



Centre for  
Environmental Rights  
Advancing Environmental Rights in South Africa



**Highveld  
Environmental  
Justice Network**



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*Universal Periodic Review of South Africa  
27<sup>th</sup> Session (March 2017)*

**Joint Stakeholders' Submission on:  
The threats to human rights from mining and coal-fired power  
production in South Africa**

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***Summary:** Poorly-regulated mining and coal-fired power generation in South Africa are responsible for air and water pollution, destruction of arable land, and biodiversity loss, violating the human rights of hundreds of communities, including their rights to life, health, water, food, culture and a healthy environment. South Africa must take immediate steps to protect the rights of mining-affected communities, including by prohibiting mining in places and ways in which it might violate human rights or cause substantial harm to the environment on which communities depend; guaranteeing access to information and meaningful participation concerning mining approvals and regulation; effectively enforcing environmental laws against mine operators and providing an effective appeals process to challenge proposed mines; and protecting advocates for community and environmental protection from harassment and violence. South Africa must also ensure that coal-fired power plants at least meet domestic emission standards.*

## **Introduction**

1. Mining is one of South Africa's biggest industries. The country is one of the world's biggest coal producers,<sup>1</sup> and a leading producer of a wide range of metals.<sup>2</sup>
2. Mining causes substantial environmental and social harm in South Africa. It depletes water supplies, pollutes the air, soil and water, and destroys ecosystems. Mining also destroys arable land, leading to a decline in food security. In Mpumalanga province, the heart of South Africa's coal production and coal-fired power generation, 60% of the surface area is being mined or is subject to prospecting and mining rights applications.
3. Much of South Africa's coal is burned domestically to produce electricity, mostly in power plants operated by Eskom, the state-owned electricity utility.<sup>3</sup> Eskom's power plants are some of the dirtiest in the world, continuously exceeding South Africa's air pollution standards. These plants release dozens of toxic substances into the air and water, causing massive health and environmental harms. As with mining, these problems are particularly prevalent in Mpumalanga, where eleven coal-fired power stations operate, a twelfth is under construction, and three others are proposed - with two of those already having received environmental authorisation.
4. The environmental and human damage done by mining and by burning coal violates the human rights of hundreds of communities across South Africa. For example, runoff from mines and spills from power plant waste ponds contaminate drinking and irrigation water with toxic pollutants, violating the rights to life, health, water, food and a healthy environment. People living near mines and power plants breathe toxic pollutants that contribute to illness or death, violating their rights to life, a healthy environment, and health. Pollution from mines destroys ecosystems on which communities rely for cultural and spiritual practices and to sustain their livelihoods, violating their rights to culture and to an adequate standard of living. These violations harm the poorest and most vulnerable

communities most, because they are frequently located close to mines and coal-fired power plants.

5. Despite the environmental and social harms of mining and of coal-burning, the South African government is not enforcing the relevant environmental standards. For example, in 2015, the Department of Mineral Resources (DMR) assigned only five officials to ensure environmental compliance for over 1000 operating and derelict mines in Mpumalanga.<sup>4</sup> The government also recently granted Eskom's request to postpone compliance with air quality standards for most South African coal-fired power plants until at least 2020, and in many cases until 2025.
6. Government inaction has also helped make the mining industry one of the least transparent industries in South Africa. Basic information essential to ensuring informed environmental decision-making and holding mines accountable is not publicly available and can only be accessed through a seriously-flawed access to information request procedure that the DMR regularly flouts. Communities are also rarely meaningfully consulted during the mining approval process, resulting in uninformed and poor government and industry decisions that do not reflect community perspectives or have their support. Without access to information and meaningful consultation, communities cannot defend the rights threatened by mines and power plants, or exercise their rights to participate in government and to have effective remedies for rights violations.
7. The serious environmental, health, and social impacts of mining, coupled with a lack of transparency, accountability, and consultation, has increased public opposition to mining projects. Tragically, the response to this opposition has been a troubling pattern of harassment and violence against opponents of mines exercising their human rights to freedom of expression and assembly. In March 2016, this culture of intimidation and violence led to the assassination of Sikhosphi "Bazooka" Rhadebe, a leader of the opposition to a proposed open-cast mineral sands mine near his community. Although the police are reportedly investigating the assassination, no report has been made public and no one has been brought to justice for this heinous crime.
8. The human rights situation surrounding mining and coal-fired power in South Africa is dire. We urge the Human Rights Council to recommend that South Africa take immediate steps to protect the rights of mining-affected communities, including by: prohibiting mining in areas and ways in which it would violate human rights or cause substantial harm to the environment on which communities depend; guaranteeing access to information and meaningful public participation in decision-making concerning mining approvals and regulation; effectively enforcing environmental laws relevant to mining, and providing an effective process to challenge proposed mines; requiring coal-fired power plants to comply with domestic emissions standards; and protecting advocates for community and environmental protection from harassment and violence.

## **I. The economic, social and cultural impacts of mining**

9. As demonstrated below, mining directly and indirectly violates the human rights of South African communities to health, water, food, and culture. These rights are guaranteed in the

International Covenant on Economic, Social and Cultural Rights (arts. 11, 12 15), and the International Covenant for Civil and Political Rights (art. 27),<sup>5</sup> both of which South Africa has ratified. South Africa thus has international obligations to prevent mining activities within its jurisdiction or control that may violate these rights.

