

# LAND CONFERENCE 2022 DAY THREE

17-19 AUGUST

THE FAILED PROMISE OF TENURE SECURITY  
CUSTOMARY LAND RIGHTS AND DISPOSSESSION

## Rapporteurs 'master document'

(mistress document)

DAY ONE is archived [here](#)

DAY TWO is archived [here](#).

### Zenande Booi summary

The Communal Land Tenure Bill released in 2017 has not realised the hopes of the people that their various challenges in respect of communal land rights be dealt with - this is in part due to the fact that there is no comprehensive legal framework in existence, as per the requirement in section 25(6) of the Constitution. Other than the procedural issues with CLRB, there were also many substantive problems identified. Zenande also shared the problems where although communities have protections from IPILRA and ULTRA - their rights also are eroded, in many cases without the community even being aware of these dispossessions. If the CLTB is adopted, it will repeal ULTRA sections 19 and 20, but will provide no remedies or recourse to communities. And we are not even talking here about the dispossession in terms of the MPRDA. Maledu and Baleni judgments have been very important, but do not create remedies for communities who were dispossessed. The legislature is not dealing with the reality that exists on the ground. Nothing in CLTB will provide any recourse to communities. What does this mean for strategy? The problem is not only about what exists in the law. "We can't just rely on the state to give people what they are entitled to. People's rights aren't protected. We need to think of new ways that don't rely on the state doing its job".

### Ben Cousins

Our focus has been on tenure reform policy – this is unlikely to succeed if we don't tackle the political context of elite capture and state dysfunction. Customary law is adaptable and flexible. The Bhe judgement refers to living customary law. It is clear that the ruling party are pro-chief in rural areas and pro-titling in urban areas. We have had some successes – but has policy really shifted? Legal challenges are costly and long-winded. We have to rethink our mindset. Consider law - all law - as **politics by other means**. The further removed the formal law and policy is from nuanced practice at local level the less relevance and legitimacy it will have in people's lives. People don't see a contradiction with custom and democracy – both have requirements for accountability and participation. Our struggles should have a wider ambition to transform society more generally. It should be combined with other issues. We should not have to choose

between law and policy on the one hand and local struggles on the other. We need to use law and policy to help people win local struggles. Emphasis now should be building from below. We need a broad social movement which should not only focus on land, but land for what? Our struggles must be transformative - and not only about land tenure - but “to transform society more generally, as we slide backwards into the rules of gangsters”. “How can solidarity be formed across communities? ARD is a model here; how can the ARD model of organising around local issues be scaled up? Self-emancipation from below captures the urgent need of the moment. Key questions:

1. Can a democratic politics be combined with one focused on rights derived from custom?
2. What laws provide protection of land rights and guarantee the right to engage in political activity
3. What legal judgments and precedents can be brought to bear?
4. Will struggles be defensive only or can they be transformative?
5. Must struggles be focussed only on land, or combined with other issues?
6. What forms of organisation are most effective at the local level?
7. How can solidarity alliances be forged across different communities? ARD is a model, or other formations have potential to grow given the crisis in society?
8. How are leaders to be kept honest and accountable? Important lessons from the trade unions.

### **Dimuna Phiri**

As discussant, Dimuna emphasised that other countries are going through similar challenges – in Zambia a number of communities on customary land have suffered dispossession- due to mining, commercial agriculture and other ventures that aim to address economic development. In Australia – a number of indigenous people have faced dispossession. Recently a mining company destroyed a cultural heritage site. There is limited engagement with customary rights holders. A common mistake is seeing customary law through the lens of state law.

### **Panel 4A Free, prior and informed consent in theory and practice: What’s the next frontier for struggle?**

#### **Rachael Knight**

Namati is a land rights organisation, which worked with communities in Liberia, Uganda and Mozambique over an extended period to help map land rights and ensure the customary land rights holders were legally empowered and knowledgeable of their rights. Two years later we found that 68% of communities lost their land to government or elites. It is clear that community knowledge of rights, or documentation or certification, are not sufficient to protect communities against the onslaught of state power. Rights, and knowledge of rights, is no match for the threat of violence, and the reality of poverty in which people are faced. Recommendations for community consultations with investors:

1. FPIC guide: A radically explicit guide for how FPIC must be done is needed. What does ‘free mean’? What is consent? How do you prove it is a true yes?
2. Legal loopholes: Close eminent domain loopholes
3. National hotlines: there should be phone and online services that allow communities to seek immediate legal advice.
4. Cadre of pro-bono lawyers, comms should have their phone numbers.

5. Training for government officials
6. Sensitise investors, to understand negative financial impacts of failures to get FPIC.
7. Empower youth, they have less fear speaking out.
8. People working on the ground, researchers and activists, need to spend more time and energy working with communities to document their land rights and struggles, and empower them to resist dispossession and enact FPIC.

### **Aubrey Langa**

Aubrey Langa highlights his struggles in fighting for his land rights and the ways he has been able to use different strategies to push back against the mines. His community is being threatened by Anglo. Their main concern is that Anglo is not complying with IPILRA, even as they prepare to relocate hundreds of households. Since the Maledu judgement, they are able to insist that the MPRDA must be read with IPILRA. They have used direct action such as protest, but have also approached the Regional Manager, Public Protector, Water Tribunal and any mechanism we could use.

### **Dayo Ayoade**

FPIC is based on people's right to own their land, natural resources and the right to self-determination. In Nigeria, there is a struggle based on the oil industry which has resulted in degradation of community lands. Elements of FPIC are (a) Free: must be voluntary and free of intimidation, coercion, bribery or manipulation; (b) Prior: permission obtained before any authorisation or commencement activity; (c) Informed: community should have access to objective information and proper data and understand the implications of the decision; (d) Consent: collective decision making by the customary processes of impacted communities. There is no single internationally agreed definition of FPIC which is problematic as governments have discretion on how to formulate the application of FPIC. FPIC may conflict with national sovereignty over natural resources. In Nigeria, the federal government owns all natural resources in the country. The government must carefully design and implement an appropriate FPIC/community engagement regime in order to give a robust voice to indigenous communities. This applies to every country.

## **Panel 4B The interface between land tenure security and land administration**

### **Nokwanda Sihlali**

There can't be one system of land administration for all black people. Black people in South Africa are not one homogenous group. And there needs to be one land administration system for the whole country, which is flexible. Different groups have their unique customs and practices - this must not be forgotten. Land administration is not a new idea that we have been grappling with. What needs to happen is that different options must be explored in different contexts to find the system that works best for people on the ground at the time. "A title serves what purpose, when my existence on land is all the barcode you need?"

### **Sipesihle & Thembakazi**

Sipesihle and Thembakazi discussed the longstand problems experienced by the Gwatyu community. The Gwatyu people were farmworkers on white owned farms when they were expropriated to be incorporated into the Transkei in the 1970s. They were never removed, but

stayed on and started farming. Their problems were exacerbated during Matanzima's reign when he placed lessees on the land. Today, despite the fact that the Gwatyu people have beneficial occupation rights in terms of IPILRA, the state is oppressing them. They cannot be removed, but they are receiving no recognition, service, or support to stop land invasions and are in fact under constant threat of the state wanting to give the land to the neighbouring and well-connected traditional council, the Amatshatshu. Sipesihle explained that IPILRA is only serving to keep the people on the land, but that is not the realisation of the right to tenure security. IN this way, the State is failing in giving effect to s25(6) and 25(9) of the Constitution. This is the basis for a legal strategy to support the community.

### **Rosalie Kingwill**

Tenure is not a single idea or event. Tenure is a set of associations and we must shift our focus to the multiplex of institutions required to secure tenure. For example, the Gwatyu example is one of overlapping claims and rights. Because we have no adjudication system to deal with such conflict - which would be one element of the multiplex required - we are unable to deal even with these conflicts which in turn exacerbates tenure security. In the absence of a system, it is simply the most powerful player that wins. The categories of land administration can be divided thus: (i) Juridical/Administrative/Technical = allocation of rights to land, delimitation of the parcel, adjudication and conflict resolution, registration; (ii) Regulatory = land use management (zoning etc); (iii) Fiscal = property values, property taxation, compensation; (d) Information Management = land info systems. **None of this is functioning properly in South Africa.** What we need to work towards is a universal infrastructure that incorporates local and national levels to ensure that community members can assert their rights not only at the local level but against the whole world.

### **Closing plenary**

#### **Sindiso Mnsi-Weeks**

A theme which stood out is the failed impact of the transformative vision of the Constitution when it comes to land and rural spaces. Traditional leaders use their power and unaccountability to stand in the way of democratic / economic advancement. There is spiritual significance of the land and what is buried in the land. Bottom-up arrangements have legitimacy and should not depend on formal structures or law. When rights are not protected, this is tantamount to dispossession. We need to undo the effects of two colonial legal principles that remain with us today: *terra nullius* (no man's land) and *lex nullius* (an absence of law), the colonial notions which rendered people without land or law. This requires us to pay attention to the ways in which these depend on one another. SA constitutionalism has not adequately addressed these concerns. The colonial authorities constructed this notion of the 'natives'... But we still live with this. We need now to envisage an 'ALTER-native' form of social and political existence." We must rely on the understanding of 'personhood' in ubuntu in the robust sense - from a pretense of 'unknowing' the humanity of people into re-humanisation or what Tshepo Madlingozi calls "*Go mothofatsa*".

#### **Constance Mogale**

A key question which emerged from the conference is how should customary law and the

community be defined? The answer lies with the people this affects. We need to start at the village level. The Expropriation Bill will be debated soon, and we must ensure that customary land rights of people are protected in this Bill. Any laws which deal with governance must be applicable to the whole country - not just to black people who live in homelands. We challenge you to mobilise across sectors, we must find a new way of organising in the era of technology - we must focus on capacity building of our activists. Immediate actions we can take is to publicise content - produce fact sheets, resource guides and simple booklets. We need to capture the reaction to what is happening around us. Invite us to community meetings and record and document meetings which are being held.

### **Nomboniso Gasa**

We have failed to articulate what a post-Bantustan post-apartheid South Africa would look like. What would this look like for people in former homelands? All the debate at the summit government convened earlier this year, it appeared as if they were in 1994, referring only to the colonial past - as if the past 28 years of law, policy and politics had never happened. The ANC has never had a resolution as to how to have traditional leaders in a democratic South Africa; they have been silent about what happened in the mid-20th century. They have been silent about what happened since 1994. The space is becoming more limited because the government does not respond to court rulings and they are overtly siding with these conglomerates. We have a situation where tax money is being used against taxpayers. It is becoming clear that the space of constitutionalism is shrinking globally. There are going to be more challenges to this as more rightwing politicians sprout here in SA, amidst our deep crisis - as is happening elsewhere around the world. We need to restate the problem, comparing how people lived under the Bantustans and how they live now; and put forward our vision of what a democratic society looks like with traditional leaders. The problem is essentially a political problem, and take it to the theatre that is the political space and make it to be an issue for upcoming elections. Three concrete things that can be done:

1. The conference steering committee, in writing the report, set up a working group to take forward this process and clarify its action points. Pool together the proposals that came up, not only from here but also from public debate
2. A delegation or committee of people should move from this conference and meet key stakeholders in society, especially ones that we want to build bridges and alliances with, like in the trade union movement, the social cluster at NEDLAC, climate change organisations, poverty and land organisations such as Abahlali and the Landless People's Movement.
3. We have to start building more awareness at a global level. If we have these issues, we take them, and table them in international platforms and show what is being done
4. I do think we need to build towards one massive campaign. Where we have a national shutdown that focuses on communal land. If it is a shutdown that highlights the issues that people are faced with post-covid e.g. hunger, unemployment. How does an unresponsive state look like today? 9 years of state capture, etc. Build these things into 5 talking points and flood SA media and news. Include trainings to supplement activism. Look at ways that successful movements, how they are built.
5. Finally, we need to talk to the Khoi and the San, as fellow travellers in solidarity. In the next 3 months we need to have planning for all these processes and engagement with those who we want to join with in campaigns.

