



ESCR-Net Collective Submission on the Second Revised Draft
Legally Binding Instrument on Corporate Accountability
Corporate Impunity Must End

October 2020

Introduction

This submission is written on behalf of ESCR-Net - International Network for Economic, Social, and Cultural Rights, a network that connects over 280 NGOs, social movements and advocates across more than 75 countries to build a global movement in pursuit of human rights and social justice a reality for all.¹ Our Common Charter for Collective Struggle² identifies impoverishment, dispossession, corporate capture, climate change, environmental degradation, deepening inequality, and growing repression as common conditions faced by people globally. These can be linked clearly to a dominant capitalist system—which prioritizes profits over people and the planet—and is intricately linked to structures of oppression, including patriarchy, racism and long histories of colonialism and imperialism. These structures have been further intensified by skewed State-led development agendas that largely focus on creating environments conducive to private actors doing business without corresponding strengthened regulatory, standard setting and institutional frameworks to ensure corporate accountability.

Over the last two months, members of ESCR-Net's Corporate Accountability Working Group (CAWG)³ engaged in a process of collective critique and analysis of the second revised draft legally binding instrument (LBI)⁴ that was published on 7 August by Ecuador, the Chairperson of the UN Open-ended Intergovernmental Working Group (IGWG) on transnational corporations and other business enterprises with respect to human rights. Our initial observations on the second draft LBI were made public in a statement on 31 August 2020⁵ in which we highlighted that the pursuit of ending corporate impunity continues to progress through the second draft LBI, but that much work remains requiring a strengthened

¹ <https://www.escr-net.org/>

² https://www.escr-net.org/sites/default/files/charter_for_collective_struggle.pdf

³ The Corporate Accountability Working Group coordinates collective actions and supports member efforts to challenge corporate impunity, advocating for new accountability and remedy structures. It engages in collective advocacy, campaigning and collaborative research, member-to-member capacity building and information dissemination.

<https://www.escr-net.org/corporateaccountability>

⁴ Second Revised Draft LBI

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

⁵ ESCR-Net Statement on the Second Revised Draft Binding Instrument on Corporate Accountability

<https://www.escr-net.org/news/2020/statement-second-revised-draft-binding-instrument-corporate-accountability-corporate>

collective resolve to its *urgent* realization as a significant part of many other initiatives aimed at corporate accountability. Most significantly, we highlighted that social movements and affected communities must be central to this process - with their lived experiences and demands for justice informing steps forward - whatever format the upcoming sessions take.

Regardless of restrictions resulting from the COVID-19 crisis and subsequent crises, our continued effective and meaningful participation as social movements and civil society organizations in this much-needed process is key. We further call on States to engage genuinely in this process, taking our proposals and demands into consideration during negotiations.

Social movements and CSOs, both members and allies of ESCR-Net, have played an instrumental role in the establishment and development of the IGWG process as a way to push back against the status quo of corporate impunity. Our voices remain central and most relevant to this process. Most recently, we participated as a large collective in the informal consultation sessions on the LBI in May and June 2020 to build momentum and encourage participation in the IGWG process, sharing our demands in a video that was disseminated among many allies and State representatives.⁶ As a strong component of the collective position that we advocated during the consultations, we highlighted the current COVID-19 crisis. This crisis has illustrated that domestic legislative systems in the majority of countries around the world are not set up to protect people against the interests of corporate power and the wealthiest one percent in normal times; in times of crisis, this reality is only exacerbated.

Corporations are abusing our rights and harming our environment – in situations of crisis, they see an opportunity for profit-making. This status quo is driving us to pressure our States, now more than ever, to rebuild a system that will allow us to hold corporations accountable. Voluntary guidelines for corporations have proven insufficient. We call on States to support negotiations for a strong international LBI to regulate corporate power as a means to stop corporate capture of the State and the privatization of the public sector. In demanding a new normal, we need to take advantage of the opportunity we have during this session to start moving towards regulations that will protect us, the people, and our planet. In times of crisis and beyond and as States negotiate this LBI, representatives must advance laws that prioritize at-risk groups, education, a strong healthcare system, procurement of local goods and the overall well-being of people and our planet over corporate profit-making.

We call on States to take our collective analysis of the draft LBI into serious consideration in their interventions throughout the October session and beyond, in order to guarantee the utmost protection of rights in a final draft of the LBI at a time when meaningful CSO participation in UN events is far from exemplary.⁷ This submission will reflect in large part what must be further strengthened in the second draft LBI. In relation to many points, we draw upon comments included in our collective submission from last year,⁸ some of which were incorporated into the current draft, while others must be advanced further in the next revised draft LBI.

