

Written contribution from African Civil Society and Faith-Based Organisations to the Intergovernmental Working Group on Transnational Corporations and Human Rights, on the Third Revised Draft of the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with regard to Human Rights

Following the Note Verbale of 2nd of March 2023 released by the Office of the United Nations High Commissioner for Human Rights.

This document is a joint submission from 17 African organisations and 8 Pan-African or regional networks, namely:

Akina Mama wa Afrika (Pan-African organisation with ECOSOC status); **Justiça Ambiental JA!** (Mozambique); **Centre for Human Rights**, University of Pretoria (South Africa); **African Coalition for Corporate Accountability (ACCA)**; **Centre for Applied Legal Studies (CALs)**, University of Witwatersrand (South Africa); **Environmental Rights Action / Friends of the Earth Nigeria ERA/FoEN** (Nigeria); **Jeunes Volontaires Pour L'environnement (Côte d'Ivoire)**; **Human Rights Defense Club** (Cameroon); **Youth Initiative for Land in Africa (YILAA)**; **Research and Support Center for Development Alternatives - Indian Ocean - CRAAD-OI** (Madagascar); **Friends of the Earth Ghana**; **Les Amis de la Terre Togo**; **FIDEP Foundation** (Ghana); **WoMin African Alliance**; **Africa Europe Faith Justice Network (AEFJN)**; **Symposium of Episcopal Conferences of Africa and Madagascar - SECAM-JPDC**; **Mining Affected Communities United in Action - MACUA** (South Africa); **Women Affected by Mining United in Action - WAMUA** (South Africa); **Zimbabwe Environmental Law Association - ZELA** (Zimbabwe); **Legal Resources Foundation Trust - LRF** (Kenya); **Southern Africa Campaign to Dismantle Corporate Power** (Southern Africa); **ALTERNACTIVA - Acção Pela Emancipação Social** (Mozambique); **Friends of the Earth Africa - FoEA**; **Uganda Consortium on Corporate Accountability - UCCA** (Uganda); **Catholic Parliamentary Liaison Office - CPLO** (Zimbabwe).

INTRODUCTION AND GENERAL COMMENTS

We, as African civil society organisations and networks comprising several social movements and collectives would like to reinforce our deep support and commitment to the ongoing process of negotiations towards a United Nations legally binding instrument to regulate the activities of transnational corporations (TNCs) under Human Rights law. This important initiative shall ultimately help to close the legal loophole through which TNCs, across their powerful, complex and opaque global value chains, are able to avoid accountability when they commit or contribute to Human Rights violations.

We recognise that progress has been made since the beginning of the negotiations, especially with regard to the involvement of States and civil society organisations, and their important contributions to the current process of elaborating a legally binding

instrument to regulate the activities of transnational corporations. The dedication of many States and civil society organisations to this process are reflected in the text that is now the 3rd Revised Draft with comments from the 7th and 8th sessions of the OEIGWG. We would like to acknowledge and appreciate the commitment and proactive spirit of the African Group of states in these negotiations, and of several African states, who have been participating with a constructive approach and providing important contributions to strengthen the text of the LBI. We would also like to note that the 3rd Revised Draft with comments from States during the 7th and 8th sessions is the only legitimate basis for negotiation. Accordingly, our inputs refer only and exclusively to this text. We reiterate here our strong rejection of the Chair's informal proposals presented at the 8th session, in line with the statement delivered by the African Group during the 8th session and reiterated by Namibia during the 52nd session of the Human Rights Council. The Chair's informal proposals are in contradiction with the agreements and methodology of this OEIGWG until date and represent an attempt to undermine and derail the democratic character of the process.

Notwithstanding, we note that the 3rd revised draft still lacks robust mechanisms to ensure that Transnational Corporations (TNCs) respect Human Rights in their operations throughout their global production chains. In the current draft, the establishment of direct obligations and not mere responsibilities to companies continues to be avoided, assigning them solely to the States, even though it is well known that most States, national jurisdictions, lack the necessary legal-administrative capacity to adequately regulate TNCs, protect people, communities and the environment in the face of TNCs and their extensive global production chains. To put an end to this impunity, we need action at the international level and within the framework of International Human Rights Law.

