



**ESCR-Net - International Network for Economic, Social and Cultural Rights  
submission to the Chair-Rapporteur and UN open-ended intergovernmental  
working group on transnational corporations and other business enterprises with  
respect to human rights**

31 March 2023

**General remarks**

ESCR-Net - International Network for Economic, Social and Cultural Rights submission to the Chair-Rapporteur and UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 31 March 2023 General remarks This submission was coordinated by ESCR-Net's Corporate Accountability Working Group, which coordinates collective action to confront corporate capture, challenge systemic corporate abuse, and advocate for new accountability and remedy structures.

ESCR-Net - International Network for Economic, Social and Cultural Rights connects over 300 social movements, Indigenous Peoples' groups, NGOs and advocates across more than 80 countries to build a global movement to make human rights and social justice a reality for all. ESCR-Net reaffirms its support to the UN process towards a legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights. At the eighth session of the open-ended intergovernmental working group on TNCs and other business enterprises, we continued to call on all States to negotiate meaningfully and effectively for a legally binding instrument based on the third revised draft, considering textual suggestions presented by States in 2021. This draft demands for stronger provisions to hold corporations accountable, as voiced by people and communities affected by violations and abuses related to business activities. States must act urgently to advance and ultimately adopt the legally binding instrument in an effort to stop corporate capture, end corporate impunity and establish effective mechanisms for remedying and compensating communities and people who have been disproportionately affected by transnational corporations, including those in the extractive, financial, food, healthcare and tech industries. It is crucial to integrate comprehensive attention to the different and disproportionate impacts experienced by women in all their diversity, gender non-binary persons, rural communities, Indigenous Peoples, and other historically marginalized groups, as well as communities in contexts of conflict and occupation.

We call on States to reject textual proposals that embolden colonial legacies. We call on States to stop corporate capture and reject capitalist agendas in negotiations that prioritize profit over people. Several States, like the United States of America, have defended corporate participation in treaty negotiations and even echoed their demands to weaken the text of the treaty. **We strongly reject the right of corporations to participate in the treaty process because they have an irreconcilable conflict of interest when it comes to regulating and remediating their own human rights impacts.** From another perspective, informal proposals provided by the Chair-Rapporteur on 6 October 2022 threaten to backtrack the incremental progress made in the creation of a third legally binding instrument. We urge States not to promote or adopt any language that weakens the treaty, blurs legal obligations on parties, and removes specificity for

important standards of legal liability and accountability to the benefit of corporate lobbyists and several demands of the Global North that can be associated with their colonial legacies.

Countries in the Global South face particular challenges in securing remedy for harms to their communities and environment by large transnational corporations often headquartered in the Global North. Global South governments are consequently stuck with the costs and other long term consequences of such damages. We believe that there is an urgent need for all States to support the third revised draft of the legally binding instrument as a valuable starting point for negotiations and to push back against corporate capture of the process. Existing elements of legal ‘liability in all contexts, extraterritoriality and a provision on conflicts of interest are essential to stopping corporate impunity. After more than eight years of this process, we ask the question - if we do not work to advance a meaningful legally binding instrument now, then when? Now is the time to act. Human rights, our planet and the environment cannot wait any longer, and we cannot allow corporate capture of our government decision-making processes to continue delaying the realization of our demands.

For textual suggestions on the legally binding instrument [click here](#).

## Article 1

Suggestions to add “adverse human rights impacts” in the text should not be accepted. The use of “adverse human rights impact” as a definition centers and favors business interests as it reduces the responsibility on corporations. An adverse human rights impact has been defined as “a harm which corresponds *to a reduction* in or removal of a *person’s ability* to enjoy an internationally recognized human right.” On a semantic level, the word “adverse” evokes less of a severity than “abuse” and the passive language of “a person’s ability to enjoy” takes away the power of a person’s entitlement to “full enjoyment” of their rights.

The Third Draft included “human rights *abuses*,” defined as “any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights *and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.*” **ESCR-Net members called for this text to be further strengthened to include a reference to workers rights as well. New proposals to remove or exclude** direct or indirect harm dangerously narrows the scope of subsequent liability for the commission of such abuse - therefore must be strongly rejected. Similarly, proposals to exclude “fundamental freedoms” after “internationally recognized human right,” eliminates the space to continue pushing for more internationally recognized rights that may not be currently supported or recognized nationally, regionally and within the international legal community. Finally, any exclusion of the specific rights (the right to a safe, clean, healthy and sustainable environment - or workers rights) takes away the important focus of the Legally Binding Treaty, which is the protection of these specific rights in light of corporate abuse. The Third Draft significantly added “including” before listing these rights, so as to ensure that those specific rights were highlighted but not limiting other rights that are under attack due to corporate abuse. This is crucial and must be retained in the text.