### Threats to water resources

10. Already the 30th driest country in the world,<sup>6</sup> South Africa is experiencing its most severe drought in 30 years and climate projections indicate such droughts will become more frequent. In this context, it is concerning that mines continue to drain and pollute the country's water resources, jeopardizing communities' access to sufficient and clean water.
11. Most mining operations require large quantities of water. For example, coal mining operations use water to extract, wash, and sometimes to transport the coal, as well as in ponds or dams where the toxic by-products from coal mining are stored.
12. Extraction of groundwater for mining operations can drain aquifers and wetlands, decreasing the amount of water available to local communities for consumption and agriculture, and to the water-dependent ecosystems on which they rely.<sup>7</sup> Local communities are then forced to rely on alternative water resources, such as rainwater storage tanks or water collected from distant water sources that may be unreliable and difficult to access.<sup>8</sup> This is particularly problematic in drought times. For example, during the 2015-2016 drought, the town of Mtubatuba had to pay to truck water from a distance because the groundwater had been depleted by Petmin (Pty) Ltd's Somkhele Mine.<sup>9</sup> South Africa's National Water Act (NWA) exacerbates this problem by giving mines precedence over local communities for the use of water resources.
13. Mining also pollutes water in many ways.<sup>10</sup> One of the most damaging sources of water pollution is acid mine drainage (AMD) from both active and abandoned mines.<sup>11</sup> AMD is water flowing from mine sites that has become acidified by contact with sulphides in the mining waste rock that have been exposed to air.<sup>12</sup> The resulting water is very acidic and high in salts and heavy metals. AMD often leaches into aquifers or flows into rivers and streams, causing widespread devastation by sterilising soils, contaminating food crops, and harming the health of humans, animals and plants.<sup>13</sup>
14. Abandoned and closed mines are the biggest source of AMD in South Africa. As of 2014, South Africa had approximately 6000 abandoned mines from which acid water and heavy metals leak into the environment.<sup>14</sup> Active mining operations also contribute to the problem. For example, in 2012, a storm event caused run-off ponds at coal-handling facilities to overflow with AMD into the Boesmanspruit Dam near Carolina in Mpumalanga, contaminating the water in the reservoir and leaving the people of Carolina and the Silobela Township without a safe water supply for seven months. The community members had to purchase water from alternative sources at their own expense.<sup>15</sup> The government has still not taken any action against the mines operating the coal-handling facilities.
15. The Olifants River, which flows through South Africa and Mozambique to the Indian Ocean, is emblematic of these problems. The upper reaches of the river have endured a

long history of mining pollution. In 2004, active mines released an estimated 50000m<sup>3</sup> of polluted water into the Olifants River per day, and abandoned mines added an additional 64000m<sup>3</sup> per day, damaging freshwater ecosystems, and affecting the water supply necessary for irrigation and municipal services.<sup>16</sup> This pollution threatens the entire Olifants ecosystem, including the lives and health of hundreds of communities and wild animal populations that depend on this water for their survival.

16. Because mining depletes and pollutes water essential for drinking and irrigation, South Africa's failure to adequately regulate mines is violating the rights to water, food, health, and a healthy environment of many communities.

Threats to food security, livelihoods and cultural practices

17. In South Africa, the mining rights holders have the right to exclude other land uses.<sup>17</sup> This often entails restricting access to land that had been used for agriculture, housing and other purposes, depriving communities, particularly in rural areas, of the use of their land, and consequently their livelihoods. Productive agricultural land is one of the biggest casualties of this system. For example, a 2012 report estimated that mining or prospecting licences covered 765 999 out of 993 301 hectares of cultivated land in three districts in Mpumalanga.<sup>18</sup> It is estimated in the South Africa National Policy on Food and Nutrition that, between 1994 and 2009, increased mining was largely responsible for a 30% decline in the overall land area in South Africa under food production.<sup>19</sup>
18. The impacts of mining on land use and biodiversity are long-lived. As a 2012 report states, "the social and environmental impact of mining activities on a region (e.g. air pollution, water pollution, crime, etc.) are often so severe that farming activities cannot be sustained on the land that is left between all the mining activities."<sup>20</sup> Even after mining ceases and communities regain access to land and other resources, those resources are often polluted and cannot be productively used. Soils affected by mining cannot be rehabilitated to their original potential.<sup>21</sup> Open-cast mining removes much of the nutrient-rich topsoil essential for food cultivation, and acidification can sterilise the remaining soil. Heavy mining machinery compacts the soil so that roots can no longer penetrate deep enough to access sufficient water.<sup>22</sup> 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.<sup>23</sup>
19. The loss and degradation of agricultural land reduces South Africans' access to food, and the resulting increased dependence on imports drives up food prices, making it unaffordable for some poor and marginalised communities.<sup>24</sup> According to the 2013 South African National Health and Nutrition Examination Survey, nearly a third of the Mpumalanga population, where coal mining is concentrated, was food-insecure and experienced hunger.<sup>25</sup> Continued and expanded mining will only exacerbate this situation.
20. Mining operations also destroy biodiversity that provides important ecosystem services to communities, including by providing a sustainable source of resources, like wood for fuel, and medicinal plants.<sup>26</sup>

21. In addition, natural areas are often used by communities for spiritual and cultural practices.<sup>27</sup> For example, in Mpumalanga, a wetland of significant cultural and spiritual value to the Madadeni community was destroyed in the construction of Nkomati Anthracite Mine, without the community being consulted prior to the construction's commencement.<sup>28</sup>
22. Poorly-regulated mining has therefore significantly decreased productive agricultural land and made food less accessible to many communities, violating their right to food. Mining operations have also impaired communities' ability to access important ecosystem services necessary for their cultural and spiritual practices as well as for their livelihoods, violating their rights to culture and an adequate living standard.