We note with great concern the growing influence of powerful corporations and their representatives in the negotiation process of the Treaty, aimed at preventing or delaying the adoption of the Treaty and / or weakening its content. We condemn this influence, and demand that adequate measures are taken to prevent corporate pressure and or corporate capture of the process considering that this is a negotiation within the United Nations Human Rights Council. It is encumbered on the Council to ensure that the negotiation and associated processors are fair and place Human Rights above any other interests.

We call on States to defend the progress so far made and the positive elements that are currently included in the third revised draft, such as the prohibition of *forum non conveniens*, the inclusion of the principle of *forum necessitatis*, and important mechanisms of access to justice for the affected communities (applicability of the law of the domicile of the affected communities, collective complaint mechanisms, legal aid, release from the payment of legal costs, fund for support to the affected communities). We urge all States to support these progressive provisions and ensure that they be kept in the text, and to work constructively and collectively to develop these further.

To ensure a strong, effective and applicable LBI, we recommend the improvement of the current revised draft around the following aspects:

- The LBI text must clearly delimit its scope, including within it TNCs and all the entities across their global production chains, according to the mandate established by Resolution 26/9. It is important to ensure that all the entities across the global value chains of the TNCs are covered by this LBI, and clearly establish the responsibility of the parent companies for the violations committed along these chains;
- The LBI must establish direct obligations for TNCs, which must be different and separate from States' obligations. The need for the LBI to include direct obligations for TNCs has been defended in each negotiation session by some states and many legal experts;
- The LBI must use the word "violation" alongside the existing term "abuse" in a manner consistent with the rest of the Human Rights instruments. While it is true that TNCs can commit abuses, it is also true and incontestable that these entities often violate the human rights of people, communities and nature's rights;
- As it becomes more and more clear that international investment law can impact the protection of Human Rights and undermine States' ability to take bold and necessary actions to protect their peoples, the environment and the climate, it is crucial that this LBI clearly reaffirms the primacy of international human rights law over any other international legal instruments and, in particular, over trade and investment agreements;
- The LBI must provide strong mechanisms against corporate capture, by strengthening the provision about undue influence of the private sector in human rights policies.

Finally, we reaffirm that the centrality of affected peoples' voices must be guaranteed throughout the whole process of drafting, negotiating and implementing the future LBI, and not the perspective of the perpetrators of Human Rights abuses and violations, as already established in International Human Rights Law.

We are confident that our contributions and other contributions from States and civil society actors committed to putting an end to Transnational Corporations' impunity will support States, in particular African States, to shape their positions on the process of negotiations, and ultimately be incorporated in the 4th revised draft of the LBI.

PROPOSED AMENDMENTS FOR THE ARTICLES

Preamble

Paragraph 11: The liability of TNCs should apply regardless of whether the TNCs have committed the act directly or indirectly. Finally, a reference to the global production chain must be added. [We support the amendment proposed by Cameroon and South Africa:](#)

PP11: Underlining that transnational corporations and other business enterprises of transnational character, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect all human rights, including by preventing or avoiding human rights violations that are committed all along its global production chains, directly and indirectly linked

to their operations, products or services by their business relationships.
(Cameroon, South Africa)

Moreover, in order to strengthen the provisions of the preamble, we propose to add a paragraph that reaffirms the primacy of human rights over investment and trade agreements, and as such [we support the new paragraph as proposed by Palestine](#):

PP11 bis: To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements. (Palestine)

Paragraph 18: We also suggest the addition of a paragraph relating to the obligations of TNCs with regard to their economic might and their decisive influence on the respect of human, labour and environmental rights. [We support the two proposals made by Cameroon](#):

(PP18 ter): Stressing the growing economic might of some business entities, in particular transnational corporations, and their particular responsibility and impact on human, labour and environmental rights. (Cameroon)

(PP18 quarter): Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations are different, exist independently and in addition of the legal framework in force in the host and home States. (Cameroon)

It is also necessary to include a reference on the issue of corporate capture, inspired by the WHO Framework Convention on Tobacco Control (article 5.3):

Proposed new paragraph: Underlining that in setting and implementing their public policies related to the regulation of TNCs with regards to human rights, State Parties shall act to protect these policies from commercial and other vested interests, and from undue interference and influence by TNCs.

