



**IN THE LEGITIMATE PERMANENT PEOPLES' TRIBUNAL
FOR SOUTHERN AFRICA**

Third Session: 2018

In the matter between:

**THE PEOPLES OF SOUTHERN AFRICA
THE NGOs SUPPORTING THE PEOPLES
and**

THE CORPORATIONS AND TNCs EXPLOITING THE PEOPLES OF SOUTHERN AFRICA

THE STATES OF SOUTHERN AFRICA

THE REPUBLIC OF SOUTH AFRICA

THE BRICS, and REGIONAL AND INTERNATIONAL FINANCIAL INSTITUTIONS

First Applicants and Claimants
Second Applicants and Claimants

First Accused and Respondents

Second Respondents

Third Respondent

Fourth Respondents

INDICTMENT and INJUNCTION or ORDER – to

- a) enforce the right to say NO, and the fundamental human and peoples' right to development
- b) effect reparations for historic violations of human rights
- c) dismantle illegal and illegitimate corporate power of TNCs and transform corporations

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- The claimants – communities and the peasantry, workers, the unemployed urban dwellers
- The TNCs and domestic corporations
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- Peoples' primary fundamental rights
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- Interdict against ongoing and systemic violations of rights
- Reparation and restitution for past violations of rights
- Instructions to states to enact statute law in protecting, promoting and fulfilling peoples' rights
- Directives for enforcement of fundamental peoples' rights

A INTRODUCTION

1. This is a prosecution of the accused and an application for an injunction against the Respondents to ensure that fundamental human and peoples' rights are enforced, reparations effected, and institutional and law reform implemented.
2. This third and final session aims to draw the Tribunal process towards determining the remedies which will be required if the systematic violation and dispossession of Southern Africa's peoples are to be halted and to determine the basis for establishing the conditions under which the most basic rights of people and communities are to be realized namely, the right to life, the right to dignity, the right to self-determination, the right to development, within the context of the realization to their fullest of the economic, social, cultural, civil, political rights as enshrined in various international, regional and national covenants, charters, constitutions and protocols. These instruments must be interpreted and applied giving full recognition to emancipated local living customary law to steer Africa from the age of human wrongs into a new age of human and peoples' rights.¹

B BACKGROUND HISTORY

3. The hearings of this PPT for Southern Africa cannot divorce itself from the history of the sub region.
4. The pre-colonial era was characterised by independent local community and peoples' governance under systems of recognised and respected customary law where natural resources were used in a sustainable manner without interference from outsiders.
5. The pre-colonial era was followed by colonial capitalism served by chartered companies in the service of European imperial powers. The coercive powers of the state were brought to bear most fully in the service of primitive accumulation in Southern Africa through slave trade, theft of land, forced migrant labour and including spatial Apartheid. The sweeping transformations of land and labour power accelerated the process of transformation of the communal mode of production into the capitalist mode.
6. The post-colonial era is marked with the vestiges of its predecessor, and as during the colonial era, the resource grabs by TNCs has entailed the systematic violations of the fundamental human rights; of the communal and subsistence farmers and pastoralists that must be dispossessed, the rural women that must be removed from their lands, the women and youth driven into cheap labour, the workers driven into precariousness and the imprisonment and murder of the activists standing in defence of their communities and the environment.
7. In some ways, even worse than the subjugation of the region by global capital, is that the power grabs of TNC has been aided and abetted by the very political institutions and instruments that led, in the previous era the struggle for national sovereignty. The co-option, corruption and corporatisation of political elites into the front men and women of corporate interests has left the mass of people defenceless. Together with state, non-state actors and multilateral agencies they have facilitated the coming into existence of an architecture / blanket of impunity, through the dismantling and systematic violation of laws and the signing of international trade and investment agreements, which award investors more rights than citizens. This in turn, has left the victims of these rights violations without effective recourse to legal avenues for justice, due compensation and remediation.
8. Building on this architecture of impunity, Southern Africa has become a key site of big power rivalries. New powers, especially BRICS countries seek to participate in this new scramble for Southern Africa. China, which has become the largest net investor in Africa is joined by Russia, India, Brazil and South Africa. The end of Apartheid has seen South African corporations reinvent themselves as global corporations with the intention of making the SADC region their springboard to accumulate and compete globally. Our concern is no longer just with corporations from the global North and the cases we have brought to the Tribunal reflect this reality.

C THE FINDINGS OF THE TRIBUNAL IN 2017

9. Two sessions of the Permanent Peoples' Tribunal on the role of transnational corporations in Southern Africa have heard the testimony of grassroots communities, activists from popular organisations and expert witnesses.
10. The first session of the Tribunal which met in Manzini 16 – 18 August 2016, and which was largely focused on TNCs operating in the extractive / mining sectors found compelling evidence of violations of fundamental

individual and peoples' rights, including: crimes committed against the communities by extractive and destructive mining corporations in a context of generalised impunity guaranteed by the complicity of the state.

