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LRC
Legal Resources Centre

United Nations Secretariat
Per email: igwg-tncs@ohchr.org

Please find our submissions on the scope and content of the proposed Treaty on Trans-National Corporations ("TNCs"). To stay within the 2,000 word limit, we included an addendum that further elaborates on the issue at hand and speaks to LRC's interest in the matter. Thank you.

Yours faithfully

LEGAL RESOURCES CENTRE

Per: WILMIEN WICOMB

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Submissions on the scope and content of the proposed Treaty on Trans-National Corporations ("TNCs")

The LRC would like to make three proposals for the treaty:

1. That the Right to Development, as contained in the African Charter on Human and Peoples' Rights and as given content by the United Nations and the African Commission on Human and Peoples' Rights be included as a founding principle and right in the treaty;
2. As a means to recognize the disproportionate impact of the current resource wave on the rural communities of South-South countries, and to ensure the feasibility of implementing the Right to Development, that the recognition of community or peoples' rights alongside individual rights (as per the African Charter) be included; and
3. As a baseline principle in ensuring the realization of both the substantive and procedural aspects of the Right to Development, that the requirement of the Free, Prior and Informed Consent of affected communities as a requirement for development projects be included. Only if a community has the option of saying no, could it possibly have any real bargaining power in its engagements with both TNCs and States. That is the basis of the Right to Development.

In what follows, we set out preliminary aspects of our main submission above that we submit would require the attention of the treaty drafters.

1) The Right to Development

A central issue that will face the IGWG in deciding on the scope of the treaty is to define the 'human rights' that this new legally binding instrument should seek to protect. Some argue that the rights to be protected should be limited to 'egregious' human rights abuses. Others wish to extend the scope of the treaty to include the civil and political rights contained in the International Covenant on Civil and Political Rights, and even the socio-economic rights contained in its sister Covenant.

The LRC submits, based on our experience in the field, that for this treaty to play any role in changing the wide-ranging impacts of TNCs and the multi-facetted causes of human rights violations by corporations, it must insist on the Right to Development as a starting point. As such, the treaty may draw from a variety of protections already included in international and regional mechanisms such as Articles 20[i], 21[ii], and 22[iii] of the African Charter on Human and Peoples Rights. As early as 1966, the United Nations was contemplating how to protect the peoples' Right to Development starting with International Covenant on Civil and Political Rights,[iv] which was later adopted into the International Covenant on Economic, Social and Cultural Rights, put into force in 1976 .[v] In 1986, the UN adopted the Declaration on the Right to Development.[vi]

There is no denying that TNCs play a pivotal role in the form that development takes in the countries where they operate. A treaty designed to regulate corporate behavior must therefore address the potential for manipulation of development models and decisions by TNCs if it is to play any meaningful role.

Article 1 of the UN's Declaration on The Right to Development provides the key: it dictates that individuals and communities must be participants in their own development and in the choices made in achieving such development. They are not passive recipients. In fact, the right to self-determination also featured in Article 1 has for all intents and purposes become such a procedural right for the marginalized: self-determination, in the current international context, relates less to 'succession' and more to the right of marginalized and

vulnerable communities to determine their own governance and development paths relative to the sovereignty of the nation state.

Legal precedent for the Right to Development as a justiciable right exists. In the Endorois matter, the Commission found that the Right to Development demands engagement with the rightsholders to be "equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the Right to Development".[vii] In that case the Commission found that the Endorois community's Right to Development was violated because they were not afforded the opportunity to participate in their own development paths.

Although the human rights framework is traditionally based on the principle that States are the implementers and enforcers of human rights, that principle have increasingly been challenged with justiciable human rights protections applying both vertically and horizontally in contemporary Constitutions and with the movement towards recognizing the responsibility of other legal entities (such as international organisations, companies and individuals) in international human rights law. We know that States are not always able to properly protect and promote the rights of their citizens when forced to balance such compliance with the pressure from potential investors. This treaty must address that reality.

In this regard, we point to the events at Marikana in South Africa in August 2012 as an example of the ambiguous and problematic relationship between states and TNCs in particular with regards to the roles traditionally fulfilled by states only. Lonmin, as most TNCs, year after year in parliament prior to 2012 falsely advertised their role as service deliverer before their gross negligence was exposed. (See addendum)

This is exactly the ambiguous role that TNCs often play in countries, taking advantage in particular where the state lacks the resources to deliver services to the rural poor. The treaty should, in this context, hold TNCs to account for their role not only in manipulating development decisions that states should make in line with their development obligations, but also their micro-level roles as unelected outsourced government agents fulfilling government functions.

At a minimum, this will serve to clarify the murky role played by TNCs in poor countries.

2) The treaty should protect the peoples' right to Free, Prior, and Informed Consent (FPIC).

The Right to Development has both procedural and substantive aspects, according to the African Commission, and a failure to comply with either is regarded as a violation of the right. Properly complying with both the procedural and substantive aspects of the right requires TNCs to seek the Free, Prior, and Informed Consent (FPIC) from the affected communities prior to the inception of the project, and at every stage when the rights of the community may again be threatened. In the Endorois case, the African Commission held that "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions".[viii] Placing the duty of complying with this right on the State only, however, disregards the context within which these violations are perpetrated – a context often dominated by TNCs. In fact, most regulatory frameworks across the continent requires consultation to happen through the TNC. What applies to the State in this regard should thus also apply to the State agent fulfilling those rights – if it is the TNC, then so be it.
The treaty needs to protect the peoples' right to full and timely disclosure, including knowledge of alternative as FPIC operates in the context of alternatives.

