

**A DRY UDDER IN THE MILK SEASON? NATURAL RESOURCE
EXPLOITATION IN AFRICA: REALISING THE RIGHT TO
ECONOMIC BENEFIT FOR HOST COMMUNITIES**

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DECLARATION

I BOSIRE CONRAD MUGOYA the student herein do hereby declare that this research is my original work; both in style and substance. It has not been presented to any university or other institution. Other people's ideas used in the course of the research have been duly acknowledged.

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DEDICATION

To my parents Barnabas Bosire and Beatrice Mogotu, in the most loving way, you taught us how to appreciate the most basic yet precious things in life.

To poor rural communities in mining areas around Africa who continue living in wanton abandon: *Aluta continua!*

LIST OF ABBREVIATIONS

| | |
|--------------------|---|
| UNCTAD | United Nations Conference on Trade and Development |
| OECD | Organisation for Economic Cooperation and Development |
| WB | World Bank |
| IBRD | International Bank for Reconstruction and Development |
| IMF | International Monetary Fund |
| WTO | World Trade Organisation |
| ICSID | International Centre for Settlement of Investment Disputes |
| ICJ | International Court of Justice |
| FDI | Foreign Direct Investment |
| ICPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic Social and Cultural Rights |
| UDHR | Universal Declaration of Human Rights |
| UNGA | United Nations General Assembly |
| NDDC | Niger Delta Development Commission |
| ILO | International Labour Organisation |
| GAOR | General Assembly Official Records |
| MPRDA | Mineral and Petroleum Resources Development Act |
| ANC | African National Congress |
| SAHRC | South African Human Rights Commission |
| BEE Act | Broad-Base Black Economic Empowerment Act |
| BIAs | Bilateral Investment Agreements |
| MNCs | Multinational Corporations |
| African Charter | African Charter on Human and Peoples' Rights |
| African Commission | African Commission on Human and Peoples' Rights |

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CHAPTER ONE

NATURAL RESOURCES AND ECONOMIC DEVELOPMENT IN AFRICA: A TALE OF A FAMINE DURING HARVEST?

1.1 Introduction

Africa is a continent endowed with natural resources; from oil to solid minerals,¹ it accounts for a major part of the world's raw materials.² The scramble for Africa was motivated by the need for raw materials and market for finished products. Africa was thus arbitrarily divided along political boundaries that were prescribed by narrow economic interests.³ Whereas raw materials were in abundance in Africa, industries were mainly located in Europe, to which raw materials were shipped for processing.⁴ Looking at Africa today, this trend has not undergone any significant change. Trade and economic activities with the West, and increasingly the East as well, still revolve around export of raw materials and agricultural products with ever decreasing returns.⁵

¹ Y Omorogbe 'The Legal Framework for Public Participation in decision making on mining and energy development in Nigeria: Giving voices to the voiceless' in D Zillman *et al* (eds) *Human Rights in Natural Resource Development: Public Participation in the sustainable development of mining and energy resources* (2002) 550 notes thus: '... Africa possesses almost all types of the known minerals of the world, many of which exist in significant quantities. It has major deposits of coal, crude oil, and natural gas. Again it has some of the world's largest reserves of gold, diamonds, copper, bauxite, manganese, nickel, platinum, cobalt, radium, titanium, and phosphates. It also has iron ore, tin, chromium, zinc, zirconium, thorium, vanadium, antimony, beryllium, clays, mica, sulphur, salt, natron, graphite, limestone and gypsum'.

² Other scholars have expressed different views on the issue of the abundance of natural wealth in Africa; see C Clapham *Africa and the international system: the politics of state survival* (1996) 28-9.

³ P Curtin 'The European Conquest' in P Curtin *et al* (eds) (2nd edition) *African History: From Earliest Times to Independence* (1997) 398-422. See also M Meredith *The State of Africa: A History of Fifty Years of Independence* (2005, 2006) 1-13.

⁴ See 'Congo: White King, Red Rubber, Black Death' documentary available at <<http://www.freedocumentaries.org>> (accessed 18 October 2009) See also D Richard 'The wealth of the West was built on Africa's exploitation' *The Guardian* 20 August 2005 7. Omorogbe (n 1 above) 552.

⁵ Africa contributes less than 2% of the world trade and there is a steady decline, see 'Global Slump Hits Developing Countries As Credit Squeeze Impedes Growth and Trade; Tensions in Commodity Markets Ease' available at: <<http://web.worldbank.org>> (accessed 7 July 2009). D Green *From Poverty to Power: How Active Citizens and Effective States Can Change the World* (2008) 295-317.

Throughout the post-colonial era, extraction of and benefit from natural resources in Africa has been a source of conflict and serious human rights concerns. Many conflicts in Africa are born of, revolve around and are sustained by natural resources.⁶ This has come to be known as Africa's 'resource curse.'⁷ There is a cruel irony between benefits reaped and the situation of the general population in many resource rich countries in Africa and beyond.⁸

In Nigeria, oil mining in the Niger Delta presents 'the paradox of plenty'⁹ where resolution of the oil mining conflicts is key to the state's future stability¹⁰ with unfortunate incidents such as execution of Ogoni environmental activist and writer, Ken Saro-wiwa and eight others in 1995 marking the height of the conflict.¹¹ Sierra Leone, Liberia and the Democratic Republic of Congo all conjure images of 'blood diamonds' that fuelled, and still continue to cause conflict to scales that attracted a world outcry.¹² South Africa, on the other hand, is emerging from a system of apartheid that saw the marginalisation of the black majority in benefit from natural resource development.¹³

⁶ K Annan *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, Report of the Secretary-General, delivered to the Security Council and the General Assembly, U.N.Doc. S/1998/318, A/52/871 on 13 April 1998.

⁷ M Donohoe 'Flowers, Diamonds, and Gold: The Destructive Public Health, Human Rights and Environmental Consequences of Symbols of Love' (2008) 30 *Human Rights Quarterly* 165, 173-178; I J Tamn 'Dangerous Appetites: Human Rights Activism and Conflict Commodities' (2004) 26 *Human Rights Quarterly* 687, 687- 689; A Papaioannou 'The Illegal Exploitation of Natural Resources in the Democratic Republic of Congo: A Case Study on Corporate Complicity in Human Rights Abuses' in O De Schutter (ed) *Transnational Corporations and Human Rights* (2006) 263-85.

⁸ Barrera-Hernandez L K 'Sustainable Energy Development in Latin America and Donor Driven Reform: What Will the World Bank Do?' in Barton *et al* (eds) *Regulating Energy and Natural Resources* Press (2006) 66, 68.

⁹ Omorogbe (n 1 above) 558 Petroleum is mainly in the Niger Delta which spans across six states; Delta, Rivers, Bayelsa, Cross River, Akwa Ibom, Ondo and Edo states.

¹⁰ Omorogbe (n 1 above) 550.

¹¹ The case of *International Pen and Others v Nigeria* (2000) AHLR 212 (ACHPR 1998).

¹² JL Fishman 'Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step down the Long Road to Solving the Blood Diamond Trade Problem' (2004-2005) 13 *University of Miami Business Law Review* 217.

¹³ TM Franck *et al* 'An Investment Boycott by the Developing Countries against South Africa: A Rationale and Preliminary Assessment of Feasibility' (1982) 4 *Human Rights Quarterly* 309.

Poverty, underdevelopment and other socio-economic ills are rampant in these resource-rich states, especially among communities in the mining areas.¹⁴

While countries like Botswana may have, to some extent, overcome the challenges connected with natural resources¹⁵ and whereas many oil rich states in Northern Africa¹⁶ may not be experiencing the ‘Dutch disease,’¹⁷ or resource curse, there are states emerging to the scene having discovered natural resources recently and are grappling with the challenge of overcoming the resource curse.¹⁸ A vast majority of resource-rich states in Africa still lack effective use of their natural resources.¹⁹ Omorogbe notes:

Most of the resource-rich developing countries have performed well below expectations and capability, with comparatively little to show after years of resource exploitation. The main symptoms of the problems of the lack of transparency and good government are pervasive corruption and stagnated economic development, which are apparent in many developing countries that are resource-rich. Within such countries history and experience have shown that the presence of abundant and valuable natural resources does not automatically equate to wealth for any country.²⁰

The general population in many of these countries bears the negative impact of natural resource exploitation; however, communities living around natural resource areas feel

¹⁴ See generally I Gary & T L Carl (eds) *Bottom of the Barrel: Africa's oil Boom and the Poor* 2003.

¹⁵ D Modise ‘Management of Mineral Revenues: The Botswana Experience’ paper presented at the Workshop on Growth and Diversification in Mineral Economies (organised by UNCTAD) in Cape Town, South Africa from 7-9 November 2000.

¹⁶ UNCTAD ‘Economic Development in Africa: Strengthening Regional Economic Integration for Africa’s Development’ (2009) 64-66.

¹⁷ Y O Omorogbe ‘Alternative Regulation and Governance Reform in Resource-Rich Developing Countries of Africa’ in B Barton *et al* (eds) (2006) *Regulating Energy and Natural Resources* 44 ‘The crowding out of the traditional export sector by a new booming export sector that generates income windfalls that end up negatively impacting upon and sometimes even destroying productive activities’.

¹⁸ Modise (n 15 above); Omorogbe (n 17 above) 45 states ‘Thus Norway, Trinidad and Tobago, and Botswana were never swallowed up by the Dutch disease and have therefore experienced the blessings of their natural resources industries. New producers such as Timor, Leste, Chad, Equatorial Guinea, Sao Tome and Principe, and Kazakhstan are endeavouring to evade the curse’.

¹⁹ Gary & Carl (n 14 above).

²⁰ Omorogbe (n 17 above) 39.

the heaviest impact.²¹ Apart from exclusion from both productive and distributive realms of natural resource exploitation, the communities also incur direct social and economic losses.²² These include investment induced displacement, loss of productive agricultural land, access to clean water and even disruption of social, cultural and religious life.²³ In such cases, communities bear the heaviest burden of natural resource exploitation compared to the general population.²⁴

International human rights standards require natural resources to be utilised in a manner that promotes equitable economic benefit and development of all peoples.²⁵ The right to benefit from natural resources entitles peoples to control and use natural resources for meaningful economic, social and cultural development.²⁶ However, the experience from many resource-rich countries in Africa shows that natural resources have not always been managed effectively towards this goal.²⁷

²¹ Omorogbe (n 1 above) 572 – 573, Donohoe (n 7 above); *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (The SERAC Case)* (2001) AHRLR 60 (ACHPR 2001); A Farmer 'Towards a meaningful Rebirth of Economic Self-Determination: Human Rights Realisation in Resource-Rich Countries' 39 (2006) *New York University Journal of International Law and Politics* 417, 419.

²² Actionaid 'Precious Metal: The Impact of Anglo-Platinum on Poor Communities in Limpopo, South Africa March 2008. Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' June 2009.

²³ South African Human Rights Commission (SAHRC) 'Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around and around the PPL Mine, Limpopo' November 2008, available at <www.sahrc.org.za> (accessed 7 July 2009). See also *The SERAC Case* (21 above).

²⁴ HO Yusuf 'Oil on troubled waters: Multi-national corporations and realising human rights in the developing world, with specific reference to Nigeria' (2008) 1 *African Human Rights Law Journal* 79, 87.

²⁵ SF Puvimansinghe *Foreign Investment, Human Rights and the Environment: A Perspective from South Asia on the Role of Public International Law for Development* (2007) 116-137.

²⁶ D Zongwe 'Wealth of Peoples, Wealth of God: A People-Based Approach to the Control of Minerals in the Democratic Republic of Congo' paper presented at the 4th Cornell Law School Inter-University Graduate Conference' 28-29 March 2008 (paper presented on 29 March 2009). Farmer (n 21 above) 417.

²⁷ Global Witness 'Breaking the Links between the Exploitation of Natural Resources, Conflict and Corruption' UNCTAD expert meeting on FDI in natural resources 20-22 November 2006.

This study seeks to advance a case for direct economic benefit to host communities from natural resource exploitation. Direct economic benefit is used in this study to mean money or other gain derived from natural resource exploitation. Given the prevailing situation of many host communities in Africa, direct economic benefit can be part of equitable development.²⁸ Equitable development in this context means development that takes into account development needs of host communities and national development. Equitable economic benefit and development may, in the appropriate context, justify direct economic benefit to host communities. Of course with a caveat that direct economic benefit should be utilised within a framework that promotes equitable and broader development.

Human rights instruments require participation of vulnerable groups in decisions that are likely to affect them.²⁹ Host communities therefore have a right to be consulted and participate in decisions on natural resource exploitation.³⁰ The right to be consulted is further strengthened where such communities have a legitimate claim to ownership of the resources.³¹ Ownership of natural resources effectively makes host communities an integral part of the investment equation and can, on that basis, claim direct economic benefit.³²

Community participation, especially in the context of natural resources, has traditionally emphasised consultation and consent.³³ For varied reasons,³⁴ the traditional approach

²⁸ Zongwe (n 26 above) 3. The *SERAC Case* (n 21 above).

