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## THIRD SESSION ON TRANSNATIONAL CORPORATIONS IN SOUTHERN AFRICA

Johannesburg, 9<sup>th</sup> - 11<sup>th</sup> November 2018

### JUDGMENT

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## I. INTRODUCTION

The public hearings of the [Permanent Peoples' Tribunal \(PPT\)](#) held on 9<sup>th</sup> – 11<sup>th</sup> November 2018 in Johannesburg, South Africa, constitute the concluding step of a three-year process of gathering and analysing evidence on the role of Transnational Corporations (TNCs) in Southern Africa. The process between 2016 and 2018 involved intensive engagement with and representative participation of local communities, popular movements, unions and non-governmental organisations from Southern Africa. Collaborative research, individual and community testimonies complemented by expert reports have comprehensively documented the impact of the neoliberal extractivist model and the negative role and impact of TNCs on the fundamental rights to life, dignity, justice and self-determination of the affected people. The evidence, deliberation and decisions of the public hearings of [Manzini \(2016\)](#) and [Johannesburg \(2017\)](#) should be deemed an integral component of the material considered by the Jury of the present session (Johannesburg 2018). Eighteen cases, from the Democratic Republic of Congo, Madagascar, Malawi, Mauritius, Mozambique, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe, form the basis of the concluding verdict.

The Permanent Peoples' Tribunal has historically allied itself to the struggles of Africa since the adoption of the Universal Declaration of the Rights of Peoples in Algiers, in 1976. As an independent tribune it seeks to give visibility to and amplify the voice of communities affected by injustice and violations of rights. It accords their right of speech at the PPT a priority, as they are the primary subjects affected. In addition, the Tribunal plays an essential role in documenting the accountability and culpability of corporate powers for criminal violations of fundamental rights, alongside those of national states, as they are the obvious protagonists of the extractive activities.

The similarity between neo-colonial and neoliberal policies and periods presents a new challenge. The renewed wave of extractivism, driven by the oil and mining sectors, especially with regard to the supply of raw materials is pertinent to the African continent and the current context of corporate power in the Southern African Development Community (SADC). Recognising the plight of those people most affected by the extractivist model of exploitation, the Tribunal is in solidarity with the daily struggles of those on the African continent and sees it as being of paramount importance.

The testimonies and reports submitted to the PPT provide substantial proof of the causes of the criminal violations of human and peoples' rights committed by TNCs. Furthermore, the evidence strongly points to the institutional responsibility of TNCs in the explicit and systematic disregard of national and international obligations. These violations by TNCs demonstrate a context of long-term impunity for some of the most severe classification of crimes against humanity.

For a broader understanding of the PPT process, as promoted in Southern Africa through the campaigns “Dismantle corporate power” and “The right to say no”, it is important to link the evidence produced on extractivist transnational policies in the region and the verdicts of the PPT to those in other political, institutional, economic, social and cultural contexts. These verdicts have explored and qualified:

- a. The collusion and aiding and abetting between public and private interests and actors which characterise the strategies of multinational corporations, including its

structural impact on the role of states ([Madrid 2010](#); [Colombia 2006-2008](#); [Mexico 2011-2014](#));

- b. The obligation of international accountability of mining corporations ([Montreal 2014](#));
- c. The qualification of living wages as a fundamental human right, and not a purely contract dependent on economic variables ([Asia 2011-2014](#));
- d. The constitutionally and internationally binding right of local communities to say “no” ([Turin 2015](#)).

By recognising the aforementioned deliberation, the PPT underscores the need for a substantial doctrine which supports the struggles of affected communities. More than condemnation, the PPT argues for the need to conceive of new juridical and economic categories. This is urgent and essential to envisage a realistic transformation of the current neo-colonial paradigms.

The courage, lucidity and creativity of the testimonies presented at the PPT clearly assert a much-desired vision despite immense difficulties and obstacles. More so, it shows us the path for our present and future.

## II. EVIDENCE PRESENTED IN 2018

The Jury was presented with two primary cases related to the activities of TNCs and brought up to date on cases presented in the previous two sessions in Manzini (2016) and Johannesburg (2017). It heard accounts of systemic injustice and violence by, and impunity of, TNCs.

### **Lack of accountability and systemic injustice in Marikana, South Africa**

One example of systemic injustice was offered by witnesses from Marikana, in the “platinum belt” north of Johannesburg, South Africa. Harrowing testimony of the plight of the many women working in the Lonmin Platinum Mines was presented. On the 16 August 2012, armed forces, with the logistical support of Lonmin, intervened to crush the mine workers who had been on strike for many weeks, killing 34 miners and injuring 78. A key witness indicated that she was forced to start working in the mines after her husband was killed by police during the strikes at Lonmin.

According to Association of Mineworkers and Construction Union (AMCU) of South Africa, survivors claims for compensation have not been processed six years after the massacre. AMCU testified that Lonmin told widows that “to earn the salary of their deceased husbands the women should step into their shoes.” The company considers that “giving the widows a mine job is a sort of compensation”. According to the case presented, children of deceased workers are scattered in schools chosen by the company and are commonly dubbed as “Marikana’s children” and victimised. Lonmin appears to have disregarded most of its commitments after the massacre. Only three of the 5 000 new homes promised by Lonmin in the social labour plan have been built thus far. Overall working conditions remain unchanged, despite a meagre pay raise after repeated strikes and workers continue to fight for a living wage.

Claims for justice have been similarly elusive. Despite expectations that those responsible be held accountable and detailed factual evidence, a Commission of Enquiry failed to hold either the state or Lonmin to account. There have been no prosecutions and only a single senior police officer was suspended. Testimonies drew comparisons to the Apartheid-era Sharpeville massacre in 1960.

### **Extreme violence and restriction in Marange, Zimbabwe**

The Marange district in Eastern Zimbabwe is classified as a national key point. Visitors and the media are prohibited access to the Marange district. The Marange diamond fields are reported to be sites of extreme violence and gross human rights abuses. According to the testimony presented by the Centre for Natural Resource Governance (CNRG), at least 40 artisanal miners have been killed between 2017 and 2018 and the situation has further deteriorated in the last year. Ten years after the massacre of October 2008, when 214 informal miners were killed by armed forces, violence has become routine in the Marange diamond fields.

Zimbabwe Consolidated Diamond Company (ZCDC), the sole mining company in the area since 2016, use security guards to systematically attack informal miners with dogs and beatings or by firing on them and the deaths are routinely concealed. The diamond operations are supported by the Zimbabwe National Army and the Jury was presented with evidence that directly linked senior officials to shareholders. Employees of the ZCDC claim that 1 billion carats of the 1.5 billion carats the company claims it has extracted since the start of its operations in 2016, have disappeared from the Reserve Bank of Zimbabwe. There have been no prosecutions for this massive theft.

In March 2018 CNRG and the Marange community addressed a petition to the parliament of Zimbabwe objecting to the community's lack of freedom and the routine use of torture. They further criticised the lack of development: despite the vast profits from extraction there is no investment in the community, roads are in disrepair, public infrastructures are crumbling and no new schools or health facilities are built.

Communities protested in April 2018 denouncing the practices and “looting of diamonds” by the ZCDC. ZCDC's response was a one-day “stakeholder conference” with a handful of community delegates. It has since announced its plans to further expand its area of operations and the relocation of another village, Kusena, to accommodate this. There has been no consultation with villagers.

### **Mega dam, displacement and “development induced poverty” in the DRC**

Located on the Congo river approximately 225 kilometres south-west of the capital Kinshasa, the Inga III Hydropower Project has a planned capacity of 11 000 Megawatts. According to official estimates, it will displace thirty-seven thousand people and affect the lives of many more up and downstream. People affected by this project were neither informed nor consulted and have not received precise information on how it will impact their lives and their natural environment.

Communities are only able to draw on their experience of displacement by the first two dams built in the region, Inga I (1972) and Inga II (1982). Displaced people have received very little, if any, compensation for their lost livelihoods, instead becoming caught in “development-induced poverty”. One witness described her family's ordeal: “[w]e had to give up our land. It was good land, we had very good yields, but that was before Inga I. The plot of land we were given in return is far from home and less productive. Now it is very difficult to live on agriculture”. The dam destroyed the best fishing grounds. Others describe the temporary nature of the work offered to villagers recruited to work on the dam and their subsequent unemployment at the end of the project.

According to Femmes Solidaires, it is the invisible work of women that ensures the survival of their families, “[w]omen literally invent activities like buying groceries at credit and re-selling with a small surplus that will allow them to buy some food for the family. Some search the waste in the fishing ports to find something to cook. They care for the elderly and the ill, walk miles every day to cultivate the small remote plots of land they received far from the new settlements, or to fetch water and firewood”.

The financial cost of the new project is an additional burden. The cost of the previous dams left country in a spiralling debt crisis as the government borrowed heavily on the international financial market. This led to deep cuts in social expenditure and consequent neglect of human development. Ironically, the output of the Inga I and II dams is below capacity due to bad management, while 84 per cent of the people of the DRC have no access to electricity.

The new Inga III dam relies heavily on an agreement with South Africa to purchase most of the hydropower generated, particularly since the World Bank in 2016, citing a lack of transparency, withdrew from financing the project. In October 2018 the government of the DRC signed an exclusive agreement with a Chinese-Spanish consortium (including China Three Gorges, Power China, AEE Power and Actividades de Construcción y Servicios) to build the dam at the cost of 14 billion USD.

Evidence presented at the PPT demonstrate the lack of a comprehensive Environmental and Social Impact Assessment and the significant risk the financial burden poses to the country. Some experts have argued that an alternative approach – that of smaller hydropower dams in each province – would better serve the purpose of providing electricity to the DRC. A coalition of Congolese civil society organisations and affected communities are campaigning to stop the Inga III project.

### **“Sitting on a mountain of money” in Moatize, Mozambique**

Since 2008 Moatize, in the Zambezi valley, has been the site of an open pit coal mining complex owned by Vale Mozambique, a subsidiary of the Brazilian giant Vale SA. Extraction started in 2011 and a second pit was later added. The displacement of people in the area to make way for mining operations is summarised by a witness as “[t]he government said that we must leave our village, because we are sitting on top of a mountain of money”.

Thousands of inhabitants have since been moved to Cateme, a newly built settlement approximately 36 kilometres away, far from the river and the district market. The displaced inhabitants received minimal compensation, have poorly built housing, poor land and additional costs. A witness stated that, “[t]he land we were promised has no water and is poor for agriculture. To reach the market we must pay for private vehicles”. Justiça Ambiental submitted into evidence that protests by inhabitants in 2012 were forcefully dealt with by the Mozambican police’s Rapid Intervention Force and visitors were barred from entering the area. Restrictions were only relaxed after repeated protests.

A new cycle of protests by villages close to the Moatize mine has commenced in response to the proposal that a third mine be opened. Villages are exposed to unsafe living conditions, pollution and restrictions from accessing sources of water and firewood. In October and November 2018 protests imposed the partial shutdown of the mine for several weeks. Subsequently, protesters were injured and they are disillusioned with the state’s treatment of them.

