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perspectives

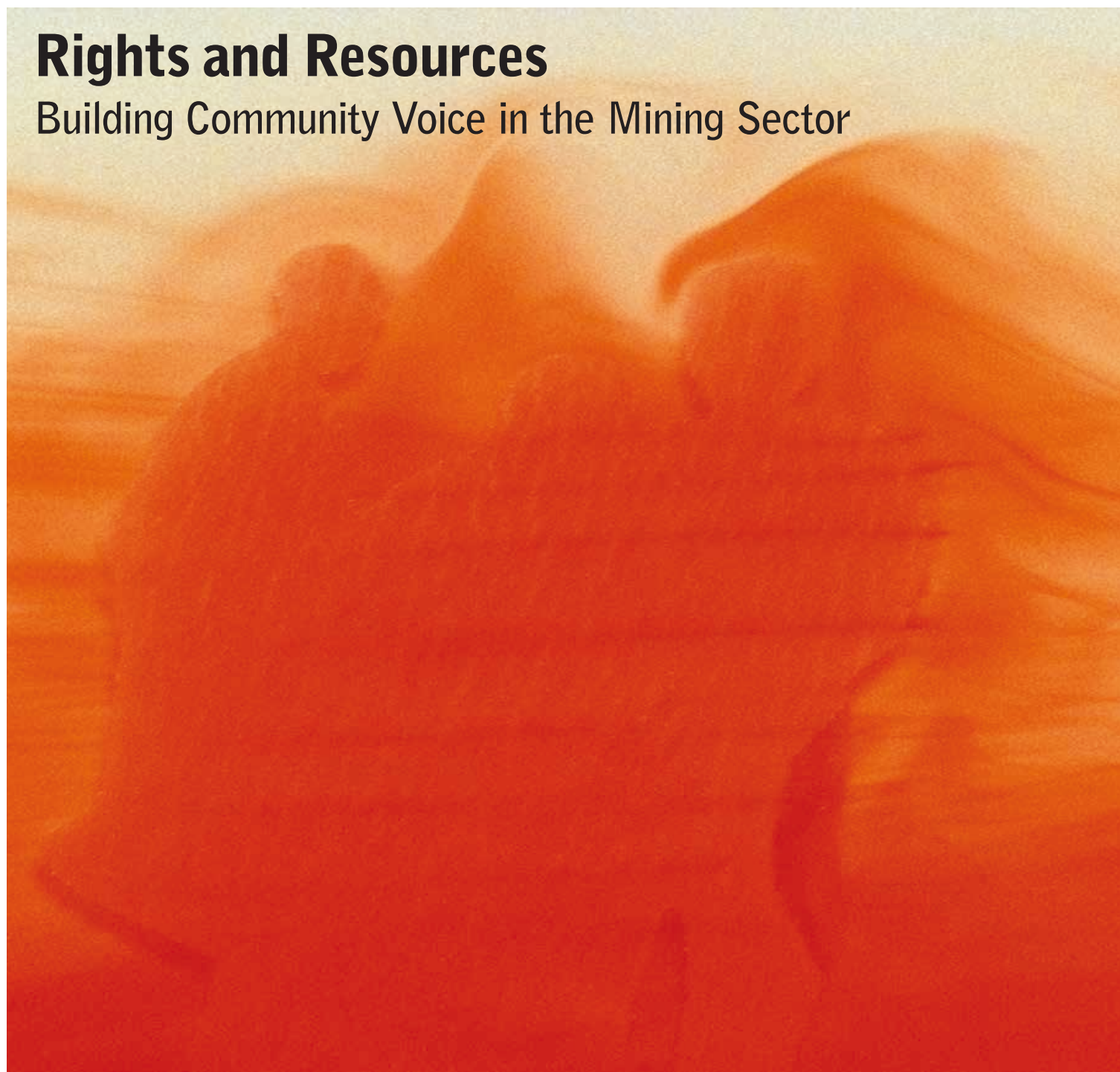
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POLITICAL ANALYSES AND COMMENTARY

AFRICA

Rights and Resources

Building Community Voice in the Mining Sector



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Heinrich-Böll-Stiftung

The Heinrich Böll Foundation is a publicly funded institution that is affiliated with but intellectually independent from the German Green party. From our headquarters in Berlin and 30 overseas offices, we promote civic participation in Germany, as well as in more than 60 countries worldwide. Our work in Africa concentrates on promoting civil society, democratic structures, gender democracy and global justice. Together with our partners, we work toward conflict prevention and search for solutions to the challenges of environmental degradation and the depletion of resources. To achieve these goals, we rely on disseminating information, creating a deeper understanding between actors in Africa and Europe, and supporting global dialogue.

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Editorial

The mining sector is central to a growing number of African economies. Since 2000, most foreign direct investment into the continent has been directed to the mining sector. Many African governments believe that mining-led growth is one of the few opportunities to develop and catch up with other countries. But while the polarised debate about whether large-scale mining is a “driver” of development or a “curse” continues, the view from the mostly rural communities that have been directly affected by mining seems to be clear. Despite the jobs that mining may provide, it is contributing very little to improve the overall living conditions at the local level. Instead, host communities face many negative impacts, including resettlement, environmental pollution, health hazards and the disruption of livelihoods.

Cooperation among stakeholders in the sector is generally poor. Groups that represent affected communities are hardly recognised as stakeholders with legitimate interests and the right to a place at the bargaining table. Where engagements do take place, the terms are defined by actors external to the community. It is, of course, important to acknowledge that communities are not homogenous: they can include mineworkers and those who depend on agriculture or fishing for their livelihoods. They also change over time as mining projects move into their areas. Inclusivity and an appreciation by all stakeholders of the socio-cultural context and power relations at play within an affected community are therefore of key importance. Of particular interest should be the experience of women, given the strongly patriarchal nature of power structures at the community level throughout Africa.

Where schemes to increase the

economic participation of communities have been introduced, such as community share-ownership trusts, ordinary members are often misrepresented by local traditional elites who follow their own narrow interests. The situation is further compounded by a lack of capacity and/or political will on the part of governments, both at national and local level, to act in the interest of their citizens. Although the policy and regulatory environment has progressed, and an increasing number of companies have also committed themselves to improving their environmental and social footprint, the gap between rhetoric and reality is wide.

Just like any other citizens, the very least that members of mining-affected communities should be able to expect, from both the public and private sectors, is that their rights be respected and remedial action taken where these have been violated. This sounds very simple, but it is sadly a far cry from the reality experienced by mining-affected communities across the continent.

In response, an increasing number of communities have begun to build their capacity for meaningful engagement with external actors, such as government agencies and mining companies. With this edition of *Perspectives*, the Heinrich Böll Foundation explores some of the approaches and instruments that communities and their NGO partners have developed to create room for community-centred stakeholder participation, and to champion community interests and rights.

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Balancing the Scales: Community Protocols and the Extractives Sector

Gino Cocchiaro and Jael Makagon

For those who depend upon lands and resources for their livelihoods, the impacts of extractive projects are immense. The destruction of the environment and sacred areas, and the removal or dislocation of communities from traditional lands are often the sad results for people who, more often than not, already belong to the most marginalised in society.

Against the backdrop of the commodity market supercycle that took place over the past decade, Natural Justice recently released a 19-country study which found that extractive industries and their associated infrastructure are a main threat to the ways of life of indigenous people and local communities around the world.¹ Although the cycle has spun back to 2005 levels, it remains to be seen whether, and for how long, the current downturn in commodity prices will ease the pressures on affected communities. What seems certain, however, is that the significant overlap of the territories of indigenous peoples and the location of fossil fuels, minerals, and other natural resources sought by extractive industries is to become more pronounced during future commodity boom cycles.² As much as 50 percent of the gold produced between 1995 and 2015 and up to 70 percent of copper production by 2020 will take place on indigenous peoples' territories.³

These territories are often left untouched or ignored until the discovery of a particular resource. Once such discoveries are made, extractive projects increase existing power asymmetries between communities and government or business. This will often result in the exclusion of communities from long-term benefits of the projects,

condemning them to carry only the burdens and costs.

Internationally, we have seen the proliferation of many laws and policies that serve to protect the interests of communities and their environments, but the policy gaps and the lack of coherence in standards related to extractive industries are also well documented.⁴ In his 2012 report to the Human Rights Council, the UN special rapporteur on the rights of indigenous people noted that deficient regulatory frameworks governing extractive industries fail to protect indigenous peoples' rights.⁵ This is particularly relevant in three major areas: the scope of communities' rights over land and territories, appropriate consultation procedures, and benefit-sharing schemes. Even where proper legal and policy frameworks exist, a lack of political will mean that they are not enforced. Finally, states often fail to provide oversight of extractive operations due to a variety of factors, including limited budgets.

In response to these imbalances, marginalised communities around the world have started to employ a number of legal and advocacy approaches in order to engage in fair and effective decision-making. One such approach is through developing a community protocol.

Creating another Reality with Community Protocols: Successes and Challenges

Community protocols are essentially a legal empowerment tool. Leveraging the power of law, they create a space for marginalised voices in decisions that may impact their



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lives and environments. Natural Justice and its partners first used community protocols under the United Nations Convention on Biological Diversity (CBD) as a means to provide opportunity for stronger benefit-sharing arrangements between communities and business or research entities. Interest in this approach – particularly from African countries, indigenous peoples and local communities – led to the recognition of community protocols in the 2010 Nagoya Protocol on Access and Benefit Sharing, which is a supplementary agreement to the CBD.⁶

A common component of community protocols for many communities is the articulation of customary rules and procedures that regulate conduct as well as interactions between themselves and outsiders. Often, these rules and procedures are not easily known or understood by those outside the community and it is very useful to have a means to channel this information, such as a written protocol. Communities may also wish to include any other information they deem relevant, such as their views on a particular issue, their aspirations for the future, the extent of their territories, and their rights under relevant national and international laws. While such articulation could take many forms, community protocols have proven to be particularly empowering due to their endogenous and community-driven nature.

Using the development of community protocols as a platform, Natural Justice and its local partner organisations have trialled this approach with mining-affected communities in Argentina, India, Kenya and Zimbabwe. These communities are using community protocols to advocate for the affirmation and protection of their substantive rights and control over their territories and resources, as well as their procedural rights, such as appropriate inclusion in decision-making that affects them.

Many nuanced details need to be considered and addressed before definitive conclusions can be drawn regarding the utility of community protocol processes. However, two years into the project, the following points describe some results that can be gleaned.

Participation and Time

A community protocol seeks to represent the wide range of voices within a community. This may coexist with a need to address particular threats within a limited time frame. The issues at hand, clarity on the

community's desired course, and the existence of decision-making structures all have an influence on the number of community meetings, the support required and, of course, the time for protocol development.

For example, the community protocol process in Odisha, India, deals with various forms of mining and land rights. Because of the diversity of views in the community toward mining and the complexity of the issues, it has taken two years for the community to agree to undertake the process and determine who will participate in the protocol. In Argentina, by contrast, at the time the concept was introduced to a community in 2013, community governance structures were already in place to address lithium-mining concessions and the views of the community toward mining were comparatively unified. These factors helped the community to develop their community protocol document in the same two-year period.

