

# TOWARDS A TRANSFORMATIVE TREATY ON BUSINESS AND HUMAN RIGHTS:

**The urgent need for global corporate accountability, negotiations for a binding treaty at UN level, and Ireland's role in delivering it.**

## Introduction

This paper sets out the collective position of the Irish Coalition for Business and Human Rights (ICBHR) on the development of a UN binding treaty on business and human rights to regulate, in international law, the activities of transnational corporations and other business enterprises.

It outlines the urgent need for a binding treaty at UN level to address the abuse of human rights by powerful corporate actors (Section 1), progress to date (Section 2), and the key principles required for an effective, transformative treaty (Section 3). It then examines the current draft treaty proposal, first published on August 6th 2020, and suggests important changes to the text needed to deliver on these key principles (Section 4).

## Irish Coalition on Business and Human Rights

The Irish Coalition for Business and Human Rights (ICBHR) is a grouping of civil society organisations, focused on progressing corporate accountability and Irish leadership in promoting business and human rights, both at home and abroad. The key purpose of the coalition is to collaborate and advocate strategically to achieve:

- Ireland's support for the development of a UN binding treaty on business and human rights, with a gender and human rights defender perspective.
- Mandatory, gender responsive human rights and environmental due diligence legislation in Ireland.

Members of the Coalition include Trócaire, Trinity Centre for Social Innovation, Comhlámh, Front Line Defenders, Fairtrade Ireland, Global Legal Action Network, Centre for Business and Society of University College Dublin, Oxfam Ireland, Latin American Solidarity Centre, Christian Aid Ireland, Irish Congress of Trade Unions, Friends of the Earth Ireland, National Women's Council of Ireland, Proudly Made in Africa and Rachel Widdis, School of Law, Trinity College Dublin. Observers are ESCR-Net, Action Aid Ireland, TerraJusta and Save Our Sperrins. The Irish Coalition on Business and Human Rights is a representative network of the European Coalition for Corporate Justice (ECCJ).



## SECTION 1

# The need for a UN binding treaty

**“In pursuit of this humanizing enterprise, we should be aware that business-related human rights abuses are much like other human rights abuses: it is the impact of the actions of the relatively powerful on the relatively powerless that we seek to address.”**

Kate Gilmore, United Nations Deputy High Commissioner for Human Rights<sup>1</sup>

The abuse of human rights in the pursuit of profit by powerful corporations is a critical injustice of the 21<sup>st</sup> century, one with a decades if not centuries old history. While companies can have a positive impact through job creation and investment, the actions of irresponsible businesses are having devastating impacts, including through violent evictions and displacement of communities from their land; environmental degradation and pollution causing the destruction of livelihoods; and the exploitation and sexual harassment of low paid workers. Projects carried out in the name of economic development, including by extractive industries and agribusiness, have resulted in high levels of human rights abuses and violence. Such projects often marginalize, impoverish and fragment communities and families.<sup>2</sup>

The number of killings of human rights defenders in the context of corporate activities is shocking, with an average of over four land and environmental defenders being killed every week in 2019.<sup>3</sup> In his 2006 report, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises surveyed allegations of the worst cases of corporate-related human rights harm. He found that they occurred disproportionately in low income countries; in countries that often had just emerged from, or were still in, conflict; and in countries where the rule of law was weak and levels of corruption high.<sup>4</sup> Some corporations are profiting from weak human rights regulation and this business model needs to be challenged and ended.

In an extensive European Parliament study on abuses by European-based multinational companies in third countries, “cases involve allegations of gross human rights abuses such as murder and complicity to murder, war crimes and crimes against humanity but also issues related to health, environmental justice and several labour rights related issues (workers safety and forced labour).”<sup>5</sup> EU companies have failed to address abuses perpetuated by subsidiaries or business partners in their global value chains, over whom they often have considerable control or influence and in many cases the costs in these global value chains are kept down as a result – directly or indirectly – of those same abuses.<sup>6</sup>

In Ireland, several companies have been linked to human rights abuses abroad, including state companies, as highlighted by the UN Committee on the Elimination of Racial Discrimination in 2019. For example, for twenty years the Electricity Supply Board (ESB) has purchased coal from a mine in Northern Colombia with a long and well-documented history of serious human rights abuses, in particular affecting people of African descent and indigenous peoples.<sup>7</sup> The recently published UN database on businesses connected to illegal Israeli settlements in the occupied Palestinian territory lists companies engaged in economic activities that keep these illegal settlements financially sustainable, and are inextricably linked with human rights abuses.<sup>8</sup> One of the companies named, Airbnb Inc., hosts and purchasers of Airbnb accommodation in the illegal settlements, contract with the Dublin-registered company Airbnb Ireland UC.<sup>9</sup> Airbnb are one of a number of high profile U.S. multinationals benefiting from the benign tax environment in Ireland. Complex corporate structures have evolved to reduce tax liabilities and facilitate avoidance, a process increasingly recognised as an impediment to the fulfilment of human rights.

Despite the negative human rights impacts that corporations can have, there is a major gap in the regulation of international corporate activity by states, particularly regarding access to remedy for victims of human rights violations.<sup>10</sup> The vast majority of human rights violations perpetrated by corporations go unpunished and impunity regarding human rights abuses by companies is increasing.<sup>11</sup> The size, influence and complexity of corporations, along with the transnational nature of much business, pose major challenges for states and affected people to hold them to account. A lack of strong corporate accountability laws, alongside complicated corporate structures and convoluted supply chains, make it difficult, often impossible, to hold these companies accountable.<sup>12</sup>

While the UN Guiding Principles on Business and Human Rights (UNGPs) have recommended a smart mix of regulatory measures, regulation has largely developed in the form of voluntary guidance and implementation of these voluntary, soft law guidelines has been marginal and ineffective. The 2019 Corporate Human Rights Benchmark, which assesses 200 of the largest publicly traded companies in the world on a set of human rights indicators (agricultural products, apparel, extractives and ICT manufacturing) reveals poor levels of implementation of the UN Guiding Principles on Business and Human Rights.<sup>13</sup> The Chair notes “that one quarter of companies score less than 10% and a full half of companies fail to meet any of the five basic criteria for human rights due diligence should alarm governments and investors.”<sup>14</sup> The 2020 EU study on due diligence in the supply chain finds that only one in three businesses in the EU are currently undertaking a process of checks and ‘due diligence’ on their human rights and environmental impacts.<sup>15</sup>

Voluntary mechanisms have failed to bring about the change in practice that is required to protect people from the most negative impacts of corporations. There is no binding international legal framework to establish the liability of transnational corporations with respect to human rights and the environment, and stronger regulation is needed internationally to ensure justice for affected communities. As stated by the Special Rapporteur on the Rights of Indigenous

Peoples “such impunity should be prevented at all costs and the need for a stronger instrument to address this cannot be overemphasized enough.”<sup>16</sup>

COVID-19 has further revealed poor human rights practices in the absence of legal regulation. In particular, the unsustainability of global supply chains and practices within the garment industry have been exposed, whereby some major companies refused to pay suppliers for goods already produced, leaving factories unable to pay the wages of some of the poorest workers in the world (including companies that have Irish branches<sup>17</sup>). The treatment of supply chain workers, migrant workers and those in precarious work, mostly women, represents an unsustainable and unjust business model of profit at the expense of human rights. These cases demonstrate why corporations need to be legally required to assess and address human rights impact across their value chains and not just with their immediately contracted employees. As COVID-19 spreads around the world, it is alarming to see governments using emergency measures as a smokescreen to continue targeting human rights defenders, in order to facilitate further corporate development. In the context of a pandemic, an uncertain future and a global economic downturn, there is a danger that human rights and environmental standards will be eroded even further in some countries, in order to attract investment. This is an important moment to ensure that responsible business conduct is rewarded and those that profit from human rights and environmental violations are held to account.



Maria Mercedes Gomez, is from the Rio Blanco community who are resisting the construction of a hydro-electric dam. Maria is a member of the Rio Blanco Elderly Indigenous Council. 7 human rights defenders have been killed protesting the dam's construction, including indigenous leader Berta Caceres, and at present the project remains stalled after Chinese, Dutch and Finnish investors pulled out in response to the violence. Photo: Garry Walsh

## SECTION 2

# Progress to date and Ireland's position

**"We are here to change the rules of the game, globalisation as we know it is not set in stone."**

Professor Oliver De Schutter, Special Rapporteur on extreme poverty and human rights, University of Louvain<sup>18</sup>

**"This Treaty is very important for our communities that suffer at the hands of corporations and states in the name of profit, and for human rights defenders who risk their lives to speak up. I think the EU Member States should also speak up and support the Treaty to protect our communities from transnational corporations."**

Donald Hernandez, director of CEHPRODEC, Honduras

It is against this backdrop of ongoing corporate human rights abuses, particularly in the context of transnational activities, that the United Nations Human Rights Council adopted the historic Resolution 26/9 in 2014, to elaborate an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This followed decades of failed attempts to regulate corporations, including through the UN Commission on Transnational Corporations. Although the Resolution faced resistance from the United States and EU Member States, including Ireland, it was adopted by a vote of 20 to 14, with 13 abstentions.<sup>19</sup> Initially tabled by Ecuador and South Africa, it established a new working group (the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, OEIGWG) to elaborate a proposed UN treaty.

The first and second annual sessions of the OEIGWG were dedicated to debating the content, scope, nature and form of a potential treaty. The third session discussed key elements for a draft 'legally binding instrument', and after a series of information consultations in 2018, a so-called 'zero draft' treaty and zero draft optional protocol were prepared for discussion at the fourth session. This fourth session in Geneva in October 2018 was seen as a milestone in the elaboration of a binding treaty on business and human rights. It was the first time that UN Member States engaged on the substantive content of the treaty, providing comments and positions from states on the issues of scope, jurisdiction, and the refinement of legislative language. The fifth session focused on an official first draft of the legally binding instrument and in August 2020 a second revised legally binding instrument was published, which will form the basis of future discussions.

