

# Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

Second session, 24 – 28 October 2016

## **FORM for NGOs and other relevant stakeholders submitting a written contribution**

Please note that the written contribution is formatted and issued, unedited, in the language(s) received from the submitting organization (it should be submitted in one of the official UN languages).

In order for your contribution to be published on the OEIWG web page prior to the session, the deadline for submission is 30 September 2016. All submissions are final.

Please fill out **this** FORM and CHECKLIST to submit your written contribution and send it to the address indicated below. Your information goes after each arrow.

1. Please indicate the contact information for the representative submitting the written contribution (i.e. name, mobile, email) here: → Wilmien Wicomb +27 78 920 8366 [wilmien@lrc.org.za](mailto:wilmien@lrc.org.za) and Anna Bulman +27 71 437 8940 [anna@lrc.org.za](mailto:anna@lrc.org.za)

2. (a) If this is an individual contribution, please indicate here your organization's name (kindly state in brackets whether your organization has ECOSOC consultative status (i.e. General, Special, or Roster). → Legal Resources Centre (no ECOSOC status)

or,

2. (b) If this is a joint contribution including ECOSOC NGO(s), list here the co-sponsoring ECOSOC NGO(s) as they appear in the ECOSOC database and their status (in brackets): Group all General NGOs first, group the Special second, group the Roster third. →

3. Indicate here any non-ECOSOC NGO(s) supporting the joint contribution (they will appear as a footnote to the title – unless it is a joint contribution from non-ECOSOC stakeholders only): →

4. Indicate the TITLE for the written contribution (in original language) here: → Submission by the Legal Resources Centre to the Inter-Governmental Working Group for the Second Meeting on the Proposed Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights

### **Please make sure that:**

- The written contribution is in MS WORD document format (Font Times New Roman 10; no bold; no underline; no italics).
- Please use the Spell/grammar check on your text. (Go to Tools, Spelling & Grammar)
- Different language versions of one statement should be sent in the same email, but using **a separate form** for each.
- Email the document to: [igwg-tncs@ohchr.org](mailto:igwg-tncs@ohchr.org)

**PLEASE PASTE THE FINAL TEXT BELOW:** ↓

The Legal Resources Centre (“LRC”) is an independent, public interest law firm and registered not-for-profit organisation that is based in South Africa. The LRC provides legal services for vulnerable and marginalised peoples, including those who suffer discrimination or are poor, homeless or landless. The goals of the LRC include promoting justice, building respect for the rule of law, and contributing to meaningful transformation in South Africa and beyond. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities to claim their fundamental rights. Some cases where the LRC has defended peoples’ rights in the context of both national and transnational corporate activity include in Xolobeni where community members are resisting titanium mining by Australian mineral company Mineral Commodities Limited and its subsidiaries, in Sekuruwe where community members refused to give up their communally-owned farm for an Anglo American tailings dam without an arrangement being on their terms, and in Marikana where striking underpaid workers at Lonmin’s platinum mine were mown down by security forces.

In much of its work, the LRC encounters the negative effects that corporate activity can have. The LRC witnesses the corruption, bullying and violence that occurs when a community demonstrates resistance (see for example the murder of Xolobeni community leader Sikhosiphi ‘Bazooka’ Rhadebe in March this year), degradation of the environment and sacred sites, and the unequal outcomes for customary communities whose lands are exploited compared with company owners and executives.

The LRC makes four specific submissions. Our submissions are substantive and procedural:

1. With regards to the substance of the Treaty, the LRC submits that it is imperative to include the peoples’ right to development as recognised in the African Charter on Human and Peoples’ Rights as a core principle of the binding instrument on transnational corporations and other business enterprises with respect to human rights (“Treaty”).
2. With regards to procedure, the LRC submits that effective participation by affected communities in the Treaty development process should be facilitated.

Within those two topics, the following specific recommendations are made to IGWG:

- The peoples’ right to development, as contained in the African Charter on Human and Peoples’ Rights (“African Charter”) and as given content by the African Commission on Human and Peoples’ Rights (“African Commission”), must be included as a founding principle and enforceable right in the Treaty. This will ensure that the highwater mark of the Treaty is not to mitigate and compensate for adverse human rights impacts, but to prevent these, and protect and promote community participation in development.
- The Treaty should expressly recognise the customary rights to land and natural resources of the affected communities as property rights, whether documented or not, and provide for appropriate compensation and reparation where applicable.
- The Treaty must require the free, prior and informed consent of all communities with customary rights to the affected land and resources. FPIC is a procedural and a substantive right: it includes the protection of peoples’ right to full and timely disclosure of all relevant information prior to the approval of the project, the recognition of and respect for the customary decision making processes of the affected communities and, ultimately, the right to say no thank you to a project.
- Communities from around the globe who are, or will be, adversely affected by corporate activity must be at the centre of the development of the Treaty, including all associated discussions and negotiations.