Identifying Community

Identifying the “community” – or other relevant national legal terms, such as “marginalised group”⁷ – that the protocol will apply to is one of the most important and challenging aspects of the community protocol process. Inclusion might be determined by a community's shared history, geographical area, ethnicity or the issues the group seeks to address. In the four pilot studies, communities identified themselves by one or more of these criteria and our research has demonstrated the impact that this selection can have. On Kenya's northern coast, several communities in Lamu County are working together to develop a community protocol to address a massive infrastructure project and related oil, gas and coal exploration. While the project was the trigger for the protocol, issues of land injustice and continued marginalisation of coastal peoples became central during the community's discussions. This then expanded the “who” of the community protocol to include many groups that would not directly be affected by the infrastructure projects. The unintended consequence of this inclusion was to divert time and capacity away from the infrastructure projects, which were about to have an immediate impact on thousands of community members. To address this, community representatives brought the protocol back to its original focus and concurrently mandated local organisations to address the themes of land injustice and recognition.



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Case Study

The Marange and Arda Transau Community Protocol

The Marange communal lands are located in Mutare Rural District in the eastern province of Manicaland in Zimbabwe. The area has been the habitat of the Bocha tribe for generations and represents their identity and bears their cultural heritage. Consisting mostly of subsistence farmers, the community of Marange has always directly depended on their natural environment and traditional knowledge for their livelihood, food security and general wellbeing.

However, community members have seen their lives turn upside down since the discovery of alluvial diamonds in the area. A diamond rush that saw an estimated 20 000 would-be miners flock to the Marange diamond fields in 2006 was followed by the violent militarisation of the area and finally the establishment of large-scale mining operations from 2009 onwards.

Mining has caused gross environmental degradation and forced relocation and loss of land for the Marange community. From 2010 to present, 1400 families have been

Justified by the government as being “for the greater good of the Zimbabwean population”, the community feels that the diamond mining has induced ills that were avoidable.

forcibly relocated to Arda Transau, a dilapidated 12 000-hectare government farm 32 kilometres from Marange. More than 2000 other families face the threat of relocation.

The forced relocation of the Marange community eroded their traditional means

of conserving their biodiversity and the sustainable manner in which they preserved and lived from their resources. Beyond the destruction of their livelihoods as subsistence farmers, the Marange and Arda Transau communities are deeply concerned about the preservation of Mount Makomwe, which bears the guardian spirits of the Bocha people, and Ushonje, a range of sacred mountains. Justified by the government as being “for the greater good of the Zimbabwean population”, the community feels that the diamond mining has induced ills that were avoidable.

In 2014, the people of Marange and Arda Transau, including their traditional and spiritual leaders, decided to develop a community protocol under the leadership of the Chiadzwa Community Development Trust, a local community-based organisation that was formed in response to the human rights violations caused by mining in the area in 2009.

A community protocol is a charter that provides in-depth detail of the cultural practices, customary laws, norms and values that have sustained the community through many generations. It provides a guide and terms of reference for engagement with government, companies, NGOs, and other external stakeholders. The community protocol works to assert the community’s rights, establish stewardship procedures for their environment, and affirm their own responsibilities.

Stakeholder workshops were held in 2014 and throughout 2015 to inform community members of the community protocol process and train them in interest-based negotiations, conflict resolution, environmental law, human rights, and national and international grievance mechanisms. A writing committee was set up, consisting of several community members, to document the grievances, aspirations and other relevant information and data that would be collated in the protocol. More than 32 workshops, focus group discussions and other meetings were held, reaching about 2500 men and women.

The community of Marange and Arda Transau has already used the process as a springboard to address a range of issues. This includes a successful challenge of the



Melania Chiponda is the coordinator and one of the founding members of the Chiadzwa Community Development Trust. Her research and advocacy work engages with global extractive industries from the perspective of communities in Zimbabwe that are directly affected by mining, and is embedded in a participatory action research approach.



government's decision in 2014 to impose a traditional leader on the people of Marange without following the community's customary procedures as captured in the community protocol. The community has also engaged with the Environmental Management Agency on the use of traditional environmental management systems. The agency has committed to work with the community for the protection of streams, forests and sacred tree species. Following negotiations with mining companies in the area, graveyards and other sacred sites have been fenced off and protected from damage. Baobab trees that were cut down have been replaced.

The community protocol process has also raised the idea of reaching out to other mining host communities to form a mining communities coalition: a network that will amplify community voices in legislative and decision-making processes at national level.

The process has also been of great benefit to the Marange community itself. Developing the community protocol has stimulated them to thoroughly explore and interrogate their knowledge systems and traditional practices. For example, there were questions about the requirement to pay a fee to traditional courts, as this made them inaccessible to some households (e.g. child-headed), which blocked their access to justice at the community level. The issues were discussed and resolved. The community protocol process has thus given community members an opportunity to critically examine how their own practices shape the development of their community, and has enabled them to let go of practices and beliefs that limit their development and self-determination. ■■■

Community training sessions
© Melania Chiponda

Case Study

The Lamu County Community Protocol

Save Lamu is a growing coalition of individuals and civil society organisations in Lamu County on Kenya's north coast. The organisation has been at the forefront of advocating for community consultations and participation in two large development projects in the county: the Lamu Port, South Sudan, Ethiopia Transport (LAPSSET) Corridor and the Lamu coal power plant. The LAPSSET Corridor project encompasses several components, including a mega port, a railway line, an oil pipeline and refinery, resort cities, airports, highways, and other factories and industries.

In 2010, a local organisation called Lamu Environmental Protection and Conservation (LEPAC) spearheaded an initiative to unite groups and individuals in a campaign to conserve the county's environment and cultural heritage. When LEPAC started using the community protocol approach, a coalition emerged under the banner of Save Lamu.

The Lamu community protocol process is complex because of the multi-ethnic communities in the county and the diverse terrain, including ocean, islands, estuaries, grasslands and forest, which are utilised by different communities for their livelihoods. While the Aweer and the Sanye are traditionally hunters and gatherers, the Bajuni are mainly fisherfolk, farmers and mangrove harvesters. The Swahilis are traders, shopkeepers and farmers, and also engage in tourism-related activities. The Orma are traditionally pastoralists, herding cattle and goats in the grasslands in the interior of the county. The glue that binds these communities together is their religion, Islam, and the lively trade that takes place among them.

From 2010 to 2012, the Save Lamu community protocol team visited over 40 villages in the county, collecting information from over 1 500 community members. In 2013, the writing team returned to the communities to record feedback to the draft protocol and to collect further information. Finally, in 2014 and 2015, Save Lamu undertook activities to strengthen the descriptive narrative of the protocol through community resource mapping and a participatory video project. The mapping project focused on marine resources in the area of the Lamu Port Project envisioned by LAPPSET, while the proposed coal plant was the subject of the video.

Undertaking such a large and long-term community project for the first time, Save Lamu has faced many challenges along the way. Save Lamu began its advocacy work at a time of high expectations among the Kenyan people, due to the launch of the 2010 Constitution that enables a more devolved form of governance in a country with a highly centralised government. However, the political elite in the county of Lamu (which governed Lamu prior to 2013, when the county government came into being) were government officers posted to Lamu and not people from the local community. They used their position to allocate land corruptly and perceived Save Lamu as a threat to their "business as usual" approach. In some areas, local administrators prevented Save Lamu members from meeting with community members. In others, they tried to break up gatherings organised by Save Lamu.

After the 2014 terrorist attacks in the county, it was placed under curfew for over six months, making it difficult to engage in activities and to move from place to place. Save Lamu executive committee members were called to the capital, Nairobi, for interrogation by the criminal investigation department in connection with the terrorist attacks. There were suspicions that Save Lamu was funding al-Shabaab, the professed perpetrators. Save Lamu offices were searched and documents confiscated – although these were returned in September 2015 and no further action was taken.



Omar Mohamed Elmawi is the programme coordinator for Save Lamu. Omar is a lawyer with LL.B honours from the University of Nairobi. He is currently pursuing a diploma in the advocates training programme at the Kenya School of Law, seeking to be enrolled as an advocate of the High Court of Kenya. He is passionate on matters of environment and community rights.



Lamu County encompasses both mainland and islands. The mainland has few roads and all are unpaved; in the rainy season, some are impassable. Vehicles and boats are few and it is difficult and expensive to move from one village to another. In addition, the communities that the process was able to reach are poor and mostly dependent on nature-based livelihoods, such as fishing, farming and pastoralism. If they attend meetings, they are unable to meet their daily needs, which required Save Lamu to provide an allowance.

Despite these challenges, the Lamu County community protocol has already yielded many positive results. The process fostered unity among the different traditional communities and provided an effective means for sensitising communities about the looming development projects and their likely impacts on the environment and people. It also enhanced discussions with external stakeholders, such as independent researchers and consultants who are investigating the possible effects of the LAPSSSET project and coal plant development. The data and information collected for the protocol have also been instrumental in the preparation of an economic cost-benefit analysis of the LAPSSSET project, which found external costs that the proponents may have recognised but not necessarily quantified.

Last but not least, the protocol was also used as the baseline for the Lamu Conflict Dialogue Mapping, a project carried out by Danish Demining Group, in partnership with Save Lamu, Spatial Collective and others, to map possible areas of conflict that could arise as a direct or indirect result of the LAPSSSET project.

Moving forward, the Lamu County community protocol, together with the community resource mapping and participatory video project, will be used to engender further dialogue between the community, project developers and government officials. This includes plans for a partnership with the Lamu County government, for the government to adopt the community protocol and ensure benefit-sharing for the county. The protocol will illuminate and validate community views and concerns about their territories and resources in view of the proposed development projects. It has the potential to assist developers to create plans that will be welcomed by the community – rather than those that will cause conflict, even violence, and ultimately fail. ■■■

Community members meet in Lamu to discuss their community protocol. © Natural Justice



Hadija Ernst is a founding member of Save Lamu and holds a position on the organisation's executive committee. She is also a writer and an enthusiast of protecting Lamu's coastal environment and its cultural integrity.

Identification and Prioritisation of Issues

The participatory nature of the process invites affected people to raise issues that are of particular importance to them. Though most of the issues related to impacts caused by extractives projects, others, as shown in the Lamu pilot study, involved longstanding injustices that predate the current projects. In Zimbabwe, where communities in Manicaland Province have been negatively impacted by diamond mining activities since 2006, issues of land ownership were often raised during the protocol development process. After multiple participatory discussions, community members decided to prioritise issues to address in the protocol. Their criteria were the importance to the community; capacity to solve the problem; likelihood of short-term success; and longer-term overarching goals. Interestingly, this process prioritised access to land and issues related to water pollution over land ownership, which was seen as a more difficult problem that would take longer to address. Community representatives and their supporting organisation also noted that small short-term victories, including during the community protocol development itself, were critical to maintaining the broader community's interest in addressing the overarching problem of land ownership.

Indeed, the process of developing a protocol could be viewed on the whole as both a legal empowerment technique and an advocacy technique to respond to a particular issue faced by a community.

Knowing and Applying the Law

In order to fulfil the priorities outlined in the community protocol, it is imperative that community representatives are conversant with relevant laws and their applicability. In each of the four pilot studies, national laws dictate adherence to procedural and substantive requirements, such as environmental impact assessments (EIAs) and environmental license conditions during construction and operations. Legal trainings were held within each pilot study. In Kenya, Zimbabwe and India, methodologies to collate and use evidence, as well as paralegal processes, will be adopted

to increase legal implementation and accountability.