²⁹ UN Human Rights Committee-General Comment No 23: Rights of Minorities (Article 27): 5th Session 8 April 2004 CCPR/C/21/Rev. 1 /Add.5 Para 3.2.

³⁰ Zongwe (n 26 above) 7.

³¹ JS Anaya *Indigenous People in International Law* (2004) 141. See also Article 15(2) of the ILO Indigenous and Tribal Peoples Convention of 1989 (ILO Convention 169) Adopted in Geneva 27 June 1989 came into force on 5 September 1991.

³² As above.

³³ See generally Pring & S Y Noe 'Emerging International Law of Public Participation Affecting Global mining, Energy and resources development' in Zillman *et al* (n1 above)11-76; See also generally Barton (n 33 above).

has dwelt mainly on mechanisms of arriving at community consensus on public issues that concern natural resource exploitation.³⁵ There is no significant input from theory and practice on the definitive and procedural issues that surround economic benefit in participation.³⁶ This study adopts a broad definition of natural resource development³⁷ that encompasses participation in the entire process until appropriation of actual economic benefits. While using a legal approach, this study argues for the integration of direct economic benefit in participation of host communities.

Concrete situations from Africa are used to illustrate how economic self-determination and peoples' sovereignty and the right to development support direct economic benefit to host communities. Clearly, the path proposed by this study goes beyond compensation and relocation of host communities when such steps are considered the only duty owed by states and investors to communities.³⁸

Both South Africa and Nigeria are immensely endowed with natural resources and as such contribute to a large share of the continent's trade activities on natural resources.³⁹ Apart from natural resource endowment, the two states have followed different social, political and economic trajectories and thus may represent the diversity of issues regarding natural resources in Africa. Whereas Nigeria may generally represent countries that were decolonised and achieved independence,⁴⁰ South Africa is emerging

³⁴ Barton (n 33 above) 79-80 attributes this situation to the fact participation in natural resource development developed from participation in environmental regulation that did not have any issues on economic benefit.

³⁵ n 33 above.

³⁶ As above.

³⁷ Barton (n 33 above) 77-82; Pring & Noe (n 33 above) 1-14

³⁸ Anglo Platinum, 'Facts: Anglo Platinum's Response to ActionAid Allegations' (2nd edition) April 2008, available at http://www.angloplatinum.com/investor_media/im_latest_news/Anglo_ActionAid.pdf (accessed 25 September 2009).

³⁹ Omorogbe (n 1 above) 554-558 Nigeria is one of the largest producers of crude oil and has vast reserves of natural gas and also among the largest coal deposits in the world, South Africa on the other hand is one of the world's leading exporters of diamonds and gold, and the third largest exporter of coal in the world and also exports fifty other kinds of minerals.

⁴⁰ Nigeria gained independence on 1 October 1960.

from a period of apartheid whose racial policies and law saw the exclusion of the black majority⁴¹ from political, social and economic development.⁴² While having due regard to the context, concrete situations will be mainly drawn from these two countries to illustrate concepts relevant to this study.

Natural resources and economic development in Africa takes place within a set of external and internal factors. These factors range from issues that prevail in the international trading system, political factors and other issues that confront natural resource exploitation and development. The study discusses political and economic issues that play at the international level but define the nature and scale of benefit from natural resource exploitation in Africa today.

1.2 Thesis statement and research question

Community participation in natural resource development in Africa should incorporate direct economic benefit to host communities, in appropriate cases, as part of equitable benefit and development. In advancing this argument, the research will answer the following question:

Are there rights under international and regional human rights regimes that host or local communities in Africa can utilise in order to advance their claim for direct economic benefit from participation in natural resource exploitation?

1.3 Significance of study

This study evaluates the factors, context and human rights norms that support direct economic benefit to host communities. Issues surrounding natural resources are as

⁴¹ Broad-Based Black Empowerment Act 53 of 2003 (BBE Act) section 1: 'Black people' is a generic term which means Africans, Coloureds and Indians.'

⁴² O Dupper 'In Defence of Affirmative Action in South Africa' (2004) 121 *South Africa Human Rights Journal* 187, 192.

complex and varied as the number of states in Africa.⁴³ Therefore, this study does not purport to premier a standard that has uniform application to all African countries, much less in a specific context. This study is of significant relevance to host communities whose needs and context necessitate direct economic benefit from natural resource exploitation as part of equitable development.

1.4 Definition of terms

A key term that is used in this study is 'Direct economic benefit,' it refers to money, material benefit or any economic gain by host communities from natural resource exploitation.⁴⁴ 'Host communities' or 'local communities' as used in this research refer to people or groups of people living within or adjacent to areas where natural resources are located. These are people or groups of people who are directly affected by commercial and investment activities.⁴⁵ 'Community participation'⁴⁶ as used in this research refers to the totality of processes that local communities use to influence the conduct natural resource development. The term 'peoples' as used in this research varies with the context and may either refer to host communities or the general population of a particular state.⁴⁷

⁴³ See generally UNCTAD (n 16 above).

⁴⁴ R Hussey *A Dictionary of Accounting* (1999) 67 defines 'Economic benefits' as 'The projected benefits revealed by an economic appraisal ... gains that can be expressed in financial terms as the result of an improvement in facilities provided by a government, local authority'.

⁴⁵ Omorogbe (n 1 above) 571 notes: 'In local parlance and ordinary meanings the local communities are those who are customarily resident or who are widely known to as the owners of the land upon which development the development is taking place'.

⁴⁶ N Steytler & J de Visser *Local Government Law of South Africa* (2006) 6-3 note that 'community participation is synonymous with terms such as 'public participation' and 'citizen participation'.

⁴⁷ RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80, 99.

1.5 Literature review

There is not much literature on direct economic benefit to host communities in participation process of natural resource development. However, there is extensive material on public participation in natural resource development. In the Book *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* edited by Zillman, Lucas and Pring,⁴⁸ Barton⁴⁹ discusses ideologies in public participation and development in regulatory theory of natural resources. However, he does not discuss in the issue of economic benefits from natural resources and the rights of communities. Pring and Noe⁵⁰ in the same book discuss international law applicable in public participation, including the conceptual and historical framework of participation. They discuss participation rights of particular groups including local communities and indigenous peoples but the entire chapter is limited to obtaining consensus on public issues.

Aguirre⁵¹ takes an interdisciplinary approach to politics and economics of globalization and their impact on the right to development argues strongly regulation of foreign investment as a tool for achieving the right to development. However, Aguirre's monograph does not address host communities but the state in the international economic system. Anaya⁵² makes a case for ownership of land and land-based natural resources by indigenous peoples and benefit from such resources. However his work is focused on indigenous communities as opposed to host communities generally.

Schrijver⁵³ gives a general discussion of the concept of sovereignty over natural resources without untying the bundle of rights that the concept offers to communities.

⁴⁸ Pring & Noe (n 33 above) in Zillman *et al* (eds) (n 1 above) 11-76.

⁴⁹ Barton (n 33 above) 77-120.

⁵⁰ Pring & Noe (n 33 above).

⁵¹ D Aguirre *The Human Right to Development in a Globalized World* (2008) 1-19, 199-77.

⁵² Anaya (n 31 above) 141; See D Rene & ECB John (3rd edition) *Major Legal systems in the world today: Comparative Discussion on Ownership*, (1985) 290 in Anaya (n 31 above) 168.

⁵³ Schrijver *Sovereignty over natural resources: Balancing rights and duties* (1997).

This study seeks to contribute to the literature on direct economic benefit to host communities in natural resource exploitation for equitable development.

1.6 Methodology of study

The nature of this research calls for a non-empirical enquiry, a qualitative research project, namely, an investigation into the question of direct economic benefit for host communities and participation in commercial exploitation of natural resources. Consequent to this, the research adopts a descriptive, analytical and critical approach to desk, electronic and other materials or information available on the topic under study.

1.7 Structure

The research is presented in five chapters. The current chapter serves as the introductory part by giving the background, scope, rationale, context and limitations of the study. Chapter one attempts a broad and contextual analysis of four issues that underlie natural resource exploitation and economic development in Africa. Delving into the right to direct economic benefit and participation, Chapter three discusses and analyses the human rights norms that support the right to direct economic benefit in participation. Chapter four discusses, with concrete illustrations, the developments and the challenges in realising the right to direct economic benefit for host communities. The last chapter gives the conclusion and recommendations.

1.8 Delineation and limitations of the study

The nature and scope of the study limits this research in three ways. First, whereas there is a corresponding need for an effective governance framework for the management of natural resources within all African states, the study focuses only on the legal basis for

direct economic benefit to host communities. Secondly, the research is limited to community participation in the context of commercial exploitation of natural resources for profit as contrasted to non-commercial or public use of natural resources. Lastly, the research is limited to issues relevant to Africa and any reference to non-African jurisdictions is limited to giving clarity on the African issues under discussion.

CHAPTER TWO

A CONTEXTUAL ANALYSIS OF NATURAL RESOURCE EXPLOITATION AND ECONOMIC DEVELOPMENT IN AFRICA

2.1 Introduction

The claim for direct economic benefit from natural resources is derived from human rights standards applicable to natural resources. Implicit in this approach, therefore, is the debate on whether the role and utility of the human rights discourse and its 'increasingly dominant emancipatory vocabulary'⁵⁴ can enhance equitable natural resource development. The 'political and institutional hegemony'⁵⁵ of human rights blurs and even weakens other alternatives.⁵⁶ Human rights has defied its apparent philosophical shallowness and greatly advanced in both legal and political status.⁵⁷ However, as regards human rights language in economic development, Kennedy warns:

However useful saying "that's my right" is in extracting things from the state, it is not good in extracting things from the economy, unless you are a property holder. Indeed, a practice of rights claims against the state may actively weaken the capacity of people to challenge economic arrangements⁵⁸

Kennedy seems to propose an approach that encompasses enabling components such as property rights in the human rights discourse on economic development. A middle ground perhaps, is a cross-linkage of human rights and concepts such as, development,

⁵⁴ D Kennedy 'The International Human Rights Movement: Part of the Problem?' 15 (2002) *Harvard Human Rights Journal* 109.

⁵⁵ Kennedy (n 54 above) 109, 118; See generally M Mutua 'The Ideology of Human Rights' (1995-1996) 36 *Virginia Journal of International Law* 589-658.

⁵⁶ Kennedy (n 54 above) 118.

⁵⁷ C Gearty *Can Human Rights Survive?* (2005) 21.

⁵⁸ Kennedy (n 54 above) 109.

democracy and rule of law.⁵⁹ Sen discusses development as freedom that is evident in the expansion of choices available to the individual.⁶⁰

This chapter sets out a broad context of factors that the human right to natural resource development has to confront. A variety of factors, both external and internal, influence the process of natural exploitation at various levels and scale. Thus, economic development from natural resources may depend on the value of those natural resources in international trade. Factors such as the international political system, global economic and investment trends and the nature of the African state all define the nature and level of benefit from natural resources. While the specific human rights concepts that support direct economic benefit are discussed in the next chapter, this chapter is an attempt to answer the question: Can human rights language rise above these factors to defend the right to direct economic benefit to host communities?

2.2 Nature and history of international economic relations

Adam Smith, the reputed father of international economics, clearly captured the early thinking that informed economic relations when he stated in 1776 that:

Nature is not Niggard or parsimonious. Her rude products, powers and capacities are all offered gratuitously to man. She neither demands nor receives an equivalent of her favours. An object which may be appropriated or adapted to our use, without any voluntary labour on our part may be of the very highest utility: but, as it is the free gift of nature, it is quite impossible it can have the smallest value.⁶¹

⁵⁹ J Donnelly 'Human Rights, Democracy, and Development' 21 (1999) *Human Rights Quarterly* 608-32 argues that 'human rights and sustainable human development "are inextricably linked" only if development is defined to make this relationship tautological'.

⁶⁰ AK Sen *Development as Freedom* (1999) 50-53.

⁶¹ A Smith (1776) (4th edition: 1850) *Wealth of Nations* xxii in Schrijver (n 53 above) 3.

The above philosophy formed the bedrock of the modern day international economics and trade relations between states. African states continue to rely on export of raw materials and agricultural goods for international trade, thus ending up in the periphery of international trade.⁶² The international economic system is determined by factors that are historical, structural and systemic.⁶³ This is evident in the tension between developed and developing on matters of trade and economic relations.⁶⁴ However, a determined and fundamental shift that is sensitive to the 'indigenous needs' of the developing world can herald the desired progress.⁶⁵

Trade and economic activities related to natural resource exploitation are subject to the rules in the international and trade system. The nature and level of benefit from natural resource exploitation therefore depends on the impact of such rules to the process of resource exploitation. Issues such as global financial crises cause demand and price fluctuations thereby affecting the nature and level of economic benefit from natural resources.⁶⁶

The role of international financial institutions such as the World Bank and the International Monetary Fund (IMF) ⁶⁷ can not be ignored as they are key players in the system. These organisations fund and regulate natural resource development projects. There are numerous cases where such projects have been stalled due to human rights

⁶² M P Todaro, *Economic Development in the third world* (1989) 468-500.