Nolundi Luwaya provided a vote of thanks to everyone.

Some do's:

- Please write as much as possible, even if it is VERY MESSY and not 100% accurate.
- Please type in 'real time' as people are speaking. Even if you type slowly, please type rather than taking handwritten notes and typing up later.
- Please include direct quotes using inverted commas "like this" whenever possible if someone says something quotable (doesn't matter if in another language, your own translation is fine).

Some don'ts....

- Don't worry about spelling and grammar. It really doesn't matter!
- Don't delete any chunks of anyone's text - yours or anyone else's!

Task:

Write notes, as detailed as possible.

When you can, cluster them under these theme headings.

You can also leave a general chunk of text that doesn't fit into these categories.

Themes:

1. Points of **Agreement**: What resonates with our own experience?
2. Points of **Disagreement**: What do we disagree with or need clarity on?
3. Insights and **New ideas**: What are our new insights and lessons?
4. Are there **Action points**: What does this mean for our movement / our call for action?

Rapporteurs:

- Joburg: **Tshepo**, Mbuso, Jeanette, David, Ektaa
- Durban: **Saadiyah**, Aaron, Kiren
- EL: **Sipesihle**, Goodness, Ona, Bonani
- Online: Shane, Ashley, **Ruth**, Wilmien

(bold = person responsible, eg. for sharing out sessions & ensuring notes are done)

## Recap session

### Dineo's recap from summary doc

**Malatse Mampye, Bakgatla ba Mmakau** - North West: Should mining not happen or should it happen differently? Is there a call for doing away with traditional leadership? It will take time because it is in legislation. Could we come up with a model of dealing with customary and common law? There were the 3 models that Sindiso set out? Can we say how to do this amalgamation? I am from a royal family so I will be in there. There's a court case. If we win.. I'm going to be in the traditional council and advise the kgosi. The ideas that emanate from this conference show that TL, being as cruel as it is, it can be turned around, with amalgamation. We can do something better in the meantime. It is going to take some time to do away with legislation. We are going to need your inputs and strength to show us how. I was born in that family, there is no way I can kick it away. But I need to help to put things differently in the

meantime. [merge with this text] It will take some time to do away with TL because it is entrenched in legislation, so another option is for us to come up with a model where there is an amalgamation. In my community I might soon be elected into the traditional council in my community - so I think that there might be some inputs from this conference that I can then implement on the ground. I am not opposed to TL; i am born in that family so I cannot simply do away with TL. Traditional leadership can be turned around, it is going to take some time to do away with these regulations. We are going to need your strength and ideas to lead the people in the correct way.

**Shirhami Shirinda, Limpopo:** This conference was very good but it was for few of us, so we need to go back to the communities to broaden the discussion - for instance, the definition of community. So we need to go back and expand these discussions so that we have a richer definition.

## POTENTIAL CHALLENGES TO THE FORTHCOMING COMMUNAL LAND TENURE BILL

### Johan Lorenzon

The conference has highlighted the limit on relying on lawyers in the face of company and state aggression. The evidence shows Parliament's dismal and on - going failure, and highlight some of the lived realities of this for the communities. During this fellowship she led a team on land... research in rural communities

- Zenande headed the team at LARC, her research depends on land tenure security.
- She did some remarkable lawyering!
- Last year we unfortunately, but fortunately for her she was appointed as executive director at fordham law centre in race, law and justice?
- We are blessed she kept up her hard work in working on

### Protection gaps illustrated in previous Communal Land Tenure Bill

Zenande Booii, *Center on Race Law and Justice, Fordham University*

Please can someone edit Zenande's input into a short para (3 sentences is fine)

### Zenande Booii summary

The Communal Land Tenure Bill released in 2017 has not realised the hopes of the people that their various challenges in respect of communal land rights be dealt with - this is in part due to the fact that there is no comprehensive legal framework in existence, as per the requirement in section 25(6) of the Constitution. Other than the procedural issues with CLRB, there were also many substantive problems identified. Zenande also shared the problems where although communities have protections from IPILRA and ULTRA - their rights also are eroded, in many cases without the community even being aware of these dispossessions.

Since 2017, with the release of comm land ten bill, waiting for long promised law . However unfortunately, all the states laws and policies including Communal Land Tenure bill, create legal frameworks that don't account for the comprehensive frameworks that give effect to section 25 and section 26 of the Constitution, for instance the Interim Protection of Informal Land Rights Act (IPILRA), Minerals and Petroleum Resources Development Act (MPRDA) and Upgrading of



Land Tenure Rights Act (ULTRA). Communities in the former homeland continue to be dispossessed of their land resources

- By not even engaging with this deniable and .... People who have lost their land or resources any recourse for having lost their land
- Not on radar of officials
- Assumption that state will comply with the current version of bill
- Whatever the version of the Communal Land Tenure bill the current and previous version will unlikely deal with the situations sets out
- E.g when civil society and affected soc made submission on certain provisions of ULTRA, during the public hearing the legal opinion that followed instructed not to deal with offending provision because it will be dealt with by an upcoming bill and communities will be dealt with under IPILRA.
- Laws that operation are in violation of IPILRA are implemented as though it does not exist
- The state cont to leg for the reg and protec of tenure for communities and individuals in a superficial approach .... These rights are deeply rooted in colonial....
- Leg in this way, treats dispossessed people as if they never had valid rights taken away
- The only people recog under the framework are comms and indivs who against all odds could keep their land and resources until the law was passed 28 yrs too late
- Will focus on CLTB and how they did not recognise failure ...
- The comm disoposs lack of impl of ipilra
- ULTRA was a pre constitutional attempt to
- It is a sweeping law, it took the rights framework of permits, ptos, leases that were controlled in urb comm and townships. They were conv to title deeds and short term leases?
- The majority of ULTRA provisions deal with individual black people's rights
- And objective of this act is to prov for transfer of tribal land
- S19 tribe can attain own and dispose of that land in accordance with the subsections of s2
- During that period the ribe can only do so on authority granted by court

Court must be satisfied its done by tribe resolution.

This expired in 2001,

- In each of these contexts does IPILRA apply
- The question: how have the provisions operated in practice, and what has their impact been on in indiv and comms
- In 1983 the kzn gov beach negos for the inanada damn - people needed to be displaced
- The sa gov agreed to comp, and it would be vested in sa gov trust
- Focus only on agri portion:
- The land couldn't be transfer to the trust due to the end of apartheid. It was transferred to their chief
- S20 of ULTRA
- Since the transfer, unbeknownst to the comm, the traditional authority sold portions of the land
- One was sold to eThekwini in 2010, and a huge amount was paid for this land.
- In 2016 a larger portion of land was donated to big company that the chief was a director of
- When this took place there was no requirement of judicial oversight.
- When community members wanted to use the agricultural land they found out it had been sold and transferred
- They were sent from pillar to post to get an answer, they tried to get assistance from PP, COGTA and government of KZN

- They have not been able to provide answers how as to how the land got transferred without consent
- Nothing in the Communal Land Tenure bill provides recourse similar to that of (case naem)
- The Maledu judgment is a good start but provides no real help for comms already dispossessed of their land
- No real remedies are created
- When you attempt to leg without real regard to the context, it perpetuates the strife of those it applies to.

People and communities aren't protected by IPILRA because ..... Act as though IPILRA does not exist. No policy or even draft law, or CLARA that wax declared unconstitutional,m [add]

The state continues to legislate for tenure security in a superficial way that continues to deprive people of tenure security. Fail to address the failures of old apartheid laws. Legislating in this way treats people as if they never had valid rights that were taken away. The only people who are benefitting are the people who, against all odds, managed to hold onto their lands.

Focus on how the CLTB fails to address the reality of continued dispossession. Communities dispossessed by the lack of implementation of IPILRA.

ULTRA was a pre-constitutional attempt to give titles to black people. It is a sweeping law that took the rights framework of PTOs, quitrents, leases etc granted to black people and converted them into title deeds ULTRA still refers to communities as tribes. The majority of ULTRA deals with indiv occupation rights. HOWEVER, the stated objective was to provide for transfer of tribal land - s19 and 20 of the Act. s19: a tribe can acquire ownership of land and cannot dispossess the land to someone not a member of the land for 10 years. The disposal must be in terms of a tribal resolution and some other conditions.

This court oversight requirement expired in 2001. THE requirement no longer exists. SO there is now no enquiry into what impact a disposal will have on a community or whether law has been complied with.

How has this operated in practice? I will refer to one community in KZN. A community (Ngolose tribe) was dispossessed by the SA government in 1983 for development of Inanda Dam. A portion of their land was identified - agricultural land. During the dying days of apartheid, the land couldn't go to SADT and was instead transferred in terms of s 20 of ULTRA to the chief on behalf of the tribe. Unbeknownst to the community, parts of the land has been sold by the TC. Some of it was sold to the municipality. THE title deed suggests a huge amount was paid for this land. In 2016 another larger portion of the land was 'donated' to a development company that has the chief as a director. There was no oversight. The community has been unable to get remedies against the TC - PP, COGTA, DARDLR, without success. The Departments were meant to do reports, but neither have done so or provided any answers.

Within that context, we look at CLTB. If it is adopted, it will repeal ULTRA sections 19 and 20, but will provide no remedies or recourse to communities. And we are not even talking here about the dispossession in terms of the MPRDA. Maledu and Baleni judgments have been very important, but do not create remedies for communities who were dispossessed. The legislature is not dealing with the reality that exists on the ground.

Nothing in CLTB will provide any recourse to communities. Unclear how many transfers have already occurred as a result of this provision of ULTRA (s19).

When community members wanted to make use of their land they discovered about the sale of their land.

Name of community in KZN? [didn't catch it]

Legislative frameworks that fail to take account of the...and political will or the operational valid laws. Communities across the country continue to face dispossession or face imminent threats of dispossession.

Whatever version of the bill is adopted - the early versions show that little will change.

**Spoiler:** people and communities are not protected by IPILRA because state, business and individuals act as though IPILRA doesn't exist

Legacy of colonial and apartheid rights. Legislating in this way treats people who were dispossessed as though they never had any rights to be taken away.

Legislature fails to recognise continued dispossession - focus on ULTRA in KZN

ULTRA: refers to traditional communities as 'tribes' (this language will be used for the rest of the presentation).

Consent - dispossession must be by tribal resolution.....(?), alternative land is available, and people who live on the land have waived their occupation rights to that land.

Objective: transfer of tribal land to full ownership of tribes.

Not clear how many transfers of community land has happened under ULTRA"

"No real remedies are created for communities who have lost their land".

Can't attempt to legislate without knowing the context.

Since 2017 there has been a wait for a law that will deal with the land tenure bill. The communities in former Bantustans have been under constant threat of losing their land . This isn't even seen under the radar of law makers. The current version of the CLTB doesn't seem like it will rectify this problem. People and communities aren't protected by IPILRA because politicians and businesses pretend as if it doesn't exist. These rights (or lack thereof) are deeply rooted in the colonial and apartheid legacy of south africa. Communities and individuals held on to their land for 28 years and it might go longer.

