

Addendum to the Submissions on the scope and content of the proposed Treaty on Trans-National Corporations (“TNCs”)

1 The LRC and its interest

1.1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic based in South Africa which uses the law as an instrument of justice. It works for the development of a fully democratic South African and African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances.

The LRC, both for itself and in its work, is committed to:

- 1.1.1. Ensuring that the principles, rights and responsibilities enshrined in the South African Constitution and the African Charter on Human and Peoples’ Rights are respected, promoted, protected, and fulfilled;
- 1.1.2. Building respect for the rule of law and constitutional democracy;
- 1.1.3. Enabling the vulnerable and marginalised to assert and develop their rights;
- 1.1.4. Promoting gender and racial equality and opposing all forms of unfair discrimination;
- 1.1.5. Contributing to the development of a human rights jurisprudence; and
- 1.1.6. Contributing to the social and economic transformation of society.

1.2. The LRC has been in existence since 1979 and operates throughout South Africa and, more recently, continentally from its offices in Johannesburg, Cape Town, Durban and Grahamstown.

1.3. The LRC represented and continues to represent individuals and communities in litigation involving:

- customary law and governance (also of resources)
- communal land and new development on communal land including mining
- environmental regulation and mining.

1.4. We appeared on behalf of clients in the South African Constitutional Court in the matters of Bhe¹, Richtersveld² and Shilubana³. Our clients include the communities that successfully challenged the

1 Bhe and Others v Khayelitsha Magistrate and Others (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).

2 Alexkor Ltd and Another v Richtersveld Community and Others (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).

3 Shilubana and Others v Nwamitwa (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

constitutionality of the Communal Land Rights Act of 2004.⁴ We have also participated in litigation and negotiations on behalf of communities resisting forced removals on account of large scale infrastructure and extractives projects or are seeking appropriate compensation from such removal in Namibia, Lesotho, Mozambique and Zambia.

1.5. Most recently, we represented victims' families and the Bench Marks Foundation at the Marikana Commission of Enquiry into the events of 16 August 2012. It is in particular our submissions on the so-called "phase 2" of the Commission, on the underlying social and economic causes of the tragedy and the liability of the relevant company and its subsidiaries in those causes that inform our submissions here. We delayed this submission to include reference to the findings of that Commission delivered on 25 June 2015.

1.6. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership legislation in South Africa, legislation that has facilitated land and resources grabbing in the country. In the LRC submissions to the South African government on taxation of TNCs, the LRC motivated for the consideration of community royalties and unitary system of taxation. A unitary system of taxation has two main components: 1) combined reporting; and 2) apportionment of profit. This system of taxation is based on the simple principle that taxes should be paid where the activities generating the income take place. Unitary taxation has several advantages.⁵

1.7. In addition, the LRC represents former gold miners who have instituted a class action against 32 gold mining companies - the gold mining industry - in South Africa. The purpose of the class action is to claim damages on behalf of mineworkers who have silicosis and tuberculosis and the families of mineworkers who have died of silicosis and tuberculosis. The mineworkers contracted silicosis and tuberculosis on the South African gold mines as a result of their prolonged exposure to excessive levels of silica dust. The mines are to blame because they consistently and systemically failed for generations to employ proper measures to protect mineworkers against excessive levels of dust and the concomitant risks of silicosis and tuberculosis. Should this application succeed, the LRC hopes that a compensation scheme will be established for all silicotic gold miners.

1.8. The LRC has over more than a decade been involved with making submissions to the Department of Mineral Resources on the development of the principal Minerals Act of 2002 and the 2008 amendment act. We also made representations to the relevant portfolio committee on the royalty bills, relevant environmental laws, land reform legislation and rural governance statutes including the legislation dealing with traditional councils and traditional courts.

1.9. In these submissions, the LRC is responding to the UN Intergovernmental Working Group's call for submissions, with the aim of fostering the "constructive deliberation on the content, scope, nature and form of the future international instrument".⁶ The Intergovernmental Working Group was established in terms of resolution 26/9 adopted on 26 June 2014.

