MARIKANA, MANGAUNG AND THE SOUTH AFRICAN MINING INDUSTRY

Address to the South African Institute of International Affairs

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Introduction

When I was originally asked by SAIIA, some months ago, to discuss the future of the South African mining industry in the run-up to the African National Congress's ("**ANC's**") quinquennial elective conference in Mangaung, I thought I would use the occasion to discuss the industry's regulatory ailments, the ANC Youth League's unrequited proposal for the industry's nationalisation, as well as the governing party's research report on the industry and its likely outcome in mid-December.

But these are no ordinary times. As you know, exactly two weeks ago, on August 16, shortly after 16:00 in the afternoon, officers of the South African Police Service's ("**SAPS's**") tactical response team shot dead 34 mine workers at Lonmin's Marikana mine, who had embarked on an illegal and therefore unprotected strike.[1] These events were foreshadowed in the preceding week by the killing, apparently by striking mine workers, of two policemen, who were hacked to death, as well as two mine security officials, who were burnt alive in their car.[2]

Although much has been written about the Marikana shootings, which played out, in graphic detail, domestically and internationally, in the electronic media, there has been surprisingly little commentary about how any of this was possible in a constitutional democracy based on the rule of law eighteen years after the end of apartheid. Not only is the rule of law a foundational principle of our democracy, but the Constitution itself, in its foundational principles, requires the democratic state "*to ensure accountability, responsiveness and openness*".[3]

Although the President has, commendably, appointed a wide-ranging judicial commission of inquiry under the chairmanship of a well-respected former judge, to investigate the Marikana shootings and the events leading up to it, as well as an inter-ministerial task team to deal with its immediate aftermath, I think it is legitimate to pose a few fundamental questions. [On a personal note, I do so with a sense of déjà vu as a former chair of Lawyers for Human Rights in Johannesburg during successive states of emergency in the late 'eighties]:

- Why were the Ministers of Labour and Mineral Resources absent from Marikana until the day after the shootings,[4] despite the fact that the underlying problem began a week

[1] *Lonmin's killing fields: the inevitable, tragic next move*, Daily Maverick, 17 August 2012.

[2] *Mine shootings threaten Zuma, ANC*, News24, 25 August 2012.

[3] Section 1(d) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").

[4] *Commission to probe Lonmin killings: Zuma*, SABC News, 17 August 2012.

earlier?[5] Likewise, why was apparently no attempt made by either department to intervene and resolve the underlying labour dispute before the hilltop shootings, despite ten lives already having been lost in the preceding week?[6]

- Why was the SAPS's tactical response team and not the public order policing unit deployed at Marikana; likewise, why were the police not equipped with riot gear?

- Even accepting that the police may well have been provoked, threatened and even shot at, how was it reasonable, justifiable and proportionate to shoot dead 34 mine workers, some of whom now appear to have been shot in the back, bearing in mind that the Constitution enjoins the police to act in accordance with its provisions,[7] and that the South African Police Service Act, 1995 mandates that where a police officer is authorised by law to use force, "*he or she may only use the minimum force which is reasonable in the circumstances*"?[8]

- How could the Minister of Mineral Resources, Susan Shabangu, claim two days after the incident that she "*was not aware of where [the Association of Mineworkers and Construction Workers ("**AMCU**")] operates in the mining industry*" after AMCU was at the forefront of Impala Platinum's six week strike in February, which led to the death of three people and cost some R2.5 billion? On the same basis, why was AMCU not invited to the emergency meeting between government, the Chamber of Mines, the National Union of Mineworkers and Lonmin in Johannesburg on August 18? Minister Shabangu's 'explanation' - that the meeting took place within an existing forum of which AMCU was not a part - is remarkable, to say the least.[9]

- How could the new national police commissioner - a highly qualified social worker recently turned four-star general - Riah Phiyega, say to the police, four days after the shootings, that "*Safety of the public is not negotiable. Don't be sorry about what happened*"?[10]

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[5] *Mineworkers shot in mine clash*, News24, 11 August 2012.

[6] *Shabangu 'concerned' at Marikana violence*, The Citizen, 15 August 2012.

[7] Section 199(5) of the Constitution: "*The security services must act, and must teach and require their members to act, in accordance with the Constitution and the law, including customary international law and international agreements binding on the Republic.*"

[8] Section 13(3)(b).

[9] *Task force to be set up: Shabangu*, The New Age, 18 August 2012.

[10] *Cops 'shouldn't be sorry' about Marikana shooting*, Mail & Guardian Online, 20 August 2012.