A range of countries support the process, mainly in Latin America and Africa, including South Africa and Ecuador which have been key advocates for the treaty. The European Parliament has expressed support for a binding UN instrument as a necessary step forward in the promotion and protection of human rights and has adopted a range of Resolutions in support of the process.<sup>20</sup> The European Network of National Human Rights Institutions has noted the insufficient progress on the part of European businesses in implementing human rights due diligence and the adverse impacts of businesses on human rights, and stated that a binding treaty could make a significant contribution to addressing current governance gaps.<sup>21</sup> Members of civil society across the world, representing the experiences of communities and human rights defenders, have mobilised and advocated for a treaty. The Global

Treaty Alliance<sup>22</sup> consists of more than 1,100 organisations who recognise the potential of this new instrument to enhance protection for victims against human rights violations and to provide effective access to remedies.

It's important to note that along with opposition from certain states, corporate lobbying power extends to within the United Nations. Corporate actors have pushed for ineffective, voluntary approaches at the UN rather than a clear, legally binding regulatory approach that will hold perpetrators of human rights violations accountable. Several prominent business organisations have lobbied against more ambitious regulations and currently oppose the proposed UN treaty on Business and Human Rights.<sup>23</sup> It is against this backdrop that UN Member States with a history of promoting and protecting human rights are being asked to deliver a transformative, effective treaty that can end corporate impunity internationally.

While some UN Member States have been very supportive of the treaty, there has been significant opposition from others. Some countries, where many large transnational corporations are headquartered, have opposed the process and refused to engage in the negotiations, including the US and Canada. EU Member States have engaged in the treaty negotiations as a bloc, and have historically stood in opposition, including dissociating from the recommendations and conclusions of the process in 2018. This was particularly disappointing given the EU's founding commitment to the promotion and protection of human rights, and the clear lack of regulation of transnational corporate activity in this sphere. More recently, following the widening of the scope to include all businesses regardless of whether they operate internationally, the EU has acknowledged "the urgent need to strengthen prevention and mitigation of adverse human rights impacts related to business activities and to provide access to effective remediation."<sup>24</sup>

However, for the EU to be in a position to engage in the UN treaty negotiations, a formal negotiation mandate is required by EU law, a mandate that the EU has once again failed to achieve in advance of the sixth session of negotiations in October 2020

in Geneva. There are a number of EU Member States, including Belgium, the Netherlands, France, Spain, Ireland, Italy, Poland and Austria that are pushing for increased EU engagement, including a formal mandate for negotiations. Given that the EU has proposed an EU-level law to require 'due diligence' checks throughout businesses' supply chains for human rights and environmental impacts, and the fact that several EU Member States have already pressed forward with their own domestic proposals along these lines, it is crucial that the EU brings this experience to the treaty negotiations. Furthermore, in line with the EU's obligation to multilateralism, engaging in this important UN human rights process is of paramount importance, particularly in the current context of eroding multilateralism. While there may be differing views within the EU, and a compromise position may ultimately be reached, it's imperative that progressive Member States seek to raise the bar and level of ambition shown at national, EU and UN level.

#### **Ireland's position in relation to the treaty has been set out as follows:**

"Ireland is open to looking at options for progress on a legally binding treaty. With regard to its scope, we believe that all economic operators, whether transnational or purely domestic, should be treated in a non-discriminatory manner. We would also wish to see essential human rights principles reflected in any possible instrument, which should reaffirm the universality, indivisibility and interdependence of human rights and stress the primary responsibility of States under existing human rights obligations to protect against human rights violations. We would also like to see any new initiative build on, rather than duplicate, existing measures such as the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. Above all we believe that it should be rooted in the UN Guiding Principles on Business and Human Rights."<sup>25</sup>

The Minister for Foreign Affairs, Simon Coveney TD, has noted that Ireland has exchanged views with other EU Member States on the draft legally binding instrument circulated in 2019, but has not undertaken a formal legal analysis of the draft instrument with other EU Member States, and does not intend to share or make public the exchange of views with other EU Member States, which remain confidential.<sup>26</sup> This is disappointing, and makes it difficult to clarify Ireland's position in detail as we approach the sixth session of the OEIGWG. Given Ireland's positive work on civil society space and human rights within the UN Human Rights Council, Ireland should be playing an active role in the treaty process. In this context, the Irish Coalition recommends that the Irish Government:

- Actively support and contribute to the development of an ambitious, effective and binding UN treaty on business and human rights, to regulate the activities of transnational corporations and other business enterprises, with a strong gender perspective and inclusion of human rights defenders;

- Follow the lead of other EU Member States, such as France, and directly address the OEIGWG sixth session on priority areas (while the EU continues to engage without a clear negotiation mandate);
- Develop and share a clear, constructive position on the UN treaty;
- Take action within the EU to ensure a clear, constructive negotiation mandate for the next OEIGWG session, set to be held in 2021.
- In tandem with the treaty negotiation process, develop domestic legislation for mandatory, gender-responsive human rights and environmental due diligence legislation in Ireland.



Ma'ale Adumim, one of the major Israeli settlement blocs in the occupied West Bank, overlooks a Palestinian community resisting displacement. Such settlements are illegal under international law and lead to a deteriorating human rights situation on the ground. Despite this, several high profile businesses continue to operate in and profit from the illegal settlements, helping to sustain them financially. Photo: Conor O'Neill.

## SECTION 3

# Key principles for a transformative treaty

**“Human Rights and environmental defenders are under threat from states and corporations who are prioritising business over human rights. The UN Treaty is an opportunity to put in place a new set of rules that will embody respect and dignity for defenders and communities, who are playing such a vital role in protecting our planet.”**

Mary Lawlor, Special Rapporteur on the situation of human rights defenders

The proposed UN treaty is urgently needed to address gaps in the current international legal framework, which has not kept pace with evolving corporate structures and a rapidly changing global economic reality. An ambitious, effective treaty has the potential to address the serious accountability gap that enables corporate impunity, by clearly asserting legally binding obligations for businesses and how they impact on human rights. As the Deputy High Commissioner for Human Rights states, this is “our opportunity to take a bold step forward for protection of human rights in the context of business activities, and, most importantly, for strengthened accountability and more effective remedy for those who are the victims of business-related activities.”<sup>27</sup>

To be effective and transformative, the treaty must seek to build a culture of respect for human rights by all corporate entities, and move beyond a set of voluntary UN guiding principles towards a mandatory system with clear obligations. It should establish a clear framework for businesses, including state enterprises, to be held accountable and address issues of complex corporate structures and jurisdiction. It must have the experience of affected communities and rights-holders at its core, among the following 8 key principles:

## 1. A broad human rights base

The treaty should not be overly limited in its scope, and must cover all internationally recognised human rights. As per the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011, this should be understood, at a minimum, as those expressed within the International Bill of Human Rights (The Universal Declaration, ICCPR & ICESCR), as well as the ILO Declaration on Fundamental Principles and Rights at Work.

Recognising the distinct, disproportionate human rights impacts faced by particular groups, including indigenous peoples, migrants and women, it should include all rights outlined in the UN’s nine core international human rights instruments (and Optional Protocols) and the ILO’s eight fundamental conventions, as well as customary international law. It should reflect that human rights are universal, indivisible, interdependent and inalienable, and clearly assert the primacy of human rights over all international agreements, including those related to trade, investment, finance, taxation, security and development.

## 2. Protect people and planet

The treaty must rise to the challenge posed by climate change, and provide clear protection for environmental rights as well as rights related to the enjoyment of a safe, clean, healthy environment. It must recognise the disproportionate environmental impact of certain sectors, including mining, extractives and agribusiness, and seek to ensure that companies operating in these industries are held accountable.

Without proper regulation, business activity can lead to the pollution and contamination of water, reduced air quality, deforestation, deteriorating

public health and other outcomes that severely limit the enjoyment of human rights. The treaty must address this, and tackle the link between climate breakdown and increased food insecurity, water scarcity, hunger and conflict. In providing remedies for victims of human rights abuses, it should include environmental rehabilitation and restoration of natural habitats.

### **3. Businesses of all size and structure**

First and foremost, the treaty must address the lack of regulation of transnational corporate activity and seek to ensure effective accountability internationally. The emphasis on transnational activity is especially important, due to the major accountability gaps in the context of complex business structures, extensive supply chains, issues of jurisdiction and avoidance of legal liability by parent companies. However, all businesses, regardless of their size, structure or operations, have the same responsibility to respect human rights and the treaty must reflect this.

As per the UN Guiding Principles, it must require businesses to respect human rights in their own operations, as well as in their supply chains and wider business relationships. This should include the company's entire corporate structure, and operations conducted through subsidiaries, affiliates, subcontractors and suppliers. This is vital to ensure the treaty's effectiveness: global brands domiciled in EU Member States cannot ignore the often dangerous conditions of garment workers who produce their clothes, for example.

### **4. Mandatory, not voluntary prevention**

The treaty must establish a corporate duty to respect human rights and the environment, and set out clear obligations for businesses to deliver on this. As per the UN Guiding Principles, addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation. In this respect, providing for a system of human rights and environmental 'due diligence' checks (HREDD)

is one of the lynchpins of the treaty's potential to prevent harm.

Under an effective treaty, states must require companies to identify, assess, prevent and mitigate the risks posed by their own activities, as well as throughout their supply chains and business relationships. This should be a continuous process of assessing actual and potential impacts, integrating and acting upon the findings, tracking responses, and communicating actions taken. It must be driven by meaningful consultation and the free, prior and informed consent of affected communities. Recognising that voluntary systems have to date been largely ineffective, it must be mandatory and provided for in law.

### **5. Liability and effective penalties**

For the measures in the treaty to deliver change, they need teeth. States must establish a comprehensive and adequate system of administrative, civil and criminal liability for business-related human rights abuses, including effective penalties commensurate with the nature of the offence. Administrative penalties are often quicker and more efficient, and can include sanctions or fines, withdrawal of licenses, or a ban on tendering for state contracts. Civil liability is needed to ensure that affected individuals and communities can seek remedies from the businesses involved. Strong criminal liability is needed to cover the most severe abuses and impacts.

