

## ESCR-Net Advocacy Position Papers

### A note on the purpose, scope and origin of the following papers

The Corporate Accountability Working Group (CAWG) of ESCR-Net - International Network for Economic, Social and Cultural Rights, welcomes the release of the Zero Draft of the legally binding instrument on transnational corporations and other business enterprises with respect to human rights (referred to as "Treaty").

We welcome the continued effort of the United Nations' Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGWG) to address the significant accountability gaps with regard to corporate human rights abuses.

As we enter the fourth session of the IGWG (Oct 15-19, 2018), we ask for the development of a stronger Treaty, reflective of current global conditions and shaped by the lived experiences of individuals and communities around the world.

A core group of CAWG members have developed advocacy positions on the Zero Draft of the Treaty for the consideration of the IGWG in relation to:

1. Adopting stronger safeguards against **corporate capture** (undue corporate influence),
  2. Integrating protections for **human rights defenders**
  3. Addressing (more fully) the rights of **indigenous peoples**
  4. Incorporating a **feminist and gender responsive lens**
  5. Including stronger protections against corporate human rights abuse in **conflict-affected areas**
- *We also include a short article analyzing the Draft Optional Protocol to the Treaty, written by ESCR-Net members, the Due Process of Law Foundation and Centro de Estudios Legales y Sociales.*

The documents collated here are **intended to facilitate the coordinated advocacy** of ESCR-Net members at the international, regional and national level and are **not meant to be published or distributed** beyond the ESCR-Net membership.

In addition to these advocacy positions, CAWG continues to align itself with our past positions. Notably we **continue to advocate for the primacy of human rights** over all international agreements, including those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security obligations. We further emphasize that for the treaty to be truly effective, it is essential that **victims and affected communities are central** to treaty negotiations, content, and implementation.

The advocacy positions collected here reflect the collective analysis and recommendations emerging from:

- CAWG's 2015-2016 worldwide consultation with over 150 civil society organizations (CSOs), including in-person consultations with our members and partners in Asia-Pacific, Africa and Latin America, and online consultations with CSOs from all regions;
- CAWG 2016 and 2017 collective submissions to the IGWG; and
- recent consultations with members following the release of the zero draft.

ESCR-Net is also actively engaged in the larger Treaty Alliance, and supports Treaty Alliance collective statements that have brought together an alliance of concerned civil society actors calling for a continued open IGWG process.

# Contributors and Coordinators of the Advocacy Positions

## Corporate Capture

AfreWatch, Alternative ASEAN Network on Burma (ALTSEAN-Burma), Arab NGO Network for Development (ANND), Asociación Pro Derechos Humanos (APRODEH), Center for Constitutional Rights (CCR), Comité Ambiental en Defensa de la Vida, Consejo de Pueblos Wuxhtaj, Corporate Accountability, FoodFirst Information and Action Network (FIAN International), Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (FOCO), International Accountability Project (IAP), Kenya Human Rights Commission (KHRC), National Fisheries Solidarity Movement, Project on Organizing, Development, Education, and Research (PODER), Tebtebba Foundation, Natural Resources Alliance of Kenya (KENRA), and Video Volunteers.

## Human Rights Defenders

Alternative ASEAN Network on Burma (ALTSEAN-Burma), Al-Haq, Asociación Pro Derechos Humanos (APRODEH), Association for Women's Rights in Development (AWID), Center for Constitutional Rights (CCR), Center for International Environmental Law (CIEL), Comité Ambiental en Defensa de la Vida, FoodFirst Information and Action Network (FIAN International), International Accountability Project (IAP), International Commission of Jurists (ICJ), International Federation for Human Rights (FIDH), Kenya Human Rights Commission (KHRC), Legal Resources Centre (LRC), National Fisheries Solidarity Movement (NAFSO), Project on Organizing, Development, Education, and Research (PODER), Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC), Tebtebba Foundation, Natural Resources Alliance of Kenya (KENRA), and Video Volunteers.

## Gender-Responsive Lens

Alternative ASEAN Network on Burma (ALTSEAN-Burma), Association for Women's Rights in Development (AWID), Center for International Environmental Law (CIEL), FoodFirst Information and Action Network (FIAN International), International Accountability Project (IAP), International Federation for Human Rights (FIDH), Project on Organizing, Development, Education, and Research (PODER), Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) and Video Volunteers.

## Indigenous Peoples' Rights

Alternative ASEAN Network on Burma (ALTSEAN-Burma), Consejo de Pueblos Wuxhtaj, Legal Resources Centre (LRC), Tebtebba Foundation and Video Volunteers.

## Conflict Areas

AfreWatch, Alternative ASEAN Network on Burma (ALTSEAN-Burma), Al-Haq, Center for Constitutional Rights (CCR), FoodFirst Information and Action Network (FIAN International), International Commission of Jurists (ICJ), International Federation for Human Rights (FIDH), Tebtebba Foundation, Natural Resources Alliance of Kenya (KENRA) and Video Volunteers.

