

Africa CSO Consultation on the Forthcoming UN Treaty on Human Rights & Business

About the Treaty Initiative Project



ESCR-Net and FIDH together have a combined membership of almost 450 human rights organizations and activists, in more than half the countries of the world. Both of these global networks have been central to calls to strengthen the international legal framework and its implementation for more than a decade. This project emanates directly from the civil society statement developed at the ESCR-Net Peoples' Forum on Human Rights and Business in Bangkok, in 2013. The statement, which gained the support of over 1000 signatories from more than 600 organisations and 400 individual activities in over 90 countries, called for the development of an open-ended intergovernmental working group with a mandate to develop an international legally binding instrument to effectively address corporate human rights abuses and ensure that effective accountability and redress mechanisms are available.

Following the development of a new UN Intergovernmental Working Group to create a legally binding instrument to address corporate-related human rights violations in June 2014, the Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net), together with the International Federation for Human Rights (FIDH), launched a joint two-year project called the Treaty Initiative in January 2015. As part of this project, a Legal Group (LG) has been established to help coordinate collective content proposals with civil society in all regions that shape and influence the new UN treaty.

The project is committed to promoting the perspectives and advocacy of affected people in the treaty process. In order to achieve that, in 2015 and 2016 the project will hold consultations and strategy meetings in various regions of the world with the LG and representatives of civil society, including groups affected by corporate-related human rights violations. Legal proposals developed from the consultations will be submitted to the UN Intergovernmental Working Group (IGWG) – a group of states with the mandate to elaborate a new binding treaty on business and human rights.

The project is also supporting the development of the global advocacy architecture required in each region to support a coordinated international push for the creation and adoption of an effective treaty. These regional advocacy platforms, led by regional CSOs, will coordinate advocacy activities that support the creation and implementation of the UN treaty, while also providing a platform in each region for CSOs to collectively advance their own national and regional corporate accountability activities. In this way the regional advocacy initiatives emanating from this project will also provide the invaluable opportunities for CSOs in each region to leverage the international attention on the international treaty and to promote more localized demands for reform and accountability at the sub-national, national and regional level. Over the next two years and beyond, ESCR-Net will work to facilitate information exchange, solidarity and joint advocacy across regions, in close coordination with these regional platforms.



For more information, please visit www.escr-net.org/cawg/treatyinitiative.

Key corporate-related human rights issues in Africa and the Middle East

Civil society presentations

CSOs and community leaders were divided in 5 sub-regional groups: Eastern Africa, Western Africa, Central Africa, Southern Africa and MENA. The format of the consultation was designed for each sub-regional group to present on five major themes for discussion: the types of corporate-related human rights violations they experienced, the groups that were most affected by these violations, the type of remedies they desired, their experiences seeking remedy so far, and the key priorities that groups wished to be reflected in the treaty. Each group gave powerful and targeted presentations and were followed by lively question and answers plenary sessions, during which CSOs and members of the LG deepened exchanges on priorities and options for an international treaty on business and human rights.

1. Types of violations

Sub-regional groups' presentation showed that important similarities and consistency existed across sub-regions in relation to the corporate-related human rights violations taking place in Africa, across all sectors of industry. The industries highlighted as most concerned by corporate abuse were mineral extraction, agribusiness, dams, energy and infrastructure development.

The violations highlighted included:

- Lack of adequate consultation;
- Lack of respect for the right to free prior and informed consent (FPIC), including lack of respect for communities' right to refuse an investment;
- Inadequate access to information;
- Inability to access effective remedies;
- Destruction of sacred sites;
- Forced displacement and evictions resulting from land grabbing;
- Various labour rights violations;
- Criminalization of and attacks on traditional leaders and human rights defenders, including cases of torture and extra-judicial killings;
- Fraud and corruption.