### **Tax avoidance and profit shifting in Mikea, Madagascar**

Toliara Sand Mines Project in Madagascar is illustrative of profit shifting by TNCs. The Australian company Base Resources acquired the Toliara Sand mining project in 2017. This 407 square kilometre area in south-west Madagascar is home to the Mikea forest and is inhabited by two hundred thousand indigenous Mikea people who are threatened with displacement once the project commences. RSCDA-IO (Research and Support Centre for Development Alternatives - Indian Ocean). brought to the attention of the PPT that Base Resources is based in Mauritius, enabling it to avoid paying tax to the Madagascar state. The Madagascar government declared Toliara Sands a “public interest” project in April and July 2018, allowing it to acquire the land without the consent of the traditional authorities. Regionally elected MPs, traditional authorities and local communities objected and are running an international campaign to stop the project.

### **Resistance and legal precedents in Xolobeni, South Africa**

Amadiba Crisis Committee opposes the opening of a titanium mine at Xolobeni, on the Wild Coast in South Africa’s Eastern Cape. Approximately two hundred households in the Umgungundlovu community would be displaced by the project, along with the destruction of a large protected natural area. Recently the North Gauteng High Court ruled that “it would be unlawful of the Department of Mining Resources to grant the mining license before they get

the full, prior and informed consent by the community”. This grants the community “the Right to say No” to the proposed mining, setting an important legal precedent.

### **Land Grabs and lack of FPIC**

The Jury heard testimonies updating the cases which among other issues illustrated land grabbing and the displacement that often accompany the activities of the extractive industry. The link between environmental devastation and the impoverishment of the affected communities was highlighted. Cases of lack of community consultation or information prior to displacement by extractive projects or their commencement were outlined. Examples of the secrecy and misinformation that accompanied these activities were underscored by expert evidence regarding the importance of free, prior and informed consent (FPIC) which included not only “the Right to say No” but also to present alternatives to the proposed activities. Lack of FPIC occurs in a context of collusion between the TNCs and national states with their security apparatus.

### **III. GEOPOLITICAL, SOCIAL, ECONOMIC AND ENVIRONMENTAL FRAMEWORK IN SADC**

#### **A. Social impact on communities and workers in SADC**

The two primary cases presented at the 2018 Tribunal, in addition to the previous cases presented at the preceding Tribunal sessions in 2016 and 2017 and their subsequent updates during the 2018 Tribunal, are prime exemplars of the export and extractives models of development in SADC. At a country-level, neoliberal policy frameworks permeate and echo the dominant international approach to human and resource use and governance. As outlined in depth in the 2017 Juror statement, these include a climate which promotes a business-centred approach to development, skewed public-private partnerships, limited restrictions and regulations on foreign direct investment, tax evasion, capital flight and low productive capital investment.

From the region, DRC, Madagascar, Malawi, Mauritius, Mozambique, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe depicted similar socio-economic inequities. Beyond the standard economic indicators and detrimental neoliberal policy economic fallout are social impacts. These include the destabilisation of local communities; social disintegration and societal disruption, not to mention the socio-ecological and environmental costs (PPT 2017 Judgment). Land displacement and dispossession have left devastating scars on affected communities, especially women (PPT 2016 Judgment).

Throughout the three Tribunals the issue of land, food and wages reverberated. The evidence showed that land access and rights were insecure for most communities. The testimonies suggest that Southern African states view land and natural resource abundance as a means to entice corporations such that TNCs were offered security of land tenure and favourable long-term leases for either large scale-infrastructure projects, mining exploration or big agrofuel and agri-business possibilities.

Land insecurity has social, economic and cultural implications for communities. With the new scramble for the region's mineral and natural resources, 51-63 million hectares of land has been grabbed. Of the 20 cases presented 5 communities, or 25%, were relocated in the name of development while 7 communities in 5 countries resisted land grabs. One such tangible consequence, mentioned during the Tribunal, was that when land tenure is insecure or when land grabs occur, communities living off the land are left hungry and face serious livelihood challenges. Food systems in the region are primarily driven and dependent on small holdings of small-scale farmers who are reliant on land access and tenure security. Small-scale farmers and fishers produce 70% of the region's food.

Various existing local and historical food systems are being destroyed and concerns were raised regarding nutritional and food deficits. Distress over increased hunger and malnutrition was voiced, as were health-related diseases accompanying hunger as a result of land grabs. The Farmer Input Support Subsidies Programme (FISP) being implemented by various states were critiqued as it directed small-scale farmers towards mono-cropping and green revolution inputs produced by multinational corporations. It was highlighted that FISP was often used for political gain and not in the interest of small-scale farmers.

A key concern put forward by the communities was that fish stock and wild animals are decreasing and thus communities are experiencing a decline in readily available food sources. River dependent communities would be severely affected. They pointed out that the agricultural production is declining due to soil deterioration as a result of explosives and chemicals used for Inga I and II. The impact of the loss of biodiversity is tremendous and the Tribunal was reminded that the Congo Basin are the lungs of the continent.

### **Creating permanent unemployment**

A consequence of extractive led development is that it has created a permanent, small class of extremely rich people, as illustrated by the Lonmin mine shareholders who benefit directly from the form of exploitation that capital takes in regions like Southern Africa. Concurrently, neoliberalism gives rise to crony capitalism in the form of state capture, evident in the close relationship between TNCs and state officials. It simultaneously creates an indigenous or local elite who drive the levers of capitalism, creating a permanent mass of impoverished people who are not, as in the past, transiently unemployed but rather are turned into the permanently unemployed. Many people have to compete with each other for fewer lower paid jobs available. Similarly, the thirty-seven thousand people displaced by Inga 3 have had their livelihoods, which had been based on agriculture, shattered. The social cost of the reproduction of labour is forced onto the unemployed women and the marginalised small rural farmers. They are forced to care for their families in the absence of state support for social infrastructure they need, which has been progressively privatised. Those with jobs face harsh working conditions and the erosion of their rights as workers to organise, as in the cases presented in relation to Maloma Colliery in Swaziland; Somkhele and Fuleni anthracite mines in South Africa; Glencore and Graspan coal mines, as well as Glencore Mopani copper mines, in Zambia. Testimonies of resistance against these conditions and struggles for justice and dignity, and the reassertion of the humanity of the impoverished manifested in many of the submissions made to the Permanent People's Tribunal.

### **Impact on women**

The activities of TNCs have a particularly negative impact on women living in the host countries because they destabilise and destroy livelihoods, food sufficiency and natural resources that women are dependent on. Testimonies illustrated that life for women in particular has become precarious and tenuous as a result of the collusion between governments and TNCs.

One testimony from a woman forcibly displaced by the development of the Inga I dam illustrates the difficulties women face to ensure the survival of their families. Displaced women from this community routinely wake at three o'clock in the morning to fetch water, seven kilometres away, to ensure that they are home in time to assist children to get ready for school. Thereafter they travel long distances to work in the fields and then return again to ensure they are able to care for children returning from school and to prepare family meals, a precarious and cumbersome way of life. This testimony too echoes previous submissions by displaced women in Mozambique.

TNCs, based in jurisdictions where human and gender rights are observed, disregard them in Southern Africa and engage in exploitative economic, social, racial and misogynistic practices. They couch advancing economic growth as “development”, when they are in fact stripping natural resources and exploiting labour (see the PPT 2016 Judgment).

## **B. Natural resource extractivism, corporate power and collusion with the state**

### **Undermining the sovereignty of states and peoples**

A key component of sovereignty is self-determination by a state to oversee and govern – autonomously and independently from any foreign rule – the territory, resources, finances and peoples. This is exercised through legislation and mechanisms that ensure the wellbeing of a country’s citizens. The two primary cases presented in the third Tribunal demonstrate the converse.

The priority of Inga III project is to generate hydropower for a neighbouring country rather than to rollout electricity for DRC citizens or electrification for the region. The implications of such a mega project would result in wide-scale displacement and would lead to devastating eco-social consequences for the DRC and for all those living along the powerline grids. The huge loans and financing being sought by the DRC government to implement this mega project undermines resourcing local infrastructure and socio-economic service delivery. The primary beneficiaries appear to be foreign companies and investors along with the domestic elite and government officials.

The project is exorbitant in cost and scale and is estimated at USD 14 billion with a seven-year implementation. The scope for financial mismanagement and irregularities, collusion and corruption by project partners and within the state is such that global institutions have withdrawn, citing political interference. Indeed, it appears that many suspicious deals were brokered at the project’s initiation. One instance is the proposed project financing model. The Chinese-Spanish development consortium implementing the project aims to secure funds from South Africa, and other mining companies in the south of the DRC, by making it the primary recipient of electricity. Through the Grand Hydro Inga Project Treaty South Africa commits to buying 2.500 megawatts on completion of the project.

Not only are there apparent financial irregularities, but institutional mechanisms seem equally compromised. To further promote this mega project, the DRC government established the Inga Development Authority (IDA) to facilitate and support TNCs participating on the project. This body is structured in such a way that, in contravention to state regulations, it enables TNCs direct access to the Presidency which short circuits the function of the Ministry of Water Resources and Electricity and bypasses the existing constitutional laws on energy development by reporting beyond the scope of the regulatory framework. It is thus unconstitutional. In enabling such direct access for TNCs to the highest political office the IDA effectively facilitates their infringements on the rights and lives of at least 33.000 indigenous people. As a result of the project, Inga III affected communities will be forced to relocate and the DRC state will enforce involuntary resettlement.

Despite the detrimental impact of the project on the sovereignty of the DRC, on its peoples’ ability to determine their own development path, it is likely that it will forge ahead given the material and political interests at stake. The multiple processes underway, in particular the development consortium’s pursuit of foreign investment and resourcing, guarantees business benefits for many actors. Significantly, the role played by the South African state in these processes should not be underestimated and its agreement to be the primary customer of the energy produced should be scrutinised. Clearly, the demand for energy is externally driven and hard questions should be asked about the real cost of this energy and who the actual beneficiaries would be. In other words, will citizens of these countries benefit from agreements made, and to what extent?

No more than 10% of the population of the DRC has access to electricity, this despite the development of Inga I and Inga II. The implication is that the hydropower generated is not used to meet the energy deficit of communities in the region but, rather, primarily serves the ravenous energy demands of the foreign-owned mining companies located there. It calls into question yet again the primary goal of this mega project, which seems transparently driven by the needs of the mineral-energy complex of the region. Local subsidiaries of these companies are at the forefront of these minerals and metals focused, export-led extractivist economies. Foreign ownership of the extraction and distribution of these national resources in SADC was presented as a key, disquieting element throughout the Tribunal.

The extractivist model, implicit in the agendas driving the development of the Inga III project, uses predominantly foreign corporate entities to effectively plunder the natural resources, and hence wealth, of countries. This process facilitates both the concentration and power of foreign corporations and collusive business practices while undermining the autonomy of countries to determine how their resources are used. Extractivist export models based on a single product or 'monocrop' create restrictive single markets, greatly narrowing the scope for alternative pricing, decentralisation, production and distribution of goods. This has far-reaching negative social, ecological, political and economic impacts. The severity of this is illustrated in the case of Lonmin and platinum belt.