- Why has not a single word of apology about the incident been heard from the government, other than a brief, but clearly heartfelt, remark by the Minister of Defence almost a week after the event?[11]

- How could the former Cabinet spokesperson, Jimmy Manyi, refuse to discuss the incident with the media at the post-Cabinet media briefing on August 22 on the basis that the "*government [was] in mourning*"?[12]

- What circumstances led to the opening, late last week, by the Independent Police Investigative Directorate of 194 cases of assault and attempted murder against the police following the arrest and detention of some 260 mine workers,[13] in addition to 34 murder charges in respect of the Marikana hilltop shooting itself?[14]

- How is any of this consistent with the Constitutional prescript of accountable, responsive and open government?[15]

In seeking some answers to these questions, my memory is drawn to the important *Bengwenyama* judgment delivered by the Constitutional Court in November 2010. In this case, the Department of Mineral Resources ("**the DMR**") had failed to afford the Bengwenyama community any of the notice, assistance, consultation, participation and, ultimately, reasons for adverse administrative action - to which they were entitled by law - in respect of the grant of a prospecting right over their land. In light of all that has happened over the past two weeks, I am reminded of the Court's concise rebuke: "*This is not the way government officials should treat the citizens they are required to serve.*"[16] Marikana, however, itself requires one to take a closer look at the current state of the South African mining industry.

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[11] *Minister begs forgiveness from miners*, News24, 21 August 2012.

[12] *Marikana: Govt won't talk, it's mourning*, Mail & Guardian Online, 22 August 2012.

[13] *Cops 'torture' miners*, City Press, 26 August 2012.

[14] *IPID opens murder dockets over Marikana*, News24, 27 August 2012.

[15] In *Joseph and Others v City of Johannesburg and Others* 2010 (4) SA 55 (CC) at para 45, the Constitutional Court held that these values "*require government to act in a manner that is responsive, respectful and fair when fulfilling its constitutional and statutory obligations. This is of particular importance in the delivery of public services at the level of local government. Municipalities are, after all, at the forefront of government interaction with citizens. Compliance by local government with its procedural fairness obligations is crucial therefore, not only for the protection of citizens' rights, but also to facilitate trust in the public administration and in our participatory democracy.*"

[16] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) at para 80.

The South African mining industry in context

The world is clearly watching and waiting to see how South Africa will handle arguably one of its most important tests since the transition to democracy in 1994. The unfolding of the events at Marikana - and perhaps our so far halting response to them - has clearly affected international investor confidence in the South African mining industry. A week after the Marikana shootings, Fitch Ratings described the events as reflecting "*broader structural problems that have long weighed on South Africa's credit rating*", and cited rising costs, policy uncertainty and nationalisation rhetoric as reasons to regard South Africa as "*a less favourable investment destination compared with its peers*".[17]

It is trite that investor confidence is essential for the substantial capital needed to explore, as much as exploit, South Africa's prodigious mineral endowment, estimated to be the largest in the world and worth almost US$2.5 trillion.[18] Despite an encouraging climb this year in the Fraser Institute's annual ranking of mining jurisdictions' "*policy potential*" - rising 13 places in the 2011/2012 survey, after falling 18 places over the three prior surveys - South Africa still placed only 54th out of the 93 mining jurisdictions ranked, falling in the bottom half and well below our neighbours Namibia and Botswana.[19] Indeed, in calculating this ranking, the Fraser Institute was advised by the technical director of one exploration company that "*[i]n South Africa, the entire process of the administration of, and applying for, and awarding of, exploration rights is protracted, corrupt, arbitrary, inconsistent, and a nightmare*".[20]

Declining investor confidence in a highly capital intensive industry is always a cause for concern, particularly when we consider the centrality of mining to the South African economy. Although mining's direct contribution to GDP has declined to less than five per

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[17] *Spread of mine labour revolt casts shadow on SA's ratings*, Business Day, 27 August 2012.

[18] *Metals and Mining Strategy: Royalties, Riches and Taxes*, Citigroup Global Markets, 27 April 2010, at 1.

[19] *Survey of mining companies 2011/2012*, Fraser Institute, February 2012, at 12. The Fraser Institute compares the investment attractiveness of mining jurisdictions according to their "*policy potential index*", which is calculated as follows:

> "*The Policy Potential Index is a composite index that measures the effects on exploration of government policies including uncertainty concerning the administration, interpretation, and enforcement of existing regulations; environmental regulations; regulatory duplication and inconsistencies; taxation; uncertainty concerning native land claims and protected areas; infrastructure; socio economic agreements; political stability; labor issues; geological database; and security… [It] is based on ranks and calculated so that the maximum scores would be 100, as described below. Each jurisdiction is ranked in each policy area based on the percentage of respondents who judge that the policy factor in question 'encourages investment.' The jurisdiction that receives the highest per cent age of 'encourages investment' in any policy area is ranked first in that policy area; the jurisdiction that receives the lowest percentage of this response is ranked last. The ranking of each jurisdiction across all policy areas is averaged and normalized to 100. A jurisdiction that ranks first in every category would have a score of 100; one that scored last in every category would have a score of 0*" (ibid. at 9).

In the 2011/2012 survey, South Africa scored a policy potential index of 44.5 (ranking 54th), while Namibia scored 51.6 (ranking 45th) and Botswana scored 76.9 (ranking 17th).