Environmental degradation and destruction of natural resources were mentioned in the context of human rights violations, and were often mentioned in the context of climate change as well as threats to food sovereignty. Additionally, participants placed corporate-related human rights violations in the broader context of the undermining of the right to development, as well as infringements on national sovereignty. The Middle East and North Africa (MENA) sub-group also stressed that corporate activities were involved in violations of the right to self-determination were being experienced in that region.

2. Affected groups

Presentations showed that the consistency with which the same groups were most affected by corporate abuse in the different sub-regions was a particularly notable conclusion from the consultations.

Traditionally marginalised or vulnerable groups were identified as being especially affected, including women, elderly people, migrants, young people, people with disabilities, landless people,

groups lacking formal education, rural communities and internally displaced persons. Similarly, indigenous peoples, traditional community leaders, unrecognised tribes, pastoralists, farmers, hunter-gatherers and fisherfolks were also highlighted as most affected.

Finally, other groups flagged as particularly affected by corporate violations included artisanal miners and occupied populations such as the Palestinian population, in the particular context of the MENA region.

3. Remedies

Experience seeking remedy

Groups highlighted the different **strategies** they utilised to advocate for strong remedies by self-organising community-based activities such as community organising and self-education (e.g. through demonstrations and awareness raising), leading to engagement with formal judicial and non-judicial recourse mechanisms including national courts, regional mechanisms and companies' internal grievance mechanisms.

The presentations underlined the difficulties experienced when seeking to obtain effective remedy. The **obstacles** put forward included:

- Access to information;
- Cost of legal representation and associated costs;
- Lack of ability to take class actions in some jurisdictions;
- Corruption and conflict of interest with state/corporate authorities;
- Unfair compensation not based on real value;
- Attacks and criminalization of human rights defenders and communities pursuing remedies;
- Weak monitoring and enforcement of remedies;
- Legal standing and issues of jurisdiction in the context of occupation (eg. Palestine);

The presentations also highlighted broader difficulties in obtaining effective remedy that are linked to protections for corporations emanating from the international trade and investment regime, compounded by weak regulatory environments, monitoring and enforcement to help redress these power imbalances.

Types of desired remedy and preventive measures

Respecting the **right to free prior and informed consent** (FPIC) was highlighted as a key preventive measure. Some discussion centred on whether this right should be extended to all communities, including the right to withhold consent for a project, effectively providing a right to reject an investment project. The **recognition of customary rights** was also highlighted as very important.

In relation to audits and impact **assessments**, groups stressed the need for meaningful, informed and inclusive social, environmental and gender impact assessments in which affected communities and relevant stakeholders would be adequately consulted at all stages of corporate activities. CSOs also mentioned how such assessments need to be made public and accessible prior to the commencement of projects. The need to clearly allocate responsibility for **due diligence requirements in occupied territories** was put forward by the MENA group.

Groups highlighted the need for the **effective execution of judgements** (including through injunctions and stop orders) and for adequate sanctions (including blacklisting and seizure of

government licences for corporations to operate). **Adequate compensation** was singled out as particularly important, including through adequate, equitable and inclusive valuation of assets (people-centred and not based on market value), monetary compensation, restitution and reparation.

4. Priorities for the treaty

CSOs' presentations highlighted how the different sub-regional groups expressed similar priorities for an international treaty on human rights and business.

Common priorities

There was a unanimous call for **all human rights** to be included in the treaty, and all groups agreed that **all businesses** must be covered by the instrument, whether national, state-owned or multinational corporations. In this regard, some groups stressed the need for the treaty to be designed from the starting point of the human rights violation, rather than who is responsible, ensuring that violations are prevented and remedied, rather than focusing on excluding some corporate actors that violate human rights and only including others.

Another priority which stood out in most groups' priorities for the treaty was the need restate the mandatory state of the right to **FPIC** in the treaty. The need for robust **enforcement mechanisms** at the national level, and to provide for adequate sanctions and penalties, stood out as another common priority expressed by a majority CSOs.

