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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-faceted 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 20ⁱ, 21ⁱⁱ, and 22ⁱⁱⁱ 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 where 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 grabbing 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 suppliers, 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.

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>

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

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>