While due diligence measures are required under the treaty, they should not absolve companies of liability. Rather, liability should also take account of factors including the severity of the impact, the structure and ownership of the company, resources available, the nature of the industry, awareness of abuses, and the leverage which could have been exercised. It should recognise the heightened risk of abuse in certain sectors, such as extractives, garment industries and agribusiness, and the inherent risk in certain contexts, such as operating in a conflict-affected area or occupied territory. Crucially, it must cover a company's own activities as well as those along its supply chain and business relationships.

## 6. Real access to justice

Ensuring meaningful access to justice and adequate, effective remedy is critical to addressing the imbalance between powerful corporate actors and affected communities. Currently, it can be extremely difficult to hold transnational corporations to account in the host state (where the violation occurred) or in the corporation's home state, or to hold parent companies accountable for the actions of subsidiaries. The treaty must ensure fair procedures and lower barriers to participation, including the provision of adequate and comprehensive legal aid.

It must enable rights holders to submit claims through a representative or collectively, in the legal forum or court most accessible to them, and provide for meaningful remedy, including financial compensation, rehabilitation, and environmental restoration. It should be forward looking, empowering communities to seek injunctive relief to prevent a foreseeable harm, rather than waiting for abuses to take place. Recognising that victims of human rights violations can find it difficult to access information on a company's structure and activities, particularly when facing major corporations with well-funded legal teams, the treaty should reverse the burden of proof for victims and require corporations to disclose relevant information and material.

## 7. Centre affected communities and human rights defenders

Communities seeking to resist the actions of corporations and complicit states are facing growing levels of violence and intimidation, with indigenous, environmental and land defenders at extreme risk. In the face of powerful interests, those who oppose projects relating to extractive industries, agribusiness, infrastructure, hydroelectric dams and logging are facing brutal consequences, including killings, attacks, sexual violence, smear campaigns, criminalisation and repression.<sup>28</sup> Since 2015, more than 2,000 attacks on activists working on human rights issues related to business have been documented.<sup>29</sup> Judicial harassment and criminalisation are among the most common forms of attacks to silence opposition to business-

related projects.<sup>30</sup> Women human rights defenders working in this context also face gendered risks, which exploit existing inequalities and perceptions about their role in society. Attacks on women human rights defenders include attacks on their honour and reputation, public shaming, sexual violence, and threats against their children and loved ones.<sup>31</sup> These defenders face the added layers of institutionalised sexism when trying to access justice.

Therefore, it is crucial that this treaty adequately puts in place provisions to create enabling space for human rights defenders that will protect them from the range of attacks and harassment they are facing and that will prevent attacks on those defending human rights and our planet.

## 8. Gender-sensitivity

Business-related human rights abuses impact women in distinctive, intersectional and often disproportionate ways. For example, indigenous women, who often have less formal rights to land, are vulnerable to eviction and dispossession to make way for large-scale development projects.<sup>32</sup> Women are over-represented in precarious work with poor working conditions and are vulnerable to exploitation and abuse, including sexual abuse. Sexual violence by security guards in the extractive industry is identified as an endemic problem.<sup>33</sup>

The treaty must be underpinned by a gender and feminist analysis, taking into account the structural discrimination faced by differently situated women, so that the specific harms and challenges that they face can be addressed. It should encompass an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations. This should include gender-responsive human rights and environmental due diligence, meaningful consultations with affected women and gender experts, the collection of gender disaggregated data, the protection of women human rights defenders, and addressing the particular barriers that women face in accessing remedy whilst providing gender responsive reparations.

## SECTION 4

# Analysis of the current draft & proposed changes

The second revised draft of the proposed UN treaty was published in August 2020, and will serve as the basis for the sixth session of negotiations, taking place from 26-30th October 2020. While the new draft has made a number of advancements, significant gaps still remain to deliver an effective, transformative treaty and reflect the key principles outlined above.

This section summarises the important advancements made in the current draft, the areas that still require improvement, and outlines specific amendments to achieve this on an article-by-article basis.

## Improvements made since the previous 2019 draft include:

- Strengthening the importance of a gender perspective;
- Replacement of “contractual relationships” with “business relationships” to clarify that this treaty will apply to activities beyond contracts;
- Provision for free, prior, informed consent of indigenous peoples (rather than just consultation);
- Improvements in access to remedy and jurisdiction that facilitates access, including the elimination of *forum non conveniens* and the inclusion of *forum necessetatis*;
- Removal of some of the language allowing for scope of the treaty to be narrowed through the lens of domestic law;
- Clarification in Art. 8 that compliance with due diligence law does not provide a safe harbor for business conduct;
- Reference to trade and investment as within the realm of business activities and in Art. 14.5;

- Inclusion of activities of state-owned enterprises in definition of business activities;
- Providing for collective redress; and
- Clarifying the provision on corporate capture.

## Areas where the current draft requires further strengthening:

- Ways to make the treaty more gender-responsive;
- Provisions for precautionary injunctive relief;
- Clarification of the range of human rights abuses subject to the treaty;
- Clarification of the range of administrative, civil, and criminal liability that State Parties should apply to those who abuse human rights, and clearly differentiating between civil and criminal liability;
- Additional reference to trade, investment and taxation agreements and an affirmation that human rights take primacy in such matters;
- Clarifying the liability of “parent” companies in business activities of a transnational character and the ability of courts to shift the burden of proof regarding parent company liability;
- Emphasising the rights of human rights defenders;
- Strengthening the provisions for protections in conflict-affected areas;
- Provisions to ensure that State parties engaged in business activities do not contribute to human rights abuses; and
- Ensuring that costs are not a barrier to accessing remedy; and
- Increasing protection from environmental

harm, including climate change.

## PROPOSED AMENDMENTS TO THE TEXT:

### PREAMBLE

Several changes and additions to the Preamble could clarify the liability of transnational corporations and those who invest in business activities that contribute to human rights abuses; emphasise the importance of protecting the rights of certain groups, including women, human rights defenders, those in conflict-affected areas; and avoid misinterpretations.

### 4<sup>th</sup> Paragraph

Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women **all people**, and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;

### 7<sup>th</sup> Paragraph

Ensuring access to justice is a critical piece of this treaty and the right to an adequate remedy in line with other human rights instruments should be emphasised.<sup>34</sup> Additional language could emphasize the importance of access:

Upholding the right of every person to have effective and equal access to justice and remedy in case of violations of international human rights law or international humanitarian law, including the rights to **effective remedy, equality, non-discrimination, participation and inclusion and to a fair trial before courts and tribunals;**

### 9<sup>th</sup> Paragraph

Important grounds for discrimination are missing, and an incomplete list could suggest that other

grounds for discrimination are acceptable.

Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all, **and stressing that there should be no** without distinction of race, sex, language or religion; **discrimination on grounds that are prohibited by international human rights law;**

### 12<sup>th</sup> Paragraph

In line with the revised draft's acknowledgement of broader liability for business activities that extends beyond contractual relationships, the Preamble should avoid language that overly limits such liability.

Underlining that all business enterprises, regardless of their size, sector, location, operational context, ownership and structure **shall have the responsibility** to respect all human rights, including by avoiding causing or contributing to human rights abuses through their **own** activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships;

### 13<sup>th</sup> Paragraph

The new draft includes a reference to the UN Declaration on Human Rights Defenders in the third paragraph of the Preamble. Human rights defenders working on business-related abuses and environmental issues are particularly at risk, as recognised by Human Rights Council Resolutions and by the Special Rapporteur on Human Rights Defenders.<sup>35</sup> That said, the Preamble could better recognise the importance of human rights defenders and refer to the State duty to take protect them and provide remedies for human rights abuse.<sup>36</sup> Women human rights

defenders often face gender-specific violence, stigma, reprisals and job insecurity for reporting business-related abuses. They tend to be the last to access remedies (where they are available) and may not obtain any remedies at all. This may be because they are more likely to be the victims of sexual abuse (and do not want to face the perpetrators), more vulnerable to retaliation, or have increased workloads (including household duties, childcare, care for relatives).<sup>37</sup> To better acknowledge the rights of and obligations toward human rights defenders, the draft could be amended to include the following additional language (including a new paragraph):

Emphasizing that civil society actors, including and human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for business-related human rights abuses and that states and businesses have a corresponding responsibility to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role;

[NEW] Concerned, that despite these responsibilities, individuals and communities continue to face business-related human rights violations and abuses in all parts of the world, including in connection with economic, social and cultural rights and in connection with the rights related to a healthy environment and remedies associated with environmental damage, including climate change, and deeply concerned that human rights defenders working on human rights issues related to business are among those most exposed and at risk;

## 14<sup>th</sup> Paragraph

The revised draft includes a new paragraph specifically recognising the need for a gender perspective. Ensuring access to justice and equitable consideration of the needs and rights of women are critical aspects of this treaty that the Preamble should acknowledge. Some additional language could clarify the need and scope of a

gender perspective (including a new paragraph):

Recognizing the distinctive and disproportionate impact of business-related human rights abuses on certain groups of people, including women and girls, children, indigenous peoples, persons with disabilities, migrants, refugees, workers and other persons in vulnerable situations, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders, and additional barriers to effective remedy, as well as a framework for meaningful engagement in decision-making processes about the effective regulation of business activities;

Emphasizing the need for States and business enterprises to integrate a gender perspective in all their measures, in line with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action and other relevant international standards;

[NEW] Recognizing that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to prevent and remedy business-related human rights violations and abuses against women and girls;

## Additional Paragraphs

An additional paragraph to the Preamble should affirm the primacy of human rights over trade, investment, development and business agreements.

