a Human Rights perspective* (Geneva: CETIM, 2010) 5-6. The UNGA Resolution 2625 (XXV): Declaration of principles of International Law Concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations, 24 October 1970; Arts. 1 of the ICCPR and ICESCR.

⁷³³ Except Eritrea and Namibia, all African countries that had suffered from colonialism were already free in 1981, the year of the African Charter adoption.

⁷³⁴ Paradoxically, Cassese himself has elaborated on the concept of "internal self-determination" ..

Lenin and Gramsci's concept of "internal colonialism".⁷³⁵ Cassese himself has elaborated on the concept of "internal self-determination" in the context of independent countries.⁷³⁶ The concept of "internal colonialism" has been referred to political dominations, economic exploitation and social discrimination of a group of people within a country.⁷³⁷ Therefore, the fundamental right to self-determination in the context of this study must be approached within this extensive post-colonial perspective, including a possible application to affected communities in so far as they may be captured as people in the reach of article 20.

The fundamental right to self-determination is naturally a people's right in so much as it refers to a group of individuals holding the prerogative to decide upon their destiny. As observed in the preceding section, this fundamental right has been developed first of all in an international dimension, when colonised people sought to free themselves from the rulership of colonising countries. This is what some scholars have qualified as "external" self-determination to differentiate it from the modern form which they qualified as "internal" self determination, meaning the fundamental right of the people to freely choose their desired political and economic regime.⁷³⁸ Thus, it can be assumed that it stands as a response to "internal colonialism".

Cassese notes that in this case, this fundamental right goes beyond choosing among what is on offer from one political or economic position only.⁷³⁹ Put in the context of community participation in the mineral sector, this assertion would imply that the choice of affected communities should not be reduced to what are the suggestions from the government or other third parties (multi-national companies or international donor

⁷³⁵ According to Clarno, this concept is rooted in the works of Lenin and Gramsci who used the concept to study uneven regional development in Russia and Italy. Clarno AJ. *The empire's new walls: Sovereignty, neo-liberalism, and the production of space in post-apartheid South Africa and post-Oslo Palestine/Israel* (Ann Arbor: Proquest, 2009) 72.

⁷³⁶ Cassese (1996) 101.

⁷³⁷ See for instance, racism against blacks in the United States as developed in the approach of Carmichel and Hamilton. Clarno (2009) 72-73.

⁷³⁸ Cassese (2009) 101; Pomerance M. *Self-determination in law and practice* (Boston: Martinusnijhof, 1982) 37.

⁷³⁹ Cassese (2009) 101.

agencies), but moreover, always be the result of their freedom to decide what is politically and economically appropriate for their own development.

Of course, the government has the duty to intervene and prevent mis-use of this fundamental right, particularly when it is used for illegitimate purposes. Indeed, what must be avoided is that leaders of communities living in mineral-rich areas of the country, manipulate members of their communities to use this fundamental right as an argument to free themselves from the central government authority and enjoy exclusive benefits from natural resources found there. This is probably the reason why, as will be seen in the next section, the African Commission was very careful when interpreting self-determination in the *Katangese* case. Indeed, from an economic perspective, the *leitmotiv* behind the Katangese secession in DRC has always been the desire of the leaders of this province to get rid of the central government to takeover a substantial part of the revenue generated by their mineral resources.⁷⁴⁰

To avoid the pitfalls of either situation, the exercising by the central government of its prerogatives in the redistribution of revenues must strictly remain motivated by the necessity to maintain a balance between areas of the country that possess a lot of natural resources and those that are deprived or poorly endowed. On the other hand communities and their leaders living inside the country should not rely on self-determination as a pretext in refusing to share a portion of their mineral revenues nationally. Nevertheless, it remains important to keep in mind that in the spirit of the African Charter, self-determination is a fundamental right vested in the people and not in the government. Thus, even when using their prerogatives, government officials should be aware that they remain responsible to the will of the people, be it nationally or at local level.⁷⁴¹ This remark is relevant because the outcome of self-determination is not always predictable. The International Court of Justice held that what is essential is that the outcome reflects the free and voluntary choice of the people concerned.⁷⁴² However in the context of this study,

⁷⁴⁰ Kanyarwunga JLN. *République démocratique du Congo: les générations condamnées: Déliquescence d'une société précapitaliste* (Paris : Publibook, 2006) 425-426.

⁷⁴¹ Dresso S. "Peoples' rights under the African Charter, supra note 727, 14.

⁷⁴² See Western Sahara, Advisory Opinion (16/10/1975), *ICJ Report* (4) (1975) 32-33.

the analysis of article 20 will not include the self-determination variant which leads to the creation of new states. Indeed, though a persistent exclusion of a community from political and economic decision-making processes can become a genuine pretext for secession, it is not the primary aim of this study to support the transformation of affected communities into new states. Self-determination has several facets (political, economic and socio-cultural) which from an external point of view imply *inter alia* the right to decide on the political status of a people within the international community, including the right to separate from the existing state of which the group concerned is a part, and create a new one.⁷⁴³ However from an internal perspective, this is not the case as it does not necessarily imply a claim to secession, but rather consists of a demand for the exercising of some fundamental rights within the boundaries of an existing state, for instance the right to decide on the form of government and the identity of rulers, the right to exercise control over natural resources and the right of a community within the state to participate in decision making.⁷⁴⁴ At this level, community participation as a means to exercise these fundamental rights becomes an expression of self-determination. The interaction between both concepts is well perceived in Bernhardt's theory of "democratic self-determination". This scholar put forward the "affectedness principle" according to which democratic self-determination is described as an ongoing process that requests that those affected by a decision should participate in its making.⁷⁴⁵ Thus, an affected community as a distinct people within a country should be able to rely on this variant of self-determination to claim their fundamental right to participate in the governance of the mineral sector and ensure throughout the decision-making process that whatever is set up, matches the socio-economic objectives they seek to achieve within their community. If self-determination in article 20 of the African Charter can be interpreted to imply this, then there is no doubt that affected communities can rely on this provision.

⁷⁴³Van Walt MC. and Seroo O. "The implementation of the right to self-determination as a contribution to conflict prevention: Report of the international conference of experts held in Barcelona from 21 to 27 November 1998" (UNESCO 1999) 12-13.

⁷⁴⁴Id. 12-13.

⁷⁴⁵Bernhardt B. "A theory of democratic self-determination: Affectedness, sovereignty, and nonterritorial political boundaries" discussion paper written for One Earth Future Foundation (2010) 6-7.

3.2.2.1.2 Interpretation of the right in the jurisprudence of the African Commission

There are not many cases on self-determination of communities living inside a country that were put before the African Commission. This is probably because in the few communications that have been dealt with thus far,⁷⁴⁶ the African Commission has generally demonstrated a high reluctance to support the variant of self-determination which leads to the creation of a new state, leaving room for a presumption of its adherence to the principle of *Uti possidetis* developed by the OAU member states in 1981 in Cairo.⁷⁴⁷ For instance, in the *Katangese* case, the African Commission referred to the fact that Zaire (DRC today) was a member of the OAU, in support of its argument that it was obligated to uphold the sovereignty and territorial integrity of the country.⁷⁴⁸ The same reasoning was developed in another case, *Kevin Mgwanga Gunme et al. v. Cameroon*, where 14 individuals brought a communication on behalf of the people of South Cameroon, alleging that they had become part of Cameroon as a result of “forceful annexion” to the francophone part in 1961 following a tacit approval by the British government. Therefore, because of the suffering they have been enduring since then, they claimed that their fundamental right to self-determination as entrenched in article 20 of the African Charter entitled them to become an independent state.⁷⁴⁹ Here again, the African Commission underlined the fact that Cameroon was a member state of the OAU as a reason that compelled it to uphold the sovereignty and integrity of this country.⁷⁵⁰

⁷⁴⁶ African Commission Communication 266/03 *Kevin Mgwanga Gunme et al. v Cameroon* (hereinafter the *Southern Cameroon* case) (1999); Report on mission of good offices to Senegal of the African Commission on Human and Peoples’ Rights (1–7 June 1996) in Tenth Annual Activity Report of the African Commission on Human and Peoples’ Rights (1996–1997) (hereinafter the *Casamence* case), ACHPR/RPT/10th, Annex VIII (1997); The *Katagese people* case, supra note 67.

⁷⁴⁷ In 1964, the OAU Assembly of Heads of State and Government adopted in Cairo a resolution stating that “that all Member States pledge themselves to respect the borders existing on their achievement of national independence”. Resolution on Border Dispute Among African States, AHG/Res. 16(I) (1964). This is what has come to be known as the *Uti possidetis* principle, seen as a stumbling block to African ethnic groups’ initiatives to raise their autonomy up to the level of becoming independent states. The aim behind this principle was to keep African borders intangible.

⁷⁴⁸ The *Katangese people* case, supra note 67, para. 5.

⁷⁴⁹ See the *South Cameroon* case, supra note 746, paras. 1-18.

⁷⁵⁰ *Id.*, para 190.

Behind this African Commission trend to promote the *Uti possidetis* principle, one can legitimately accept the belief of commissioners that self-determination as conceived in the African Charter was not foreseen as a tool to generate more independent states all over the continent. Such deduction is corroborated by the fact that in both above-mentioned cases, the panel of commissioners made a special reference in their argumentation to the fact that Zaire and Cameroon were part to the African Charter.⁷⁵¹ In the *Southern Cameroon* case, the African Commission even went so far as to assert that secession was not recognised as a variant of the right to self-determination within the context of the African Charter.⁷⁵² Nevertheless, despite this strong support for the OAU *uti possidetis* principle, the African Commission has left a small door open to a possible interpretation of self-determination in the African Charter that would lead to the creation of a new state.

The case for this exception is justifiable because, as pointed out in the preceding subsection, the outcome of self-determination is not predictable. In the *Katangese* case, the African Commission took the stance that the territorial integrity of Zaire could be questionable where concrete evidence of fundamental rights' violations, coupled with the denial of the fundamental right to participate in the government, existed.⁷⁵³ In the *Southern Cameroon* case, the African Commission reached the conclusion that, despite the violation of some fundamental rights, the fact that the fundamental right to participate in the government in article 13 was not violated, the highest variant of self-determination could not be exercised by the Southern Cameroonians.⁷⁵⁴ This double conditionality suggests the idea that participation in the government is implicitly viewed by the African Commission as a means to secure fundamental rights or fight against their violation. The Commission also underlined that it is "massive" violations of fundamental rights that are to be taken into consideration. Therefore, this African Commission interpretation of self-determination proves that the African Charter has not only embraced the OAU *uti possidetis* principle as a tool to safeguard territorial integrity in Africa, but has gone as to embrace exceptional circumstances that could necessitate the creation of a new state. This

⁷⁵¹ Ibid., para. 190 and the *Katangese people* case, supra note 67, para. 5.

⁷⁵² See the *South Cameroon* case, supra note 746, para. 200.

⁷⁵³ See the *Katangese people* case, supra note 67, para. 6.

⁷⁵⁴ See the *South Cameroon* case, supra note 746, paras. 194-195.

perspective has been the reason for the legitimation of the creation of the state of South Sudan in 2011 after the referendum held in Sudan. Nevertheless, as pointed out previously, it is not the purpose of this study to promote community participation as a pretext to secession.

In both the *Katangese* and *South Cameroon* cases, the African Commission called for the exercise of self-determination variants that are compatible with sovereignty and territorial integrity, contending that autonomy within a sovereign state can be exercised under the African Charter in terms of local government, confederacy, federation or any other form of governance that is in accordance with the wishes of the people.⁷⁵⁵ In this dimension, community participation by affected communities becomes a way of expression of their fundamental right to self-determination in the mineral sector. It is the tool through which they determine critical issues in direct connection to their welfare. For instance, through participation, they can determine the environmental regime to which a mineral project must adhere to.

3.2.2.2 The right to freely dispose of wealth and natural resources

3.2.2.2.1 Scope of the right

Article 21 of the African Charter provides that:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity.

⁷⁵⁵ Id., para. 191; the *Katangese people* case, supra note 67, para. 4.

States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practiced by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Permanent sovereignty over wealth and natural resources became an effective principle of international law in the aftermath of World War Two as well. In respect of developing countries, it was initially developed, as the people's right to self-determination, in the context of their struggle for decolonisation.⁷⁵⁶ In fact, this fundamental right is deeply rooted in self-determination in so far as the exercise of sovereignty over economic resources is conditioned by a people's enjoyment of the prerogative to determine what it deems suitable. As already underlined in the introductory chapter, African leaders in their quest for independence held within the UN that if natural resources had to profit the development of their peoples, the latter had to enjoy the freedom to decide how and to what extent these resources had to be exploited.⁷⁵⁷

The principle was gradually crystallised in some UN resolutions (523 (VI), 626 (VII), 1803 (XVII), 3201 (S-VI), 3281 (XXIX)) and then codified in international instruments like the ICCPR and the ICESCR in 1966; and the Charter of Economic Rights and Duties of States (CERDS) in 1974. But surprisingly, after stubbornly promoting the people's right in their quest for independence, African leaders made no mention of it in the text of the OAU Charter adopted in 1963. As a result of this, a confused application of the principle could be observed in the first three decades of the post-colonial era (1960s-1980s), with African leaders behaving as if sovereignty over natural resources was vested in them rather than their people.⁷⁵⁸ This was perceptible through the instauration of authoritarian regimes in many new independent African countries, characterised *inter alia* by the mismanagement of mineral revenues.⁷⁵⁹ Despite the fact that the African Charter later on in 1981 clearly entrusted this fundamental right to the people, the confusion is still ongoing. Sovereignty over wealth and natural resources is classically still

⁷⁵⁶ Schrijver (1997) 3.

⁷⁵⁷ Id. 82.

⁷⁵⁸ Duruigbo (2006) 35.

⁷⁵⁹ Human Rights Watch "The human rights impact of local government corruption...", supra note 73; Netherlands Institute for Southern Africa (2006).

exercised by African rulers, without any regard to what the will of the people are, to such an extent that one can legitimately wonder who the real holder of the right is.

Jackson qualified this dilemma as the new sovereignty game of post-colonial Africa and concluded that sovereign rights entrenched in the African Charter are the rights of rulers rather than those of the peoples.⁷⁶⁰ Indeed, the free disposal of wealth and natural resources has always represented a powerful tool cherished the more by governments of developing countries in so far as it empowers them to take actions with strong legal effects in the economic sphere.

Chowdhury observes that the principle has been invoked by states largely in the context of relations between host countries and multinational companies engaged in the exploration of natural resources in their territories.⁷⁶¹

In Africa, this has been highlighted by for instance, the wave of nationalisation that occurred in many countries during the 1970s.⁷⁶² Also a recent illustration in this regard can be taken from the revision of mineral contracts initiated unilaterally by DRC government in 2009 to upgrade the margin of fiscal revenues.⁷⁶³ As aptly recalled by Kymlicka, in democracy, any power that the government possesses is not inherent, but delegated.⁷⁶⁴ This implies that whenever the government enforces sovereign rights, they do it on behalf of the people that are the real holders of these rights. As it is clear from the African Commission jurisprudence, when the African Charter mentions people's rights, it is always with reference to the people and not their

⁷⁶⁰ Jackson RH. *Quasi states: Sovereignty, international relations and the third world* (Cambridge: Cambridge University Press, 1990) 157.

⁷⁶¹ Chowdhury SR. "Permanent sovereignty over natural resources – substratum of the Seoul declaration" in De Warrt P. and Peters P. (eds.) *International law and development* (Boston: Martinus NijhoffPublisher, 1988) 64.

⁷⁶² Nigeria, DRC and Zambia had nationalised large petroleum and mineral companies. Rood LL. "Nationalisation and indigenisation in Africa" (1976) 14(3) *The Journal of Modern African Studies* 432-434.

⁷⁶³ Kabange NCJ. (2010) 67-71.

⁷⁶⁴ Kymlicka W. "Two dilemmas of citizenship education in pluralist societies" in (eds.) Locker A., Crick B., Anette J. (eds.) *Education for democratic citizenship: Issues of theory and practice* (Aldershot: Ashgate Publishing Limited, 2003) 60.

government or even the state.⁷⁶⁵ Nevertheless, though under this international instrument it is easy to seize the demarcation between the “government” and their “people”, this is not the same in the context of approaches developed in national systems, especially regarding sovereignty over mineral resources. If ownership of natural resources has to be taken as the criterion, arrangements made within national laws display different approaches. For instance, in the Nigeria Minerals and Mining Act of 2007, section 1(1) provides that:

The entire property in and control of all Mineral Resources in, under or upon any land in Nigeria...is and shall be vested in the government of the federation on the behalf of the people.⁷⁶⁶

If this provision is to be interpreted *strict sensu*, it means that the owner of mineral resources in Nigeria is the government. However, it is questionable whether the fact that this provision underlines that this ownership is vested for and on the behalf of the people can make any difference. In a true democratic system, the answer should be “yes” because in such a context the exercise of this ownership is presumably fulfilled by a government that has been mandated by the people through elections and which one way or another, remains accountable to the people. Nevertheless, despite the return to a civil and elected government in 1999, Nigerian rulers have continued to display a lack of accountability to their people.⁷⁶⁷ A report from Amnesty International has noticed that the Nigerian federal government allocated permits, licences and leases to survey, prospect for and extract oil to the oil companies that were then automatically granted access to the land covered by their permit, lease or licence, without the people affected by these decisions having a say beforehand.⁷⁶⁸

In South Africa, the Mineral and Petroleum Resources Development Act 28 (2002) provides in its preamble 2 that “mineral and petroleum resources belong to the nation and that the state is the

⁷⁶⁵ When international fundamental rights treaties entrench “people’s rights”, they creates at the same time an obligation for the state towards their peoples to protect, promote and fulfil them through their governments. Therefore, confusion between both concepts would lead to the government being at the same time holder of the right and debtor of the obligations attached to it, which is irrational. Knop K. “Statehood: Territory, people and government” in Crawford J. and Koskenniemi M. *The Cambridge companion to international law* (New York: Cambridge University Press, 2012) 95-116.

⁷⁶⁶ This formulation was adopted following to the provision of s. 44 of the 1999 Constitution.

⁷⁶⁷ Amnesty International “Nigeria: Petroleum, pollution and ...”, supra note 342, 10.

⁷⁶⁸ *Id.*, 9.

custodian thereof.” Here if the concept nation can be interpreted to mean the South African people, then it is clear that the ownership is vested in them. Indeed though the debate within the sociology scholarship has tended to discuss more the relationship between concepts of nation and state,⁷⁶⁹ it can be assumed that the objective approach to what constitutes a nation remains a people-centred one. Symmon-Symonolewicz provides a definition that is simply worded, but explicit enough to perceive this people-centred characteristic. According to this scholar, a nation is:

a territorially-based community of human beings sharing a distinct variant of modern culture, bond together by a strong sentiment of unity and solidarity, marked by a clear historically-rooted consciousness of national identity, and possessing or striving to possess, a genuine political self-government.”⁷⁷⁰

According to this definition, a nation first of all represents a community of human beings or in another word a “people”. In the South African context, because the white paper published in 1998 states that the government’s long-term objective is to vest all mineral rights in the “state” for the benefit and on the behalf of all the people, one may choose to take another stance and contend that the nation as mentioned in that paragraph of the preamble refers rather to the state. Even in this case, because this formulation is quite similar to the one of the Nigerian mineral law, it would call for the same interpretation. Also, the fact that in the Mineral and Petroleum Resources Development Act,⁷⁷¹ the legislator has made a clear demarcation between the nation and the state, underlining that the latter is the custodian of the wealth belonging to the former raises a question: who then is the South African nation? In the light of the preamble, any attempt to answer this question may not result in the state, because if it was the case, a distinction between the owner and the custodian in the formulation of this paragraph would be useless. Even if the legal effects of a preamble remain a subject of discussion among scholars, at least its primary function is to reveal the intention of the legislator. Therefore, it is doubtless that reference is made to the South African people as being the South African nation. It is rather the South African state which is assigned the role of “custodian”.

⁷⁶⁹ See the different school of thoughts presented by Chenillo DA. *Social Theory of the Nation-State: The political forms of modernity beyond methodological nationalism* (Oxon: Routledge, 2007).

⁷⁷⁰ Symmon-Symonolewicz K. as quoted by White W. *Nation, state, and territory: Origins, evolutions and relationships* (Lanham: Rowman and Littlefield, 2007) 27.

⁷⁷¹ Contrarily to the white paper which was only a guideline, the Mineral Petroleum Resources Development Act is a law that holds binding effects.

If one agrees that “nation” and “people” are interchangeable expressions, another question that is raised, is what explains the continuing demand for nationalisation in this country?⁷⁷² If nationalisation amounts to the transfer of ownership to the nation and if the nation is to be regarded as the whole of the South African people, should one not assume that mineral resources already belong to the people? Logically, after the entrenchment of the principle in the Mineral and Petroleum Resources Development Act, this demand cannot be justified, at least at a rhetorical discourse level. However, the truth is that this call for nationalisation finds its meaning only when one reconciles it with past injustices that led the apartheid regime to discriminate against some racial groups in terms of equal access to the mineral industry.

At the end of apartheid in 1990, as a result of land dispossession that occurred under the Black (or Natives) Land Act No. 27 (1913) and the Bantu Homelands Citizenship Act of 1970, the white minority held approximately 87 % of land and the majority were confined to the remaining 13%.⁷⁷³ As a result, the first post- apartheid government led by President Mandela and the African National Congress planned to redistribute 30% of the land over a period of 20 years of democracy, so that black people would own 43%.⁷⁷⁴ In 2004, beside the Mineral and Petroleum Resources Development Act, a Broad-Based Socio-Economic Empowerment Charter for the South African mineral industry was released. This document called for the transfer of mineral assets’ ownership to historically disadvantaged South Africans. In 2010, a reviewed version of this Charter underlined that 26% of this transfer must be achieved before 2014. One year later, the South African Chamber of Mines announced that 28% of mineral assets were already owned by blacks.⁷⁷⁵ By the beginning of 2012, the South African mineral resources minister made a statement at the Indaba Conference in Cape Town that “South Africa will not nationalise its

⁷⁷² ANC YL Discussion Document “Towards the transfer of mineral...”, supra note 182.

⁷⁷³ Levin R. and Weiner D. “The agrarian question and emergence of conflicting agricultural strategies” in South Africa” in Matlhape S. and Munz A. (eds.) *Towards a New Agrarian Democratic Order* (Amsterdam: Saert 1991) 91.

⁷⁷⁴ Modisane C. “Why SA needs nationalisation” (2012); Available at <http://www.news24.com/MyNews24/Why-SA-needs-nationalisation-20120624> [accessed on 8/3/2013].

⁷⁷⁵ Cohen M. “Black Ownership of South Africa’s Mining Industry at 28%, Chamber Says”; Available at <http://www.bloomberg.com/news/2011-08-24/black-ownership-of-south-africa-s-mining-industry-at-28-chamber-says.html> [accessed on 9/3/2013].

mines” while later on that same year the ANC youth leader Julius Malema and his supporters kept on claiming nationalisation.⁷⁷⁶

All these positions reveal a serious conflict of opinion within the South African society, as well as the extent to which the mineral industry is contemplated by the people as a key factor for its development.⁷⁷⁷ In fact, it seems that the populist views that advocate nationalisation want ownership of mineral resources to be restored to the people as a whole, while the government whose positions have been controversial⁷⁷⁸ sees the alternative to be simply the increase of private ownership to the historically disadvantaged South Africans, who appear to be mainly blacks. This divergence of opinion points to the fact that the issue is beyond a simple crystallisation of the principle in the legislation and lies in practical aspects. Indeed, as was already mentioned, on a simple rhetoric stance, there is no need for nationalisation because the Mineral and Petroleum Resources Development Act has already vested ownership in the nation.

Despite the need for land reforms, the priority in the mineral industry today is to reflect on the implementation of better strategies to redistribute mineral wealth and benefits to all South Africans on an equal basis. As Godsell aptly underlines, the real issue is how South Africa can best achieve the creation of wealth and its fair distribution.⁷⁷⁹ It would be irrational to interpret sovereignty over natural resources as meaning that every South African should possess a mineral company; while at the same time it must be accepted that no matter who runs the business (state or private owners), people must enjoy benefits generated from this industry as part of this sovereignty. This is where the conception of a people’s right as entrenched in the African Charter can really help to solve the problem. It is not about writing the word “nationalisation” within the law, but to clearly establish what the prerogatives of those who the law entrusted with economic sovereignty, are. Therefore, it is relevant to interpret the statement in the Mineral and Petroleum

⁷⁷⁶ Hweshe F. “South Africa 'will not nationalise mines” , available at <http://www.southafrica.info/business/economy/policies/mining-070212.htm>[accessed 8/3/2013].

⁷⁷⁷ This is understandable in so far as South Africa represents the the world’s largest reserves of platinum, manganese, chrome, vanadium and gold. Chamber of Mines “Facts & figures” (2010); Available at <http://www.bullion.org.za/Publications/Facts&Figures2009/F&F2009.pdf>[accessed on 9/3/2013].

⁷⁷⁸ The controversy can be perceived if one for instance compares the government position held in the white paper regarding the need to vest mineral resources in the state and the one expressed at the Indaba conference in 2012.

⁷⁷⁹ See the view of Godsell has quoted by Mathebe A. *South African nationalization* (Bloomington: Xlibris publishing, 2010) 11.

Resources Development Act on nation ownership in the light of what has been the interpretation of article 21 of the African Charter in the African Commission jurisprudence.

As already mentioned in chapter 2, this study focuses more on the situation at the local level rather than at the national one. The key issue is whether affected communities in South Africa have any claim to sovereign rights with regard to mineral resources found in their areas. It is nevertheless suitable to suggest that debaters should have a comparative look at what has been the experience, cost and results in other African resource-rich countries that went through that process.⁷⁸⁰

In DRC, the ownership of mineral resources is determined by the general clause found in article 9 of the Constitution (2006) which holds that “the state exercises permanent sovereignty, including soil, sub-soil, water and forests, the air spaces, river, lake and sea...”

This provision is unclear whether or not the exercise of sovereignty by the state is to be interpreted as its ownership of mineral resources. An interpretation along the lines of the ownership being vested in the state is very plausible considering the fact that no reference is made to the Congolese people in this article. This was the case in past constitutions where it was said explicitly that the soil and the sub-soil belonged to the state.⁷⁸¹ If this interpretation is the one to be accepted, it therefore stands in stark contrast to the African Charter which vests sovereignty in the people rather than the state.

In Zambia, the Mines and Mineral Development Act 7 (2008) provides in section 3 that “All rights of ownership in, searching for, and mining and disposing of, minerals are hereby vested in the President on behalf of the Republic.”⁷⁸²

This provision clearly established that ownership of mineral resources is vested in the president. One can therefore easily contend that in Zambia, sovereign rights over natural resources are the rights of the ruler rather than the people, as was assumed in Jackson’s remarks. However, such an interpretation would be in stark contrast with section 1(2) of the Constitution (1996) which

⁷⁸⁰ See for instance, the case of Gecamines in DRC (1967) or ZCCM in Zambia (1968) which collapsed after a government decision to nationalise.

⁷⁸¹ See art. 14 of the 1967 Constitution as revised on 31/12/1971 and art. 9 of the 2003 Constitution.

⁷⁸² The same provision was already present in the Zambia Mines & Minerals Act No 31 (1995).

provides that “All power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with this Constitution.”

If section 3 of the *Zambian Mineral Act* had to be confronted with this constitutional provision, the president would just act as a representative of the people who actually are the real owners of the sovereignty over natural resources, otherwise there would be incompatibility between the two legal texts.

To sum up this point on mineral resources ownership, one can easily observe that every national system has its own perception of sovereignty over natural resources, which does not necessarily match the one prevailing at the continental level pursuant to the African Charter. What is advisable is that provisions of national law be interpreted with regard to article 21 of the African Charter and that whenever there is incompatibility, this latter provision should prevail. This is because following section 27 of the Vienna Convention on the Law of Treaties, a state party to a treaty cannot invoke its international law as justification for its failure to apply it.⁷⁸³ However, the conclusion reached by Viljoen after his survey of the application of the African Charter in 16 African countries, is that this legal instrument is invoked by domestic courts depending on the status that it enjoys in that national system.⁷⁸⁴ If in countries with a monistic system, the invocation of the African Charter provisions can be done directly, this is not however the case in countries with a dualistic system where an Act of Parliament needs to be passed before it can come into effect. Nevertheless, no matter the arrangements made at the national level, it is clear that the African Charter will prevail and be applied whenever a case is dealt with at the level of the African Commission or the African Court.⁷⁸⁵ Therefore, since all African countries have ratified the African Charter, one can firmly conclude that sovereignty over wealth and natural resources is a fundamental right of the people and not of their states or rulers.

But the question is whether a portion of the population living within the country, namely an affected community, can be entitled to resort to this right to claim their right to control mineral projects within their area.

⁷⁸³ Vienna Convention on the Law of Treaties adopted in 1969.

⁷⁸⁴ Viljoen F. “Application of the African Charter on Human and Peoples' Rights by domestic courts in Africa” 43 (1)(1999) *Journal of African Law* 15.

⁷⁸⁵ Arts.1 and 62 of the African Charter.

If local communities were entitled to invoke sovereign control over the mineral industry, the implication would be that sovereignty can be conceived not only at the national level, but at the local one as well. For indigenous peoples this possibility has already been acknowledged under international law,⁷⁸⁶ but the question remains open for other communities that are not regarded as indigenous.⁷⁸⁷ What would be the legal base for their claim to control governance of mineral resources within their areas?

Firstly, because equality is a fundamental right, it can be contended that it would be unfair to restrain this prerogative only to indigenous peoples. It is a principle of international law that all peoples, both at national or local levels, are to be treated equal.⁷⁸⁸ Thus, if indigenous peoples have a right over natural resources, the concept of “equality” imposes also that such recognition be given to other local communities. Secondly, in the context of this study, the best answer to this question should be sought in the extent to which the African Commission has interpreted the concept “people”. As stressed earlier, the African Commission has applied this concept to local communities living within a country, provided only that they have enough distinctive features to be identified as a people.⁷⁸⁹ When applying the people’s rights, the African Commission does not seem to make a difference between indigenous and other communities. For instance in the *Katangese* case, the African Commission did not look at the internal composition of the people, asserting that whether they consist of one or more ethnic groups was of no relevance.⁷⁹⁰ In the *Endorois* case, the African Commission even held a generalised discourse twice, asserting explicitly that “a people inhabiting a specific region within a state could also claim under article 21 of the African Charter.”⁷⁹¹

The same approach was adopted by the Working Group on Indigenous People established by the African Commission in 2000 with the mandate to study the implication of the African Charter for

⁷⁸⁶ UNDRIP (2007)

⁷⁸⁷ The term “indigenous” refers often to the people who first occupy the land. But it may happen that an ethnic group or community has established itself later on in an area, without being the first occupant. Should they be denied this right even though their livelihood is dependent on natural resources found in their area?

⁷⁸⁸ See art. 2 of the UNDRIP (2007).

⁷⁸⁹ See the *Endorois* case, supra note 67, para. 162.

⁷⁹⁰ See the *Katangese* case, supra note 67, para. 3.

⁷⁹¹ See the *Endorois* case, supra note 67, paras. 255, 267.

the indigenous people's well-being and make appropriate recommendations thereto. In its final report to the Commission, this working group held the view that:

... as the African Charter recognises collective rights, formulated as rights of 'peoples', these rights should be available to sections of populations within nation states, including indigenous people and communities.⁷⁹²

Therefore, the main requirement for the application of article 21 as for all other people's rights in the African Charter, seems to be simply that the affected community must be regarded as a "people", no matter it being indigenous or not. Now, whether the people's right in article 21 has to be formally called sovereignty or not does not really matter. What is critical is that because it is a fundamental right that is bestowed upon affected communities at a local level, they must enjoy a certain level of power that enables them to protect their vital interests. In this context, an affected community which constitutes a "people" can rely on article 21 of the African Charter in so far as its rights and interests are concerned.

3.2.2.2 Interpretation of the right in the jurisprudence of the African Commission

Thus far, the African Commission has received up to 13 cases alleging a violation of article 21 of the African Charter, but it is only in three communications that the infringement was established.⁷⁹³ The first case where the Commission found a violation was the one of *Ogonis* submitted in 1996.⁷⁹⁴ In this case, the military government of Nigeria was accused of having infringed on people's rights in the Niger Delta through activities of the state oil company, the Nigerian National Petroleum Company (NNPC), where it was part of the shareholders together with Shell Petroleum Development Corporation (SPDC). In respect of article 21, the complainants contended that a violation had occurred because the Nigerian government failed to monitor the NNPC's operation and had paved the way to the exploitation of oil reserves in Ogoniland, and also because the Ogonis were not part of the decisional process

⁷⁹² African Commission's Working group Report of experts on Indigenous populations/communities (ACHPR and IWGIA, 2005) 79.

