**General Comment No. 26 (2021) on**

**Land and economic, social and cultural rights:**

**Input highlighting the context of land rights in Southern Africa**

**Submission by**

**Zimbabwe Lawyers for Human Rights & The Southern Africa Litigation Centre**

**Zimbabwe Lawyers for Human Rights (ZLHR)** is a not for profit law-based human rights organisation, established in 1996, whose core objective is to foster a culture of human rights, equality and respect for the rule of law in Zimbabwe. ZLHR’s secretariat and member lawyers provide legal defence support to human rights defenders, and conduct strategic impact litigation, training, research and advocacy, in all areas of human rights law.

**The Southern Africa Litigation Centre (SALC)** is a regional non-governmental organisation which was established in 2005. SALC promotes and advances human rights and the rule of law in Southern Africa, primarily through strategic litigation support.

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1. Introduction

This submission highlights context-specific land rights issues in Southern Africa, of historical injustices, multiple-form land tenure systems, displacements, women’s land and property rights, and the need for sustainable use of natural resources, that ZLHR and SALC recommend be highlighted in General Comment No. 26.

# Past Injustices, Structural Inequalities, and Preventing Conflict

Paragraphs 3, 34, 35, 45, 47 and 48 of the Draft General Comment refer to reparations and transitional justice processes relating to land to some extent, but these could be further expanded upon in terms of established soft law principles.[[1]](#footnote-1) This aspect is critical to redress ongoing conflict and tensions in post-colonial countries in Sub-Saharan Africa, due to the legacy of unequal and racially discriminatory distribution of land and urban planning from the colonial and apartheid regimes. For example, the colonial regime in former Rhodesia, now Zimbabwe, evicted all indigenous people off their productive arable ancestral lands to ‘Native Reserves’, later known as ‘Tribal Trust Land’.[[2]](#footnote-2) Since independence in 1980, these areas have been regulated by the Communal Lands Act [Chapter 20:04].[[3]](#footnote-3) While the Act recognises customary law and communal ownership of these lands, in reality the lands are still owned by the state, and administered by the Rural District Councils in consultation with traditional leaders. The land users have very limited security of tenure rights, as discussed below. Post-independence, political elites have disproportionately benefited from the land reform processes while rural agrarian communities and former farm workers, who could have benefitted and used the land productively, have largely been excluded.

# Multiple-Form Land Tenure Systems

Due to the colonial history of segregating land into ‘European’ and ‘Native’ areas, and a desire to recognise pre-existing customary law land rights, post-colonial African states are now operating with multiple-form land tenure systems. In Zimbabwe, for example, there are four main systems of land tenure,[[4]](#footnote-4) which can be based on written policies and laws, unwritten customs and practices, or a mixture of both, so land rights are not always easy to determine.[[5]](#footnote-5) The systems are often conflicting, and several individuals or groups can hold different overlapping tenure claims to the same land.[[6]](#footnote-6) The Draft General Comment importantly recognises issues related to land tenure systems in paragraphs 1, 15, 19, 23 and 27. The Draft General Comment may wish to further address the specific problems arising in multiple-form land tenure systems, and call for equality and non-discrimination in the hierarchy of the systems.

For example, section 33 of Zambia’s Lands and Deeds Registry Act[[7]](#footnote-7) provides that: “A certificate of title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise…” This means that persons with private title and leasehold, with a certificate of title, are presumed to be the owner, and their rights supersede the rights of persons with pre-existing claims based on customary law interests. In Zimbabwe, communities occupying communal lands under the Communal Lands Act also have limited security of tenure. The state is the owner of the land and occupants do not have ownership rights. The President and the Minister of Local Government, Public Works and National Housing can set aside Communal land at any time.

Paragraph 42 of the Draft General Comment calls for ensuring that foreign investors do not deprive individuals of access to land or resources on which they depend for their livelihood. This can be expanded to condemn all unlawful transfers, sales and exploitation of communal lands without indigenous communities’ consent. The rights to ancestral land should be unconditionally held by its rightful owners. Botswana’s High Court affirmed this, finding a compulsory acquisition of the Ba-Ga-Malete chiefdom’s land to be unconstitutional.[[8]](#footnote-8)

# Land Use Changes and Evictions

Paragraphs 25 and 26 of the Draft General Comment acknowledge that forced evictions must be carried out in accordance with legislation that is compatible with the Covenant and principles of reasonableness and proportionality, and that effective legal remedies should be provided. However, despite these international law protections, arbitrary evictions are widespread in Southern Africa.

