HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION AND THE ACCELERATION OF FUNDAMENTAL CHANGE

REPORT OF WORKING GROUP 2 ON LAND REFORM, REDISTRIBUTION, RESTITUTION AND SECURITY OF TENURE

ROUNDTABLE 3

"COMMUNAL LAND TENURE IN THE FORMER HOMELANDS"

(Kempton Park, 7 October 2016)

1. INTRODUCTION

Roundtable 3 was held in Kempton Park on 7 October 2016, on the theme of communal land tenure in the former homelands. The Working Group was addressed by three invited experts who presented written papers on different aspects of the theme and then participated in subsequent discussion sessions. The presentations were as follows: **Mr Siyabu Manona** of Phuhlisani NPC on ***The breakdown of land administration systems in the former homelands: lessons and potential remedies for South Africa, based on the Eastern Cape Experience***; **Ms Phililе Ntuli** of the Land and Accountability Research Centre (LARC) on ***Whose Land is it anyway?: A Critical Analysis of the Post-Apartheid Communal Land Tenure Project, drawing on Case Studies from Rural KZN***; and **Ms Nolundi Luwaya** of LARC on ***The Report on Communal Tenure***, a report commissioned by the High Level Panel.

Presented below is a consolidated summary of the issues raised by the presenters, and which emerged during the discussions, arranged by sub-theme rather than by designated speaker. The summary is followed by a brief assessment of the discussion trends and interlinkages between sub-themes, followed by a listing of the legislation (including draft legislation, and policy documents) referred to in the discussion. The report concludes with a collated list of conclusions and recommendations.

2. ISSUES RAISED

- Problematic issues surrounding the question of communal land tenure today have many origins, chief amongst which are the interferences of colonialism and apartheid. The most glaring consequence of these interferences is the continuing tenure insecurity of millions of South Africans living on land in the areas that were once "homelands", whose land rights remain unrecognised. This means that they lack the legal and practical ability to defend their ownership, occupation, use of and access to, their land against interference by others. This is the case even where individuals and families have had undisturbed occupation and use of the land for generations – their legal claims to the land that they inhabit are weak, leaving them susceptible to exploitation and dispossession.
- The colonial and apartheid governments systematically established and maintained a complex legal framework that effectively prohibited black people from legally owning land. Colonial administrators in particular held significantly distorted perceptions of communal land tenure systems, seeing them as wholly collective systems of land ownership that were totally devoid of notions of individual interest. Moreover, they interpreted communal tenure through the common law lens of their own countries in particular their own notions of ownership and, failing to find anything in communal tenure that was familiar, they concluded and declared that ownership was alien to customary law. This opened the way to the approach that saw black people as perpetual tenants on the land they occupied and used; their land rights were of

'second class status'. These rights were generally subservient, permit-based, or 'held in trust' by the government or the SA Development Trust.

- There is scholarship (Okoth Ogendo, Kerr) contradicting these colonial perceptions and describing communal tenure accurately as a system of complementary interests and rights and obligations, based on relationships, and containing aspects of both ownership and communality. For these reasons, decisions about land and rights to land involve negotiation and joint decision-making amongst a range of people and groups. These are 'layered' or 'nested' rights.
- For the post-apartheid government, it was necessary not only to repeal the apartheid laws that had created and fostered the insecurity of people on communal land, but also to "construct a new system….based on a clear understanding of how existing property relations have developed, and why those relations do not satisfy people's needs". In execution of this mandate the government has enacted a list of measures which attempt to comply with the Constitution's requirements. The main pillars of the legal and policy framework are as follows: ***Constitution of the RSA, s25(6)-(9); Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA); Communal Land Rights Act 11 of 2004 (CLARA, now repealed); Communal Land Tenure Policy 2014 (CLTP); Draft Communal Land Tenure Bill (CLTB); Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA); Traditional and Khoisan Leadership Bill (B23-2015, which would replace the TLGFA); KwaZulu Ingonyama Trust Act KZ4 of 1994; Land Rights Bill 1998; Spatial Planning and Land Use Management Act 2013 (SPLUMA); Communal Property Associations Act 28 of 1996 (CPA Act).***
- This legislative and policy framework essentially covers the main aspects of the land debate in South Africa, with the enduring question being: *"why have these measures not worked?"* The question has many variations: *why has IPILRA, which recognises a number of positive rights for rural communities, not been implemented widely?; what caused the invalidation of CLARA?; what are the flaws in the CLTP and the CLTB?; why is there such an outcry against the TLGFA and its likely successor, the TKLB? is the Ingonyama Trust in KZN functioning within the terms of its Act?; why are traditional leaders so dead set against SPLUMA?; what explains official hostility to the CPA Act despite a very positive judicial decision?* **In various ways, these questions were debated in the course of the Roundtable discussions.**
- At the heart of the answers to many of the questions posed above lies the issue of **customary law.** An understanding of the direct relationship between this law and the question of communal tenure is key. The distortions of communal tenure by the colonial and apartheid governments were distortions of customary law. The alarm over the powers granted to traditional leaders by some of the legislation above is essentially a recognition of how far these powers contravene customary law. There are thus at least two (overlapping) dynamics at play here: (i) a colonial and apartheid agenda denying rights of ownership over communal land by its inhabitants; and (ii) an attempt by traditional leaders to move into this 'vacuum' by claiming ownership rights over communal land. The untenability of many of the impugned statutes and policies listed above lies precisely in the apparent support these measures give to this power-grab by traditional leaders.
- Briefly stated, the customary law issue replays age-old debates about distortion, which produced the notions of "official" versus "living" customary law. By all accounts, the core issues in the debate were settled when the *Certification case* and *Alexkor v Richterveld Community* (to name just two landmark decisions) made it clear that the customary law recognised by section 211 of the Constitution was the "living" version, being the norms, adapted to circumstances, that guide the lived reality of people's day-to-day lives. In respect of the two dynamics mentioned above, living customary law dictates that strong rights