[NEW] Affirming the primacy of human rights obligations under the Charter of the United Nations (as indicated in Art. 103) over all rights granted to investors and corporations in international trade, investment, finance, taxation, development cooperation and security agreements;

# ARTICLE 1

## Definitions

### 1.1. Victims

The revised draft includes a broader definition of “victim” clarifying the nature of harm, and a broader scope of persons who may be victims (including those who intervene in a human rights abuse). An amendment could clarify that the definition extends to situations where there is an imminent risk of a human rights abuse, to ensure that the treaty supports the prevention of human rights abuses. Further, the definition should identify specific classes of historically marginalised people and not leave the definition to domestic law, which could exclude these classes. The revised draft was improved by removing a reference to domestic law as a determinant of the inclusion of family members. Such deference to domestic law would have allowed State Parties to make exceptions in granting essential rights entirely at their own discretion. Finally, the term “victim” is a disempowering term. Consideration should be given to replacing it with “affected rights holder” or “affected person.”

1. “Victim” shall mean any persons or group of persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse, or who are at risk of suffering irreparable harm. The term “victim” shall also include the immediate family members (including civil partners) or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

### 1.2. Human Rights Abuse

The revised draft includes a specific definition of “Human rights abuses.” However, the treaty should clarify that State-owned enterprises are also included. In addition, the revised draft should retain the reference to “individually or collectively, including physical or mental injury, emotional” and add a reference to social and cultural harm to make clear that the reference to internationally recognized human rights includes these rights.

2. “Human rights abuse” shall mean any harm committed by a business including a State-owned enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights and human rights relating to the enjoyment of a safe, clean and healthy environment, physical or mental injury, and emotional, economic, social, and cultural harm. The term includes failures to act to prevent a foreseeable abuse that the business was in a position to prevent.

### 1.3. Business Activities

In line with the approach set out in the United Nations Guiding Principles on Business and Human Rights (UNGPs)<sup>38</sup> and its implementation guidance, activities covered should be related to everything that is linked to an enterprise’s products and services as well as failures to act. Further, there is a need to clarify that investment and trade are considered business activities, given the potential for human rights abuses related to transnational investment and trade and the likelihood that affected rights holders will not have an access to a remedy.

3. “Business activities” means any for profit economic or other activity undertaken, **or omission**, by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures **linked to its products or services**, undertaken by a natural or legal person. This will include **investment, trade, and** activities undertaken by electronic means.

5. “Business relationship” refers to any relationship between natural or legal persons, **including State and non-State entities**, to conduct business activities. **The term includes** including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, **entities in the value and supply chain**, or any other structure or contractual relationship as provided under the domestic law of the State, **and any other non-State or State entity linked to its business operations, products or services even if the relationship is not contractual, including those related to supply, export, services, insurance, finance and investment, and** activities undertaken by electronic means.

## 1.5. Business Relationships

The revised draft has been strengthened by replacing the term “contractual relationships” from the previous draft with “business relationships.” The term “business relationships” more accurately characterise the scope of human rights due diligence responsibilities as elaborated by Treaty Bodies, Special Procedures, and the UNGPs.<sup>39</sup> The draft should include a few additional examples of what the term encompasses to ensure that responsibility for harm caused through business relationships includes activities of other entities “directly linked to its operations, product or services by its business relationships,”<sup>40</sup> other entities over which it has influence (including subsidiaries), and the company’s business partners (including suppliers and financiers).<sup>41</sup> The draft should also clarify that State entities are subject to this article, for consistency with the recognition in Art. 1.3 (business activities) that States may be engaged in business activities and relationships. Revised language is as follows:

## New Definition: Conflict-Affected Areas

Specific reference to conflict-affected areas is only made in three provisions of the draft binding treaty, and the treaty should provide more direction on how to address rights in these areas. To fulfil this suggestion, there is a need to define what conflict-affected areas are. Currently there is not a generally accepted definition in international law.

<sup>42</sup> Being located in a conflict-affected area will impact rights holders’ access to remedies, and the type of remedies which will practically be available. For example, the usual judicial mechanisms of seeking recourse may have broken down due to the instability of political system. Affected people may be forced to relocate to a different jurisdiction to ensure their safety meaning that they are prohibited from participating in the judicial system of their home country. The difficulties are compounded for women and girls, since sexual violence may be used as a tool of warfare, and patriarchal structures already impede women and girl’s ability to seek recourse.

**[NEW] “Conflict-affected areas” include places subject to political instability, institutional or social fragility, and repression, or other areas of widespread violence, due to armed conflict, occupation, and other forms of violent conflict or repeated acts of terrorism or riots, that may lead to violence and human rights abuses.**

## ARTICLE 2

# Statement of Purpose

It is unfortunate that the reference to “fulfilment” of human rights has been eliminated.

Several wording changes to Art. 2(1)(b) could strengthen the treaty. First, the word “environmental harm” should be added, to clarify the connection between human rights and environmental harm. Second, the need to ensure remedies to those in conflict areas should be emphasised. Third, this article omits the original objective of “regulating the activities of TNCs and other business enterprises in international human rights law”, as set out in Resolution 26/9,<sup>43</sup> and the drafters should consider language to refer to transnational corporations’ obligations.

In Art. 2(1)(d), the word “reparation” should be added to ensure that “remedy” is geared toward a reparative outcome and is not just procedural. A gender perspective and concern for conflict-affected areas is also needed here.

In addition, a new Art. 2(1)(e) should be added to recognise that many trade, development and business agreements between States already exist and may require systematic reforms in the legislative and judicial system in order to ensure the primacy of human rights.

- b. To prevent the occurrence of human rights abuses and environmental harm in the context of business activities in both conflict and non-conflict affected areas by establishing obligations for States and obligations to respect human rights for corporations conducting business activities, and by creating effective and binding mechanisms of monitoring and enforceability
- d. To facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities and provide access to justice and effective remedy and reparation to victims who have been subject to such abuses.
- e. To ensure the primacy of human rights over all international agreements, including those pertaining to international trade, investment, finance, taxation, environmental and climate change protection, development cooperation, and security obligations.

## ARTICLE 3

# Scope

Investments should be included in Art. 3(1), since they are often the frame in which corporations abuse human rights, and the term “unless stated otherwise” should be removed, as the treaty should clearly apply to all business enterprises:

1. Unless stated otherwise, ~~t~~This (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations, those who finance business activities, and other business enterprises that undertake business activities of a transnational character.

**Article 3(2) should be deleted.** It is rational that liability may differ for entities in different sectors with different sizes. But the current language would

allow a country to all but discharge large groups of businesses from obligations under this treaty, rendering it ineffective. Concerns about size and sector are already discussed in Article 5 (Prevention).

The scope of human rights should not be limited to treaties that a state ratified. Article 3(3) should specifically mention the ILO Declaration on Fundamental Principles and Rights at Work as follows to decouple the covered labor rights from the ratification requirement of the fundamental conventions:

3. This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms **understood, at a minimum, as those emanating from the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, and** any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law.

## ARTICLE 4 Victims' Rights to Remedy and Reparations

Art. 4(2)(c) provides a non-exhaustive list of possible remedies, which could be strengthened by clarifying the fundamental attributes of effective remedies through the inclusion of definitions at the end of the article. The right to relocation, particularly in connection with environmental damage, including harm related to climate change, is an important one that has been deleted and should be reinstated. In addition, there is a need to avoid limiting the scope of human rights, and to provide for remedies in conflict-affected areas.

The revised draft rightfully acknowledges the right to class action in Art. 4(2)(d).<sup>44</sup> Human rights violations can affect large groups of people (i.e.,

displaced communities) that are better served by collective remedies. Often it is cost prohibitive for one affected individual to take actions to remedy these violations. To ensure that human rights defenders have standing to bring claims, they should be added to Art. 4(2)(d).

Additional suggested language for Art. 4(2)(d) relates to the need for affected rights holders to submit claims in competent courts, rather than have their rights adjudicated in investment arbitration and trade panels where people may lack standing. Such tribunals are not competent to address human rights abuses and often have discretion to deny third-party amicus briefs, which are frequently rejected even when the rights or interests of the non-parties/amici are directly at stake in a claim brought by an investor against a state.<sup>45</sup>

In Art. 4(2)(e), the right to avoid “re-victimization” or further abuse is an important one that should be considered with particular attention to how women can be re-victimized. The treaty is strengthened by the inclusion of gender responsive language and in recognition of the disproportionate human rights abuses and access challenges faced by women and girls.<sup>46</sup> Additional language should clarify how to be gender responsive. Women and girls are faced with gender-specific rights violations that are not understood or widely publicised (i.e., gynaecological and reproductive issues)<sup>47</sup> and may have difficulty accessing remedies due to patriarchal structures.<sup>48</sup> For example, land inheritance rules prevent women from owning land, meaning that they are unable to prove that their land rights have been violated.

The revised draft includes the guarantee of legal aid in Art. 4(2)(f), which is critical in accessing remedy. Accessing information is likewise critical. Affected rights holders face barriers in access to justice because of legal requirements to prove a link between the damage caused and the conduct of the chain of companies alleged to be involved in causing the harm. This Article should explicitly mention human rights defenders, given their essential role in accessing information and providing legal aid.