The foreign-owned Lonmin mining company, through its platinum extraction, generates vast profits. Yet it is able to use its extensive financial networks to direct finances out of the host country, South Africa, through price-shifting, offshore subsidiaries, tax evasion and corporate profit mechanisms. This not only robs the state of revenue, it also prohibits the creation of secure, non-precarious, decently waged work. It refutes the hollow refrain that increased wages make mining untenable, as expert testimony presented by AIDC made all too evident.

This case further demonstrates the unmistakable collusion between corporations and that state in the export-led mineral extractives sector. The state-owned Public Investment Corporation (PIC), the government pension fund holder, is currently the largest shareholder in Lonmin, with holdings of 29.2 per cent. A proposal to take over the mine by Sibanye-Stillwater would give this company an 11.2 per cent stake, making it the second largest shareholder and the second largest platinum producer in the world. The legal and financial intricacies entailed in this takeover raise grave concerns about state entities, such as PIC, working closely with private mining companies. Questions regarding the implications for workers' pension funds and their rights to transparency and accountability, to enable them to protect their investments, should be paramount. Processes must be visible and in the public domain, most particularly to ensure that they are legal. This is especially pressing given the widespread collusion and corruption exposed in recent state capture hearings. This takeover illustrates that it is imperative that domestic resources be used in the interest of workers and for the protection of national sovereignty. Furthermore, it exemplifies the need for more stringent rules and monitoring and, crucially, a zero-tolerance approach to any processes that jeopardise the health and wellbeing of both people and nature by undermining the sovereignty of the state.

Inga III and Lonmin demonstrate how the extractivist model undermines the sovereignty of the state. This is also evident in the problematic expectations TNCs have of the role that the state should play in relation to their interests. TNCs demand that, in return for FDI they purportedly bring, the state actively creates "enabling environments" and exercises its use of force against protests and opposition. Thus, while governments are encouraged not to intervene in the public

sector or against the privatisation of the Commons, a strong state is required to ensure the protection of the interests of capital. This was illustrated in the many submissions received by the Tribunal testifying to the increasing use of armed force against miners and communities resisting the efforts to steal their land and to appropriate the Commons. One such instance is the case of Marange.

### **Role of traditional authorities**

As illustrated in many cases brought before the tribunal, traditional authorities collude with state and TNCs. Historically undermined by colonialism and the state, these authorities have gradually become distanced from their communities, placing them, and the natural resources under their jurisdiction, at risk. The case of Xolobeni in the Eastern Cape of South Africa illustrates how the Australian company, Transworld Energy and Mineral Resources, attempted to bribe the local chief to favour those supporting mining against those opposing it. It further illustrates the collusion between TNCs and the state, exposing the Minister of Mineral Resources' support of Transworld Energy, which ultimately forced the community to take the state to court. The court has decided in their favour, upholding the right of affected people to say "No".

Most of the testimonies and cases confirmed that in all their countries, without exception, the state acted in collusion with TNCs. States appeared more accountable to TNCs than to the citizens of the country. This is evident even in countries like South Africa, that have very specific provisions in the Constitution about their obligations to citizens. Instead, local authorities adopt a law-enforcement rather than a developmental approach, forcing local people to litigate for their rights despite their lack of income.

### **Environmental costs and Ecological Devastation**

The cases presented since 2016 point to serious violations of the right to environments that are safe and healthy, especially for mining-affected communities. The contamination of water, soil, air, noise pollution, as well as acid drainage, was evident, resulting in ill health of miners and communities surrounding the mines. Natural resource exploitation, in particular minerals and metals, have affected surrounding water bodies, biodiversity and respective flora and fauna negatively. The negative impact of fossil fuel led extractivism, in the cases presented with regards to mining as well as agribusiness, has led to climate change resulting in extreme weather temperatures, drought and global warming. Key testimonies put forward how ecological destruction has direct bearing to biocultural and sociocultural loss and undermining of a way of life. Land and nature are critical to rural and indigenous communities' meaning making knowledge systems, family, identity, economic systems of organisation and political sovereignty. The Mikea, Xolobeni and Congo peoples gave evidence that suggests their intimate ecological context is inextricably linked with, and define, their human relations.

## **IV. VIOLATION OF FUNDAMENTAL HUMAN AND PEOPLES' RIGHTS, AND OF NATIONAL LAWS**

Article 1 of the Universal Declaration of Human Rights provides for the universality and inalienability of human rights, by stating that “All human beings are born free and equal in dignity and rights.” Human rights are also indivisible, which means that denial of one right invariably impedes enjoyment of other rights. By contributing to “the realization of a person’s human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs”,<sup>1</sup> human rights are also interdependent and interrelated. Inherently linked to the right to self-determination and the concept of meaningful participation in the decision-making process, the right to development has emerged as the right underpinning the realization of other rights and human needs.<sup>2</sup>

Any juridical assessment of conduct and activities by states and TNCs involves an analysis of the human rights dimensions that intersect with structural and cultural factors including e.g. political, legal, social and economic marginalization, discrimination, exclusion, the environment and the political economy. The juridical assessment that is applied by the Permanent Peoples’ Tribunal is based on the Algiers Charter establishing the Tribunal, the Statute of the Tribunal, and existing national, regional and international frameworks on human rights. The extent, scope and complexity of human rights violations committed by TNCs and SADC states (in the context we are exploring), should not be understood as a comprehensive analysis of all violations but, rather, as an attempt to highlight the most emblematic and prevalent violations of certain rights by respective states and TNCs.

### **1. Violations of Civil and Political Rights**

A number of international and regional binding instruments recognize the inherent right to bodily integrity.<sup>3</sup> States are under the obligation to refrain from violating these rights and must prevent any acts, including human rights abuses committed by the third parties within their territory and under their jurisdiction,<sup>4</sup> that would violate them, including arbitrary deprivation of life, torture, inhuman and degrading treatment or injury. These rights are non-derogable.<sup>5</sup> The Algiers Charter provides that “None shall be subjected, because of his national or cultural

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<sup>1</sup> United Nations Population Fund (UNFPA), “Human Rights Principles”, available at <https://www.unfpa.org/resources/human-rights-principles>

<sup>2</sup> OHCHR, Realizing the Right to Development (2013) available at

[https://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive\\_EN.pdf](https://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf).

See also Article 1, UN General Assembly, Declaration on the Right to Development Adopted by General Assembly resolution 41/128 of 4 December 1986

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightToDevelopment.aspx>

<sup>3</sup> E.g. Article 3, the Universal Declaration of Human Rights; Article 6, the International Covenant on Civil and Political Rights (ICCPR); Article 4, the African Charter on Human and Peoples' Rights.

<sup>4</sup> Article 2(1), ICCPR; Principle 4, Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989, available at

<https://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

<sup>5</sup> Article 4(2), ICCPR.

identity, to massacre, torture, persecution, deportation, expulsion or living conditions such as may compromise the identity or integrity of the people to which belongs.”<sup>6</sup>

The Tribunal heard of numerous cases detailing human rights abuses including intimidation, threats, violent assaults and extra-judicial killings of individuals and communities who opposed ‘development’ projects, in their struggles to protect the rights of their communities, including livelihoods and just wages. The emblematic cases include:

- a) The case of independent miners in Marange district and Zimbabwe Consolidated Diamond Company (ZCDC).

Testimony presented before this Tribunal included evidence of how at least 40 artisanal miners were killed between 2017 and 2018 in the Marange diamonds fields in Eastern Zimbabwe. It is alleged that many were tortured and beaten by security guards in the employ of the Zimbabwe Consolidated Diamond Company, with state officials being equally responsible for these acts by failing to take action to either prevent or prosecute them.

The ZCDC is wholly-owned by the Zimbabwe government<sup>7</sup> and therefore its actions can be directly attributed to the State of Zimbabwe.<sup>8</sup> Based on the facts and evidence available, and that the acts of the ZCDC can be linked to the state, the Government of Zimbabwe and the ZCDC have jointly violated the rights to bodily integrity of artisanal miners in the Marange diamonds fields in Eastern Zimbabwe, resulting in gross human rights violations causing serious mental and physical injury.

- b) Forced evictions and associated violence against the communities – The Example of Moatize Community in Mozambique.

Forced evictions<sup>9</sup> is “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.<sup>10</sup> Forced evictions result in severe human rights violations of social-economic and cultural rights, pose a risk to the right to life itself and have also been found to be tantamount to cruel, inhuman or degrading treatment. Women and girls are particularly vulnerable to violence, including sexual violence, before, during and after an eviction. Forced evictions may also result in indirect violations of political rights, such as the right to vote, if persons are rendered homeless.

The Moatize community’s protests against mining activities resulted in forced evictions, involuntary resettlement, the loss of livelihoods and restrictions imposed on the movement of the population, placing an already vulnerable population at great risk. The protests by the community held in 2012 and 2018 were also met with extreme violence from the police. The Tribunal has found that the state of Mozambique is responsible for violating people’s right to

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<sup>6</sup> Article 4, the Algiers Charter, Universal Declaration of the Rights of Peoples adopted in Algiers, 4 July 1976 (hereinafter ‘Algiers Charter’).

<sup>7</sup> Zimbabwe Consolidated Diamond Company, Official Website. Available at <https://www.zcdco.com>

<sup>8</sup> See Article 5 and its commentary, The Draft articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001).

<sup>9</sup> See OHCHR’s Fact Sheet on Forced Eviction. available at <https://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf>

<sup>10</sup> Committee on Economic, Social and Cultural Rights, General comment No. 7 (1997) on the right to adequate housing: forced evictions.

existence and bodily integrity, having caused injuries to a number of people and damage to property.<sup>11</sup> The Tribunal also rules that the company Vale Mozambique was complicit in the violations, as it directly benefited from the forced evictions and involuntary resettlement.

## 2. Violations of the Right to Land and Livelihood

The right to land is not explicitly recognized as a human right under international law, but nevertheless constitutes a cornerstone of people's right to existence, which is underpinned by a multiplicity of regional human rights instruments and mechanisms which have sought to address land issues in relation to a number of civil, cultural, economic, political and social rights, which include the rights of minorities and indigenous peoples.<sup>12</sup> Land must, therefore, be seen as a part of Commons, accessible to all members of a society, that is a source of livelihood by dignifying people's existence. Communities and the people have over the centuries established ties with land that go beyond commercial and tangible understanding of it, having a spiritual dimension too.

The Universal Declaration of Human Rights provides that "Everyone has the right to an adequate standard of living for himself and his family, including food."<sup>13</sup> In terms of a right to food in the context of a land tenure, the UN Special Rapporteur on the right to food found that states are under obligation to refrain from taking measures that may deprive individuals of access to critical productive resources, must protect such access from encroachment by other private parties, and must seek to strengthen people's access to and utilization of resources and means to ensure their livelihoods.<sup>14</sup> The Africa Commission on Human and People's Rights has arrived to similar conclusions in its decision.<sup>15</sup>

Testimonies of the victims and experts presented before the Tribunal point to the large-scale dispossession of land by SADC states in order to benefit TNCs. As a result, communities have been deprived of their access to livelihoods, water, fishing opportunities but most importantly their sacred and fertile land (e.g. Dam Inga I and II in DRC, Mozambique, ZCD and Zimbabwe). Currently, a population of 37.000 people in the DRC continue to live under the threat of losing their land once the Inga III project is constructed by the Chinese-Spanish consortium.