over communal land are held by the people living on those lands and that such land does not belong to traditional leaders, whose claim is unknown in living customary law. The corollary of this is that communities have a right under customary law (as well as statutes like IPILRA) to be consulted before any decisions about their land are taken by traditional leaders..

- These issues then lead to an examination of the conduct of state entities like the Ingonyama Trust, whose behaviour appears to contravene living customary law. Such behaviour includes the conversion of ownership rights to leasehold for people living on IT land, the authorising of mining operations without consulting the communities affected, and the routine dispossession of holders of historical land rights.
  Many such groups can demonstrate independent ownership rights. This includes groups who clubbed together to buy land before the enactment of the 1913 Land Act, and others who managed to buy land subsequently through exemptions from the Land Act. In some cases, clans and other groups managed to secure recognition of elected 'Community Authorities' rather than 'Tribal Authorities' when they steadfastly rejected tribal identities during the implementation of the Bantu Authorities Act. Whereas this task is clearer in areas where groups and/or individuals had proof of ownership in the form of Deeds of Grant, it may be less clear where groups may have had strong customary rights that were not recorded by the colonial and apartheid governments.
- Issues around informed consent and the formalisation of land rights bring into relevance the crucial question of land administration and land administration systems which, if properly managed, could provide an inimitable form of empowerment for people made vulnerable by insecure tenure, such as rural communities living on communal land. Land tenure administration systems involve a set of intertwined functions that make them work: juridical, fiscal, enforcement, regulatory, information management. These functions all need to work efficiently together: when they do not, breakdown frequently occurs. Using the Transkei as a case study has revealed the following reasons for breakdown in the former homeland: layers of conflicting and overlapping land rights; ignoring of, and failure to update, registered quitrent titles; forced settlement ("betterment"); broken Permission to Occupy (PTO) systems; broken land allocation procedures; absence of legislation and disregard of existing legislation; multiple land allocations; bifurcation of practice and legislation (customary law; vesting of rights, etc); disarray and decay of land records; traditional leaders fighting SPLUMA.
- Legislation of relevance here (in addition to statutes mentioned above) includes: ***Local Government Municipal Property Rates Act 2004; Municipal Systems Act 32 of 2000; National Environmental Management Act 46 of 1998 (NEMA); Deeds Registry Act 47 of 1937; Expropriation Act 1975; Proclamation R188 of 1969; Subdivision of Agricultural Land Act 70 of 1970; Conservation of Agricultural Resources Act 43 of 1983; Sea Fishery Act 12 of 1988.*** The implementation of these measures is expected to happen in the context of overlapping portfolio responsibilities spread around many different government departments: *Department of Environmental Affairs (DEA); Department of Economic Development Environmental Affairs and Tourism (DEDEAT); Department of Rural Development and Agrarian Reform (DRDAR); Department of Agriculture Forestry and Fisheries (DAFF); Department of Rural Development and Land Reform (DRDLR); Local Government.* There exists no viable forum to co-ordinate these multiple institutional structures.
- To craft a way forward, there is a need to develop a shared national vision for a revamped land administration system, elements of which can be built into IPILRA to enhance its potential as a short-to-medium-term solution. So as not to re-invent the wheel, it is important to draw on global best practice, particularly the many sets of model laws and guidelines developed by the UN and its agencies: the UN

FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (VGGTs); the World Bank fit-for-purpose Solution 2009; the Social Tenure Domain Model (STDM); UN Committee of Experts on Global Geospatial Information Management; the Global Land Tenure Network (GLTN) on the Continuum of Land Rights; the World Bank's Land Governance Assessment Framework (LGAF). There is also no shortage of local developments which can be used as building blocks for a reformed land administration system, especially the GIS-based information systems initiated by different government departments. Among these are: **DRDLR** – National Geomatics Management Services; **DEA** – Environmental Geographic Information System (EGIS), South African Renewable Energy EIA Application Database; **DAFF** – Extension Suite Online; **Department of Human Settlements** Housing Development Agency – *Lapsis;* **StatsSA** – Digital Census Atlas.

3. DISCUSSION

- The three presentations worked well together in outlining the issues surrounding communal tenure, from highlighting the essential attributes of this type of tenure in customary law and its disruption in the service of colonial and apartheid agendas (and the consequent problems of tenure insecurity), to the role of traditional leadership in the mix and the determination that the answer lies in a return to living customary law. These insights on the substance of the problems of communal tenure are ably buttressed by an overarching procedural insight into the breakdown of land administration, the very system that should be empowering residents on communal land to assert their rights.
- More directly relevant to the mandate of the HLP, the presentations all identify the legislation and the policies that operate in this area and come to the conclusion that the legislative and policy framework have so far been ineffective. The reasons for this are identified primarily as bad policy formulation, legislative *lacunae* and (where legislation exist) bad or non-existent implementation. Bad policies (leading to bad law) are identified as arising from uninformed advice and official ambiguity as to whether legislation should come down in favour of the people or of traditional leaders, where opting for the people means the adoption of living customary law and weighing in on behalf of chiefly authority supports authoritarian distortions of customary law with a pedigree going back to colonial agendas. The presentation on land administration goes so far as to decry the opportunity missed by the SA Law Reform Commission in its review of legislation enacted between 1937 and 2004 to transform the statute book in fundamental ways, by accommodating African conceptions of land holding instead of assimilating them under the Roman Dutch law paradigm.
- Prompted by the question-and-answer interaction, the issue of litigation came up for discussion. An example was made of programmes in the Eastern Cape that could not get off the ground because of court decisions and pending court cases. Many of these cases are between government entities: municipalities against one another, or against some government tribunal. The tax losses alone are a significant drain on the provincial fiscus. This discussion drew widespread support for the proposals to develop a strong recordal system, which would act as a buffer against everything defaulting to common law understandings of tenure. A Deeds Office which had the benefit of data enabling it to record countervailing customary rights would be an effective protection against, for instance, the transfer of communal land to itself by Ingonyama Trust in KZN. Indeed, the broader question of "trusts" was discussed, where it was shown that the Ingonyama Trust was in significant part a clone of the SA Native Trust especially on the definition of beneficiaries ("natives" in the case of the latter and "tribes and communities" in the case of the former).

- Also discussed was the issue of securing the rights of households living on freehold land where the title is in the name of someone who is deceased. The difficulty here is how to register the property in the name of a deceased person while avoiding the local power dynamics; might the answer lie in national legislation (which itself would have to avoid being one-size-fits-all) which attempts to strike a balance? These "local versus national" concerns elicited an example from the Eastern Cape which was used to show that national legislation has a role to play in eliminating the silo mentality. The example was that of mining in Xolobeni, where the customary law land rights holders have to be recognised. There is a multiplicity of involved players: the municipality which needs to make zoning decisions; DRDLR which technically holds the land on behalf of the community; COGTA; DEA. Theoretically, any decision on a mining proposal on this land needs all these people and groupings to sit around a table, but this never happens. There is a big gap here simply crying out for national legislation. But sometimes this is not about enacting new legislation, but rather about repeal, rationalisation and consolidation. This line of thinking led to a consideration of the opportunity presented by the mandate of the HLP to propose a different approach to legislative enactment, one that takes a "big picture" approach.
- It was this discussion of the HLP mandate that brought the Roundtable to a conclusion that garnered high levels of consensus around the following points:
    - The idea that the Panel can concretely propose some repeals as well as some new enactments is exciting. This means that by a combination of these approaches, laws can be developed which set out the content of land rights, the procedures for consent, and scrap all other provisions that seek to override these rights, like the consent provisions of the MPRDA. Ultimately one ends up with legislation that goes far beyond simply beefing up IPILRA.
    - Part of the problem is actually the architecture of the government itself, where each department pursues its own "key performance areas" despite everyone understanding that the objective is a shared one. What is needed is a clear statement of the concrete goals to pursue and then effective joint-monitoring structures can be put in place (a strategy which worked to perfection with the inter-ministerial committee during the FIFA World Cup). The exciting part is that the HLP again has the opportunity to help create a template on how to craft legislation aimed at addressing certain historical imbalances.
    - Also, in doing this, Working Group 2 can act as a peg on which to hang other recommendations from the other Working Groups since the matters currently under discussion overlap so strongly with their own mandates.