3) The treaty needs to overturn the current hierarchy of rights holders.

Local communities must be empowered to lead the charge in their own development, starting with the development of this treaty, which has to be people centered by giving the community a chance to participate in the process. With the development of this treaty, there has to be opportunities for the community to

participate in the debates and resolutions. Additionally, there needs to be a full sharing of information about issues and submissions that informed the resolutions in July. After July, there must be opportunities for communities that have had experiences with TNCs to voice their concerns through notice and comment procedures and strategic workshops were community representatives, civil society, and community supporters can participate. Lastly, there needs to be general feedback at each stage of the process.

4) All abuses must be investigated and addressed, not just the "most egregious" ones.

The treaty cannot focus on only 'gross' human rights abuses, narrowly defined, as this creates a hierarchy of rights relegating the more systemic violations relating to development and poverty, for example, to rights of less importance. As a result, the treaty may have the effect of giving TNCs a renewed mandate to ignore rights not defined as egregious.
Should the developers of the treaty persist with the bias towards the "most egregious" violations, we submit that for many communities across the African continent who have been the victim of land grabs, the lack of respect for their tenure rights is egregious. As the courts in North America, Australasia and Africa have found, the historical non-recognition of customary forms of ownership and tenure of land and other resources was based on the crudest form of racism. When the Australian Supreme Court, in the classic aboriginal title case of Mabo v Queensland (No 2), finally rejected the Privy Council decision of In re Southern Rhodesia, it did so on the basis of the right to equality. [1] In re Southern Rhodesia defined the attitude of common law courts across the Commonwealth to the recognition of customary tenure: a rejection of its validity due to the perceived 'lack of civilisation' of the African populations.

While rejected by the Australian, Canadian, South African and Botswana courts, in reality, the non-recognition of customary forms of tenure continue to facilitate land and resource gabbing by TNCs across the African continent. Such crude discrimination based on race can only be described as egregious.

It is submitted that the Treaty process should draw from, amongst its base documents, the FAO United Nations Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests, a recent international instrument necessitated precisely by the continued and often ignored discrimination against customary forms of tenure. [2]

5) There needs to be an independent agency with prosecutorial powers to deal with cases concerning business violation of human rights and the arbitration process with this treaty must be open for the public to observe the process and the outcome.

The United Nations binding treaty must provide for the establishment of a World Court on TNCs and Human Rights. This Court must be established alongside national, regional, and international human rights mechanisms and shall not function to preclude them. The court will hear all matters pertaining to TNCs, their executives, as well as the activities of their supplies, licensees and subcontractors and shall be responsible for receiving, investigating and judging complaints against TNCs. In order for this treaty to have the intended impact, it has to be legally binding and apply to all businesses.

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[1] They held that "whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. [...] The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration". See Mabo v State of Queensland [No 2] [1992] HCA 23

[2] The document particularly addresses non-state actors: "Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others." Available at http://www.fao.org/docrep/016/i2801e/i2801e.pdf

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While huge Transnational Corporations commit a sheer amount of the prevalent abuses, it is undeniable that human rights abuses occur across all sectors and thus a binding norm should be generally applicable

A treaty body/committee must be established and must have the capacity to receive individual and collective complaints about any breach of the treaty, in order to be able to monitor whether states and TNCs are observing the treaty rules and obligations. TNCs and states must have an obligation to provide all necessary information and data requested by the committee. Additionally a Public Centre for the Control of Transnational Corporations must be established. Its primary duties should include analyzing, investigating, documenting and inspecting practices of TNCs regarding their impact on human rights. Affected communities, indigenous peoples, government officials, trade unions and social movements should participate in managing and supervising this Center.

6) The treaty should require States to adopt legislation and other measures requiring TNCs and other business enterprises to adopt policies and procedures aimed at preventing, stopping and redressing human rights impacts including violation of the peoples' Right to Development and right to FPIC.

It is apposite to repeat the imperative posited in Article 8 of the Declaration on the Right to Development formulated as early as 1986[ix]

Yours faithfully

LEGAL RESOURCES CENTRE

Per: WILMIEN WICOMB

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[i] All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.

[ii] All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

[iii] 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.

[iv] Article 1. 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations
Available at https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

[v] ibid. available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[vi] Article 1

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the
relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.
Article 4
1. States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development.
2. Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.
Article 6
2. All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights.
Available at: http://www.un.org/documents/ga/res/41/a41r128.htm

[vii] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, at para 291, available at http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf, accessed on 23 June 2015.

[viii] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, at para 291, available at http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf, accessed on 23 June 2015.

[ix] Article 8: States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. Available at http://www.un.org/documents/ga/res/41/a41r128.htm

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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 Bhe[1], Richtersveld[2] and Shilubana[3]. 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 Enquiry[7] 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

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[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.

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[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.