### Threats to air quality

23. Communities near mines are exposed to toxic air pollution, primarily in the form of fine particulate matter (PM) released as dust during the mining process, including from blasting, wind erosion of soil removed to access subsurface minerals, and dust blown from haul trucks.<sup>29</sup> PM emissions can cause a wide range of 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.<sup>30</sup> The United States Environmental Protection Agency (US EPA) explains: PM "contains microscopic solids or liquid droplets that are so small that they can get deep into the lungs and cause serious health problems."<sup>31</sup> The US EPA further explains that "[p]eople with heart or lung diseases, children and older adults are the most likely to be affected by particle pollution exposure."<sup>32</sup> Unfortunately, as the World Health Organization notes, "[s]mall particulate pollution [has] health impacts even at very low concentrations – indeed no threshold has been identified below which no damage to health is observed."<sup>33</sup>
24. Many studies have documented elevated PM levels in communities near open-cast coal mines throughout the world, including in India,<sup>34</sup> the United States,<sup>35</sup> and Colombia.<sup>36</sup> This is also true in South Africa, largely because of coal-mining, Mpumalanga's PM levels significantly exceed South African and World Health Organization standards.<sup>37</sup> The Highveld Priority Area Air Quality Management Plan, published by the Department of Environmental Affairs (DEA) in 2011, estimated that mine haul roads alone accounted for approximately 50% of PM pollution in the 31106 km<sup>2</sup> priority area.<sup>38</sup>
25. PM pollution from mines in South African is exacerbated by the inadequacy of the country's Dust Control Regulations. The regulations only offer a single tool for controlling dust – a Dustfall Standard – which is inadequate in many instances; other tools are available and should be required where the circumstances require.<sup>39</sup> In addition, the government is not enforcing the regulations at mines (*see* discussion in section III).<sup>40</sup>
26. Toxic air pollution from mines violates communities' rights to life, health, and a healthy environment. Moreover, these harms are most often concentrated among the poorest and most marginalised communities in South Africa, because they live in informal settlements frequently located near mines and power plants.

## II. The economic, social and cultural impacts of coal-fired power plants

27. 90% of South Africa's electricity is generated by fifteen coal-fired power plants.<sup>41</sup> Two enormous Eskom coal-fired plants are currently under construction. In addition, the government proposes to obtain another 2500 MW of energy from independent coal-fired stations.
28. Coal-fired power plants use substantial amounts of water for cooling and in ponds to store toxic waste. In South Africa, Eskom, which generates about 95% of the country's electricity, uses an average of 316 billion litres of water annually.<sup>42</sup>
29. Coal combustion is also a major source of toxins that pollute the air and water, including mercury, PM, nitrogen oxides (NO<sub>x</sub>), sulphur dioxide (SO<sub>2</sub>), and dozens of other substances known to be hazardous to human health. For example, mercury is a neurotoxin that can cause reduced IQ, mental retardation, and permanent intelligence loss.<sup>43</sup> NO<sub>x</sub> exposure can cause serious damage to the tissues of the upper respiratory tract, fluid build-up in the lungs and death at high exposure levels.<sup>44</sup>
30. Power generation accounts for 75% of mercury emissions in South Africa, and the DEA has estimated that power generation accounts for 82% of SO<sub>2</sub> pollution, 73% of NO<sub>x</sub> pollution, and 12% of PM pollution in the Highveld Priority Area where Eskom operates eleven coal-fired power plants, with a twelfth under construction.<sup>45</sup> It is estimated that as many as 2200 to 2700 premature deaths, 200 of which would be of young children, are caused annually by the air-pollution emissions from Eskom's coal-fired power plants.<sup>46</sup>
31. Despite being a major source of pollution in South Africa, the government has allowed Eskom to flout air quality standards.<sup>47</sup> In 2010, following an extensive consultation process, the Minister of Environmental Affairs published emission standards that applied to coal-fired power stations.<sup>48</sup> Eskom's existing power stations were required to meet one set of standards by April 2015, and to meet stricter standards by April 2020. In December 2013, Eskom applied for postponement of the standards for thirteen existing coal-fired power plants and one plant under construction, all of which are located in areas designated as needing special protections because of existing air pollution problems.<sup>49</sup> In February 2015, the DEA, despite widespread public opposition, granted Eskom's postponement requests for almost all of its plants.
32. The postponements sought would allow Eskom to emit an estimated 28 million tonnes more SO<sub>2</sub> than the standards would have allowed, 2.9 million tonnes more NO<sub>x</sub>, 560 000 tonnes more PM, and 210 tonnes more mercury over the remaining life of the power plants.<sup>50</sup> It was estimated that these postponements would cause about 20000 premature deaths over the remaining life of the power plants, approximately 1600 of which would be of young children.<sup>51</sup> The economic cost associated with the premature deaths and the neurotoxic effects of mercury exposure was estimated at 230 billion rand.
33. The storage of post-combustion waste from coal-fired power plants and its dispersion into the water and air also threatens human health and ecosystems. In South Africa, coal-fired power generation produces at least 36 million tonnes of solid waste residue annually. Called "fly ash", this residue is made of very fine particles that are corrosive and contain

toxic metals and soluble salts which can leach into the environment, polluting surface and ground water. When stored in dry heaps, fly ash can be dispersed into the air, causing a variety of human health impacts when inhaled, including cancer, heart damage, lung disease, and respiratory distress.<sup>52</sup>