⁷⁹³ Institute for Human Rights and Development in Africa "Collection of decisions from the African Human Rights system"; Available at <http://caselaw.ihrda.org/acmhpr/search/?a1=28021000> [accessed on 14/3/2013].

⁷⁹⁴ See the *Ogonis* case, supra note 104.

that led to this exploitation.⁷⁹⁵ The African Commission upheld these contentions in the following terms:

The destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of article 21.⁷⁹⁶

The second case where article 21 was found infringed on, was in the inter-state communication opposing DRC v. Burundi, Rwanda and Uganda.⁷⁹⁷ In this case, DRC had alleged the violations of some fundamental rights, including the one in article 21, by the respective armies of these countries in the eastern part of the country where there had been rebels' activities since August 1998.⁷⁹⁸ In its decision on the merits, the African Commission found that the illegal exploitation and looting of natural resources of DRC by these armies amounted to a violation of the fundamental rights entrenched in article 21 of the African Charter.⁷⁹⁹

The third case is the *Endorois* case. In this communication, the complainants alleged that the government of Kenya had infringed on the African Charter by forcibly removing the *Endorois* from their ancestral lands, without proper prior consultation and adequate and effective compensation.⁸⁰⁰ In respect of article 21, the complainants alleged that the forced eviction had prevented the *Endorois* community from access to vital resources and that the mineral concessions that had been granted in the land did not give them a share in the exploitation, and as such they constituted an infringement.⁸⁰¹ The African Commission found that because the *Endorois* had never received adequate compensation or restitution of their land, the respondent state had violated article 21.⁸⁰²

⁷⁹⁵ Id., para.55.

⁷⁹⁶ See the *Ogonis* case, supra note 104, para.55

⁷⁹⁷ African Commission Communication 27/99 *DRC v. Burundi, Rwanda, Uganda* (2003) (Hereinafter the *DRC* case).

⁷⁹⁸ Id., para. 2.

⁷⁹⁹ Ibid., 94.

⁸⁰⁰ The *Endorois* case, supra note 67, para. 2.

⁸⁰¹ Id., paras. 120-121.

⁸⁰² Ibid.

From these African Commission cases, there are interesting conclusions to be drawn from for this study. Firstly, these cases demonstrate that the fundamental right contained in article 21 can be exercised both at the national level and the local one. Secondly, they reveal that the application of this article to a local community simply requires that this community can be regarded as a “people”, even if it is not an indigenous one. Thirdly, another conclusion that emerged especially from the *Endorois* case is that the exercise by a local community of prerogatives flowing from article 21 is not absolute, but conditioned by a necessary relationship with the livelihood of this community.⁸⁰³ Drawing on an example from the Inter-American Court, the African Commission has embraced the view that affected communities enjoy prerogatives attached to article 21 only in so far as the exploitation of the mineral resources affects their livelihood and that in such a case the state is compelled to consult them.⁸⁰⁴ But in practice, simply because mineral activities always have an environmental impact, it is quite obvious that affected communities are always likely to be in a position to exercise their prerogatives contained in article 21 and make the implementation of any project or policy dependent upon their consent.

Fourthly, article 21 constitutes the legal base upon which affected communities are entitled to claim material benefits in the course of mineral resources exploitation.⁸⁰⁵ This may include benefits like the construction of necessary infrastructure for the community and the retrocession of mineral royalties. Whenever an affected community can establish that they enjoy no benefits, a breach of article 21 will occur.

Community participation is a powerful tool that enables affected communities to uphold their fundamental rights in article 21. By effectively participating in the decision-making process of mineral policies and projects that have direct implications for their life, affected communities are given the opportunity to secure their vital interests.

In the *Ogonis* case, the African Commission made the following observation:

Furthermore, in all their dealings with the oil consortiums, the government did not involve the Ogoni communities in the decisions that affected the development

⁸⁰³ The *Endorois* case, supra note 67, para 266.

⁸⁰⁴ *Id.*

⁸⁰⁵ *Ibid.*, para. 266; The *Ogonis* case, supra note 104.

of Ogoniland. The destructive and selfish role played by oil development in Ogoniland, closely tied with repressive tactics of the Nigerian Government, and the lack of material benefits accruing to the local population, may well be said to constitute a violation of Article 21.⁸⁰⁶

To draw this conclusion that article 21 was violated, the African Commission has brought forward two elements. These are the non-involvement of *Ogonis* in the decision-making and their non-sharing of material benefits in the course of the exploitation. If a relationship between these two elements can be attempted, one can logically assume that the participation of affected communities in the decision-making process is a means through which these latter communities can make sure that they obtain some material benefits to which they are entitled pursuant to article 21. The connection between the two is simple to establish. On the one end, following the formulation of article 21, the main purpose of this provision is to guarantee the enjoyment of material benefits to affected communities, protect them against illegal exploitation and provide them with compensation in case of spoliation, while on the other hand, as underlined previously, the main motivation for affected community participation is the need to ensure that their view is considered in the decision.

In such a context, community participation is a key strategy through which objectives attached to the fundamental right entrenched in article 21 can be achieved. The same principle of participation was underlined in the *Endorois* case in which the African Commission observed that the exercising of the fundamental right in article 21 requires the consultation of the affected community.⁸⁰⁷

3.2.2.3 The right to development

3.2.2.3.1 Scope of the right

Article 22 of the African Charter provides:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

⁸⁰⁶ The *Ogoni* case, supra note 104, para. 55.

⁸⁰⁷ The *Endorois* case, supra note 67, para. 268.

Development is the highest aspiration of any people. This is the reason why it appears today among people's rights. However, the compatibility between development and fundamental rights has been a serious issue dividing economists and jurists for a long time. This divergence of approaches is well summed up in the writings of Seymour and Pincus as follows:

The relationship between the disciplines of [fundamental] rights theory and economics is often awkward and at times openly hostile. Departing from contrasting conceptions of 'the good', mainstream economists and rights theorists have tended to talk past, rather than to, each other. Thus, for many economists, any attempt to posit and enforce a [fundamental] right to basic services is either fanciful or counterproductive, or both. [Fundamental] rights theorists counter that economists are too quick to hide behind the impracticality of realising rights, particularly economic and social rights, when in many cases violations are primarily the result of explicit political decisions rather than resource scarcity or other physical or institutional limitations.⁸⁰⁸

As a result, it was assumed that fundamental rights must be undermined for the sake of economic development.⁸⁰⁹ An argument advanced by proponents of this view has been that an exaggerate attention to rights instead of duties does not match the requirements of production and consumption.⁸¹⁰ For instance, the fundamental rights discourse was seen as an impediment to the need for a strong state able to enforce some unpopular measures such as the forced labour of people or any other relevant decision to advance the economy.⁸¹¹ However, over the years, reactions have emerged against this separatist view. Progressive scholars have rejected this assumption and rather advocated a concept of development which is integrative of fundamental rights. Among them, there is Osibanjo who used the experience with past military regimes in Nigeria to demonstrate the fallacy of the argument that compromising fundamental rights may be necessary for rapid economic development.⁸¹² This scholar observes that fundamental rights' violations actually constitute a subterfuge and catalyst for corruption,

⁸⁰⁸ Seymour D. and Pincus J. "Human rights and economics: The conceptual basis for their complementarity" (2008) 26 (4) *Development Policy Review* 387-388.

⁸⁰⁹ Spagnoli F. *Homo democraticus: On the universal desirability or the not so universal possibility of democracy and human rights* (Cambridge: Cambridge University press, 2003) 255.

⁸¹⁰ *Id.*, 255.

⁸¹¹ *Ibid.*, 255-256.

⁸¹² Osinbajo (2004) 121.

which in practice declines efforts made to achieve development goals.⁸¹³ Another objection comes from Tlakula who contends that gross violations of fundamental rights is inimical to a long lasting development and that this latter cannot be nurtured in countries where the rule of law does not exist and where people are marginalised and live in degrading conditions.⁸¹⁴ As to Olowu, he insists on the necessity to link fundamental rights to development discourses and considers that the fulfilment of fundamental rights is part of the process for the achievement of development.⁸¹⁵

There is no way that one can speak development nowadays where fundamental rights are not given proper consideration. From a formalistic point of view, this progressive approach to the relationship between development and fundamental rights peaked in the UN 1986 declaration which recognised development as a fundamental right. In this declaration not only fundamental rights are seen as a component of a true development, but development itself is part of those fundamental rights. This is what progressive scholarship qualifies henceforth as the rights-based approach to development.⁸¹⁶ Under this approach, it is asserted that the improvement of well-being which is the ultimate goal of development implies the realisation of fundamental rights.⁸¹⁷ It is in this respect that Panda points out, for instance, that the process towards the realisation of development implies the exercise of the following rights:

...sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity [and] the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights.⁸¹⁸

In the context of this study, it is relevant to recall that the late Senegalese jurist M'Baye was one of the first scholars to express the idea of a right to development in his 1972 inaugural

⁸¹³ Osinbajo (2004) 127.

⁸¹⁴ Tlakula P. "Human rights and development" in (ed.) Zeleza PT. and McConnaughay PJ. (eds.) *Human rights, the rule of law and development in Africa* (Philadelphia: University of Pennsylvania Press, 2004) 109.

⁸¹⁵ Olowu (2009) 7.

⁸¹⁶ Andreassen and Marks (2010) xxiii-xxxx; Boesen and Sano (2010) 45-70; Eide (2010) 275-314; Osmani (2010) 315-337; Panda (2007) 6-8; Sen (2010) 3-12; Sengupta (2010) 13-44.

⁸¹⁷ Andreassen and Marks, Id., xxvi; Boesen and Sano, Id., 50; Panda, Id., 6-8; Sen, Id., 3-4; Sengupta, Id., 17.

⁸¹⁸ Panda, Id., 31.

lecture at the International Institute for Human Rights.⁸¹⁹ This remark is important because M'Baye is one of the founding fathers of the African Charter. It can therefore be assumed that he has played a critical role in the inclusion and formulation of this provision. However, while M'Baye's understanding of this right implies both an individual dimension and a collective one, the formulation of article 22 seems to look at this right only from the latter perspective.⁸²⁰ This is because when compared to the formulation found in the article 1 (1) of the UN Declaration on the Right to Development (UNDRD) where it is mentioned that it is a right enjoyed by both "every human being" and "all people", article 22 of the African Charter only refers to "all people". Discussing the content of this right in general, Ouguergouz embraced a balanced approach which looks at the right to development as "an individual right which can be exercised collectively".⁸²¹ However, if one considers Ouguergouz's theory of "synthesis right" and the rights-based conception which both imply that development in substance implies the fulfillment of all fundamental rights,⁸²² it becomes obvious that it should not be regarded as a right that can be exercised either individually or collectively only. Since, individuals' rights are distinct from people's rights and that as fundamental rights, both types are relevant to the achievement of development, the right to development is undoubtedly made of both dimensions. So contrarily to Ouguergouz's restrictive approach, it can also be conceived as a prerogative to be exercised by a people in a collective way. The question is now whether and, if yes, how far affected communities may exercise this fundamental right in the mineral industry.

As for other people's rights, the question whether an affected community can rely on the people's right to development as entrenched in article 22 is determined by the extent to which the African Commission has approached the concept "people". As observed previously, the Commission has embraced an extensive conception including communities living within a country. Therefore, it is clear that affected communities may rely on article 22 to secure their right to development in connection with mineral policy and projects having a direct impact on

⁸¹⁹ M'Baye (1972) 503, 505.

⁸²⁰ Ouguergouz (2003) 299.

⁸²¹ *Id.*, 302.

⁸²² *Ibid.*, 303; Chauffour JP. *The power of freedom, uniting development and human rights* (Washington: Cato Institute, 2009) 7.

their livelihood. The African Commission jurisprudence on the right to development that will be reviewed in the next paragraph provides evidence of this fact. However, the critical question is how far an affected community can claim to exercise this prerogative in a context where a country always consists of different ethnic groups and communities living inside its territory.

The first step in answering this question is to distinguish between the development plan designed at the national level and the one made at the level of each community. It is clear that affected communities would be entitled to exercise their prerogative attached to the provision of article 22 only in respect of the development plan designed at the local level. But even in this case, the central government must use its margin of autonomy to make sure that the plans made locally do not encroach upon development objectives defined nationally. For instance, in respect of benefits generated by the mineral industry and as all areas of a country are not always endowed with the same quantity of resources, the central government must ensure that tension does not arise between communities by implementing a national policy of fair redistribution.⁸²³ It is not because an affected community is entitled to exercise its fundamental right in respect of mineral projects affecting its livelihood, that benefits must accrue only to that community and generate an “island of development”.⁸²⁴ This is why community participation as envisaged in this study rests on the principle that development objectives defined at local level must fit in the general development process of the country.⁸²⁵ In other words, the exercise of the fundamental right to development at local level must be done in a compatible way with its exercise at the national level.

3.2.2.3.2 Interpretation of the right in the jurisprudence of the African Commission

The African Commission has had the opportunity to decide on the fundamental rights’ development entrenched in article 22 in three cases, namely the *DRC* and *Endorois* cases already mentioned and the *Sudan Human Rights Organisations and Centre on Housing*

⁸²³ Obi (2010) 229.

⁸²⁴ Limpitlaw (2005) 7.

⁸²⁵ UNDP “Local governance and poverty...”, supra note 196, 30.

*Rights and Evictions (COHRE) v. Sudan.*⁸²⁶ Before reviewing the stance taken by the African Commission in these cases, one can notice that surprisingly article 22 was not alleged to be infringing on the *Ogoni* case. This is surprising because the way the oil project was reported to be badly managed before the Communication should have led to the conclusion that the Ogonis's rights to development in article 22 had been violated. Nevertheless, because of the interconnection of development with some other fundamental rights, the same conclusion was reached based on other provisions of the African Charter.⁸²⁷

In the *DRC* case, the African Commission analysed the fundamental right to development in article 22 in respect of the whole population, and established a link with the violation of article 21, contending that the deprivation of the Congolese people's right to freely dispose of their wealth and natural resources had also occasioned the violation of their right to development.⁸²⁸

As to the *Endorois* case, the complainant alleged that the failure of the Kenyan government to involve Endorois in the development process and ensure the continued improvement of their well-being amounted to a violation of article 22.⁸²⁹ The African Commission upheld this contention and found that the respondent state had failed to create conditions favourable for Endorois' development *inter alia* by excluding them from the decision-making process regarding the mineral project undertaken in their land and not providing them with adequate compensation for the loss of their land.⁸³⁰

In the *Sudanese* case, the African Commission had to deal with an alleged violation of article 22 in that the complainant contended that attacks and forced displacement against communities living in the Darfur region of Sudan denied them the opportunity to engage in economic activities.⁸³¹ The African Commission ruled that this right had been effectively

⁸²⁶ African Commission Communication 279/03-296/05 *Sudan Human Rights Organisations and Centre on Housing Rights and Evictions (COHRE) v. Sudan* (2009) (Hereinafter the *Sudanese* case).

⁸²⁷ See the *Ogoni* case, supra note 104, para. 55.

⁸²⁸ See the *DRC* case supra note 797, para. 95.

⁸²⁹ See the *Endorois* case, supra note 67, para. 125.

⁸³⁰ Id. paras. 283,298.

⁸³¹ See the *Sudanese* case, supra note 826, para. 224.

violated and urged the Sudanese government to rehabilitate economic and social infrastructure such as education, health, water and agricultural services in order to facilitate the return of the displaced people.⁸³²

What can be learned from this jurisprudence is the principle developed by the African Commission that, be it at the national or local levels, whenever an activity threatens the well-being of the people, it automatically violates article 22. Therefore, because the respect and fulfilment of fundamental rights are part of the people's well-being, there is no way the mineral industry can contribute to the achievement of development of affected communities while degrading their well-being through violation of fundamental rights.

To perceive how community participation contributes to the fulfilment of the fundamental right to development in article 22, one needs to look at the reasoning made by the African Commission in respect of the right to freedom of choice. In the *Endorois* case, the African Commission embraced the view that "freedom of choice" is part of the right to development and that a "lack of choice" contradicts the guarantees of the right.⁸³³ This assertion simply implies that in the development process, people have the right to choose which development model is right for them. Implicitly, the possibility to express this choice requires that the beneficiaries of the development foreseen, participate and determine the suitability of any project which impacts on the development process. In the *Ogoni* case, though article 22 was not involved, the African Commission rebuked the Nigerian government as well for not involving the *Ogonis* in the decisions affecting the development of Ogoniland.⁸³⁴ Therefore, it is clear that the African Commission sees participation as a way to guarantee that the right to development and all commitments that it requires are respected in the implementation of any policy or project relevant thereto. It is at this level that community participation is to be viewed as relevant for the fulfilment of the right to development in connection with mineral activities affecting them.

⁸³² the *Sudanese* case, supra note 826, paras. 228 and 229.

⁸³³ See the *Endorois* case, supra note 67, paras. 277-279.

⁸³⁴ See the *Ogonis* case, supra note 104, para. 55.

What is particularly relevant to observe is that the African Commission has rejected the conception of participation which would amount to a simple consultation, emphasising rather the imperative that for participation to be effective and fruitful, it must generate the free, prior and informed consent of the people.⁸³⁵ Thus, because the freedom to choose is part of the right to development, effective community participation contributes somehow to the fulfillment of this fundamental right. It is through effective community participation that affected communities may express their choices in the mineral resources governance and canalise benefits coming from there towards the achievement of development objectives set at the local level.

3.2.2.4 The right to environment

3.2.2.4.1 Scope of the right

Article 24 of the African Charter provides that “All peoples shall have the right to a general satisfactory environment favourable to their development.”

This provision of article 24 clearly situated the fundamental right to environment in the context of development. For decades, there has been a tug of war between both areas. Environment and development were viewed as irreconcilable opposites.⁸³⁶ But, since the Rio Declaration on Environment and Development of 1992, the ideological trend has shifted. The interrelationship between the environment and development has been increasingly asserted⁸³⁷ to such an extent that it is now widely recognised that, for long-term economic development to be sustainable, environmental quality must be conserved. As a consequence, foreign investment activities, that are an engine of economic growth, have found themselves facing higher environmental standards than in the past.⁸³⁸ It is in this dimension that the fundamental right to environment must be analysed in respect of the relationship between affected communities and mineral companies.

⁸³⁵ See the *Endorois* case, *supra* note 67, paras. 281-291.

⁸³⁶ Silveira M.P.W “The Rio process: Marriage of environment and development” in Lang W. (ed) *Sustainable Development and International law* (1995) 9-10.

⁸³⁷ *Id.*, 9-10.

⁸³⁸ Volterra R.G. and Bisiaux A., “A brief practitioner’s view of foreign investment and international environmental standards: The developing custom of Non-state practice” in The international Bureau of the Permanent Court of Arbitration staff (ed.) *International investments and protection of environment, the role of dispute resolution Mechanisms* (The Hague: Kluwer Law International, 2002) 175.

Zazueta observes that very often marginalised groups benefit the least from unchecked economic growth while bearing a high burden of environmental degradation.⁸³⁹ This is particularly true in respect of mineral activities which are naturally damaging to the environment, but for which affected communities in Africa often reap little benefits.⁸⁴⁰ It has become a tradition for many African governments to require an assessment of environmental impacts before the mineral permit is delivered to the operator. However, as demonstrated in the introduction of the study, this procedure has often failed to protect the environmental right of affected communities because of their exclusion or marginalisation among stakeholders, and also because of factors like corruption within the government and mismanagement of public funds. The effective enforcement of article 24 of the African Charter should actually meet this deficiency and offer a better guarantee to the beneficiaries of the right. Nevertheless, the formulation of article 24 is unclear as to the real content of the fundamental right to environment that at times has led to a paradoxical interpretation. Some scholars have deduced from the formulation of article 24 that this provision implies that development considerations must be given preference over environmental measures in the event of conflict between the two and that it can only be invoked where it will not infringe on the requirements of development.⁸⁴¹ It is clear that in the context of this study, this approach cannot be given consideration, because sustainable development as defined in chapter two implies that a true development cannot be reached without the respect for fundamental rights, among which the environmental right appears as a critical one because it concerns not only conditions of present generations but of the future ones as well. As aptly observed by Amechi, the inclusion of this fundamental right in the African Charter is to be regarded as an acknowledgement of the importance of a healthy environment for the development of Africa.⁸⁴² Indeed, instead of embracing an interpretation that tends to devalue environmental considerations in the

⁸³⁹ Zazueta (1995) 5.

⁸⁴⁰ Bell FG. and Donnelly LJ. *Mining and its Impact on the Environment* (New York: Taylor & Francis 2006) 4-6.

⁸⁴¹ Churchill R. "Environmental rights in existing Human rights treaties" in (eds.) Boyle AE. and Anderson MR. *Human rights approaches to environmental protection* (Oxford: Clarendon Press, 1998) 90,106; Atapattu S. "The right to a healthy life or the right to die polluted? The emergence of a Human Right to a healthy environment under international law" (2002) 16 *Tulane Environmental Law Journal* 65, 88 and Van der Linde M. and Louw L., "Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication" (2003) *African Human Rights Law Journal* 167, 176.

⁸⁴² Amechi EP. "Enhancing environmental protection and socio-economic development in Africa: A fresh look at the right to a general satisfactory environment under the African Charter on Human and Peoples' Rights" 5 (1) (2009) *Law, Environment and Development Journal* 62.

development process, article 24 should be understood as promoting a model of development which accommodates the environment within which its beneficiaries are living.

In terms of beneficiaries, contrarily to the approach developed in the American systems that look at the fundamental right to environment as an individual right,⁸⁴³ the African Charter entrenches it as a “people’s right”. In this context, it is clear that the fundamental right to environment should be enjoyed not only by the whole population, but also to communities living within the country. This is a logical inference in so far as environmental degradation can directly affect groups of people living in a specific corner of the country.

Also concerning the scope of this fundamental right, it does require not only a prior assessment before the starting of the project, but also the implementation of the project in a less damaging manner and the obligation to rehabilitate the land after mineral exploitation.⁸⁴⁴ It is at these three levels that affected communities can make use of article 24. In any case, affected communities can recourse to the preventive strategy developed in western societies in order to deal with environmental degradation. Indeed in Europe as in the United States, the subscription of an environmental assurance is often demanded prior to development for various polluting activities.⁸⁴⁵ Following their fundamental right in article 24, affected communities may compel mineral corporations to present such insurance as a precondition to the starting of the mineral project. Of course, to apply this strategy will require new developments in the insurance market of African countries, because the common regime would be insufficient to support the cost of

⁸⁴³ Art. 11 of the Protocol to the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights "Protocol of San Salvador". With regard to individuals, the African Commission has referred to the art. 16 of the African Charter which provides for the the right to enjoy the best attainable state of physical and mental health (see the *Ogoni* case, supra note 104, para. 52.) In the European system, the call by the Council of Europe to adopt an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment has been dismissed so far by the Committee of ministers. European Parliament Assembly, Reply from the Committee of Ministers, 27th Sess., Doc. No. 12298 (2010); available at <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc10/edoc12298.htm> [accessed on 23/3/2013]; European Parliament Assembly, The Role of Parliaments in the Consolidation and Development of Social Rights in Europe, Doc. No. 12632 (2011); Available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc11/EDOC12632.htm> [accessed 23/3/2013].

⁸⁴⁴ Limpitlaw *et al.* (2004).

⁸⁴⁵ See the EU Environmental Directive 2204/35/EC (ELD, 2004); the US Comprehensive Environmental Response, Compensation and Liability Act of 1980.

environmental damage which is always high. If this technique is applied, it may help affected communities to secure their compensation for environmental damages.

3.2.2.4.2 Interpretation of the right in the jurisprudence of the African Commission

In respect of affected communities, the only case that has directly involved article 24 is the one related to the situation of *Ogonis*. When one considers the increase of mineral activities all over the continent these last years, this poor statistic confirms the assumption made at the beginning of this study, that the application of the African Charter provisions in the mineral sector has been a less explored option.

In the *Ogonis* case, the African Commission explicitly held that:

The right to a general satisfactory environment, as guaranteed under article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.”⁸⁴⁶

When explaining the meaning of this assertion, the Commission stressed that the government is obliged to order or at least permit independent scientific monitoring whenever the environment is likely to be threatened by a project, publish environmental and social impact studies prior to any major industrial development operation and provide affected communities with information and meaningful opportunities for their members to participate in the final decision.⁸⁴⁷ This African Commission’s approach demonstrates clearly that the government has an active role to play in respect of the protection of environment. It must not be passive. Moreover, the fact that the government must be involved in environmental protection does not deny the principle that those whose livelihood would be affected must participate in the decision-making process. The Nigerian government was blamed by the African Commission because it failed to involve the

⁸⁴⁶ See the *Ogonis* case, supra note 104, para. 54.

⁸⁴⁷ *Id.*, para. 53.

Ogonis in all its dealings with oil consortiums.⁸⁴⁸ This same principle that led the African Commission in the *Endorois* case to assert that affected communities have a right to free, prior and informant consent in matters of capital importance⁸⁴⁹ is equally valid when it comes to policy or decisions that raise environmental issues.

The implementation of these obligations raises some practical difficulties. For instance, with regard to the independent monitoring, a study from Amnesty has pointed out that African governments have generally little capacity to initiate this process with the consequence that the task is often left to the companies themselves that finally supply the government with data that are rarely verified.⁸⁵⁰ Moreover, the same report has come up with the observation that it is hard for the government to implement its obligations in connection with fundamental rights every time that it is itself among the shareholders of the mineral company.⁸⁵¹ These difficulties therefore stand as a strong argument to support community participation because it can help people to themselves supply the shortcomings of their rulers regarding the protection of their vital interests. However, environmental issues require a certain level of scientific knowledge which is not always at the reach of members of affected communities. This is probably what led one scholar to observe that villagers or peasants are sometimes right and sometimes wrong when it comes at solving environmental problems and that the key solution is to create a process through which the views of all stakeholders are tested in order to come up with a decision that is comprehensible and rational.⁸⁵²

Community participation is the tool through which affected communities are empowered to watch over their environmental rights at all stages of mineral exploitation. An affected community that takes part in the process before the implementation of the policy or project, during the execution of mineral projects or then, at the closure is able at each stage to oppose any threat or violation of its fundamental right to environment as entrenched in article 24. To the extent that this provision can be legally enforced, community participation offers a wonderful platform to affected communities to resist the forced implementation of policy and project by the government and

⁸⁴⁸ See the *Ogonis* case, supra note 104, para. 55.

⁸⁴⁹ See the *Endorois* case, supra note 67, para. 291;

⁸⁵⁰ Amnesty International “Nigeria: Petroleum, pollution and ...”, supra note 342, 50.

⁸⁵¹ *Id.*, 50.

⁸⁵² Zazueta (1995) vii.

mineral corporations which is generally accompanied by oppression. Not only do they need to be informed and heard, but their point of view must determine the viability of the policy and project.⁸⁵³

3.2.3 Application of the African Charter provisions in the mineral sector

The application of the African Charter in the mineral industry is of capital importance to this study because it determines how far affected communities can rely on this instrument to secure their fundamental rights in respect of projects that have serious implications for their development. Generally, a distinction is made between the vertical application and the horizontal one.

3.2.3.1 Vertical application

The conventional wisdom so far is that international human rights law creates obligations or places duties only on states.⁸⁵⁴ This is what is known as the vertical application meaning that individuals are protected against the violation of their fundamental rights by the state or public bodies or officers acting on behalf of the state.⁸⁵⁵ It is in this context that the African Commission has made clear what the obligations of states' parties to the African Charter are. In the *Ogonis* case, the Commission pointed out four levels at which obligations of the states were manifested. The states have the obligation to respect, protect, promote and fulfil fundamental rights

The obligation to respect entails that:

⁸⁵³ See the *Endorois* case, supra note 67, para. 291; the *Ogonis* case, supra note 104, paras.52, 55.

⁸⁵⁴ Knox JH. "Horizontal Human rights law" 120 (1) (2008) *American Journal of International Law* 1, Christoffersen J. "Denmark Drittwirkung and conflicting rights-viewed from national and international perspectives" in Oliver D. and Fedtke J. (eds.) *Human Rights and the private sphere* (London: Routledge, 2007) 34; De Brabandere E. "Human rights considerations in international investment arbitration" in Fitzmaurice M. And Merkouris P. (eds.) *The interpretation and application of the European Convention of Human rights: Legal and practical implications* (Boston/Leiden: Martinus Nijhoff, 2012) 183-2016.

⁸⁵⁵ Corrin F. "From horizontal and vertical to lateral: extending the effect of human rights in post colonial legal systems of the south pacific" (2009) 58 *International and Comparative Law Quarterly* 31.

the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.⁸⁵⁶

The state is also obliged:

to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.⁸⁵⁷

The obligation to promote is intertwined:

with the tertiary obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.⁸⁵⁸

Finally the state is obliged:

to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the State to move its machinery towards the actual realisation of the rights. This is also very much intertwined with the duty to promote mentioned in the preceding paragraph. It could consist in the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).⁸⁵⁹

This description of states parties' obligations by the African Commission is explicit enough that one can easily anticipate and capture what is expected from the government in any

⁸⁵⁶ See the *Ogoni* case, supra note 104, para. 45.

⁸⁵⁷ *Id.*, para. 46.

⁸⁵⁸ *Ibid.*, para. 46.

⁸⁵⁹ *Ibid.*, para. 47.

particular context. In respect of this study, some assertions made by the African Commission call for particular attention. Firstly, when the African Commission observes that the state must give proper consideration to the resources belonging to a collective group as they are supposed to satisfy its needs, this implies that anytime benefits brought by mineral resources are not returned to affected communities proportionally to what they may reasonably expect, the government is automatically in breach of its obligation to respect. Secondly, the government has the duty to protect rights-holders against violations by other subjects. Dickson describes the scenario as a complaint by an individual that the state has indirectly violated his fundamental right because a non-state actor has transgressed the said fundamental right.⁸⁶⁰ This principle is what led the African Commission to find that the Nigerian government was in breach of its obligation to protect the Ogonis, arguing that this obligation implies the duty to protect from damaging acts that may be perpetrated by private parties.⁸⁶¹ If the same principle is to be applied in the context of this study, it means that it is the government that is liable towards affected communities for any fundamental rights violation by mineral companies. In this regard, Brabandere observes that in the absence of directly imposed and enforceable fundamental rights against foreign investors, it is not the international responsibility of these latter ones that is at issue, but rather the one of the host state.⁸⁶² This approach makes sense to the extent that at the first front of responsibility, it is the government that is accountable towards its people based, as mentioned previously, on democratic considerations such as for instance, the fact that representatives are chosen and given a mandate through election to uphold people's interests, and also on the general obligation pending upon the host state to exercise control over investments it has admitted inside its territory. However, the open question is whether the regime of responsibility should stop there and not be somehow extended to the mineral corporation which in practice is the effective perpetrator of the fundamental right violation. In practice, when victims are

⁸⁶⁰ Dickson B. "Horizontal application of Human rights" in Hegarty A. and Leonard S. (eds.) *Human rights: 21st century* (London/Sydney: Cavendish Publishing, 1999) 59.

⁸⁶¹ See the *Ogoni* case, *supra* note 104, paras. 57-58.

⁸⁶² De Brabandere (2012) 191.

operating on national level, they generally tend to file law suits directly against mineral corporations where the domestic law allows such a direct application.⁸⁶³

Another assertion of the African Commission that deserves particular attention is its perception of the obligation to promote, which includes the necessity for the government to make sure that rights-holders are able to exercise their fundamental rights and freedoms. This principle is very critical to the fact that whenever the government does not put in place a mechanism or platform through which affected communities can participate in mineral projects which impact on their development, it fails to offer them an opportunity to exercise their fundamental rights and should therefore be found in breach of its obligation to promote.

3.2.3.2 Horizontal application

One of the most controversial issues in international human rights law today is whether or not its provisions should be applied to private parties and obligations put on them. This is what is known as the horizontal application, which means the implementation of fundamental rights in the sphere of relations between private parties. At the international law level, such a horizontal application has generally not been accepted so far, except now in some criminal matters. The classic objection raised against horizontality is often the fact that compulsory enforcement would subject individuals to international obligations, whereas international human rights law was developed as a tool to protect individuals against the abuse of power by states and not otherwise.⁸⁶⁴ The rationale behind this argument is presumably the traditional theory which considers that individuals are not subjects of public international law.⁸⁶⁵ As aptly explained by Manner, this theory suggests that because an individual is not a subject of this law, he/she has no rights and duties whatsoever under it and therefore cannot invoke its provisions for his/her protection, nor violate its rules.⁸⁶⁶ However, one can easily

⁸⁶³ See the discussion below related to the horizontal application.

⁸⁶⁴ Christoffersen (2007) 34; Kinley D. and Tadaki J. "From talk to walk: the emergence of Human rights responsibility for corporations at international law" (2003-2004) 44 *Virginia Journal of International law* 937.

