Comments on 3rd Revised Draft Treaty Business and Human Rights from South African Civil Society Organisations

We commend the release of the 3rd Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (henceforth, 'Treaty'). Whereas, some refinements and improvements have been made on earlier drafts of the Treaty, there still remain key areas in need of strengthening to ensure that the language and text of the Treaty is effective enough to address the various areas of corporate abuses and violations experienced globally--especially in the developing world. Overall, the 3rd draft retains its general structure and makes some changes to the language with some rearrangement of articles.

As key members of African civil society, we strongly support the continuation of the existing process and refinement of the existing draft. We reject the need for starting any new process or the need to fundamentally change the text. This text is effectively taking forward the UNGPs, in both the areas of prevention and access to remedy. It involves rendering human rights due diligence mandatory and addressing obstacles to access to remedy. We thus reject any attempt to weaken these elements and ask State Parties to continue with this existing process and reach finalization of the text. In doing so, they will be doing the work of the UNGPs.

This commentary outlines several improvements we believe have been made as well as issues in the Treaty that we believe are important to address before adoption – in some cases, we re-iterate points we made previously relating to the 2nd draft of the Treaty. While this instrument is not perfect and there are still issues and concerns that ought to be addressed, we call on States to meaningfully engage in the finalising of this treaty. In doing so, we hope they will accommodate previous comments made by civil society and take all necessary steps towards adopting a strong Treaty that effective addresses the common global challenges around prevention of corporate abuses and violations, addresses rising cases of corporate capture, ensures effective access to remedies for victims of rights violations.

Revisions to Text

At the outset, we would like to commend the drafters on the use of the term 'obligations' for business rather than 'responsibilities'. The use of the term 'obligations' of business rather than 'responsibilities' is a commendable revision to the text and further strengthens the purpose of the LBI.

Preamble

1. (PP7) – We reiterate our comment regarding the 2nd draft of the Treaty that the language of states having the 'primary obligation to respect, protect, fulfill and promote human rights' should be removed. The language of primacy introduces a hierarchy of obligation which is inappropriate when it comes to human rights violations.
2. (PP 10) – We welcome reference to the environment and climate which is a vital challenge for our world.
3. (PP 11) – We welcome the reference to business enterprises having the **obligation** to respect internationally recognized human rights.
4. (PP 14) – We welcome the express reference to a gender perspective.
5. (PP18) – We welcome the language of obligations once again.

Article 1: Definitions

1. 1.1 – "Victim" – Our view is that this definition should be more inclusive, as follows:
    a. First, the definition should recognise not only people who have suffered harm but also those who are under impending threat of harm to their rights.
    b. Secondly, in the African context, communal living beyond nuclear family homesteads are common. There may be caregivers who are not necessarily legal guardians. There also may be extended family members who provide care and are an integral part of the life of a person in many contexts and cultures. The definition should be expanded to reflect this reality. We recommend the inclusion not just of immediate family members but 'caregivers' and 'all those in familial relationships' with the direct victim.
    c. Thirdly, the definition should make explicit reference to human rights defenders as potential victims. Many large scale investment and development projects happen in resource-rich rural areas dominated by ethnic communities. Communal organisations and movements to defend their land and resources often find themselves against powerful corporate entities and the state.

2. 1.2 – 'Human rights abuse' – we welcome the mention of the right to a safe, clean, healthy and sustainable environment. However, we are of the view that this definition still requires refinement. The primary problem is what is included within the definition of harm. The use of the term is an improvement on the term 'impact' (as used in the UNGPs), which was too wide but it is unclear that all harms to rights are impermissible (consider restrictions on privacy/movement at the workplace). We propose qualifying language: 'shall mean any direct or

indirect impermissible or disproportionate harm' – that will allow for subsequent development of the content of the obligations of businesses and defining their limits.

3. 1.4c. – Add the word 'a' before 'significant effect'.

Article 2: Statement of Purpose

1. 2.1a – Add the word 'the' before effective.

2. 2.1b – We welcome the inclusion of the word 'obligations' rather than 'responsibilities', as well as use of the term 'respect and fulfillment', suggesting businesses can have both negative and positive obligations.

Article 3: Scope

1. 3.1 – We recognize the change from a focus on enterprises to a focus on activities. Generally, we welcome this change, which places emphasis on what businesses do and their effect on fundamental rights – the change also emphasizes the fact that activities which cause harm cannot neatly be confined or defined as domestic or international. We however emphasize that there cannot be violations without a violator and the nature of business affects its obligations – therefore, in our view, the nature of enterprises themselves should not be removed completely from instrument. We also note the focus has moved from the transnational to all business activity. Whilst it is important to recognize that all businesses have an effect on fundamental rights, much of the treaty relating to remedy will apply to transnational activity in the main.

2. 3.2 – We recognise that this provision allows states to exercise their discretion to differentiate between different types of businesses and sectors based on their specific situations. It is important to flag that this discretion should be qualified and it be clear that any differentiation must not undermine international human rights.

Article 4: Rights of Victims

1. 4.2(f) – The guaranteed access to information should include access to information for human rights defenders. The provision could include the following: 'together with their legal representatives and/or other human rights defenders'.

Article 6: Prevention

1. 6.1 and 6.2 – There remains a failure to properly address the changes in corporate law that are required to render business accountable for fundamental rights violations, including direct obligations on enterprises and their office-bearers.

2. 6.3(a) and (b) – There is a gap between assessing the actual potential abuses and the taking of appropriate measures. To determine what must be done, the corporation should be required to expressly outline its understanding of its

obligations: that will determine what measures it needs to take and whether those involve avoidance, prevention or mitigation, which are all conflated here and are not the same thing. It would also allow for a judicial review of this understanding.

