The Right to Say No: Customary Land Rights, Extractive Industries and the Need for Free, Prior and Informed Consent

By

Richard Stowe Mc Lean

Supervised by: Mrs Salona Lutchman

Presented to the Department of Public Law, University of Cape Town, in partial fulfilment of the requirements for the degree of

Master of Laws

(Specialising in Human Rights Law)

Faculty of Law

UNIVERSITY OF CAPE TOWN

March 2021

CONTENTS

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
BBKTA	Bakgatla Ba Kgafela Tribal Authority
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CSR	Corporate Social Responsibility
ECCJ	ECOWAS Community Court of Justice
ECOWAS	Economic Community of West African States
FPIC	Free, Prior and Informed Consent
IBMR	Itereleng Bakgatla Mineral Resources
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IPILRA	Interim Protection of Informal Land Rights Act
MCEJO	Mfolozi Community Environmental Justice Organisation
MPRDA	Mineral and Petroleum Resources Development Act
SADC	Southern African Development Community
SLO	Social Licence to Operate
TEM	Transworld Energy and Mineral Resources
UNDRIP	United Nations Declaration on The Rights of Indigenous Peoples

This work is dedicated to Fikile Ntshangase and Sikhosiphi Radebe – activists who gave their lives fighting for their land and their communities' right to have a voice in how it is used. To the Amadiba Crisis Committee, MCEJO and other activists fighting for your communities, stay strong and stay united – history is in your favour.

And to those who would ride roughshod over marginalised communities in pursuit of profit:

"There will always be resistance; the next battle will always be near.
As long as you have everything, there will be those who have nothing to fear.
And little by little, or maybe all at once, you will lose.
Because our future is not yours to choose."

(David Rovics)

CHAPTER 1 - BACKGROUND AND INTRODUCTION

1.1 *History and Context*

The fact that Africa is one of the most mineral rich continents is fairly uncontroversial[1] and yet it is also one of the most economically disadvantaged.[2] While there are a range of theories that suggest why this might be the case, a common thread that simply cannot be ignored is Africa's history of extractive colonialism: European powers set up colonies in Africa for the sole purpose of developing and increasing the wealth of the metropole.[3]

One of the most sinister aspects of extractive (as opposed to settler) colonialism was that its sole objective was 'to tap African Resources in order to help resolve the economic problems of Europe'.[4] The result of this was that the colonial powers only set up enough infrastructure as was necessary to remove these raw materials for shipment back to Europe[5].

This is a pattern that continues in many post-independence African states, which have to base their economies almost entirely on these modes of production[6], leading to what some academics describe as a 'second scramble for Africa'[7] led by private corporations often based in more developed nations. Unsurprisingly, these extractive operations tend to benefit the

[1] Chris Nwachukwu Okeke 'The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?'(2008) 42 *The International Lawyer* (1) at 194.
[2] Walter Rodney *How Europe Underdeveloped Africa* (2018) 35.
[3] Ibid.
[4] Bill Freund *The Making of Contemporary Africa: The Development of African Society since 1800* 2 ed (1998) 97.
[5] Ibid 99.
[6] Frederick Cooper *Africa Since 1940: The Past of The Present* 1 ed (2002) 99.
[7] Nwachukwu Okeke op cit note 1 at 193.

company concerned, and its home state, while doing very little for the country from which the resources are taken.[8]

Nevertheless, the economies of these African states are often dependent on the foreign investment brought in by these projects, which leads to a very clear, and problematic, imbalance of power.

Those who are inevitably most heavily impacted are the communities that live on the land that these projects seek to 'develop'. In recognition of this problem, both domestic and international legal systems have a range of mechanisms designed to better protect the rights and interests of customary communities. This is particularly true on the African Continent and yet we still see cases in which mining companies attempt to use the law to ride roughshod over these communities in pursuit of profit. One of the most well-known cases in relation to this issue in South Africa is that of the Xolobeni Community, in the Eastern Cape[9]. This is largely due to gaps and deficiencies in the theoretical framework.

In South Africa, we have two main pieces of legislation that come into play where the relationship between extractive projects and rural customary communities is concerned: the Mineral and Petroleum Resources Development Act (MPRDA)[10] and the Interim Protection of Informal Land Rights Act (IPILRA).[11] One of the major issues arises due to the fact that these two pieces of legislation seem to contradict each other. Having said this, some degree of resolution was provided by the recent cases of *Baleni and Others v Minister of Mineral Resources and Others* (The *Baleni* Case)[12] and *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* (The *Maledu* Case).[13] This legislative tension

[8] Nwachukwu Okeke op cit note 1 at 193.
[9] *Baleni and Others v Minister of Mineral Resources and Others* (2019) 1 All SA 538 (GP).
[10] Mineral and Petroleum Resources Development Act no. 28 of 2002.
[11] Interim Protection of Informal Land Rights Act no. 31 of 1996.
[12] *Baleni* supra note 9.
[13] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC).

and how the courts have attempted to resolve it will be addressed in Chapter 4 of this dissertation.

1.2 *Problem Statement*

It is clear that there are significant deficiencies in the law that may favour the interests of extractive industry over those of affected communities. The goal of this research is to discuss mechanisms in the South African legal system in detail and highlight their shortfalls as well as discuss what rural communities need by way of stronger legal protection or effective remedies. Finally, it will make recommendations and offer possible solutions to allow the law to provide better protections to some of the most marginalised sections of the South African population.

1.3 *Methodology*

This dissertation will be conducted through desktop research – based primarily in South Africa - analysing the relevant global, regional, sub-regional and domestic mechanisms regulating the relationship between customary land rights and extractive industries. The research will supplement this with an in-depth discussion around South African case law. This will serve the dual purpose of highlighting the current precedent, while also giving an idea of how the law works in practice. The end goal of this being to illustrate the benefits, as well the major deficiencies, in the system as it stands. It will also draw on existing research by international legal academics relating to the regulation of extractive industries with the goal of offering a deeper analysis of how these mechanisms could better fulfil their purpose.

Admittedly, there are limitations to this kind of research: without personally engaging with affected communities, it would be inappropriate to attempt to offer solutions or ideas relating to the communities in question. For this reason, while certain case studies may be

discussed in order to make a particular point, this research will focus on the broader, theoretical issues. This work will aim to contribute to a baseline from which other academics or legal practitioners can work to ensure that customary land rights are better protected in each specific instance.

While a significant portion of this dissertation is concerned with international law, it is important to remember that it is written from the South African perspective, and so South African customary communities and the kinds of laws and institutions that might impact them will be at the centre of the research.

1.4 ***Literature Review***

In order to adequately set out the current literature on the relationship between customary communities and extractive industries, one needs to group the different works into sub-categories relating to the major thematic issues; these are issues with the current framework relating to 'indigenous peoples' in the African context and; second, the effect of mining on rural environments and customary communities.

1.4.1 The Issue with the current framework relating to 'indigenous peoples' in the African Context

Most international jurisprudence relating to the land rights of rural communities uses the term 'indigenous peoples', which raises a number of issues. Foremost among these is that ideas around indigeneity developed primarily in the Americas where 'the historical context…is very different to the African history of warfare, displacement and migration and the subsequent

imposition of colonial boundaries'[14]. Thus, the usual conception of indigeneity 'emphasises historical and unbroken attachment to the land …[and]…excludes many African rural communities'[15]

It can be argued that the criteria for indigeneity, where customary rights are concerned, should go beyond the ordinary meaning of the term and instead look at issues such as the particular community's degree of marginalisation in their society [16] as well as 'modes of production currently practiced or practiced in a near past.'[17] The reason for this being that, while groups using different modes of production were in conflict long before the first Europeans arrived in Africa, the colonial authorities 'reinforced the power of agricultural peoples over herders and hunters'. [18]

Taking all this into consideration, one of the major arguments for the use of indigeneity in the African context is pure necessity. Generally speaking, when one speaks about "human rights" – one is concerned with those rights that can be held by individuals. However, the emerging field of 'indigenous rights' is one of the few exceptions to this. The result is that customary communities are compelled to claim some form of identity as an 'indigenous group' for their communally held rights to be legally recognised. One clear example of this was when the Nakuru High Court in Kenya ruled the Endorois could not claim that their communal land rights had been violated since 'There is no proper identity of the people who were affected by the setting aside of land to form the game reserve'.[19]

[14] Wilmien Wicomb 'Free Prior and Informed Consent in Africa: Challenges and Opportunities' unpublished Article written for Heinrich Boll Stiftung (2015) at 2.
[15] Ibid.
[16] Felix Mukwiza Ndahinda 'Marginality, Disempowerment and Contested Discourses on Indigenousness in Africa ' (2011) 18 *International Journal on Minority and Group Rights* (4) at 481.
[17] Ibid at 480.
[18] Ibid at 481.
[19] Gabrielle Lynch 'Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and People's Rights and the Endorois' (2012) 111 *African Affairs* (442) at 35.

The strength of indigeneity as a framework for the protection of Customary Land Rights was reflected in the findings of the African Commission on Human and Peoples' Rights (ACHPR) in the case of *Centre for Minority Rights Development (Kenya) and Another on behalf of the Endorois Welfare Council v Kenya* (the Endorois Case)[20]. Gabrielle Lynch states that the commission's finding that the Endorois needed '*de jure* ownership' rather than just 'mere access' to the territory in question is a clear indication of the strength of indigeneity in international fora. Thus, she states that the success of the Endorois case as well as the fairly general criteria for indigeneity[21] will likely encourage other communities in similar situations to claim indigenous identity to enforce their customary rights.[22] One needs to remember that, even where one might be inclined to sympathise with the community in question, it can still be the case – such as that of the Endorois – where a community has created an indigenous identity in order to 'mobilize…moral, political and legal advantage on a global scale'.[23]

On the other hand, Ndahinda disputes the idea that rural communities need to claim indigeneity in order to be able to adequately enforce their rights. With specific reference to the Ogoni people in Nigeria, he argues that there are a myriad of other angles from which their case could be heard, including 'environmentalism, minority rights, and general human rights activism'.[24]

Furthermore, the use of terms such as 'indigenous' could become more hindrance than help in the work of protecting the rights of these communities.[25] While it seems to be readily accepted that hunter-gather groups, such as the Basarwa (San) in Botswana or the Twa in

[20] Communication 276/03, Centre for Minority Rights Development(Kenya) and Another on behalf of the Endorois Welfare Council v Kenya (2009)AHRLR 75 (ACHPR 2009).
[21] Essentially, the claimant group needs to (1) Identify and be accepted as being indigenous and (2) have suffered significant historical injustice.
[22] Lynch op cit note 19 at 42.
[23] Ibid at 28.
[24] Ndahinda op cit note 16 at 490.
[25] Ibid at 482.

Rwanda, can legitimately claim to be indigenous the ability of pastoralist communities, such as the Khoe, Maasai and Tuareg, to do the same is more contested.

Far more controversial is the fact that there have been those with European ancestry living in Africa who have attempted to claim indigeneity and participate in the 'global indigenous movement'. These groups are the 'Baster' People, living mainly in Rehoboth, Namibia, as well as certain Boer (Afrikaaner) communities in South Africa.[26] . Not only have the Basters managed to successfully self-identify as indigenous, as shown by their declaration on the 10th of October 1992, they have also been recognised as such by other indigenous groups including the Griqwa and the Nama.[27] The success of the Basters that inspired a number of right-wing Afrikaaner groups to attempt to do the same., alleging that Afrikaaner culture 'developed uniquely and distinctively in Africa'.[28]

The primary issue is that the focus on indigeneity leads to an obsession with 'politics of recognition' in a manner that ultimately works to the detriment of those very communities that are attempting to enforce their rights.[29]

In addition to the issue of who can claim to be indigenous, there are other significant problems with encouraging customary communities to embrace 'ethnic and cultural narratives of difference and distinction'[30] in order to claim and protect their communal land rights. Most notably, it feeds into the stereotype of a 'Tribal Africa'.[31] Furthermore, such 'ethnic essentialism' could easily lead to 'political tribalism…[which would]…manifest in racism and xenophobia'.[32] Finally, when activists and community members focus on this spiritual and

[26] Ndahinda op cit note 16 at 491.
[27] Ibid.
[28] Ibid at 493.
[29] Lynch op cit note 19 at 44.
[30] Ibid.
[31] Ibid.
[32] Ibid.

cultural link to the land, they run the risk of diverting attention away 'from a reality of gross inequalities in wealth and power'. [33]

In fact, there is the question about whether 'indigenous' is even the appropriate framework to use when referring to these customary communities. Terms such as 'indigenous' have often been used, alongside other terms such as 'native' or 'primitive', to refer to various African cultures and communities in a disparaging manner that ultimately served to further entrench their marginalisation[34].

The nature of indigeneity is ultimately beyond the scope of this dissertation. This being said, it will use 'indigenous peoples' alongside ideas such as 'marginalised' or 'mining-affected' communities to refer to the same kinds of communities that find their customary land rights impacted by extractive operations.

1.4.2 The effect of mining on rural environments and customary communities

As highlighted by John Capel[35] in the affidavit that he submitted in support of the applicants' request for a declaratory order in the *Baleni* case 'Mining is often presented as a virtually universally positive for the South African Economy and its people'.[36] To illustrate this point, he quotes the Minister of Mineral Resources in the respondent's founding affidavit, who said that:

> Our people, we believe, are genuine people, they should be able to see that this mining is going to be able to open other avenues because that is what mining does[37]

---

[33] Lynch op cit note 19 at at 45
[34] Ibid at 44
[35] Executive Director of the Bench Marks Foundation NPC.
[36] Affidavit: John Capel in Volume 6 Applicants Pleadings *Baleni and Others v Minister of Mineral Resources and Others* at 515.
[37] John Capel op cit note 36 at 516

While Capel does accept that mining might have some benefits to all, including the affected community, he takes 'a more nuanced view' highlighting the fact that the affected community usually suffers harms that outweigh any benefits. It is based on this that he sets out his argument for 'Free, Prior and Informed Consent' (FPIC)f.[38]

MacInnes et al. are less willing to giving extractive projects the benefit of the doubt. They highlight that, from an historical point of view, the link between the pursuit of wealth through extractive projects and the destruction of indigenous communities and culture is inescapable.[39] There is also a fair amount of consensus that this continues to be the case. Admittedly, any party who lives in close proximity to mining operations would stand to be negatively impacted by 'environmental pollution [and] air borne diseases'.[40] However, it is widely accepted that 'Indigenous peoples have been especially susceptible to marginalisation and the destruction of livelihoods, because they rely heavily on land and resources that are susceptible to environmental damage from resource extraction'.[41]

South African courts have acknowledged that customary communities, generally, stand to lose significantly more than any other community or group of people. In the *Baleni* Case, Justice Basson states that 'It is well documented that customary communities such as the applicants, tend to suffer disproportionally from the impacts of mining activities'[42]. In addition to the more generalised adverse effects of mining (air pollution etc.), customary communities generally stand to be most severely impacted by 'loss of their farm land and grazing land, forced displacement and loss of community'.[43] Similarly, the Court in the *Maledu* case

[38] John Capel op cit note 36 at 516.
[39] Angus MacInnes, Marcus Colchester and Andrew Whitmore 'Free, Prior and Informed Consent: How to rectify the devastating consequences of harmful mining for indigenous peoples' (2017) 15 *Perspectives in Ecology and Conservation* (3) at 152.
[40] *Baleni* supra note 9 para 19.
[41] Ciaran O'Faircheallaigh 'Extractive industries and Indigenous peoples: A changing dynamic?' (2013) *Journal of Rural Studies* 30 at 20.
[42] *Baleni* supra note 9 para 19.
[43] Ibid.

emphasised the 'obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure that is legally secure or to comparable redress'.[44] However, it should be said that all of this will be addressed in greater detail in Chapter 4 of this dissertation.

1.5 *Chapter Breakdown*

In order to examine the complex issues around customary land rights and extractive industries in Africa, the rest of the dissertation is divided into four chapters, each dealing with its own, narrower focus:

Chapter 2 - African Customary Law and Land Rights - gives a broad theoretical overview of the way in which African Customary Law should work in relation to land rights, and examines how this tends to play out in practice, with a specific reference to the contested nature of African Traditional Leadership institutions.

Chapter 3 – International Legal Mechanisms regulating the relationship between Customary Land Rights and Extractive Industries - looks at the codified legal mechanisms at every level from global treaties through to sub-regional protocols and directives, in order to come to terms with the role of international law in protecting the rights of mining-affected communities.

Chapter 4 – Customary Land Rights and Extractive Industries: The South African Example - examines the situation as it stands in South Africa by offering an analysis of the relevant legislation before discussing three major examples, two of which are disputes that (as of November 2020) are ongoing. The aim of this exercise is to understand how these kinds of

[44] *Maledu* supra note 13 para 5.

disputes play out in practice and to examine the arguments that led to relevant binding precedent.

Chapter 5 - The final chapter summarises the points that emerged throughout my research, highlights the major concerns and attempts to offer an idea of what needs to happen in order to afford better protection to customary communities in mining-affected areas.

