

Mining

A review of the findings of the High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change – December 2017

These notes key findings and recommendations of the HLP report and review new developments of relevance since the release of the report.

Key issues at a glance

Core problems	Principal HLP recommendations
<ul style="list-style-type: none"> ● Historically mining has been a root cause of poverty and dispossession. ● Mining policy and law post 1994 has favoured elite enrichment. ● Where minerals have been discovered and mined on land in the former homelands customary land rights have been extinguished. ● Mineral exploitation has proceeded without adequate consultation and prior informed consent of customary rights holders. ● The provisions contained within Interim Protection of Informal Land Rights Act have not been implemented. 	<ul style="list-style-type: none"> ● IPILRA should be amended to become a permanent act that provides meaningful protection to vulnerable groups in former homeland areas faced with external mining or other investment deals that will negatively impact on their land rights. ● Such rights holders must be properly consulted, and their consent obtained for others to use the land they occupy and use. ● If they withhold their consent, the investment company must be required to apply to court for the expropriation of their rights. ● Communities that have already been dispossessed through mining must be compensated. ● The MPRDA must be amended to ensure that both revenues from mining-related activities and opportunities generated by such mining activity are shared in an equitable and transparent manner among people whose land rights are directly affected.

The HLP report

The report has identified mining as a root cause of poverty and dispossession, amounting to violation of human and peoples' rights which has not been addressed in post constitutional legislation by parliament. Mining, a backbone of South Africa's colonial and apartheid economies, is at the root of spatial inequality and racialised income and wealth inequality exclusions in South Africa. Historically, only white landowners were able to benefit from mining. Black people were doubly disadvantaged by mining: where minerals occurred on their land, they were dispossessed.

Where they did not, land scarcity was engineered in order to force people to provide labour to the mines for limited compensation and intolerable working conditions.

The HLP report:

- notes “recent land policy is being driven by opportunities for political alliances and elite enrichment (particularly in mineral-rich areas) rather than focusing on the structural drivers of enduring inequality in ownership and control over land”;¹
- “proposes specific amendments to the MPRDA to address the way it is being implemented to undermine customary land rights and customary accountability requirements in the former homelands”;²
- “makes recommendations for amendment in relation to compensation for loss of land and livelihoods, for the transparent sharing of benefits accruing from mining, and for explicit compliance with IPILRA before the granting of a mining-related right”.³

Voices from hearings

The HLP report records that:

“the public hearings indicate that people on the ground attribute their current tenure insecurity to collusion by government officials who have failed to enforce existing legal checks and balances, so that elites are enabled to profit from land and mining deals.”⁴

HLP recommendations

The report deals with the shortcomings of the MPRDA and finds that urgent amendments must include addressing the legacy of mining and accountability of communities and mining companies:

The report recommends that:

- “The most urgent task in the current context is to provide meaningful protection to vulnerable groups faced with external mining or other investment deals that will negatively impact on their land rights. Such rights holders must be properly consulted, and their consent obtained for others to use the land they occupy and use. If they withhold their consent, the investment company must be required to apply to court for the expropriation of their rights, and the court must then balance the interests of the rights holders with those of the investment company within the parameters of Section 25 of the Constitution. IPILRA should be amended to make this explicit”.⁵
- “For communities who have already faced dispossession, clear provisions regarding compensation are required”.⁶
- Where mining has already taken place on communal land and the directly affected community has not benefited, the MPRDA must provide for compensation for

¹ HLP report page 55 and 304. REPORT OF THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE, Nov 2017

² HLP p 60

³ HLP p 60

⁴ HLP p 264

⁵ HLP report p 268 Recommendation 3.4 read with page 507

⁶ HLP p 504

individuals, households and communities to be calculated to put affected persons in the position that they would have been in had the mining not occurred.