11. The second session of the Tribunal held in Johannesburg from 16 – 18 August 2017 focused on the interplay between the destruction of the environment caused by the operations of TNCs and the violations of people's rights to development. The Tribunal found that "there is a continued threat of dispossession, dislocation and displacement by the state, which favours a mining-for-development approach regardless of social, cultural and ecological costs. SADC states, their local elites, the international institutions and the TNCs are bent on an extractives model and a neo-colonial plunder of resources.
 - 11.1. TNCs are not just profiting from non-renewable natural resources, externalising environmental, health and other social costs but are avoiding their obligations through the systematic use of profit shifting to tax and secrecy havens such as Mauritius which denies the state the revenue needed to meet its obligations to its citizens. The Tribunal found that this was not the only incidence compromising the right to development but was further aggravated through processes of systematic land grabs. The cases presented showed that the projects and proposed plans of TNCs do not lead to the gains promised by the new Sustainable Development Goals; rather, they deteriorated social conditions so that poverty is endemic in the areas where transnational corporations have set up their activities. Furthermore, it was found that in the case of displacement for mining, infrastructure and more recently agro-business projects households are often forced to leave the land they have lived on for decades, which is the basis of their livelihoods. "These evictions have dramatic effects on economic and general living conditions. The land people are sent to, is often less fertile than that they've had to leave, households are not compensated for these evictions, the houses provided are often inadequate both in terms of their size – with consequent overcrowding effects – and in terms of building requirements." In the process customary laws are disregarded both by the companies and by the government leading to loss of tenure rights.
 - 11.2. Cases presented provided compelling evidence that the drive for foreign direct investment and government revenue makes it impossible for governments to enact and enforce strict environmental laws and regulations. Rather, they lower the bar in ways that enable TNCs to operate with scant responsibility. This state of affairs allows extreme harm to the people, communities and their environment.
 - 11.3. Once again this session of the Tribunal found that there was a systematic process of criminalising the resistance evoked by the extractivist, export model of development that is generalised throughout the Southern African region.
 - 11.4. The Tribunal found that a veil of secrecy and misinformation accompanies this development model, which makes it impossible for communities and citizens more generally to give their free, informed consent to so-called development project aimed at attracting foreign investment. It is in this context, that the Tribunal recommended the enactment of legal mechanisms to ensure the inclusive, participatory voice of communities and of their development through processes such as a free-prior consent that is genuine and mandatory.

D THIS INDICTMENT – THE PARTIES AND THEIR CHARACTERISTICS:

The claimants:

12. This Indictment is brought by the survivors and victims of human rights violations: rural communities, mining affected communities, workers, peasants, agricultural workers, migrant workers, small-scale farmers, women, men, girls, boys, youth, activists and the future generations who as individuals and/or as a group of people or community are physically, mentally, spiritually, emotionally, economically, socially and politically harmed by the said gross violations of their human rights.
13. The representative claimants and communities also bring this charge on behalf the classes of persons and communities that suffer the same violations of rights, their forebears who suffered historic violations, their descendants who are threatened by ongoing and future violations, and nature and its resources which suffer the consequences of the violation of peoples' rights.
14. The democratically accountable community-based organisations and non-governmental organisations [CBOs and NGOs] which support the peoples and sustainable harvesting of nature similarly have legal standing to prosecute the claims of their constituencies.

15. The claimants build their strength on democratic organisation, and they use law to protect their organisations and hold themselves and other parties accountable to society.

The TNCs and Corporations of Southern Africa:

16. The TNCs and domestic corporations claiming corporate legal status have been and matured into unaccountable entities which despite their unscrupulous protestations to the contrary, only serve themselves, their offshore parent corporations, their financial masters, their banks and their shareholders. Corporations are abetted by politicians who accept inducements and bribes. State owned corporations are included in this category of respondents. They use law to create fictitious corporate veils to immunise them from criminal and civil liability and pretend to adhere to voluntary soft law industry standards, codes of conduct and guidelines to pay lip service to their social responsibilities despite being the major actors in the economic and political lives of societies.

The State Parties:

17. The state parties include the executive, legislative and judicial branches of the governments of Southern Africa, and the Southern African Development Corporation and its institutions which remain untransformed and largely unaccountable to the communities and classes of peoples, including workers, the unemployed and marginalised communities despite sporadic national elections. The political parties forming governments stand accused of majoritarian and populist organisational practices, and dishonest political leaders get away with self-serving corruption in the interest of powerful political elites and their comprador cronies. Sovereign states make laws and exercise their power to conclude contracts, investment treaties, and other bilateral instruments with corporations or other states, and these instruments are capable of being upheld and enforced by courts and arbitrators.