34. Burning coal to produce electricity causes air and water pollution that directly and indirectly undermines the rights to water and health of many South African communities. As with mining-affected communities, these threats are borne most often by the poorest and most marginalised communities, many of whom cannot themselves afford electricity and are forced to use dirty fuels – with their attendant health impacts – for cooking and heating.

### **III. The lack of transparency and accountability in the mining sector**

35. Certain procedural human rights – access to information, participation in decision-making, and access to legal remedies – are vital for making “policies more transparent, better informed and more responsive.”<sup>53</sup> When directed at mining activities, “the exercise of such rights results in policies that better reflect the concerns of those most concerned and, as a result, that better safeguard their rights to life and health, among others, from infringement through environmental harm.”<sup>54</sup> Unfortunately, the procedural rights of mining-affected communities in South Africa are consistently violated.<sup>55</sup>
36. South Africa has clear international human rights obligations to respect, promote and protect these procedural rights. The rights of freedom of expression, access to information, freedom of peaceful assembly and association, participation in government and effective remedies for violations of rights are recognized in the Universal Declaration (arts. 7, 8, 19, 20 and 21) and elaborated on in the ICCPR (arts. 2, 19, 21, 22 and 25), which South Africa has ratified.<sup>56</sup> The United Nations Special Rapporteur on human rights and the environment has clarified that although these instruments “do not explicitly address environmental issues, they undoubtedly encompass the exercise of the rights for environmental ends.”<sup>57</sup> In other words, these rights apply to the approval and regulation of mines.

#### *The mining sector operates in a culture of secrecy*

37. The approval, operation and regulation of mines in South Africa are more often than not shrouded in secrecy. The government and mining companies do not provide the public with the most basic information, including environmental authorisations, environmental management programmes, waste management licences, atmospheric emission licences, mining rights, mining work programmes, social and labour plans, or compliance and enforcement information.<sup>58</sup> To access this information, official requests must be made to the DMR and companies using the Promotion of Access to Information Act, 2000 (PAIA). The government can take months to process requests, and it frequently ignores or refuses requests, usually unlawfully.
38. The Centre for Environmental Rights (CER) has kept detailed records of the PAIA requests it has made since 2010 to government bodies responsible for regulating mining. The results demonstrate the DMR’s complicity in the lack of transparency in the mining sector.



For example, in 2015, the DMR responded to only three of the eight PAIA requests the CER submitted to it,<sup>59</sup> granting two in full, and one partially. The DMR, however, has only provided information responsive to one of these requests. Considering the exceptionally high level of environmental degradation caused by the mining industry, the DMR's PAIA track record is unacceptable.

39. Without access to this information, the public cannot meaningfully participate in the approval process, or, as discussed below, hold mine operators accountable to their legal commitments.

*Communities are not adequately consulted on mining-related decisions*

40. South Africa's Constitutional Court has held that public consultation must be undertaken "in good faith to attempt to reach accommodation,"<sup>60</sup> a standard consistent with South Africa's international human rights obligations. Unfortunately, public consultation processes in South Africa rarely meet the Constitutional Court's and international standards, generally being little more than box-ticking exercises for mining companies.
41. There are many reasons for this failure. Companies undertaking public consultation do not take into account circumstances that may necessitate different consultation processes in different communities. For example, companies rarely consult with traditional communities (many of which are poor and marginalised) in a manner consistent with the communities' customary practices, meaning that the input received often does not accurately reflect the positions or decisions of the community. Despite legal requirements that companies consult with all affected persons, many communities report that mining companies consult only with their traditional leaders, entering into private deals with these leaders absent the community awareness and without any benefit for the entire community.<sup>61</sup> Companies also rarely make accommodations to ensure that people who do not speak English – which includes many people in mining-affected communities – can understand the relevant issues and participate fully. They also do not present complex environmental information in way that is accessible to all community members.<sup>62</sup> Consultations at insensitive times or venues exclude sections of the community, such as workers or those with childcare responsibilities.
42. The legal frameworks governing public participation in the consideration of applications for mining authorizations are also flawed in ways that prevent meaningful public participation. For example, the 30-day public participation timeframe provided in South Africa's environmental impact assessment regulations is too short to allow for meaningful consultation with affected communities.<sup>63</sup> Notice requirements and practices concerning mining applications are also flawed, resulting in many interested and affected persons being excluded from the approval process for lack of notice.<sup>64</sup> Affected parties are also not guaranteed opportunities to participate in water use licence decisions for mines because, although the National Water Act gives the Minister of Water and Sanitation discretion to direct a water use licence applicant to conduct a public participation process, the Minister rarely does so.<sup>65</sup> Furthermore, the traditional knowledge residing in rural communities is almost never sought or valued in such processes. Finally, as mentioned above, many important documents related to mining approvals are not made automatically available and

are difficult to obtain through PAIA requests.<sup>66</sup> Without access to these documents, communities and organizations cannot meaningfully participate in the consultation process.