4. LEGISLATION REFERRED TO IN SUBMISSIONS

Constitution of the RSA, s25(6)-(9); Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA); Communal Land Rights Act 11 of 2004 (CLARA, now repealed); Communal Land Tenure Policy 2014 (CLTP); Draft Communal Land Tenure Bill (CLTB); Traditional Leadership and Governance Framework Act 41 of 2003 (TLGFA); Traditional and Khoisan Leadership Bill (B23-2015, which would replace the TLGFA); KwaZulu Ingonyama Trust Act KZ4 of 1994; Land Rights Bill 1998; Local Government Municipal Property Rates Act 2004; Municipal Systems Act 32 of 2000; National Environmental Management Act 46 of 1998 (NEMA); Deeds Registry Act 47 of 1937; Expropriation Act 1975; Proclamation R188 of 1969; Subdivision of Agricultural Land Act 70 of 1970; Conservation of Agricultural Resources Act 43 of 1983; Sea Fishery Act 12 of 1988; Spatial

Planning and Land Use Management Act 2013 (SPLUMA); Communal Property Associations Act 28 of 1996 (CPA Act); Promotion of Administrative Justice Act 3 of 2000; Land Survey Act No. 8 of 1997; Land Titles Adjustment Act 111 of 1993; Upgrading of Land Rights Act 34 of 1991; Sectional Titles Act 95 of 1986; Ciskei Land Regulations Act; Deeds Registry Act 47 of 1937; Proclamation 26 of 1936; Proclamation 70 of 1922; Proclamation 174 of 1921; National Environmental Coastal Management Act 24 of 2008; Waste Act 59 of 2008;Biodiversity Act 10 of 2004; Air Quality Act 39 of 2004; Eastern Cape Traditional Leadership and Governance Act 4 of 2005; Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA); Municipal Systems Act 32 of 2000; National Heritage Resources Act 25 of 1999; National Forestry Act 84 of 1998

5. CONCLUSIONS AND RECOMMENDATIONS

- **The state should develop legislation to comply with the provisions of section 25(6) and (9) of the Constitution that grants legal recognition to the rights that individuals, families and groups have over communal land in a manner that is consistent with the nuanced ways in which people in communal areas regulate their land rights in practice.**
- **The legislation referred to above should comply with all facets of the state's obligations in relation to right to tenure security of people whose tenure is insecure due to past racially discriminatory laws and practices, namely to respect, protect, promote and fulfil this right. In other words, the legislation developed to give effect to this right should: grant legal recognition of rights to land of people in communal areas (including rights held in terms of customary law), provide protective measures to ensure that these rights are protected against infringement, and aim to strengthen tenure security on an ongoing basis. The protection mechanisms of the legislation should be based on the basic protections provided for in IPILRA, but should not be limited to it.**
- **The legislation referred to above should contain provisions to facilitate clear and transparent land rights investigations or enquiries to determine what rights people hold in practice. The legislation should provide for the registration or recording of people land rights in a manner that would be suitable to the people whose rights are being protected. The record system should be capable of easy verification, it should be affordable and it should be flexible.**
- **The legislation referred to above should offer individuals, families and groups living in communal areas a range of tenure options and grant them a genuine choice in relation to these options. It should also provide clear guidance as to how those choices will be exercised and what mechanisms will be used.**
- **In the process of developing the legislation mentioned above the state should be careful not to rely too heavily on common law principles or notions of ownership, which may be foreign to and distort communal land tenure systems. Instead tenure models should be developed that are in keeping with the existing normative systems used by people in communal areas to manage land in practice. Such a process would be in keeping with the Constitutional Courts remarks in Richtersveld case, where the Court emphasised not viewing customary law or indigenous law through a common law lens. Moreover, the development of legislation in this vein would indicate that the state takes seriously the constitutional recognition of customary law systems on equal footing with the common law.**
- **In the process of developing legislation to give effect to section 25(6), the state should consult meaningfully and in good faith with communities in communal areas. In particular, the state should seek to ensure that the concerns of vulnerable groups, including women, are given adequate**

consideration. The state should also be careful not to give undue consideration to powerful interests groups at the expense of marginalised groups.