⁸⁶⁵ Manner G. "The object theory of the Individual in international law" (1952) 46 (3) *American Journal of International law* 428.

⁸⁶⁶ Manner (1952) 428.

observe that from 1896 when the theory was formulated⁸⁶⁷ up to now, the approach to this question has significantly evolved and exceptions to the rule have been established. The fact that individuals are at the heart of international human rights law today as “subjects” departs from the traditional approach. As such it is a *lex specialis*. Lopez and Quénivet explain that though it is the responsibility of the states to ensure that their legislation complies with international treaties on fundamental rights and that their domestic courts deliver judgments abiding by international standards, yet individuals enjoy the ability to seek the protection of their fundamental rights by bringing a case at the international level.⁸⁶⁸

This progressive approach strongly raises a parallel reasoning question. If individuals are now entitled to be subjects of international law when it comes to the protection of their fundamental rights, why should it not be the same in respect of duties or obligations imposed by these fundamental rights?

As already observed, the objection rests on the view that international law on fundamental rights was developed as a tool to protect individuals against the arbitrary use of power by states.⁸⁶⁹ As a consequence, this legal system does not embrace non-state actors’ responsibility, except to the extent that states are made *indirectly* liable for violations committed by them. A well-established exception to this rule in modern international law is the possibility now for individuals to be trailed before international criminal jurisdictions for serious fundamental rights violations that amount to either crimes against humanity, war crimes, genocide or aggression.⁸⁷⁰ Moreover, despite the traditional objection in international law, it is noteworthy that reference to the duties of the individual is not unknown to the universal and regional systems.⁸⁷¹ The African Charter is very explicit in this regard as it does not just include the concept of “individual duties”, but provides a more extensive and

⁸⁶⁷ Id.

⁸⁶⁸ Lopes C. and Quénivet N. “Individuals as subjects of international humanitarian law and Human rights Law” in (eds.) Roberta A. and Quénivet N. *International Humanitarian law and Human rights law* (Leiden/Boston: Martinus Nijhoff, 2008) 211-212. See also Mullerson RA. “Human rights and individuals as subjects of international law” (1990) *European Journal of International Law* 36-37.

⁸⁶⁹ Kinley and Tadaki (2003-2004) 937.

⁸⁷⁰ ICC (1998), ICTY (1993), ICTR (1994), Nuremberg Tribunal (1950).

⁸⁷¹ See art. 29 (2) of the UDHR; art. 10 (2) of the European Convention of Human Rights (1950) and art. 32 of the American Convention of Human Rights (1969).

detailed enumeration which is the result of its drafters' belief that formulations in other international instruments were so vague as to be meaningless.⁸⁷² From articles 27 to 29, the African Charter enumerates explicitly what the duties of individuals are, such as for instance the mutual respect and tolerance towards a fellow being.

In the context of this study, what actually deserves particular attention in the African Charter is not only the fact that it offers a detailed enumeration of individuals' duties, but that it explicitly establishes the principle according to which "the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone."⁸⁷³ An interaction between rights and duties should imply that for every fundamental right entrenched in the African Charter there is a corresponding obligation not only explicitly for the state, but implicitly for individuals as well in their mutual relations.⁸⁷⁴ The evidence of this is more obvious in the context of human development where the necessity for individuals to respect each others' fundamental rights is perceived as part of the general obligation pending upon members of the society to advance and enhance the development process.⁸⁷⁵ Thus, the development context is the appropriate standpoint from which the interdependence principle between fundamentals rights and obligations attached to them can be well apprehended in respect of private parties' duties.

Following the above reflections, especially the one underlying the exception in respect of international criminal law, it is legitimate to contend that from a theoretical viewpoint nothing prevents individuals from bearing obligations in respect of fundamental rights and incurring direct responsibility for their violations. It is more the liability of mineral corporations that is at stake. There is no strong legal argument to support the non-liability regime of corporation in international law. If this is already happening in the domestic system of many countries, there is no valid justification why this should not be the case as well under international law.

⁸⁷² Réunion des experts pour l'élaboration d'un avant-projet de Charte Africaine des droits de l'Homme et des Peuples 1-2 (mimeo 1979) as quoted by Gittleman R. "The African Charter on Human and Peoples' Rights" (1982) *Virginia Journal of International Law* 667.

⁸⁷³ Para.6 of the African Charter Preamb.

⁸⁷⁴ Welch CE Jr. "The African Commission on Human Rights and Peoples' Rights: A five-year report and assessment" (1992) *Human Rights Quarterly* 45-46.

⁸⁷⁵ Panda (2007) 25.

Under international law, the question as to what responsibility multinational corporations should assume towards the society where they operate, started to be formally envisaged in the 1970s. The generic term sometimes used to identify the issue is corporate social responsibility (CSR). In 1974 the UN Economic and Social Council established a Commission on Transnational Corporations with the mandate *inter alia* to elaborate a UN Code of conduct on Transnational Corporations.⁸⁷⁶ The draft of the code that was presented to the UN ECOSOC in 1990 was not adopted because of disagreements between the developed and developing countries. While the first group sought more protection for transnational corporations, the latter group emphasised the need to better regulate the activities of these corporations.⁸⁷⁷ Similar initiatives were undertaken during the same period, with the ILO adopting the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977 and the OECD the Guidelines for Multinational Enterprise in 1976.⁸⁷⁸ In 2003, Draft Norms on the responsibilities of Transnational Corporations and other Business Enterprises were proposed by a Sub-commission of the UN Commission on Human Rights.⁸⁷⁹ Since the document sought to impose binding obligations on these entities directly under international human rights law, a vehement opposition developed between the business community and fundamental rights advocacy groups, which led to the failure of the initiative. In 2005, following the request of the said Commission, UN Secretary-General Kofi Annan appointed a special representative on the issue of fundamental rights and transnational corporations and other business enterprises. Harvard Professor John Ruggie was given the assignment to move beyond the stalemate and clarify the roles of both state and non-state actors in the cross-cutting relations between business and fundamental rights. It is consecutive to this, that a few years later, in 2008 the special representative produced a document know as the UN "Protect, Respect and Remedy".⁸⁸⁰ In 2008, the UN

⁸⁷⁶ UN ECOSOC Res. 1913 (LVII) (5/12/1974).

⁸⁷⁷ Adeye A. "Corporate responsibility in international Law: which way to go?" (2007) *Singapore Year Book of International Law* 148.

⁸⁷⁸ ILO Tripartite Declaration of Principles (1977); OECD Guidelines for Multinational Enterprises (1976).

⁸⁷⁹ UN ECOSOC, Sub-Commission on Promotion and protection of Human rights "Norms on the responsibilities of transnational corporations and other business enterprises with regard to Human rights" U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug 26, 2003).

⁸⁸⁰ Human Rights Council Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) 3.

Council on fundamental rights which replaced the above mentioned commission welcome the Framework and requested the UN Special representative to make it operational by 2011. Therefore, the special representative concretised this assignment in 2011 by formulating guiding principles to implement the Framework.⁸⁸¹

Other mechanisms of control also exist either at the global level, regional or sub-regional ones like the EITI (2002), the Kimberley Process Certification Scheme (2003), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas (2010), the Mineral Certification Scheme of the International Conference on the Great Lakes Region (2010).

All these instruments are constitutive of soft law rather than hard law in so far as they are not binding upon corporations but serve simply as guidelines. Actually, the main weakness of the current regime regulating the behaviour of multinational corporations under international law is the fact that it rests on the principle of “voluntarism”.⁸⁸² This principle implies that international law is limited to suggesting to multinational corporations which behaviour they should adopt, while it is up to their good will to adhere or not to these suggestions.⁸⁸³ Indeed, guidelines on due diligence suggest precautionary measures that corporations should take, especially when working in a context very critical to fundamental rights. In the natural resources field, they provide guidance to multinational corporations as to how they should conduct their activities. However, nowadays they appear disproportionate to contain the power of multinational corporations because they are not assorted with a sanction regime in case of non compliance. This shortcoming makes affected communities almost defenceless when facing serious violations by mineral corporations. It is a serious flaw in so far as, in its current state, international law appears as a limited legal system only able to hold states liable for fundamental rights abuses perpetrated by corporations that did not abide by fundamental rights standards suggested unto them. This traditional approach is somehow illogic because,

⁸⁸¹ Id.

⁸⁸² Horiggan B. *Corporate Social Responsibility in the 21st century: Debates, models and practices across government, law and business* (Cheltenham/Northampton: Edward Elgar Publishing, 2010) 34-35.

⁸⁸³ For instance, s. 13 of the UN Draft Code suggests that “Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate”.

except in certain case of legal incapacity,⁸⁸⁴ one cannot be sued for the criminal activity of the main perpetrator, whereas this latter one is being left free of any charge. This is not to contend that the state must not incur liability for fundamental rights abuses by corporations operating within its territory, but simply that it is irrational that the responsibility regime be limited at this level and failed to capture corporations themselves. The huge capacity of multinational corporations working in the natural resources field to infringe fundamental rights has now been demonstrated in several cases adjudicated world wide.⁸⁸⁵ It is undeniable that a soft law regime appears inadequate to contain their strike-force. As aptly observed by Garvey and Newell, the current system of regulation does not match the growing power of multinational corporations.⁸⁸⁶ Along the same line, Mullart argues that the advent of economic globalisation has made obsolete the state-centric perception that fundamental rights is a domain of governments, because multinational corporations increasingly bear more direct responsibility in fundamental rights violations.⁸⁸⁷ Of course, it is true that from a practical standpoint, should such perspective be embraced, the triggering process of their responsibility will be very challenging because as a juristic person, they act through their representatives. However, should one consider that this legal fiction is a genuine excuse to hold them non-liable when they participate somehow in fundamental rights abuses? The simple logic commands that someone must directly respond for the grief committed. If the state can be held indirectly liable for its lack of due diligence, the corporation itself may be directly held responsible at least through its representatives.⁸⁸⁸ Such a minimalist approach will have the advantage to discourage representatives from engaging the corporation into activities that may lead to serious fundamental rights abuses.

⁸⁸⁴ See the case of children for who parents or guardian can incur responsibility in certain circumstances. Weinstein T. "Visiting the sins of the child on the parents: The legalist of criminal parental liability statutes" (1991) 64 *South California Law Review* 859.

⁸⁸⁵ By way of illustration, beside the *Ogoni* case which has come to be the reference all over Africa, see also these other well-known cases which happened beyond the continent *Guerrero v. Monterrico Metals Plc* [2009] EWHC 2475; [2010] EWHC 3228; *Connelly v. RTZ Corporation Plc* [1998] AC 854; *OK Tedi litigation v. BHP* [1997] 1 VR 428.

⁸⁸⁶ Garvey N. and Newell P. "Corporate accountability to the poor? Assessing the effectiveness of community-based strategies" (2005) 15 (3) (4) *Development in practice* 390.

⁸⁸⁷ Mullart R. *International corporate responsibility in practice: The role of corporations in the economic order of the 21st century* (Alphen aanden Rijn: Kluwer law International, 2010) 389.

⁸⁸⁸ See for instance the vicarious liability in South Africa as explained in previous paragraphs.

Amao points out that the current limitation existing under international law is the main reason of the ongoing failure to establish a workable framework for CSR.⁸⁸⁹ But a sound perception of the problem would lead to take the other way around and consider that it is the failure to work out an effective model of CSR by main international law-makers that are states, which imposes limitations on international law. The inability of states to come up with a common vision about what the legal substance of CSR should be and how its principles may be enforced to monitor multinational corporation behaviour⁸⁹⁰ is the reason why corporate liability under international law remains light.⁸⁹¹ In the midst of this ambiguity, a better strategy can be to leave aside points of disagreement and focus more on common grounds or relevant characteristics. Though CSR is generally presented as a broad concept which embraces all ethical aspects of doing business in a country, some of the main elements that emerge from perceptions developed by scholars in their writings are the necessity to meet preconditions for doing business in the society concerned, the imperative of making corporation activities profitable to the host community and the need for corporations to assume liability for their wrong actions.⁸⁹² Since the UN framework incorporates all these elements, it can serve as the normative ground on which discussions can be initiated at a global level to agree on a binding regime to hold multinational responsible for their fundamental rights violations. There is obviously a need for an international law reform in the sense of a better protection of fundamental rights against the threat that multinational corporations activities represent. The minimum consent already exists now within both international and national legal system that at least corporates should be socially responsible, so why then continue to promote a soft international law regime which obviously has its limitations? Why not seek for a more effective regime? Actually no valid argument can

⁸⁸⁹ Amao O. *Corporate social responsibility, Human rights and the law: Multinational corporations in developing countries* (Abingdon/New York: Routledge, 2011) 243.

⁸⁹⁰ Adeye A. *Corporate social responsibility of multinational corporations in developing countries: Perspectives on anti-corruption* (New York: Cambridge University Press, 2012) 143; Amao (2011) 243; Horiggan (2010) 34.

⁸⁹¹ This difficulty to agree on the CSR is also present in the writings of scholars who promote different approaches to the concept as well. Amao, Id., 243, Horiggan, Id., 34-35; Mullerat (2010) 12; Zerk J. *Multinationals and corporate social responsibility: Limitations and opportunities in international law* (Cambridge: Cambridge University Press, 2006) 34-35.

⁸⁹² Horiggan, Id., 34; Mullerat, Id., 14-25; Karake-Shalhoub ZA. *Organizational downsizing, discrimination and corporate social responsibility: The role of corporations in the 21st century* (Westport: Greenwood Publishing Group, 1999) 22.

oppose a constraining regime of CSR, not even the view that multinational corporations are not direct participants in the elaboration of international law norms.⁸⁹³ Indeed, the adherence to the rule of law principle does not require that one has forcefully to be part of the law making process before abiding by the rules established under the law in force.⁸⁹⁴ Otherwise, what can then justify the fact that multinational would claim the application of bilateral investment treaties in their relations with the host state since they were not participants to the elaboration of those treaties?

From a practical standpoint, corporations can well be bearers of fundamental rights obligations.⁸⁹⁵ It is true that corporation as legal persons are fictitious and that as such they cannot practically always be approached as is the case for natural persons. However, the simple fact that corporations are juristic person does not prevent them from being debtors of fundamental rights obligations. A capital argument in this regard arises from a simple analogy which suggests that if this has to be the case, then the state, because being as well as a juristic person, should not be able to incur liability whenever fundamental rights are infringed.

The African Commission standard position so far is that international law on fundamental rights:

imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of *due diligence* [footnote 50] to prevent the violation or for not taking the necessary steps to provide the victims with reparation.⁸⁹⁶

This assertion that was made in a communication brought against the Zimbabwean government demonstrates that, despite the recognition of individuals' duties in the African

⁸⁹³ Amao (2011) 240-241.

⁸⁹⁴ Waldron J. "The rule of international law" (2006) 30 (1) *Harvard Journal of Law & Public Policy* 16-17.

⁸⁹⁵ Clapham A. *Human rights obligations of non-state actors* (Oxford: Oxford University Press, 2006) 3-4, 21; Bridgeford (2003) 1014-1015.

⁸⁹⁶ African Commission Communication 245/2002 *Zimbabwe Human Rights NGO Forum v. Zimbabwe* (2006) para. 143.

Charter, the African Commission approach on the issue does not depart from the classic approach currently in force under international law. It is on the shoulders of the state that liability for corporation wrong doing rests. The same position was held in the historical *Ogoni* case where the African Commission found that the Nigerian Government had violated its obligation to protect communities living in the Nigeria Delta against interferences by the oil company in the enjoyment of their fundamental rights.⁸⁹⁷ Nevertheless, despite the lack of horizontal direct application, the African Charter remains a suitable legal regulation to undertake the protection of affected communities in the governance of mineral resources. This is because in terms of rights' enforcement it offers an additional alternative to affected communities whenever national judicial and quasi-judicial bodies fail in this task. The *Ogoni* case demonstrates that whenever the government is involved as a shareholder with the mineral company, it is almost utopian to expect that it will enforce fundamental rights standards against the joint-venture. In this context, Prihandono observes that, if a violation occurred, it is difficult to expect that national courts will maintain their impartiality.⁸⁹⁸ While in the *Ogoni* case, the African Commission was unable to determine whether local remedies were exhausted,⁸⁹⁹ in the *Endorois* case, the domestic court in the first instance struck out the matter on procedural grounds and then in a second instance, dismissed the case contending that the complainants had been properly consulted and compensated for the loss.⁹⁰⁰ This was totally in stark contrast with the decision reached later by the African Commission that held that no proper compensation had taken place.⁹⁰¹ However, this single case would be insufficient to establish the tendency of national courts under the African system to be clement towards their government, though as comes out of Moravcsik's work it is a natural predisposition of national courts in this situation to be less active than their international counterparts.⁹⁰² Thus, though the primary forum for the enforcement of fundamental rights

⁸⁹⁷ See the *Ogoni* case, supra note 104, paras. 57-58.

⁸⁹⁸ Pihandono I. "Barriers to transnational human rights litigation against transnational corporations (TNCs): the need for cooperation between home and host countries" (2011) 3 (7) *Journal of Law and Conflict Resolution* 89-103.

⁸⁹⁹ See the *Ogoni* case, supra note 104, para. 40.

⁹⁰⁰ See the *Endorois* case, supra note 67, para. 59.

⁹⁰¹ *Id.*, para 268.

⁹⁰² Moravcsik A. "Origins of Human Rights regimes: Democratic delegation in postwar Europe" (2000) 54 (2) *International organization* 227-228.

lies within the national jurisdiction, it is indubitable that the enforcement machineries set up by the African Charter at the regional level should provide affected communities with a feeling of more independence and neutrality than domestic courts. It is not always predictable how national judges will behave faced with standards imposed by international fundamental rights whenever their governments have infringed them.⁹⁰³

Despite the above-mentioned arguments, it would nevertheless be suitable for the African system to improve its approach towards horizontal application through, for instance, a future revision of the African Charter by the AU that would clearly establish corporate direct responsibility for grave fundamental rights abuses.⁹⁰⁴ However this should not be done in a way that would prejudice the promotion of private investment for which the demand is still high in most African economies. Indeed, if one considers the observation of Adeyeye according to which the need for direct liability of corporations is most obvious when considering the case of developing countries,⁹⁰⁵ it is clear that African countries would appear at the first frontline of such a demand. This is firstly because Africa is a region vastly endowed with mineral resources and then because multinational mineral corporations have been involved in many fundamental rights violations all over the continent,⁹⁰⁶ which included the most atrocious ones.⁹⁰⁷ To balance this progressive approach, it can be suggested that multinational corporations will be held directly responsible for fundamental rights abuses either as accomplices or main perpetrators and be sanctioned under international law when

⁹⁰³ Schreuer C. "Interaction of international tribunals and domestic courts in investment law" (2010) *Contemporary issues in international arbitration and mediation* 71-94.

⁹⁰⁴ Mugambi L. "It is time for the African Union to deal with the negative impact of corporate activity" (LSE); available at <http://blogs.lse.ac.uk/africaatlse/2011/08/15/it-is-time-for-the-african-union-to-deal-with-the-negative-impact-of-corporate-activity/> [accessed on 7/4/2013].

⁹⁰⁵ Adeyeye (2012) 143.

⁹⁰⁶ See developments made in the background.

⁹⁰⁷ See the involvement of multinational corporations in the plundering of mineral resources in DRC wars in which millions of Congolese were killed. UN Report Addendum to the interim report of the Group of Experts on the DRC concerning violations of the arms embargo and sanctions regime by the Government of Rwanda S/2012/348 (UN 2012); Final report of the UN group of experts on DRC (2008) ; Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of DRC (UN 2001); see also the case in the Angola war that lasted twenty seven years and where multinational corporations were involved in what has been qualified "diamond blood". Reno W. "The real (war)economy of Angola" in (eds.) Cilliers J. and Dietrich C. *Angola's war economy: The role of oil and diamonds* (Pretoria: Institute for Security Studies, 2000) 221.

national mechanisms fail in this assignment, but only in cases of extreme gravity like crimes against humanity, war crimes, genocide and aggression.⁹⁰⁸ This can be the minimalist regime under which to launch a constraining regime upon multinational corporations in international law because this kind of abuse requires deliberate forcefully willingness for their perpetration. Despite difficulties raised by the application of the *mens rea* criterion to juristic persons,⁹⁰⁹ developments under the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Nuremberg Tribunal⁹¹⁰ offer grounds to at least support the proposal that the corporation criminal liability should be incurred by its representatives who made and executed the decision involving the entity in the criminal operation, while the corporation itself may respond to civil aspects of its responsibility which often raise the issue of adequate compensation for which it is presumably more solvable than its representatives. In this context, it is relevant to point out that since 2009, the AU has made a formal proposal for the African Court to be given criminal jurisdiction to try international crimes like genocide, crimes against humanity and war crimes.⁹¹¹ Though the study on the implications of extending the Court's jurisdiction was finalised in 2010, the draft protocol to that effect has not been yet approved. From the perspective of the present discussion, this decision by the AU opens the door to a new dimension of horizontal application in so far as individuals who commit these crimes would become defendants before the African Court, and no more merely states. However it remains to be seen whether the Court will follow the classic approach of international law or depart from it in respect of corporations' liability.

Pending such a reform, affected communities should just satisfy themselves with the liability incurred by the government for lack of "due diligence". In this regard, it is worthy to underline that if community participation can take place before the establishment of any

⁹⁰⁸ As will be demonstrated below, this is a logic deduction of the complementarity or subsidiary principle that governs the relationship between international mechanisms of enforcement and the national ones.

⁹⁰⁹ The criminal intention or knowledge that an act is wrong, that the accused must have had at the time of committing the offense.

⁹¹⁰ The jurisprudence developed through these tribunals demonstrates that criminal liability can be incurred by juristic persons. By way of illustration, see *Prosecutor v. Furundzija*, ICTY Case No. IT-95-17/1-T (Trial Chamber Dec. 10, 1998); *The Nuremberg Trials (U.S. v. Goering)*, 6 F.R.D. 69, 112 (Int'l Mil. Trib. 1946).

⁹¹¹ Decision Assembly/AU/Dec.213 (XII) of February 2009; Decision Assembly/AU/Dec.292 (XV) of July 2010.

mineral project, it can help prevent future fundamental rights violations by setting conditions under which the mineral corporation would operate.

3.3. Conclusion

This chapter has reviewed the normative content of the African system with the aim to see whether it can really accommodate an effective model of participation for affected communities in the mineral sector. The provisions of the African Charter are really supportive of the fundamental rights to participate in governance and all other fundamental rights that are relevant to the realisation of sustainable development. This, despite the fact that some shortcomings could be identified, like for instance the claw-back clause issue or the lack of direct horizontal application in respect of mineral corporations' liability. Thus far, norms on people's rights in the African Charter constitute the largest legal basis on which affected communities can rely to protect their fundamental rights and interests in mineral projects. The fact that the Charter was ratified by all African countries makes it available for all African affected communities. Enforcement bodies should be prompt to interpret its provisions of the African Charter to the extent that provisions are given the meaning likely to afford the best protection to affected community. This has been the general trend developed in the jurisprudence of the African Commission.

Chapter four: Enforcing community participation under the institutional frameworks of the African Charter

4.1 Introduction

There are three institutional levels at which one can seek the quasi judicial or judicial enforcement of fundamental rights enshrined in the African Charter. These are respectively national courts, the African Commission and the African Court. Accordingly, to analyse how community participation may take place in the mineral sector under provisions of the African Charter requires a critical look at arrangements made in respect of each of these enforcement machineries. In this chapter, what is more critical is to highlight the extent to which members of affected communities can make positive use of these institutional mechanisms.

4.2 The prerequisite of local remedies exhaustion and domestic courts

Before a case is taken to the African Commission, a number of conditions that need to be fulfilled are set in article 56 (5) of the African Charter, among which the requirement that local remedies must first be exhausted. This specific condition is the one that actually makes national courts the first judicial instance where provisions of fundamental rights are to be enforced. Thus, under this section, the study wants to analyse how the African Commission has interpreted this rule and to what extent domestic courts can help to enforce fundamental rights in the Charter. However, because in the search for a strategy to enforce fundamental rights against corporations, the extraterritoriality has often been looked at as a possible option, it will be interesting to see how far it can support fundamental rights of affected communities in mineral exploitation.

4.2.1 A flexible approach to the local remedies exhaustion rule as a positive factor for affected communities

The local remedies exhaustion rule can be described as the requirement that national courts must be given the opportunity to redress an alledged violation of fundamental rights before the matter can be taken before international or regional bodies. Lopes and Quénivet explain

that the rationale for this rule is based on the fact that if all claims were made directly at the international level, international bodies would be overwhelmed with a lot of files with the consequence that decisions on cases would be delayed.⁹¹² In fact, the intervention of international enforcement machineries is generally governed by the international law rule of “subsidiarity”.⁹¹³ This rule determines the domain of competence between larger communities and small ones, commending that the former ones should refrain from intervening in matters which may be efficiently administered and decided by the latter ones, and that interventions by the larger ones will be justified only in case smaller units failed to fulfil their mission properly.⁹¹⁴ Nollkaemper who looks at subsidiarity as a consequence of the sovereignty principle, observes that states are entitled to reserve a primary role for their courts in the adjudication of international claims and that in doing so, they may refuse that an international proceeding takes place when national options to remedy the issues have not yet been used.⁹¹⁵ This confirms the assertion made previously that states are the main entities upon which the primary obligation rests to make sure that international fundamental rights are implemented within their national jurisdiction. In the context of the African Charter, article 1 requires that states parties adopt legislative or other measures to give effect to fundamental rights contained in this instrument. Therefore, it is only in case of failure of arrangements made at the domestic level that institutional mechanisms set at the regional level should be resorted to.

In the *Ogoni* case, the African Commission itself took the opportunity to explain the exhaustion of the local remedies rule which is an application of subsidiarity and observed that:

One purpose of the exhaustion of local remedies requirement is to give the domestic courts an opportunity to decide upon cases before they are

⁹¹² Lopes and Quéniwet (2008) 210.

⁹¹³ Ouguergouz (2003) 577; Carroza GP. “Subsidiarity as a structural principle of international human rights law” (2003) 97 (38) *The American Journal of International Law* 38-79.

⁹¹⁴ Jirásek J. “Application of the principle of subsidiarity on decision making of the ECJ in the area of Fundamental rights protection” *Dny práva – 2009 – Days of Law: the Conference Proceedings*, (Masaryk University, 2009); Carroza (2003) 39-40.

⁹¹⁵ Nollkaemper A. *National court and the international rule of law* (Oxford: Oxford University Press, 2012) 26.

brought to an international forum, thus avoiding contradictory judgements of law at the national and international levels. Where a right is not well provided for in domestic law such that no case is likely to be heard, potential conflict does not arise. Similarly, if the right is not well provided for, there cannot be effective remedies, or any remedies at all. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. (See the Commission's decision on *Communications 25/89, 47/90, 56/91 and 100/93 World Organisation against Torture et al./Zaire: 53*)[sic] 1. The exhaustion of domestic remedies requirement should be properly understood as ensuring that the State concerned has ample opportunity to remedy the situation of which applicants complain. It is not necessary here to recount the international attention that Ogoniland has received to argue that the Nigerian government has had ample notice and, over the past several decades, more than sufficient opportunity to give domestic remedies. Requiring the exhaustion of local remedies also ensures that the African Commission does not become a tribunal of first instance for cases for which an effective domestic remedy exists."⁹¹⁶

These statements by the African Commission reveal that in the view of this institution, the application of the local remedies exhaustion rule aims to fulfil three main purposes which are to avoid contradictory judgements between national and international instances, give an opportunity to the government to remedy a violation before taking the case to the international level and prevent the international body to work as the court or tribunal in the first instance. All these purposes do not call for a particular observation, except the one upholding the avoidance of contradiction between judgments rendered at the national level and decisions delivered at the international one. Indeed, it is questionable whether this can be regarded as a legitimate purpose in so far as international or regional judges are also called upon to work independently,⁹¹⁷ but in no case can they be compelled or tied by the interpretation given by national judges. As already said previously, the purpose of the local remedies exhaustion rule in this specific context should be rather described as the necessity to give an opportunity to national courts to redress or remedy any fundamental right violation before it is taken to international judicial or quasi-judicial bodies which in that case would act almost as an appellate institution. For instance, as already observed

⁹¹⁶ See *Ogoni* case, supra note 104, paras. 37-39.

⁹¹⁷ UN OHCHR *Human rights in the administration of justice: A manual on Human rights for judges, prosecutors and lawyers* (New York/Geneva: UN Publication 2003) 119.

previously, the purpose of contradiction avoidance does not match the outcome in the *Endorois* case where the African Commission found that the respondent state had violated some fundamental rights in the African Charter and that adequate compensation had to be paid to the community, while the national court previously ruled that the complainant had been properly compensated.⁹¹⁸

It is also relevant to observe that article 56 (5) of the African Charter has established an exception by underlying that the obligation to exhaust local remedies ceases whenever it is obvious that this procedure is unduly prolonged. This assertion actually implies that whenever proceedings started at the national level are unnecessarily delayed to such an extent that it hampers the proper administration of justice, the complainant is allowed to drop off and bring the case straight to the African Commission. However, a difficulty arises because the African Charter has not determined the lapse of time and circumstances within which a procedure may be regarded as “unduly prolonged”. In the absence of such an indication, it is clear that the appreciation was left at the discretion of the African Commission.

Therefore, a review of the application of the rule by the African Commission reveals that this institution has in practice adopted a very kind interpretation of article 56 (5) which in many cases has led it to admit communications on the pretext that local remedies were either inexistent or unavailable or ineffective.⁹¹⁹ Of course, where local remedies were available, but obviously not resorted to by the complainant without any reasonable explanation, the Commission has clearly declared the inadmissibility of the communication.⁹²⁰ Nevertheless, the flexibility of the African Commission in applying this provision comes from the observation that at times it has admitted communications where there was no clear indication that the complainant had tried to use local remedies or even where they had failed to do so but yet the commission admitted the case. In the

⁹¹⁸ See the *Endorois* case, supra note 67, paras. 59 and 298.

⁹¹⁹ By way of illustration, see the *Huri – Laws* case, supra note 706, para. 39; the *Dawda* case, supra note 662, para. 35; See the *Lawyers of Human Rights* case, supra note 662, para. 27; African Commission Communication 25/89-47/90-56/91-100/93 *Free Legal Assistance Group, Lawyers' Committee for Human rights, Union Inter africaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire* (1995) (Hereinafter *Témoins de Jehovah* case) paras. 37-38.

⁹²⁰ By way of illustration see African Commission Communication 260/02 *Bakweri Land Claims Committee v. Cameroon* (2004) para. 56; African Commission Communication 258/02 *Miss A v Cameroon* (2004) para. 26; African Commission Communication 235/00 *Curtis Francis Doebbler v. Sudan* (2000) para. 117; African Commission 310/05 *Darfur Relief and Documentation Centre v. Sudan* (2009) paras. 81-82.

Ogoni case, the Commission declared the case admissible whereas the communication did not contain any information on any actions taken before national court.⁹²¹ The argument of the African Commission has been that when the respondent state does not provide a substantive response when the complaint of violations is brought to its attention by the Commission itself, this institution must decide on the merit of the facts.⁹²² In the *Kevin Mgwanga Gunme et al v. Cameroon*, the African Commission did not provide any explanation on its decision to admit the case despite the failure of the complainant to resort to national court.⁹²³ In this case, it seems that the African Commission had tacitly adhered to the claimant's argument that there is no remedy in national law for self-determination.⁹²⁴ Moreover, the African Commission has demonstrated another measure of its flexibility by asserting that the exhaustion of local remedies is not necessary where there are massive violations of fundamental rights.⁹²⁵ If it can be assumed that the violation of an affected community's fundamental rights includes the mass of the people living within this community, the conclusion should be that the exhaustion of local remedies rule should be never applied in this case. However, this theoretical deduction would be challenged by the fact that in practice the African Commission had explicitly looked at this requirement in the *Endorois* case.⁹²⁶

Actually, if one has to sum up the formal requirements as developed by the African Commission, these imply that remedies must exist in the national legislation, that should be efficient to address the violation and that national courts must be able not only to deliver adequate judgments, but also to implement them. Whenever these conditions are blatantly missing, there is no need to stick on the rule of exhaustion. In the case of *Lawyers for Human Rights against Swaziland*, the communication was declared admissible merely on the observation that the King of the respondent state was likely to utilise the judicial power vested in him through a proclamation

⁹²¹ See the *Ogoni* case, supra note 104, para. 40.

⁹²² Id.

⁹²³ See the *South Cameroon* case, supra note 746, paras. 81-87.

⁹²⁴ Id., par. 81.

⁹²⁵ African Commission Communication 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 *Malawi African Association and Others v Mauritania* (2000) para. 85; African Commission Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (2009) (Hereinafter the *Malawi African Association and Others* case) para. 103.