Support organisations and complementary advocacy strategies

In each of the pilot studies, an organisation from or close to the community has been facilitating the community protocol process. This has helped to guide the direction of the community protocol and implement its stated priorities. In Lamu, Kenya, community members initially formed a community protocol committee to lead the process. Within a year, however, the committee created a community-based organisation. This allowed them to address the complex issues that were arising in a systemic manner and to receive funding. The organisation now has four paid staff members and a management committee consisting of representatives from affected communities. In the other three pilots, national organisations with longstanding connections to the communities have provided technical and logistical support throughout the protocol processes.

Mining-affected communities and their NGO partners around the world are using numerous legal and advocacy techniques to respond to the external threats and challenges they face. These include the use of litigation or litigation-like strategies, such as filing lawsuits to challenge projects in national, regional and international courts; filing complaints before non-judicial bodies, such as the grievance mechanisms of development finance institutions; campaigns of protest and demonstration to draw attention to human rights violations; appeals to national, regional and international human rights bodies to issue decisions that address the impacts caused by extractive industries; and using national legislation through paralegal methodologies to ensure that companies and governments follow the rules when planning and implementing projects.

Community protocols complement these techniques as a supportive empowerment tool that is proving relevant in a wide variety of contexts. Through the protocol process, the communities in the four pilot countries have decided to engage in a number of different advocacy techniques. Indeed, the process of developing a protocol could be viewed on the whole as both a legal empowerment technique and an advocacy technique to respond to a particular issue faced by a community.

Community Protocols and Extractives: Looking Ahead

Community protocols, which have proven to be valuable in other contexts, are showing their value in the context of extractive industries where communities face varied and layered challenges. One aim of the pilot studies is to collate sufficient information to be able to investigate how community protocols might be used to effect change in different extractives contexts. A final publication will detail the results of all these experiences. Further, a community-protocol facilitator's guide is being developed.⁸

While it should not be used in isolation from advocacy techniques, the community protocol process provides communities with a framework to come together to address the challenges and opportunities posed by extractive activities, as well as other challenges that may go beyond the extractives context. A clear framework and plan to address challenges, as identified by the community, in combination with legal training, will serve as a fundamental step to empower community members and balance the power asymmetries that exist in extractives projects. ■■■

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- 1 The Study found three main pressures on indigenous peoples and local communities' conserved territories and areas. The first was categorized as systemic pressures on the environment and biodiversity worldwide, including habitat loss, overexploitation of resources, rapid urbanization, pollution, invasive species, and climate change. The second category was described as "direct pressures" on environment and communities by infrastructure projects, including roads, dams, ports; extractive industries, including oil extraction and mining, land use change caused by large-scale agriculture; and exclusionary conservation practices. The third and final category related to the lack of legal recognition, including failed implementation, of communities' rights, including relevant environmental laws and standards. See: Jonas et al., 2012, *Indigenous Peoples and Local Communities' Conserved Territories and Areas (ICCAs) Legal Review and Recognition Study*. Available at: <http://naturaljustice.org/resources-and-research/icca-legal-reviews/>.
 - 2 A/HRC/24/41, 2012. Available at: <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>.
 - 3 International Work Group for Indigenous Affairs, *Indigenous Peoples, Transnational Corporations and Other Business Enterprises*, 2012. Available at: www.iwgia.org/iwgia_files_publications_files/0566_BRIEFING_2.pdf.
 - 4 Op. cit.: Jonas et al., 2012.
 - 5 A/HRC/21/47, 2012. Available at: <http://unsr.jamesanaya.org/annual-reports/report-to-the-human-rights-council-a-hrc-21-47-6-july-2012>.
 - 6 See: <https://www.cbd.int/abs/>.
 - 7 The Constitution of Kenya, 2010.
 - 8 See: www.naturaljustice.org.

A Double Challenge: Building the Voice of Women Affected by Mining

Interview

Samantha Hargreaves

WoMin, launched in October 2013, is an African gender and extractives alliance, which works alongside national and regional movements of women, mining-impacted communities and peasants to research and publicise the impacts of extractives on peasant and working-class women. It supports women's organising, movement-building and solidarity, and advocates for structural reforms to the extraction-led development model pursued by many African countries.

WoMin addresses a substantial area of neglect in the work and activism of traditional natural resources, extractives, environmental and climate organisations and movements. While the mainstream women's movement has focused much of its attention on questions of violence against women, political representation and education, it has substantially failed to address the significant economic and social justice questions for African women that occur with this mode of development.

Samantha Hargreaves, director at WoMin, took some time out to speak about the need to build the voice of women affected by mining operations.

HBS: What are the impacts women have to deal with when resource extraction starts to take place in their area?



Samantha Hargreaves has a long history of work on land and agrarian reform, specifically in regard to women in South Africa and the Africa region. In her formal employment she has worked as a field worker, researcher, campaigner and programme manager in local, national and international non-governmental organisations including the National Land Committee and its affiliates in South Africa for 12 years, and in Action Aid International for eight years. She has led WoMin since its conception in early 2013, balancing the roles of strategist, researcher and writer, alliance-builder, fundraiser and director.

Hargreaves: Working-class and peasant women carry a particular burden of costs associated with extractives and associated transportation, combustion and processing activities. For example, forced relocations, devastated water systems and polluted soils have particular gendered effects because of women's leading role in household food production, processing and provisioning in Africa. The Food and Agriculture Organisation estimates that women are responsible for 70 to 80 per cent of food that's put on the table of rural households.

Polluted river systems and drinking water result in women having to walk further in search of safe drinking water, reducing the time they have available for productive work and exposing them to increased risks of sexual harassment and violence.

Health problems arising from environmental pollution and poverty, such as tuberculosis, respiratory diseases and the increased incidence of HIV/Aids, as well as occupational disease such as silicosis and asbestosis, all make demands of care upon women and children in contexts where there are few, if any, health and social services.

Women in mining-impacted communities are also exposed to disproportionately high levels of violence that is related to the concentrated presence of single male migrant workers set outside of their usual social and cultural milieus. The militarisation of extractives territories gives rise to gendered repression in the form of gang rapes,

sexual harassment and intimidation of women by the military and private security companies.

What makes it more difficult for women in mining-impacted communities to get their concerns and problems heard?

Women essentially face double exclusion from decision-making about development in their communities. The first level of exclusion relates to the patriarchal nature of most families and rural and traditional communities across Africa. Here women generally only gain access to land and natural resources via a man. Their interests are typically represented into communal decision-making via the recognised male head of the family. Although female elders often enjoy a higher status, they are often still not allowed to make direct representations to a king, chief or his traditional representatives in court or at village level. The flouting of patriarchal decision-making hierarchies often results in fines or other forms of censorship.

This pattern of exclusion is repeated when extractives projects get underway, typically sidelining the majority of women and their families who are neither informed nor involved, nor genuinely empowered to give or withhold consent. At the local level, deals are typically cut between corporates, chiefs, other traditional representatives, politicians and the economic elite – typically men who stand to gain in some way.

Even when so-called “free prior and informed consent” (FPIC) is addressed in national law or if “community participation” is required in policy and protocol pertaining to development projects, the practice generally falls far short of what is required. In WoMin’s work with allies across the region, we find the oft-repeated testimony that ordinary people’s – men and women alike – involvement in decisions that affect their lives, livelihoods and bodies is generally reduced, if it happens at all, to incomprehensible briefings, notification meetings, and presentations of highly technical impact-assessment reports. The majority of people, women included, generally hear by rumour, when prospecting equipment is brought onto their lands, and/or when the corporate or state authorities effect physical relocations.

How do you hope to change the current status quo of women in mining-affected communities?

WoMin’s vision is of an Africa in which all women exercise control over the lands they use, their livelihoods and natural resources, and their bodies and cultural heritage. To achieve this, WoMin’s mission



Women at a workshop on coal mining. © WoMin

is to support women's movement-building – starting with grassroots formations organised by women in affected communities – which challenges destructive extractivism and proposes development alternatives that respond to the needs of the majority of African women.

WoMin's work to advance reforms is located within a wider strategy of transitioning to a post-extractivist eco-feminist society. We consider non-reformist reforms – in the areas of consent, safeguards for communal tenure systems, demands for expansive and full compensation, and stricter environmental regulations and the proper enforcement of these – as highly strategic. Our ultimate objective, which such transformative reforms should lead us to, is the transition to a post-extractivist order, in which extraction does occur, but on terms that are supportive to local and sub-national development agendas, in which local land-based livelihoods that protect nature and nurture its regeneration are supported, and in which the daily work of reproducing workers and communities is valued, respected and supported.

In very practical terms, this means that we undertake participatory research, political education work, training and strategy meetings, grassroots solidarity exchanges and locally driven women-led campaigns. For example, WoMin is currently preparing for its first feminist movement-building school with more than forty women activists and leaders from seven African countries.

The question of community consent is emerging as a key focus area in your work. What makes it such a critical principle in the fight for the rights of mining-affected communities?

Consent is a critical principle and a dimension of due and fair process that must be struggled for and enjoyed in any living democracy. Peoples, including women, must be empowered with the voice to participate in decisions about development processes that will affect them

or the generation to come. Beyond the matter of principle and right, consent is an extremely important tool to bolster community struggles against destructive development projects, and (if these proceed) to lay the basis for fair and just compensation and benefit.

And from a longer-range, more structural perspective, the right of consent and the ability of groups to influence decision-making about development processes that impact them is a critical component of the broader transformation and democratisation of the economy and society which WoMin seeks. Within each rationale, women's voice, perspective and interest must be heard, supported, recognised and advanced.

However, consent is limited to a specific development project proposed in respect of a bounded geography and therefore has its limitations, considering that the development agenda is determined at a much higher national or supranational level. For this reason, WoMin also addresses the much bigger question of alternatives to the dominant development agenda, and women's participation in socio-economic decision-making processes beyond the very local.

How do you ensure that your work is "driven by" and not just implemented "on behalf of" women in affected communities? In other words, how do you build and maintain community ownership of your work?

WoMin does not claim the identity of a movement but rather an alliance that supports women's organising and movement-building. As a regional alliance, supporting the work of its national friends and allies, we are some steps removed from the localised struggles of community women. Our allies represent a mix of traditional NGOs and movements; with our strong commitment to women's movement-building, we hope that the composition of our allies will consolidate in the direction of a movement with time.

In all of our work, we encourage the direct participation of grassroots women leaders and activists. For example, in our upcoming feminist movement-building school, more than two-thirds of the participants are from community organisations, networks and movements. In the fossil fuels campaign we are building, more than half of the participants at national consultations and regional campaign meetings must be strong activists from local organisations and movements. Similar requirements will be made for leadership and decision-making structures of the campaign.

Our methodologies of grassroots solidarity exchanges, participatory action research and localised campaigning all support women's organising and women's leadership, which will bolster WoMin's roots in, and accountability to, organised constituencies of affected women. ■■■

Free, Prior and Informed Consent in Africa: Moving Beyond a Narrow Legal Principle

Wilmien Wicomb

The last decade saw the demand for minerals and metals globally rise to the highest levels ever, with a concurrent peak in prices, before the extractive industries experienced a remarkable fall from grace over the last 18 months. For the rural African communities that have increasingly played host to these industries over the last thirty years, the development bubble had burst much earlier. As the International Study Group on Africa's Mineral Regimes of the UN Economic Commission for Africa (ECA) and the African Union (AU) noted as early as 2011, the record levels of extractive-fuelled economic growth on the African continent before the onset of the 2008 economic crisis failed to meaningfully contribute to the social and economic development objectives of the continent.¹ Benefits were not trickling down.