2. Without prejudice to the paragraph above, victims shall:
  - c. be guaranteed the right to fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy, regardless of whether affected people are located in conflict or non-conflict affected areas, in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, reinstatement in employment, rehabilitation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration, including covering of expenses for relocation of affected people, replacement of community facilities, and mitigation of harm caused by climate change;
  - d. be guaranteed the right to submit claims for human right abuses, including by a human rights defender or representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the State Parties having competence in human rights law, including labor, environmental, and constitutional and administrative law of the State Parties;
  - e. be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, before, during and after any proceedings have been instituted, as well as from re- victimization in the course of proceedings for access to effective remedy, including through appropriate protective and support services that are inclusive and gender responsive, including through appropriate protective and support services that ensures substantive gender equality and equal and fair gender-responsive access to justice such as gender appropriate counselling and gender-specific healthcare.
  - f. be guaranteed access to legal aid and information and legal aid held by businesses and others relevant to the pursuit of remedies, paying particular attention to the increased barriers faced by women and girls, Indigenous peoples, and other traditionally marginalized groups; the right to access information extends to human rights defenders and includes information relative to all the different legal entities involved in the business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents; and
  - g. be guaranteed access to appropriate diplomatic and consular means to facilitate access to effective remedy, especially in cases of business-related human rights abuses of a transnational character.
3. Nothing in this provision shall be construed to derogate from any higher level of recognition and protection of any human rights of victims or other individuals under international law or national law.
4. In this article, the following terms have the following meanings:
  - a. 'restitution' refers to reinstatement, i.e. restoring the affected rights holders to their pre-violation situation (for instance, this could be releasing those who are detained);
  - b. 'compensation' refers to financial reparations to assist affected Rights Holders to rebuild their lives, which could be in the form of money, goods or services;
  - c. 'rehabilitation' refers to medical and psychological care and other social services to help Victims restore physical and mental health.
  - d. 'satisfaction' seeks to restore the dignity of an affected rights holder. It could encompass impartial, effective and thorough investigation, prosecution and punishment of those responsible;
  - e. 'guarantees of non-repetition' seek to ensure similar violations are not perpetrated in the future, for instance through a transformative declaratory order;
  - f. 'environmental remediation' refers to the removal of pollutants or contaminants from environmental media; and
  - g. 'ecological restoration' refers to the recovery of ecosystems that have been degraded, damaged, or destroyed.

## ARTICLE 5

# Protection of Victims

It is essential that this draft treaty acknowledges the rights of human rights defenders in adherence to the UN Declaration on Human Rights Defenders, and Article 5(2) should specifically refer to the term “human rights defenders.”<sup>49</sup> Others who have a role in protecting human rights, but may not fit the definition of “human rights defender” (i.e., whistle blowers and trade unions) should also be acknowledged.

In addition, two new sub-articles should be added after Art. 5(2) to clearly protect against retaliation in the form of Strategic Lawsuits Against Public Participation (SLAPP) suits,<sup>50</sup> and to avoid a situation in which transnational corporations make decisions on national laws governing labour rights, health and environmental standards, while communities whose rights have been abused struggle to access a remedy.<sup>51</sup>

1. State Parties shall protect victims, their representatives, families, **communities** and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective remedy.
2. State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, **particularly women and indigenous human rights defenders**, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity. **Adequate and effective measures include, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seeks to exercise their right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work, including gender-specific violence; and fully, promptly and independently investigating and punishing attacks and intimidation of human rights defenders.**
3. **State Parties shall protect affected rights holders who are parties to legal proceedings in the public interest and their legal representatives against harassment and intimidation through judicial complaints or counter-complaints.**
4. State Parties shall investigate all human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, in accordance with domestic and international law.

## ARTICLE 6

# Prevention

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To ensure the public's right to information, a slight modification should be made in Art. 6(2)(d).

2(d). Communicate regularly and in an accessible manner to **the public** stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses- **and environmental harm** that may arise from their activities including in their business relationships.

**In providing for Human Rights Due Diligence (HRDD), Art. 6(3) is one of the lynchpins of the treaty's ability to prevent harm.**<sup>52</sup> A number of changes should be made to strengthen this section.

First, language in 6(3)(a) requiring results of due diligence assessments to be integrated into business activities, consistent with UNGP 19 should be included.<sup>53</sup> The phrase later in the sub-article “Integrating human rights due diligence requirements in their business relationships and making provision for capacity building or financial contributions, as appropriate” does not substitute for the deleted language. Without the deleted language, due diligence requirements can become a checkbox exercised rather than a method for improving practices.

The revised draft references a gender perspective in Article 6(3)(b) and additional language should clarify how a gender perspective can be applied. Gender-sensitive assessments must be conducted with the meaningful participation of women from all affected communities, as well as relevant women’s organisations and gender experts, and take into account, inter alia, impact of operations on gender roles and gender-based discrimination, women’s health including prenatal and maternal health, gender-based and sexual violence, gendered division of labour on family and community levels, and access to and control of social and economic resources. In such assessment, multiple and/

or intersecting forms of discrimination should be addressed. This information must be compiled in cooperation with those who may be impacted, and it must disaggregate information on impacts to show how women are affected.<sup>54</sup> It must be in a form that is easily accessible so the public can understand the relationships and domiciles for each entity. Due diligence reports should provide an opportunity for public input, not unlike the U.S. process for environmental impact statements.<sup>55</sup>

For Art. 6(3)(c), some additional language should be added regarding consultation to ensure a broad range of stakeholders are included. Further, consultation and consent are not a one-time process—repeated consultation is necessary for each stage of a business activity.

Article 6(3)(d) is strengthened by providing for free prior and informed consent from indigenous peoples rather than consultation, which is in line with international standards.<sup>56</sup>

The requirement to provide financial disclosures in Art. 6(3)(e) was removed and should be reinstated to provide the full range of information needed to remedy human rights abuses. “Group structures” may or may not be interpreted to require clarification on ownership of subsidiaries.

For Art. 6(3)(f), the term “contracts regarding” should be deleted, otherwise this article may be interpreted to apply only to contracts and not to all business relationships.

As discussed above, the term “conflict-affected areas” should be standardized and used consistently throughout the text. Suggested additions to Art. 6(3)(g) recognize that, in conflict-affected areas that lack State regulation, or where the State contributes to the conflict, the risk of businesses becoming involved in human rights abuses is particularly severe.<sup>57</sup> There are existing soft-law and legislative frameworks relevant to business activities in conflict-affected areas, often focused on the extractive sector, but there are no internationally agreed and comprehensive legal standards despite increasing concerns over the risk of complicity of businesses in human rights abuses.<sup>58</sup> Due diligence must consider how to ensure human rights obligations in conflict-

affected areas.<sup>59</sup> States must require businesses to conduct enhanced human rights due diligence in such contexts. Business activities must either not be undertaken, or must be suspended or terminated in circumstances where it might not be possible to avoid human rights abuses. In certain situations, the immitigability of adverse human rights impacts is such that no due diligence exercise can ensure the avoidance of abuse.<sup>60</sup>

3. State Parties shall ensure that human rights due diligence measures undertaken by business enterprises under Article 6.2 shall include:
  - a. Implement an ongoing human rights and environmental due diligence process for the value chain and undertake regular environmental and human rights impact assessments throughout their operations and integrating the results of such assessments into business activities;
  - b. Integrating a gender perspective, in consultation with potentially impacted women and women's organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls, whereby women are involved in the collection of data and data is disaggregated by gender and other categories;
  - c. Conducting meaningful, continued consultations with individuals or communities whose human rights can potentially be affected by business activities, or with their credible proxies and with other relevant stakeholders, including trade unions, ombudspersons, human rights defenders, and credible independent experts, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

- d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of ongoing free, prior and informed consent in advance of and at each stage of the business activity;
- e. Reporting publicly and periodically on, and make easily accessible, financial and non-financial matters including information about subsidiary ownership, group structures and suppliers as well as policies, risks, outcomes and indicators on concerning human rights, labour rights and environmental standards throughout their operations, including in their business relationships;
- f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate;
- g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation; and preventative measures and corrective measures such as divestment to avoid contributing to human rights abuses in their business activities and relationships. States Parties shall caution business enterprises operating in their territory and/or jurisdiction against operating in existing and potential conflict-affected areas where it might not be possible to prevent or mitigate risks. States shall create disincentives, including withdrawal of economic diplomacy and financial support, to deter business enterprises domiciled in their territory and/or jurisdiction from causing, contributing to, or being directly linked to human rights abuses and violations arising from their business activities or business relationships in conflict-affected areas.

The revised draft includes new language in Art. 6(6) clarifying that businesses may be held liable for failing to conduct and communicate due diligence assessments. This is important given the potential for non-compliance with self-reporting.<sup>61</sup> It is also important that human rights due diligence is an ongoing process across the full value chain, rather than just a single assessment.

A new Art. 6(8) should be included to address the role States have in preventing human rights abuses caused by their own business activities (either directly through State-owned or controlled enterprises<sup>62</sup> or in conjunction with non-State actors). Business-related human rights abuses linked to actions by States as economic actors have been documented in a variety of sectors and countries, including in the extractive,<sup>63</sup> agribusiness,<sup>64</sup> arms,<sup>65</sup> and infrastructure sectors.<sup>66</sup> Abuses can occur when States engage in business activities with private entities (e.g. public-private partnerships, public procurement, privatisation of services, investment through a sovereign wealth fund), and with other States (as a member of multilateral institutions that deal with business-related issues, as well as when entering into trade and investment agreements).<sup>67</sup>

**[NEW] 8. States Parties shall take all necessary additional steps, including through human rights and environmental impact assessments, to respect and protect human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes but is not limited to, State ownership or control in business activities, State engagement in business activities with companies or other States, State regulatory oversight, or political or financial support.**

## ARTICLE 7

# Access to Remedy

The revised draft strengthens access to remedy in Arts. 7(2). Additional language should be included to remove domestic legislation that impedes women's access to remedy:

2. State Parties shall ensure that their domestic laws facilitate access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases. **State Parties must review and repeal domestic legislation that is a barrier to eliminating gender discrimination and providing training and education programmes to prevent recurrences of abuses and changes of attitudes of patriarchal attitudes.**

For Arts. 7(4), the previous draft was stronger in reducing barriers to access to remedy by better providing for legal costs. This draft is a step backwards and should restore the previous language and include additional language to avoid unfair payments and better address gender-specific barriers:

4. States Parties shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases. **Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this (Legally Binding Instrument). State Parties shall assist affected rights holders in overcoming such barriers, particularly gender-specific barriers, including through waiving costs where needed. State Parties shall not require victims to provide a warranty as a condition for commencing proceedings.**

In no case shall affected rights holders that have been granted the appropriate remedy to redress the violation, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the affected rights holder shall not be liable for such reimbursement if such affected rights holder demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the affected rights holder.