Land dispossession is in many instances facilitated by policy and legislative changes or legal interpretations that promote the interests of TNCs, as well as institutional arrangements which deliberately favour transnational corporations by host governments. The land is acquired without the requisite social and economic assessments (e.g. DRC) and without giving due

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<sup>11</sup> Article 1, PPT Statute in relation to Article 1, Algiers Charter.

<sup>12</sup> E.g. The African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, and the European Court of Human Rights, as well as the European Committee of Social Rights.

See Land and Human Rights, [https://www.ohchr.org/Documents/Publications/Land\\_HR-StandardsA](https://www.ohchr.org/Documents/Publications/Land_HR-StandardsA)

<sup>13</sup> Article 25, Universal Declaration of Human Rights; Article 11(1), International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 28(1), Convention on the Rights of Persons with Disabilities.

<sup>14</sup> "Access to Land and the Right to Food", Report of the Special Rapporteur on the right to food presented at the 65th General Assembly of the United Nations UN Doc. A/65/281, 21 October 2010, par 2.

<sup>15</sup> *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (27 October 2001).

consideration to alternative projects, or new practices of interpreting “public interest”, to allow government to acquire land without the consent from the traditional authorities (e.g. Mozambique) or, as in the case of the Xolobeni community, to allow mining without the community’s consent. In many instances, consultation processes are not meaningful and do not provide tangible benefits for the local communities but are conducted with the systematic use of intimidation and threats. Compensation for land dispossession, if provided, is usually totally inadequate and does not address either the material or moral damages caused to the communities in question. By depriving the communities of their fundamental right to existence and peaceful possession of their territory, the states and TNCs have caused severe and irreparable damage to their livelihoods with disastrous consequences for their right to security, including food and livelihoods.

The Tribunal is of the view that the governments of the DRC, Mozambique and Zimbabwe have acted in violation of the right to food by leasing or selling land to investors (whether domestic or foreign) as “they were depriving the local population of access to productive resources indispensable to their livelihoods.”<sup>16</sup>

The Tribunal finds therefore that the states in question and the respective TNCs are responsible for violating the rights of communities, and in particular have violated their rights to existence and to the peaceful possession of their territory,<sup>17</sup> as well as their right to food, water, adequate housing and conditions of living, causing material and moral harm to the communities.

### ***Development-Induced Displacement***

The obligation of states to refrain from and protect against forced evictions or development-induced displacement, from homes and land, has been recognized by a number of international and regional instruments, including Article 17 of the International Covenant on Civil and Political Rights.<sup>18</sup> Accordingly, involuntary or coerced displacement constitutes a violation of a number of internationally-recognized human rights, i.e. rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement,<sup>19</sup> and is often planned or conducted under the pretext of serving the “public good”, in particular in the context of large development projects.<sup>20</sup>

The 2009 African Union’s Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) requires that states “as much as possible, shall prevent displacement caused by projects carried out by public or private actors”, and demands that states ensure proper consultations with those affected by displacement, the need for an examination of alternatives, and that they carry out the environmental and socio-

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<sup>16</sup> Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter Addendum: Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, UN Doc. A/HRC/13/33/Add.2, 28 December 2009, par.15.

<sup>17</sup> See e.g. Article 1, PPT Statute in relation to Articles 1, 3, the Algiers Charter.

<sup>18</sup> E.g. Universal Declaration of Human Rights; Article 11(1), ICESCR; Article 5(e), The International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>19</sup> Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annexe 1 of the Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, U Doc. A/HRC/4/18. Available at

[https://www.ohchr.org/Documents/Issues/Housing/Guidelines\\_en.pdf](https://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf)

<sup>20</sup> Ibid., Principle 8.

economic impact assessments prior to the project.<sup>21</sup> This African Commission has confirmed these criteria in the *Ogoniland* case.<sup>22</sup> The UN Committee on Economic, Social and Cultural Rights requires that displaced communities have a right to a resettlement, which among others include “the right to alternative land of better or equal quality” and adequate housing.<sup>23</sup>

The emblematic cases of mass and enforced displacement include: communities in DRC as a result of the construction of Inga I and II; the native Mikea people in Madagascar by the Toliara Sand mining project; communities in Moatize district, Northern Mozambique, following the construction of the mining complex by a subsidiary of the Brazilian giant Vale SA. Furthermore, the Umgungundlovu community in Xolobeni, South Africa, more than 37 000 people in the Congo DRC, as well as the community in Kusena village in Marange district, Zimbabwe, continue to live under the threat of forced displacement and involuntary resettlement.

In the cases of already concluded projects, the displaced populations were relocated to places far from rivers, district markets and where the land they were given and housing allocated were of much poorer quality than the one they previously enjoyed and cultivated. In all instances the communities were not consulted and the whereabouts of the projects were concealed from them. The alternatives to these disastrous projects were not even considered, even though experts stated explicitly that the alternatives would benefit local communities and would be better for the environment (e.g. the Inga III dam in DRC).

This Tribunal is satisfied beyond reasonable doubt that the forced displacement that took place in the SADC countries in question have violated people’s right to existence and to retain peaceful possession of their territory,<sup>24</sup> and have impacted on their livelihoods and deprived them of enjoyment to their socio-economic rights, including access to land, water, food and decent work. The respective TNCs have benefited from the enforced displacement and the deprivation of people’s rights and therefore are equally responsible for the violations.

### **3. Violation of the Right to Natural Resources**

The principle of sovereignty over natural resources recognized by the UN General Assembly embodies the right of states and peoples to dispose freely of their natural resources.<sup>25</sup> This has been confirmed in the African Charter<sup>26</sup>, the 169 ILO Convention that further stipulates that the right to natural resources and land includes “the right of these peoples to participate in the use, management and conservation of these resources”<sup>27</sup>, as well as in the Algiers Charter.<sup>28</sup>

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<sup>21</sup> Articles 10(1),(2) and (3).

<sup>22</sup> *Social and Economic Rights Action Centre and Another v. Federal Republic of Nigeria*, Communication 155/96 (African Commission on Human and Peoples’ Rights 2001), available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>, par. 53.

<sup>23</sup> See general Comment No. 4 on the Right to Adequate Housing adopted by the Committee on Economic, Social and Cultural Rights in 1991 as cited in Principles and Guidelines on Development-Based Evictions and Displacement.

<sup>24</sup> See e.g. Article 1, the PPT Statute in relation to Articles 1, 3, the Algiers Charter.

<sup>25</sup> The General Assembly resolution 1803 (XVII) of 14 December 1962 entitled “Permanent sovereignty over natural resources” and the UN Declaration on the Rights of Indigenous Peoples.

<sup>26</sup> Article 21.

<sup>27</sup> Article 7(4) and Article 15(1), the ILO *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (05 Sep 1991).

<sup>28</sup> Article 8, 16, Algiers Charter.

This has been further reaffirmed in the national legislation of SADC countries, i.e. the Minerals and Petroleum Resources Development Act of South Africa (MPRDA), which is sometimes used as a model for the region. In a landmark court decision, the North Gauteng High Court ruled that, before any mining license is granted for the titanium project to proceed in Xolobeni, the full prior and informed consent of the affected community must be obtained<sup>29</sup>.

The Tribunal heard of many instances in which the right of people to the sovereignty of natural resources was violated by states, TNCs and other actors. The emblematic cases include: Paladin Uranium Mining in Tanzania; the Toliara Sand mining project in Mikea, Madagascar; or the theft of diamonds in the Marange district in Zimbabwe.

Roughly half of the world's vanadium, platinum, and diamonds originate in the SADC region, along with 36% of gold and 20% of cobalt,<sup>30</sup> which should primarily benefit its people. While the SADC countries have committed themselves "to promote sustainable and equitable economic growth and socio-economic development,"<sup>31</sup> the mineral wealth and resources within the SADC region has been used to optimise benefits for corporations and corrupt politicians.

This Tribunal is satisfied beyond reasonable doubt that the extraction of uranium in Tanzania and mining activities in Madagascar or Zimbabwe have violated people's and/or indigenous rights to natural resources, development and cultural identity. In all instances, the mining activities have been conducted without the participation and meaningful consultation with the local communities, as well as any benefits for the local communities and indigenous people. The TNCs demonstrated through their mining activities and projects that they had no respect for the communities' beliefs and spiritual attachment to land. According to witness testimonies, the uranium extraction in Tanzania commenced almost a decade before the licence for such exploration was issued. The Tribunal is equally satisfied that the state of Zimbabwe, either by commission or omission, is responsible for a theft of 1 billion carats that 'disappeared' from the Reserve Bank of Zimbabwe, thus violating people's right to natural resources and development. This represents just a handful of cases demonstrating how the extractive TNCs, either with help or a silent agreement from states, loot natural resources which should benefit the local populations and their nations.

#### **4. Working Conditions**

The Permanent Peoples' Tribunal on a number of occasions dealt with workers' rights and declared that their right to fair wages was a fundamental human right.<sup>32</sup> The Universal

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<sup>29</sup> Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018)

<sup>30</sup> SADC, Official Website: Mining <https://www.sadc.int/themes/economic-development/industry/mining/>

<sup>31</sup> Article 5(1)(g), the SADC Treaty, available at [https://www.sadc.int/files/5314/4559/5701/Consolidated\\_Text\\_of\\_the\\_SADC\\_Treaty\\_-\\_scanned\\_21\\_October\\_2015.pdf](https://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf)

<sup>32</sup> E.g. Permanent People's Tribunal, Session on Living Wages as a Fundamental Human Right and the Role of International Institutions. Conclusion of National Peoples' Tribunals in Asia, Sri Lanka Foundation Institute, Colombo, Sri Lanka December 17-20, 2015, Verdict, available at [http://permanentpeopletribunal.org/wp-content/uploads/2016/02/PPT-FINAL-SRI-LANKA\\_final-verdict-41.pdf](http://permanentpeopletribunal.org/wp-content/uploads/2016/02/PPT-FINAL-SRI-LANKA_final-verdict-41.pdf) (last visited 08 July 2019).

Declaration of Human Rights prohibits slavery and servitude.<sup>33</sup> It also provides that everyone has the right to work and that everyone should work in a job freely chosen, and that everyone has a right to a just wage.<sup>34</sup> These rights have been further reaffirmed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the African Charter, and other international documents.<sup>35</sup>

The PPT received first hand testimonies of the conditions of the workers employed in the extractive sector or at the large-scale development projects. The emblematic cases in which the Tribunal is satisfied beyond reasonable doubt that the rights of workers have been violated include: Paladin Uranium Mining in Tanzania and Lonmin in South Africa. Following the first session, the Tribunal found that, in at least three cases, the working conditions of mine workers have deteriorated,<sup>36</sup> as the mine workers were fed with meat for animals, were paid much lower wages than that paid by national mining companies,<sup>37</sup> and in Tanzania worked without required safety and health measures.<sup>38</sup> The case of Lonmin is particularly egregious as the Tribunal heard evidence which indicates that mine workers and their families continue to live in dire conditions in the informal settlements, and that only 3 out of 5000 houses promised have been built up to date. Despite the slight increase in salaries, the mine workers continue to struggle to live in dignity and to provide for their families.