Affected local communities in Africa, with the aid of civil society, began to demand a greater say in development decisions when these directly affected them. These communities joined the already very successful movement of indigenous peoples and communities across the world. These groups had been campaigning at the international level for legal mechanisms to protect their territories and cultures from resource extraction since at least the early 1980s and had already achieved major milestones such as the 1989 ILO Convention 169 and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). While these instruments were limited to the obligations of states towards indigenous communities, frameworks and guidelines relevant to

company conduct have in the last decade increasingly taken on board the protection of indigenous communities.² Legally, this protection is captured in the principle of *free, prior and informed consent* (FPIC). While debates continue to rage as to the precise content and appropriate application of FPIC, the legal force of this right for indigenous peoples faced with a development project on their territories, has been almost universally confirmed (if often not properly implemented).³

There can be no doubt that the local communities in Africa affected by extractive industries have been able to benefit greatly from the gains made in international law by the indigenous peoples' movement. However, it has also created challenges that are particularly difficult to navigate for local communities on the continent. For one, the notion of "indigenous peoples" as generally recognised in international law⁴ developed mainly in Latin America. The historical context of that region, within which the concept gained traction, is very different to the African history of warfare, displacement and migration, and the subsequent imposition of colonial boundaries. As a result, the legal definitions of "indigenous", which may emphasise historical and unbroken attachment to land, for example, exclude many African rural communities. Politically, African leaders have rejected the application of "indigeneity" to the African context, and only a last-minute legal opinion by the African Commission on Human and Peoples' Rights (African Commission) convinced the African block not to reject UNDRIP.⁵ Only one African country, the Central African Republic, has ratified ILO Convention 169 – with little hope of that figure improving.



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Free, Prior and Informed Consent (FPIC) refers both to a substantive **right** under international, statute and customary law as well as a **process** designed to ensure satisfactory development outcomes. The right to FPIC places the development decision in the hands of the community.

To realise this right, the community's decision should be made free from any obligation, duty, force or coercion. Ideally, alternative development options should also be available to the community to ensure that the decision is based on real choice.

Secondly, the community has the right to make the development choice **prior** to any similar decisions made by government, finance institutions or investors. In other words, the community's right to FPIC is not realised if they are presented with a project as a *fait accompli*.

Thirdly, the community must be able to make an **informed** decision. That means 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. Such information should be objective and based on a principle of full disclosure. The community should be afforded enough time to digest and debate the information.

Finally, **consent** means that the community's decision may be to reject the proposed development. They can say no.

FPIC is then also described as a **process**, precisely because the right to say no places the community in a position to negotiate. In other words, FPIC is not designed only to stop undesirable projects, but also to provide communities with better bargaining positions when they do consider allowing proposed developments of their land or resources.

But the modern-day African reality is that, on the back of the colonial rejection of indigenous law and property regimes, customary ownership and rights to land and resources remain almost entirely unrecognised. As a result, the rural communities of Africa – who occupy more than two-thirds of the continent's surface – are as vulnerable and marginalised through historical discrimination as indigenous communities in other parts of the world. Often falling short of the international law definition of “indigenous” in the eyes of their governments and the extractive industries, these communities are unable to insist on the protections afforded to indigenous peoples by UNDRIP.

The same is true of current industry standards and best practices: important industry groups, such as the International Petroleum Industry Environmental Conservation Association and the International Council on Mining and Metals, have policy documents on FPIC and indigenous peoples only, while international development agencies, notably the Organisation for

Economic Cooperation and Development (OECD), and financing institutions continue to require consent exclusively from indigenous peoples.⁶ Contrary to these

But the modern-day African reality is that, on the back of the colonial rejection of indigenous law and property regimes, customary ownership and rights to land and resources remain almost entirely unrecognised.

developments, the World Bank caused consternation with the release of a draft revision of its Environmental and Social Policy and Standards in 2014, proposing an opt-out clause for governments that prefer to deal with the issue of indigenous peoples in an “alternative” way. Many believed that the recommendation was particularly aimed at appeasing African states. In response, the African Commission in early 2015 adopted a

resolution on the draft Policy and Standards reasserting its commitment to indigenous peoples on the continent.⁷

In fact, the African regional and sub-regional human rights institutions have consistently shown significant sensitivity for their particular context and for the vulnerability of all local African communities threatened by large-scale development projects.⁸ Therein lie some of the greatest protections for African communities under threat. The African Commission, the institution tasked with giving content to the African Charter on Human and Peoples' Rights (ACHPR), has not only understood the vulnerability of local African communities before the powerful extractive industries, but has explicitly linked their protection to FPIC and to the recognition of their ownership of their land and resources. The ACHPR's Resolution on a Human Rights-Based Approach to Natural Resource Governance of 2012 includes the language of community consent and participation:

Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing; [the African Commission] calls upon State Parties to ... confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities in decision making related to natural resource governance ... and to promote natural resources legislation that respect human rights of all and require transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefits from any development on their land or other resources, or that affects them in any substantial way.⁹

This resolution followed the Commission's landmark FPIC decision in the *Endorois*¹⁰ case of 2010. The case concerned a Kenyan community that was removed from its ancestral lands and resources in 1973 by the government of the time. The community argued successfully that the removal violated their rights to property, development and culture and to freely dispose of

their natural resources. While the Commission decided that the Endorois community indeed constituted an indigenous community, it remained ambiguous as to the significance of that finding for its further findings on the community's right to property, development, natural resources and culture. In other words, did the Endorois community have the right to FPIC because they were indigenous or simply because they were an affected local community? Read with its earlier decisions (and the 2012 resolution cited above), it appears clear that the African Commission regards local communities as "peoples" for the purposes of the Charter – and for attracting FPIC.

In *Kevin Mgwanga Gunme et al v. Cameroon*, the Commission decided that a group of people will be considered a "people" if it manifests all or any of the following attributes, namely: common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, ethno-anthropological attributes, or a common economic life. Additionally, the African Commission further held that a group also might identify itself as a "people" with a separate and distinct identity.¹¹ Finally, in the *Endorois* decision itself, the Commission emphasised that

the term "indigenous" is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities ... In the context of the African Charter, the Working Group notes that the notion of "peoples" is closely related to collective rights.¹²

Given the continued injustice and inequality suffered by all the bearers of customary rights to land and resources, the *Endorois* protections must be understood to extend to distinct local communities under threat of the extractive industries. So what are these protections? The Commission not only clarified that the right to development included FPIC to be sought in terms of the particular community's customary law,¹³ but gave content to this right. The community's right to development under the Charter includes procedural and substantive elements. It held, in particular, that it requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable,

and transparent, with equity and choice as important, over-arching themes in the right to development ... Freedom of choice must be present as a part of the right to development.¹⁴

In this case, the Endorois community's right to development was violated because community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role. Furthermore, the community representatives were in an unequal bargaining position ... being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.

The connection established by the Commission between the right and implementation of FPIC and the customary law of the community concerned is of crucial importance in the African context. For one, it has the potential of grounding FPIC in customary law and customary ownership rights as an alternative legal basis to the international law discourse on indigenous peoples rights.¹⁵ Moreover, it highlights the historical and present-day injustice of the continued non-recognition of customary tenure as equal to common-law forms of tenure based simply on racist colonial prejudices. As the victims of such continued discrimination, local communities whose customary land and resources are threatened deserve the right to FPIC not only because their own customary law requires it, but because the African Charter's vision – of overturning the legacy of colonial oppression in every form – demands it.

In fact, at a regional and an international level, the linkages between customary tenure and FPIC have emerged as central to the elevation of the protection of local communities. The African Commission has stated unequivocally that the right

Endorois lands, Baringo County, Kenya. © Minority Voices



At the national level, however, examples of the requirement for consent from affected communities are few and far between. Even where these exist, they are hardly operational.

to property in the Charter includes the protection of “rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership”.¹⁶ In the same vein, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of the National Food Security of 2012 of the Food and Agriculture Organisation of the United Nations feature multiple protections of customary tenure, including a call on states to “protect communities with customary tenure systems against the unauthorised use of their land, fisheries and forests by others”. The guidelines explicitly link customary rights to resources to the need to “obtain the [customary community’s] free, prior and informed consent”.

Finally, the Economic Community of West African States (ECOWAS), in its 2009 Directive on the Harmonisation of Guiding Principles and Policies in the Mining Sector, explicitly states that “companies shall obtain the free, prior and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations”.

At the national level, however, examples of the requirement for consent from affected communities are few and far between. Even where these exist, they are hardly operational. While the Botswana Mines and Minerals Act requires the written consent of an owner or lawful occupier before a mining right is granted, for example, the well-publicised fate of particularly the San communities’ diamond-rich land indicates that this is far from the reality.¹⁷ In countries such as Zambia and South Africa, where a reading-together of mining, land and customary laws ostensibly provides the right to consent for affected communities, the practice of singling out traditional leaders – whether legitimate community representatives or not – fatally weakens the bargaining

Thekwana village outside Rustenburg, South Africa. Villagers insist that large-scale mining is taking place against their will. They also claim that the mining royalties are not being used to develop the community.

© Gallo Images / Sunday Times / Simon Mathebula



position of the community. Attempts to ensure that extractive industries contribute tangibly to socio-economic transformation – for example, through the Social and Labour Plans in South Africa or the Indigenisation Policy in Zimbabwe – are at best top-down and inappropriate development measures that happen *to* communities rather than *with* them. These approaches do not afford communities choice.

Despite the difficulties at the domestic and international levels, however, the opportunities created by the African

regional institutions and instruments, as well as the increasing recognition of customary law and ownership on the continent, should mean that all is not lost for Africa's customary local communities. In fact, if FPIC can be acknowledged regionally as a principle of customary law – the law that lives and develops in the practice and histories of communities – it has the potential to move beyond a narrow legal principle to become a community-agency organising approach to localised development in Africa. ■■■

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- 1 Available at: <http://www.uneca.org/publications/minerals-and-africas-development>.
 - 2 For a detailed discussion of these standards globally, see Voss M and Greenspan E, 2014, *Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)*, Oxfam America.
 - 3 The International Finance Corporation (IFC) has stated, for example, that "there is emerging consensus among development institutions that adopting the term [FPIC] is necessary. Increasingly, other IFIs ... industry associations ... and roundtables have adopted or are considering adopting FPIC" (IFC 2010 in Voss and Greenspan, p 14).
 - 4 It remains a concept that is difficult to define precisely: UNDRIP includes no specific definition.
 - 5 Since UNDRIP provided no specific definition of indigenous peoples, the African Commission released an Advisory Opinion laying down broad rules to make such a determination, namely (a) self-identification as indigenous; (b) attachment to traditional land; and (c) a state of subjugation and marginalisation.
 - 6 In other sectors, tentative steps towards the broadening of the application of FPIC have been taken. For more, see Voss and Greenspan, 2014, p 15.
 - 7 301: Resolution on the World Bank's draft Environmental and Social Policy (ESP) and associated Environmental and Social Standard (ESS) - ACHPR/Res.301 (EXT.OS/XVII) 20 available at <http://www.achpr.org/sessions/17th-eo/resolutions/301/>.
 - 8 For example, in an earlier decision (*Antonie Bissangou v. Congo*, Case 253/02, African Comm'n H.R. (2006), §81) the Commission said the following about Article 21 of the African Charter: "The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society."
 - 9 Available at: <http://www.achpr.org/sessions/51st/resolutions/224/>.
 - 10 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.
 - 11 266/2003 Kevin Mgwanga Gunme et al/ Cameron. Available at: <https://docs.google.com/file/d/0B0uuvXdgDIroNmExNDdInzUtMmEyZi0ONTIITgXOGMtYjE40TRiODRjNDFm/edit?pli=1&hl=en#>.
 - 12 At para 149.
 - 13 "[T]he African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."
 - 14 At Paras 277-282.
 - 15 The case of *Alexor Ltd v. The Richtersveld Community*, 14 October 2003, CCT 19/03, cited in *Endorois*, saw the South African Constitutional Court emphasise the right to consent as a central aspect of customary or aboriginal ownership and title.
 - 16 The African Commission's Guidelines and Principles on the Implementation of the Socio-Economic Rights contained in the African Charter, 2011.
 - 17 The San people have over the last twenty years systematically been removed from their ancestral lands in the Central Kalahari Game Reserve. Despite the protestations by government that these forced removals were not linked with diamond mining, the opening of a multi-billion dollar mine in 2014 in the Reserve placed the issue beyond doubt.