Article 1: Definitions

Paragraph 1.1: Definition of victims: We propose to use the term “affected communities and individuals” instead of or in parallel with the term “victims”. This term better underscores the protagonism of the people affected. Moreover, the term “abuses” should be replaced for violations.

Paragraph 1.2: The proposal to add the term ‘violation’ next to ‘abuse’ must be incorporated and standardised through the next draft, and as such [we support the proposal made by Cameroon](#):

1.2: “Human rights violation” shall mean any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment. (Cameroon)

Paragraph 1.3: Regarding the definition of “business activities”, it is important to maintain accordance with Resolution 26/9 which focuses on TNCs and other business enterprises (OBEs) of transnational character. In this regard, throughout the treaty, business activities are to be understood as activities carried out by “transnational corporations and other business enterprises of transnational character”. [We support the proposal made by Cameroon:](#)

1.3: “Business activities” means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by **transnational corporations and other business enterprises of transnational character (natural or legal person), which can be private, public or mix, a natural or legal person, including State-owned enterprises,** including financial institutions and investment funds, joint ventures, ~~and any other business relationship undertaken by a natural or legal person.~~ This includes activities undertaken by electronic means. (Cameroon)

Paragraph 1.5: Definition of business relationship: it is necessary to strengthen this definition by: 1) linking it to other mechanisms which extend legal liability (not just due diligence) along the entire global production or value chain in question, including instruments able to balance the asymmetry regarding the burden of proof; and 2) defining the global production or value chains which are the pillars of the transnational architecture and not conditioning its recognition to the provisions of domestic law. [We support the proposal made by Palestine, with an additional sentence at the end:](#)

1.5: “Business relationship” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, entities in the value and supply chain, any non-State or State entity linked to a business operation, product, or service even if the relationship is not contractual, as well as including activities undertaken by electronic means. **The business relationship shall include financial entities as investors, shareholders, banks and pension funds that finance the activities of TNCs.**

Article 2: Statement of purpose

Paragraphs 2.1.b, c: In the paragraphs on prevention, it is necessary to reiterate the importance of regulating TNC’s by establishing direct and binding obligations and responsibilities vis a vis human rights, accompanied by necessary implementation mechanisms.

Amendment: b. To clarify and ensure respect and fulfilment of the human rights obligations of business enterprises, c. To prevent and avoid the occurrence of human rights violations in the context of business activities **by establishing specific, binding and concrete obligations to respect human rights for TNCs, in addition to States’ obligations, and by creating effective and binding mechanisms of monitoring and enforceability.**

Article 3: Scope

Paragraph 3.1: With the formulation “This LBI shall apply to all business activities, including business activities of a transnational character”, article 3 departs from the mandate of the Working group (Resolution 26/9). Therefore, as already said, it is necessary to harmonise throughout the future legally binding instrument the terms used when referring to TNCs and other enterprises of transnational character, and not to any type of enterprise. Otherwise, the coherence and efficiency of the Treaty will be compromised. As such, [we propose to combine the amendments proposed by Egypt, Pakistan and Palestine, Namibia, as follows:](#)

Amendment: This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character along the value chain.

Article 4: Rights of victims

The title of this article is incomplete since the article does not just include rights of the victims but also rights that belong to all individuals and communities threatened or affected by corporate harm, even if they have not yet been declared as victims. Therefore, [we support the proposal by Cameroon](#) to change the title of this article to: **Rights of Affected Individuals and Communities/Right of victims**. The respective changes should be included throughout the article, changing the word victims or adding the term affected individuals and communities.