⁹²⁶ See the *Endorois* case, supra note 67, para. 59.

made in 1973 to overturn court decisions.⁹²⁷ The Commission considered that based on past experience where this prerogative had been used to disregard court's decisions, chances for the complainant to obtain remedy and redress the situation were minimal to such an extent that it amounted to unavailability and ineffectiveness.⁹²⁸

The flexibility developed by the African Commission is really a positive element for the advancement of fundamental rights because the context in which the judicial system functions in many African countries is one where the executive put pressure upon judges, trying to compel them by all means to deliver unfair decisions.⁹²⁹ Therefore, wherever the national judicial system appears powerless and ineffective to secure fundamental rights, the rule of local remedies exhaustion is of no use. For affected communities, this is a good approach, in so far as the long delay that the process to obtain a remedy from national courts may occasion, is likely to prolong the threat or even the violation of fundamental rights that an ongoing mineral operation can cause. There is a need for expeditious justice when it comes to the protection of fundamental rights, especially when it involves a group of people. Therefore, the African Commission approach is a rational one as it offers more guarantees to the protection of affected communities' fundamental rights.

4.2.2 National courts as the forum of first instance

Though the study focuses on the role that regional enforcement machineries established by the African Charter and its protocol thereto can play, it seems interesting to see to what extent national courts can help to secure affected communities against fundamental rights abuses in the mineral sector. In this respect, Frynas has observed that as other regions of the World, Africa has experienced an increase in litigation against multinational corporations these last decades,

⁹²⁷ See the *Lawyers of Human Rights* case, supra note 662, para. 27.

⁹²⁸ *Id.*, para. 27.

⁹²⁹ Kabange NCJ. "The challenges for the advancement of Human rights and democracy in Africa in the 21st century" (2012) 2(1) *Sacha Journal of Human Rights* 26; United States General Accounting Office- Foreign assistance, U.S. anticorruption programs in Sub-Saharan Africa will require time and commitment: Report to the Subcommittee on African Affairs, Committee on Foreign Relations, U.S. Senate (April 2004)10-11.

especially concerning environmental and labour rights.⁹³⁰ An illustration in this regard was taken from Shell and Chevron in Nigeria, for which it was reported that:

There has been a significant rise in litigation between oil companies and those affected by oil operations in Nigerian courts. In the period 1981-86, 24 compensation claims against Shell went to court in Nigeria. In early 1998, Shell was reportedly involved in over 500 pending court cases in Nigeria, out of which 70 per cent, or roughly 350 cases, dealt with oil spills, the other 30 per cent, or 150 cases, dealt mostly with other types of damage from oil operations, contracts, employment and taxation.² In the whole of the 1980s, Chevron reportedly had only up to 50 court cases in Nigeria. In early 1998, Chevron was involved in over 200 cases, of which 80-90 per cent, or roughly 160-180 cases, dealt with oil spills, other types of damage from oil operations or land acquisition for oil operations.⁹³¹

One of the well known decisions is *Shell against Farah*.⁹³² In this case, the affected communities filed a lawsuit to claim compensation for environmental pollution which resulted from Shell's failure to rehabilitate the land spoiled by the oil well blowout which occurred in 1970.⁹³³ While Shell claimed that it had already rehabilitated the land and that a compensation of £ 22000 was paid, the communities claimed that it was not the case and that as a result of all this they could not use the land to farm anymore. The Nigerian court of appeal awarded them 4.6 million Naira as compensation.⁹³⁴ This decision is now considered a landmark decision because after its pronouncement, it has been observed that the amount of compensation increased in cases decided thereafter.⁹³⁵ In South Africa as well, corporations have faced lawsuits for fundamental rights violations. In fact, under the South African criminal law, corporations can be made liable under the theory of "vicarious liability".⁹³⁶ It happened, for instance, that corporations were found liable for the failure of their directory board to provide safe working conditions and other benefits to employees.⁹³⁷ In a group action initiated against *Gencor* in 2001, miners who sued the company

⁹³⁰ Frynas (1999)121.

⁹³¹ Id., 372.

⁹³² Ibid.

⁹³³ Frynas (2004) 372.

⁹³⁴ Id.

⁹³⁵ Ibid. In the same line, see also *Shell v. Tiebo VII* (1996) 4 NWLR) where the Court awarded 6 million Nera to an affected community for environmental damage caused by an oil spill from Shell which occurred in 1987.

⁹³⁶ Vicarious liability is the liability incurred by one person for the delict committed by another one, in this case, by the corporation for the act of its agents.

⁹³⁷ See for instance, *Boyd v. Stuttaford & Co* 1910 AD 101; *Mkize v. Martens* 1914 AD 382 as reported by Nana CN. "Corporate criminal liability in South Africa: The need to look beyond vicarious liability" (2011) 55 (1) *Journal of African Law* 89.

for the illnesses they suffered from exposure to asbestos, accepted 448 million Rand as compensation.⁹³⁸ Moreover, in the *Bafokeng* case against Impala mentioned previously, it is because of litigation supporting their ownership on land that members of this community succeeded to put pressure on Impala and get an increase in royalties, though finally through an out of court settlement. It took over ten years of legal wrangles before this settlement could be reached, but it was worth it in the end.⁹³⁹

The above developments in Nigeria and South Africa prove that at times it is possible for national courts to support the fundamental rights of affected communities in the mineral sector. However, knowing the high prevalence of corruption which is still haunting the judiciary in many African countries, the capacity of domestic courts remains obviously limited. In fact, the extent to which national courts may protect affected communities' fundamental rights depends particularly on the quality of the judiciary. Where independence and impartiality of the judiciary are not well rooted in the system, the potential for court to protect these communities can be significantly limited. In a corrupt judicial system, African judges are often put under pressure from the executive and compelled to render justice contrary to what the law prescribes. Many reports demonstrate that this is a serious issue faced by many African countries.⁹⁴⁰ For instance, in *Anvil Mining Ltd. c. Association canadienne contre l'impunité*,⁹⁴¹ where the mineral corporation was sued for its alleged participation in a war crime in DRC because it had provided logistical support to the army in a military operation which led to the massacre of people in the town of Kilwa near the company's silver and copper mine in Katanga, justice could not take its normal course because of interference and obstruction which led to all the defendants being acquitted.⁹⁴² Furthermore, whenever investments are seen as more valuable than fundamental rights in the development process, there is always the risk that the court decision will be inefficient to redress the violation.

⁹³⁸ McCulloch J. "Beating the odds: The quest for justice by South African asbestos mining communities" (2005) 32 (103) *Review of African Political Economy* 73.

⁹³⁹ Legal fight for royalties increase started in 1985 and was settled out of court in 1999. Manson and Mbenga (2003) 28.

⁹⁴⁰ United States General Accounting Office (2004)10-11. See also reports by Transparency International *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge: Cambridge University Press, 2007).

⁹⁴¹ *Anvil Mining Ltd. c. Association canadienne contre l'impunité* 2012 QCCA 117 (Hereinafter the *Anvil Mining* case).

⁹⁴² Global witness *et. al.* "Kilwa Trial: a denial of justice a chronology (October 2004 – July 2007)" 23-24; Available at http://raid-uk.org/docs/Kilwa_Trial/Kilwa-chron-EN-170707.pdf [accessed 16/5/2013].

This has occurred, for instance, in the Nigerian case of *Irou* against *Shell BP* where the judge refused to grant an injunction to the oil company to stop its operations that were damaging the environment, based on the pretext that the oil sector is the main source of the state's revenue.⁹⁴³ Temitope observes that after this case, judges have, at several other occasions, supported the position that economic considerations should prevail over environmental rights, even in cases where operations of oil-companies had adverse effects on host communities and the environment.⁹⁴⁴ This is a wrong approach in so far as it disregards the sustainable development requirement which makes the protection of environment one of the core components of sustainability.

The uncertainty brought by all the above shortcomings is what prompted African victims to start considering extraterritorial adjudication as a possible way to remedy fundamental rights violations by corporations. This is one of the avenues that affected communities can contemplate under the exhaustion of local remedies rule, but of course in this case the African Commission will not make it a compulsory requirement because such a step will depend on the victims' own discretion.

Particular developments have taken place in the American jurisdiction in respect of the liability of multinational corporations for fundamental rights abuses that have happened in Africa. This liability has often been discussed in respect of the US Alien Tort Statute of 1789 (ATS). This Act has been long contemplated as a worldwide reference in terms of extraterritorial legislation based on which multinational corporations could be sued for fundamental rights violations.⁹⁴⁵ The ATS consists of a single sentence in the Judiciary Act of 1789 which holds that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." This was initially interpreted as giving foreign nationals the possibility to sue multinational corporations before US federal courts for fundamental rights abuses committed abroad.⁹⁴⁶ Most litigation has taken place in the US Courts

⁹⁴³ See *Irou v. Shell BP* as explained by Frynas (1999) 122.

⁹⁴⁴ Temitope (2010) 435.

⁹⁴⁵ One can refer to the abundance of publications within the scholarship on the legal reach of this statute.

⁹⁴⁶ Since the inception of the statute entrenchment hundreds of years ago, an average of 150 lawsuits have been initiated thus far. Childress III DE. "The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation" (2012) 100 *The Georgetown Law Journal* 713.

of appeal for the Second, Ninth, and Eleventh Circuits,⁹⁴⁷ before finally reaching the US Supreme Court recently. Among the most notable successful case are *Doe* against *Unocal*⁹⁴⁸ and *Wiwa* against *Royal Dutch Shell*.⁹⁴⁹ In the *Doe* case, court proceedings were initiated by Burmese villagers against the multinational corporation Unocal for its alleged direct complicity in fundamental rights abuses committed by the Burmese military in Burma. A few years after the commencement of the proceedings in 2005, the corporation agreed to compensate the plaintiffs and provide funds for development initiatives to improve living conditions of peoples affected by the pipe line project in which it was involved in Burma. In the *Wiwa* case, the proceedings were initiated by the Ogoni people following the conflict of oil exploitation by Shell, particularly in respect of the execution of nine of their leaders, among who Ken Saro-Wiva was the main one. Here as well, the multinational corporation agreed to settle the matter in 2009 through a compensation of US\$15.5 million. Nevertheless, when interpreting this ATS, two conflicting views have emerged from the American courts.

On the one hand, it has been contended that, corporate liability for fundamental rights violations can be established under the ATS provided that the conduct of the corporation falls under the torts reprobated by the statute. This was, for instance, the view held *in re* South African Apartheid Litigation,⁹⁵⁰ where a class action was brought before a New York Southern District Court in 2002 by a group of black South Africans, who claimed to have suffered damages from the apartheid regime and therefore decided to sue some multinational corporations like Ford Motor Co., Daimler, IBM, Fujitsu and two international banks for aiding and abetting fundamental rights abuses by this regime in violation of international customary law.⁹⁵¹ While in the first instance, this court dismissed the class action on the grounds that aiding and abetting were not within the scope of the ATS,⁹⁵² the second circuit which acted as an appellate court held that corporations could indeed be sued for aiding and abetting under the ATS.⁹⁵³ But the court held that two requirements had to be fulfilled for this, namely the fact that the corporation conduct must be

⁹⁴⁷ Adamaski TM. "The Alien Tort Claims Act and corporate liability: A threat to the United States' international relations" (2011) 34 (6) (2) *Fordham International Law Journal* 1504.

⁹⁴⁸ *Doe v. Unocal* 248 F 3d 915 (9th Cir 2001).

⁹⁴⁹ *Wiwa v. Royal Dutch Shell* 2009 WL 498088.

⁹⁵⁰ *In re* South African Apartheid Litigation (S.D.N.Y. Apr. 8, 2009) par. 1.

⁹⁵¹ *Id.*, par. 1.

⁹⁵² *Ibid.*, para. 2.

⁹⁵³ *Ibid.*, para. 2.

wrongful and that the corporation must be aware that its actions will assist the perpetrator in the commission of the tort.⁹⁵⁴ The court dismissed the demands of plaintiffs because these requirements could not be established against each defendant. On the other hand, when deciding the case of *Kiobel* against *Royal Dutch Petroleum* where another lawsuit was brought against this latter company on behalf of the late Dr Barinem Kiobel, an Ogoni leader and 11 other Nigerians from the Ogoni community for alleged crimes against humanity, torture and extrajudicial executions, and other international law violations committed with the complicity of the defendant between 1992 and 1995 against the Ogoni people, the second circuit embraced the view that corporations cannot be sued under the ATS because under international customary law they are not held liable for fundamental rights abuses.⁹⁵⁵

In the midst of these divergent approaches, the US Supreme Court was called to deliver a decision on this matter in the same *Kiobel* case which went before it for review.⁹⁵⁶ The debate which opposed lawyers of parties before this highest jurisdiction included the question of whether the responsibility of corporations for fundamental rights violations should be determined based on the American domestic law, or on international law which does not yet formally accept such direct responsibility. In its decision, the US Supreme Court simply rejected the previous position held by the lower courts that the ATS offers aliens the possibility to bring a case before US federal courts for tort actions committed by multinational corporations.⁹⁵⁷ This has been seen by fundamental rights advocacy groups as a serious regress in the extraterritorial protection of fundamental rights by the American system.

Many other non-African legal systems provide the possibility to initiate lawsuit on an extraterritorial jurisdiction basis,⁹⁵⁸ but the limit that this solution imposes is that it cannot always be predicted how foreign courts will behave and interpret provisions serving as legal grounds on which court proceedings may be initiated. This is particularly true when extraterritoriality is not

⁹⁵⁴ See the *In re South African Apartheid Litigation* case, supra note 949, par. 1.

⁹⁵⁵ *Kiobel v. Royal Dutch Petroleum Co.*, No. 621 F.3d 111, 123–24 (2d Cir. 2010).

⁹⁵⁶ *Kiobel v. Royal Dutch Shell Petroleum Co.*, No. 10-1491 (U.S. 2012/2013).

⁹⁵⁷ See the *Kiobel* case, Id.

⁹⁵⁸ Australia, Canada, New Zealand, Germany, Switzerland ... For more developments, one may read De Jong A. *Transnational corporations and international law: Accountability in the global business environment* (Glos/Massachusetts: Business and Economics 2011) 128.

unequivocally expressed in provisions of the law and that claimant must rely on presumptions. Despite this uncertainty, extritoriality may be beneficial for affected communities since it has been observed that the amount of compensation offered by extraterritorial courts has been much larger than the one commanded by African courts.⁹⁵⁹ This is a positive element that can make extraterritoriality a viable option for affected communities whenever they succeed in overcoming procedural barriers when approaching the foreign court.

Above all, it has been contended that litigation can benefit affected communities in many ways, like getting compensation for material damages or the moral satisfaction of the demand for justice resulting from the fact that the liability of the mineral corporation was established in a court decision.⁹⁶⁰ Therefore, national courts, be it in the host country or abroad in case of extraterritoriality, must be aware of the significant role that they are called upon to play in the protection of affected communities' fundamental rights in their relations with other powerful stakeholders, especially the mineral corporations. Whenever they fail to do so, regional or international bodies must be given the opportunity to fill the gap.

4.3 Second level of enforcement: The African Commission

4.3.1 Organisation of the African Commission

The Charter of the OAU made very little reference to the concept of fundamental rights and mentioned their protection simply as general statements regarding the welfare and well being of Africans.⁹⁶¹ In fact, the OAU was preoccupied with more pressing issues such as unity, non interference in internal affairs and liberation.⁹⁶² Practically, it served as a discussion shop for African states but displayed considerable reluctance in intervening in systematic human rights abuses by various regimes in the region.⁹⁶³ The situation shifted when in 1981 the African Charter was adopted and five years later when it came into operation. From that time, the African continent became equipped as the European and inter-American systems with a regional

⁹⁵⁹ Frynas (2004) 373.

⁹⁶⁰ *Id.*, 379.

⁹⁶¹ Ankumah (1996) 4.

⁹⁶² Para 3. of the Preamb. and art. 2 of the OAU Constitutive Act (1963).

⁹⁶³ Smith RKM. *Textbook on international Human rights* (Oxford: Oxford University Press, 2005) 132; The argument advanced to justify this attitude had been generally the principle of non interference in the internal affairs of OAU member states.

instrument protecting fundamental rights. Unfortunately, instead of embracing the early proposal of creating an African Court to curtail observance of fundamental rights on the continent,⁹⁶⁴ OAU member states rather opted for an African Commission with the status of a quasi-judicial body. The reason for such a choice was said to be found in the fact that the African Charter was infused with, and reflected, the African traditions⁹⁶⁵ that favour dialogue and consensual settlement of issues rather than the adversarial adjudicative process proper of Western countries.⁹⁶⁶ This argument fell short and was somewhat confusing, because it could not explain why domestic courts were then deemed suitable to handle fundamental rights issues in respect to the exhaustion of local remedies. Presumably, the true motive behind such a compromise stemmed from the drafters desire to accommodate African leaders⁹⁶⁷ as they were not yet prepared to accept the hegemony of an African court that would make them accountable for fundamental rights violations through compulsory decisions. Viewed from the perspective of states, this reluctance to establish binding enforcement machinery was probably also the result of what Moravcsik describes as the fear of governments to pay the high cost of sovereignty surrender by delegating power to international judges to deliver decisions that at times override national ideals, political cultures or traditions.⁹⁶⁸ Therefore, the African Commission was established as a quasi-judicial body deprived of the necessary authority to deliver binding decisions, issuing recommendations to respondent states rather than orders.

Article 31 of the African Charter provides that the African Commission is composed of 11 members chosen from among African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and people's rights. In the

⁹⁶⁴ See the Law of Lagos Conference on the rule of law organised in 1961 by the International Commission of Jurist and where participants called African governments to establish an African Court to which fundamental rights cases could be referred.

⁹⁶⁵ Preamble of the African Charter, para. 4.

⁹⁶⁶ Udombana NJ. "Toward the African Court on Human and Peoples' Rights: Better late than never" (2000) 3 (5) *Yale Human Rights and Development Law Journal* 72-75. In reaction to this argument, Mangu observes that reconciliation and consensus are not unknown to other peoples (America and Europe) whose fundamental rights systems include a regional court. Mangu (2004) 152.

⁹⁶⁷ Keba Mbaye spoke of the 'AfricanState', but I rather refer in a synonymic way to African leaders because of the rupture that existed at that time between the leaders and their people. Many of the positions expressed in the international fora emerged from dictatorship regimes. I thus share the view that the true reason was the unwillingness of many African leaders to engage in the effective prevention and repression of fundamental rights abuses that originated mostly from the political arena in which they ruled. Udombana (2000) 75.

⁹⁶⁸ Moravcsik (2000) 227.

same article, provision is also made for them serving in their individual capacity. This simply means that as members of the African Commission, they do not act as representatives of their home governments. To emphasise this principle, the rules of procedure of the African Commission précised that holding a position within the African commission is incompatible with any activity that may compromise the independence and impartiality required in the functioning of this body, such as members of the government, diplomatic representatives or any other political binding function or activity that can have such effects.⁹⁶⁹ With no more than one national from the same country,⁹⁷⁰ members of the African Commission are chosen through a secret ballot by the Assembly of the AU Heads of States and governments from a list of individuals nominated by states parties to the African Charter.⁹⁷¹

4.3.2 Mandate of the African Commission

The African Commission is a quasi-judicial body with the mandate to promote, protect and interpret the fundamental rights guaranteed by the African Charter and to carry out all other tasks which may be entrusted to it by the AU Heads of States and Government assembly.⁹⁷²

4.3.2.1 Promotional mandate

Article 45 (1) of the African Charter provides that the African Commission is enjoined to promote fundamental rights all over the continent through the collection of documents, the study and research on African fundamental rights problems, the organisation of seminars, symposia and conferences, the dissemination of information related to fundamental rights and by encouraging national and local institutions concerned with fundamental rights to do the same. In so doing, the African Commission may formulate and lay down, principles and rules aimed at solving legal problems relating to fundamental rights and which can offer guidance to African governments in the design of their national legislations. The African Commission may also co-operate with other African and international institutions concerned with the promotion and protection of fundamental rights.

⁹⁶⁹ R.7 of the rules of procedure of the African Commission (2010).

⁹⁷⁰ Art. 32 of the African Charter.

⁹⁷¹ Art. 33 of the African Charter.

⁹⁷² Arts.30 and 45 of the African Charter.

Besides this information, research, consultation and cooperation, Ouguergouz observes that article 62 of the African Charter adds another task to the African Commission's promotional mandate which is the consideration of periodical reports from states' parties.⁹⁷³ As formulated, this article only compelled states parties to provide for reports, without specifying to which body they have to be submitted. As a result, this issue was raised in the initial stages just after the African Charter came into force. At its third ordinary session in 1988, the African Commission took a step to fill the gap by asserting that it was the only appropriate organ of the OAU which could not only study the periodic reports, but also make pertinent recommendations to states parties.⁹⁷⁴ Accordingly, the OAU entrusted the African Commission with this prerogative and gave this body the assignment to prepare guidelines for periodic reports.⁹⁷⁵ The Guidelines for national periodic reports under the African Charter were finally released in 1989.⁹⁷⁶ The document was too detailed and complex and was finally amended later on in 1998. The very same year it was reported that only 21 of states parties had submitted reports.⁹⁷⁷ Not only was this number below half of the total number of OAU member states, but even countries that submitted reports did not do it on a regular basis.⁹⁷⁸ According to Evans and Murray, this is presumably due to the fact that the Commission endeavoured more to involve the states in its work rather than to behave as an effective monitoring institution.⁹⁷⁹ At present, the number of state reports has increased, but still without the regularity required in article 62 of the African Charter. In 2012, the record of the African Commission indicated that six States had submitted all their Reports, 14 were late by one or two reports, 22 late by three or more reports and 12 had not submitted any reports.⁹⁸⁰

Despite some shortcomings, the African Commission has generally taken positive steps to achieve its promotional mandate. For instance, beside its involvement in the activation process of the state

⁹⁷³ Ouguergouz (2003) 519.

⁹⁷⁴ Evans M. and Murray R. "The state reporting mechanism of the African Charter" in (eds) Evans M. and Murray R. *The African Charter on Human and Peoples' Rights* (Cambridge: Cambridge University Press, 2008) 52.

⁹⁷⁵ *Id.* 52.

⁹⁷⁶ Guidelines for National Periodic Reports under the African Charter (1989).

⁹⁷⁷ Nmeielle VO.O. *The African Human rights system: Its laws, practice, and institutions* (The Hague: Martinus Nijhoff Publishers, 2001) 189.

⁹⁷⁸ *Id.*, 189.

⁹⁷⁹ Evans and Murray (2008) 56.

⁹⁸⁰ African Commission "State reports and concluding observations" <http://www.achpr.org/states/reports-and-concluding-observations/> [accessed on 16/4/2013].

reporting mechanism, the African Commission has often proceeded to do the printing and dissemination of the African Charter and its rules of procedures, to organisations which in large numbers were attending seminars and conferences related to fundamental rights concerns. At times, in collaboration with national and international NGOs, it made recommendations to states parties regarding legislative adjustments.⁹⁸¹ Nevertheless, the survey made in the context of this study reveals that many people ignore the enforcement machineries of the African Charter. Few are those who at least know the existence of the African Charter. Therefore, the challenge is still big for the African Commission in terms of promoting the fundamental rights in the Charter.

4.3.2.2 Protective mandate

Article 45 (2) of the African Charter defines the protective mandate of the African Commission as the duty to ensure that fundamental rights are protected under conditions laid down in the Charter. It is in this context that the African Commission is entitled to receive and examine state communications or other communications.⁹⁸² In practice, only one inter-state communication has been decided on,⁹⁸³ the rest being cases involving individuals or communities against respondent states. It is also in the context of the protective mandate that it appears logic to consider the fact-finding missions and the adoption of resolutions on the situation of fundamental rights in states parties as initiated by the African Commission. Indeed, though Ouguergouz contended that it is hard to locate these initiatives in any of the Commission's functions as defined in article 45,⁹⁸⁴ it is clear that no matter the approach with which these actions are taken, the fact that the ultimate outcome is to remedy, if any, a fundamental right violation, places them undoubtedly within the area of the protective mandate.

In fulfilling its protective mandate, the African Commission delivers recommendations that are not binding upon states⁹⁸⁵ and can also release provisional measures whenever necessary.⁹⁸⁶ It is at this level that the African system was severely criticised before the establishment of the African court with regard to its efficiency. The inability to compell states has several times undermined

⁹⁸¹ See a summary of activities as summed up by Ouguergouz (2003) 519-524.

⁹⁸² Arts.47-59 of the African Charter.

⁹⁸³ See the the *DRC* case, supra note 796.

⁹⁸⁴ Ouguergouz (2003) 519.

⁹⁸⁵ Art. 58 of the African Charter.

⁹⁸⁶ R. 98 of the Rules of procedure of the African Commission (2010).

the work of the African Commission to such extent that it has been portrayed as a toothless dog – all bark and no bite.⁹⁸⁷ But nevertheless, as will be seen, despite working in an environment full of adversity, the African Commission has played an important role in the advancement of fundamental rights on the continent.

4.3.2.3 Interpretative mandate

Article 45 (3) requires that the African Commission provides an interpretation of any provision of the African Charter on demand of a state party, an institution of the AU or an African organisation recognised by the AU. The objective that this provision wants to achieve is to provide clarification on the real reach of any provision within the African Charter. Practically, it is in this context that the African Commission recently adopted during its 52nd ordinary session general comments pertaining to Article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.⁹⁸⁸ Of course, here the African Commission has extended the scope of its interpretation mandate following subsection (1) (b) of article 45 which empowers it to formulate and lay down principles and rules aimed at solving legal problems relating to fundamental rights.⁹⁸⁹

4.3.3 Admissibility of communications

There are a number of conditions that a communication needs to fulfill before it is deemed admissible to be examined by the African Commission. Admissibility of cases before this body is regulated by Article 56 of the African Charter and rules 113 to 118 of the rules of procedures. The main requirements set within these provisions are that the Communication must indicate the name of its authors, be compatible with the AU Constitutive Act and the African Charter, not be written in disparaging or insulting language directed against the respondent states, its institutions or the AU, not be based exclusively on news discriminated through the mass media, be sent after the exhaustion of local remedies, if any and unless it is obvious that the procedure is unduly

⁹⁸⁷ Udombana NJ. (2000) 64; Hansungule M. "African courts and the African Commission on Human and Peoples' Rights" in Bösl A. and Diescho J. (eds.) *Human rights in Africa: Legal perspectives on their protection and promotion* (Windhoek: Macmillan Education, 2009) 234.

⁹⁸⁸ African Commission General Comments on Art. 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 52nd Ordinary Session (October 2012) (Hereinafter General comments).

⁹⁸⁹ General comments, para. 1.

prolonged, be submitted within a reasonable period and not deal with cases which have been settled by states parties involved in accordance with the principles of the UN Charter, the AU Charter or the provisions of the African Charter. These requirements are cumulative and should all be adequately fulfilled for a communication to be admissible.⁹⁹⁰

In practice, the African Commission had the opportunity to make application of these requirements, at time underlying the implications of some of them. For instance, it was pointed out that the obligation to indicate the name of authors of the communication does not imply that the name of victims must be necessarily provided.⁹⁹¹ Regarding the language of the communication, in *Ligue Camerounaise des Droits de l'Homme v. Cameroon*, the African Commission declared the communication inadmissible because it held that “Paul Biya must respond to crimes against humanity; 30 years the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya; regime of torturers.... government barbarisms”.⁹⁹² Some scholars have criticised this decision on the ground that it was a denial of the freedom of expression of the victims’ feeling arising from the trauma caused by the fundamental right violated.⁹⁹³ As to the requirement that a communication must not be exclusively based on news disseminated through the mass media, the African Commission in the *Dawda* case underlined that it is not because some aspects of a communication made up of news from the mass media that it should *ipso facto* be rejected and that what is important is whether the information is correct.⁹⁹⁴ Concerning the exhaustion of the local remedies rule, the way the African Commission perceives its application was already discussed above in relation to the involvement of national courts in the first instance. On the reasonable period within which the communication must be submitted after the exhaustion of local remedies, the African Commission has not clearly determined the period as is the case in the European and Inter-American systems that adopted a six months period after the final decision

⁹⁹⁰ African Commission Communication 304/2005 *FIDH, National Human Rights Organisation (ONDH) and Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO) v. Senegal* (2006) para. 38.

⁹⁹¹ *Id.*, para. 40.

⁹⁹² African Commission Communication 65/92 *Ligue Camerounaise des Droits de l'Homme v. Cameroon* (1997) para. 13.

⁹⁹³ Ondikalu C.A. and Christensen C. “The African Commission on Human and Peoples’ Rights: The development of its non-state communications procedures” (1998) 20 *Human Rights Quarterly* 225; Mugwanya G.W. “Realising Universal Human Rights Norms through Regional Human Mechanisms: Reinvigorating the African System” (1999) 10 (1) *Indiana International and Comparative Law Review* 36.

⁹⁹⁴ See the *Dawda* case, *supra* note 662, paras. 24-26.

is delivered and the complainant notified.⁹⁹⁵ In respect of the condition that the communication does not deal with cases which have been settled by states parties involved in accordance with the principles of the UN Charter, the AU Charter or the provisions of the African Charter, this simply implies that it must not be a case already settled or being settled through another international body.

What needs to be noted from all the above is that the African Commission has often considered admissibility requirements with enough flexibility to allow victims of violations to access its jurisdiction and obtain a remedy.

4.3.4 *Locus standi* before the African Commission

The African Commission is competent to receive communications from a state party against another one (articles 47-54) and other communications (article 55). The *locus standi* of states parties, clearly formulated in the text of the African Charter, gave rise to a huge debate within the scholarship as to the meaning of “other communications”, giving birth to divergent opinions regarding whether or not cases submitted by individuals could be considered. While some were of the opinion that the African Commission was not entitled to receive communications from individuals and that other communications related to cases of massive and serious violations referred to in article 58,⁹⁹⁶ others have rather asserted that other communications indeed include the possibility to hear a case from individuals.⁹⁹⁷ As the time passed by, the practice of the African Commission has demonstrated that this institution received and decided cases submitted by individuals.⁹⁹⁸ At present, it is possible to contend that the African Commission is one of the regional enforcement bodies which offer a very open *locus standi*. The floor is open not only for victims, but even for non-victims that have knowledge of any fundamental rights violation. While this is obvious in cases of massive and serious violations and in individual cases, the initial rules of procedures of the African Commission adopted in 1998 allowed a submission on the behalf of

⁹⁹⁵ Art. 35 of the European Convention and art.46 (1) (b) of the American Convention.

⁹⁹⁶ Murray R. “Decisions by the African Commission on individual communications” (1997) 46 *International and Comparative Law Quarterly* 413; Benedek W. “The African Charter and Commission on Human and Peoples’ Rights: How to make it more effective” (1993) 11 *Netherlands Quarterly of Human Rights* 31.

⁹⁹⁷ Ouguergouz (2003) 558-561; Ondikalu and Christensen (1998) 238; Ankumah (1996) 24.

⁹⁹⁸ African Commission Communication 253/02 *Antonie Bissangou v. Congo* (2006); African Commission Communication 197/97 *Bah Ould Rabah v. Mauritania* (2004); The the *John K. Modise* case, supra note 662.

the victims only to the extent that he or she was unable to submit the case.⁹⁹⁹ As pointed out by Viljoen, the standard practice of the African Commission remains that the author of the communication (be it the victim or non-victim) must indicate a name, even if anonymity is requested.¹⁰⁰⁰ This absence of a victim requirement is a good approach in terms of strategies to maximise the protection of fundamental rights. In a context where many individuals and local communities are at times ignorant of their fundamental rights, through the African Charter and all its enforcement machineries, to limit access to the African Commission only to victims would have considerably slowed down the work of this institution. In respect of collective rights, the African Commission has adopted the *actio popularis* doctrine¹⁰⁰¹ for cases where there are massive and serious violations of fundamental rights.¹⁰⁰² This is surely the case whenever fundamental rights of a whole affected community are infringed by a mineral corporation. For instance, the experience demonstrates that of the few cases that have been taken before the Commission in respect of affected communities' natural resources, it was NGOs that initiated the communications on behalf of the victims.¹⁰⁰³ These latter organisations may therefore bring a law suit against mineral corporations in respect of any fundamental rights of affected communities.

4.3.5 Prospects of compliance with the decisions of the African Commission

Decisions of the African Commission have the main characteristic of being non binding. It is in this respect that most criticism was levelled at this institution at its outset and thereafter. Some scholars have made a record of several cases where recommendations from the African Commission were, totally or partially, not complied with by the respondent state.¹⁰⁰⁴ Though in certain cases, the Commission's recommendations were abided to,¹⁰⁰⁵ the general situation

⁹⁹⁹ Viljoen F. *International Human Rights Law in Africa* 2nded (Oxford: Oxford University Press, 2012) 304.

¹⁰⁰⁰ Id., 304.

¹⁰⁰¹ A law suit brought by a person or a group to obtain a remedy in the name of the collective interest.