## Right to Development

Individuals and communities must be participants in their own development and in the choices made in achieving such development.<sup>1</sup> The right to development is, however, a complex and polarising human right. For a start, the very notion of what constitutes “development” is contested and continually evolving. The right is also considered to be a composite right that encompasses all other relevant human rights. It can apply to both individuals and peoples. Further, it embodies both “external” (international) elements of inter-state responsibilities, and “internal” (national) elements of intra-state responsibilities. The value of the African understanding of the right is that it localises the right to affected communities.

In terms of what is “development,” development can happen in many ways. The current favoured model of *economic* development operates in a “trickle-down” fashion. Under this model, communities are expected to give up their most valuable assets (without receiving fair value due to the continued discrimination against customary forms of tenure) in order to one day receive the benefits of the tax injection on account of “development.” This model has been widely discredited, and communities around the world over taking a strong stand against it. Instead “development” must be people-centred and driven by the vision that a particular community sees for themselves.

To date, African regional human rights jurisprudence offers the most concrete and practical interpretation of the right to development. The African Charter empowers communities to determine their own development paths, rather than being mere spectators. The Charter provides:<sup>ii</sup>

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In *Endorois*, the African Commission explained that the right to development comprises a two-pronged test: (1) constitutive (substantive) and (2) instrumental (procedural).<sup>iii</sup> This means that the right is “useful as both a means and an end” and that a “violation of either the procedural or substantive element constitutes a violation of the right to development.” Both the procedural and the substantive requirements must be met in order to satisfy the right to development.

#### Free, Prior and Informed Consent

Proper compliance with both the procedural and substantive aspects of the right to development requires investors to seek the free, prior and informed consent (“FPIC”) of the affected communities prior to the inception of the project, and at every stage when the rights of the community may again be threatened. Only if a community has the option of saying no, will they have an effective bargaining position when participating in the development decisions that affect them. FPIC is essential for ensuring satisfactory development outcomes.

FPIC in this context is not limited to indigenous peoples, but, rather, extends to all customary communities who are affected by a particular corporate activity.

The elements of FPIC comprise:

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| Free     | The community’s decision is made free from any obligation, duty, force or coercion. Ideally, alternative development options should also be available to the community to ensure that the decision is based on real choice.  |
| Prior    | The community has the right to make the development choice prior to any similar decisions being made by government, finance institutions or investors – prior to applications for financial support even being lodged. In other words, the community’s right to FPIC is not realised if they are presented with a project as a <i>fait accompli</i> . This is at a far earlier stage than simply considering adequate remedies for violations.   |
| Informed | The community must be able to make an informed decision through provision of sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and protect peoples’ rights to full and timely disclosure of all relevant information, including knowledge of alternative development approaches. The community should be afforded enough time to digest and debate the information. |
| Consent  | The community’s decision may be to reject the proposed development. They can say no.   |

This is not about stopping development or refusing to move under all circumstances. To the contrary, communities may actively seek or welcome certain investment opportunities. Rather, it is about

creating bargaining positions in the context of the non-recognition of customary rights. The following quote from Endorois is apposite:<sup>iv</sup>

... the community representatives were in an unequal bargaining position, ... being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. ...

... The result of development should be empowerment of the Endorois community. ... The capabilities and choices of the Endorois must improve in order for the right to development to be realised.

While remedy is an essential component of full human rights protection, the goal of the Treaty is not limited to mitigating the impacts of corporate activity, but instead, to change the very power dynamic of development.

FPIC is not simply a procedural indicator of compliance. It is not a tick-box exercise that can be checked off in order to justify a development. Rather, it is a substantive right in the sense that compliance will be evident if the outcome of a development is positive and the process is generally regarded by community members as legitimate. While realisation of the right necessarily involves the procedural aspect, it will be important for a Treaty to focus on the substantive element as well, so that it does not simply equate FPIC with a meeting or two. FPIC should be clearly expressed as an ongoing requirement for corporate activity that affects local communities.