The banks and financial institutions:

18. Domestic, regional and financial institutions including state pension funds, state industrial development corporations and development banks, and private and public international banks and other lending institutions, employ a range of self-serving instruments to further their own interests, including: the financialisation of public goods and public infrastructure projects, derivative based financial products, debt markets and securitisation. They use law to give a veneer of legality to the “logic” of financial engineering and prescribe masterplans for infrastructure investment. They may hold states and TNCs at ransom with selective structural adjustment programmes and mega infrastructure projects.

E THE CLAIMS

19. The Peoples of Southern Africa have struggled for their liberation, and are still struggling for their dignity and genuine independence from colonialism, neo-colonialism, apartheid, aggressive foreign intervention and neo-liberalism. Rights and freedoms, and the elimination of all forms of discrimination, are all important historically and currently.
20. The Peoples of Southern Africa are experiencing an onslaught of violations of their rights. The instances of violations are reflected in the findings of the Tribunal in the first two sessions and include:
- 20.1. Specific incidents of gross violations of human and peoples’ rights including massacre of protestors, mass raping of women, state sanctioned private confiscation of land for extractive purposes without compensation, looting of property, exploitative labour practices including outsourced labour brokering, the destruction of environmental resources and extra judicial assassinations of human rights defenders. The perpetrators include private armies or outsourced security guard complements of TNCs, state police and the state army and their paid accomplices employing often extra-legal coercive powers.
- 20.2. The systematic and systemic violation of peoples’ social and development rights by commission and omission. The TNCs exploit gaps in the gaps in the enforced law to effect “lawful” land grabbing, the state parties allow or look on as land and resources are wrenched and disconnected from direct producers dependant on their means of production. The exploitation occurs through legally formalised acquisition arrangements, transforming land holders into wage-labourers subordinated to the dynamics of competition and surplus reinvestment.
- 20.3. Agro- industry and the food, feed, fuel collusion by the respondents which forces small scale producers off their land, and promotes the production of cash crops and bio-fuel for the international market, without regard to local and regional food security and sovereignty.

- 20.4. The failure by TNCs and state parties to address the historic violations of rights and the legacies of past practices including forced migrant labour, the resulting impoverishment of labour sending areas, and associated industrial diseases such as silicosis.
- 20.5. The right to work, a living wage and to livelihoods are systematically violated by TNCs through various practices, including repression of trade unions, use of contract work and third party employment agencies (labour brokers), in complicity with state parties. Profit shifting is not primarily about tax evasion but rather wage evasion.
- 20.6. In the sphere of reproduction, including housing, land for settlement, upgrading of informal settlements, health services, other basic services including water and education, austerity measures by TNCs, state parties and international financing institutions have led to further sacrifices by ordinary workers and farmers.
- 20.7. In the sphere of circulation: money, credit and law [seen as constituting social relations [of production] in and as of themselves], facilitate a logical model for engineering financialisation and monetisation of public goods and services, aided and abetted by the international financial institutions such as the world bank group, state parties offering public guarantees, and the private sector which is ensured sufficient guaranteed profits.ⁱⁱ The only feasibility consideration for extractivist and infrastructure projects are their bankability, rather than the scale of the projects' social and human rights impacts.
- 20.8. The machinations of TNCs to avoid and circumvent rights obligations in the country of operation, including tax evasion, use of tax havens such as the Republic of Mauritius, transfer pricing and profit transfers at the cost of decent living wages for workers and local economic development.
21. The legal basis and causes of action for the peoples' claims are founded in the domestic, regional and international legal systems reinterpreted honestly to give form and content to the rights dearly held by the peoples of Southern Africa, including:
- 21.1. The emancipated local living customary law of communities;
- 21.2. The bills and charters of human rights contained in the constitutions of the liberated countries of Southern Africa;
- 21.3. Treaty law such as the African Charter of Human and Peoples' Rights [Adopted in Nairobi June 27, 1981, Entered into Force October 21, 1986];
- 21.4. The jurisprudence of International Tribunals such as the African Commission, the African Court and the Inter-American Court;
- 21.5. Customary international law.
22. TNCs operating in Southern Africa backed by their home states as well as the compliant states of Southern Africa are systematically involved in a process of
- dispossessing the peoples of Southern Africa,
 - reinforcing the subordination of women and traditional forms of patriarchy and fermenting the war on women's bodies;
 - destroying the environment;
 - contributing to the acceleration of runaway climate change, and thus robbing people of their right to development,
 - aligning with warlords to ferment conflict so as to gain control of natural resources and often
 - directly or indirectly through working with various state agencies complicit in the repression of activists resisting their toxic model of development.