1.6 *Conclusion*

What has been provided thus far is an illustration of why there is still a need for further discussion around the rights of mining-affected communities on the African Continent as well as some background discussion on some of the major contentions. However, before one can address the rights of these communities in the international and domestic sphere it is necessary to deal with the kind of land rights that they hold. It is with this in mind, that Chapter Two concerns itself with the theoretical nature of African Customary Law – or 'indigenous' law – while paying special attention to potential difficulties relating to land rights in terms thereof.

CHAPTER 2 – AFRICAN CUSTOMARY LAW AND LAND RIGHTS

2.1. ***Introduction***

In an attempt to avoid the errors of the past, the South African Constitutional Court has held that we should view customary law as 'living' rather than 'codified', meaning that it is sourced from the 'practices, principles and negotiations that people use and engage with in their everyday lives'[45]. The Constitutional Court, in the case of *Alexkor Ltd and Another v Richtersveld Community and Others*, argued that customary law 'is not a fixed body of formally classified and easily attainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life'.[46]

Thus, one of the major difficulties with African Customary Law in general is that it is rarely that simple to determine what the relevant rules of customary law says on any particular matter. One needs to attempt to get a stronger grasp on what property and ownership rights might actually mean in terms of African Customary law before attempting to offer any meaningful suggestions as to how those property rights can better be protected.

2.2. ***Living or Official Customary Law***

One of the most apparent ways in which colonial authorities distorted African Customary Law was by attempting to reach 'certainty' by codifying it and applying this 'official' version of Customary law throughout the court systems.

---

[45] Land Accountability and Research Centre and Ndifuna Ukwazi, 'Patriarchs and Pariahs: The Geography of Traditional Leadership' (2016) *People's Law Journal* at 11.
[46] *Alexkor Ltd v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 52.

The preference for official African Customary Law over 'living' customary law is something that continues to create problems in post-Apartheid South Africa. In the case of *Bhe and Others v Khayelitsha Magistrate and Others*, Langa DCJ acknowledged that it might be difficult for courts to correctly apply living customary law as its rules are, by their very nature, 'ad hoc and not uniform'.[47] However, he also re-emphasised the problematic disjunction between Official Customary Law and Living Customary Law, saying that 'because of the dynamic nature of society, official customary law as it exists in the textbooks…is generally a poor reflection, if not a distortion of the true customary law.'[48] While he was concerned specifically with the customary law of succession, it is important to note Langa DCJ's concerns about the fact that official Customary law has 'been distorted in a manner that emphasises its patriarchal features and minimises its communitarian ones'.[49] Thus, even as Roman Dutch Law was being developed in keeping with the changing times, 'customary law was [being] robbed of its inherent capacity to evolve in keeping with the changing life of the people it served'.[50]

In addition, institutions of traditional leadership, like any other institutions and mechanisms under 'Official Customary Law', were severely impacted by its 'formalisation and fossilisation'.[51] This issue was discussed at length in the case of *Shilubana and Others v Nwamita*, where the Court had to reach a decision about a woman's 'right to succeed as Hosi (Chief) of the Valoyi traditional community in Limpopo'.[52] When the first applicant's father died, he did not have any sons and so the title of Hosi passed to his younger brother,[53] the father of the respondent. While the respondent's father was still alive, the Valoyi Royal Family

[47] *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC) para 86.
[48] Ibid.
[49] Ibid para 89.
[50] Ibid para 90.
[51] Ibid.
[52] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66(CC) para 3.
[53] Ibid.

passed a Resolution naming the applicant as the successor to the title of Hosi,[54]stating that times had changed and that customary law should allow for female leaders. However, when the respondent's father died the respondent challenged this decision, stating that customary law did not allow a woman to take the title of Hosi[55]. Both the High Court and the Supreme Court of Appeal found in favour of the respondent (who was the applicant in the Court *a quo*). For example, the High Court described the Royal Family's resolution as 'a bout of constitutional fervour' arguing that 'without the benefit of a 'general poll' the Court could not conclude that customary law had been changed.'[56] This decision was ultimately overruled by the Constitutional Court when the majority found in the applicant's favour. To this end, Van Der Westhuizen J stated that 'Customary law is living law and will in future inevitably be interpreted, applied and when necessary, amended or developed by the community itself'[57]

What these two cases clearly show is that Constitutional Court, as the highest court in South Africa, has tended towards preferring the notion of 'living' rather than 'official', formalised customary law

2.3. ***The problems with attempting to understand customary land tenure system through a common law lens.***

In most Western legal systems, the concept of 'ownership' where property is concerned is fairly straight-forward: a person who 'owns' a certain piece of property has exclusive, near-limitless rights of access to and use of that property. Furthermore, those rights can be enforced against any other individual or against the world at large. To this end, Pope et al. quote the 1979 case of *Gien v Gien* which described ownership rights as 'the most complete right a subject can have

[54] *Shilubana and Others v Nwamitwa* supra note 52 para 4.
[55] Ibid para 7.
[56] Ibid para 22.
[57] Ibid para 81.

in relation to an object'.[58] This is then further explained by the use of the latin maxim *nemo plus iuris ad alium trasferre potest quam ipse haberet*, meaning 'no one can transfer more rights than he has'.[59] In a way, this serves to distinguish ownership as a 'real right' from rights that may exist in the law of obligations – since a lawful owner of a certain thing can enforce their claim against any individual who may unlawfully be in possession of that thing – regardless of whether or not the possessor has actually 'wronged' them directly.

However, as stated in the *Alexkor* case, 'The dangers of looking at [African customary] law through a common law prism are obvious. The two systems of law developed in different situations, under different cultures and in response to different conditions.'[60] In 'African Indigenous Land Rights in a Private Ownership Paradigm' WJ Du Plessis describes 'ownership' - particularly where land is concerned - as something that 'was both 'communal' and 'individual''.[61] She elaborates on this idea by stating that pre-colonial ideas of property were more concerned about individuals' obligations to each other 'in respect of property' than they were with the ability of any particular individual 'to assert his or her interest in property against the world'[62].

One of the ways in which theorists have 'attempted to overcome the problem of indigenous land tenure and its incompatibility with the notion of [private law] 'ownership'[63] was to suggest that African systems of land tenure regarded land as 'common to all people',[64] essentially suggesting that 'the land is farmed collectively and…the produce is shared'[65] . Du

[58] Anne Pope et al. *The Principles of The Law of Property in South Africa* 7 ed (2015) 91.
[59] Ibid.
[60] *Alexkor* supra note 46 para 56.
[61] W.J. Du Plessis 'African Indigenous Land Rights in a private ownership paradigm' (2011) 17 *Potchefstroom Electronic Law Journal* 7 at 49.
[62]Ibid.
[63] Ibid at 51.
[64] Ibid at 52.
[65] Ibid.

Plessis argues that this view is 'erroneous', and that the use of the term 'communal' in the legal sense[66] is 'confusing'[67].

The use of terms like 'communal' in the context of African Customary Law 'seems to imply joint or collective ownership and use of all land and natural resources'[68] whereas these systems work by means of 'the conferral of rights on the basis of accepted group membership'[69] rather than from the state as a whole. For this reason, the slightly more wordy description of group rights in the context of African customary law as being 'community-based'[70] has been offered as an alternative. Addressing what he refers to as the 'extensive reconfiguration'[71] of customary law under colonial administration, Cousins states that the idea of African Customary Land Rights as 'communal' often worked to the benefit of the colonial administration. '[T]he [British] Privy Council in 1926 pronounced that 'the notion of individual ownership is foreign to native ideas. Land belongs to the community not to the individual'.[72] While evidence suggests that the colonial period was a time of 'the vigorous assertion of individual rights'[73] he states that 'new economic opportunities'[74] created by the advent of colonialism were largely responsible for this phenomenon[75] and that while 'the colonial state was generally happy to concede to them these rights of occupation and use, the question of whether these rights could be bequeathed…was more contentious'.[76]

---

[66] Since she argues that it could refer either to 'one property, inseparable title' or 'one property, separate – but with the same title in land'.
[67] Du Plessis op cit note 61 at 52.
[68] Ben Cousins 'Potential and Pitfalls of 'communal' land tenure reform: experience in Africa and implications for South Africa' (2009) Paper for World Bank conference on 'Land Governance in support of MDGs: Responding to new challenges available at https://www.fig.net/resources/proceedings/2009/fig_wb_2009/papers/trn/trn_1_cousins.pdf at 2, accessed on 22 June 2020.
[69] Ibid.
[70] Ibid.
[71] Ibid at 3.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ibid.

While there was some 'spirited opposition to individuation'[77] among rural African communities, this too, was directly linked to the 'politics of the colonial situation'.[78] Out of fear of losing any more land, communities would assert that customary law viewed property rights to be communal; taking this approach, 'individualism was a code word for 'sale to Europeans'.'[79]

Keeping all this in mind, the widely accepted view is that 'colonial conquest'[80] meant that African Customary Law had 'limited scope to develop at its own pace, and based on its own principles',[81] particularly with the introduction of the 'market economy'[82]: 'with the introduction of commerce, an exchange value had to be attached to a commodity, and in this context ownership provided the answer to securing the property'.[83] This illustrates the role that this idea of ownership had in justifying the colonial project since, to the colonial authorities, 'land must have an owner'[84] and the fact that ownership did not work in the same way among African communities 'meant that the government could appropriate this 'unowned' land'.[85] This justification 'was more than just an intellectual error'.[86] This attitude continues to affect customary communities in post-independence African States in two clear ways. First, that legal practitioners continue to treat customary land rights as 'a dying regime'[87] with the result that they tend to get over-ridden by 'statute and court interventions propounding foreign law'.[88] Second, academics and policy makers continue to perpetuate these distorted ideas of customary

[77] Cousins op cit note 68 at 3.
[78] Ibid
[79] Ibid
[80] Du Plessis op cit note 61 at 50.
[81] Ibid.
[82] Ibid at 51.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] HWO Okoth-Ogendo 'The Nature of Land Rights under Indigenous Law in Africa' in Aninka Claasens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* 1 ed (2008) at 98.
[87] Ibid.
[88] Ibid .

land rights.[89] In short, it is these deliberate distortions of customary land rights that continues to contribute to insecurity of tenure where customary communities are concerned.[90]

The insecurity of tenure faced by these communities is entirely due to this distortion and 'dislocation'[91] of these systems and not due to some inherent problem with customary law land tenure systems, themselves.[92] One can clearly see why Wilmien Wicomb and Henk Smith argue that:

> One of the most destructive impacts of colonialism on the continent was the imposition of western forms of law - and in particular property law – on African countries and thus on customary law. This imposition was so pervasive and absolute that the fiction that 'ownership' can only be proven through a title deed or similar written entitlement remains intact in most of Africa.[93]

The colonial project imposed its own values on African Customary Law in order to justify itself and, in the process, completely warped customary systems of land tenure.[94] From a certain point of view, this colonial influence actually destroyed any system of customary land tenure.[95] There is widespread consensus among legal theorists that attempting to understand how land tenure works in African Customary Law by applying common law norms only furthers this distortion and runs the risk of causing more harm than good. In conclusion, Bennet – as quoted in the *Bhe* case – said that:

> [the] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype which has become ossified in the official code, or whether it continues to enjoy social currency.[96]

---

[89] Okoth-Ogendo op cit note 86 at 98.
[90] Ibid.
[91] Ibid.
[92] Du Plessis op cit note 61 at 53.
[93] Henk Smith and Wilmien Wicomb *Customary Law and the Protection of Community Rights to Resources* Legal Resources Centre Pamplet at 1 available at https://landportal.org/library/resources/customary-law-and-protection-community-rights-resources, accessed on 25 June 2020.
[94] Cousins op cit note 68 at 4.
[95] Ibid.
[96] *Bhe* supra note 47 para 86.

2.4. ***The cultural importance of secure tenure over land***

When writing about the term as it is used in the International Covenant on Economic, Social and Cultural rights, Rodger O'Keefe mentions that culture could legitimately be understood in three fairly different ways:

> (1) …in the classic highbrow sense, meaning the traditional canon of art, literature, music, theatre, architecture and so on;
>
> (2) … in a more pluralist sense, meaning all those products and manifestations of creative and expressive drives …[including] …mass phenomena such as commercial television and radio, the popular press, contemporary and folk music, handicrafts and organised sports; and
>
> (3) …in the anthropological sense, meaning not simply the products or artefacts of creativity and expression…but, rather, a society's underlying and characteristic pattern of thought -its 'way of life'- from which these and all social manifestations spring.[97]

Where most people consider culture in the first or even the second way, the focus of this discussion is rather on the third idea of culture. As was highlighted by the Constitutional Court in the case *Daniels v Scribante and Another* the Court quoted a speech by a Mr Petrus Nkosi in front of a community meeting where he said that 'Our purpose is the land…The land is our whole lives…When the whites took our land away from us, we lost the dignity of our lives'.[98] The Court focused on the link between the land and the dignity of African people, however, leading up to this, the Court makes a remark that 'their way of life had been torn asunder'.[99]

Whether it is being used for housing, retail, manufacture or agriculture; the modern global economy tends to think of land only in terms of the economic value that can be derived from it. To quote an article written in *The Journal of The Royal African Society* in 1939:

---

[97] Roger O'Keefe 'The 'Right to Take Part in Cultural Life' under Article 15 of the ICESCR' (1998) 47 *The International and Comparative Law Quarterly* 4 at 905.
[98] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) para 1.
[99] Ibid.

> The philosophy of our era and our race is that land is acreage to be exploited, bought and sold and that any sentiment that may attach to title or vested interest, however deep or old is secondary consideration.[100]

If one views land, or 'immovable property' in this manner, then it makes perfect sense that a company should be allowed to mine on a person's piece of land without their consent as long as they are allowed to give their input into the decision making process and are adequately compensated for any harm that they suffer as a result of it. However this does not consider groups of people for whom the value of the land goes beyond mere economic benefit. In their article on Free, Prior and Informed Consent, Adrienne Mckeehan and Theresa Buppert speak about 'the indigenous peoples of the world whose livelihoods, cultures and identities are intimately tied to the land on which they have lived for generations'[101]. It should be said that they are writing with specific reference to communities in Asia and South America. However, despite the contestations around ideas of indigeneity in the African context, it is clear that many rural, customary communities view their relationship to their land in a similar manner. In illustration of this idea, former Constitutional Court Judge, Justice Albie Sachs said:

> The land represents the link between the past and the future; ancestors lie buried there, children will be born there. Farming is more than just a productive activity, it is an act of culture, the centre of social existence, and the place where personal identity is forged.[102]

Recognising the deep significance of land for many African cultures, it becomes clear that any act impacting on a community's land necessarily impacts on their culture, way of life and dignity in a manner which is almost impossible for anyone outside of that community to

---

[100] E.S. Craighill Handy 'The Religious Significance of Land' (1939) 38 *Journal of The Royal African Society* 105 at 114.

[101] Adrienne Mckeehan and Theresa Buppert 'Free Prior and Informed Consent: Empowering Communities for People-Focused Conservation' (2014) 35 *Harvard International Review* 3 at 48.

[102] T.W. Bennett *Human Rights and African Customary Law* 1 ed (1995) at 152.

understand. It is, therefore, imperative at the very least to consider this cultural impact when discussing issues of customary land tenure.

The applicants in the *Baleni* case discussed the cultural importance of the land to a mining-affected community, partially as a response to the fifth respondent's allegation that 'IPILRA is [merely] intended to give informal land rights an equal status to formal land rights.[103] The applicants mentioned that 'The land…has deep spiritual and religious connections.' More than just being a place to live[104] they mention that for each member of the community, the home and the land it is built on 'is a symbol of social maturity and social dignity'.[105] It also takes on a special religious significance as 'it serves as a conduit for the perpetuation of relations of inter-linkage and mutual dependence between the living and the dead.'[106] The applicants submitted that these customary land rights cannot possibly be seen simply as being equivalent to common-law ownership rights since 'Common-law owners have no cultural right to respect for their attachment to the land. Customary-law owners do.'[107] In addition, the applicants turned to foreign law to illustrate the importance of cultural rights when attempting to understand 'indigenous' land rights. They quoted the Colombian Constitutional Court as saying that '[A]n ethnic community cannot be forced to renounce its way of life and its culture for the mere arrival of an infrastructure…or an exploitation project'.[108] This, exactly, would be the case if the respondent granted a mining right on the community's land. The Court found that such mining would lead to 'the further destruction of traditional authority structures

[103] Fifth Respondent's Heads of Argument; *Baleni and Others v Minister of Mineral Resources and Others* para 1.8.4.
[104] Applicant's Heads of Argument; *Baleni and Others v Minister of Mineral Resources and Others* para 17.
[105] Ibid
[106] Ibid.
[107] Ibid para 189.
[108] Ibid para 206.

and traditional norms and culture'[109] and, eventually 'the loss of the community's cultural identity and…way of life'.[110]

In the *Baleni* judgment, Basson J also explicity recognises the importance of land to the community's way of life. She mentions that 'land…accrues to persons by virtue of them being members of the Umgungundlovu community'.[111] While people not from the community are able to own land, their 'applications…are subjected to robust assessment processes'.[112] She states that it is this overly cautious attitude to outsiders that has allowed the community 'to preserve and protect the interests of the community'[113] as well as 'their continued way of life on this sacred land'.[114]

This exchange between the parties in the *Baleni* case, makes it clear how important it is to emphasise this link between land and cultural rights if one is serious about ensuring that these communities have the best possible protections where extractive industries are concerned, since without it there is little left to ordinarily distinguish them from their common law equivalents. Furthermore, there is the risk of causing a harm that runs far deeper than can be actually understood, going beyond what can be remedied by economic compensation.