The revised draft is strengthened with the addition of the provision s in 7.5 and 9.3 prohibiting forum non conveniens, which is a practice carried out in a number of common law jurisdictions through which courts decline jurisdiction on grounds that venue is not a convenient or practical place for the litigation to occur.<sup>68</sup> The doctrine of forum non conveniens must be prohibited to ensure that affected rights holders can access justice in the forum that is most support to their case.

The draft also requires a reversal of burden of proof to ensure access to information and justice, but revisions should provide the detail necessary to ensure that the burden of proof is reversed under fair circumstances. Suggested language is modeled on language from Colombia's article 167 of the General Procedural Code<sup>69</sup> and article 8.3 of the Escazú agreement.<sup>70</sup>

6. State Parties may, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfil the victims' right to access to remedy.

State parties shall ensure that courts asserting jurisdiction under this (Legally Binding Instrument) shall have the capacity to reverse the burden of proof to facilitate the production of evidence of environmental damage (including climate change) and human rights abuse when one party is in a better position to provide the evidence or clarify the controversial facts by virtue of its proximity to the evidence (i.e., having the object of evidence in its possession) or due to a state of defenselessness or disability of the other party. This rule shall be especially applicable to assess the liability of natural or legal persons conducting transnational business activities.

In addition, two new sub-articles after Art. 7(7) should be included to improve access to remedy in connection with transnational corporations and with imminent harm. A new 7.8 would address the fact that enterprises hold information needed to show liability, and affected people are often unable to obtain information needed to prove a court case—particularly when companies operate remotely through subsidiaries and sub-contractors. Stronger requirements for the disclosure of information can facilitate legal procedures. Affected rights holders should be able to access comprehensive information about the different entities forming a transnational corporation or economic group, and their legal relationships (e.g. land titles, contracts, social environmental responsibility policies). If this information is unavailable, the judges of domestic courts should apply a rebuttable presumption of control, whereby the court would presume a business relationship sufficient to warrant liability unless the companies can prove to the contrary.

Proposed language for 7.8 is as follows:

**[NEW] 8. In the case of the unavailability of information needed to pursue a remedy against a transnational company, courts shall apply a rebuttable presumption that the parent company controls subsidiary companies and information held by subsidiary 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.**

Affected rights holders (or their surviving kin) may only be able to seek compensation after an egregious injury. Rights holders should be able to obtain injunctive relief for foreseeable impending harm, and courts should be able to enjoin the harmful action pending the outcome of a case. A model is the Inter-American Human Rights system, which can require States to “take immediate injunctive measures in serious and urgent cases, and whenever necessary [ … ] to prevent irreparable harm to persons”.<sup>71</sup>

Proposed language for 7.9 is as follows:

**[NEW] 9. Affected rights holders shall have the right to request competent courts, including those of State parties, to enjoin actions that present a risk of irreparable harm. Such injunction should be available as a precautionary measure pending the resolution of a case.**

## ARTICLE 8

# Legal Liability

Art. 8.1 clarifies that liability includes not just one's own business activities but also those from business relationships. The revised draft also includes new reference to administrative law in this article and clarifications regarding criminal law; however, there is no mention of civil law. Additional changes should be made to Article 8 in line with the original purpose of the treaty (preventing transnational corporation abuses) and to outline the range of liability. It is important for States to ensure that their domestic law provides for a comprehensive and adequate system of administrative, civil, and criminal liability for human rights abuses in the context of business activities. Administrative liability is often the most efficient form of liability, while criminal is the strongest liability needed for the most reprehensible actions caused by human rights abuses (regardless of whether due diligence was conducted). Civil liability is needed to ensure adequate remedies to people. As such, it is important that States recognize civil (i.e., tort) causes of action for human rights violations.

1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of **administrative, civil, and criminal** legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.

The draft treaty currently does not clarify the nature of penalties for violating due diligence reporting requirements, particularly in the event that a reporting failure does not rise to the level of a human rights abuse. Art. 8.4 is an opportunity to provide clarification:

4. State 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 criminal offences or other regulatory breaches that amount or lead to human rights abuses **including business activities that present a real risk of undermining and violating human rights and international investments that support such business activities. Penalties shall also be adopted for violations of due diligence reporting requirements. Administrative penalties for inaccurate or incomplete reporting and similar violations should include measures such as sanctions/fines, withdrawal of licenses, permits or government support, denial of opportunities for state contracts, the appointment of monitors, and /or the dissolution of the company.**

The revised draft includes a clear requirement for gender-specific reparation in Article 8.5. Additional language should be included to ensure that reparations are not going to the State unless the State has truly provided that compensation already directly to the affected rights holder (and not to men in the rights holder's family):

5. States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, and gender responsive reparations to the victims of human rights abuse in the context of business activities, including those of a transnational character, in line with applicable international standards for reparations to the victims of human rights violations. Where a legal or natural person conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim or compensate the State **to the extent**, if that **the** State has already **directly** provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

The revised draft includes clarifications in Article 8.7 regarding the coverage of liability for business relationships. It is essential to ensure that a transnational corporation is liable for the actions of its subsidiaries and those in the supply chain with whom it has a business relationship. For clarification and to avoid a conflict with Article 8.8, the final phrase should be removed. In addition, additional language should be added to the end of this sub-article to clarify that this article applies in the context of relationships between parent and subsidiary companies, a company and its supply chain, and an investor supporting such actions:

7. States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse. **This article applies to an enterprise that fails to prevent harm caused by their subsidiaries or supply chain, as well as to investors in such enterprises.**

The revised draft includes a clarification in 8.8 that simply adhering to a procedural checklist regarding due diligence reporting should not absolve a company of liability.<sup>72</sup> This sub-article is a good place to add more detail regarding how liability should be determined. Language based on Relevant Policy Objectives from Accountability and Remedy Project Part I report<sup>73</sup> discussing human rights due diligence should be included. Policy Objective 3 refers to principles for assessing corporate liability under domestic public law regimes; while Policy Objective 14 covers private law regimes. Both objectives call for measures by companies to identify, prevent and mitigate the adverse human rights impacts of their activities; measures by companies to supervise their officers and employees to prevent and mitigate adverse human rights impacts; using strict or absolute liability as a means of encouraging greater levels of vigilance in relation to business activities that carry particularly high risks of severe human rights impacts; and for judicial bodies to account for credible and sector-specific guidance as to the technical requirements of human rights due diligence in different operating contexts. The proposed language would substitute the last sentence of the sub-article as follows:

Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.7. The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards. **Liability shall be based on the relevant standards of care established by member states through this treaty and others. Liability shall not be determined solely on the question of whether a company has complied with due diligence measures, but shall include a consideration of factors such as the severity or significance of the impact, the size and sector of the company, ownership, structure and resources of the company, industry practices, the level of leverage which the company has and whether this was exercised, and what the company knew or should have known. Strict liability is appropriate in cases where businesses are engaged in hazardous or inherently dangerous industry that poses a potential threat to the health and safety of the persons working for the company as well as others who are affected by the activities of the company. Nothing in this treaty shall be interpreted to reduce more protective standards on corporate liability or tort law already existing in national legislation.**

To ensure that the full range of human rights instruments and customary law applies, the revised draft should eliminate language that confines this sub-article to domestic law, and add language that clarifies the scope of criminal law:

Subject to their legal principles, States Parties shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law binding on the State Party, customary international law, and or their domestic law. **State Parties shall also develop their criminal liability law to include acts that go beyond traditional criminal offenses to include violations of a full range of human rights, including economic, social, cultural and environmental rights.** Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are commensurate with the gravity of the offence. States Parties shall individually or jointly advance their criminal law to ensure that the criminal offences covered in the listed areas of international law are recognized as such under their domestic criminal legislation and that legal persons can be held criminally or administratively liable for them. This article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offences.

Finally, it is important to reinclude from the zero Draft a provision requiring States to incorporate or otherwise implement within their domestic law appropriate measures for universal jurisdiction for human rights violations and internationally recognized crimes:

**[NEW] Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes.**

## ARTICLE 9

# Adjudicative Jurisdiction

The revised draft is strengthened by including a denial of forum non conveniens and recognizing of forum necessitas to avoid a denial of justice where States closely connected to the case have denied jurisdiction. This principle already exists in various regional and domestic legal systems.<sup>74</sup>

However, the draft omits victims' or rights holders' domicile as well as a place of substantial business of the defendant as a basis for jurisdiction, and these should be restored. In some cases, a right holder may not be able to leave their domicile to bring a claim, such that there is a need for jurisdiction to be based there. Further, limiting suit to the principle place of business and not a substantial place of business would significantly reduce the practical forums in which a transnational corporation can be sued. Another problem with changing the place of substantial business to the place of incorporation is that it could encourage a transnational corporation to incorporate in places that may not be as responsive to human rights obligations, which the transnational corporation actually carries out its primary business elsewhere. This article relates only to jurisdiction over civil claims, leaving aside the question of criminal jurisdiction, which should be addressed in the next draft.

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 covered under this (Legally Binding Instrument), shall vest in the courts of the State where: a. the human rights abuse occurred; **b. the affected rights holders are domiciled;** c. an act or omission contributing to the human rights abuse occurred; or d. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled. The above provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or national law, **nor does it exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.**
  
2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its: a. place of incorporation; or b. statutory seat; or c. central administration; or d. **principal substantial** place of business **interests;** or

## ARTICLE 11

# Applicable Law

The revised draft rightfully removes the provision subjecting the choice of applicable law to domestic legislation. The affected rights holder should be able request which law is to be applied, and that choice should include the person's domicile. To further improve this article, the draft should return to the option of applying the law of the domicile of the rights holder and it should clarify that the applicable law is in accordance with the primacy of human rights over trade and investment agreements:

1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
2. Notwithstanding Art. 9.1, all matters of substance regarding human rights law relevant to claims before the competent court **shall** **may**, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where:
  - a. the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
  - b. the person is domiciled;**
  - c. the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.
- 3. In the event of confusion regarding which law applies, the choice of applicable law shall be in accordance with the provisions of this (Legally Binding Instrument) regarding the primacy of human rights over trade and investment agreements.**

## ARTICLE 10

# Statute of limitations

The revised draft is strengthened by removing language limiting the scope of this article to domestic law, and including a provision recognising that in some cases, including sexual violence, harm may not be recognisable or capable of being discussed for a long time.