SALC worked with the Zambia Land Alliance to challenge the Chikankata District Council’s takeover of individual farms and grazing land of a community of 4429 people, without following the legal and constitutional procedures, rendering the community landless and homeless.[[9]](#footnote-9) In a recent Zimbabwean case, ZLHR and the Zimbabwe Environmental Law Association challenged Statutory Instruments setting aside 12,940 hectares of ancestral land in Chilonga, occupied by 13,840 members of the Hlengwe Shangaani ethnic group[[10]](#footnote-10), who now face eviction from their ancestral lands, without remedy or compensation.[[11]](#footnote-11) The General Comment should explicitly discuss the scope of the violations created by evictions. It can propose minimum safety standards to support persons who must leave their homes, and additional mechanisms to prevent unlawful evictions.

# Women’s Land and Property Rights

Paragraphs 16 and 17 of the Draft General Comment helpfully note that women are particularly vulnerable to intersectional discrimination in terms of land rights and that land is an important resource for women. The General Comment takes a gender-neutral approach to equality, noting in paragraph 16 that women should have land and property rights on an equal basis with men. However, the Comment should also note that an intersectional, gender-focused perspective is necessary to ensure substantive, and not merely formal, equality. The Comment can also acknowledge that women’s voices continue to be silenced when it comes to leadership and decision-making over land. For example, in a case supported by SALC, a woman was denied a chieftainship on the basis of her gender.[[12]](#footnote-12) The inputs of women and other vulnerable groups are necessary when developing laws and policies to ensure that those frameworks speak to their lived intersectional experiences.

Paragraph 16 briefly mentions marital property as an area of discrimination against women. This is an evolving issue which can be expanded upon in the Comment. The Botswana High Court has held that a customary law rule providing that only men may inherit the family home infringes the right to equality under the Constitution.[[13]](#footnote-13) Other similar groundbreaking recent cases in African courts include a decision in the Eswatini High Court in *Sacolo v Sacolo[[14]](#footnote-14)* and the Zimbabwe Supreme Court in *Chigwada v Chigwada[[15]](#footnote-15)*. The General Comment should acknowledge the harmful discriminatory effect of the marital power doctrine and other similar practices, and should encourage states to follow precedent nullifying them.

# Sustainable Use of Natural Resources

# 6.1 Mining and Extractive Industries

The African Commission Working Group on Extractive Industries, Environment and Human Rights Violations has noted that while extractive industries can contribute to socio-economic development, they also pose major risks to communities.[[16]](#footnote-16) Unsustainable and poorly regulated mining practices are increasingly threatening people’s health and livelihoods in Southern Africa. For example, the Kanyika Community in Malawi has suffered serious negative impacts of extensive mining and prospecting operations, including environmental degradation, loss of homes, water shortages and deterioration of cultural areas, and is attempting to recover damages.[[17]](#footnote-17)

The Draft General Comment does allude to these issues: paragraphs 32 and 56 call for a legal framework requiring business entities to exercise human rights due diligence and procedures to address the impact of business activities. However, the General Comment should explicitly address the significant issues posed by extractive industries and provide concrete mechanisms for justice. The Comment can reference instruments such as the UN Guiding Principles on Business and Human Rights, which discuss states’ obligations to mitigate business-related damage and to ensure that those affected have access to an effective remedy. The Report of the Special Rapporteur on the rights of indigenous people: Extractive industries and indigenous people[[18]](#footnote-18) also states in paragraph 89 that: “Companies should conduct due diligence to ensure that their actions will not violate or be complicit in violating indigenous people’s rights, identifying and assessing any actual or potential adverse human right impacts of the resource extraction project”. The General Comment should specifically address the requirement for due diligence, in accordance with international law principles.

The General Comment may also wish to address the hierarchy of laws relating to extractive industries. For example, the Zimbabwe Mines and Minerals Act of 1961 takes precedence over traditional and communal land laws, and other sectors.[[19]](#footnote-19) The precedence of the Act has resulted in authorisation of mining in National Parks, heritage sites and communal lands, infringing on local communities’ land rights, access to natural resources, and right to a healthy environment.[[20]](#footnote-20)

# 6.2 Wetlands

The critical issue of ecosystems and wetlands protection is mentioned in paragraph 7 of the General Comment, however the issue of regulating development on wetlands could be addressed in more detail. Corruption and poor governance in urban planning procedures has led to rampant development on wetlands in Southern Africa. ZLHR has extensively litigated to protect urban wetlands in Harare, to safeguard the city’s water source. Despite Zimbabwe’s ratification of international environmental treaties, and despite having strong environmental rights principles in its Environmental Management Act and Constitution, there are numerous loopholes allowing for development to continue.[[21]](#footnote-21) Critically, despite recognising various wetlands as Ramsar sites of international importance,[[22]](#footnote-22) the wetlands have not been gazetted and development can still easily be authorised under domestic law.