2.5 ***Traditional Leaders and Community Rights***

The role of traditional leadership institutions in the distortion and manipulation of African Customary Law to the benefit of themselves and the colonial authorities is an issue that bears frequent repetition and re-emphasis. According to Martin Chanock :

---

[109] Applicant's Heads of Argument op cit note 104 para 22.
[110] Ibid.
[111] *Baleni* supra note 9 para 10.
[112] Ibid.
[113] Ibid.
[114] Ibid.

> There is a profound connection between the use of the chieftaincy as an institution of colonial government and the development of the customary law of land tenure. The development of a concept of a leading customary role for the chiefs with regard to ownership and allocation of land was fundamental to the evolution of the paradigm of customary tenure.[115]

In South Africa, misunderstandings about the role of traditional leaders have led to difficulties in protecting the rights of marginalised communities even after the end of Apartheid. For example, there have been incidents in Kwa-Zulu Natal of traditional leaders entering into 'development deals and land sales without the consent of the community members living on the land'[116] because they assumed that they were the lawful owners of the communal land within their jurisdiction.[117] Thus, it is clear that one cannot discuss the complicated relationship between customary land rights and the common law without also addressing the question of traditional leadership.

And yet, there are reasons for traditional leadership institutions to continue to function in independent and democratic African States. In order to understand this fully, one needs to look into the nature of pre-colonial traditional leadership institutions. As noted by Mathonsi and Sithole, traditional leaders 'such as chiefs and headmen' formed 'the backbone of local governance in many parts of the continent'[118] before the arrival of Europeans in Africa. This being said, Himonga and Nhlapo in *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* draw attention to the phrase 'A chief is a chief by the people'[119] to highlight that pre-colonial traditional leadership institutions (while not necessarily 'democratically' elected) were entirely dependent on legitimacy derived directly from those

---

[115] Martin Chanock 'Paradigms, Policies and Property: A review of the Customary Law of Land Tenure' in Kristin Mann and Richard Roberts (eds) *Law in Colonial Africa* (1991) at 64

[116] Land Accountability and Research Centre and Ndifuna Ukwazi, 'Protecting The Land Rights of Rural People: Is IPILRA the Answer?' (2016) *People's Law Journal* at 70.

[117] Ibid.

[118] N Mathonsi and S Sithole 'The incompatibility of traditional leadership and democratic experimentation in South Africa' (2017) 9 *African Journal of Public Affairs* 5 at 37.

[119] Chuma Himonga and Thandabantu Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 1 ed (2014) at 229.

over whom they claimed to exercise authority. Thus, in theory, traditional leaders could not just be 'unbridled dictators' but had to use their powers fairly.[120] There were two clear reasons for this, the first being the nature of politics generally – an unjust leader was left vulnerable to being 'displaced by a competitor'.[121] The second, perhaps more important reason, was the fact that land was generally more abundant[122] which meant that individual subjects or even entire sections of the community who were displeased with a certain chief's leadership could simply leave and establish a new community.[123] All of this meant that, pre-colonial chiefs occupied a position of 'stewardship'[124] as representatives and/or decision makers on behalf of their people rather than one of absolute top-down authority.[125] It needs to be said that none of this is aimed at romanticising pre-colonial traditional leadership institutions or suggesting that they were completely unproblematic, rather it aims to show that there is some theoretical justification for them in modern, democratic African states as representatives acting in the best interests of their community.

In South Africa we have a situation wherein 'several laws adopted over the past 12 years have linked people's land rights to traditional leadership'[126]. For most of the early years of a democratic South Africa, traditional leadership institutions were regulated by the Traditional Leadership Governance and Framework Act 41 of 2003 (herein referred to as 'the Framework Act'). Arguably, it had the admirable goal, to restore 'the integrity and legitimacy of the institution of traditional leadership'.[127] However, whether or not it could reasonably be expected to do this was an issue of debate among legal academics and practitioners until it was repealed and replaced by the Traditional and Khoi-San Leadership Act in 2019. Foremost

[120] Himonga and Nhlapo op cit note 119 at 230.
[121] Ibid.
[122] Ibid.
[123] Ibid.
[124] Ibid at 231.
[125]Ibid.
[126] Land Accountability and Research Centre and Ndifuna Ukwazi op cit note 45 at 11.
[127] Preamble, Traditional Leadership and Governance Framework Act 41 of 2003.

among the concerns related to the Framework Act was that it had the effect of recognising and legitimising the systems of traditional leadership as they were established during the Apartheid era.[128]

However, much of the success of the extractive colonial project was due to the co-option of these traditional authorities in order to suit the needs of the colonial authority, via a re-interpretation of African Customary Law in such a manner so as to increase the powers of traditional leaders while ensuring that they remain subject to colonial rule[129]. For example, traditional leaders who refused to co-operate with the colonial and (later) Apartheid Authorities would be 'replaced by other[s] who seemed to submit to the control of the colonisers'[130]. Even after the advent of independence in many African states, there is a multitude of cases to show that traditional leaders rarely act in the interests of the community that they allegedly serve[131], tending to act in their own self-interest and/or 'as government and mining industry instruments'.[132]

One would be forgiven for expecting that a fundamental role of any traditional leader would be to ensure that their community's cultural and spiritual interests (inter alia) are protected as far as possible. Thus, the fact 'the Royal Bafokeng Authority claims to uphold and promote the heritage interests of the Bafokeng people as a whole' [133] should be entirely unremarkable. And yet, the fact that they are under discussion here suggests that they were

---

[128] Lungisile Ntsebeza, 'Rural Governance and Leadership in post-1994 South Africa: democracy compromised?' in John Daniel, Rodger Southall and Jessica Lutchman (eds) *State of the Nation: South Africa 2004 – 2005* (2005) at 73.
[129] Ibid.
[130] Ibid.
[131] Llewellyn Leonard 'Traditional Leadership, community participation and mining development in South Africa: The case of Fuleni, Saint Lucia, KwaZulu-Natal' (2019) *Land Use Policy 86* at 292.
[132] Ibid at 292.
[133] The Bench Marks Foundation 'Communities in Platinum Minefields POLICY GAP 6 A review of Platinum Mining in the Bonjala District of the NW Province: A Participatory Action Research (PAR) approach' at 108. available at https://www.researchgate.net/publication/317888541_Policy_Gap_6_A_Review_of_Platinum_Mining_in_the_Bojanala_District_of_the_North_West_Province_A_Participatory_Action_Research_PAR_Approach/link/5950db570f7e9be7b2e83ed8/download, accessed on 28 June 2020.

caught acting in a manner that, while not directly contrary to, showed a clear lack of interest in their people's well-being. A research team working for the Bench Marks Foundation was shown a prospecting beacon belonging to Royal Bafokeng Platinum[134] - the result of a joint venture between Royal Bafokeng Holdings[135] and Anglo American Platinum (Amplats). Their report mentions that they were 'surprised and dismayed'[136] to see that it was right on top of 'a desecrated burial site'.[137] The community members mentioned that the workers on the site had told their supervisors that this was the case; and yet those supervisors chose to ignore their warnings.[138] The report lists the 'the desecration of these graves'[139] as among the issues that eventually 'brought [the community] into conflict with the Royal Bafokeng Authority'.[140]

While the legislation relating to traditional leadership institutions and the effects thereof may be enough cause for concern, many traditional leadership institutions are fraught with problems. One instance of this corruption in a Traditional Leadership institution is discussed by Kevin Bloom and Sasha Wales-Smith in the third chapter of their booklet on corruption around platinum deposits in the North-West Province of South Africa. For example, they mention that the Bakgatla Ba Kgafela Tribal Authority (BBKTA) passed a resolution promising to pay for the expenses of 'the king of the Bakgatla Bakgafela…Kgosikgolo Kgafela II'[141] in the following manner:

---

[134] Royal Bafokeng Platinum 'About us' available at https://www.bafokengplatinum.co.za/about-us-a-brief-profile.php, accessed on 28 June 2020.

[135] An investment company allegedly formed 'To deliver sustainable and predictable income and capital growth to serve the inter-generational needs of [the] community' – information from the about section on Royal Bafokeng Holdings' Page (Url: https://www.bafokengholdings.com/about.html, date accessed 28 June 2020)

[136] The Bench Marks Foundation op cit note 133 at 108.

[137] Ibid.

[138] Ibid.

[139] Ibid.

[140] Ibid.

[141] Kevin Bloom and Sasha Wales-Smith *Stealing The Crust* 1 ed (2018) at 10.

> Initially it was R 1 million for the subsistence costs of Kgafela II, R4,3 million for the operating costs of the Mochudi traditional authority and R400 000 for renovations to the tribal offices in Mochudi.[142]

Soon after this, the BBKTA passed another resolution promising 'a further R 5 million for all of the above, with the salaries of employees in the Mochudi office serving as the sole additional item'.[143]

As riddled with problems as it is, there is no escaping the fact that the BBKTA is really just one in a multitude of different traditional leadership structures that exist in South Africa alone. This being said, it nonetheless, serves its role as an illustration of the way in which corruption can become rampant in traditional leadership structures. This fact is particularly noticeable where there are conflicts around extractive projects, as highlighted by Anne Mayher in an article written for the Foundation for Human Rights, entitled 'A Clash of Rights? Platinum Mining Vs. Rural Communities in Limpopo Province, South Africa'.[144]

A traditional leader who co-operates with mining companies 'will receive positive support from the mine and by higher traditional leaders (sic)'[145]; even where they are not supported by 'the overwhelming majority'[146] of the community that they claim to represent. On the other hand, there have been instances of traditional leaders who 'are responsive to community concerns regarding [extractive operations]' finding themselves faced with a variety of undesirable consequences for their stance; including being ousted from power.[147] Mayher mentions an example of this where Nduna Isaac Pila of the Ga-Pila community who was

[142] Kevin Bloom and Sasha Wales-Smith *Stealing The Crust* 1 ed (2018) at 10.
[143] Ibid.
[144] Anne Mayher, 'A Clash of Rights? Platinum Mining Vs Rural Communities in Limpopo Province, South Africa.' (2009) – unpublished article on file with author.
[145] Ibid at 9.
[146] Ibid.
[147] Leonard op cit note 131 at 292.

replaced as Nduna by his son, who was co-operating with a company claiming to represent the interests of the community while being funded by AmPlats.[148]

In other instances, Traditional Leaders may purport to negotiate on behalf of their communities with mining companies, while in fact working to the detriment of community interests. A different kind of collusion between mining companies and traditional leaders was the sale of fifteen percent of Rustenberg Platinum Mines' 'Union Section Mine' to the Bakgatla Ba Kgafela: Bloom and Wales-Smith mention that 'ostensibly, the deal was struck for the ultimate benefit of the historically disadvantaged community'[149] and yet, in practice, the 'fine print' left the community's situation worse than it was before the deal was struck.[150] In addition, discussing a similar example involving 'the mining conglomerate Lonmin and the Bapo Ba Mogale'[151]; they point out that cases such as these are indicative of a trend of 'a single, unelected individual speaking for an entire community, with the strings of traditional chieftaincy pulled at will by the highest bidder'[152]

As has been shown, traditional leadership institutions are plagued with issues of corruption and illegitimacy among the communities that they are meant to represent. This is particularly concerning when it comes it comes to extractive industries, since mining companies provide a plethora of incentives for their co-operation and threaten them with severe sanctions should they offer any opposition. In circumstances like this, it is hardly surprising that traditional leaders find themselves no longer accountable to their communities, and inclined towards furthering the interests of mining companies.

Rights in terms in terms of African Customary Law function in two distinct spheres. The first is internal – concerned with the regulation of the conduct of individuals and

[148] Mayher op cit note 144 at 9.
[149] Bloom and Wales-Smith op cit note 141 at 7.
[150] Ibid.
[151] Ibid 8.
[152] Ibid.

communities bound by African Customary Law among themselves; while the second is external - serving as a mechanism to protect the interests of the community and its members against encroachment from the outside. More than that, property rights – as we understand them in terms of common law – do not allow for the existence, and therefore protection, of communally held land rights. It is on account of these two core issues that we cannot attempt to understand how to better protect community land rights.

This is all further complicated by the fact that the role of traditional leadership structures is more than just ceremonial: these are institutes that theoretically exist to protect the best interests of their communities, particularly when those interests come into conflict with those of external individuals and organisations. And yet we see a troubling pattern of traditional leaders acting contrary to the concerns of their communities in order to grow their own wealth and power by working in co-operation with these outside bodies that seek to exploit the resources of land held in terms of customary law.

2.6 *Conclusion*

The nature of land ownership in terms of African Customary Law is something that seems to be in a constant state of flux. Unfortunately, not only is this a fact that was exploited by the colonial and Apartheid authorities, but it is a problem that we see extractive companies and unscrupulous traditional leaders continuing to exploit even after 1994. It is against this background that various mechanisms of both international and domestic law are attempting to enhance and protect the land rights of mining-affected communities.

CHAPTER 3 – INTERNATIONAL LEGAL MECHANISMS REGULATING THE RELATIONSHIP BETWEEN CUSTOMARY LAND RIGHTS AND EXTRACTIVE INDUSTRIES

3.1 *Introduction*

Having highlighted the historical and societal problems around customary land rights in Africa – particularly where extractive industries are concerned, it is now necessary to discuss the various international, regional and domestic legal mechanisms that have attempted to address these issues.

Much of the international human rights law instruments refer to 'indigenous rights'. As such, from this point forward, the terminology of 'indigenous land rights' or 'customary land rights' shall be used interchangeably for the purpose of focusing the discussion.

3.2 *Global Systems*

There are two major International Human Rights Treaties with which are binding on most United Nations Member states: the International Covenant on Civil and Political Rights[153] (ICCPR) and the International Covenant on Economic, Social and Cultural Rights[154] (ICESCR). While neither of these covenants explicitly deals with indigenous/customary rights, they are both binding on most UN Member States, and they both contain provisions that need

[153] UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 993.
[154] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

to be kept in mind when understanding how extractive projects interact with customary land rights in the international arena.

The only UN document to explicitly concern itself with safeguarding the rights of customary communities is the United Nations Declaration on The Rights of Indigenous Peoples (UNDRIP) which was adopted as a resolution by the UN General Assembly in September 2007. It should be said at the outset that the UNDRIP is 'soft law' setting out the aspirations and values of the signatory states without actually binding them to any of its terms. And yet, Martin Papillon and Thierry Rodon suggest that its value should not be underestimated, since it still 'establishes an international standard against which states' practices are measured in their relation with indigenous people'[155]. This being the case, there are a number of provisions within the UNDRIP that would go a long way towards protecting the rights of mining-affected communities.

One of the more useful provisions in the UNDRIP is Article 32, the first part of which states that indigenous people have the right to choose 'priorities and strategies for the development or use of their lands or territories'[156] and the second part of which goes a step further by obliging states to:

> co-operate in good faith with indigenous communities in order to obtain their free and informed consent prior to the approval of any project affecting their lands…particularly in connection with the…utilization or exploitation of mineral…or other resources[157]

The idea of 'Free, Prior and Informed Consent' is apparent throughout the UNDRIP. For example, Article 11(2) obliges states to 'provide redress' to indigenous populations who

[155] Martin Papillon and Theirry Rodon 'Proponent-Indigenous agreements and the implementation of the right to Free, Prior and Informed Consent in Canada' (2017) *Environmental Assessment Review* 62 at 216.
[156] UN General Assembly, *United Nations Declaration on the Rights of Indigenous People : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, Article 32(1)
[157] Article 32(2); Ibid.

have been deprived of their 'cultural or spiritual property…without their free prior and informed consent'.[158] As has been shown[159], any deprivation of an indigenous community's land rights would also constitute a violation of their right to freely practice their culture in terms of article 11(2).