## ARTICLE 12

# Mutual Legal Assistance & International Judicial Cooperation

In line with previous suggestions that domestic law not be used to eviscerate the treaty, article 12(9)(c) (allowing parties to refuse judgment enforcement if contrary to the party's sense of "ordre public" and 12(10) (allowing parties to refuse mutual aid) should be deleted. "Ordre public" is not defined, and a party could interpret the term to avoid carrying out any judgement. Article 12(10) could allow any party to avoid adhering to a request for mutual assistance under the treaty if the party determines that the request is "contrary to the legal system" of the party, or relates to a human rights instrument that the party did not sign.

## ARTICLE 13

# International Cooperation

Potential partnerships in Article 13(2) should be broadened as follows:

2. State Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society **and trade unions.**

## ARTICLE 14

# Consistency with International Law principles and instruments

The revised draft directly addresses trade and investment in Article 14.5. The primacy of human rights in investment and trade agreements is essential. To further ensure that such agreements do not undermine human right, additional provisions should be included:

5. States Parties shall ensure that:
  - a. any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfill **and shall ensure** their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.
  - b. Any new bilateral or multilateral trade and investment agreements shall be compatible **not conflict with and shall ensure upholding** the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.

## ARTICLE 15

In accordance with CEDAW Article 7 (requiring States Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, ensure to women, on equal terms with men, the right to participation in public and political life) and mirroring the UN's own gender-parity strategy, gender balance in the monitoring of the treaty implementation can and should be achieved, rather than considered.

Gender balance among human rights treaty bodies experts is still far from being reality. For instance:

- 94% of experts in the Committee on the Rights of Persons with Disabilities are men;
- 72% of experts in the Committee on Economic, Social and Cultural Rights are men;
- 70% of experts in the Committee on Enforced Disappearances are men;
- 60% of experts in the Committee against Torture are men.

Only the CEDAW Committee has a higher proportion of female experts with one male expert. In addition to ensuring gender balance of Committee members, the Committee created under the treaty should foresee gender expertise as a criterion to consider in the selection of experts, given the highly gendered dimension of business-related human rights abuses.

- a. ...The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields **and shall have gender expertise.**
- b. The experts shall be elected by the State Parties, consideration being given to equitable geographical distribution, the differences among legal systems, **gender expertise, and ensuring a** gender balanced representation and ensuring that elected experts are not engaged, directly or indirectly, in any activity which might adversely affect the purpose of this (Legally Binding Instrument)
- f. **The members shall receive communications and complaints, and make specific recommendations on specific cases.**

## ARTICLE 16 Implementation

In several places throughout the draft treaty, the option of implementing the treaty “in accordance with domestic law” has been eliminated. This avoids the situation in which domestic law could nullify the treaty, which would run contrary to the Vienna Convention’s prescription that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>75</sup> The draft should include a final sub-article to Art. 16 to clarify the duty for States to incorporate the treaty under their laws or to adapt their national laws to the provisions of the treaty:

**[NEW] 6. Parties may not invoke their domestic law as justification for non-observance of the obligations in this instrument. If conflict between this instrument and a rule of domestic law, is inevitable, the State must amend the latter as quickly as possible in order to bring it into line with its obligations under this instrument.**

## ENDNOTES

1. Gilmore, K. (15 November 2018) "Opening of the 4th Session of the OEWG in Charge of the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises, With Respect to Human Rights."
2. HRC (2019) "Situation of women human rights defenders - Report of the Special Rapporteur on the situation of human rights defenders," A/HRC/40/60.
3. Global Witness (2020) "Defending Tomorrow: The climate crisis and threats against land and environmental defenders," <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>
4. HRC (7 April 2008) "Protect, Respect and Remedy: a Framework for Business and Human Rights," Un Doc A/HRC/8/5.
5. European Parliament (2019) Access to legal remedies for victims of corporate human rights abuses in third countries.
6. Anti-Slavery International and European Coalition for Corporate Justice (2020) "What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet." [https://corporatejustice.org/asi\\_eccj\\_report\\_final.pdf](https://corporatejustice.org/asi_eccj_report_final.pdf)
7. UN Committee on the Elimination of Racial Discrimination (2019) "Concluding observations on the combined fifth to ninth reports of Ireland" CERD/C/IRL/CO/5-9.
8. UN Press Release (14 February 2020) "Special Rapporteur on the Situation of Human Rights in the oPt Applauds Database, Says Israeli Settlements Deprive Palestinians "Land Base for Genuine State and Viable Economy" <https://www.un.org/unispal/document/special-rapporteur-on-the-situation-of-human-rights-in-the-opt-applauds-database-says-israeli-settlements-deprive-palestinians-land-base-for-genuine-state-and-viable-economy-press-release/>
9. HRC Database of all business enterprises involved in the activities detailed in paragraph 96 of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/43/71.  
See also Amnesty International (2019) Destination: Occupation - Digital tourism and Israel's illegal settlements in the Occupied Palestinian Territories. <https://www.amnesty.org/download/Documents/MDE1594902019ENGLISH.PDF>
10. HRC (10 May 2016) "Improving accountability and access to remedy for victims of business-related human rights abuse - Report of the United Nations High Commissioner for Human Rights," A/HRC/32/19
11. Business and Human Rights Resource Centre (2017) "Corporate impunity is common & remedy for victims is rare - Corporate Legal Accountability Annual Briefing," [https://www.businesshumanrights.org/sites/default/files/documents/CLA\\_AB\\_Final\\_Apr%202017.pdf](https://www.businesshumanrights.org/sites/default/files/documents/CLA_AB_Final_Apr%202017.pdf)
12. Anti-Slavery International and European Coalition for Corporate Justice (2020) "What if? Case studies of human rights abuses and environmental harm linked to EU companies, and how EU due diligence laws could help protect people and the planet." [https://corporatejustice.org/asi\\_eccj\\_report\\_final.pdf](https://corporatejustice.org/asi_eccj_report_final.pdf)
13. Corporate Human Rights Benchmark (2019) <https://www.corporatebenchmark.org/>
14. Corporate Human Rights Benchmark (2019).
15. European Commission Press Release (24/02/2020) "Commission study shows the need for EU-level legislation on due diligence throughout the supply chain on human rights and environmental impacts" [https://ec.europa.eu/commission/presscorner/detail/en/MEX\\_20\\_323](https://ec.europa.eu/commission/presscorner/detail/en/MEX_20_323)
16. Tauli-Corpuz, V. (6 July 2015) "Opening Remarks By The United Nations Special Rapporteur On The Rights Of Indigenous Peoples' United Nations Special Rapporteur On The Rights Of Indigenous Peoples," <http://unsr.vtaulicorpuz.org/site/index.php/en/statements/70-igwg-2015>.
17. The Workers Rights Consortium are tracking responsible business practice during this time. See <https://www.workersrights.org/issues/covid-19/tracker/>
18. OHCHR (2014) "Regulating Transnational Corporations: A Duty under International Human Rights Law - Contribution of the Special Rapporteur on the right to food, Mr. Olivier De Schutter, to the workshop 'Human Rights and Transnational Corporations: Paving the way for a legally binding instrument' convened by Ecuador, 11-12 March 2014, during the 25th session of the Human Rights Council" <<https://www.ohchr.org/Documents/Issues/Food/EcuadorMtgBusinessAndHR.pdf>>
19. In favour: Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Viet Nam

**Against:** Austria, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America

**Abstaining:** Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Peru, Saudi Arabia, Sierra Leone, United Arab Emirates] <https://www.ihrb.org/pdf/G1408252.pdf>

<sup>20</sup>. See European Parliament (2018) “European Parliament resolution of 4 October 2018 on the EU’s input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights,” 2018/2763(RSP) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0382+0+DOC+XML+V0//EN&language=EN>

<sup>21</sup>. OHCHR (15-19 October 2018) “ENNHR Statement on Occasion of the 4th session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGWG)” <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ENNHR%20Statement%20on%20Zero.pdf>.

<sup>22</sup>. An alliance of networks and campaign groups from around the world united in the demand for a legally binding treaty to regulate the activities of transnational corporations and other business enterprises. Some of the founding Treaty Alliance groups include: CETIM, CIDSE, Dismantle Corporate Power Campaign, ESCR-Net, FIAN, FIDH, Franciscans International, Friends of the Earth International, International Commission of Jurists & Transnational Institute. <https://www.treatymovement.com/home>

<sup>23</sup>. Such as the draft “United Nations Code of Conduct on Transnational Corporations” & the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” in Martins, J. (2014) “Corporate Influence on the Business and Human Rights Agenda of the UN.”

<sup>24</sup>. Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/43/55) [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex\\_CompilationStatements\\_5th\\_session.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex_CompilationStatements_5th_session.pdf)

<sup>25</sup>. Dáil Éireann Debate, Tuesday - 14 July 2020, Questions (473) <https://www.oireachtas.ie/en/debates/question/2020-07-14/473/>

<sup>26</sup>. Dáil Éireann Debate, Tuesday - 14 July 2020, Questions (473) <https://www.oireachtas.ie/en/debates/question/2020-07-14/473/>

<sup>27</sup>. Gilmore, K. (15 November 2018) “Opening of the 4th Session of the OEWG in Charge of the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises, With Respect to Human Rights.”

<sup>28</sup>. HRC (10 August 2018) ‘Report of the Special Rapporteur on the rights of indigenous peoples.’ A/HRC/39/17

<sup>29</sup>. In areas including mining, agribusiness, oil, gas, logging and renewable energy. See Business and Human Rights Resource Centre website at <https://dispatches.business-humanrights.org/hrd-january-2020/index.html>

<sup>30</sup>. UNGA (19 July 2017) “Situation of Human Rights Defenders: Report of the Special Rapporteur on the Situation of Human Rights Defenders,” UN Doc A/72/170.