Further, any suggestions to change the definition of human rights abuse to “any acts or omissions that take place in connection with business activities and *result in an adverse human rights*

*impact*” is vague and narrows the scope of potential human rights abuses and violations. Narrowing the definition of human rights abuses in the Third Draft, quoted above, eliminates important qualifying concepts, such as “direct and indirect harm” as well as “acts or omissions.” It also eliminates the subject of the harm– namely “any person or group of persons.”

Finally, it is significant that Article 1 maintains mentions of the following definitions: (a) business activities; (b) regional integration organization; (c) victim; and (d) business relationship.

For further textual suggestions on this article [click here](#).

## **Article 6**

### **Article 6.1**

We support textual suggestions made by the State of Palestine in the 7th session of the IGWG last year to strengthen Article 6 by adding a provision highlighting that *“State Parties shall take precautionary measures, including the halt of business activities, when such activities can cause imminent human rights abuses or violations causing irreparable harm, independently from the existence or outcome of a legal proceeding relative to the situation.”*

We also urge states to **enforce respect by corporate entities** of internationally recognized human rights standards through legislative approaches as a preventative measure. It would be important to avoid language that promotes voluntary approaches such as “enhancing respect” or “strengthening the practice of human rights due diligence”. **States must require corporations under this article to actively “prevent and mitigate human rights abuses and violations or else face punitive measures and accountability.”**

### **Article 6.2**

This provision must remain unchanged as per the text in the Third Draft treaty - with the addition of the word violations in addition to abuses. We agree with the proposal of Cameroon (in 2021) to strengthen this Article by adding a provision that articulates the following: “Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships.” We support the proposals by Mexico and Panama to delete the word “and mitigate” from this provision.

### **Article 6.3**

This provision is key and must not be further weakened or watered down in a revised draft treaty text. We support textual suggestions made last year by Palestine to further strengthen this text particularly by adding language on:

- **Accountability across the value chain:** States Parties shall require business enterprises and associated actors across the full value chain, to undertake ongoing and frequently updated human rights due diligence.... across all operations

- **Terminating activities where mitigation is impossible:** In cases where effective human rights due diligence is impossible, businesses may be required to terminate their relationship and/or cease activities/operations to fulfill their obligations

Of note, we strongly encourage States to also include in a revised draft that where States and financial institutions are involved in business, they too are required to conduct both human rights and environmental due diligence, in addition to the corporate entity involved. The due diligence obligation should further be an ongoing process across the full value chain, rather than just a single checklist activity.

**For that purpose, States Parties shall require business enterprises to undertake human rights due diligence based on national laws and international obligations, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows. -Proposal made by Ethiopia, but Mexico opposes.**

#### **Article 6.4**

We support the proposal by Cameroon for a provision stipulating that “State Parties shall designate a competent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by business enterprises as well as their effective implementation.” We also support Panama’s proposal to undertake and publish regular impacts assessments *prior* and throughout their operations.

We also support Argentina’s suggestion to add a provision that would ensure “freedom of association, the right to strike, collective bargaining, nondiscrimination and gender equality - elimination of workplace violence and harassment in the world of work -, occupational safety and health, prohibition of child and forced labor, and social protection, as specific issues.”

We also support suggestions to strengthen this provision in line with the following:

- Consultations with Indigenous Peoples must be in line with in line with principles of free, prior and informed consent and must be carried out throughout all phases of operations (text supported by Palestine and South Africa)
- Consultations on business activities shall be undertaken by an independent public body and protected from any influence from commercial and other vested interests (text supported by Palestine and South Africa)
- Where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless it is for the benefit of the oppressed population (text supported by Palestine, South Africa)
- Inclusion of civil society organizations in consultations on business activities (text supported by Panama, Palestine and South Africa)
- Respecting that Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land without threats of retaliation. (text proposed by Palestine).
- States parties shall provide mechanism for financial guarantees to communities for activities with a high potential of damage to human rights, to be made immediately available in case of harm (text proposed by Cameroon)

- Adopting and implementing enhanced and ongoing human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation – the enhanced due diligence must take place prior to the commencement of business activities and throughout all phases of operations, corporations and/or State entities already engaged in business activity in conflict-affected areas, including situations of occupation, shall also adopt and implement urgent and immediate measures, such as divestment and disengagement policies, to avoid corporate involvement in, or contribution to human rights abuses and violations in their activities and relationships. (text proposed by Palestine)

Of note, in order to properly safeguard Peoples’ right to self-determination, the Legally Binding Treaty must also include explicit language recognizing Indigenous Peoples “right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” as well as the right to “own, use, develop, access and control the lands, territories, and resources that they traditionally possess or own.