It is impossible to rely on UNDRIP for the protection of African Indigenous communities. Since it is a declaration, it can only be viewed as an expression of values to aspire to and it cannot be regarded in the same way that one might consider a treaty or convention which would be binding on member states - since 'many states that have endorsed the UNDRIP consider section 32(2) as an aspirational text that invites authorities to "seek consent" rather than formally obtain it.'[160] In addition, UNDRIP was not well received among many African States with many of them either voting against the UNDRIP's adoption, or – at the very least- choosing to abstain from the vote entirely.[161]

Furthermore, UNDRIP does not actually contain any explicit definition of what 'indigenous peoples' are. The closest thing we have to such a definition is that which was proposed by the United Nations Working Group on Indigenous Populations, and restated in the *Endorois* case, which described customary communities as those with 'a historical continuity with pre-invasion and pre-colonial colonial societies that developed on their territories'.[162]

One of the earliest international treaties to recognise indigenous rights was the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries that was published by the International Labour Organisation (ILO) in 1957. While it did occasionally reference the need for indigenous culture to be preserved, most of the 1957 Convention emphasised the economic

[158] A/RES/61/295 supra note 156 Article 11(2)
[159] In Chapter 2 at 2.4.
[160] Papillon and Rodon op cit note 155 at 216.
[161] Frans Viljoen *International Human Rights Law in Africa* 2 ed (2012) at 229.
[162] Ibid para 152.

upliftment of indigenous peoples and 'their progressive integration into their respective national communities'.[163] This was then revised by the ILO's 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries. The preamble to the 1989 Convention explicitly states that it was adopted 'with the view to removing the assimilationist orientation of the earlier standards'.[164]

Article 7 of the 1989 convention explicitly states that 'the peoples concerned shall have the right to decide their own priorities for the process of development as it affects…the lands the occupy or otherwise use'.[165] This is a clear departure from the 1957 convention which gave the 'primary responsibility'[166] for safeguarding the interests of indigenous peoples to government.

While the 1957 Convention recognises the need to preserve the 'cultural heritage' of indigenous communities,[167] the 1989 convention explicitly acknowledges the link between land rights and the right to freely practice culture – where the rights of an indigenous community are implicated.[168]

In a manner similar to the UNDRIP, the idea of 'free and informed consent' is used in multiple provisions throughout the 1989 Convention. However, most important among these, for the purposes of this dissertation is Article 30 which states that:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands,

[163] Preamble; ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, 1957.
[164] Ibid.
[165] Article 7; ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[166] Article 2(1); ; ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, 1957.
[167] Article 18(2); ibid.
[168] Article 13(1); ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

> territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[169]

Why this provision might be relevant to indigenous communities that find themselves faced with extractive projects operating on their land without their consent is self evident. However, one should keep in mind the additional term 'prior' that is included in this article, since the slightly altered phrase 'Free, Prior and Informed Consent' is a core idea in the emerging field of business and human rights – especially where extractive projects are concerned. The notion of FPIC will be discussed in more detail in chapter 5 of this dissertation.

What becomes clear is that, despite the strong phrasing of the two major global mechanisms for the rights of indigenous peoples, few African States consider themselves bound to these documents in any real way. This means that even their persuasive value is somewhat inhibited on the African Continent. For this reason, it may well be necessary to pay closer attention the human rights treaties that African States do consider to be binding – those at the regional and sub-regional level.

3.3 *Regional Mechanisms*

The over-arching human rights mechanism on the African Continent is the African Charter on Human and Peoples' Rights that was adopted by Organisation of African Unity (now the African Union) in 1981 (herein referred to as the Banjul Charter).[170] What might seem tautological to the lay person, is the fact that the Banjul Charter refers to 'Human and Peoples' Rights' – however, this wording is actually indicative of an element that makes it unique when compared to similar mechanisms in Europe and the Americas. However, when properly

[169] Article 30; ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[170] This is being done in order to avoid confusion with the African Commission on Human and People's Rights which shares the same acronym - ACHPR

considered, the reasoning behind this becomes fairly self evident: 'human rights' are concerned with individuals; where 'peoples' rights' ascribe to collective groups.[171]

In many ways, it could be said that referring to marginalised communities as simply 'peoples' is probably better suited to the African context than using the qualifier of indigeneity that is used in the global mechanisms and those in other regions. And yet, as noted by the ACHPR reviews of state reports on their compliance with the Banjul Charter have shown that, for the most part, 'no adequate or relevant information is provided on legislative or other measures taken for the operationalization[sic] of peoples' rights under the charter'[172]

When it comes to the issue of peoples' rights and extractive industries, there are two provisions in the Banjul charter that stand out. These are articles 21 and 24. Article 24 states that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.[173] While article 21 emphasises the right of a community to 'freely dispose of their wealth and natural resources.' And further qualifies this by requiring that 'This right shall be exercised in the exclusive interest of the people'[174].

And yet, Article 21(3) adds the *caveat* that the rights in question 'shall be exercised without prejudice to the obligation of promoting international economic cooperation'.[175] It would not be difficult for a state or corporation to argue that a marginalised community expressing opposition to an extractive project is prejudicial to 'international economic cooperation'.

---

[171] Richard N Kiwanuka 'The meaning of "people" in the African Charter on Human and People's Rights' (1988) 1 *The American Journal of International Law* at 83.

[172] Human Rights and Environment in Africa 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' at vi available at https://www.achpr.org/public/Document/file/English/Articles%2021%20&%2024%20State%20Reporting%20Guidelines.pdf, accessed on 10 June 2020.

[173] Article 24; The African Charter on Human and Peoples' Rights.

[174] Article 21(1); Ibid.

[175] Article 21(3); Ibid.

Article 21(4) creates confusion as to the identity of the 'peoples' who bear rights in terms of article 21 by requiring States to exercise those rights 'with a view to strengthening African solidarity and unity'[176]. This can create real practical difficulties where the interests of the state are in direct conflict with a marginalised and/or mining-affected community. Although extractive operations were not an apparent factor for consideration, the relatively recent case of *African Commission on Human and People's Rights v Republic of Kenya* (the *Ogiek* Case) offers a clear illustration of how it is possible for the 'public interest'[177] goals of the state to be in direct conflict with the interests of an 'indigenous minority ethnic group'.[178]

The relevance of Articles 21 and 24 to extractive industries has been recognised by the ACHPR itself, which stated that 'these rights are at the core of the concerns surrounding the protection of rights relating to the operations of the extractive industries in Africa'.[179] For this reason, the commission adopted the 'State reporting guidelines and principles on Articles 21 and 24 of the of the African Charter relating to Extractive Industries, Human Rights and the Environment' (the guidelines). The main idea behind this document was 'to further elaborate on the content of the obligations under Articles 21 and 24 [of] the African Charter in the context of extractive industries'.[180]

As has already been mentioned, the charter itself only offers a framework of rights to which and individuals and communities that make up the various African Union member states are entitled. For this reason, various working groups and committees draft documents like the guidelines to give content to the rights in the Banjul charter and offer an explanation as to how they should be understood in particular circumstances. And so, to properly understand how

[176] Article 21(4); The African Charter on Human and Peoples' Rights.
[177] *African Commission on Human and Peoples' Rights v Republic of Kenya* (ACtHPR) Application no.006/2012 (2017) para 130
[178] Ibid para 6.
[179] ACHPR Working Group op cit note 172 at v.
[180] Ibid at vii.

articles 21 and 24 can be used to protect the rights of mining-affected communities, it is as important to discuss the terms of the guidelines.

One of the strongest points of the guidelines is that, unlike the potentially confusing terms of the Banjul Charter, they include an unambiguous definition of who should be considered 'peoples' for the purposes of the guidelines and the Charter to which it applies, describing them as:

> a group of individuals having a common identity on account of objective markers of shared language, racial or ethnic makeup, historical experience, religious, cultural or ideological affinity, connection to a particular territory, and the subjective manifestations of self-identification and awareness as a distinct group possessing of shared identity[181]

It then goes on to say explicitly that 'peoples are therefore not to be equated solely with 'Nation' or 'State'.'[182]. In fact, the 'Principle of using wealth and natural resources in the exclusive interest of the people' that is listed under the 'underlying principles' that form part of the explanatory note attached to the guidelines goes even further than this by stating that 'the rights of the people of the State as a whole **may not** detract from the specific rights of the affected people who are directly impacted by the extractive industries'.[183] This goes beyond simply clarifying that 'peoples' cannot be understood to be referring to the state, to requiring that, where there is a conflict of interests between those of the state, or even the interests of other nationals, and those of the community affected by extractive operations, then those of the community should be given priority.

The guidelines are only the latest in a string of documents relating to concerns around extractive industries and customary land rights. One of the earliest documents in the lead up to the adoption of the guidelines was the ACHPR's 'Resolution on a Human Rights based

[179] ACHPR Working Group op cit note 171 at 11.
[182] Ibid.
[183] Ibid at 20.

approach to natural resources governance'[184] (Resolution 224) which was passed with a number of issues in mind including being 'the disproportionate impact of human rights abuses on rural communities in Africa. Resolution 224 does not, itself, guarantee rights of communities affected by extractive operations, rather it acts as a precursor to documents such as the guidelines by making a number of demands on member states, including asking them to 'establish a clear legal framework for sustainable development…that would make the realisation of human rights a prerequisite for sustainability'[185].

Resolution 224 demands that states take all necessary measures to involve affected communities in the decision making process 'including free, prior and informed consent'[186]. While there were multiple documents and processes leading up to the adoption of the guidelines in 2018 (in fact two other key resolutions[187] are included as annexures to the final published guidelines), attention is drawn to resolution 224 on account of its explicit use of the word 'consent'; since this terminology is noticeably absent from the guidelines that followed.

While they are not 'hard law'; one should remember that the guidelines are important indicators of the kind of conduct that the ACHPR expects of member states. They should give member states an idea of the extent to which communities should be involved in the decision-making process where extractive industries on their land are concerned. And, indeed, such a standard is a crucial element of the guidelines. In fact, the guidelines contain an entire sub-heading concerning 'participation and consultation' regarding state reports under both Article 21 and Article 24.

[184] ACHPR Res. 224(LI) 2012 Resolution on a Human Rights Based Approach to Natural Resources Governance.
[185] Ibid para iv.
[186] Ibid para ii.
[187] These are the ACHPR Res. 364 (LIX) 2016 Resolution on Developing Reporting Guidelines with Respect to Extractive Industries and ACHPR Res. 367 (LX) 2017 Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector, respectively

The other significant African regional mechanism for our purposes is the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention). Unlike the Banjul Charter, the full name of the Kampala Convention suggests that it is more concerned with the protection of individually held human rights – as shown by its deliberate reference to persons - rather than collective 'People's rights'. And yet it is interesting to note that the Kampala Convention specifically expresses a commitment on the part of the signatory states:

> to protect communities with special attachment to, and dependence on, the land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests[188]

This qualifier is significant as it means that the Kampala Convention does not protect the rights of potentially affected communities to veto development on their land, what it does do is require states to commit to protecting communities against arbitrary deprivation of their land rights by 'foster[ing] an indigenous peoples-led model of developments'.[189]

The Kampala Convention suffers from the same fundamental flaw that affects the Banjul Charter. Most of its protections have some kind of qualification which ultimately weaken them. In the case of article 10(1), this is the *caveat* that states are only obliged to prevent displacement 'as much as possible'.[190] This vague wording leaves a wide legal loophole for states to escape this particular obligation by saying that it would go beyond what is possible with little further justification or explanation required. This issue also presents itself in relation to the exception in Article 4 which allows displacement in situations where there are 'compelling and overriding public interests'.[191] These public interests could mean

[188] Article 4(5); African Union Convention for the Protection and Assistance of Internally displaced Persons in Africa, 2009.
[189] Romola Adeola 'The responsibility of businesses to prevent development induced displacement in Africa' (2017) 17 *African Human Rights Law Journal* 1 at 257.
[190] Ibid.
[191] Article 4(5); Kampala Convention supra note 188.

anything ranging from the health of the community members themselves to the economic interests of the State and multinational corporations that are investing in the territory in question.

To its credit, the ACHPR has made it clear that assertions of 'a compelling and overriding public interest'[192] will not be enough for a state to escape its obligations with regards to protecting the rights of customary communities. However, the issue that remains is that the drafters of the Kampala convention could have reasonably foreseen that states would attempt to use this qualification to escape their obligations. As such, it should not have been necessary for dispute resolution forums such as the ACHPR to make it clear that they cannot do so.

The Kampala Convention also does not require states or companies to ensure that communities who might be displaced by development projects give their consent. In fact, the only time it requires that they have any say in the process at all is in Article 10(2), which obliges the signatory states to 'ensure that the stakeholders concerned…explore feasible alternatives, with full information and consultation of the persons likely to be displaced by the projects.'[193]

Where the global trend has been moving towards the consent of communities being required, the standard used in the guidelines (and therefore read into the charter), is 'participation' and 'consultation' – the problem with this is that it is a significantly lower standard. This allows states and/or corporations to proceed with an extractive project where: (a) the affected community has clearly said that they do not want any such project on their land and (b) where such a project could be severely detrimental to the health and well-being of the affected community and the surrounding environment; provided that there has been a 'consultation' with the community.

[192] Adeola op cit note 189 at 257.
[193] Article 10(2); Kampala Convention supra note 188.

3.4 *Sub-Regional Systems*

What still needs to be kept in mind is the fact that regional structures and human rights mechanisms are not the only supra-national forums in which aggrieved individuals or communities can seek recourse: there are also multiple sub-regional forums and tribunals which might be more accessible and/or have stronger protection mechanisms.

Two significant examples of the sub-regional forums are the Southern African Development Community (SADC) and the Economic Community of West African States (ECOWAS). It does bear repeating that, despite the fact that this chapter has primarily concerned itself with the international law position, the dissertation as a whole is written from a South African context, and so specific attention has been paid to mechanisms and institutions that may have an impact on customary communities in South Africa. With this in mind, the decision to discuss the ECOWAS system was based primarily on the comparative analysis that it offers. As will be shown, the ECOWAS Mining Directive offers significantly stronger protections for mining-affected communities than those contained in the SADC Mining Protocol – one could even go so far as to suggest that they are the strongest protection for such communities on the entire continent.

Both these bodies have mechanisms in place to regulate the conduct of extractive operations in the territories if their respective member states. SADC has the Protocol on Mining which was adopted in 1997[194] (The SADC Protocol) and ECOWAS Directive on The Harmonization of Guiding Principles and Policies in the Mining Sector which was adopted in 2009 (the ECOWAS Directive). While both documents are newer than the Banjul Charter, it is worth noting that they are significantly older that the guidelines that were adopted in 2018 and

[194] Full Title: Protocol on Mining in the Southern African Development Community

thus the Working Group on Extractive Industries, Human Rights and Environment in Africa could have drawn on either or both these documents in drafting the guidelines.

Simply skimming through the SADC Protocol, one can clearly see that it is a product of its time. For the most part, it is an extremely 'pro-business' document, in places even going so far as to express an undertaking on the part of member states to 'adopt policies that encourage the exploration for and commercial exploitation of mineral resources by the private sector'.[195] It then adds to this idea by saying that member states will 'create a conducive environment for attracting…foreign investment to the region and to the mining sector in particular'.[196]

The only points at which the SADC Protocol mentions anything about limiting the harm caused by extractive operations are in Article 8 which is aimed at achieving 'a balance between mineral development and environmental protection'[197] and in Article 9 which expresses a commitment to 'improving the practices and standards of occupational health and safety in the region's mining sector'.[198] The only time at which the SADC protocol even refers to 'indigenous people' is when it includes them in the definition of those who are 'historically disadvantaged' – along with women and children.[199] The only other point at which it mentions 'the historically disadvantaged' is under the general principles right at the beginning of the document where it states that 'Member states shall promote economic empowerment of the historically disadvantaged'[200]. And yet, even based on this somewhat generous interpretation, any commitments relating to the environmental or human rights of mining-affected communities remain noticeably absent.

[195] Article 6(1); Protocol on Mining in the Southern African Development Community.
[196] Article 6(3); Ibid.
[197] Article 8(1); Ibid.
[198] Article 9(1); ibid.
[199] Article 1; Ibid.
[200] Article 2(8); Protocol on Mining in the Southern African Development Community.

Rights are just words in a document unless there is a practical way in which they can be asserted before an appropriate forum. This presents a clear problem with regard to the enforcement of any rights in the SADC region. Following an unfavourable finding in the *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe*, the Zimbabwean Government asked SADC to suspend the tribunal 'under the guise of a review process.'[201] The end result of this was that it was formally disbanded in 2011.[202] While the SADC Summit in August 2012 resolved to re-establish the SADC Tribunal,[203] this was done with the *caveat* that 'its mandate should be confined to interpretation of the SADC Treaty and Protocols relating to disputes between Member States'.[204] Admittedly, this is not so much a problem with the SADC Mining Protocol as it is an issue with the SADC system in its entirety, but mining-affected communities within the SADC member states remain unable to assert any of their rights at a sub-regional level.

Even taking into account the time at which the SADC protocol was adopted; the notion of 'peoples rights' was already part of the discourse in International Human Rights Law[205] and the idea that communities that stand to be negatively impacted by extractive projects should have a say in whether or not such projects are allowed to operate on their land was already gaining traction in International Law. [206] What should be taken into consideration at this point is the fact that the SADC Mining Protocol is, first and foremost, an economic document. Unlike the ILO Convention or the Banjul charter, it was not intended to be used as a rights protection mechanism. And yet, it is a crucial document for extractive industries in the SADC

[201] Ilyayambwa Mwanawina 'The position of Judicial Independence within the SADC Institution Framework' (2013) 46 *Law and Politics in Africa, Asia and Latin America* (3) at 330.
[202] Laurie Nathan 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) 35 *Human Rights Quarterly* (4) at 871.
[203] South African Development Community 'SADCAT' available at: https://www.sadc.int/about-sadc/sadc-institutions/tribun/, date accessed 29 June 2020.
[204] Ibid.
[205] As shown by the signing of the Banjul Charter, and its explicit inclusion of 'peoples rights' in the title.
[206] An idea that was reflected in values of the 1989 ILO Convention.

region. That it does not contain any provisions designed to protect community rights and places such a small emphasis on measures to mitigate environmental harm is of major concern.