¹⁰⁰² See the *Témoins de Jehovah* case, supra note 919; the *Malawi African Association and Others* case, supra note 925.

¹⁰⁰³ By way of illustration, see the *Ogoni* case, supra note 104 and the *Endorois* case, supra note 67.

¹⁰⁰⁴ Viljoen F. and Louw L. "State compliance with the recommendations of the African Commission on Human and Peoples' Rights" (2007) 101 (1) *The American Journal of International Law* 6; Keetharuth SB. "Implementation of decisions of the African Commission on human and people's rights"; Available at <http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/documents/sheilakeetharuthpres.pdf> [accessed on 21/3/2013].

¹⁰⁰⁵ By way of illustration, see for instance African Commission Communication 212/98 *Amnesty International v. Zambia* (1999).

remained confused due to the fact that, because of the non-binding character, compliance was left to the discretion of the respondent state. Though it might be true that the legal force of decisions delivered by an international body is dependent on the moral and legal authority which governments and other members of the international community attach to published reports and conclusions of this body,¹⁰⁰⁶ it is predictable that if decisions of the African Commission were made “formally” binding, the situation would be better. Compliance has been such a serious challenge in the work of the African Commission that, during its 22nd ordinary session held in 1997, the issue was raised by its secretary and it was decided that recommendations made by the Commission should be included in its annual report forwarded to the OAU AHSG for adoption.¹⁰⁰⁷ It seems that the strategy behind this was to involve the AHSG in the follow up of the implementation of its decisions. But this approach did not bear fruit. Since the African Commission had no clear follow-up policy to monitor the steps taken by state parties to implement its recommendations, following up on implementation was largely left to the victim or the author of the communication. This was until the rules of procedure of the African Commission were revised in 2010. Rule 112 set time limits first of six months within which parties must report all measures, if any, taken or being taken by the state party to implement the decision of the Commission, and then a further three months, within which it may invite the State concerned to submit further information on the measures it had taken in response to its decision. However, despite all these initiatives, respondent states are yet bold enough to explicitly reject decisions of the African Commission. For instance, in the 2012 annual report of the African Commission it was mentioned that in the case of *Kenneth Good* against *Botswana* in 2010,¹⁰⁰⁸ the respondent State argued that it is not bound by the decision of the Commission.¹⁰⁰⁹ The African Commission also has the authority to deliver provisional measures wherever it appears urgent to prevent irreparable harm to the victim (s) of the alleged violations.¹⁰¹⁰

¹⁰⁰⁶ See Tardu M. “Protocol to the UN Covenant on Civil and Political Rights and the Inter-American system: a study of coexisting procedures” (1976) 70(4) *American Journal of International Law* 784, as quoted by Viljoen and Louw (2004) 20.

¹⁰⁰⁷ “Non-compliance of state parties to adopted recommendations of the African commission: a legal approach” footnotes as in original, reprinted in Murray R. and Evans M. *Documents of the African commission on human and peoples’ rights* (Portland: Hart publishing, 2001) 758.

¹⁰⁰⁸ African Commission Communication 313/05 *Kenneth Good v. Republic of Botswana* (2010) (Hereinafter the *Keneth Good* case).

¹⁰⁰⁹ Combined 32nd and 33rd Activity Report of the African Commission on Human And Peoples’ Rights (2012) 9.

¹⁰¹⁰ R. 98 (1) of the African Commission Rules of procedure (2010).

This is particularly relevant for affected communities as a tool to stand against any contractual arrangement made between the government and the mineral company and which represents a threat to their fundamental rights even before its execution. Unfortunately, even in this case, respondent states have at times disregarded or neglected provisional measures by the African Commission. A well known example of this was the attitude displayed by the Nigerian Government in the case against International Pen and others NGOs.¹⁰¹¹ In this case where Kenule Beeson Saro-Wiwa, a writer and *Ogoni* activist, the president of the Movement for the Survival of the *Ogoni* People, and eight other *Ogonis* were sentenced to death by a domestic tribunal, the Nigerian Government ignored the call of the African Commission through a provisional measure to suspend execution. This was explained in the African Commission decision in the following terms:

The Secretariat of the Commission faxed a note verbale [*Sic*] invoking interim measures under revised Rule 111 of the Commission's Rules of Procedure to the Ministry of Foreign Affairs of Nigeria, the Secretary General of the OAU, the Special Advisor (Legal) to the Head of State, the Ministry of Justice of Nigeria, and the Nigerian High Commission in The Gambia. The note verbale pointed out that as the case of Mr. Saro-Wiwa and the others was already before the Commission, and the government of Nigeria had invited the Commission to undertake a mission to that country, during which mission the communications would be discussed, the executions should be delayed until the Commission had discussed the case with the Nigerian authorities. No response to this appeal was received before the executions were carried out. On 7 November 1995 the Provisional Ruling Council (PRC) confirmed the sentences of death and on 10 November 1995 all the accused persons were executed in secret at the Port Harcourt Prison.¹⁰¹²

Another case is the one of *Interights and others (on behalf of Bosch)* against *Botswana* where the respondent state also proceeded to the execution of the complainant despite the African Commission's call for a stay of execution pending examination of the communication.¹⁰¹³ These non-compliance cases of provisional measures simply consolidate the observation that the difficulty

¹⁰¹¹ African Commission Communication 137/94, 139/94, 154/96 161/97 *International Pen and others v. Nigeria* (1998) (Hereinafter, the *International Pen* case).

¹⁰¹² See the *International Pen* case, supra note 1011, paras 8-10.

¹⁰¹³ African Commission Communication 240/2001 *Interights and others (on behalf of Bosch) v. Botswana* (2003) para. 10; See also the case of Salif Al-Islam Gadadfi where the African Commission decided to seize the African court in 2013 as the result of the National Transition Council (NTC) non complying with the provisional measures requested by the Commission a year before. *African Commission v. Libya* Application No. 002/2013.

to implement the Commission's recommendations remains the heart of weaknesses experienced by this institution in its functioning.

Faced with such shortcomings, one can legitimately wonder on what basis the African Commission will be able to enforce fundamental rights of affected communities in the mineral industry?

Despite the fact that decisions of the African Commission are not binding, it still have some potentials to contribute to the advancement of the fundamental rights-based approach to community participation on the continent. The African Commission should for instance, maximise the use of its promotional mandate to educate affected communities and raise awareness among them about the protection that the African Charter and its enforcement machinery offer them. In this respect, several activities, as pointed out previously, have been initiated all over the continent, even if the challenges remaining are considerable in terms of people's knowledge of the system set by the African Charter. Moreover, the African Commission has fulfilled its interpretative mandate somehow successfully. Besides the case of article 14 of the Protocol mentioned above, the Commission has seized the opportunity to further elaborate on socio-economic rights and even to read in the provisions of the African Charter some other rights that are not formally entrenched.¹⁰¹⁴ Another way the African Commission may be useful is through its ability to adopt a resolution establishing specialised working groups. In this regard, it is noteworthy that in 2009, the African Commission had used this prerogative to establish the working group on extractives industries, environment and human rights violations.¹⁰¹⁵ The assignments of this group imply:

- examine the impact of extractive industries in Africa within the context on the African Charter on Human and Peoples' Rights;

¹⁰¹⁴ See the guidelines and principles on the implementation of socio-economic rights adopted by the African Commission at its 48th Ordinary Session (10th to 24th November 2010); as to the addition, see the fundamental right to housing and food as interpreted the *Ogoni* case, supra note 103, paras. 59-63,65.

¹⁰¹⁵ ACHPR/Resolution on the Establishment of a Working Group on Extractive Industries, Environment and Human Rights Violations in Africa Res. 148 (XLVI) (2009).

- research specific issues pertaining to the right of all peoples to freely dispose of their wealth and natural resources and to a general satisfactory environment favourable to their development;
- undertake research on the violations of human and peoples' rights by non-state actors in Africa;
- request, gather, receive and exchange information and materials from all relevant sources;
- inform the African Commission on the possible liability of non-state actors;
- formulate recommendations and proposals on appropriate measures and activities for the prevention and reparation of violations of human and peoples' rights by extractive industries;
- collaborate with interested donors institutions and NGOs; and
- prepare a comprehensive report to be presented to the African Commission.¹⁰¹⁶

The African Commission can resort on activities of this group to get specific information on the situation of affected communities. This was the case in Maricana case which happened in South Africa and where 34 miners were shot dead by security forces during a strike to demand better working conditions. After the African Commission has sent an urgent appeal to the South African government in the aftermath of unfortunate incidents and that a commission of inquiry had been established, the working group continued to follow the situation on the behalf of the African Commission.¹⁰¹⁷ Pending the result of the investigation, the working group carried out a visit in South Africa in May 2013 to visit the Maricana site and get in touch with local NGOs working in the field of extractive industries.

4.4 Third level of enforcement: The African Court

4.4.1 Historical background

As the years passed by, the inability of the African Commission to render compulsory pronouncements only spurred more demands for a more effective system. The situation was revised in a two step process. First through the establishment of an African Court on Human and

¹⁰¹⁶ Id.

¹⁰¹⁷ Commission Africaine des droits de l'Homme, Rapport du Groupe de travail sur les Industries extractives, l'Environnement et les Violations des droits de l'homme en Afrique) présenté à l'occasion du 25ème anniversaire de la Commission africaine des droits de l'homme et des peuples (la Commission), 52ème session ordinaire tenue à Yamoussoukro du 9 au 22 octobre 2012, 11.

Peoples' Rights in 1998 (1998 Protocol)¹⁰¹⁸ and then in 2004 through the merging of this latter with the Court of Justice of the AU to become the African Court of Justice and Human Rights¹⁰¹⁹ (in the 2008 Protocol). However, the 2008 Protocol has not yet entered into force. This will happen only after 15 states have ratified it. As Hasungule rightly observes, it is unfortunate that the AU has started the process of ratification afresh, leaving aside the previous adherence of states to the 1998 Protocol.¹⁰²⁰ Such “resetting” will inevitably delay the coming into force of the 2008 Protocol because 26 states will have to go through the same process again.¹⁰²¹ In the meantime, the African Court of Human and People's rights remains in function.¹⁰²²

4.4.2 Organisation of the Court

A useful analysis of the African Court's organisation should consider its composition, its jurisdiction, the people or entities that have *locus standi* and the remedies that may be granted to the victims of fundamental rights violations.

4.4.2.1 Composition of the Court

The 1998 Protocol provides for eleven judges elected in their individual capacity as well, with no more than one from the same member state of the AU, chosen in regard of their high morality and recognised practical, judicial or academic competence and experience in the field of fundamental rights.¹⁰²³ Independence is required from judges in article 17 which provides that “the independence of the judges shall be fully ensured in accordance with international law.” This requirement is very important for the efficiency of the African Court because judges must deliver their opinions and decide cases without interference from external influences. But the question in

¹⁰¹⁸ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998). It entered into force on 24/1/2004 after its ratification by 15 states.

¹⁰¹⁹ Decision on the Merger of the African Court on Human and Peoples' Rights and the Court of Justice of the African Union, Assembly/AU/Dec.83 (v), adopted on July 4-5, 2005, Doc. Assembly/AU/Dec. 45 (III), para. 4. Resources arguments and potential areas of common jurisdiction were among the reasons that militated for the merger of both courts. Hansungule (2009) 235.

¹⁰²⁰ Hansungule, Id., 237.

¹⁰²¹ Some African countries are still in the process of ratifying the 1998 Protocol. For instance, Ghana deposited its declaration on 10/3/2011.

¹⁰²² Assembly/au/dec.427(xix) Decision on the Protocol on amendments to the Protocol on the statute of the African Court of Justice and Human Rights doc. Assembly/au/13(xix) a.

¹⁰²³ Arts.11 and 12.of the 1998 Protocol.

this regard is what the meaning of “in accordance with international law” is. Underlining the fact that in 1985, the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders had adopted the Basic Principles on the Independence of the Judiciary and that these latter had been subsequently unanimously endorsed by the UNGA, the Office of the High Commissioner for Human Rights and points out that independence involves both individual and institutional relationships.¹⁰²⁴ This means that judges taken individually must give their opinions without any external influences, but also that the Court as a corporate body should function free from such influences.

From a list provided by member states, judges are elected by secret ballot by the AU Assembly according to the 1998 Protocol.¹⁰²⁵ The term is for six years, with the possibility to be re-elected once.¹⁰²⁶

4.4.2.2 Jurisdiction of the Court

The jurisdiction of the African Court may be analysed in two different compartments including, its contentious jurisdiction and its advisory jurisdiction.

4.4.2.2.1 Contentious Jurisdiction of the Court

The analysis of the contentious jurisdiction also needs to be undertaken through two different compartments, the jurisdiction *ratione materiae* and the jurisdiction *ratione personae*.

a) Jurisdiction *ratione materiae*

The African Court was established to complement and reinforce the functions of the African Commission.¹⁰²⁷ However, concerns have been raised in terms of defining what should be the inter-action between these two institutions, and what role each one should fulfil since they both share a common goal, that is to promote fundamental rights and protect them all over the

¹⁰²⁴ UN OHCHR (2003) 119.

¹⁰²⁵ Arts.14 and 15 of the 1998 Protocol.

¹⁰²⁶ Art.15 of the 1998 Protocol.

¹⁰²⁷ Para.7 of the Preamb. and art.2 of the 1998 Protocol.

continent.¹⁰²⁸ They are both called to interpret and apply the African Charter and any other relevant fundamental rights instruments ratified by the States concerned.¹⁰²⁹ To harmonise the relationship between both institutions, the rules of the African Court adopted in 2009 and those of the African Commission as revisited in 2010 required a meeting between both institutions at least once a year and whenever necessary to guarantee a good working relationship between them.¹⁰³⁰

If one considers the context in which the African Court was established, complementarity should imply that the Court would work to add something that was missing in the functioning of the Commission. In this respect, it is clear that the main area in which the African Court was set to supplement the work of the African Commission was in respect of its lack of enforcement power, its inability to deliver binding decisions. However, even in this case, there is still inconsistency in the interactions between both institutions. For instance, how should one reconcile the fact that the African Court was established to fill up the gap left by a lack of effectiveness in the work of the African Commission with the fact that this same Court can deliberately decide to refer a case to the Commission as stipulated in article 6 of the 1998? Indeed, why would the Court decline to offer a binding remedy to a fundamental rights violation and leave the matter to be solved under a non-binding regime? This procedure is paradoxical to the complementarity sought with the establishment of the Court. It may lead to absurdity and cause delays in so far as the Commission itself can consider referring the matter to the Court in case the respondent state has not complied with its recommendations.¹⁰³¹ Nevertheless, so far the cases that have been referred to the Commission by the Court are those where individuals had no *locus standi* before this latter institution because of the lack of the respondent state's declaration.¹⁰³²

¹⁰²⁸ Ebobrah ST. "Towards a positive application of complementarity in the African Human Rights system: Issues of functions and relations" (2011) 22 (3) *The European Journal of International Law* 663-688; Ingange wa Ingange JD. "The African Human rights system: Challenges and prospects" (Unpublished Doctoral thesis, UNISA 2010) 289; Elsheikh IAB. "The future relationship between the African Court and the African Commission" (2002) 2 *African Human Rights Law Journal* 253.

¹⁰²⁹ Art.7 of the 1998 Protocol.

¹⁰³⁰ R. 29 of the Rules of the Court (2009) and r. 115 of the African Commission Rules (2010).

¹⁰³¹ R. 116 of the African Commission Rules of procedure (201).

¹⁰³² *D Amare and M Amare v. Mozambique and Airline Mozambique* N.005/2011; *S Ababou v. Algeria* N.002/2011. For discussion on the respondent state declaration, see *infra* under the section on access to Court.

Ebobrah observes that some of the challenges the issue of complementarity raised in the African system have been or are still being experienced in other international legal systems having a two-tiered institutional structure.¹⁰³³ The truth is that more clarification needs to be brought forward by the AU Assembly as to the respective areas of operation of both institutions. This will help avoid duplication of functions resulting in redundancy, waste of resources, lengthening of the time and institutional tension which often comes as a result of the struggle for supremacy.¹⁰³⁴ The same reasoning is applicable to the relationship between the Court and the African Committee of Experts on the Rights and Welfare of Children¹⁰³⁵ that also enjoy some monitoring and interpretative prerogatives in respect of children fundamental rights.¹⁰³⁶

What one needs to keep in mind as to the material jurisdiction of the African Court is that it is entitled to hear and decide on cases which involve the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned.¹⁰³⁷ Of course because of the merger, the material jurisdiction of the African Court goes beyond this, but the study here is only concerned with its competences to decide cases related to fundamental rights. An important remark in this regard is that unlike courts in other regional human rights systems,¹⁰³⁸ the African Court enjoys a broader jurisdiction which goes beyond the African Charter and embraces all relevant fundamental rights instruments ratified by the respondent states.

It is also important to note that as mentioned previously, the material jurisdiction of the African Court would be extended to the trial of international crimes like genocide, crimes against humanity and war crimes if the draft protocol thereto is approved.

¹⁰³³ Ebobrah (2011) 665.

¹⁰³⁴ *Id.*, 665.

¹⁰³⁵ Hereinafter "African Committee of Experts".

¹⁰³⁶ See the African Charter on the Rights and Welfare of the Child (1990).

¹⁰³⁷ Art. 28 of the 2008 Protocol; art.7 of the 1998 Protocol.

¹⁰³⁸ See the European Court whose material jurisdiction is limited to the application of the European Convention and its protocols (arts. 32, 33 and 34 of the European Convention), and the Inter-American Court also whose material jurisdiction is circumscribed to the application of the American Convention (art. 62 (1) of the American Convention).

The jurisdiction *ratione personae* refers generally to the competence of a Court to bring a person into its adjudicative process and take cognisance of the suit.¹⁰³⁹ If this definition can be applied to the African Court, it implies that this institution is vested with the power or competence to hear a case in respect of persons who are covered by provisions of African Charter, the protocol thereto and all international instruments ratified by the respondent state. However, in practice, scholars tend to focus their discussions of personal jurisdiction on the question of who may bring a case before the Court as determined in article 5 of the 1998 Protocol and article 29 of the 2008 Protocol.¹⁰⁴⁰ This approach is somewhat confusing because it implicitly suggests that the concept of “*jurisdiction ratione personae*” and the one of “*locus standi*” are identical in their meaning and thus, interchangeable. *Locus standi* is actually the legal ability of a victim or peoples who may act on his/her behalf to initiate legal proceedings in a court.¹⁰⁴¹ As such this concept is to be analysed from the perspective of the individuals, people and organisations that enjoy the capacity to approach the court, while personal jurisdiction is to be rather examined from the perspective of the Court itself in respect of all those that fall under its power or competence. This means personal jurisdiction is broader as it includes all the persons whose fundamental rights are covered by the African Charter, its protocol and other international instruments ratified by the state concerned, no matter the issue of standing which in fact, as will be seen, may vary depending on the declaration of the respondent state.

4.4.2.2 Advisory jurisdiction of the African Court

It is current that a court established at the international or regional level enjoys some competences to deliver advisory opinions.¹⁰⁴² In the case of the African Court, both protocols have provided for advisory jurisdiction, but in a little bit different perspective. In the 1998 Protocol, the African Court may give an opinion on any legal matter relating to the African Charter or any other relevant instruments on fundamental rights, at the request of a member State of the OAU, the OAU, any of its organs, or any African organisation recognised by the OAU and provided that the subject matter of the opinion is not related to a matter being examined by the Commission. It is

¹⁰³⁹ Roberts R.III. “Jurisdiction *ratione materiae et personae* in Louisiana” (1952) 12 *Louisiana Law Review* 211.

¹⁰⁴⁰ Ougouergouz F. “The African Court of Justice and Human Rights” in (eds.) Yusuf AA. and Ougouergouz F. *The African Union: Legal and institutional framework* (Leiden-Boston: Martinus Nijhoff, 2012) 128.

¹⁰⁴¹ Mwalim C. *The Nigerian legal system* (New York: Peter Lang Publishing, 2007) 325.

¹⁰⁴² See arts. 65 to 68 of the ICJ statute; art. 64 of the American Convention.

for instance in this respect that the Pan African Lawyers Union and the South African Litigation Centre requested the African court to provide an advisory opinion on the legality of the SADC Tribunal suspension and legal issues pertaining to it.¹⁰⁴³ Under the 2008 Protocol, such an option is no more available for CSOs as the ability to request an advisory opinion is now limited solely to the AU Assembly, parliament, executive Council, Peace and Security Council, the Economic, Social and Cultural Council, financial institutions or any other organ of the AU as may be authorised by the Assembly. A demand for advisory opinion must not be related to a pending application before the African Commission (or the African Committee of Experts as added in the 2008 Protocol) responds to the necessity to prevent a double and contradictory interpretation within the African system. As aptly pointed out by Ougouergouz, it would have been prejudicial to the integrity of the quasi-judicial function of these bodies if the Court were to give interpretations of legal issues that are divergent from those of the Commission.¹⁰⁴⁴

4.4.3 Admissibility of a case

The 1998 Protocol expressly requires that the submission of a case to the African Court should comply with the requirements set in article 56 of the African Charter in order to be admissible.¹⁰⁴⁵ However, the 2008 Protocol is silent on this matter. Rule 116 provides that whenever the Commission is requested to give its opinion on the admissibility of a case before the Court, it should consider the matter in accordance with article 56 of the African Charter and other applicable rules. The rule of procedures of the Court adopted in 2009 and which is currently applied by the African Court also contains a similar provision in the rule 34 (4). Moreover, since article 31 (d) enjoins the African Court to consider general principles of international law, it is obvious that the merged Court will have to consider the exhaustion of the local remedies requirement which is now acknowledged as part of customary international law.¹⁰⁴⁶

4.4.4 *Locus standi* before the African Court

¹⁰⁴³ The request was introduced on November, 23 2012.

¹⁰⁴⁴ Ougouergouz (2012) 137.

¹⁰⁴⁵ Art.6 (2) of the 1998 Protocol.

¹⁰⁴⁶ Boczek BA. *International law: A dictionary* (Lanham: Scarecrow Press, 2005) 59-60; Rosene S. *The International Law Commission's Draft articles on state responsibility: Part 1, articles 1-35, part 1* (Dordrecht: Martinus Nijhoff publisher, 1991) 31.

Under the 1998 Protocol, only the African Commission, states parties, African inter-governmental organisations and African national human rights institutions enjoy unconditional and direct standing before the African Court. As for non-profit organisations and individuals, following a comprehensive reading of articles 5(3) and 34 (6) of the 1998 Protocol, they are entitled to bring a case directly before the Court only if the matter involves a state that has formally acknowledged competence of the Court to this end. This is an unjustified limitation because access to effective remedies remains illusory for victims of fundamental rights violations whenever such a declaration is not made. Though it is true that in a roundabout way, individual plaintiffs and non-profit organisations may successfully obtain effective ruling from the Court using the channel of the African Commission, this route is dependent on the Commission's discretion; thus occasioning further delay to the enforcement process. As for the previous decision to opt for a commission instead of a court, the reason for this restricted choice presumably sprung from a desire to accommodate states that still feel uncomfortable with the settlement of fundamental rights issues by a regional court.¹⁰⁴⁷ Access to the African Court would provide individuals with a much needed alternative to judicially enforce their rights. Thus, the restrictive approach to the *locus standi* is antithetical to the pressing demand for a more effective system, and more so to the very fact that individuals rather than governments are the main bearers of the fundamental rights in the African Charter. In fact, statistics reveal that except for one inter-state dispute, all cases brought before the African Commission involved individuals, local communities and non-profit organisations as complainants. If the establishment of the African Court is to be seen as a response to the ineffectiveness experienced by complainants in past decisions and recommendations of the African Commission, the restrictive nature of the Court accessibility calls into question the court's very essence. The

¹⁰⁴⁷ Another one can be the fear to experience overflow of pending cases since it is obvious that victims will be more comfortable to apply directly to the court. However, despite the pertinence of such an argument, it cannot legitimise the restriction because it does not match the rationale which led to the establishment of this body, namely to satisfy the demand for an enforcement mechanism able to deliver binding decisions. In a comparative perspective, despite the growth of pending cases before the European Court since the entry into force of the Protocol 11, this phenomenon has not led to a call for a resurrection of the late European Commission, but to simple internal reforms in the functioning of the court under protocol 14. Council of Europe "Supervision of the execution of judgments and decisions of the European Court of Human Rights: 6th annual report of the committee of Ministers" (2012)11-13; Available at http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2012_en.pdf [accessed on 26/6/2013]; Egli P. "Another step in the reform of the European Court of Human Rights: the report of the group of wise Persons"68 (2008) *ZaöRV* 155.

irrational side of this approach has been evidenced in practice by two initial cases in which the African Court had to decline its competence and refer the case to the African Commission because respondent states had not made such a declaration.¹⁰⁴⁸ This is why in another interesting case, the provision of the 1998 Protocol restricting access to court was directly challenged by the claimant before the African Court itself. In *Femi Falana against African Union*,¹⁰⁴⁹ the applicant, a Nigerian national, decided to sue the AU as a representative of 54 members states, contending that article 34 (6) of the 1998 protocol which makes direct access to court by individuals and NGOs pending upon a declaration by member states, is inconsistent with provisions of articles 1, 2,7,13, 26 and 66 of the Charter.¹⁰⁵⁰ The AU in its reply started by emphasising the distinction that must be made between the organisation itself and its member states and then concludes that not being a state, neither a party to the Charter and its protocols, no case can be brought against it in connection with its member states obligations.¹⁰⁵¹ The Court followed the argument of the AU and decided that it did not have jurisdiction to hear the cases because the Union enjoys a legal personality different from the legal personalities of its member states.¹⁰⁵²

Though one may find the argument of the Court valid, the contentions of the applicant yet open doors to some critical questions:

1. What is the rationale for restraining access to the court for individuals and NGOS?
2. Does this rational, if any, goes in line with the objective of advancing human rights in Africa?

Regarding the first question, the reason for this restricted choice presumably sprung from a desire to accommodate states that still feel uncomfortable with the settlement by a court. But technically, one can legitimately suspect that the drafters of the protocol decided to restrain

¹⁰⁴⁸ See the *D Amare and M Amare* case, supra note 1041; the *S Ababou* case, supra note 1032.

¹⁰⁴⁹ *Femi Falana v. African Union* N. 001/2011; see also *Atabong Denis Atemnkeng v. The African Union Application* N.014/2011.

¹⁰⁵⁰ See the *Femi Falana* case, Id., para 3.

¹⁰⁵¹ Ibid., paras. 42-44.

¹⁰⁵² Ibid., paras. 56-68.

access to the court in order to keep some space for the African Commission in the litigation process. Otherwise, all individuals and NGOs would directly take their cases to the African Court because of its ability to deliver final and binding decisions.

Whether this choice advances fundamental rights in Africa is, however, questionable. It can be argued that a preliminary intervention by the African Commission would be useful to bring more light to the Court. Though the argument is worthy, one finds more interesting the view that, instead of constraining individuals and NGOs to refer to the Commission wherever a state declaration is not made, recourse to the African Commission should be left at the discretion of the Court itself in case it finds it necessary to enlighten a case. Actually, it is obvious that applying to the African Commission with the expectation to see the case reaching the Court following an application by the African Commission itself does not contribute to the advancement of fundamental rights because by delaying the process towards an effective remedy, it negatively affects the effectiveness of the African System.

In the context of this study, since these provisions of both protocols only mentioned individuals and NGOs, it is questionable if there is any room for groups to accede to the Court. If the literal rule of interpretation is to be applied,¹⁰⁵³ it may easily lead to the contention that drafters of both protocols omitted to explicitly address the issue of groups or communities' standing before the Court. However, the simple fact that the mandate of the African Court includes the protection of people's or collective rights is enough to assert that groups or communities may enjoy standing before the Court. In this case, their complaint would reach the African Court either through the channel of the African Commission or directly through NGOs or individuals provided that the respondent state made the declaration in this respect. There is an interesting case where the African Commission brought the matter before the African Court on the behalf of a local community. In *African Commission v. The Republic of Kenya*, the applicant initiated proceedings against the respondent state, alleging serious and massive violations of the Ogiek community fundamental rights whose eviction had been decided by the respondent state in 2009.¹⁰⁵⁴ Pending

¹⁰⁵³ Under this rule of interpretation, provisions of the legal instrument are interpreted according to their common sense in the ordinary language. They are understood according to their literal meaning. Zander M. *The law-making process* 6th ed. (Cambridge: Cambridge University Press, 2004) 130.

¹⁰⁵⁴ African Court Application no. 006/12: *African Commission on Human and Peoples' Rights v. Republic of Kenya* (Hereinafter the *Ogiek community case*).

a decision on the merit of the case, the African Court granted provisional measures on March 15 2013, commanding the respondent state to refrain from any act that may cause irreparable prejudice.¹⁰⁵⁵ As to individual submissions, this was the case in the *Katangese* communication, where Moke as a leader of the Katangese's people initiated a demand on behalf of the whole community.¹⁰⁵⁶ It is nonetheless questionable if a respondent state would ever make a declaration just for a particular local community living within its territory.

4.4.5 Remedies by the African Court

All fundamental rights that are entrenched without any possibility of remedy should they be violated, are rendered meaningless. This fact clearly suggests the idea that the establishment of an African Court with the power to deliver authoritative decisions should serve as a catalyst to translate these rights into a living reality for deprived peoples. The 1998 Protocol requires the African Court to grant an appropriate order, including fair compensation where necessary.¹⁰⁵⁷ The African Court may also take provisional measures if it considers that circumstances so require.¹⁰⁵⁸

The monitoring of judgments and their execution are assigned to the Executive Council of Justice Ministers.¹⁰⁵⁹ But, in case of persistent refusal to comply, the 1998 Protocol provides that the court must report to the AHSG.¹⁰⁶⁰ This simply implies that in the monitoring of the state's compliance with the court decisions, there must be an interaction among the three (the African Court, the Executive Council of Justice Ministers and the AHSG). Thus, because the African Court is an organ of the AU, the AHSG can address directives requesting that states comply with the court decisions.¹⁰⁶¹ If a state still fails to abide, the AHSG can apply sanctions as provided in the AU Constitutive Act. But except the denial of transport and communication links with other

¹⁰⁵⁵ *Id.* para. 25.

¹⁰⁵⁶ See the *Katangese* case, *supra* note 67.

¹⁰⁵⁷ Art. 27 of the 1998 Protocol.

¹⁰⁵⁸ Art. 27 of the 1998 Protocol.

¹⁰⁵⁹ Art. 29 of the 1998 Protocol.

¹⁰⁶⁰ Art. 31 of the 1998 Protocol.

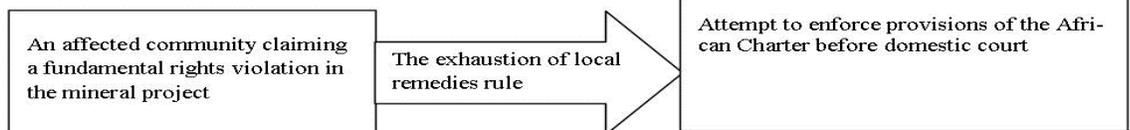
¹⁰⁶¹ This is the result of a combined reading of r. 4 (1) and r.36 of the Rules of Procedure of the AU Assembly (2002).

member states, the AU Constitutive Act has not specified what these sanctions should be, leaving it at the discretion of the AHSG.¹⁰⁶²

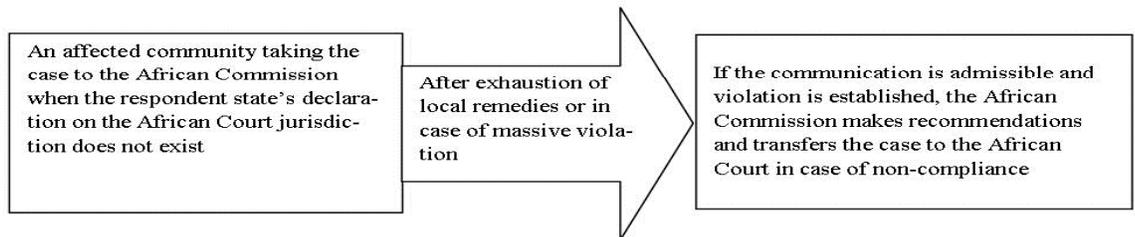
¹⁰⁶² Art. 23 (2) of the AU Constitutive Act (2000).

4.5 Schematic presentation of the ways affected communities can make use of the African Charter enforcement machineries

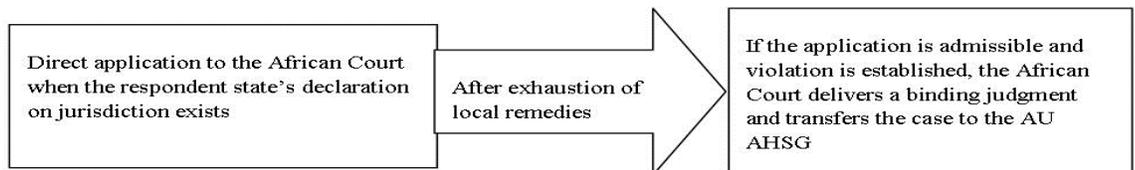
Possibility 1



Possibility 2



Possibility 3



* Possibility 3 can become possibility 2 when declaration from the respondent state exists. This is because nothing prevents a direct application to the African Court in this case.