3. 6.3(c) - A fundamental aspect that has been left out here and that needs to be emphasized, is that companies have an obligation to integrate learnings over time. Ongoing integration of what is learned by the process of human rights due diligence must be reflected in human rights and social impact assessments based on unhindered input from the communities affected. This is key to prevention of human rights abuses by business enterprises.

4. 6.4(a) – We welcome the inclusion of environmental and climate change impact assessments.

5. 6.4(c) (and Preamble) – The reference to 'people of African descent' should be clarified, if not omitted. The use of the aforementioned term appears to be drawn from understandings in North and South America. From an African perspective, we fail to understand this term and the use of this term thus does not reflect the international nature of the Treaty. There is a lack of clarity as to whether it is meant to refer to issues of race or origin. We recommend the use of a term or terms that are more inclusive and reflect the international nature of the Treaty.

6. 6.6 - It must also be noted that States should have a monitoring responsibility overall to ensure human rights due diligence is taking place properly and so should have to report in a meta-study on the workings and effectiveness of due diligence measures.

7. 6.7 – The consequences for a business failing to comply with the due diligence obligations in 6.3 and 6.4 are unclear – this provision should be strengthened.

Article 7: Access to Remedy

1. 7.2 - Access to information provisions remain weak, and the article does not address discovery in any detail.

2. 7.3(d) – This provision is not well-located. States can only remove operation of the *forum non conveniens* doctrine through legislation and so a separate provision should be included. The wording of this provision is also unclear.

Article 8: Legal Liability

1. 8.8 – This provision should reference international criminal law not 'criminal offences under international human rights law' which lacks meaning, as IHRL does not create criminal offences.

2. 8.10 - This provision must also add joint and several liability for human rights violations for all subsidiaries and contractors involved with a violation.

Article 9: Adjudicative Jurisdiction

1. 9.1 – Generally, it is important to contemplate the need to obtain injunctive relief when there is a threat of a human rights abuse that has not yet crystalised. Furthermore, jurisdiction must be granted pursuant to the victim's choice of forum provided it meets the requirements of this article.

2. 9.1(d) – In our view, this provision should be broadened to include the jurisdiction in which the care-givers, dependents or family members of victims are domiciled (we welcome this provision suitably broadened).

3. There should perhaps be a provision against instituting the same action in multiple jurisdictions which may have jurisdiction.

4. 9.2(b) – The regional offices (and potentially branches) of multi-national corporations should be included in this provision. We welcome the extension of domicile to where principal assets or operations are located.

5. 9.5 – This provision fails adequately to include the principle of *forum necessitatis* into the treaty. The words 'there is a connection to the state party concerned' and the rest of what follows should be deleted. The formulation of the doctrine is really to provide a forum where no other forum exists which is the key consideration – see, for instance, the formulation of this doctrine by the Ontario Court of Appeals:

   'The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction …. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction'.[1]

6. 9.3 – Courts will often need legislative authority to dispense with the doctrine; hence the need for legislation to remove it in human rights cases.

Article 10: Statute of Limitations

1. 10 – We take the position that there should not be a statute of limitation for business-related human rights abuses. A statute of limitation could exclude human rights enforcement. If there is one, it should be for a period longer than is typically allowed for ordinary civil litigation in the relevant jurisdictions.

Article 12: Mutual Legal Assistance and International Judicial Cooperation

1. 12.11(c) – In our view, the limitation of the recognition of a judgment based on *ordre public* is too broad and represents a notion that is not well understood outside of the French-speaking world. It may as a result allow too much leeway to avoid recognizing and enforcing judgments.

Article 14: Consistency with International Law Principles and Instruments

[1] *Van Breda v Village Resorts Ltd* (2010) 98 OR (ed) 721 par 100.

1. 14.5(b) – In our view, the Treaty should contain a provision that requires States to engage in public consultation around any bilateral or multilateral investment treaties, given their far-reaching consequences for the public, and potential inconsistency with human rights principles.

2. 14.5 – additional article: To ensure the utmost protection and promotion of human rights, States should have an obligation to conduct human rights impact assessments before signing any new bilateral or multi-lateral investment agreement in order to prevent the undermining of States' obligations and victims' rights.

Article 15: Institutional Arrangements

1. To reiterate a concern that we raised with the 2nd draft, the Treaty does not contain an individual complaints mechanism at the international level. This is a major omission. Ultimately, it seeks enforcement through civil law and cases being brought in one jurisdiction for abuses in another. This could be cured in the future through an optional protocol; however, the applicability of a mechanism created in this way would be limited to the States Parties to the optional protocol. This omission is a significant weakness in enabling victims of rights violations to access effective redress.

2. 15.4(a) – In relation to its ability to make general comments, we suggest specifically tasking the Committee with clarifying the obligations of States and businesses under the Treaty: we propose adding the words 'and providing clarity on the obligations of states and businesses under this treaty.'

The comments were prepared after a virtual workshop co-organised by SAIFAC and the Centre for Applied Legal Studies (CALS) (University of the Witwatersrand) on 13 September 2021. The workshop included many civil society legal organisations active in the area of advocating for a treaty on business and human rights. SAIFAC prepared an initial draft with the organisations below all having had the opportunity to comment, contribute and approve these comments.

The organisations who have signed these comments are:

- The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), University of Johannesburg
- The Centre for Applied Legal Studies, University of the Witwatersrand
- The Centre for Human Rights, University of Pretoria
- The African Coalition for Corporate Accountability, University of Pretoria
- Lawyers for Human Rights
- Rosa Luxemburg Stiftung Southern Africa
- Uganda Consortium on Corporate Accountability (UCCA)