---

*This compilation was coordinated by the ESCR-Net Corporate Accountability Working Group, which coordinates collective action to confront corporate capture, challenges systemic corporate abuse, and advocates for new accountability and remedy structures. ESCR-Net connects more than 280 social movements, indigenous peoples' groups, NGOs and advocates across more than 75 countries to build a global movement to make human rights and social justice a reality for all.*

---



[escr-net.org/corporateaccountability](https://escr-net.org/corporateaccountability)

# Corporate Capture

The OEIGWG has the potential to develop a treaty that contains lifesaving international policies to protect people from the human rights violations of transnational corporations and other business enterprises (TNC-OBE); this hinges on its ability to insulate the treaty-making process from the industry's interference.

**The OEIGWG must ensure that treaty negotiations are safeguarded from the interference of corporations whose interests are counter to the objectives of the treaty.** Indeed, an inherent conflict of interest exists between the profit motives of the corporations that will be regulated by the Treaty and the goals of that Treaty. As such, it is fundamental to protect the integrity of the policymaking space, its participants, and outcomes from the interests of these corporations—including any potential, perceived, or actual conflicts of interest. **It is imperative to develop good governance measures that safeguard against corporate political interference at the national, international, and intergovernmental levels,** whether in the current discussions that pertain to the Treaty's content, negotiations, or implementation.

Corporate capture is the phenomenon of economic elites exerting undue influence and control over political decision-makers and public institutions in ways that undermine human rights, the public interest, and the environment.

As the political and economic power of corporations continues to grow and dwarf that of many States, so too does their ability to operate without constraint and with impunity. Around the world, corporations are influencing and even writing government policies. Unchecked by binding regulation to limit their influence, they succeed in weakening, delaying, and even blocking meaningful policy intended to protect public health, human rights, and the environment. Indeed, TNC-OBEs have long used a variety of tactics to interfere in policy-making, including:

1. **Litigation:** intimidating governments with costly lawsuits or the threat of them;
2. **Economic diplomacy:** using diplomacy to advance the interests of corporations in foreign countries at the expense of the human rights, environment, and sovereignty of that foreign country;
3. **Judicial interference:** pressure exerted on the judiciary to favor corporations in legal cases; procedural obstacles for plaintiffs when denouncing corporate-sponsored human rights violations;
4. **Legislative/policy interference:** pressure exerted on policy makers by corporations and their representatives to expand corporate opportunities/undermine regulation, including revolving doors (movement of employees from the corporate sector to public regulators and other agencies, and vice versa);
5. **Public-private or government partnerships:** including promoting voluntary regulation, gaining favor by bankrolling government initiatives, and providing funds to regulatory bodies;
6. **Claiming rights as stakeholders:** Setting up front groups or gaining accreditation and consultative status through industry and trade associations with a nonprofit legal status to participate in public policymaking on the same footing as public interest organizations with no conflict of interest with the objectives of the United Nations or the Treaty;
7. **Community manipulation:** undermining and manipulating community decision-making processes such as through financial or other enticements, intimidation, or misinformation;
8. **Corporate social responsibility schemes:** misleading the public by promoting the perception that the corporation's operations/policies are environmentally friendly and respectful of human rights;
9. **Privatizing public security services:** provision of salary or other inducements by corporations for police, army or other public security services to act in their interest against local communities;
10. **Shaping narratives:** influencing public opinion by manipulating media and thought leaders to serve profit motives; and
11. **Capturing academic, research, and scholarly institutions:** using financial support and power to influence these institutions to produce research that favors corporate interests.

## Current Zero Draft: weak on protections against corporate capture

Conflicts of interest are mentioned in **only one place in the treaty, in a way that is weak and inadequate** to address corporate capture. **Article 15.3** states: *"In policies and actions pursuant to this Convention, Parties shall act to protect these policies and actions from commercial and other vested interests of the [business sector] in accordance with national law."* In particular, the addition of the phrase "in accordance with national law" **raises questions about whether this article strengthens standards or merely reverts to national law**, despite the fact that the inadequacy of national law is a central reason States sought an international treaty in the first place.

## Recommendations:

This treaty should include a more developed set of provisions to protect against corporate capture, political interference, and conflicts of interest, based on international precedents. The first ever corporate accountability treaty, the World Health Organization Framework Convention on Tobacco Control (WHO FCTC),<sup>1</sup> provides an established international legal precedent for such safeguards within the U.N. system itself. Article 5.3 of the FCTC<sup>2</sup> establishes that: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law." This article and its guidelines for implementation<sup>3</sup> provide policymakers guidance on the specific measures to ensure policies and governments are protected from the interests of corporations.