⁶³ S Kayizzi-Mugwera 'Globalisation, Growth and Income Inequality: The African Experience' in R Kohl (ed) *Globalisation, Poverty and Inequality: Development Centre Seminars* (2003) 45-52.

⁶⁴ H Singer and J Ansari *Rich and Poor Countries* (1978) 41.

⁶⁵ Singer & Ansari (n 64 above) 37.

⁶⁶ DW te Velde 'Background note: The Global Financial Crisis and developing countries' Overseas Development Institute (ODI) October 2008.

⁶⁷ Collectively referred to as Brettonwood institutions, the World Bank (International Bank for Reconstruction and Development) and the IMF were established in 1945 after the World War II to assist in redeveloping economies that were destroyed by the war. However, the institutions have grown to assume major roles in the international financial system, see 'About the IMF: History: Cooperation and Reconstruction (1947-71)' available at <<http://www.imf.org/external/about/histcoop.htm>> and 'World Bank History' available at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTARCHIVES.HTML> (accessed 6 September 2009).

concerns. The Chad-Cameroon pipeline project has come under intense pressure from human rights groups to address human rights of host communities along the area the pipeline including the issue of economic benefit from the project.⁶⁸ Such experiences have made the Bank to develop guidelines for consultation, participation and inclusion of local communities in all its development projects.⁶⁹

However, some commentators question the legitimacy of the policies of the World Bank and other international financial organisations in developing countries.⁷⁰ They maintain that the policies perpetuate poverty, inequality and economic dependence by developing states.⁷¹ In international trade, the deregulation, liberalisation and equal treatment agenda of World Trade Organisation (WTO) has come under criticism for going against historical experiences of reforms in trade and economic development.⁷²

2.3 Trends in economic globalisation

Globalisation generally "... involves the widening, deepening, and speeding up of worldwide inter-connected economic and social life, from the cultural to the criminal, to the financial and the spiritual."⁷³ Economic globalisation, on the other hand, specifically

⁶⁸ See generally Amnesty International 'Contracting out of Human Rights: The Chad-Cameroon pipeline project' September 2005; I Gary & N Reisch *Chad's Oil: Miracle or Mirage?* 2005

⁶⁹ World Bank Policy Guidelines (Operational Directive 4.20) that covers protection of indigenous peoples. See International Council for Human Rights Policy 'Beyond Voluntarism: Human Rights and the developing international legal obligations of companies' (February 2002) 106-109 for a discussion on the effectiveness.

⁷⁰ GK Helleiner 'Aid and Dependence in Africa: Issues for Recipients' in TM Shaw & KA Heard (eds) *The Politics of Africa Dependence and Development* (1979) 217-245.

⁷¹ D Korten 'Predatory Corporations' in G Evans *et al Moving Mountains: Communities confront mining and Globalisation* (2002) 6; Green (n 5 above) 295-317, 353-383; E Duruigbo 'The World Bank, Multinational Oil Corporations, and the Resource Curse in Africa' (2005) 26 *University of Pennsylvania Journal of International Economic Law* 1-68, Todaro (n 34 above) 468-500.

⁷² Singer & Ansari (n 64 above) 6, 114 note that North America was until 1900, an international borrower together with other countries but the fundamental difference between the borrowing in this era and that of African and other developing states is that there were exceptionally strong regulatory domestic regimes that only accepted trade and investment that strictly served economic interests of the borrowing states. See also Green (n 5 above) 318-352.

⁷³ D Held *et al Global Transformation: Politics, Economics and Culture* (1999) 2 in Aguirre (n 51 above) 19.

refers to the growing interdependence of the world economies as a result of increased cross-border economic and trade activities.⁷⁴ It is led mainly by multi-national businesses,⁷⁵ and facilitated by states and the ever advancing technology. States offer the framework within which forces of economic globalisation operate.⁷⁶ In turn, this has eroded traditional roles of the state that and is being replaced corporations.⁷⁷ This has seen the emergence of a corporate global elite whose economic might and ever increasing political power transcends state structures, societies, financial institutions and even supra-national bodies.⁷⁸

The impact of economic globalisation on host communities is glaringly evident in many resource-rich states in Africa.⁷⁹ Host communities have been forced to confront predatory corporations that take advantage of weak states structures or even use the states in exploitation of such communities.⁸⁰ In Nigeria, the Shell Company decided to pay communities in the Niger Delta 15.5 million USD as an out of court settlement for the company's complicity in the execution of Ken Saro-Wiwa and others.⁸¹ This can be seen as an act of a MNC averting judicial shame as there were pending cases in the United States of America in respect of the company's deeds during the military regime

⁷⁴ G Shangquan 'Economic Globalisation: Trends, Risks and Risk Prevention' United Nations, Department of Development Policy and Analysis Division (DPAD) Department of Economic and Social Affairs, CDP Background Paper No. 1 ST/ESA/2000/CDP/1.

⁷⁵ See generally K De Feyter & I Gomez (eds) *Privatisation and Human Rights in the Age of Globalisation* (2005).

⁷⁶ Aguirre (n 51 above) 21 notes that, 'states retain the ability to govern national policies and domestic economies. They are therefore the principal determinants of economic affairs affecting human rights' see also R Gilpin *Global Political Economy: Understanding the International Economic Order* (2001) 3 in Aguirre (n 51 above) 21.

⁷⁷ M Addo (ed) *Human Rights Standards and the Responsibility of Transnational Corporations* (1999) 4 in (Aguirre n 51 above) 22 notes: 'While corporations have not replaced the state, their activities hold considerable sway over policy-making.' Korten (n 71 above) 2-7 and Omorogbe (n 1 above) 552-554 both attempt to trace the roots of corporate influence to the 15th and 16th centuries and the colonial era when monarchs granted powers to companies to regulate both political and economic activities in foreign large territories.

⁷⁸ See generally Evans (n 71 above).

⁷⁹ As above.

⁸⁰ Korten (n 71 above) 6-28.

⁸¹ E Pilkington 'Shell pays out \$ 15.5 m over Saro-Wiwa killing' *The Guardian* 9 June 2009 available at <<http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>> (accessed 20 October 2009).

in Nigeria. Multinational corporations in the DRC have been complicit in human rights abuses that border on criminal liability in the pursuit of solid minerals in the DRC.⁸²

Capitalism,⁸³ imperialism⁸⁴ and neo-liberalism⁸⁵ are enabling factors of economic globalisation. The overall effect is a reduction of the state's regulatory power and autonomy over economic relations⁸⁶ and a manifestation of the dependency theory.⁸⁷ This has led to reduced significance of the states in people's daily struggles for socio-economic development.⁸⁸ The state-centric paradigm of human rights presupposes the existence of a strong state upon which protection of human rights can be anchored.⁸⁹ However, trends in economic globalisation weaken the ability of the state to perform⁹⁰ Realisation of direct economic benefit or equitable development from natural resources calls for a strong regulatory role of the state.⁹¹ However, the forces of economic globalisation render African states unable to regulate their economies. Some commentators hold the view that regulation can only happen with the cooperation of the international community.⁹²

⁸² Papaioannou (n 7 above) 263-287.

⁸³ C Wilber & K Jameson (eds) *The Political Economy of Development and Underdevelopment* (1995) 85-93 in Aguirre (n 51 above) 36 discuss capitalism as an economic and social system where means of production are privately owned and controlled.

⁸⁴ Lenin, a Marxist Scholar interpreted capitalism in the international context as imperialism, see V Lenin *Imperialism, the Highest Stage of Capitalism* (1917) in Aguirre (n 51 above) 36.

⁸⁵ Neo-liberalism calls for a market oriented regulation and policies where the state is relegated to an observer, see generally S Strange (1996) *The Retreat of the State: The Diffusion of Power in the World Economy* Cambridge University Press in Aguirre (n 51 above) 6.

⁸⁶ Aguirre (n 51 above) 36.

⁸⁷ Aguirre (n 51 above) 36 A neo-Marxist analysis of international development, which states that: '... the centre (the developed industrial states) uses the periphery (the underdeveloped majority of states) to supply resources in order to fuel markets. No genuine development is possible so long as a dependent relationship predominates'.

⁸⁸ G Buckman *Global Trade: Past Mistakes, Future Choices* (2004) 95 in Aguirre (n 51 above) 2.

⁸⁹ P Alston 'The "Not-a-cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in P Alston (ed) *Non-State Actors and Human Rights* (2005) in Aguirre (n 51 above) 5.

⁹⁰ Aguirre (n 51 above) 22 states that, "The loss of the regulatory function by host-states is often pointed to as evidence of the decline of the nation-state."

⁹¹ D Schneiderman *Constitutionalizing Economic Globalisation: Investment Rules and Democracy's Promise* (2008) 26-28, 153-160.

⁹² Aguirre (n 51 above) 22 states, 'The international community must empower institutions that enable individual states to deal with pressures arising from globalisation. Nevertheless, the

2.4 The nature of the African state

In the pre-colonial era, African societies lived in simple communal systems with strong kinship ties and had political structures that varied from community to community, region to region and culture to culture.⁹³ The advent of colonialism saw the suppression, abolition and imposition of new models of the state, based on the western ideology.⁹⁴ The modern African state emerged from colonialism a few decades ago⁹⁵ and struggles for relevance as far its capacity and effectiveness to meet challenges of statehood are concerned.⁹⁶ While some scholars have pointed to the inappropriateness of the Western state model as the cause of failure of the African state,⁹⁷ others have attributed the failure of the African state to external factors such as foreign interests from the West.⁹⁸

With regard to natural resources, there is persistent corruption, and lack of transparency in the natural resource management by many African states.⁹⁹ States have instead taken to repression of communities and other voices on this situation. In Nigeria, the government readily flexed its military muscles against communities in the Niger Delta who were protesting at harmful activities of oil companies.¹⁰⁰ In South Africa, the police have been used by mining companies to harass and intimidate host communities in

international community seems reluctant to do so'. See also J Rosenau *Along the Domestic-Foreign Frontier: Exploring Governance in a Turbulent World* (1997) 38 in Aguirre (n 51 above) 22.

⁹³ See generally M Fortes & EE Evans-Pritchard (eds) *African Political Systems* (1987); Omorogbe (n 1 above) 550-552.

⁹⁴ As above.

⁹⁵ With the exception of Liberia, South Africa, Egypt and Ethiopia which were founding members of the United Nations Organisation. Most of the countries in Africa underwent decolonisation and achieved full statehood in the period between 1960 and 1970.

⁹⁶ Clapham (n 2 above) 30-52.

⁹⁷ Clapham (n 2 above) 34 notes the alienness and frequent artificiality of the African state structures. See also A Versi 'Social Change and Political Instability: The Search for an African Philosophy' in S Wright & JN Brownfoot (eds) *Africa in World Politics* (1987) 110-119.

⁹⁸ T Mboya *The Challenge of Nationhood: A collection of Speeches and Writings* (1970) 1-21, 130-218.

⁹⁹ Global Witness (n 27 above); Transparency International, 'Sub-Saharan Africa: corruption-one of the biggest challenges in the region, available at <<http://www.transparency.org>> (accessed 20 September 2009).

¹⁰⁰ *SERAC Case* (n 21 above) 61.

mining areas.¹⁰¹ On the other hand, the DRC is unable to control its vast mineral wealth leaving the same to private armed groups and rebels.¹⁰² These examples illustrate the failure of many African states to respond to the challenge of human rights protection in natural resource exploitation, and even emerge perpetrators.¹⁰³

2.5 Trends in international investment

Generally, there has been little progress in developing international investment law¹⁰⁴ despite the fact that international trade and investment have both played vital roles in the history and development of societies in the world.¹⁰⁵ The ICJ noted in the *Barcelona Traction case* that there is no internationally agreed body of laws on international investment. The Court described the gap as "...a period of an intense conflict of systems and interests between states that is yet to lead to generally accepted rules on the basis of *opinio juris*"¹⁰⁶ Efforts at having a multilateral framework for international investment, most notably by the World Bank and the Organisation for Economic Cooperation and Development (OECD), have consistently failed.¹⁰⁷ Lacking in central regulatory framework, international investment law has largely been shaped by Bilateral

¹⁰¹ Actionaid (n 22 above) 8.

¹⁰² See generally UN 'Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the Democratic Republic of Congo' UN Security Council S/2001/357.