- **The state should adopt and implement a range of legislative, administrative, budgetary and practical measures to protect the tenure rights of people living in communal areas, with a particular focus on the rights of vulnerable groups. In this light the state should ensure that it enforces IPILRA effectively, including providing fines to individual or institutions who do not comply with IPILRA, rendering contracts that are inconsistent with IPILRA invalid, and developing sufficient institutional capacity to enforce IPILRA. Moreover, the state should develop mechanisms to monitor transactions in relation to communal land - especially land where it owns acts as nominal owner - to ensure that the land rights of people living on communal land are protected.**
- **The state should take legislative measures to clarify how existing laws interact with each other and should clarify the respective responsibilities and roles of state actors in relation to communal land tenure. This should include ensuring that legislation that impacts on the tenure security of people living on communal land is consistent in its requirements regarding the access and use of communal land.**
- **The state should take immediate steps to strengthen the system of land administration in communal areas, including ensuring that appropriate record keeping systems are put in place. That records are regularly updated and accessible, and that land administration is better resourced and has increased capacity.**
- **The state should recognise the autonomy of the people living on communal land in relation to decision-making about their land. In this light, the state should not elevate the role of traditional leaders in relation to land administration above that of the people, in a way that leaves communities voiceless and reliant on traditional leaders to speak on their behalf. The role of traditional leaders or councils in land administration should be developed in a manner that is in line with and led by how communities conceive of this role in practice. In relation to investments or developments on communal land, there needs to be departure from the idea that all development will benefit rural communities and that they therefore need to quietly accept it. Rather there must be recognition of the fact that communities are not homogenous entities (differently placed people will be affected differently by development) looking to have 'solutions' handed down to them which is why there must be an emphasis on and a commitment to consultation.**

- **Following the prescripts of the Constitution, IPILRA, PAJA and the PFMA, the state should make it its prerogative to probe the administrative practice of the Ingonyama Trust. Amongst the issues to be investigated should be included:**
    - **deeds history searches of land transferred to the ITB, which the Trust claims it does not hold for any tribe;**
    - **the issuing of commercial and residential leases apparently contrary to the requirements of the PFMA;**
    - **the notion of apartheid boundaries which the Trust clings to in confirming customary land rights. These are not only widely recognised as embodying a distortion of customary law, but they trump the pre-existing indigenous land rights. The primary goal of such review should be to interrogate the legality of the Trust's transfers of land to its own name while it is a statutory trust in law. The second goal should be ascertain whether the transfers that have taken place confirm to conveyancing requirements as stipulated in the Deeds Registry Act (93 of 1998)**

- **In respect of land administration, the state should initiate a closer examination of the multiplicity of laws covering land admin across the country, with a view to identifying inconsistencies and contradictions and enacting national legislation to resolve these. This will entail further research on the tapestry of land administration legislation, and while lessons from UN Habitat suggest that a process of developing the full suite of land administration policy and legislation could take between 8 and 15 years, it is recommended that the state embark on this process incrementally, employing the 'pilot' approach as it goes along.**

- **The state should appoint a multidisciplinary team on land administration constituted by international and local specialists to lead the process of crafting of a new vision for land administration and the concomitant realignment of land administration policy and legislation. Central to the role of this body would be the re-imagining of land administration with a view to giving legal expression to African ways of conceptualising land rights, outside of the Roman-Dutch law frameworks. This body could also take leadership in rolling out a few land administration pilots which are representative of the full spectrum of tenure typologies.**
- **The state should put in place an urgent programme to rescue land records of quitrent and PTOs. In addition to archiving, consideration should be given to digitizing the records to ensure accessibility.**

- **The state should now make decisions on the role of traditional leaders in land administration. The policy conundrum around the role of traditional leaders has dragged on for far too long with disastrous impacts on land administration.**
- **It is recommended that the work that is done under the auspices of the Land Rights Management Facility should be reconceptualised as an "adjudication and land rights enquiry" process and should be entrenched into law. This function should be institutionalised within the department and not be wholly outsourced as is currently the case.**
- **A wide range of disparate GIS-based land information systems has been identified, which are run by national government departments and in some cases by municipalities, and the state should initiate discussions for integrating these systems around a new automated land admin system across the country. A national consensus should be developed around which Land Information system should be adopted and who will drive that process. Opportunities for introducing an automated land information management system such the Social Tenure Domain Model (STDM) should be explored, and implications considered. New legislation to support that process would need to be developed.**