

DEVELOPMENTS IN THE FIELD

Remedy and Accountability a Decade after the Marikana Massacre

Jordi Vives-Gabriel^{1*}  and Hugo van der Merwe²

¹Postdoctoral Fellow, IESE Business School, Universidad de Navarra, Spain and Associate Researcher, Institute for Business Ethics, University of St Gallen, Switzerland

²Senior Advocacy and Policy Officer, Global Survivors Fund, South Africa

*Corresponding author. Email: jvivesg@iese.edu

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I. Introduction

August 16th, 2022 marked the 10th anniversary of the Marikana Massacre in Rustenburg, South Africa. This was the worst incident of mass killing by police since the Sharpeville Massacre in 1960 in the heyday of the Apartheid regime. In the first days of August 2012, workers at Lonmin plc, a platinum group metals mining company, went on a wildcat strike demanding a minimum salary of 12500 Rand, *circa* 800 USD, per month and protesting against the poor living conditions they and their families were subjected to in the Marikana vicinity, an area 100 km north of Johannesburg where the mine is located. As days passed, tension escalated leading to the killing of ten people, including three non-striking workers, two security guards, three striking workers, and two police officers. Various attempts to facilitate negotiations with striking workers were turned down by Lonmin management. Instead, Lonmin managers actively engaged in communications with senior political leaders, police officers, and state mining officials to frame the situation as one that required strong and decisive police intervention.¹

Albert Jamieson, the CEO of Lonmin, urged the Minister of Mineral Resources to ‘bring the full might of the state to bear on the situation’.² Also, South Africa’s current president, and board member of Lonmin at the time, Cyril Ramaphosa, urged the police to take ‘concomitant action’ against the ‘criminal protesters’.³ On the morning of August 16th, as had become routine during the strike, workers met around a koppie, a small hill, near the mine to deliberate on the situation. Simultaneously at the boardroom of Lonmin, the police official in charge, Commissioner Lieutenant General Zukiswa Mbombo declared to the media

¹ Raphaël Botiveau, ‘Briefing: The Politics of Marikana and South Africa’s Changing Labour Relations’ (2014) 113:450 *African Affairs* 128.

² Nick Davies, ‘Marikana Massacre: the Untold Story of the Strike Leader who Died for Workers’ Rights’, *The Guardian* (25 May 2015), <https://www.theguardian.com/world/2015/may/19/marikana-massacre-untold-story-strike-leader-died-workers-rights> (accessed 14 December 2022).

³ Ranjeni Munusamy, ‘Cyril Ramaphosa: The True Betrayal’, *Daily Maverick* (27 October 2012), <https://www.dailymaverick.co.za/article/2012-10-27-cyril-ramaphosa-the-true-betrayal/> (accessed 14 December 2022).

'If they resist, like I said, today is a day that we intend to end the violence'.⁴ Later that morning, the police, without any prior warning, opened fire on the protesters, killing 34 mineworkers, injuring at least 78, and arresting 253 in what is known as the Marikana Massacre.

Building on extensive documentation and field research, including more than 40 interviewees with key stakeholders, company management, and victims/survivors, this piece aims to examine the unfinished journey of Marikana victims to achieve remedy and accountability over the last decade.⁵ The Marikana Massacre perfectly illustrates the challenges of fulfilling Pillar 3 of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in a context where the state systematically fails in its duty to protect the victim's right to remedy and the company repeatedly falls short in its remedy responsibilities. In what follows, this piece will first assess the role of the South African state in terms of meeting its obligations to hold accountable those responsible and provide reparations to victims of the Massacre. The authors then examine the role of the company to unpack how and why its efforts to contribute to reparations have kept falling short for the last 10 years. The article concludes on the need for a holistic and coordinated approach to remedy that integrates state and company remedy efforts for victims to enjoy their human right to an effective remedy.

II. The State Dragging its Feet

The scale and brutality of the violence in Marikana shocked the world and provoked a profound crisis in national politics and the mining industry. President Jacob Zuma reacted quickly by appointing a commission of inquiry, known as the Farlam Commission, to investigate and shed light on the events. The Commission sat for two-and-a-half years, collecting testimonies and evidence to eventually publish its finding in a 665-page report in June 2015.⁶ The Commission concluded that the company had not used its best endeavours to resolve the disputes with the strikers and failed to provide sufficient safeguards and measures to protect its employees.⁷ Furthermore, its failure to comply with its housing obligations 'created an environment conducive to the creation of tension, labor unrest, disunity among its employees or other harmful conduct'.⁸

Despite these findings, the Commission did not recommend any criminal action against Lonmin officials, but it did not exonerate them from criminal accountability either. Yet, since the publication of the Commission's report, the state has moved at a snail's pace in fulfilling its duties to protect the victim's right to remedy or in acting on the recommendations issued by the Commission. A decade later, the state has yet to investigate, punish and redress the alleged participation of the company in the massacre. Victims are still waiting for the legal proceeding to take place against the police officers accused of killing the striking workers. Dozens of miners are still on trial accused of murders or attempted murders in the violence that preceded the massacre.