¹⁰³ F Viljoen 'Africa's contribution to the development of human rights and international humanitarian law' (2001) 1 *African Human Rights Journal* 18 acknowledges that Africa is associated more with human rights problems and humanitarian crises than with their solutions.

¹⁰⁴ M Hirsch 'Interactions between investment and non-investment obligations in International Investment Law' 12, 2006 paper for International Law Association's Committee on the International Law on Foreign Investment, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430> (accessed 15 August 2009).

¹⁰⁵ See generally K Galbraith *Economic Development* (1964).

¹⁰⁶ *The Barcelona Traction, Light and Power Company, Limited (New Application: 1962) Belgium v Spain (Second phase)* Judgment of 5 February 1970 at 46, paragraphs 89-90.

¹⁰⁷ E V K Fitzgerald *et al* (consultants) 'The Development Implications of the Multilateral Agreement on Investment' Department of Foreign International Development (DFID) available at <<http://www.oecd.org/dataoecd/45/27/1922690.pdf>> (accessed 20 August 2009); E Neumayer 'Multilateral Investment Agreement on Investment: Lessons for the WTO from failed OECD-Negotiation' (1999) 46 *Wirtschaftspolische Bloetter* available at <<http://ssrn.com/abstract=203348>> (accessed 12 October 2009).

Investment Treaties (BITs) and Multilateral Agreements on Investment (MAI) collectively referred to as International Investment Agreements) IIAs.¹⁰⁸ The United Nations Conference on Trade and Development (UNCTAD) notes that the current global economic crisis has accelerated conclusion of IIAs as many states struggle to attract foreign investment in order to curb the crisis.¹⁰⁹ The global trend in international investment is headed for a conflict with the states' human rights obligations.¹¹⁰

There has been little interaction between human rights and international investment law,¹¹¹ perhaps due to the undeveloped and fluid nature of the former.¹¹² Whereas much time has been devoted to study accountability for human rights violations by corporations, 'the state's political, legal and economic facilitation of foreign investment to such corporations has not been subjected to analysis in human rights terms.' The implication on human rights enjoyment as a result of state facilitation of investment is therefore not clear. Three concerns emerge from lack of interaction between human rights and investment. First, there is no guarantee that IIAs will have regard to human rights.¹¹³ UNCTAD notes that very few IIAs make direct reference to human rights concerns.¹¹⁴ Secondly, there is gradual institutionalisation of international investment rules into constitutional principles of states generally.¹¹⁵ This trend means that a practice that has not been subjected to human rights analysis is slowly becoming part of the

¹⁰⁸ Schneiderman (n 91 above) 28 notes that by the end of the year 2006, the UNCTAD reported that 2 578 BITs had been concluded involving 175 countries and the trend continues.

¹⁰⁹ UNCTAD (2008) Recent Developments in International Investment Agreements (2008-June 2009) IIA Monitor No. 3 (2009) International Investment Agreements, available at <http://www.unctad.org/en/docs/webdiaeia20098_en.pdf> (accessed 12 August 2009).

¹¹⁰ Peterson LE & KR Gray 'International Human Rights in Bilateral Investment Treaties and Investment Treaties Arbitration' A research paper prepared by the International Institute for Sustainable Development (IISD) April 2003.

¹¹¹ Aguirre (n 51 above) 3-4.

¹¹² However, there is emerging interest that has not crystallised into a concrete area of study, see UNCTAD Selected Recent Developments in IIA Arbitration and Human Rights, IIA Monitor No. 2 (2009) International Invest Agreements, available at <http://www.unctad.org/en/docs/webdiaeia20097_en.pdf> (accessed 12 August 2009).

¹¹³ See generally, Hirsch (n 104 above), Aguirre (n 51 above) 119-25.

¹¹⁴ UNCTAD (n 109 above).

¹¹⁵ D Schneiderman (n 91 above) 1-20 says that the institutionalisation is mainly through constitutional and legal reforms, and judicial interpretation.

constitutional principles of a state. This has an effect on the enjoyment of the affected rights in the long term. Thirdly, investment arbitration panels, due to the nature of their role, rarely delve into specific issues of fundamental rights. Hirsch notes that investment tribunals are led by the goal of enhancing foreign investment flow as opposed to addressing fundamental human rights norms; he further notes that the asymmetrical relationship of the investor and the state makes it inappropriate for detailed findings on issues of fundamental rights.¹¹⁶

Lack of proper international investment law framework therefore poses danger to economic gains for host communities in natural resource exploitation. IIAs may vest rights on investors that may bar benefit sharing arrangements with host communities. This is the case in South Africa where BITs entered into with other countries before 1998 are in conflict with the human rights obligations of the South African government.¹¹⁷ The South African government was sued by investors for allegedly expropriating their mining rights reached under the framework of the BITs;¹¹⁸ the issue is discussed in more detail in the fourth Chapter. The Chad-Cameroon pipeline project sponsored by the World Bank has raised many human rights concerns despite being touted by the Bank as a model project.¹¹⁹

¹¹⁶ Hirsch (n 104 above) 30-31; Peterson and Gray (n 43 above); V Lowe 'Changing Dimensions of International Investment Law', (March 2007) Oxford Legal Studies Research Paper No. 4/ 2007 available at <<http://ssrn.com>> (accessed 15 August 2009).

¹¹⁷ See Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of South Africa and the Kingdom of Netherlands, available at <www.unctad.org/sections/dite/iial/docs/bits/netherlands_southafrica.pdf> (accessed 26 September 2009); Agreement between the Government of the Republic of Korea and the Government of the Republic of South Africa on the Promotion and Protection of Investments available at <www.unctad.org/sections/dite/iial/docs/bits/korea_southafrica.pdf> (accessed 26 September 2009).

¹¹⁸ See generally LE Peterson 'South Africa's Bilateral Investment Treaties: Implications for Development and Human Rights' Dialogue on Globalisation - Occasional Papers November 2006.

¹¹⁹ Amnesty International (n 68 above); Bank Information Centre 'World Bank's "Model" project in Chad beset by Persistent Problems 13 February 2007 available at <<http://www.bicusa.org/EN/Article.3148.aspx>> (accessed 20 October 2009).

Approximately 70% of Nigerians live on less than 1 USD A day¹²⁰ the biggest impact is felt in the Niger Delta.¹²¹ UNCTAD reports that Nigeria has approximately 22 BITs since 1990.¹²² Nigeria has adopted investment policies that have which have removed most of the restriction of Foreign Direct Investment (FDI) and has literally abandoned its 'indigenisation policy' of the 1960s and 1970s that restricted foreign investment.¹²³ However, the economic situation of host communities and the general population continues to worsen under the much touted economic liberalisation agenda. States have a duty to respect, protect, fulfil and promote human rights in all spheres including FDI, however, the experience in many states points to the contrary. This has serious implications on human rights especially in resource-rich states where the bulk of economic development depends on natural resource exploitation.

Efforts by developing states to challenge economic arrangements that affect natural resources and economic development can be traced to resolutions passed in 1952.¹²⁴ However, the adoption of the 1962 resolution, "Permanent Sovereignty over natural resources,"¹²⁵ which had the objective of protecting natural resources and improving economic relations with the developed countries was a major step. Later significant steps included the Charter on Economic Rights and Duties of States¹²⁶ and issues such as nationalisation of "foreign-owned sectors"¹²⁷ by developing countries. Schrijver describes the period 1962 – 1977 was an intense period activism by developing states.¹²⁸

¹²⁰ UNCTAD 'Investment Policy Review: Nigeria' (2009) 3.

¹²¹ *SERAC Case* (n 21 above).

¹²² UNCTAD (n 120 above) 29.

¹²³ UNCTAD (n 120 above) 4-6.

¹²⁴ Integrated Economic Development and Commercial Agreements G.A. Res. 523 at 20 UN GAOR 6th session Supp No 20 UN Doc A/2119 (January 12 1952); Right to exploit freely natural wealth and resources. UNGA Res 626 UN GAOR 7th Session Supp. No 20, UN Doc A/2361 (21 December 1952).

¹²⁵ General Assembly resolution 1803 (XVII) of 14 December 1962.

¹²⁶ GA. Res 3281 (XXIX), U.N. Doc.A/3281 on 1 May 1974; see Schrijver (n 53 above) 100-02.

¹²⁷ Schrijver (n 53 above) 82.

¹²⁸ As above.

Developed states responded by withdrawing capital investment in natural resources leading to lower economic returns and profitability from natural resources.¹²⁹

2.6 Conclusion

This chapter sought to discuss, with appropriate illustrations, how broader factors determine natural resource exploitation hence affecting the nature and level of benefit of host communities and the general population. Whereas the factors explained in the chapter above define the level and nature of benefit at the international level, there are specific human rights norms that host communities can utilise in order to claim economic benefit from natural resource exploitation. The next chapter attempts an analysis of the human rights concepts and norms that can support the claim for direct economic benefit.

¹²⁹

Schrijver (n 53 above) 83.

CHAPTER THREE

DIRECT ECONOMIC BENEFIT IN COMMUNITY PARTICIPATION

3.1 Introduction

Having discussed the factors that define for natural resource exploitation in Africa in the previous chapter, this chapter is an attempt to go into the specific human rights norms and concepts that support direct economic to host communities. The chapter addresses two main issues, first, it analyses the main human rights concept that support direct economic benefit from natural resource exploitation. The chapter further illustrates situations that may warrant direct economic benefit to host communities where the same is in line with equitable economic development. Secondly, the chapter discusses the conception and application of participation and how the same can incorporate economic benefit.

3.2 The right to economic self-determination

Defined simply as “the capacity of peoples to dispose freely of natural resources according to democratically taken decisions,”¹³⁰ major human rights instruments articulate this right in no uncertain terms. Article 1(2), common to both the International Covenant on Civil and Political Rights (ICCPR)¹³¹ and the International Covenant on Economic Social and Cultural Rights (ICESCR)¹³² provides that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation,

¹³⁰ Farmer (n 21 above) 418.

¹³¹ Adopted in New York 16 December 1966, came into force 23 March 1976.

¹³² Adopted in New York 16 December 1966, came into force 3 January 1976.

based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

Article 20 of the African Charter on Human and Peoples' Rights (African Charter)¹³³ also contains similar provisions on the right to economic self-determination in natural resources. It has been argued that use of phrases such as 'unquestionable and inalienable'¹³⁴ and 'exclusive interest of the people'¹³⁵ in the African Charter provides a stronger basis for protection the right than the ICCPR and the ICESCR.¹³⁶ Economic self-determination has its roots in the struggle against colonialism¹³⁷ and foreign economic dominance.¹³⁸ However, a state-centric articulation of the right in the post-colonial period is inappropriate due to emerging conflict and separation of state and peoples interests.¹³⁹ However, it must be distinguished from exercise of self-determination that may call for secession and fragmentation of states.¹⁴⁰

3.2.1 Economic self-determination and host communities

An exercise of the right is evident in the autonomy and ability of peoples to democratically determine how natural resources will be used and actual economic gain from those natural resources.¹⁴¹ Definition of peoples, as rights holders, is pertinent and

¹³³ Adopted in Banjul 26 June 1981 and came into force 21 October 1986.

¹³⁴ African Charter (n 133 above) Article 20.

¹³⁵ African Charter (n 133 above) Article 21.

¹³⁶ See Farmer (n 21 above) 433-437.

¹³⁷ Concepts such as sovereignty over natural resources and self-determination have their roots in the struggle against colonialism; Schrijver (n 53 above); A Farmer (n 21 above) 417.

¹³⁸ Kiwanuka (n 47 above) 88-89 argues that some of the strongly worded provisions in the African Charter, such as self-determination, were a reaction to ongoing dominance and influence by former colonial powers.

¹³⁹ Farmer (n 21 above) 419.

¹⁴⁰ Farmer (n 21 above) 421-422. For a discussion on self-determination see generally J Oloka-Onyango 'Heretical Reflections on the Right to Self-Determination: Prospects and Problems for a Democratic Future in the New Millenium' (1999-2000) 15 *American University International Law Review* 151.

¹⁴¹ Zongwe (n 26 above).

central to the enjoyment of the right to economic self-determination. Kiwanuka¹⁴² and Dersso¹⁴³ argue that the term 'peoples' is capable of four and five meanings respectively. The competing definition of the term 'peoples' has been indicated to weaken the right to direct economic self-determination.¹⁴⁴ This study adopts a meaning that allows host communities as well as the general population to benefit from the right in a manner that promotes equitable economic gain and development.