43. The lack of community participation is particularly egregious in the development of social and labour plans (SLPs) associated with mining approvals. These statutorily-required plans set out binding commitments by mining companies to benefit communities and mine workers.<sup>67</sup> For SLPs to be effective, companies must consult with communities to identify and prioritize the needs in the community. In reality, however, communities regularly report that broad-based consultation on developing SLPs does not occur, and many communities do not even see SLPs before they are finalized because they are not made automatically available by mining companies.<sup>68</sup> Unfortunately, South Africa's mining laws and regulations do not set out any requirements for public participation in the SLP design process.<sup>69</sup> For example, the laws and regulations do not specify what information communities should be provided, or on what schedule. The potential for community exclusion from SLP development, and for SLPs not to achieve the statutorily-mandated goals – and even, perhaps, to cause more harm than good – is especially great, given that the statute shifts developmental responsibilities from the government to mining companies. The system creates incentives for developing poor SLPs, excluding affected communities, and generally favouring corporate profits over community well-being. Therefore, government oversight of the processes for developing and implementing SLPs must be vigorous and thorough to avoid human rights violations.
44. The mining laws and regulations also allow mine operators to make decisions about the implementation, monitoring or amendment of SLPs without consulting affected communities.<sup>70</sup> SLP commitments can thus be weakened without consulting the beneficiaries. For example, a promise by a mining company to build 550 houses in the community can be reduced to 55 houses without community consultation.
45. The lack of meaningful participation in the mining approval process has led to poor decisions that do not reflect community perspectives and undermine their human rights.

*Accountability in the mining sector is virtually non-existent*

46. In South Africa, the DMR is responsible for enforcing mining operations' compliance with environmental and mining laws, while the Department of Water and Sanitation (DWS) enforces compliance with the National Water Act and water use licences. Unfortunately, these departments are failing to hold mining companies accountable for their legal obligations, imposing few or no consequences for unlawful activities and shifting the costs of pollution to local communities.
47. As mentioned above, documents and data related to mines' compliance with environmental and mining licences are not automatically made available to the public and must be requested through the PAIA process, which the DMR usually unlawfully ignores. Thus, violations of laws and licence conditions are often concealed, and the public cannot hold the government and mine operators accountable for ensuring compliance.
48. The DMR and DWS also consistently fail to enforce the law against mining companies that operate without a licence or fail to comply with their licence conditions. For example,

although in July 2014 103 mines in South Africa were operating without water use licences, the DWS has brought only 12 enforcement actions. Moreover, of the six actions that resulted in criminal prosecutions, CER research found no evidence of any convictions.<sup>71</sup> As far as the limited available information indicates, the DMR's track record is even worse – it either ignores complaints of violations by mining companies or refuses to get involved in any enforcement action, despite reports of non-compliance.<sup>72</sup>

49. Effective enforcement of mining and environmental laws is constrained by the DMR's conflicting mandates - to encourage and promote mineral development, and to enforce mines' compliance with environmental laws.<sup>73</sup> Mining is unique in this respect in South Africa: every other industry's compliance with environmental laws is the DEA's responsibility. Perhaps as a result of the DMR's conflicting mandates, the DMR has not devoted adequate resources to compliance monitoring and enforcement, as is evidenced by its designation of only five environmental compliance inspectors in Mpumalanga.<sup>74</sup>
50. The process for challenging mining authorizations is also riddled with problems. For example, the mining law requires a DMR regional manager to refer any public objections to prospecting or mining rights to a 14-member expert committee known as the Regional Mining Development and Environmental Committee (RMDEC).<sup>75</sup> RMDEC does not issue decisions, but instead provides the minister with advice and recommendations, leaving the final decision to the minister. According to the DMR, RMDEC provides "an affordable avenue other than a court of law, where mediation around competing interests pertaining to land use can be resolved."<sup>76</sup> Unfortunately, RMDEC does not hold public hearings, nor does it give open access to its proceedings to parties who have objected to applications.<sup>77</sup> Moreover, neither the minutes of RMDEC's proceedings, nor its decisions, are routinely made public or even available to affected parties.<sup>78</sup> The delays in accessing this information (if access is ever achieved) further threaten affected parties' ability to exercise their right of access to remedy.
51. Under the Mineral Petroleum Resources Development Act, 2002, affected persons can also challenge the DMR's final decision to grant rights. However, launching an appeal to the Minister of Mineral Resources against such a decision does not automatically suspend the right, and the law does not prescribe deadlines for particular steps in the appeal process.<sup>79</sup> Most requests to suspend a mining right pending appeal go undecided, as do many of the appeals themselves,<sup>80</sup> meaning harmful mining operations can commence and continue indefinitely, despite an appeal. This effectively nullifies the right to an appeal in its entirety.
52. Without effective enforcement of environmental laws, the pollution and other activities that undermine the human rights of communities across South Africa will continue unabated. Poor appeals processes in the mining sector prevent communities from exercising their right of access to remedy for the many human rights violations they are subject to from mining.