Paragraph 4.2. f: The right to access information should be further elaborated to include stronger requirements for the disclosure of information in order to facilitate legal proceedings. In particular, affected communities and individuals should have access to information regarding the different legal entities linked to the parent company so as to facilitate the determination of liability. [The amendments proposed by Palestine and Cameroon, Namibia are both very important, and as such we propose to combine the two as follows:](#)

Amendment: be guaranteed access to legal aid and information held by businesses and others and legal aid relevant to pursue effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure;

To strengthen article 4, two additional paragraphs should be included:

Proposed new paragraph 4.2.h: be guaranteed with access to independent technical advisory mechanisms that facilitate access to impartial evidence regarding the harm or risk of harm caused by companies;

Proposed new paragraph 4.4: Affected individuals and communities shall have the right to request State parties adopt precautionary measures related to serious or urgent situations that present a risk of irreparable harm pending the resolution of a case **as, for instance, in cases of risks of environmental harm.**

Finally, all [amendments proposed by the Plurinational State of Bolivia](#), and supported by several States, on the inclusion of peasants' rights throughout the articles, should be accepted and incorporated into the future Treaty.

Article 6: Prevention

The article on prevention is a pillar of the future LBI, and an article where direct obligations should be imposed on TNCs, in addition to and separated from the obligations listed for States. Furthermore, it should ensure that due diligence is an obligation of results and not only of means.

Paragraph 6.1: This article should explicitly include the obligation to repair human rights violations and should include the entities in the economic groups and production chains of the TNCs.

Amendment: States Parties shall regulate effectively the activities of transnational corporations and other business enterprises of transnational character within their territory, jurisdiction, or otherwise under their control. For this purpose States shall take all necessary legal and policy measures to ensure that transnational corporations and other business enterprises of transnational character respect all internationally recognized human rights and prevent, remedy and repair human rights violations throughout their operations, including through their business relationships and global production or value chains.

Furthermore, [we also support the proposal made by Cameroon](#):

6.1.bis: In order to comply with their obligations to respect, protect and fulfil the rights of this instrument, States parties shall adapt their administrative law to prevent the authorization of business activities of transnational character that would not meet the standards of human rights protection provided in this Legally Binding Instrument. States shall adopt higher standards in their own business relationships, in particular but not limited to public contracts, public-private partnership services and not enter into any type of collaboration with transnational corporations and other business enterprises of transnational character condemned for human rights violations. (Cameroon)

Paragraph 6.2: This article could be reformulated to be imposed directly on TNCs, without the need of passing a national law. It should include an obligation to publish a mapping of the possible risks and gendered impacts, i.e. the companies should publish explicitly the list of activities, countries and individual projects that are identified as posing risks to human rights, women's rights and the environment. It should not only include the duty to "take appropriate legal and policy measures", but also the duty to

“implement effectively”, as many companies already have due diligence procedures, but only on paper. This obligation of effective implementation should fall on the parent or outsourcing companies and they should be responsible for this effective implementation throughout their whole global production chain and their business relationships. [We therefore support the proposal from Cameroon:](#)

6.2 bis: Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships. (Cameroon)

Paragraphs 6.4.c and 6.4.d: [We support the proposal from Cameroon](#) to move 6.4(c) and 6.4(d) to a new provision (6.3 bis.). In this article, it would also be necessary to establish the expression “consent”. In addition, the right to free, prior and informed consent must extend beyond indigenous communities and be understood as:

- the right to be previously informed about the risks related to the activity before the company is installed, in a timely manner and accessible language;
- the right to be protected from any pressure or harassment and to be able to freely express your concerns and demands about a project or company;
- the right to say no, that is, a veto right against the installation of a new company or project if they consider that it will not benefit the local population and represents a risk to their rights.

As such, [we support the proposal from Palestine, South Africa:](#)

6.4.c: Conducting meaningful consultations - in line with principles of free, prior and informed consent and throughout all phases of operations - with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas, such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests - where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless it is for the benefit of the oppressed population; (Palestine, South Africa)

Article 7: Access to remedy

We welcome the inclusion of article 7.3.d preventing the use of the doctrine of *forum non conveniens*. However, we propose deleting the term “*appropriate cases of human rights abuses*”, which is wrong (as we are talking about human rights violations) and is also vague and open for interpretation. [We therefore support the proposal made by Palestine:](#)

7.3.d: Removing legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in the courts of another State Party in all

appropriate cases of human rights abuses and violations resulting from business activities in particular those of a transnational character. (Palestine)

With regard to paragraph 7.5 on the reversal of the burden of proof, we consider that this investment should be considered a right of the affected individuals or communities to ensure both access to justice and due legal process. In addition, the term appropriate cases should be withdrawn, in addition to the express need in accordance with national jurisdictions. We recall that the reversal of the burden of proof is a way of ensuring equality of arms in the judicial process, eliminating the barriers that exist to access justice.