[20] *Ibid*. at 47.

cent from around 20 per cent in 1970 and 9 per cent in 1994,[21] the mining industry still accounts for almost 60 per cent of our export revenue,[22] as well as the employment of about half a million people directly and a further half a million indirectly.[23] The mining industry thus remains the most significant private sector contributor to the fiscus, providing some R25.9 billion in taxes (approximately 17 per cent of total corporate taxes) and R5.5 billion in royalties in 2011.[24]

There is, however, an ever increasing distance between where we are and where we all would wish to be: on a sustainable path of growth, employment and development. This distance was illustrated when the National Planning Commission's National Development Plan 2030 ("**NDP**"), subtitled "*our future - make it work*", was being debated in Parliament at the very same time that the tragic events at Marikana were unfolding over 1200 kilometres away. As it happens, the NDP, under the chairmanship of Trevor Manuel, provides a sober assessment of the current state of our mining industry, acknowledging that it "*has performed poorly over the past decade*", and that during the commodity boom from 2001 to 2008 it shrank by one per cent per year, when the world's top 20 mineral exporters achieved an average annual growth rate of five per cent.[25]

The NDP describes this as "*an opportunity lost, as estimates show the mining sector could expand by 3 per cent to 4 per cent a year to 2020, creating a further 100 000 jobs*", if it could overcome its "*central constraints*", namely "***uncertainty in the regulatory framework and property rights****; electricity shortages and prices; infrastructure weaknesses, especially in heavy haul rail services, ports and water; and skills gaps*".[26] The NDP notes that unlocking the growth potential of the mining sector "*relies substantially on platinum-group metals*",[27] of which South Africa is home to over 80 per cent of the world's estimated reserves.[28]

It is somewhat ironic that the NDP identifies the platinum sector as the champion of the rejuvenation of our mining industry, when in fact it is a sector facing a perfect storm of plummeting global prices and rising local costs which this year has forced many platinum

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[21] *South Africa's mines: In the pits*, The Economist, 25 August 2012.

[22] *National Development Plan 2030: Our future - make it work*, National Planning Commission, 15 August 2012, at 146.

[23] *Annual Report 2011*, Chamber of Mines of South Africa, at 18. According to the most recently available *Quarterly Employment Statistics* released by Statistics South Africa on 19 June 2012 (at 8), the number of people directly employed in the mining and quarrying industry in March 2012 was 522 000, the highest number since September 2008.

[24] *SA mining upping its growth, development game - Baxter*, Mining Weekly, 17 August 2012.

[25] National Planning Commission, *op cit*, at 146.

[26] *Ibid*.

[27] *Ibid*.

[28] "The mineral industry of South Africa" in *2009 Minerals Yearbook: South Africa [advance release]*, United States Geological Survey, September 2011, at 37.1.

mines to consider closing shafts and retrenching workers. According to a recent report by CIBC World Markets, the South African platinum industry "*is facing a significant margin squeeze*", driven by cost escalation and historically low prices.[29] The report explains that the "*average cost of labour - some 60% of the cost base - has increased in the order of 10% per annum for at least the past 18 years*", while the cost of electricity - roughly 10 per cent of the cost base - has risen between 15 and 25 per cent per annum in the past three years.[30]

Overall, the report calculates that the average cash cost of the platinum industry has risen just over 20 per cent per annum over the past ten years, which would be fine if the platinum price had risen concomitantly. But this has not happened. In fact, the average price of the platinum group metals basket has only risen ten per cent annually over the past ten years, in other words, at half the rate of the rising costs.[31] This disparity steadily eroded the profit margins of South Africa's platinum mines, leaving them very vulnerable to price volatility. Thus, when the platinum price declined rapidly over the past year - from about US$1900 per ounce in August 2011 to some US$1400 per ounce by early August 2012 - the industry faced a growing crisis.

In February this year, Anglo American Platinum announced that it was reducing its capital expenditure for 2012 by over ten per cent, warning that the sector would suffer further disinvestment if the platinum price did not recover.[32] Meanwhile, an illegal strike by AMCU-affiliated workers at an Impala Platinum mine in Rustenburg raged violently for six weeks, costing the company R2.5 billion in lost revenue and the lives of three employees.[33] In June, Aquarius Platinum decided to suspend two mining operations on account of low prices, high costs and operational difficulties. At the beginning of August, the company's only remaining operational mine was invaded by some 200 contract workers who had been dismissed by Aquarius's mining contractor for undertaking an illegal strike. In the ensuing violence, three protesters were killed by mine security and at least twenty others were injured.[34]

As you can imagine, 2012 has been a harrowing year for the platinum industry, culminating in the terrible events at Marikana on August 16. It is important to understand these events in context. As we seek ways to prevent further such tragedies, we should focus on the realities that continue to constrain the growth of our mining industry. This point is all the more

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[29] *Batten down the hatches (again): low prices, high costs - tough times*, CIBC World Markets, 10 May 2012, at 20.

[30] *Ibid*. at 7.

[31] *Ibid*. at 8.

[32] *Amplats paints grim outlook for platinum mining*, Miningmx, 13 February 2012.

[33] *How SA platinum lost its way*, Miningmx, 16 April 2012.

[34] *Three dead in Aquarius Platinum mine invasion*, Business Day, 1 August 2012.

important as the ANC leadership begin to turn their minds from Marikana to Mangaung, where the party's December 2012 elective conference will decide how the state should, in the language of its 2007 Polokwane resolutions, "*intervene strategically … to drive the growth, development and transformation*" of the mining sector.[35] I hope that the months remaining before Mangaung do not lead to the further resurgence of resource nationalism, but to reflection on our recent history, on the shortcomings in our current approach to the mining industry, as well as how we may use this to prevent another Marikana.