Despite its name implying a body prioritising economic interest ahead of other concerns, the ECOWAS Mining Directive offers protection for mining-affected communities that is stronger than that of the SADC Mining Protocol or even the Banjul Charter. This strength comes from a number of provisions which are unique among similar systems. Notable among this is the requirement that member states designate certain tracts of land as 'no go zones'.[207] These areas are those which have 'environmental, social and cultural sensitivity to mining operations'.[208] This emphasis on mitigating the negative impact on mining-affected communities runs throughout the entire ECOWAS Mining Directive; Article 5(3) requiring any application for mining rights in member states to include terms relating to the rights of the affected community.[209]

The ECOWAS Directive is unique in how it specifically requires that both companies and member states ensure that mining communities get the maximum benefit from the existence of the extractive project. To this end article 5(3) requires that any applicant for mineral rights include 'a plan to utilize local goods, service and manpower'.[210] Similarly, Article 11(2) requires member states to ensure that any application for mining rights include clauses relating to corporate social responsibility and 'Alternative Livelihoods Programmes'[211] to enhance the wellbeing of the affected community. Furthermore, these programmes have to be developed with the involvement of the community in question. This works as part of the ECOWAS Mining Directive's broader emphasis on 'localization' – which is 'all

[207] Article 4(4); ECOWAS Directive on the Harmonization of Guiding Principle and Policies in the Mining Sector.
[208] Ibid.
[209] Article5(3) ; Ibid.
[210] Ibid.
[211] Article 11(2); Ibid.

activities…designed towards the eventual replacement of expatriate personnel with personnel of a member state'.[212]

Yet what really sets the ECOWAS mining directive apart from similar regional and sub-regional system is that it is possibly the only supra-national mechanism on the African continent to explicitly require the consent of potentially impacted communities before any extractive project can begin operations.[213] It goes even further than this in two respects: it does not only require Free, Prior and Informed Consent before the start of the extractive project, but also 'prior to each subsequent phase of mining and post mining operations' [214] meaning that the rights of affected communities are protected throughout the existence of the extractive project, and giving consent to the project at the start does not mean they are waiving all future rights. And second, the ECOWAS mining directive does not impose obligations on member states only, but also sets out rules for the conduct of extractive operations within the territory of member states. In article 15(2), both 'Member states and the holders of mining rights' are required to 'ensure that the rights of local communities are respected at all times'.[215]

What makes article 16(3) unique when compared to similar provisions in other legal mechanisms is the fact that it states that 'Companies shall obtain free, prior and informed consent of the local communities'[216] where most other similar mechanisms place this onus on the state alone.

The relevant forum where ECOWAS is concerned is the ECOWAS Court of Justice (ECCJ). While most of the powers and procedures were set out in the Protocol on the Community Court of Justice,[217] there is a vital provision in the revised treaty itself which states

[212] Article 1; ECOWAS Directive on the Harmonization of Guiding Principle and Policies in the Mining Sector.
[213] Article 16(3); ibid.
[214] Ibid.
[215] Article 15(2); ibid.
[216] Article 15(2); Ibid.
[217] ECOWAS, Protocol A/P.1/7/91 On The Community Court of Justice

that 'Judgements of the Court of Justice shall be binding on the Member States, the institutions of the community and on individuals and corporate bodies'.[218]

This is crucial as it serves to give enforceability to the provisions in the mining directive which are aimed at holding corporations, as well as member states, accountable for violations of the rights of mining-affected communities. In 2005, the supplementary court protocol[219] was adopted which does two important things: the first is that it re-affirms that the ECCJ is empowered to adjudicate on any matters relating to the 'application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS'[220] and the second is that it explicitly mentions that Access to the Court is open to 'Individuals on application for relief for violation of their human rights'.[221]

Finally, what makes the ECCJ unique among supra-national dispute resolution forums is the degree to which it claims jurisdiction over member states. This consideration is one of the many 'unresolved issues'[222] with the ECCJ. Most similar tribunals are entirely dependent on the consent of member states, meaning that any powers that they may exercise are usually restricted to those over which states have explicitly agreed to grant the judicial competence.[223] However, this is not the case where the ECCJ is concerned: 'there is no clear demarcation between community competence and state competence'.[224] This unrestricted jurisdiction should be regarded as praiseworthy[225] 'from the view-point of a human rights lawyer'[226];

---

[218] Article 15(4); Revised Treaty of the Economic Community of West African States
[219] Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol.
[220] Article(3)(1)(b); ibid.
[221] Article 4(d); ibid.
[222] Solomon T Ebobrah 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* (1) at 11.
[223] Ebobrah op cit note 222 at 11.
[224] Ibid at 13.
[225] He does later qualify this by mentioning a number of theoretical legal concerns, such as a worry about 'forum shopping' – however, those are concerns that go beyond the scope of this dissertation.
[226] Ebobrah op cit note 222 at 13.

Africa is a large continent, and it almost goes without saying that ECOWAS and SADC are not the only sub-regional bodies, including the Economic Community of Central African States and the East African Community – however, they are useful as extreme examples of different ways in which sub-regional bodies have attempted to regulate the fraught relationship between extractive projects and the affected communities.

3.5 *Conclusion*

There is global trend towards stronger protections for the rights of mining-affected communities – with a clear emphasis on the need for communities to be empowered to either give – or withhold – their free, prior and informed consent to extractive operations. And yet, many of these mechanisms are hamstrung either by limited acceptance by member states – as in the case of the ILO 1989 Convention and the majority of African states - or by the mechanisms' own non-binding nature – a clear example of this being the UNDRIP. While Africa might be ahead of other regions in recognizing communally held 'peoples' rights', as a region it continues to lag behind the global trend towards ensuring better protections for mining-affected communities. The only exception to this is the ECOWAS Mining Directive which meets and even exceeds the free, prior and informed consent standard as it is understood in the global human rights discourse.

The mere fact that a person or community may have a right in law is no guarantee it will be respected by other private individuals, or even the state. For this reason, the next chapter examines the situation in South Africa in further detail, illustrating what statutory rights exist and attempting to reach a clear conclusion about how those rights have been applied by our courts.

CHAPTER 4 – CUSTOMARY LAND RIGHTS AND EXTRACTIVE INDUSTRIES: THE SOUTH AFRICAN EXAMPLE

4.1 *Introduction and Background*

As highlighted by the Constitutional Court in the *Maledu* case, 'Mining is one of the major contributors to the national economy'[227]. At the same time, there is the inescapable fact that 'the very processes that generated wealth in the economy simultaneously produced poverty and patterns of unemployment that still hobble South Africa as it struggles to democratize in the twenty first century'[228] This is why the Court in *Maledu* also mentioned the 'constitutional imperative…to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress.'[229]

Before going into the details of the cases themselves, it is necessary to first discuss the two core pieces of legislation that come into play where marginalised communities and extractive operations are concerned, since an understanding of the legislation is crucial to any analysis of the case law.

[227] *Maledu* supra note 13 para 5.
[228] Francis Wilson 'Minerals and Migrants: How the Mining Industry has Shaped South Africa' (2001) 130 *Daedalus* (1) at 103.
[229] *Maledu* supra note 13 para 5.

4.2 *Legislation*

South Africa has two significant pieces of legislation designed to deal with this complicated history and difficult social context: the Interim Protection of Informal Land Rights Act no. 31 of 1996 (IPILRA) and the Mineral and Petroleum Resources Development Act no 28 of 2002 (the MPRDA).[230] The difference in focus between these two acts was highlighted by Basson J in the *Baleni* case when she stated that:

> Whereas the MPRDA is primarily concerned with the promotion of equitable access to South Africa's reach[sic] mineral resources to all South Africans, IPILRA sets out to protect communities who were the victims of past discrimination and who have deep cultural and religious connection to their land[231]

Thus, one needs to look at the exact provisions of both IPILRA and the MPRDA in order to understand where they might present difficulties in relation to the rights of potentially affected communities and the interests of extractive industry.

The cornerstone of the underlying philosophy of the MPRDA is set out in it section (3)1, where it says that 'Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'[232] This being the case, it is the state who is empowered to 'grant, … refuse...and manage any … prospecting right [or]… mining right'[233]

This means that any company looking to set up an extractive project needs to approach the state for permission to mine and not the owner or occupier of the land in question. This is a material departure from the common law position in which mining rights, as a form of

---

[230] It should be said that IPILRA and the MPRDA are not the only pieces of legislation that can have an impact on the relationship between customary communities and extractive projects – another equally notable piece of legislation is the National Environmental Management Act no. 107 of 1998 (NEMA). However, NEMA is not discussed in this dissertation as it is more concerned with the rights that are given to customary communities specifically, rather than the more generalised environmental concerns.

[231] *Baleni* supra note 9 para 64.

[232] Section 3(1); MPRDA supra note 10.

[233] Section 3(2)(a); ibid.

'limited real rights',[234] would be something that the owner of a certain piece of land would grant to another person.[235]

This does not mean that the owners of the land in question would be denied an opportunity to make themselves heard on the issue. Section 10 deals with the question of 'Consultation with interested and affected parties' – that the owner or occupier of the land to be mined would be an 'interested party' is self-evident.[236] After being informed of the intention to grant a mining right over a particular piece of land, the interested parties have 30 days in which to submit their comments to the office of the regional manager.[237]

At this point it should be said that the MPRDA does not allow an affected party to 'say no' to the granting of mineral rights on their land. They can only submit an objection, which would then be referred to the Regional Mining and Development Committee, which then has to consider the objection and 'advise the Minister thereon'.[238] There are two more important provisions in the MPRDA for the purposes of this discussion. Sections 23(6) and 17(6) both state that mining and prospecting rights, respectively, are subject to the terms of the MPRDA and 'any other relevant law'.[239]

Having highlighted the concerns around the somewhat weaker 'consultation' requirement, it is clear why an advocate for the rights of mining-affected communities might find the use of this standard in the MPRDA troubling. However, more than just raising

[234] P.J Badenhorst 'The Nature of new order prospecting rights and mining rights: a can of worms?' (2017) 134 *South African Law Journal* (2) at 363.
[235] Ibid at 369.
[236] P.J Badenhorst and C.N Van Heerden 'Conflict resolution between the holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander' (2019) 136 *South African Law Journal* (2) at 306.
[237] Section 10(1)(b); MPRDA supra note 10.
[238] Section 10 (2); ibid.
[239] Section 23(6); ibid.

ideological or theoretical concerns, it creates actual legal difficulties, especially when the MPRDA is read alongside IPILRA.

The importance of the intention underlying IPILRA cannot be overstated: one needs to remember constantly that it was drafted in order 'to provide for the temporary protection of certain rights to and interests in land which are not otherwise adequately protected by law'.[240] Although it is an extremely concise piece of legislation, the most important provision in IPILRA is Section 2(1), which states that 'no person may be deprived of any informal right to land without his or her consent'.[241] It should be said that this right is 'subject to [the expropriation act]…or any other law which provides for the expropriation of land or rights in land'.[242]

At this point, there are two questions that need to be dealt with, the first is the question of whether the granting of a mining right can be considered to be a 'deprivation'[243] and the second is whether the MPRDA falls within the general category of 'any other law which provides for the expropriation of…rights in land. '[244]

With regards to the second question, the Court in *Maledu* discussed the nature of a mining right under the MPRDA, pointing out that 'it grants to the holder a right of access to the land, even against the wishes of the landowner'[245] with this in mind, the Court accepted that 'there can be no denying that when exercising her rights, the mining right holder would intrude into the rights of the owner'[246]

[240] Preamble; IPILRA supra note 11.
[241] Section 2(1); Ibid.
[242] Ibid.
[243] This issue is discussed in more detail in the section dealing with the specifics of the *Maledu* case below.
[244] Section 2(1); IPILRA supra note 11.
[245] *Maledu* supra note 13 para 100.
[246] Ibid para 102.

There is one more important provision in IPILRA, section 2(4) states that the community can only dispose of its informal right in land after the decision to do so has been 'taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal.'[247]

None of this takes away from the fact that customary communities can and should be considered as 'interested and affected persons' in terms of the MPRDA – in fact, the act is worded is such a way so as to give the same level of protection to these communities, even if they are not the 'owners' of the land in the usual common law sense. However, unlike common law landowners, or other kinds of unlawful occupiers; marginalised communities with historic and customary ties to the land in question also have the additional protections offered by IPILRA.

All of this being said, IPILRA is still far from a perfect piece of legislation: its most obvious defect is apparent in its name. It was never meant to be a permanent solution – it was merely drafted to give 'temporary protection'. This is further illustrated by its relative brevity compared with similar pieces of legislation. For this reason, despite the fact it offers some of the strongest legal protections for community land rights in the South African Domestic Legal System, a more detailed, permanent piece of legislation would be more desirable.[248]

Following this line of thought, section 4 of IPILRA states that the Minister of Rural Development and Land Reform may 'make regulations regarding all matters where necessary or expedient to be prescribed in order to achieve the objects of this act'.[249] These could include regulations that would give content to strengthen the provisions of the Act itself and yet, over two decades later, the Minister still had not published any such regulations.[250]

---

[247] Section 2(4); IPILRA supra note 11.
[248] Land Accountability and Research Centre and Ndifuna Ukwazi op cit note 116 at 73.
[249] Section (4); IPILRA supra note 11.
[250] Land Accountability and Research Centre and Ndifuna Ukwazi op cit note 116 at 73.

In the *Maledu* case the Constitutional Court accepted the submission of the *Amicus Curiae* that: 'The relevant provisions in the MPRDA and IPILRA are not in conflict with each other and therefore ought to be interpreted and read harmoniously'[251]. The Court also highlights the principle of statutory interpretation which says 'the ordinary meaning of words in a statute must be ascertained in the context of the statute in its entirety and its apparent purpose'[252]

Having set out the core legislative framework, the discussion will look more closely at findings in the two key cases of *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* and *Baleni and Others v Minister of Mineral Resources and Others.* These set out the current position in South African Law where the customary land rights of marginalised communities are concerned. It will also address the case of *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others* to show how these issues remain unresolved, often with disastrous results for mining-affected communities and the activists trying to assert their rights.

4.3 ***The Lesetlheng village community and the Bakgatla-Ba-Kgafela Traditional Authority – Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another***

Customary communities in the North West Province of South Africa 'have been trying for decades to claim the elusive benefits of the industry that changed their lives when platinum began to challenge gold as the primary source of South African export earnings'.[253] And yet in 2018, 'the full story of the dispossession of the Bakgatla Ba Kgafela [had] yet to emerge'.[254]

[251] *Maledu* supra note 13 para 68.
[252] Ibid para 44.
[253] Bloom and Wales-Smith op cit note 141 at ii.
[254] Ibid at iii.

The *Maledu* judgment is one of the most significant recent developments in this ongoing conflict.

The case in the Constitutional Court was an appeal against the judgment of the High Court in Mahikeng which ordered the eviction of the appellants from their homes. According to Louise Du Plessis, Land Housing Programme(*sic)* Manager at Lawyers for Human Rights[255], 'mining companies have often pushed residents off their land or applied for a simple eviction order despite whether communities consent or not.'[256]

The applicants submitted that they were the actual owners of the land in question, which had been purchased by their ancestors in 1919.[257] However, due to the discriminatory environment of the time, their ancestors were not allowed to own the land and so the land was owned in trust by the Minister. [258] Further complicating the matter, was the fact that that the community was not a recognised legal entity at the time, and so the title deed of the property simply mentions that the land is owned by the Minister 'on behalf of the entire Bakgatla Ba Kgafela community'[259]. The applicants submit that this was on the understanding that only those who had contributed to the land's purchase price would have any legal interest in the land in question.[260] In 2004, Itereleng Bakgatla Mineral Resources(IBMR) obtained a prospecting right over the land,[261] they were then granted a mining right in mid-2008.[262] It was soon after that IBMR entered into a surface lease agreement with the Minister and the Bakgatla Ba

[255] As quoted by Greg Nicholson, writing for the Daily Maverick
[256] Greg Nicholson 'Ruling 'fundamentally changes power dynamics' as Communities win big in ConCourt' available at https://www.dailymaverick.co.za/article/2018-10-26-ruling-fundamentally-changes-power-dynamics-as-communities-win-big-in-concourt/?fbclid=IwAR2daL7kWcYDCIDZ9WZXxn3r-U89zXTKV4UncAzMRe4OH7qJWgIPMhqrmKk#gsc.tab=0 accessed on 3 July 2020.
[257] *Maledu* supra note 13 para 12.
[258] Ibid.
[259] Ibid.
[260] Ibid.
[261] Ibid para 14.
[262] Ibid.