Groups stressed that **extraterritorial obligations** should also be restated in the treaty, and that states must be required to establish enabling legislation in relation to the activities of their companies' operations abroad. CSOs also insisted that affected groups should be able to access judicial remedies in any states that has jurisdiction over the business enterprise concerned.

Access to effective remedy was highlighted as a key priority for all groups. They indicated that civil, criminal and administrative remedies should be considered in the treaty. Some groups called for the creation of an international **court or tribunal**, which could serve as a court of appeal to national and regional bodies, which would have direct purview over legal persons (i.e. corporations). One group suggested that the specialised court could have the power to revoke licenses or to order states to do so, and that both states and corporations should be bound by the court's orders. Some groups demanded that in all mechanisms affected individuals, communities, civil society organisations (including trade unions), and indigenous peoples should have **legal standing**.

The need to address the issue of **funding** to access to recourse mechanisms, for example through a global fund to support affected people seeking remedy, was put forward by two sub-groups.

Some groups included in their list of priority the need to **build capacity** including through NHRIs and the UN OHCHR and to **raise awareness** of affected communities.

Priorities specific to sub-regions

The **MENA sub-regional group** called on the treaty to refer to international humanitarian law and to tackle conflict-affected areas, including by clarifying what due diligence means in such contexts and what additional protection measures need to be taken. This group also indicated that the process of developing a legally binding instrument should be complementary to the process of pursuing the implementation of the UNGPs. The MENA sub-regional group also added that the treaty should

address the current imbalances and protection gaps resulting from trade and investment agreements by reinforcing the primacy of human rights.

The **Central Africa sub-regional group** suggested having a very low number of ratifications for the treaty to enter into force. They also suggested requiring the treaty to mandate states to create a high-level body at the national level to monitor the implementation of the treaty and produce an annual report to be debated in the parliament, and with the NHRI, and requiring each party to the treaty to issue a public report each three years concerning their implementation of the treaty.

The Central Africa sub-regional group also outlined the need to include a mandatory maximum time limit of three years for any remedy / grievance mechanisms to deal with all human rights claims related to corporate violations, and to impose an obligation on companies to establish internal mechanisms to respect, protect and promote human rights. They called on the treaty to include a detailed standard consultation procedure. Another concern of this sub-regional group was to ensure the treaty addresses the issue of **beneficial ownership**, so all communities can understand who is the actual owner of any companies involved in investment in their local areas. Finally, this sub-group stressed that particular attention should be paid to national enterprises, as transnational corporations actually register as local businesses as well as participate in joint ventures with national and state-owned corporations.

Regarding the issue of consultation, the **Eastern Africa sub-regional group** stated that communities must be considered as legitimate stakeholders and that they should be involved early in all decision-making processes concerning corporate activities and cultural leaders should be consulted, notably concerning sacred sites. Access to information was moreover highlighted as a key priority for the group, including access to investment contracts, impact assessments and related studies. The group moreover suggested that confidentiality clauses be removed from contracts. In addition, the group called on the treaty to address the entire value chain of corporate operations.

The **Western Africa sub-regional group** suggested that economic crimes such as tax evasion, transfer pricing and tax havens be covered by the treaty. They recommended the creation of a global independent monitoring and oversight body for businesses. The group added that the treaty should address the issue of security of indigenous peoples, local communities and human rights defenders. The issue of witness protection came up in the question and answer discussion as an issue to be examined in detail. The group recommended that universal jurisdiction should apply to corporations' crimes. Finally, the sub-regional group reaffirmed the call for the process to develop process the treaty to be people-centred and bottom-up.

The **Southern Africa sub-regional group** indicated that the treaty should cover both violations by corporations and lack of accountability by states, and that the treaty should take account of customary international law. They added that corporations should, beyond CSR, have a positive responsibility to advance human rights. Regarding remedies, the group suggested that compensation and reparation be included in the treaty.

Advocacy opportunities

Presentations and discussions regarding challenges faced and key priorities to be covered by an international treaty were followed by strategic planning sessions in which CSOs discussed advocacy opportunities related to the treaty development process, both at the national and regional level.