To my mind, there are several lessons we can learn from the events of the past month, which can be used not only to improve the working and living conditions of mine workers and mine communities, but take a fresh look at the way black economic empowerment ("**BEE**") has played out in the industry.

The Voluntary Principles on Security and Human Rights

First, I would like to touch briefly on one lesson we might learn from the way in which the conflict was handled and permitted to lead to what seems to be the single worst public protest this country has witnessed since the advent of democracy.[36]

In my view, the government and mining industry - now more urgently than ever - need to prioritise the proper management of mine security using an international best practice approach, for which we already have a good model in the Voluntary Principles on Security and Human Rights ("**Voluntary Principles**"). The Voluntary Principles were developed in 2000 by the governments of the United Kingdom and the United States of America, major companies in the mining, oil and gas industries, as well as prominent human rights and corporate responsibility organisations, and are intended to serve as a guide for companies to maintain security within an operating framework of respect for human rights.[37]

Importantly, the Voluntary Principles address three spheres of security management, i.e. risk assessment, interactions with public security (i.e. police), and interactions with private security. In the sphere of risk assessment, focus is placed on the early identification of the potential for violence, which requires regularly updated, credible information on security threats. In respect of a company's interactions with public and private security, emphasis is placed on the deployment of security contingents that are competent, appropriate and proportionate to the threat, ensuring that any force employed should be strictly necessary and proportional.

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[35] *52nd National Conference: Resolutions*, African National Congress, 20 December 2007.

[36] *'Massacre' outrage as workers die in bloodbath at Marikana*, Business Day, 17 August 2012.

[37] See www.voluntaryprinciples.org for more information and a list of participants.

Reflecting on the Marikana tragedy, one cannot help feeling that it could, and should, have been better predicted and prevented if a sufficiently rigorous framework were in place to detect and react to threats of violence. To improve this position in the future, I would urge both the South African government and those mining companies which have not already subscribed to the Voluntary Principles to give serious consideration to doing so. Given the reality that this year at least two thirds as many mine workers' lives have been lost above ground as underground,[38] it seems to me that the adoption of the Voluntary Principles should be an urgent priority, and perhaps a helpful step towards preventing another tragedy.

A new social contract for mining?

Although the incident at the Marikana mine was ostensibly driven by union rivalry and wage dissatisfaction, as much as by the conduct of the police, the root causes seem to run much deeper, to the daily living and working conditions of mine workers and mine communities. When one looks at how best to optimise South Africa's prodigious mineral wealth, an important focus must be on those most directly affected by mining - those South Africans whose physical and social space is affected by the arrival and, importantly, the departure of mining companies. A fundamental priority should be to ensure that mine communities are fairly included in the benefits that mining clearly brings to the economy.

Having visited the Marikana mine and its surrounding area this past week end, I had the opportunity to see for myself the conditions in which many of the mine workers and their families live. In the informal settlement of Nkaneng, the housing appears to be made up predominately of shacks; there is a sprawling refuse dump that lies on open land; and there is apparently no refuse collection, no lighting or electricity, and no proper sewerage.[39] I should add that this is not the responsibility of the mining companies concerned, but of the

[38] The death of five mine workers at Gold Fields' KDC West mine in early July brought mine accident fatalities to 63 since the beginning of 2012 (*Safety task team seeks Section 54 arbiter*, Miningmx, 9 July 2012). At least 42 mine workers have died in above ground violence so far this year: three at Impala Platinum's Rustenburg mine in February, another three at Aquarius Platinum's Kroondal mine in early August; and 36 at Lonmin's Marikana mine in mid-August (in addition to the 34 shot by police on August 16, at least two others were killed in the days prior).

[39] *Platinum riches elude desperate communities in Marikana's shadow*, Business Day, 28 August 2012. See also *A review of platinum mining in the Bojanala District of the North West Province: A participatory action research (PAR) approach*, Bench Marks Foundation, 2012 which describes the living conditions at Marikana as follows (at 73):

> "*The visits by the Bench Marks Foundation research team to Marikana convince us that the residential conditions under which Lonmin and other mine company employees live are appalling. This can be seen in the proliferation of shacks and informal settlements, the rapid deterioration of formal infra-structure and housing in Marikana itself, and the fact that a section of the township constructed by Lonmin did not have electricity for more than a month during the time of our last visit. At the RDP Township we found broken down drainage systems spilling directly into the river at three different points. Residents informed the Bench Marks Foundation team that they have been reporting the matter to both the Local Government and Lonmin for five years now, and it still remains unaddressed. The Bench Marks Foundation team interviewed residents living next to the spills and found that children showed symptoms of chronic illnesses associated with such spills*."