The right is exercisable by a particular group of people within a particular state such as indigenous peoples.¹⁴⁵ The uncontested and varied application of the term 'peoples' allows host communities such as indigenous peoples to derive economic benefit from natural resource exploitation. Therefore, in appropriate situations host communities can utilise the right to economic self-determination as a peoples of a particular state. However, this should be compatible with equitable national development. Past injustices and exclusion of host communities from natural resource development is an effective ground for claiming economic self-determination by host communities.¹⁴⁶

Ownership of land the natural resources therein forms a strong basis for economic benefit.¹⁴⁷ This lays the basis for the exercise of the right to economic self-determination. In most states however, minerals and other natural resources are vested in the state and are to be exercised for the benefit of all peoples. However, in places such as South Africa, minerals are vested in the state by the MPRDA¹⁴⁸ but there are arrangements for benefit due to ownership and affirmative action reasons. This illustrates that in

¹⁴² Kiwanuka (n 47 above) 85.

¹⁴³ SA Dersso 'The Jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights' (2006) 6 African Human Rights Journal 358, 362.

¹⁴⁴ Farmer (n 21 above) 420-421.

¹⁴⁵ n 143 above.

¹⁴⁶ This is the case for most host communities in South Africa that are utilising affirmative action legal framework to benefit from natural resources.

¹⁴⁷ See Anaya (n 31 above) 141-148.

¹⁴⁸ Section 3(1).

appropriate circumstances, economic self-determination can be applied as part of affirmative action in a state to ensure direct benefits.

Despite the fact that there are instances where host communities have been able to exercise economic self-determination, there is need for a definite legal and policy framework for the same. In South Africa, exercise of economic self-determination may be based on issues such as affirmative action and restoration of land rights. However, a more appropriate approach to economic self determination will mean a broader right where the factors such as those in South Africa only form part.

3.3 Sovereignty over natural resources

Like economic self-determination, sovereignty over natural resources or permanent sovereignty over natural resources (PSNR)¹⁴⁹ was developed in struggle against colonialism and foreign domination.¹⁵⁰ Use of the term 'sovereignty,' is due to the initial link to the state as the state was the only medium of defence to peoples sovereignty.¹⁵¹ The principle supports peoples' autonomy and independence over natural resources to the exclusion of foreign interests.¹⁵² Sovereignty over natural resources favours peoples' interests over foreign interests to such resources. States should uphold peoples' interests in natural resources over foreign or separate state interests.¹⁵³ Pursuit of policies in natural resources adverse to identifiable and legitimate interests of peoples goes against

¹⁴⁹ The Principle is established through the various treaties such as the ICESR and ICCPR and declarations, most notably the Permanent Sovereignty over Natural Resources-PSNR (n 1 above).

¹⁵⁰ E Duruigbo 'Permanent Sovereignty and Peoples' Ownership of natural resources in International Law' 38 (2006) *George Washington International Law Review* 33, 65.

¹⁵¹ Duruigbo (n 150 above) 50.

¹⁵² See generally Schrijver (n 53 above), Farmer (n 21 above).

¹⁵³ See generally C Grossman & DD Bradlow 'Are we Being Propelled Towards a People-Centred Transnational Legal Order?'(1993) 9 *American University Journal of International Law and Policy*1-25.

the principle of sovereignty.¹⁵⁴ Ideally, the state should act as a ‘competent manager’ of natural resources in the interest of peoples.¹⁵⁵

3.3.1 Sovereignty over natural resources and host communities

Application of the concept of peoples sovereignty over natural resources serves to exclude all other interests over such resources. Where the peoples interests are discernible, the state has a duty to ensure that such interests are given priority to the exclusion of other interests. Sovereignty, however, applies to peoples of a nation collectively.¹⁵⁶ It is therefore appropriate to refer to direct economic benefit by host communities as part of exercise of full sovereignty over resources by all peoples. Full sovereignty of peoples involves balancing national development the needs of individual groups for equitable development. In such circumstances, the principle of sovereignty may justify direct economic benefit to host communities in the exercise of full sovereignty. Where the interests of the host community are in accordance to national development, their interests can be upheld against foreign interests or investors.¹⁵⁷ Legitimate interests of host communities can be appropriated and protected as part of full sovereignty of peoples sovereignty over natural resources within a particular state.

3.4 The right to development

The right to development is ‘...an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and

¹⁵⁴ Schrijver (n 53 above) 269-274.

¹⁵⁵ Duruigbo (n 150 above) 37.

¹⁵⁶ Duruigbo (n 150 above) 33-35.

¹⁵⁷ See discussion on section 4.2.1 of Chapter 4.

fundamental freedoms can be fully realized',¹⁵⁸ it traces its origins to the Charter of the UN, the UDHR and the ICESCR and ICCPR.¹⁵⁹ Several declarations by the UNGA (United Nations General Assembly) also provide for the right to development the most important being the 1986 UNGA Declaration on the right to development.¹⁶⁰ Though controversial in its usage,¹⁶¹ the right has been authoritatively argued as a composite right to the process of development and a breach of any of the individual rights constitutes a violation of the right to development.¹⁶² The bundle of rights that accrue to host communities through concepts such as economic self-determination is collectively protected under the right to development.

A full and meaningful exercise of the right to development therefore means a situation where people are able to realise their economic, social and cultural development.¹⁶³ The right to development in natural resource exploitation means that peoples should be able to enjoy development as a result of exploitation of such resources.¹⁶⁴ The right to development assists the claim by host communities to meaningful economic, social and cultural development from natural resource exploitation.

3.5 Right to property and ownership of natural resources

Ownership of land and land-based natural resources by host communities also supports direct economic benefit from natural resources. Anaya notes that, '... the concept of

¹⁵⁸ United Nations, Office of the High Commissioner for Human Rights (OHCHR) 'Development- Right to Development' available at <<http://www2.ohchr.org/english/issues/development/right/index.htm>> (accessed 21 September 2009).

¹⁵⁹ n 133 above.

¹⁶⁰ Declaration on the Right to Development (4 December 1986), UNGA Res. 41/128, annex 41, Supplementary No. 53 at 186, UN Doc. A/41/53.

¹⁶¹ There is no internationally agreed definition of the right to development, the other controversy regards the identification of the duty bearers and beneficiaries of the right to development, Zongwe (n 26 above) 57.

¹⁶² A Sengupta 'Fifth Report of the Independent Expert on the Right to Development' (2002) 5-6 E/CN.4/2002/WG.18/6 in Zongwe (n 26 above) 57.

¹⁶³ A Sengupta 'Implementing the Right to Development' in Schrijver, N & Weiss, F (eds) (2004) *International Law and Sustainable Development: Principles and Practice* 341, 344-347.

¹⁶⁴ Zongwe (n 26 above) 57.

property includes the notion that human beings have rights to lands and chattels that they, by some measure of legitimacy have reduced to their own control.¹⁶⁵ International human rights law, he further notes, supports ownership of resources, and, he particularly identifies the phrase ‘... and in no case shall they be deprived’¹⁶⁶ as having a close relationship with ownership of natural resources. The principle of non-discrimination requires that all forms of property ownership, including traditional and communal ownership, are accorded some legitimacy.¹⁶⁷

Thus, the Constitutional Court of South Africa in *Alexkor Ltd and Another v The Richtersveld Community and Others (Richtersveld Community Case)*¹⁶⁸ upheld ownership of land and sub-surface minerals by the Richtersveld community under indigenous law. The Court followed, with approval, the privy council decision in *Oyekan and Others v Adele*,¹⁶⁹ where it stated that indigenous law, not English property law, should apply to disputes between indigenous people over rights to occupy a piece of land. However the other issue that confronts indigenous peoples is the controversy surrounding the definition of indigenous peoples in Africa.¹⁷⁰

The ICJ,¹⁷¹ regional courts of human rights,¹⁷² and national courts have held that groups of people can own land and natural resources through traditional systems. In South

¹⁶⁵ Anaya (n 31 above) 141. See also L Westra *Environmental Justice and the Rights of Indigenous Peoples: Domestic and Legal Perspectives* (2008) 126-139.

¹⁶⁶ Articles 1 (2) of the ICCPR and the ICESCR and Article 21 of the African Charter.

¹⁶⁷ Article 22 of the African Charter (Banjul Charter).

¹⁶⁸ 2004 (5) SA (CC) 460. See also G M Wachira ‘Vindicating Indigenous Peoples’ Land Rights in Kenya’ unpublished PhD thesis, University of Pretoria 2008 189.

¹⁶⁹ [1957] 2 All ER 785 (PC) 788 Paragraph G-H in *The Richtersveld Community Case* (n 168 above) 483.

¹⁷⁰ African Union ‘Report of the African Commission on Human and Peoples’ Rights Working Group of Experts on Indigenous Populations/Communities’ 78-89, 22 April 2005 E/CN.4/Sub.2/AC.5/WP.3

¹⁷¹ The ICJ in the *Western Sahara, Advisory Opinion* ICJ reports (1975) 35-37 found that certain nomadic groups possessed rights, including rights to the lands in the Western Sahara.

¹⁷² In the *The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua (Awas Tingni case)* Series C No 79 (2001)1A CHR 9 the Inter-American Court of Human Rights found that the Mayagna people had ownership rights over their lands under traditional system of ownership that had been breached by the state of Nicaragua.

Africa, the Communal Land Rights Act¹⁷³ provides for communal land rights democratic exercise of those of rights. Ownership of land and natural resources therein entitles a host community to economic benefit from investments in such resources.¹⁷⁴ Whereas the MPRDA¹⁷⁵ of South Africa vests the resources in the state for benefit of all South Africans,¹⁷⁶ the decision of the Constitutional Court in the *Richtersveld Community Case* and the experience of the Royal Bafokeng Nation¹⁷⁷ all show that direct economic benefit to host communities is possible in domanial systems of land ownership.¹⁷⁸ This is discussed in greater detail in the next chapter.

3.6 Host communities only?

Advancing a cause for direct economic benefit to host or local communities from natural resources is justified under a specific set of circumstances. Central to direct benefit for host communities is use of the term ‘peoples’. Whereas dominant use ‘peoples’ is to refer to the general population,¹⁷⁹ the term can also refer to those under colonial occupation, a portion of the population like indigenous peoples, as a synonym for a state or even collective reference to people in Africa.¹⁸⁰ In this concept therefore, host communities can utilise the term ‘peoples’ and claim the rights thereunder including direct economic benefit from natural resource exploitation.

Affirmative action and ownership of land and natural resources by host communities appear to be the main basis of granting direct economic benefit. This may be attributable

¹⁷³ Act 11 of 2004.

¹⁷⁴ See generally *The Richtersveld Community Case* (n 168 above).

¹⁷⁵ Act 28 of 2002. section 3(1)

¹⁷⁶ Section 3(1) of the MPRDA.

¹⁷⁷ See discussion on the Royal Bafokeng Nation in Chapter 4 below, for more information visit <<http://www.bafokengholdings.com>> (accessed 12 July 2008).

¹⁷⁸ A system where land and natural resources are vested in the state, people are merely considered as users.

¹⁷⁹ Farmer (n 21 above) 423.

¹⁸⁰ Dersso (n 1 above) 360-363; Duruigbo (n 150 above); Kiwanuka (n 47 above) 96.

to past experiences of host communities all over Africa in regard to economic benefit from natural resource exploitation. In South Africa, host communities in mineral rich areas are using the BBE Act¹⁸¹ an affirmative action law black empowerment, to own and share benefits from natural resource exploitation. However, there are also cases where non-black private owners of land and resources in South Africa have entered into direct benefit sharing with mining companies in South Africa.¹⁸² Affirmative action measures have also been extended to economic benefit from the oil mining in the Niger Delta¹⁸³ through the principle of derivation.¹⁸⁴ Experiences of host communities in Nigeria and South Africa prompted such action. However, issues such as ownership rights independent of affirmative action arrangements may also entitle a community to direct benefit from natural resource exploitation.¹⁸⁵

Due regard has to be given to all surrounding circumstances including the needs of the general population. Host communities should not benefit unfairly from natural resources in a manner that affects equitable national development. The needs and benefits of host communities should be a balanced against equitable national development. Any unfair economic benefit to host communities to the exclusion of the general population is against trite human rights standards. This consideration made the African Commission to remark in the *SERAC Case*¹⁸⁶ that ‘undoubtedly and admittedly, the government of Nigeria through the NNPC¹⁸⁷ has the right to produce oil, the income of which will be used fulfil the economic and social rights of Nigerians.’

¹⁸¹ n 41 above.

¹⁸² Actionaid (n 22 above) 13.

¹⁸³ Yusuf (n 24 above) 87 Section 162(2) of the 1999 Constitution of Nigeria provides for a ‘derivation fund’ for oil-producing communities 13% of federal revenue from the area is ploughed back for economic development.

¹⁸⁴ A rule that allows the area of production to retain all or part of the proceeds, see Omorogbe (n 1 above) 559.

¹⁸⁵ *The Richtersveld Community Case* (n 168 above); *The Awas Tingni Case* (n 1 above).

¹⁸⁶ *The SERAC Case* (n 21 above) 69 Para 54.