4.6 Conclusion

This chapter has reviewed the institutional perspectives of the African system with the aim to see whether it can really implement an effective model of participation for affected communities in the mineral sector. It has been noticed that there is potential in the African Commission to play a relevant role in the enforcement of the fundamental rights-based approach to community participation in the mineral sector despite the fact that its decisions are not binding. Its flexibility concerning admission of cases and the *locus standi*, the ability to request periodical reports from member states, the establishment of a working group dealing with extractive industries, environment and fundamental rights violations and the exercise of its promotional mandate are some of the tools and avenues that this body may use to promote and protect the fundamental rights of affected communities in the mineral sector. As to the African Court, the authority to deliver binding decisions is a considerable advancement for the protection of fundamental rights on the continent. Mutua held that the mere addition of the Court cannot by itself address all the weaknesses of the African system.¹⁰⁶³ However, its relationship with the African Commission needs to be further elaborated and clarified to avoid dysfunction or confusion within the system. A question can be raised about the relevance of the African Commission in the fundamental rights-based approach to community participation if it is unable to deliver binding decisions. The Commission remains of utility to provide more light on the understanding of any fundamental right in the Charter, but it can also participate in the advancement of communities' rights through its promotional mandate by requesting information from states on a regular basis and by sensitising these communities by way of campaigns on the possibilities that the African Charter and the Protocol thereto offer to the protection of their rights. Moreover, since direct access to the court is still restricted, the African Commission remains the channel through which affected communities can reach this judicial body in cases where the respondent state declaration is non-existent.

¹⁰⁶³ Mutua M. "The African Human Rights Court: A two legged stool?" in (1999) 21 *Human Rights Quarterly* 343.

From all the above, challenges need to be addressed in order for the normative and institutional components of the African system to offer the maximum protection to affected communities in the mineral sector.

Chapter five: Challenges to the fundamental rights-based approach to community participation under the African Charter

5.1 Introduction

In the preceding chapter, it has been seen that there is enough potential in both the normative and institutional components of the system established under the African Charter to support and make effective community participation in the governance of mineral resources. The chapter served to answer the question whether the fundamental rights-based approach undertaken under the African Charter could achieve the objective of an effective participation of affected communities. In this chapter, the purpose is to determine the prerequisites for the provisions of the African Charter to help practically the fundamental rights-based approach to be effectively implemented and thus produce the desired results. These prerequisites can be described as challenges to the fundamental rights-based approach to community participation under the African Charter. Since the desired results are mainly to empower affected communities using solutions that the African Charter and its protocols offer affected communities to prevent or remedy any violations in their pursuit of sustainable development goals through mineral exploitation, and to compel African governments and mineral corporations to give due respect to their fundamental rights in the implementation process of mineral projects, some of the challenges that need to be looked at in the context of this study are:¹⁰⁶⁴

- The necessity to formalise community participation and mechanisms supporting other fundamental rights in the mineral legislation which is the *lex specialis* of the field. As will be seen, this challenge arises out of article 1 of the African Charter;
- The extent to which affected communities need to be equipped with the appropriate capacity to participate efficiently in mineral and development projects and make use, when it becomes necessary, of mechanisms set by the African Charter to enforce their fundamental rights. This challenge specifically touches on the capacity-building of affected

¹⁰⁶⁴ It is not possible to foresee all challenges because of particularities found at times in the context of each country. The challenges looked at here are those that generally face any African country no matter the context.

communities in terms of knowledge, ability to conduct negotiation, required skills to take employment in the mineral project, establishment of an appropriate process to reach a community decision; the ability to access the African Court and obtain appropriate remedies in case a violation occurs.

- The extent to which African governments and mineral corporations may be compelled to abide by decisions that emanate from the African Charter enforcement bodies, in which fundamental rights of affected communities are upheld. This challenge raises a special concern related to the commitment and determination of the AU and its organs to constrain member states abiding by decisions enforcing fundamental rights.

In 2011, the AU, in collaboration with regional economic communities, adopted a guideline on the strategy to advance fundamental rights in Africa.¹⁰⁶⁵ This document which contains a five years plan of action (2012-2016), tries to develop a strategy to address the challenges faced by the African system. The AU advocates the application of a fundamental rights-based approach in development policy and planning and suggests that technical support must be provided to organs and institutions at both national and regional levels to realise this application.¹⁰⁶⁶ Therefore, while discussing the above-mentioned, the analysis will include a look at what has been adopted in the AU strategy.

5.2 Necessity to update the mineral legislation and effectively implement its provisions

Article 1 of the African Charter provides that:

The member states of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

Except for countries where treaties require prior adoption in the form of statutes by the parliament, one can really wonder what the relevance of such a provision is for fundamental rights lawmaking wherever the Charter can be applied directly. An attempt to answer this question should lead to the observation that the inclusion of this provision in the African Charter is actually consecutive to the principle that implementation of fundamental rights is

¹⁰⁶⁵ AU Human Rights strategy for Africa (2011).

¹⁰⁶⁶ Id., 4.

first of all states' responsibility.¹⁰⁶⁷ Despite the existence of a treaty or convention, each state should take the responsibility to organise its legal system to such an extent to comply with its international obligations. Viljoen explains it by contending that in order to meet the rationale of its adoption, a treaty needs to be felt at the national level and that for such a purpose, effective legal and other mechanisms must be organised in the domestic system to make it effective.¹⁰⁶⁸ Since it is the mineral sector with which this study is concerned, it is relevant that the legislative framework organising this sector be in line with fundamental rights entrenched in the African Charter in order to facilitate their implementation in the mineral project. Therefore, the normative component of mineral legislation must be updated to the extent that it can accommodate the fundamental rights based approach.

One reason for a specific update in mineral legislation is the fact that when mineral companies want to invest in a country, beside the attractiveness of the country's geological potential, the very first thing that captures their attention is the investment regime established in the mineral code.¹⁰⁶⁹ This is particularly true when the fiscal regime is defined in the mineral code or Act.¹⁰⁷⁰ In the context of the South African mineral law, it was observed that though the mineral sector can be somehow affected by any existing legislation or policy, it is more directly impacted by legal instruments specifically addressing mineral matters.¹⁰⁷¹ Another reason comes from Langton's observation that mineral legislation plays a key role as a tool through which interests of all stakeholders involved in the mineral project may be brought to balance.¹⁰⁷² The possibility for mineral legislation to fulfil this function is obvious because it is naturally supposed to lay down the foundation on which mineral agreements should be concluded. It should define the legal structure and process through which negotiations should

¹⁰⁶⁷ Lopes and Quénivet (2008) 211-212.

¹⁰⁶⁸ Viljoen F. "An introduction to the Protocol on the African Charter of Human and Peoples' Rights on the rights of women in Africa" (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 30.

¹⁰⁶⁹ Otto J. "Global changes in mining laws, agreements and tax systems" (1998) 24 (2) *Resources Policy* 79, 81.

¹⁰⁷⁰ Id. 83.

¹⁰⁷¹ Mining Qualification Authority "Sector skills plan for the mining and minerals sector 2005 to 2010"; Available at <http://www.mqa.org.za/siteimgs/SSP%20Update%202009%20Final%20Signed%20-%20%20Submitted%2031%20Augsut%202009.pdf> [accessed on 23/7/2013].

¹⁰⁷² Langton M. "introduction" in (eds.) Langton M. and Longbottom J. *Community futures, legal architecture: foundation for indigenous people in the global mining boom* (New York: Routledge, 2012) 2-3.

be conducted until the agreement is signed.¹⁰⁷³ As such, it can be deduced that it represents a strategic tool through which the effectiveness of community participation can be reinforced.

Community participation as approached in this study has double implications for the organisation of the mineral legal regime of a country. Firstly, the fact that participation is to be regarded as a fundamental right, implies that this perspective must clearly appear in the mineral legislation. In this respect, Langton aptly observes that the disparity of regimes between states is such that some offer the opportunity to affected communities to mitigate detrimental impacts and increase benefits in mineral projects, while others undermine or simply disable the development capacity of these communities.¹⁰⁷⁴ Thus, from silence to a consultation without much precision on the nature of the process, and then to an effective participation where communities' views influence the outcome of the decision-making process, the general situation in Africa seems to be at the middle stage. Though community participation is a general discourse shared now in the AU, its effective implementation in the mineral sector is not yet developed all over the continent.¹⁰⁷⁵ Indeed, where the law is not silent, participation is often reduced to a process in which consultation is a mere formality to fulfil in order to provide a measure of legitimacy to the project, but without a clear explanation of what the prerogatives of affected communities are.

Looking at the countries selected in this study, DRC is a benchmark of African countries which are yet at the preliminary stage, the one where the mineral legislation is almost silent on community participation. Its mineral code does not say anything about how an affected community must get involved in the process that leads to the approval of a mineral project. The only reference is made in article 281 to the community's right to compensation by the mineral company, whenever its activities, once already started, cause damages. In South Africa, the Mineral and Petroleum Resources Development Act (2002) does not explicitly address the issue of community participation. As already observed, the only exception is the possibility for an

¹⁰⁷³ Godden L. and Tehan M. "Legal forms and their implications for long-term relationship and economic, cultural and social empowerment: structuring agreement in Australia" in (eds.) Langton M. and Longbottom J. *Community futures, legal architecture: foundation for indigenous people in the global mining boom* (New York: Routledge, 2012) 111.

¹⁰⁷⁴ Langton (2012) 2-3.

¹⁰⁷⁵ See art. 3 (g) of the AU Constitutive Act; AU AMV (2009) 16, 27.

affected community to assert its ownership of the land and obtain the preferent right provided in section 104 of the Act. There is nevertheless a general provision in section 10 of the Act which holds that interested and affected persons may submit their comments about any application for prospecting or mining rights within 30 days of being informed by the regional manager. But in case they have any objection to the project, the same provision asserts that the Minister is the one who has the last say. In Nigeria as well, as previously mentioned, despite the requirement of the owner or occupier's prior consent, the Mineral Act provides the government with a discretionary power to bypass this requirement. Even the Petroleum Industry Draft Bill proposed to reform the Nigerian oil sector since 2008 confers to the president of the republic the discretionary power to grant a license without a regard to the consent of affected communities.¹⁰⁷⁶

The silence in the Congolese mineral code and the paradox found in the South African and Nigerian mineral statutes exactly reflect the current status that community participation often enjoys on the continent,¹⁰⁷⁷ a scenario where consultations amounts to what Katy and Mamen describe as a smokescreen process, lacking substance and creating the illusion of a democratic process.¹⁰⁷⁸ Zambia could be a benchmark of regimes where community participation is indeed enforced at the third stage, meaning where affected communities' views influence the outcome of the decision-making process. However, despite being entrenched in section 127(1)(c) of the Zambia Mines and Mineral Development Act of 2008, the requirement of prior consent has not been really implemented in practice.¹⁰⁷⁹ Nevertheless, if the recent decision obliging Mopani Copper Mine to suspend its activities and involve affected communities in discussions,¹⁰⁸⁰ marks the new trend that the Zambian government intends to follow, it can be hoped that

¹⁰⁷⁶ Fagbohunlu B. and Ikwuazom C. "Overview of the Nigerian Petroleum Industry Bill"; Available at http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CCsQFjAA&url=http%3A%2F%2Fwww.hoganlovellsafrica.com%2F_uploads%2FPublications%2FAfrica_September_2012_new_sletter_-_Nigerian_Petroleum_Industry_Bill.pdf&ei=RfzbUebvNcuKhQe20oCQBA&usg=AFQjCNGJTfmdCXoB3jTT5U4TuQY9s1C_jQ&sig2=M8I4Gj5sJeJRhJ9KizM7Ew&bvm=bv.48705608,d.ZWU [accessed on 20/6/2013].

¹⁰⁷⁷ Though exceptions may exist, the frequent situation is often like this.

¹⁰⁷⁸ Katy and Mamen "Community consultation in mining...", supra note 134.

¹⁰⁷⁹ Mukumba MB. "stakeholder relations in the mining sector in Zambia" (2009); Availbale at http://www.roundtableafrica.net/getattachment/Round-Tables/Mining-Round-Table-Zambia/Mining-Round-Table-in-Lusaka/MiningRT_report.pdf.aspx [accessed on 17/6/2013].

¹⁰⁸⁰ Lee (2012).

community participation will enjoy more effectiveness in that country. The situations described in this Zambian case reveal furthermore that the challenge of updating mineral legislation also touches to the behavior of government officials in connection with what is provided in the legal text. The operationalisation of the provisions to enforce community participation in mineral projects will always undergo a very heavy process if government officers in charge of implementation chose to act regardless of what is provided in the law.¹⁰⁸¹ This is what made a group of scholars to assert that the assessment of the extent to which a mineral project has a positive incidence on affected communities' development requires not only an appropriate legislation, but also an administration that is effective to implement policy.¹⁰⁸² For instance, the government office where applications for a mineral license are screened, should practically require that the formal proof of affected communities' consent be included among documents submitted by the applicant. Therefore, as a prerequisite, any section in the mineral legislation which allows, either explicitly or implicitly, the government to neutralise the impact of prior consent must be repealed from the mineral legislation.

The second implication that the approach embraced in this study would have on the legal regime organising the mineral sector, would be that because community participation works as a channel to emphasise other fundamental rights in the monitoring of mineral projects, the mineral legislation should include provisions through which affected communities are empowered to protect them. This is why for instance, when addressing its recommendations to the Congolese Government in respect of the planned revision of the mineral code, Global Witness has suggested that it should contain clear provisions stating that:

- Damage from pollution is the responsibility of the company or companies holding the relevant mining permit. Where subsidiaries are created by a parent company for its operations in the DRC, the parent company is ultimately responsible for the subsidiary's actions, or its failure to act, including in relation to due diligence and financial matters. Full disclosure of information

¹⁰⁸¹ This is because in this situation, the legal option available to affected communities will be to approach a court or a quasi-judicial body to seek for enforcement of the provisions guaranting their right to participation and influence the outcome of the decision-making process. As seen in the Bafokeng case, this solution is at times very long and brings a legitimate reason to fear that claimants get discourage in case justice is seriously delayed. This is why the African Commission's flexible approach to the rule of local remedies exhaustion appears as an appropriate strategy to avoid such pitfalls.

¹⁰⁸² Otto J. *et al.* (2006) 205.

related to environmental pollution caused by mining activities should be made public on a regular basis by the mining-rights holder.

- A fund held in an escrow account should be created by the company or companies holding the relevant mining permit to compensate local communities that are negatively affected by mining activities.
- In the event that expropriation or the forced removal of people from their land cannot be avoided, this should be carried out in a humane and culturally-sensitive way (for example, people should not have to move into areas where their language is not spoken). Those displaced must also receive fair compensation. Resettlement should be part of the compensation and should place people in a situation similar to or better than before. Any compensation payable by the company or companies holding the mining rights should be prompt and in accordance with a contract that should be made public. The right to collective redress should also be guaranteed in the new code for communities affected by mining activities.¹⁰⁸³

These suggestions by Global Witness focus more on the obligation to compensate and the possibility for affected communities to use legal avenues to get redress. In fact, it has become a recurrent issue in developing countries that when a natural resources project is established, affected communities often fail to be properly compensated.¹⁰⁸⁴ Though most mineral legislation provide a right to compensation,¹⁰⁸⁵ in practice they are often not properly enforced. Affected communities often contend in practice that they were not at all compensated, or as they should have been.¹⁰⁸⁶ Therefore, there is not only a need for more precisions in the legislation wherever provisions seem unclear or are missing, but also the need for effective enforcement wherever affected communities' compensation is already organised in the law. In this respect, once the provision is clearly established in the mineral legislation, the capacity of affected communities to negotiate compensation needs to be increased to avoid past scenarios

¹⁰⁸³ Global Witness "Global Witness's recommendations for the Democratic Republic of Congo's new Mining Code" (2012); available at <http://www.globalwitness.org/sites/default/files/library/DRC-GW%20Mining%20code%20brief%20Oct%2010,%2012%20ENG.pdf> [accessed on 20/6/2013].

¹⁰⁸⁴ Aburge C. and Akabzaa T. "Socio-economic and environmental impacts of Foreign direct investment in African mining" in (eds.) Kayizzi-Mugerwa S., Olukoshi AO., Wohlgemuth L. *Towards a new partnership with Africa: Challenges and opportunities* (Uppsala: Nordisk African Institute, 1998) 117.

¹⁰⁸⁵ S. 54 of the South African Mineral and Petroleum Resources Development Act (2002); ss 107-115, ss. 19-20 of the Nigerian Oil pipelines Act (1990); ss. 123 and 132 of the Zambia Mines and Mineral Development Act No 7 (2008).

¹⁰⁸⁶ See previous illustrations, supra notes 15 and 16.

of inadequate compensation.¹⁰⁸⁷ The same remark is also valid for the issue of rehabilitation. Because the mitigation of environmental pervasive impacts is critical for the welfare of future generations, the mineral legislation must be more specific on how affected communities must secure the guarantee that the land will be rehabilitated fully long in advance and provide the possibility for such a provision to be enforced against the government and the mineral company in case of failure to do so. Also, to ensure that affected communities benefit from mineral projects, the legislation must also address the issue of community shares in royalties and how this should be paid to them.¹⁰⁸⁸

There are many other relevant issues that can require to be properly addressed in the mineral legislation depending on the context of each country. What one should simply keep in mind is that the legal framework regulating the mineral sector in every African country should be updated wherever necessary, to the extent that it matches fundamental rights of affected communities in the African Charter. In fact, the public-private partnership in development have several organisational and institutional challenges that its success is conditioned by the establishment of appropriate appropriate policy and structures through which the private partner, which in this case is the mineral corporation, will bring its contribution to efforts devoted to achieve development.¹⁰⁸⁹ In the context of a people-centred development, this should lead to the removal of all mechanisms existing in current mineral legislation which serve to paralyse the choices of affected communities; and the inclusion of provisions supporting their freedom of expression and empowering them to enforce their fundamental rights in the mineral project. For this purpose, CSOs together with marginalised communities, should put pressure on lawmakers of African resource-rich countries to amend their mineral legislation and put them in line with fundamental rights standards imposed by the African Charter. The AU should also, as suggested in its strategic document, make its technical support available to help national institutions in the update of mineral legislation in line with the fundamental rights approach to development as advocated by this organisation.¹⁰⁹⁰ On the other

¹⁰⁸⁷ Aburge and Akabzaa (1998) 117.

¹⁰⁸⁸ Otto *et al.* (2006) 4.

¹⁰⁸⁹ Dansereau S. "Win-win or new imperialism? Public-private partnership in Africa mining" (2005) 103 *Review of African Political Economy* 49-50, 60.

¹⁰⁹⁰ Dansereau (2005) 4.

hand, though under international law, “non-interference in states’ internal affairs” is sovereignty’s most fundamental principle, the ratification of the African Charter by all AU member states and their progressive adherence to the Protocol on the African Court endows regional enforcement machineries with sufficient legal basis to question the government in respect of its obligations in the Charter. In *Purohit and Moore v. Gambia*,¹⁰⁹¹ the African Commission interpreted its mandate in article 30 of the Banjul Charter as empowering it to examine the extent to which a domestic law complies with the provisions of the African Charter and concluded that, following the rule established in article 14 of the Vienna Convention on the Law of Treaties (1980), such a prerogative is subsequent to the consent expressed by the respondent state to be bound by obligations under the Charter. At the closing of this case, the Commission found that the Gambian Lunatics Detention Act was inconsistent with provisions of the Charter and needed to be replaced by a more compatible legislation.¹⁰⁹² The same orientation can be cast onto the African Court in as much as article 28(c) of the 2008 Protocol entrusts it with the mandate to decide on cases involving the interpretation and application of the Charter.¹⁰⁹³

5.3 Empowering affected communities through capacity building

Affected communities should no longer be seen as mere recipients of development programmes; but instead as critical stakeholders that have an important role to play in the management of development projects taking place in their areas. However, at the same time, there is this undeniable reality that rural people in Africa have long been the worst educated, with the consequence that their capacity of participation in decision-making remains weak. Therefore, even though one may contend that fundamental rights exist in the African Charter to support their participation in decision-making, how would they take steps to seek enforcement of these rights if they do not know what is provided and how they should approach the Charter enforcement bodies?

¹⁰⁹¹ African Commission Communication 241/2001 *Purohit and Moore v. Gambia* (2003) para. 43.

¹⁰⁹² *Id.*, para 85.

¹⁰⁹³ This remark is only valid in the case of countries that has already ratified the 2008 Protocol.

Though a unanimous definition does not exist, capacity building is often perceived as a process of helping peoples to help themselves.¹⁰⁹⁴ The concept can be understood here as the process through which members of an affected community, taken individually or collectively, are provided with the capacity to address community's problems in respect of a mineral project and determine their own values and priorities in the achievement of sustainable development goals throughout this project.¹⁰⁹⁵ This approach implies that members should be equipped with the necessary knowledge to identify and address matters that affect their community in the context of mineral activities and that the whole community should be able to reach an agreement on values and objectives to be prioritised in the realisation of development projects.¹⁰⁹⁶ This challenge of capacity building is so critical that Aburge and Akabzaa contend that one reason why many affected communities in Africa end up with poor compensation is their insufficient ability to negotiate directly with the mineral company.¹⁰⁹⁷ Therefore, the capacity building of affected communities undeniably conditions the success of the fundamental rights-based approach under the African Charter. As such, relevant aspects of capacity building of affected communities are analysed here in respect of the education of community members in terms of their fundamental rights in the African Charter and the possibility to resort on regional enforcement machineries, the necessity to raise their understanding of implications that mineral operations may have on their livelihood and to equip them with the necessary skills to take employment in the sector and the need to have appropriate modalities of decision-making.

5.3.1 Education on fundamental rights

Discussing the participation of aboriginal communities in mineral agreements in Australia, O'Faircheallaigh observes that one key factor that determines the extent to which affected communities can achieve benefits from negotiations and avoid undesirable outcomes

¹⁰⁹⁴ Alaerts GJ. "Definitions intermezzo: Ten annotated definition of capacity building" in (eds.) G. J. Alaerts, Hartvelt FJA. and Patorni FM. *Water sector capacity building: Concepts and instruments : Proceedings of the second UNDP Symposium on water sector capacity building, delft, 1996* (Taylor & Francis 1999) 85-88; Eade D. *Capacity-building: An approach to people-centred development* (Oxford: Oxfam, 1997) 2.

¹⁰⁹⁵ Alaerts (1999) 2-3.

¹⁰⁹⁶ This process is often called "self-identification". The World Bank (2012) 18-19; Environmental Resource Management "Mining Community Development Agreements, supra note 79.

¹⁰⁹⁷ Aburge and Akabzaa (1998) 117.

corresponds to the extent to which they can mobilise the bargaining power they possess, and take advantage of any opportunities to enhance it.¹⁰⁹⁸ In the African context, this assertion implies that members of these communities should be fully aware of their fundamental rights and able to use all the legal powers bestowed on them to get them enforced. But the capacity of affected communities to take legal actions is generally hindered by the fact that many Africans are yet ignorant of their fundamental rights and the mechanisms established by the African Charter for their enforcement. It is part of the generalised issue of illiteracy in Africa, for which the continent remains one with a high rate.¹⁰⁹⁹ Especially in rural areas, members of affected communities are often not educated and at times even unable to write. This lack of knowledge continues to be a barrier that prevents African peoples from claiming and exercising their fundamental rights, despite efforts deployed by international governmental and non-governmental organisations.¹¹⁰⁰ During the research survey made in the context of this study, many interviewees both in the rural and urban areas of the countries selected in this study, confessed that they were ignorant of the African Charter and its system, while those few that declared their awareness enjoyed only a limited knowledge about it. Okafor has particularly observed that despite good initiatives by CSOs that consisted of taking cases to treaty bodies on the behalf of victims, members of these organisations are for the most elitists who often do not speak the native language of those they want to represent.¹¹⁰¹ This remark is pertinent in so far as it does not deny the role played by CSOs in the work of the African Commission, but rather highlights another field in which CSOs need to deploy much efforts, that is to ensure the transmission of the knowledge of the African Charter system to African peoples that they often contend to defend, into a language that they understand best.

AU Strategy in this regard is to increase the promotion and popularisation of fundamental rights, norms all over the continent by 2014.¹¹⁰² Concerning the educational challenge, the AU

¹⁰⁹⁸ O'Faircheallaigh C. *Negotiations between mining Companies and aboriginal communities: Process and Structure* (Canberra: Centre for Aboriginal Economic Policy Research, 1995) Paper delivered to the Annual Conference of the Society for Applied Anthropology, Tampa, Florida (28 March – 1 April 2007) 1.

¹⁰⁹⁹ The UNESCO Institute of statistics observed in 2012 that only an average of 40% of peoples is illiterate in Africa.

¹¹⁰⁰ Horn N. "Human rights education in Africa" in (eds.) Bösl A. and Diescho J. *Human rights in Africa: Legal perspectives on their protection and promotion* (Whindock: Macmillan Education, 2009) 60.

¹¹⁰¹ Okafor OC. *The African human rights system* (Cambridge: Cambridge University Press 2007) 268.

¹¹⁰² AU Human Rights strategy for Africa (2011) 4.

wants to develop thematic material on fundamental rights that can be easily accessible all over the continent by 2014 and also to erect an “AU model” of educational institutions.¹¹⁰³ As indicators of progress, the AU projects to look at the statistical increase of the usage of African instruments on fundamental rights at the national level. State reports are one of the means through which the will and commitments of African governments to that effect will be assessed.¹¹⁰⁴

What can be said in this respect is that the AU must not only focus on the behaviour of governments, it should also try to build up a strong partnership with CSOs working at the grassroots level. This was underlined at several occasions like for instance at the NGOs forum preceding the fiftieth ordinary session of the African Commission held in Gambia in 2011.¹¹⁰⁵ It was observed there that the implication of CSOs is critical to the process of raising concerns and promoting fundamental rights in the African Charter and all other instruments that compose the African system; and also that Africans themselves should collaborate and get involved in this process of popularisation.¹¹⁰⁶ Indeed, this approach can be well-done through the African Commission’s promotional mandate. CSOs that have helped this institution thus far in this task must continue to deploy as much effort, because empowerment is a continual process, they should be granted with necessary resources to back up the African Commission’s work. This means that beyond the development of the strategy as to the role of different actors in the advancement of fundamental rights on the continent, the AU must be able to mobilise funds needed to achieve educational programmes and raise more awareness among African peoples. In fact, whatever the strategy may be, the AU will have to find and make financial resources available for its implementation.

¹¹⁰³ AU Human Rights strategy for Africa (2011) 4.

¹¹⁰⁴ Id., 4.

¹¹⁰⁵ See the Summary Report of the NGOs Forum preceding the 50th Ordinary Session of the African Commission on Human and Peoples’ Rights and 24th African Human rights Book Fair 19-21 October 2011 – Banjul, The Gambia, available at <http://www.acdhrs.org/?s=Summary+Report+of+the+NGOs+Forum+preceding+the+50th+Ordinary+Session+of+the+African+Commission+on+Human+and+Peoples%E2%80%99+Rights+and+24th+African+Human+Rights+Book+Fair+19-21+October+2011+%E2%80%93+Banjul%2C+The+Gambia&lang=en> [accessed 29/4/2013].

¹¹⁰⁶ Id..

Along the same lines, it is possible to contend that this challenge on the knowledge of fundamental rights in the African Charter also faces members of the judiciary in many African countries. This inference comes from the observation that in many fundamental rights cases taken to the national courts, the provisions of the African Charter are often not put in the front line of legal discussions.¹¹⁰⁷ This situation does not necessarily express ignorance by judges, but is often the result of a simple disregard of the Charter, due at times to the fact that it is not in the same format as national law in monistic systems.¹¹⁰⁸ This trend has been particularly observed in African Francophone countries where, for instance, it was reported that the reliance on the African Commission's decisions in the case law is not a developed practice.¹¹⁰⁹ This confirms the assertion made previously that it is not easily predictable how national judges will behave faced with standards imposed by international fundamental rights law.¹¹¹⁰ National judges at least need training to fully understand and in-depth how the system established under the African Charter should influence the domestic legal system.

5.3.2 The minimum understanding of a mineral project and empowerment with employability skills

This challenge specifically concerns local communities living in the surroundings of a mineral area and whose livelihood is likely to be directly affected by mineral operations. It is one thing to claim the right to participate in the governance of mineral resources, but it is another one to possess the knowledge of what needs to be achieved in the process of participation. As mentioned previously, a mineral project is very technical in some aspects and the affected communities need to be introduced to certain key concepts that may be at the centre of discussions with other stakeholders.¹¹¹¹

There is also the necessity to provide members of affected communities with necessary skills to work in the mineral sector. Indeed, if the creation of jobs is to be among benefits brought by a

¹¹⁰⁷ Killander M. and Adjolohoun H. "International law and domestic human rights litigation in Africa: an introduction" (eds.) Killander M. *International law and domestic human rights litigation in Africa* (Pretoria: PULP 2010) 3-22; Viljoen (1999) 15-16.

¹¹⁰⁸ Viljoen, Id., 8.

¹¹⁰⁹ Ibid., 8.

¹¹¹⁰ Schreuer (2010) 71-94.

¹¹¹¹ Bass *et al.* (2004) 6.

mineral project, it implies that members of affected communities must enjoy preference in the process of recruitment. This cannot happen if they do not possess the required skills. In Zambia, members of the Mushitala communities complained that people from outside benefited more from employment opportunities than they did in the Kansanshi mine, due to the facts that their education and skills were very limited and that the recruitment structure and policies failed to facilitate their selection.¹¹¹²

According to Guerra, the duty is incumbent on mineral companies and governments that should inform and educate affected communities about the activities projected or already being carried out, and train them to acquire employability skills.¹¹¹³ Without rejecting this view, it would be advisable to also involve mainly CSOs in this exercise, because it is naturally predictable that mineral companies will hardly present what might be the wrong side of the project. The same can be thought of the government whenever it is already favourable to the projects. According to Abrugue and Akabzaa, “there is a feeling that state interests are now so closely intertwined with those of mining companies that there is little sensitivity to social and environmental issues arising from mining activities.”¹¹¹⁴ The 2012 African Mining Review observes that the EITI participatory approach which includes NGOs is accepted by many African governments but with some measures of suspicion because it emphasises control on financial revenues from the extractive industry.¹¹¹⁵ This means that a government which is satisfied with opacity and clientelism as methods of mineral resources governance will not be comfortable with the involvement of NGOs. Therefore, the implication of broader national constituencies, of which CSOs are also a part, is a measure of safeguard for affected communities.

Furthermore, it is not during negotiations or discussions that members of affected communities must learn technical aspects of mineral operations. They need to be equipped with such knowledge before anything happens, and for this task, NGOs specialising in the natural

¹¹¹² Ngosa and Van Alstine (2010) 15.

¹¹¹³ Guerra MCG. “Community relations in mineral development projects” (2002) 11 *The CEPMLP International Journal* 17.

¹¹¹⁴ Abrugue and Akabzaa (1998) 117.

¹¹¹⁵ UNECA “Africa Review Report on Mining (2012)” 19, available at <http://www.uncsd2012.org/content/documents/AfricanReviewReport-on-MiningSummary.pdf> (accessed on 13/5/2013).

resources field can really be of great value. For instance, they need to understand what the meaning of mineral rents and royalties are otherwise they may not easily proceed with their claim for the financial benefits that must return to them. On this issue also, the African Commission can also make a use of its promotional mandate to partnership with local NGOs and spread the knowledge of basic concepts of mineral projects. Affected communities must be able to understand what the impact will be of the mineral project so that they appreciate how fair and equitable the compensation should be.¹¹¹⁶ Also, because the beneficiation brought by mineral activities includes the creation of jobs, members of affected communities need to be trained about mineral operations so that they may get the necessary skills to work in the field.¹¹¹⁷

5.3.3 Defining appropriate modalities of participation in decision making

The participation of affected communities in the decision-making process of a mineral project implies that they must express their views under the label of the fundamental right to express and disseminate opinions as provided in article 9 (2) of the African Charter. This is also part of the fundamental rights to self-determination and to participate in the government. Therefore, structural arrangements need to be made to facilitate this exercise. This implies forcefully that the decisional power must be decentralised, because participation is irreconcilable with the concentration of power at the centre.¹¹¹⁸ As already observed, the way structures are decentralised depends on arrangements made within each society. Therefore, the decentralisation models of many African countries that have failed to effectively include peoples in decision making¹¹¹⁹ should be reformed to make room for affected communities' participation in mineral matters decisions impacting on their livelihood. This requires a democratic mode of operations, but the question is whether they should act through direct democracy or indirect democracy relying in this case on their representatives. This challenge needs to be carefully considered otherwise it will paralyse the functioning of community participation. A proponent of direct participation contends that:

¹¹¹⁶ See the International Institute for Environment and Development "Breaking new ground..." (2002) 201. Guerra (2002)18.