Rustenburg Local Municipality, within which Nkaneng falls. Incidentally, Rustenburg is one of the many municipalities whose audit was incomplete this year, and it has received a qualified audit from the Auditor-General every year since 2007.[40] It appears that much has been done by local mining companies, including Lonmin, to improve the mine hostels, many of which have been converted into single quarters or family units. Nevertheless, the relatively generous living-out allowances lead many employees to live out in the surrounding community, where living conditions are deplorable, owing to what appears to be evanescent local government.[41]

But the real problem which needs to be addressed with mine communities is much wider than simply one of living conditions. At the *Mining Lekgotla* organised by the South African Chamber of Mines earlier this year, I urged government and industry to recognise the need for a "new deal" for South Africa's mine workers and mine communities, because without it - without strengthening the social licence to operate - we would not have a sufficiently firm foundation for equitable and sustainable growth in the mining sector. Under the Mineral and Petroleum Resources Development Act, 2002 ("**the MPRDA**"), a mining right may only be issued if the applicant submits a compliant social and labour plan ("**SLP**") to the DMR as well as subsequently complying with its requirements.[42] SLPs aim to give effect to sections 2(f) and (i) of the MPRDA: to promote employment and advance the social and economic welfare of all South Africans; as well as ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating.

The required content and form of such a plan[43] are unworkably vague. In 2006, the DMR published a guideline on SLPs, but a 2009 study by the University of Stellenbosch's Unit for Corporate Governance in Africa found that that key parts of this guideline were "*frustratingly vague*",[44] provided "*no guidance whatsoever on desired courses of progression or desired outcomes for development*", and - most concerning of all - that the SLP process itself was formulaic and formalistic, being "*treated as a paper exercise to get approval for the mining licence*".[45]

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[40] *General report on the audit outcomes of the North West Local Government 2010-2011*, Auditor General of South Africa, 23 July 2012, at 77.

[41] *Platinum riches elude desperate communities in Marikana's shadow*, Business Day, 28 August 2012. Lonmin, for instance, is reported to pay R1850 a month, that being 30 per cent of the basic wage.

[42] Regulation 42 of the Mineral and Petroleum Resources Development Regulations, 2004, published in Government Gazette 26275, 23 April 2004 ("**MPRD Regulations**"); section 25 of the MPRDA.

[43] Regulation 46 of the MPRD Regulations.

[44] *Corporate governance: Social and Labour Plans in the mining sector*, Unit for Corporate Governance in Africa (University of Stellenbosch Business School), May 2009 at 4.

[45] *Ibid.* at 6. The study goes on to state that SLPs were "*also seen as rigid, and not allowing for changing local circumstances over the lifetime of the mine … [D]espite the presence of a fair amount of approved SLPs, no*

Moreover, a 2011 report on Africa's mineral regimes, conducted under the joint auspices of the African Union Commission and the United Nations Economic Commission for Africa,[46] found that South Africa's SLP framework "*is static and does not provide mechanisms to address emerging challenges as mining operations progress*".[47] By contrast, the report describes the position in Nigeria, where the Minerals and Mining Act, 2007, requires an applicant for a mining right to conclude a community development agreement ("**CDA**") "*that will ensure the transfer of social and economic benefits to the community*".[48] Such an agreement must address any matters relevant to the community and must provide for community participation in the planning, implementation, management and monitoring of activities carried out under that agreement. Each agreement is reviewed every five years, which allows parties to address emerging challenges, while providing reasonable stability.[49] Sierra Leone has enacted a similar requirement in its Mines and Minerals Act, 2009. CDAs are also required under Papua New Guinea's Mining Act, 1992, and, more recently, under the Mongolian Minerals Law, 2006.[50]

A CDA, in contrast to an SLP, gives important recognition to the voice of the community concerned. Mine communities are enabled "*to articulate - and have addressed - their development goals and aspirations*".[51] Communities also become better acquainted with the financial and other constraints on the company. In this way, CDAs can foster a mutual understanding of expectations, and by defining mutual obligations can help to build a "*sense of shared responsibility*".[52]

Our current approach to mine communities is simply not delivering these benefits. It presupposes a one-size-fits-all model for such communities, despite their diverse needs and circumstances. Moreover, it reserves no seat at the regulatory table for the affected mine communities.[53] It is vital that, as we discuss the future of mining in South Africa, we ensure

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cases were recorded where the conditions of an SLP relating to retrenchments were invoked in the aftermath of the 2008 world financial crisis."

[46] *Minerals and Africa's Development: The International Study Group Report on Africa's Mineral Regimes*, November 2011.

[47] *Ibid.* at 85.

[48] *Ibid.*, quoting section 116(1) of the Nigerian Minerals and Mining Act, 2007.

[49] *Ibid.*

[50] *Good practice note on community development agreements*, EI Source Book, 2011, at 4.

[51] *Ibid.* at 5.

[52] *Ibid.*

[53] According to the Bench Marks Foundation study on communities in the platinum minefields, part of the problem is that SLPs are not made public, making it difficult for communities to engage meaningfully on their contents (Bench Marks Foundation, *op cit*, at 1).

The shortcomings of the SLP scheme are summed up well by Paul Kapelus in *Migrant labour still a part of social dynamics of mining*, Business Day, 24 August 2012:

that mine communities and workers are given a fair say in how mining will affect their own future. We could do well to look beyond South Africa's borders at what reform-minded African mining jurisdictions are doing to promote community participation.

