"We Know Our Lives Are in Danger"

Environment of Fear in South Africa's Mining-Affected Communities

HUMAN RIGHTS WATCH

groundWork

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Centre *for* Environmental Rights

Advancing Environmental Rights in South Africa

"We Know Our Lives are in Danger"

Environment of Fear in South Africa's Mining-Affected Communities

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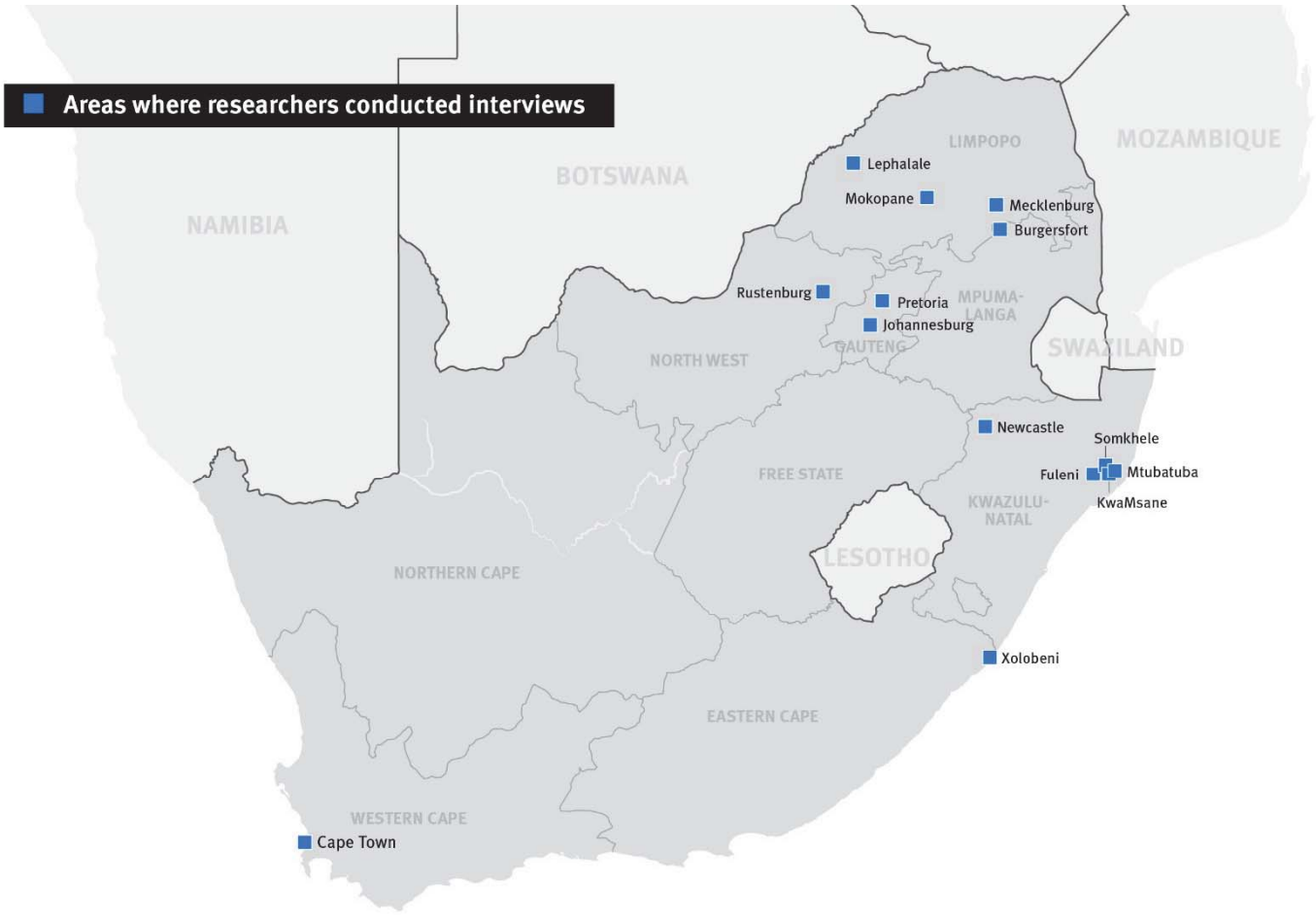
Map


Areas where researchers conducted interviews
NAMIBIA
BOTSWANA
MOZAMBIQUE
LIMPOPO
Lephalale
Mokopane
Mecklenburg
Burgersfort
Rustenburg
Pretoria
Johannesburg
MPUMA-LANGA
GAUTENG
NORTH WEST
SWAZILAND
Newcastle
Somkhele
Fuleni
Mtubatuba
KwaMsane
FREE STATE
KWAZULU-NATAL
LESOTHO
NORTHERN CAPE
Xolobeni
EASTERN CAPE
WESTERN CAPE
Cape Town

Summary

> I know I am on the hit list.… If I am dying for the truth, then I am dying for a good cause. I am not turning back.
>
> **— Nonhle Mbuthuma, community member and spokesperson of the Amadiba Crisis Committee, Cape Town, February 2018**

In March 2016, activist Sikhosiphi "Bazooka" Rhadebe was killed at his home after receiving anonymous death threats. Bazooka was the chairperson of the Amadiba Crisis Committee, a community-based organization formed in 2007 to oppose mining activity in Xolobeni, Eastern Cape province. Members of his community had been raising concerns that the titanium mine that Australian company Mineral Commodities Ltd proposed to develop on South Africa's Wild Coast would displace the community and destroy their environment, traditions, and livelihoods. More than three years later, the police have not identified any suspects in his killing.

Nonhle Mbuthuma, another Xolobeni community leader and spokesperson of the Amadiba Crisis Committee, has also faced harassment and death threats from unidentified individuals. Nonhle recalled talking to Bazooka the day before he was killed. He told her he had seen a hit list that included three people — Nonhle, Bazooka, and another person from the Amadiba Crisis Committee — making rounds in the community. Nonhle fled her home and went into hiding in the days following Bazooka's death.

Other mining areas in South Africa, including Limpopo, KwaZulu-Natal, and Northwest provinces have had experiences similar to that of Xolobeni. While Bazooka's murder and the threats against Nonhle have received domestic and international attention, many attacks on activists have gone unreported or unnoticed both within and outside the country.

People living in communities affected by mining activities across South Africa are exercising their human rights to freedom of expression and peaceful assembly to advocate for the government and companies to respect and protect community members' rights from the potentially serious environmental, social, and health-related harms of mining. In many cases, such activism has been met with harassment, intimidation, or violence.

This report documents threats, attacks, and other forms of intimidation against activists in mining-affected communities in KwaZulu-Natal, Limpopo, Northwest, and Eastern Cape provinces, and in domestic nongovernmental organizations challenging mining projects, between 2013 and 2018. Between January and November 2018, two South African nongovernmental organizations working on environmental justice issues, the Centre for Environmental Rights and groundWork, and two international nongovernmental organizations, Human Rights Watch and Earthjustice, conducted over 100 in-person and telephone interviews with activists, community leaders, environmentalists, lawyers representing activists, and police and other government officials.

Killings, Attacks, Threats, and Harassment in Mining-Affected Communities

Some of the activists in mining-affected communities have experienced threats, physical attacks, and/or damage to their property that they believe is a consequence of their activism, while others have received threatening phone calls from unidentified numbers. Women play a leading role in voicing these concerns, making them potential targets for harassment and attacks.

The origin of these attacks or threats are often unknown. So are the perpetrators, but activists believe they may have been facilitated by police, government officials, private security providers, or others apparently acting on behalf of mining companies. Threats and intimidation by other community members against activists often stem from a belief that activists are preventing or undermining an economically-beneficial mining project. In some cases, government officials or representatives of companies deliberately drive and exploit these community divisions, seeking to isolate and stigmatize those opposing the mine.

Community members often do not report the threats or attacks to the police because they fear retaliation from the person making the threat or believe the police would not take their allegations seriously. When police are informed of attacks or threats, they sometimes fail to conduct timely or adequate investigations into the incidents. In many cases, it remains unclear whether the police have even investigated the incidents. Although some of the attacks and threats documented in this report may not be related to community activism against mines, the lack of reporting by community members or failure of police to investigate adequately makes it impossible to determine the cause.

In response to our inquiries, Tendele Coal, a coal company in KwaZulu-Natal, wrote in an email that they "are aware of claims of attacks, yet upon investigation and consultation with Police, the information could not be verified/substantiated." Two other companies operating in Limpopo, Ivanplats and Anglo American, said that they are not aware of threats or attacks against community members near their mines. In addition, the Minerals Council of South Africa, a 77-member organization that supports and promotes the South African mining industry, wrote in a letter that it "is not aware of any threats or attacks against community rights defenders where [its] members operate." Ivanplats, Anglo American, and the management of Sefateng Chrome mine in Limpopo welcomed this report's recommendation on the importance of monitoring threats and abuses against community rights defenders in mining-affected communities.

Extra-Legal Restrictions on Protest in Mining-Affected Communities

When community members seek to protest against mines, local municipalities often create obstacles that have no basis in law. For example, municipal officials have given community members the false impression that all protests need to be "approved," even though South African law does not have such a requirement and the prevention or prohibition of gatherings is permitted only under very limited and exceptional circumstances.

Municipalities also often unnecessarily require community members to provide documentation of prior engagement with the mining company or to notify the mining company about their plans. In other cases, companies themselves have requested that communities notify companies of their planned protest, wrongfully claiming that this is a requirement under the law.

Several community members interviewed for this report believe that the municipalities are trying to prevent them from protesting. "They want to avoid protests because it could deter investors," one community member from Lephalale said. Several municipality officials told researchers that they believe their role is to prevent protests.

Extra-legal requirements can effectively mean that community members have to either abandon their protests or face the consequences of protesting without complying with what officials often present as requirements, but in reality, are not.

Police Crackdown on Protest

There is a pattern of police misconduct during peaceful protests in mining-affected communities, including violently stopping protests or unjustified and arbitrary arrests and detentions of protesters.

South African police, using teargas and rubber bullets to disperse protests, have injured peaceful protesters. Police have also arrested community members during protests or other gatherings related to mines, justifying such arrests on grounds of "public violence" or "malicious damage to property," and have later released the protestors and dropped the charges. In some cases, police have not investigated these incidents or have delayed investigations.

The fear of being jailed, injured, or even killed every time they participate in a protest deters some activists and community members from protesting. "I was not far away from the guy who was shot. Since then, I am afraid to go to marches," an activist from Limpopo said.

Use of Courts and Social Media Campaigns by Non-State Actors to Harass Activists

South African courts have served as an important venue for some mining companies to silence opposition to mining projects. Some mining companies have tried to intimidate activists through the court system by asking for cost penalties, using court interdicts to prevent protests, and in at least one case, filing strategic litigation against public participation (SLAPP) suits against nongovernmental groups. SLAPP suits seek to censor, intimidate, and silence critics by stifling them with the cost and burden of mounting a legal defence until they abandon their criticism or opposition. Nongovernmental organizations often commit scarce resources to defend themselves in court. One company has also used social media campaigns to harass activists and organizations who are challenging them. SLAPP suits and harassing social media campaigns can take an emotional toll on the activists, and impose a personal, financial, and reputational cost on mining opponents.

Environment of Fear

The threats to personal security of community rights defenders and environmental groups, restrictive interpretation of protest laws, police violence, and harassment through SLAPP

suits or social media campaigns have contributed to an environment of fear in some mining-affected communities and environmental NGOs. These tactics have deterred some people from activism against mining; others have toned down or limited their opposition.

South Africa's Obligation to Protect the Rights of Mining-Affected Communities

International and South African law requires South Africa to guarantee the rights of all people to life, security, freedoms of opinion, expression, association, and peaceful assembly, and the rights to health and a healthy environment. The attacks, threats, and obstacles to peaceful protest described in this report prevent many community activists in South Africa from exercising these rights to oppose or raise concerns about mines, in violation of South Africa's obligations.

The South African government should urgently take steps to respect and protect the rights of these community rights defenders. The government should direct officials at all levels to comply with the country's domestic and international obligations to guarantee the rights of people protesting mining across the country, including activists in mining-affected communities.

The Department of Police should ensure that when reports of credible threats against activists exist, law enforcement officials take all necessary steps to ensure the safety of those threatened. Police should also ensure prompt, independent, and thorough investigation of all reports of killings, threats, attacks, or harassment of community members. The Independent Police Investigative Directorate (IPID), which is responsible for investigating claims against the police, should investigate all reports of police intimidating, harassing, and threatening activists. They should also ensure prompt and effective investigation of allegations of police use of arbitrary arrest and excessive force. Municipalities should stop imposing extra-legal requirements on applicants for protests and ensure that the constitutional right to protest is protected. The South African Parliament should revise the Regulations of Gatherings Act in accordance with the 2018 decision of the Constitutional Court on the constitutional right to protest and adopt legislation to protect non-government organizations and activists from SLAPP suits.

Recommendations

To all National Government Agencies, including the Office of the President

- Publicly condemn assaults, threats, harassment, intimidation, and arbitrary arrests of activists, and direct the police and other government officials to stop all arbitrary arrests, harassment, or threats against community rights defenders. Provide adequate and effective individual and collective protection measures to individuals and communities at risk.
- Direct government officials at all levels, in particular in any departments responsible for regulating mining or protests, to comply with South Africa's domestic and international obligations to respect, protect, and promote all human rights of activists across South Africa, including the community rights defenders in mining-affected communities, to freedom of expression, association, peaceful assembly, and protest, and the rights to health and a healthy environment. Provide all resources necessary for these officials and departments to fulfill their obligations under the South African Constitution and international human rights law.

To the Department of Police, including the National and Provincial Commissioners

- National and provincial police commissioners should ensure that law enforcement authorities impartially, promptly, and thoroughly investigate any allegations or incidents of attacks, threats, and harassment against community rights defenders and the wider community for exercise of their rights to freedom of expression, assembly, and protest, and adopt a plan that would address the failure to adequately investigate such cases.
- Ensure that when there are credible threats against community rights defenders, relevant law enforcement authorities take all necessary steps to ensure the safety of those threatened.
- Investigate any reported cases of police officials, regardless of rank or position, failing to take adequate steps to prevent harm after having been made aware of a reasonably credible threat against a community rights defender. If necessary, adopt a plan that would address the failure to adequately investigate such cases.

- Ensure that law enforcement authorities respect and protect the right to protest, including by not using unlawful measures of crowd control beyond what is strictly necessary to prevent harm to people or excessive harm to property.
- Ensure that community rights defenders and others opposing mines are not arbitrarily arrested or detained, including by complying with of the Constitutional Court's decision prohibiting the arrest and criminal prosecution of conveners for failing to give notice of a protest to municipalities.
- Ensure that police thoroughly and comprehensively investigate protest-related incidents in mining-affected communities before charging or arresting community rights defenders for any alleged unlawful actions. Ensure that activists charged with criminal offenses are always informed about their rights and provided access to a lawyer.
- Ensure that law enforcement officials or other government authorities who threaten, harass, arbitrarily arrest, or use excessive force against community rights defenders are appropriately disciplined, including, where appropriate, being discharged, suspended, fined, and subjected to criminal sanctions.

To the Independent Police Investigative Directorate (IPID)

- Promptly and thoroughly investigate any reported cases of police officials, regardless of rank or position, being directly or indirectly involved in the killing or assault of any community rights defenders in mining-affected communities and regularly update their families on the progress of the investigation.

To the Directorate for Priority Crimes Investigation ("Hawks")

- Promptly and thoroughly investigate the killings of any community rights defenders in mining-affected communities and provide regular feedback to their families on the progress of the investigation.

To the Department of Justice

- Ensure access to effective remedies for attacks, threats, and harassment of community rights defenders in mining-affected communities and violations of their rights to life, physical security, and freedoms of opinion, expression, assembly and protest, including through appropriate compensation.

- Train judges on statutory and constitutional requirements that protect non-state litigants asserting constitutional or environmental claims from adverse or punitive cost rulings.

To the National Prosecuting Authority

- Ensure that all prosecutors comply with the Constitutional Court's decision prohibiting the criminal prosecution of protest conveners for failing to notify municipalities of a planned protest.

To the Departments of Mineral Resources, Environmental Affairs, and Energy

- Direct relevant officials to take steps within their remit to prevent attacks, threats, violence or stigmatization of individuals, groups, and communities who are challenging or raising concerns about mining, and to notify law enforcement officials of any such attacks or violations of their human rights.
- Take steps to prevent interactions between departmental officials and communities, such as meetings or visits to the community, which may result in increased violence against or harassment of mining-affected communities, including by coordinating with the police department on how to mitigate any such risks and consulting with community members.
- Adopt and implement transparent policies and practices that promote financial accountability in mining governance, including public disclosure of all mining applications, authorizations, approvals, permits, licenses, and regular monitoring of impacts required to lawfully conduct operations. Also make publicly available all documentation related to mine permitting decisions, such as minutes of meetings between government and companies, that would be available under an access to information request, with appropriate reasons provided for any decisions taken, to strengthen accountability.
- Ensure that communities receive all relevant information on all adverse environmental and social risks of mining and are free in their decision-making in line with South African jurisprudence. Make such information, including relevant summaries, available in local languages and in various formats, including print, online, and posted on the walls of public buildings, making it accessible to both literate and non-literate community members.

To the Department of Cooperative Governance and Traditional Affairs

- Ensure that municipalities do not impose extra-legal requirements on applicants for protests in mining-affected communities, and guarantee their rights to freedom of opinion, expression, peaceful assembly, and protest.
- Revise the "guidelines for managing service delivery protests and public marches" for municipalities to facilitate and ensure effective exercise of the right to peaceful assembly and protest.

