Complex commons under threat of mining: the process for and content of community consent

– Henk Smith, Sayi Nindi and Gerrit Beckhaus[1]

Abstract

The Sekuruwe community of Mokopane district lost much of its land to an international mining company when the cabinet member responsible for communal trust land leased the valuable agricultural land with the approval of the distant leadership of the larger tribe, but without talking to or negotiating with the community itself. Three hundred families lost their best mealie fields and vegetable gardens, and their best communal grazing land, springs and dams. Their gravesites were moved, and they lost access to their sacred places to make place for a tailings dam of the world's richest platinum mine. They would never have agreed to sell or lease their land. The community lost most of its commons and is now challenging the minister's decision in the South African law courts. It is fighting to retain its soul.

The Protection of Land Rights Act[2] requires that communal land cannot be disposed without a decision in terms of its customary law and the consent of a general meeting of affected community members, and the South African constitution insists on the recognition of customary law. The minerals act (MPRDA)[3] supersedes the tenure laws and allows the state to authorise mining with minimal recognition of the rights of owners and occupiers. In the court litigation proceedings and other advocacy measures

[1] Henk is an attorney in the Cape Town office of the Legal Resources Centre, South Africa. Sayi is an attorney in the Constitutional Litigation Unit in Johannesburg, and Gerrit worked as in intern in Cape Town. www.lrc.org.za The paper submitted for presentation to the 2011 IASC-FES conference, Sustaining Commons, Sustaining our Future: Governance of the Commons, 10 January 2011, Hyderabad India.

[2] Interim Protection of Informal Land Rights Act 1996

[3] Minerals and Petroleum Resources Development Act 2002

adopted by the community leadership, like elsewhere, customary law is pitted against the powerful external driver in the form of national state law designed to further class interests.

The stories of the Sekuruwe and Endorois communities are replete, and the urgent project at hand is to guide and debate the rules and procedure of engagement between miners, developers and the owners/users of commons. The paper will explore

- the voices of owners, users and occupiers of commons,
- the boundaries of their authority,
- their living local or customary rules, procedures and institutions,
- equality of arms and bargaining strengths,
- ecological, sustainability and other interests.

All of these must be considered to give substance to the demand that any disposal of commons must be subject to the consent and veto power of its users, and the concomitant implications for governance of commons. A veto power gives legal political impetus and grounding for governance arrangements.

The paper will also cover developments in international soft law on the application of the FPIC principle to commons and community property.

Key words: mining, extractive industry, customary law, consent, local communities, indigenous communities.

1. Introduction: Customary law and consent under the South African Constitution

In South Africa, the land rights of communities to their communal land are recognised, so is their customary law. But their consent is not required for mining on their land. Why, and what is to be done?

The South African constitution emphasises the importance of land rights of communities, the restitution of rights dispossessed under a racially discriminatory legal regime and the recognition and promotion of communal land tenure rights. In addition, the legal system has now duly recognised customary law as a legitimate source of South African law in terms of the Constitution. It follows that any disposal of communal land should require community consent under customary law.

It therefore appears odd that there are regular reports that mining companies ride roughshod over community rights to communal land. One would have expected, in the spirit of the South African constitution, that community consent is required before any mining could happen. Also, one would have expected legal mechanisms to address current mining that commenced without consent and participation, and to provide for compensation or restitution where historically mining occurred without consent.

Instead, the first form of redress undertaken by the democratic government in relation to the legacy of inequity was to divorce mining rights from surface land occupation and ownership rights. Secondly, in its effort to achieve some shift in the skewed demographics relating to the ownership of the mines, a limited notion of black economic

empowerment through shareholding by black businessmen was introduced. This ignores the importance of deriving full restitution of past rights and taking up their rightful places as African communities holding a genuine stake in the mining industry.

Our argument goes like this: Firstly, under customary law, community consent is required before any land rights are disposed or third parties are allowed to use the communal land. Secondly, the content of such consent requirement must be found in customary law, with reference to the South African constitution, the African Charter and customary international law. Finally, the right to meaningful participation supports legitimate governance, the principles equity and justice, and contributes to the management, maintenance and sustenance of the local and global commons.

The story starts with our understanding of the content of customary law. For present purposes we pick up on what the South African Constitutional Court says in this regard in the cases of Richtersveld, Tongoane and the Commonwealth authorities on customary law and culture.

In the Richtersveld case in 2003, the Constitutional Court noted that 'the real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld community had a right of ownership in the subject land under indigenous law'.[4]

The Court based itself on a finding by the Supreme Court of Appeal according to which the mainstay of the community's culture was its customary land tenure laws and rules, and approved of the following description which emphasis community consent as the organising principle or engagement between the community customary system and third parties:

> *"One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples: A non-member using communal grazing without permission would be fined 'a couple of heads of cattle'..."*

The Constitutional Court then interprets the finding of the lower court in language reminiscent of the Commonwealth authorities on aboriginal title that similarly defer to the origin of the right and the regime in traditional laws, custom and culture.[5]

---

[4] South African Constitutional Court, *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Community and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), para. 62. The court's preference for the term "indigenous" law rather than "customary" law appears to be based on the use of "indigenous" in schedule 4 of the constitution.

[5] "The undisputed evidence in this case shows that at the time of annexation the Richtersveld people had enjoyed undisturbed and exclusive occupation of the subject land for a long period of time. The right was rooted in the traditional laws and custom of the Richtersveld people. The right inhered in the people inhabiting the Richtersveld as their common property, passing from generation to generation. The right was certain and reasonable. The inhabitants and strangers alike were aware of the right and respected and observed it. [28]

Our legal system has now duly recognised customary law as a legitimate source of South African law in terms of the Constitution.[6] The content of evolving customary law continues to be debated. In *Alexkor*, the Court states:

> "It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. … In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written."[7]

The wording is emphatic: living customary law is the only true customary law.[8]

In the Tongoane judgment the Constitutional Court points out in terms and specifically that the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.[9]

> The *"field ... not unoccupied"* with *"living indigenous law as it evolved over time"* includes all communal land in South Africa: *"Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other. When CLARA speaks of land rights, it speaks predominantly of rights in land which are defined by indigenous law in areas where traditional leaders have a significant role to play in land administration. This is more apparent when CLARA refers to "old order rights" which include rights derived from indigenous law. While the subject-matter of CLARA may well be land tenure, as it relates to communal land it is also legislation that necessarily affects indigenous law and traditional leadership."*[10]

In Richtersveld, the Court relied on the obvious principle stated as early as 1922 in Amudo Tijani[11]:

> *"The title, such as it is, may not be that of the individual, as in this country it nearly always is in some*

---

[6] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at paras 307-8; *Bhe and Others v Magistrate, Khayelitsha and Others*; *Shibi v Sithole and Others* 2005 (1) SA 580 (CC) at para 45; *Gumede v President of the Republic of South Africa and Others* 2009 (3) SA 152 (CC), at para 20; *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC) in para 52; *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 45; *Tongoane and Others v Minister for Agriculture and Land Affairs and Others*, CCT 100-09, judgment delivered on 11 May 2010; [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC).

[7] *Alexkor* at paras 52-3

[8] Notions of 'customary' or 'community' law are inextricably linked to notions of community and a degree of community autonomy. The constitutional development of customary law as an external influence should only be accepted if a 'fair' conversation can take place between the laws and not sheer dominance. Sindiso Mnisi: (Post)Colonial Culture and Its Influence on the South African Legal System: Exploring the Relationship between Living Customary Law and State Law, Master of Studies Thesis

[9] Tongoane at para 90 reads: "whether the community rules adopted under the provisions of CLARA replicate, record or codify indigenous law or represent an entirely new set of rules which replace the indigenous-law-based system of land administration, the result is the same: a substantial impact on the indigenous law that regulates communal land in a particular community." Also see para 79 (as well as para 89): "the field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land. This system also regulates the powers and functions of traditional leaders in relation to communal land. It is this system which CLARA will repeal, replace or amend."

[10] At paragraph 88. As background: in 2006 four rural communities challenged the constitutionality of the Communal Land Rights Act of 2004 which was not yet in operation and which dealt with the titling and conversion of old order land rights and titling of communal land. Controversially, the chiefs and tribal authorities from the Apartheid era were to become central in the proposed land administration system. The Court found that CLARA was unconstitutional as the legislative process did not involve sufficient public participation in its passing because it avoided the more demanding legislative route of section 76 of the Constitution. Section 76 gives the provinces and their constituents a bigger role to play than section 75, which was used instead. Also CLARA does not show adequate respect to the systems of living customary law that it finds on the ground and seeks to 'repeal or amend' by its terms.

[11] Viscount Haldane (100) (1921) 2 AC, at pp 403-404

form, but may be that of a community. Such a community may have the possessory title... To ascertain how ...this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading."

These few paragraphs have the following message:

a) Communal ownership is associated with customary law and culture.
b) Customary community law is founded on the premise that it is a system of law developed by the community through practice by the community. A thorough investigation on a case-by-case basis is necessary to ascertain its content.
c) What matters for a community seeking protection of its communal land is that it defines itself as adhering to customary law.
d) Any interference with communal rights requires permission and consent in terms of the local customary law.

Before we return to the subject of the content of customary law under international law and the principle of meaningful participation and free prior informed consent, we shall first explore the challenges facing communities affected by mining on their land, through:

a) the experience of the Sekuruwe community at the hands of South African state law,
b) developments in South African statute law and policy;
c) comparable experience of the Nyamgiri community

2. The story of Sekuruwe

The tiny Sekuruwe community was recently in the news. On 26 November 2010 the North Gauteng High Court postponed the urgent application by members of the Sekuruwe Community for an interdict to stop Anglo Platinum's PPL Mine near Mokopane in the Limpopo Province from dumping mine waste and continuing with the construction of a tailings dam on the farm Blinkwater.