Criminally low wages that cannot secure a life in dignity for the workers and their families, non-adequate living conditions, and unhealthy and insecure working environment, with reported instances of inhumane and degrading treatment (i.e., feeding with animal food), violate a number of workers' rights – a right to work, a right to living wages, a right to equitable and satisfactory conditions, a right to health and security of a person, a right to family life and the right to adequate housing, to list a few. This Tribunal is of the view that these are severe violations of people's right to "a fair evaluation of its labour and to equal and just terms in international trade", that have caused a serious damage to workers and their families.<sup>39</sup>

## 5. Environmental Crimes

The right to a healthy environment entails the environmental dimensions of a range of rights, i.e. right to life, health, food, water, sanitation, property, private life, culture, and non-discrimination, with a right to health bridging the environmental protection and human rights.<sup>40</sup> While no standing alone right exists at a global level requiring states to protect, ensure and fulfil the right to a healthy environment, this field of law is still developing, with more than 100 states worldwide,<sup>41</sup> including all SADC countries, having recognized the right to a healthy

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<sup>33</sup> Article 4.

<sup>34</sup> Article 23, 24.

<sup>35</sup> Article 6 and 7; Article 15 of the African Charter; Committee on Social, Economic and Cultural Rights, General Comment No. 18: A Right to Work adopted on 24 November 2005 – Article 6 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/18, 6 February 2006.

<sup>36</sup> Permanent People's Tribunal, Transnational Corporations in Southern Africa, Manzini, Swaziland, 16-17 August 2016, Opening Session (hereinafter 'Report from the 1<sup>st</sup> Session), at 6.

<sup>37</sup> Ibid.

<sup>38</sup> Report from the 2<sup>nd</sup> Session, at 20.

<sup>39</sup> Article 1, the PPT Statute in relation to Article 10, the Algiers Charter.

<sup>40</sup> HRW, M Orellana, The Case for a Right to a Healthy Environment (2018) available at <https://www.hrw.org/news/2018/03/01/case-right-healthy-environment>

<sup>41</sup> Ibid.

environment in their constitutions, legislation, as parties to a regional treaty, or a combination of these instruments.<sup>42</sup>

The African Charter provides that “All peoples shall have the right to a general satisfactory environment favourable to their development”.<sup>43</sup> The right to a healthy environment is also referenced to various extents in the ICSECR,<sup>44</sup> the 169 ILO Convention,<sup>45</sup> and the decisions by the African Commission.<sup>46</sup> The Algiers Charter states that “Every people has the right to the conservation, protection and improvement of its environment”.<sup>47</sup>

Several SADC member states are also party to various regional and global Multilateral Environmental Agreements, which impose obligations on state parties to protect the environment,<sup>48</sup> and require that states adopt measures to decrease the environmental risks and ensure a right to information, public participation in the decision-making, and a right to an effective remedy.<sup>49</sup>

While SADC countries have committed themselves to “achieve sustainable utilization of natural resources and effective protection of environment”,<sup>50</sup> the evidence presented before the Tribunal shows that they are far from achieving these objectives. The emblematic cases where the Tribunal was satisfied beyond reasonable doubt that the rights of people to a healthy environment was violated include: Madagascar Resources and Ilmenite Mining; Paladin Uranium Mining in Tanzania; Vale Mozambique mining activities in Moatize, Mozambique; ProSavana Project in Mozambique; Farm Input Subsidy Programme; A Dairy Network in Zambia; Toliara Sand mining project in Mikea, Madagascar; or diamond mining project in the Marange district in Zimbabwe.

The Tribunal heard compelling testimony on how these projects negatively impacted on the environment and its inhabitants. In particular, the environmental effects of large-scale infrastructure, extractive, farming and agricultural projects in a number of SADC have caused higher levels of pollution, reduction in biodiversity and disturbance of ecological balance, as well as on people living in the affected areas by causing or increasing the risks of diseases or death, contamination of food chains, disruption of social relations or deprivation of livelihood, to list a few.

The construction of Inga I and II in DRC has destroyed an entire ecosystem, including the fertile land and best fishing grounds that was vital to the survival of communities living there.

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<sup>42</sup> See UNGA, Report of the Special Rapporteur on the Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UN Doc. A/HRC/40/55, 08 January 2019, at 4.

<sup>43</sup> Article 24, The African Charter.

<sup>44</sup> Article 12(2)(b), ICSECR.

<sup>45</sup> Article 7(4) and Article 15(1), the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (05 Sep 1991).

<sup>46</sup> *Social and Economic Rights Action Centre and another v. Federal Republic of Nigeria*, Communication 155/96 (African Commission on Human and Peoples’ Rights 2001), available at <http://www.cesr.org/downloads/AfricanCommissionDecision.pdf>, par. 51.

<sup>47</sup> Article 8, 16, Algiers Charter.

<sup>48</sup> For the Conventions ratified by SADC countries See <https://www.sadc.int/issues/environment-sustainable-development/conventions/>

<sup>49</sup> [https://www.who.int/hhr/information/Human\\_Rights\\_Health\\_and\\_Environmental\\_Protection.pdf](https://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf)

<sup>50</sup> SADC Treaty, Article 5(1)(g).

Other ecosystems in DRC will remain under the threat of serious damage if Inga 3 is ultimately constructed. In some areas mining activities are conducted in protected areas (e.g. Marange District in Zimbabwe, a UNESCO World Heritage area in Tanzania) or in the Mikea Forest in Madagascar, which is a home to indigenous Mikea people and a biodiversity hotspot (Toliara Sand mining project).

Consequently, the Tribunal has found that these joint projects conducted by the respective states and TNCs led to the emission, or intentional or negligent disposal, of solid, liquid or gaseous substances liable to lead to such contamination and, therefore, violated a number of internationally recognized rights, i.e. right to life, dignity, health, food, water, adequate housing, as well as regionally and nationally recognized right to a healthy environment. These acts also violated a number of procedural human rights, and the rights enshrined in the Algiers Charter. Accordingly, these acts amount to environmental crimes as contained in the PPT's Statute.<sup>51</sup>

Furthermore, the Tribunal heard compelling evidence describing how large-scale infrastructure, extractive, farming and agricultural projects has resulted in serious damage, destruction and loss of one or more ecosystems in a number of SADC countries, in contravention of international, regional and national laws.<sup>52</sup>

The Convention on Biological Diversity (1992) defines ecosystem as “a dynamic complex of plant, animal and micro-organisms communities and their non-living environment interacting as a functional unit.”<sup>53</sup> This ‘interconnectedness’ requires “that human interaction with and use of the environment respect the need for maintaining ‘ecosystem integrity’”.<sup>54</sup> The activities described above do not respect the need to maintain the ‘ecosystem integrity’ but have provoked or had a high risk of provoking severe reduction in the environmental benefits enjoyed by the inhabitants of those areas.<sup>55</sup> Moreover, it is the view of this Tribunal that polluted water, land and air, destroyed houses, flooded fertile land, destroyed fishing grounds, and ruined indigenous and biodiverse territories constitute an irreparable damage to the ecosystems and, therefore, amount to a severe reduction in the environmental benefits for the inhabitants in question. The same applies to those communities which were forcibly displaced and received land which is less fertile than the one they cultivated before. Consequently, this Tribunal is of the view that these joint conducts by the states and the TNCs in question amount to a crime of ecocide as contained in Article 5(1) of the PPT's Statute.

## 6. Economic Crimes

The growing economic power of TNCs in world economic affairs outweighs the economic power of nation states and many international organizations, resulting in unprecedented levels of wealth being accumulated in the hands of TNCs. This economic growth model is export-orientated and has contributed globally to the de-regularisation of labour and politics,

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<sup>51</sup> See Article 5(2)(h), PPT Statute.

<sup>52</sup> See Article 5(1), PPT Statute defines ‘ecocide’.

<sup>53</sup> Article 2.

<sup>54</sup> J. Brunnée and S.J. Toope, ‘Environmental Security and Fresh- water Resources: A Case for International Ecosystem Law’, 5 Yearbook of International Environmental Law (1994) 41, at 55.

<sup>55</sup> Article 5(1), PPT Statute.

tremendous financial outflows of capital from African states, and a growing dependency on direct foreign investment. The concomitant increase in dependency on TNCs' investments has in turn resulted in the growing interconnectedness and collusion between private and public sectors, and the emergence of new complex relationships between states and TNCs to the detriment of citizens.

The Algiers Charter stipulates that “Every people has the right to choose its own economic and social system and pursue its own path to economic development freely and without any foreign interference” and “The economic rights set forth shall be exercised in a spirit of solidarity amongst the peoples of the world and with due regard for their respective interests”.<sup>56</sup>

The Tribunal heard evidence pointing to a number of SADC countries and TNCs being responsible for a commission of economic crimes as contained in the Statute of the PPTs, either through commission or omission.<sup>57</sup> The emblematic cases include: Zambia; Madagascar, Mozambique, Tanzania, or Mauritius.

This Tribunal is of the view that many of the human rights violations that have been described in this and previous reports – i.e., a threat to the very existence of communities, enforced evictions and displacement, damage to environment and livelihood, as well as violations of a right to land and labour rights – derived either directly or indirectly from the structural policies which are the consequence of decisions taken by leaders of governments or multilateral intergovernmental organizations,<sup>58</sup> and, therefore, amount to economic crimes committed by the respective state with, and with a benefit for, TNCs.<sup>59</sup>

Given that most African countries with natural resources and mineral wealth depend to a large extent on the extraction of natural resources for their exports and tax revenues, there is a clear relationship between countries that are highly dependent on extractive industries and the incidence of IFFs. The relationship is highly unequal and is characterised by extensive underreporting of the quantity and sometimes quality of natural resources extracted for export, be it crude oil, diamonds, coltan, gold, shrimp or timber. Most African countries lack the ability and skill to have their own independent means of verifying the precise amount of natural resources extracted and exported. Instead, they depend on reports filed by the operators, who have an incentive to underreport, especially since requirements in legislation, such as the Dodd-Frank Act, cannot cover undeclared quantities. This sector is prone to the generation of illicit financial outflows by such means as transfer mispricing, secret and poorly negotiated contracts, overly generous tax incentives and under-invoicing.

In this regard, the Tribunal heard extensive evidence describing how state revenue is being undercut in the interests of TNCs with the detriment of peoples and communities, including underdevelopment and lack of resources. By way of example, off-shore companies use the double taxation treaty to avoid paying taxes in the country where they actually conduct their business operations and where their actual income is generated. The topic was extensively discussed during the second session in Johannesburg, in particular with relation to Mauritius. Consequently, this Tribunal acknowledges that, in light of a tax evasion that amounts to a financial crime, the state of Mauritius and the Australian Company Basic Resources that owns

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<sup>56</sup> Articles 11 and 12, the Algiers Charter.