**Are 'customary' land tenure systems in rural South Africa changing, and if so, why?** Ben Cousins, PLAAS, *University of the Western Cape*

### **Ben Cousins summary**

Our focus has been on tenure reform policy – this is unlikely to succeed if we don't tackle the political context of elite capture and state dysfunction. Customary law is adaptable and flexible. The Bhe judgement refers to living customary law. It is clear that the ruling party are pro-chief in rural areas and pro-titling in urban areas. We have had some successes – but has policy really shifted? Legal challenges are costly and long-winded. We have to rethink our mindset. The further removed the formal law and policy is from nuanced practice at local level the less

relevance and legitimacy it will have in people's lives. People don't see a contradiction with custom and democracy – both have requirements for accountability and participation. Our struggles should have a wider ambition to transform society more generally. It should be combined with other issues. We should not have to choose between law and policy on the one hand and local struggles on the other. We need to use law and policy to help people win local struggles. Emphasis now should be building from below. We need a broad social movement which should not only focus on land, but land for what? Self-emancipation from below captures the urgent need of the moment.

I am concerned that we have not yet acknowledged the depth of the crisis that we are facing: politically, economically. We are not the same country as 4 years ago and we need to deal with that.

Consider law - all law - as ***politics by other means***.

I have enjoyed the conference so far but I don't think any speaker acknowledged the depth of the crisis (state capture and dysfunction) . We are not the same country we were 4 yrs ago We are not taking account of our limited state. What does tenure reform from below look like in an area of state dysfunction?

Argument \*\*\*\*: (added later)

Outline:

Social tenures subject to social change

Prospects for ten ref in a period of state dysfu

Political embeddedness revisit

Lessons from recent exp

Tenure reform from below through building a social movement

Refers to a diagram referring to socially and politically embedded land ten systems.

I will talk about tenure reform from below in an era of state dysfunction. Key focus of civil society has been tenure reform laws and policies. Elite capture and state dysfunction mean that positive gains are unlikely. I think we must refocus on building social movements; on local struggles.

1. Social tenure subject to social change
2. Tenure is flexible and negotiated consists of access and control. Authority and power are key and change over time. This means rights are variable - balance of power within communities also shifts over time.

Question: has this changed? Or is this still what tenure looks like. I think a lot is changing, positive and negative. Social tenure is increasingly not only rural but also urban. This is making the socially embedded nature more complex. Allocation is shifting to those in need rather than just those with legitimate rights. Traditional authorities are being replaced by democratic structures in some places.

BUT Some rural settlements now densely settled, but still under TAs (Bushbuckridge and Limpopo). Increasingly, civil servants are using housing allowances to build in these areas for the free services and rates and they invest in cattle herds. Mansions going up in rural areas. This means there is not enough land for cultivation opening up for corruption and bribes paid to chiefs or committees.

Social and legal systems are always dynamic and changing. Same with customary law especially in the context of legal pluralism.

This also happens to common law.

She tried to capture that.

But the question is, whose interests are served by changes in living customary law?

This is partly a matter of local politics; law is politics by other means.

What are the prospects for tenure reform in a time of severe crisis?

Policy stances of the ruling party are pro-chief in rural areas and pro-title in urban areas.

OBSTACLE - can it be changed? We are in a severe crisis: economic, political and governance crisis.

Contesting policy of legislation is long-winded and costly and ties litigation and takes the resources of lawyers, researchers and activists. Success is not guaranteed.

ON the ground, ordinary people remain vulnerable to corrupt chiefs and companies.

Political embeddedness revisited:

Authority and power dynamic and variable.

The further removed the formal land and policy is from nuanced practice at the local level, the less relevance and legitimacy it will have in peoples' lives.

SHOULD CIVIL SOCIETY NOT SHIFT ITS FOCUS TO HELPING PEOPLE WITH THESE DAY TO DAY STRUGGLES?

Land struggles do not appear in isolation - in the context of wider political economy, think of Pondoland revolts in the 1960s, radical youth challenging corrupt traditional leaders.

This true in apartheid and equally true now. We must relocate our tenure reform efforts in a wider political context. The post-apartheid democratic project is under threat.

Where do the struggles break out: disputes about who owns land, who should be allocated land, who benefits etc.

Learning from local struggles: Mmotwaneng (Rakgwadi):

Independent land rights. Strong kgotla. Popular headman. Strong social cohesion. Willing to acknowledge Kgosi Matlala. People prepared to march against him when he started allocating land unlawfully. Met with repression.

Problem is that they were isolated against a powerful chief. There was no solidarity - maybe today with a social movement we can fight such isolations.

Lessons:

History counts - local histories are complex and struggles are rooted in circumstances.

People see no contradiction between custom and democracy.

Both custom and democracy feature local decision-making, participation in debates, seeking agreement and mechanisms for accountability.

"People do not see any contradiction between custom and democracy"

Accountability to the people is a threat to powerful elites, mining companies etc.

The power can be countered by asserting the power of community members.

BUt support from wider alliances is often crucial to success - example of Amadiba Crisis Committee in Xolobeni who already shared their experiences.

Some communities exert their power to disrupt or present elite projects.

Key questions:

1. Can a democratic politics be combined with one focused on rights derived from custom?

2. What laws provide protection of land rights and guarantee the right to engage in political activity
3. What legal judgments and precedents can be brought to bear?
4. Will struggles be defensive only or can they be transformative?
5. Must struggles be focussed only on land, or combined with other issues?
6. What forms of organisation are most effective at the local level?
7. How can solidarity alliances be forged across different communities? ARD is a model, or other formations have potential to grow given the crisis in society?
8. How are leaders to be kept honest and accountable? Important lessons from the trade unions.

In local struggles, difficulties are the local and external elites with powerful allies.

There are even ordinary people who are divided by class, gender and interests.

Not enough lawyers with the skills for this work. proposals: maintain focus on questions of law/policy AND local struggles.

But give more emphasis on winning local struggles

Aim to build a broad social movement

Build solidarity laterally and vertically focus on land for what (not only whom? And focus on issues related to land.

Massive obstacles - but practical suggestions for lawyers and researchers. (too fast)

We can combine custom and democracy. We must disentangle authoritarian from emancipatory  
Potential of customary law. Self-emancipation from below!

Local and external elites have powerful allies in gov, pol parties and business circles

Isolation from struggles in other contexts undermine morale

Few lawyers with the relevant experience are available and lawyers charge fees (aren't cheap)

Aim to build a broad social movement with more than 100 000 members of local affiliates

Build solidarity alliances laterally between activists in diff locations

And vertical alliance with activists, lawyers, and academics/researchers

“In building a movement for tenure reform from below....connecting to wider struggle.....bringing SA back to democracy....customs and democracy can exist together”.

## Key questions

- Can a democratic politics be combined with one focused on rights derived from custom?
- What laws provide protection of land rights and guarantee the right to engage in political activity?
- What legal judgements and precedents can be brought to bear?
- Will struggles be defensive only, or can they be transformative?
- Must struggles be focused only on land rights, or can they combined with other issues (e.g. access to water, farming projects, etc)?
- What forms of organization are most effective (civic associations, development forums, economic transformation committees, etc)?
- How can solidarity alliances be forged across different communities?
- How are leaders to be kept honest and accountable?



Prospects for tenure reform in a period of state dysfunction

Lessons from recent experience

Tenure reform from

Civil society should focus on local government in order to build a social movement.

Negative:

- some rural settlements are now densely settled
- Civil servants are using housing allowances to build in communal areas and invest in cattle herds
- Not enough land for cultivation
- Chiefs or committees charge fees/bribes for plots to build on

Social change can be both positive and negative. What this shows is the adaptability of customary systems in civ society.

Social and legal systems are always dynamic and changing

The same applies to custom law

This is why common law changes over time

Quote from the judgement

Question arises: Whose interests are best served by changes in customary law?:

What are the prospects of ten ref when the state is captured?

He argues that it is clear from the conf, the ruling parties and states stance is pro chief in rural areas and pro-title in urban Areas.

A major obstacle, is it possible to change?

**“Political embeddedness”** quotes from Nyamu-musembi and Aninka Claassens

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## Political embeddedness re-visited 1

authority and power relations are dynamic and variable: balance of power between levels of authority, and between rights holders and authority, shift over time

- “The further removed the formal law and policy is from nuanced practice at the local level, the less relevance and legitimacy it will have in people’s lives” (Nyamu-Musembi 2002)
- “The living law approach ... includes the multiple actors who are engaged in confronting, negotiating and changing property relations and power in day-to-day struggles” (Claassens 2008)
- Should civil society not focus its efforts on helping people to win these day-to-day struggles?

Ben Cousins

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Here's the quote

He argues land struggles do not occur in isolation from emerging in other arenas within wider political eco

This was true in the era of apartheid

It is true now too, post apartheid. Where do the struggles emanate from? They emanate from the sites of struggles that we have been hearing about in this conference

- 9 points
- Learning from local struggles: Mmotwaneng - claasens

Lessons

One size does not fit all its strat for success

People don't see contradiction between customary and democratic rights and culture

Both involve local dec making, participation in debates agreement, accountability mechanics

Accountability is a threat to powerful autocratic elites and their cronies

The power of elites can be countered by asserting the power of comm memes

Support from wider alliances is critical for success

Can demo politicals be combined with one focused on rights from customs

What judgements can be brought to bear

Will struggles be defensive only or can they be

“Can our struggles be transformative....to transform society more general....as we slide backwards into the rules of gangsters”.

“How can solidarity be formed across communities - ARD is a model here”.

**Check one page up - where others are taking full notes. Add to make into full quotes?**



“Instead of focussing our arrows on the laws and policies, we should focus on building a strong social movement “

“We are not the same country we were 4 years ago...we need to come up with new strategies”

Argument: “The key focus of civil society to date has been tenure reform policies at national level.....civil society should refocus its struggles on democratic politics and solidarity alliances...we need to build a social movement”.

“We need a social movement to push tenure reform from below”.

“Authority and power are dynamic and variable.....balance of power between different right holders in a community shifts over time”.

“Is it any different to what it was when I first started working on it....I have concluded that a great deal is changing.....social tenures are subject to social change”.....not only in rural areas - increasingly in urban and informal contexts”.

Negative changes: dense settlements with urban characteristics (eg: outside Polokwane) - in many cases they are dormitories for urban workers.

“Often not enough land for cultivation....and chiefs and committees often take bribes in exchange for land”.

“We need to see all low as politics by other means”

“We live in a time of severe crises - social, political, economic and governance. Is it appropriate to continue our struggles as we have in the past?”

Pro chief in rural areas and pro title in urban areas. Has policy really shifted ?

The rules of tenure will fit into changes circumstances

“On the ground, ordinary people remain vulnerable to mining companies, corrupt chiefs and other actors”.

“We have to rethink. We have to adopt a different mindset”.

“Should civil society not shift attention away from national policy and legal frameworks, down to people in the group who are engaging in day-to-day struggles and help them win these struggles”.

Land struggles to not happen in isolation from other political struggles

“...back to the trenches of struggle”

“The problem is that they fought the battle on their own. They were isolated....there was no solidarity with people fighting similar struggles”.