The background to the matter is briefly as follows: Following an unsuccessful application in January 2009, by the community to interdict the Minister of Rural Development and Land Reform from leasing a large portion of the farm Blinkwater to Potgietersrust Platinums Limited (PPL), a wholly owned subsidiary of Anglo Platinum Ltd, the community filed a review application in the North Gauteng High Court to set aside the lease. That matter will be heard in early 2011.

Since the grant of the disputed lease, PPL has undertaken the construction of a tailings dam on Blinkwater where it intends to dump hundreds of millions of tons of mine waste over the next 70 years. In about July this year PPL began with the dumping of waste.

Blinkwater is occupied by the members of the Sekuruwe community. Sekuruwe is a village near Mokopane in the Limpopo province. Many community members depend for their subsistence on farming activities on Blinkwater. The establishment of the tailings dam on Blinkwater will rob the community of more than half of their land including all the arable land on Blinkwater. The land will be permanently sterilized for any purposes. This will cause hardship and hunger and will totally disrupt the community's traditional way of life.

The Minister awarded PPL the lease against the wishes of the community and without ever consulting with it. She relied on a "community land rights resolution" taken at a meeting convened by the mine and its proxy, the Sekuruwe section 21 company, where a small and unrepresentative minority ostensible agreed to lease the land to the mine. The proposed lease agreement itself was not made available to the community for consideration.

The lease provides for an annual rental of R194 169,16 per annum [USD 28 000] was based upon an agricultural valuation and was not the product of an arms length negotiation between the parties. The establishment of the tailings dam is part of a R4.5 billion expansion project that will produce 450 000 ounces of platinum per annum worth some R5.3 billion [USD 800M]. It is the largest open cast platinum mine in the world. The mine will produce some 70 million tons of waste rock and tailings per annum. The communities upon whose land the mine will occur, have no financial interest in the mine despite the fact that almost 15 000 villagers have been relocated to make way for mining operations and thousands more, including the members of the Sekuruwe community have been displaced from their farm lands.

Since the lease was granted, PPL has fenced off the land, constructed the larger part of the tailings dam, exhumed community members' graves, and paid some compensation to some farmers on a take it or leave it basis. The members of the Sekuruwe community have since been denied access to the fenced in land. The tailings dam which is built in close proximity to the Sekuruwe village has a footprint of approximately 280 ha, a capacity of one million tons of tailings per month, and will amount to a height of 60 meters. By now 1.8 million tons of tailings have been pumped into the dam. Community members are concerned about the loss of farming land, potential health hazards associated with the tailings dam and the pollution of ground water resources.

The mine maintains that it has been authorised to construct the dam and to dump mine waste on Blinkwater by virtue of an Amendment to its Environmental Management Plan (EMP) which was approved by the Department of Mineral Resources in 2003. The applicants maintain that the dam and the dumping of tailings on Blinkwater is illegal in that

- no Environmental Impact Assessment was carried out and no environmental authorisation was granted in terms of the national Environmental management Act (NEMA) and
- Blinkwater does not fall within the area in respect of which PPL has mining rights and as such the Minister of Mineral Resources has no jurisdiction to authorise mining activities that include the construction of tailings dams and the dumping of mine waste upon it.

In the application the applicants seek an order interdicting the dumping of waste on Blinkwater pending the grant of environmental authorisation in terms of NEMA alternatively the determination of the application for the review and setting aside of the lease.

The Sekuruwe community and their neighbours have also been in the news earlier this year. In the face of a wide-spread public outrage, Anglo Platinum was compelled to apologize to the community for removing their graves without due regard to traditional

custom or procedure and without the permission of the South African Heritage Resources Agency (SAHRA).

The relocations of some 10 000 residents of the neighbouring villages of Ga-Puka and Ga-Sekhaolel was criticized by the SAHRA. Subsequent investigations and reports by international NGO, Action Aid, and ERM, the consultants appointed by Anglo Platinum, to review the relocations, confirmed that the relocations were not carried out in conformity with internationally accepted norms and standards. The unrepresentative section 21 companies established by Anglo Platinum to represent the Sekuruwe and other communities have also come under fire. The Minister for Mineral Resources pledged that these structures would be replaced. The legal advisor to these companies, Advocate Seth Nthai SC, has since also been disbarred.

The outcome of the proceedings has significant implications for the Sekuruwe community and the mine. If the application is successful the mine will be obliged to undertake a fresh round of consultation with the Sekuruwe community and other interested parties to address their interests and concerns around the construction of the tailings dam on their land. On its part the PPL mine will be prevented from continuing to dump tailings on the land, which according to the mine will occasion it substantial economic loss.

More specifically, concerning the consultation process followed by the mining company failed to satisfy community demands and expectations: a community leader, Mr James Shiburi, had this to say:

> *"The mining company says that there were over 300 consultative meetings held between the Langa tribe and PPL involving communities, their relocation, housing, compensation and relocation of graves. I know about this because the story of our land and our lives and our communities is the story of disruption by the Mining company. The Human Rights Commission prepared a 100 page report on what happened in the Makopane area involving the Mining company and its impact on communities. Although the report of the Human Rights Commission acknowledges that community members were given opportunity to voice concerns and raise major issues, the report states serious concerns that issues were in some cases not properly addressed. In addition, the report records concerns that the consultation took place under the community perception that the mine expansions would take place and therefore that the relocation was inevitable, thus giving the community the impression that they had no agency to protest. Of importance is the fact that there was lack of sensitivity given to the location of graves of the community."*
>
> *"Furthermore, the report criticizes that the section 21 companies to which the Mining company effectively delegated responsibility for the consultation to. Therefore, the mere fact that hundreds of consultative meetings took place does not lead to a sufficient community involvement. The report specifically detects that the section 21 companies failed as a consultation vehicle (p. 84 of the SAHRA report)."*
>
> *"Regarding the section 21 companies the report further elaborates on the existing perception among the community that the section 21 companies are not democratically elected institutions. More reservations regarding the section 21 companies noted among various elements of the communities include the belief that the section 21 companies are in receipt of financial benefits from PPL, that the section 21 companies enjoy exclusive relationships with the Tribal Authority to the detriment of the wider community or that the legal representatives are not acting in the best interest of the community (of the SAHRA report)."*
>
> *"The report further points out the international best practice concerning resettlement action plans recommended by the IFC which were not followed (p. 87 of the SAHRA report). It criticizes that a representative community consultation committee has not been formulated at the start of the process allowing for representation from all major stakeholders but in the latter half of 2007. The report*

proposes the participation of all major stakeholders in the future process and recommends reference to international guidance thorough several IFC publications (p. 88 of the SAHRA report)."

"Moreover the SAHRC recommends that Anglo Platinum move beyond a compliance based approach in undertaking community consultation and achieving community consent and in future seek to achieve free, prior and informed consent as a key risk mitigation strategy (p. 90 of the SAHRA report)."

"The mining company commented on the report of the Human Rights Commission stating that it merely complied with the law and did not regard itself as bound by the provisions in international law or best practice in the industry in South Africa and elsewhere. Angloplats responded that "if the Commission is suggesting that the current legal framework insufficiently protects the rights of poor and vulnerable people, then we should be discussing changes in law, not just corporate practice".

The mining companies of South Africa rely on state law for authority not to consult communities, not to seek their consent and to avoid preparing accountable social and environmental impact assessments. In addition, even if they consult and seek consensual relationships with communities hosting their mines, such efforts are largely defensive, meaning that they are strategies to protect companies against legal and reputation risks. It is not based on the idea that if approached strategically and recognising the complex relationships affected and brought about by mining projects, responsible engagement with communities affected by mining creates value and forms part of a company's competitive advantage.

3. South African statute law on mining, communities and consultation

The Minerals and Petroleum Resources Development Act of 2002 (MPRDA), on the face of it, addresses transformation in the industry. The fourth object of the act says: *"substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources"*.[12]

The MPRDA allows mining companies to get prospecting and mining rights on community land without consultation and without inviting communities to help plan their participation in mining. The MPRDA requires minimal consultation by the company with the landowner on environmental issues, and access to the land only once the right has been awarded. The state does not take part in any of these exercises and merely accepts the reports of the applicant mining company.

Despite the tenets of the legislation, rural communities do not see any benefit from mining on their communal land, and communities complain that now – with the end of apartheid – that they can become owners of their own land, they cannot participate or share in the mining opportunities on their own land. There is widespread dissatisfaction among rural communities and accusations of that they are being ignored, discriminated against and exploited under the MPRDA. The 2008 SAHRC report said this:

- *"affected communities indicated an absence of either clear or adequate interaction between themselves and the abovementioned departments on a provincial and national level"*

[12] section 2(d) – note that the underlined words are contained in the 2008 MPRDA amendment act which is not yet in operation

- *"The SAHRC recommends that Anglo Platinum move beyond a compliance based approach in undertaking community consultation and achieving community consent and in future seek to achieve free, prior and informed consent as a key risk mitigation strategy."*

We have seen above that Mr Shiburi complained that the mining company responded that "if the Commission is suggesting that the current legal framework insufficiently protects the rights of poor and vulnerable people, then we should be discussing changes in law, not just corporate practice".

The absence of protection of community rights to consultation before prospecting and mining rights are granted to companies on communal land, communities find that mining commences on their land without any notice to them, and if they are told about it, it happens without community members playing any role or any meaningful role in negotiations which affect them and may involve their forced removal.

The ruling party in South Africa, the African National Congress, at its 2007 conference put out the challenge in a resolution:

> *"The use of natural resources of which the state is the custodian on behalf of the people, including our minerals, water, marine resources in a manner that promotes the sustainability and development of local communities and also realises the economic and social needs of the whole nation. In this regard, we must continue to strengthen the implementation of the Mineral and Petroleum Resources Development Act (MPRDA), which seeks to realise some of these goals."*

More recently, in August 2010 the relevant cabinet minister announced that the MPRDA would be reviewed.