2 Lessons from Marikana

2.1. On 25 June 2015 the report of the Farlam Commission of Enquiry⁷ into the Marikana disaster was published. The judicial commission found that Lonmin was careless in its responsibility and duty towards its employees and did not respond appropriately to the threat and outbreak of violence. Lonmin's failure to comply with its obligation to provide decent housing to its employees was recommended for referral for action by the mining regulatory authority. The commission found that Lonmin's failure to comply with its

⁴ *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Center, with Webber Wentzel attorneys, represented four communities: Kalkfontein, Makuleke, Makgobistad, and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004.

⁵ http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/20140509_LRC_Submission_Davis_Tax_Committee.pdf

⁶ Human Rights Council, available at

<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>

⁷ <http://www.gov.za/sites/www.gov.za/files/marikana-report.pdf>

housing obligations “created an environment conducive to the creation of tension, labour unrest, disunity among its employees or other harmful conduct”. The commission also held that the mining regulatory itself should be investigated for its “apparent failure ... adequately to monitor Lonmin’s implementation of its housing obligations.”

2.2. The central significance of these findings to these submissions is the recognition that TNCs, like Lonmin, can no longer shirk their obligations to contribute to the realization of the socio-economic rights and the Right to Development of those affected by their operations. This is so because the TNCs have become a key player in the realization of the Right to Development. A central theme of TNCs legitimization of their operations in the face of the proven negative environmental, social, cultural, and other impacts these operations is their purported ability to create employment. Thus, TNCs legitimize their existence through boasting about their ability to contribute to the realization of the Right to Development through job creation and economic injection. The Farlam Commission calls Lonmin out on this very promise: it is not enough to create employment (if that indeed happens) and not provide the conditions for those employees to live dignified lives. The TNC has an obligation to do so.

2.3. This significant finding follows the finding of the African Commission on Human and Peoples’ Rights, in 2001, that it is not enough for States to allow the operation of TNCs in their countries in the name of development, without ensuring that the development reaches the affected communities – both the host community and the employees. After deciding that the Ogoni community constituted a people having social, economic, and cultural rights as a group, the Commission declared that the government had failed to involve the Ogoni community in the decisions affecting the development of Ogoniland and to ensure its peoples’ rights to free disposal of resources, as no material benefits accrued to the local population. The argument that benefits would eventually trickle down to the community did not hold water. As a result, Nigeria had violated the Ogoni peoples’ Right to Development.

2.4. The impact of the operation of TNCs on the host communities and the problematic relationship between TNCs and the state in this regard is also illustrated by the Marikana disaster and more specifically the story of the Wonderkop farm where Lonmin’s operations are located:

a) In the 1920s the Wonderkop farm was purchased by a consortium of individual black families who did not necessarily align themselves with the Bapo ba Mogale ‘tribe’.⁸ Some of the families were dispossessed of their nearby land under the Hartebeestpoort Irrigation Scheme Act of 1914 which was established to support poor whites and victims of the Anglo Boer War and First World War. The purchasers requested the Bapo chief to facilitate their purchase of the land, because the laws of the time provided that black people could only hold land as a tribe and then by the chief on behalf of the tribe.

b) The Apartheid Bantu Development Trust gave old order mining rights to mining companies and received royalties in respect of mining on and under the Wonderkop farm. Under the later Bantustan system, the royalties went to the Bapo tribal authority as recognized by the apartheid government.

c) Lonmin acquired the old order rights and continued to pay royalties to the Bapo tribal authority without direct benefit to the Wonderkop community. In 2014 the royalties were converted to an equity share in order to comply with the black empowerment requirements of the government, again without regard to the property rights of the Wonderkop community whose land was being mined and which was hosting the informal settlements and slum villages resulting from Lonmin’s refusal to comply with its housing obligations towards its workers.

2.5. Lonmin plc will be the subject of continuing investigations following the judicial commission’s report for failure to comply with its common law obligations to care for its employees and act responsibly, and for failure to comply with its housing obligations, which action contributed to the deaths. But Lonmin’s human rights obligations go much further and their violation are still to be addressed.