⁶ <https://www.youtube.com/watch?v=87oPeV5zsXQ>

⁷ Joint NGO statement on the United Nations' COVID-19 response

<https://ifex.org/joint-ngo-statement-on-the-united-nations-covid-19-response/>

⁸ https://www.escr-net.org/sites/default/files/escrnet_cawg_position_un_treaty_october_2019_0.pdf

Some of the key issues foregrounded in our collective submission include the following:

- Ensuring that feminist visions, particularly of grassroots women leaders, are at the center of the LBI;
- Centering the lived realities and demands of impacted communities & social movements within them;
- Addressing gaps in obligations towards corporate accountability throughout the text of the LBI;
- Reintroducing and strengthening Articles on State obligations and liability for violations;
- Incorporating the elements of Free, Prior and Informed consent for Indigenous Peoples;
- Including provisions on the right to self-determination;
- Guaranteeing continuous access to information in consultations and remedy processes;
- Introducing a non-pursuit clause for business with oppressors in conflict-affected areas;
- Requiring disengagement/divestment following enhanced due diligence when appropriate;
- Strengthening provisions on criminal liability across the value chain;
- Articulating specific punitive measures in cases of corporate-related abuses / violations;
- Developing referrals of legal or natural persons to the International Criminal Court;
- Ensuring transparency to deter and overcome corporate capture of the State;
- Incorporating workers' rights into the text - workers' rights are human rights;
- Cementing the primacy of human rights over trade and investment agreements;
- Improving human rights defenders' protection from corporate-related abuses / violations;
- Waiving of legal fees and costs for victims where economic barriers exist;
- Ensuring legal representation throughout all proceedings in the context of this LBI; and
- Incorporating safeguards to challenge climate change, particularly when profit-driven.

In accordance with our key issues articulated above, we have divided our collective submission thematically. Please find to follow a table of contents outlining the thematic sections in this submission:

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Feminist Perspective

A fundamental part of ESCR-Net's work strives to advance towards transformational changes, which are necessary to address the challenges of the current economic, political and social model rooted in unsustainable modes of consumption and production that deepen existing inequalities and discrimination. Feminist organisations are calling for deep structural changes to existing global economic governance and the LBI is part of that transformation. Grassroots women leaders and feminist visions must be at the center of policymaking, legal developments, and systemic alternatives. Last October, ESCR-Net's Women and Economic, Social, Cultural Rights Working Group (WESCR),⁹ facilitated the engagement of several women leaders in the IGWG negotiations in Geneva.¹⁰ Some of the main demands that the leaders articulated included the prioritization of women and women workers' voices in this process.

Women have a closer relationship¹¹ with land and other natural resources in many parts of the world and, as such, face more violations and abuses of human rights. According to numerous accounts from our members across the world, when women resist business activity, they are attacked physically, sexually and through slander campaigns as a result. This places them and their families in risk situations when faced with corporate projects that may impact their communities' territories and livelihoods. The suggestions to improve the second revised text throughout this collective submission represent *inter alia* the demands of women leaders and activists who are part of ESCR-Net. Representative, well-resourced, and meaningful participation of women in all their diverse identities and contexts is key to this process. We must acknowledge that online participation is not simple for many in this time of crisis and, as such, space must be provided for an inclusive and feminist analysis of the text.

From a feminist perspective, we support the analysis of the Feminists for the Binding Treaty (F4BT) on the revised draft text¹² and agree that while there have been some improvements in the second revised LBI text with regards to integrating a gender responsive approach to protection, remedy and legal liability, the text remains far from ideal and needs to be further strengthened. In the coming section, we will highlight what is positive in the new revised text, while also providing suggestions to further strengthen protections.

⁹ <https://www.escr-net.org/women>

¹⁰ Juana Toledo of Consejo de Pueblos Wuxhtaj: https://www.youtube.com/watch?v=YFnysG_3I0E, Claudia Lazzaro of the Union of Leather Workers of Argentina <https://www.youtube.com/watch?v=8j99P-C5KDg>, Valentina Camacho of Comité Ambiental en Defensa de la Vida, <https://www.youtube.com/watch?v=nDWDqQrRdo>

¹¹ Patriarchy and other root causes of substantive inequality manifest as multiple and intersecting forms of discrimination against women and related societal barriers undermining their ability to access, use, inherit and control land, property, and natural resources, as well as to enjoy related economic, social, cultural, civil, and political rights. In some countries, inadequate or inadequately enforced laws fail to guarantee equal rights in land ownership, security of tenure, inheritance, access to credit for women, and/or social housing allocation and land redistribution. Over half of all countries have laws and/or customs which impede women's ownership of, or access to land, and there are 90 countries where customs restrict women's access to land. Women make up approximately 43 percent of the global agricultural labor force, almost 50 percent in East and Southeast Asia and Sub-Saharan Africa, and women farmers make up 60% of employed women in Sub-Saharan Africa , yet less than 15 percent of the world's landholders are women.