¹⁸⁷ Nigerian National Petroleum Corporation.

International human rights standards imply that host communities should enjoy economic benefits in a manner that promotes equitable development of a particular state. In determining whether host communities can have direct economic benefit from natural resource, several relevant factors have to be considered. Income taxes and other levies from benefits that accrue to the national government have to be taken into account as the same is appropriated for national development. Corporate taxes on mining companies, levies and other fees that accrue to the state should also be relevant in balancing direct economic benefit to communities and resources derived for national development. All relevant factors need to be taken into consideration when determining the need for direct economic benefit to host communities.

There is a need to have a thoroughly critical approach to the notion of 'peoples' and its substance in the effective protection of rights over natural resources. The concept of peoples does not mean 'faceless populations' without real rights.¹⁸⁸ Sieghart observes that, 'abstract concepts have in the past only too often presented great dangers to the enjoyment by individuals of their human rights and fundamental freedoms ... A "people" is no less an abstraction ... it cannot in reality consist of anything more than individuals who compose it'.¹⁸⁹ This statement find validity in situations where a few individuals conveniently appropriate terms such as 'peoples' and 'state' and proceed to engage in plunder of natural resources.¹⁹⁰ Actual benefits from natural resource exploitation need actual persons and not 'peoples' in the abstract conception in order to fulfil the right to direct economic benefit. Host communities in appropriate cases fill in the void left by abstraction of the concept of peoples. Thus, direct economic benefit to host communities represents a situation where economic gains are received by real beneficiaries in the process of natural resource development.

¹⁸⁸ Duruigbo (n 150 above) 37.

¹⁸⁹ P Sieghart *The International Law of Human Rights* (1983) 388 in Duruigbo (n 150 above) 58.

¹⁹⁰ Duruigbo (n 150 above) 35-36.

The concept of peoples may be useful in demanding accountability of the state at the international level, but its utility diminishes at the level of extracting real benefits from natural resources.¹⁹¹ There is therefore need for strategic application of the concept of peoples as far as demands for accountability and extraction of real benefits from natural resource exploitation is concerned. The same approach and thinking is needed in community participation in natural resource development. Participation as a concept needs to be appropriated in a manner that fully guarantees peoples rights over natural resources. In the case of economic development, real economic gains from natural resource exploitation make an effective measure of fulfilment of peoples rights over natural resources.

3.7 Origin and theory of participation: early beginnings

Participation can be traced to the earliest humans gathered around a fire collectively planning a hunt and other communal activities.¹⁹² Indeed, it has even been argued that participation is inherent and integral in the nature of human beings,¹⁹³ and as such, it can be found in the simplest of human societies. From the medieval times to modern day societies, the formal concept of participation has been present and it confirms the assertion that it is the 'the original political right'¹⁹⁴ which pre-dates even the social contract theory.

Formal sources of participation can be traced to periods such as the classical Athenian democracy of the 5th Century BC whose amplifying feature was direct citizen

¹⁹¹ Duruigbo (n 150 above) 58 -59.

¹⁹² Pring & Noe (n 33 above) 17; J Bronowski (1973) *The Ascent of Man* 40-45 in Pring & Noe (n 33 above) 17; Omorogbe (n 1 above) 551.

¹⁹³ MG Kweit & RW Kweit *Implementing Citizen Participation in a Bureaucratic Society* (1981) 50 referring to the argument that participation is 'integral to the nature of man' in Pring & Noe (n 33 above) 18.

¹⁹⁴ D Smith (1971) 'The Right to Petition for redress of Grievances: Constitutional Development and Interpretations (unpublished dissertation, Texas Tech University) in Zillman (n 1 above) 17.

participation in public affairs.¹⁹⁵ Other beginnings include works such as Plato's *The Republic*,¹⁹⁶ Confucius teachings, Aristotelian teachings of equality and Liberty, the Magna Carta of 1215,¹⁹⁷ the European enlightenment of 18th century. Later events such as the American Declaration of Independence in 1776 and the French Revolution of 1789 have also shaped public participation.¹⁹⁸ Thus, concepts such as freedom of speech, assembly, voting and equal representation evolved through time become the cornerstone of democracy today.¹⁹⁹

With an ever varying and expanding meaning,²⁰⁰ 'public participation' or simply, 'participation' has been traditionally defined as 'an all encompassing label used to describe the various mechanisms that individuals or groups may use to communicate their views on a public issue'²⁰¹ The term 'community' describes a unit of social organization based on some distinguishing characteristics or affinity, in this context ethnicity or locality.²⁰² Participation in the context of a community therefore implies involvement in processes that are of common interest.

¹⁹⁵ Pring & Noe (n 33 above) 17.

¹⁹⁶ The Proceedings of the Friesian School: *Fourth Series*, 'Plato's Republic' available at <<http://www.friesian.com/plato.htm>> (accessed 22 September 2009).

¹⁹⁷ Britannia History, 'Magna Carta: The Great Charter of English liberty granted (under considerable duress) by King John at Runnymede on 15 June 1215' available at <<http://www.britannia.com/history/docs/magna2.html>> (accessed 29 September 2009).

¹⁹⁸ Pring & Noe (n 33 above) 18.

¹⁹⁹ Kenya Human Rights Commission, 'Framework for a Sessional Paper for the Public Participation Bill' July 2006.

²⁰⁰ Zillman (n 1 above) calls states that 'public participation means different things to different people' and has achieved a more expansive meaning due to entry of other players in the field such as civil society groups, international financial organizations and experts.

²⁰¹ Pring & Noe (n 33 above) 15.

²⁰² Community Cultural Development in Australia (CCD), definition of 'Community' available at <<http://www.ccd.net/resources/guide/glosary/glossary1.html>> (accessed 29 September 2009).

3.7.1 Participation in natural resource development: a product of environmental regulation?

Formal accounts of participation in the context of natural resources development are traced to urban land use planning laws before the 1960s in the United Kingdom. Other early participation process in natural resource development can also be traced to environmental legislation and policy in the United States in the late 1960s.²⁰³ Modern day principles of participation owe much of their development and application to environmental regulation and development.²⁰⁴ Participation has been provided for in many important environmental instruments as part of the process towards sustainable use of the environment.²⁰⁵ The European Aarhus Convention,²⁰⁶ is 'the most far-reaching and detailed environmental treaty on public participation to date'.²⁰⁷ Participation continues to define the contours of engagement between investors, the government and local communities in natural resource development in the 21st century.²⁰⁸ In Africa, the African Charter for Popular Participation²⁰⁹ represents yet another collaborative approach to participatory development. The Charter calls for equitable sharing of benefits from development.²¹⁰

²⁰³ Barton (n 33 above) 80-81 for instance the National Environmental Policy Act of 1969 that regulated public participation in environmental issues at federal level.

²⁰⁴ Pring & Noe (n 33 above) 28 refer to the environment and development arena as the 'The "crucible"' in which the international law of public participation has been forged.

²⁰⁵ Pring & Noe (n 33 above) 29-50.

²⁰⁶ The Convention was negotiated under the auspices of the UN and though applicable to Europe, it has membership drawn from countries such as Israel, Canada and the US hence increasing its global significance, Convention available at <http://www.unece.org/env/pp/documents/cep43e.pdf> (accessed 29 September 2009).

²⁰⁷ Pring & Noe (n 33 above) 23, 36 the Convention 'creates more public rights in relation to mining, energy, resources, and other forms of economic development than all previous international law put together.'

²⁰⁸ Pring and Noe (n 33 above) 12.

²⁰⁹ Adopted at the The International Conference on Popular Participation in the Recovery and Development Process in Africa was held in Arusha the United Republic of Tanzania, from 12 - 16 February 1990, conference was organised by the UN Economic Commission for Africa.

²¹⁰ African Charter on Popular Participation in Development (n 206 above) Para 11.

The relationship between environmental regulation and natural resources development is basically that the two areas target the same players and stakeholders. These will normally be the government, investors, civil society, international organisations and communities or the public in general. Barton attempts a distinction between the two areas thus:

Energy and natural resources projects have some particular characteristics that are not shared by general environmental regulation. One is the legal framework for the management of public lands and publicly-owned natural resources. Decisions are made about matters such as the allocation of rights and the determination of royalties, but usually without public participation. Another characteristic is the need to accommodate landowners and local communities in various ways; compensation payable to land owners directly affected by the development, arrangements to avoid damage to the interests of indigenous peoples, and agreements with respect to social impact.²¹¹

Barton cites lack of participation in allocation of rights over natural resources and determination of royalties as a distinguishing feature from environmental regulation. Experiences between mining companies and host communities in South Africa confirm that mining companies can legally obtain mining and prospecting rights with little or no involvement of host communities.²¹² The Mineral and Petroleum Resources Act (MPRDA) requires mining companies in South Africa to carry out community consultation on proposed mining or prospection.²¹³ However, they only report back to the Department of Minerals and Energy (DME) without procedures of verification of community consultation.²¹⁴

²¹¹ Barton (n 33 above) 79-80.

²¹² Actionaid (n 22 above).

²¹³ Section 22(4)(b) of the MPRDA Act 58 of 2003.

²¹⁴ Section 22 of the MPRDA (n 213 above) applicants for mining rights are required to consult affected parties within 180 days of notice to apply for a mining right. However, there is no requirement for independent verification of consultation.

Lack of participation in rights allocation and royalty determination, as Barton identifies above, is a failure to adhere to human rights standards rather than a distinguishing feature.²¹⁵ Peoples or communities or communities, have rights over natural resources under international law and should participate in decisions over use of such natural resources.²¹⁶ There is a clear case for effective consultation with communities where such communities own the surface soil without the minerals beneath or both.²¹⁷ Special interests such as indigenous peoples rights remain relevant especially in participation of benefit sharing.²¹⁸

Participation in natural resource development and environmental regulation targets same players but different goals. Natural resources development mainly involves the carrying out of economic and commercial activities by investors. Environmental regulation on the other hand is oriented towards sustainable use of the environment use only without any economic benefits.²¹⁹

3.7.2 Incorporating the right to direct economic benefit in participation

Economic benefit as a component of participation has subtly featured in the development of the concept of participation.²²⁰ This may be due to the fact that participation was conceived in the environmental regulation; where there are little or no issues on benefit sharing.²²¹ Whereas the issue of economic benefit may not have traditionally featured in participation, it appears that in some aspects it may even form

²¹⁵ Host communities who fall under ethnic or other minorities are protected by provisions such as section 27 of ICCPR that has been interpreted to mean a right to be consulted on issues affecting them. See UN Human Rights Committee General Comment No 23.

²¹⁶ See earlier discussions in this Chapter on peoples' rights over natural resources; see also Zongwe (n 26 above) 4-5, 48-62.

²¹⁷ Anglo Platinum (n 38 above).

²¹⁸ Article 15 (2)

²¹⁹ However, there are many other commercial activities that take place with the environmental arena, an ideal example here is emissions trading, see Barton (n 33 above) 77.

²²⁰ Barton (n 33 above); Pring & Noe (n 33 above).

²²¹ n 211 above.

the central issue between host communities, investors and the government. An appropriate example in this regard is ownership of the land and the natural resources by the host community. This can be generally derived to mean that the nature of occupation of land by host communities determines the level of participation and engagement with investors and even the benefit.²²² The situation varies slightly where the mining company or investor owns the natural resources while communities own the soil.²²³

Where communities own the land and the natural resources on the land, there is a clear case for a claim for a stake in the profits from the mining of those resources. In this case, host communities can become co-investors with mining companies where the former provides raw materials while the latter provides monetary capital, technology and skills to mine the resources. In such a case host communities negotiate on benefit sharing from the proceeds. An ideal example in this regard is the Royal Bafokeng Nation in the North West Province of South Africa and the Richtersveld Community in South Africa.²²⁴ In Limpopo area of South Africa, Anglo-Platinum Company owned the minerals while host communities the top soil.²²⁵ Despite the different scenarios of ownership of resources, mining of natural resources affects host communities in different ways and therefore they need to participate in the process. Effective participation of communities ensures reduced conflict with investors and also meaningful benefits from natural resource exploitation.²²⁶

While the concept of participation has taken many forms, it has benefited from a great deal from innovation the process of its development.²²⁷ There is no universal agreement as to the definition and content of the process of participation.²²⁸ It can thus be concluded that inclusion of the factor of direct economic benefit as a part of the

²²² Anglo Platinum (n 38 above) 8.

²²³ As above.

²²⁴ Royal Bafokeng Nation (n 177 above); *The Richtersveld Community Case* (n 168 above).

²²⁵ Anglo Platinum (n 38 above) 8.

²²⁶ Zongwe (n 26 above)

²²⁷ Pring & Noe (n 33 above) 29.

²²⁸ As above.

processes faces no conceptual challenges, especially in the area of natural resources development. States need to guarantee 'direct economic participation' of host communities in natural resource exploitation as part of equitable development.