In order to strengthen the article, we propose to include an article with the principle of *in dubio pro persona*:

Proposed new paragraph 7.7: States shall guarantee that if there is any doubt about the implementation of the LBI, people and communities, particularly women and youth, that have been or are affected or threatened by the activities of transnational corporations and other business enterprises of transnational character will enjoy the widest protection of their rights.

We also propose to include an article of precautionary measures:

Proposed new paragraph 7.8: States shall make available mechanisms to allow affected communities and persons, particularly women and youth to demand precautionary measures to prevent harm.

Article 8: Legal liability

The whole of the article should be modified to include the violations committed by legal persons outside the territory through their global production chains. It is also necessary to list the obligations of the TNCs, which, in case of non-compliance, will entail their liability. This article should also explicitly state the need for administrative, civil and criminal regimes of liability. Criminal liability is necessary since civil convictions are not sufficient and do not act as a deterrent. [We also support the following proposals made by Palestine:](#)

8.1: States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability including joint and several liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses and violations that may arise from actions or omissions in the context of their own business activities, including those of transnational character, or from their business relationships. (Palestine)

8.3: States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions where legal or natural persons conducting business activities have caused or contributed to human rights abuses and violations - such as withdrawal of licenses, termination of contracts for company projects, or inclusion on a prohibited list of companies for business. (Palestine)

Paragraph 8.8: The expression ‘Subject to their legal principles’ should be deleted.

A key provision is missing in Article 8: one that establishes the joint responsibility of the different companies that participate in the violation of human rights. [We therefore support the proposal made by Palestine:](#)

8.10 bis: All companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibilities for human rights abuses in which they are involved. (Palestine)

A paragraph to establish TNCs obligations and responsibility should also be added:

Proposed new paragraph 8.11: TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, whether home states, host States or States affected by the operation of TNCs.

To this end: a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.

b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities - as the case may be.

c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.

Article 9: Adjudicative jurisdiction

It is crucial to strengthen provisions widening the jurisdiction of courts to judge human rights violations committed by TNCs. [We therefore support several proposals made by Palestine and South Africa, namely:](#)

9.1: Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses or violations covered under this (Legally Binding Instrument), shall upon the victims and their family’s choice, vest in the courts of the State where: (Palestine, South Africa)

9.2: Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal or natural person conducting business activities of a transnational character, including through their business relationships, is considered domiciled including through their business relationships and global production chain at the place where it has its: (Palestine)

9.3: Courts vested with jurisdiction on the basis of Articles 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of forum non conveniens, to initiate proceedings in line with Article 7.5 of this (legally binding instrument). (South Africa)

Article 10: Statute of limitations

Paragraph 10.1: We propose to delete the reference to the most serious crimes and to add a reference to labour rights, women's rights, environmental norms and climate obligations.

Article 11: Applicable law

Article 11 does not allow for a clear resolution of conflicts between different national legislations or between international human rights law and trade and investment law for example. It should be explicitly stated that the choice of applicable law should be the choice of affected communities and persons and/or the law most protective of victims' rights. The article 11.2 allows the victims' choice but it limits their options.

Article 14: Consistency with international law and principles

Paragraph 14.5.a.: This paragraph should be modified to guarantee the primacy of this Treaty (when it guarantees greater protection of Human Rights) and Human Rights over any other trade or investment agreements.

Amendment: any existing bilateral or multilateral agreements, private-public partnerships and contracts, [...] shall be interpreted and implemented to ensure the primacy of human rights, in a manner that will not undermine or limit their capacity to fulfil their obligations under this LBI and its protocols, as well as other relevant human rights conventions and instruments.