

**LAWYERS FOR HUMAN RIGHTS' COMMENTS AND AMENDMENTS TO THE REVISED DRAFT LEGALLY
BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES
WITH REGARD TO HUMAN RIGHTS**

4 March 2020

A. Introduction

1. Lawyers for Human Rights (LHR) is encouraged by the continuity of the process for an International Legally Binding Treaty on Business and Human Rights. The Revised Draft, released on 16 July 2019 and presented to the 5th session of the Intergovernmental Working Group (Working Group), presents some important changes, is a far more coherent text than its predecessor and shows a willingness to continue promoting the development of a Binding Treaty which Lawyers for Human Rights (LHR) believes to be undeniably positive.
2. Lawyers for Human Rights (LHR) is an independent human rights organisation with a 40-year track record of human rights activism and public interest litigation in South Africa. LHR is committed to seeking social justice through courts, contributions to progressive policy and legal reform, support for community mobilization and education, and to coalition-building around critical constitutional and human rights issues.
3. The work of LHR's Environmental Rights Programme is focused principally on the impacts of mining on surrounding communities, and in particular, those communities that host operations on their land. LHR's efforts in this respect include legal representation, community education, sustained engagement with the state and advocacy efforts within regional and international fora to promote improved, human rights-focused extractive industry policy. It is a priority for LHR that these advocacy efforts should be based on the lived experiences of mining community clients, in order that recommendations and outcomes are responsive to the realities of those most directly

impacted by trans-national corporations (TNCs) in South Africa. While we do not speak for our clients, our history of engagement with and representation of these communities suggests that we are well-placed to comment on the substance of the Revised Draft.

B. Primacy of Human Rights

4. The primacy of international human rights law over any other international legal instruments or agreements is an established principle of the Working Group. However, the Revised Draft once again fails to recognize the primacy of human rights obligations over trade and investment agreements. LHR supports the inclusion of such a provision, which would build on UN Guiding Principle 9 and its commentary and General comment No. 24 (2017) on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. We believe the next draft should be explicit in ensuring compatibility between the Legally Binding Instruments and other obligations undertaken by States Parties under bilateral or multilateral agreements.

C. Scope

5. We previously expressed concern at the narrow scope of the 'Zero Draft', which was concerned with 'business activities of transnational character' (see its Article 10, for instance), and only those. LHR supports the approach to scope that Professor Surya Deva and Professor David Bilchitz have expressed, which they term the "hybrid approach"—this involves, initially, stating a general principle that all businesses or corporations, no matter their nature or form, have obligations to respect, protect and fulfil human rights. Then, having recognised this widespread human rights responsibility, many of the operational provisions of the Treaty can focus on multi-national corporations and solving the problems of international law that emerge with respect to human rights.
6. We note that Article 3 of the Revised Draft appears to accept a broadening of the scope of the Treaty, stating that the Treaty "shall apply, except as stated otherwise, to all business activities including particularly, but not limited to, those of a transnational character." We welcome this approach, by which existing duties of States in relation to domestic companies operating within

their jurisdictions remain, while also creating new obligations relating to cross-border activities of companies.

7. We similarly welcome the move away from reference to “for profit” activity. We previously contested the inclusion of this definition in reference to state owned enterprises, which would appear to escape liability, with significant consequence for impacted communities in the African context in particular.
8. We do however note that the definition of business activities is limited to “any economic activity of transnational corporations and other business enterprises”. This could be read as essentially only those business activities of a transnational character, which despite the intention of Article 3 has created vagueness and confusion in what has become a contentious debate and needs clarification for consistency.

D. Direct Obligations

9. The Revised Draft does not take into account the direct obligations of corporations to respect human rights and their responsibilities to prevent violations and instead requires the State to legislate measures to prevent violations of human rights by businesses and to enable access to remedies for victims of human rights violations.
10. LHR continues to argue for more explicit direct corporate obligations, particularly given the African context, where corporations and particularly the extractive industry play so influential a role in society in terms of commercial activity, impacts on communities, and basic services provision. There is a strong argument that this must include a positive contribution and direct obligation to communities in which such corporations operate.
11. Consequently, we favour instead an approach which recognizes that corporations have direct obligations flowing from human rights at the level of international law. This would mean that there is no need for the State to impose those obligations.

12. This more ambitious approach can be seen in the African Charter, which does not only require corporations to respect human rights, but also sets out direct and indirect negative obligations as well as certain positive obligations on companies, particularly in relation to transparency, the duty to adequately inform and substantively consult with affected people, and to contribute to development of host communities.