⁸ This was the colonial term. It is also significant as the colonial and later apartheid governments actively promoted the notion of bounded tribes with clear boundaries and identities and imposed these boundaries and identities through a series of laws.

2.6. In June this year, concerned members of the Bapo ba Mogale community launched litigation to review the deal by which Lonmin converted the royalties of the community to shares citing the lack of open and transparent procedures, poor community engagement and a lack of respect for the customary law of the community as complaints.

3. Regional Context

3.1. The LRC is a member of the Treaty Alliance and the Global Campaign for Dismantling Corporate Power. We participated in and endorse the submissions made by these structures. In this additional submission, we merely wish to elaborate somewhat on the importance of including the Right to Development as a fundamental principle and an enforceable right in the proposed treaty.

3.2. Our submission is motivated by the reality that faces communities affected by the operations of TNCs and the inadequacy of the current legal framework to deal with these issues. This treaty comes at the end of years of campaigning on the part of organisations and communities who feel powerless in changing the way they are forced to bear the extraordinary brunt of so-called ‘development’. It is not that TNCs are able to dictate the way development happens and who will carry the externalized costs because of a complete absence of a legal framework. On the contrary, applicable instruments, both binding and non-binding, abound. Rather, it is because of the inability of these plethora of instruments to address the fundamental and underlying issues that the existing frameworks simply make little or no difference.

3.3. As in all countries on the African continent, the South African government, and in particular the local governments operating in the rural areas completely neglected under the apartheid regime, are struggling to provide basic services to every corner of the country. That is often the case in particular in the rural areas targeted by TNCs in the context of the latest resource wave. TNCs in all guises routinely use this weakness in service provision to convince affected communities to agree to large scale projects, and to leave their land, in exchange for the TNC facilitating access to the basic services that urban dwellers receive as a matter of right. In effect, the poorest of the poor give up their only asset – land – to get what they should be receiving for free. In the case of Marikana, Lonmin subsidiaries had different relationships with the thousands of migrant labourers entering the area to work on the mines and the affected local communities whose land rights were implicated.

3.4. In terms of South Africa legislation, a mining company must contribute to local economic development and local housing needs (amongst others) in order to obtain and retain a mining right. Lonmin and its subsidiaries promised, amongst other things, to build 5500 houses for their employees over a period of 5 years from 2007 to 2011. They reported yearly to the relevant Department and to their stakeholders on their progress – which was dismal. In fact, by the time of the Marikana tragedy happened in 2012, only 3 of the 5500 houses had been built. Yet, neither the department nor the shareholders lifted a finger to hold the company to account for this gross negligence. We submitted to the Marikana Commission that the horrible conditions in which the workers lived were in fact a contributing factor to the tragedy.

3.5. Lonmin CEO emphasized the role they were playing in delivering services on behalf of the government. When appearing in parliament immediately after the tragedy, their tune had changed: they denied any responsibility for the socio-economic conditions of the area, on the basis that it was an exclusive government function. The Marikana Commission disagreed.

3.6. It is thus the duty of the drafters of this treaty to ensure that the gaps in an existing legal framework are filled. From our experience in representing communities in attempting to assert their rights against the might of TNCs, the most critical gap to fill is the need for an enforceable Right to Development. That is, a right for communities to determine their own development paths, rather than being forced to give up their land in return for, at best, access to services that they should receive in any event and a plethora of promises of employment and ‘development’ that simply never materialise. The so-called ‘trickle-down’ development that expects communities to give up their most valuable assets (without receiving anywhere near its value in return given the continued discrimination against customary forms of tenure) in order to one day receive

the benefits of the tax injection on account of 'development' has been discredited widely. Yet, TNCs are allowed to continue to insist on these models and to force States to abide by simply threatening to pack up and leave.⁹

The treaty is a unique and critical opportunity to change the tide in this regard.

Yours faithfully

LEGAL RESOURCES CENTRE

Per: WILMIEN WICOMB

⁹ The SERAC judgment of the African Commission on Human and Peoples' Rights was a notable exception.