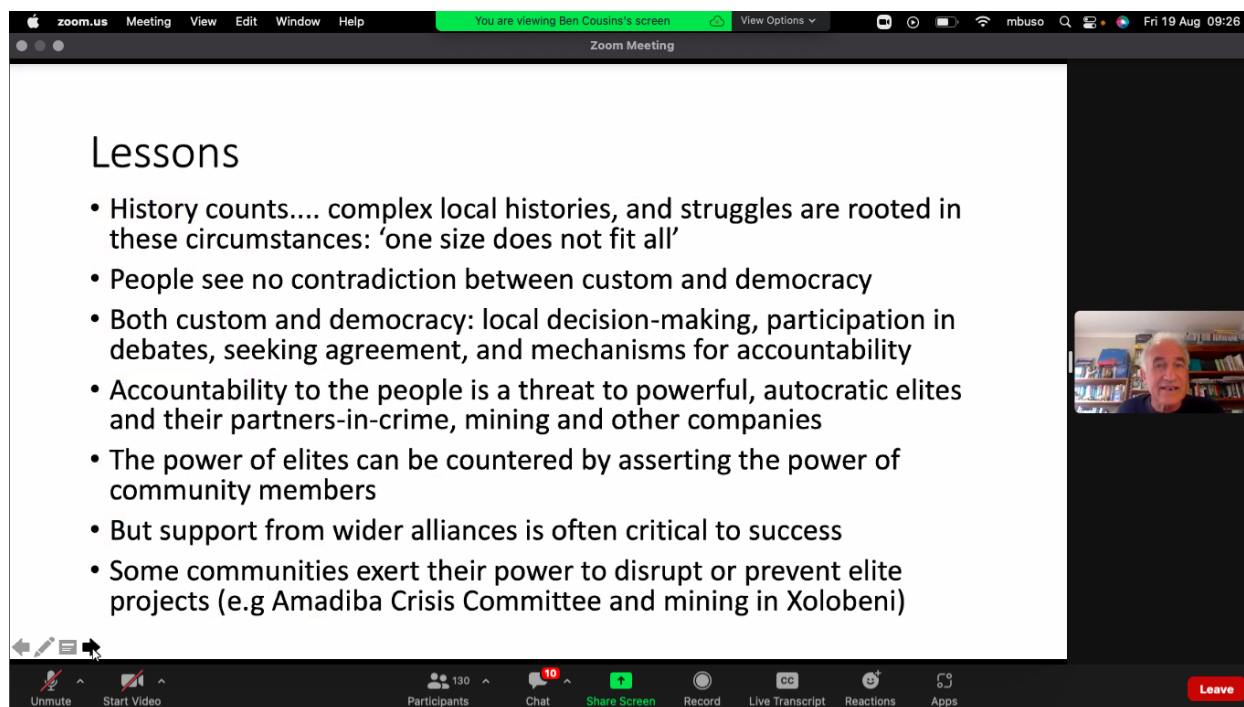
“Local struggles are rooted in (historic) complexity”.

“People do not see contradiction between custom and democracy, rights and culture”.

Lovely quotes! Thank you!

I have sent to Swazi for tweeting

Detailed notes are happening above, so please just focus on select juicy quotes



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## Lessons

- History counts.... complex local histories, and struggles are rooted in these circumstances: 'one size does not fit all'
- People see no contradiction between custom and democracy
- Both custom and democracy: local decision-making, participation in debates, seeking agreement, and mechanisms for accountability
- Accountability to the people is a threat to powerful, autocratic elites and their partners-in-crime, mining and other companies
- The power of elites can be countered by asserting the power of community members
- But support from wider alliances is often critical to success
- Some communities exert their power to disrupt or prevent elite projects (e.g Amadiba Crisis Committee and mining in Xolobeni)

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## Some proposals for civil society

- Begin to focus more on 'land for what?' – livelihoods, social reproduction, production, cash income, development projects
- Build effective links with progressive movements and initiatives focused on issues other than land (e.g. jobs, grants, agriculture, housing, health, education, climate change, etc)



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### Comments (Zoom) following Ben's talk:

Obbey Mabena: "Amongst the myriad of tools in the vast arsenal of tools used by corrupt government officials frustrating struggles of land deprived communities is that of using unscrupulous members of the community and traditional leaders to sow disunity amongst communities that are fighting for land reform and restitution. This is a standard excuse that is used to explain away lack of progress in

addressing the issue of land reform by the department.” - “A further fascinating implication of Ben's argument is that land struggles cannot be seen in isolation from a broader struggle for democracy - to fight for South Africa as a land belonging to all who live in it, against the power of the corrupt officials and the gangsters. Is there space to link land struggles more explicitly to the struggle for a renewed political struggle for the SA democratic project?”

Andries Du Toit: “A further fascinating implication of Ben's argument is that land struggles cannot be seen in isolation from a broader struggle for democracy - to fight for South Africa as a land belonging to all who live in it, against the power of the corrupt officials and the gangsters. Is there space to link land struggles more explicitly to the struggle for a renewed political struggle for the SA democratic project?”

Itumeleng Rabotapi: “A further fascinating implication of Ben's argument is that land struggles cannot be seen in isolation from a broader struggle for democracy - to fight for South Africa as a land belonging to all who live in it, against the power of the corrupt officials and the gangsters. Is there space to link land struggles more explicitly to the struggle for a renewed political struggle for the SA democratic project?”

Barbara Van Koppen: “Amongst the myriad of tools in the vast arsenal of tools used by corrupt government officials frustrating struggles of land deprived communities is that of using unscrupulous members of the community and traditional leaders to sow disunity amongst communities that are fighting for land reform and restitution. This is a standard excuse that is used to explain away lack of progress in addressing the issue of land reform by the department”.

Johan Lorenzen (Chair): “Ben asked about the possibility of lawyers building networks to respond to his call. I do not think those networks are well established at this time, but I do believe there is a strong and robust cohort of young progressive lawyers who would love to be doing this work increasingly if we could be facilitating more platforms for engagement as well as securing some modest funds”.

Nkanyiso Gumede: “But it is about more than that. Land and livelihoods are inseparable from citizenship. What we have at the moment is a democracy for ratepayers - those with insecure tenure are also excluded politically, subject to patron client relationships”.

#### Climate crisis

Ben: embracing the climate crisis means taking the climate crisis much more seriously. We must overcome thinking about these separately. We are at fault for not making those connections and thinkers, lawyers etc. - “We are at fault for not supporting these struggles”.

“Land and livelihoods cannot be thought of separately”.

Andries Du Toit Response (Zoom chat): “But it is about more than that. Land and livelihoods are inseparable from citizenship. What we have at the moment is a democracy for ratepayers - those with insecure tenure are also excluded politically, subject to patron client relationships”.

Rev Mavuso on Ben:

“Rural land is being converted into urban land. A white man is telling us that. Something needs to change!”

## DISCUSSANT

Dimuna Phiri, *Land Equity International Pty Ltd., Zambia/Australia*

**Dimuna Phiri**

Other countries are going through similar challenges – in Zambia a number of communities on customary land have suffered dispossession- due to mining, commercial agriculture and other ventures that aim to address economic development. In Australia – a number of indigenous people have faced dispossession. Recently a mining company destroyed a cultural heritage site. There is limited engagement with customary rights holders. A common mistake is seeing customary law through the lens of state law.

[Did not get the last sentence she said - seemed nb?]

Zenande's approach was based on the right space approach looking more from the legal perspex. Ben's approach was socio-politico-economic analysis as they pertain to customary land tenure. Zenande analysed and compared the since repealed cltb, and compared it as it relates to the community bringing up aspects from the leg, and that it weakens individuals and comms rights. Discussing the fears and failures and that community concerns were not considered in the process. Ben constantly referenced social issues in the dynamic custom tenure system and there is need to consider the social relations that are prevalent there and social identities that constantly overlap. He referred to nested and layered character and that all aspects need to be considered. Deprived primarily from accepted members of a social unit and linked to Zenande's discussion on the social unit perspective and that individuals attain sights by being in the social unit. These are not considered adequate by legislation.

Zenande: The state has been obsessed with the issue of titling and transfer of land rights to traditional leaders and customary landowners ... it does not consider the actual cultural dynamic/systems in that regard. Similar with institutions, they're not very considerate of that fact. In one of Zenande's cases studies she shows how applications of laws..... she talked about ULTRA, but ..community had issues concerning their land and the traditional council got to actually make a decision on behalf of community members- i think it was not the right decision and the legislature failed community members and progressed a decision with the council and is not necessarily a reflection of the decision reached by the comm

Coming to other examples, SA is not the only place going through these challenges regarding customary land right. Zambia: number of communities have suffered dispossession - due to mining commercial in terms of agriculture, other ventures that aim to progress economic development and we see that there are so many of these issue. There is a customary land administration bill sitting since 2014 and not enacted to legislation due to issues and politics around the land area. In Australia, struggles regarding indigenous people land rights and how they interface with the stat system and their recognition of those rights in the current setting

Lots have faced dispossession. A mining company destroyed a cultural heritage site and stated that they did not know it was so. The indigenous people were upset as it shows there is no proper consultation as to what these communities consider sacred or not. When pieces of

legislature failed custom land holder in terms of cultural heritage it maps out or shows where your cultural heritage is.

Pioneering this is Australia. Indigenous people push back and say everything is sacred ( rivers, song line) made examples of paths being sacred - how do you map them out and put them into a database? Those are the challenges laws have failed to address.

Similarities: South Africa, Zambia and Australia - all of them have experienced colonisation and some, including. South African and Zambian Constitution recognises custom land, but the Australian Constitution does not. Reason that Zambian and South African Constitutions were recently enacted - 96/97. The Australian Constitution is outdated and has discord provisions.

There are also social and moral standards which form part of custom law and it consists of 3 countries. The application of western..... Have proved challenging. All 3 face dispossession due to economic development. Limited engagement in dev projects in custom land. It is happening in other countries. The land threats are prev, the state legislature can make them worse concerning protection and it comes back to Zenande's case, where the community faced the challenge.

Lack of effective mechanisms for claims. Community members grievance are not properly addresses. And institution of failures. Community mistakes: Interaction of customary land tenure dynamics through statutory law, seeing it through statutory law is challenging.

Ben highlights specific actionable. Lack of understanding of politics of customary law, made worse by legislature. Power struggle amongst communities and politics. State ecosystem nature are inter of law: constantly anchored in rules - plain and ordinary sense even when illogical. When applied to customary system its proves to be a challenge. Whether the intention of parliament is ..... we see where that is prevalent.

## Questions and Answers

Johannesburg:

**Emily Tjale:** I reside on tribal land in Ntwane. What is the best model for security of tenure in this current situation?"I have struggled to get transfer of inheritance rights, and property that my mom left that I should inherit. I went to the offices with my brothers, because it is custom. "Is this system really protecting us?" "They gave me a letter stating that I can stay there as long as i want. I don't know what that means."The tribal office gave us a paper that says you can only have user rights on the land so after harvest anyone can come. Is it protecting us this system?

**Billy Masha [from where?]****Ga-Masha Makopane:** How should we revolt against the government because it will be difficult to start another movement? Can you provide a way forward on what we should do?

Durban

**Lerato Ntombela, from the South Coast under the Vukauzithathe Chiefdom]:** I hear that

it's Ben who said we have to get a big organisation here in our communities. I think our communities must be together so we can get a big organisation. I want to know how we can do that or else the lawyers can help us to open this organisation. I think in our communities it will help us do things - we will have a voice to go to traditional leaders, and we are also going to get very big support.

East London

**[Monwabisi Jende [From where?]:** We have the power to unseat the current government. Let us unseat this current government and that will free us from our problems.

**Andile Sishuba from Hewu [again!]:** I would be worried if I do not raise this point about dispossession. They occur in various places in various forms but it is different in our case. The same dispossession occurs in the sense of human settlement. The Ciskei, apartheid and ANC governments have all been using our land to resettle people (relocate informal settlements). The second form is our land being sold to foreigners for game reserves. I took the form and applied for those six farms and they asked if I had the money to buy and I agreed meanwhile my car barely had tyres to get me to town. That was the last form of communication I had with those people. (This was probably done in defiance to halt the purchase of the land?)

### Responses from panel

#### Zenande:

It's not very clear how those rights can be protected, and the legal framework that exists does not show that it cannot be protected? "We can't just rely on the state to give people what they are entitled to.....people's rights aren't protected.....we need to think of new ways that don't rely on the state doing its job".