E. Jurisdiction

13. LHR has previously supported the argument for both an expansion and clarification of the jurisdiction provision, noting that jurisdiction has historically functioned as a critical obstacle in respect of access to justice, particularly for marginalized communities and individuals.
14. We note that the Revised Draft has included the word “adjudicative” to the term jurisdiction, signifying a more centred approach to the jurisdiction of courts to hear claims brought by victims of human rights violations and abuses in the context of business activities. This eliminates any confusion with prescriptive or legislative jurisdiction, which concerns the ability of states to prescribe laws for persons and their(?) conduct abroad, or enforcement jurisdiction, which concerns the ability of states to ensure that their own laws are complied with.
15. We support adjudicative jurisdiction as an essential element of access to remedies by victims, as it gives them the means for articulating grievances to be heard by a competent court, based on access to information, witnesses and other necessary evidence, to pursue a claim. It also ensures the enforcement of a judicial decision.
16. We further welcome the inclusion of the place of domicile of the victims as a third element to establish jurisdiction. This broadens the scope of the protection of victims, allowing them to pursue their case where they live, eventually reducing litigation costs and facilitating access to justice. Additionally, the fact that the Revised Draft mandates States to recognise the jurisdiction of the court where the defendant is domiciled will avoid the use of the doctrine of *forum non conveniens* in cases covered under Article 7.

F. Prevention

17. We welcome the extension of the obligation on states to impose due diligence obligations on all corporations (though, as mentioned in relation to scope, the definition of business activities appears to confuse this intention). We also welcome the focus of the Revised Draft on violations and abuses rather than simply impacts. Exactly how we determine whether a violation or abuse has taken place however remains vague given the lack of reference to the obligations of corporations.
18. We are particularly concerned about article 5(3)(b) which requires ‘meaningful consultations with groups whose human rights can potentially be affected by the business activities’. In our view, the standard should not be consultations but consent. Article 10 of the UN Declaration on the Rights of Indigenous Peoples specifically mentions such consent. Similarly, the General Comment no. 24 of the UN Committee on Economic, Social and Cultural Rights specifically mentions at para 12 that ‘State parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights’. We do not believe that the draft treaty should take a step backwards in international law by recognizing only that consultations should take place; rather, free prior and informed consent should be required.

G. Inclusion of Vulnerable Groups

19. Numerous stakeholders have emphasized the need to clearly define victims and their rights, with the strongest voices focusing on human rights defenders, victims in conflict zones and a need to ensure that the treaty reflects a clearer gender lens throughout its text.
20. While we acknowledge and welcome efforts to protect individuals defending human rights in the context of violations by corporate entities in Article 4(9) of the Revised Draft, this Article should explicitly mention human rights defenders and refer to States’ obligation to: (a) guarantee in all circumstances, the integrity of all human rights defenders, including trade unionists; (b) protect human rights defenders from any unlawful interference with their privacy and from any form of threat, attack or criminalization; and (c) provide victims and human rights defenders, including

women human rights defenders, appropriate access to information at any time in relation to business activities.

H. Mutual Legal Assistance

21. We are concerned, with regard to mutual legal assistance, about the provisions in Article 10(10) which allow substantial leeway for some states to deny the recognition and enforcement of a foreign judgment and, particularly, to allow defendants within that jurisdiction to escape liability. We are particularly concerned with Article 10(10)(c) which offer extremely wide grounds to deny such recognition.
22. Article 10(11) also contains curious wording about mutual legal assistance being refused if the violation ‘would be contrary to the legal system of the requested State party’. In our view, this offers too large a scope for state parties to refuse such assistance and should be removed. Such a refusal should only be allowed if the claim fails to disclose a prima facie case that there has been a violation of an internationally recognized fundamental right.

I. Treaty Enforcement/monitoring mechanism

23. One of our most pressing concerns relates to remedy; the Revised Draft states its purpose to “ensure effective access to justice and remedy for victims” and yet, like the Zero Draft, it fails to provide a clear, effective path to remedy. Despite prolonged debate on the topic, the Revised Draft appears to rely on state-level implementation as a mechanism for remedy, without providing an international remedial mechanism.
24. From our perspective, the need for some sort of treaty oversight body or mechanism is critical to ensuring the efficacy of the treaty over the long term.

J. Conclusion

25. Thank you for the consideration of our submission. We look forward to participating in continued discussions in this respect. Should you have further queries, please do not hesitate to contact Michael Clements at michael@lhr.org.za or Robin Lenahan at robin@lhr.org.za.