¹¹¹⁷ Guerra, Id., 13.

¹¹¹⁸ Ibid., 13.

¹¹¹⁹ UNDP "Local governance and poverty reduction ...", supra note 196, 27.

A full debate between the supporters and opponents of a specific project, followed by a free and fair election, offers an accurate measure of community opinion on a proposed project and a democratic solution to issues that are far more important to the lives of voters than the typical election of the next set of government officials.¹¹²⁰

In the context of the African illiteracy problem, this approach would be very dangerous since it implies that members of affected communities would directly decide on every matter in connection with the mineral project, including even those which they have no appropriate knowledge of. Though where people are few in number, direct democracy appears to be the appropriate mode of participation in decision-making,¹¹²¹ it might be unadvisable to apply it where people do not have the appropriate competence on subject matters of the decision. The experience of some local communities in African countries has revealed how challenging direct democracy can be, with difficulty to reach consensus on decisions because of the absence of co-ordination, conflict of leadership and opposing views.¹¹²² Moreover, in case the interest of more than one affected community is at stake, the majoritarian mode of decision imposed by a vote can easily lead to conflict and tension. The probability for such a situation to happen is great, naturally when one of the communities is in the minority.¹¹²³ Smith sees it as a prejudice to the voice of the minority and contends that legal safeguards need to be put in place to avoid abuses. A balance needs therefore to be found by maybe, leaving some aspects of the negotiation to sole representatives. Indeed, article 13 of the African Charter accommodates both variants of democratic arrangements (direct and indirect). Thus, it could be advisable for issues of high technicality or those that may raise tensions between communities that these latter ones take participation indirectly through their representatives, while matters which do not require a high level of comprehension would be left to the discretion of the whole community.¹¹²⁴ This matches Khwaja's observation according to

¹¹²⁰ McGree B. "The community referendum: Participatory democracy and the right to free, prior and informed consent to development" (2009) 570 *Berkeley Journal of International law* 574.

¹¹²¹ Hansen (2005) 2.

¹¹²² Rono and Aboud (2003) 92; Mwegbi G. "South African Local Government: 10 years later"; Available at <http://www.afesis.org.za/Local-Governance-Articles/south-african-local-government-10-years-later> , (accessed 16/5/2013).

¹¹²³ Smith (2011) 33.

¹¹²⁴ For instance, priority in the realisation of development infrastructure can be decided by the whole community, while the appreciation of compensation and environmental impacts can be left to the

which community participation improves project outcomes in non-technical decisions, but worsens them in technical decisions.¹¹²⁵ However, because of concerns about the issue of corruption,¹¹²⁶ it would be imperative in this case to provide affected communities not only with the ability to make their representatives accountable, but also to oppose any decision that blatantly stands in stark contrast with their vital interests, as its implementation would amount to the violation of their rights in article 13. In DRC, for instance, it was reported by Global Witnesses that the mineral industry in Katanga is characterised by a high level of corruption which not only involves representatives from the government but also traditional chiefs of indigenous communities.¹¹²⁷ In respect of the traditional model of governance, it is questionable whether the fact that the community consent is to be given by the head of the community, as for instance provided for in section 127 (1) (c) of the Zambian Mineral law, can match the standard of democratic governance. As already mentioned, the dichotomy that can arise from such a model was perceivable in the relationship between Chevron and affected communities in the Niger Delta where following protests by community members, the company had to drop its previous approach in MoUs where relations with the communities were made with traditional leaders.¹¹²⁸ While community members complained that profits were flowing just to the leaders instead of benefiting the whole mass of the people, after the shift in Chevron approach, leaders started to complain that they felt marginalised and had lost homage payments and direct contact with the company.¹¹²⁹ In the South African Bafokeng community, this issue is solved through the Kgotha Kgothe, a community meeting where members are given an opportunity to directly discuss issues with

representatives. Knowledge is not required to decide on priorities, but on compensating and environmental issues, it is an imperative. These are just suggestions to avoid delays because in communities, everybody do not have the same level of knowledge.

¹¹²⁵ Khwaja AI. "Is increasing community participation always a good thing?" (2004) 2-3 *Journal of the European Economic Association* 427.

¹¹²⁶ World Bank (2012) 20.

¹¹²⁷ Global Witness "Une corruption profonde: Fraude, abus et exploitation dans les mines de cuivre et de cobalt du Katanga" 14-16, available at <http://www.globalwitness.org/sites/default/files/import/kat-doc-fr-lowres.pdf> [accessed 2/5/2013].

¹¹²⁸ Faleti (2008) 24.

¹¹²⁹ Id., 24.

the Kgosi (King of Bafokeng) and the Supreme Council (traditional government of Bafokeng).¹¹³⁰

The challenge here can only be addressed in a conception where no matter what democratic arrangements are made for the decision-making, the fundamental right to participate in governance of mineral resources and all its implications are regarded as the supreme prerogative of those affected by the project. This means that even if indirect participation is adopted, the resistance of affected communities to the outcome of negotiations will remain legitimate. In respect of the CDAs for instance, the World Bank has pointed out that they may not necessarily represent broad community consent.¹¹³¹ Mechanisms of safeguard should be foreseen to avoid undemocratic positions from representatives. For instance, a withdrawal clause¹¹³² can possibly be included to allow the community to obtain the cancellation of the agreement entered into between representatives and the mineral company whenever it does not match the priorities defined by the community. In respect of environment, because of the technical character of the assessment, affected communities can, as already observed, make a subscription to an environmental insurance by the mineral company as a prerequisite for the starting of the mineral project. Also, the exercise of the veto is not an option welcomed by other stakeholders, but this is actually the logic outcome of a fundamental rights-based conception. Bernhardt aptly observed that in democratic deliberations, those who run the risk of having their fundamental rights violated by a decision must enjoy a veto power over that decision.¹¹³³ This scholar emphasises nevertheless that this veto must not be idealised as the standard mode of decision-making, but be of utility only after institutional arrangements set up to facilitate dialogue and negotiation have failed. This is the correct perception of how veto should be used by affected communities. Instead of denying them such a prerogative which is consecutive to their fundamental rights, the best approach is to have it as an exceptional process. In practice however, affected communities will generally have a positive

¹¹³⁰ Cook SE. "The business of being Bafokeng: The corporatization of a tribal authority in South Africa" (2011) 52 (2) *Current Anthropology* 152.

¹¹³¹ World Bank (2012) 75.

¹¹³² *Id.*, 71.

¹¹³³ Bernhardt B. "A theory of democratic self-determination, affectedness, sovereignty and non-territorial" University of Colorado discussion paper (2010) 1-18.

attitude towards a mineral project provided that there is a constructive dialogue that promotes their fundamental rights and interests.¹¹³⁴

All the above mechanisms that affected communities may use in democratic deliberations should result from an existing policy expressed through legislation organising the governance of mineral resources at the local level and in the design of which affected communities should also participate. The mode of decision-making should be highly conceptualised with a fundamental rights component to avoid frustration of affected communities in the process of participation. It is only in such a context that the African Charter and other relevant international instruments can really support and enhance effective community participation under the fundamental rights-based approach.

5.4. Access to the African Court as a challenge

Access to the African court is one of the challenges in relation to the protection of the fundamental rights of individuals and groups all over the continent. As already pointed out, the restriction found in both protocols is antithetical to the advancement of fundamental rights in Africa. Despite the fact that the discretionary power of governments to make the declaration or not to grant access to the Court to individuals and NGOs is an implicit fallout of the sovereignty acknowledged to states under international law, it is no less evident that looking at the restriction beyond the territory of a single state, it entrenches discrimination between Africans at the continental level. Indeed, the fundamental right to equality enshrined in article 3 of the African Charter loses its meaning by the simple fact that some Africans will enjoy access to the Court and some others not. In practice, this is a serious impediment to the effectiveness of the fundamental rights-based approach to community participation in so far as affected communities will almost be deprived of the possibility to compel their governments through a binding decision, the discretion to approach the court being vested in this case in the African Commission.

It has been contended that the principle of non-discrimination is a cross-cutting theme of access to justice in the international law context where the possibility of adjudication seeks

¹¹³⁴ Guerra (2002)13.

inter alia to prevent or repair any harmful actions to fundamental rights.¹¹³⁵ Therefore, the issue of access to the African Court needs to be seriously discussed by the AU and reforms should be allowed to let individuals, groups and NGOs have direct access in order to banish this discriminatory selection. Since the coming into operation of the African Court under the 1998 Protocol, among the 14 cases which went before this body, besides the three cases that were rejected on the grounds that the AU and the Pan African Parliament, as separate entities from members states, are not parties to the African Charter and its Protocol¹¹³⁶ and another one where the respondent states did not sign the protocol, the 10 others were dismissed because in all of them the respondent state had failed to make the declaration required for individuals and NGOs to have direct access to the Court.¹¹³⁷ This majority amounts to 71, 4% of cases where the Court could not decide on the merit because of this procedural requirement. These statistics confirm indeed the observation that as long as this limitation of access to the African Court will be carried on, it will seriously undermine the potential of this institution to secure affected communities participation. Actually, the restriction is inconsistent with the letter and the spirit of the African Charter, especially its article 7 of the Charter which provides the fundamental right for individual (and implicitly groups)¹¹³⁸ to have his/her cause heard by an impartial court and tribunal within a reasonable time. Unfortunately, the AU document of strategy to advance fundamental rights is silent about this issue. The time has come for members of the AU AHSG to question their commitment to move Africa forward in the protection of fundamental rights and realise that this rule needs to be changed and wide access granted to the victims.

5.5 Enforcement of regional decisions and political will as challenges

The enforcement of decisions delivered under the African system is one of the serious challenges that need to be overcome for the fundamental rights-approach to bear its fruits.

¹¹³⁵ Pring and Siegele (2005) 271.

¹¹³⁶ See the *Femi Falana* case, supra note 1058 and the *Atabong Denis Atemnkeng* case, supra note 1058, in respect of the AU; see also Application 010/2011 *Efou Mbozo'o Samuel v. Pan African Parliament*; Application 007/2011 *Youssef Abadou v. The Kingdom of Morocco*.

¹¹³⁷ Statistics are made here based on cases published on the Court's website up to June 20, 2013; Available at <http://www.african-court.org/en/index.php/judgments/other-decisions> [accessed on 20/6/2013].

¹¹³⁸ See the previous discussion on art. 7 in Chapter 2.

Since the African Commission has been indexed for its shortcomings in this area, more attention should now be focused on the African Court that is formally vested with the power to deliver binding decisions. As already observed, it is the AU Executive Council of Justice Ministers that is in charge of monitoring the execution of judgments¹¹³⁹ and in case of non-compliance the Court must transfer the case to the AU AHSG.¹¹⁴⁰ This final step reveals that a strong political will is needed within the AHSG to back up the work of the Court and oblige the stubborn states to abide by the judgments. Indeed, political will is this motivating force that generates concrete actions to achieve objectives predefined. However, it remains an open question as to how far members of the AHSG are aware of their responsibility in this regard. This question is inspired by Linde's and Louw's observation on the ASHG failure to follow up communications that were referred to it by the African Commission in its initial stages.¹¹⁴¹

If the ASHG displayed little commitment as regards the African commission's communications, what then would motivate the belief that they would take a different stance in the case of the African Court? So far the very case of non-compliance that is well-known is the one where the African Court in 2011 ordered provisional measures against the Libyan government to stop any action that would result in loss of life or prejudice the physical integrity in violation of international fundamental rights.¹¹⁴² The Court requested the Libyan government to report within 15 days on arrangements it had made to implement the measures ordered.¹¹⁴³ Unfortunately, the Libyan government did not comply with the Court's order. This was probably due to the intensive war going on there. Nevertheless, the ability of AU AHSG to aptly follow up compliance with decisions of the African Court must not be restrained to times of peace and quietness. This is because the experience demonstrates that massive and serious violations of fundamental rights often happen in times of disturbance and conflict.¹¹⁴⁴ The AHSG is vested with the power to impose sanctions to a non-complying state by virtue of article 23 (2) of the AU Constitutive Act which holds that member States

¹¹³⁹ Art. 29 of the 1998 Protocol and art43 (6) of the 2008 Protocol.

¹¹⁴⁰ Art. 46 (4) of the 2008 Protocol.

¹¹⁴¹ Van der Linde and Louw (2003) 181.

¹¹⁴² See *African Commission v. Libya* Application 004/2011, para. 25 (1).

¹¹⁴³ *Id.*, para.25 (2).

¹¹⁴⁴ A best illustration can be taken as well in the Rwandese genocide of 1994.

failing to comply with the decisions and policies of the Union may be subject to sanctions such as the denial of transport and communications links with other members and other measures of a political and economic nature to be determined by the Assembly. Interestingly, article 23 (2) was formulated in a very flexible way that allows the AHSG to adopt any sanction it deems efficient and adopt it in a particular case. This confirms therefore that it is a matter of political will at the level of the AHSG. How far the AHSG will support judgments of the African Court determines the maximum efficiency that the African system will now enjoy in respect of the binding nature of decisions that uplift fundamental rights. This is critical for affected communities in so far as having a judgment that is not complied with amounts somehow to a *statu quo*.

In a comparative perspective, it is worthy to note that in the European system, as well as the monitoring of judgments, implementation is conducted by the Committee of Ministers of the European council, while in the inter-American system, non-compliance with the Court's judgments is reported to the General Assembly of the OAS. Both systems had also to face a similar challenge,¹¹⁴⁵ but the situation improved as the years went by.¹¹⁴⁶ Indeed, difficulties experienced at the beginning are sometimes due to the fact that the processes of the establishment of a regional organisation are steadily marked by political interests of member states and that improvement comes as they demonstrate more commitment to achieve the objectives defined at the outset. Ugiagbe observes that contrarily to the European Court which grew alongside political organs of the European Union and the inter-American Court which enjoyed the same development despite being established after but at early, the situation

¹¹⁴⁵ Cavallaro JL. and Brewer SE. "Reevaluating regional human rights litigation in the twenty-first century: the case of the Inter-American court" (2008) 102 *American Journal of International Law* 774.

¹¹⁴⁶ Roper SD. and Barria LA. "Judgments of the European Court of Human Rights: A test case for enforcement and managerial theories of state Compliance", Prepared for delivery for the 2011 Annual Meeting of the American Political Science Association, 1-4 September (2011) 19; Available at <http://www.stevendroper.com/Roper%20and%20Barria%20APSA%20Paper.pdf> [accessed on 5/5/2013]; Morse T. "Member state compliance with the judgments of the Inter-American Court of Human Rights" (2005) 33 (3) (4) *International Journal of Legal Information* 320-344.

of the African Court is made tougher by the fact that it is a latecomer in a context where political organs of the AU were already highly developed.¹¹⁴⁷

Without making it a general principle, there is a case at the African sub-regional level to support this argument. Indeed, though the Tribunal of the Southern African Development Community (SADC) was provided for in article 9 of the treaty adopted in 1992, it is only in 2005 that it was inaugurated and become effectively operational, whereas political organs were already largely developed.¹¹⁴⁸ This time lag between the development of political bodies and the establishment of the Tribunal is certainly one of the factors that explain the decision of the SADC AHSG to suspend this judicial body in 2010 and later to curtail its jurisdiction to inter-states matters only, just after its ruling against Zimbabwe in the matter that involved the dispossession of two Zimbabwean farmers (Campbell and Tembani).¹¹⁴⁹ It can be assumed that President Mugabe after expressly qualifying the judgment of “non sense” and “of non consequences”,¹¹⁵⁰ used his influence to push the AHSG towards the adoption of the resolution suspending this institution. Nevertheless, despite the suitability of a concomitant progress between political and judicial organs in the life of a regional organisation, it is clear that no matter the context, much rests on the real political will of the body to which is assigned the task to back up decisions of the court. In the context of this study, it implies that the fundamental rights-based approach will deliver the maximum of its promises for affected communities only to the extent that the AU AHSG will demonstrate enough commitment pressuring the respondent state to comply with the court decision’s protecting their rights.

It is surprising that the AU strategy to advance fundamental rights did not specifically discuss this aspect. But at least it was mentioned that state reports is the means through which the will and commitments of African governments will be scrutinised.¹¹⁵¹

¹¹⁴⁷ Ugiagbe TB. “The African Court of Justice and Human Rights: Future political and jurisdictional realities and challenges”, available at http://www.monitor.upeace.org/archive.cfm?id_article=714 [accessed on 3/5/2014].

¹¹⁴⁸ In fact the SADC came as the transformation of the former Southern African Coordinating Conference.

¹¹⁴⁹ *Campbell (Pvt) Ltd and Others v. Zimbabwe* [2008]SADCT 2 (November 2008).

¹¹⁵⁰ *Campbell v. Zimbabwe* [2009] SADCT 3 (June 2009) para.4 (3).

¹¹⁵¹ AU Human Rights strategy for Africa (2011) 4.

5.6 Conclusion

The positive inputs expected from the fundamental rights based-approach to community participation will not occur any how. Several challenges need to be addressed for this approach undertaken under the provisions of the African Charter, to provide a strong legal platform on which community participation should take place and be effective. Those addressed here are some of the basic ones. The analysis has demonstrated that they should be overcome at two levels, namely at the level of normative arrangements and then at the societal institutions. The situation is such that normative reforms are dependent on whether actors within societal institutions are willing to commit themselves to raise up community participation at the standard of fundamental rights. For instance, because mineral legislation must be brought into accordance with the model of development that is integrative of fundamental rights, it is obvious that a great responsibility rests on the shoulders of law-makers in African resource-rich countries to make concrete proposals which are inclusive of affected communities's aspirations. Actually, challenges reviewed throughout the analysis require the direct implication of all actors that may exert influence on mineral governance in order to facilitate the implementation of fundamental rights in the African Charter in mineral activities held within affected communities. Beside ordinary stakeholders that are the government, the affected communities and the mineral corporations, other entities like the AU, international donor agencies and CSOs have also somehow an important role to play in addressing these challenges. Therefore, the approach to community participation in the perspective of the African Charter has far more implications that go beyond local boundaries and even across national borders. Its success calls for a global mobilisation in the international society as well as in the national one, and is rooted in a spirit of collaboration and cooperation between actors in the public and private spheres.

Chapter six: Conclusion: summary of the findings and recommendations

6.1 Introduction

The main concern of this study was to find out whether and, if yes, how the fundamental rights-based approach to community participation could help improve the governance of mineral resources in Africa and contribute as such to the realisation of sustainable development at local level. Throughout the analysis of research questions raised by this approach, the study has come up with some findings on which final recommendations will be made. Moreover, it would be too presumptuous to assert that this study has addressed all issues related to the implementation of a fundamental rights-based approach to community participation in the governance of mineral resources in Africa. Questions therefore remain that call for further research and the debate is far from over. This is particularly true in so much as the demand for mineral resources, is likely to continue growing worldwide and affected communities will not stop championing their rights.

Before going through each point raised in this concluding chapter, it is relevant to remind one about what have been the major discussions held in each part of the study. Chapter one has provided the philosophical foundation of the research. After an overview of the background to the study, a description was made of the subject matter, the research problem, the aims and significance of the study. It has demonstrated that there is a need for effectiveness in the implementation of community participation in the mineral governance and that a progressive approach needs to be formulated. Then, this chapter also provided the literature review, the methodology used in the study and highlighted difficulties encountered in the completion of the thesis. Chapter two offered a theoretical analysis of different approaches to the concept of community participation and demonstrated that among them, the fundamental rights perspective better suites affected communities' interests in mineral projects. Chapter three discussed the potential of the normative and institutional framework of the African Charter to serve as the legal basis for the fundamental rights-based approach and make community participation really effective. Chapter four looked at the practical challenges that need to be addressed under the African Charter system to successfully

uphold fundamental rights in mineral operations. All these chapters converge towards the elaboration of the present chapter which forms the general conclusion.

6.2 Findings

6.2.1 Findings and conclusions in terms of the aims of the study

This study aimed to demonstrate that mineral governance could be improved in Africa if community participation is really made effective. The rationale of this assertion rested on the belief that by giving affected communities the possibility to get involved in discussions pertinent to a mineral project and other related development projects and influence the outcomes, they would be empowered to exercise self-monitoring and manage all benefits that could flow from mineral operations taking place in their surrounding areas. This proved to be true in practice. Indeed, even if it stands among exceptions to the general situation prevailing on the continent, the case of the Bafokeng community has demonstrated how beneficial an effective partnership between affected communities and other stakeholders can be. Significant development initiatives have been realised because this community, the mineral corporation Impala and the South African government agreed to cooperate and advance their mutual interests in the platinum exploitation. After the long legal wrangle that led to the Bafokeng recognition of their benefits flowing from their ownership of the mineral land, this community was able to increase its royalties and exercise real control in the exploitation of platinum. This model should therefore inspire all African resource-rich countries. It is only when participation produces positive results that it becomes meaningful to affected peoples. If affected communities can say yes or no and see their will respected by other stakeholders, if they can question the government and the mineral company on critical issues, such as, for instance, on royalties, environmental impacts, opportunity of employment for community members, and get proper answers from them, then they will be able to increase transparency and accountability in the management of mineral projects. Where communities' involvement is made binding and not optional, they are given the chance to advocate a sustainable model of development that governance practices must accommodate. As explained by Hens and Noth, governance in the context of sustainable development requires a new way of implementing decisions, namely the participation of all the interested

groups in discussions relating to the sustainability aspects of the project.¹¹⁵² It is in this context that affected communities can ensure that due consideration be given to their fundamental rights in the mineral project. This is in line with the aim of this study which was also to demonstrate that the fundamental rights-based approach, contrarily to a loose or soft approach, would make a significant difference in the search for effectiveness. The difference is that affected communities will impose their preferences not as a simple matter of opinion polling but as logic fallout of the fundamental rights they hold. This is what strengthens the contention made throughout this study that participation should be regarded as a fundamental right itself, and then also as a channel through which other fundamental rights are enforced in mineral governance. This dimension is still missing in the mineral governance of many African resource-rich countries, including DRC, Nigeria, South Africa and Zambia. Even when prior consent is entrenched as a legal right as in the Nigerian or the Zambian mineral legislation, the relationship between affected communities and the mineral corporation is yet approached from a non-binding perspective, with the result that participation often becomes a simple formality intended to legitimise the project. In such a context, the potential of community participation to bear the expected inputs in mineral governance is undermined. Everything becomes dependent on the goodwill of the government and the mineral corporation to really consider claims of affected communities, and if not, violence becomes the language spoken by marginalised members of these communities. The tight relations developed so far between oil companies and communities in the Niger Delta sufficiently describe this reality. Nevertheless, as demonstrated when discussing the relevance of national courts, a serious commitment of domestic judges to protect fundamental rights can help mitigate this marginalisation where affected communities suffer in the decision-making process and monitoring of mineral projects. This is particularly true in national systems where judges are not only entrusted to award compensation but also enjoy the power to command the infringing activities by the mineral company be stopped.¹¹⁵³ This reinforces the finding that community participation needs to be reconceptualised to embrace a

¹¹⁵² Bachus K. "Governance for sustainable development and civil society participation" in (eds.) Hens L. and North B. *The world summit on sustainable development: The Johannesburg conference* (Dordrecht: Springer science & Business, 2005) 328.

¹¹⁵³ See for instance, the Nigerian case of *Irou v. Shell BP* as explained by Frynas (1999) 122. In this case, though the judge expressed many reserves in the decision, it was reported that he enjoyed actually the prerogative to go far beyond and stop activities of the abusing company.

fundamental rights-based approach if it is really meant to influence decisions in the mineral sector. This is not to be accepted as optional, but rather as an imperative by which all stakeholders should abide. In the specific context of the mineral industry, this role of fundamental rights is one which corresponds with the description given by Dresso, namely to provide a legal and political framework to oppose abuse of power and actions which are contrary to the well being of the people.¹¹⁵⁴

6.2.3 Findings in terms of the research questions and hypotheses

The research work attempted somehow to fill the gap left by questions that are insufficiently addressed in the existing literature. The first concern was the fact that, despite the increasing acknowledgment of its importance, the strategy to make community participation effective in practice has not been given much attention. The study sought to identify at which level frustration commonly arises in the process of participation and what can be done to offer a better and faster response. Indeed, the importance of community participation in governance has become so evident that it is now a generic term used in the discourse of all stakeholders, not only by affected communities themselves and CSOs working on their behalf, but also by government officials, international donor agencies and mineral corporations. Community participation is now largely accepted as a means through which more accountability and transparency can be brought to the management of mineral resources, especially in terms of benefits that must flow to affected communities and the consideration that should be given to their fundamental rights. It is also seen as a necessary step for reducing the costs raised by social tension resulting from the communities' feeling that the mineral project is externally imposed on them. As was seen with respect to activities of Shell in Nigeria, conflicts with affected communities cause huge financial losses for the mineral corporation.¹¹⁵⁵ As a strategy to gain legitimatisation, community participation is also seen as a useful means to avoid delays that often result from the radical opposition of affected communities to the execution of mineral projects. However, how it should be enhanced or enforced remains uncertain. Actually, the existing disagreement among stakeholders as to how participation

¹¹⁵⁴ Dresso, *supra* note 161.

¹¹⁵⁵ Watts (2009).

must formally take place disturbs the equilibrium needed in a system of governance that takes the sustainable development as its standard. While states, international donor agencies and mineral corporations are generally favourable to a soft approach to participation which corresponds with a process deprived of formal constraints to consider views of people affected by the project, CSOs and affected communities themselves advocate a coercive approach which imposes due consideration to the most affected people's opinion and interests. Unfortunately, until now, it has been the former approach which has been predominant, giving rise to a strong contradiction between the demand for democratic practices, sharing in decision-making, transparency and accountability and what is really done in practice. As a consequence, environmental damages and negative social impacts caused by mineral operations are often undermined by a discourse which exalts the benefits of mineral investments more.¹¹⁵⁶ In developing countries, Szablowski promptly observes that the ability of state actors to respond to the pressing demand of securing fundamental rights in the development process is circumscribed by the quest to attract more foreign investment.¹¹⁵⁷

The study confirmed the hypothesis that it is only through an approach based on fundamental rights that community participation can uncompromisingly enjoy real effectiveness and serve as a tool to enhance practices that match sustainable development requirements. As already mentioned, this approach starts by an appropriate definition of community participation as a fundamental right and then the perception of its role as a mechanism through which other fundamental rights are enforced in mineral projects. Effectiveness is guaranteed in this approach by the fact that affected communities share real power to approve or reject a project, to command its halt when it does not look after their best interests anymore, require transparency in the management of royalties and claim compensation and the rehabilitation of the closure. They can approach courts to enforce their fundamental rights which serve as the legal justification for their actions. Respect for the environment, the disposal of revenues generated by the exploitation of mineral resources, the self-determination of development priorities, do not make community participation a simple matter of privileges granted to

¹¹⁵⁶ Olowu (2009) 252; See also the process that led to the establishment of the Chad oil project as described by Nguiffo and Breitkop (1999).

¹¹⁵⁷ Szablowski (2007) 27.

affected communities, but as a fundamental right bestowed on them. This is the major difference with the soft approach.

Another research question that called for in-depth analysis was the models of democracy and decentralisation that would be better suited to make community participation more effective. In this regard, the main concern was to find out the extent to which democracy and decentralisation arrangements should accommodate the fundamental rights-based approach in order to build good governance in African countries. This was a critical question for research because African resource-rich countries have generally failed to capture the socio-economic demand of affected communities in mineral projects because of the malfunctioning of democracy and decentralisation in their societies. This is seen by Kimani as the result of the fact that affected communities have little say in the way mineral agreements and legislation should be formulated.¹¹⁵⁸ In fact, the incapacity to influence them automatically deprives affected communities from arguments to make their representatives and implicitly the mineral corporation, accountable. Indeed, if legitimate expectations of affected communities do not filter through to the mineral legislation in general and the mineral agreement in particular, what would justify any claim that their socio-economic demand was not satisfied by a particular mineral project?

The first remark in this regard is that consensus exists among stakeholders that community participation has some structural implications for its implementation. The view is largely shared now that the establishment of a democratic and decentralised system of governance is a factor that preconditions the feasibility of any participatory initiative. In Africa, this is one of the results brought by the movement for the democratisation of the development process which took place in the 1980s.¹¹⁵⁹ In the context of sustainable development, the interaction between democracy, decentralisation and community participation is perceived as being of major importance because it determines the extent to which transparency and accountability can be achieved in the governance process. Therefore, a proper balance of the synergy existing between the three institutions is a key determinant of any success that may be reaped in efforts devoted to improve mineral governance in Africa.

¹¹⁵⁸ Kimani (2009) 4.

¹¹⁵⁹ See for the process of adoption of the Arusha Declaration as described in the background of the study.

Between direct participation of communities and their indirect involvement through representatives, this study has suggested a middle path, because the negative effects of illiteracy, which is yet high and the risk of conflict between competing communities in the same mineral project can be prevented through discussion with a restrained group of representatives. Nonetheless, at the same time, members of the community must be able to directly express their opinions on some matters that do not require a high intellectual level. This is the case, for instance, in the decision-making process concerning development projects which need to be prioritised. Members of the community often know best what the urgent demands that need to be satisfied are.

With respect to decentralisation, it has been agreed and found that the poor performance under past models adopted in many African countries ¹¹⁶⁰ requires that reforms be undertaken to increase possibilities to get peoples involved in decision-making. The model of decentralisation must be one where the interaction between affected communities and the local government is bottom up and not the reverse. Indeed, though decentralisation is generally defined as the transfer of power from the centre to sub-national levels, ¹¹⁶¹ local authorities should not regard themselves as being at first accountable to the central government, ¹¹⁶² but rather to their local people, as democratic governance means that the power belongs to the people. Genuine democratic and decentralised governance should one way or another empower local people to exercise control over the management process of mineral resources and make representatives accountable in respect of their welfare. Accordingly, the local government should work in a way that is supportive of affected communities' interests and advocate the respect of their preferences in mineral projects. However, despite the existence of decentralisation in many African countries, the field of mineral resources still remains highly centralised, to such an extent that central authorities often enjoy large discretions to grant licenses and even bypass prior consent of communities where provided for in the law. This is what Adejumobi rightly considered dictatorship in the development process. ¹¹⁶³ Though the central government must continue

¹¹⁶⁰ UNDP "Local governance and poverty reduction ...", supra note 196, 27.

¹¹⁶¹ Crawford and Hartman (2008) 1.

¹¹⁶² This is a major difference with deconcentration where they act just as representatives of the centre.

¹¹⁶³ Adejumobi (2008) 100-101.

to play its role of ensuring that the development process at the national level remains balanced in terms of resource redistribution, this study contends that mineral governance in Africa needs to be decentralised to ensure that affected communities are able to influence decisions on relevant matters touching directly on their development. Thus, it can be suggested, for instance, that royalties to which affected communities are entitled should be paid to the local authorities or directly to the communities themselves, instead of undergoing the long process of retrocession from the central government to the local structures.¹¹⁶⁴

All the above findings confirm the hypothesis according to which the fundamental rights-based approach can only work where democratic and decentralised conditions are at the optimal, with a system of governance in which affected communities can make the government, mineral corporations, and even their representatives accountable. The concept of accountability cannot be removed from a genuine model of community participation.

Another research question was the extent to which provisions of the African Charter could possibly be applied in the regulation of the mineral sector to secure fundamental rights. The concern of the study here was to find out how far affected communities could make use of the African Charter provisions and enforcement mechanisms to have their fundamental rights respected throughout the governance of mineral resources and how far the African Charter system could positively influence the functioning and behaviour of national institutions and other stakeholders working in the mineral sector. The African Charter protects both individual and collective rights, civil and political rights and socio-economic rights.¹¹⁶⁵ Since the mineral industry is one of the society sectors which should generate opportunities to satisfy the socio-economic demands, provisions of the African Charter are able to secure the fundamental rights of people who are supposed to benefit from the mineral projects.

In practice, if the fundamental rights-based approach is to be formally implemented, it would need a legal base or be entrenched in at least one legal instrument where victims can

¹¹⁶⁴As demonstrated in the *DRC* case, the risk of retrocession is the fact that the affected communities may suffer delays to receive their share and be deprived of necessary funds to finance development projects.