"Need to have much greater imagination of what is possible and not think the status quo is all we have and all we have to deal with.....how can we think about having a new ruling party...having the imagination to think about what South Africa, and what world, we are trying to build.....need to be brave in imagining the world and society we want to build....we can unseat the ANC if that is the best way to protect ourselves".

#### Ben:

"ARD is a model.....can grow itself to being a large, truly significant player if it takes on the issue of scale.....membership models.....we have experience to build on".

"We can also learn lessons from the Democratic Trade Union movement in the 1970's/80's was key in overturning apartheid: bottom up movement with lawyers and academics supporting workers struggles....powerful lessons about how to build power from below".

"Each local situation is different, and needs to be understood in its own terms".

"Need to use the law to win a local struggle but you also need to be supported by a larger movement"

“Ambitious initiative.....we have to rise to this challenge or we will have to kiss goodbye to these dreams and aspirations”.

**Dimuna:**

My key remarks are things we have already discussed. But of course there is a need to look into social practice and intervention we want to venture in. Ben highlighted being practical and action orientated....considering the politics within these systems. Those are my key remarks in moving forward.

## FREE, PRIOR AND INFORMED CONSENT IN THEORY AND PRACTICE: WHAT'S THE NEXT FRONTIER FOR STRUGGLE?

CHAIR: Sienne Molepo, *PLAAS, University of the Western Cape*

Introducing panel. When we look at the idea of FPIC is the requirement to get consent from communities who hold rights to the land... particularly in informal rights and customary tenure. The idea is to establish consultation before the development of projects? It is compulsory under the UN declaration (2007).

**Consent and Coercion: Communities' capacity to respond to external requests for community land in Liberia, Uganda and Mozambique** Rachael Knight, *International Institute for Environment and Development*

### Rachael Knight

Namati is a land rights organisation, which worked with communities in Liberia, Uganda and Mozambique over an extended period to help map land rights and ensure the customary land rights holders were legally empowered and knowledgeable of their rights. Two years later we found that 68% of communities lost their land to government or elites. It is clear that community knowledge of rights, or documentation or certification, are not sufficient to protect communities against the onslaught of state power. Rights, and knowledge of rights, is no match for the threat of violence, and the reality of poverty in which people are faced. Recommendations for community consultations with investors:

9. FPIC guide: A radically explicit guide for how FPIC must be done is needed. What does 'free mean'? What is consent? How do you prove it is a true yes?
10. Legal loopholes: Close eminent domain loopholes
11. National hotlines: there should be phone and online services that allow communities to seek immediate legal advice.
12. Cadre of pro-bono lawyers, comms should have their phone numbers.
13. Training for government officials
14. Sensitise investors, to understand negative financial impacts of failures to get FPIC.
15. Empower youth, they have less fear speaking out.
16. People working on the ground, researchers and activists, need to spend more time and energy working with communities to document their land rights and struggles, and empower them to resist dispossession and enact FIPC.

Hello, good morning. Name is Rachel Knight, an attorney and consultant. Speaking about work I did 4 years ago. What we had done from 2009 to 2015, worked with over 140 communities in Liberia, Uganda and Mozambique? To help with land rights and participatory decisions with the local government to mapo land and seek titles for registration documents.

All that work often for up to 2 years in each community. We also did the work with: Land and Equity movement in Uganda.

Two years later, we went back and evaluated the impact. Called leaders and mobilisers and asked whether they have been approached by gov or companies seeking land. Testing the



central assumption that once communities know their rights they will act in an empowered way and be involved in consultation. Of the 61 communities, 28 had been approached by external actors seeking resources, statistics:

60 (46% had been approached

54% had not

Of 28 communities approached, 35 separate investment requests

34% of the time, it was the government seeking land; 40% foreign companies, 24% local elites.

Far fewer protections against corrupt land acquisitions for national investments - compared to international

- In 57% of cases the community accepted the request.
- 11% tried to reject but weren't able
- 68% of communities lost their land or gave it
- 14% of instances rejected request
- 17% hadn't decided

Findings show a clear picture of communities who were no match for state power. There were a variety of communities in Uganda who were fully supported to protect their land and as soon as the government understood there was a free area they decided to set up a giant hospital on that land. Majority of the community thought it was amazing and gave 200 hectares of land without asking for compensation. Some community members wanted to ask questions of the government but were silenced by the wider community. There is a complexity intra-community when the government wants to pursue a development project,

Other finds, the story illustrates show how the threat of violence and the reality of poverty and the absence of alternatives overrides residents' rights

After research finished, I wrote a major report on land corruption. So much of what we found was that government officials overriding citizen rights were often the bad actors in the situation.

One customary leader said this experience made them realise that just having a certificate is not enough to protect their rights because the state will use all their power/resources to get what they want.

When leaders asked an investor questions the investor got upset and left and returned with a commissioner who dissolved the community committee and appointed new decision makers. Even called in police to intimidate them when trying to exercise their consultation rights.

Of the findings, 35 external requests for land, 11 times the comm made attempts to refuse and ask further questions. One of the mobilisers said that you have to be brave to refuse because investors have the backing of the government. It is scary to speak out. In Mozambique, the government did not use outright force, they were just intimidating. You are afraid to say no to gov officials. A final finding is that 24/35 the community [what did they get?] and that *not a single one* got a written MOU.

When I did this research it crushed me as an academic activist....we spent years working with the community to strengthen their protection of land rights....completely failed. Made me question the concept of rights and legal empowerment. Alone it isn't enough, it's important to have a cultural and spiritual connection. When you love something you protect it more. Harder to fight for it if you see it as economic, but if you love your land you will fight hard for it.

Recommendations for community consultations with investors:

1. **FPIC guide:** A radically explicit guide for how FPIC must be done is needed. We need to be able to hand leaflets to villagers and lawyers and officials to say this is what you have to do, They don't explain the investors are profiting or what the environmental and health impacts will be... We need to be able hand leaflets to villagers and lawyers and investors to say this is actually what FIPC looks like. What does 'free mean'? What is consent? How do you prove it is a true yes?
2. **Legal loopholes:** Close eminent domain loopholes [add]
3. **National hotlines:** there should be phone and online services that allow communities to seek immediate legal advice.
4. **Cadre of pro-bono lawyers,** comms should have their phone numbers. No FPIC consent should be considered valid unless reviewed by a lawyer representing the community.
5. **Training for government officials,** so that they understand the (impact) they have when they push through investment projects. Must remember government officials are human.
6. **Sensitise investors,** to understand negative financial impacts of failures to get FPIC. They use a number of tactics to undermine the process. If the proper route is not followed, there can be huge financial losses caused by communities protesting and stopping projects.
7. **Empower youth,** they have less fear speaking out. Young people are warriors. Must be ready to ask the hard questions and be able to say no.
8. **Researchers and activists** need to spend more time and energy working with communities to empower them to enact FIPC. especially to empower youth, the young people are warriors, and if you want engines of change, you need to empower youth.

#### **IPILRA and Section 54 of the MPRDA: How we leveraged various laws to achieve FPIC for mining projects**

Aubrey Langa, *community activist, Mogalakwena Mining Communities*

Mogalakwena Mining Communities (MMC) is an umbrella organisation made up of community organisations pertaining to mine-affected land. Specifically in the platinum belt in Limpopo. Aubrey Langa is a community activist. The main case is our struggle. "Our struggle must start from the bottom going up."

The case is about an attempt by host communities in an attempt to push back mining companies. We are talking about the law of IPILRA, we can take into account Mrs Maledu's court case and how the court's interpretation of the law and how it should be applied. This law protects the residents and we can see from Prof Claassens presentation that this is here to give us power and protect the people.

The regional manager has the power to stop the mine from operating under sec 54(6). As Mma Moleko said that the mine has started operating, I informed her that the mine can still be stopped. This does not mean that they can't stop the operation. The Mining giant Anglo is making super profits from mining our land, we have done multiple things such as protest etc, but the main one is the case of Mrs Maledu on section 54.

When they went to apply for their mining right, they used our case and that IPILRA is still applicable. When mine started they worked for us but eventually stopped. Once they got the right we said to them that we will object and stop the mine. We wrote to the Regional Manager, who ignored our letter. We then went to the Public Protector who then wrote a letter to the Regional Manager to stop the mine and take our letter into account. We took additional steps such as going to the Public Protector again since the government protects their officials who don't implement laws correctly. The mine then stopped for a bit but continued, so we went and

made a criminal case against the mine and eventually closed the mine using protest action. They then interdicted us from going to the mine. We will share the presentation with you.

We appealed the mining right of Anglo Plats and Ivan Plats because they failed to take IPILRa into consideration when they gave the mine the licence to mine. From the 3 mines in the area, 2 IvanPlats and Anglo Platinum refused to listen to section 54 but we won the case in front of the Regional Manager of mineral resources. Maledu judgement says that section 54 goes hand in hand with IPILRA. We are here to show people how to use this laws to protect their land.

“Without any IPILRA, there is not going to be any mining”. Without IPILRA< the mining right ought not to have been granted.” “As far as expansion projects are concerned, Anglo wants to relocate 1,000 households of Reruleng and Skineng (sp?) that is also under section 54. “And we are calling on civil society to assist us with this pushback against Anglo moving to relocate the community without taking into consideration IPILRA.”

### **FPIC and natural resources:**

#### **Lessons from Nigeria**

Dayo Ayoade, *University of Lagos, Nigeria*

#### **Dayo Ayoade**

FPIC is based on people’s right to own their land, natural resources and the right to self-determination. In Nigeria, there is a struggle based on the oil industry which has resulted in degradation of community lands. Elements of FPIC are (a) Free: must be voluntary and free of intimidation, coercion, bribery or manipulation; (b) Prior: permission obtained before any authorisation or commencement activity; (c) Informed: community should have access to objective information and proper data and understand the implications of the decision; (d) Consent: collective decision making by the customary processes of impacted communities. There is no single internationally agreed definition of FPIC which is problematic as governments have discretion on how to formulate the application of FPIC. FPIC may conflict with national sovereignty over natural resources. In Nigeria, the federal government owns all natural resources in the country. The government must carefully design and implement an appropriate FPIC/community engagement regime in order to give a robust voice to indigenous communities. This applies to every country.

I’m looking at FPIC and natural resources and some of the problems we’ve had in Nigeria, which I hope will be of some interest to the group.

When we talk about FPIC it is explicitly based on people's rights to their own land and self determination. It is derived from international law. Based on right to consultation. Communities should be consulted. It ensures when we talk about host communities, they should not be intimidated to allow projects in their territories.

Mining sector in Nigeria is not organised in the same way as SA (more artisanal). Have a lot of problems with illegal mining. It is not easy to identify a mining company that you can approach or raise a complaint with or take to court. In Nigeria we find there is a big struggle over natural resources between the government and communities who live on the land and water which is severely destroyed by operations.

We have indigenous oil companies (Nigerian) that actually extract oil and gas, we also have global companies such as Shell, Mobil and Exxon that extract oil and gas in Nigeria. We have NNPC which has the status of a private company but is owned by the federal government. WE

also have indigenous people or host oil communities.

We look at the elements that make up FPIC.

1. **Free:** when you say “free” in the context of FPIC what does it actually mean? How do you know approval is voluntary? Free of bribery or intimidation. Private actors have a lot of money - power imbalance makes it easy to manipulate, bribe or intimidate members of the community.
2. **Prior:** permission obtained before authorisation or commencement of activity
3. **Informed:** comm should have access to objective information and understand implications.
4. **Consent:** Collective decision making by the customary process of impacted communities.

