

Common Statement of the undersigning members of the Treaty Alliance regarding the 3rd Draft of LBI and the 7th Session of IGWG negotiations

We, the undersigning members of the Treaty Alliance and other organizations, a broad platform of civil society organizations and social movements in support of the adoption of an international human rights treaty on transnational corporations (TNCs) and other business enterprises (OBEs), call on UN member States to engage in the 7th session of negotiations bringing concrete textual suggestions to strengthen the text of the treaty to improve the human rights of communities and people affected by the operations of TNCs and OBEs and their access to effective remedy, and to put an end to corporate impunity for human rights abuses.

The Treaty Alliance welcomes the efforts made by the Chairmanship of the IGWG to publish the new draft of the legally binding instrument (LBI) ahead of the 7th session in Geneva (October 2021). We are pleased to note that, for the first time since the beginning of the process, State delegations are expected to “present specific textual proposals on the various provisions of the draft text” during the session. This is a key opportunity for States to advance the process towards the fulfillment of the mandate of the intergovernmental working group (IGWG) “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” as requested in Resolution 26/9 of the Human Rights Council.

In this regard, we observe with serious concern the proposal for vague alternatives. Adopting an approach based on these unprecise alternatives based exclusively on the United Nations Principles on Business and Human Rights would jeopardize the most crucial elements in the current draft treaty text.

States must mobilize to defend the progress made in the treaty text to date, which includes broad prevention measures, beyond mandatory human rights due diligence throughout the value chain and global operations; legal liability, which is intrinsically linked to access to justice and effective remedy; gender-responsive remedies and reparations; judicial mechanisms operating extraterritorially; and judicial cooperation provisions. The current text reflects the ambition to remove barriers that victims and their representatives face, including jurisdictional barriers, access to information, the high costs of litigation, the challenges associated with the burden of proof, and inequality of resources in legal procedures, and the implementation of judgments, among other elements.

We emphasize that it is essential that the LBI not be just a mandatory version of the Guiding Principles on Business and Human Rights. To add value to international law, it should contribute to clarifying the ambiguities and regulatory gaps left by the Guiding Principles. For example, the LBI should provide clarity on the obligations applicable in the context of transnational business activities, including within transnational corporations, economic groups and along value chains. This work of precision, clarification and supplementation requires a strong treaty, with a greater degree of detail. The current draft is an adequate basis for negotiation, which should be further clarified and strengthened during the 7th session and other intersessional and sessional negotiations in the framework of the IGWG.

The COVID-19 pandemic has exposed and intensified grave systemic injustices all over the world. At the forefront of these injustices is the entrenched ability of corporations to capture decision-making processes, in order to maximize profit at the expense of our fundamental human rights. Accordingly, it has become even more urgent for us to protect our spaces and reclaim our rights. For this reason, corporate capture must be restricted both in the ongoing IGWG process and through the LBI text by ensuring that corporations are not allowed to monopolise decision-making spaces – whether domestic, regional, international, bilateral, or multilateral. It is fundamental to protect the integrity of the policymaking space in the public interest, its publicly interested participants and outcomes from corporate interests. This includes any potential, perceived, or actual conflicts of interest. In that line, meaningful participation of civil society and social movements, especially those representing affected communities, should be continuously ensured.

The third revised draft provides many positive aspects that need to be kept in the next steps of the process. However, work remains to be done to clarify and improve parts of the text. We expect that they will be addressed by concrete proposals and solutions to be presented by delegations to achieve significant advancements in regard to access to remedy and justice for victims of corporate-related abuses, to end corporate impunity and to create an urgently needed international level playing field.

To that end, current provisions on liability are key, yet further clarification is necessary to ensure the gaps of accountability are effectively closed.

- The explicit inclusion of joint and several liability is key to ensure that all companies involved in the abuse under article 8.6 are liable for the harm caused by others through their value chains, as well to guarantee integral remedies for the affected communities or individuals.
- Given the difficulty for victims to prove the links of control, supervision and the nature of business relationships among various legal entities, courts should be able to establish a rebuttable presumption of control.
- Due diligence should never act as a shield from liability. Article 8.7 is very important to avoid due diligence requirements becoming a procedural ‘check-list’ exercise and a tool for transnational corporations and other business enterprises to escape liability. Clarifying that this defense is not available when companies cause or contribute to human rights abuses through their own operations is paramount. Thus, we suggest removing the last sentence of article 8.7. The aim of this deletion is to ensure that the adjudicator does not focus on the implementation or not of a due-diligence procedure, but on the harm caused, according to the principles of the duty of care or the principles of extracontractual civil liability.
- Liability standards should be different and stricter for business activities that are inherently dangerous and where risk is foreseeable. In such cases, transnational corporations and other business enterprises should be held liable, even when they have not acted negligently. Strict liability is appropriate in cases where business enterprises are engaged in hazardous or inherently dangerous activities or industries. herefore, we propose to include a clause on strict liability, which is a form of liability that already exists in different domestic legal systems.

