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## Submission in respect of the third cycle Universal Periodic Review of South Africa on the right to an adequate standard of living in South Africa

Jointly submitted by the Legal Resources Centre and the Bench Marks Foundation,  
referred to as the *Don't Forget Marikana Coalition* for the purposes of this report.

## I. Introduction

1. This submission is presented for consideration as part of the Universal Periodic Review (“UPR”) stakeholder report on behalf of the Legal Resources Centre (“LRC”) and the Bench Marks Foundation.
2. The LRC, established in 1979, is a not-for-profit organisation and the largest public interest law firm in South Africa, focusing on human rights and constitutional law. The goals of the LRC are to promote justice, build respect for the rule of law, and contribute to socio-economic transformation in South Africa and beyond. Operating across four cities, with three satellite offices, the LRC’s clients are predominately vulnerable and marginalised, including people who are poor, homeless and landless. The LRC is committed to assisting communities through strengthening knowledge, skills and experience, in order to assist communities claim their fundamental rights.
3. The Bench Marks Foundation is a non-profit, faith-based organisation owned by the churches in South Africa. It is a unique organisation in the area of Corporate Social Responsibility (“CSR”) and monitors corporate performance. Its three goals are: to promote a culture of ethical investments in the churches and faith communities; to monitor multinational corporations operating in Southern Africa and the rest of the African continent to ensure that they meet minimum social, environmental and economic standards; and to promote an ethical and critical voice on what constitutes CSR. The Bench Marks Foundation is committed to providing leadership and advocacy on issues regarding benchmarking of good corporate governance, ethical and socially responsible investment as well as linking people and institutions committed to these ideals.
4. This submission focuses specifically on the right to an adequate standard of living, providing feedback on the recommendations issued at the second UPR cycle in 2012 with a focus on the Marikana massacre that occurred in August 2012. At the previous UPR review hearing, in September 2012, the parties reflected on the Marikana massacre that occurred the previous month,<sup>1</sup> and expressed themselves on the need for steps to be taken that such a human rights violation does not happen again.
5. It is appropriate, four years later, to reflect on progress with regard to dealing with the impacts and remediation of impacts on communities affected by mining generally, and to deal with the South African government’s response to the Marikana massacre and the social conditions of the mineworkers of Marikana.

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<sup>1</sup> Andries Nel, Deputy Minister of Justice and Constitutional Development, stated that this was a time of national sadness regarding the tragic events that occurred at the Lonmin Mine in Marikana in North-West Province. He recalled the words of President Jacob Zuma when he addressed the nation in August 2012, available at: [http://www.upr-info.org/sites/default/files/document/south\\_africa/session\\_13\\_-\\_may\\_2012/a\\_hrc\\_21\\_2\\_hrc\\_report.pdf](http://www.upr-info.org/sites/default/files/document/south_africa/session_13_-_may_2012/a_hrc_21_2_hrc_report.pdf) at 770.

## II. Feedback on recommendations issued at the second Universal Periodic Review cycle in 2012

### *Article 22.1. Right to an adequate standard of living*

6. The South African Government and civil society in South Africa face formidable obstacles and opportunities to address socio-economic standards and livelihoods of the members of South African society, whether they are permanent members of the body politic or guest workers and refugees temporarily resident within the borders of the country.
7. South Africa's history under Colonialism and Apartheid meant that there are huge social inequalities largely related to spatial inequalities and social exclusion resulting from an extravivist mode of economic development.
8. The previous round of the Universal Periodic Review pointed to the challenges and opportunities in relation to the right to an adequate standard of living in South Africa. The recommendations on this area ranged in content but they all pointed to the poverty challenges:
  - 124.108. *Develop further decent work/labour through the comprehensive economic growth (Palestine);*
  - 124.111. *Strengthen its development policies in rural areas, with special emphasis on the access of children and persons with disabilities to services (Chile);*
  - 124.113. *Take effective measures to combat poverty (Iraq);*
  - 124.114. *Maintain and intensify the efforts towards the elimination of poverty and social inequality (Lesotho);*
  - 124.115. *Continue efforts in the fight against social inequality and poverty (Senegal);*
  - 124.116. *Accelerate the implementation of its national strategy for the reduction of the scale of poverty, including by availing itself of advanced international experience in this regard (Uzbekistan);*
  - 124.117. *Continue consolidating essential social programmes in the fight against poverty and social exclusion (Venezuela (Bolivarian Republic of));*
  - 124.126. *To fight against child mortality, and thus implement Millennium Development Goal number four, in particular by improving children's living conditions and their access to adequate food (Germany);*
  - 124.148. *Protect and fulfil migrants' rights, in particular by effectively prosecuting offences committed against them and by improving their living conditions, also through the access to adequate health-care services (Germany);*
  - 124.22. *Consolidate economic initiatives aimed at empowering its people, especially those who were underprivileged under the Apartheid system (Zimbabwe).*
9. The mining industry shaped South Africa in terms of development, including spatial development, power and inequality. The transformation of the mining