These directives include **increasing transparency, developing codes of conduct for government officials, protecting against conflicts of interest, raising awareness about industry tactics to undermine health, and regulating corporate social responsibility (CSR) activities**, among others. The success of the FCTC and its strength as a treaty are a significant testament to the powerful effect good governance measures such as Article 5.3 can have on regulatory processes and outcomes that threaten to diminish the profits of transnational corporations. As such, the Treaty should include provisions such as:

1. State Parties shall act to protect the Treaty and its negotiations, bodies, and processes from commercial and other vested interests of TNC-OBES **by excluding them from the Treaty-making process and refusing to give them the means to influence** relevant policies on human rights in their bilateral, regional, multilateral or other types of trade and investment agreements.
2. States Parties shall take the necessary measures to protect these public policy-making processes and government bodies from the undue influence of commercial and other vested interests of TNC-OBES. For this matter, the States Parties shall **establish national legislation**, including the following measures:
  - a. Reject and act against interference from commercial and other vested interests in the establishment and implementation of any laws and/or public policies that seek to provide appropriate oversight, regulation and accountability of TNC-OBES' activities in order to ensure the effective enforcement of this Treaty and enjoyment of human rights.
  - b. **State agencies that have hired TNC-OBES shall be transparent and accountable**, especially in relation to affected individuals and communities, in regards to all dealings with the TNC-OBES.
  - c. To **document and disclose the files of contracts** and other dealings with TNC-OBES and related information to the public.
  - d. To **institute multi-year bans on the "revolving door"** between State agencies and TNCs, and vice versa. For members of government, a five-year cooling-off period shall be instituted to avoid the risk of corporate capture.
  - e. To **prohibit all public employees from accepting gifts** from lobbyists. And to prohibit TNC-OBES from making financial contributions to political parties or candidates.
  - f. To **prohibit the use of State public security personnel** and/or armed forces, through either employment or inducement, by TNC-OBES.
  - g. To **reject state partnerships and non-binding or non-enforceable agreements** with TNC-OBES, establish measures to limit state interactions with TNC-OBES and ensure the transparency of such interactions when they occur, and avoid preferential treatment of TNC-OBES.
  - h. To take measures to ensure that **government officials and employees avoid conflicts of interest**.
  - i. To ensure that information provided by TNC-OBES is transparent and accurate.
  - j. To subordinate all trade diplomacy measures and investor protections to International Human Rights Law.
3. State Parties shall de-normalize and, to the extent possible, regulate activities described as "socially responsible" by TNC-OBES, including but not limited to activities described as "corporate social responsibility."
4. State Parties shall treat State-owned TNCs in the same way as any other TNCs.

<sup>1</sup> <http://www.who.int/fctc/cop/about/en/>

<sup>2</sup> [http://www.who.int/tobacco/wntd/2012/article\\_5\\_3\\_fctc/en/](http://www.who.int/tobacco/wntd/2012/article_5_3_fctc/en/)

<sup>3</sup> [http://www.who.int/fctc/guidelines/article\\_5\\_3.pdf](http://www.who.int/fctc/guidelines/article_5_3.pdf)

# Human Rights Defenders

The current Zero Draft includes an article on the rights of victims (Article 8), and a definition for victims (Article 4), but there is **no specific reference to human rights defenders**. The failure to include direct provisions on HRDs is deeply regrettable, especially given the key role HRDs play in supporting affected communities — including during free prior and informed consent consultations, and other consultation processes; as well as in identifying, mitigating, exposing and ensuring accountability for any potential or actual adverse impacts on human rights and the environment associated with corporate activity and development projects. **Failing to formally recognize and protect HRDs and activists by the provisions of the Treaty risks harming one of the Treaty's core objectives: to strengthen and ensure corporate accountability.**

The current zero draft of the binding treaty is a lost opportunity to address the great challenges faced by human rights defenders (HRDs) when attempting to unveil and fight adverse human rights and environmental impact by businesses.

Defenders often endure obstruction to their work, abuse or repression by corporations, by other non-state actors and, in many situations, by States supporting such business activities. This includes judicial harassment; undermining their freedom of expression, association and assembly; harassment, intimidation and physical threats perpetrated by private or State security services. In the worst cases, HRDs have faced arbitrary arrest and detention, disappearances, judicial harassment, torture, ill-treatment, and even killings. Experience shows that women human rights defenders (WHRDs) are particularly targeted, as well as marginalised sections of society, including (among others) impoverished communities, indigenous peoples, and ethnic as well as other minorities. Additionally, criminalisation of legitimate human rights activity through restrictive or vague laws — such as those relating to national security, counter-terrorism, and defamation — has gradually inhibited the work of HRDs.

## Current Zero Draft: failing to acknowledge the integral role of human rights defenders and specific risks faced by human rights defenders

The language of the Treaty needs to change because it fails to recognize the active and central role of human rights defenders. And through its neglect, the Treaty fails to guarantee that HRDs can work in a safe enabling environment, free from attacks, reprisals and unreasonable restrictions.

Human rights defenders are often **victims of corporate abuse but, above all, they are key actors and leaders** in the movement for accountability and redress of corporate abuses. They serve and pursue the interests of rights holders and victims of corporate-related human rights violations. Therefore, **the effective implementation of the future Treaty depends on HRD capacity** to support affected communities in adequately using this instrument in the search for accountability and redress.

Meanwhile, HRDs denouncing and exposing business-related human rights abuses face increasing pressure from State and non-state actors — including corporations. The deterioration of the situation for human rights defenders is compounded by a lack of State action in response to such attacks.