1. <https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Resources.aspx>;<https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx>; Transitional Justice and Economic, Social and Cultural Rights (HR/PUB/13/5)<https://www.ohchr.org/Documents/Publications/HR-PUB-13-05.pdf>; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx> [↑](#footnote-ref-1)
2. Palmer, Robin. (1977) Land and Racial Domination in Rhodesia. London: Heinemann [↑](#footnote-ref-2)
3. Moss T *‘Zimbabwe's Two Land Tragedies That Must be Resolved ’* Available at<https://www.cgdev.org/page/zimbabwes-two-land-tragedies-must-be-resolved> [↑](#footnote-ref-3)
4. Food and Agriculture Organization of the United Nations ‘Zimbabwe at a glance’. Available at<http://www.fao.org/zimbabwe/fao-in-zimbabwe/zimbabwe-at-a-glance/en/#:~:text=Zimbabwe%20is%20a%20landlocked%20southern,wildlife%2C%20and%20for%20urban%20settlements> [↑](#footnote-ref-4)
5. Pritchard J, Lesniewska F, Lomax T, Ozinga S and Morel C ‘*Securing community land and resource rights in Africa: A guide to legal reform and best practices’* 2013. Available at<https://www.fern.org/fileadmin/uploads/fern/Documents/Securing%20community%20land%20and%20resource%20rights%20in%20Africa.pdf> [↑](#footnote-ref-5)
6. ​​Pritchard J, Lesniewska F, Lomax T, Ozinga S and Morel C ‘*Securing community land and resource rights in Africa: A guide to legal reform and best practices’* 2013 Available at<https://www.fern.org/fileadmin/uploads/fern/Documents/Securing%20community%20land%20and%20resource%20rights%20in%20Africa.pdf> [↑](#footnote-ref-6)
7. Zambia Deeds and Registry Act a*s amended by S.I. No.* 65 *of* 1965” <https://www.parliament.gov.zm/sites/default/files/documents/acts/Lands%20and%20Deeds%20Registry%20Act.pdf> [↑](#footnote-ref-7)
8. https://www.southernafricalitigationcentre.org/2021/05/21/news-release-botswana-high-court-finds-compulsory-acquisition-of-a-tribes-freehold-land-unlawful/ [↑](#footnote-ref-8)
9. https://www.southernafricalitigationcentre.org/2017/05/29/zambia-challenging-forced-eviction-of-communities-living-on-customary-land/ [↑](#footnote-ref-9)
10. <https://bigsr.africa/bsr-at-the-mercy-of-the-state-plight-of-the-chilonga-community/> [↑](#footnote-ref-10)
11. https://www.humanrightspulse.com/mastercontentblog/danger-looms-the-chilonga-village-evictions-in-zimbabwe [↑](#footnote-ref-11)
12. https://www.southernafricalitigationcentre.org/2014/09/29/lesotho-womens-right-to-chieftainship/ [↑](#footnote-ref-12)
13. https://www.southernafricalitigationcentre.org/2013/09/03/botswana-womens-inheritance-rights-under-customary-law/ [↑](#footnote-ref-13)
14. *Sacolo v Sacolo* (1403/ 16) [2019] SZHC (166) [↑](#footnote-ref-14)
15. Chigwada v Chigwada & 2 Ors (SC 188-20, Civil Appeal No. SC 397/17) [2020] ZWSC 188 (28 December 2020) [↑](#footnote-ref-15)
16. https://www.achpr.org/specialmechanisms/detail?id=13 [↑](#footnote-ref-16)
17. https://www.southernafricalitigationcentre.org/2018/02/06/challenging-uncompensated-disturbances-damages-loss-and-suffering-due-extensive-mining-and-prospecting-operations/ [↑](#footnote-ref-17)
18. Report of the Special Rapporteur on the rights of indigenous people A/HRC/24/41 [↑](#footnote-ref-18)
19. Tumai Murombo, “Regulating Mining in South Africa and Zimbabwe: Communities, the Environment and Perpetual Exploitation,” *Law, Environment and Development Journal* 9, no. 1 (2013): 42, http://www.lead-journal.org/content/13031.pdf; Nqobizitha Dube et al., “Institutional exclusion and the tragedy of the commons: Artisanal mining in Matabeleland South Province, Zimbabwe,” *Extractive Industries and Society* 3, no. 4 (2016): 1088, https://doi.org/10.1016/j.exis.2016.08.006. [↑](#footnote-ref-19)
20. <https://allafrica.com/stories/202107250085.html>;<https://www.voanews.com/africa/zimbabwe-villagers-fight-chinese-coal-mining-project-near-wildlife-reserve> [↑](#footnote-ref-20)
21. Harare Wetlands Trust And Zimbabwe Lawyers For Human Rights Position Paper On Protection Of Harare’s Wetlands, ZLHR, February 2, 2021 <https://www.zlhr.org.zw/?p=2274> [↑](#footnote-ref-21)
22. In terms of the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat [↑](#footnote-ref-22)