The MPRDA amendment act 36 of 2008, which is not yet in operation, further dilutes the rights of communities to participate in negotiations or even discussions about what happens on their land. Landowners merely get 21 days notice before mining can start on their land (section 5). By contrast, the amendment act gives the minister the power to set conditions for community participation and "to promote the rights and interests of the community". But the amendment act does not require any consultation or negotiation between the department, the minister and the community.

Some mining companies do consult or communicate with communities or their traditional leaders or, in the case of communal land registered with the minister of rural development and land reform, with that minister. Some mining companies establish community section 21 companies and enter into supposed joint ventures about housing and relocation with such section 21 companies. It happens in a haphazard manner, is not strictly required under the MPRDA and, as a result is regarded as illegitimate and even corrupt.

Under apartheid and pre 1994 law, white land owners and tenants were advantaged in various ways. For example: they had the exclusive right to prospect on their land and a first option to mine or transact it to a nominee mining company, and owners received a 25% share of profits or royalty payable to the state.

It is ironic that disadvantaged communities on state owned land have forfeited (in terms of the operation of the MPRDA) even the minimal benefits obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands. Communities that were already disadvantaged and dispossessed under apartheid are further disadvantaged and dispossessed by legislation enacted under the

democratic government. This perpetuates their poverty and disempowerment and contradicts the rural development goals articulated by government.

Another law, the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) has important principles namely: a) no disposal or development that involves a deprivation of a land use right without a decision taking into account custom and usage, and b) any disposal must also involve a decisionmaking process including democratic meeting(s) called for the purpose, with opportunity to participate and state supervision. But IPILRA is trumped and overridden by the MPRDA. Mining can happen without community consent. And state regulation of the negotiation process and assistance in dispute resolution is not required.

Any process going forward should provide that the MPRDA and any new tenure reform law replacing the Communal Land Rights Act must ensure that communities whose land may be mined or otherwise affected or used has the bargaining position and power to negotiate meaningfully and participate actively. Also, guidelines for community decision-making processes with reference to living customary law need to be drawn up.

4. The story of Nyamgiri and Indian legislative developments compared – from a South Arican perspective: Vedanta's proposed mine over the Niyamgiri Hills[13]

In India, the mining company, Vedanta Aluminium Limited (Vedanta), which is part of the Vedanta group, a global corporation, obtained a Proposed Mining Lease (PML) over the Niyamgiri hills. Indian authorities gave Vedanta and the state-owned Orissa Mining Corporation permission to mine bauxite for the next 25 years in the Niyamgiri hills.[14] The Niyamgiri hills are a highly agricultural land, with, *inter alia,* dense forests, wildlife, various species, streams and a rich biodiversity.

These hills are also occupied by indigenous people known as the Dongaria Kondh and Kutia Kondh tribes. These two communities and their land are protected under the India constitution, national laws, and the UN Declaration on the Rights of Indigenous Peoples. The PML site is amongst the highest points in the hills and it is considered especially important as a sacred site by both the Kutia and the Dongaria Kondh. The proposed mining lease (PML) area is used by both these communities and is part of their Community Reserved Forests as well as their habitat, since they depend on it for their livelihoods as well as socio-cultural practices. Their reverence for the hills is rooted in their strong dependence on the natural resources that the mountains provide.

Vedanta had obtained the PML to extract bauxite from the top part of the Niyamgiri mountain range in Orissa.[15] The Indian Ministry of Environment and Forest commissioned a committee to draft a report and deliver their findings on this mining proposal. What was alleged by the community was that the official authorities had failed

[13] Report of the Four Member Committee for Investigation into the Proposal Submitted by the Orissa Mining Company for Bauxite Mining in Niyamgiri: Dr. N.C. Saxena, et al. 2010. This section is based on the report.
[14] India: Proposed Vedanta Mine Threatens Livelihoods and Cultural Identity of Indigenous Community, http://www.amnesty.org/en/for-media/press-releases/india-proposed-vedanta-mine-threatens-livelihoods-and-cultural-identity- 9 July 2009
[15] Indian Government committee condemns Vedanta's proposed Niyamgiri mine, *Statement*, 22 August 2010, http://www.minesandcommunities.org/article.php?a=10322

to obtain their consent prior to the approval of this project.[16] The report was delivered on 16 August 2010.

It came to the fore that Vedanta and Orissa Mining Corporation were involved in a number of gross violations of the rules and regulations of India. Most of these violations relate to the laws protecting indigenous peoples rights. The legislation violated include the Forest Conservation Act, Forest Rights Act, Environment Protection Act and the Orissa Forest Act. The report concluded that Vedanta would not be able to proceed with its mining at the Niyamgiri hills due to the ecological and human costs of Mining.

In terms of the ecological costs of mining, the committee said that the mining operations of the intensity proposed in this project spread over more than 7 square km would severely disturb this important wildlife habitat that has been proposed as part of the Niyamgiri Wildlife Sanctuary; a large number of trees would need to be cleared for mining besides many more shrubs and herbal flora; wildlife would be disturbed and in some areas destroyed, i.e. the South Orissa Elephant Reserve would be disturbed and threaten the important task of elephant conservation. Further, the Mining would drastically alter the region's water supply, severely affecting both the ecological systems and human communities dependant on this water.

In terms of the human costs of mining, it was found that since the indigenous people of this area are highly dependent on the forest produce for their livelihood, this forest cover loss will cause a significant decline in their economic well-being.

The committee established that the Orissa government made false certificates in order to grant Vedanta the PML. The committee concluded that the Orissa government is not likely to implement the Forest Rights Act in a fair and impartial manner. The provision of the FRA had not been followed by the state government and the legitimate and well established rights of the indigenous people of the PML area have been deliberately disregarded by the district administration and the state government. In terms of section 4(5) of FRA, there can be no removal or eviction of people from forest land unless the tribal rights under FRA have been recognised and the verification procedure is complete.

In sum, the Ministry of Environment and Forestry cannot grant clearance for diversion of forest land for non-forest purposes except if:

1. The process of recognition of rights under the Forest Rights Act is complete and satisfactory;
2. The consent of the concerned community has been granted; and
3. Both points have been certified by the Gram Sabha (statutory authority under the Forest Rights Act) of the area concerned (which must be that of the hamlet, since this is a Scheduled Area).

All of these conditions must be satisfied.[17] The committee found that if the mining were to be permitted, it would:

- destroy one of the most sacred sites of the Kondh Primitive Tribal Groups;
- destroy more 7 square kilometres of sacred, undisturbed forest land;

[16] See note 15 above. See also Saxena report, note 13 above at page 5

[17] Saxena report, note 13 above, at page 86. See "Ministry of Environment and Forestry Panel: Vedanta should not be given mining approval". Debabrata Mohanty *India Express* 16 August 2010 http://www.minesandcommunities.org/article.php?a=10322 See also note 14.

- endanger the self-sufficient forest-based livelihoods of these Primitive Tribe Groups;
- seriously harm the livelihood of hundreds of families who depend on the land for their economic relationship with these Primitive Tribe Groups;
- result in the building of roads through the Dongaria Kondh's territories, making the area easily accessible to poachers of wildlife and timber smugglers threatening the rich biodiversity of the hills.

It was under the Forest Conservation Act the company is in illegal occupation of more than 26 ha of village forest lands enclosed within the factory premises. The claim by the company that it had followed the state government orders and enclosed the forest lands within their factory premises to protect these lands and that they provide access to the tribal and other villagers to their village forest lands was false.

Environmental and forest laws in India make it mandatory for private firms and public agencies to obtain prior clearances for new industrial and development projects in terms of the Environmental Protection Act (EPA). The Minister of Environment and Forests evaluates applications and grants these clearances. To obtain these clearances, the project must fulfil the EPA mandates based on Environmental Impact Assessments (EIA).

The EIAs submitted by Vedanta were inadequate and did not study the full implications of the refinery and the mining project on the environment. They paid very little attention to the socio-economic impact on affected people and did not also address the loss of cultural heritage.

Vedanta had already commenced with the construction activity of its expansion without obtaining an environmental clearance as per the provisions of the Environmental Impact Assessment Notification under the EPA. Once the EIA was submitted it was found to contain false information.

In terms of Indian legislation, the PML is a scheduled V area where the Panchayatas Act (PESA) is applicable. In terms of PESA, Vedanta failed to consult with the Gram Sabha or the Panchayatas (the elected village councils) before acquiring the land for development projects. The provisions under PESA aim at safeguarding and preserving the traditions and customs of the people, their cultural identity, community resources and customary mode of dispute resolution. Gram Sabha has the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe.

The Committee held the view that the impact that mining bauxite will have over the land and the community by far overrides the economical benefits of having the mine.

The Commission found that allowing the mining in the proposed mining lease area by depriving two Primitive Tribal Groups of their rights over the proposed mining site in order to benefit a private company would shake the faith of the tribal people in the laws of the land which may have serious consequences for their security and well being of the entire country.

Bengwenyama Minerals and Community v Genorah Resources

This is a recently decided South African case[18] where emphasis was placed on the importance of consultation with a community before prospecting rights are granted over an area in terms of the Minerals and Petroleum Resources Development Act 28 of 2002 (the Act). The Constitutional Court ruled that the community had not been properly consulted in terms of the Act and that the department had not given the community a hearing.

The brief facts of this matter can be compared to that of the Niyamgiri matter as in this matter a community also brings an application to set aside the grant of a prospecting right on their land. It is a dispute between an owner of a land and a person who has been awarded a prospecting right over that land. As with the Niyamgiri matter, the owner of the land in this matter is a community, that in terms of the previous racially discriminatory laws in SA, were deprived of formal titles to their land. This community is under the traditional leadership of kgoshi Nkosi same as a Gram Sabha or the Panchayat in the Niyamgiri matter.

The contentious issues in this matter are highly similar to the ones mentioned in the Niyamgiri matter. Both cases deal with the lack of consultation between the communities, the mining companies and the government officials.

The facts of this case are: Genorah, the mining company, was awarded prospecting rights over five properties in September 2006, including two properties on which members of the community reside. The community had enjoyed uninterrupted occupation in this land for more than a century. It became apparent to the Department approximately by 2004 that the community had an interest in acquiring prospecting rights on the farms.