To strengthen the text, rights-holders, in all their diversity, must see their rights protected and respected in the context of business activities, particularly those of TNCs, without direct discrimination or indirect discrimination.

- Better include the **protection of human rights defenders** as a key element for an effective prevention of human rights abuses and violations in the context of business activities, and explicitly clarify that human rights defenders and affected community members, including women, members of the LGBTIQ+ community, peasants and other rural people and ethnic and linguistic minorities. The state or impartial mechanisms should consult such affected parties throughout the planning, implementation and follow-up of a given economic project.
- Similarly ensure that States guarantee the right of Indigenous Peoples to free, prior and informed consent.
- Make explicit reference to the human right and implementation principle of self-determination to address the root causes of injustices related to business activities and suggest adding an Article 6 under preventions to read: “Respecting that Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land, or affecting their natural wealth and resources without threats of retaliation.”

Despite positive improvements, the current text should further integrate provisions on preventing abuses and serious violations in conflict-affected areas. We welcome the explicit reference to enhanced due diligence in para. 6.4 (g). Yet, some textual shortcomings are still to be addressed. The text should:

- Clarify in the preamble and throughout the text that International Humanitarian Law (IHL) is integrated in the scope of the LBI and should better recall the existing duties of States under international law in such contexts.
- Specify that appropriate action in these contexts may include refraining from, or ceasing certain operations or business relationships in circumstances in which due diligence cannot guarantee respect for human rights and the rules of IHL.
- Explicitly mention that enhanced due diligence should also contemplate the possibility of disengagement if the respect of human rights cannot be guaranteed in conflict-affected areas. Liability standards should also be stricter for business activities in conflict-affected areas, which are inherently dangerous and where risk is foreseeable.

We underline our strong commitment to the objective of establishing an international treaty. A set of binding obligations and enforcement mechanisms is the next necessary and logical step in the process that started several decades ago to ensure access to justice for affected individuals and communities and put an end to corporate impunity.

Signatories

1. Acción Ecológica
2. Africa Europe Faith & Justice Network (AEFJN)
3. African Coalition for Corporate Accountability (ACCA)
4. Al-Haq
5. ALTSEAN-Burma
6. American Association of Jurists/ Asociación Americana de Juristas (AAJ)
7. Asia Indigenous Peoples Pact (AIPP)
8. Baby Milk Action (IBFAN UK)
9. CADTM France
10. CCFD-Terre Solidaire
11. Center for Constitutional Rights/Centro de Derechos Constitucionales
12. Centre for Human Rights, University of Pretoria
13. Center for Research and Documentation Chile-Latin America (FDCL)
14. Centro de Documentación en Derechos Humanos “Segundo Montes Mozo S.J.” (CSMM)
15. Comisión Intereclesial de Justicia y Paz
16. Corporate Accountability
17. Deache
18. European Coalition for Corporate Justice (ECCJ)
19. FIAN International
20. FIAN Ecuador
21. FIAN Germany
22. FIAN Switzerland
23. FIAN Belgium
24. FIAN Austria
25. Global Policy Forum
26. IBFAN Italy
27. International Baby Food Action Network
28. International Federation for Human Rights (FIDH)
29. Manushya Foundation
30. Movendi International
31. Organisation guinéenne de défense des droits de l'homme et du citoyen (OGDH)
32. Organisation Marocaine des Droits Humains (OMDH)
33. Project Organizing Development Education and Research (PODER)
34. Red Mexicana de Acción frente al Libre Comercio (RMALC)
35. Sin Olvido
36. Sin Olvido Tierra
37. Society for International Development (SID)
38. SOMO
39. Somos Génesis
40. Südwind, Austria

41. Universidad de Paz
42. Women's International League for Peace and Freedom
43. Instituto de Estudios Ecologistas del Tercer Mundo, Ecuador
44. Centre de Recherche sur l'Environnement, la Démocratie et les Droits de l'Homme (CREDDHO)
45. Goliathwatch
46. WEED - World Economy, Ecology & Development
47. Werkstatt Ökonomie (WÖK)
48. FIAN INDIA
49. TerraJusta
50. CIDSE
51. Justice & Paix Belgique
52. ActionAid International
53. FIAN Colombia
54. CNCD-11.11.11 (Belgium)
55. Instituto Políticas Alternativas para o Cone Sul (PACS) Brasil
56. WRM - World Rainforest Movement
57. FCPEEP-RDC (Front Commun pour la Protection de l'Environnement et des Espaces Protégés)
58. Comité pour les droits humains en Amérique latine (CDHAL), Canada
59. Human Rights Movement "Bir Duino-Kyrgyzstan"
60. Centro de Políticas Públicas y Derechos Humanos - Perú EQUIDAD
61. Observatorio Ciudadano, Chile
62. Liga voor de Rechten van de Mens, The Netherlands