Linking treaty advocacy to advocacy in different spaces

African CSOs discussed how advocacy for the treaty could be brought into and reinforce advocacy efforts in other spaces (for example at the regional level, the OECD level or in the framework of EITI, etc). CSOs agreed that the treaty process would facilitate the building of pressure on states to push them to take legislative, administrative, budgeting, judicial and other measures to protect citizens from corporate-related human rights violations. They identified also that it would serve to raise interest and capacity on different issues linked to human rights and business in different advocacy spaces. For example, it could help secure meetings with decision-makers on issues that are traditionally sidelined, including at the regional level. Additionally, they expected that discussions on a treaty on human rights and business could also encourage states to add a human-rights approach to processes that are not framed in these terms, for example regarding the development of national mining legislation.

The treaty process was identified as a major opportunity to strengthen enforcement and recourse mechanisms. It was also seen as a drive to move beyond relying on voluntary strategies to address corporate abuse and towards developing effective sanctions.

It was seen as an opportunity to strengthen advocacy on trade and investment policies both at the national and international levels. The treaty was also considered an occasion to feed and reinforce strategic litigation efforts, as well as reinforce protections for the rights of Indigenous peoples'.

The treaty was also seen as a chance to advance the process of developing model mining legislation for countries in Africa that CSOs are currently working on. Discussions on an international treaty were seen as helping to address issues of conflict and occupation through a human rights and business lens, for example in the case of Palestine.

Building ongoing and effective regional coordination

African CSOs brainstormed on how to build effective regional coordination for successful advocacy on the treaty. The suggestions put forward included building a regional platform, setting up a central coordinating entity for the region, working closely with existing CSO networks and building on existing initiatives to avoid duplication. There was a discussion about the need to identify two focal points to coordinate exchanges, one anglophone and one francophone. Another suggestion was the idea of setting up country-level as well as sub-regional CSO networks working on the treaty and establishing a regional mailing list for information sharing.

CSOs stressed the need for broad participation and consultations, to maintain continuous conversations, as well as to secure funding to ensure strong regional coordination. They deemed it particularly important to make efforts to find similar priorities while highlighting local differences, as well as to share and draw on experiences and unify efforts towards protection for affected people. Finally, they also outlined the importance of coordinating with groups in other regions of the world.

Using attention on the treaty to elevate local cases of corporate abuse

CSOs discussed how they could use the treaty process to bring more attention to local cases of corporate abuse, and agreed that the momentum around this process could be used to engage with governments and establish an open dialogue with different stakeholders. They stated that the need for a treaty could be linked to advocacy related to strategic litigation, success stories holding corporations accountable for abuse in different fora and highlighting existing gaps, which would also help bring

attention to corporate abuses taking place at the local level. In terms of tools to increase attention on cases of corporate abuses, CSOs suggested developing strategic communication campaigns, publishing reports on corporate abuse, conducting community awareness-raising about human rights and available remedies, organising round-tables that engage governments as well as strategic use of the media.

Getting national governments to increase support for the treaty

CSOs discussed strategies to build pressure on national governments in order to increase their support for the treaty. Securing states' active participation and ownership in the treaty process was deemed fundamental. CSOs recognised that states needed support, and that CSOs themselves also needed states to address their concerns in the treaty negotiations. They suggested drafting briefs highlighting cases of corporate-related human rights violations and demonstrating the need for a treaty. Moreover, they recommended framing the issue by focusing on the need to regulate corporate behaviour and on highlighting how states could benefit from stopping corporate abuse.

They stressed that sharing information on the advancement of discussions on the treaty was needed so that national CSOs were aware of their government's positions, which could help them refine their advocacy. CSOs also recommended working with NHRIs as these who could influence governments.

For a full version of the Joint African CSO statement emanating from the CSO consultation, see:

www.escr-net.org/sites/default/files/joint_statement_of_african_csos_on_a_binding_treaty_english.pdf