When it comes to defenders' rights and protection mechanisms at the national, regional and international level, **a legally binding instrument should serve to close some of the gaps and counter shrinking space for civil society across regions**. The Treaty should refer to human rights defenders — with explicit recognition of women human rights defenders — and include a specific article regarding State obligation to respect, protect and fulfill their rights. All of this is essential condition for the Treaty to substantially reinforce transparency and corporate accountability for human rights and environmental violations.

## Recommendations:

1. Ensure that the **preamble acknowledges the central role of human rights defenders** in ensuring corporate accountability; and recalls the right to promote the protection and realization of human rights and fundamental freedoms at the national and international levels (individually and in association with others); the right to enjoy liberty and security, freedom of association and expression, as well as other related rights and freedoms enshrined in the UN Declaration on Human Rights Defenders and other relevant international instruments.
2. In **Article 8** on the rights of victims, the Treaty should **explicitly refer to States' obligation** to:



- a. guarantee in all circumstances, the physical and psychological integrity of all HRDs, including by developing effective protection strategies in consultation with them;
  - b. protect human rights defenders from any unlawful interference with their privacy and from any form of threat, attack or criminalization; and
  - c. provide victims and human rights defenders, including women human rights defenders, appropriate access to information relevant to the defense of human rights and the pursuit of accountability and remedies — including the right to know, seek, obtain, receive and hold information relevant to the monitoring of human rights, to freely publish, impart or disseminate views, information and knowledge on human rights and fundamental freedoms, actually or potentially affected by business activities.
3. Include a **dedicated provision on States' obligation** to respect, protect and fulfil the rights of all human rights defenders and create an enabling environment for their work. As such States should, among other measures:
- a. Review, amend and adopt legislation and policy, in consultation with human rights defenders, inter alia, to:
    - i. Prohibit the interference by non-State actors, including through the use of public or private security forces, with the activities of any person seeking to exercise the right to participate in decision-making processes and to peacefully assemble or protest against and denounce abuses linked to business activities; Reinforce and ensure the availability and accessibility of judicial and non-judicial recourse mechanisms, including ombudspersons or administrative bodies, that are effective, equitable, transparent, rights-compatible, impartial and sufficiently equipped to fully, promptly and independently adjudicate complaints, provide precautionary measures of protection, and effective remedy in cases of violations whether perpetrated by States, corporations or other non-State actors against HRDs, including women human rights defenders and defenders acting outside of their territorial jurisdiction, with a gender and culturally-responsive approach;
    - ii. Create a straightforward and coherent legal and administrative framework favorable to the development of NGOs and civil society organizations, and their work, and repeal any legislation which prohibits or criminalises NGOs and civil society organizations due to restrictions on registration or association, or funding received from abroad;
  - b. Ensure non-State actors, including businesses, conform to human rights standards in line with international law, and other applicable pertinent laws.
  - c. Combat impunity for attacks against human rights defenders and violations of their rights committed both by State and non-state actors, including by undertaking effective, independent and transparent investigations into those cases in order to identify those responsible, bring them to justice and ensure adequate compensation and reparation;
  - d. End any criminalisation of social protest and ensure that those exercising the right to protest are effectively preserved from violations, including by ensuring the investigation and sanction of State agents involved in cases of criminalization and providing full redress;
  - e. Refrain from adopting restrictive laws or ambiguous criminal provisions such as those relating to national security, counter-terrorism and defamation that may result in restrictions or the criminalisation of human rights defenders' work;
  - f. Fulfill the specific protection needs of human rights defenders pertaining to groups facing different, disproportionate, or unanticipated risks, including women, impoverished communities, indigenous peoples, ethnic groups and other minority groups;
  - g. Respect all components of the right to access funding - the right to solicit, receive and utilise funding;
  - h. Support and legitimize the essential work of human rights defenders in public declarations and integrate them into consultations;
  - i. Create an enabling environment to ensure that affected communities are at the center of discussions and decision-making about corporate interaction with local communities.
4. In line with the UN Declaration on the Rights of Indigenous Peoples, the Treaty should strengthen States' obligation to consult and cooperate in good faith **with the indigenous peoples** concerned through their own representative institution in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, specifically in relation to **Article 9** (Prevention).

# Indigenous Peoples' Rights

Whilst a number of existing international human rights law instruments outline state obligations relating to indigenous peoples, the **current frameworks do not directly or adequately address human rights violations arising in connection with corporate activity.** It is essential that the proposed treaty is responsive to the lived experience of such communities – representing approximately 370 million people globally – as unique to such groups and as reflective of impacts felt by wider populations who are similarly situated.

Any discourse on an international legal instrument regulating the responsibility of corporate actors in relation to human rights must underscore the protection of the rights of indigenous peoples pursuant to the UN Declaration on the Rights of Indigenous Peoples and international human rights law.