<sup>57</sup> Article 6, PPT's Statute.

<sup>58</sup> Report from the 2<sup>nd</sup> Session, at 13.

<sup>59</sup> Article 6(d), PPT's Statute.

Toliara Sands Project in Mozambique have jointly violated people's right to development and the right to benefit from natural resources in Mozambique.

The PPT has also heard multiple accounts of how economic structural adjustment programmes and market liberalisation paved the way for the concentration of ownership and market dominance by TNCs. This was extensively discussed during the second session, in particular with relation to cases of Parmalat in Zambia and Monsanto in Malawi.<sup>60</sup> While the quantitative data on the economic and social impacts of these investments is lacking,<sup>61</sup> the qualitative data presented in the cases and by the expert witnesses suggest that people's rights to food, to work and to "to choose its own economic and social system and pursue its own path to economic development freely and without any foreign interference,"<sup>62</sup> have been violated as a result of financial transactions that have been made possible by the rules governing financial markets under the dominant neo-liberal model.<sup>63</sup>

## 7. Crimes against humanity

There is no universal treaty that deals with crimes against humanity at the global level, however, these crimes have been recognized by the Nuremberg Charter, as well as the statutes of a number of international and hybrid courts and tribunals.<sup>64</sup> In particular, the Rome Statute establishing the International Criminal Court defines crimes against humanity as acts (e.g. murder, torture, deportation or forcible transfer of population, sexual violence) committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.<sup>65</sup> The prohibition of crimes against humanity have also passed into customary international law.<sup>66</sup>

The most prominent example attributable to an extractive giant Lonmin and the South African state, is the massacre by Lonmin at Marikana, where the police were responsible for killing 34 mineworkers and seriously injuring another 78, in flagrant disregard of the principles of necessity, proportionality and precaution that must guide security operations under international human rights law. Protesting miners were unarmed and constituted a "civilian population" as understood under international law, given their distinctive nature as a group of civilians struggling for a common cause.<sup>67</sup> The attack against the miners was also widespread given the evident lack of proportionality in the use of force and the extensive casualties which was a result thereof,<sup>68</sup> as well as in light of the planned and state-sponsored character of the

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<sup>60</sup> Report from the 2<sup>nd</sup> Session, at 19.

<sup>61</sup> Report from the 2<sup>nd</sup> Session, at 12.

<sup>62</sup> Article 11, the Algiers Charter.

<sup>63</sup> Article 6(b), the PPT Statute.

<sup>64</sup> E.g. Article 6 of the Charter of International Military Tribunals, August 8; article 2 of the Special Court for Sierra Leone Statute; article 3 of the Statute of the International Criminal Tribunal for Rwanda; Statute of the Iraqi Special Tribunal adopted by the Iraqi Governing Council on December 10, 2003.

<sup>65</sup> Article 7, the Rome Statute of the ICC. See also Article 3, PPT's Statute.

<sup>66</sup> C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (2011), at

<sup>67</sup> E.g. ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*, "Appeals Judgement", IT-96-23-T and IT-96-23/1-A, 12 June 2001, para. 90; ICTY, *Prosecutor v. Stakić*, "Judgement", IT-97-24-T, 31 July 2003, para. 623.

<sup>68</sup> E.g. ICTY, *Prosecutor v. Jadranko Prlić*, Case No. IT-04-74-T, Judgement (TC), 29 May 2013, paras. 41-42.

act.<sup>69</sup> In light of the fact that it was a security operation authorised by the state, it was conducted with the intent directed against the civilian population. Accordingly, this Tribunal is convinced beyond reasonable grounds that this conduct amounted to a crime against humanity of murder as defined under Article 3(a) of PPT's Statute.

The Tribunal also found that acts of displacement caused by the economic activities of the respective TNCs constitute a "forcible transfer of population" as understood under the definition of a crime against humanity. The latter includes "the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, denying them access to schools, and forcing them to wear a symbol of their religious identity."<sup>70</sup> The Tribunal is of the view that depriving people of the sole source of their existence – i.e. food, water etc. – constitutes a coercive measure that forces people to flee. The conduct by the Mozambican and Congolese governments and TNCs was also widespread, as they involved thousands of people who were displaced, were planned and authorized by the respective states, and were intentionally directed against the civilian population. Consequently, the Tribunal has found that both the state of Mozambique and DRC, together with the relevant TNCs, are jointly responsible for a crime against humanity of a forcible transfer of population as defined under Article 3(c) of PPTs Statute.

Equally, the Tribunal is of the view that the state of South Africa, DRC and Madagascar, together with the respective TNCs, may potentially be held accountable for violating people's right to existence and to retain peaceful possession of their territory,<sup>71</sup> and for a crime against humanity of a forcible transfer of population, if the initiated development projects take place as planned.

## **8. Gender-Based Crimes as System Crimes**

The activities by the TNCs and SADC states that lead to the extractivism and large-scale 'development' projects in agriculture, mining or farming have resulted in the disruption of the social fabric and have a tremendous gendered impact on the life of men and women, boys and girls, and LGBTI+ people, resulting in further violations of their human rights. This catastrophic gender impact has been described in this and the reports from previous sessions of this Tribunal.

Consequently, the Tribunal is of the view that these violations can be considered as amounting to a gender-based system crime as described in Article 7 of the PPT's Statute. It is a complex crime that is rooted in environmental and economic crimes committed jointly by states and TNCs that have resulted in profound violations of communities' human rights. The impact of these gender-based crimes transcends the responsibility of single companies or states and has been caused by a sum of decisions adopted over the years, often in different countries, which are therefore not easily imputable to identified persons, states or companies.<sup>72</sup>

## **9. Impunity**

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<sup>69</sup> E.g. ICC, Prosecutor v. Ruto, Koshey and Sang, "Decision on the confirmation of charges", ICC-01/09-01/11, 23 January 2012, para. 210.

<sup>70</sup> Christopher K. Hall in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), at 162.

<sup>71</sup> See e.g. Article 1, the PPT Statute in relation to Articles 1, 3, the Algiers Charter.

<sup>72</sup> Article 7, PPT Statute.

Impunity entails the lack of individual criminal accountability of state officials and TNC's managers for the violations; the absence of the corporate accountability of TNCs; lack of accountability of states; and a notable lack of effective remedies for victims. Victims of gross human rights violations have a right to an effective, adequate and prompt remedy.<sup>73</sup> The term "remedy" must be understood as having two facets, namely a procedural one that is closely related to a victim's right to a fair trial by an independent and impartial court,<sup>74</sup> and the substantial one that relates to the outcome of the proceedings and relief afforded to victims.<sup>75</sup> As re-affirmed in the African Commission of Human Rights in *Jawara v The Gambia*, remedies must be available, effective, and sufficient.<sup>76</sup>

Although the Commission of Inquiry into Marikana finalized its report already years ago and established the facts, to date no one has been prosecuted for these events. There was little accountability for Marikana also in term of reparations, which, if granted, have been either inadequate (only 3 out of 5000 promised houses were built) or inappropriate and demeaning (trauma of 'Marikana children' at schools and women taking upon their late husbands' jobs). In light of this, both South Africa and Lonmin fall short of their obligations to provide effective remedies to the victims of the Marikana massacre. Similarly, the impunity prevails in DRC or Mozambique, where states and TNCs have been responsible for crimes against humanity of forcible transfer of population. If compensation was provided to the victims of violations, it was neither adequate or effective.

Currently, under international law, TNCs are not recognized as having human rights obligations.<sup>77</sup> TNCs operate in a legal vacuum and despite the panoply of human rights abuses committed by TNCs. The normative framework that exists in respect of Human Rights and TNCs, namely the UN Norms and the 2011 UN Guiding Principles on Business and Human Rights, are considered 'soft law', i.e. international norms that do not impose binding legal obligations. Consequently, this Tribunal is of the view that it should become the obligation of each state to support and to meaningfully engage in the adoption of the binding treaty on business and human rights.

## V. PLANTING THE SEEDS FOR AN ALTERNATIVE FUTURE

The evidence presented throughout the three sessions – Manzini (2016) and Johannesburg (2017 and 2018) – calls for mechanisms and policies that are beyond corporate social responsibility. The evidence challenges the dominant discourse of economic development which legitimises the current extractivist *modus operandi*.

The jurors found that "there is a continued and even growing threat of dispossession, dislocation and displacement by the state, which favours a mining-for-development approach

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<sup>73</sup> E.g. See Principles VII-IX, UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 16 December 2005.

<sup>74</sup> Shelton, Remedies in International Human Rights Law (2005), at 7 as cited in H Varney, K Zdunczyk and M Gaudard, The Role of Victims in Criminal Proceedings (2017), International Centre for Transitional Justice.

<sup>75</sup> Ibid.

<sup>76</sup> ACHPR, *Jawara v. The Gambia*, May 11, 2000, No. 147/95-149/96, § 32.

<sup>77</sup> John Ruggie, A UN Business and Human Rights Treaty? (2014) available at <http://www.ihrb.org/commentary/board/business-and-human-rights-treaty-internationallegislation.Html> (accessed 25 April 2016).

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.

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. In the process, customary laws are disregarded both by the companies and by the government leading to loss of tenure rights.

The power grabs of TNCs has been aided and abetted by the very political institutions and instruments that, in the previous era, led the struggle for national sovereignty. The formation and co-option of political elites associated with the struggle for independence into the enablers of corporate interests has left the mass of people defenceless. Together with state, non-state actors and multilateral agencies have facilitated the establishment of an architecture of impunity. This is done 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.

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. It is clear from the cases brought before the Tribunal that we are dealing with a very wide range of corporations, including those from the global South.

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 that denies the state the revenue needed to meet its obligations to its citizens. Taking all these aspects together the Tribunal found that **the right to development** was systematically and fundamentally compromised

It is in this context that the Tribunal recommends 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.

Hence, the jurors find that the issue of consent, i.e. the right to say no, is of critical importance, not just to prevent the ongoing violation of human rights but to defend the sovereignty of the peoples of the region. Embedded in the right to say no is the possibility of articulating a different development model to the current extractivist one. In this regard the jurors strongly advocate for the opening up of policy spaces where different models of development can be explored and enacted, which would structurally and systemically guarantee the fundamental human and peoples' rights, social progress and environmental preservation. Guaranteeing the life and dignity of all peoples should be a universal covenant guarded by all. Each state should be directly responsible to assure these rights, and to account for them when violated: no state can tolerate that its citizens are transformed from subjects of inviolable rights to victims of economic contracts.

Throughout the sessions 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. The jurors were both moved and inspired by the stories of resistance, often led by rural women and at great odds. Their resistance to being dispossessed, displaced and “banished” often led to the formation of associations and other forms of democratic organisation that contain the possibilities for not just defending customary rights but allow the development of law from below. In this we find the seeds for steering Africa from the age of human wrongs into a new age of human and peoples’ rights.