Genorah's interest in obtaining prospecting rights over the community's farms surfaced in early 2006. It submitted its application for prospecting rights over five properties to the Department of Mineral Resources on 6 February 2006. Two weeks following its submission, the Department informed Genorah that its application was being processed and was thus required to submit an environmental management plan; consult with the landowner or lawful occupier of the land as well as with other interested parties; and to report the results of the consultation to the Regional Manager. Genorah submitted its environmental management plan to the Department in April 2006 but did not consult with the community.

This environmental management plan is comparable with the Indian Environmental Impact Assessment in terms of India's Environmental Protection Act. Both these provisions need to investigate, assess and evaluate the impact of the proposed mining on the environment and the socio-economic conditions of any person who might be directly affected by the prospecting operation.

The community then pursued its own application for prospecting rights through Bengwenyama Minerals in May 2006. The community leader, the Kgoshi, wrote a letter regarding the community's application to prospect over the farms, in which he stated that Genorah (as well as other companies) had failed to meet or consult with the community or him as the kgoshi of the community in regard to prospecting rights on the

[18] Case CCT 39/10 [2010] ZACC Constitutional Court decided 1 December 2010

farms. The Kgoshi expressed concern that during the process of the community's application they were informed of other applications and recorded their objection to the Department. In October 2006 Bengwenyama Minerals handed in their requisite financial guarantee for environmental rehabilitation to the Department.

However, in the meantime the department had already informed Genorah that their prospecting rights on five properties, including the farms of Bengwenyama Minerals, had been awarded to it, a week before Genorah handed in its financial guarantee to the Department. The judges found it to be perplexing that this award had not been communicated to the community.

Section 16 (4) of the MPRDA that deals with the consultation process to be complied with by the Applicant. The requirements are, to:

1. inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration;
2. inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land;
3. consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and
4. submit the result of the consultation process within 30 days of receiving notification to consult.

Genorah did not comply with these requirements for consultation.

The court found that "The Department was at all times aware that the Community wished to acquire prospecting rights on its own farms. It gave advice to the Community over a long period of time in this regard, to the extent of requiring better protection for the Community in the investment agreement. It continued dealing with the Community and Bengwenyama Minerals in relation to their application brought on prescribed section 16 forms without informing them of the fact that approval of that application would end their hopes of a preferent prospecting right. There is no explanation from the Department for this strange behaviour. The Department had an obligation to directly inform the Community and Bengwenyama Minerals of Genorah's application and its potentially adverse consequences for their own preferent rights under section 104 of the Act. This obligation entailed, in the circumstances of this case, that the Community and Bengwenyama Minerals should have been given an opportunity to make an application in terms of section 104 of the Act for a preferent prospecting right, before Genorah's section 16 application was decided. None of this was done ...".[19]

Further, a prospecting right cannot be issued if the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment. An applicant for a prospecting right must submit a prescribed environmental management plan. This provision can be compared to section 5 (c) of India's Forest Rights Act which ensures that the habitat of the PML are preserved from any form of destructive practices that affects their cultural and ecological heritage.

[19] Saxena Report, note 13 above, page 25 paragraph 74.

The court found that there was "no evidence on affidavit by the Deputy Director General who granted the prospecting rights to Genorah that he or she considered and was satisfied that the environmental requirement was fulfilled".[20]

From the Bengwenyama matter it is clear that there are a number of parallels in the provisions of the Constitution of South Africa and the South African Minerals and Petroleum Resources Development Act and the laws of India such as the Environmental Protection Act, the Forest Right's Act,

The plight of the Sekuruwe community, can be compared with the Niyamgiri matter and the Bengwenyama community. The same complaints were lodged by the community to the court with regard to lack of consultation The same lesson emerges: weak consultation requirements, lack of oversight by the state and unequal power and bargaining relations between communities and mining companies, make communities vulnerable to exploitation. Dispute resolution through the courts is expensive and time consuming and often too late. It is in this context that the consent requirement applicable to communal land of traditional communities is relevant and warrant attention.

The plight of the Sekuruwe community, can be compared with the Niyamgiri matter and the Bengwenyama community. The same complaints were lodged by the community to the court with regard to lack of consultation. The same lesson emerges: weak consultation requirements, lack of oversight by the state and unequal power and bargaining relations between communities and mining companies, make communities vulnerable to exploitation. Dispute resolution through the courts is expensive and time consuming and often too late. The context ingredients are: weak legal frameworks for mining, weakening environmental standards, and weak regulatory institutions, a huge capacity gap between mining communities and multinational mining companies, and lack of organisation for mining communities. It is in this context that the consent requirement applicable to communal land of traditional communities is relevant and warrant attention.

5. The evolving principle of free prior informed consent in international law and the Endorois decision

This paragraph provides a short overview of the current status of the requirement to obtain Free Prior Informed Consent (FPIC) in relation to developments that directly impact on the rights and interests of traditional communities. This requirement for FPIC has evolved into an established universal norm of international law. FPIC establishes the framework and context for consultations with indigenous peoples pertaining to project acceptance and any related negotiations pertaining to benefit sharing and mitigation measures. Particular emphasis is placed on FPIC in cases where there are potentially substantial impacts on indigenous communities, such as those resulting from large-scale natural resource extraction in their territories. Towards the end of the paragraph we argue that there is no reason in law why the FPIC principle should not apply to all traditional communities, whether they regard themselves as indigenous or not.

[20] Saxena report, note 13 above, page 26 paragraph 75.

Despite several references in international human rights norms and development policies, there is no generally agreed definition of the terms free, prior, informed and consent. The term "informed" leaves much room for interpretation. The required extent of information needs clarification.

The discussion on the international treatment of the consent principle must be qualified: First, the distinction between indigenous and other local communities has little practical or legal relevance in the context of Africa. Second, the consent or consultation principle is more often than not rationalised as a governance legitimating prerogative which makes economic sense. From the vantage point of Africa we would argue that the first principle comes from and is rooted in local living customary law. We therefore, towards the end of the paragraph, turn to the Endorois decision of the Africa Commission. Third, the Aarhus principles appear to provide a useful starting point to operationalise FPIC in the international law context.

The status of FPIC as a universal norm of international law, and the increasing importance being attributed to it, is further evidenced by the following:

a) existing and emerging jurisprudence mandating FPIC at international, regional and national levels and the enactment of legislation to give effect to it.

b) recognition of the principle of FPIC within the normative framework of indigenous peoples rights as reflected in international and regional human rights standards.

c) the evolving policies of international financial institutions and development agencies.

d) repeated statements and demands of indigenous peoples emphasising FPIC as the minimum standard for the realization of their full and effective participation.

At the International level the United Nationals Committee on the Elimination of all forms of Racial Discrimination (CERD), in its 1997 General Recommendation No 23 on Indigenous Peoples has interpreted the content of International Convention on the Elimination of all forms of Racial Discrimination (ICERD), as requiring that

> *'no decisions directly relating to [indigenous peoples] rights and interests are taken without their informed consent'*.[21]

In its 2008 Concluding Observations CERD recommended that the Government of Russia *"seek the free informed consent of indigenous communities and give primary consideration to their special needs prior to granting licences to private companies for economic activities on territories traditionally occupied or used by those communities".*[22]

In its 2006 follow up procedure it emphasised to the Government of Australia that it should take decisions related to its indigenous peoples with their informed consent.[23]

In addition to CERD, other Treaty bodies such as the United Nations Committee on Economic Social and Cultural Rights (CESCR) have also instructed states to obtain indigenous peoples consent in relation to extractive industry projects.[24]

---

[21] See CERD General Comment XXIII on the Rights of Indigenous Peoples (1997)
[22] See UN Doc CERD/C/RUS/CO/19 20 August 2008 Concluding observations of the Committee on the Elimination of Racial Discrimination Russian Federation 73rd CERD session
[23] Letter to Government of Australia August 2006 available at http://www2.ohchr.org/english/bodies/cerd/docs/69letter-australia.pdf

The Supreme Court of Canada has clarified that, with regard to consultation, where Aboriginal people hold title to land, the governments' duty to consult is *'in most cases' 'significantly deeper than mere consultation'* and can extend to the more demanding requirement of *'full consent'*.[25] Likewise in its October 2007 landmark ruling, the Supreme Court of Belize referenced, inter-alia, the FPIC requirements in the UNDRIP and CERDs General Recommendation XXIII on Indigenous Peoples. The Court ordered the state cease and abstain from any acts, including granting of mining permits or issuing any regulations concerning resource use, impacting on the Mayan indigenous communities 'unless such acts are pursuant to their informed consent'. [26]

The clearest elaboration on the requirement for FPIC is found in the UNDRIP. FPIC together with Self Determination are two of the foundational principles of the United Nation Declaration on the Rights of Indigenous Peoples (UNDRIP). Indicative of the importance of FPIC for the realization of the rights articulated in the UNDRIP is the fact that FPIC is explicitly required in six of its articles (Art. 10, 11, 19, 28, 29 and 32). The drafting of the UNDRIP by indigenous peoples and its adoption at the General Assembly in September 2007, with 143 States voting in favour of it, is an acknowledgement on behalf of States that FPIC has emerged as the standard to be adhered to by all parties, including the private sector, in relation to development projects in indigenous peoples lands. FPIC is required in six of its articles with article 32 specifically addressing FPIC in the context of the extractive sector. It states that:

> *"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."*

The Akwe: Kon guidelines for the implementation of Article 8j of the Convention on Biological Diversity recognize FPIC as being of fundamental importance in the context of protection of indigenous peoples traditional knowledge and intellectual property.