The UN Special Rapporteur on the Rights of Indigenous Peoples (UNSRIPRIP) Victoria Tauli-Corpuz, in her inaugural keynote message before the IGWG's<sup>4</sup> first session responds:

*"Indigenous peoples have been at the forefront of discussions regarding the human rights abuses committed by corporations since the 1970s. For decades, indigenous peoples have been victims of corporate activities in or near their traditional territories, which have depleted and polluted their traditional territories without their consent, putting many peoples at the verge of cultural or physical extinction. Today, little has changed in relation to this situation. As reflected in the communications I have received in my capacity as Special Rapporteur, **indigenous peoples and other local communities continue to suffer disproportionately** the negative impact of corporate activities, while community leaders and activists suffer a true escalation of violence on the hands of government forces and private security companies. Many of the displacements of indigenous peoples from their ancestral territories and the extrajudicial killings of indigenous activists usually happen in communities where there are ongoing struggles against corporations. My predecessor in the mandate, Professor James Anaya, concluded that **extractive and other large scale corporate activities constitute today 'one of the most important sources of abuse of the rights of indigenous peoples' in virtually all parts of the world.**"<sup>5</sup>*

Citing research by different UN Special Procedures and relevantly experienced civil society organisations (CSOs), the UN Working Group on Business and Human Rights reported to the UN General Assembly in 2013 that "indigenous peoples are among the groups most severely affected by the activities of the extractive, agro-industrial and energy sectors. Reported adverse impacts range from impacts on the right of indigenous peoples to maintain their chosen traditional way of life, with their distinct cultural identity to discrimination in employment and access to goods and services (including financial services), access to land and security of land tenure, to displacement through forced or economic resettlement and associated serious abuses of civil and political rights, including impacts on human rights defenders, the right to life and bodily integrity."<sup>6</sup> These impacts are compounded on indigenous women and gender non-conforming persons who are "subjected to multiple forms of discrimination based on gender and ethnicity" and "specific forms of discrimination or abuse, such as sexual violence".<sup>7</sup>

Furthermore, "indigenous peoples feel the cumulative effect of vulnerabilities that individually affect other groups who face increased risk of human rights violations, such as peasants, seasonal workers, the landless and ethnic minorities. They are often the target of racial discrimination, are politically and economically marginalized, lack formal title over their land and are often excluded from the regular labour market."<sup>8</sup>

## Current Zero Draft: mere token references to indigenous peoples

Despite the foregoing, the current Zero Draft neglects the highly vulnerable situation of indigenous peoples in relation to corporate and business activities. The Zero Draft **merely mentions indigenous peoples as part of a list of vulnerable groups and sectors who need to be consulted (Article 9.2)** within the framework of due diligence (**Article**

<sup>4</sup> Open-ended Intergovernmental Working Group in Charge of Elaborating a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.

<sup>5</sup> *Opening Remarks in the occasion of the First Session of the Open-ended Intergovernmental Working Group in Charge of Elaborating a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights.* July 6, 2015, <http://unsrvtaulicorpuz.org/site/index.php/statements/70-igwg-2015>

<sup>6</sup> UN Working Group on Human Rights and transnational corporations and other business enterprises. Report to the General Assembly (2013), p. 3. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/420/90/PDF/N1342090.pdf?OpenElement>

<sup>7</sup> UN Working Group on Human Rights and transnational corporations and other business enterprises. Report to the General Assembly (2013), p. 4.

<sup>8</sup> As above, n 3.

**9.1)** and who are among those who face “heightened risk of violations of human rights” due to business activities (**Article 15.5**) and therefore should be given special attention.

The provision on consultation (**Article 9.2**) **exceedingly waters down the right of indigenous peoples**— framing these rights as if they were just about “consultation” and not a question of full agency free, prior and informed “consent.”<sup>9</sup> Overall, the failure of the Zero Draft to allocate specific provisions for indigenous peoples underlines an inadequate understanding of the disproportionate impact of corporate and business activities on indigenous peoples rights.

## Recommendations

The proposed treaty must fully address the human rights violations against indigenous peoples that involve transnational corporations and business enterprises — already recognized in various UN documents and academic research. The treaty must include **specific** provisions that **directly** address indigenous peoples rights’ concerns.

In relation to the processes of the IGWG, and in respect to the right of indigenous peoples to free, prior and informed consent (FPIC) on all matters impacting on their rights, the **IGWG must ensure the participation** and the voice of indigenous peoples in all its discussions. It must therefore **institutionalize a process whereby this participation is guaranteed**.

This treaty should explicitly reaffirm the human rights of indigenous peoples in the context of TNC-OBE activity and require States to take concrete, targeted measures in relation, inter alia, to the following:

- 1. The right to self-determination**, and as such the right to determine their development priorities;
- 2. The right to Free, Prior and Informed Consent (FPIC);**
- 3. The right to benefit from the activities generated by TNC-OBEs** after first obtaining FPIC;
- 4. The right to protection of indigenous and traditional knowledge from TNC-OBE activity**, particularly in relation to appropriation through patenting;
- 5. The right to an effective and culturally sensitive remedy** that includes the respect and recognition of indigenous peoples’ customary laws and courts, and attentive to any damages caused or contributed to by TNC-OBE to land, territories, natural resources and biodiversity as enjoyed by indigenous peoples;
6. The **adoption of legislative and other measures** to require TNC-OBEs to identify and address not only human rights impacts resulting from their activities, but **environmental impacts** as well, since indigenous peoples’ rights are intrinsically linked to the health of their natural environment;
7. Enable **indigenous peoples’ active participation** and central role in consultation processes surrounding TNC-OBE activities that will affect, directly or indirectly, their land, resources, culture and way of life (including specifically regarding the structure of consultation processes, ensuring that any process is conducted in a culturally appropriate manner and with **recognition of differing and disproportionate impacts experienced by indigenous women**);
- 8. Protect and create an enabling environment for the work of indigenous human rights defenders and land rights defenders**, as they have faced continuous and increasing violence, threats, harassment, arbitrary detention and other serious human rights abuses in the context of peacefully taking action in connection with the impacts of TNC-OBE activities.