## VI. WAY FORWARD AND RECOMMENDATIONS

The tribunal testimonies highlight the need to curb corporate power, ensure state accountability and protect community rights. This entails:

(a) The adoption into international law of a binding treaty governing business and human rights with a particular focus on transnational corporations and thereafter domesticated into national legal frameworks. These should include the duty of transparency in dealings between national states and TNCs: a permanent monitoring and timely assessment and reparation of violations, established and publicised with explicit terms of reference to binding national and international norms, should be assured throughout the process: from seeking community consent, daily operations and finance, planning revisions, to the prevention and assessment of environmental damage.

(b) Ensuring local, national and international accountability of states. This includes the duty to publicly disclose all procurement and financial information; the obligation to conduct an independent environmental assessment, the timely and rigorous judicial investigation of documented or suspected human rights violations.

(c) Tax avoidance and evasion starts in the subsidiaries of TNCs. Even for TNCs that are public companies, the public annual report to shareholders do not show the transactions between fellow companies that usually end offshore. In relation to tax authorities, it is the obligation of the TNC mother company to file all annual reports of their subsidiaries at the regulatory authority and registrar of the country where the subsidiaries have their operations. In addition, it should be the obligation of the mother company to file the financial statements of its related companies located outside the country of operation that are regularly receiving payments for services allegedly rendered to a subsidiary in the country of operation, like sales commissions, management services, legal consultation, the use of a brand or intellectual property and the like.

(d) Enforcing and protecting communities' rights. Communities should have the right to say "no" and to choose and to conceive alternative visions of development. This entails access to complete information to ensure effective, meaningful, prior and free consent. In cases where abuse and violations have occurred, it is paramount that the state ensure the right to compensation and reparation for victims.

This Panel of Judges makes the following recommendations:

1. The documentation gathered in the three sessions – Manzini (2016) and Johannesburg (2017 and 2018) – be submitted to the UN Human Rights Commission and the United Nations Economic and Social Council (ECOSOC).
2. The regional monitoring and assessment network developed by communities be permanently established. Its ability to collect evidence of environmental damage and human rights violations coupled with expert opinion provides a reliable and timely source of information, enables public awareness and supports informed communication.

3. Expert hearings be held on the complex issues of ownership and transfers of ownership of TNCs. This will help to create an informed public opinion.
4. Expert opinions be obtained regarding Lonmin and the Inga III Dam with a view to holding Special Hearings on the Sibanye-Stillwater deal and the relationship between Sibanye, Lonmin and the Public Investment Corporation (PIC). Such a hearing will focus on the rights of workers and specifically workers' pension funds which are invested in the PIC.
5. Expert opinions be obtained in the case of Inga III Dam to clearly document the relationship between the government of the DRC and the TNCs involved in the construction of the dam. This will assist in ascertaining whether the purchase of electricity by the South African government is contributing to the violation of the rights of communities affected by the construction of this dam.
6. Further examination of South Africa's particular role in the region, in order to ascertain in greater depth its responsibilities with regards to extractivist activities in SADC.

## **Annexure 1**

### **Excerpts from the session 3 of the Permanent Peoples' Tribunal Statement and the Indictment**

#### **Permanent Peoples' Tribunal Statement:**

The public hearings of the Permanent Peoples Tribunal (PPT) held on November 9-11 in Johannesburg, South Africa, involving intense and representative participation of communities, movements and organizations of the SADC region, constitute the concluding step of a three-year process of gathering and analysing evidence on the role of Transnational Corporations (TNCs) in Southern Africa. The highly collaborative research in many of the SADC countries has documented the impact of the extractivist policies of the TNCs on the fundamental rights to life, dignity, and self-determination of the affected peoples, through the individual and collective testimonies produced by grassroots communities and organizations. The Tribunal also received a number of expert reports. What was of particular note in the testimonies presented to the PPT was the courage of those individuals and communities that face daily threats and violence in their efforts to assert their rights to justice, dignity and self-determination.

The PPT received detailed reports on 18 cases, submitted in their hearings in Manzini in 2016 and in Johannesburg in 2017. These reports provided substantial proof of the depth, causes, and the personal and institutional responsibilities for the criminal violations of human and peoples' rights committed by TNCs, in explicit and systematic disregard of national and international obligations. These violations have further aggravated a situation of almost permanent and long-term impunity of TNCs, even for events which amount to the most severe classification of crimes against humanity according to international law.

For a broader understanding of the PPT process promoted in SADC through the campaigns "Dismantle corporate power" and "The right to say no", it is important to link the evidence produced on extractivist transnational policies in this region and the corresponding responsibilities with the verdicts of the PPT which, over the years, and in other political, institutional, economic, social and cultural contexts, have explored and qualified:

- a. The collusion and aiding and abetting between public and private interests and actors which characterize the strategies of multinational corporations, including the structural impact on the role of states (Madrid 2010; Colombia 2006-2008, Mexico 2011-2014);
- b. The obligation of international accountability of mining corporations (Montreal 2014);
- c. The qualification of living wages as a fundamental human right and not a purely contract dependent on economic variables (2011-2014);
- d. The constitutionally and internationally binding right of local communities to say "no" (Turin 2015).

#### **The Indictment:**

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.

The claims:

1. 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.
2. 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:
  - 2.1. 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.
  - 2.2. The systematic and systemic violation of peoples' social and development rights by commission and omission. The TNCs exploit 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.
  - 2.3. Argo- 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.

**Full Tribunal Statement available [online](#)**

**Find the full the Indictment [here](#)**

## **Annexure 2**

### **Composition of the panel of judges**

#### **Donna Andrews**

Donna is a researcher in Food Politics and Cultures Project at the University of the Western Cape, exploring the political and philosophical implications of food in the context of social subjects' relations to nature. She was active on trade and trade-related issues in Southern Africa and worked for the Jubilee South Debt Movement that initiated the International People's Tribunal on Debt. She is an ecofeminist and trained as a political economist. Her work focuses on capitalism and nature, specifically on land, mining, and fishing in post-apartheid South Africa. She has experience in women's organizations and NGOs as well as in academic institutions, where she taught political theory. She holds a BA and an Honours degree in Philosophy (University of the Western Cape), an MA in Political Economy and Development (ISS, Erasmus University) and a Ph.D. from the University of Cape Town.

#### **Teresa Almeida Cravo**

Teresa Almeida Cravo is an Assistant Professor in International Relations at the Faculty of Economics of the University of Coimbra and a Researcher at the Centre for Social Studies. She is currently co-coordinator of the PhD Programme Democracy in the XXIst Century at the University of Coimbra and a Visiting Fellow at the African Studies Centre of the University of Oxford. She holds a PhD from the Department of Politics and International Studies of the University of Cambridge. In the last years, Teresa has been a Visiting Fellow at the University of Westminster, in the UK, at the University of Monash, in Australia, and a Predoctoral Fellow and later an Associate at the Belfer Centre for Science and International Affairs, at the John F. Kennedy School of Government at Harvard University. Her research interests include peace and conflict, security and development, interventionism, and foreign policy, particularly within the Lusophone context.

#### **Firoze Manji**

Firoze Manji has more than 40 years' experience in international development, health, human rights, and political organizing. He is the publisher of Daraja Press, and founder and former editor-in-chief of the pan African social justice newsletter and website Pambazuka News and Pambazuka Press, and founder and former executive director (1997-2010) of Fahamu – Networks for Social Justice ([www.fahamu.org](http://www.fahamu.org)). In September 2018 to August 2019, he is based in Berlin as Richard von Weizsäcker Fellow at the Robert Bosch Academy. He was a Visiting Fellow at Kellogg College, University of Oxford (2001-2016), and is currently Associate Fellow of the Institute for Policy Studies. He has previously worked as Director of Pan-African Baraza, an initiative of ThoughtWorks Inc; at the Council for the Development of Social Science Research in Africa (CODESRIA) as head of the Centre for Documentation, Information and Communications; as Africa Programme Director for Amnesty International. He has published widely on health, social policy, human rights, and political sciences, and authored and edited a wide range of books on social justice in Africa, including on women's rights, trade justice, China's role in Africa, and on the recent uprisings in Africa. He has been a member of the International Advisory Board of the Centre for the Study of Global Media and Democracy, Goldsmiths College, University of London, and currently serves on the editorial advisory board of *AwaaZ Magazine*. He is a member of the board of Greenpeace Africa since 2018. He holds a Ph.D. and MSc from the Faculty of Medicine of the University of London, and BDS from the

University of Newcastle-upon-Tyne.

### **Marina Forti**

She is a journalist based in Rome. She worked with the daily newspaper "il manifesto" from 1983 until 2013, including as Foreign Editor and Editor-in-chief. As a Foreign Correspondent she travelled extensively in South and South East Asia and in Iran. Her environmental column "TerraTerra" ("Earth to Earth") was awarded the journalistic prize known as Premiolino. Her book *La signora di Narmada* (Feltrinelli 2004) was awarded the Elsa Morante Prize for Communication. She also published "Il cuore di tenebra dell'India" (Bruno Mondadori 2012) on the social conflicts in rural India. Her latest book is *Malaterra. Così hanno avvelenato l'Italia* (Laterza, September 2018). She contributes regularly to [Internazionale.it](http://Internazionale.it)

### **Yasmin Sooka**

Ms. Yasmin Sooka is the Executive Director of the Foundation for Human Rights in South Africa. She is a leading human rights lawyer, activist and an international expert in the field of Transitional Justice, gender and international war crimes, following her work on investigating war crimes in Sri Lanka and her report on post-conflict sexual violence in Sri Lanka. Ms. Sooka also served as the George Soros Inaugural Chair at the School for Public Policy at Central European University in the fall of 2015. In June 2016, Ms. Sooka was appointed by the President of the UN Human Rights Council to chair a three-person Commission on Human Rights in South Sudan, a post she currently holds. In addition, Ms. Sooka is the Director of the international Truth and Justice Project, Sri Lanka, with whom she has co-authored and published several reports on Sri Lanka. The reports include *Forgotten: Sri Lanka's Exiled Victims* (June 2016); *The Unfinished War: Torture and Sexual Violence in Sri Lanka: 2009-2014*; *Stili Unfinished War, Sri Lanka's On-going Crimes Against Humanity, 2009- 2015* and an interactive report; *Five Years On: The White Flag incident 2009-2014*.

### **Dr Wallace Mgoqi**

Dr. Wallace Mgoqi is the former City Manager of the City of Cape Town, the former Chief Land Claims Commissioner on the Restitution of Land Rights dealing with land claims, specifically over a period of eight years. He is a former Attorney and Advocate of the High Court of South Africa. He holds a B.A Soc Science, LLB, degrees, Postgraduate qualifications from Harvard University, USA, and the Development Lawyers Course at the international Development Law institute in Rome, Italy. In June 2012, through a parliamentary nomination-process he was appointed as a Commissioner for the Commission on Gender Equality. Dr Mgoqi is currently in his sixth year of service as a Commissioner, responsible, among other things, for the Western Cape and Northern Cape. Dr Mgoqi was a founding member of the Trust for Community Outreach and Education, (TCOE) a development non- governmental organisation, established in 1983, and was its Chairperson for 17 years (1988-2005).