Bringing Law to Life:

Paralegal Interventions in Natural Resource Exploitation

Sonkita Conteh

Introduction

When a diamond mining company closed its operations in Mofuwe Village, in the south of Sierra Leone, it left behind three mined-out pits the size of several football pitches, a collapsed bridge, a blocked stream and an uncompleted community school building. It was as if the villagers woke up one morning and the company was gone. When floodwaters – attributed to the blocked river – destroyed their crops, community members and leaders decided that they had finally had enough and sought help from a paralegal office two miles down the road. It was the only justice mechanism within reach. Two years later, with help from lawyers within and outside the country, the paralegals finally managed to get the company back to the community to redress the damage. Pits were filled, the bridge repaired, the stream unblocked and the building completed.

Just like the villagers of Mofuwe, the majority of the world's population is not satisfactorily protected by law or the institutions established to govern them.¹ In many African countries, the poor, who mostly live in rural areas, are in a particularly helpless position – their rights are routinely violated, they are unable to access formal institutions and are incapable of speaking out. Nowhere is this more keenly felt than in the extractive sector where poor rural communities are too often left to pick up the pieces of their broken lives after devastating mining activities. The picture is similar across resource-rich African countries. Profit-hungry corporations and ineffectual, and sometimes complicit, regulators leave a trail of destruction, disempowerment and helplessness in the wake of natural resource exploitation.

In Sierra Leone, a country that has endured a decade of civil conflict and, more recently, an Ebola epidemic, the vast majority of the population does not have access to the formal justice system.² They have to devise their own solutions to the myriad socio-economic challenges they encounter daily³, or rely on informal or traditional institutions that often leave them vulnerable to exploitation and discrimination.

The daily struggle to make ends meet – to access food, water, sanitation, transportation and healthcare on less than a dollar a day – makes access to justice an unattainable luxury for the rural poor.

Building Hope at the Frontlines

Attempts to make the law work for everyone, particularly the poor, have focused almost entirely on building the capacity of the “supply side” of justice – mainly courts and government institutions – with little or no attention paid to the capacity of those who require justice services to efficiently utilise these institutions or find helpful alternatives.

Legal empowerment seeks to rectify this imbalance. It is a process through which the poor are enabled to use the law to advance their rights and interests. It recognises that everyone should have access to justice and that all the legal rights that are owed to an individual are respected without regard to that person's status. It gives voice to individuals and communities at the grassroots level to participate in decision-making processes.⁴ One principally effective and inexpensive way to achieve that has been



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through the use of community-based paralegals.

Different stripes of paralegal programmes exist across Africa. Many paralegals work as “generalists”, responding to the many needs of the communities in which they are located. Others specialise, focusing on particular issues or methods.

South Africa is one of the earliest adopters of the model. From the 1950s, paralegals provided important assistance to non-white citizens as they navigated the biased laws of the apartheid regime. These days, a combination of paralegal advice offices and law clinics address issues such as pension benefits, gender-based violence, employment and the rights of persons living with AIDS.⁶

In Sierra Leone, far-flung rural communities continue to benefit from the efforts of NGOs to provide basic justice services through paralegals and mediators. For example, a local NGO called Timap for Justice has provided grassroots justice services since 2004, with a frontline of generalist community-based paralegals who engage in mediation, advocacy, organising, and education to address concrete instances of injustice.⁷

Addressing Power Asymmetries in Natural Resource Exploitation

In the context of natural resource exploitation, too, paralegals working with communities have managed to secure important remedies or enhanced the voice of otherwise vulnerable communities in matters that affect their lives and livelihoods.

Namati, a legal empowerment organisation with offices in Sierra Leone, helps communities that are interfacing with large-scale land investors to obtain fairer, more responsible land deals as well as enforce compliance with regulations. In 2015, Namati’s paralegals worked with ten communities in the north of the country to secure a more equitable lease agreement between the communities and a logging company. They successfully negotiated provisions for the protection of traditional or sacred grounds, profit sharing with communities, and protection from environmental harm.

Namati’s paralegals have also worked with communities adversely affected by the operations of mining companies. Manon-

koh, a small farming village in northern Sierra Leone, suffered repeated flooding of cultivated swampland as a result of the operations of the now-defunct ore miner, London Mining Company.⁸ The company and mining regulators ignored complaints from the community for over two years, until the paralegals stepped in. Working together, paralegals and community members wrested important remedial action from the miner, even though it refused to accept liability. Floodwater was drained, drainages were expanded, and rice for food, seeds and other farming inputs were provided to the 35 households in the village. The company’s successor arranged to pay compensation to the affected farmers before it, too, went belly up.

In late 2015, paralegals began working with several communities affected by the operations of a diamond miner in Tongo, Eastern Sierra Leone. The company often blasts hard rock to get at the precious stones. Residents are asked to leave their houses and move to a safe distance, usually a football field. The blasting results in severe damage to their properties, which they claim is never properly repaired. Given the repeated nature of the exercise and the distress it causes, many had asked to be relocated, but neither the company nor the relevant government agencies responded.

Interestingly, residents who have spoken to the paralegals don’t think that the company will ever relocate or alter the way it mines because, they believe, it enjoys strong support from the government. This

A community-based paralegal is a person who:

- has basic knowledge of the law, the legal system and its procedures, and has basic legal skills
- is a member of the community or part of an organisation that works in the community and has basic knowledge of the ways community members access justice services (including through traditional or informal justice mechanisms)
- has skills and knowledge related to alternative dispute-resolution mechanisms, including mediation, conflict resolution, and negotiation
- is able to communicate ideas and information to community members using interactive teaching methods
- can have working relationships with local authorities and service delivery agencies
- has community organising skills that can be used to empower communities to address systematic problems on their own in the future.⁵

speaks directly to one of the reasons why the extractive sector throws up some of the toughest justice challenges for community-based paralegal programmes in Africa. The economic might of corporations and their close association with political power creates a major disincentive in the minds of ordinary folks to pursue remedies against them. In fact, some investment-hungry governments have labelled bottom-up campaigns for corporate accountability as “anti-development” and NGOs involved in such actions have reported intimidation. Governments put more effort into “improving the business environment” in order to attract foreign investment than they do into creating or strengthening structures of accountability.

Also, justice issues within the extractive sector tend to be complex and long term. Paralegals may work for years on a case, such as the flooding in Manonkoh. Cases dealing with the environmental and health impacts of company operations may require basic scientific knowledge and terminology in addition to relevant laws. They may also require specialised equipment, such as water testing kits, that paralegal organisations or communities cannot read-

ily access. In this respect, links with lawyers and other professionals become crucial for effective resolution.

In addition to these technical challenges are the practical ones that are inherent where there are severe power and resource imbalances between disputing parties. In the Mofuwe Village case, for instance, company employees sought to influence the paralegals to drop the matter. When that failed, they offered mobile phones and cash to community leaders, some of whom accepted the bribe. A combination of deep rural poverty, wealthy and unscrupulous firms, and complicit government officials makes local leadership – and rural populations generally – susceptible to negative corporate influence. They can be manipulated to act against their best interests.

However, the biggest threat to generalist or specialist paralegal programming has been funding and, to a lesser extent, formal recognition. Most paralegal programmes begin and are sustained, at least for a while, by external donors.⁹ Donor support is by nature short-term. Paralegal interventions in Sierra Leone and elsewhere in Africa have folded up or become severely constricted as soon as donor priorities changed. Many

Legal education for members of grassroots women's groups.

© Namati



governments have not taken up the responsibility for funding paralegal services or incorporating them into the formal legal system. In a few countries like Sierra Leone, where paralegals have been incorporated into the national legal aid framework, the level of government funding for legal aid services has not been very significant. In fact, competing needs within a mixed legal-aid system makes it difficult for the paralegal component to be properly funded. Most legal aid boards prioritise funding for criminal legal aid or legal representation in courts, which are comparatively more expensive.

Formal recognition of paralegals, either by statute or policy, opens up the possibility of public funding but, most importantly, it creates the space for paralegals to effectively engage with public institutions in their daily work. However, care must be taken to avoid co-option or the loss of independence. A paralegal's work often involves holding government or powerful interests accountable and this critical edge could be sacrificed in pursuit of recognition. It is imperative that

paralegal programmes remain independent when they are funded publicly or afforded legal recognition by the state.

Conclusion

Over the years, there has been a growing awareness of the importance of access to justice in the fight against deprivation, insecurity, exclusion and the voicelessness of the poor.¹⁰ Paralegals have helped to demystify the law and legal institutions by educating people and guiding them through remedial processes when rights are infringed. It seems unlikely that communities would have received any measure of justice in the instances described above without the intervention of paralegals. Without a doubt, community-based paralegal programmes help to make resource-exploiting corporations accountable and their operations more responsible. Most importantly, however, they prove that the law and government can be made to serve ordinary citizens. ■■■

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- 1 *Making the Law Work for Everyone*, Report of the Commission on Legal Empowerment of the Poor, Vol. 1, 2008, pg. 19.
 - 2 Government of Sierra Leone Justice Sector Reform Strategy and Investment Plan, 2008-2010, pg vi.
 - 3 Ibid.
 - 4 United Nations General Assembly, *Legal empowerment of the poor and eradication of poverty*, Report of the Secretary-General, 13 July 2009, pg. 3.
 - 5 *Community-based paralegals: A Practitioners Guide*, Open Society Foundations, 2010.
 - 6 Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone and Elsewhere*, Open Society Justice Initiative, 2006, 2010.
 - 7 See <http://www.timapforjustice.org>.
 - 8 Sonkita Conteh, *Discarding the Resource Curse Label: Corporate Accountability in Natural Resource Exploitation in Sierra Leone* available at <http://politicosl.com/2012/10/discarding-the-%E2%80%98resource-curse%E2%80%99-label/>.
 - 9 *Community-based Paralegals: A Practitioners Guide* Open Society Foundations, 2010.

Building Community Voice through Litigation?

Lessons from the Silicosis Class Action Suit in South Africa

Tanya Charles and Dean Peacock

The entire South African gold mining industry is currently on trial. In a historic lawsuit, 32 gold mining companies, collectively comprising all the major mining houses, are being sued by 56 litigants who are current mineworkers, former mineworkers, or widows of former mineworkers. The miners and their families are seeking damages from the mining companies for silicosis¹ and/or tuberculosis acquired while working in the gold mines. These 56 are only the tip of the iceberg: they potentially represent hundreds of thousands of affected individuals.