#### **IV. Environmental and community defenders are regularly harassed and subject to physical violence**

53. In South Africa, community activists are on the frontlines advocating against some of the most polluting and socially-harmful mining projects. Because of this, they are also regularly harassed, intimidated, subjected to physical violence, and even assassinated.
54. As a party to the ICCPR, South Africa is obligated to respect and protect the rights to freedom of expression and assembly. As the UN Special Rapporteur on human rights and the environment has explained, nations also have obligations to “protect the life, liberty and security of individuals exercising those rights.”<sup>81</sup> Similarly, the 1998 UN Declaration on the Protection of Human Rights Defenders states that nations have a duty to prevent threats, assaults and harassment, to investigate and respond to threats or acts of violence and, where appropriate, to punish those responsible and provide an adequate remedy for victims. Unfortunately, the reality is that the South African government is not meeting these obligations.
55. One example of this failure is the assassination of Sikhosiphi “Bazooka” Rhadebe. Mr. Rhadebe was the chairperson of the Amadiba Crisis Committee, a community group opposing a proposed open-cast mineral sands mine near Mr. Rhadebe’s home in Xolobeni by Mineral Commodities Limited, an Australian-owned mining company. On 22 March 2016, unidentified assailants pretending to be police officers assassinated Mr. Rhadebe at his home in Xolobeni.<sup>82</sup> Although a special unit of the South African Police Service is reportedly investigating the assassination, to date, no report has been made public and no assailants have been charged. Mr. Rhadebe’s murder is not the first case of intimidation or violence against those who have opposed mining in the area. Opponents of the mine have been the victims of repeated acts of violence, including armed attacks against community members in May and December 2015, as well as intimidation and raids by police.<sup>83</sup>
56. Intimidation and violence against mining opponents is not limited to Xolobeni. Members of other communities regularly report such conduct, sometimes perpetrated by or with the support of the police. For example, the week prior to Mr. Rhadebe’s assassination, members of the Mpukunyoni community in KwaZulu-Natal marched to the Mpukunyoni Traditional Council offices to protest the environmental and social harm caused to their community by the Somkhele Coal Mine. That evening, attackers entered the compound of Bongani Pearce, Chairman of the Mpukunyoni Community Property Association, and fired gunshots, broke windows and set fire to Mr. Pearce’s truck.<sup>84</sup>
57. Incidents like this are rarely investigated, and the police and other government bodies do not monitor or keep records of them, or provide protection to those who are threatened.

#### **V. Recommendations**

58. Mining and coal-fired power generation significantly harm the human rights of hundreds of communities across South Africa, violating their rights to water, food, health, culture and a healthy environment, among others. Communities have also been kept in the dark about and excluded from participating in many aspects of mining approvals and regulation.

59. For these reasons, we request that the Human Rights Council make the following recommendations to South Africa:

- **Prohibit mining in places or using practices that may violate human rights or cause substantial harm to the environment on which communities depend, prioritizing strategic water source areas and protected areas.**
- **Hold mining companies accountable for unlawful activities through a comprehensive and transparent compliance and enforcement programme, and an effective and transparent licensing appeals process.**
- **Adopt a transparent and effective approach to disclosure of information related to mining, including through the mandatory and automatic disclosure of all documents related to the approval and regulation of mines.**
- **Adopt and enforce laws ensuring that communities and other affected parties can meaningfully participate in all aspects of the mining authorization process.**
- **Immediately require coal-fired power plants to meet air emissions standards and to require Eskom to commence decommissioning those plants that cannot comply.**
- **Protect community-defenders opposing mines from harassment and violence, investigate threats or acts of harassment or violence, punish those responsible, and provide an adequate remedy for victims.**
- **Implement a significant decline of existing coal-production and invest strongly in clean energy to provide for South Africa's energy needs and to address the dire impacts of climate change.**