To the Municipalities and the South African Local Government Association

- Stop imposing extra-legal requirements on applicants for protests and ensure that all community members in the municipality's jurisdiction can exercise their rights to freedom of expression and peaceful assembly.
- Comply with the Constitutional Court's decision prohibiting the criminal prosecution of conveners for failing to notify municipalities of a planned protest.
- Ensure that all staff responsible for processing protest applications are trained in the appropriate application of laws and regulations governing protest.
- Investigate impartially, thoroughly, and promptly all allegations that municipal authorities have imposed extra-legal requirements on protest applicants.
- Ensure that all municipal authorities who impose extra-legal requirements on protest applicants are appropriately disciplined.

To the Parliament, including the Portfolio Committee on Mineral Resources, the Portfolio Committee on Energy, the Portfolio Committee on Environmental Affairs, and the Portfolio Committee on Justice

- Revise the Regulations of Gatherings Act in accordance with the 2018 decision of the Constitutional Court on the constitutional right to protest.
- Adopt legislation to protect non-government organizations and activists from SLAPP suits.

To the South African Human Rights Commission

- Investigate allegations of state officials and any companies implicated in intimidation and harassment of community rights defenders.

- Assist community rights defenders and communities affected by mining with information, skills, and resources necessary to respond to security challenges and protect themselves, including through individual and collective protection measures.
- Regularly monitor and report on threats and abuses against community rights defenders in mining-affected communities.
- Call on South African law enforcement and prosecuting authorities to investigate and prosecute those responsible for threats and abuses.

To Mining Companies in South Africa and the Minerals Council South Africa

- Publicly condemn all attacks against community rights defenders in mining-affected communities and nongovernmental organizations opposing mining.
- Develop and implement, in collaboration with mining-affected communities, a grievance mechanism for raising allegations of human rights violations, and take all necessary steps to ensure the safety of anyone who files a grievance. Companies and the Minerals Council should thoroughly investigate and address all alleged incidents reported under the grievance mechanism, and if necessary, take immediate action to remedy human rights violations. The Minerals Council should take disciplinary action against its members that are found to have violated human rights, including by expelling them if necessary.
- Regularly monitor threats and abuses against community rights defenders in mining-affected communities and urge national, provincial, and municipal governments to protect communities and other civil society members who are exercising their domestic and international rights to freedom of opinion, expression, assembly, and association.
- In addition to complying with their existing human rights responsibilities, adopt and implement the Voluntary Principles on Security and Human Rights, including by recording and reporting allegations of credible human rights abuses by police in their areas of operation to appropriate government authorities and encouraging investigations of allegations.

Methodology

This report documents threats and attacks against community activists, as well as extra-legal restrictions and police crackdowns on protests, in mining-affected communities in KwaZulu-Natal, Limpopo, Northwest, and Eastern Cape provinces between 2013 and 2018. It also documents threats to – and harassment of – South African nongovernmental organizations challenging mining projects.

The United Nations Special Rapporteur on the situation of human rights defenders uses the term environmental human rights defenders (EHRDs) to include activists or human rights defenders advocating against environmentally harmful activities, including mining. However, this report uses the terms "community rights defenders" or "activists" to describe these community members. Community rights defenders do not always describe or see themselves as activists or defenders, but instead as advocates for their communities and families.

The findings in this report are based on research conducted in-person and by telephone by two South African nongovernmental organizations working on environmental justice issues, the Centre for Environmental Rights and groundWork, and two international nongovernmental organizations, Human Rights Watch and Earthjustice, between November 2017 and February 2019, including five weeks of field research in South Africa in March, April, August, November, and December 2018. Researchers visited mining-affected communities in KwaZulu-Natal, Limpopo, and Northwest provinces. Researchers also interviewed, in Pretoria, Johannesburg, and Cape Town, NGO representatives that have worked in these communities and in some cases been targets of SLAPP suits or harassing social media campaigns. Researchers conducted additional interviews with activists from Xolobeni in Eastern Cape.

The three provinces on which this research focuses have large-scale and mid-scale industrial mines operating or proposed: The coal mining areas in KwaZulu-Natal (Somkhele/Fuleni and Newcastle), the platinum belt and chrome mining area in Limpopo (Lephalale, Sekhunkune, and Mokopane), and the platinum mining area in Northwest province (Rustenburg). The findings of this report are limited to the areas where we conducted the research.

Researchers interviewed more than 100 people for this report, including 69 people living in mining communities, and more than 20 experts who currently work, or have worked, on mining issues in South Africa, including staff of international organizations, NGOs, health administrators, and academic researchers. In addition to individual interviews, we also conducted four focus-group discussions, each of between eight and 10 participants, in four locations in Northwest (Marikana) and KwaZulu-Natal provinces (Fuleni, Mtubatuba, Newcastle). All participants were informed that they could speak individually to researchers following group discussions. We also interviewed officials of four municipalities, a policeman, three prosecutors, four lawyers, and a ward councilor. Of the 69 community members interviewed, 34 were adult women and 35 adult men. Interviews were conducted in English, or in isiZulu, Xhosa, or Sepedi via an interpreter. All interviewees provided verbal informed consent and were assured that they could end the interview at any time or decline to answer any questions. Where requested or appropriate, this report uses pseudonyms to protect interviewees from possible reprisals. Interviewees were not compensated.

Researchers reviewed secondary sources — including academic research, media reports and relevant South African laws and policies — to verify or corroborate some of the information provided by community members. The background section of this report reviews examples of how mining has caused environmental and social harms in South Africa, and is based on secondary sources, including studies and reports from NGOs. These are harms mining-affected communities face throughout South Africa, including in the areas where we conducted research.

In August 2018, researchers met with government officials at four municipalities in Limpopo (Greater Tubatse, Mokopane, Lephalale) and KwaZulu-Natal provinces (Mtubatuba). In October 2018, researchers wrote follow-up letters to the four municipalities as well as two municipalities (Rustenburg and New Castle) that had not responded to initial meeting requests, the provincial police commissioners in Limpopo, KwaZulu-Natal, Northwest, and Eastern Cape provinces, and the Independent Police Investigative Directorates (IPID) in Limpopo and Northwest provinces. In March 2019, researchers sent the summary of findings and recommendations of this report to relevant government departments, including the Office of the President, Department of Police, Department of Justice, Departments of Mineral Resources, Environmental Affairs, and

Energy, and the Department of Cooperative Governance and Traditional Affairs. At time of writing, no answer had been received.

Researchers also wrote to the companies working in the areas where the research for this report was conducted to request information on the steps taken to address the human rights issues documented in this report. The companies are Tendele Coal (Somkhele Mine, KwaZulu-Natal), Anglo American Platinum (Twickenham Mine, Limpopo), Sefateng Chrome Mine PTY (LTD) (Sefateng Chrome Mine, Limpopo), Ivanhoe Mines (Ivanplats Mine, Limpopo), Tharisa (Tharisa Mine, Northwest), Future Coal PTY (LTD) (Chelmsford Colliery Mine, KwaZulu-Natal), Ibutho Coal Party Ltd (Fuleni, KwaZulu-Natal), Keysha Investments/Transworld Energy and Mineral Resources (Xolobeni, Eastern Cape), and Royal Bafokeng Platinum (Bafokeng Mine, Northwest). We also contacted Eskom in relation to the Medupi coal power plant in Lephalale, Limpopo province. In October 2018, researchers wrote a similar letter to the Minerals Council South Africa, previously the South African Chamber of Mines, to request information. In March 2019, researchers wrote follow-up letters with specific findings and recommendations to the nine mining companies mentioned above, ESKOM, Afarak (Mecklenburg Mine, Limpopo), as well as the Minerals Council about the documented abuses in relation to specific operations.

At time of writing, four out of 12 recipients had responded. In October 2018, the Minerals Council South Africa responded to our general questions in a letter, and Tendele Coal in an email. Researchers also interviewed a representative of Anglo Platinum and received an email from Anglo American which provided general company policies, also in October 2018. In March 2019, Sefateng Chrome responded in a letter to specific questions relating to their operations, while Anglo American and Ivanplats responded in April 2019. All letters received are available on the Human Rights Watch website as an Annex to this report at https://www.hrw.org/sites/default/files/supporting_resources/sa_reportannex_kr.pdf.

Background

> Overall, the mining sector is riddled with challenges related to land, housing, water, the environment.[1]
>
> **— South African Human Rights Commission, National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa, August 2018**

South Africa is the world's seventh-largest coal producer, and a leading producer of a wide range of metals, including gold and platinum.[2] It holds over 80 percent of the world's platinum reserves, producing almost 200 tons in 2017, with a total revenue of over 9 billion South African Rand (about US$660 million).[3] Although mining takes place throughout South Africa, most of the country's platinum mines are concentrated in Limpopo and Northwest provinces, while 60 percent of coal deposits are in Mpumalanga.[4] The Minerals Council of South Africa estimates that, in 2015, mining directly employed 457,698 people in South Africa, representing just over three percent of all those employed nationally.[5]

The Environmental, Health, and Social Costs of Mining in South Africa

The mining sector and the Government of South Africa point out that mining is essential for economic development, but they fail to acknowledge that mining comes at a high environmental and social cost, and often takes place without adequate consultation with, or consent of, local communities.

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[1] South African Human Rights Commission, "National Hearing on the Underlying Socio-Economic Challenges of Mining-Affected Communities in South Africa," p. 81, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf, August 2018 (accessed September 29, 2018).

[2] World Economic Forum, "These are the World's Biggest Coal Producers," January 2018, https://www.weforum.org/agenda/2018/01/these-are-the-worlds-biggest-coal-producers/; United States Geological Survey, 2014 Minerals Yearbook, South Africa (December 2017), https://minerals.usgs.gov/minerals/pubs/country/2014/myb3-2014-sf.pdf.

[3] Africa Mining IQ, Platinum Mining in South Africa, https://www.projectsiq.co.za/platinum-mining-in-south-africa.htm (accessed March 2019).

[4] Ibid.

[5] South Africa Chamber of Mines, "MINE SA 2016 Facts and Figures," p.6, http://www.mineralscouncil.org.za/industry-news/publications/facts-and-figures/send/17-facts-and-figures/390-facts-and-figures-2016 (accessed March 2019).

Labour Issues

As early as the turn of the 20th century, the South African mining industry relied largely on poorly paid black migrant laborers, a practice supported by discriminatory policies and racial segregation under Apartheid that continues today.[6] From that time onwards, mineworkers have worked in dangerous and unhealthy conditions, often far away from their families.[7]

Mineworkers have repeatedly protested their work conditions and low wages, often at great risk.[8] In a tragic recent example that has been referred to as the Marikana massacre, over four days in August 2012, police shot 34 striking workers demanding better wages and working conditions at the Lonmin platinum mine in Marikana, Northwest province.[9] In one particularly horrific incident captured on video on August 16, 2012, police killed 17 workers over eight seconds with a barrage of gunfire.[10] The story made international news and then President Jacob Zuma established a Commission of Inquiry that produced a report that was criticized for its failure to properly address the question of accountability. No police officer has been charged with responsibility for any of the killings.[11]

Environmental and Health Harms from Mining

Because of the absence of effective government oversight, mining activities have harmed the rights of communities across South Africa in various ways. Such activities have

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[6] groundWork, "The Destruction of the Highveld, Part 1: Digging Coal," November 2016, pp. 28-50, http://www.groundwork.org.za/reports/gWReport_2016.pdf; J Brooks Spector, "A Story of South Africa: Mining, Migration, Misery," *Daily Maverick*, April 14, 2014, https://www.dailymaverick.co.za/article/2014-04-14-a-story-of-south-africa-mining-migration-misery/; The CJPME Foundation, "Roots of Apartheid: South Africa's Mining Industry", May 2014, https://d3n8a8pro7vhmx.cloudfront.net/cjpmefoundation/pages/38/attachments/original/1453674977/001_-_South_Africa_Mining_Industry_and_Apartheid_v.1.pdf?1453674977.

[7] Ibid.

[8] Ibid.

[9] Tolsi, Iren and Botes, Paul, "Markiana: The Blame Game," *Mail and Guardian*, 2012, https://laura-7.atavist.com/mgmarikanablamegame; Davies, Nick, "Marikana massacre: the untold story of the strike leader who died for workers' rights," *The Guardian*, May 2015, https://www.theguardian.com/world/2015/may/19/marikana-massacre-untold-story-strike-leader-died-workers-rights.

[10] Ibid.

[11] Human Rights Watch, *South Africa – Broaden Inquiry into Miner Killings*, August 2015, https://www.hrw.org/news/2012/08/22/south-africa-broaden-inquiry-miner-killings. The Lonmin chairperson issued a statement on August 16, 2012, noting that eight of its employees and two police officers had been killed over the preceding weekend, expressing deep regret for the further loss of life, see https://www.webcitation.org/69zSRIMaG?url=https://www.lonmin.com/downloads/media_centre/news/press/2012/Lonmin_Statement_on_Marikana_-_16_08_12_-_FINAL.pdf (accessed April 9, 2019).

depleted water supplies, polluted the air, soil, and water, and destroyed arable land and ecosystems.[12]

As of 2014, many of South Africa's approximately 6,000 abandoned mines are polluting surrounding surface waters with acidic water and dissolved heavy metals, harming the health and livelihoods of people in surrounding communities.[13] Acid mine drainage from several active and abandoned coal mines, combined with the discharge of inadequately treated effluents from mines, industries, and sewage treatment plants, has made the Olifants River, which flows through South Africa's Mpumalanga and Limpopo provinces and into Mozambique, one of the most polluted rivers in South Africa.[14] A 2014 study led by the Council for Scientific and Industrial Research to assess health risks related to water from the Lower Olifants River found excess amounts of antimony, arsenic, cadmium, mercury, and uranium in community water supply samples, elements that can be toxic and extremely harmful to human health and marine organisms. Mercury levels were found to be more than 10 times the level the study found to be safe for life-time consumption, based on the daily consumption of just one liter of water from the river a day, and 20 times the safe amount of arsenic.[15] This pollution threatens the entire Olifants River ecosystem,

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[12] See, e.g., "Will there ever be accountability for the Marikana Massacre?," Daily Maverick, https://www.dailymaverick.co.za/article/2018-06-15-will-there-ever-be-accountability-for-the-marikana-massacre/(accessed June 15, 2018 South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 81, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf; Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf; ActionAid, "Precious Metal: The impact of Anglo Platinum on poor communities in Limpopo, South Africa," March 2008, https://womin.org.za/images/impact-of-extractive-industries/social-and-environmental-impacts-general-analysis/ActionAid%20-%20Impact%20of%20Anglo%20Platinum%20on%20Poor%20Commnunities%20in%20South%20Africa.pdf; Harvard Law School International Human Rights Clinic, "The Cost of Gold: Environmental, Health, and Human Rights Consequences of Gold Mining in South Africa's West and Central Rand ," 2012, http://hrp.law.harvard.edu/wp-content/uploads/2016/11/The-Cost-of-Gold-Full-Report-Final.pdf; groundWork, "The Destruction of the Highveld: Part 1: Digging Coal ," 2016, http://www.groundwork.org.za/reports/gWReport_2016.pdf.

[13] Bench Marks Foundation, "South African Coal Mining: Corporate Grievance Mechanisms and Mining Impacts," 2014, http://www.bench-marks.org.za/research/policy_gap_9.pdf, pg. 34.

[14] See, e.g., A Addo-Bediako, et al., "Human health risk assessment for silver catfish Schilbe intermedius Rüppell, 1832, from two impoundments in the Olifants River, Limpopo, South Africa," Water SA, Vol 40, No 4, 2014; Sipho Kings, "A river of shit, chemicals, metals flows through our land," Mail and Guardian, April 2017, https://mg.co.za/article/2017-04-13-00-a-river-of-shit-chemicals-metals-flows-through-our-land; J. Lebepe, et al., "Metal contamination of human health risk associated with the consumption of Labeo rosae from the Olifants River system, South Africa," African Journal of Aquatic Sciences, 2016, 41(2): 161-170.

[15] Centre for Environmental Rights, "Lower Olifants Community Health: Risks and Opportunities Project, Final Report," March 2014, https://cer.org.za/wp-content/uploads/2017/09/Annexure-J-Final_Report_Lower_Olifants_31March2014_FINAL.pdf.

including the lives and health of the many communities in Limpopo Province that depend on this water.[16]

Mining also has grave effects on air quality. Dust generated during the mining process – including from blasting, wind erosion of soil removed to access subsurface minerals, and haul trucks – causes air pollution, primarily in the form of fine particulate matter (PM).[17] For example, a recent government study found that in the Mpumalanga Highveld area, where air quality is extremely poor, mining haul roads contribute 49 percent of the PM_{10}, particulate matter with a diameter of 10 microns or less, found in the surrounding air.[18] Breathing these fine particles can contribute significant harm to human health, including premature death in people with heart or lung disease, aggravated asthma, decreased lung function, and increased respiratory symptoms, like irritation of the airways, coughing, or difficulty breathing.[19]

Mining contributes to high rates of silicosis and tuberculosis in miners. Tuberculosis not only affects miners, but can also be transmitted to family members and others in surrounding communities. Research conducted by the National Institute for Occupational Health in Johannesburg and the University of Cape Town puts the silicosis rate in living miners at between 20 and 30 percent, and it has been estimated that up to 60 percent of

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[16] Ibid.

[17] Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 12; Centre for Environmental Rights, South African Human Rights Commission Submission, "Exposure to any type of fine particle dust, known as particulates, has been proven to cause, trigger, or exacerbate the occurrence of respiratory and cardiovascular diseases,"; see "Tackling the global clean air challenge," World Health Organization press release, http://www.who.int/mediacentre/news/releases/2011/air_pollution_20110926/en/ (accessed July 21, 2017). World Health Organization, "Health Effects of Particulate Matter," 2013, http://www.euro.who.int/__data/assets/pdf_file/0006/189051/Health-effects-of-particulate-matter-final-Eng.pdf (accessed July 21, 2017), p. 6.