#### Customary Law

From our experience in representing communities who are attempting to assert their rights against corporations, a critical gap that the Treaty should fill is the non-recognition of customary laws and rights, including land. Rural communities across Africa have for generations utilised land, forests, marine and other resources in terms of their customary laws, making them owners or rights holders of the land and resources. The community's relationship to the land and resources commonly developed as an integral part of their identity and cultural existence.

These customary laws are the system of rules and principles that the communities use to govern themselves and their access to shared resources. Colonisation saw the imposition of Western forms of law, including property law, on African countries. This imposition was so pervasive and absolute that the fiction that "ownership" can only be proven through a title deed or other written entitlement remains intact in most of Africa. And so, unwritten and largely unrecognised by these formal, imposed colonial legal systems, customary law is commonly ignored and communities' customary land rights completely violated. "Land grabbing", the popular term for the acquisition of large tracts of land, is not necessarily the applicable term in Africa, as these acquisitions are, in fact, facilitated by the inherited formal legal systems.

Recognition must not be limited to use rights where people are simply compensated for their crops. Customary rights comprise a complex and varying bundle. For example, land is often communally owned and then divided into family parcels. While some community members may have rights to grow crops at certain times of the year, others may have livestock grazing rights after harvest. The community may then agree that the field must be left fallow to recover soil fertility.

Customary law must not be viewed in a narrow sense as being relevant only for indigenous peoples. Indigeneity in Africa is a fairly contested concept.<sup>v</sup> The history of conquest and movement across the continent means very few groups can prove connection to a specific area "since time immemorial." In this context, the broader term "customary communities" is more appropriate – meaning "communities who regulate their lives, and in particular their tenure rights, in terms of customary law".<sup>vi</sup> If such customary communities are excluded, it creates a form of double discrimination – especially as the vast majority of new corporate activity in Africa disproportionately impacts on customary communities.

#### Participation by Affected Communities in Treaty Process

Across the developing world, affected communities are taking a stand against development projects that leave them worse off and asserting their rights to be taken seriously as agents in their own

development. The result in some instances is the successful delay or even halting of major projects. States and corporations can no longer afford to treat these communities as spectators, but must recognise them as central to the projects planned. The Treaty should improve the bargaining power of vulnerable and marginalised communities.

#### Practical Steps for Involvement of Affected Communities

While in theory it might be non-contentious that affected communities should be at the centre of the Treaty development process, in practice it will offer some significant obstacles for the IGWG. To that end, some practical suggestions for implementing this approach include:

- Setting aside adequate time to hear directly from representatives from affected communities around the globe.
- Encouraging states and civil society to source funding to bring community members to Geneva to share their stories with the IGWG.
- Allocating member positions on the IGWG itself for community members.
- Coordinating with community-based non-governmental organisations to set up Skype links for interactions with the IGWG.
- Facilitating a process whereby the experiences and recommendations of affected communities can be meaningfully considered in the drafting of the Treaty, even when these are not expressed in legal language.
- Establishing and conducting focus groups with affected communities.
- Specifically encouraging states and civil society to facilitate written submissions by affected communities who cannot travel to the sessions.
- Sensitising members of the IGWG and drafters of the Treaty to understanding the connection between the lived experiences of affected communities and the development of the Treaty, so that the Treaty reflects realities on the ground.

#### LEGAL RESOURCES CENTRE

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<sup>i</sup> United Nations Declaration on The Right to Development, article 1; African Charter on Human and Peoples Rights, Articles 20-22; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (“Endorois”), 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, available at <http://www.refworld.org/docid/4b8275a12.html>.

<sup>ii</sup> African Charter on Human and Peoples' Rights, Article 22: Right to Economic, Social and Cultural Development, available at <http://www.achpr.org/instruments/achpr/#a22>.

<sup>iii</sup> Endorois (see above), 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, [277].

<sup>iv</sup> Endorois (see above), 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, [282]-[283].

<sup>v</sup> See “indigenous” definition in Frans Viljoen, *International Human Rights Law in Africa* (2012), p. 229.

<sup>vi</sup> Wilmien Wicomb, Henk Smith, Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the Endorois decision (2011) 11 *African Human Rights Law Journal*, available at <http://www.scielo.org.za/pdf/ahrlj/v11n2/06.pdf>, 432, footnote 5.