#### Basis of FPIC

No single internationally agreed definition which can be problematic. It is well recognised though on an international level (UN dec on rights of indigenous people - UNDRIP)). Referred to as a right, derivative right, concept or principle. Various definitions and uncertainty governments have significant discretion in how they implement it. UNDRIP article 23 sets out state obligations.

Nigeria is dependent on oil and gas revenues. So the natural resource sector has an enhanced status within the country. FPIC which tries to empower host communities conflicts with national sovereignty over natural resources . Federal government owns all natural resources and finds a situation where companies are obliged to obey laws of the land - a situation where host communities are ignored and suffer devastating ecological degradation. Problem is that laws will only be theoretical, will rebellions of communities become a problem? Net result is sometimes that there is communal conflict, violence, kidnapping, oil theft which ultimately results in economic loss. So no reason for companies to ignore indigenous stakeholders (given economic loss).

Nigeria has various laws pertaining to natural resources. Most recent is the Petroleum Industry Act which intends to help communities gain relief BUT does not explicitly require a consultation process.

#### Lessons and conclusion

Failure to address FPIC in national laws is a significant omission. Causes uncertainty in cases where communities demand environmental and socio-economic audits (e.g. Exxon issue?).

No government should ignore FPIC, at the end of the day companies will lose a lot of money if the community does not give consent. Thus all governments should put in place an appropriate (depends on legal tradition and culture) FPIC mechanism.

“Genuine change is essential to give a robust voice to indigenous oil communities”.

#### Questions

JHB:

**Who said this? Billy??** Promote FPIC by resisting the government

**Francina Nkosi from Lephalale** - As mining affected communities we need to unite. When women are being killed because they resist more, what can be done? Women are resisting more because protecting their culture, seeds, plants to preserve for future generation

**Koketso Manku** - The previous sessions emphasised the importance of land as a source of African spirituality. It would have been interesting to have traditional healers who would help

align the question of spirituality and highlight the disconnect.

**Billy Masha** - Is it possible that in a case (In terms of the FPIC) that there has never been such, there could be a recourse. When communities are made to sign deals without any knowledge, could there be recourse?

**Christopher Mohulatsi** - I want to check on the case of Anglo (I think that is a civil case). What happens in the interim while the civil case against Anglo is underway?

Durban:

**Nonhle from Xolobeni** - Not a question, just a comment in terms of FPIC. Honestly, forget about that it is a word of English, this is the thing that we knew for a long time but it disappeared because communities moved away from their attachment with land. That is why the speaker said you need to be brave because you will be faced with all sorts of brutality. As a community of Xolobeni we don't see land as a commodity. If communities are not attached to land it is easy to not understand FPIC.

**Nokubonga** - Bribery is a grassroots level issue. Not only the community, but also leaders and other stakeholders are getting bribed. If we as a community learn of something like that we must face up to it.

East London:

**[Name; From]** - I was caught by the presentations that are taking place because of the water bulk project happening where I am from. The contractor destroyed people's property and when the community went to the headman, he said they will deal with it only to find out that it never happened. It turns out they are being bribed with jobs within the project.

**[Name; From]** - Is it possible for people whose assets have been destroyed to get paid compensation? IF there was no FPIC elements implemented in a project, is it possible for communities to reverse the project and get compensation,

## RESPONSES

Aubrey Langa:

Consent granted under IPILRA and FPIC can be withdrawn. It is not a constant thing, a project can be stopped if consent is retracted by the community.

According to CC in Maledu, section 54 interpretation, a mine is not permitted to take the community to court once IPILRA has been triggered. Comm should not be subjected to a long litigation period since there shouldn't be any in the first place.

Dayo Ayoade:

I can see SA law is more advanced than what we have in Nigeria, will be taking learnings from discussion into work with communities.

THE INTERFACE BETWEEN LAND TENURE SECURITY AND LAND ADMINISTRATION

CHAIR: Wilmien Wicomb, *Legal Resource Centre*

What we are talking about in this break is the interface between ten sec and land admin ( why ten security is impossible without functional land administration) we have 3 admins that will consider the probs from different angles. We start with Sm from LRC, joined by Tembekaazi?

### **How is the role of land administration understood in the rural context?**

Nokwanda Sihlali, LARC, *University of Cape Town*

Nokwanda Sihlali summary:

There can't be one system of land administration for all black people as black people in south africa are not one homogenous group. Different groups have their unique customs and practices - this must not be forgotten. Land administration is not a new idea that we have been grappling with , however, what does need to happen is that different options must be explored in different contexts to find the system that works best for people on the ground at the time. "A title serves what purpose, when my existence on land is all the barcode you need?"

I needed to be more clearer, this is something we are still exploring in our sector. Very much an interest for developing research and will get more refined as one of my outcomes.

Today is going to be limited, I want to run over 5 points to give people an idea of what I would like to cover.

1. It is important to understand that when we discuss land admin, we cannot see black people as homogeneous or monolith. Prof Ben also explained that customary law does change in its own different ways. We support living custom law. One thing I want us to see is that black people are not the same. This is why we cannot have a uniform land admin system on custom land. Each and every comm that we engage with on land admin is very unique. We can capture principles and practices... but we cannot the essence of what it is. I emphasise this to leg who want to find a way to have one piece of legislation that includes everything. We will be recreating apart and colonial ideas about what living custom law is. I wanted to emphasise that. When I talk about the Ingonyama Trust case I speak in the context of KZN and also a place in the north called Jozini. Even though the ig trust board vested 2.8 mil hec of land. There is still a disaggregation of communities that exists. We still need to ask q;s about land and admin..... with the case we still can't say the Ingonyama trust case KZN, we must be very specific about the spaces we talk about. Something from the conference is an understanding that if we talk about communal land it does not equate to collective ownership. Communal land is land we all use together, forest and rivers. Not that it takes away from individual ownership - house and family ownership. The idea of ownership is something that researchers must further engage. Owning is not only a western concept that means exclusive ownership.... \*zulu\* this idea, in as much as we need to unpack what community means, who is community, and the word of ownership. I will use the following ways to demonstrate the ways to own assets. Even things around decision making- it does not just stay with one person - as the western model encourages.... We only ever think of a title deed but we will discuss other easy to do this.
2. Land admin results in tenure security. How do you govern, use, allocate, manage customary land? All of this informs tenure security. In essence we discuss CLTB, TKA-gov land,SPLuma- man land,TCB,IPILRA. All of these empower ipilra as the weapon we use to protect custom land rights esp those who've suffered dispossession. Emphasis on how to use, govern, allocate and manage land.

3. The Ingonyama Trust case - and the judgement on 11 June 2021. I want to discuss the missed opportunity on their part, one of the reasons given to capture people's rights in the forms of leases. There is no land administration leg. ....not necessarily active- we can then come up with a lease. Leases violate pre existing rights. How do we capture peoples rights as they are and move forward... we are not trying to capture land..... obviously the first thing we must do is protect pre existing rights if you are a landowner you cannot be relocated or dispossessed without having been consulted/consent we must understand.. Consent is ongoing and is not a once off. So many loses with losing land and intangibles - GRAVES! You not only lose what's on the ground but air, clean water, forest, sometimes the traditional healers lose herbs and sacred places of worship = spiritual insec. They must be accounted for when we discuss the loss of land, and it needs to come with ongoing consent.
4. There is no need to reinvent the wheel , parl processes have already changed land admin. A 600 page report from the High Level Panel was handed to Parliament that spoke about land admin and a way to move forward including discussing a land recording system - to capture it and work with it in the deeds registry, it is a western system that looks for exclusive ownership and fails to account for the lived experiences of people.
5. We need to explore other options: options have been put forward like household titles - they look at who is directly in the space and be affected iro dispossession. We must move away from inl one person ont he tile. Issues of gender - pref of title given to men and is very exclusionary of others who need to make decisions on the land. Formalization of tenure is exclusionary of woman, as per 2A yesterday

Quote “ a title serves what purpose, when my existence on land is all the barcode you need”

Emphasis of iplira is who is directly aff. We can never have a uniform land admin for black or white people. We need to constantly capture the practices and principles.

### **The Gwatyu problem**

Sipesihle Mguga, *Legal Resource Centre Thembakazi Matsheke, chairperson of an “unregistered” Gwatyu CPA*

### **Sipesihle & Thembakazi summary:**

Sipesihle and Thembakazi discussed the longstand problems experienced by the Gwatyu community. The Gwatyu people were farmworkers on white owned farms when thee were expropriated to be incorporated into the Transkei in the 1970s. They were never removed, but stayed on and started farming. Their problems were exacerbated during Matanzima’s reign when he placed lessees on the land. Today, despite the fact that the Gwatyu people have beneficial occupation rights in terms of IPILRA, the state is oppressing them. They cannot be removed, but they are receiving no recognition, service, or support to stop land invasions and are in fact under constant threat of the state wanting to give the land to the neighbouring and well-connected traditional council, the Amatshatshu. Sipesihle explained that IPILRA is only serving to keep the people on the land, but that is not the realisation of the right to tenure security. IN this way, the State is failing in giving effect to s25(6) and 25(9) of the Constitution. This is the basis for a legal strategy to support the community.

### **Siphe**

Good morning , I'll continue, introducing myself. I am an attorney from LRC Makhanda office but I am originally from Queenstown. I am here to talk about the issues faced by people of Gwatyu,

and Tembakazi will speak about the day to day struggles and I will speak about the gap in our law to address the issue of security of tenure.

The Gwatyu problem did not begin today, it dates back to the 1970s during the time of Matanzima. It didn't end there; it continued even after 1994 and unfortunately still continues today. Now I hand it over to Thembakazi. I appreciate this opportunity. We are talking on the last day but luckily many issues have been shared through the conference. We face the same challenges as the people in this conference.

The Gwatyu problem dates back to the Mantizima era, when land belonged to white farmers bought by the Transkei government and farm labourers remained. Then the Transkei government arrived and took over this land. During mantizima reign he created Oathay township to relocate the farm dwellers from Gwatyu. Then when democracy was introduced in 1994 we hoped but nothing materialised. In 2013 a turning point in Gwatyu, a group of ppl Imijelo who were unknown to people of Gwatyu touted as the developers of the land and many farms were allocated to these ppl of Imijelo. This led to CPA formation to counter this and using the CPA Act of 1996 we applied and registered in 2014.

To date it has not been registered to date. I am a member of an unregistered CPA but Minister Nkwinti promised in 2016 to take action. The Min Task Team met with us and promised to intervene. MTT met us and presented a work plan with timeframes and accompanied by Dep Skwatsha. MTT met us after 3 days at Gwatyu with this timeplans.

Dep has conducted series of wasteful audited w/o tangible results and this includes:

- 1ha, 1 household
- 2014 failed audit
- 2015 CPA led successful audit
- 2018 land rights inquiry and repeated in 2020 costed at R400 000

Each time CPA successfully assisted dept in conducting audits and dept brings in Amatshatshu resulting in failure of exercise

In 2020, Didiza advertised state farms and we learnt Gwatyu is earmarked for state leasing but intervention from LRC led to Gwatyu being withdrawn from the list. In 2021 the portfolio committee met us and visited Gwatyu farms, but the committee did not engage ppl of Gwatyu instead spent time with Matanzima at Qamata.

Focus on the meeting was service delivery not land reform. Meanwhile, the conditions of infrastructures (roads, water, clinic, network, electricity- is poor. Example the other day a young boy was stabbed and an ambulance was not able to attend to him. The boy died from his injuries because of the poor condition of the roads. There are high crime levels, stock theft and drug abuse by the youth.