sector is necessary and a pre-condition for development under social justice. It is our view that the Mineral and Petroleum Resources Development Act (MPRDA) 28 of 2002 as a whole needs to be restructured and redirected, as it has been diminishing the voice of mining affected communities in policy and practice.<sup>2</sup>

10. We are not pretending that the narrow and limited form of redistribution represented by the intention behind Social Labour Plans (SLPs) and Black Economic Empowerment (BEE) deals begin to address the transformation challenge. In addition, the state or the industry watchdogs such as the Chamber of Mines do not enforce SLPs and many BEE deals are unsustainable from the start or unravel over time.<sup>3</sup>
11. Going back over the conflicts involving communities and mining companies in the last three to five years, there have been repeated public statements and documents alluding to the lack of benefit for local communities from the extractives sector. The monopolisation of power, knowledge and wealth continues up to this day. The denial of voice and a genuine say for poor mining communities in various aspects of mining – from pre, during and post mining – speaks to the denial of rights and freedoms, or a disenfranchisement of these communities.
12. An assessment of the impact of the Mining Charter that informed showed, amongst other issues, general non-implementation of the SLPs of companies, lack of integration with local planning processes and very little impact at a local level. The South African government acknowledges that they will need to appoint inspectors to specifically monitor SLPs.
13. There is a clear identification and acknowledgement that practice and legislation to date has not achieved the desired benefits for communities hosting mining capital. The South African government's approach reveals a worrying overlap whereby the SLP and administrative requirement for the legal licence to operate is also seen as the basis of the social licence to

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<sup>2</sup> The promulgation of the MPRDA in 2002 was intended to usher in a new, more equitable, natural resource management dispensation in South Africa. The product of extensive engagement between the South African government, organised labour (NUM) and the mining sector, the MPRDA vested custodianship of South Africa's mineral and petroleum resources in the State, which is tasked with ensuring the sustainable development of these resources. This, according to the MPRDA's fundamental principles requires, inter alia: "substantially and meaningfully expand[ing] opportunities for historically disadvantaged persons, including ...communities, to enter into and actively participate in the mineral and petroleum industries to benefit from the exploitation of the nation's mineral and petroleum resources"; "promot[ing] employment and advance[ing] the social and economic welfare of all South Africans" and "ensur[ing] that holders of mining and production rights contribute towards socio-economic development of the areas in which they're operating."

<sup>3</sup> The MPRDA makes provision for a number of mechanisms which impose on extractive companies specific minimum standards in relation to employment, housing and community development, timeframes for the attainment of these standards, and reviews to measure progress. These mechanisms are: the Social and Labour Plans; the Housing and Living Conditions Standard for the Minerals Industry; The Codes of Good Practice for the Minerals Industry and The Amendment of The Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry (The Amended Mining Charter).

operate.<sup>4</sup> Companies should adhere to the SLP or have their mining rights revoked, as a matter of administrative law not ministerial pleading. Instead there must be a demonstrated respect of communities through engagement processes that have impact and are based on a consensus approach.

14. Whilst the slow emerging changes to the SLP and BEE regime begin to provide more operational context to sustainability in the minerals regime, they still fall far short of:

14.1 Formalising a right to free, prior and informed consent (FPIC)<sup>5</sup>; and

14.2 Assessing the marginal cost (available mineral rent) of a resource based on the full calculated externalised social environment and economic opportunity costs of a mining operation to assess whether the mining operation is indeed viable as a sustainable development option.

