SUBMISSIONS TO THE WORKING GROUP ON EXTRACTIVE INDUSTRIES, ENVIRONMENT AND HUMAN RIGHTS VIOLATIONS IN AFRICA

We, concerned legal professionals from South Africa, Lesotho, Swaziland, Malawi, Namibia, Zambia and Mauritius, hereby express our earnest support for the work of the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa as established by the African Commission on Human and Peoples' Rights in terms of Resolution 148(XLVI)09.

We further express our deep concern with the impact of extractive industries – both foreign and domestic – upon the rights of the rural communities of our countries.

We note that the Resolution expresses specifically violations of Articles 21 and 24 of the Charter, and we commend the Commission for encouraging greater protection for the rights of communities as peoples. We understand the African Charter to be a document catered for the unique challenges facing Africa, and we note that rural communities – while constituting the majority of Africans – remain one of the most marginalised groups on the continent and as such deserve the special attention of the Commission. We further note that where these communities share resources on a communal basis and in terms of customary law they must be protected and respected as a people.

We acknowledge that the extractive industries do have the potential to contribute positively to the economic development of our countries. However, we submit that if a balance is not struck between this potential and the rights of communities to decide about their resources, to sustainable development and to a healthy environment, then the extractive industries become an enemy to the peoples of Africa, and we will not stop in challenging them in this regard.

We, as Africans, cannot afford to choose economic development blindly above the political, social, cultural, developmental and environmental rights of our rural communities.

We would like to note here what we believe should be a central concern of the Working Group: the lack of consultation with and consent gained from communities in the exploitation of their resources.

<u>Free, prior, informed consent (FPIC)</u>

In their communication to the African Commission on Human and Peoples' Rights claiming the violation of various of their rights by Kenya as a member state,[1] the Endorois people pointed the African Commission to the international law requirement of prior, informed consent as a requirement of disposing of communities' resources and that has been delineated by the case law of the Inter-American Commission on Human Rights.[2] The latter states that a process of consent that is fully informed – and therefore discharges the onus of the international law principles of FPIC – 'requires at a minimum

[1] 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*

[2] Para 133 of the Endorois decision.

that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with and effective opportunity to participate individually or as collectives'.

The principle of free, prior, informed consent has been developed in international law with reference to the rights of indigenous peoples. As the Commission notes in Endorois,[3] the threshold for proper consultation is especially stringent in favour of indigenous peoples as it requires their consent rather than mere consultation.

We submit that in the African context, the international law delineation of indigenous peoples as opposed to other rural communities is inappropriate and superficial and that all customary communities in Africa who have a communal entitlement to their resources, should be entitled to claim the principle of FPIC.

We further submit that the African Commission and the Working Group on Indigenous Peoples established by the African Commission have confirmed our submission. In this regard, we respectfully point the following out:

1. The Working Group has indicated that a major problem facing 'indigenous communities' is the fact that 'their customary law and regulations are not recognised or respected as national legislation in many cases does not provide for collective titling of land'. This, we submit, is applicable to all traditional communities that regulate their lives in terms of customary law and that hold land in terms of collective forms of tenure. As such, this problem faces all customary communities and not merely those that have been recognised as 'indigenous'.

2. In the same vein, the Working Group notes that 'dispossession of land and natural resources is a major human rights problem for indigenous people […] This [the loss of fundamental natural resources] is a serious violation of the African Charter which states clearly that all peoples have the right to natural resources, wealth and property'.[4] Precisely the same violation is befalling customary communities not recognised as indigenous people. It would make no sense to protect communities recognised as indigenous and allow the violation to be committed against other communities.

3. Most significantly, the African Commission notes in the Endorois decision the following:[5]

   The African Commission nevertheless notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems […] The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'.[…] In that regard, the African Commission notes its own observation that the term

[3]Para 226 of the Endorois decision.

[4]Report of the African Commission's Working Group of Experts, quoted in para 121 of the Endorois decision.

[5]Para 148-149 of the Endorois decision.

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

It follows that the principles developed for indigenous peoples vis a vis their rights to their resources apply in Africa to all traditional communities who collectively own resources and who regulate their lives in terms of customary law – especially where these communities suffer from present-day 'injustices and inequalities'. As collective ownership is hardly recognised by African jurisdictions, the tenure rights of these communities are necessarily treated with inequality. We urge the Working Group to emphasize in their report that the principle of gaining the consent of a community who collectively own resources such as land or minerals applies to all the customary communities of Africa.

Illegitimate consultation

In the decision in favour of the Endorois peoples released by the Commission in 2009, the community allege that the authorities conducted 'illegitimate consultations' with individuals who purported to be representing the community.[6] These individuals gave the authorities the consent to remove the community – clearly contrary to the desires of the people who brought this communication before the Commission.