Land invasions - many farm dwellers in Gwatyu have been incarcerated for resisting land invasion. These are our problems that we fight for our land rights and end up being arrested. We do not have power to defend our land rights. We want our rights to be recognized and strengthened. We acknowledge IPILRA. Thank you for this opportunity. I handed it back to our attorney.

Thembakazi:

The people of Gwatyu are beneficial occupiers in terms of IPILRA, in that they have occupation of land by a person, as if he or she is the owner, without force, and openly. But **“IPILRA is not enough”**. Are there other ways to protect security of tenure for Gwatyu? Maybe there are alternatives for the Government to transfer land to Gwatyu; 1) ULTRA or 2) State Land Disposal



Act.

- ULTRA, 1991: not applicable: refers to deed of grant, leasehold, customary rights therefore inapplicable
- SLDA, 1961: discretionary power of gov to donate land to people, not obligatory role. The Constitution says: 25(6) and 25(9).

Important: Mr Nkwinti community appointed the task team to attend to the issue of Gwatyu, and the department conducted a series of waste audits without any tangible obligations.

Service delivery, all over the service delivery is poor, even in our communities we don't have a right road, lots of potholes damaging cars, no water, lots of protests, the communities demand service delivery.

What can be done? The state must create mechanisms to secure the people of Gwatyu's tenure. The state is obligated to provide tenure security to the people of Gwatyu. The rights contained in the Constitution must not remain as words, it must become a lived reality.

### **Nesting land tenure in land administration Rosalie Kingwill, independent researcher**

Video recording:

#### **Rosalie Kingwill summary**

Tenure is not a single idea or event. Tenure is a set of associations and we must shift our focus to the multiplex of institutions required to secure tenure. For example, the Gwatyu example is one of overlapping claims and rights. Because we have no adjudication system to deal with such conflict - which would be one element of the multiplex required - we are unable to deal even with these conflicts which in turn exacerbates tenure security. In the absence of system a system, it is simply the most powerful player that wins. The categories of land administration can be divided thus: (i) Juridical/Administrative/Technical = allocation of rights to land, delimitation of the parcel, adjudication and conflict resolution, registration; (ii) Regulatory = land use management (zoning etc); (iii) Fiscal = property values, property taxation, compensation; (d) Information Management = land info systems. **None of this is functioning properly in South Africa.** What we need to work towards is a universal infrastructure that incorporates local and national levels to ensure that community members can assert their rights not only at the local level but against the whole world.

Effects of ignoring land admin are well documented. This ppt looks holistically at what secures tenure as a whole. There has been 3 decades of contestation, but little solid analysis of why securing tenure is so difficult. One problem is the idea of two sides of a contested battlefield that reduces tenure to one side or event. We need to shift thinking of tenure as a single component of rights or even set of rights to thinking about tenures as a set of associates with multiple attributes. We need to move away from duality: registration vs customary tenure - thinking like this gets us nowhere. There is evidence about social units, access, inclusivity, boundaries, values etc.

Ingonyama Trust Case: issues of authority and decision making powers. ITB tried to impose a system of new rights on top of existing authorities thus exerting authority to allocate and make decisions about rights to land. This would be unthinkable in terms of freehold to have this imposition. But for informal rights it does happen. There are problems with segmented institutions of government enabled by the state.

Gwatyu Case: overlapping and conflicting rights and claims to land and how it is held.

There are universal problems in rural black communities especially the former bantustans including ITB. no system of adjudication to measure the relative strength of rights and claims vis a vis others. It is an 'open season' of contestation. People on the ground develop hybrid systems on their own but there is no ultimate power to make authoritative decisions.

Land Admin categories:

- Juridical/Administrative/Technical = allocation of rights to land, delimitation of the parcel, adjudication and conflict resolution, registration
- Regulatory = land use management (zoning etc)
- Fiscal = property values, property taxation, compensation
- Information Management = land info systems

Underlying Cadastre is Land Admin and spatial data but when looking at off register rights maybe the framework does not apply.

Need to look at local level to put together info and record systems but local gov does not have powers over this function which sits with national gov. Land tenure isn't an idea, it is a composite sys of governance with many elements that must align. There are many governors who feel tenure is achieved through single legislation and single ideas. Tenure involves politics and power. Tenure involves human relations of power. No ideology can force-fit these relations into one mould. We can develop a more uniformed, consistent and predictable system to govern and manage tenure like a road for the rights to drive on and limit crashes.

Why a uniform infrastructure?

Rights that are purely locally allocated and managed can be vulnerable to bigger interests and power elites. It makes a big difference if rights are locally, regionally or inter authorised. There is no reason not to adopt customary rights to be recognised internationally - to mitigate against being overshadowed by institutional imperialism.

## Questions and Comments from the Floor

### Johannesburg

Elizabeth Dineo Moleko: I am a traditional doctor. I work with traditional medicines that I harvest on our land but when I go harvest I am prevented. Red ants come to stop us from even planting our herbs and end up being destroyed. Gov promised us to stop harvesting in the land - now gov offers us food parcels and R350s when we already know how to sustain ourselves. We do not want to be taken advantage of because gov wants us to show them how we harvest herbs and our indigenous knowledge, then gover later goes to manufacture pills with our knowledge.

Mokhuwe Masekwa:

I observed we are talking to ppl who did not do any research on our land and I see all the researchers in this conference. Can't we channel them toward our villages and develop a model so that academics and lawyers come to our area.

East London

**Mawethu, from Singisa:** I feel pain when discussing Gwatyu. There has been a violation of people's rights and their dignity. Some people who have death in their families have to bury and now they have to relocate the graves. What can be done about s25(6) and s25(9).

**Second Speaker:** We are free but not liberated. When white ppl lived on the land they were regarded as owners but with the black gov it is unclear if they are owners or not. Gov needs to conduct surveys to establish correct landowners to prevent ppl coming to that land with false claims.

Durban

**Gentleman:** Will there be a summary of the conference available to the attendees?

Nokwanda Response: The Idea that land is only economic must be banished, it has spiritual and cultural implications. How can land be productive, make money - that is also needed. But esp in xolobeni for example - they are open to that but they are also clear that their rights must not be trampled upon.

Joburg proposal

We need a law that will redress mining-induced dispossession in the post-apartheid South Africa

**\*\*\* Johannesburg Overnight Reflections:**

- We need to capacitate community Facilitators to start mapping out the current customary processes on matters of land (allocation, use, residential, farming and grazing, grass thatching hunting and herbs) this can be led by the convening universities
- We need robust political education on rights and the laws.
- We must campaign against voting for the non-accountable government which is the majority over citizens of this country.
- Is it possible for 'civil society' to direct attention to supporting local action plans including local action plans that involve direct action to protect livelihoods and land rights, including occupation where it has become necessary for survival.
- The community delegates report back to village meetings and the community prepares its own action plan to protect and promote democratic rights and property rights ( within 30 days all action plans are shared?)
- Map out all organisations working at your village level. Have a local stakeholder database and stop duplicating, but integrate
- Map out your village boundaries, have maps and know boundaries. If you don't know your geographical boundaries then you can not be able to defend it or manage it.
- Get a copy of your core document like IDPs and SLPs and know how to lobby and where to put pressure.
- Mobilizing people is often difficult due to poverty. The elites, traditional leaders and business people dish out money to people to win them. So, us as activists we are not able to compete the modus operandi particularly due to lack of funding for Land Rights formation. We need to travel from one place to another in order to reach the grass roots - **lack of funds is the main obstacle. We should have a plan to overcome this. (This links to Prof Cousins saying let us be self-sustaining)**
- We also have another challenge of traditional leaders violating land rights of people and they use lawyers - land rights holders due to poverty and their struggle do not succeed in court for not being able to pay the costs of land lawyers. **We need to have a litigation fund which at the moment is not there.**
- It is very difficult to mobilise on ground, though it is simple but a challenge is that really these mines gives them money and food parcels as little as 1 kg's but because they think with their stomach, it really difficult for them to be able to attend because 1) we don't hire and 2) we don't have money to provide food parcels. But the fact is that they understand our struggle
- The challenge is that some civil society organisations are deeply attached to the ruling party as such we might trigger conflicts amongst communities. We need carefully planned strategies to circumvent that

## CLOSING PLENARY

### Sindiso Mnisi Weeks

#### Sindiso Mnisi-Weeks summary

A theme which stood out is the failed impact of the transformative vision of the Constitution when it comes to land and rural spaces. Traditional leaders use their power and unaccountability to stand in the way of democratic / economic advancement. There is spiritual significance of the land and what is buried in the land. Bottom-up arrangements have legitimacy and should not depend on formal structures or law. When rights are not protected, this is tantamount to dispossession. We need to undo the effects of two colonial legal principles that remain with us today: *terra nullius* (no man's land) and *lex nullius* (an absence of law? - think so), the colonial notions which rendered people without land or law. This requires us to pay attention to the ways in which these depend on one another. SA constitutionalism has not adequately addressed these concerns. The colonial authorities constructed this notion of the 'natives'... But we still live with this. We need now to envisage an 'ALTER-native' form of social and political existence." We must rely on the understanding of 'personhood' in ubuntu in the robust sense - from a pretense of 'unknowing' the humanity of people into re-humanisation or what Tshepo Madlingozi calls "Go mothofatsa".

Very glad to be with you all and apologies for not being able to attend. Wanted to start by summarising themes that have stood out.

Main theme -

- the failed impact of the transformative vision of the Constitution when it comes to land and rural spaces, traditional leadership and powers. Traditional leaders' powers have distorting effects on community governance.
- I would make reference to the ways in which land is a primary site of contestation. How traditional leaders use that power and unaccountability in order to stand in the way of democratic progress. Another thing is that the citizenship implications of rural people (specifically women) being subjected to leadership without consultation or choice and being dispossessed is tremendous. The impoverished systems of leadership are...

In the opening panel I spoke about how ubuntu is important. I am struck by the inherent dignity of our peoples; the right to choose [leaders?], the right to remove them, the spiritual significance of the land as well as what is buried in the land, whether it is minerals or our ancestor's remains. Bottom up processes have legitimacy and do not need to only have legitimacy in law.

This disregard, disrespect and lack of protection of rights is tantamount to dispossession.

In short, I want to make the case that history of violent land dispossession on one hand and denial of legitimate and normative systems on the part of the government on the other hand.

The undoing of plunderous doctrines and treatment of natives, rendering them people without law. The assumption that they don't have law so they cannot defend their rights.

We still need to dismantle two colonial principles that continue to prevail:

- Terra nullius (an absence of property or ownership, or nobody's land)
- Lex nullius (an absence of law)

“The colonial authorities constructed this notion of the ‘natives’... But we still live with this. We need now to envisage an ‘ALTER-native’ form of social and political existence.”

Focusing on our understanding of personhood - of ubuntu

The TKLA's dismantling of any form of community representation is a profound infringement of personhood.

We cannot deal with land issues without dealing with law issues. The constitution as a whole has not confronted and addressed these concerns. Failure to recognise these realities of terra nullius and lex nullius being the foundation of colonial/apartheid systems.

I want to make the claim that the operative notions of law and property is a fallacy. The fundamental questions that we are faced with are not of law or land but of personhood.

Do we need to envision an alternative version of the natives? Imagine alternative modes of social and political existence.

Definition that SA leans on ubuntu as dignity is rather impoverished.

Ultimately our only hope for change is to ground our interventions in personhood and vernacular interpretations. We can draw on Joel Modiri's "constitutional unknowing" and Tshepo Madlingozi's "Go mothofatsa" re-humanisation. Through that lens you see the TKLA as a profound infringement on personhood.