14.3 Allowing communities to see the document and determining the content thereof. This top-down imposition of views of government and the corporations is undemocratic and ineffective.

15. It is likely that the South African government would continue to resist it on the following grounds:

15.1 Providing a community with an effective and on-going veto right over mining would make the investment climate more uncertain.

15.2 The state itself is increasingly eager to become directly involved in mining and would not want to subject itself to such controls. State companies are routinely exempted from legislative requirements as it is. On this point the notion of state mining companies and

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<sup>4</sup> Department of Minerals and Energy Budget Vote Speech by Ms Susan Shabangu, Minister of Mineral Resources, in the budget vote speech on 23 June 2009 raised the issue of communities sharing in benefits: “The role of communities in mining has been less than adequate, with only a few pockets of excellence which we anticipated would demonstrate the value of community participation and would be widely adopted as a model for effective community participation. We remain concerned about the tensions between mining companies and communities in areas where mining activities take place. Such tensions are more pronounced in Limpopo and the Eastern Cape. We believe that communities would not oppose mining if they were meaningful beneficiaries. We recognize that some companies are taking active steps in this regard and encourage those who are not doing so proactively to initiate programs to contribute towards improving the social conditions of the affected communities. Mining companies should take cognisance of the fact that, over and above the legal license to operate, they obtain a social license through cooperation with communities. I therefore implore mining companies to take their commitments in their Social and Labour Plans seriously,” available at <http://www.gov.za/departments-minerals-and-energy-budget-vote-speech-ms-susan-shabangu-mp>.

<sup>5</sup> FPIC implies informed, non-coercive negotiations between investors, companies or governments and communities peoples prior to the development of enterprises on their customary lands. This principle means that those who wish to use the customary lands belonging to communities must enter into negotiations with them. It is the communities who have the right to decide whether they will agree to the project or not once they have a full and accurate understanding of the implications of the project on them and their customary land. As most commonly interpreted, the right to FPIC is meant to allow for communities peoples to reach consensus and make decisions according to their customary systems of decision-making. The standard is recognised in a number of international instruments.

nationalisation is filling the policy gap created by the new dispensation that has failed to benefit affected communities sufficiently.

- 15.3 On the grounds that minerals must benefit all South Africans and affected communities should not have a disproportionate ability to slow this accumulation cycle. There is also the concern that this would slow BEE based accumulation processes and may even have implications for ruling party investment companies such as chancellor house.
- 15.4 The state is actively trying to increase the volume of extraction in the country for reasons of economic growth, revenues etc. FPIC as a process would slow down such a process.
16. The lesson is clear. Self-regulation and administrative discretion do not create a clear platform for the development of affected communities. South Africa, in attempting to create a middle of the road flexible system, has by in large, left communities to fend for themselves. There is not a practiced right to consent, but only a lukewarm duty to consult without clear procedural guidelines and no right to benefit sharing through legislated royalties.
17. The South African government considers the SLP as creating the social to operate. This is not the case. It is part of the legal licence to operate and is characterised by compliance at best but in many instances not even this. The social licence to operate from the perspective of host communities must lie in their right to full FPIC. This should be given legislative force and not ministerial discretion. At all levels of mining, the principle of FPIC must be enshrined in the law and violations must be prosecutable.
18. The emerging approach is one that attempts to apply a voluntary system on mining companies to create benefit for broader sections of the community living around mining areas by semi regulating Corporate Social Investment. This emergent approach at the same time fails to distinguish those sections of the community that are more directly impacted by mining activities. This is apparent in the approach the state has taken to changes in legislation dealing with royalties, proposed amendments to the MPRDA, the stated direction of 'sustainable mining' in South Africa and the amended BEE mining charter document.
19. If there is a crisis in the South African mining industry, it is the extent of social and ecological debt it has amassed. Reconstituting the racial makeup of capital does not address this debt. Adopting third generation CSR techniques based on partnership and consent is a first step in slowing the further accumulation of this debt.
20. If there were a calculation of loss of livelihood and land use; cultural compromises and impacts on women in a shifting pattern of survivalist agriculture during a time of encroaching mining activities; and, other externalised costs of the industry to their host community; against the benefits of the licensing system and the MPRDA for local communities; the balance would no doubt be negative.