A new approach to BEE

Another integral component of this new social contract for mining must be real and meaningful transformation, which to my mind requires sober reflection on, as much as the revision of, the government's key transformation policy, BEE. The intention behind both the original and revised Mining Charter[54] was to champion the government's BEE policy, which itself is an attempt to de-racialise the economy, by requiring mining companies, *inter alia*, to divest equity in favour of black South Africans: 15 per cent by 2009 and 26 per cent by 2014, supposedly at fair market value.[55]

The promotion of BEE in the mining sector has, ironically, become a catalyst for the populist support for nationalisation. This is because both the original and revised Mining Charter promote a form of "*narrow*" BEE, resulting in the enrichment of the well-connected few, as opposed to the economic empowerment of workers, as well as poor and marginalised black communities, who should be the principal beneficiaries of BEE. For instance, while the revised Mining Charter requires BEE transactions to aim to achieve "*meaningful economic participation*", it also confusingly requires that these beneficiaries are vested with "*effective ownership*", including voting rights and management control.[56] This seems to preclude broad-based share schemes with communities and workers as their beneficiaries, as such

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"*[D]evelopment cannot follow the old pattern, where communities wait for developers to direct schools, clinics, bursaries and buildings their way, resulting in a dependency syndrome. This is caused in part by mines historically taking on the role of government, and by the pressure to spend money on corporate social investment, tick the boxes on the black economic empowerment scorecard, and get the nod from the Department of Mineral Resources on the implementation of a social and labour plan.*

The key problem is that the communities do not decide for themselves what their future should look like, and then secure the support of the development partners such as the mining houses or municipalities. These communities need to construct development plans that support their ambitions with respect to their economics, their health, their environment, their education, their social welfare and their infrastructure."

[54] Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, published in Government Gazette 26661, 13 August 2004 ("**original Mining Charter**"); Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, published in Government Gazette 33573, 20 September 2010 ("**revised Mining Charter**").

[55] According to the Minister of Mineral Resources in her 2011 budget vote address, the aggregate black ownership in 2009 was only approximately 8.9 per cent. It also emerged at the public hearings on the revised Mining Charter held before the Parliamentary Portfolio Committee on Mineral Resources in August 2011 that there is a real dispute as to the actual level of black ownership of the mining industry, possibly due to the methodology used to calculate the level of black ownership.

[56] Revised Mining Charter, at 2.1.

schemes tend to be in the form of a trust which holds shares in a mining company, and collectively exercise the voting rights attaching to the shares on behalf of the community.[57]

The majority of South Africans who were disadvantaged by the racist economic policies of the past are simply not benefiting from the government's key empowerment policy. Unless a programme of truly broad-based economic empowerment is implemented, the current policy will continue to fuel discontent among the historically underprivileged majority in South Africa, which is likely to strengthen the hand of those stoking the fires of nationalisation.[58]

I have never understood why, if BEE is a given - if not a constitutional imperative - the empowerment of mine workers, through employee share schemes, and mine communities, through community trusts, should not be made compulsory under the Mining Charter.

Fortunately, it seems that members of the ruling party, too, have come to realise this. Just last week, ANC secretary-general Gwede Mantashe launched a scathing attack on the way in which BEE had been used for the personal gain of a limited few,[59] and it appears possible that one outcome of the Mangaung conference may be to address BEE's current shortcomings.

The need for economic growth and development

In order for any new social contract to succeed, there is a clear need for economic growth and development that filters through to all levels of society. The NDP itself observes that there is an urgent need to stimulate mining investment and production, and sets out six proposals aimed at growing investment, outputs, exports and employment in the minerals sector, which includes: addressing the major constraints impeding accelerated growth and development of the mining sector in South Africa (such as amending the MPRDA to ensure a predictable, competitive and stable mining regulatory framework); developing and

[57] It is perhaps for this reason that most mining companies opt to divest shares to a BEE company rather than a community trust or employee share ownership programme, which might have a more immediate socio-economic impact. In 2010, for example, Lonmin saw the entire empowerment stake (18 per cent) in its two South African subsidiaries transferred from the Lonplats Employee Masakhane Trust to Incwala Resources, of which just over half is owned by Cyril Ramaphosa's Shanduka Resources, and almost a quarter each is owned by the Industrial Development Corporation and Lonmin itself. According to Lonmin's 2011 annual report, however, the company plans to include broad based community and employee share schemes in its empowerment holdings in future.

[58] As was highlighted in Time magazine last week (*As South Africa reels from mine shootings, social inequality threatens to undo the post-apartheid 'miracle'*, Time, 22 August 2012):

> "*The emphasis in redistribution under the rubric [of BEE] was on promoting black ownership within the existing - highly unequal - economic structure. BEE made instant tycoons of a handful of politically connected black power players. If the apartheid-era economic inequalities were to remain in place, at least their beneficiaries would now include - as a very junior partner - a small black elite associated with the ANC. The deal worked for those it benefited, and also for the corporate titans who saw the obvious benefit in giving the ANC a stake in maintaining the economic status quo.*"

[59] *BEE is a giant rip-off - Mantashe*, Independent Online, 23 August 2012.

enhancing linkages with other sections of the economy; and improving the alignment of the Mining Charter requirements to ensure effectiveness in local communities.[60]