[18] South Africa Department of Environmental Affairs, "The Medium-Term Review of the 2011 Highveld Priority Area (HPA): Air Quality Management Plan, Draft Review Report," December 2015, https://cer.org.za/wp-content/uploads/2016/07/HPA-AQMP-Midterm-review-Draft-Report_February-2016.pdf, Table A.

[19] United States Environmental Protection Agency, "Particulate Matter: Health," https://www3.epa.gov/pm/health.html (accessed February 2019); World Health Organization, "Ambient (Outdoor) Air Quality and Health," https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health (accessed February 2019).

miners will eventually develop an occupationally related life-threatening and incurable disease.[20]

Migration of labor to serve the mining sector has also contributed to the HIV epidemic in South Africa.[21] Migrant miners are mostly male, and the prolonged separation from their families and the proximity of sex workers has led to high HIV prevalence. Workers would then transmit the virus upon returning home.[22]

In addition, mining threatens food production because it often takes place on and destroys fertile agricultural land and land used for grazing. A 2012 report by the South African Bureau for Food and Agricultural Production estimated that mining or prospecting licences covered over 77 percent of cultivated land in three districts in Mpumalanga.[23] The South Africa National Policy on Food and Nutrition estimates that between 1994 and 2009, increased mining was largely responsible for a 30 percent decline in the overall land area available for food production.[24] Even after mining ceases and communities regain access to land, the land may not be productive because soils affected by mining cannot be

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[20] Steen TW, Gyi KM, White NW, "Prevalence of occupational lung diseases among Botswana men formerly employed in the South African mining industry," Occup. Environ. Med., 1997; 54: 19–26; Murray, J, Davies, T, Rees, D., "Occupational lung disease in the South African mining industry: research and policy implementation," J. Public Health Rep., 2011; 32: 65–79; Murray J., "Development of radiological and autopsy silicosis in a cohort of gold miners followed up into retirement," South Africa National Institute for Occupational Health, May 2005 (Vol. 26); World Health Organization, "Ambient (Outdoor) Air Quality and Health," https://www.who.int/news-room/fact-sheets/detail/ambient-(outdoor)-air-quality-and-health (accessed February 2019).

[21] Lurie, M. N. et al., "Who infects whom? HIV-1 concordance and discordance among migrant and non-migrant couples in South Africa," AIDS, 2003, 17(15), 2245–2252; Lurie, M. N. et al., "The impact of migration on HIV-1 transmission in South Africa: a study of migrant and nonmigrant men and their partners," Sex. Transm. Dis., 2003, 30(2), 149–156; Coffee, M., Lurie, M. N. & Garnett, G. P., "Modelling the impact of migration on the HIV epidemic in South Africa," AIDS, 2007, 21(3), 343–350.

[22] Ibid.

[23] Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 8-9; Bureau for Food and Agricultural Production (BFAP), "Evaluating the Impact of Coal Mining on Agriculture in the Delmas, Ogies and Leandra Districts – with a Specific Focus on Maize Production," 2012, http://www.bfap.co.za/documents/research%20reports/The%20impact%20of%20coal%20mining%20on%20agriculture%20-%20a%20Pilot%20study%20focus,%20based%20on%20maize%20production%20(2012).pdf. (BFAP is a non-profit company founded in 2004 with the intention to inform decision-making by stakeholders in the agro-food, fibre, and beverage complex by providing independent research-based policy and market analyses. BFAP has offices at the University of Pretoria, the University of Stellenbosch, and the Western Cape Department of Agriculture and consists of 40 public and private sector analysts and experts who pool their knowledge and research to inform decision-making within South Africa's food and beverage sector (http://www.bfap.co.za/index.php/about-us).

[24] South Africa National Policy on Food and Nutrition Security, 637, GG 37915 (GNR), August 22, 2014, https://www.nda.agric.za/docs/media/NATIONAL%20POLICYon%20food%20and%20nutririton%20security.pdf.

rehabilitated to their original potential.[25] For example, open-pit mining removes much of the nutrient-rich topsoil essential for food cultivation, and acidification can sterilize the remaining soil.[26] Heavy mining machinery compacts the soil so that roots can no longer penetrate deep enough to access sufficient water.[27] Mining can also result in subsidence of soil, which can cause surface water to pool in subsided areas and the higher-lying areas to dry out, frustrating revegetation efforts.[28]

All forms of mining are also energy intensive and produce significant amounts of greenhouse gases (GHGs), including carbon dioxide, methane, and nitrous oxide.[29] Combustion of coal for energy production is a particularly large source of GHGs worldwide, causing roughly 25 percent of global annual GHG emissions.[30]

Threats to Existing Land Use

In South Africa, holders of mining rights have the right to preclude other land uses.[31] This often prevents local people from accessing land they depend on for agriculture, housing and other purposes, depriving communities, particularly in rural areas, of their livelihoods. Gauteng High Court, in November 2018, ruled in respect of the Community of Umgungudlovu, which opposes a proposed mine in their community:

> The land that comprises the proposed mining areas is an important resource and central to the livelihoods and [subsistence] of the applicants. Many of the applicants utilise the land for grazing for their livestock and for the cultivation of crops and depend on the water supply. The products of

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[25] Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 7.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] H. Immink et al., "Tracking decarbonisation in the mining sector," Journal of Energy in South Africa, 2019, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1021-447X2018000100002; Michael Whitaker et. al, "Life Cycle Greenhouse Gas Emissions of Coal-Fired Electricity Generation," Journal of Industrial Ecology, 2012, https://onlinelibrary.wiley.com/doi/full/10.1111/j.1530-9290.2012.00465.x; John Carras et al., "Fugitive Emissions," Intergovernmental Panel on Climate Change (IPCC), 2006, Volume 2, Chapter 4; 4.9, https://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/2_Volume2 /V2_4_Ch4_Fugitive_Emissions.pdf.

[30] Ecofys & ASN Bank, "World GHG Emissions Flow Chart," 2016, https://www.ecofys.com/files/files/world-ghg-emission-flow-chart-2012_v9-c-asn-ecofys-2016_02.pdf.

[31] South African Mineral Petroleum Resources Development Act (MPRDA), Section 5, 2002, http://www.dmr.gov.za/Portals/0/mineraland_petroleum_resources_development_actmprda.pdf.

their labour are used to sustain their families. Any surplus is sold to generate a cash income.[32]

Because of this connection between their lands and livelihoods, and the pollution resulting from mines, many communities in South Africa are reluctant in consenting to mines on their lands.

Unfortunately, the government has – until shortly before the publication of this report – allowed mines to operate on lands governed by customary or traditional laws without consulting with or seeking the consent of the communities living on them. In fact, the government has used mining laws to override legal protections for land rights. The 1996 Interim Protection of Informal Land Rights Act (IPILRA) requires the majority of a community to provide their consent before disposing of their informal rights to land, which the act defines as "the use of, occupation of, or access to land in terms of any tribal, customary or indigenous law or practice of a tribe."[33] However, in 2002, the government adopted the Mineral and Petroleum Resources Development Act (MPRDA), which conflicts with that provision by allowing the government to grant prospecting and mining permits to land without the consent of landowners.[34]

The government previously accorded the MPRDA precedence over the IPILRA, effectively negating the protections established under the IPILRA. Two recent court decisions, however, have clearly held that communities with land rights under IPILRA must, through a majority of their members, consent to mining operations on lands they occupy or use. In *Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another,* the Constitutional Court overruled an eviction order issued by a lower court to a mining company, permitting it to evict 13 families from a farm in Lesetlheng Community, North West Province, where the company had mining rights.[35] The court held that the Lesetlheng

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[32] Baleni v. Minister of Mineral Resources, High Court of the Republic of South Africa, Gauteng Division, Pretoria, Case No. 73768/2016, November 22, 2018, para. 15.

[33] South Africa Land Affairs General Amendment Act 61 of 1998, Interim Protection of Informal Land Rights Act 31 or 1996, http://www.ruraldevelopment.gov.za/phocadownload/Acts/interim%20protection%20of%20informal%20land%20rights%20act%2031%20of%201996.pdf.

[34] Baleni v. Minister of Mineral Resources, High Court of the Republic of South Africa, Gauteng Division, Pretoria, Case No. 73768/2016, November 22, 2018.; South African Mineral Petroleum Resources Development Act (MPRDA), Sections 22-23, 2002, http://www.dmr.gov.za/Portals/0/mineraland_petroleum_resources_development_actmprda.pdf.

[35] Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another, CCT265/17, ZACC 41, 2018; 2019 (1) BCLR 53 CC, October 25, 2018.

Community, which had informal rights to the land, had not provided consent as required by IPILRA, and thus could not be evicted from their lands through a mining right under the MPRDA. Similarly, in the November 2018 decision *Baleni and others v. Minister of Mineral Resources and others*, the Gauteng High Court held that communities that have informal land rights under IPILRA "must be placed in a position to consider the proposed depravation and be allowed to make a communal decision in terms of their custom…on whether they consent or not to a proposal to dispose of their right to their land" prior to granting any mining right under the MPRDA.[36]

Role of Traditional Authorities Related to Mining

Despite the protections communities have under IPILRA, many traditional authorities — the customary government structures comprised of a traditional council and a chief, which operate in parallel with the state government — have unlawfully negotiated and "consented" to mines on behalf of communities without consulting them. The South African Human Rights Commission (SAHRC) has noted the "belief [of mining companies] that consent for [use of customary land] must be sought from Traditional Councils, and not from the State or from affected communities. Lease agreements are therefore negotiated and concluded with Traditional Councils to the exclusion of other relevant parties."[37] The Centre for Applied Legal Studies (CALS) similarly noted that:

> [S]ome activists explained how they first heard that mining would come to their area from the chief during village meetings which were also attended by representatives of the company. The participants noted that it was apparent from these meetings that the chief was in favour of mining and that the community was not being consulted but rather simply informed of what was to happen.[38]

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[36] Baleni v. Minister of Mineral Resources, High Court of the Republic of South Africa, Gauteng Division, Pretoria, Case No. 73768/2016, November 22, 2018, para. 84.

[37] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 62, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[38] Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," *Centre for Applied Legal Studies,* April 2018, p. 19, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf.

The lack of consultation between traditional authorities supporting mines and the wider community often leads to the perception in the community that bribery and corruption are taking place and the traditional authorities have been "bought over."[39]

Traditional authorities also suppress community opposition to mines that they support and "exercise [their] powers to dissuade community members from engaging in actions that are deemed to be at odds with the mining activities in the area."[40] In 2018, CALS documented various efforts by traditional authorities to stifle opposition to mines in their communities. For example, chiefs have banned activists from attending community meetings, prohibited them from participating if they do attend, and prohibited activists from making use of communal places of assembly.[41] In some cases, traditional authorities label those opposing mines as anti-development and troublemakers, thus alienating and stigmatizing them.[42] As a result, community members are often afraid to speak out against a mine in open consultations.[43] The SAHRC also found that community members sometimes "are afraid to openly oppose the mine for fear of intimidation or unfavourable treatment [by the Traditional Authority]."[44]

Lack of Benefits to Communities

Local communities often do not benefit from mining. Although South African law requires the development of social and labour plans (SLPs) that establish binding commitments by mining companies to benefit communities and mine workers, the Centre for Applied Legal Studies at the University of Witwatersrand, Johannesburg, has documented significant flaws in the development and implementation of SLPs.[45] For example, a number of procedural inadequacies prevent communities from participating meaningfully in the

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[39] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," pgs. 56-62, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[40] Ibid.

[41] Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," *Centre for Applied Legal Studies,* April 2018, p. 19-21, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf.

[42] Ibid.

[43] Ibid.

[44] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 62, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[45] Snyman, L, et al., "The Social and Labour Plan Series Phase 3: Alternative Models for Mineral-Based Social Benefit," Centre for Applied Legal Studies, March 2018, https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/SLP%20Report%203%20For%20Web%2018%20January%202018.pdf.

development of SLPs.[46] And for SLPs to be effective, companies must consult with communities to identify and prioritize the needs in the community. Unfortunately, South Africa's mining laws and regulations do require public participation in the SLP design process, and communities regularly report that broad-based consultation on developing SLPs does not occur.[47]

The mining laws and regulations also do not require mining companies to make draft SLPs available to the public, so many communities do not see SLPs until they are final, if at all. In one example noted by CALS, the community had to submit a series of letters to the company through their lawyers before obtaining the draft SLP to comment on.[48] The mining laws and regulations also allow mine operators to make decisions about the implementation, monitoring, or amendment of SLPs without consulting affected communities.[49] SLP commitments can thus be weakened without consulting the beneficiaries. The South African Human Rights Commission similarly found that "the current SLP system does not adequately address the negative impacts of mining activities and the shortcomings in the design of, and compliance with, SLP commitments limit their ability to drive socio-economic transformation in mining-affected communities."[50]

Inadequate Government Oversight and Lack of Industry Transparency

Despite the environmental and social costs of mining highlighted above, the South African government is not adequately enforcing relevant environmental standards and mining regulations throughout South Africa, including in some of the communities where researchers conducted interviews for this report.[51] Although the Department of Mineral Resources (DMR) is responsible for enforcing compliance with environmental and mining laws, the South African Human Rights Commission (SAHRC) found that the department

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[46] Ibid.

[47] Ibid.

[48] Ibid.

[49] Ibid; Two exceptions are with respect to provisions dealing with worker's housing and future forums. A future forum is a structure that must consist of workers, their representatives, and management and is designed to anticipate crises and plan more constructive alternatives to retrenchment.

[50] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 57, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[51] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa – Case Studies on Somkhele and Sekhukune," p. 22, 52, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

often fails to hold mining companies accountable, imposing few or no consequences for unlawful activities and therefore shifting the costs of pollution to local communities.[52] The SAHRC found that "compliance with regulatory obligations, as well as monitoring and enforcement of such responsibilities, remains a crucial concern in the context of mining activities."[53] For example, the commission found that "the existing sanctions for non-compliance with environmental laws and regulations are inadequate and do not address, nor disincentivise, systemic non-compliance in the sector,"[54] and that the DMR and other governmental agencies often do not respond to complaints filed against mines by community members.[55]

Unfortunately, the lack of government action and oversight has also helped make the mining industry one of the least transparent industries in South Africa.[56] Basic information that communities require to understand the impacts of mines and to hold mining companies accountable for harmful activities is often not publicly available. Such information includes environmental authorizations, environmental management programs, waste management licences, atmospheric emission licences, mining rights, mining work programs, social and labour plans, or compliance and enforcement information.[57] The only way to access such information is through a request under South Africa's access to

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[52] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 57, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.

[53] Ibid., p. 75.

[54] Ibid., p. 77.

[55] Ibid., p. 79.

[56] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 68 – 70, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL; Centre for Environmental Rights, Written Submission to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-economic Challenges in Mining-affected Communities in South Africa, August 26, 2016, https://cer.org.za/wp-content/uploads/2016/09/CER-Submission-to-SAHRC-on-Mining-Affected-Communities.pdf, pg. 12; Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 55-56.

[57] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 57, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf; Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 55, 66.

information law, a procedure that the World Health Organization has called "seriously flawed" and which the Department of Mineral Resources regularly flouts.[58]

In addition, mining companies and the government rarely consult meaningfully with communities during the mining approval process, resulting in uninformed and poor government and industry decisions that do not reflect community perspectives or have their support.[59]

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[58] Centre for Environmental Rights, Written Submission to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-economic Challenges in Mining-affected Communities in South Africa, August 26, 2016, https://cer.org.za/wp-content/uploads/2016/09/CER-Submission-to-SAHRC-on-Mining-Affected-Communities.pdf, pg. 12; Centre for Environmental Rights, "Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga," May 2016, http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf, pg. 8-9.

[59] South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 24.

Activism under Attack: Cases from Mining-Affected Communities

Across South Africa, people living in mining-affected communities are advocating for protection of rights such as the rights to health and a healthy environment, protection from serious social, health, and environmental harms that can stem from mining, which are exacerbated by a lack of transparency, accountability, consultation, and the lack of community benefit from mines.[60] As documented below, some of this activism has been met with threats, attacks, or violence. In addition, municipalities often impose burdens on organizers that have no legal basis, making protests difficult and sometimes impossible.

Researchers also documented cases of police misconduct, arbitrary arrest, and excessive use of force during protests in mining-affected communities, which is part of a larger pattern in South Africa. Mining companies in the country have also been using legal tactics – including strategic litigation against public participation and social media campaigns – to harass activists and organizations who are challenging them. The threats, attacks, and other forms of intimidation against community rights defenders and environmental groups have created an environment of fear that prevents mining opponents from exercising their rights to freedom of opinion, expression, association, and peaceful assembly, and undermines their ability to defend themselves from the threats of mining.

Killings, Attacks, Threats, and Harassment

> We know our lives are in danger. This is part of the struggle.
>
> **– Billy M., activist from Fuleni, KwaZulu-Natal, March 2018[61]**

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[60] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 57, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf; Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," *Centre for Applied Legal Studies,* April 2018, p. 19-21, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf; Terwindt, C., Schliemann, C., "Tricky Business: Space for Civil Society in Natural Resource Struggles," *Heinrich Böll Foundation*, https://www.boell.de/sites/default/files/tricky-business.pdf?dimension1=division_demo.

[61] Interview with Billy M., Fuleni, KwaZulu-Natal, March 28, 2018.

Activists in several communities told researchers that they or others in their community had been physically attacked or received death threats from known or unknown sources as a consequence of their opposition to mining. In some cases, activist have been killed.

Xolobeni: Attacks Against Community Rights Defenders

Since 2007, members of the Xolobeni community in the Western Cape have pushed back against the government's efforts to allow mining operations on their traditional land, the area in which their families have lived for generations.