Further, we also propose adding language under Article 6 highlighting the protection of human rights defenders as an essential element of the prevention of corporate-related abuses or violations. **Human rights defenders**, including journalists, lawyers, activists, members of indigenous communities and others, are crucial actors in the context of human rights and business activities as they fulfill the task of ensuring corporate accountability and responsibility. However, their work is subject to danger and restrictions in many countries of the world. Attacks such as killings, beatings, threats, strategic lawsuits against public participation (SLAPPs), and others intended to silence or intimidate defenders focused on business-related activities are evident and increasing with each passing year.

### **On Article 6.8**

With corporate capture being a major obstacle to advancing a strong legally binding instrument, we call on the UN and States to restrict the participation of the International Organization of Employers (IOE), International Chamber of Commerce (ICC), the United States Council for International Business (USCIB) and any other representatives of corporate power in the negotiations for an LBI by adopting lessons from the Framework Convention on Tobacco Control which explicitly recognized the tobacco industry’s irreconcilable conflict of interest with public health policymaking and put measures in place to protect treaty processes and implementation from industry interference.

We call on States not to encourage the classification of the IOE, ICC, USCIB and other representatives for corporate power as “civil society organizations”. Such corporate-backed entities represent some of the most abusive corporations in the world—including Dow, Chevron, and Shell—which have been implicated in serious human rights violations affecting communities, human rights defenders, and civil society. States must also maintain and strengthen the text of the LBI to (a) stop corporate capture, and (b) develop an independent and international court to hold corporations, particularly those that operate transnationally, accountable for committing or contributing to human rights abuses and violations.

In concrete textual suggestion we call on States to retain Article 6.8 and to further strengthen with the words highlighted in bold: “In setting and implementing their **legislation** and public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these legislation and policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of a transnational character. **In efforts to limit corruption, States shall also review and adopt laws that will enhance transparency regarding business donations to political parties, corporate lobbying, awarding of licenses, public procurement, and revolving doors practices.**”

At the core of preventing human rights abuses and violations related to business activity is ensuring that corporations are not making decisions through government and multilateral platforms, including the UN, that affect our basic rights in the interest of profit-making. We elect governments, not corporate actors. We advocate for democracies, not corporatocracies. States who are echoing corporate language, such as the US, must consider that their duty is public service, it is to serve our rights and our interests as people and to protect the planet - and not the interest of profit making for the 1 percent. As such we recommend that Article 6 maintain strong language to stop corporate capture in an effort to prevent abuses and violations in the context of business activity. We support proposals by the State of Palestine in this regard.

For further textual suggestions on this article [click here](#).

## Article 7

Language in Article 7.1 must be retained as was proposed in the third revised treaty. In particular, language on ensuring that State Parties shall provide competence in judiciary for overcoming obstacles for specific marginalized groups in seeking remedy.

This article must articulate clearly that an international legal forum can be used - in addition to a domestic one - for access to remedy by those affected by abuses or violations related to business activities. In this vein, we support the inclusion of a provision on ensuring that “State Parties shall provide adequate and effective legal assistance to victims throughout the legal process” - in accordance with international law as suggested by Panama.

We also strongly support Palestine’s textual suggestion for a provision in 7.1 *bis* stipulating that “State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented, in consultation with, and with the full participation of affected communities, are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected. (Palestine)” - we could see this Article being placed under legal liability as well.

In Article 7(2), States party to the Treaty should ensure that their domestic laws facilitate access to information both through assisting with the provision of information when corporations fail to provide meaningful access to information, and by taking into due consideration and recognising the validity of different forms of data and information gathered by communities.

Article 7 must articulate specific avenues for redress. Notably, the article must keep reference to two central components of the right to an effective remedy: (1) the right to due process (notice and right to be heard); and (2) the right to access justice systems in an “adequate, timely, and effective manner.”

This article must also keep reference to specific remedies, including:

- Facilitating requests for disclosure of State or corporate finances or relations and other relevant information (as suggested by Palestine in Article 7.2)
- Expanding admissible evidence to include different types of evidence, such as oral and visual, in efforts to prioritize which is more suitable for communities to remove barriers for community-led data
- Provide adequate and effective legal assistance to victims throughout legal process
- Guarantee due process right to be heard in all stages of proceedings,
- Avoiding gender and age stereotyping
- Avoiding unnecessary delays and costs on those affected by abuses and violations related to business entities
- Removing legal obstacles, including *forum non conveniens*, to initiate proceedings in the courts of another State Party in all cases of human rights abuses and violations resulting from business activities in particular those of a transnational character.
- Ensuring that burden of proof is on corporate entities or entities involved in business activities that may have caused or contributed to human rights abuses and / or violations (as suggested by Palestine in Article 7.5)

For further textual suggestions on this article [click here](#).