International Labour Organization Convention 169, an international binding treaty dedicated to indigenous peoples, contains an explicit reference to indigenous peoples' informed consent in the context of relocation. In addition it requires that indigenous peoples *'decide their own priorities for the process of development'* and consultations with them should be through their representative institution *'with the objective of achieving agreement or consent to the proposed measures'*.[27]

The Human Rights Council, established the UN Experts Mechanism on the Rights of Indigenous Peoples in December 2007. At its first session in October 2008 the Experts Mechanism recommended that the Durban Declaration and Programme of Action

---

[24] See Concluding Observations of the Committee on Economic, Social and Cultural Rights to Ecuador 32nd Session 26 April - 14 May 2004 E/C.12/1/Add.100, para. 12; see also Concluding Observations of the Committee on Economic, Social and Cultural Rights to Columbia 27th Session 12-30 Nov. 2001 E/C.12/1/Add.74, para. 12. CERD Concluding Observations Ecuador 2003 CERD/C/62/CO/2 'as to the exploitation of subsoil resources located subjacent to the traditional lands of indigenous communities the committee observes that mere consultation of these communities prior to exploitation falls short of meeting the requirements set out in General Comment XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought'.

[25] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 para 186

[26] The Supreme Court Of Belize, 2007 Consolidated Claims Claim Nos. 171 & 172 of 2007 para 136 d

[27] International Labour Organization Convention 169 (1989) Article 6. Article 15 requires consultation in the context of exploration or exploitation of sub soil resources.

'should acknowledge that both the right to self determination and the principle of FPIC are now universally recognized through the adoption of the Declaration'.[28]

The International Council of Mining and Metals (ICMM) released its position statement on Mining and Indigenous Peoples in May 2008. The statement did not recognize the requirement to obtain FPIC but did commit to ICMM members to participating *'in national and international forums on Indigenous Peoples issues, including those dealing with the concept of free, prior and informed consent.'*[29] it is not clear if the ICMM and its members would endorse the concept of fully free prior informed consent to project approval, nor would they unequivocally reject the use of private and state security against communities or their forced removals, or accept legally binding penalties against companies that violate its codes.(Darimani MAY 13□14, 2009 OTTAWA)

Further regard can be paid to the Common Mining Code by the Economic Community of West African States (ECOWAS) that will be implemented by the end of 2012 as well as to its prelude, the ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector of May 2009. The Common Mining Code aims at standardizing the social, environmental, and financial requirements for mines in West Africa. In the agreement of 4 April 2008 between ECOWAS and Oxfam America on collaborating on its creation the objective reads *"to facilitate the contribution of civil society in the process of forming a common mining policy that is favorable to the poor, respectful of the protection principles of the environment and of human rights, and that renders the government and the mining companies responsible through good governance practices."* In particular, the Common Mining Code will require mining companies to obtain the consent of local communities before mines can be established or expanded, and give communities a meaningful role in decisions.

Both the World Bank commissioned Extractive Industry Review (2003)[30] and World Commission on Dams (2000) recommended that the Bank ensure that FPIC of indigenous peoples be obtained in advance of funding large-scale extractive or hydro projects. However, the Bank's Operational Policy 4.10 and the IFC's Performance Standard No 7 substitute 'free prior informed consultation (FPICon)' for 'free prior informed consent (FPIC)'. In doing so it removes the requirement for indigenous peoples' consent, replacing it with an ambiguous objective of achieving broad community support (BCS).[31] The "ambiguity" of the Bank's "determination of BCS" has been raised by its own Compliance Advisor / Ombudsman.[32]

The World Bank as a specialised agency of the United Nations is bound by Article 41 of the UNDRIP, which requires it to "contribute to the full realization of the Declaration". To be consistent with the rights articulated in the UNDRIP, as well as the policies of other International Financial Institutions, the World Bank Group will have to address the

[28] Proposal No 2 of the Experts Mechanism to the Human Rights Council in relation to HRC resolution L/17 Draft copy on file with author.
[29] ICMM Position Statement Mining and Indigenous Peoples issued May 2008 available at http://www.icmm.com
[30] Salim et al 2003
[31] See F MacKay 'The Draft World Bank Operational Policy 4.10 on Indigenous Peoples Progress or more of the same?' 22 (Spring 2005) Arizona Journal of International and Comparative Law p81
[32] Office of the Compliance Advisor/Ombudsman (CAO) IFC and MIGA, World Bank Group Advisory Note 'IFC's Policy and Performance Standards on Social and Environmental Sustainability and Disclosure Policy, Commentary on IFC's Progress Report on the First 18 Months of Application' December 17, 2007

short comings of its polices and standards by revising them to include the requirement for FPIC.

The World Bank Group's policies influence the policies of a range of other International Financial Institutions in particular through the Equator Principles. The revision of the Bank's policies, when this occurs will therefore lead to the alignment of the Equator Principles with the international normative framework pertaining to indigenous peoples rights.

The Equator Principles launched in 2003, revised in 2006, represent an example for industry standards, focusing on consultation instead of consent. The Equator Principles are a voluntary set of standards for determining, assessing and managing social and environmental risk in project financing. They were developed by private sector banks led by Citigroup, ABN AMRO, Barclays and WestLB and base upon the environmental standards of the World Bank and the social policies of the International Finance Corporation (IFC). For this analysis Principle 5: Consultation and Disclosure is relevant. Thereafter. A loan will not be provided to projects unless *"the government, borrower or third party expert has consulted with project affected communities in a structured and culturally appropriate manner. For projects with significant adverse impacts on affected communities, the process will ensure their free, prior and informed consultation and facilitate their informed participation [...]"*. The Equator Principles further establish a definition on the prerequisites of consultation. Consultation *„should be "free" (free of external manipulation, interference or coercion, and intimidation), "prior" (timely disclosure of information) and "informed" (relevant, understandable and accessible information), and apply to the entire project process and not to the early stages of the project alone. The borrower will tailor its consultation process to the language preferences of the affected communities, their decision-making processes, and the needs of disadvantaged or vulnerable groups."*

The International Finance Corporation's (IFC) Policy on Social and Environmental Sustainability of 30 April 2006, states in paragraph 19:

> *"Effective community engagement is central to the successful management of risks and impacts to the affected communities. Through the Performance Standards, IFC requires clients to engage with affected communities through disclosure of information, consultation, and informed participation, in a manner commensurate with the risks to and impacts on the affected communities."*

The Rotterdam Convention on the Prior Informed Consent procedure for certain hazardous chemicals and pesticides in international trade of 1998, enforced on 24 February 2004, provides a further example of the application of the FPIC principle in a related context. The Convention promotes open exchange of information and calls on exporters of hazardous chemicals to use proper labeling, include directions on safe handling, and inform purchasers of any known restrictions or bans. It is particularly meant to protect developing countries from the uncontrolled import of materials those countries cannot handle safely because sufficient information and infrastructure are lacking. The Rotterdam Convention currently has 128 parties.

The Aarhus Convention establishes a regime setting out minimum standards of public participation in environmental matters. The Aarhus Convention is of particular interest to this analysis as the mining of natural resources typically involves environmental impacts, and it contains detailed legislative framework on public participation. The

Aarhus Convention does not establish consent as a precondition to projects with impacts on environment, but it sets detailed and binding standards for FPIC's first prerequisite: access to information.

The UNECE Convention on access to information, public participation in decision-making and access to justice in Environmental matters done at Aarhus, Denmark on 25 June 1998 entered into force on 30 October 2001. Currently it has been signed by 40 primarily European and Central Asian countries and the European Union.

The convention aims at contributing *"to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being"* by obliging its member states to provide certain public-participation rights for citizens in governmental decision-making processes on matters concerning the local, national and transboundary environment. Thus, the focus lies on interactions between the public and public authorities. The Aarhus convention is based on three pillars. The first concerns the citizen's access to information towards public authorities, the second participation in decision-making processes, the third access to justice.

Article 4 of the Aarhus Convention provides that *"public authorities, in response to a request for environmental information, make such information available to the public […] without an interest having to be stated […]."* The approach of the Aarhus Convention can be described as quite broad, as the definition of "environmental information" in Article 2 (3) covers *"any information in written, visual, aural, electronic or any other material form"* on almost any imaginable impact on the environment. Article 4 (4) (d) contains probably the most important exception in context of this analysis. It provides that, *„a request for environmental information may be refused if the disclosure would adversely affect the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest."*

The second pillar provides detailed regulations for procedure and extent of public participation in Article 6. However, as Article 6 (8) states that each party to the convention *"shall ensure that in the decision due account is taken of the outcome of the public participation"* instead of establishing an obligatory consent of the affected people, this part of the Convention is not further examined. As for access to justice in Article 9, the third pillar, as it only grants access to the courts for violations of the right for access to information under Article 4.

In view of the potential of the FPIC standard to interfere in state sovereignty, the Aarhus Convention represents a considerable step towards internationally binding standard of community participation but it has serious shortcomings. It is important to provide a comprehensive and detailed legislative framework to clearly define what public participation requires, especially in light of the lack of detail with regard to the FPIC standard. The Aarhus Convention provides such an example.

Most importantly indigenous peoples themselves have consistently called for respect for FPIC at national and international fora. As a result of the importance attributed by indigenous peoples to FPIC at the first workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights held in December 2001 the workshop recommended that

'consultation between indigenous peoples and the private sector should be guided by the principle of free, prior, informed consent of all parties concerned.'

The central role for FPIC in the realization of the rights to self determination and lands territories and natural resources and the obligation it imposes on governments and private sector was given particular emphasis in the statement of Global Indigenous Caucus following the adoption of the UNDRIP:

'Indigenous Peoples' right to self-determination is about our right to freely determine our political status and freely pursue our economic, social and cultural development. It also includes our right to freely manage our natural wealth and resources for mutual benefit, and our right to maintain and protect our own means of subsistence. 'Free, prior and informed consent' is what we demand as part of self-determination and non-discrimination from governments, multinationals and private sector.'[33]

The Manila Declaration of the International Conference on Extractive Industries and Indigenous Peoples of 25 March 2009 is the most emphatic:

"[...] we now find ourselves within the borders of States which have established norms and laws according to their interests. On account of this situation, we have suffered disproportionately from the impact of extractive industries...