- “The MPRDA must be amended to ensure that both revenues from mining-related activities and opportunities generated by such mining activity are shared in an equitable and transparent manner among people whose land rights are directly affected.”
- “The MPRDA must be amended to include clear and binding financial and administrative protocols for entities that purport to represent community interests and companies that do business with them, including accountability mechanisms that align with customary law principles of transparency and accountability.”
- “The MPRDA must be amended to provide for a Charter to protect and promote customary and artisanal small-scale miners and set a framework for the participation of communities in the sustainable and equitable exploitation of the resources of their communal land”.⁷

The report states upfront that IPILRA must apply to all new mining applications:

“The MPRDA must be amended to expressly require compliance with IPILRA as a condition for the grant of a mining-related right. (IPILRA rights are routinely ignored so compliance with IPILRA before a mining right is granted must be made explicit.)”⁸

“Should mining commence or a right be granted without the consent of the community, that community shall have the right to set aside the licence and to be paid compensation for the full damages suffered, or to consent to the mining retrospectively through the process to be set out in the MPRDA - including the negotiation of compensation, and to recover all compensation that would have been owed to it had the community’s consent been received from the outset.”⁹

Intervening developments

World Bank guidance notes on free prior informed consent

On 1 November 2017 the World Bank issued a draft guidance note on conditions for free prior informed consent. Borrowers must comply with strict requirements and report on consultation with and consent by communities affected by mining.¹⁰

This ESS recognizes that Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities have identities and aspirations that are distinct from mainstream groups in national societies and often are disadvantaged by traditional models of development. In many instances, they are among the most economically marginalized and vulnerable segments of the population. Their economic, social, and legal status frequently limits their capacity to defend their rights to, and interests in, land, territories and natural and cultural resources, and may restrict their ability to participate in and benefit from development projects.

When the FPIC of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities cannot be ascertained by the Bank, the aspects of the project

⁷ HLP p 506

⁸ HLP p 507

⁹ HLP p 508

¹⁰ World Bank’s 2016 Environmental and Social Framework. Guidance Note for ESS7 Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities.

relevant to those affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities for which the FPIC cannot be ascertained will not be processed further.

Operation Phakisa

The Operation Phakisa draft report on “Agriculture, Land Reform and Rural Development” of October 2017 ignores the impact of mining and the resulting challenges for land reform. It provides for a presidential war room on water redistribution and district land reform committees.

SAHRC report

The SAHRC draft report on “National Investigative Hearing on the Underlying Socio-Economic Challenges in Mining-Affected Communities in South Africa concludes with a weak recommendation:

8.11. Meaningful Participation, Consultation and Consent

The DMR must, within 6 months from the release of this Report, develop a clear policy for the assessment of the adequacy of consultations, which assessment must be conducted prior to the granting of mining rights.

Within a period of 6 months, the DMR must establish a working group to include the CoM, SALGA, civil society, community-based organisations, and other relevant stakeholders with a view of establishing best practice guidelines and/or formal binding standards for the establishment of community engagement forums within mining affected communities. These guidelines and/or standards must provide for the inclusion of diverse representation, democratic elections, set roles and responsibilities and clear reporting and transparency obligations. Within a period of 12 months, the DMR must report back to the SAHRC on progress made.

SONA 2018

The SONA of February 2018 did not address the recommendations of the HLP report. It stated that the MPRDA Amendment Bill should be passed in the first term.

It should be noted that the current Bill is very controversial in terms of process and content:

- The Bill was sent back to Parliament by the President on the issue of lack of recognition for customary law and lack of proper public participation in the legislative process.
- The Portfolio Committee of the NA made some adjustments to the bill while the Department and the Phakisa process introduced 54 new amendments ostensibly through the provincial legislatures. These amendments are unconstitutional in terms of process and are open to legal challenge.

As highlighted above the content of the Amendment Bill remains highly problematic. It further limits consultation on new mining to a bare minimum. It fails to address the historic legacy of dispossession caused by mining. A proper process of consultation is required to engage with the HLP recommendations and address the fundamental flaws in the existing Bill which facilitate capture and continue to deprive communities from meaningful benefits from mining.

Conclusion

The HLP report makes far reaching recommendations for the overhaul of the MPRDA. Most importantly it recommends that “The MPRDA must be amended to expressly require compliance

with IPILRA as a condition for the grant of a mining-related right”. This recommendation needs to be read with proposals for strengthen IPILRA and transform this into the Protection of Informal Land Rights Act (PILRA).