Since 2012, the mineworkers' legal representatives – Richard Spoor Attorneys, Abrahams Kiewits Attorneys, the Legal Resources Centre and two firms based in the United States – have been building towards a class action lawsuit to hold the gold mining industry to account for a century of neglect of mineworkers' health rights and the displacement of their medical care onto impoverished women in rural labour-sending areas. The 56 applicants, a combination of clients of the three legal teams, were selected on the basis that their claims are similar enough to other members of the class action to make them suitable representatives of the class. The legal firms are acting "on contingency", which means that they will only receive their legal fees if they are successful. This is common practice with clients who are indigent.

The case, *Bongani Nkala and Others v Harmony Gold Mining Company Limited & Others (Nkala)*, was heard in October 2015. The South Gauteng High Court in Johannesburg will soon decide if a class action lawsuit can indeed proceed against

the mining companies involved.

Sonke Gender Justice (Sonke) and the Treatment Action Campaign (TAC), with legal representation by public-interest law centre Section 27, applied to intervene in this lawsuit as *amici curiae* (friends of the court) in order to share expert information on the broader social impact of silicosis and related occupational lung diseases. Despite strong industry opposition – with a team of nearly twenty corporate lawyers representing the mining houses – the South Gauteng High Court dismissed their arguments and allowed the admission of evidence from Sonke and the TAC.

Civil society organisations have successfully turned to the courts to win socio-economic rights ever since these rights were embedded in the South African Constitution. When confronted with government resistance, cases such as *Grootboom vs Government of South Africa*, which affirmed the right of citizens to rudimentary shelter, or *TAC vs Minister of Health*, which ensured the provision of anti-retroviral drugs to thousands of South Africans living with HIV, have demonstrated that the courts can provide important redress and ensure that ordinary citizens are able to access and enjoy the rights guaranteed to them in the Constitution.² However, as this paper will show, "rights are not gifts". Neither a written constitution nor a rights-supportive culture nor sympathetic judges are sufficient: rights are "won through concerted collective action arising from both a vibrant civil society and public subsidy".³

Strategic litigation like this is vital for protecting the rights of vulnerable people in South Africa. It "uses the justice sector to achieve legal and social change through



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test cases and is sometimes called impact litigation because it seeks to have an impact beyond the actual outcome of the case. Unlike the provision of legal services, strategic litigation's goals are broader than helping an individual client⁴. However, strategic litigation alone does not always secure wider social change. To achieve maximum success, Budlender and others (2014) argue that:

it ought to take place in combination with three other strategies. These are: conducting public information campaigns to achieve rights awareness; providing advice and assistance to people in claiming their rights; and making use of social mobilisation and advocacy to ensure that communities are actively involved in asserting their rights inside and outside the legal environment.⁵

This article will discuss how Sonke and the TAC used some of these strategies to garner public interest in the hidden pandemic of silicosis and to support litigation to ensure that the gold mining industry is finally held accountable for its negligence.

Nkala and Workers' Compensation in South Africa

The legal battle for the socioeconomic rights of miners suffering from silicosis/TB has been fought in South Africa's courts since the early 2000s, culminating in a landmark 2011 Constitutional Court case, *Mankayi v AngloGold Ashanti Limited*, which significantly expanded workers' rights.⁶ For decades, injured mineworkers could only access a paltry compensation determined by the Occupational Diseases in Mines and Works Act (ODIMWA). *Mankayi* allowed mineworkers with occupational lung diseases to pursue civil law remedies for their employer's negligence. This ruling, which started out as the pursuit for justice for a few individuals, became a campaign to attain justice for tens – and possibly hundreds – of thousands of miners and their families, as affected people began to realise their rights under the 1996 Constitution.

In 2012, the year after the *Mankayi* ruling, several law firms began to build the class action lawsuit, with the intention of holding the gold mining industry accountable for a century of neglect.⁷ It quickly became apparent that this was likely to become the

Patrick Sitwayi is 57 years old and has silicosis from working underground in the gold mines for 22 years.

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Sekhobe Letsie started work in the mines in 1970, when he was 28 years old. He has silicosis and has not received any compensation.
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biggest class action lawsuit in the history of the country and that it offered important opportunities both to win significant compensation for the most exploited communities in the country, possibly as much as USD2.5–4 billion, and also set important legal precedents in what has been described as a “David versus Goliath” battle.⁸

In late 2014, Sonke Gender Justice and the Treatment Action Campaign, represented by Section 27, made their application to the court as *amici curiae*. Sonke highlighted the gendered implications of occupational disability. Specifically, Sonke argued that women in rural communities have been forced to assume an unfair and debilitating burden of care as a result of widespread industry failure to protect mine-workers from silicosis or to adequately meet their obligations to address their health needs once they contracted the disease. Sonke argued that industry practices indirectly forced many women and girls to leave formal employment, drop out of school, and spend scarce resources on medication and visits to far-flung rural health facilities, and that this undermined their ability to enjoy the gender equality enshrined in the Constitution. The TAC in turn introduced evidence that silicosis increases vulner-

ability to tuberculosis and exacerbates the impact of HIV and AIDS in the context of a generalised AIDS epidemic.⁹

To support the litigation, Sonke and the TAC have utilised a variety of tactics, including those discussed above.

Conducting Public Information Campaigns to Achieve Rights Awareness

A critical mass of people calling for accountability in the gold mining industry had not been achieved before the advocacy efforts of the TAC, Sonke and Section 27. Despite investigations into the prevalence of silicosis since the early 1900s, “the disease was invisible”¹⁰. While those involved in organised labour, politics and the medical sphere are aware of the “silicosis hazard”, the extent of public engagement has been minimal. Sonke, the TAC and Section 27 therefore elected to expose this hidden pandemic through an extensive media advocacy campaign in support of the silicosis litigation.

The first step was to raise awareness with miners and their families, given that this case was meant to facilitate their access

to socioeconomic rights. Sonke researchers went to the Mbashe and Mhlontlo municipal areas in the Eastern Cape to document the socioeconomic and gendered impact of silicosis and TB contracted through gold mining. In May 2015, Sonke conducted a training programme on silicosis with representatives from 18 communities in Mbashe. Sonke and the TAC also met with the Mhlontlo municipal manager and six councillors to discuss the lawsuit. Approximately 70 men and 10 women who were former mineworkers and their partners attended the meeting, including silicotic former mineworkers. These engagements raised awareness about the class action, as well as enabled Sonke to properly explain the field research and photographic project being conducted. We received substantial support from the Mhlontlo municipality in recruiting ex-mineworkers and their families for these initiatives. Community action teams in their respective villages were able to identify and recruit people suffering from silicosis, and also supported translation for the research, photographs and film. Most importantly, these human narratives and experiences were used to inform the public awareness campaigns.

In June 2015, Sonke interviewed 11 women who were caring for men suffering from silicosis, two women who were widows of men who died from silicosis-related complications, and four former gold mineworkers suffering from silicosis. Sonke also contacted a clinic in Idutywa that provides health services to men with silicosis and TB, and gathered information from the nurses in relation to these cases. Sonke researcher Patrick Godana remarked, “The poverty that these women endure is unbearable. Women are faced with the burden of care but also the direct impact of extreme poverty. When we visited their homes there was no smell of what was cooked in the morning or the previous evening. It’s just dry.”¹¹

Through newspapers, radio, television, and social networks like Twitter and Facebook, the media campaign reached over eighteen million people in South Africa and internationally. The campaign partners also communicated information through non-traditional methods. Throughout 2015, commissioned photographer Thom Pierce began to do what press briefings could not: put faces to the stories. His photographic exhibition, “The Price of Gold”, with images of 56 mineworkers and their families from

the Eastern Cape and Lesotho, poignantly reveals the painful circumstances in which they work and live.¹² During the October hearings, Pierce’s photographs were part of a multimedia exhibition designed to replicate the feeling of working in a mineshaft. “This story is so consumable, so understandable and can be told in a visual way, and what we need to do is show other people the real people who are involved in this court case, because court cases are so dry,” he said.¹³ The exhibition has been hosted at the Methodist Church in Johannesburg and the Iziko Slave Lodge in Cape Town, and individual portraits have also been showcased in various media.

Sonke’s Demelza Bush produced a documentary film called ‘Silicosis: A Tragic History of Rights Violations’, which goes even deeper to document the burden of silicosis and related illness, particularly on women.¹⁴ The media work undertaken by the partner organisations throughout 2015 caused the public to engage emotionally with the story of silicosis.

Community and grassroots mobilisation is essential for the most affected to be able to protect and defend their interests. It has a direct bearing on how legal teams litigate and the manner in which the courts engage with the issue.

Making Use of Social Mobilisation and Advocacy

The value of social mobilisation and advocacy is to ensure “that communities are involved in asserting their rights inside and outside the legal environment”¹⁵. Community and grassroots mobilisation is essential for the most affected to be able to protect and defend their interests. It has a direct bearing on how legal teams litigate and the manner in which the courts engage with the issue. That the combination of social mobilisation and litigation strategies “has the greatest potential to alter laws and policies”¹⁶ is well noted

Mobilisation culminated in the week of 12 October 2015 as the application for class certification was underway. About 600 activists from the TAC and Sonke, together with members of the National Union of Mineworkers, the Association of Mine-



Vuyani Elliot Dwadube worked for 16 years at Harmony Gold and was retrenched in 1995. He has pulmonary tuberculosis (TB of the lungs) and did not receive any compensation.

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workers and Construction Union and other members of civil society participated in a Justice for Miners march and held daily protests outside the South Gauteng High Court. There were further mass protests in the Eastern Cape and elsewhere in the country.

Work also needs to be done to campaign for sector reform and better protection for working miners and to lobby the government for better healthcare services in rural areas.

Support for the protests made it clear that South Africans stand in solidarity with mineworkers and their families. An enduring question is whether or not these efforts will result in positive sustainable outcomes for affected communities.

The Challenge of Strategic Litigation: Meeting Immediate Needs while the Wheels of Justice Turn

When the courts adjourned to deliberate at the end of October 2015, could one argue

that the efforts of the TAC, Sonke, Section 27 and others had been enough to ensure that communities could assert their rights both inside and outside the courts?

While public awareness had been raised, there was still a huge gap to fill. Because of the awareness campaign, affected mine-workers and families looked to Sonke and the TAC as “advice centres”. Staff received hundreds of calls and emails from individuals seeking compensation, with the expectation that it would come sooner rather than later. The demand was simply too overwhelming and a number of people have been left hanging because they lack adequate information about the case or other avenues for compensation.

This is largely due to capacity issues that are crippling social justice organisations in South Africa. The global economic crisis and the more recent refugee crisis in Europe have restricted the funding usually available for South African civil society organisations. This has exacerbated the broader problems of donor funds shifting away from South Africa because of South Africa’s middle-income status and the growing concentration of donor funds within large international NGOs at the expense of local advocacy-focused national NGOs.