### **Makoma Lekalakala**

Ms. Makoma Lekalakala is the Director of Earthlife Africa, a civil society environmental justice and anti-nuclear organization. She has been active in social movements tackling issues

from gender and women's rights issues, economic and environmental justice issues. In recent years, Lekalakala has been effective in targeting environmental corruption. Her commitment to climate justice in South Africa has led civil society to win the first South African climate change legal case against the government and the reversal of the nuclear deal by SA and the Russian government of which she received the Goldman Environmental Prize for Africa 2018 and SAB Environmentalist of the year 2018. Ms. Lekalakala has her roots as a liberation fighter is a strong campaigner for a just and fair society.

**Annexure 3**  
**Matrix of the cases presented at the sessions of the Permanent Peoples' Tribunal on Transnational Corporations in Southern Africa**

Case	Organisation	Country and area of Impact	Country of Corporation	Sector	FPIC	Threat of displacement or displaced	Threat of Livelihood	Violence	Collusion with traditional leader
Maloma Colliery	Foundation for Socio-Economic Justice and Swaziland Economic Justice Network	Nsoko and Lubombo, Swaziland	Swaziland	Mining and Minerals	No	Yes	No	No	Yes
Transworld Energy and Minerals	Amadiba Crisis Committee and the Legal Resources	Xolobeni, Eastern Cape, South Africa	Australia	Mining and Minerals	No	Yes	Yes	Yes	Yes
Somkhele Anthracite Mines	Womin	Somkhele, Kwa-Zulu Natal, South Africa	South Africa	Mining and Minerals	No	Yes	Yes	No	Yes
Fuleni Anthracite Mines	Womin	South Africa	South Africa	Mining and Minerals	No	No	Yes	No	Yes
Glencore	Centre for Trade Policy and Development	Zambia	Switzerland	Mining and Minerals	No	Yes	No	Yes	No
Maloma Colliery	Amalgamated Trade Unions of Swaziland	Swaziland	Swaziland	Mining and Minerals	No	Yes	No	No	Yes
Anhui Foreign Economic Construction Company	Zimbabwe Environmental Law Association	Zimbabwe	China	Mining and Minerals	No	Yes	Yes	Yes	No
Vale	Justicia Ambiental (JA!)	Tete, Mozambique	Brazil	Mining and Minerals	No	Yes	Yes	Yes	No
Jindal	Justicia Ambiental (JA!)	Tete, Mozambique	India	Mining and Minerals	No	Yes	Yes	Yes	No
Penhalonga Mining	Centre for Natural Resource Governance	Penhalonga, Zimbabwe	Zimbabwe	Mining and Minerals	No	Yes	Yes	Yes	No
Glencore Coal Mining	Southern African Green Revolutionary Council	Mpumalanga, South Africa	Switzerland	Mining and Minerals	No	No	Yes	No	No

Case	Organisation	Country and area of Impact	Country of Corporation	Sector	FPIC	Threat of displacement or displaced	Threat of Livelihood	Violence	Collusion with traditional leader
Brazil, Mozambique and Japan governments	No to Prosavana Campaign	Mozambique	Brazil, Mozambique and Japan	Agriculture	No	Yes	Yes	No	No
Monsanto	Rural Women's Assembly	Malawi	USA	Agriculture	No	No	Yes	No	No
World Titane Holdings Ltd (WTH)	Research and Support Centre for Development Alternatives	Madagascar	Madagascar	Mining and Minerals	No	Yes	Yes	Yes	Yes
South African and Mozambique governments	Justica Ambiental (JA!)	Mozambique	South African and Mozambique	Water	No	Yes	Yes	No	No
Mauritian government	Rezistans ek Alternativ	Mauritius	Mauritius	Finance	No	No	No	No	No
Paladin Uranium Mining	Lawyers for Human Rights Tanzania	Tanzania	Australia	Mining and minerals, Law	No	No	No	Yes	No
Parmalat	Rural Women's Assembly	Zambia	Italy	Agriculture	No	No	Yes	No	No
Lonmin	Association Mineworkers and Construction Union (AMCU)	South Africa	United Kingdom	Mining and Minerals	No	No	No	Yes	No
Three Gorges, State Grid Development, The South African government	International Rivers and Womim	DRC	China, Spain and South Africa	Water	No	Yes	Yes	Yes	No

**Annexure 4**  
**List of Cases Presented at session 1 of the Permanent Peoples' Tribunal on Transnational Corporations in Southern Africa (16-17 August 2016)**

**Case 1**

Coordinated by Foundation for Socio-Economic Justice and Swaziland Economic Justice Network (Swaziland)

Company: Maloma Colliery, owned by Ingwenyama (Swazi National Trust), Government of the Kingdom of Swaziland, Chancellor House Mineral Resources (South Africa)

Area of Operations/Country: 25km west of Nsoko and Lubombo regions, Swaziland

**Case 2**

Coordinated by Amadiba Crisis Committee (South Africa), Legal Resources Centre

Company: Mineral Commodities Ltd (Australia)

Area of Operations: Xolobeni, Eastern Cape, community of Xolobeni, South Africa

**Case 3 and 4**

Coordinated by WoMin (South Africa)

Companies: - Somkhele Anthracite mines- Tendele Mining, owned by Petmin (South Africa)

Fuleni Anthracite mines- Ibutho Coal (South Africa)

Area of operations: Communities of Somkhele and Fuleni, KwaZulu Natal, South Africa

**Case 5**

Coordinated by Centre for Trade Policy and Development (Zambia)

Company: Glencore Mopani copper Mines

Area of Operations/Country: Kitwe, Northern Zambia

**Case 6**

Coordinated by Amalgamated Trade Unions of Swaziland

Company: Maloma Colliery, owned by Ingwenyama (Swazi national trust), Government of the Kingdom of Swaziland, Chancellor House Mineral Resources (South Africa)

Area of Operations/Country: 25km west of Nsoko and Lubombo regions

**Case 7**

Coordinated by Zimbabwe Environmental Law Association (Zimbabwe)

Company: Anhui Foreign Economic Construction Company t/a Anjin Investments (Pvt) Ltd and as Jinan Mining (Pvt) Ltd (China)

Area of Operations/Country: Marange, Zimbabwe

**Case 8 and 9**

Coordinated by Justica Ambiental (Mozambique)

Companies: Vale (Brazil) and Jindal (India)

Area of operations/Country: Tete Province, Northern Mozambique

**Case 10**

Coordinated by Centre for Natural Resource Governance (Zimbabwe)

Company: DTZ-OZGEO Penhalonga Coal mines  
Area of operation/Country: Penhalonga, Zimbabwe

**Case 11**

Coordinated by Southern African Green Revolutionary Council (South Africa)

Companies: Glencore – Graspan Coal Mine

Shanduka (Glencore Subsidiary) – Wonderfontein Coal Mine

Area of operations/Country: Mpumalanga, South Africa

## **Annexure 5**

### **List of Expert Presentations at session 1 of the Permanent Peoples' Tribunal on Transnational Corporations in Southern Africa (16-17 August 2016)**

#### **Lonmin, the Marikana Massacre and the Bermuda Connection**

Presented by: Dick Forslund

Country: South Africa

Organisation: AIDC

#### **UK mining companies in Africa**

Presented by: Tom Lebert

Country: United Kingdom

Organization: War on Want

#### **Bilateral Trade Relations and Investment Agreements**

Presented by: Riaz Tayob

Country: South Africa

**Annexure 6**  
**List of Cases Presented at session 2 of the Permanent Peoples' Tribunal on**  
**Transnational Corporations in Southern Africa (17-18 August 2017)**

**Case 1**

The Prosavana Programme  
Coordinated by No to Prosavana Campaign  
Area of operations/Country: Mozambique

**Case 2**

Monsanto and Farmer Input Subsidies Programme  
Coordinated by Rural Women's Assembly Malawi  
Area of operations/Country: Malawi

**Case 3**

Madagascar Resources and Ilmenite Mining  
Coordinated by Research and Support Centre for Development Alternatives  
Area of operations/Country: Madagascar

**Case 4**

Mphanda Nkuwa Dam  
Coordinated by Justica Ambiental  
Area of operations/Country: Mozambique

**Case 5**

Illicit Financial Flows and Tax Evasion  
Coordinated by Rezistans ek Alternativ  
Area of operations/Country: Mauritius

**Case 6**

Paladin Uranium Mining and Illegal Imprisonment of Lawyers and Activists  
Coordinated by Lawyers for Human Rights Tanzania  
Area of operations/Country: Malawi and Tanzania

**Case 7**

Parmalat and Small-Scale Dairy Farmers  
Coordinated by Rural Women's Assembly Zambia  
Area of operations/Country: Zambia

## **Annexure 7**

### **List of Expert Presentation at session 2 of the Permanent Peoples' Tribunal on Transnational Corporations in Southern Africa (17-18 August 2017)**

#### **Food systems**

Presented by Stephen Greenberg (Researcher)  
Organization: African Centre for Biodiversity  
Country: South Africa

#### **Illicit Financial Flows and Tax Havens**

Presented by Savior Mwambwa  
Country: Zambia

#### **Law from Below and the Right to Say No**

Presented by Akhona Mehlo (Attorney)  
Organization: Legal Resource Centre  
Country: South Africa

**Annexure 8**  
**List of Cases Presented at session 3 of the Permanent Peoples' Tribunal on**  
**Transnational Corporations in Southern Africa (9 - 11 November 2018)**

**Case 1**

The Lonmin/Marikana Case

Coordinated by: Association Mineworkers and Construction Union

Area of operations /Country: South Africa

**Case 2**

The Inga 3 Case

Coordinated by: International Rivers

Area of operations/Country Democratic Republic of Congo

## **Annexure 9**

### **List of Expert Presentation at session 3 of the Permanent Peoples' Tribunal on Transnational Corporations in Southern Africa (9 - 11 November 2018)**

#### **The Role of Transnational Corporations in Africa**

Presented by Prosper Chitambara

Organization: Ledriz Zimbabwe

Country: Zimbabwe

Role of TNCs in super-exploitation and reproducing precariousness and a low wage regime.

#### **Militarization in the DRC**

Presentation by Guillain Koko

Organization: African Coalition on Corporate Accountability

Country: Democratic Republic of Congo

#### **Investment agreements**

Presented by Faith Lumonya

Organization: Southern and Eastern African Trade, Information and Negotiations Institute (SEATINI)

Country: Uganda

How Investment agreements undermine people's rights and sovereignty

#### **Traditional authorities and transnational corporations**

Presented by Prof. Lungisile Ntsebeza

Organization: University of Cape Town

Country: South Africa

The role of traditional authorities in enabling TNC

#### **Consent and The Right to Say No**

Presented by Michael Koen

Organization:

Country: South African

The question of Consent: Why communities need the right to say no

Presented by Wilmien Wicomb

Organization: Independent

Country: South Africa

Establishing a legal basis for the right to say no!