21. From a broader Southern perspective, we must warn and recognise the limitations of a planning perspective to transformation. Social theories of change will be confronted with and where appropriate embrace contending actors and conflicting rationalities:
  - 21.1 States which are weak, fragmented and probably corrupt, and state functionaries who will seek to use planning systems for financial and political gain.
  - 21.2 “Civil society” which is not a source of democracy but is fractured by economic and political divisions, may be based on criminal organisations, and functions as an instrument through which claims on the state are directed, often via patron-client relationships and sometimes in violent form.
  - 21.3 Communities or organisations which may choose to engage with the state and assert their demands through court challenges, street demonstrations, and destruction of property rather than through dialogue or collaborative processes.
  - 21.4 New concepts of citizenship that are based on a sense of entitlement and where there is a consciousness of rights but not of responsibilities.
22. In 2012 during the previous UPR, the Marikana massacre at the Lonmin mine was discussed. By way of background, in August 2012, following a miner’s strike for increased pay and subsequent protests in Marikana at the Lonmin mine, South African police killed 34 miners and injured at least 78 others. Significant was the social conditions under which the mineworkers lived
23. A week after the massacre, the President of South Africa, Jacob Gedleyihlekisa Zuma, expressed himself on the tragedy:
 

“The events are not what we want to see or want to become accustomed to, in a democracy that is bound by the rules of law, and where we are creating a better life for our people. We assure South African People in particular, that we remain fully committed to ensuring that this country remains a peaceful, stable, productive and thriving nation that is focussed on improving the quality of life of all, especially the poor and the working class. It is against this background that we uncover the truth about what happened here. In this regard, I have decided to institute a Commission of Inquiry. The Inquiry will enable us to get to the real cause of the incident and to derive the necessary lessons.”<sup>6</sup>
24. On 26 August 2012, President Zuma appointed a Commission of Inquiry to investigate the tragic incidents at Lonmin. Judge Farlam was appointed to

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<sup>6</sup> Statement of President Zuma on the Marikana Lonmin mine workers tragedy, Rustenburg, 17 August 2012, available at: <http://www.thepresidency.gov.za/pebble.asp?relid=6619&t=79>.

head the Commission. On 25 June 2015, President Zuma released the Commission's report.

25. The the Farlam Commission made one recommendation to the Department of Mineral Resources (DMR):

“The Commission recommends that Lonmin’s failure to comply with the housing obligations under the SLP’s should be drawn to the attention of the Department of Mineral Resources, which should take steps to enforce performance of these obligations by Lonmin.”<sup>7</sup>

26. Upon releasing the report, President Zuma stated that he required that the relevant ministers report to him on the recommendations, stating:

“The Commission also criticised Lonmin’s implementation of undertakings with regards to the Social and Labour plans...

The Commission recommends that Lonmin’s failure to comply with the housing obligations under the Social and Labour Plans should be drawn to the attention of the Department of Mineral Resources, which should take steps to enforce the performance of these obligations by Lonmin...

The affected Ministers will study the Commission report and advise me on the implementation of the recommendations.”<sup>8</sup>

27. However, despite the government stating it will implement the recommendations, it is clear that the situation in Marikana has not improved and Lonmin has not built the houses as required under the Social and Labour Plans. As Muleya Mwananyanda, Amnesty International’s deputy director for Southern Africa, recently reported:

“Marikana today is a land of rock dust and muddy water, where thousands of people live in informal settlements without access to electricity, adequate sanitation facilities or running water.”<sup>9</sup>

28. In early September 2016, the DMR reported to Parliament on its investigations. The DMR admitted that Lonmin did not comply with its undertaking in its 2006 SLP to build 5500 houses and in fact had only built three show houses. The DMR stated:

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<sup>7</sup> Farlam Commission Report, Chapter 25, paragraph 1, page 554, available at: <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.

<sup>8</sup> See note 4.