While Sonke and the TAC have become adept at using traditional media, social media and other creative avenues to generate public debate, it is considerably harder to find the money, human resources and time needed for deep community engagement. Local capacity to demand change is built through outreach and organising. In the case of silicosis-affected mineworkers, long-term change is required to ensure that sick miners get access to medicines, that their children get to school, and that their wives, partners or carers do not lose work or education opportunities because of the care work they are forced to undertake. It takes time for miners and their families to learn about their rights and to make decisions about whether to litigate individually or wait for the outcome of the class action suit – and time is a key factor, as many miners are on their deathbeds.

Work also needs to be done to campaign for sector reform and better protection for working miners and to lobby the government for better healthcare services in rural areas.

Translating Rights into Tangible Outcomes

The TAC, Sonke and Section 27 worked tirelessly to ensure that miners, their widows and families were at the forefront of the silicosis case and centrally involved in the litigation and public awareness campaigns. The organisations employed media advocacy and social mobilisation as key strategies to support the silicosis case, in full awareness that the courts alone can never bring about social change.

But even with the use of all three strategies (media advocacy, social mobilisation and litigation), the miners and their families are not out of the woods as far as receiving the immediate medical, legal and financial relief that they urgently need. While Sonke and the TAC, together with the legal teams involved in the matter, have definitely lifted the lid on the gold-mining industry's neglect, much more will need to be done to bring about the social change that this case hopes to inspire. ■■■

- 1 Silicosis is a degenerative and incurable lung disease caused by inhaling silica dust, which is produced when mining gold. Characterised by scarring of the lungs, which produces shortness of breath and fever, it first came to the attention of the gold mining industry over one hundred years ago when it affected minority white miners who formed part of the work force.
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- 4 UN Women, *Engage in Strategic Litigation*. Available at: <http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html>.
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- 10 McCulloch J, 2012, *South Africa's Gold Mines and the Politics of Silicosis*. Published Jacana Media (PTY) LTD, p. 155.
- 11 See Mail and Guardian: <http://mg.co.za/multimedia/2015-08-11-silicosis-the-price-of-gold>.
- 12 Thom pierce blog: <http://thompierce.com/blog/>.
- 13 <http://mg.co.za/article/2015-10-16-artists-who-drill-below-the-obvious>.
- 14 *Silicosis: 'A tragic story of rights violations'*. Available at <http://www.iol.co.za/news/south-africa/silicosis-a-tragic-history-of-rights-violations-1958608>.
- 15 Op. cit.: Budlender et al., 2014, p. 3.
- 16 Op. cit.: Budlender et al., 2014, p. 106.

Building Community-Centred Stakeholder Engagement:

A Conflict Resolution Approach

Brian Ganson

International policy for some time has recognised the imperative to give voice to communities in their own futures. The United Nations Development Programme (UNDP), in its Human Development Report 1990, reminded us that “people must be at the centre of all development” and that “the purpose of development is to offer people more options”. The World Bank’s Voices of the Poor initiative noted in its 2000 publication, *Crying Out for Change*, that “[c]ommunity-based processes are needed to guide land and resource use planning and regulations so as to bring meaningful benefits to poor communities”. These policy directions have become progressively more binding and more specific. The right of indigenous communities to grant or withhold their consent to projects on their land is enshrined in international law (with advocates calling for the extension of the right to “free, prior and informed consent” to all communities), while the UN Guiding Principles on Business and Human Rights note a variety of business responsibilities, from assessment of current and potential negative impacts to grievance resolution, to which community involvement is imperative. In the specific context of extractive sector investments, the African Union’s 2009 Africa Mining Vision called for measures to “[e]nsure broad-based, active and visible involvement of affected communities in the approval, planning, implementation, and monitoring of mining projects”. It is hard to find a contemporary policy document without some

reference to the need for solutions to be “locally rooted” in the community.

Within such an apparently positive policy environment, it would seem that communities that develop clarity about their own needs and aspirations for the future, and solidarity to minimise social strife and division, would be well positioned to ensure community-centred stakeholder engagement. Yet as important as these elements may be, they are almost certainly not enough. This article will touch briefly on some of the reasons why this is true. In particular, it will delve into the long-term dynamics of extractives development that challenge the very identity of the community itself. It concludes that communities that intend to keep their own vision and voices at the centre of engagement with companies, governments and others over long periods of time must develop and institutionalise their own capacities for collaborative analysis, political mobilisation, and conflict resolution.

Communities Continue to be Marginalised in Extractives Development

International policy to empower communities affected by large-scale extractive sector investments is commonly not put into local practice, particularly in poorly regulated or weak rule-of-law environments. National governments holding mineral rights negotiate deals with companies about which communities are often not informed, let alone involved as decision-makers. Less



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principled companies are happy to let governments do the dirty work of resettlement or water diversion so that their projects can proceed without troublesome community relations at all. International financial institutions that are meant to be the stewards of standards that protect communities – but which are, after all, rewarded for making profits from projects that proceed according to plan – often have no capacity to monitor developments or ensure compliance on the ground. In particularly complex environments, there may be a plethora of overlapping consultation and planning processes – by national and regional authorities, a variety of companies, and international and local development agencies – that exhaust a community's capacity for meaningful participation and influence. The less ethical of these processes will cherry-pick representatives in order to report community support.

In the end, actors external to the community are worried about their own interests, not the community's. The just-off-the-press Understanding Company–Community Relations Toolkit of the International Council on Mining and Metals, for example, makes this explicit: “the emphasis is on helping companies achieve relationships that are supportive”, which is to say, to achieve relationships that support the company's plans and operations. Its model questionnaire asks community members, “Do you feel that the company takes your opinions into account when making decisions?” but never asks, “Do you feel the company respects and follows your decisions?” Neither the mental model of “consultation” of the most powerful actors, nor the vast majority of processes they implement, will dependably lead to community-centred stakeholder engagement.

Communities are Changed Profoundly by Extractives Development

Even as it struggles to have its voice heard, the long-term dynamics of extractives development will predictably change a community, often profoundly. The community that exists before a plan for a mine is developed, for example, is not the community that will see the mine go into operation, nor the one that will be part of its closure plan design and implementation. This is most evident in direct impacts of extractives

development. Major projects are typically accompanied by a significant urbanisation of the adjoining area, with ensuing pressures on land, water, housing and public services. In many cases, citizens have no recourse to public authorities to regulate these often-dramatic socio-economic and environmental repercussions, as “frontier urbanisation” is rarely accompanied by sufficient governance capacity or public service provision.

Despite the promises of development, segments of a community may experience increased hardship. Displaced by extractives development, children may need to travel farther to school or women work harder and longer to collect firewood. Whatever level of compensation is provided for relocation, families may end up destitute if they have difficulty re-establishing their livelihoods in a new location. While some may benefit from jobs or subcontracts, the presence of a new, large enterprise may drive local price inflation in the market and increase property and rental costs, causing a decline in the standard of living for significant portions of the local population, particularly its already vulnerable segments. These dynamics can significantly stress community cohesion.

Even as it struggles to have its voice heard, the long-term dynamics of extractives development will predictably change a community, often profoundly.

A community may also experience rising conflict and violence. The town of Moramanga in Madagascar, for example, saw a large influx of foreign workers, security personnel and labourers from other parts of Madagascar – including former members of the armed forces – with the opening of a nickel and cobalt mine. Armed break-ins and sexual violence in particular increased. In such situations, state security forces may be absent or, when present, may not be there for the benefit of the community. In the Democratic Republic of Congo, for example, the army has been deployed to suppress artisanal mining and to move communities off of land deemed necessary for development by private companies. Additionally, an extractive company's operations may force dormant conflicts to the surface. In Uganda, land claims among neighbouring chiefdoms could remain con-

tested over decades without fuelling acute conflict. Once it became clear that a company would pay into a fund for development controlled by local authorities, however, violent conflict erupted as the land claim now had resource and power implications.

Over time, communities may find themselves less resilient and less able to address such challenges. Traditional governance structures and authorities can be captured by greed, or undermined when young men gain unprecedented access to money and status through formal employment. Changes in income levels, status and patterns of interaction can disrupt group identities and social relationships: between

Yet making sense of a rapidly evolving context is challenging in rumour-rich and information-poor environments. This is partly because data generation does not occur in a political vacuum; controlling information is an expression of political power that favours or disfavors different interest groups.

men and women, landowners and landless, different generations, or migrants and locals. New people may step forward to represent the community, challenging existing patterns of legitimacy and representation. While such change is not necessarily bad, it can damage mutual support networks and patterns of trust, creating competing power centres and undermining the legitimacy of functional local mechanisms that prevent or manage conflict. These dynamics are exacerbated when companies establish new or parallel institutions – company grievance mechanisms that are unconnected to legitimate local mechanisms, for example – that weaken existing ones.

Communities Need to Build and Nurture Coalitions for Positive Change Over Time

As the above illustrations make clear, a community will not simply engage with a mining company or a government to talk about its interests and aspirations. Extractive operations will force the community to confront complex political, social, economic and conflict dynamics, some of which centres around the company and its operations, but much of which plays out among members

of an evolving community. This suggests that the community must develop a long-term strategy to keep its vision and voice at the centre of changes unfolding around it, even as that voice changes. Within this strategy, community-centred stakeholder engagement might usefully be seen as a three-legged stool. The first leg is *technical know-how*: to gather data and intelligence, understand rights and responsibilities as they apply to the local context, and convene diverse parties for analysis, option generation, and consensus building. The second leg is *political skill*: to find entry points for engagement with powerful actors whose ears may initially be closed; to build alliances and linkages to outside actors who may bring resources and political capital to bear; and to manage conflicts. The third leg is *institutional capacity*: to provide legitimate and neutral facilitation of complex processes, bring specialised services and expertise to bear, and maintain the institutional memory of issues addressed and promises made across years, if not decades. Taken together, community-centred stakeholder engagement becomes a structured process to build and nurture winning coalitions that advance the community's interests over time.

Communities need to understand the impacts – direct and indirect, current and potential, short term and long – of extractive sector activities on social, political, economic and conflict systems. Yet making sense of a rapidly evolving context is challenging in rumour-rich and information-poor environments. This is partly because data generation does not occur in a political vacuum; controlling information is an expression of political power that favours or disfavors different interest groups. A community may therefore benefit from the development of its own monitoring network that helps all actors confront the realities of their changing environment. This has a technical aspect, for instance, through application of more rigorous data collection methods, including those such as community-based monitoring systems (CBMS), which put the community in charge of its own information. But it also serves a political function. An intentionally broad and inclusive network may be the first opportunity for different actors to hear competing perspectives and challenge each other's thinking. Moderated conversations may uncover gaps in information and understanding, as well as potentially



faulty assumptions underlying attitudes and behaviours. Such networks can effect a kind of educative transformation, socialising understanding not only of the facts on the ground, but of the rules and norms that should be applied, and ultimately of the solutions that may be both practically and politically viable from a community perspective.

The task of building sufficient consensus for pro-community action may be daunting. It must succeed in the context of the very factors – social division, legacies of grievance, weak institutions, lack of trust in government, or pressing socio-economic challenges – that allow the negative impacts of extractives investments to manifest in the first place. This requires community advocates to be astute political operatives, not only within the community but also with powerful actors outside it. They must understand the perspectives and motivations of every player in the system. Advocates must be able to approach companies or government on the basis of their partisan interests: building the case, for example, that more meaningful community engagement and participation in community-led processes represents a tool for government to realise its revenue and development plans, or for the company to manage its operational continuity and reputation risks. A community will also need to develop capacities for conflict interruption and conflict resolution, lest conflict and violence be exploited by

those indifferent or opposed to community interests. Linkages will need to be built: to the headquarters, management and shareholders of an extractives company, who are more sensitive to reputational risks; to project finance-lenders, who are accountable for seeing that internationally-recognised social and environmental standards are applied; to development agencies with influence within government; to international NGOs that may help the community achieve traction on issues of transparency, corruption, or respect for human rights. It will be helpful to remember that not all good people are found within communities nor all bad ones within companies or governments. In a challenging environment, communities must find and mobilise the “good actors” into a sufficient coalition for positive action, across all sectors and from the local to the international level.