<sup>31</sup>. HRC (2019) “Situation of women human rights defenders - Report of the Special Rapporteur on the situation of human rights defenders,” A/HRC/40/60.

<sup>32</sup>. The Global Initiative for Economic, Social and Cultural Rights (2014) “Using CEDAW to Secure Women’s Land and Property Rights: A Practical Guide.”

<sup>33</sup>. Working Group on the issue of human rights and transnational corporations and other business enterprises (2019) “Gender dimensions of the Guiding Principles on Business and Human Rights.” A/HRC/41/43

<sup>34</sup>. E.g., Universal Declaration on Human Rights art. 8, International Covenant on Civil and Political Rights art. 2 (3); General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International humanitarian Law, A/RES/60/147, 21 March 2006, Principle 11.

<sup>35</sup>. Situation of human rights defenders, A/71/281, 3 August 2016; HRC resolution A/HRC/40/L.22/Rev.1, Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development, 21 March 2019, preambular para.11; HRC resolution A/HRC/31/32, Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, 24 March 2016.

<sup>36</sup>. Such duty is derived from the State's primary obligation to protect all human rights, which includes guaranteeing the right of everyone, individually and in association with others, to promote and strive for the protection and realization of human rights

and fundamental freedoms at the national and international level, see Human rights defenders, A/66/203, 28 July 2011, paras. 54-56.

<sup>37</sup>. Amnesty International (2014) Injustice Incorporated Corporate Abuses and the Human Right to Remedy <https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf> p. 51.

<sup>38</sup>. UNGP were adopted by Human Rights Council A/HRC/17/31 resolution 17/4, 16 June 2011.

<sup>39</sup>. For instance, the Special Rapporteur on Contemporary Forms of Slavery recommended that: "All businesses' human rights policies and procedures and the systems to implement them should integrate measures reaching beyond the first tier in supply chains and include clear guidelines and indicators to assist those operating at the lower tiers and in the informal economy to identify human rights violations, including contemporary forms of slavery, and ensure compliance with international human rights standards", para. 69 c), A/HRC/30/35, 8 July 2015.

<sup>40</sup>. UNGP Principle 17(a).

<sup>41</sup>. The Committee on Economic, Social and Cultural Rights in its General Comment no 24 on business activities define the scope of human rights due diligence includes " entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party's laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors)"; General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 33.

<sup>42</sup>. Various laws provide examples of related terms, e.g., Reg. (EU) 2017/821, 17 May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Article 2(f) ("conflict-affected and high-risk areas' means areas in a state of armed conflict or fragile post-conflict as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses"); OECD Guidelines on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, Third Edition, p. 66: ("Conflict-affected and high-risk areas – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international

or non international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law."); Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 7 ("Conflict-affected or high-risk areas are countries, areas, or regions: that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely, in which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present, that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence, that are currently in transition from violent conflict to peace.")

<sup>43</sup>. HRC, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 14 July 2014.

<sup>44</sup>. See U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, 21 March 2006, article 13 (referring to the need to develop procedures to allow groups of victims to present claims for reparation and to receive reparation).

<sup>45</sup>. Columbia Center for Sustainable Investment (May 2019) Primer: International Investment Treaties and Investor-State Dispute Settlement <http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/>; Lorenzo Cotula (23 July 2020) Investment disputes from below:whose rights matter? <https://www.iied.org/investment-disputes-below-whose-rights-matter>.

<sup>46</sup>. In 2017, the Committee on Economic, Social, and Cultural Rights underlined in its General Comment No. 24 both the disproportionate adverse impacts of business activities on women and the need to incorporate a gender perspective into all measures to regulate business activities that might adversely affect economic, social and cultural rights.

- <sup>47</sup>. Amnesty International (2014) Injustice Incorporated Corporate Abuses and the Human Right to Remedy, 2014 <https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf>
- <sup>48</sup>. In line with CEDAW's General recommendation on women's access to justice, the gender guidance on the implementation of the UNGPs adopted by the Human Rights Council in June 2019 recommends that: "States should take proactive and targeted measures to reduce additional barriers that may be faced by women in holding businesses accountable for human rights abuses, for example a low level of literacy, limited economic resources, gender stereotyping, discriminatory laws, patriarchal cultural norms and household responsibilities." Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23 May 2019, Principle 26.
- <sup>49</sup>. See also Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Article 9.2, 4 March 2018 ("Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights,...")
- <sup>50</sup>. For example, in a case involving Texaco's extraction efforts in Ecuador, Defendant Chevron sued plaintiffs for fraud and the lawyer under the Racketeer Influenced Corrupt Organization (RICO) Act for conspiracy. See *Chevron v. Donziger*, No. 11 Civ. 0691 (LAK), 2013 WL 5575833, at \*1 (S.D.N.Y. Oct. 10, 2013).
- <sup>51</sup>. Columbia Center for Sustainable Investment (May 2019) Primer: International Investment Treaties and Investor-State Dispute Settlement <http://ccsi.columbia.edu/2019/06/03/primer-international-investment-treaties-and-investor-state-dispute-settlement/>; Lorenzo Cotula, Investment disputes from below: whose rights matter? 23 July 2020, <https://www.iied.org/investment-disputes-below-whose-rights-matter>.
- <sup>52</sup>. HRDD is one of the core elements of the United Nations Guiding Principles on Business and Human Rights (UNGPs), whereby corporations must protect human rights and States must enforce such protections. See UNGP Principles 3 and 17.
- <sup>53</sup>. See UNGP Principle 19: "In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action."
- <sup>54</sup>. See OECD Due Diligence Guidance for Responsible Business Conduct, 2018 (providing practical guidance on how to integrate gender in due diligence, including by collecting and assessing sex-disaggregated data).
- <sup>55</sup>. National Environmental Policy Act of 1969, as amended, 42 USC Sections 4321-4347.
- <sup>56</sup>. See UN Declaration on the Rights of Indigenous Peoples, art. 10; General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 12.
- <sup>57</sup>. See Business and human rights in conflict-affected regions: challenges and options towards State responses, A/HRC/17/32, 27 May 2011; OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, 2016; Fragile! Handle with Care: Multinationals and Conflict, Lessons from SOMO's Multinational Corporations in Conflict-Affected Areas programme, November 2016, p. 55.
- <sup>58</sup>. See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition; UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors, 2010, p. 10.
- <sup>59</sup>. See, e.g., United States legislation regarding imports of conflict minerals, Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502; European Union Regulation 2017/821 on conflict minerals, 17 May 2017; European Union Regulation 995/2010 on timber, 20 October 2010.
- <sup>60</sup>. See HRC, Database of all enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/37/39, 1 February 2018, para. 40-41.
- <sup>61</sup>. See, e.g., UK Home Office, "Home Office tells business: open up on modern slavery or face further action" (Oct. 18, 2018), available at: <https://www.gov.uk/government/news/home-office-tells-business-open-up-on-modern-slavery-or-face-further-action> (estimating that 40% of companies covered by the legislation have failed to publish a due diligence statement).

- <sup>62</sup>. See HRC, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, 4 May 2016, paras. 29-34
- <sup>63</sup>. See Global Witness, South Sudan's Leadership Uses State-Owned Oil Company Nilepet to Funnel Millions into Brutal Security Services and Ethnic Militia, 6 March 2018, <https://www.globalwitness.org/en/press-releases/south-sudans-leadership-uses-state-owned-oil-company-nilepet-funnel-millions-brutal-security-services-and-ethnic-militias/>; HRC, The economic interests of the Myanmar military, A/HRC/42/CRP.3, 5 August 2019, para. 189.
- <sup>64</sup>. See, e.g. FIAN International, "The Business of Land in Matopiba, Brazil," <https://www.fian.org/en/struggle/the-business-of-land-in-matopiba-brazil>
- <sup>65</sup>. See Amnesty International (2019) "Outsourcing Responsibility, Human Rights Policies in the Defence Sector" <https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF>
- <sup>66</sup>. See CIEL campaign update (July 2018) "Panama Transmission Line IV Threatens Indigenous Land Rights" <https://www.ciel.org/project-update/panama-transmission-line-iv/>
- <sup>67</sup>. UNGP Principles 4, 5, 6, 8, 9, 10; General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 13, 21,22 29.
- <sup>68</sup>. E.g., Uniform Law Conference of Canada, Court Jurisdiction and Proceedings Transfer Act (CJPTA) of 1994.
- <sup>69</sup>. General Code of Procedure, Law 1564 (2012), "(... according to the particularities of the case, the judge may, ex officio or at the request of a party, distribute the burden of proof when ordering the production of evidence, during its production or at any time during the process before taking a decision, requesting the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts by virtue of its proximity to the evidence, for having the object of evidence in its possession, for special technical circumstances, for having intervened directly in the events that gave rise to the dispute, or due to a state of defencelessness or disability in which the counterpart is, among other similar circumstances.")
- <sup>70</sup>. Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement) 2018, article 8.3 (requiring "measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof").
- <sup>71</sup>. See Rules of Procedure of the Inter-American Commission on Human Rights (2011), art. 25.
- <sup>72</sup>. British Institute of International and Comparative Law in United Kingdom, et al, (2020) "Study on due diligence requirements through the supply chain," p. 250. HRC, Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability A/HRC/38/20 (June 1, 2018) para. 12.
- <sup>73</sup>. HRC, Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19, 10 May 2016; see also British Institute, p. 250.
- <sup>74</sup>. See, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, art. 49; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, art. 50; Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 146; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147, paras. 4-5.
- <sup>75</sup>. Vienna Convention on the Law of Treaties (1969) Art. 27.

This paper was written by Layla Hughes and edited by Siobhan Curran, Mairead Keigher and Conor O'Neill on behalf of the ICBHR.