Indigenous Peoples are rights holders, with an inextricable link to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and should not be treated merely as stakeholders. We have a right to self-determination of our political condition and to freely choose our economic, social and cultural development (UN DRIP Article 3)

…our rights are inherent and indivisible and seek recognition not only of our full social, cultural and economic rights but also our civil and political rights"

The Manila Declaration called on states to implement the UNDRIP, ILO 169, ICERD, establish clear mechanisms and procedures, to recognize and enforce the rights of to FPIC as laid out in UN DRIP, in accordance with our customary laws and traditional practices, and in particular to "*recognize our customary laws and traditional mechanisms of conflict resolutions; and to legislate and regulate thorough processes for independently conducted environmental, social, cultural and human rights impact assessments, with regular monitoring during all of the phases of production and rehabilitation".* It also challenged to private sector, companies and consultants to respect international standards as elaborated on in the normative framework of indigenous peoples rights, especially the minimum standards as set forth in the UN DRIP, ILO 169 and ICERD, which includes in particular, the right to lands, territories and resources and attendant right to FPIC.

The recent experience pronouncements on FPIC in Africa, refers principally to the international instruments rather than relating to customary law. We argue that it could and should refer to communities' own local law.

Africa and the Endorois decision: crude transjudicialism ignores the organising principle

The General Assembly of the African Union, which provides rulings on violations of the African Charter on Human and Peoples Rights, to which over fifty countries are party, decided in February 2010 to affirm a commission report that the Endorois people had

[33] Statement by the Chairman, Global Indigenous Caucus, Les Malezer, 13 September 2007 on the adoption of the UN Declaration on the Rights of Indigenous Peoples

customary land rights to lands from which they had be expelled by the Kenyan government.[34]

The Commission found that, under the African Charter's pronouncement of basic rights and freedoms, Kenya's eviction of the Endorois was in violation of Article 14 of the Charter[35], and that the state had to immediately *"recognise rights of ownership to the Endorois and restitute Endorois ancestral land."* The ruling concluded that *"(1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title …"*

Further violations of Charter rights, including the right to practice religion, the right to development, the right to exploitation of natural resources and the right to culture are found, and the decision adds further remedies to the entitlement to restitution, namely compensation and participation in implementation of the recommendations.

The Endorois community comprising 60 000 people claim that they were dispossessed and forcibly removed from their ancestral lands at Lake Bogoria. They community of transhumant pastoralists utilised the grazing in the lowlands and on the shores of the lake in the rainy season and turned to the Monchonchoi forest in the dry season. The lake provided pastures, salt licks and, importantly, is a sacred site and the centre for the community's religious and traditional practices and cultural ceremonies. The Endorois believe that the spirits of their forebears live on the lake.

In the relevant paragraphs of the decision dealing with the complainants' submissions on the merits, the Endorois people emphasises that:

a) They are the bona fide owners of the land around the lake [72], and that they exercised an indigenous form of tenure, holding the land through a collective form of ownership [87];
b) Others would ask permission to bring their animals to the area;
c) They have always considered themselves to be a distinct community [73];
d) They are a "people" as envisaged under the African Charter and the importance of "community and collective identity" is recognised [74 and reference to SERA v Nigeria].

No claim of aboriginality or indigeneity is made, or at least not in the defining paragraphs. The references to indigeneity, and the complainants' claim to it, are contained in that part of the text dealing with the complainants' and the commission's argument on the violations.

In the section on the complainant's argument on the right to recognition of its property right, practice of domestic courts, more specifically Amodu Tijani, Calder, Mabo and Richtersveld where courts have recognised "indigenous property rights" [94]. The commission, in its consideration, relies, largely, on the Inter American Court, the Saramaka and Awas Tingni cases dealing with indigenous peoples' rights to conclude, in [209], that:

a) Traditional possession of land by indigenous people has the equivalent effect as that of the state-granted full property title;

[34] 276 / 2003—Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African C.H.R. (2010)
[35] African (Banjul) Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 26363 ("The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.").

b) traditional possession entitles indigenous people to demand official recognition and registration of property title;

c) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and

d) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality.

This is a revolutionary outcome and bodes well for the Endorois and their future negotiations with the Kenyan government to implement the recommendations. The decision goes further than the conventional outcomes in the Canadian and Australian common law aboriginal titles act, and the provisions of the Australian Native Titles Act. With regard to (d) it compares with the South African Restitution Act mandated under the Constitution.

But... the commission's findings are limited to violations in respect of "indigenous peoples". The commission does not elaborate on a definition of the constituency and findings of the American regional instruments do not necessarily assist as they employ the narrow definitions of "indigenous" associated their demographics.

The commission notes that the term "indigenous" is also not intended to create a special class of citizens, but rather "to address historical and present-day injustices and inequalities". It says that "this is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission". The African Commission's Working Group of Experts concerned itself not only with the recognition of indigenous people in Africa, but also their protection. The African Commission brought this working group to bear in an effort to integrate international law, namely those relating to indigenous rights, in all states of the African continent.

The experts' report is strong on description but weak on any organising principle beyond self identification as indigenous, and non discrimination. Indeed the most illuminating observations in the section dealing with "criteria" are the following general aspirational statements for democratic participation by all marginalised and peoples including indigenous peoples:

> *"Indigenous peoples" has come to have connotations and meanings that are much wider than the question of "who came first". It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development [87]*
>
> *certain dominant groups force through a sort of "unity" that only reflects the perspectives and interests of certain powerful groups within a given state, and which seeks to prevent weaker marginalized groups from voicing their particular concerns and perspectives.[88]*
>
> *The very spirit of the term is to be an instrument of true democratisation whereby the most marginalised groups/peoples within a state can get recognition and a voice.[102]*

The commission in Endorois depicted the community as an "indigenous people". In its argument it relied on jurisprudential outcomes where a narrow definition was employed. It may, even unwittingly have expanded the definition. We argue that, for Africa, the organising principle could be that all communities living under customary law may claim their land and development rights. The organising principle is that customary rights and

customary law systems be afforded given full recognition and equal treatment in domestic legal systems in the protection of communal rights.

6. Community consent: its content and meaning

Because of their scale and complexity, mines and dams affect the existing rights of different groups and create a wide range of significant risks for a diverse range of interest groups. Among those affected are traditional communities and indigenous, women and other vulnerable groups who have been shown to suffer disproportionately. This has been compounded by negligible participation of these groups in decision-making processes, with the result that planning processes for large mines and large dams have frequently overlooked equity and gender aspects. The vulnerability of these groups stems from the failure to recognise, or respect their rights, and from the significant involuntary risks imposed on them.[36]

Few other industry sectors have such a profound social impact – and consequently such a propensity to provoke community opposition – as the extractive industries. At the same time, the sector is particularly vulnerable to disruption by community opposition and in need of earning and maintaining the trust of affected communities over time. Mining projects are particularly vulnerable to community opposition because they are very long term (generally lasting at least twenty years), complex (usually involving a chain of investments, multiple contracts and numerous parties) and capital intensive (often requiring investments of several billion dollars).

The need for land frequently causes property disputes and collides with the rights of indigenous peoples, who often see their lands as non-saleable and collectively held, without clearly defined borders or titled owners. A state's expropriation powers and use of eminent domain to evict people from their traditional lands to make way for a mining project can lead to the disruption of communities and cultures as well as the loss of livelihoods, particularly when done without adequate compensation.[37]

But the complex relations between the rights holders and stakeholders provide further challenges and opportunities of complexity. First, business concerns are not monoliths and neither are states. They, perhaps more so than community parties often fail to get or ever have negotiating mandates and cause delays.

Obtaining consent from communities may appear to be complicated by the difficulty of determining who comprises the relevant community and who speaks for that community. Communities are far from homogeneous and may be divided about whether to support a mining project. Resolving disputes and deciding how to treat groups that may be impacted to differing degrees pose challenges to FPIC processes. The consent process should allow communities to participate through their own freely chosen representatives and customary or other institutions. Consent processes must be inclusive if they are to help prevent future conflict, meaning that the entire community must have the opportunity to be heard, to have their questions answered, and to give their consent freely.[38]

[36] WCD November 2000
[37] Laplante and Spears 2008, 74
[38] Laplante and Spears 2008, 97

The self identification of local communities involves the critical social arena and and community political strategies of inclusion and exclusion. The self identification process is not natural or inevitable. But it is also not simply invented, adopted or imposed. The process whereby a local community is generated is a "positioning" that builds upon custom and experience, ranges of meaning and emerges through interaction, engagement and struggle. If we accept that the definition of community is not shaped by the rights claimed or to be protected, then the circular argument is avoided and community action and organisation rightfully recognised. This is not to say that old and new strategies or inclusion and exclusion and human rights appeals are but one of the means.

It is significant that anthropologists conclude that most local communities are primarily concerned with "questions of control over their own destinies, both in relation to the state and in terms of the management of projects, the flow of benefits, and the limitation or redistribution of mining impacts."[39]

The relevant law governing consent:

The World Commission on Dams is clear about the guiding law on the consent seeking process. It says that the customary laws and practices of the people involved, national laws and international instruments will guide the manner of expressing consent. "At the beginning of the process, the indigenous and tribal peoples will indicate to the stake-holder forum how they will express their consent to decisions. A final agreement on how to express consent will be reached before the start of the planning process."[40]

Benefit sharing

In addition to being free, prior, informed and consensual, FPIC must be enduring, enforceable and meaningful.[41] In this context meaningfulness translates into tangible recognition, in word and deed.

Recognition of the rights of traditional communities over their lands as the basis for negotiations over proposed extractive industries, necessarily involves the organization of engagement, partnership and sharing of financial benefits. In instances where communities' consent to extractive activities on their land, payments or benefit sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any mining must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.

Where benefit-sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the indigenous people.[42] Consent is not transferable.