## **Constance Mogale**

### **Constance Mogale summary**

A key question which emerged from the conference is how should customary law and the community be defined? The answer lies with the people this affects. We need to start at the village level. The Expropriation Bill will be debated soon, and we must ensure that customary land rights of people are protected in this Bill. Any laws which deal with governance must be applicable to the whole country - not just to black people who live in homelands. We challenge you to mobilise across sectors, we must find a new way of organising in the era of technology - we must focus on capacity building of our activists. Immediate actions we can take is to publicise content - produce fact sheets, resource guides and simple booklets. We need to capture the reaction to what is happening around us. Invite us to community meetings and record and document meetings which are being held.

It is a privilege for me to wrap up this complex and difficult discussion.

I would reiterate what the speakers from the venues have been saying in reaction to the presentations. On the first day we were defining the problem. I think this process of articulation is very important. We need to start at the village level.

Oftentimes we rally people from the village to attend workshops and conferences.

On the first day we talked a lot about customary law and who should own and monitor customary law. Do we want it codified as a living law? Do we want it to be fluid? The answers lie with the people who will be affected. Most important thing that came up was the definitions of community. This is a root cause of why we cannot unite and agree as a community. This is sometimes swept up under the carpet.

As these three groups we have different interests and strategies. The immediate action is to capture everyone who was here to broaden our communication systems and disseminate information. We need fact sheets and simple booklets to disseminate this information.

We need to know what is happening around us. The expropriation bill will be discussed this month. Is it what we want? Does it protect customary and IPILRA rights? How do we make sure we protect the land? How do we make sure that the voices of this conference penetrate debates on law making?

We need to remember our campaign to stop bantustan laws.

Laws that are made for traditional leaders and traditional governance, land and mining must be applicable across the country, not only to Black people who were dumped in the former bantustans. We are one democracy. Let's go and mobilise. Video yourself. We must teach each other how to gather and share information (capacity building). Where are our land rights and what do they look like?

A uniting factor is also to mobilise across sectors. Let's make those connections and come up with a united strategy. Organise across sectors - and we need to find a new way of organising. We are in a new era. We need capacity building of activists to use social media.

## **Prof Nomboniso Gasa**

### **Nomboniso Gasa summary**

We have failed to articulate what a post-Bantustan post-apartheid South Africa would look like. What would this look like for people in former homelands? All the debate at the summit government convened earlier this year, it appeared as if they were in 1994, referring only to the colonial past - as if the past 28 years of law, policy and politics had never happened. The ANC has never had a resolution as to how to have traditional leaders in a democratic South Africa; they have been silent about what happened in the mid-20th century. They have been silent about what happened since 1994. The space is becoming more limited because the

government does not respond to court rulings and they are overtly siding with these conglomerates. We have a situation where tax money is being used against taxpayers. It is becoming clear that the space of asserting rights through constitutionalism is shrinking globally. There are going to be more challenges to this as more rightwing politicians sprout here in SA, amidst our deep crisis - as is happening elsewhere around the world. We need to restate the problem, comparing how people lived under the Bantustans and how they live now; and put forward our vision of what a democratic society looks like with traditional leaders. We need a more imaginative way of mobilising and strategies that build social and political movements in a way that interfaces with people's experiences. The problem is essentially a political problem, and take it to the theatre that is the political space and make it to be an issue for upcoming elections.

Thank you so much for this opportunity to share my thoughts on the proceedings of the last couple of days and what people could take home. Since the summit in may, the communal land summit in may organised by the department of agriculture in association with Cogta and the Department of Justice. .... The situation we are in today has shown us our lack of understanding regarding the situation. The state we are in is quite poor and we should not expect new ideas from them. The second aspect is the shrinking of mitigation. There is no doubt that in the last 15 years there have been powerful ways in which the courts have been used. Consultation is used cheaply to circumvent people's right. There is no shortcut to 'a community or person' that are entitled to tenure that is secure in Section 25(6)..

Have been thinking about where we are in terms of the CLTB. What are the key challenges? The first issue ties in with what people have been talking about.

The crisis at the moment is unlike any we have faced before. Ties in with the lack of clarity in the yeats (Is this "years" or "yeats"?) proceeding has put us in a position where we do not understand the depth of the crisis we are in.

It is a poor state of thinking, a state that has become a wasteland. There are no new ideas that are coming out, still clinging onto policies that were inadequate or a mismatch between what they want to achieve and what is being done.

The second aspect is the shrinking of space that we have been using for mitigation. There is no doubt in the last 15 years, there's been incredibly powerful ways in which the Constitutional Court and other courts on the legislation being in line with that s 25 of the Constitution promises. I do think that the space is becoming more limited, we have seen a gov that does not respond to judgments; does not implement or meet obligations. Even though we may get the judgments that we need, there is a clear culture that is disregard. Tax money is being used against citizens and repressing any action that produces meaning within the Constitution. I am not saying that we abandon this but be more mindful.

The space is becoming more limited because the government does not respond to court rulings and they are overtly siding with these conglomerates. We have a situation where tax money is being used against taxpayers. It is becoming clear that the space of constitutionalism is shrinking globally. There are going to be more challenges to this the more rightwing politicians sprout (i.e mogoeng mogoeng). Following the summit in May made me pause and think about how we arrived at this point



Observations from the may summit and a way forward:

1. There is no doubt that we are experiencing failure in articulating what post apart south africa looks like. When the leaders spoke, it seemed as if the last 28 years were null because they brought nothing to the table
2. They spoke about the history of traditional leaders and their role in the ANC but there was a change in the mid 20th cent with the formation of the BAntustans. The tl we had were those doing the apartheid state's bidding. We never had a conversation about working with traditional leaders in the formation of contralesa because these people came from minorities with power and resources
3. We have to lay down the nature of the problem and compare how people lived in Bantustans and now.
4. I agree with ben and connie, we need a better way of reaching our and interact with people
5. If we state the problem as a political problem and use research and make it an issue for the next elections...

Globally it is becoming clear that that space of constitutionalism or that space of asking constitutional judgments to breathe life to rights is shrinking. I think there will be more and more challenges as politicians become more right wing? If we start with what was said about the poverty of the imagination of the government. Maybe we must go back, how do we understand the nature of the problem? How do we state the problem? Following the summit in May I actually thought about these problems, made me pause and think about how we have come here. In terms of way forward; there is no doubt that we are also experiencing the failure of articulating what a post-bantustan apartheid SA would look like. We had the freedom charter, we have not figured out how this looks for people who live in former homelands. At the summit, all the politicians spoke about the legacy of colonialism and apartheid, all the political principles. When they spoke it was as if the last 25 years had not existed, it was as if they were speaking in 1994/5. Part of that is that the ANC has never had a reckoning of what it would mean to have traditional leaders in a democratic SA. They were silent about what happened in the mid-20th century. While traditional leaders were part of ANC and anti-colonial movements. Those progressive trad leaders were isolated and taken out of the system so the kind we had from there were those doing the apartheid states bidding.

There is a silence in the ANC about this as they have not really thought about it. There was never a conversation about how this would be. In this period of looking at where we go from now.

We need to restate the problem and put forward our own vision of what a democracy looks like with traditional leaders.

We need to put forward the nature of the system comparing how people lived under bantustans and how they are living now.

We need a much more engaged form of mobilism, more energetic way. Essentially we need to have strategies that build social and political movements that interfaces with people's experiences.

If we state the problem of not just one of law or policy, but as a political problem and take it to political spaces and ultimately make it an issue for upcoming elections. There isn't really anything that parties bring to the table about communal land tenure that breathes life into it.

## Plans moving forward

### **Durban**

**[Name: From]** I would like to greet you all for the last time. What needs to be done after this is to mobilise people and conscientise them about their rights. There are places where they'd give over their land and in the long run, they begin seeing the truth behind the project when it is too late. We also have a problem regarding our leadership because once the chief began getting paid, they automatically became the government's lackey.

**Dingeni Mthimkulu (Babanango):** All our challenges are the same. Legislation is a problem. Before the government can amend these laws can they (must?) consult the community. The way forward is that the lawyers among us must help us. My view is that the government, before passing laws, must engage with us as communities so we can see what the pitfalls of these laws are for us. Can they look into mining laws? When they consult, they should not only consult traditional leaders but also communities.

### **Johannesburg**

**Molatelo Mohale:** Strategies to help move forward is something that I learned from the Indian social movements. They finance their mobilisation so they use different strategies to develop their content and they are not relying on anyone else. All parties come together – financial contributions, development content and shaping the debate

**Christina Mudau:** People are afraid to engage with us because we cannot give them food parcels and those things, people nowadays think with their stomach. We are attacked by people who have been paid by mines. We need all organisations to come to our area to assist us.

### **East London**

**Thabisa Mhlahlo** (from where?): We must mobilise ourselves. We must organise, write petitions outlining our issues and take these to the government. At every stage, the government must let us know whether it is a Bill or a White Paper. They must not just show up calling for a public hearing with a written law looking for community input.

**Ntombi... Zitha: (EL people, who was this?)** My thing is, on these laws, we ask that the government... As women, it's important we stand up and not be afraid like the women in 1956 did to make their voices heard. We must support each other as women in our communities. Women must stand up. But there is a lot of division among women as well.

## Responses

### Sindiso Mnisi Weeks

One thing that maybe I didn't get the opportunity to expand upon was with regards to how the ideas I was trying to present relate to land in particular. To me I would argue that it is not esoteric. When the government is legislating they are making decisions about people that they see or people that they don't see (people who are just subjects). Essentially when we understand ubuntu not just as a concept of personhood but a concept of people's connectedness, then you stop seeing leaders as people that make decisions from the top. The idea of communities being their own stewards, making decisions for themselves, is integral to the leaders in turn. I think the poverty of imagination is because our imagination is dominated by global external ideas. One of the comments was that we are told that our ancestors are standing in the way of development - what does this mean? If our imagination starts from our own positionality then we can come up with solutions that are appropriate for our circumstances. I did not get that last bit

### Constance Mogale

I want to repeat that people together will never be defeated. We need to stop the bantustans. We shall stop the Bantustans.

We are the ones we have been waiting for. If we reflect what went wrong over the past 24 years at gov, companies, white people the other fingers are pointing back at us.

Let's go find the land, let's go fight for the land. Let's look at what went wrong with customary law. The CPAs are behaving like the people we have been criticising, like the chiefs. It is about our land, our rules and about the people. If it is about the people I want to see pop ups in the communities. I am very inspired.

### Nomboniso Gasa

I've enjoyed listening to some of the issues we don't normally talk about.

For me, the session that looked at the spiritual aspects of land was very powerful.

How do we translate this into public discourse that will have a meaningful impact? I want to suggest 3 things. The steering committee, in writing the report, you have a committee that looks specifically at what is the way forward

1. Pool together the proposals that come up - ones that inform public debate, what should happen. For example, people suggested that IPILRA can be upgraded and made permanent.
2. Need a delegation/committee of people that will move from this conf and meet key stakeholders in society, especially ones that we want to build bridges and alliances

e.g. people in the social cluster at NEDLAC, trade union movement, climate change orgs, poverty and land orgs such as Abahlali, Landless People's Movement

3. We have to start building more awareness at a global level. If we have these issues, we take them, and table them in international platforms and show what is being done
4. I do think we need to build towards one massive campaign. Where we have a national shutdown that focuses on communal land. If it is a shutdown that highlights the issues that people are faced with post-covid e.g. hunger, unemployment. How does an unresponsive state look like today? 9 years of state capture, etc. Build these things into 5 talking points and flood SA media and news. Include trainings to supplement activism. Look at ways that successful movements, how they are built.
5. Finally, we need to talk to the Khoi and the San, as fellow travellers in solidarity.

In the next 3 months we need to have planning for all these processes and engagement with those who we want to join with in campaigns.