In March 2016, unidentified individuals killed activist Sikhosipi "Bazooka" Radebe, chairperson of a community-based organization opposing mining in Xolobeni called Amadiba Crisis Committee, at his home. His nickname "Bazooka" refers to a South American soccer star.

Members of the Xolobeni community had been publicly raising concerns that a titanium mine proposed by Australian company Mineral Commodities Ltd on South Africa's Wild Coast would displace community members, and destroy the environment and their livelihoods, which had, until then, depended on farming. The mining company told the *Guardian* "that the development of the mine and the balancing of the environmental impacts with the social and economic upliftment can be managed to the satisfaction of all stakeholders."[62] Mineral Commodities Ltd did not respond to a letter from researchers about the research and the mine's planned operations.

Nonhle Mbuthuma, a leader of the Xolobeni community, told researchers: "We are resisting mining activities in our community because it will lead to the displacement of households, the disruption of our connection to land and ancestors, devastation of our water supply, air quality, marine and estuarine ecosystems, and destroy opportunities for ecotourism and agriculture."[63]

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[62] Jonathan Watts, "'I Thank God I am Alive': Standing Firm Against Mineral Extraction in South Africa", The Guardian, July 21, 2018, https://www.theguardian.com/environment/2018/jul/21/i-thank-god-i-am-alive-standing-firm-against-mineral-extraction-in-south-africa (accessed October 14, 2018). Researchers did not receive a response to letter to Mineral Commodities Ltd.

[63] Interview with Nonhle Mbuthuma, activist, Cape Town, Western Cape, February 6, 2018.

According to an investigation by *The Guardian*, villagers believe that Bazooka's killing was likely linked to his activism.[64] However, the company in a statement to *The Guardian* refuted claims that it was implicated in the incident as unfounded and pledged to cooperate fully with investigations into his death.[65] *The Guardian* investigation revealed that mining "has created an atmosphere in which some members of [the] community, eager to profit from future mining, have become violent."[66] According to Mbuthuma, who succeeded Bazooka as Chairperson of the Amadiba Crisis Committee, the day before he was killed, Bazooka told her he had seen a hit list that included three people — her, Bazooka, and another person from the Amadiba Crisis Committee – making rounds in the community. Mbuthuma fled her home in the days following Bazooka's death and went into hiding.[67] More than three years later, the police have not identified any suspects in Bazooka's murder.[68]

In April 2018, Xolobeni community members asked the Pretoria High Court to rule that the South African Department of Mineral Resources cannot issue a mining license without the community's consent. They also argued that the government should respect the rights of the people who have lived on the land for generations, even if they do not have a formal land title.[69] In November 2018, the court held that the government is obliged to obtain the free and informed consent of the community according to their customs before granting

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[64] Fred Pearce, "Murder in Pondoland: how a proposed mine brought conflict to South Africa," The Guardian, March 28, 2017, https://www.theguardian.com/environment/2017/mar/27/murder-pondoland-how-proposed-mine-brought-conflict-south-africa-activist-sikhosiphi-rhadebe (accessed July 12, 2018).

[65] Joshua Robertson, "Australian mining company denies role in murder of South African activist," The Guardian, March 25, 2016, https://www.theguardian.com/environment/2016/mar/25/australian-mining-company-denies-role-in-of-south-african-activist (accessed July 12, 2018).

[66] Fred Pearce, "Murder in Pondoland: how a proposed mine brought conflict to South Africa," The Guardian, March 28, 2017, https://www.theguardian.com/environment/2017/mar/27/murder-pondoland-how-proposed-mine-brought-conflict-south-africa-activist-sikhosiphi-rhadebe (accessed July 12, 2018).

[67] Interview with Nonhle Mbuthuma, activist, Cape Town, Western Cape, February 6, 2018; Bega, S., "Xolobeni activist defies death threats to protect her ancestral land," IOL News, February 9, 2019, https://www.iol.co.za/news/south-africa/gauteng/xolobeni-activist-defies-death-threats-to-protect-her-ancestral-land-19212076.

[68] Thembela Ntongana, "Family of murdered Xolobeni activist appeal to NPA to "unblock" investigation," Mail and Guardian, March 28, 2018, https://mg.co.za/article/2018-03-28-family-of-murdered-xolobeni-activist-appeal-to-npa-to-unblock-investigation (accessed July 12, 2018). The slow pace of police investigations is not limited to communities opposing mines, but part of a larger pattern in South Africa. For example, the SAHRC in its 2018 report on human rights defenders emphasized "the persistent challenges presented when HRDs, or those whose rights they aim to promote and respect, pursue access to justice."; South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 40.

[69] Carnie, T., "Wild Coast Mine Fight Goes to Court," PressReader, April 23, 2018, https://www.pressreader.com/south-africa/business-day/20180423/281973198255648.

any mining rights.[70] Despite the court decision and continued community opposition, Mineral Commodities Ltd continues its efforts to mine in the area and community activists are still receiving threats and experiencing harassment.[71]

In September 2018, the South African Police Services (SAPS) used tear gas and stun grenades against Xolobeni community members who were participating in a meeting with Gwede Mantashe, the Minister of Mineral Resources.[72] According to Amnesty International, more than 100 members of the Amadiba Crisis Committee had gathered at the tent where the meeting was to be held, holding placards and posters and voicing their opposition to mining in Xolobeni.[73] They had to negotiate with the police before being allowed into the tent.[74] Members of the Amadiba Crisis Committee were limited to a small area at the back of the tent where they were surrounded by police, which made them feel uncomfortable participating in the meeting.[75]

Richard Spoor, an attorney representing the Xolobeni community members opposing the mine, said that after the meeting started, he asked the SAPS deputy provincial police commissioner to create more space for the community members and to remove the police stationed around them.[76] They began to argue after the deputy commissioner dismissed his proposal.[77] When Spoor started to walk away, the deputy commissioner instructed the police to "take him away" and the police pulled Spoor out of the tent.[78] When Spoor tried to re-enter the tent to discuss the incident with the minister and how to resolve it, the police arrested him for assault, disobeying a lawful order of police, and incitement to

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[70] Greg Nicolson, "Wild Coast community wins 15-year David-and-Goliath battle against Australian mining company," Daily Maverick, November 22, 2018, https://www.dailymaverick.co.za/article/2018-11-22-wild-coast-community-wins-15-year-david-and-goliath-battle-against-australian-mining-company/ (accessed November 27, 2018). Judgment of the Pretoria High Court on file with researchers.

[71] Bega, S., "Xolobeni activist defies death threats to protect her ancestral land," IOL News, February 9, 2019, https://www.iol.co.za/news/south-africa/gauteng/xolobeni-activist-defies-death-threats-to-protect-her-ancestral-land-19212076.

[72] Amnesty International Press Statement, "SAPS Must Investigate Events at Xolobeni without Delay," September 25, 2018, https://amnesty.org.za/saps-must-investigate-events-at-xolobeni-without-delay/.

[73] Email from Uyanda Mabece, Amnesty International, February 4, 2018.

[74] Email from Uyanda Mabece, Amnesty International, February 4, 2018; telephone interview with Richard Spoor, human rights attorney, February 18, 2019.

[75] Telephone interview with Richard Spoor, human rights attorney, February 18, 2019.

[76] Ibid.

[77] Ibid.

[78] Ibid.

public violence.[79] When some community members protested, the police used teargas and stun grenades to make them leave.[80] Spoor was released on bail the same day and the National Prosecuting Authority declined to prosecute him on March 15, 2019.[81]

Mbuthuma continues to receive death threats from unidentified individuals.[82] In a media interview in December 2018, she said that although she had thought the threats against her and others opposing the mine would decrease after the court ruling, the situation has not improved. "I am continuously getting calls from people saying that hit men are coming to get me, and as a result I am forced to sleep in different houses every night. I also leave my cell phone turned off for long periods so my whereabouts cannot be tracked," she said.[83]

Threats and Attacks Against Community Activists in KwaZulu-Natal and Limpopo

Accounts like the ones from Xolobeni are common in South Africa's mining areas. While Bazooka's murder and the threats against Mbuthuma have received both domestic and international attention, many threats and attacks on activists go unreported or do not receive public attention.

For example, Billy M., a community activist from Fuleni, a small rural village in KwaZulu-Natal's King Cetshwayo District Municipality, has received threats from unidentified sources for about five years.[84]

Nestled on the rolling hills of KwaZulu-Natal's grasslands, Fuleni is located on the doorstep of one of South Africa's oldest and largest wilderness areas, the Hluhluwe

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[79] Kaveel Singh, "Attorney who marched on Mantashe's mining meeting charged," *news24*, September 25, 2018, https://www.news24.com/SouthAfrica/News/attorney-who-marched-on-mantashes-mining-meeting-charged-20180925 (accessed December 15, 2018). Charge sheets on file with the researchers.

[80] Email from Uyanda Mabece, Amnesty International, February 4, 2018.

[81] Kaveel Singh, "Attorney who marched on Mantashe's mining meeting charged," *news24*, September 25, 2018, https://www.news24.com/SouthAfrica/News/attorney-who-marched-on-mantashes-mining-meeting-charged-20180925 (accessed December 15, 2018). Charge sheets and notice from prosecutor on file with the researchers.

[82] Jonathan Watts, "'I thank God I am alive': standing firm against mineral extraction in South Africa," *The Guardian*, July 21, 2018, https://www.theguardian.com/environment/2018/jul/21/i-thank-god-i-am-alive-standing-firm-against-mineral-extraction-in-south-africa (accessed October 14, 2018).

[83] Corcoran, Bill, "Deep divisions exposed in South Africa's mining stand-off," *Irish Times,* https://www.irishtimes.com/news/world/africa/deep-divisions-exposed-in-south-africa-s-mining-stand-off-1.3744589 (accessed December 31, 2018).

[84] Interview with Billy M., community activist, Fuleni, KwaZulu-Natal, March 28, 2018.

iMfolozi Park. In 2013, Ibutho Coal applied for rights to develop a coal mine in Fuleni that would have required the relocation of hundreds of people from their houses and farmlands, and would have destroyed their graveyards.[85] The mine's environmental impact assessment estimated that more than 6,000 people living in the Fuleni area would be impacted, and that blasting vibration, dust, and floodlights could harm the community.[86] During the environmental consultation processes, Billy M. led opposition to mining that culminated in a protest by community members in April 2016. The company reportedly abandoned the project in 2016.[87] In 2018 it was reported that a new company, Imvukuzane Resources Ltd, is interested in mining at Fuleni.[88]

Opposition to mining has come at a high cost to Billy M. and other activists. On the night of August 13, 2013, Billy heard gunshots at the gate of his house. He did not know who was responsible for the shots and did not report the incident to the police because he was worried that the traditional leadership might have been involved.[89] More recently, some community members warned him that he will be in trouble if he continues to oppose mining.[90]

Coal mining has long been a reality in Somkhele, as has a feeling of insecurity among those who have voiced their concerns about the impacts of the mine. Some community members believe that coal dust and dust from mining roads may be responsible for strong

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[85] Tony Carnie, "Mystery 'coal moles' plan to burrow on fence-line of Africa's oldest wilderness area," *The Daily Maverick*, July 4, 2018, https://www.dailymaverick.co.za/article/2018-07-04-mystery-coal-moles-plan-to-burrow-on-fence-line-of-africas-oldest-wilderness-area/ (accessed October 25, 208); Ibutho Coal (PTY) LTD, Fuleni Anthracite Project, Draft Environmental Impact Report, May 2015, https://drive.google.com/file/d/0B2Sma3ZszxtoaE82b3l4SDhqamM/view (accessed December 12, 2018).

[86] Ibid.

[87] Tamlyn Jolly, "New mining threat looms," Zululand Observer, June 21, 2018, https://zululandobserver.co.za/173920/new-mining-threat-looms/ (accessed November 27, 2018); Berry, S., "Fuleni Blockade Stops RMDEC Site Visit," Save Our Wilderness, April 21, 2016, https://saveourwilderness.org/2016/04/21/fuleni-blockade-stops-rmdec-site-visit/.

[88] Tony Carnie, "Mystery 'coal moles' plan to burrow on fence-line of Africa's oldest wilderness area," The Daily Maverick, July 4, 2018, https://www.dailymaverick.co.za/article/2018-07-04-mystery-coal-moles-plan-to-burrow-on-fence-line-of-africa s-oldest-wilderness-area/ (accessed October 25, 208); SABC2, 50/50 documentary, Hluluwe Imfolozi Threatened by Mining, October 21, 2018, https://youtu.be/-4w3qSU5TEk; Imvukuzane Resources (Pty) Ltd Application for Environmental Management, May 22, 2018, https://sahris.sahra.org.za/sites/default/files/additionaldocs/I&AP%20 Letter%20Fuleni%20-%20Eng.pdf.

[89] Interview with Billy M., community activist, Fuleni, KwaZulu-Natal, March 28, 2018.

[90] Interview with Billy M., community activist, Fuleni, KwaZulu-Natal, March 28, 2018.

coughs and other respiratory diseases in the community.[91] They also complain about the noise from the mining trucks and the depletion of water sources.[92]

One of the biggest concerns for community members in Somkhele is the lack of compensation of their customary land they can no longer use due to mining-related activities. One woman in Somkhele said, "There are so many problems we don't even know where to start. We used to have land for farming…but the mine took it away and we did not get any compensation."[93] The mining company, Tendele Coal, has said on several occasions that while it compensates for houses and other belongings, it is legally prevented from paying the community members for the land when they are evicted because the land is owned by the Ingonyama Trust Board (ITB), a traditional body mandated to hold land for communities in that part of KwaZulu-Natal province.[94]

However, South African law gives community members a right to be compensated for loss of their non-formalized right to land, including the use and occupation of – or access to – land.[95] Two recent court decisions confirm that this right to be compensated also exists in the absence of a formal land title, holding that that any decision about customary land requires consent from majority of the community and that people cannot be considered free in their decision to consent unless the question of compensation has been discussed

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[91] Jason Burke, "Open coalmine near Africa's first nature reserve divides community," The Guardian, October 17, 2018, https://www.theguardian.com/global-development/2018/oct/17/the-coming-of-the-mine-separated-us-a-community-split-in-south-africa (accessed November 15, 2018); Environmental Justice Atlas, "Somkhele coal mine owned by Tendele, KwaZulu-Natal, South Africa," https://ejatlas.org/conflict/tendele-coal-mine-somkhele-kwazulu-natal (accessed November 15, 2018).

[92] Tamlyn Jolly, "Somkhele Mine's Water Use Questioned," Zululand Observer, April 24, 2015, https://zululandobserver.co.za/65870/mines-water-use-questioned. Researchers were not able to confirm or reject these claims (accessed November 15, 2018).

[93] Interview with Wandile M., community member, Somkhele, KwaZulu-Natal, August 8, 2018.

[94] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 22, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[95] Section 25 of the South African Constitution; Section 1 Interim Protection of Informal Land Rights Act.

previously.[96] Several community activists opposing the Somkhele coal mine in KwaZulu-Natal, said they have experienced threats, physical attacks, and damage to their property that they believe are in response to their opposition to Tendele coal mine.[97] The night after community members protested against the traditional authority's alleged involvement with the mine, one of the conveners of the protest noticed some noise outside his house.[98] "When I looked through the window I saw my vehicle was burning," he said.[99] In 2017, another community member who had expressed his frustration with the mine was cornered and threated by a group of community members on the streets after he attended a meeting to discuss grievances about the mine. "There were about 30 people. I was all by myself," he recalled. "I felt like I was going to die."[100] They eventually backed off when someone else distracted them.

In an email response to our enquiries, Tendele Coal, the company operating Somkhele coal mine, said that they "are aware of claims of attacks, yet upon investigation and consultation with Police, the information could not be verified/substantiated."[101]

Community members opposing Chelmsford coal mine in Newcastle, KwaZulu-Natal have also experienced threats because they oppose mining. Residents of Newcastle's coal mining areas complain about the environmental harms of mining including dust, damage to their houses from daily blasting, and relocations.[102] A community member who

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[96] Maledu and Others v. Itereleng Bakgatla Mineral Resources (Pty) Limited and Another, South Africa Constitutional Court, (73768/2016), 2018, ZAGPPHC 829; Baleni and Others v. Minister of Mineral Resources and Others, Pretoria High Court, 2019, 1 All SA 358 (GP), November 22, 2018. The Ingonyama Trust Board itself also argued in Ethekwini v. Ingonyama Trust Board that they do not own the land, but the land belongs to the state. Ingonyama Trust land is vested in the Zulu monarch, King Goodwill Zwelithini Zulu; Customary law recognises individual rights and works in a democratic way that ensures that if some activities are to occur on an individual's plot of land, they are consulted and they provide consent. Section 25(6) of the Constitution and IPILRA of 1996 further solidify in these principles in common law. The South African Human Rights Commission also said that Tendele's practice of not paying compensation for land is "below what is considered to be appropriate in terms of global industry standards," citing standards of the International Finance Corporation, a World Bank institution that encourages private sector investment in developing countries; South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 57, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[97] Focus group interview, Mtubatuba, KwaZulu-Natal, March 29, 2018.

[98] Tamlyn Jolly, "Somkhele March Organizer Targeted," *Zululand Observer*, March 17, 2016, see text: https://saveourwilderness.org/2016/03/18/somkhele-march-organiser-targeted/.

[99] Interview with Bongani P., community member, Mtubatuba, KwaZulu-Natal, March 29, 2018.

[100] Interview with Phindile S., community member, Mtubatuba, KwaZulu-Natal, March 29, 2018.

[101] Email from Tendele Coal to researchers, October 12, 2018, on file with research and available on Human Rights Watch website.

[102] "Coal mining leaves community devastated," Mining Review Africa, April 19, 2018, https://www.miningreview.com/historical-coal-mining-leaves-kzn-community-disrupted-devastated/ (accessed December 1, 2018).

participated in a protest at the mine on August 19, 2016 said, "We heard from the workers at the mine that we should stop or else something bad will happen."[103] At time of writing, the company had not responded to these allegations.