Such efforts will often benefit from professional and institutional support to coordinate and sustain them. Ad hoc processes convened directly by community stakeholders can die from the exhaustion of planning and managing complex collaborative initiatives that are outside of the core mandate or expertise of any participant. Particularly in conflict-prone environments, expert and neutral assistance may be necessary:

- to help build relationships of confidence where they do not sufficiently exist
- to facilitate participatory analysis

Informal settlement on South Africa's platinum belt.

© Eleanor Bell

- of local dynamics as well as local strengths and challenges for dealing with them across a variety of actors
- to ensure careful evaluation of strategic and tactical options for introducing new thinking and new modes of action into a complex environment
 - to provide expert support for design, implementation and management of conflict prevention systems
 - to engage in consistent outreach to the full range of local, national and international stakeholders for coherent action.

Additionally, extensive case analysis confirms that, for both companies and communities, a safe place for dialogue and dispute resolution is important. While communities rightfully worry about information, expertise, analyses, planning processes, or grievance mechanisms residing within a company and therefore being subject to its control, a healthy relationship can probably not be built by simply attempting to reverse those dynamics. Particularly where trust is low, parties may best work with the assistance of a trusted steward. Given the breadth of functions required and the decades over which extractives investments will impact the community, this will likely need to be a built-for-purpose (or adapted-to-purpose) local institution.

Communities Can Add to Their Toolbox Practices That Work

Communities require methods for finding and asserting their voices, despite constraints and rapid changes within their local environment. Communities, and even more so their NGO partners, often focus on litigation and legal approaches, but they may also want to consider other possibilities – particularly those with good track records in difficult situations. Readers may recognise the elements described above from mainstream peacebuilding, conflict prevention and violence reduction practice. Their interconnected building blocks – institutionalised mechanisms or networks for monitoring the local context; the rallying of diverse and sometimes conflicting local stakeholders around higher-quality

data and more trustworthy analysis; dialogue that builds sufficient consensus for action; proactive conflict prevention and resolution interventions; and a backbone support organisation that facilitates expert and neutral assistance – are underpinned by reasonably well-articulated principles and well-understood mechanisms of action.

These often succeed in advancing community interests despite conditions of fragility and power imbalances, factors that often undermine access to legal redress. They do so by engaging parties on the basis of their partisan interests and desires to mitigate their own risks; creating vertical linkages from local contexts to influential actors at regional, national or international levels; building from existing social and political capital and functioning institutions whether formal or informal; and providing entry points for outside expertise and advice. Furthermore, the available evidence – from company–community *mesas de diálogo* (literally, “tables of dialogue”) that are increasingly prevalent in Latin America to the Partners for Peace initiatives in Nigeria that reduce conflict not only between communities and Chevron but between and within communities themselves – suggests that these principles and approaches can work to centre stakeholder engagement around the community in the context of large-scale extractives investments, even under difficult circumstances. Implementation of these approaches still requires astute and courageous local leadership. Those who step forward should be reassured, however, that effective approaches are there to build from. ■■■

This article draws substantially from Brian Ganson & Achim Wennmann, *Business and Conflict in Fragile States: The Case for Pragmatic Solutions* (London: International Institute for Strategic Studies, 2016), and Brian Ganson (ed.), *Management in Complex Environments: Questions for Leaders* (Stockholm: NIR, 2013). Data and examples on mining and urbanisation are from Oliver Jütersonke and Hannah Dönges, “Digging for Trouble: Violence and Frontier Urbanisation”, in Small Arms Survey, *Small Arms Survey 2015: Weapons and the World* (Cambridge: Cambridge University Press, 2015), pp. 37-57.

Speak Out!

Transforming Communities Through Activism

Interview

Olebogeng Motene

Bua (Speak out!) Mining Communities is a social movement that represents more than 10 mine-hosting communities in and around the Bojanala Platinum District Municipality in the North West Province of South Africa. It is part of the Bench Marks Foundation's Monitoring Project, which was set up in 2009 to help develop the capacity of local communities to monitor the actions of corporations and government and to take action where they identify destruction of the environment and the undermining of community life.

Olebogeng Motene, a Bua community activist, spoke with the Heinrich Böll Foundation about her work.

HBF: What motivated you to become an active member of your community?

Motene: I became an active member of the community about five years ago, a few months after being unable to go back to university to complete my last module. I ended up job-hunting, as finding employment was my last hope to finance my studies. I recall being woken up by huge vibrations from blasting in a nearby, newly-established mine almost every morning, which at that point made me wonder how I could get employed there. Unable to find a job, I decided to attend a meeting held by Chaneng Youth Organisation, a local youth structure dealing with youth challenges such as unemployment. At the time, members of the organisation were also busy with a study identifying common challenges faced by mining-affected communities across the mining area around Rustenburg. When the first draft of the study was circulated, I was shocked, as I was not aware of most of the issues – or rather was blindsided by my need for employment. This, plus seeing the passion with which the youth committee worked on these issues, motivated me to get involved in community activities and to become an active member of the organisation.

What are some of the main challenges that the communities around Rustenburg are facing?

One of the most common challenges is the high unemployment rate. In spite of being located in one of the richest areas in terms of mineral wealth in the world, the official unemployment rate in Rustenburg stands at 26.4 percent and youth unemployment at 34.7 percent. The unofficial figures are likely to be much higher. At the same time, there



Olebogeng Motene is a young environmental and social activist from Rustenburg, North West Province in South Africa. She was a committee member of Chaneng Youth Organisation from 2012–2014 and now serves as one of the coordinating committee members of Bua Mining Communities. She is also a coordinator of the Bench Marks Foundation's Action Voices production team and facilitates the Bua Mining Communities monitoring school.



Steven Ramokhula, Bua Ikemleng informal settlement monitor, interviews a community member about community health issues.

© BMC

is an influx of mineworkers from other countries seeking employment, which sometimes fuels xenophobic sentiments, as locals feel that foreign nationals take what's theirs. Other challenges include relocations to make way for mining activities. Water, air and noise pollution, cracked houses, and increased social problems such as crime drug and alcohol abuse are also common. Another pressing issue across mining communities is the dividing nature of the rule by mining companies who only consult with traditional leaders or local councillors, who then take decisions on behalf of the community without consultation. Sadly these leaders tend to have their individual and business aspirations at heart, at the expense of community needs and wants.

What kind of activities have you implemented to address some of these issues?

As Bua Mining Communities, we have educational seminars through which we hope to develop a more conscious community. These seminars do not only cater to youth but also include elders. We have critical discussions about the current challenges faced by people and develop problem-solving strategies. We also, with assistance of well-established NGOs such as the Bench Marks Foundation, have a newsletter and we print out fact sheets on any research conducted by our field researchers. The newsletters are distributed in communities where we have active members. We make use of social media such as Facebook, Twitter and WhatsApp to mobilise and inform those who have smartphones or access to the internet. However, all this has its limitations due to the lack of funds.

What is your experience with interacting with stakeholders such as local government, traditional authorities and mining companies?

Unfortunately, our interactions with these authorities often only come about as a result of a protest or demonstration. I remember receiving

calls from my family while I still was at university about community demonstrations that went to the tribal council or the chief so that they avail themselves to engage with the community. Back then, I thought this was none of my business and even looked at it as the activity of hooligans. That changed once I understood the reality of mining-affected communities better. In September 2011, about a year after I became an active member of the community, we had a three-day-long protest in my home village, Chaneng, which resulted in the member of the executive council of local government affairs in North West province coming to address the community. Later in the month, the Royal Bafokeng chief also came. Action on the ground is the only way to get to these engagements. Writing letters does not help. For example, we have written to the health department on numerous occasions, but haven't received any responses or seen any action on our enquiry.

Have the tragic events at nearby Marikana where police killed 34 protesting mineworkers in August 2012 led to any noticeable changes?

One would think that the tragic event that took place at the Lonmin mine in Marikana would have led to a change in how companies operate in and around Rustenburg, or even the world, but no. We continue to see mineworkers being undermined, underpaid and violated on a daily basis. Currently, Royal Bafokeng Platinum is retrenching employees and trying to suppress their right to freedom of expression. The company has warned its workers not be active in any community activities against the mine, nor to comment on any social platform about the operations of the mine. In fear of loss of employment, most workers oblige. So have we seen any changes since Marikana happened? I don't think so.

So what do you think needs to be done?

There are no easy answers. But I strongly believe that uniting communities and making them more independent from the mines is the only way there is to achieve change. But how does a conflicted and divided community become united vis-à-vis the mining industry that has relocated them and made promises of development and all things gold and shiny? When the mines have community leaders in their pockets? People tend to get tired of attending educational workshops and seminars, because when they get home they face the reality of poverty. Setting up vegetable gardens or anything that can help do away with people's dependencies and educate them at the same time is an important way to go. ■■■

BUA NEWS
 August 2014

“Yonke Indawo Umzabalazo Uya si vumela”

During the apartheid era “Yonke Indawo Umzabalazo Uya si Vumela” was one of the struggle chants sung by our forefathers and parents during demonstrations against the operation they were facing. 20 years in to democracy the Chant has not lost its struggle vibe. The community of Chaneng situated north of Rustenburg, one of the Royal Bafokeng Nation’s 29 villages under leadership of Kgosi Leruo Molotlegi also forms part of Rustenburg Local municipality designated as ward 2. This community is surrounded by several mining activities of well-known companies. The youth and all others of the community have been chanting this chant in defence of their land, environment, human rights and demands development. The community has turned into protest hotspot since 2009 when one of RHP’s mine shaft called Snydrikt started operating in Chaneng without community consultation, were youth of Chaneng expressed their frustration by protesting and some youth got arrested. *Continued on page 2*

Newsletter team note

This is BUA NEWS first issue and it has been made a success by the commitment of the BUA mining communities’ monitors and the Benchmarks Foundation. Through monitor’s commitment on the Benchmarks monitoring school were they most once a month and take up on community issues, write short articles. All this articles are gathered and published on social networks, www.communitymonitors.org website, www.buanews.blogspot.com and soon will be shared by an e-letter. This are powerful stories as their written from experience.

BUA NEWS team: Gilegeng Motone, Magofofo Tshame, Mpho Makgona, Tshogeng Mofele, Khama Nadi, Omphile Rakabale, Gift Kgomo and Fatatoe Tseko



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About the Cover Artist

Berni Searle is a world-renowned South African artist working with photography, video, and film to produce lens-based installations that stage narratives connected to history, memory, and place.

Often, but not exclusively, using herself in her work, she has produced performative works that explore issues of self-representation, the relationship between personal and collective identity and narratives connected to history, memory and place. Her use of metaphor and poetic ambiguity transcend the specificity of context, drawing on universal human emotions associated with displacement, vulnerability and loss.

Searle is currently Associate Professor at the Michaelis School of Fine Art at the University of Cape Town.