¹¹⁶⁵See para. 7 of the African Charter.

resort to prevent or remedy a violation. The finding of this study in this regard is that the system built on the African Charter provides the normative and institutional architecture for a progressive approach in the extractive industry. At the normative level, not only does this instrument make their participation to be regarded as a fundamental right and thus oblige other stakeholders not only to protect it, but also as a challenge for the realisation of other fundamental rights directly relevant for sustainable development through processes of negotiation, execution and closure of the mineral project. Besides the specific fundamental right to participation in article 13, the panoplies of other fundamental rights, including both individual and collective ones like the rights to receive information, to express and disseminate one's opinions in article 9, the right to access justice in article 7, the right to self-determination in article 20, the right to freely dispose of wealth and natural resources in article 21, the right to development in article 22 and the right to environment in article 24 all provide the standard at which other stakeholders must define their relationship with affected communities in mineral operations. Under the regional system established by the African Charter, affected communities enjoy a broad range of legal possibilities to remedy the failure of other stakeholders, with triple levels at which they can seek enforcement. Starting with the exhaustion of local remedies that may be available before national courts, affected communities can then approach the African Commission and then, provided the respondent state made the required declaration, take the matter to the African Court. The scope of the protection granted to affected communities is therefore very large and should be regarded as a positive element for the desired model of mineral governance which seeks to protect the fundamental rights of affected communities. In this respect, the study stressed the complementarity existing between national courts and supra-national bodies under the principle of subsidiarity. This complementarity is such that the risk found at each level can be dealt with at another level. For instance, the risk of obstruction to justice resulting from the executive branch's pressure on the judiciary in national courts should be absent at the level of the African Court because this body is not directly dependent on any African state member of the AU. This presumption is reinforced by articles 2 and 3 of the African Court rules of procedure of 2010 which forbid a member of the Court to hear a case involving either its home state or any other state by virtue of which he or she was elected. At the same time, because of lack of horizontality in

international law, the inability of the African Commission and the African Court to directly sanction multinational corporations, it can be supplied by national courts in countries where judges are empowered to punish corporations for fundamental rights abuses. Nevertheless, the study has come to the conclusion that in a reforming perspective, because nothing substantially prevents corporations to hold fundamental rights obligations and because the devastative potential of their activities has been largely demonstrated in developing countries, the African system could be innovating by creating direct responsibility for corporations in case of grave violations of fundamental rights.

By emphasising affected communities' fundamental rights, the African Charter provides them with the necessary weapon to compel other stakeholders to consider their views in development matters raised by the mineral project. But despite the fact that it has been in existence for three decades now, its application in the mineral sector remains very low. One of the reasons found in this study is lack of awareness about the system it has established, especially in rural areas. The consequence is such that there is an ongoing gap between what is provided for in the text of the Charter and what is going on in the field. In the Action Plan for implementing the AMV proposed in 2011. by the AU Commission, it was found that there was a mismatch between the expression of public participation rights in formal instruments and their implementation.¹¹⁶⁶ The plan asserts that such a gap generates inadequacy in participation which leads to conflict between mineral investors and affected communities.¹¹⁶⁷ This is the situation in many African resource-rich countries, where theoretically affected communities are among the holders of the fundamental right to participate in article 13 of the African Charter, but whose participation in mineral projects is yet made dependent on the good will of other stakeholders like the states and mineral corporations and in a format which does not necessarily ensure the taking into account of their views and interests.

¹¹⁶⁶ AU Commission *et al.*, "Building a sustainable future for Africa's extractive industry: From vision to action: Action plan for implementing the AMV" (2011) 24; Available at http://www.africaminingvision.org/amv_resources/AMV/Action%20Plan%20Final%20Version%20Jan%202012.pdf [accessed on 25/5/2013].

¹¹⁶⁷ AU Commission *et al.*, (2011).

This observation opens the door to another finding of this study according to which for the fundamental rights based-approach to be properly implemented under the African Charter, some challenges need to be seriously addressed. If they can be overcome, improvements will obviously flow in the governance system. The first one identified was the need for updates in the mineral legislation. Though the African Charter establishes a general regime for fundamental rights, mineral legislation should accommodate their application in the field. This is arguably because as the *lex specialis* of the field, it is the primary source of law that mineral investors look at. It will be therefore easy to make them aware of the due consideration that they should give to affected communities' fundamental rights in mineral operations. This is in line with the provision of article 1 of the African Charter, which compels, AU member states to adopt legislative measures to give effect to rights, duties and freedom contained in the African Charter. Though the right to compensation is at times emphasised, mineral legislation of countries reviewed in this study do not include affected communities' fundamental rights at the standard of the African Charter. For instance, while prior consent is in line with the requirement of participation in decision-making which results from article 13 of the African Charter, the possibility for the central government to bypass it reduces its nature to a privilege rather than a real right held by affected communities. Affected communities must not only be compensated when violations occur, but participation should empower them to prevent potential infringements through the ability to approve or disapprove a project.

Another challenge is related to the capacity-building of affected communities. Actually, the simple recognition of their fundamental rights in the legal text is not enough, affected communities need to be aware of their rights and know how to resort on them in their interaction with other stakeholders. This raises, for instance, the issue of education on fundamental rights, the ability to discuss and to negotiate with other stakeholders on the mineral project and other related development projects, the possession of employability skills by the majority of community members and a clear definition of the modalities which should lead to a community decision. In the *Endoris* case, the African Commission

held that capabilities of a local community should improve to foster the realisation of development.¹¹⁶⁸

Apart from all these concerns, there are challenges proper to the functioning of the African Charter enforcement machineries. Access to the African Court needs to be broadened to increase the possibilities for affected communities to approach judges whenever their fundamental rights are infringed on. Moreover, there are issues like the clarification of the role that each enforcement body must play to avoid muddles in the relationship between the Commission and the Court, and the necessity to get decisions of the African Court enforced once violations are established. On the other hand, affected communities should be careful not to abusively use legal avenues offered by the African Charter, because excessive litigation spoils the reputation of the mineral corporation. The fundamental rights-based approach must not be seen at first glance as synonymous to litigation, but rather as a strategy to increase the level of consideration that the government and the mineral corporation, should give to affected communities' aspirations in mineral developments and other related development projects. It is only in the case of persistent denial and violations of their rights that they should seek enforcement before courts.

6.3 Recommendations

The implementation of community participation in mineral governance requires a real commitment from all stakeholders. Therefore, closing recommendations should be made in respect of the responsibility of each of them in this regard.

Starting with African governments, they should demonstrate more commitment to achieving the vision of a mineral-led development in which fundamental rights of affected communities are given due respect. This is part of the AU general vision, which supports the application of fundamental rights in the development process.¹¹⁶⁹ In this regard, African governments should devote all their efforts to ensure that operations and practices in the mineral industry comply with provisions of the African Charter. Actually, though emphasising community

¹¹⁶⁸ See the *Endorois* case, supra note 67, para. 283.

¹¹⁶⁹ *Id.* 4.

participation, this study acknowledges the critical role of the government. The only difference is that contrarily to the much pronounced discretion it enjoys in the bilateral model of governance (state-mineral company), in the three-leg model (state-affected communities-mineral corporation), the role of the government needs to be adjusted.

Firstly, the government must continue to fulfil its assignment of coordinating the development process in order to maintain equilibrium in every part of the country in the sharing of benefits and opportunities. But, in doing so, the government must make room for the participation of those who will suffer directly from the potentially negative impacts of the mineral project, to express their approbation or disapprobation of the project throughout the decision-making process.¹¹⁷⁰ Given that the fundamental right to community participation is likely to promote transparency in the management of mineral resources and therefore, strengthen good governance, the government must step up its efforts to ensure that democracy, decentralisation and accountability are effective, as all three determine the extent to which participation will be useful and effective in the development process. Of course, what can be tricky is the case where the choice of the affected community is totally irrational. But even in this case, the government cannot decide to disregard the prior consent of the community because it is part of democratic requirements.

Secondly, the government must build and strengthen the state-capacity to establish a framework which will facilitate the implementation of sustainability in the mineral industry. This implies the incorporation of fundamental rights' aspects in all state mineral policy, a good use of mineral revenues and for the most, the integration of the mineral industry in a vision of economic diversification. This is critical because the government must ensure that, despite the existence of mineral activities, affected communities are still able to run other activities that are also important for the economy, like for instance farming and fishing. One can contend that all these assignments arising from the perception of what the role of the government should be under a fundamental rights based-approach, can only be feasible in the context of a social democracy rather than one of a liberal democracy. This is simply because, as observed, in the former type, the ideological foundation generally rests on the belief that

¹¹⁷⁰As will be discussed in the next section, how to mitigate irrationality in the choices of affected communities is part of the questions that call for further research.

the government assignment is to ensure equality and social justice between citizens, giving priority to common interests over individual ones, while in the latter model, the government intervention in the private sphere is very limited, with the emphasis put on the duty to protect an individual's freedom against outside invasion from other individuals or groups.¹¹⁷¹ However, as aptly observed by Adejumobi, community participation has been appropriated in the development discourse of neo-liberalism where it is viewed as fully compatible with a liberal agenda.¹¹⁷² The best illustration comes from the World Bank policy which, despite promoting liberalisation, emphasises the necessity to have community participation in the development process.

Along the same line, it can be suggested that the win-win principle advocated nowadays in mineral agreements by many African governments in their relations with investors must be extended to embrace the best interests of affected communities, which include respect of their fundamental rights.¹¹⁷³ On this specific point, the government must organise mechanisms to prevent the risk of having mineral agreements signed by a political elite pursuing their own short-term interests to the detriment of the people's long term interests.¹¹⁷⁴ A screening process can be established prior to the signing of the agreement. For instance, in a comparative perspective, it is reported that in Netherlands, Parliament must scrutinise a state contract in which the main object implies a transaction above 50€ millions before its signature.¹¹⁷⁵ Moreover, from a practical viewpoint, the win-win principle cannot be effective anymore between parties in a bilateral model of mineral agreement (state-company). This is because of the high cost that communities' opposition can bring in the mineral project whenever they are excluded. As seen throughout this study, the government can no more be fully entrusted to guarantee interests of affected communities in mineral negotiations. Affected communities must be empowered to take action against any decision of the government in the mineral sector that violates their fundamentals rights. Despite the continual

¹¹⁷¹ Hinnfors (2006) 23-26; Pinkey (2003) 13; Lumumba Kasongo (2005) 8-9.

¹¹⁷² Adejumobi (2008) 99.

¹¹⁷³ Kimani (2009) 4.

¹¹⁷⁴ Marysse S. and Geenen S. "Win-win or unequal exchange? The case of the Sino-Congolese cooperation agreements" (2009) 47 (3) *Journal of modern African studies* 391.

¹¹⁷⁵ Conseil de l'Europe *Forces armées et services de sécurité: Quel contrôle démocratique?* (Paris: Conseil de l'Europe Publishing edition, 2009) 207.

demand for an increase of foreign investment, government officials must be aware that as long as affected communities' preferences and claims are not satisfactorily dealt with, the climate within which mineral investments take place will continue to remain characterised by disapprobation and violence. In such a context, the risk of financial loss not only exists for the mineral corporation, but also for the government in terms of taxes. African resource-rich countries are competing to attract foreign investments in the mineral sector as they provide a considerable source of revenue to the government. However, this should not be done at any cost. Government officials must be careful to not reverse the equation in that it is development that is made to profit human beings and not human beings to serve and sacrifice their vital interests for the sake of a utopian development. This is why African governments should also avoid exaggerating the role that foreign investments should play in the development process. Such exaggeration is what at times makes government officials misconceive the role of mineral corporations as they cannot replace the state's responsibility to ensure the realisation of socio-economic objectives. Mineral corporations are partners with the state, but should not be seen as the first actors on which the burden of realising the development rests.

To demonstrate their commitment, African governments must undertake practical actions. At the normative level, African governments should work on their national mineral legislation to bring them in accordance with fundamental rights granted in the African Charter. Legislative provisions should clearly explain who determines priorities at the local level, how affected communities should be involved in decision-making and how they influence the outcome of discussions, how royalties should be paid to them, how they should be compensated and what the legal steps are that they should take when their fundamental rights are infringed on.

As far as mineral corporations are concerned, they should accept to raise up the standard of community participation to such an extent that they cease to see it as simply a means to legitimate the project, but rather as an effective strategy to involve affected communities and contribute to the achievement of development objectives in a sustainable manner. This implies that in their relation with affected communities, they should acknowledge that their prerogatives are to be adjusted in accordance with their fundamental rights, with the

consequence that their capacity to influence the decision-making process should increase.¹¹⁷⁶ For this, mineral corporations should reject the fallacy that mineral investments and fundamental rights are irreconcilable. In fact, the aim of a partnership between all stakeholders is definitely to take account of their mutual interests. Thus, if the corporation can succeed in capturing the expectations of affected communities in the mineral project, of course in a way that does not prevent the maximising of benefits, the development process will be one that is peaceful and integrative of sustainability practices. Indeed, it is obvious that a mineral project which really offers benefits like employment opportunities, necessary infrastructures like roads, schools and hospitals, with enough precautionary measures on environmental degradation, will certainly get the support of affected communities. Under such conditions, the mineral corporation will be able to avoid the high financial cost that a conflict with communities may occasion. However, this is possible only where there are mechanisms through which affected communities can hold corporations accountable for the ways in which their actions impinge upon their livelihood.¹¹⁷⁷ It is a positive advancement that mineral corporations accept now that they have a social responsibility towards peoples affected by their activities, but much remains to be done in terms of how this responsibility must be properly formulated to be effective.¹¹⁷⁸

To international governmental organisations, the recommendation is that they should deploy all their efforts to support a process of participation where other stakeholders are compelled to respect fundamental rights of affected communities and where these latter can judicially enforce them through the life cycle of the mineral project. The World Bank, for instance, should remember that the absence of some measure of democracy in the SAPs is one of the reasons that led to its rejection by African people.¹¹⁷⁹ Since fundamental rights are now uncompromisingly seen as part of the development process, the World Bank should not refrain from joining in this integrative approach. In this respect, because effective community participation is a vital element which somehow determines the successful execution of development policies and projects in any field of its member states' economy, including the

¹¹⁷⁶ Garvey and Newell (2005) 389-391.

¹¹⁷⁷ *Id.*, 390.

¹¹⁷⁸ Amao (2011) 243, Horiggan (2010) 34-35.

¹¹⁷⁹ Ibhawo (1999) 159-161.

mineral field, the World Bank, despite difficulties pointed out, that states should accept the truth that the fundamental rights based-approach is more efficient than the soft approach in empowering affected communities with the ability to influence decisions having a direct impact on their development. It was observed that when development initiatives took place without affected communities being involved, mineral corporations tended to believe that they had fulfilled their obligations arising from the CDA, despite considerable dissatisfaction and disagreement with NGOs and local communities.¹¹⁸⁰ The World Bank should therefore offer its full support to an approach which is likely to bring more effectiveness to participation in development.

As to the AU, it must deploy all its efforts to pressure its member states to organise their mineral sector in accordance with their international obligations. The AU should request them to see to it that practical democratic arrangements be established to facilitate the participation of affected communities in decision-making regarding mineral projects. The AU should make a permanent follow-up to check out whether mineral policy developed by African governments respond to the fundamental rights-based approach to development and whether they abide with the standards of the African Charter or not. In this respect, reports that African states are compelled to submit to the AU in the context of the NEPAD/APRM and to the African Commission in respect of the advancement of the rights enshrined in the African Charter can serve as a tool to assess the commitment of African states.¹¹⁸¹ Moreover, through activities of the African Charter enforcement bodies, one should be able to perceive how AU member states abide by their obligations. For instance, in the exercise of its promotional mandate, the African Commission could multiply its visits to African resource-rich countries to examine the situation of affected communities, and try to make the system known to Africans much more. For this purpose, the AU should make sure that enough financial means is made available to allow this institution to realise its assignments.

The AU should also seriously consider the issue of broadening access to the African Court. This is a strong option since affected communities' fundamental rights in the mineral sector will not be fully protected until they have easy and wider access to this transnational

¹¹⁸⁰ Environmental Resource Management "Mining Community ...", *supra* note 138, 10.

¹¹⁸¹ See art. 62 of the African Charter and s. 15 of the APRM Base Document (2001).

mechanism of enforcement. The possibility to access the African Court actually determines the extent to which this body may be of use to affected communities. Indeed, a binding decision from the African Court could be one of the efficient ways to constrain the state and the mineral corporation to give a proper consideration to the view and best interests of the community affected by a mineral project. If access remains restricted as it is at present, the African Charter will only offer a small corridor of solution for affected communities and even delay the process of enforcement of their fundamental rights. As was aptly observed in the *Atemnkeng* case, restriction to court access gives the violator state power to prevent victims from making their voices heard and from obtaining justice.¹¹⁸² The AU and AHSG should therefore take the necessary action to enlarge access to the African Court. Also, in case litigation takes place at the regional level, the AU and AHSG must develop tactics and adopt a rigorous approach to make respondent states comply with the decisions of the African Court. Otherwise, despite having a judgment in hands, victims will continue to suffer injustice and prejudice caused by the violation of their fundamental rights.

With regard to CSOs, the recommendation is that they should continue to assist affected communities and advocate on their behalf the implementation of a fundamental rights' based approach in the relationship between the communities and other stakeholders. As was pointed out already, the jurisprudence of the African Commission demonstrates that they have played a relevant role in bringing communications before this body. Beyond the adjudicative process, they can be also of great support in the popularisation of the relevant fundamental rights' instruments and the education of affected communities. They should help and assist affected communities in building their capacity to negotiate with the government and mineral investors and to claim their royalties and define their priorities in development initiatives. They should also train them on how to use the different enforcement possibilities available under the African Charter. CSOs must be aware that in the African context, they enjoy more trust in the eyes of affected communities as compared to the government. They should therefore take advantage of being among the most trusted institutions in the society to consolidate the capacity of affected communities and pressure other stakeholders to effectively consider the view of these communities in the decision-making process.

¹¹⁸²The *Atemnkeng* case, supra note 1049, para. 18.

Finally, affected communities themselves need to be aware of their fundamental rights. They should not ask for participation in mineral projects as if this was a privilege that other stakeholders were granting them, but should claim it as being part of their fundamental rights. They should be eager to learn what legal arrangements are made in the African Charter to make their fundamental rights enforced in the mineral operations. This is because when participation is approached as a privilege, their share of authority in the power relation with other stakeholders becomes insignificant or quasi-inexistent.¹¹⁸³ Furthermore, they should work seriously on the appropriate modality to reach community decisions and on how to agree on priorities in development initiatives. This is particularly critical because if they are not able to speak the same language in discussions held with other stakeholders, it would be very difficult to perceive what their main position is. Obviously, be it through direct or representative democracy, divergent opinions will inevitably arise,¹¹⁸⁴ but what is of major importance is to develop strategies through which a common position can emerge from the community. This is why for instance, before engaging in discussions with other stakeholders, leaders of affected communities must encourage communication among their community members. They should multiply opportunities for members to meet and discuss development issues of their communities. Furthermore, affected communities should be able to define their expectations at a level which is rationally feasible. During the negotiation process with the mineral corporation, they should avoid exaggeration in terms of benefits to draw from the mineral project.

Affected communities should also avoid an abusive use of legal enforcement machineries as excessive litigation may have a negative impact on the investment climate. This is a recommendation for all three parties since actually the ideal is that all stakeholders interrelate in good faith to prevent recurrent conflicts which one way or another prejudice the good advancement of the mineral project. It is in the interest of the government and the mineral corporation to avoid conflicting relations with affected communities, because as said previously, this may delay the execution of the project, cause financial prejudice to the investor and fiscal loss for the government. During the violence which occurred in the Nigeria

¹¹⁸³ Ribot (2004) 174.

¹¹⁸⁴ Acemoglu D. *et al.*, "Opinion fluctuations and persistent disagreement in social networks" (2013) 38 (1) *Mathematics of Operation Research* 1-27.

Delta during the summer of 2009, it was reported that Shell was losing 20 million US dollars per day, which finally led to the closure of its operations in the west.¹¹⁸⁵ The firm should be aware that its reaction to affected communities' interests could impact on its economic performance.

From a legal perspective, Frynas explains it as the fact that an increase in litigation between the company and affected communities may have an economic impact on the financial health of the firm by bringing costs when what he calls the "legal liability risk" occurs.¹¹⁸⁶ In other words, the more the company is exposed to the payment of compensation arising from its liability for damages caused to the communities, the more it can suffer loss. In respect of litigation in Africa, this risk is reported to be very high when the matter is dealt with in transnational litigation through the extraterritorial jurisdiction mechanism, because the amount of compensation awarded is often far higher than those granted by African domestic courts.¹¹⁸⁷ Thus, depending on how the corporation chooses to interact with affected communities, positive outcomes can be generated like, for instance, the articulation of a shared vision to assist in the settlement of development issues raised in the area, while negative outcomes will surely occur when downplaying their concerns, with a possible succession of events that could undermine the efforts of the firm in the maximising of profits.¹¹⁸⁸ It is advisable that mineral corporations particularly approach their relations with affected communities from a fundamental rights perspective.

Experience demonstrates that where mineral operations have disregarded affected communities' fundamental rights, violence characterises the environment within which activities of the company are conducted. This is true not only in respect of the external

¹¹⁸⁵ Watts M. "Crude Politics: Life and death on the Nigerian oil fields" Working paper 25/ Nigeria Delta, economy of violence (University of California, 2009) 1-2; available at http://oldweb.geog.berkeley.edu/ProjectsResources/ND%20Website/NigerDelta/WP/Watts_25.pdf [accessed on 20/6/2013].

¹¹⁸⁶ Frynas (2004) 377.

¹¹⁸⁷ It was observed that while several cases brought before African courts had the prospect of obtaining millions of dollars in compensation, those filed for instance in the United States could potentially lead to compensation awards in the range of billions of dollars. Frynas, *Id.*, 373.

¹¹⁸⁸ Faleti (2008) 8.

dimension of the company's relations with the communities, but as well in the internal relations between the company and its employees, among which some community members can be part of.

Concerning the external dimension, for instance, the youth of affected communities in the Niger Delta has often resorted to militancy to protest against the exploitation of oil without due regard to their fundamental rights.¹¹⁸⁹ Aminu explains this phenomenon by the frustration-aggression theory borrowed from the work of another scholar and according to which the human frustration leads to the development of aggressive behaviour.¹¹⁹⁰

As to the internal dimension, an illustration of how the situation can degenerate when labour rights are not properly considered, can be taken from the tragedy which happened in 2012 in South Africa at the Marikana mine where many striking miners were either killed or severely injured in a confrontation with the police and the company security staff.¹¹⁹¹ Nevertheless in their relationship with mineral companies, affected communities must be careful not to exaggerate their emphasis on their legal means of constraints. Frynas sees in it as a double risk. The first would be a reputational risk arising from the bad publicity that litigation can cause the firm's image. This issue is so sensitive that Frynas assumes that even a legal victory in litigation cannot compensate for the adverse image generated by the lawsuit after several years of legal wrangle.¹¹⁹² The other risk identified by Frynas is for the national economy in that the increase of the legal liability risk and the reputational risk could discourage investors and lead to a reduction in the flow of investment to African countries.¹¹⁹³ Though the decision to invest in a country is dependent on several factors, it is clear that mineral investors will feel

¹¹⁸⁹ Obi (2010) 226-236; Abila SE. "Historic and philosophical foundation of minority groups in Niger Delta" in (eds.) Emiri F. and Deinduomo G. *Law and petroleum industry: current challenge: Essay in honor of Justice Kate Abiri* (Lagos: Malthouse Press 2009)185.

¹¹⁹⁰ Aminu SA. "The Militancy in the oil rich Niger Delta: Failure of the federal government of Nigeria" in (2013) 4 (11) *Interdisciplinary journal of contemporary research in business* 817.

¹¹⁹¹ Alexander P. et al *Marikana: A view from the mountain and a case to answer* (Auckland Park: Jacana 2012) 15.

¹¹⁹² Frynas (2004) 378; see also Akpan GS. "Host community hostility to mining projects: A new generation of risk" in (eds.) Bastida E., Wälde T. and Warden-Fernández J. *International and comparative mineral law and policy: Trends and prospects* (The Hague: Kluwer Law International, 2005) 320.

¹¹⁹³ Frynas, Id.

uncomfortable to work in an environment where they have to face court proceedings very often.

When a divergence of views arises which is likely to degenerate into a conflict between the community and the company, it is advisable that affected communities first attempt to explore the possibility of an amicable settlement before resorting to legal mechanisms of enforcement like courts. This suggestion if taken into consideration will help mitigate the negative impacts that a drastic legal approach can have on the relationship between stakeholders. This is in line with the letter and the spirit of the African Charter and the 1998 Protocol which both provide for the possibility of an amicable settlement where feasible.¹¹⁹⁴ The government should therefore contribute to this by fostering a platform or structure of consultation where affected communities can freely engage in discussions with all other stakeholders and try to reach a compromise on relevant questions linked to the mineral project.

Thus, the responsibility to preserve the investment climate is incumbent to all stakeholders. If mineral corporations can positively respond to affected communities' social demands, if the government can create an appropriate structure for interaction, and if affected communities can use legal avenues only when conciliation has become impossible, then the fundamental rights-based approach will accommodate an investment climate that matches the sustainable model of development.

6.4 Questions for further research

The merit of community participation in a mineral-led development process has been established throughout this study. It has been demonstrated that involving affected communities in the decision-making process of mineral projects and other related development projects in a way that makes their view binding on other stakeholders, can bring positive inputs in mineral governance. However, a question that may be naturally raised is whether this should be contemplated as a panacea. It is important to keep in mind that peoples' participation in decisions affecting their livelihood is unavoidable because, it is part

¹¹⁹⁴ Art. 52 of the African Charter, art.9 of the 1998 protocol.

of democratic governance requirements. However, challenges identified in chapter four of this study suggest that, community participation is not a strategy to be applied blindly under the pretext of getting positive results in any situation. Khwaja observes that overstating the importance of community participation in the development process can lead to its misunderstanding and misapplication.¹¹⁹⁵ For instance, it is questionable what the conceivable solution should be in case the choice expressed by an affected community to reject a mineral project is blatantly irrational. This issue is part of community participation limitations and is very critical because the whole country cannot be deprived from potential benefits of a mineral project just because of any thoughtless refusal by a local community.¹¹⁹⁶ Therefore, it is imperative that a mechanism be established to rationally balance the benefits and limitations of community participation. Since the fundamental rights based-approach provides the possibility for affected communities to engage in litigation in case of persistent disagreement with other stakeholders, it is possible to suggest that judges should be the ones who ultimately assess the rationality of the position expressed by an affected community. However, even in this context, the ambiguity does not totally disappear. Because decisions related to the formulation and implementation of public policies are to be made by those who have been democratically elected,¹¹⁹⁷ one can deem inappropriate the intervention of judges. In practice, judicial review by courts has often been criticised when it involved decisions made by the two other branches (executive and legislative) on the grounds that it is undemocratic to have judges who are not elected to question decisions of representatives who have been democratically elected.¹¹⁹⁸ Though such an approach rests on a rational argument, the truth is that in any genuine democratic system, the judiciary plays a vital role as courts are established with the aim to *inter alia* protect peoples' fundamental rights. In a democratic system based on the supremacy of the rule of law, the judiciary has to test legislation and

¹¹⁹⁵ Khwaja (2004) 428.

¹¹⁹⁶ Indeed limitations here concerned both the fact that the affected community's decision can be irrational and the fact that there can be a clash between local interests and those of the whole country. Khakee A. "Assessing the political dimension of structural planning process" in Borri D., Khakee A. and Lacirignola C. (eds.) *Evaluating theory-practice and urban-rural interplay in planning* (Dordrecht: Springer 1997) 110.

¹¹⁹⁷ Marquez E. *My country and my people* (Quezon City: Rex Book Store, 1998) 115.

¹¹⁹⁸ For more insights on the different views, once can read Zurn CF. *Deliberative democracy and the institution of deliberative democracy* (New York: Cambridge University Press, 2007) 132-134.

administrative actions against values and principles imposed by fundamental rights.¹¹⁹⁹ It is in this context that the intervention of the courts and even transnational bodies like the African Commission and the African Court,¹²⁰⁰ to assess the choice of affected communities can be justified. However, what constitutes a question for further research in this regard is how far judicial bodies should go and what principles and values should prevail in their assessment. This is a question that can be reflected on in future discussions on community participation. Nonetheless, it can be anticipated that judges will avoid excessive activism which will lead them forcefully to substitute their own view to the one of the affected community.

The question about rationality gives rise to further discussions on another issue. If it is to be considered that each individual who is part of the community has his/her own perception of what is rational, and because the opinion of the community is basically formed through an addition of individual opinions, the challenge is to find out how individual rights should intertwine with collective rights. The analysis of this question is particularly relevant because as Joong-Seop observed, the emergence of communal collectivism can easily hinder the development of individual freedom and personal preference when it rests on the fallacy that community members should be homogeneous in their perception of shared norms and values.¹²⁰¹ Since each member of the community holds a fundamental right to express his/her opinion, further research needs to be undertaken on how individual preferences should be weighted in the process of community participation. When a community member disagrees with the group, it becomes questionable how his/her fundamental rights should be taken care of in development initiatives launched at the local level. This question relates to the debate on how the minority and the majority must be accommodated in democracy.

Another question which deserves further research is whether in the consideration of affected communities' fundamental rights, there should be a hierarchy. This question especially arises in the process of defining priorities in development projects that should be funded with

¹¹⁹⁹ See *Matiso and others v. Commanding officer, Port Elizabeth Prison and another* 1994 (4) SA 592 (SE) 594.

¹²⁰⁰ In the case of the African Commission and the African Court, their intervention is further legitimised by the fact that they were established through an international treaty which was regularly ratified by member states.

¹²⁰¹ Joong-Seop K. "Toward Human rights in the local community: Multiple approaches to implementation" (2010) 39 (1) *Development and Society* 124-126.

mineral revenues. For instance, if the fundamental right to health is perceived as prevailing over the fundamental right to education, then it means that the construction of a hospital should be given priority over the construction of a school. How the views of affected communities' members may possibly be reconciled in this regard is also questionable. This is a critical issue because empowerment and capacity building do not concern only the external dimension of the relationship with other stakeholders, but also the internal dimension which includes the way members of the group agree on their priorities.

The debate on the hierarchy of fundamental rights has often been held in respect of the primary importance attached to either civil and political rights or socio-economic rights.¹²⁰² However, the intellectual level at which discussions are held by scholars makes it hard to suggest that different approaches promoted in their writings may be easily implemented in African rural areas. As stressed earlier, this is particularly because of the issue of illiteracy. Actually, from a purely theoretical point of view, if one adheres to the assumption that all fundamental rights are interdependent in the process of their enforcement, the debate on hierarchisation is void of all meaning. But because, in practice, considerations and approaches are different in the arrangements of each society, the discussion is somehow relevant. Because values privileged within a group of people contribute *de facto* to favour certain interests,¹²⁰³ further research needs to be undertaken on how the hierarchy of values defined in the context proper to each affected community should be captured throughout the implementation process of the fundamental rights based-approach. Therefore, the extent to which a particular fundamental right may influence the process of defining priorities in development cannot escape the debate on cultural relativism.¹²⁰⁴ Briley observed that "people with different cultural backgrounds have different expectations, norms and values, which in turn have the potential to influence their judgements and decisions as well as their subsequent

¹²⁰²See for instance, Konvitz MR. *Fundamental Rights: History of a Constitutional Doctrine* (New-Brunswick: Transaction publishers, 2009) 1-18; Farer T. "The hierarchy of Human Rights" (1992) 8 (1) *American University International Law Review* 115-119.

¹²⁰³ Campbell (2010) 198.

¹²⁰⁴ From a legal perspective, the concept of cultural relativism generally refers to the idea that for a right or a rule to be valid, it must match the culture of the society where enforcement is sought. Donnelly J. "Cultural relativism and universal Human rights" (1984) 6 (4) *Human Rights Quarterly* 400-401.

behaviour.”¹²⁰⁵ The question should specifically include the analysis of how cultural relativism may shape the implementation of the fundamental rights based-approach in the decision-making process concerning the mineral project and other related development projects. In such a context, it is not enough to only understand the political and socio-economic contexts of an affected community when addressing development issues, one should go beyond that and scrutinise the cultural background which generates local values through which priorities are set.¹²⁰⁶ However, this exercise will be valid only for values which are compatible with fundamental rights. This is one direction that scholars’ discussions on the fundamental rights-based approach to development may be orientated in the future.

To avoid the trap of monopolising the debate on community participation, this study suggests that multidisciplinary approaches should be encouraged for future research on issues which call for further research. This is because solutions which are elaborated on from different perspectives are likely to be more responsive to societal problems.

At the closing of this study, there is a firm conviction that the research work undertaken here has somehow brought a positive input in the debate on community participation in development. But from theory to practice, much remains to be done by actors involved in the governance of mineral resources to ensure effective participation of affected communities in line with the fundamental rights based-approach.

¹²⁰⁵ Briley D. “The effect of culture on decision-making and judgment” (2007) 13 *Research frontiers* 1.

¹²⁰⁶ Voda A.L. “Do cultural factors influence economic development?” (2012) 1 (1) *Academic Research Journals (India)* 21-22.

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