## Article 8

In Article 8.1, the liability should be clearly attributed to “legal or natural persons *conducting business activities* that may have caused or contributed to human rights abuses and / or violations - particularly of a transnational character”. The explicit mention of these phrases, while simple, makes the section much more powerful. This article must not eliminate mention of the transnational nature of business activities as it may signal an intention to protect or shield multinational corporations from the effects of this treaty by blurring their explicit accountability to this binding document.

This Article must retain mention of “comprehensive and adequate systems of liability” as well as the broad jurisdictional approach of the Third Draft (“conducting business activities within their territory, jurisdiction or otherwise under their control”).

In Article 8, criminal, civil and administrative legal liability for abuses and violations related to business activities must be clearly articulated. There should be a clear legal standard classifying how business activities will be prosecuted by State Parties through this legally binding instrument. This Article must further be enshrined in rights - rather than needs. Any reference to victims “needs” instead of “rights” is very concerning because it frames this concept as a weaker mechanism through which victims of corporate abuse and violations can access the justice system. Further, the gravity of violations and abuses may differ but endeavors for legal liability



and subsequent avenues must be at the disposal of those affected or impacted by human rights abuses or violations.

Liability of legal and natural persons under Article 8 must not be limited to crimes accessory to the commission by the main perpetrator such as conspiracy as well as aiding and abetting - it must also refer to situations where legal or natural persons may be directly involved in violations and abuses of human rights - whether separately or jointly with other actors. Categories of accessory liability such as conspiracy are not standards adopted in international law (i.e. the Statute of the ICC).

In Article 8.3, the notion of criminal liability could be further strengthened by the mentioning of specific examples of sanctions or penalties that companies could face should they be prosecuted such as withdrawal of licenses or termination of contracts for company projects and so on.

It would be crucial to ensure that criminal liability under Article 8 is triggered also by a business activity that violates war crimes, crimes against humanity, and other grave breaches of international human rights and humanitarian law. This would ensure that the gravity of the abuse, the public interest and justice is reflected in the kind of legal liability attributed to the perpetrator and the sanctions applied.

Article 8 should also include a provision reaffirming the joint and several responsibilities between all companies involved in an abuse or a violation, be it along the global value chain or in the time of armed conflict. In particular - in Article 8.10, we agree with the proposal by Palestine to include the following provision: *“All companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibility for human rights abuses in which they are involved.”*

For further textual suggestions on this article [click here](#).

## **Article 9**

This article must absolutely retain the language in the Third Draft which includes, “victims, irrespective of their nationality or place of domicile,” can bring a claim for human rights violations and abuses. This sentence must not be eliminated in the treaty text. Victims and their families should be able to decide where to adjudicate a case.

It is also important for the treaty text to articulate what is meant by domicile - this should include both where the company is headquartered but also the place where its substantial assets are held to ensure remedy for affected communities. We agree with the proposal of Palestine (in 2021) to include a provision to this effect in Article 9(2)d *bis*.

Article 9 should also not restrict the advancement in applicability of international law based on applicable domestic or State laws. This defies the very purpose of this treaty which would be to expand avenues for remedy and corporate accountability by setting legal standards that would enhance the ability to adjudicate cases of abuses and violation related to business activity extraterritorially across different jurisdictions. The aim of this treaty is not to limit liability but to expand it.



States should incorporate or otherwise implement within their domestic law appropriate measures for universal jurisdiction for human rights violations and internationally recognized crimes mentioned in the preceding. This was mentioned in the zero Draft under Article 6 and should be reintroduced. As such, we support the textual suggestion by the State of Palestine to add the following provision: ***“Where applicable under international law, State Parties shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes.”***

### **Article 10**

In line with feminist analysis, we recommend adding that domestic statute of limitations applicable to civil claims or to violations that do not constitute the most serious crimes of concern to the international community as a whole shall allow a reasonable and gender-responsive period of time for the investigation and commencement of prosecution or other legal proceedings. This should also apply where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological state (to support, in particular, justice for victims of sexual and gender-based violence, as well as children and persons with disability): “10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable gender-responsive period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time, or where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological condition.”

### **Article 11**

The “applicable laws” section of the LBI must be retained in the draft text of the treaty - and it must recognize Indigenous customary laws. If taken away, this would eliminate one solid avenue for Indigenous Peoples and nations under occupation to assert their right to self-determination.

### **Article 13**

Article 13 must maintain the good faith standard for State Parties to cooperate with one another to stop corporate abuse of human rights - with the requirement that State Parties take “all necessary steps” to do so. The good faith standard represents a concrete obligation that State Parties must comply with.