THE REMEDIES AND RELIEF SOUGHT:

23. The accepted standards of equity, justice and reasonableness justify a verdict that violations of human rights including systemic violations occurred and continue to be inflicted in terms of process, substance and outcomes.
24. The appropriate relief sought includes:
- 24.1. The universal application of the principle of free, prior and informed consent and the right to say NO to unwelcome development, extractivist and infrastructure projects, and the adjunct and corollary rights associated with the right to say NO, ie:
- 24.1.1. The right to choose a development path, its scale and pace;
- 24.1.2. The right to all relevant information on development plans and
- 24.1.3. The right to negotiate the terms and conditions including ownership and control thereof if a development project is agreed upon;

- 24.1.4. The right to continuously monitor and evaluate an agreed upon development project and to withdraw consent if an agreement is violated;
- 24.1.5. The right to compensation and negotiate compensation of a development project proceeds with the consent of the directly affected households and their self-defined community;
- 24.1.6. The right to a programme of reparation and restitution for historic violations of human rights and unwelcome development projects, which may include the cessation of a project if consent is not given, or negotiated participation in a development project even if it was unwelcome at inception;
- 24.1.7. The preparation and publication of regular joint participatory integrated audits on human rights, social and environmental impacts of projects, and the social and ecological costs thereof.
- 24.2. The dismantling of the ostensible, self-professed and perceived status of corporations that seemingly protects them by employing their legal and economic powers to discriminate against communities, violate human rights and act with impunity, including:
 - 24.2.1. Holding TNCs, their directors and management liable in civil and criminal proceedings for violation of human rights broadly interpreted under all relevant law;
 - 24.2.2. Holding TNCs and their subsidiaries liable in their country of origin, or country of operation or any convenient forum under all relevant law;
 - 24.2.3. Requiring of TNCs [and their host states] to account fully and publicly on their composition, ownership, shareholding, loans, banks and control, and to publish reviewed audits of assets and liabilities including taxes paid.
 - 24.2.4. the Tribunal must consider how a relatively small number of actors, that is, a set of transnational corporations have come to dominate the region's economy. More critically the Tribunal must consider how TNCs have been transformed into such a formidable power that their actions are not just facilitating the reconsolidation of a neo-colonial order, rolling back the gains of the national liberation and independence struggles but through the systematic destruction of the environment threatening the basis for life. After-all It is not the millions of rural women, landless farmers, farm and plantation workers that have turned our oceans into plastic flower beds, our fresh water sources into killing fields of freshwater species, our soils into chemically toxic repositories and the atmosphere into a greenhouse, giving us floods and droughts of unprecedented destruction.
- 24.3. ensure an effective access to justice and remedy to victims of human rights violations who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights, through acts or omissions and not restricted by statutes of limitations of liability with reference to time, delay or seat of the tribunal
 - 24.3.1. Victims shall have the right to fair, effective and prompt access to justice and remedies.
 - 24.3.2. remedies shall include, but shall not be limited to:
 - 24.3.2.1. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims
 - 24.3.2.2. Environmental remediation and ecological restoration where applicable
- 24.4. States shall provide proper and effective legal assistance to victims throughout the legal process, including by:
 - 24.4.1. Informing victims of their procedural rights and the scope, timing and progress of their claims in an opportune and adequate manner;
 - 24.4.2. Guaranteeing the rights of victims to be heard in all stages of proceedings without prejudice to the accused and consistent with the relevant domestic law;
 - 24.4.3. Avoiding unnecessary formalities, costs or delay for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards to victims;
 - 24.4.4. Providing assistance with all procedural requirements for the presentation of a claim and the start and continuation of proceedings in the courts of that State Party;
 - 24.4.5. Expert evidence support;
 - 24.4.6. Organisational and logistical support, including support to bring class actions.
- 24.5. In light of the scale of the environmental destruction as a result of the intensifying of mining, oil and gas extraction, the dangers posed by climate change we believe it is crucial that the Tribunal pronounces on the relevance of nature rights as necessary for the sustenance of life and to give expression to the rights to life, healthy environment and development. Rights of Nature would bring an important additional dimension into the consent paradigm, as in the determination of the right to say no based on free, prior, informed and continuous consent.

24.6. Instructing state parties in consultation with communities to prepare integrated programmes and plans, for land and agrarian reform that provides immediate short term protection for communities and the right to say NO, FPIC and the right to negotiate terms of development, as well as longer term measures to promote choice of development paths, opportunities to participate in different economies, long term security of tenure and livelihood, and appropriate consideration of the effects of climate change and mitigation measures. Any law reform or legal transformation programmes must have due regard to emancipated local living law which promotes participation and accountability.

28 October 2018

ⁱ http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf

The African Charter on Human and Peoples' Rights in its preamble, grounds and commits the signatory states to their conviction of "their duty to promote and protect human and people' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa".

ⁱⁱ <https://za.boell.org/2015/11/05/mega-infrastructure-structural-adjustment-20>