<sup>9</sup> See UN Declaration on the Rights of Indigenous Peoples, Article 10, Article 11.2, Article 19, Article 28.1, Article 29.2, Article 32.2,



# Gender-Responsive Lens

---

The Binding Treaty is a critical opportunity to acknowledge and address how transnational corporations and other business entities (TNC-OBE) have different, disproportionate, or unanticipated impacts on women and gender non-conforming persons, as a result of gender-based systemic discrimination in societies. **This approach is essential to the very purpose of the prospective treaty, that is to put the concerns of rights holders at the center and to effectively ensure the prevention, protection and remediation of business-related harms for all.**

---

In all regions, women face extensive discrimination within work environments, which in turn contributes to the entrenchment of gender inequalities linked to access to resources within the household, broader social and economic agency within society, and the ability to enjoy an adequate standard of living. Throughout the world, women are disproportionately represented in informal and unpaid forms of work, which are associated with precarious and hazardous labor conditions, lower and inconsistent wages, shorter-term or no formal employment status, irregular or long work hours, and increased vulnerability to harassment, physical abuse, and sexual violence.

Extractive industries in particular — such as mining, oil exploration, and other large scale development projects — continue to have a specific impact on women's rights. Because of the disproportionate role that women play in domestic and caregiving responsibilities, growing and harvesting food, and collecting water, women are more affected when these resources are damaged.

Women and women human rights defenders — including indigenous women and people of all gender, ages, race and ethnicity — often face gender-specific violence, stigma, reprisals and job insecurity for reporting business-related abuses. Women also face barriers accessing justice in many countries, due to structural racism and patriarchal sites of power, their marginalized position in society, a lack of information and knowledge about their legal rights, discriminatory domestic laws, and fear of retribution when they seek remedies. In many countries, women are not recognized as juridical equals.

## Current Zero Draft: failing to incorporate a gender responsive lens:

A few provisions **briefly mention women or gender**. Regarding prevention, the zero draft requires that special attention should be given to those facing heightened risks of violations of human rights, including women, including indigenous women, and others, during consultations. (Article 9(2)(g)).

The final provisions of the zero draft require states to give special attention to those facing heightened risk of violations of human rights, including women and others. (Article 15.5).

The final provisions also require that in conflict areas, special attention should be paid to both gender-based and sexual violence. (Article 15.4).

The preamble and final provisions both stress the importance of the principle of non-discrimination. (Articles 1 & 15.6).

**This language needs to change because it fails to provide measures for overcoming the structural and systematic barriers in realizing gender and economic justice.**

**Business-related human rights abuses are not neutral** and affect different groups of right holders, including women, in differential and sometimes disproportionate ways due to pre-existing and sometimes structural forms of discrimination. These groups also face additional barriers to justice in seeking remedy for business-related human rights violations. Thus, to ensure substantive equality, the zero draft must acknowledge and account for these differences.

Throughout the treaty provisions and interpretation, states and others should adopt a “gender-responsive” approach in order for women to truly engage and benefit from such process and associated measures by states and others. That means **rather than only identifying gender issues or work under the “do no harm” principle** (connected with obligation to respect), **any process should substantially help overcome historical gender biases and “do better”** (also uphold the obligations to protect and fulfil) and achieve equality for all persons.

In this regard, and as guided by the human rights framework, substantive equality in practice requires a multifaceted approach which: **redresses disadvantage** (based on historical and current social structures and power relations that define and influence women's abilities to enjoy their human rights); **addresses stereotypes, stigma, prejudice, and violence** (with

underlying change in the ways in which women are regarded and regard themselves, and are treated by others); **transforms institutional structures and practices** (which are often male-oriented and ignorant or dismissive of women's experiences); and **facilitates social inclusion and political participation** (in all formal and informal decision-making processes).

## Recommendations:

1. Ensure that the **preamble acknowledges the differentiated impacts** of corporate activities on women and women's essential role in the process of creating an instrument to remedy these impacts.
  - a. The preamble should also recall States' pre-existing obligations to protect women from corporate-related human rights abuses under the Convention on the Elimination of All Forms of Discrimination against Women. In addition, it should explicitly recognize that economic policies and associated TNC-OBE activities must be aligned with existing human rights obligations and environmental wellbeing, and that the existing dominant economic framework is not conducive to these objectives.
2. Ensure that the **statement of purpose** articulates and embraces a gender-responsive approach. This includes ensuring that multiple and/or intersecting forms of discrimination are addressed.
3. Ensure that the **article on the rights of victims** clarifies that access to justice and remedies must be gender-responsive and guarantees the safety of human rights defenders as well as the specific safety needs of women human rights defenders.
4. As part of **due diligence**, require independent, expert-led gender impact assessments that are supported by sex disaggregated data.
5. Move, from the **final provisions** to the article on prevention, the sections addressing the heightened risk of violations to women and others from corporate activities and in conflict areas.
6. **Move the section** that requires application and interpretation of the agreement to be without any discrimination of any kind or on any ground, without exception, **from final provisions to the article on applicable law**.