Kgafela Tribal Authority[263]. All of this mining activity constituted 'an intolerable situation'[264] for the applicants based on which they sought and obtained a spoliation order for their free and undisturbed use and possession of the land.[265] The respondents then approached the High Court looking for an eviction order against 'the applicants, and all persons whose right of occupation derived from that of the applicants.'[266]

The applicants opposed this eviction, stating that they were the true owners of the farm and they had not been consulted in terms of either the MPRDA or IPILRA.[267] These arguments were rejected by the High Court, which referred to the fact that the Minister owned the land in trust for the benefit of the entire Bakgatla Ba Kgafela community – which had been consulted and had agreed that the Minister should conclude a lease agreement with IBMR in order to allow IBMR to establish a mining project on the land.[268]

In addition to the eviction order, the High Court issued an interdict preventing the applicants from entering and/or 'erecting any structures on the farm'.[269] Finally, the High Court refused the applicants' request for leave to appeal.[270] Leave to appeal was also refused in the Supreme Court of Appeal (SCA), on the basis that that the appeal 'lacked reasonable prospects of success'.[271] It was because of this that the applicants approached the Constitutional Court for leave to appeal the decision of the High Court.[272]

The Constitutional Court granted the applicants leave to appeal on the basis of three core considerations: first, the Court argued that the matter had severe implications for the

[263] *Maledu* supra note 13 para 14.
[264] Ibid.
[265] Ibid.
[266] Ibid para 15.
[267] Ibid.
[268] Ibid para 17.
[269] Ibid para 18.
[270] Ibid para 25.
[271] Ibid para 25.
[272] Ibid.

applicants whose 'livelihood…[was] likely to be severely and adversely affected if not perpetually ruined';[273] second, the case had 'great public importance transcending the immediate interests of the litigants'; [274] and third, the Constitutional Court disagreed with the finding of the SCA, arguing that the appeal did, indeed, have reasonable prospects of success.[275]

The Court devoted a significant portion of the judgement to dealing with the issue of the interaction between IPILRA and the MPRDA. This issue and the sentiments of the Court in *Maledu* relating thereto have already been addressed in the previous section, which specifically dealt with those two pieces of legislation, and so, in order to avoid repetition, this section is more concerned with the Court's findings regarding the other issues raised by the applicants.

The Court chose to focus the enquiry on whether the applicants had been deprived of an informal right to land in terms of section 2 of IPILRA; and whether the respondents had followed the correct procedures for resolving a dispute between the owner or lawful occupier of land and the holder of the mining right in terms of section 54 of the MPRDA.[276]. With this in mind, the Court applied a purposive approach to its interpretation of the two statutes.[277]

With regard to whether the applicants had been deprived of their land rights, the Constitutional Court in the *Maledu* case drew attention to the fact that IPILRA does not actually give a clear idea of what a 'deprivation' actually is. For this reason, the Court chose to apply the definition of 'deprivation' contained in the Concise Oxford English Dictionary which is 'The damaging lack of basic material benefits; lack of or denial of something considered

[273] *Maledu* supra note 13 para 32.
[274] Ibid.
[275] Ibid.
[276] Ibid para 42.
[277] An approach that was almost identical to that of Basson J's later judgment in the *Baleni* case – however, the discussion around the details of this approach has been discussed in reference to *Baleni* due to the fact that that is where it had the most significant impact for mining-affected communities.

essential.'[278] Adding to this, the Court also quoted the previous judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality* which said that:

> Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation…substantial interference that or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to a deprivation.[279]

The Court noted that the granting of a mining right confers, on the holder, a kind of limited real right[280] which, by its very nature, takes away from the bare dominium of the land owner. The respondents agreed that it would not be possible for them to 'undertake mining operations whilst the applicants remain on the farm',[281] nonetheless, they still claimed that the mining right was not a form of expropriation.[282] Unsurprisingly, the Court did not find this argument to be convincing.

Despite the severe impact that mining would have on the community members, 'The existence of a mineral right, itself, does not extinguish the rights of the landowner or any other occupier of the land in question.'[283]With this in mind, the Court argued that a person or community with an informal land right in terms of IPILRA could: 'consent to the granting of a mining right, but may still be entitled to occupation, depending on the terms and conditions of their consent'.[284] The Court also argued that this idea is 'buttressed by the underlying purpose of IPILRA which is to provide security of tenure for the historically disadvantaged and vulnerable'.[285] To add further strength to this, the Court referred to its own judgment in the case of *Maccsand (Pty) Ltd v City of Cape Town and Others* in which it pointed out the fact

[278] *Maledu* supra note 13 para 98.
[279] *Mkontwana v Nelson Mandela Metropolitan Municipality* 2004 (1) SA 530 (CC) para 32.
[280] *Maledu* supra note 13 para 100.
[281] Ibid para 102.
[282] Ibid para 101.
[283] Ibid para 103.
[284] Ibid para 105.
[285] Ibid.

that section 23(6) of the MPRDA states that any mining right granted in terms thereof is subject to the terms of the MPRDA as well as 'other relevant laws'.[286]

Finally, the respondents attempted to argue that the applicants had been deprived of their land rights in keeping with the rules of IPILRA, due to the fact that the decision was made in terms of a resolution of a meeting in terms of Customary Law.[287] However, the Court stated that the resolution that the respondents presented 'does no more than…indicate that it was signed by Kgosi Pilane[288] and a representative of Barrick.[289]

The Constitutional Court found that the respondents 'could not point to any provision in the MPRDA'[290] which allows the holder of a mining right to evict an uncooperative occupier merely because they are prevented from exercising their mining rights. When the respondents argued that they were exercising their common law remedy[291] the Court held that the mining right was derived from the MPRDA[292], which explicitly states that 'in so far as the common law is inconsistent with this Act, this Act prevails'.[293] Thus, the Court found that the respondents were not entitled to seek any other remedy without first attempting to resolve the dispute in a manner contemplated by the Act, itself. The importance of this is that that the MPRDA also 'contains its own internal mechanisms for resolving obstacles of the kind that they encountered when they sought to exercise their mining rights'.[294]

It was based on this reasoning that the Constitutional Court overturned the High Court's decision, and granted a costs order against the respondents.

---

[286] *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) para 44.
[287] *Maledu* supra note 13 para 108.
[288] The Traditional leader of the Bakgatla Ba Kgafela
[289] A company that partnered with IBMR 'for the purposes of conducting prospecting'
[290] *Maledu* supra note 13 para 109.
[291] Ibid.
[292] Ibid.
[293] Section 4(2); MPRDA supra note 10.
[294] *Maledu* supra note 13 para 109.

4.4 *The Umgungundlovu Community and the proposed Xolobeni Mine - Baleni and Others v Minister of Mineral Resources and Others.*

The *Baleni* case is the most recent in a long line of precedent concerned with how and to what extent customary land rights should be protected. Early in 2015, Transworld Energy and Mineral Resources (TEM) applied for a right to conduct open-cast mining on the land occupied by the Umgungundlovu Community. [295] It should be noted that this was not the only time that there had been an application for a mining right on this particular piece of land – in fact a mining right was granted in 2008 before being revoked in 2011.[296] Throughout all this time, the community living on the land had only ever 'featured as an afterthought'.[297] Even when revoking the mining right in 2011, the Minister of Mineral Resources still claimed 'that the community had been adequately consulted'.[298] Among the issues raised by the applicants was the fact that 'the prospect of mining has sterilised all alternative development and investment in the community since the mid-2000s.'[299]

In addition to those relating to their culture and way of life - as discussed in Chapter 2 - the applicants mentioned a multitude of concerns about the possible effects that mining would have on the environment as well as on the community.[300] Foremost among these was the effect that the mining would have on their water supply: in her founding affidavit, Duduzile Baleni mentioned two major concerns relating to water.

---

[295] Applicant's Heads of Argument op cit note 104 para 13.
[296] Ibid para 19.
[297] Ibid para 18.
[298] Ibid para 19.
[299] Founding Affidavit: Duduzile Baleni; *Baleni and Others v Minister of Mineral Resources and Others* para 20.
[300] Ibid para 21.

The first was the risk of the mine drying up the water table in the area, leaving members of the community without enough water to meet the needs of their households[301] and the other was based on advice that she had received regarding a 'significant risk of sea water seeping through the dunes should the freshwater table drop too low' rendering the ground water unsuitable for human use.[302] In addition, Baleni mentions that mining will inevitably lead to the displacement of the community while restricting their access to important communal resources such as timber and thatch for the construction of their homes and fish and shellfish from the sea.[303] She concludes her list of environmental concerns by mentioning that all of this activiyy will have a severe impact on the local tourism industry which 'is predicated on the area's natural beauty, the unique and diverse ecology and the rich and fairly unique culture and traditions of the local people'.[304]

After addressing these environmental concerns, Duduzile Baleni mentions the negative results of the industrialisation that would be caused by the mine's operation[305]. Foremost among these were her concerns about an increase in pressure on 'social services such as schools and clinics' as well as an increase in crime and alcohol abuse. The applicants' heads of argument mentioned the fact that these fears were not unfounded, since negative results such as these 'are well documented in South Africa and internationally'.[306]

Much like the Court in *Maledu,* Basson J discussed at length the relationship between the MPRDA and IPILRA – which has already been covered in this document. Nonetheless it is worth mentioning briefly the fact that the Court discussed the importance of context when interpreting any legislation. To this end, Basson J quoted the finding of the Constitutional Court

[301] Founding Affidavit: Duduzile Baleni op cit note 299 para 148.
[302] Ibid.
[303] Ibid para 154.2.
[304] Ibid para 154.3
[305] Ibid para 154.6
[306] Applicant's Heads of Argument op cit note 104 para 23.

in the case of *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* in which the Constitutional Court made the following remark concerning 'remedial legislation umbilically linked to the Constitution'[307]:

> We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation.[308]

With this in mind, Basson J said that the two acts are not as opposed as one might think: they were both enacted to 'redress our history of economic and territorial dispossession'[309] since they both 'seek to restore land and resources to Black people who were the victims of historical discrimination'[310] and, therefore, should be read harmoniously.[311] When reading the two documents, one needs to remember the different but related historical injustices that they are aimed at redressing.

It is true that meeting the consultation and participation standard of the MPRDA would suffice if the land in question fell within common law ownership. If one considers the redistribution imperative that the MPRDA is aimed at addressing, one can understand why giving property owners carte blanche over who can get mining rights on their land might make it difficult 'to bring about equitable access to South Africa's mineral and petroleum resources'[312]. However, compelling marginalized communities to allow mining operations to continue on their land without their consent, and to their detriment would clearly run contrary

---

[307] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.
[308] Ibid para 53.
[309] *Baleni* supra note 9 para 40.
[310] Ibid.
[311] Ibid para 39.
[312] Preamble; MPRDA supra note 10.

to 'the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination.'[313]

Although it might look like IPILRA is being given 'preference' over MPRDA if one takes this purposive approach to the statute, one can see how this is not necessarily the case. Both statutes were drafted to try to address South Africa's uncomfortable legacy around customary land rights and extractive industries. Thus, in order to allow both statutes to fulfil this purpose, the right of communities to grant or withhold their consent for extractive industries to operate on their land in terms of IPILRA needs to be respected.

The *Baleni* judgment is a ground-breaking precedent for communities struggling to assert their rights to say 'no' to extractive operations on their land. However, it should also be noted that the 2019 High Court judgment was not the end of the conflict between the Umgungundlovu community and TEM Mining. In many ways, the litigation between the two parties in this dispute continues to set valuable precedent for other mining-affected communities. Most recently, community activists brought another matter before the Gauteng North High Court wherein they asked the Court to compel both the mining company and the government to provide the community with access to the full, unredacted application for mining rights.

As mentioned by Johan Lorenzen, one of the attorneys for the community, for years the state had either failed to give access to the full applications or forced communities 'to use a dysfunctional…process' in terms of the Promotion of Access to Information Act. It is worth noting that this judgment around the access to information has not been appealed and is now settled law. According to Lorenzen, if the 2019 *Baleni* judgment is upheld by the Constitutional Court or the Supreme Court of Appeal – and thus becomes settled law – then

[313] Preamble; MPRDA supra note 10.

the recent developments regarding communities' rights to access the full and unredacted application for mining rights does little more than giving content to their right to give or withhold their consent to extractive projects. However, if the 2019 judgment is ultimately overturned, then the recent judgement gains new value as the strongest protection for the rights of mining-affected communities.[314]

Either way, what is clear is that the *Baleni* case served as a watershed moment for mining-affected communities in South Africa. If the judgment of the Pretoria High Court is upheld on appeal to the Supreme Court of Appeal and/or the Constitutional Court; then future mining-affected communities will have an unambiguous right to give or withhold their consent to extractive projects. But even if it is overturned, and all that is left is the 2020 judgment on the right to access the unredacted mining rights application, communities will be able to confront mining companies on a far more even playing field with access to all relevant information.

4.5 ***The Somkhele Community's Ongoing Dispute –Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others***

The findings in both of the abovementioned cases are extremely significant, for the particular applicants and for other communities that stand to be adversely impacted by extractive operations on their land without their consent. However, the case of *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others* has yet to be resolved by the courts.[315]

[314] The opinion of Johan Lorenzen, an attorney with Richard Spoor Attorneys, who acted on behalf of the community in the *Baleni* matter, as expressed in an informal, unrecorded meeting on Zoom on the 12th of October 2020 at 12:00 and confirmed in an email correspondence that is on file with the author.
[315] As of July 2020

The applicant currently operates an opencast coal mine[316] in Kwa-Zulu Natal, however its current mine is 'rapidly running out of [coal] reserves'[317] – they state that they expect their current mine to run out by September 2020.[318] They admit that, due to the lockdown they will not be able to meet this date. For this reason, they state that their operations will have to be 'placed on care and maintenance'[319] However, they argue that this can only go on for 'a maximum of six months'[320]

For this reason, the applicants are wanting to expand their mining operations to two additional sites. These sites are currently occupied by a number of families which 'regrettably,…must be relocated'[321] in order to allow the applicant to proceed with their mining activity.[322] The applicant states that it has successfully negotiated the terms of this relocation – including compensation with most of these families. However, there are still twenty-four of these families (the eighth to thirty-first respondents in the matter) who 'either refuse to engage with [the applicant] or demand excessive amounts of compensation'.[323] The applicants listed multiple reasons as to why they felt justified in bringing their matter on an urgent basis – foremost among these was their claim that, if they are not able to commence mining at the new sites, they will have to put 'all but 77' of their employees on unpaid leave[324] and eventually retrench them.[325]

The applicants also mention the fact that anthracite is 'a critical component'[326] for the production of ferrochrome. According to the founding affidavit, this information is relevant

[316] Founding Affidavit: Jan Christoffel Du Preez in Applicants Pleadings *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others* para 41.
[317] Ibid para 39.
[318] Ibid para 51.
[319] Ibid para 52.
[320] Ibid para 53.
[321] Ibid para 41.
[322] Ibid.
[323] Ibid para 43.
[324] Ibid para 54.
[325] Ibid para 55.
[326] Ibid para 64.

due to the fact that the applicant's mine 'is the principal supplier of anthracite to ferrochrome producers in South Africa'[327] They allege that if the applicant's mine is not able to supply anthracite to the local ferrochrome producers, then they, in turn, will have to use imported alternatives which will drive up the cost of ferrochrome and – ultimately – 'will negatively affect South Africa's trade balance and have associated regional and national economic impacts.'[328]

It is with these extremely bleak predictions in mind that the applicants are approaching the Court 'to urgently determine the compensation in terms of section 54(4) of the MPRDA, in order to allow [the applicants] to commence mining'.[329]

In her answering affidavit, Tholakele Mthethwa submits that the applicants did not even attempt to engage with her in good faith.[330] She states that it was based on this that the Mfolozi Community Environmental Justice Organisation (MCJEO) had approached the High Court to have the applicant's mining right set aside.[331] She then states that the applicants 'ensured that that the review application [relating to the mining right] would not be heard in July 2020'[332] while accepting that this might be, at least partially, due to the restrictions on court processes necessitated by the Covid-19 Pandemic. However, she then mentioned that it was during this delay that the applicants launched the urgent review proceedings without properly notifying any of the parties to the original review.[333] With this in mind, should the matter not be dismissed on the merits, Mthethwa asks that the Court stay the application pending the outcome of the review proceedings.[334]

---

[327] Founding Affidavit: Jan Christoffel Du Preez op cit note 316 para 64.
[328] Ibid para 65.
[329] Ibid para 48.
[330] Answering Affidavit: Tholakele Mthethwa *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others* para 9.
[331] Ibid para 12.
[332] Ibid para 13.
[333] Ibid para 16.
[334] Ibid para 33.