Shortly after the incident, rumours spread across the village that hitmen had been hired to kill Lucky S., one of the most prominent activists in the area. "A 15-year old boy overheard a group of men saying that I should be killed," Lucky remembered. "The boy was on his way to herd the goats. He quickly ran home to inform his mother. His mother then called me immediately to warn me."[104]

Similar concerns have arisen in mining communities of the platinum belt in Limpopo. Elton T. is a community activist and a member of the steering committee of the Mining and Environmental Justice Community Network of South Africa (MEJCON), which has engaged in a government-led process aimed at creating a national mining charter that would establish rules to distribute the country's mineral wealth more equally among citizens, including by increasing the percentage of black mine ownership and community benefits.[105] Elton expressed concern about the lack of community involvement at national mining charter meetings in late 2017. In December 2017, he started receiving calls from a private number threatening that if he continued his involvement at the mining charter meetings, the caller would "make a plan" to make him stop.[106] He received four calls within a few weeks warning him to withdraw from the process. Despite the threats, Elton continued his activism.[107]

In addition to our research, several other NGOs have recently documented threats facing human rights defenders and activists in South Africa, including in mining-affected communities. For example, the Centre for Applied Legal Studies has investigated various forms of victimization faced by activists, mainly in mining communities, including death,

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[103] Interview with Zodwa K., community member, Newcastle, KwaZulu-Natal, March 26, 2018.

[104] Telephone interview with Lucky S., community activist, May 22, 2018.

[105] Minister Gwede Mantashe, Media Statement on the Occasion of the Release of the Mining Charter, 2018, https://www.gov.za/speeches/media-statement-minister-mineral-resources-mr-gwede-mantashe-occasion-release-mining.

[106] Interview with Elton T., Steering Committee Member, Mining and Environmental Justice Community Network of South Africa, Moroke, Limpopo, April 1, 2018.

[107] Ibid.

violence, frivolous litigation, and criminalization of their activities.[108] The Heinrich Böll Foundation, with assistance from the Legal Resource Centre, has detailed incidents of killings and other physical violence against activists in mining-affected communities of South Africa.[109]

In its November 2018 review of South Africa's compliance with the International Covenant on Economic, Social and Cultural Rights, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) expressed concern about "reports of human rights defenders, particularly those working to promote and defend the rights under the Covenant in the mining and environmental sectors, being threatened and harassed."[110] It recommended that South Africa provide a safe and favorable environment for the work of human rights defenders to promote and protect economic, social, and cultural rights, including by…[e]nsuring that all reported cases of intimidation, harassment, and violence against human rights defenders are promptly and thoroughly investigated and the perpetrators are brought to justice.[111]

The Minerals Council South Africa, a 77-member organization that supports and promotes the South African mining industry and whose members include companies operating mines in some of the communities represented in this report, responded to researchers of this report that it "is not aware of any threats or attacks against community rights defenders where our members operate."[112]

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[108] Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," Centre for Applied Legal Studies, April 2018, p. 19-21, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf.

[109] Terwindt, C., Schliemann, C., "Tricky Business: Space for Civil Society in Natural Resource Struggles," Heinrich Böll Foundation, pgs. 81-82, https://www.boell.de/sites/default/files/tricky-business.pdf?dimension1=division_demo.

[110] Office of the High Commissioner on Human Rights, Council on Economic, Social, and Cultural Rights, Concluding observations on the initial report of South Africa, November 2018, U.N. Doc. E/C.12/ZAF/CO/1, para. 12.

[111] Ibid.

[112] Email from Minerals Council South Africa to researchers, November 28, 2018, on file with researchers and available on Human Rights Watch website.

Impacts on Women Activists

Women are often first to experience the harms of mining and can play a leading role in voicing these concerns, which makes them potential targets for harassment and attacks.[113]

Lebogang N., an activist from Fuleni, has received several death threats from fellow community members who were hoping that a coal mine could bring them jobs.[114] In April 2017, Lebogang's cousin told her that others in the community wanted her to stop opposing mining, and that "the only way to stop [her] is by killing [her]."[115] A few days later, another cousin told her that people in the community were trying to kill her.[116] The village headman, who is part of the traditional leadership, told her that she would be banned from the village if she kept opposing mining.[117] Lebogang has not reported these incidents to the police.[118]

Silindile N., a 39-year-old woman from Fuleni, received about five phone calls a day for several days in April 2016, after she had started to mobilize against the coal mine in the community by distributing information about the risks of coal mining.[119] An anonymous caller told her, "You must stop what you are doing. If you don't stop, we will shoot you."[120] Silindile said the calls stopped when the mining company pulled out from the project.[121]

Women like Lebogang and Silindile, who are often the main caregivers in the family, also worry about the impacts on their families of threats made against them for their activism.[122] For example, Lebogang turned down an NGO's offer of support to leave the community. "If I had left I would have worried about my family, especially my daughter,"

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[113] Association for Women's Rights in Development & Women Human Rights Defenders International Coalition, "Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations," pp. 10ss, https://www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf (accessed December 17, 2018).

[114] Interview with Lebogang N., activist, Fuleni, KwaZulu-Natal, March 28, 2018.

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Interview with Silindile N., community member, Fuleni, KwaZulu-Natal, March 28, 2018.

[120] Ibid.

[121] Ibid.

[122] Telephone interview with Nicky LeRoux and Caroline Ntaopane, WoMin, January 16, 2018.

she said.[123] Research by the Centre for Applied Legal Studies found that threats against women in South Africa adversely affect their children and families because of the role women predominantly play as primary caregivers.[124] Women are also often first to experience the harms of extractive industries on land, water, food, health, and livelihoods. This often motivates them to play a leading role in voicing these concerns and acting as human rights defenders, which makes them potential targets for harassment and attacks.[125]

Creation and Exploitation of Divisions within Communities

In some cases, government officials or companies deliberately create or exploit community divisions or close their eyes to acts of intimidation and abuse between community members, in order to isolate or weaken critics. The South African Commission for Human Rights has found that many mining-affected communities across South Africa are experiencing "the creation of tension and division within communities as a result of mining operations."[126] Sometimes, threats and intimidation against activists come from community members who have been promised economic benefit from the proposed project or are politically allied with the government or traditional authority. "There is division everywhere," an activist from Somkhele said. "I believe there were people who were paid to block us from organizing."[127]

In Somkhele, one community member said, "The mine [operated by Tendele Coal Mining], is not directly threatening people, but they will [intimidate] their employees by telling them that they will lose their jobs if the activism continues."[128]

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[123] Interview with Lebogang N., activist, Fuleni, March 28, 2018.

[124] Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," *Centre for Applied Legal Studies*, April 2018, p. 21ss, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf.

[125] Association for Women's Rights in Development & Women Human Rights Defenders International Coalition, "Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations," pp. 10ss, https://www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf (accessed December 17, 2018).

[126] South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 26.

[127] Focus group interview, Mtubatuba, KwaZulu-Natal, March 29, 2018.

[128] Focus group interview, Mtubatuba, KwaZulu-Natal, March 29, 2018.

Tendele has sought to brand community members opposing its operations as anti-development or as acting against the interest of the community, putting them at further risk of being attacked or threatened. For example, on February 21, 2018, the company's management circulated a memorandum to employees warning that because "the realities of running out of coal have already started affecting the Mine," the "January bonus may very well be the last time that employees will received a production bonus" and that management may soon approach the unions to discuss lay-offs.[129] The company blamed these potential cuts on "a few community members [who] … choose to stand in the way of future development and huge economic and social investment and upliftment in the community." In a letter sent to researchers, the company also asserted some activists "would rather have a devastated economy and no jobs than a responsibly run mine."[130]

Extra-Legal Restrictions on Protest in Mining-Affected Communities

> When the community members apply for a protest [about mining], we call a so-called rapid-response meeting. The goal is to prevent the march from happening.
>
> **– Municipal official from Limpopo, August 8, 2018[131]**

South African municipalities, the local level of government, often seriously limit the rights to protest, freedom of expression, and peaceful assembly of members of mining-affected communities. Research in KwaZulu-Natal, Limpopo, and Northwest provinces found that local municipalities seek to limit or prohibit protest against mines by imposing requirements that have no legal basis.[132] When municipalities reject or delay approving protest applications, communities often protest without approval, which often leads to police violence and arrests of activists.

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[129] Management Brief, Brief No. HR 2018-02, February 21, 2018, on file with researchers.

[130] Email from Tendele Coal to researchers, October 12, 2018.

[131] Interview with Superintendent Law Enforcement, Mtubatuba municipality, KwaZulu-Natal, August 8, 2018. Copy of rapid-response meeting agenda on file with researchers.

[132] There are 278 municipalities in South Africa, comprising eight metropolitan, 44 district, and 226 local municipalities.

Governance Structure

South Africa is a constitutional democracy with national, provincial and local levels of government that "are distinctive, interdependent, and interrelated," and an independent judiciary.[133] The local level of government consists of municipalities, which fall under one of three categories: metropolitan, district, or local.[134] In addition, the South African Constitution recognizes "[t]he institution, status, and role of traditional leadership, according to customary law."[135]

According to article 17 of the South Africa Constitution, "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions." However, community members interviewed for this report struggled with tedious and lengthy protest notification processes created by municipalities that exceed the requirements of South Africa's Regulation of Gatherings Act (RGA) of 1993, the main legislation regulating the constitutional right to protest.

Notification Process as "Permission-Seeking Exercise"

The RGA requires communities to notify the municipality seven days ahead of a planned protest, unless notification is "not reasonably possible."[136] Section 5 of the RGA only allows a municipality to prevent or prohibit a proposed gathering if "there is a threat that [the] gathering will result in serious disruption of vehicular or pedestrian traffic, injury to participants in the gathering or other persons, or extensive damage to property, and that the Police and the traffic officers in question will not be able to contain this threat." If a municipality does not prohibit a protest or otherwise respond to a notice to protest, the protest can proceed legally; the RGA does not require affirmative approval.[137]

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[133] Constitution of South Africa, section 40; South African Government, Structure and functions of the South African Government, https://www.gov.za/node/537988.

[134] Constitution of South Africa, sections 151 and 155; South African Government, Structure and functions of the South African Government, https://www.gov.za/node/537988.

[135] Constitution of South Africa, section 211.

[136] Regulations of Gatherings Act (RGA), South Africa, Section 3, https://www.saps.gov.za/resource_centre/acts/downloads/juta/a205of1993.pdf, para. 2.

[137] Regulations of Gatherings Act (RGA), South Africa, Section 4, https://www.saps.gov.za/resource_centre/acts/downloads/juta/a205of1993.pdf, para. 3.

Despite these guarantees, however, the South African Commission on Human Rights found that "rather than facilitating the right to freely assemble, many local municipalities apply the provisions of the RGA in a manner that restricts its intended implementation."[138] "[T]he notification process [under the RGA] has been interpreted by government authorities as a permission-seeking exercise."[139] In research on the right to protest, Professor Jane Duncan of the University of Johannesburg found that this misapprehension "set the tone for how notifications were dealt with, both by the municipalities and by the police."[140] For example, two municipal government officials interviewed for this report explicitly referenced the need to "approve" or "disapprove" protests, and explained that many protests were "illegal" because they had not been "approved."[141]

As a result of misunderstanding or intentionally misinterpreting the protest regulations, municipalities are illegally or inappropriately denying permits, as reported by the Right to Protest Project.[142] The UN CESCR also expressed concern "at the high number of rejections of protest applications [in South Africa] owing to deliberate restrictions or inadequate understanding of legislation by public officials."[143] The CESCR recommended that South Africa review "the Regulation of Gatherings Act No. 205 (1993) with a view to preventing it from being abused to suppress peaceful protests and ensuring that the Act and its related regulations are adequately enforced by public officials."[144]

Misinterpretation of Section 4 Meeting Requirements

Another obstacle to the ability to exercise the right to protest relates to irregularities around convening of special meetings authorised under Section 4 of the Gatherings Act when local municipal officers believe that the notice to protest warrants further discussion

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[138] South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 19.

[139] Ibid.

[140] Jane Duncan, *Protest Nation: The Right to Protest in South Africa*, (University of KwaZulu-Natal Press, 2016), p. 94.

[141] Interviews with government officials, Lephalale municipality, Limpopo, August 6, 2018; Interviews with Public Participation Officer, Greater Tubatse Municipality, Limpopo, August 3, 2018.

[142] Right to Protest Project, *The State of Protest Report: Right2Protest Project report on the state of protest in South Africa October 2016 – September 2017*, https://www.osf.org.za/wp-content/uploads/2018/09/Right2Protest-Project-The-State-of-Protest-Report.pdf, pp. 9-11.

[143] United Nations Committee on Economic, Social, and Cultural Rights, "Concluding observations on the initial report of South Africa," November 29, 2018, U.N. Doc. E/C.12/ZAF/CO/1, http://www.un.org.za/committee-on-economic-social-and-cultural-rights-concluding-observations-on-the-initial-report-of-south-africa/, para. 12.

[144] Ibid.

with the applicant.[145] Under that provision, if the municipal officer, after consultation with the police, determines that a meeting is "necessary," the officer must, within 24 hours of the protest notification, call a meeting with the convener of the protest, local municipal officials, and police authorities "to discuss any amendment of the contents of the notice and … conditions regarding the conduct of the gathering."[146] If a convener has not been called to a meeting within 24 hours after giving notice to protest, the RGA provides that the protest "may take place."[147]

However, some municipalities incorrectly tell convenors that the protest cannot go ahead without a Section 4 meeting regardless of whether the municipality has called one within 24 hours of receiving notice or has failed to ensure that all the required officials attend the meeting. This happened in Lephalale, an area in the northwest of Limpopo province, where coal mines and Eskom coal-fired power plants contribute to air pollution that threatens the health of local communities.[148] Eskom estimates that emissions from 13 of its 15 coal-fired power stations cause 333 premature deaths per year.[149]

In Lephalale, a community near the Medupi power station, the municipality was notified of several marches in 2016 and 2017. According to the community members interviewed, the municipality did not request a Section 4 meeting within the 24-hour period, yet insisted that protests cannot go ahead without "approval."[150]

Lawyers for the Right2Protest Campaign, a nongovernmental organization, also documented several cases across South Africa, including in the provinces covered by this

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[145] Regulations of Gatherings Act (RGA), South Africa, Section 3, https://www.saps.gov.za/resource_centre/acts/downloads/juta/a205of1993.pdf.

[146] Ibid.

[147] Regulations of Gatherings Act (RGA), South Africa, Section 4, https://www.saps.gov.za/resource_centre/acts/downloads/juta/a205of1993.pdf.

[148] Sipho Kings, "How Eskom's Coal Kills," *Mail and Guardian*, June 20, 2014, https://mg.co.za/article/2014-06-19-power-stations-are-deadly-internal-report-reveals; https://www.pressreader.com/south-africa/saturday-star/20170401/281913067953942 (accessed November 15, 2018).

[149] Gosling, Melanie, 'Eskom estimates 333 people like to die every year from coal power station emissions," *Fin24,* November 22, 2018, https://www.fin24.com/Economy/Eskom/eskom-estimates-333-people-likely-to-die-every-year-from-coal-power-station-emissions-20181122.

[150] Interview with Thabo R., activist, Mokopane, Limpopo, April 4, 2018; Interview with Andries M., activist, Lephalale, Limpopo, August 5, 2018.

report, where the municipality delayed the decision about the protest because the police did not attend the scheduled Section 4 meeting.[151]

In some instances, companies have also argued that a protest could not go ahead because of the absence of police officials at the Section 4 meeting. Such a situation arose at Tharisa mine in Marikana, operated by Tharisa Group. The area around Rustenburg in Northwest province is one of the areas with the highest density of mines, and experiences many of the mine-related environmental and social challenges that come with such intense activity.[152] At Tharisa mine community members are concerned that the large influx of male workers from across the country is threatening health care because health services to meet the needs of the increased population and workers are not sufficient. For example, one woman said, "We have high HIV rates here, but people don't have access to treatment. It's amazing because we are surrounded by big wealthy mines."[153] People living in informal settlements in the area are particularly concerned about the significant harms caused by the pervasive dust and noise from the mines.[154] At time of writing, the company had not responded to these allegations.

The Marikana Youth Development Organization and the Right2Know Campaign applied for a protest to occur on August 16, 2018 – the sixth anniversary of the Marikana massacre. On the eve of the planned march, Tharisa mine management wrote the applicants, telling them to cancel the protest because the South African Police Service was not present at the Section 4 meeting.[155] When challenged in court, the judge decided that the march could go ahead.[156]

The Right2Know Campaign's Murray Hunter, who has assisted communities across the country with protest applications, said, "The Section 4 meetings are only supposed to

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[151] Telephone interview with Stanley Malematja, Right2Protest Project, August 16, 2018.

[152] Cairncross, E., Kisting, S., "Platinum and Gold Mining in South Africa: The Context of the Marikana Massacre," *New Solut.,* February 2016, 25(4):513-34; doi: 10.1177/1048291115622027, https://www.ncbi.nlm.nih.gov/pubmed/26721787.

[153] Focus group interview, Marikana, Northwest province, August 6, 2018.

154 Focus group interview, Marikana, Northwest province, August 6, 2018.

155 Letter to Marikana Youth Development Organization and the Right2Know Campaign, August 15, 2018, on file with researchers.