# Conflict Areas

The Zero Draft of the Treaty makes reference to conflict-affected areas once in Article 15(4) of the Final Provisions. The provision **echoes the language of the UNGPs, and ultimately remains weak and unfulfilling of its purpose, as it fails to establish the specific obligations of states, and uses soft language of “special attention.”** Considering the significant role of corporations in protracting and sustaining conflicts, stronger language is needed to ensure protection against corporate human rights abuses in conflict-affected areas and toward greater accountability.

The Zero Draft Treaty provides an opportunity to address the negative impacts on the ground resulting from the direct and indirect involvement of corporations in gross human rights violations in conflict-affected areas. Precedent sets that corporations and business enterprises — both national and transnational — have taken advantage of instabilities, insecurities and ongoing conflicts in order to advance their work and expand their activities to reap and increase their profit and presence.

At the same time, several international initiatives, such as the UN Guiding Principles on Business and Human Rights (UNGPs), have reiterated and reaffirmed the responsibility of businesses to respect human rights in their operations, particularly those conducted in conflict-affected areas. Nonetheless, and due to several factors — ranging from the lack of political will, to greed for controlling land and natural resources — **business activities remain poorly regulated by states in most conflict situations, and lack the appropriate and effective avenues and mechanisms of accountability for corporations, and redress for victims.**

## Current Zero Draft: lacks clarity that could jeopardize implementation

In line with international human rights law applicable in situations of conflict, the state is primarily responsible for respecting, protecting and fulfilling human rights. However, that does not absolve non-state actors, including private actors and business enterprises, from their responsibility to respect human rights standards.<sup>10</sup>

Similarly, international humanitarian law does not only bind states and armed groups, it extends to all actors whose activities are linked to an existing conflict. As such, a business enterprise that is carrying out its operations and activities within a conflict nexus, must also respect the provisions of international humanitarian law.<sup>11</sup> Moreover, In conflict-affected areas, if corporations are involved in or directly responsible for grave breaches of international law which may constitute internationally recognised crimes, representatives may incur individual criminal liability, as per the Rome Statute of the International Criminal Court.

## Recommendations:

1. The Treaty needs to **set out clearer provisions on corporate human rights abuses in conflict affected areas and accountability, with particular regard to the special context, and where the language is explicitly in line with international humanitarian law.** This will ensure more protection for individuals and communities, and pose obligations on the state and non-state actors, including corporate bodies.
2. In this regard, the Treaty, and where it highlights enhanced due diligence (Article 9 on Prevention) should encompass the specific and necessary due diligence required by states and corporations in situations of conflict. This can be done by:
  - a. Drawing on more provisions from the **UNGPs on situations of conflict**, including those articulated in **Principle 7** relevant to the role of states in identifying, preventing and mitigating human rights abuses by business activities and relationships;
  - b. Incorporating immediate measures that can be taken by the state to this end, including denying access to public support and services for implicated businesses, and having effective legislations and policies to regulate and decrease business-related human rights risks;
  - c. Adding in **another provision in Article 7** on the Applicable Law, where such provision would be specific to conflict-affected areas, emphasizing the applicability of IHRL and IHL in such contexts.
3. The Treaty as a whole ignores the role of “business relationships” and the direct link to human rights abuses. However, in the provision concerned with conflict-affected areas, the Treaty manages to state both business

<sup>10</sup> See: UN Guiding Principles on Business and Human Rights.

<sup>11</sup> ICRC, Business and International Humanitarian Law, pp. 4.

activities and relationships. Once again, this is something that **should be emphasized throughout the text of the Treaty as a whole**, in order to avoid any gaps in implementation.

## First impressions on the Draft Optional Protocol to the Legally Binding Instrument regulating the activities of transnational corporations and other business enterprises

Gabriela Kletzel & Andrés López Cabello  
Centro de Estudios Legales y Sociales (CELS)

Daniel Cerqueira  
Due Process of Law Foundation (DPLF)

At first glance, the zero drafts of the Legally Binding Instrument (LBI) and Optional Protocol (OP) raise serious doubts as to whether they add value to the effort of making business enterprises accountable for human rights abuses. The draft LBI establishes the “effective access to justice and remedy to victims of human rights violations in the context of business activities” as one of its main purposes. However, the OP addresses enforcement mostly through national implementation mechanisms and an international committee of experts, both of which have weak oversight and monitoring powers.