Economic benefit in participation is an effective safeguard of rights over natural resources. Actual benefit from natural resources is evidence of ownership and control of such natural resources. Therefore a process of participation that ends in sharing of actual benefits from natural resource exploitation is in fulfilment of international human rights standards. While referring to the case of indigenous peoples, Schrijver warns that:

The word 'participate' considerably diminishes the value of safeguarding the indigenous peoples' rights to their natural resources, even in cases where the peoples concerned enjoy ownership and possession of the lands and their natural resources.²²⁹

Article 15 (2) of ILO Convention No. 169 ²³⁰ says that as regards natural resource exploitation, indigenous peoples should '...wherever possible participate in the benefits of such activities.' This is an ideal illustration of a requirement for direct economic benefit in the process of natural resource exploitation.

3.8 Conclusion

Economic self-determination, sovereignty over natural resources and the right to development all, in varying levels, support the right to direct economic development. Ownership of natural resources under different systems including indigenous or traditional systems allow direct economic benefit from natural resources. However, the role of the state remains that of ensuring realisation of equitable economic development from natural resource exploitation.

²²⁹ Schrijver (n 53 above) 316.

²³⁰ ILO Convention 169 (n 31 above).

Despite the centrality of the state in regulation of natural resources, and in the origin of concepts such as sovereignty and economic self-determination, there is need for a people-centred approach to natural resource exploitation. Participation is key in people-centred approach to natural resources. Peoples have a right to determine the manner in which natural resources are used and also to benefit from the use of such natural resources. Host communities should be able to participate in the entire process of natural resource development until enjoyment of direct benefits from natural resource exploitation.

CHAPTER FOUR

TOWARDS PROTECTION OF THE RIGHT TO ECONOMIC BENEFIT FOR HOST COMMUNITIES

4.1 Introduction

The national level remains the *situs* of implementation of international law and human rights standards and dovetails to the state-centric nature of human rights. Enforcement of human rights requires attuning of national legislation, policy, administrative action to international standard.²³¹ Absence of such measures points, not to failure of international law but failure of states to implement it.²³² Having discussed the norms and human rights concepts that favour direct economic benefit and incorporation of the same in participation, this chapter continues with discussion on better protection of economic benefit of host communities in Africa. The Chapter highlights situations and developments in economic benefit from natural resources from mainly South Africa and Nigeria. The study also makes reference to other useful developments in the area of direct economic benefit to host communities from other jurisdictions in Africa and beyond.

4.2. National practice on public participation and natural resource exploitation

Despite the common international and regional human rights standards, there is a varying level of domestication of the same standards. The nature and level of protection of public participation varies from one country to another. In South Africa for instance, the right to public participation is justiceable²³³ and supported by constitutional

²³¹ Aguirre (n 51 above) 224.

²³² As above.

²³³ See the cases, *Doctors for Life International v Speaker of the National Assembly and 2006* (12) BCLR 1399 (CC) and *Matatiele Municipality and Others v President of the Republic of South Africa and Others* 2007(1) BCLR 47(CC).

provisions.²³⁴ However, there are varying levels of requirements for public participation in different areas in South Africa.²³⁵ It is in doubt whether an action can be sustained in court against an investor or the minister for lack of adequate consultation before grant of a mining right. In Nigeria, environmental legislation²³⁶ and the 1999 constitution form the broad basis for public participation.²³⁷ Whereas legislation is passed mainly to address the local context, useful experience such as a justiceable right to participation can lead to better natural resource development.

There is a glaringly evident disconnection between participation and economic benefits in natural resource development. There is no law that expressly provides for direct economic benefit for communities in Nigeria and South Africa. However, there are salient examples where this has happened in both countries, this is considered in detail in the next section below. There is no case that illustrates whether communities can rely on public participation process in order to claim direct economic benefit. However, it appears that such an action will need stronger components such as recognition of communal land rights and ownership of the land or resources.²³⁸

4.2.1 Direct economic benefit and host communities: issues and lessons

Direct economic benefit in form of money or other economic gain from natural resource exploitation is not a new phenomenon. The 'Alaska Permanent Fund' that was

²³⁴ Section 152(e).

²³⁵ The MPRDA (n 213 above) requires superficial participation of affected persons before a mining right is granted by the minister, see section 22 thereof.

²³⁶ Omorogbe (n 1 above) 564 The Environmental Impact Assessment Decree (EIA Act) of 1992 was the first law that provided for the right to participation in decision-making processes relevant to development.

²³⁷ Omorogbe (n 1 above) 570.

²³⁸ See *The Richtersveld Case* (n 168 above).

established in 1976, although established in a different framework of a public fund,²³⁹ provides direct dividends to Alaskans from revenue earned from oil mining in the Prudhoe Bay of Alaska²⁴⁰ and has been hailed for uplifting the economic situation of rural Alaskans.²⁴¹ A similar fund has also been proposed for Nigeria.²⁴²

Affirmative action as a ground for economic benefit by host communities, however, seems the most common factor in natural resource exploitation in resource-rich states. Laissez-Fair²⁴³ captures the early entrenchment of apartheid policy in South Africa thus:

The earliest gold-mining claims regulations, adopted in 1872 under the first gold law of Transvaal, stated that 'No Kaffir or aboriginal inhabitant of South Africa shall be deemed eligible to hold or represent any area or areas, claim or claims, share or shares, on these goldfields'²⁴⁴ This type of restriction, in varying forms, has been successively embodied in gold-mining legislation until the present day.²⁴⁵

The apartheid policy led to a number of measures by the post-apartheid South Africa taken to eliminate the apartheid structures in the society. The Constitution²⁴⁶ and many a legislation such as the Mineral and Petroleum Resources Development Act (MPRDA) were enacted within a broader constitutional and political framework that seeks to

²³⁹ For a discussion of public funds in natural resource management, see Duruigbo (n 150 above) 68-85.

²⁴⁰ Duruigbo (n 150 above) 68-70.

²⁴¹ See 'Alaska Permanent Fund Corporation' available at <<http://www.apfc.org/home/Content/dividend/dividend.cfm>> (accessed 25 October 2009).

²⁴² K Boudreaux (2004) *From Curse to Cure* in Duruigbo 2 (n 150 above) 70.

²⁴³ The writer, who was then an attorney and notary of the then Supreme Court of South Africa, declined to be named for professional reasons.

²⁴⁴ General clause of the 1872 diggers' regulations for the Marabastad goldfields, published in *Straatscourant* 447, 12 November 1872 in Laissez-Fair 'Mining in South Africa and Private Enterprise 3(1987) *South Africa Journal of Human Rights* 169.

²⁴⁵ Laissez-Fair (n 244 above) 169-70.

²⁴⁶ Section 9 (2) states, 'Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'.

achieve equality and equitable economic development.²⁴⁷ The BBE Act is the main affirmative action law for economic empowerment for the black majority. In natural resource development, the Act ensures that mining companies contribute to socio-economic development of mining areas and also 'empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills.'²⁴⁸ It is under this framework that some host communities in South Africa have been able to engage in benefit sharing arrangements with investors in mining.²⁴⁹ It also puts in place measures for economic benefit and control of natural resources by the black.

An example of such direct participation in ownership and control of investments between investors and host communities is that of the Royal Bafokeng Nation of the North West Province.²⁵⁰ A community of about 300 000 people, they managed to secure 26% shareholding in Implat Holdings, a Platinum mining company under the BEE Act framework and thus becoming the largest shareholders in the mining company.²⁵¹ The tribe receives sustainable income in the form of royalties from the platinum mining that is then used for social and economic projects in the community.²⁵² Whereas the profits from mining of platinum are used exclusively for development of the community, other

²⁴⁷ Section 12 of the MPRDA (213 above) for instance allows the Minister of Trade and Industry to facilitate assistance to historically disadvantaged persons in prospecting and mining operations carried out under the Act.

²⁴⁸ BEE Act (n 22 above) section 2 paragraph (f).

²⁴⁹ The BBE calls for ownership and control of investment entities with black entrepreneurs in the mining industry.

²⁵⁰ Meldrum, A 'Platinum deal sees South Africa's richest tribe get richer' *The Guardian* 16 December 2005 available at: <<http://guardian.co.uk/world/2005/dec/16/southafrica.andrewmeldrum>> (accessed on 27 September 2009); Dixon, R 'South Africa tribe has rich aspirations' *Los Angeles Times* 6 April 2009 available at <<http://articles.latimes.com/2009/apr/06/world/fg-rich-tribe6>> (accessed on 28 September 2009); Bafokeng (n 177 above).

²⁵¹ Royal Bafokeng Nation 'Submissions by the Royal Bafokeng Nation in Respect of Communal Land Rights Bill, 2003 available at <<http://www.pmg.org.za/docs/2003/appendices/031114bafokeng2.htm>> (accessed 17 October 2009).

²⁵² The Bafokeng tribe now runs an average budget of 75 million USD per annum, see Royal Bafokeng Holdings 'Annual Review 2008' available at <http://www.bafokengholdings.com/a/files/RBH_annual_review_2008.pdf> (accessed 17 October 2009).

income that accrues to the nearby Rustenburg municipality, under whose jurisdiction the Royal Bafokeng Nation falls, takes care of general development.²⁵³

The situation is not the same for all host communities in South Africa, there are host communities that have faced human rights abuses by mining companies and the government.²⁵⁴ Varied response to community rights over natural resources in South Africa may be attributed to issues such as restoration of land rights under Restitution of Land Rights Act,²⁵⁵ the degree of agitation for community rights by community members and other supporters²⁵⁶ and the nature of land and resource ownership by communities.²⁵⁷ However, it shows lack of a coherent national policy or law for community economic from natural resource exploitation.

Affirmative action in natural resource development seeks to remedy past injustices in the use and benefit from natural resources. Although the BEE Act framework has enhanced benefits in some communities in South Africa, it conflicted with some commitments by the South African government in BIAs.²⁵⁸ Thus, after the passing of the Act, the South African government was threatened²⁵⁹ with legal action and in other cases sued by other private foreign investors for the alleged breach the earlier BIAs. The case of *Piero Foresti, Laura De Carli et al v Republic of South Africa*²⁶⁰ was the first to be instituted

²⁵³ Dixon (n 250 above).

²⁵⁴ SAHRC (n 23 above); Actionaid (n 22 above).

²⁵⁵ Act 22 of 1994; TT Gwanya 'Presentation at the Budget Hearings for Portfolio Committee on Agriculture and Land Affairs' Commission on Restitution of Land Rights 3 June 2004 available at <www.pmg.org.za/files/docs/090825crdp.ppt> (accessed 10 October 2009). See also Wachira (n 1 above) 176-230.

²⁵⁶ M Olivier 'Wild Coast Communities lodge HRC Complaints against Mine Plans (South Africa) Mining Weekly News 13 April 2007 available at <<http://www.business-humanrights.org/Categories/Individualcompanies/M/MineralCommoditiesMRC>> (accessed 18 October 2009).

²⁵⁷ Gwanya (n 255 above).

²⁵⁸ n 117 above.

²⁵⁹ Schneiderman (n 91 above) 156 explains that four foreign mining companies expressed intention to sue for what they termed as expropriation of their mining rights; see also P Khulu 'Foreign Miners Warn They May Sue Government' *Business Day* 11 January 2004, in Schneiderman (n 91 above) 156.

²⁶⁰ ICSID ARB (AF)/07/1.

against the government of South Africa. Proceedings were suspended by consent of all parties on March 29 2009; three additional have joined the case at the ICSID.²⁶¹

This case is an ideal illustration of the conflict between human rights and investment discussed earlier.²⁶² The South African government now incorporates its human rights responsibilities in later BITs with other states.²⁶³ Due to the confidential nature of investment disputes, there is scarce information on what the South African government pleaded in defence *Piero Foresti* case. Hirsch argues for public access to such cases due to the importance and nature of implication of the decision to the public.²⁶⁴ Analysts note that the government of South Africa was likely to plead human rights obligations such as affirmative action in the ICCPR²⁶⁵ and the ICESCR.²⁶⁶ The ICESCR further gives states the opportunity the limit economic, social and cultural rights of non-nationals.²⁶⁷ However, states with fewer natural resources than South Africa will have difficulty in following the same course as South Africa.²⁶⁸

The affirmative action agenda under the BEE Act has been criticised for not empowering the rural poor communities as was intended.²⁶⁹ With regard to natural resource

²⁶¹ Visit <<http://icsid.worldbank.org/ICSID/FrontServlet>> (accessed 26 September 2009).

²⁶² See discussion in Chapter 2 above.

²⁶³ See for instance, Agreement between the Czech Republic and the Republic of South Africa for the Promotion and Reciprocal Protection of Investment, 14 December 1998, available at <www.unctad.org/sections/dite/iial/docs/bits/czech_southafrica.pdf> (accessed 26 September 2009).