While these are all worthy objectives, the concern, as always, remains how these can be implemented to achieve real results. In this regard, there is one point in the NDP that I would like to highlight: the paramount need for *certainty* in the mineral regulatory regime.[61]

Lack of certainty and maladministration in the mineral regulatory regime

It is by now well known that in resource-rich developing countries with ambitious transformation and development goals, such as South Africa, investors require regulatory certainty and administrative efficiency. This in turn requires laws and policies that are clear, definite and consistently applied. This is particularly true of the mining sector, in which security of tenure is a *sine qua non* of long term capital investment in what is a high risk industry. Unfortunately, however, there are many examples of legal uncertainty in the South African mineral regulatory regime: the MPRDA, the foundation of this regime, is fraught with vague and ambiguous provisions, as is the revised Mining Charter. This has led the National Treasury, rather unusually, to criticise South Africa's mining regulatory and administrative regime as both "*opaque*" and "*inefficient*".[62]

While the MPRDA was intended to mark a formal shift away from subjective, broad discretions towards generally objective criteria combined with bound ministerial discretion, in reality it applies this principle inconsistently and employs its BEE and socio-economic

[60] NDP, *op cit*, at 146-147. The proposals for the mining industry read in full as follows:

- *Address the major constraints impeding accelerated growth and development of the mining sector in South Africa. The main interventions include: ensuring certainty in respect of property rights; passing amendments to the [MPRDA] to ensure a predictable, competitive and stable mining regulatory framework; secure reliable electricity supply and/or enable firms to supply their own plant with an estimated potential of 2 500MW by 2015; and secure, reliable rail services, potentially enabling private participation.*
- *Develop, deepen and enhance linkages with other sections of the economy. This includes: linkages with both manufacturers of inputs (capital goods and consumables) and suppliers of mining-related services; and downstream producers, especially for platinum-group metals and chrome ore. In this regard, an export tax could be considered.*
- *Provide focused research and development support to enable improved extraction methods that lengthen mine life; better energy efficiency and less water intensity; and alternative uses of South Africa's extracted minerals, especially platinum-group metals, titanium and others that have potential for application in new energy systems and machinery.*
- *Identify opportunities to increase regional involvement and benefit in the whole minerals cluster. This could include encouraging the establishment and development of alternative providers of partially processed intermediate inputs in other countries in the region.*
- *Ensure active engagement on, and resolution to, issues raised through the Mining Industry Growth and Development Task Team process.*
- *Improve alignment of mining charter requirements to ensure effectiveness in local communities.*

[61] *Ibid.* at 42 and 146.

[62] *Medium term budget policy statement 2011*, National Treasury of the Republic of South Africa, 25 October 2011 at 15.

objectives to retain, in effect, a high level of administrative discretion. The major problem, of course, is that the MPRDA is written in vague terms, rendering key licensing conditions vulnerable to extensive 'back door' discretion. As such, applicants have little certainty whether they will ever receive a licence, even if they ostensibly comply with the statutorily prescribed conditions. Because these are couched as mandatory requirements, no indication is given of the criteria that must be applied when exercising this apparent discretion.

This is particularly evident with regard to the granting of prospecting and mining rights, where ostensibly mandatory requirements contain much room for variance. Although the original Mining Charter and the revised Mining Charter could and should have addressed these regulatory deficiencies, the vagueness of their provisions only added to the conundrum. The situation, however, is not irremediable, and it is hoped that these are among the issues that the DMR will consider in its proposed revision of the MPRDA, which according to the Minister of Mineral Resources is now imminent.[63]

South Africa has unfortunately already missed the commodities boom of the last decade - the longest sustained boom in history.[64] The challenge is to avoid this happening again. While clearly there are some factors over which we have no control, not least the turmoil in the global economy and the ongoing Eurozone crisis, others are clearly within our grasp. Fixing our logistics, managing escalating labour costs, ensuring a predictable supply of energy at a reasonable cost, and, most importantly, ensuring that the regulatory framework is remedied to provide greater certainty, are some ways of addressing the industry's problems.

Looking ahead to Mangaung: the SIMS report and the ANC policy conference resolutions

As we turn our attention to the ANC's mid-December elective conference in Mangaung, in the hope that it may offer some predictable policy direction for the mining industry, it is helpful to remember the political peaks and troughs that have brought us to this point. State intervention in the mining sector has arguably been central to the country's economic transformation debate since December 2007, when the ANC elected its new leadership in Polokwane and resolved that the state should "*intervene strategically*" in the mining sector "*to drive the growth, development and transformation of the structure of our economy*".

[63] In her address at the Africa Down Under conference in Perth yesterday, Minister Shabangu explained that the review and amendments of the MPRDA had been "*concluded*" and would be "*presented to Parliament shortly*".

[64] *Mining: More headache than cash cow*, Mail & Guardian, 17 September 2010.

Greater state intervention in the mining industry has thus been a reality for the last five years. The source of uncertainty has always been "*how*" and "*how much*". This has been a topic of contention, not only between the industry and the ANC, but within the ANC itself. The debate intensified in 2009, when the ANC Youth League, led by its then President Julius Malema, called for the nationalisation of the South African mining industry without compensation. The ANC National Executive Committee ("**NEC**") responded in November 2010 by commissioning a research report into state intervention in the minerals sector ("**the SIMS report**"),[65] which was released in February 2012 and condensed into a discussion document for the ANC's national policy conference at the end of June 2012.