Mthethwa also states that none of these proceedings would have been necessary if the applicants had lawfully engaged with the respondents at the start, and yet the applicants are still attempting 'to pin the loss of jobs…on me, my family and my fellow Resident Respondents to justify urgency and to create pressure on us (*sic*)'.[335] In addition, she mentions that she has been faced with additional pressure in the form of death threats and even an attack on her home.[336] She claims that the timing of the proceedings is prejudicial to her and the other respondents due to the fact that they lack the technology or infrastructure to consult with their attorneys online and 'the travel restrictions between provinces during the lockdown precluded in person consultations'.[337] She finishes this part of her submissions by stating that the applicants are expecting her and the other respondents 'to either defend this hideously complex application or to capitulate'.[338]

Bearing all this in mind, the respondents are asking for the following findings from the Court:

> 22.1 That the application is **not urgent** and should be struck from the roll or dismissed for that reason alone.
>
> 22.2 That the application is **substantively flawed** and should be dismissed on the merits
>
> 22.3. Alternatively, the application is an abuse of process and should be **stayed** pending the finalisation of the related review proceedings. [339]

With regard to the alleged urgency of the claim, the respondents mention that this occasion is not the first time that the applicants have 'made such an alarmist claim.'[340] Even if the urgent application were to be successful and the respondents could be relocated immediately, Mthethwa points out that this would not be the only legal hurdle that the

---

[335] Answering Affidavit: Tholakele Mthethwa op cit note 330 para 17.
[336] Ibid.
[337] Ibid para 21.
[338] Ibid para 18.
[339] Ibid para 22.
[340] Ibid para 23.1.

applicants would need to overcome before they could commence mining at the new sites[341] all of which would 'delay the start of mining beyond [the] supposed deadline, regardless of whether [the respondents] are relocated or not'.[342]

Furthermore, the respondents argue that the applicants' claims of economic collapse if they are not able to continue mining are unfounded since 'there is [already] more than enough anthracite and alternative products being produced in South Africa'.[343] In addition, Mthethwa points out that the planned new mine sites would produce 'thermal coal'[344] and not the 'higher quality anthracite'[345] that the applicants allege is needed to save the national and regional economy.

According to the founding affidavit, the respondents have demanded R7 million per homestead for homesteads that are only worth between R100 000 and R750 000[346]. If one views land as having no value other than economic, then this figure could well be considered 'excessive'. However, if one considers the importance of land in relation to a community's culture and way of life as discussed in Chapter 2; one can appreciate why this is incorrect. Mthethwa summarises these considerations by stating that the applicant 'has failed to value the land on the basis that we are customary owners or have customary rights to the land'.[347]

One of the most significant considerations, for the purposes of this research, relates to the question of compensation to the families that are potentially faced with forced relocation. This is the central component of the mining company's application: they claim that they are asking the Court to 'determine the compensation in terms of section 54(4) of the MPRDA'[348].

[341] Answering Affidavit: Tholakele Mthethwa op cit note 330 para 23.
[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Founding Affidavit: Jan Christoffel Du Preez op cit note 316 para 64.
[346] Ibid para 43.
[347] Answering Affidavit: Tholakele Mthethwa op cit note 330 para 30.
[348] Founding Affidavit: Jan Christoffel Du Preez op cit note 316 para 48.

However, the respondents submit that the applicants are not, in fact, asking the Court to determine what might be a fair amount of compensation, rather they are 'demand[ing] that it certify the compensation amounts [the applicant] has unilaterally determined'.[349]

Unfortunately, as judgment has still not been given in relation to the *Tendele* case, it would be difficult to pinpoint its precedential value exactly. This being the case, further discussion around the intricacies of the case would run the risk of entering into the territory of speculation and goes beyond the scope of this thesis. However, this does not mean that the *Tendele* case lacks any value for the purposes of this dissertation. A victory for the respondents in the *Tendele* case would be another significant step towards establishing precedent that will better protect the interests of mining-affected communities. The mere fact that this is an ongoing case serves as a clear illustration of the fact that the victories that were won in the *Maledu* and *Baleni* matters do not, in and of themselves, offer enough protection to other mining-affected communities; rather this is a battle that needs to continue to be fought by community activists and public interest lawyers.

4.6 ***Conclusion***

Taken alone, South African legislation seems to create more confusion than anything else when it comes to the rights of mining-affected communities. The reason for this being the *prima facie* contradiction between the redistribution imperative of the MPRDA versus ILIPRA's concern with ensuring that the rights of communities impoverished by colonialism and Apartheid are as strong as possible in the democratic era. However, as was shown by both the *Baleni* and

[349] Answering Affidavit: Tholakele Mthethwa op cit note 330 para 29.

Maledu cases – these provisions have an identical imperative of undoing – or at least minimising – the harm caused by South Africa's history of particularly violent dispossession.

It should be said that South Africa has not explicitly adopted the standard of Free, Prior and Informed Consent that is steadily gaining traction in The Americas, Asia and Oceania. However, the combined effect of IPILRA and the subsequent precedents of *Maledu* and *Baleni* is that mining-affected communities in South Africa find themselves in a far stronger legal position than many of their equivalents in the SADC region and on the continent as a whole.

CHAPTER 5 – RECOMMENDATIONS AND CONCLUSION

The relationship between customary land rights and extractive industries on the African continent has been addressed in some of detail, with specific attention being paid to the situation as it stands in South Africa. Following a brief summary of the current legal status quo, all that remains is to make recommendations relating to what should be done in order to ensure the best possible protections for mining-affected communities.

5.1 *Can communities say 'No'? – The need for Free, Prior and Informed Consent*

One of the earliest references to FPIC was in Article 30 of the 1989 ILO Convention, which stated that: 'Indigenous peoples have… the right to require that States obtain their **free and informed consent prior** to the approval of any project affecting [them].'[350]

FPIC represents little more than the radical notion that marginalised rural communities 'facing development projects likely to impact their livelihoods …[should]…be able to have a say about whether and how the project should proceed.'[351] It is an idea that is 'rooted in the recognition that indigenous peoples, as self-determining, collective actors, should be empowered to make decisions over their future and that of their traditional lands'[352]. The natural result of this recognition is that 'They must, therefore, consent to economic developments that may have a major impact on their lands and communities'[353]. Arguably,

[350] Article 30; ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.
[351] Philippe Hanna and Frank Vanclay 'Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent' (2013) 31 *Impact Assessment and Project Appraisal* 2 at 146.
[352] Papillon and Rodon op cit note 155 at 216.
[353] Ibid

FPIC 'is one of the most important ways in which indigenous peoples' right to self-determination is realised' [354] since it represents:

> the right of indigenous people to freely give or withhold their consent to any decision that will affect their lands, territories or livelihoods. To make this decision, they must be fully engaged in the process before decisions about the project have been made, and have access to information in a form and language they understand.[355]

The notion of FPIC recognises both the negative and positive realities of the situation in which most indigenous communities find themselves. On the one hand, indigenous communities have 'close spiritual and cultural ties to their lands, strong traditions of sustainable resource use, and communal land use plans that encompass current and future generations'[356]; while on the other, these communities 'face…undue discrimination, higher rates of poverty, and less access to public or private infrastructure than others in the same country'[357]

Parshuram Tamang sets out six elements that he hopes can be used to develop 'a set of core principles'[358] that would, in turn, work 'as a practical tool for providing guidance to policy makers and actors, whether in national or local government,[or] the private sector'[359]. These include:

> i. The Principle of FPIC … requires processes that allow and support meaningful choices by indigenous peoples about their development path…
>
> iii. Interpretation of the principle of FPIC should be embedded in international human rights instruments, conventions …

[354] Mckeehan and Buppert op cit note 101 at 49.
[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Parshuram Tamang 'An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices' (2005) 9 *Australian Indigenous Law Reporter* 2 at 114.
[359] Ibid.

v. Participation of indigenous peoples is key to the design, decision and evaluation of any activity in providing FPIC

vi. FPIC is an evolving tool and its further development is on-going, it could be adapted to different realities and ecosystems.[360]

Among these, points v and vi offer some of the most noteworthy considerations for very different reasons. Point v highlights the importance of involving indigenous communities in the development of any mechanism that is designed to protect their interests, while point vi carries most significance for human rights lawyers and activists in Africa. It is clear that Tamang – like other researchers working outside of Africa – understands FPIC within the narrow confines of indigeneity. And yet, it is worth noting that it is the concept of FPIC, itself, that Tamang says could be adapted, rather than the notion of indigenous rights that could potentially be adapted to other realities. Thus, one could easily work with the idea of FPIC as envisioned by Tamang without being restricted to his focus around indigeneity.

While much of the established jurisprudence on FPIC was developed in and relates to jurisdictions outside of the African Region, it should be said that a multitude of African law makers and legal practitioners have written on the applicability of FPIC to the fairly unique African context. Foremost among these is Wilmien Wicomb who stated that 'The right to FPIC places the development decision in the hands of the community'.[361] Furthermore, she highlights the fact that FPIC is more than merely a way for communities to veto 'undesirable projects';[362] it also serves an equaliser in the power imbalance between the state and/or corporate interests on the one hand, and the community on the other. Thus, even where a community may want

[360] Tamang op cit note 358 at 115.
[361] Wicomb op cit note 14 at 1.
[362] Ibid.

extractive developments on their land, FPIC, properly understood, places the community in a better position to negotiate more favourable terms.[363]

Against this background, Wicomb elaborates on each of the apparently self-explanatory elements of FPIC. 'Free' means that the decision in question needs to be made without 'any obligation, duty, force or coercion'.[364] Furthermore, the community should be presented with 'alternative development options'[365]; this is to ensure that the community is not effectively coerced into giving their consent by economic circumstances. With regard to the requirement that the community be 'Informed', Wicomb states that 'they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts'.[366] She also states that 'Such information should be objective and based on a principle of full disclosure'. It is also not enough for states and/or mining companies to simply provide communities with this information, they have to give them 'enough time to digest and debate'[367] what they have been told. Finally, in order for the right to FPIC to mean anything, the community must be able to refuse to give it – in effect, their right to say 'no' must be respected.

Law makers and activists choose to explicitly mention this seemingly implied term as part of the concept as a whole, primarily to prevent governments or corporations from attempting to circumvent any FPIC based legal provision by simply 'present[ing]…a project as a *fait accompli*.'[368] In other words, without the requirement that consent be given before any mining operations can commence, 'Free and Informed Consent' would serve as little more than a system of 'rubber-stamping'.[369]

---

[363] Wicomb op cit note 14 at 1.
[364] Ibid.
[365] Ibid.
[366] Ibid.
[367] Ibid.
[368] Ibid.
[369] Adeola op cit note 189 at 260.

The matter of FPIC was one of the major issues before the Court in the *Baleni* Case. One of the core submissions of the Bench Marks Foundation related to the fact that, in their view, 'if FPIC had been complied with in contexts in which [the Foundation] has encountered mining activities on community land, it would have prevented or ameliorated many of the challenges suffered by communities and individuals.'[370] They submit that the present lack of clarity around whether or not mining companies are required to respect communities' rights to FPIC 'has seen mining companies flagrantly disregarding this principle'.[371]

One could compare FPIC to what many academics refer to as a 'Social License to Operate'.[372] There is one view that says that the fundamental difference between the two mechanisms is the fact that FPIC 'is a once-off formalization or agreement, while a[n] SLO takes a longer term perspective indicating the need to maintain community support throughout the life of the project'[373] However, this dissertation takes the opposing view which is that one should not emphasise the differences between the two mechanisms, but should rather view FPIC as a 'formalized, documented and verifiable social license to operate'.[374] The result of this is that FPIC should applied as an ongoing mechanism rather than once off waiver of future rights. The reason for taking this approach is based on the idea that FPIC should operate as more than just a right of veto over undesirable extractive projects, rather it should serve as an equaliser of bargaining power between communities and public or private bodies looking to establish extractive operations on their land. If one wants communities to retain this equal bargaining power throughout the lifetime of the extractive project, the one needs to require that the company and/or the state respect the community's right to FPIC throughout the process.

---

[370] Affidavit: John Capel op cit note 36 at 516.
[371] Ibid.
[372] Toyah Rodhouse and Frank Vanclay 'Is Free, Prior and Informed Consent a form of corporate social responsibility' (2016) 131 *Journal of Cleaner Production* at 789.
[373] Ibid.
[374] Ibid.

Futhermore, this understanding of FPIC is not an entirely new idea. The most obvious example of this understanding of FPIC in a binding legal text is the ECOWAS Mining directive which requires states that 'companies shall obtain free, prior and informed consent before exploration and prior to each subsequent phase of mining and post mining operation'.[375] In this way, the community has a right to comment on and even say 'no' to each new development throughout the life of a single project that might change and/or adversely impact on their rights and wellbeing.

It is evident that FPIC 'is increasingly recognized as a new international standard for relations between Indigenous peoples and extractive industries'.[376] The clearest illustration of this is the fact that, as mentioned by Martin Papillon and Thierry Rodon, 'The right to FPIC is at the heart of the United Nations Declaration on the Rights of Indigenous Peoples'.[377] At the same time, there are two major problems with the situation as it stands. The first is the manner in which FPIC is restricted to the idea of indigeneity. This is more than mere semantics: it has real effects on mining-affected communities. For example, many international financing institutions require consent to be given in only instances where the affected community meets this somewhat contested definition of indigeneity.[378] While there are clear examples of supra-national mechanisms that deal with indigenous or peoples'[379] rights and – in doing so- emphasise the importance of FPIC, the second issue is that there is currently no mechanism which has the wide-ranging binding force of conventions such as the ICCPR or ICESCR. One cannot really suggest that this is justified by reason of the highly specific nature of Indigenous rights, since there are already multiple United Nations conventions protecting similarly specific rights; such as the Convention on the Elimination of All Forms of Discrimination against

[375] Article 16(3); ECOWAS Directive on the Harmonization of Guiding Principle and Policies in the Mining Sector.
[376] Papillon and Rodon op cit note 155 at 216.
[377] Ibid.
[378] Wicomb op cit note 14 at 1.
[379] Depending on the region in which the mechanism in question exists.

Woman (CEDAW) and the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

The only question that remains at this point is what exactly we can determine when a community has or has not given its consent to an extractive project. Thus, not considering only whether communities can say 'no', but also trying to get an idea of what 'yes' looks like. According to Mckeehan and Buppert, FPIC 'as a static, regulated principle does not exist'[380], rather it is a process that should work 'in a way that is flexible and adaptable to each specific project'.[381]

In the African Context, Romola Adeola uses the example of the *Kgotla* system, a traditional mechanism of dispute resolution among the Batswana, as an illustration on one model that can be used to determine whether or not a community is giving its assent to extractive projects.[382] As innovative and progressive as this idea may sound on paper, the reality paints a very different picture. The extremely problematic nature of traditional leadership institutions was discussed in some detail in Chapter 2.

At this point, we have a clear indication of what community consent does not look like. Given the uncertainty about how we should view African Customary Land Rights in a common law framework – or, indeed, whether we can at all – this fact is not particularly surprising. However, a more thorough investigation into intricacies of customary communities laws and dynamics would need to happen before we can really get a concrete idea of when a community has given its consent. While such an investigation is, unfortunately, beyond the scope of this dissertation; it is a field that is ripe for study by similarly interested sociologists, anthropologists and students of African Customary Law.

---

[380] Mckeehan and Buppert op cit note 101 at 49.
[381] Ibid.
[382] Adeola op cit note 189 at 255.

5.2 *The liability of businesses with regard to rights violations committed in the pursuit of extractive projects*

While, depending on the jurisdiction, it might be easier for the state or private individuals to hold businesses accountable for human rights violations in domestic courts, the question of whether individuals have the same kind of recourse at in any "supranational forum" has not always been as certain[383]. At least part of this could be attributed to the fact that international law was traditionally held to be a system that exists primarily to regulate state conduct – usually *vis a vis* other states[384]. This means that, in theory, only states should have rights or responsibilities in terms of international law. However, this is quite clearly not the case.

The fact that non-state actors have rights including the right to bring a claim against a state in terms of international law is an idea that is clearly widely accepted. In Africa, we have examples of this such as the *Endorois* case, in which non-governmental organisations successfully brought claims against the Kenya and Nigeria, respectively, in a regional forum. However, whether anyone other than states are able to bear responsibilities in International Law is still somewhat more controversial. This is not to say that it would be entirely impossible. In fact, International Criminal Law is significantly premised on the idea that the international community can hold individual natural persons criminally liable for their conduct. This is reflected in Article 25 of the Rome Statute of the International Criminal Court which states that 'A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this statute'[385]. Regardless of whether it is or is not justifiable to compare the violations of human and peoples' rights committed in

[383] TW Bennett and J Strug *Introduction to International Law* 1 ed (2013) 190.
[384] Ibid at 1.
[385] Article 25(2); Rome Statute of the International Criminal Court, 1998.

the pursuit of extractive projects to the crimes against humanity that fall within the jurisdiction of the International Criminal Court, what is clear is that one cannot say that only states can ever have rights and responsibilities in terms of international law.

In Africa, the Kampala Convention requires states to limit potential displacement caused by development regardless of whether such development is spearheaded by public or private entities.[386] However it fails to adequately address the extent to which business should be held responsible.[387]

While discussing corporations' FPIC obligations as a form of Corporate Social Responsibility (CSR), Rodhouse and Vanclay claim that 'the stake holder engagement practices necessary to ensure genuine FPIC are different to those expected by CSR Stakeholder Management Theory'[388]

Papillon and Rodon suggest that, 'While many governments remain non-committal toward FPIC, corporate actors in the natural resource sectors have recently been more proactive in engaging with indigenous peoples in seeking their consent to resource extraction and infrastructure projects.'[389] With specific reference to their Canadian context, they refer to private companies using a system of 'Impact and Benefit Agreements'[390] which explicitly set out the terms under which indigenous communities give their consent.