⁴ Thanduxolo Jika, Lucas Ledwaba, Sebatso Mosamo and Athandiwe Saba, *We are Going to Kill Each Other Today: The Marikana Story* (Cape Town: NB Publishers Limited, 2013).

⁵ For more details about the interviews, the local community context and legacy of the conflict, see Malose Langa, Hugo van der Merwe, Modiegi Merafe and Jordi Vives-Gabriel, 'The Marikana Massacre: Repair and Corporate Accountability 10 Years On 2012–2022', *Centre for the Study of Violence and Reconciliation* (2022), <https://www.csvr.org.za/the-marikana-massacre-repair-and-corporate-accountability/> (accessed 14 December 2022).

⁶ Farlam Commission, 'Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising Out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province' (10 July 2015), vol 38978, *South Africa Government Gazette*.

⁷ *Ibid.*, 556.

⁸ *Ibid.*, 557.

Civil cases against the state and the company are yet to be concluded. The state slowly started to settle some of these claims. The 35 families of those killed by the police received compensation for loss of support, but they still wait for a resolution on constitutional and general damages.⁹ The 253 miners unlawfully arrested and detained also reached an agreement on payment with the state recently.¹⁰ Injured miners, however, are still to reach a settlement or to receive any form of social, physical or psychological rehabilitation to deal with the consequences of the wounds and traumas endured. Furthermore, the state has not made any effort to acknowledge its responsibility, nor has it committed to commemorating or memorializing the Massacre. Victims continue to demand a public apology from President Cyril Ramaphosa for his alleged personal complicity in the massacre and have instituted civil claims against him.¹¹

III. The Company's Reparatory Efforts

In the aftermath of the massacre, Lonmin reacted by engaging in several initiatives to support the families of the 44 people who died in the violence of August 2012. These initiatives have continued until today, even though, in 2019, Lonmin was taken over by Sibanye-Still Water, a South Africa-based mining company. The efforts put forward by the two companies include a diverse array of what can be labelled as material and symbolic forms of repair. For example, in material terms, the company offered houses for the widows, bursaries for the orphans, and employment for family members of those who died. From a symbolic perspective, the company also led initiatives acknowledging and commemorating the memory and the suffering of victims through annual commemorations and the erection of a memorial wall at the entrance of the mining site with the names of the 44 deceased. The company, however, has yet to issue an apology or acknowledge its responsibilities.

A priori, these sets of efforts could be labelled as reparations in so far as they are specifically geared towards acknowledging and redressing the wrong inflicted on victims.¹² The company, though, has never used the term reparations to describe these efforts and has always framed them as acts of sympathy and solidarity towards the victims. Still, in substantive terms, they could constitute what the United Nations Working Group on Business and Human Rights (UNWG) defines as part of a diverse 'bouquet of remedies' made available to the victims¹³. Yet, from a procedural perspective, these initiatives have failed to live up to the remedy standards required by the corporate responsibility to respect human rights.¹⁴ For example, the policy assigning houses to widows has been subject to controversy as the company refused to grant them to those who had received

⁹ Interview with Nomzamo Zondo, lawyer of the 35 families. Constitutional damages are punitive damages for depriving someone of their constitutional rights, and general damages are for the non-economic impact of the loss, such as emotional suffering.

¹⁰ Ernest Mabuza, 'Millions Paid to Marikana Families but Disputes Remain Over Millions More'. *Times Live* (17 August 2021), <https://www.timeslive.co.za/news/south-africa/2021-08-17-millions-paid-to-marikana-families-but-disputes-remain-over-millions-more/> (accessed 14 December 2022).

¹¹ Thabi Myeni, 'Marikana Victims Rally in South Africa as Ramaphosa Sued', *Aljazeera* (2 June 2022), <https://www.aljazeera.com/news/2022/6/2/eff-rallies-with-marikana-victims-in-action-against-ramaphosa> (accessed 14 December 2022).

¹² Margaret Walker, *Moral Repair: Reconstructing Moral Relations After Wrongdoing* (Cambridge: Cambridge University Press, 2006) 16.

¹³ United Nations General Assembly, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', A/72/162 (18 July 2017).