<sup>9</sup> Muleya Mwananyanda, *Marikana: Shame on you, lying Lonmin — houses promised to workers still not reality*, 12 August 2016, available at: <http://mg.co.za/article/2016-08-12-00-marikana-shame-on-you-lying-lonmin-houses-promised-to-workers-still-not-reality/>

“Following the recommendations made by the Farlam Commission, it conducted an inspection focusing on Housing Social and Labour Plan commitments. The outcome of the inspection reveals the following:

- All hostel dwellings have been converted into bachelor, single and family units by the end of 2014 as per the Mining charter targets. This constitutes 776 family units and 1908 single units.”<sup>10</sup>

29. The implementation of the housing backlog pertaining to the SLP commitment of Lonmin is, according to the DMR, progressing however not at the “desired” pace. The DMR is saying that the SLP is being amended to align the housing component to the National Housing Strategy.<sup>11</sup>

30. The failure of the SLP system, the failure of compliance with the SLP standard and the lack of any remedy after four years for those affected are not being addressed. In terms of the original SLP, 5500 family houses would have been built within five years, by 2011. Arguably there has been 12% compliance after ten years. This lack of performance is all the more telling in light of the fact that had Lonmin performed at the time before the Marikana massacre, its workers would have been in better conditions. As evidence leader Mr Chaskalson SC submitted during the Inquiry:

“...instead of 25% of the workers in decent housing and 74% not in decent housing, you would have had 54% in decent housing and 45% not in decent housing.”<sup>12</sup>

31. Neither the mining company nor the South African government is taking responsibility for the renegeing on its undertakings. We attach a letter to President Zuma dated 6 October 2016 requesting that he provide the Republic of South Africa with an update in relation to the implementation of the recommendations.

32. It is emphasised that Lonmin had the resources at the time to provide decent social conditions for its workers. This was revealed when the Farlam Commission investigated the excessive commissions paid to the Lonmin marketing subsidiaries:

“31.1 Over the 2007-2011 period in which Lonmin claims that WPL and EPL paid more than R1.3 billion in ‘marketing commission’ payments to Lonmin Plc (in the form of its SA branch company Lonmin Management Services (Pty) Ltd) and/or its Bermudan registered subsidiary, Western Metal Sales Ltd. Over the period 2008-2011 alone, Lonmin Management Services made an aggregate profit of

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<sup>10</sup> Department of Mineral Resources, *Presentation to the Portfolio Committee on Mineral Resources on Farlam Commission and the steps taken by the Department to deal with the findings*,” Powerpoint presentation, 7 September 2016, slide 6.

<sup>11</sup> Ibid, slide 13.

<sup>12</sup> Farlam Commission Report, Chapter 24, paragraph 36, page 541, available at: <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.

R 643,547,159 on these ‘marketing commissions’ paid by WPL and EPL.”<sup>13</sup>

33. We repeat the finding:

“31.2. Over the period 2008-2011 alone, Lonmin Management Services made an aggregate profit of R 643,547,159 on these “marketing commissions” paid by WPL and EPL.”<sup>14</sup>

34. The question remains as to what the South African government is doing about the problem of transfer pricing and marketing commissions that happen at the cost of the social conditions of the rural poor. The DMR reported on this, four years after Marikana and two years after the Farlam findings:

“...He [Mr F Mokoena, EFF] also referred to the finding of the Commission about the R250 million in the financial outflows of Lonmin. He is aware there was a recommendation to investigate this financial outflow because this criminal act affects the mining industry the most. He asked the Department if it was doing anything to curb these outflows which are costing the country billions of rands.

...

The Minister excused himself and left for a cabinet meeting and stated the DG was capable of dealing with all the questions raised.

The Director General replied to the financial outflow question, stating that work had been done on this by the Department of Trade and Industry and Treasury. Investigations were done by Treasury and actions taken where necessary.”<sup>15</sup>

35. The communities of Marikana and Wonderkop are entitled to be told and hold their government to account to the outflows and non-compliance with statutory standards. The repeated violation of their procedural and substantive social and economic rights remains blight on the record of the South African society.

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<sup>13</sup> Farlam Commission Report, Chapter 24, paragraph 33, page 538, available at: <http://www.sahrc.org.za/home/21/files/marikana-report-1.pdf>.

<sup>14</sup> Ibid.

<sup>15</sup> Farlam Commission Findings: Steps taken by the DMR, Committee Meeting Report, 7 September 2016, pages 3 -4, available at: <https://pmg.org.za/committee-meeting/23217/>.