Although this piece is focused on the OP, we cannot ignore how the LBI affects the possibility of improving corporate accountability, particularly in relation to effective access to justice and remedy. We must voice once again our disagreement with the limited scope of the draft treaty. The current text excludes corporations that act solely within the confines of the jurisdiction of the State where they operate. Our experience in Argentina<sup>12</sup> and in other Latin American countries indicates that these kinds of corporations can also be involved in human rights violations. Therefore, it is of utmost importance to expand the scope of the LBI to go beyond business activities of a transnational character.

Even for transnational corporations that commit abuses, the LBI fails to establish effective measures to prevent impunity with exemptions for the enforcement of judgments involving redress for these kinds of abuses. Some of the exemptions are based on extraordinarily vague criteria, such as situations “contrary to the public policy” of the State in which the judgment enforcement is sought.

Furthermore, the LBI does not adequately address States’ extraterritorial obligations. Although it mentions the obligation to provide remedies and to comply with due diligence duties for both home and host states of offending companies, the LBI falls short in establishing concrete obligations. For instance, it does not address the issue of forum non conveniens (power to dismiss a case where another forum may more conveniently hear the case) nor the corporate veil doctrine, among legal tools frequently used to avoid liability and other forms of responsibility of “parent companies” and shareholders of transnational enterprises involved in human rights violations.

Unfortunately, the recent release of the OP only added to our several concerns about the substance and procedural aspects of the current draft treaty. The enforcement framework of the OP relies on the National Implementation Mechanism (NIM) to promote compliance with, monitor and implement the LBI, as well as on a committee of experts (Committee), established in the LBI under Article 14, which would have the competence to receive and consider individual complaints.

Most of the OP text regulates the establishment and functions of the National Implementation Mechanism (NIM). However, this mechanism does not provide an effective venue for monitoring and redressing corporate abuses. According to the draft, the NIM will act as a mediator among contesting parties to bring together opposing positions in a so-called amicable solution process. It is highly problematic for NIMs to focus their mandate on this kind of mediation process. Experience shows that States often use these instances as delay tactics. Such processes only work properly when extreme asymmetries between involved parties are balanced with adequate institutional arrangements. At a minimum, it is fundamental to create a public office staffed with specialized lawyers to represent victims’ interests in this context.

The NIMs’ oversight capacities established in the OP are contingent upon the achievement of an amicable settlement. There are no provisions addressing cases in which solutions are not amicably met. And in cases in which the amicable settlements are breached (OP Art. 6), the purpose of NIMs sending information to the Committee is left unclear.

It is crucial for NIMs to have standing before national courts in civil, criminal and administrative proceedings. They should also be able to lodge class actions and collective claims in defense of diffuse interests. These functions could represent a real

---

<sup>12</sup><https://www.cels.org.ar/web/en/2015/12/nuevo-informe-responsabilidad-empresarial-en-crmenes-de-lesa-humanidad-en-la-argentina/>



contribution for victims' access to justice, especially considering that NIMs are supposed to be specialized agencies, well trained in business liability.

While OP's Art. 2 asserts that States Parties "shall consider the Principles Relating to the Status of National Institutions for the Protection and Promotion of Human Rights (Paris Principles) when designating or establishing the [NIM]," the draft focuses almost exclusively on conciliation and mediation functions. It makes no mention of other functions contained in the Paris Principles, especially the possibility of issuing binding decisions, hearing complaints or petitions of human rights violations, and transmitting them to the competent administrative and judicial national authorities.

There is also deficient elaboration of the NIMs' powers to demand information from companies and state agencies. NIMs should have a clear and effective mandate to request or even, requisition relevant information for analyzing concrete cases of human rights abuses, and not just regular data and reports that companies are already required to produce to comply with legal requirements at the national level. It is essential to develop clear criteria and guidelines on what and how information should be produced and delivered to the NIMs.

Likewise, it is unclear what kind of remedies the Committee and the NIMs may order. Although the draft LBI refers to States' obligation to establish diverse remedies, the OP's text is silent when it comes to their powers on this matter.

Furthermore, it is important for the LBI and the OP to include strict and transparent requirements for the appointment of members and composition of the NIMs and the Committee. It is especially important to establish clear rules to prevent conflicts of interest and to ensure impartiality and independence of said organs and their members.

It is also necessary to strengthen the prevention of retaliation against those who interact with NIMs or the Committee, with provisions addressing, for example, anti-union actions by companies and governments. Article 21 of the OPCAT<sup>13</sup> might be helpful in this regard. The Committee should be able to grant interim or provisional measures and accept third party interventions and *amici curiae*, as other international human rights bodies frequently do. Moreover, it is important that the Committee has stronger oversight and monitoring powers, including, and in line with other human rights instruments, such as the Optional Protocol to the International Covenant on ESCR,<sup>14</sup> the ability to follow up with states on Committee recommendations in context of individual complaints.

Finally, we expect that civil society organizations and victims of corporate abuses will be key in shaping the deliberation process around the LBI and its OP at the UN Human Rights Council. Otherwise, it is unclear how these new instruments could be a meaningful contribution to the field of business and human rights.

---

<sup>13</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx>

<sup>14</sup> <https://www.ohchr.org/en/professionalinterest/pages/opcescr.aspx>