156 High Court of South Africa, North West Division, Mahikeng, Case No: UM 126/18, August 16, 2018, on file with researchers.

happen when there is a specific security risk. But we have seen how it has been abused by municipalities [to keep people from protesting]."[157]

Extra-Legal Requirement of Notifying or Receiving Consent of the Mine or Traditional Authorities

Nothing in the Regulation of Gatherings Act requires protestors to attempt to engage with the mining company to resolve their grievances before a protest, or to notify the company about the planned protest. Nevertheless, municipalities have required conveners to provide documentation of such efforts before protesting. For example, municipal officers interviewed in Limpopo and KwaZulu-Natal stated that communities must directly engage with the mining company before applying for a march related to a particular grievance.[158] One officer argued that notification was a legal requirement, claiming that "[t]he [Gatherings] Act says that it is the responsibility of the convener to notify the mine."[159] While it may be a reasonable expectation of companies to be notified about any planned protest near their operations by the police or municipality, this is not a legal obligation for the conveners. Some municipal officials acknowledged that notification to the company is an extra-legal requirement imposed by the municipality. One official from Limpopo said: "The requirement to contact the mine is coming from the municipality. We do it so we are not getting blamed by the mine."[160]

Mining companies have also requested that communities notify or even engage with them ahead of their planned protest, wrongfully claiming that this was a requirement under the law.[161] For example, Tendele Coal company representatives in Somkhele said that the conveners need to engage with them on their grievances prior to applying for a protest at the municipality.[162]

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[157] Telephone interview with Murray Hunter, Right2Know, July 23, 2018.

[158] Interview with Superintendent Law Enforcement, Mtubatuba municipality, KwaZulu-Natal, August 8, 2018; Interview with Superintendent for Traffic, Mokopane municipality, Limpopo, August 2, 2018; Interview with Public Participation Officer, Greater Tubatse Municipality, Limpopo, August 3, 2018.

[159] Interview with government officials, Lephalale municipality, Limpopo, August 6, 2018; Interview with Public Participation Officer, Greater Tubatse Municipality, Limpopo, August 3, 2018.

[160] Interview with Superintendent for Traffic, Mokopane municipality, Limpopo, August 2, 2018.

[161] Letter to Marikana Youth Development Organization and the Right2Know Campaign, August 15, 2018, on file with researchers.

[162] Email from Tendele Coal to researchers, October 12, 2018.

Municipalities have sometimes disapproved protests if the mining company has indicated an intention to address the protesters' grievances. For example, one official from a municipality in Limpopo's platinum belt said, "We disapprove the march if the issue has been addressed. For example, if the mine commits to addressing the grievance."[163] However, nothing in the RGA supports such a practice, and the right to protest is not conditioned on a government official's determination whether the protester's concern is being addressed; the right exists independent of the content of the protest.

Some municipalities, such as Mokopane and Greater Tubatsein Limpopo province, also require protest applicants to show the written consent of the mining company to receive a so-called memorandum, a document listing the demands of the community members which is typically handed over to mining companies, as a condition for approving a march.[164] Again, nothing in the RGA supports such a requirement. Even if the rationale for seeking such an assurance may be to prevent frustration for the protesters, researchers have identified it as a "censorship device, where those who are being marched against can squash the protest simply by refusing to accept the memorandum."[165]

In some areas of North West province where traditional leadership structures are particularly powerful, municipalities have also required the consent of the traditional leader as a precondition for a protest, although there is no basis in law for such a demand. For example, in 2015, when the Bafokeng Land Buyers Association, a local human rights organization based in Rustenburg, applied for a protest on behalf of community members near Bafokeng mine, the municipality told them that they needed a letter from the chief authorizing the protest.[166] Such a requirement is particularly problematic because, as explained by Eric Mokuoa, a campaigner who works with many mining-affected communities across South Africa, "traditional leadership plays a strong role regarding the suppression of protest" by influencing municipalities in their decisions about protest applications.[167]

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[163] Interview with Public Participation Officer, Greater Tubatse municipality, Limpopo, August 3, 2018.

[164] Interview with Superintendent for Traffic, Mokopane municipality, Limpopo, August 2, 2018; Interview with Public Participation Officer, Greater Tubatse Municipality, Limpopo, August 3, 2018.

[165] Jane Duncan, *Protest Nation: The Right to Protest in South Africa*, (University of KwaZulu-Natal Press, 2016), p. 94-95.

[166] Interview with Thusi Rapoo, Bafokeng Land Buyers' Association, Rustenburg, Northwest province, August 7, 2018.

[167] Interview with Eric Mokuoa, Bench Marks Foundation, Johannesburg, August 6, 2018.

Misinterpretation of Department of Cooperative Governance and Traditional Affairs' Guidance

Municipalities in mining-affected communities are also guided in their practices concerning protest by instructions from South Africa's Department of Cooperative Governance and Traditional Affairs (COGTA), the ministry responsible for ensuring that all municipalities perform their basic responsibilities and functions. In 2012, in response to increasing protests around the country, COGTA issued "guidelines for managing service delivery protests and public marches," stating that, "while some of the issues are genuine[,] … political and community dynamics and organisations of civil society … have exploited the situation to their advantage."[168] COGTA's guidelines to all municipalities were intended to find "speedy solutions to the socio-economic conditions that bedevil the efficient and effective functioning and service delivery." The guidelines state that municipalities should clearly communicate "the criteria to be considered for approval […for] public protests," portraying protest notifications as a permission-seeking exercise.[169] The Right2Know Campaign observed that municipal officials have misinterpreted this recommendation to justify the prohibition of protests.[170]

Other Extra-Legal Practices

Municipal officials acknowledged other extra-legal practices that present considerable logistical challenges for the communities. For example, the Mtubatuba local municipality has required protest organizers to complete notification forms in person at the municipal buildings, even though the RGA does not require such forms or that notice happen in person. This requirement makes protests difficult to organize because, as one Limpopo official explained: "It is very far for people … to come to the municipality to apply for a march."[171]

The preceding discussion shows how the extra-legal restrictions applied by municipalities act to restrict or prevent communities from exercising their constitutional right to peaceful protest and freedom of expression. Because of these extra-legal requirements, fewer protestors notify the municipality of a planned protest. "The increase of unlawful protest could also be the result of the heightened requirements for successful applications," said Murry Hunter from the Right2Know Campaign.[172]

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[168] Department for Cooperative Governance and Traditional Affairs, Circular, June 19, 2012, on file with researchers.

[169] Ibid.

[170] Telephone interview with Murray Hunter, July 23, 2018.

[171] Interview with Superintendent Law Enforcement, Mtubatuba municipality, KwaZulu-Natal, August 8, 2018.

[172] Telephone interview with Murray Hunter, July 23, 2018.

Criminalization of Protest

When protesters do not or cannot comply with the extra-legal requirements imposed by municipalities, legal protests are deemed "illegal," and organizers are often arrested or harassed on that basis. In fact, some municipal officers interviewed for this report said that they are trying to hold the conveners of what they consider "illegal marches" – i.e., protests carried out without fulfilling the notification requirements under the RGA – criminally accountable.[173] As one police officer said, "During the illegal march, we try to find out who the leaders are. We will always arrest three people there and fine them. We want to arrest the culprits."[174]

Such criminalization is not supported by South African law. Although the RGA criminalizes protests that do not follow the notification process by subjecting conveners of a "gathering in respect of which no notice … was given" to fines of up to R20,000 (US$1,439) or imprisonment, the South African Constitutional Court has held such criminalization unconstitutional.[175] In a November 2018 decision, the court explained that:

> [M]ultiple international legal bodies have condemned the categorical criminalisation of the failure to comply with notice requirements [for protests]. Instead, the apparent standard required under international law is that every infringement of the right to freedom of assembly must be linked on the facts to a legitimate purpose. Thus, restrictions that are blanket in nature – that criminalise gatherings "as an end in itself" – invariably fall foul of being legitimate. Such restrictions will encroach on the right without linking the restriction to a legitimate purpose in every instance of encroachment. To avoid this, restrictions need to be context and fact-sensitive.[176]

As a result of the decision, the lack of notification can no longer be prosecuted as a criminal offense under Section 12, paragraph 1(a) of the RGA. The court deferred to the

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[173] Interview with Public Participation Officer, Greater Tubatse Municipality, Limpopo, August 3, 2018.

[174] Interview with Superintendent for Traffic, Mokopane municipality, Limpopo, August 2, 2018.

[175] Mlungwana and Others v. The State and Another, Constitutional Court of South Africa, Case CCT 32/18, ZACC 45, 2018, para 2.

[176] Ibid.

legislature to decide whether to amend the law to include other penalties that are less restrictive, such as administrative fines.[177] Although the decision of the Constitutional Court is a big step towards protecting protesters' rights, it does not address many of the other actions municipalities are taking to stifle protest or, as discussed below, the use excessive and unlawful force by police to break-up peaceful protests.

Crackdown on Protest

> The police often arrest people during protest because they have to be seen doing something. They are happy to arrest, I don't know why. They are probably chasing targets. The more cases they have, the more resources they get.
>
> **– Public prosecutor in KwaZulu-Natal, August 2018[178]**

Police misconduct, including excessive use of force and arbitrary arrest, has long been a concern in South Africa.[179] The attack on the rights to protest and free speech is not limited to mining areas.[180]

In its 2018 report, the South African Human Rights Commission observed that protestors "demanding the delivery of housing, education, and basic services such as water, sanitation and electricity, are shot at by the police with water cannons, tear gas, stun grenades, and rubber bullets."[181] According to the Commission, such conduct has contributed to the "perpetual exclusion of poor communities [that] has resulted in [their] inability…[to] influence social change that prioritises human rights."[182]

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[177] Ibid.

[178] Interview with public prosecutor, KwaSane, KwaZulu-Natal, August 8, 2018.

[179] Human Rights Watch, *South Africa – Southern Africa: A Year of Little Rights Progress*, January 29, 2015, https://www.hrw.org/news/2015/01/29/southern-africa-year-little-rights-progress.

[180] South African Human Rights Commission, "National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa," p. 25, https://www.sahrc.org.za/home/21/files/SAHRC%20Mining%20communities%20report%20FINAL.pdf.

[181] South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 19.

[182] Ibid., p. 2.

Several organizations and human rights bodies have found that police have used excessive force and baseless criminal charges to clamp down on protests. The SAHRC has noted that municipalities and police create extra-legal and arduous obstacles that "in many instances [have] led to…violating the right of [human rights defenders] to freely assemble and resulting in unwarranted violent encounters with the [police]."[183] The Right to Protest Project has also observed that malicious arrests and improper prosecutions are restricting the right to protest in South Africa.[184]

A shortage of police officers and inadequate training in policing peaceful protests may be some of the drivers of police violence. "The police on the frontlines are often unable to deal with unrest. They are not well trained," Eric Mokuoa, of Bench Marks Foundation, a non-profit, faith-based organization owned by the churches in South Africa, said.[185] In a recent report on South Africa's compliance with its international human rights obligations, the UN CESCR recommended that South Africa ensure "that law enforcement personnel are appropriately trained so as to prevent the excessive use of force against protesters."[186]

Several people interviewed for this report described incidents in which police had arbitrarily and violently shut down protests or arrested people. Some community members felt unsafe participating in protests based on past incidents of excessive force and violence. In some cases, authorities have not investigated incidents of police violence or investigations have been excessively delayed.

Violence by Police and Private Company Security Forces During Protest

Police have used violence, including teargas and rubber bullets, to suppress protest in mining-affected communities. These tactics have sometimes been used without warning or justification, or where the risk of injury to protestors is out of proportion to the threat they pose, and have occasionally caused injury or death.

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[183] Ibid., p. 21.

[184] Right to Protest Project, *The State of Protest Report: Right2Protest Project report on the state of protest in South Africa October 2016 – September 2017*, https://www.osf.org.za/wp-content/uploads/2018/09/Right2Protest-Project-The-State-of-Protest-Report.pdf, pp. 9-11.

[185] Interview with Eric Mokuoa, Bench Marks Foundation, Johannesburg, August 6, 2018.

[186] United Nations Committee on Economic, Social, and Cultural Rights, "Concluding observations on the initial report of South Africa," November 29, 2018, U.N. Doc. E/C.12/ZAF/CO/1, http://www.un.org.za/committee-on-economic-social-and-cultural-rights-concluding-observations-on-the-initial-report-of-south-africa/, para. 12.

In September 2018, when the community in Xolobeni protested the visit of Minister of Mineral Resources Gwede Mantashe, the South African Police Services fired tear gas and arrested people.[187] Amnesty International called for an investigation of "excessive force" by the police.[188]

In Marapong village near Lephalale, the police shut down a protest on November 30, 2017. Hundreds of people had gathered in the village near Medupi power station and blocked one of the lanes of the road. One of the protest organizers said the police commander refused to speak with the protesters when they approached him and he claimed that the police commander gave instructions to his unit to "shoot those dogs."[189] The police hit several people with rubber bullets.[190]

In another community, near Royal Bafokeng Platinum Mine in Rustenburg, an activist was shot dead in a January 2018 protest. The mining company claimed that the shooting was from within the protestors, but the police investigation has not revealed any information.[191]

Private security forces have also used violence to suppress protest, in the platinum and chrome mines in and around communities near Burgersfort and Mokopane, Limpopo Province. Many of these operations have forced residents to relocate because mining companies claimed the land previously used for farming or housing by community members. The communities near Sefateng and Mecklenburg mines have also complained that the company is mining on their fields without paying any compensation.[192] According to residents, mine blasting has created loud noise and caused rocks from mine explosions to fall into people's gardens.[193] "They are mining on our farms … and blasting next to our

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[187] Steyn, L., "Xolobeni Dines Mining Dispute Still Rages On," *Business Live,* October 2, 2018, https://www.businesslive.co.za/bd/companies/mining/2018-10-02-xolobeni-dunes-mining-dispute-still-rages-on/.

[188] Amnesty International Press Statement, "SAPS Must Investigate Events at Xolobeni without Delay," September 25, 2018, https://amnesty.org.za/saps-must-investigate-events-at-xolobeni-without-delay/.

[189] Interview with Andries M., activist, Lephalale, Limpopo, August 5, 2018.

[190] Interview with Andries M., activist, Lephalale, Limpopo, August 5, 2018.

[191] "Man shot dead during protest at Rustenburg mine," *City Press,* January 12, 2018, https://city-press.news24.com/News/man-shot-dead-during-protest-at-rustenburg-mine-20180112-2 (accessed July 28, 2018).

[192] Interview with Junis M., Ga Phasha community, Limpopo, August 4, 2018.

[193] Interview with Morele S., Ga Mampa, Limpopo, April 2, 2018; interview with Junis M., Ga Phasha community, Limpopo, August 4, 2018.

houses," one community member said.[194] Sefateng Chome mine management denied these allegations.[195]

On August 17, 2015, 600 members of the Burgersfort and Mokopane communities gathered to peacefully protest harms caused by the Mecklenburg mine, owned by Chromex Mining company (Pty) Ltd and Afarak. According to an investigation by the Centre for Environmental Rights, the protesters, led by Eric M., dispersed peacefully after failing to convince security personnel to allow them to present their grievances to the mine management. As they were leaving, however, without any threat or provocation, the security personnel fired rubber bullets from close range at the backs of people leaving, injuring, according to activists interviewed for this report, two people, William M. and Tebogo S.[196] Tebogo said he was shot at his left leg, just above the kneecap.[197] At time of writing, the company had not responded to these allegations. Tebogo opened a case at the Mecklenburg police station. He reported that the police called him and told him he needed to come to the police station to amend his statement. He reports that when he arrived, "they locked me up because they said I committed public violence."[198]

On July 12, 2017, police and company security forces responded violently to another community protest near the Sefateng Mine that community members say was peaceful. Activists told researchers that several hundred people had gathered at the two gates of the mine in the early morning hours. "We were in front of the gate singing…but there was still space for the mining cars to pass through," said a community member who was later hit by a rubber bullet.[199]

Matime P. reported that he and 20 to 30 other people were waiting at the mining company gate for a meeting with mine-company management on the same morning.[200] After the mining officials entered the gate, the police and company security forces approached the

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[194] Interview with David M., Moroke, Limpopo, August 4, 2018; Centre for Environmental Rights, "CER Attorneys Secure Withdrawal of Charges Against Environmental Justice Activists," February 17, 2016, https://cer.org.za/news/cer-attorneys-secure-withdrawal-of-charges-against-environmental-justice-activists.

[195] Letter from Gerard Blaauw, March 28, 2019, on file with researchers and available on Human Rights Watch's website.

[196] Centre for Environmental Rights, Representations for possible withdrawal in terms of Section 6(a) of the Criminal Procedure Act, No. 51 of 1977, Mecklenburg Case No. 101/08/2015, on file with researchers.

[197] Picture of scar on file with researchers.

[198] Interview with Tebogo S., Ga-Mampa community, Limpopo, April 2, 2018.

[199] Interview with Ruben M., Moroke, Limpopo, August 4, 2018.

[200] Interview with Matime P., Ga Phasha community, Limpopo, April 2, 2018.

community members. "I heard someone say 'Shoot,'" reported Matime.[201] He was injured by a rubber bullet hitting his arm.[202] After he ran away, he "found one person that was shot dead."[203]

Thirty-two-year-old Tinas M. was killed during these interactions under unclear circumstances. Ruben M., who was running away behind Tinas, said he recalled seeing him go down after being shot in the left side of the back. "By that time we were about 200 meters away from the gate."[204] According to the company management, the protest was not peaceful and some protesters were carrying arms.[205] The company said it had obtained an interdict against some of the protesters, preventing them from coming within a 500 meter radius of the mine, and that the SAPS investigation into the fatal shooting revealed that a "SAPS officer fired the fatal shot since the SAPS members' lives were endangered." The management of Sefateng Chrome mine argued that none of their security service providers have faced charges for excessive use of force, disciplinary or criminal prosecutions.[206]

In addition to police and company security force violence, companies sometimes attempt to intimidate protesters by taking pictures of them. Community members in Newcastle said that a company official was taking photos of the protesters during an August 2016 protest. According to the community members, he posted the pictures on the building wall inside the mine, to let workers know those against them.[207] "During the protest [the manager] was there and took photos. One of the workers told him who was who," a woman recalled.[208]

Inadequate Investigations of Police Violence

Police investigations into the killings or injury by police documented in this report are moving very slowly or have not taken place at all. For example, after Tinas M. was killed during a protest near Sefateng mine in July 2017, his mother reported that the Independent

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[201] Ibid.
[202] Ibid.
[203] Ibid.
[204] Interview with Ruben M., Moroke, Limpopo, August 4, 2018.
[205] Letter from Gerard Blaauw, March 28, 2019, on file with researchers.
[206] Letter from Gerard Blaauw, March 28, 2019, on file with researchers.
[207] Focus group interview, Newcastle, KwaZulu-Natal, March 26, 2018.
[208] Interview with Poppy X., Newcastle, KwaZulu-Natal, March 26, 2018.