While the SIMS report rejects the wholesale nationalisation of mining companies as unaffordable and unconstitutional, it retains the option of nationalising specific companies, "*particularly for strategic monopoly-priced mineral feedstocks*".[66] It also recommends a formidable array of interventionist regulatory "*reforms*". The SIMS report has been widely criticised, not only by the mining industry and the investment community, who contend that it goes too far and will harm growth,[67] but also by the ANC Youth League, who protest that it does not go nearly far enough.[68]

It appears that the ANC itself is divided on the merits of the SIMS report's proposals, leading to an unusual delay in the public release of the resolutions agreed upon by the economic transformation committee at the party's national policy conference in June. Six of the nine provincial delegations to the policy conference reportedly favoured a model of "*strategic nationalisation*" of targeted mining companies when justified "*by the balance of evidence*" - arguably the most extreme of the SIMS report's proposals.

Although the adoption of the strategic nationalisation policy has been publicly confirmed by several party officials, it is not clear what would determine the "*balance of evidence*" nor which minerals might be deemed "*strategic*". However, at the end of the NEC's bi-annual *Lekgotla* last month, ANC Secretary-General Gwede Mantashe announced that a list of strategic minerals (to be the target of greater state intervention) would be finalised by the next NEC meeting in September.[69] According to Mr Mantashe, a starting point for this is the SIMS report, which identifies coal, iron ore and platinum group metals, among others, as

[65] *Maximising the developmental impact of the peoples' mineral assets: state intervention in the minerals sector*, ANC Policy Institute, 17 February 2012.

[66] *Ibid.* at 353.

[67] See, for example, *Mine proposals will hurt sector - Anglo*, Business Day, 29 June 2012.

[68] *Report from the ANCYL policy workshop*, ANC Youth League, 2 June 2012 (accessible at http://www.ancyl.org.za/docs/reps/2012/reps0603.html).

[69] *ANC plans to publish list of minerals it deems 'strategic'*, Business Day, 31 July 2012.

strategic minerals. If the SIMS report is supported, these minerals could become subject to export tariffs, infrastructure tariffs and other measures to ensure their secure supply to state-owned entities, as well as cheaper supply to domestic industry, to stimulate job creation and greater industrialisation.[70]

The NEC has apparently also agreed that South Africa's mineral regulatory approval system should be simplified; that a portion of strategic minerals should be "*set aside*" for local beneficiation; and that mineral feedstock input costs should be reduced "*with the state playing a critical role in this regard*".[71] No detail was provided about any of these interventions, and it is not yet clear whether the list of strategic minerals or the details of any of the other proposed interventions will be made public once it is finalised next month.

While these measures may be well intentioned, the imposition of restrictions on the export of minerals (through local supply quotas) as well as on the import of goods and services (through local procurement quotas) would potentially place South Africa in breach of international trade agreements it has signed as a member of the World Trade Organization. Further, it is not clear from the report itself whether these imports would have the desired effect of promoting local beneficiation, much less whether such increased beneficiation would be viable, given South Africa's energy constraints and the higher capital demands that this would impose on mining companies. These concerns are raised in the NDP,[72] but are not addressed at all in the SIMS report.

This speaks to a more fundamental flaw in the SIMS report - a lack of any comprehensive economic impact assessment, which, if conducted, would reveal that the approach adopted in the report is somewhat self-defeating. While the report proclaims its principal objective as being to "*maximise the developmental impact*" of South Africa's prodigious mineral endowment, it ignores the reality that our minerals cannot have any developmental impact at all if they are left in the ground, which will be the inevitable result if they cannot be productively and profitably extracted.

South Africa simply cannot achieve development and genuine transformation without economic growth. It is thus illogical to seek to promote these ends by adopting any measures that will increase costs and jeopardise the growth of the mining industry. This year, the mining industry, and the platinum industry in particular, has been facing a growing crisis of escalating costs, plummeting prices and policy uncertainty. The mining industry

[70] SIMS report, at 364-376.
[71] *ANC NEC Annual Lekgotla Statement*, 30 July 2012 (accessible at http://www.anc.org.za/show.php?id=9789).
[72] NDP, *op cit*, at 146.

remains the bedrock of our economy and its success is in the government's interest, as much as the broader public interest. If the government fails to address the problems affecting the platinum industry - and, indeed, if it decides to exacerbate them by adopting ill-considered regulatory interventions - we are likely to see more Marikana conflicts, not fewer.

Conclusion

Marikana is clearly an epiphany for the country as much as the mining industry. Despite its underlying tragedy, it is also an opportunity for government, labour and business to learn from its terrible lesson and build a better, more inclusive and sustainable industry. If we fail to do that, as Tom Stoppard so tellingly reminds us, "*The bad end unhappily, the good unluckily. That is what tragedy means.*"[73]

[73] *Rosencrantz and Guildenstern are Dead*, Act II; cf "*The good ended happily, and the bad unhappily. That is what fiction means.*" Oscar Wilde, *The Importance of Being Ernest*, Act II.