²⁶⁴ Hirsch (n 104 above).

²⁶⁵ n 29 above.

²⁶⁶ South Africa has only signed but not ratified the ICESCR, however, the constitution recognises and protects economic, social and economic rights. Further, judicial decisions in South Africa have been heavily influenced by the approach by the practice of economic, social and cultural rights under the ICESCR.

²⁶⁷ Article 2 (3) of the Covenant states that 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.' See also Aguirre (n 51 above) 168-169.

²⁶⁸ Schneiderman (n 91 above) 150-57 observes that South Africa faced the risk of capital flight due to the risks involved in the BEE framework, see also Aguirre (n 51 above) 170.

²⁶⁹ Cronin Jeremy 'BEE-llionaires and Wanna-BEEs' *Mail & Guardian* 20 October 2004; Sapa 'Zuma says BEE not "broad-based enough"' *Mail & Guardian* 11 March 2009 available at

exploitation, the black elite has benefited to the exclusion of rural host communities.²⁷⁰ In Nigeria the government also entered into affirmative action in the Niger Delta²⁷¹ through the derivation principle²⁷² and creation of the NDDC to specifically look into Niger Delta development. However, the functioning of the NDDC and legitimacy of its operations to host communities has also been called into question. Yusuf notes:

Community stakeholder representation is crucial to allow the representatives of the communities to prioritise their needs and allocate resources in the most efficient manner. In all events, it engenders trust for the organisation among the communities it is meant to serve. The present situation, where government appointees, though from various ethnic, corporate and other interest groups in the country constitute the board of the NNDC and dictate its priorities, violates the rights of the communities to adequate representation.²⁷³

In passing the BBE Act and creating the NDDC, the respective governments responded to legitimate concerns affecting host communities but failed to take proper measures to ensure effectiveness. The effectiveness of such measures should be measured on the actual impact of such measures on the collective community members and the perceptions of the local communities on such measures. Direct participation of host communities in decisions and enjoyment of benefits will fulfil the process.

4.2.2 Fulfilment of Economic Social and Cultural Rights of host communities

The realisation of economic benefit and development of host communities in natural resource exploitation is implicit in the state's responsibility to respect, promote and fulfil

<<http://www.mg.co.za/article/2009-03-11-zuma-says-bee-not-broadbased-enough>> (accessed 26 September 2009)

²⁷⁰ Sapa (n 269 above); SAHRC (n 23 above).

²⁷¹ Yusuf (n 24 above) remarks that, 'All individuals resident in Nigeria, and not just the Niger Delta peoples, are entitled to the enjoyment of economic, social and cultural rights. ... But no other part of Nigeria suffers from the same problems as those of the Niger Delta that required the creation of the NDDC.'

²⁷² n 177 above.

²⁷³ Yusuf (n 24 above) 88.

economic, social and cultural rights. This was well illustrated in by the African Commission in the *SERAC Case*²⁷⁴ with regard to host communities in the Niger Delta. Thus, approaches to progressive realisation of Economic, Social and Cultural Rights (ESCR) such as the minimum core approach,²⁷⁵ the equality approach,²⁷⁶ and reasonableness approach²⁷⁷ all remain a relevant consideration in regard to economic development to host communities.

The minimum core approach emerged from the UN Committee on Economic Social and Cultural Rights which has held that ESCR 'contain a minimum core obligation that must be fulfilled by state parties.²⁷⁸ Failure to perform the obligation is a prima facie breach of the ICESCR. The reasonableness approach on the other hand requires states to take all reasonable steps and take all relevant factors into account in the fulfilment of ESCR.²⁷⁹ These include issues such as the dignity of persons, their immediate and long term needs and all other factors that must be weighed. The equality approach implies that state programmes for fulfilment of ESCR should target peoples equally and not exclude a significant part of the population.²⁸⁰

In natural resource exploitation and host communities, the state will consider available resources and the needs of the host communities and the general population. The three approaches discussed above may in appropriate circumstances justify direct economic benefit in fulfilment of ESCR. However, only South Africa is among the few countries with express ESCR in its constitution hence making them justiceable. Non-recognition of

²⁷⁴ n 1 above.

²⁷⁵ RE Kapindu 'From the global to the local: The role of international law in the enforcement of socio-economic rights in South Africa' (2009) 42-49.

²⁷⁶ D Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (2007) 138-165.

²⁷⁷ Bilchitz (n 276 above) 165-170.

²⁷⁸ General Comment No 3 Para 10 in Bilchitz (n 276 above) 140.

²⁷⁹ Bilchitz (n 276 above) 152-165.

²⁸⁰ Bilchitz (n 276 above) 166.

ESCR in many constitutions of many countries in Africa becomes a challenge to realisation and enforcement.²⁸¹

4.2 Corporate social investment and the ethical-moral approach in benefit sharing: on the wrong premise?

Multinational Corporations (MNCs) are the subject of regulation in natural resource exploitation. MNCs form the subject of this study as they are the ultimate partners in the sharing of economic gains from natural resource exploitation with host communities. In an ideal situation that guarantees direct economic benefit, MNCs may be required to restructure ownership of equity to accommodate host communities in profit sharing proportionate to their equity.²⁸²

Realisation of the right to direct economic benefit by host communities is also premised on willingness of MNCs to enter into arrangements that will facilitate the realisation. There are efforts being made at different levels to ensure accountability of MNCs to human rights in their operations. The UN 'Norms on the Responsibilities of Transnational Corporations and Business Enterprises with Regard to Human Rights'²⁸³ The main emphasis of the UN Draft norms is due diligence by MNCs to ensure that they do not breach human rights.²⁸⁴ The Norms are similar in nature to initiatives such as the UN Global Compact.²⁸⁵

²⁸¹ F Viljoen *International Human Rights Law in Africa* (2007) 125-126.

²⁸² An example of this arrangement is the Royal Bafokeng Nation that holds 26% shares in Implat Holdings, a South African mining company, thus becoming the largest shareholders.

²⁸³ E/CN.4/Sub.2/ 2003/12/Rev.2 Drafted by a working group under the leadership of the UN Secretary-General special representative on Business and Human Rights John Ruggie, the norms were adopted by the UN Sub-Commission on Protection of Human Rights, a sub-commission of the Commission for Human Rights.

²⁸⁴ Aguirre (n 51 above) 188.

²⁸⁵ Initiated by the former UN Secretary-General Koffi Annan, the initiative is meant to promote socially responsible operations in accordance with 10 principles visit <<http://www.unglobalcompact.org>> (accessed 18 October 2009).

The state should ensure that MNCs respect the rights of host communities in natural resource exploitation. Corporate Social Investment (CSI) and Corporate Social Responsibility (CSR) may contribute to development of host communities²⁸⁶ but such mechanisms are voluntary and profit oriented.²⁸⁷ To that extent they fall short of human rights standards and can never be a substitute to performance of human rights obligations.²⁸⁸ The right to direct economic benefit is based on international human rights standards and requires states to regulate activities of MNCs to ensure that the same is fulfilled.²⁸⁹ The approach in CSI and CSR activities makes host communities recipients of charitable goods from MNCs as opposed to being legal rights holders in natural resource exploitation.

4.3 Conclusion: towards direct economic participation of host communities

It is possible to cater for interests of local communities while balancing with needs of the general population. There are many reasons that necessitate such treatment ranging from historical exclusion, ownership and the even the nature of legal system of the state that is home to host communities. Host communities mainly emerge as weak parties but a strong regulatory role of a state enhances claims of host communities to their rights over natural resources. The experience of the Royal Bafokeng Nation discussed above and the *Richtersveld* communities in South Africa demonstrate the need for strong national institutions that will defend and lay the basis for enjoyment of benefits for host communities.

The national level remains the most important bridge between international human rights standards and the actual impact of such standards on host communities and the general population.

²⁸⁶ Anglo Platinum (n 38 above)

²⁸⁷ Aguirre (n 51 above) 183.

²⁸⁸ J Gelfand 'The Lack of Enforcement in the United Nations Draft Norms: Benefit or Disadvantage?' in De Schutter, O (ed) *Transnational Corporations and Human Rights* (2006) 314.

²⁸⁹ Aguirre (n 51 above) 187.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Natural resource exploitation in many countries in Africa has been a curse rather than a blessing because of poverty, conflict and underdevelopment in many resource-rich states. The impact of these negative aspects has been most heavily felt by communities in mining and natural resource areas. Economic benefit from natural resources by those host communities has also been varied by a variety of broad and immediate factors. These range from the international economic and political factors to issues such as nature of ownership and affinity to the natural resources. This dissertation sought to make a legal argument for direct economic benefit for host communities in the process of natural resource exploitation, and incorporation of the same in the process of community participation. In doing so, the research also analysed human rights norms and concepts that support direct economic benefit and participation in natural resource exploitation. The following conclusion and recommendations ensue from the discussion.

5.2 Conclusion

Turning natural resource exploitation into meaningful and equitable economic development and benefit to peoples is a challenge that calls for cooperation at many different levels of natural resource development. It calls for an effective regulation of investment and development activities in the national system. This implies regulation that is guided by principles of equitable national development from natural resources. In the context of host communities, such equitable development will be guided by the needs of the host communities and those of the general population. In the appropriate

circumstances, it calls for direct economic gains of the host communities from natural resource exploitation of the resources within their areas.

There is need for international cooperation in order to ensure that states realise meaningful economic development from natural resource exploitation.²⁹⁰ Factors such as economic globalisation, the international economic and trade regime all influence economic benefit from natural resource exploitation. This therefore calls for regulation of investment and other economic activities internationally and at the domestic level. Developing states are not able to effectively perform this role without cooperation from the international community.²⁹¹ Both the developing states and the international community may have demonstrated unwillingness or inability to carry out this function, but human rights obligations still beckon them. Effective regulation of investment and economic activities in natural resource exploitation will lead to better respect of the rights of host communities and the general population within a particular state.

Public or community participation in natural resource development is a fairly recent concept. It continues to evolve and benefit from innovation and adapting to circumstances that surround natural resource development. This study argues for integration of economic benefit in the process of community participation in natural resource development by host communities. Incorporation of economic benefit into participation will ensure that host communities enter into an agreement on how they will participate in the process of natural resource exploitation until the sharing of the actual benefits. The equitable sharing of economic benefits between host communities, investors and the general population indicates fulfilment of human rights in natural resource development.

²⁹⁰ n 51 above.

²⁹¹ As above.

5.3 Recommendations

Whereas the context and level of natural resource exploitation and development varies in Africa, some common challenges and issues need a common approach. One of such issues is that of the plight of host communities in mining areas or natural resource areas. This study has demonstrated that host communities in many places in Africa have borne the direct negative impact of natural resource exploitation. African states, especially those that are rich with natural resources need to evaluate the effect of exploitation of such resources on host communities. Host communities, as part of the citizenry of a particular state also deserve to pursue their own economic, social and cultural development from natural resource exploitation. However, states have a further and more important duty of ensuring equitable national development from natural resources. Therefore any means adopted for economic development of host communities have to be in line with the goals of equitable national development.

African states need to take the first step and demonstrate commitment and consistent willingness to regulate natural resource development in order to achieve economic development. In this way, African states will send a convincing signal to the international community for the much needed cooperation in regulation of investment and economic activities over natural resources. Regulation of economic activities relating to natural resource exploitation will therefore be lead by the need to achieve equitable economic development. This will be evident in effective law and policy on the management of natural resources and economic development.

The regional and international levels remain pertinent in terms of standard setting and enhancing accountability through several mechanisms.²⁹² In natural resource exploitation and development, there is need for a firm and real commitment by states to standards that take into account equitable national development from natural resources.

²⁹²

These include state reporting, communications, and international litigation in regional courts.

There are many basic human rights instruments at the regional and international level that can be relied on basic human rights standards in natural resource development. However, the situation of host communities and the general population in many states calls for effective functioning of such bodies. African states need to collectively and effectively approach challenges of natural resource development in the continent.

Host communities in the area of natural resource exploitation in Africa are located in rural and mostly poor areas in Africa. In most cases, the only evidence of development in such areas is the presence of MNCs mining or prospecting for natural resources. The government needs to a policy and legislation that targets development in such areas. The Local Government or decentralised government will be an effective entry point of states into development of host communities. The government, local government and host communities should define the mandate and duty of each party in ensuring equitable economic gain from natural resource exploitation.

Lack of meaningful economic benefit from natural resource exploitation in any particular state raises legitimate human rights concerns. There is need to allow the constructive participation of all parties in order to ensure that there is maximum benefit from such resources to all peoples. Therefore, states, host communities, civil society organisations, the international and regional communities should put energies and capacities together to ensure that natural resources contribute to development. The positive role of each player can not be ignored in the process if the same is to have a meaningful and sustainable outcome.

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