Police Investigative Directorate from Polokwane "came to talk to us and take all the guns for testing."[209] As of November 2018, the investigating unit had not updated her about its findings.[210] Lekgale is disappointed: "If somebody harmed you, they need to come back and say sorry. But [the police] did not do that. Probably they don't care about him. It's as if they had killed a dog."[211] Tinas's sister has tried to follow up with the relevant police unit and received some limited information. "They don't take initiative," she said. "It is always me who has to follow up."[212]

Arbitrary Arrests

Several people interviewed for this report described being arrested by police during protests or other gatherings related to the mines, often on baseless charges that were later dropped. Some were jailed for several days on grounds such as "public violence" or "malicious damage to property" and were later released without charge.

For example, on August 17, 2015, Eric M., was arrested and detained at the Mecklenburg police station on an alleged charge of malicious injury to property following a clash between the police and community members during a protest against the Chromex mine.[213] The following day, two other community members who were injured by rubber bullets during the protest were arrested and detained on the same charge. "They locked me up because of alleged public violence," Tebogo recalled.[214] Security personnel had told police that community members threw stones at them, damaged one of the company vehicles, and injured one of their colleagues.[215] The activists denied the allegations. Through the representation of an attorney and money collected in the community, they were released on bail on August 18, 2015. The charges were eventually dropped because of lack of evidence.[216]

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[209] Interview with Lekgale M., Ga Phasha community, Limpopo, April 2, 2018.

[210] Ibid.

[211] Ibid.

[212] Interview with Kgaogelo M., Ga Phasha community, Limpopo, April 2, 2018.

[213] Centre for Environmental Rights, Email to MEJCOM members, August 21, 2015, on file with authors.

[214] Interview with Tebogo S., Ga-Mampa community, Limpopo, April 2, 2018.

[215] Centre for Environmental Rights, "CER Attorneys Secure Withdrawal of Charges Against Environmental Justice Activists," February 17, 2016, https://cer.org.za/news/cer-attorneys-secure-withdrawal-of-charges-against-environmental-justice-activists; CER Representations for Possible Withdrawal in Terms of Section 6(a) of the Criminal Procedure Act, No. 51 of 1977, on file with researchers.

[216] Centre for Environmental Rights, Representations for possible withdrawal in terms of Section 6(a) of the Criminal Procedure Act, No. 51 of 1977, Mecklenburg Case No. 101/08/2015, on file with researchers.

In KwaZulu Natal, community members interviewed for this report also reported that they were arbitrarily arrested when gathering in proximity to the mine.

In Somkhele, near Tendele coal mine, police arrested 16 people on November 14, 2017, as they gathered before the mine's gate.[217] Police jailed seven of them for a weekend, before dropping all the charges.[218] In an email to researchers, the company wrote that "people were arrested in an illegal protest action when they blocked the access to the Mine" and that "[c]ommunity leaders and Mine Management jointly agreed that the transgressors would perform community service and the case was withdrawn."[219] Commenting on protests more generally, the company said:

> Protestors can be very violent and attack innocent bystanders, i.e. set alight vehicles, trucks and or equipment. Many protest actions are illegal in nature and in many instances the Mine is used as leverage to serve the interests of the protestors in matters such as service delivery, housing, unemployment etc. None of which are the responsibility of the Mine, but rather that of government/municipalities. Protests on public roads influence production, transport and also impede against OUR human rights.[220]

According to a prosecutor with knowledge of the Tendele case, most of the charges brought by police against environmental activists protesting against the mine are not taken to court because they lack substance to support prosecution.[221] "If they know you are outspoken, then you get arrested. Some people were arrested just for standing next to a coal heap," he said.[222]

In Lephalale, according to a community activist, the police arrested five community members, including activists identified as protest conveners, on the day after they shut down what they considered an "illegal march" in November 2017.[223] The activists were

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[217] Letter from Youens Attorneys to Public Prosecutor, December 6, 2017, on file with researchers.
[218] Interview with Kirsten Youens, lawyer for the arrested community members, Durban, KwaZulu-Natal, March 27, 2018.
[219] Email from Tendele Coal to researchers, October 12, 2018.
[220] Email from Tendele Coal to researchers, October 12, 2018.
[221] Interview with Public Prosecutor, KwaSane, KwaZulu-Natal, August 8, 2018.
[222] Ibid.
[223] Interview with Andries M., Lephalale, Limpopo, August 5, 2018.

granted bail at the initial court hearing and on February 6, 2017, all the charges were dropped.[224] One of the prosecutors at Lephalale's Magistrate Court commenting on the case said: "The police practice of arresting conveners does not make sense. The arrest for convening does not make sense."[225]

Use of Courts to Harass Activists

South African courts have played an important role in silencing opposition to mining projects. Some companies have tried to intimidate activists through the court system by filing defamation lawsuits against nongovernmental groups, asking for cost penalties, or using court interdicts to prevent protest.

Strategic Litigation Against Public Participation

Mining companies sometimes use legal tactics to silence opposition, including filing defamation lawsuits against activists. Such suits, known as "strategic litigation against public participation" or "SLAPP suits," seek to censor, intimidate, and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition. SLAPP suits can also take an emotional toll on the activists named in lawsuits. These tactics impose a personal, financial, and reputational cost on mining opponents.[226] In a 2017 report on SLAPP suits, the United Nations Special Rapporteur on freedom of assembly wrote that they pose significant threats to the rights of activists to freedom of expression, assembly, and association.[227]

In 2017, Mineral Sand Resources (MSR) brought a defamation suit against two attorneys from the Centre for Environmental Rights (CER) and a local activist for statements they made during a lecture at the University of Cape Town's Summer School concerning the company's Tormin mineral sands mine, located on the west coast of South Africa.[228] MSR

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[224] Ibid.

[225] Interview with Public Prosecutor, Lephalale, Limpopo, August 6, 2018.

[226] South African Human Rights Commission, "Report on Human Rights Defenders," April 2018, https://www.sahrc.org.za/home/21/files/Human%20Rights%20Defenders%20Publication.pdf, p. 26.

[227] Ciampi, Annalisa, "SLAPPs and FoAA Rights," United Nations Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 2010, www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx.

[228] Centre for Environmental Rights, "CER to resist attempts by Australian mining company to intimidate attorneys and activist," May 5, 2017, https://cer.org.za/news/cer-to-resist-attempts-by-australian-mining-company-to-intimidate-attorneys-and-activists.

and its parent company, Mineral Commodities Limited (MCL), and/or directors or employees of these companies, have active defamation suits against a total of eight activists and lawyers in South Africa in relation to remarks made concerning MSR's Tormin Mine or MCL's Xolobeni Mine. In total, the two companies are demanding R9,850,000 (US$685,052) from the eight activists. "The impact of SLAPPs on small NGOs only becomes apparent over time," said Christine Reddell, former attorney at CER and one of the defendants in the lawsuit. "No matter what the outcome of the lawsuit will be, we have already spent too much time and resources on our legal defence."[229] CER announced that it will strenuously defend the lawsuit, which seeks R1,250,000 (US$89,936) in damages.[230]

Several countries and sub-national governments have adopted legislation or procedural rules to protect against SLAPP suits, including in the United States, Canada, Australia, and the Philippines.[231] Under a strong California law, if the defendants in a SLAPP suit show through a "special motion" that the cause of action against them arises from protected activity, the court will shift the burden of proof to the plaintiff to show a probability of prevailing on the claim. The law defines protected activity broadly:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[232]

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[229] Interview with Christine Reddell, former attorney at CER, Cape Town, Western Cape, March 23, 2018.

[230] Ibid.

[231] See California anti-SLAPP law of 2009, Code of Civil Procedure sections 425.16 through 425.18; Australia, Protection of Public Participation Act 2008; Canada, Ontario, Protection of Public Participation Act, 2015, S.O. 2015, c. 23 - Bill 52; Philippines, Supreme Court Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Part 2, Rule 6. https://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html.

[232] California Code of Civil Procedure, Section 425.16, 1971, http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=425.16.&lawCode=CCP.

Should the plaintiff fail to meet its burden, the court will dismiss the suit and award attorney fees and costs to the defendants.[233]

The Supreme Court of the Philippines' Rules of Procedure for Environmental Cases also affords protection to defendants of a SLAPP suit. If a defendant asserts that a case is a SLAPP suit, the court will hold a hearing requiring that "the party filing the action assailed as a SLAPP shall prove by preponderance of evidence that the action is not a SLAPP and is a valid claim…."[234]

South Africa should enact similar legislation or rules.

Crippling Cost of Financial Penalties

Access to the courts is essential to the ability of communities to defend themselves and their rights, and of nonprofit organizations to support them. Unfortunately, the risk of potentially crippling cost penalties even when a case is non-frivolous nor vexatious has a serious chilling effect on this important access to court.

One recent example is an attempt by members of the Somkhele community and Global Environmental Trust to challenge the fact that the Tendele mine was operating without an environmental authorization, and as such was harming their constitutional right to a healthy environment. The Kwazulu-Natal High Court dismissed the plaintiffs' constitutional claim but, notwithstanding no finding that the case was frivolous, ordered them to pay the company's legal costs.[235] The applicants filed an application for leave to appeal on December 11, 2018.[236]

The Somkhele ruling on costs is inconsistent with a previous decision of South Africa's Constitutional Court. In *Biowatch Trust v. Registrar Genetic Resources and Others*,[237] the Constitutional Court held that a losing non-state litigant challenging the constitutionality

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[233] Ibid.

[234] Philippines, Supreme Court Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Part 2, Rule 6, https://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html.

[235] Global Environmental Trust and Others v. Tendele Coal Mining (Pty) Ltd and Others, No. 11488/17P, ZAKZPHC 62; 2018.

[236] Application on file with researchers.

[237] Biowatch Trust v. Registrar Genetic Resources and Others, South Africa Constitutional Court, (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009), http://www.saflii.org/za/cases/ZACC/2009/14.pdf.

of a law or of government conduct should be "shielded from the costs consequences of failure" unless the litigation was frivolous.[238] The Court explained that this rule "diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights," which is important because "each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy."[239] Section 32(2) of the National Environmental Management Act provides a similar cost rule.[240]

Despite the protections afforded to plaintiffs in *Biowatch Trust*, if the High Court's decision in *Somkhele* is allowed stand on appeal it may deter communities from litigating claims against mining companies in fear of adverse costs judgments.

Impacts of Court Interdicts

Mining companies have sometimes obtained court interdicts or restraining orders against individual activists, who rarely have legal counsel to defend their rights in court.[241] In some cases, municipalities have argued that such court orders prevented individual activists or even the entire community from engaging in any protests and were used by mining companies to further intimidate activists.

For example, in August 2017, a court granted the mine operator at Tharisa mine its request for an interdict, ordering four community members to refrain from "encouraging or participating in any unlawful protest action, or marching to and barricading any of the access roads."[242] The court order was only served on the respondents via Multimedia Messaging Service, so that Mashamaite R., one of the community members affected, was

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[238] Ibid. para. 23.

[239] Ibid.

[240] National Environmental Management Act of South Africa, Section 32(2), 1998: "A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

[241] Gumboh, Esther, et al., "Victimisation Experiences of Activists in South Africa," Centre for Applied Legal Studies, April 2018, p. 21ss, https://www.osf.org.za/wp-content/uploads/2018/09/Centre-for-Applied-Legal-Studies-Victimisation-Experiences-of-Activists-in-South-Africa-report.pdf. This research was conducted in five provinces – Gauteng, KwaZulu-Natal, the Eastern Cape, the Western Cape and Limpopo.

[242] Court order from August 8, 2017, confirmed on October 5, 2017, on file with the researchers.

unable to access the file on his cell phone and remained unaware of the court order.[243] In September 2017, he notified the municipality of a planned protest, listing himself as one of the conveners. The Rustenburg municipality prohibited the protest, arguing that Mashamaite's being listed on the court order meant that the protest was prohibited.[244] In December 2017, Mashamaite learned that mine management had laid a criminal charge against him on the ground that the protest application had violated the court order. Although the charges were later dropped in recognition of the lack of proper service of the initial order, the use of the court order has intimidated activists like him. "The court interdict is like a cloud over our head," Mashamaite said.[245]

Social Media Attacks

Some mining companies and their supporters are also using social media to threaten and attack activists and organizations opposing mines. For example, Praveer Tripathi, the senior-vice president of Atha Africa Ventures has attacked, on Twitter, the Centre for Environmental Rights and its attorneys, as well as its client NGOs, for their role in a court challenge to the water use license and environmental authorization of Atha's Yzermyn underground coal mine in Mpumalanga province.[246] In a June 29, 2018, tweet, Tripathi (who tweets as @praveer65) said, "If these treasonous NGO's have any self respect left, they must apologize to the Nation for their treacherous and anti national actions. Love that the community will ask Parliament for an investigation into their anti national activities. The evidence is overwhelmingly strong."[247] On September 6, 2018, he tweeted, "For Heavens sake, could the professional liars of Centre of Environmental Rights and their liar

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[243] Telephone interview with Mashamaite R., July 2, 2018; interview with Thandeka Chauke, Lawyers for Human Rights, Pretoria, March 20, 2018.

[244] Interview with Thandeka Chauke, Lawyers for Human Rights, Pretoria, March 20, 2018.

[245] Interview with Mashamaite R., Marikana, Northwest province, August 6, 2018.

[246] See, e.g., GroundUp, "Twitter abuse continues in Mabola Coal Mine saga," The Daily Maverik, October 20, 2018, https://www.dailymaverick.co.za/article/2018-10-29-groundup-twitter-abuse-continues-in-mabola-coal-mine-saga/; John Yeld, "Farmer gets death threat from radical economic transformation lobbyist," The Citizen, July 24, 2018, https://citizen.co.za/news/south-africa/1985655/farmer-gets-death-threat-from-radical-economic-transformation-lobbyist/.

[247] Tripathi, Praveer, @praveer65, "If these treasonous NGO's have any self respect left, they must apologize to the Nation for their treacherous and anti national actions. Love that the community will ask Parliament for an investigation into their anti national activities. The evidence is overwhelmingly strong." 12:52 PM, June 29, 2018. Tweet, https://twitter.com/praveer65/status/1012755677150924805.

in chief @melissafourie explain to the @Moneyweb and people how Limpopo river would be polluted? Abominably shocking untruths from development destroyers! Shame."[248]

In response to CER's raising concerns about Mr. Tripathi's tweets, the Minerals Council South Africa wrote on September 25, 2018:

> The Minerals Council notes your concerns about inflammatory language. Indeed, we are often perturbed at the inflammatory language used against the industry, too, by people and groups expressing grievances against the industry. We would join you in appealing that engagements between the industry and its stakeholders about differences should be conducted in a considered and mutually respectful manner.[249]

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[248] Tripathi, Praveer, @praveer65, "For Heavens sake, could the professional liars of the Centre of Environmental Rights and their liar in chief @melissafourie explain to the @Moneyweb and people how Limpopo river would be polluted? Abominably shocking untruths from development destroyers! Shame" 8:45 AM, September 6, 2018. Tweet, https://twitter.com/praveer65/status/1037698400827916294.

[249] Letter from the Mineral Council to CER, "Your request to the Minerals Council South Africa regarding Atha-Africa Ventures," September 25, 2018, on file with researchers.

Despite this promise, on October 15, 2018, Tripathi tweeted: "Blatant blackmail by the foreign funded anti development anti people Centre for Environmental Rights to the MP's threatening legal action to stop development in SA. This Civil Society is a danger to the society and not so civil."[250]

CER has published a statement on its website addressing harassing social media posts, asserting that it will not "tolerate…abusive, racist, sexist messages, and threatening messages that are aimed at intimidating our staff, and our partners. Henceforth, any

[250] Tripathi, Praveer, @praveer65, "blatant blackmail by the foreign funded anti development anti people Centre for Environmental Rights to the MP's threatening legal action to stop development in SA. This Civil Society is a danger to the society and not so civil. @MiningWeekly." 7:16 PM, October 15, 2018. Tweet, https://twitter.com/praveer65/status/1051990120692367361.

individual or company who engages in this kind of behaviour will be blocked from our social media platforms, and reported to the appropriate authorities."[251]

Environment of Fear

The threats to personal security, restrictive interpretation of protest laws, police and private security violence, social media harassment, and other conduct against community rights defenders and environmental groups described above have contributed to an environment of fear in some mining-affected communities. For some, this has meant reducing or stopping their activism. For example, after being near someone who was shot at a march, Matime P. from Limpopo said he has been "afraid to go to marches."[252] Junis M., another activist from the same community, did not participate in protests at all out of fear for her life.[253] The community in Lephalale has also refrained from organizing any protest since the last incident of arbitrary arrest in February 2017.

Although personal threats have not caused most of the activists interviewed for this report from stopping their activism, most said they are taking more precautions for their own security or the security of their families.[254] This is yet another cost that limits activists' ability to exercise their rights to freedom of opinion, expression, association, and assembly.