## ANNEX

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- <sup>1</sup> BP Statistical Review of World Energy June 2016, <https://www.bp.com/content/dam/bp/pdf/energy-economics/statistical-review-2016/bp-statistical-review-of-world-energy-2016-full-report.pdf>.
- <sup>2</sup> United States Geological Survey, <http://minerals.usgs.gov/minerals/pubs/#mcs>.
- <sup>3</sup> Eskom, Coal Power, [http://www.eskom.co.za/AboutElectricity/ElectricityTechnologies/Pages/Coal\\_Power.aspx](http://www.eskom.co.za/AboutElectricity/ElectricityTechnologies/Pages/Coal_Power.aspx); Centre for Environmental Rights, *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga*, (May 2016) (“Zero Hour”), p.1, available at <http://cer.org.za/wp-content/uploads/2016/06/Zero-Hour-May-2016.pdf>.
- <sup>4</sup> Zero Hour, p. viii.
- <sup>5</sup> International Covenant on Economic, Social & Cultural Rights, 993 UNTS 3; 6 ILM 360 (1967) (ratified in 2015); International Covenant on Civil and Political Rights, 999 UNTS 171; 6 ILM 368 (1967) (ratified in 1998).
- <sup>6</sup> Zero Hour, p. 2.
- <sup>7</sup> Centre for Environmental Rights, *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*, (“CER SAHRC Submission”), 26 August, 2016, p. 3.
- <sup>8</sup> CER SAHRC Submission, pp. 3, 7
- <sup>9</sup> *Ibid.*, p. 5.
- <sup>10</sup> See e.g. Bench Marks Foundation, pp. 39-42; World Wildlife Fund South Africa, *Coal and Water Futures in South Africa* (2011), p. 41, available at <http://www.wwf.org.za/?4981/coalwater>.
- <sup>11</sup> See Zero Hour, p. 4.
- <sup>12</sup> WWF South Africa, *Coal and Water Futures in South Africa* (2011), p. 40, [http://awsassets.wwf.org.za/downloads/wwf\\_coal\\_water\\_report\\_2011\\_web.pdf](http://awsassets.wwf.org.za/downloads/wwf_coal_water_report_2011_web.pdf).
- <sup>13</sup> Zero Hour, p. 4.
- <sup>14</sup> Bench Marks Foundation, *South African Coal Mining: Corporate Grievance Mechanisms and Mining Impacts* (2014), p. 34, available at [http://www.bench-marks.org.za/research/policy\\_gap\\_9.pdf](http://www.bench-marks.org.za/research/policy_gap_9.pdf).
- <sup>15</sup> Zero Hour, p. 5.
- <sup>16</sup> *Ibid.*, pp. 2-3.
- <sup>17</sup> Section 5 of the South African Mineral Petroleum Resources Development Act (MPRDA).
- <sup>18</sup> Zero Hour, pp. 8-9, *citing* Bureau for Food and Agricultural Production (BFAP), 2012. *Evaluating the Impact of Coal Mining on Agriculture in the Delmas, Ogies and Leandra Districts – with a Specific Focus on Maize Production*, available at [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](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 purpose 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>).
- <sup>19</sup> South Africa National Policy on Food and Nutrition: Published as GNR 637 in GG 37915 on 22 August 2014.
- <sup>20</sup> 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, p. 11, available at [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](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).
- <sup>21</sup> Zero Hour, p. 7.
- <sup>22</sup> *Ibid.*
- <sup>23</sup> *Ibid.*, p.7-10.
- <sup>24</sup> *Ibid.*, p. 7-11.
- <sup>25</sup> Shisana O. et al., (2013) *South African National Health and Nutrition Examination Survey (SANHANES-1)*. Cape Town: HSRC Press, <http://www.hsrc.ac.za/en/research-outputs/view/6493>.
- <sup>26</sup> Zero Hour, pp. 10-11; CER SAHRC Submission, p. 5.
- <sup>27</sup> CER SAHRC Submission, p. 5.
- <sup>28</sup> *Ibid.*

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- <sup>29</sup> Zero Hour, p. 12; CER SAHRC Submission, p. 6.
- <sup>30</sup> See e.g. US EPA website, Particulate Matter: Health, <https://www3.epa.gov/pm/health.html>.
- <sup>31</sup> *Ibid.*
- <sup>32</sup> *Ibid.*
- <sup>33</sup> OMS, Fact Sheet No. 313, Ambient (outdoor) air quality and health (March 2014), <http://www.who.int/mediacentre/factsheets/fs313/en/>.
- <sup>34</sup> See e.g. Mrinal K. Ghose & S.R. Majee, *Characteristics of Hazardous Airborne Dust Around an Indian Surface Coal Mining Areas*, Environ. Monit. Assess. 130 (2007) 17-25 (finding elevated levels of PM at residential areas 2.5 km from the Jharia open-pit coal mine).
- <sup>35</sup> See e.g. Laura M. Kurth, et al., *Atmospheric particulate matter size distribution and concentration in West Virginia coal mining and non-mining areas*, Journal of Exposure Science and Environmental Epidemiology (2014), 24, 405-411 (finding on average 30% higher levels of ultrafine PM in mining residential communities compared to control communities); Viney P. Aneja et al., *Characterization of particulate matter (PM<sub>10</sub>) related to surface coal mining operations in Appalachia*, Atmospheric Environment 54 (2012) 496-501 (finding levels of PM<sub>10</sub> up to three times the federal standards in communities living near a road with heavy coal truck traffic).
- <sup>36</sup> Colombia Constitutional Court, Sentencia T-154 de 2013, p 18 (citing findings by the state environmental agency, Corposesar).
- <sup>37</sup> Department of Environmental Affairs (DEA), 2014, *State of the Air Report and National Air Quality Indicator.*, available at <https://www.environment.gov.za/sites/default/files/reports/stateofairandnationalairqualityindicator2014.pdf>.
- <sup>38</sup> Zero Hour, p. 6, citing DEA, *Highveld Priority Area Air Quality Management Plan*, 2011. The Minister of Environment designates air pollution priority areas in recognition of their poor air quality and the need for specific air quality management action to rectify the situation. See Department of Environmental Affairs, South Africa Air Quality Information System, <http://www.saaqis.org.za/Priority%20Areas.aspx>.
- <sup>39</sup> Zero Hour, p. 6.
- <sup>40</sup> *Ibid.*
- <sup>41</sup> South African Department of Energy, Basic Electricity Overview, [http://www.energy.gov.za/files/electricity\\_frame.html](http://www.energy.gov.za/files/electricity_frame.html).
- <sup>42</sup> Zero Hour, p.4; Yolandi Groenewald, *Coal's hidden water cost to South Africa*, Greenpeace June 2012, p. 7, available at <http://www.greenpeace.org/africa/Global/africa/publications/coal/CoalsHiddenWaterCost.pdf>.
- <sup>43</sup> Physicians for Social Responsibility, *Coal's Assault on Human Health*, (November 2009), p. 9, <http://www.psr.org/assets/pdfs/coals-assault-executive.pdf>.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> Zero Hour, p.6, citing DEA, *Highveld Priority Area Air Quality Management Plan*, pp. x-xi..
- <sup>46</sup> Lauri Myllyvirta, *Health impacts and social costs of Eskom's proposed non-compliance with South Africa's air emission standards*, Greenpeace 2014, available at <http://www.greenpeace.org/africa/Global/africa/publications/Health%20impacts%20of%20Eskom%20applications%202014%20final.pdf>.
- <sup>47</sup> CER, *Eskom's applications to delay compliance with AQA minimum emissions standards*, <http://cer.org.za/virtual-library/letters/eskom/eskoms-applications-to-delay-compliance-with-aqa-minimum-emissions-standards>; Groundwork, *Another Five Years of Toxic Pollution By Eskom*, <http://www.groundwork.org.za/archives/2015/news%2020150224.php>.
- <sup>48</sup> See "Minimum Emissions Standards Issued for Listed Air Quality Activities," Dept. of Env'l Affairs (2013), <http://www.sabinetlaw.co.za/environmental-affairs-and-water/articles/minimum-emissions-standards-issued-listed-air-quality-activ>.
- <sup>49</sup> *Ibid.*
- <sup>50</sup> Lauri Myllyvirta, *Health impacts and social costs of Eskom's proposed non-compliance with South Africa's air emission standards*.
- <sup>51</sup> *Ibid.*
- <sup>52</sup> Physicians for Social Responsibility, *Coal Ash: Hazardous to Human Health*, <http://www.psr.org/assets/pdfs/coal-ash-hazardous-to-human-health.pdf>.
- <sup>53</sup> *Preliminary Report of the Independent Expert on human rights and the environment*, para. 25, U.N. Doc. A/HRC/22/43, 24 December 2012.
- <sup>54</sup> *Ibid.*
- <sup>55</sup> For a comprehensive discussion of these issues, please see Zero Hour.