And yet, the research conducted by the Bench Marks Foundation around community land rights and extractive industries in South Africa paints a very different picture. In their submissions in relation to the *Baleni* case, they quoted their conclusions which found 'the

[386] Article 10(1); Kampala Convention supra note 189.
[387] Adeola op cit note 189 at 257.
[388] Rodhouse and Vanclay op cit note 372 at 788.
[389] Papillon and Rodon op cit note 155 at 216.
[390] Ibid.

glaring neglect of fair, transparent, and honest engagement by companies with communities over their needs and aspirations'.[391]

One of the major problems with the current human rights law framework – particularly in the international sphere – is that it places an onus on the state to ensure that the human rights of its nationals are protected. However, particularly in African States, there is a desperate need for investment and an over-reliance on extractive industries, resulting in a clear imbalance of negotiating power. For this reason alone, it is already unfair that the full burden of ensuring the protection of communities' rights is placed on the state alone. Regional and sub-regional bodies need to follow the example set by the ECOWAS mining directive and explicitly state that companies operating extractive projects within the territories of member states should be considered to be as liable for human rights violations as those member states, themselves.

Of course, the difficulty that arises relates to the question of enforceability. Where natural persons are concerned, adjudicative bodies are able to impose severe penalties that prevent them from doing further harm, serving a as a deterrent to others who might be inclined to similarly offend and providing the aggrieved parties with a sense of 'justice' in the knowledge that the offenders have faced consequences for their actions. However, holding juristic persons – such as multinational corporations - accountable for their conduct is not as straightforward. As mentioned by Jonathan Clough, 'There is, understandably, a perception that if corporations are in fact subject to the threat of prosecution, it is an idle threat'[392]. However, this does not mean that prosecution is impossible. Clough offers some insight into how this might be achieved in his book chapter entitled 'Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World'[393].

---

[391] Affidavit: John Capel op cit note 36 at 520.
[392] Jonathan Clough 'Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World' in Ron Levy et al. (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) at 164.
[393] Ibid at 165.

There is a clear gap in our international human rights jurisprudence where states – for the most part, exclusively – bear the onus for ensuring that the customary land rights of their nationals are protected. Since private individuals and companies, both domestic and foreign, often cause as much, if not more, harm to marginalised communities in the way that they manage extractive projects, developing an effective mechanism to hold them accountable is critical.

The question of 'how' extractive companies could be held liable for the harms caused by their operations – particularly in the international arena - falls beyond the scope of this dissertation, but it provides fertile ground for further academic inquiry.

5.3 ***Conclusion***

The movement concerned with business and human rights is still in its relative infancy. And yet there have seen significant strides, particularly where the relationship between customary land rights and extractive industries is concerned. Most noticeable among these is the global trend towards Free, Prior and Informed Consent as the appropriate standard of community involvement. At the same time, Africa presents a somewhat complicated picture – in cases such as *Endorois* , the ACHPR – as the primary body charged with promoting and protecting human rights in the region - fully endorsed the notion of Free, Prior and Informed Consent. And yet, the same commission publishes documents such as the Guidelines on Articles 21 and 24 of the African Charter which permits states – and by extension the private sector – to use the far weaker standard of participation. African regional mechanisms need to stop using half-hearted terms relating to "participation" and "consultation", the notion of "consent" in this regard is not new to Africa. The blueprint exists in the ECOWAS Mining Directive and should be applied in mechanisms across the continent.

In South Africa, the consent standard required by IPILRA is roughly equivalent to that of FPIC in terms of the protections it offers to marginalised communities. Recent case law such as the judgment handed down in the *Baleni* and *Maledu* matters tested the consent standard and resolved the conflict between IPILRA and the MPRDA.

That the strongest mechanism that currently exists in South Africa to protect the rights of marginalised communities is still an 'interim' measure is of major concern. While this does not appear to weaken its protections significantly in practice, the risk that the 'Interim' status of IPILRA **could** potentially have severe consequences for marginalised communities remains an unjustifiable risk. IPILRA needs to be replaced with an equally strong, but more permanent and comprehensive piece of legislation for the protection of informal land rights.

While the *Maledu* case did address FPIC in some detail, neither that judgment nor *Baleni* explicitly references it in the order that was handed down. The result of this is that we lack any clear precedent on whether the FPIC standard has been incorporated into South African jurisprudence. Some might argue that this is not of real concern, since the net result is the same: stronger protection for mining-affected communities. The issue is that each element of FPIC was specifically chosen to give marginalised communities the strongest possible protection and, until the concept is officially incorporated into South Africa Law, there will be those who try to benefit from the vague wording – usually to the detriment of the community concerned. This is not a baseless assumption – there are clear, documented examples of mining companies, traditional leaders, and state officials trying to use the law to subvert the interests of marginalised communities and gain profit for themselves.

Undeniably, progress has been made in the movement for the stronger protection of customary and/or indigenous land rights in the face of potentially harmful extractive projects. But it is still far from sufficient. Free, prior and Informed Consent needs to be more common in both domestic and international jurisprudence.

Customary communities continue to struggle for the basic right to have a decide what happens to their land, and nothing short of a clear and unequivocable right to say ‘no’ to extractive industries that is embedded in the law and given teeth through functional legal systems and processes will afford them the necessary legal protection.

BIBLIOGRAPHY

Primary Sources

Legislation

Interim Protection of Informal Land Rights Act no. 31 of 1996.

Mineral and Petroleum Resources Development Act no. 28 of 2002.

Traditional Leadership and Governance Framework Act 41 of 2003.

International Legal Mechanisms

The African Charter on Human and Peoples' Rights.

ACHPR Res. 224(LI) 2012 Resolution on a Human Rights Based Approach to Natural Resources Governance.

ACHPR Working Group on Extractive Industries, Human Rights and Environment in Africa 'State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter Relating to Extractive Industries, Human Rights and the Environment' at pg vi available at https://www.achpr.org/public/Document/file/English/Articles%2021%20&%2024%20State%20Reporting%20Guidelines.pdf, accessed on 10 June 2020.

African Union Convention for the Protection and Assistance of Internally displaced Persons in Africa, 2009.

ECOWAS Directive on the Harmonization of Guiding Principle and Policies in the Mining Sector.

ECOWAS, Protocol A/P.1/7/91 On The Community Court of Justice

ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989.

ILO Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Population in Independent Countries, 1957.

Protocol on Mining in the Southern African Development Community

Revised Treaty of the Economic Community of West African States

Supplementary Protocol A/SP.1/01/05 Amending the Preamble and Articles 1,2,9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of Said Protocol.

United Nations Declaration on the Rights of Indigenous Peoples.

Case Law

Alexkor Ltd v Richtersveld Community and Others 2004 (5) SA 460 (CC).

Baleni and Others v Minister of Mineral Resources and Others (2019) 1 All SA 538 (GP).

Applicant's Heads of Argument; *Baleni and Others v Minister of Mineral Resources and Others*.

Fifth Respondent's Heads of Argument; *Baleni and Others v Minister of Mineral Resources and Others*

Founding Affidavit: Duduzile Baleni; *Baleni and Others v Minister of Mineral Resources and Others*.

Affidavit: John Capel in Volume 6 Applicants Pleadings *Baleni and Others v Minister of Mineral Resources and Others*.

Bhe and Others v Khayelitsha Magistrate and Others 2005 (1) SA 580 (CC).
Daniels v Scribante and Another 2017 (4) SA 341 (CC).

Department of Land Affairs and Others v Goedgelegen Tropical Fruits 9Pty) Ltd 2007 (6) SA 199 (CC).

Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC).

Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another 2019 (2) SA 1 (CC).

Mkontwana v Nelson Mandela Metropolitan Municipality 2004 (1) SA 530 (CC).

Shilubana and Others v Nwamitwa 2009 (2) SA 66(CC).

Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others (No Judgment to Date)

Founding Affidavit: Jan Christoffel Du Preez in Applicants Pleadings *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others*.

Answering Affidavit: Tholakele Mthethwa *Tendele Coal Mining (Pty) Ltd v Minister of Mineral Resources and Energy and Others*.

International Case Law

African Commission on Human and Peoples' Rights v Republic of Kenya (ACtHPR) Application no.006/2012 (2017)

Communication 276/03, Centre for Minority Rights Development(Kenya) and Another on behalf of the Endorois Welfare Council v Kenya (2009)AHRLR 75 (ACHPR 2009).

Secondary Sources

Books

Anne Pope et al. *The Principles of The Law of Property in South Africa* 7 ed (2015).

Bill Freund *The Making of Contemporary Africa: The Development of African Society since 1800* 2 ed (1998).

Chuma Himonga and Thandabantu Nhlapo *African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives* 1 ed (2014)

Frans Viljoen *International Human Rights Law in Africa* 2 ed (2012).
Frederick Cooper *Africa Since 1940: The Past of The Present* 1 ed (2002).

HWO Okoth-Ogendo 'The Nature of Land Rights under Indigenous Law in Africa' in Aninka Claasens and Ben Cousins (eds) *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights*.

Kevin Bloom and Sasha Wales-Smith *Stealing The Crust* 1 ed (2018).

Lungisile Ntsebeza, 'Rural Governance and Leadership in post-1994 South Africa: democracy compromised?' in John Daniel, Rodger Southall and Jessica Lutchman (eds) *State of the Nation: South Africa 2004 – 2005* (2005).

Martin Channock 'Paradigms, Policies and Property: A review of the Customary Law of Land Tenure' in Kristin Mann and Richard Roberts (eds) *Law in Colonial Africa* (1991).

T.W. Bennett *Human Rights and African Customary Law* 1 ed (1995).

TW Bennett and J Strug. *Introduction to International Law* 1 ed (2013).

Walter Rodney *How Europe Underdeveloped Africa* (2018) 35.

Academic Articles

Adrienne Mckeehan and Theresa Buppert "Free Prior and Informed Consent: Empowering Communities for People-Focused Conservation" (2014) 35 *Harvard International Review*.

Angus MacInnes, Marcus Colchester and Andrew Whitmore 'Free, Prior and Informed Consent: How to rectify the devastating consequences of harmful mining for indigenous peoples' (2017) 15 *Perspectives in Ecology and Conservation* (3).

Anne Mayher, "A Clash of Rights? Platinum Mining Vs Rural Communities in Limpopo Province, South Africa." (2009). – unpublished Article, on file with the author.

Chris Nwachukwu Okeke 'The Second Scramble for Africa's Oil and Mineral Resources: Blessing or Curse?'(2008) 42 *The International Lawyer* (1).

Ciaran O'Faircheallaigh 'Extractive industries and Indigenous peoples: A changing dynamic?' (2013) *Journal of Rural Studies* 30.

E.S. Craighill Handy "The Religious Significance of Land" (1939) 38 *Journal of The Royal African Society* 105.

Felix Mukwiza Ndahinda 'Marginality, Disempowerment and Contested Discourses on Indigenousness in Africa ' (2011) 18 *International Journal on Minority and Group Rights* (4).

Francis Wilson "Minerals and Migrants: How the Mining Industry has Shaped South Africa" (2001) 130 *Daedalus* (1).

Gabrielle Lynch ‘Becoming Indigenous in the Pursuit of Justice: The African Commission on Human and People’s Rights and the Endorois’ (2012) 111 *African Affairs* (442).

I.P Bekker et al. “The Dichotomy between “official customary law” and “non-official customary law” (1992) 17 *Journal for Juridicial Science* 1

Ilyayambwa Mwanawina ‘The position of Judicial Independence within the SADC Institution Framework’ (2013) 46 *Law and Politics in Africa, Asia and Latin America* (3)

Jonathan Clough ‘Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World’ in Ron Levy et al. (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017)

Land Accountability and Research Centre and Ndifuna Ukwazi, “Patriarchs and Pariahs: The Geography of Traditional Leadership” (2016) *People’s Law Journal*.

Land Accountability and Research Centre and Ndifuna Ukwazi, “Protecting The Land Rights of Rural People: Is IPILRA the Answer?” (2016) *People’s Law Journal*

Laurie Nathan ‘The Disbanding of the SADC Tribunal: A Cautionary Tale’ (2013) 35 *Human Rights Quarterly* (4)

Llewellyn Leonard “Traditional Leadership, community participation and mining development in South Africa: The case of Fuleni, Saint Lucia, KwaZulu-Natal” (2019) *Land Use Policy 86*

Martin Papillon and Theirry Rodon “Proponent-Indigenous agreements and the implementation of the right to Free, Prior and Informed Consent in Canada” (2017) *Environmental Assessment Review* 62.

N Mathonsi and S Sithole “The incompatibility of traditional leadership and democratic experimentation in South Africa” (2017) 9 *African Journal of Public Affairs* 5.

Parshuram Tamang “An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices” (2005) 9 *Australian Indigenous Law Reporter* 2.

Philippe Hanna and Frank Vanclay “Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent” (2013) 31 *Impact Assessment and Project Appraisal* 2.

P.J Badenhorst "The Nature of new order prospecting rights and mining rights: a can of worms?" (2017) 134 *South African Law Journal* (2).

P.J Badenhorst and C.N Van Heerden "Conflict resolution between the holders of prospecting or mining rights and owners (or occupiers) of land or traditional communities: What is not good for the goose is good for the gander" (2019) 136 *South African Law Journal* (2).

Richard N Kiwanuka 'The meaning of "people" in the African Charter on Human and People's Rights' (1988) 1 *The American Journal of International Law*.

Roger O'Keefe "The "Right to Take Part in Cultural Life" under Article 15 of the ICESCR" (1998) 47 *Th International and Comparative Law Quarterly* 4.

Romola Adeola 'The responsibility of businesses to prevent development induced displacement in Africa' (2017) 17 *African Human Rights Law Journal* 1.

Solomon T Ebobrah 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 *Journal of African Law* (1).

Toyah Rodhouse and Frank Vanclay 'Is Free, Prior and Informed Consent a form of corporate social responsibility' (2016) 131 *Journal of Cleaner Production.*

W.J. Du Plessis "African Indigenous Land Rights in a private ownership paradigm" (2011) 17 *Potchefstroom Electronic Law Journal* 7.

Wilmien Wicomb "Free Prior and Informed Consent in Africa: Challenges and Opportunities" unpublished Article written for Heinrich Boll Stiftung (2015).

Websites

Ben Cousins "Potential and Pitfalls of "communal" land tenure reform: experience in Africa and implications for South Africa" (2009) Paper for World Bank conference on 'Land Governance in support of MDGs: Responding to new challenges available at https://www.fig.net/resources/proceedings/2009/fig_wb_2009/papers/trn/trn_1_cousins.pdf at pg 1, accessed on 22 June 2020.

The Bench Marks Foundation 'Communities in Platinum Minefields POLICY GAP 6 A review of Platinum Mining in the Bonjala District of the NW Province: A Participatory Action Research (PAR) approach' at pg 108 available at https://www.researchgate.net/publication/317888541_Policy_Gap_6_A_Review_of_Platinum_Mining_in_the_Bojanala_District_of_the_North_West_Province_A_Participatory_Action_Research_PAR_Approach/link/5950db570f7e9be7b2e83ed8/download, accessed on 28 June 2020.

Greg Nicholson 'Ruling "fundamentally changes power dynamics" as Communities win big in ConCourt' available at https://www.dailymaverick.co.za/article/2018-10-26-ruling-fundamentally-changes-power-dynamics-as-communities-win-big-in-concourt/?fbclid=IwAR2daL7kWcYDCIDZ9WZXxn3r-U89zXTKV4UncAzMRe4OH7qJWgIPMhqrmKk#gsc.tab=0 accessed on 3 July 2020.

Henk Smith and Wilmien Wicomb *Customary Law and the Protection of Community Rights to Resources* Legal Resources Centre Pamphlet. available at https://landportal.org/library/resources/customary-law-and-protection-community-rights-resources, accessed on 25 June 2020.

International Labour Organisation 'Ratifications of C169 – Indigenous and Tribal Peoples Convention, 1989 (No. 169) available at *https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO, accessed* on 6 June 2020

Royal Bafokeng Platinum "About us" available at https://www.bafokengplatinum.co.za/about-us-a-brief-profile.php, accessed on 28 June 2020.

South African Development Community 'SADCAT" available at: https://www.sadc.int/about-sadc/sadc-institutions/tribun/, date accessed 29 June 2020.

ACKNOWLEDGMENTS:

I would like to thank the following individuals, without whom this dissertation would not have been possible: My parents, Leigh and Susan McLean; for their love, support, editorial input and willingness to listen to me talk at them about my research non-stop for hours at a time; Salona Lutchman, my supervisor, for her valuable input and endless patience with missed deadlines; Wilmien Wicomb for introducing me to the cutting edge field of business and human rights as well as the concept of FPIC, itself; and to Johan Lorenzen for his willingness to engage on the topic as well as his insider's perspective of the Xolobeni and Tendele cases.