A starting point would be to recognise customary law as determinative in giving content to the principle of consent and to augment the right with statute law assertions dealing with:

[39] Ballard and Banks 2003
[40] WCD November 2000, 220
[41] Laplante and Spears 2008
[42] UN 2009

1 Access to information ito a) customary law, and b) statute law

2 Impact assessments and rights inquiries ito a) customary law and b) statute law, and human rights due diligence reports on contracting parties in order to identify and prevent or mitigate any adverse human rights impacts that activities and associated relationships may have on communities[43]

3 Community meetings and other expressions dealing with the issue of consent: who calls and how ito customary law, and default provisions if not adequate or legitimate ito customary law

4 Meetings for rights holders affected directly

5 Input and meetings by rights holders and stake holders affected by indirect and/or cumulative impacts

6 Reporting about meetings and other expressions dealing the issue of consent

7 Facilitation and conciliation to seek consent, and equality of arms in negotiations and preparation of binding agreements

8 Fair dispute resolution and adjudication of disputes in terms of customary law, state law and international law, including

   a) State based judicial mechanisms
   b) State based non-judicial grievance mechanisms
   c) Non state based grievance mechanisms[44]

In addition the following normative principles could support the development of customary law, along the following lines:

1 The principles shall

   a) apply to all decision making processes concerning communal land and shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

   b) serve as guidelines by reference to which any person and any organ of state must exercise any function when taking any decision in terms of the principle or any statutory provision concerning communal land;

   c) serve as principles by reference to which a facilitator or conciliator must make recommendations; and

   d) guide the development and interpretation of customary law, custom and usage.

2 Any decision about the disposal, development or change of land use affecting access rights on communal land requires the consideration of all relevant factors including the following:

[43] Ruggie 31 January 2011, 16. This would include the human rights context prior to the proposed project, cataloguing the relevant human rights standards and issues, and projecting how the proposed project could affect, both in adverse and beneficial terms, the existing enjoyment of those rights. Assessments of human rights impacts should be undertaken at regular intervals.

[44] Ruggie 31 January 2011, 25. The following effectiveness criteria are relevant: legitimacy, accessibility, predictability, equitability, rights compatibility, transparency and any operational level mechanisms should be based on dialogue and engagement.

a) the right for communities to meaningful participation and to control access to their land and resources;

b) that impact on the access rights of members of the community are avoided, or, where they cannot be altogether avoided, are minimised;

c) that the use and exploitation of renewable and non-renewable natural resources is responsible and equitable, and takes into account the benefit of such use and exploitation by the community;

d) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

e) that negative impacts on the social, economic, cultural and environmental rights of the community and its members are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

3 Adverse impacts shall not be distributed in such a manner as to unfairly discriminate against any affected person or member of the community, particularly vulnerable and disadvantaged persons including women and children.

4 Equitable access to resources and benefits must be pursued, and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

5 Responsibility for any development decision rests with and remains with beneficiaries and the persons affected, and future generations, and this means that decisions may be re evaluated and projects redirected to remedy negative impacts and address consequences of a project throughout its life cycle. Communities have the right to participate in decision making throughout the project cycle.

6 The participation of all members of the community must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

7 Decisions must take into account the interests, needs and values of all affected persons and members of the community, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

8 Community wellbeing and empowerment must be promoted through education, the raising of awareness, the sharing of knowledge and experience and other appropriate means.

9 The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

10 Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with customary law, custom and usage, and any relevant statute law.

11 The vital role of women and youth must be recognised and their full participation therein must be promoted.

Useful references

Altman, Jon, and Peterson, Nicolas. "A case for retaining Aboriginal mining veto and royalty rights in the Nothern Territory." *Australian Aboriginal Studies*, 1984/No 2, 44-53.

Ballard, Chris, and Glenn Banks. "Resource Wars: The Anthropology of Mining." *Annual Review of Anthropology*, 2003, 287-313.

Darimani, Programme Officer Third World Network Africa Abdulai. "An alternative investment framework for African's extractive sector: a perspective from civil society." *CCIC conference on development, investment and extractive sector*, May 13-14, 2009 Ottawa.

Laplante, Lisa J, and Suzanne Spears. "Out of the Conflict Zone: The Case for Community Consent Processes in the Extractive Sector." *Yale Human Rights and Development Law journal*, 2008, 17-116.

O'Faircheallaigh, Ciaran. "Negotiating Cultural Heritage? Aboriginal-Mining Company Agreements in Australia." *Development and Change*, Vol 39 (2008), No 1, 25-51.

Pring, George. "The Law of Public Participation in Mining and Resources Development." December 2001, No 21a, Mining Minerals and Sustainable Development (MMSD).

Ruggie. *Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework .* General Assembly United Nations, A/HRC: Report of the Specail Represetnative of eth Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 31 January 2011. (comment by)

Salim et al. "Striking a better balance, the World Bank Group and Extractive Industries." 2003.

Saxena, Parasuraman, Kant, and Baviskar. "Report of the four member committee for the investigation int the porposal submitted by the Orissa mining company or bauxite mining in Niyamgiri." New Delhi: Ministry of Environment and Forests, 2010.

South African Human Rights Commission. "Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo." November 2008.

United Nations. "Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility: Manila Philippines." *Permanent Forum on Indigenous Issues.* New York: United Nations E/C.19/2009/CRP, 4 May 2009.

World Commission on Dams (WCD). "Dams and development a new framework for decisio-making: the report of the World Commission on Dams." London and Sterling, VA: Earthscan Publications Ltd, November 2000.

World Resources Institute. "Development without a conflict – The Business Case for Community Consent." Editor: Sohn, Jonathan; Authors: Herz, Steven, and, La Vina, Antonio, and Sohn, Jonathan, May 2007.

Zillman, Donald, and Lucas, Alastair, and Pring, George. "Human Rights in Natural Resource Development – Public Participation in the Sustainable Development of Mining and energy Resources." Oxford, 2002.

Media:

Sekuruwe

Angloplat accused of stalling by community – Business Day, published: 29 November 2010(http://www.businessday.co.za/articles/Content.aspx?id=128056)

Limpopo community to take Anglo Platinum on in court – Eye witness news, published: 27 November 2010 (http://www.eyewitnessnews.co.za/articleprog.aspx?id=53801)

Community's platinum bid delayed – Business Report, published: 26 November 2010 (http://www.iol.co.za/business/business-news/community-s-platinum-bid-delayed-1.878033)

Mining giant faces local protest – The Star, published: 27 October 2010 (http://www.thestar.co.za/index.php?fArticleId=5703525)

New allegations against tainted advocate surface – The Star, published: 10 February 2010 (http://www.security.co.za/fullStory.asp?NewsId=15174)

Anglo American challenged at 2010 AGM – London Mining Network, published: 1 May 2010 (http://www.minesandcommunities.org//article.php?a=10079&highlight=consent)

South African community confronts Anglo Plat – London Mining Network, published: 30 January 2009 (http://londonminingnetwork.org/2009/01/south-african-community-confronts-anglo-plat/)

Genorah

Legal groups take issue with Sexwale's claims – Business Day, published: 6 December 2010 (http://www.businessday.co.za/Articles/Content.aspx?id=128634)

Mining case may set risky precedent – Business Day, published: 3 December 2010 (http://www.businessday.co.za/articles/Content.aspx?id=128555)

New hurdle for miners as court pulls rights – Business Day, published: 1 December 2010 (http://www.businessday.co.za/articles/Content.aspx?id=128265)

Traditional Communities Challenge the Communal Land Rights Act

In March 2006, four communities in the North West, Mpumalanga and Limpopo provinces instituted legal proceedings challenging the constitutionality of the pending Communal Land Rights Act 11 of 2004 (CLRA). The LRC represents the Kalkfontein, Mayaeyane and Dixie communities and Webber Wentzel represents the Makuleke community. The matter will be heard in the Pretoria High Court on 14 October 2008.

As Henk Smith, attorney with the LRC, explains, 'The core of the Act deals with the transfer of land title from the state to traditional communities; the registration of individual land rights within 'communally owned' areas; and the use of traditional council or modified tribal authority structures to administer the land and represent the 'community' as owner…The Act applies to all communal land, including the former homelands and post-1994 land reform land.'[1]

Amongst its defects, according to the claimants, the bill had been rushed through Parliament before the 2004 election without following the provincial consultation process required by the Constitution. It contravenes section 25(6) of the Constitution, which requires that a 'person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. It gives unprecedented and undemocratic powers to traditional leaders without taking into account traditional methods of accountability. It incorporates autonomous communities into the jurisdiction of unrelated tribal authorities created during apartheid and reconstituted as traditional councils. It also gives traditional councils the power to exercise property rights on behalf of communities with whom they have little or no historical connection without the permission of the community members themselves. The CLRA could undo the rights to land won through restitution claims and reincorporate the communities back into apartheid-era 'tribal' units. It also fails to address adequately the insecure tenure and dispossession of African women due to racial as well as gender discrimination.

A fourth tier of government could be created by the CLRA, especially in conjunction with other acts (the pending Traditional Courts Bill and the Traditional Leadership and Governance Framework Act 41 of 2003), providing a greater sphere of executive influence for traditional leadership than that envisioned in the Constitution. This could create a separate system for the regulation of land affairs for nearly 50% of the South African population with decidedly inadequate provision for financial accountability, constitutional guarantees, and democratic mechanisms.

The members of the applicant communities hold their land and exercise their land rights in accordance with customary law. Professor Thandabantu Nhlapo,[2] who has filed a supporting affidavit in the matter, said: 'One of the key features of living customary law is that land relations are created by and mirror the bonds and relations between people. Another is that access to land is a function of membership at different levels of rural society, for example, membership of the family, lineage, village or wider community.' The CLRA, by vesting ownership at the level of the 'community' and control at the level of the traditional council, undermines the strength of land rights at other levels of society as well as local control and accountability. By taking an individualised

approach to tenure rights, and ignoring the layered rights which vest in members of the family other than the husband and wife, the CLRA weakens the already insecure tenure which some members of the family have. This is in breach of the obligation on the state under section 25(6) and (9) of the Constitution.