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- <sup>56</sup> See Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A(III) of 10 December 1948, arts. 7, 8, 19, 20 and 21; ICCPR, arts. 2, 19, 21, 22, and 25.
- <sup>57</sup> *Preliminary Report of the Independent Expert on human rights and the environment*, para. 26.
- <sup>58</sup> CER SAHRC Submission, p. 12, Zero Hour pages 55, 66.
- <sup>59</sup> CER, *Signs of Hope*, p. 8.
- <sup>60</sup> *Bengwenyama Minerals (Pty) Ltd and others. Genorah Resources (Pty) Ltd and others*, [2010] ZACC 26.
- <sup>61</sup> See e.g. Aninka Claassens “Contested power and apartheid tribal boundaries: the implications of ‘living customary law’ for indigenous accountability mechanisms” (2011) *Acta Juridica: Pluralism and Development: Studies in Access to Property in Africa* p174-209; Oral submissions made by the Mining and Environmental Justice Communities Network of South Africa (MEJCON-SA) to the South African Human Rights Commission on 13 September 2016 in Johannesburg – some of those submissions are captured in this article: <http://www.sowetanlive.co.za/news/2016/09/15/traditional-leaders-fuel-mining-tension>; see also MPRDA, Section 22(4).
- <sup>62</sup> CER SAHRC Submission, p. 11.
- <sup>63</sup> *Ibid.*
- <sup>64</sup> See Centre for Applied Legal Studies (CALs), *The Social and Labour Plan Series, Trends Analysis Report* (March 2016), p. 95, <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf>.
- <sup>65</sup> CER SAHRC Submission, p. 11.
- <sup>66</sup> *Ibid.*, p. 12.
- <sup>67</sup> See CALS, *The Social and Labour Plan Series, Trends Analysis Report*, p. 95.
- <sup>68</sup> *Ibid.* p. 96-7.
- <sup>69</sup> *Ibid.*
- <sup>70</sup> *Ibid.* p. 97. 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.
- <sup>71</sup> Zero Hour, pp. 57-8; CER SAHRC Submission, p. 9.
- <sup>72</sup> *Ibid.*, p. 58.
- <sup>73</sup> Zero Hour, pp. xiii, 71; CER SAHRC Submission, p. 13.
- <sup>74</sup> Zero Hour, p. viii.
- <sup>75</sup> *Ibid.*, p. 49.
- <sup>76</sup> *Ibid.*, p. 49.
- <sup>77</sup> *Ibid.*, p. 49.
- <sup>78</sup> *Ibid.*, p. 69.
- <sup>79</sup> *Ibid.*, p.44.
- <sup>80</sup> *Ibid.*, p. 44.
- <sup>81</sup> *Mapping Report of the Independent Expert on human rights and the environment*, paras. 39-40, U.N. Doc. A/HRC/25/53, 30 December 2013.
- <sup>82</sup> See CER, *Joint NGO statement on assassination of Eastern Cape activist* (23 March 2016), <http://cer.org.za/news/joint-ngo-statement-on-assassination-of-eastern-cape-activist>; also World Organisation Against Torture, *South Africa: Killing of anti-mining activist Sikhosiphi “Bazooka” Rhadebe* (4 April 2016), <http://www.omct.org/human-rights-defenders/urgent-interventions/south-africa/2016/04/d23714/>.
- <sup>83</sup> *Ibid.*
- <sup>84</sup> See CER, *Joint NGO statement on assassination of Eastern Cape activist*.