¹⁴ Jordi Vives-Gabriel, Wim van Lent and Florian Wettstein, 'Moral Repair: Toward a Two-Level Conceptualization' (2022) 1–31 *Business Ethics Quarterly*. <https://doi.org/10.1017/beq.2022.6>

housing support from other entities. Furthermore, the delivery of the houses has also been subject to long delays.¹⁵

Victims have also repeatedly complained about not being able to decide where their children should be educated, delays in the provision of school materials, and lack of employment opportunities when finishing their studies.¹⁶ Some widows and relatives who were offered a job at the company affirm that ‘there is no reparation in this act of being employed by the mine because we work for these salaries’.¹⁷ Others expressed that there is nothing symbolically significant in being employed by the company as it is a regular practice in South Africa’s mining industry to offer a job to the relatives of those who died in work-related accidents.¹⁸

The lack of space for victim participation has also been challenged by many victims, who perceived Sibanye-Stillwater’s consultation and negotiation efforts as authoritarian.¹⁹ Victims had little room to influence the design and execution of reparations and most of them took what was being offered out of desperation. For example, for some, accepting the job at Marikana implied leaving behind their families living in rural areas to work at the mine. Also, this is most evident in the erection of the wall of remembrance, as families of the 44 were upset with the fact that the monument was placed within the company facilities instead of the site where the massacre took place, and some names on it were spelled incorrectly.

Finally, the scope of the company’s efforts has been strictly circumscribed to the families and relatives of those who died in the massacre of August 16th, 2012, and the days that preceded it. Astonishingly, no attention has been granted to the 78 who were injured, many of whom continue to suffer physical and psychological consequences of the violence that impairs their ability to enjoy a normal life. Hence, the company’s reparative efforts fall short in not being sufficiently participatory, inclusive, adequate, timely or responsive to the needs and expectations of the rights holders.²⁰ As a result, the poor performance in procedural terms of the corporate reparatory initiatives had deleterious consequences for the victims in the form of tensions and divisions among them and further suffering and victimization.²¹

IV. Remedy: The Need for Cooperation Between the State and the Company in Marikana

The UNGPs state clearly that the corporate responsibility to respect human rights requires businesses to avoid causing or contributing to human rights impacts through their activities and address such impacts when they occur.²² Corporate remedy mechanisms are important because they can contribute to the remediation of the company’s adverse impacts through, for example, complementing and supplementing judicial mechanisms, facilitating access to remediation, and preventing the escalation of conflict in those instances where grievances

¹⁵ Langa et al, note 5.

¹⁶ Ibid.

¹⁷ Ibid, 29.

¹⁸ Ibid, 29.

¹⁹ Ibid, 32.

²⁰ United Nations General Assembly, note 13, para 20.

²¹ Langa et al, note 5.

²² United Nations Human Rights Council, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie. Business and Human Rights in Conflict-Affected Regions: Challenges and Options towards State Responses’, A/HRC/17/32 (21 March 2011), para 13.

may not amount or qualify for legal enforcement of legal claims.²³ Yet, these mechanisms are expected to work in cooperation with other actors.²⁴ The case of the Marikana massacre illustrates the difficulties of achieving a much-needed coherent and consistent cooperation between the state and the company. In a context where the state is continuously dragging its feet in fulfilling its remedy and accountability obligations, the initiatives provided by the company, albeit inconsistent, incomplete, and not recognizing any responsibility for the massacre, became the main avenue through which victims found some support in addressing the trauma and consequences of the violence. However, a corporate remedy plan designed and implemented without coordination with the state loses most of its effectiveness. For example, in Marikana, the provision of certain reparative measures (e.g., housing) to a targeted sub-group of victims in a context where basic services and infrastructure are missing and most of the population in Marikana are living in dire conditions in informal settlements, makes the corporate remedies appear counterproductive, with the potential of becoming a source of tension among victims and between the victims and the rest of the community. Also, in terms of symbolic remedies, the state is the only one capable of declaring August 16th a national holiday in South Africa or erecting and maintaining an official memorial museum on the koppie where the Massacre occurred, a long-standing demand by victims and their representatives. Both the state and the company jointly contributed to the escalation of violence through leadership communications and logistics.²⁵ In fact, victims often struggle to differentiate between the roles and responsibilities of the company and those of the state.²⁶ Hence, the provision of any kind of reparatory efforts by the company without the engagement of the state presents victims with a distorted and incomplete message on responsibility for the massacre.

Today, 10 years later, the trauma and consequences are still vivid among the families of those who died and the survivors of the massacre. Victims still look for accountability, truth and reparations. Yet, receiving substantial reparations from the company in a context where criminal and civil claims are still pending to be resolved and apologies and acknowledgment of responsibilities remain absent may only undermine the effectiveness of those efforts and contribute to dissonant and partial narratives of the past events. Hence, in Marikana, only a holistic approach to remedy that is coordinated between the state and the company in a consistent and coherent manner, and with full participation by the victims and survivors, can secure the right to an effective remedy.

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Conflicts of interest. The authors declare none.

²³ United Nations Human Rights Council, ‘Improving Accountability and Access to Remedy for Victims of Business-related Human Rights Abuse through non-State-based Grievance Mechanisms. Report of the United Nations High Commissioner for Human Rights’, A/HRC/44/32 (19 May 2020), para 6.

²⁴ *Ibid*, para 22.

²⁵ Farlam Commission, *note 6*.

²⁶ Langa et al, *note 5*.