In the 1960s, the Makuleke community was forcibly removed from their land to the Nthlaveni area, and placed under the jurisdiction of the Minga Tribal Authority. There is documented evidence that the Minga Tribal Authority and Chief Adolf Minga had actively lobbied the Minister of Native Affairs for this. The Makuleke received their original land in restitution by order of a Land Claims Court on 14 December 1998, but as it had been incorporated into the Kruger National Park, the restitution settlement limited residency. In compensation, the Makuleke were granted rights to the Nthlaveni area.

The CLRA will remove the land from the control of the Makuleke community's democratically constituted communal property association, and place it in the hands of a traditional council. The destruction of land-holding instruments of the local community, and placing control in the hands of a larger institution, would inevitably undermine the tenure security of members of the local community.

The Kalkfontein community comprises two separate sets of community buyers, whose claims of restitution to portions of the Kalkfontein farm were granted in 1994 by the Transvaal Provincial Division. The farm had previously been held in trust for the community in the name of the Minister of Land Affairs, formerly the Minister of Native Affairs, due to a racially discriminatory policy which prevented black communities from owning communal land in their own names. However, it took another *ten years* for the title to be transferred to entities representing the communities.

When the former Kwa-Ndebele homeland was established in 1986, the Kalkfontein community was, against their will, incorporated into a tribal authority with an appointed chief, Daniel Mahlangu. Mahlangu allegedly abused his position of authority – he sold residential plots without community consent and levied illegal 'tribal' taxes. The communities petitioned for a government inquiry and the resulting Kruger Commission recommended that Mahlangu be removed and the disestablishment of the tribal authority be considered. Mahlangu was removed, but the unwanted tribal authority remained, and a relative, also a Mahlangu, was appointed to replace Daniel as 'acting chief.' Over the years, the Kalkfontein communities have petitioned and litigated for protection of their rights to the land but their pleas have been ignored by various branches of government and opposed by the House of Traditional Leaders. Under the CLRA, the co-purchasers of Kalkfontein farm would, as communal land owners, fall under the jurisdiction of a traditional council comprised of the former tribal authority, with the unelected chief Christopher Mahlangu as member. The Kalkfontein community would once again be denied their right to hold full title, secure rights of use and administration to their land.

The Dixie community living on the Farm Dixie 240KU was placed under the jurisdiction of the Mnisi Tribal Authority under the terms of the Black Authorities Act 68 of 1951. They had no historical association with the Mnisi prior to that event. The farm borders on Kruger National Park, Manyeleti Game Reserve and Sabie Sands Reserve, and is a very valuable piece of real estate. The Mnisi Tribal Authority signed a contract with Curato Developments to build a lodge on the farm with no regard for, consultation with, or compensation to the Dixie community, and before their right to do so was properly established through the Land Claims Courts. The community sought an interdict in terms of section 2 of the Interim Protection of Informal Land Rights Act 31 of 1996 to prevent the development, and when confronted with the possibility of litigation, the investing parties withdrew. However, under the CLRA, the land rights of the Dixie community would be destabilized, with land use and development of the farm potentially coming under the jurisdiction of a traditional council. The Dixie community stands to lose the legitimate right to make their own land use determinations.

1 Henk Smith, 'An overview of the Communal Land Rights Act 11 of 2004' in Aninka Claassens & Ben Cousins, Land, Power & Custom: Controversies generated by South Africa's Communal Land Rights Act (2008); 39.

2 Professor Nhlapo is Deputy Vice-Chancellor and a Professor of Law at the University of Cape Town. He has held a presidential appointment as a full-time member of the South African Law Commission, in which capacity he specialised in the field of customary law.

Mining and the Plight of Rural Communities

Inequity in the mining industry has its roots in the dispossession of the African population's land. Colonial and apartheid land and mining laws discriminated against black communities by preventing them from participating in mining on the land that they occupied. In the case of land occupied by black communities, the state awarded royalties payable by the mining companies to itself (the state). In the case of 'white' land, there were special measures to promote the interests of the landowners and occupiers. Mining laws under apartheid guaranteed minimum royalties or equity to white land owners and surface occupiers.

The first form of redress undertaken by the democratic government in relation to this legacy of inequity was to divorce mining rights from surface land occupation and ownership rights. Secondly, in its effort to achieve some shift in the skewed demographics relating to the ownership of the mines, a limited notion of black economic empowerment was introduced.

However, considerations not taken into account in the current scheme included using the ownership and use rights that communities acquire through the restitution process as a highly effective way of enabling those who were dispossessed to exercise their rights in a manner they think best; and the importance of deriving full restitution of past rights and taking up their rightful places as African communities holding a genuine stake in the mining industry. While the placement of the country's mineral wealth in the hands of the State enables the nation

Kim Hawkins

to benefit from future extractions, it does not compensate for past injustice and plunder.

Examples of past statutory discrimination against black communities and promotion of white interests include the following:

a) Black people were not allowed to participate in the industry, in that they were prohibited from applying for prospecting and mining permits.
b) White land owners and tenants (i.e. those who had acquired the occupational ownership rights of the surface) were given legislative backing to participate in mining and shares in the proceeds of mines, whilst black people could not become owners of the land they occupied and did not get benefits from mineral exploitation on their land.
c) The Development Trust and Land Act of 1936 contained a blanket provision reserving all mineral rights on trust land and black owned land for the Trust and all proceeds went to the trust fund as if it were the private holder of mineral rights.

The new Constitution requires that the substantive and procedural rights of occupying communities have to be recognised. The Land Reform White Paper of 1996 promised consultation and community participation in all decisions concerning tenure reform, sale of communal land and development of communal land.

Pretoria News

The Restitution of Land Rights Act provides for the restoration of rights in land, arguably including mineral rights, to dispossessed communities. However, today, only a fraction of the rural community claims have been finalised. A small number of these involve claims to the mineral rights associated with the land claims.

In 2007, at Polokwane, the ANC resolved that natural resources, including our minerals, water and marine resources, must be used 'in a manner that promotes the sustainability and development of local communities…In this regard, we must continue to strengthen the implementation of the Mineral and Petroleum Resources Development Act (MPRDA), which seeks to realise some of these goals'. However, as seen below, there are problems with this Act.

The stated aim of the Act (MPRDA) is to redress past racial discrimination in respect of access to the mining industry. Unused 'old order' rights (rights awarded under the previous system) including mineral rights where the surface and minerals were not separated, could be converted into 'new order' mining rights within one year of the coming into operation of the Act (i.e. by 1 May 2005). Other old order mining rights (those in use) could be converted into new order mining rights within five years (i.e. by 1 May 2009), and prospecting rights within two years (i.e. by 1 May 2006). Otherwise, these old order rights would be permanently extinguished.

The Minister of Land Affairs, as current owner of communal land and unused old order rights, did not apply on behalf of communities for new mining rights within one year. According to the MPRDA, the mineral ownership rights of communities on this communal land, through the ownership of the Minister, were thereby deemed extinguished. The MPRDA does not provide for a holding mechanism or moratorium on new mining pending the finalisation of land claims or tenure reform and transfer of ownership to communities.

The MPRDA requires notification and consultation with the owner or lawful occupier before new mining commences, and such consent may include compensation for loss of use of the land. But a damages claim will be limited to 'reasonable' compensation or rental.

It does not provide for the affirmative measures afforded to old order landowners.

The MPRDA does not prescribe the procedure for consultation and notice before new mining begins. Communities are not consulted about the feasibility of mining and appropriate conditions to ensure that there is a satisfactory way in which the communities would benefit. In other words, whereas the apartheid regime enabled white land owners to benefit from any minerals to be extracted from their land, in its current form, this law will make this difficult for African communities to achieve.

An amendment bill to the MPRDA proposes that the Minister gets the discretionary power to afford communities participation privileges in new prospecting and mining ventures and when authorising the conversion of old order mining rights. The amendment fails to require that communities be consulted before the Minister sets participation conditions. Consultation is critical to ensure that the local community's needs are met.

Experience tells us that the demands of the affected rural communities include the following:

- the MPRDA be applied in a manner more consistent with section 12 of the MPRDA that requires a comprehensive and effective programme of assistance to historically disadvantaged persons to conduct prospecting or mining operations
- consultation with and consent by the community owners before new mining development happens should be supervised by the state or an independent party delegated by the State and governed by regulations
- state assistance should be available to those communities who give their consent, to negotiate fair agreements and compensation
- community royalties should be made available on application to qualifying communities, and assistance should be provided to make applications to the state to impose community royalties on mines located on community lands
- existing community royalties should be retained (subject to the transitional provisions of the MPRDA and further regulation under the Mineral and Petroleum Resources Royalty Bill (MPRRB))
- all community royalties and their management entities must be managed according to a strict regime of planning, budgeting and reporting under the MPRRB
- any hardship caused by the introduction of the community royalty could be offset by ringfencing the current state royalty or an appropriate adjustment of the state royalty formula.

Allocation of mineral rights should not be allowed to proceed in a manner that exacerbates the existing negative impact of lengthy delays in the resolution of land claims on communities who were illegitimately dispossessed of their land. The empowerment of communities who were the direct victims of apartheid's geographical planning should be the first priority in pursuing black economic empowerment.

The empowerment of communities who were the direct victims of apartheid's geographical planning should be the first priority in pursuing black economic empowerment.

In the face of the financial and technical resources that established mining companies have at their disposal to support the narrow interests of their shareholders, lack of state action results, intentionally or unintentionally, in supporting the interests of the wealthy rather than protecting the interests of the poor. It is therefore essential that due process and adequate support are assured in the election of community representatives, in making decisions and in developing and signing agreements that clearly protect their interests.

Furthermore, rights to access new order mining rights cannot be allowed to be extinguished through oversight or lack of consultation by any official. New order mining law should create enabling mechanisms to achieve outcomes that satisfy the obligation to redress the results of past racial discrimination.