The combination of abuses at the community and civil society group level, as documented in this report, may also take its toll on the broader environmental justice movement in South Africa. Community activists increasingly rely on the support of nongovernmental groups to defend their rights related to freedom of expression, peaceful assembly, and protest. In several of the cases documented in this report, community members received legal and other support from South African human rights or environmental organizations. This, in turn, depletes time and resources that these organizations could spend on their work challenging harmful projects.

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[251] Centre for Environmental Rights, "Zero tolerance to abusive conduct on our social media platforms," 2018, https://cer.org.za/news/zero-tolerance-to-abusive-conduct-on-our-social-media-platforms.

[252] Interview with Matime P., Ga Phasha community, Limpopo, April 2, 2018.

[253] Interview with Junis M., Ga Phasha community, Limpopo, August 4, 2018.

[254] Interview with Elton T., Twickenham, April 1, 2018; Interview with Nonhle Mbuthuma, Cape Town, Western Cape, February 6, 2018.

Domestic, Regional, and International Human Rights Obligations and Responsibilities

Under the South African Constitution, as well as under the African Charter on Human and Peoples' Rights (African Charter) and the International Covenant on Civil and Political Rights (ICCPR), both of which South Africa has ratified, South Africa is obligated to respect and protect the rights to freedom of opinion, expression, information, association, and peaceful assembly. As the UN Special Rapporteur on human rights and the environment has explained, governments also have obligations to "protect the life, liberty and security of individuals exercising those rights."[255] Governments should also guarantee meaningful participation in public affairs, access to information, and access to remedies for violations of human rights.

International and regional norms also require that South Africa protect and enable the work of human rights defenders, including by deterring threats, assaults, and harassment, investigating and responding to threats or acts of violence and, where appropriate, punishing those responsible and providing adequate remedy for victims.[256] The African Commission on Human Rights in 2014 adopted a resolution on peaceful demonstrations that, among other things, calls on states to refrain from arbitrarily arresting and detaining demonstrators and to immediately release them, as well as not to use disproportionate force against demonstrators and to effectively investigate all human rights violations against them.[257]

The special procedures created by the UN Human Rights Council have contributed to developing standards of protection specifically for environmental human rights defenders. The UN Special Rapporteur on the situation of human rights defenders has called on states to "reaffirm and recognize the role of environmental human rights defenders and respect, protect, and fulfil their rights" as well as "ensure a preventive approach to the security of

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[255] Mapping Report of the Independent Expert on Human Rights and the Environment, U.N. Doc. A/HRC/25/53, December 30, 2013, paras. 39-40.

[256] See, United Nations General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," A/RES/53/144, March 8, 1999, http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf, art.12.

[257] Resolution 281: Resolution on the Right to Peaceful Demonstrations, adopted by the African Commission on Human and Peoples' Rights (the Commission) meeting at its 55th Ordinary Session held from 28 April to 12 May 2014, in Luanda, Angola.

environmental human rights defenders by guaranteeing their meaningful participation in decision-making and by developing laws, policies, contracts and assessments by States and businesses."[258]

In March 2018, the Special Rapporteur on human rights and the environment presented to the Human Rights Council the synthesis of his work over the course of his mandate: a set of framework principles on human rights and the environment "to facilitate implementation of the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment."[259] Framework Principle 4 calls on states to "provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence."[260] In an explanatory note to the principles, the Special Rapporteur explained that this requires governments to:

> Adopt and implement laws that protect human rights defenders in accordance with international human rights standards; publicly recognize the contributions of human rights defenders to society and ensure that their work is not criminalized or stigmatized; develop, in consultation with human rights defenders, effective programmes for protection and early warning; provide appropriate training for security and law enforcement officials; ensure the prompt and impartial investigation of threats and violations and the prosecution of alleged perpetrators; and provide for effective remedies for violations, including appropriate compensation.[261]

Rights to Life and Security

Section 11 of the South African Constitution enshrines the right to life. Section 12 guarantees that, "Everyone has the right to freedom and security of the person, which

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[258] Michel Forst, Special Rapporteur on the Situation of Human Rights Defenders, Report, August 3, 2016, https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/247/09/PDF/N1624709.pdf?OpenElement, p. 25.

[259] Office of the High Commissioner on Human Rights, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Framework Principles on Human Rights and the Environment with commentary, 2018, https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf.

[260] Ibid., p.8.

[261] Ibid.

includes the right … (a) not to be deprived of freedom arbitrarily or without just cause … [and] (c) to be free from all forms of violence from either public or private sources."

Article 4 of the African Charter on Human and Peoples' Rights (African Charter) states that, "Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."[262]

The state's primary responsibility to protect the rights to life, liberty, and security of person is enshrined in articles 6(1) and 9(1) of the ICCCPR. Article 6(1) states that, "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Article 9(1) provides that, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

This obligation is further emphasized in the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms – known as the Declaration on Human Rights Defenders – in particular in its articles 2, 9, and 12. The Declaration establishes the need for protections fundamental to rights defenders' work.[263] Though not itself legally binding, the Declaration on Human Rights Defenders draws from legally binding international human rights instruments, including the ICCPR, that enshrine rights such as freedom of assembly, freedom of opinion and expression, and freedom of association.[264]

This report demonstrates that community rights defenders are regularly facing threats to their life and property, and in some cases have been killed, related to their opposition to mines. The Government of South Africa is failing to protect community rights defenders

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[262] African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, 2005, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, Article 9.

[263] United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), General Assembly Res. 53/144, U.N. Doc. A/RES/53/144, March 8, 1999, https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf (accessed January 24, 2019), art. 1.

[264] UN Declaration on Human Rights Defenders, arts. 5, 6, 7, 12; UNOHCHR, "Declaration on Human Rights Defenders: Legal character," https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx (accessed January 24, 2019); ICCPR, arts. 18, 19, 21, 22.

that are expressing their opposition to mines from threats, harassment, and violence, including lethal violence.

Freedom of Expression

Section 16 of the South African Constitution protects the right to freedom of expression.

The African Charter provides that, "Every individual shall have the right to express and disseminate his opinions within the law."[265]

Article 19(2) of ICCPR recognizes that, "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."[266] Under article 19(3), restrictions must be "provided by law" and may not be greater than necessary for "respect of the rights or reputations of others" or "for the protection of national security or of public order (*ordre public*), or of public health and morals." The UN Human Rights Committee has required countries to provide "a legitimate ground for restriction of freedom of expression, [and to] demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."[267] Consistent with this caution against unjustified limits on freedom of expression, the UN Special Rapporteur on human rights and the environment has stated that, "States must ensure that civil laws relating to defamation and libel are not misused to repress the exercise of the [right to freedom of expression]."[268]

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[265] African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, 2005, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, Article 9.

[266] United Nations Treaty Collection, Status of Treaties: International Covenant on Civil and Political Rights, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en; International Covenant on Civil and Political Rights (ICCPR), adopted December 19, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc A/6316 (1966), 999 U.T.S. 171, entered into force March 23, 1976, ratified by South Africa on December 10, 1998, Article 19 para. 2.

[267] UN Human Rights Committee (HRC), CCPR General Comment No. 27: Article 12 (Freedom of Movement), November 2, 1999, CCPR/C/21/Rev.1/Add.9.

[268] Office of the High Commissioner on Human Rights, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Framework Principles on Human Rights and the Environment with commentary, 2018, https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf.

Community rights defenders interviewed for this report have been threatened or attacked, often repeatedly, in relation to their opposition to mines in their communities. Sometimes the perpetrators are unknown, and police conduct limited or no investigations. In some cases, community rights defenders also fear retaliation from traditional authorities who support the mine. In addition, nongovernmental organizations and activists have been subject to SLAPP suits and harassing social media campaigns that seek to stifle their freedom of expression. The threats, attacks, and harassment community rights defenders experience, in addition to extra-legal requirements for protest applications and police violence during peaceful protests, can deter defenders from exercising their rights.

Freedom of Association and Peaceful Assembly

Section 17 of the South African Constitution recognizes: "Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions." Section 18 also recognizes the right to freedom of association.

The African Charter provides that, "Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."[269]

The ICCPR provides: "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."[270]

The United Nations Human Rights Council has reminded states of "their obligation to respect and fully protect the rights of all individuals to assemble peacefully [...] and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with their obligations

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[269] African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, 2005, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf, Article 11.

[270] Office of the High Commissioner on Human Rights, International Covenant on Civil and Political Rights, 1976, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, Article 21.

under international human rights law."[271] States should also "facilitate peaceful protests by providing protestors with access to public space and protecting them, without discrimination, where necessary, against any form of threat and harassment, and underlines the role of local authorities in this regard."[272]

The Special Rapporteur on human rights and the environment has explained that, "States may never respond to the exercise of [the rights to association and peaceful assembly] with excessive or indiscriminate use of force, arbitrary arrest or detention…the misuse of criminal laws, stigmatization or the threats of such acts."[273] "When violence occurs in an otherwise peaceful assembly or protest, States have a duty to distinguish between peaceful and non-peaceful demonstrators, take measures to de-escalate tensions and hold the violent individuals — not the organizers — to account for their actions. The potential for violence is not an excuse to interfere with or disperse otherwise peaceful assemblies."[274]

The African Commission on Human and Peoples' Rights in 2017 adopted Guidelines on the Freedom of Association and Assembly. According to a section of the guidelines on notification regimes:

- A notification regime requires that the presumption is always in favor of holding assemblies;
- Assemblies should not be automatically penalized, through dispersal or sanction, due to failure to notify;
- Lack of notification shall not be understood to make an assembly illegal. Notification procedures shall be nonburdensome.[275]

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[271] United Nations Human Rights Council, The rights to freedom of peaceful assembly and of association, October 8, 2013, A/HRC/RES/24/5, The promotion and protection of human rights in the context of peaceful protests, para. 2.

[272] United Nations Human Rights Council, April 11, 2014, A/HRC/RES/25/38, para. 4.

[273] Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Framework Principles on Human Rights and the Environment, (2018), p. 9, https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf

[274] Ibid.

[275] The Guidelines on Freedom of Association and Assembly of the African Commission on Human and Peoples' Rights (African Commission) were adopted at the Commission's 60th Ordinary Session held in Niamey, Niger, from 8 to 22 May 2017. See Article 71 ff.

By placing several types of extra-legal restrictions on protest applications, municipalities create obstacles for communities to lawfully protest against mines. When municipalities reject or delay approving protest applications, communities sometimes protest without approval, which often leads to police violence and arrests of activists. During protest, police regularly use excessive force and file meritless criminal charges against peaceful protesters, thereby limiting the exercise of their rights. These abuses indicate that the Government of South Africa is failing to respect and protect the rights to freedom of association and peaceful assembly and the right of activists to protest.

Right of Access to Information

Section 16 of the South African Constitution recognizes the freedom to receive information or ideas. In addition, section 32 provides: "Everyone has the right of access to a. any information held by the state; and b. any information that is held by another person and that is required for the exercise or protection of any rights." Article 9 of the African Charter guarantees every individual "the right to receive information."

Transparency and access to environmental information are directly linked to the right to seek, obtain, and impart information in article 19 of the ICCPR, as well as article 6 of the Declaration on Human Rights Defenders.

Without the ability to receive information related to mining applications and operations, communities cannot fully understand the harms and threats from mines against them, or make informed decisions regarding mines.

Right to a Healthy Environment

Section 24 of the South African Constitution enshrines the right to a healthy environment, noting that everyone has the right:

a. To an environment that is not harmful to their health or well-being; and
b. To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
    i. Prevent pollution and ecological degradation;
    ii. Promote conservation; and

iii. Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 of the African Charter recognizes that "All peoples shall have the right to a general satisfactory environment favourable to their development."

The UN Special Rapporteur on human rights and the environment's Framework Principles on Human Rights and the Environment, which interpret the right to a healthy environment, provide that states "should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters."[276] The Special Rapporteur on human rights and the environment explains:

> The obligations of States to respect and protect the rights to freedom of expression, association and peaceful assembly encompass the exercise of those rights in relation to environmental matters. States must ensure that these rights are protected whether they are being exercised within structured decision-making procedures or in other forums, such as the news or social media, and whether or not they are being exercised in opposition to policies or projects favoured by the State.[277]

The threats, attacks, and harassment community rights defenders experience, in addition to extra-legal requirements for protest applications and police violence during peaceful protests, can deter defenders from advocating for a healthy environment and jeopardize protection of the right to a healthy environment.

Right to Remedy

Article 2(3)(a) of the ICCPR establishes the obligation of states to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective

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[276] United Nations Office of the High Commissioner on Human Rights, Framework Principles on Human Rights and the Environment with commentary, 2018, A/HRW/37/59, Principle 5, https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx.

[277] United Nations Office of the High Commissioner on Human Rights, Framework Principles on Human Rights and the Environment with commentary, 2018, A/HRW/37/59, p. 9, https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx.

remedy." Interpreting this obligation, the Human Rights Committee observed that states have a positive obligation to protect individuals against violations by their agents and by private persons or entities, and that this obligation includes the duty to exercise due diligence to prevent, punish, investigate, and bring perpetrators to justice and to redress the harm caused by non-state actors. A failure to investigate and bring perpetrators of such violations to justice could, in and of itself, give rise to a separate breach of the ICCPR.[278]

Article 9 of the UN Declaration on Human Rights Defenders further holds that defenders have the right to benefit from an effective remedy.[279] Prompt and impartial investigations into alleged violations; prosecution of the perpetrators regardless of their status; provision of redress, including appropriate compensation to victims; and enforcement of the decisions or judgments are fundamental in order to ensure the right to an effective remedy.

As noted in this report, South African police often do not adequately investigate threats or acts of violence against community rights defenders carried out by unknown perpetrators or the police. Because the police have not taken adequate steps to ensure effective investigation of threats to community rights defenders and prevent unjustified barriers to access to the courts for legitimate environmental concerns, the right to a remedy is threatened.

Human Rights Responsibilities of Mining Companies

Companies are the subject of a number of international human rights standards. These include international norms that elaborate the respective roles of governments and companies in upholding human rights and avoiding complicity in violations, as well as standards developed related to security and human rights.

In 2008, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises elaborated the "Protect, Respect and Remedy" framework for business and human rights, which was further

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[278] CCPR/C/21/Rev.1/Add.13, paras. 8 and 18.

[279] United Nations General Assembly, "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms," A/RES/53/144, March 8, 1999, http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration.pdf, art.9.

supplemented by a set of "Guiding Principles on Business and Human Rights," endorsed by the United Nations Human Rights Council in 2011.[280] This framework sets out: 1) the state duty to protect human rights, 2) the corporate responsibility to respect human rights, and 3) the need for a remedy for victims of business-related human rights abuses.[281]

Pursuant to these instruments, all businesses should have adequate policies and procedures in place to identify, prevent, mitigate, and account for their impact on human rights. To meet their human rights responsibilities, companies should carefully assess potential human rights risks, monitor the impact of their activities on an ongoing basis, seek to prevent or mitigate harm, and adequately address any adverse human rights impacts they have caused or to which they have contributed.

The UN Special Rapporteur on human rights defenders commented on the responsibility of businesses:

> [T]he responsibility of businesses to respect human rights not only entails a negative duty to refrain from violating the rights of others, but also a positive obligation to support a safe and enabling environment for human rights defenders in the countries in which they are operating. Discharging this duty requires consultation with defenders in order to understand the issues at stake and the shortcomings that impede their work.[282]

Extractive companies should also seek to comply with the Voluntary Principles on Security and Human Rights, which provide guidelines for interactions between companies and police and military and private security providers in a manner that is consistent with the protection and promotion of human rights.[283]

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[280] John Ruggie, "Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises," A/HRC/17/31, March 21, 2011, http://www.businesshumanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

[281] "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework," Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, Annex, I.A.1, March 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also, "Voluntary Principles on Security and Human Rights," 2000, http://www.voluntaryprinciples.org/what-are-the-voluntaryprinciples/.

[282] United Nations General Assembly, Note by the Secretary-General, Situation of Human Rights Defenders, July 19, 2017, Item 73 (B) of provisional agenda, https://undocs.org/en/A/72/170.

[283] Voluntary Principles on Security and Human Rights, "What are the voluntary principles?," 2000, http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/.

This report has documented credible allegations that mining companies sometimes acted to supress opposition to their activities, through – among other things – vexatious litigations, harassing social media campaigns, creating and exploiting divisions in communities, requesting extra-legal actions related to protest, and using harmful force to disperse peaceful protesters.

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“We Know Our Lives Are in Danger”

Environment of Fear in South Africa’s Mining-Affected Communities

In South Africa, people living in mining-affected communities are raising concerns about, and advocating for, protection from the serious social, health, and environmental harms that can result from mining activities. Many of these activists have experienced threats, physical attacks, or damage to their property that they believe are acts of retaliation for their activism, while others have received threatening phone calls from unidentified numbers.

“We Know Our Lives Are in Danger”: Environment of Fear in South Africa’s Mining-Affected Communities documents attacks and other forms of intimidation against activists in KwaZulu-Natal, Limpopo, Northwest, and Eastern Cape provinces between 2013 and 2018. This report found that municipalities often impose burdens on organizers of protests which have no legal basis and make protests difficult and sometimes impossible. Activists in mining-affected communities also face police misconduct, including arbitrary arrest and excessive use of force, which is part of a larger pattern in South Africa.

Also, mining companies in South Africa have been using legal tactics, including both strategic litigation against public participation and social media campaigns, to harass activists and organizations who are challenging them.

South African authorities and companies should take a zero tolerance approach to threats and abuses against rights defenders in mining-affected communities. The government should direct officials at all levels to comply with the country’s domestic and international obligations to guarantee the rights to protest and free speech in mining areas.

(above) Coal mine in Somkhele viewed from Ocilwane village in Fuleni, KwaZulu-Natal.

(front cover) Activists from mining communities protesting at the Pietermaritzburg High Court on August 24, 2018, KwaZulu-Natal.

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