This allegation echoes similar situations that play out in our countries on a daily basis. The following must be noted:

1. In many instances, the legislation of our countries provide for consultation with communities prior to any action that would negatively impact upon the rights of that community: whether it entails the expropriation of land or resources, the degradation of the environment or the violation of the right to freely express ones culture.

2. While this legislation exists, our authorities find a way around it by overtly or covertly establishing entities or consulting individuals that purport to represent the communities and who are positively disposed to the proposals of the authorities. Unfortunately, this sometimes involves monetary gain for the individuals involved.[7]

3. In the case of traditional communities, the authorities as well as the extractive industry in question, often consult the relevant traditional leader claiming that he/she expresses the voice of the community. This is very often not the case with

[6] Para 20 of the Endorois decision.

[7] For example, in South Africa, a major mining company was recently forced to admit that the individuals that they had dealt with who purported to represent a community whose land was rented out by these individuals to the mining company, did not represent the community at all. The mining company only made these admissions after extensive litigation on behalf of the aggrieved community.

many traditional leaders disposing of their communities' resources as if it was their own.[8]

The problem that we would like to bring to the attention of the Working Group, therefore, is the violation of the substantive right to consultation of communities due to extractive industries and the authorities merely 'ticking the box' in complying with relevant legislation where it exists.

Recommendations: the content and appropriate process to implement and apply the consent standard.

In addition to being free, prior, informed and consensual, FPIC must be enduring, enforceable and meaningful (Laplante and Spears 2008). In this context meaningfulness translates into tangible recognition, in word and deed.

Recognition of the rights of traditional communities over their lands as the basis for negotiations over proposed extractive industries, necessarily involves the organization of engagement, partnership and sharing of financial benefits. In instances where communities consent to extractive activities on their land, payments or benefit sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any mining must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities;

Where benefit-sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the indigenous people (UN 2009). Consent is not transferable.

A starting point would be to recognise customary law as determinative in giving content to the principle of consent and to augment the right with statute law assertions dealing with:

1 Access to information ito a) customary law, and b) statute law

2 Impact assessments and rights inquiries ito a) customary law and b) statute law, and human rights due diligence reports on contracting parties in order to identify and prevent or mitigate any adverse human rights impacts that activities aned associated relationships may have on communities

3 Community meetings and other expressions dealing with the issue of consent : who calls and how ito customary law, and default provisions if not adequate or legitimate ito customary law

4 Meetings for rights holders affected directly

[8]There are various examples of this in South Africa. The Legal Resources Centre, a public interest law firm that represents communities that find themselves in this situation, invite the committee to contact them for further information in this regard at henk@lrc.org.za or wilmien@lrc.org.za.

5 Input and meetings by rights holders and stake holders affected by indirect and/or cumulative impacts

6 Reporting about meetings and other expressions dealing the issue of consent

7 Facilitation and conciliation to seek consent, and equality of arms in negotiations and preparation of binding agreements

8 Fair dispute resolution and adjudication of disputes in terms of customary law, state law and international law, including

a) State based judicial mechanisms

b) State based non-judicial grievance mechanisms

c) Non state based grievance mechanisms

In addition the following normative principles could support the development of customary law, along the following lines:

1 The principles shall

a) apply to all decision making processes concerning communal land and shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

b) serve as guidelines by reference to which any person and any organ of state must exercise any function when taking any decision in terms of the principle or any statutory provision concerning communal land;

c) serve as principles by reference to which a facilitator or conciliator must make recommendations; and

d) guide the development and interpretation of customary law, custom and usage.

2 Any decision about the disposal, development or change of land use affecting access rights on communal land requires the consideration of all relevant factors including the following:

a) the right for communities to meaningful participation and to control access to their land and resources;

b) that impact on the access rights of members of the community are avoided, or, where they cannot be altogether avoided, are minimised;

c) that the use and exploitation of renewable and non-renewable natural resources is responsible and equitable, and takes into account the benefit of such use and exploitation by the community;

d) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and

e) that negative impacts on the social, economic, cultural and environmental rights of the community and its members are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

3 Adverse impacts shall not be distributed in such a manner as to unfairly discriminate against any affected person or member of the community, particularly vulnerable and disadvantaged persons including women and children.

4 Equitable access to resources and benefits must be pursued, and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

5 Responsibility for any development decision rests with and remains with beneficiaries and the persons affected, and future generations, and this means that decisions may be re- evaluated and projects redirected to remedy negative impacts and address consequences of a project throughout its life cycle. Communities have the right to participate in decision making throughout the project cycle.

6 The participation of all members of the community must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

7 Decisions must take into account the interests, needs and values of all affected persons and members of the community, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

8 Community wellbeing and empowerment must be promoted through education, the raising of awareness, the sharing of knowledge and experience and other appropriate means.

9 The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

10 Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with customary law, custom and usage, and any relevant statute law.

11 The vital role of women and youth must be recognised and their full participation