¹² Contact msabell@escr-net.org for a copy of the F4BT analysis on the LBI.

Positive developments

Preamble

In the *Preamble*, the second revised text emphasizes that States and business enterprises must integrate a gender perspective in all their measures, in line with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action and other relevant international standards. While this is positive, the meaning of “measures” is not clear. Additionally, the provision can further be strengthened by referring to the protection of gender minorities – see below in next section on “What can be improved?”.

Article 4 – Rights of Victims

As Article 4(2)(e) is currently worded, “victims shall be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, before, during and after any proceedings have been instituted, as well as from re-victimization in the course of proceedings for access to effective remedy, including through appropriate protective and support services that are *gender responsive*.” While the inclusion of the words “gender responsive” is positive, this provision can be further strengthened – see below in next section on “What can be improved?”.

Article 6 – Prevention

According to Article 6(3)(b), “...human rights due diligence measures shall now include integrating a gender perspective, in consultation with potentially impacted women and women's organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls.” Similar to the point above, this is generally a positive development; however, it can be further improved to read as such: “...[i]ntegrating a gender perspective, in consultation with potentially impacted at-risk groups including women, women's organizations and other gender minorities, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls, whereby women are involved in the collection of data and that data is disaggregated by gender and other categories.”

Article 8 – Legal Liability

In Article 8(5) on legal liability, the second revised text now includes a reference to gender responsive reparations to the victims – this is a welcomed development.

What can be improved?

Preamble

1. Informed by the feminist analysis developed by ESCR-Net's WESCR WG¹³ on the dangers of retrogression of rights during the COVID-19 crisis, it is important that we introduce a new paragraph in the Preamble on the principle of non-regression, requiring that norms which have

¹³ <https://www.escr-net.org/news/2020/systemic-change-not-retrogression>

already been adopted by States not be revised if this implies going backwards on the subject of standards of protection of collective and individual rights. As such, we recommend adding the following new language: “**Confirming that the principle of non-regression requires that human rights norms which have already been adopted by State not be revised if this implies going backwards on the subject of standards of protection of collective and individual rights.**”

2. With regards to paragraph 9, the following changes are recommended: “Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all, and stressing that there should be no without distinction of race, sex, language or religion; discrimination on grounds that are prohibited by international human rights law.”
3. With regards to paragraph 15, it would be important to clarify that the word “measures” encompasses all aspects of business-related operations for States and corporations, including the planning phase, the due diligence processes, and any other further operations. It is also crucial that the text reflects an awareness of the fact that a gender perspective is not only synonymous with women’s rights, as such, the text must underscore the importance of other gender vulnerabilities that arise due to unaccepting social constructs of gender that undermine protections of other groups, including other gender minorities.

Article 2 – Statement of Purpose

In Article 2(1)(d), we suggest the consideration of the following changes in the language to ensure that States prioritise effective remedy and reparations in contexts of mutual legal assistance and international cooperation, particularly for women and girls, as well as those affected by conflict: “...to facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses and violations in the context of business activities and provide access to justice and effective remedy and reparations to victims of such abuses or violations - paying particular attention to women and girls including those affected by conflict.”

Article 4 – Rights of Victims

1. In Article 4(2)(e), we suggest the following changes from a non-binary gender responsive lens, stipulating that victims shall: “...be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, before, during and after any proceedings have been instituted, as well as from re- victimization in the course of proceedings for access to effective remedy, including through appropriate protective and support services that are gender responsive, ensure substantive gender equality, as well as equal and fair gender-responsive access to justice such as gender-appropriate counselling and gender-specific healthcare.”
2. In Article 4(2)(f), we suggest the following changes from a non-binary gender responsive lens, stipulating that victims shall: “...be guaranteed access to legal aid and information and legal aid held by businesses and others relevant to the pursuit of remedies, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples', as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business

activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents; and..."

Article 6 – Prevention

In general, prevention of abuses or violations is best achieved when data is collected by the impacted group and when the data collection is also reflective of the different categories and ways particular groups are impacted by business. As such, in Article 6(3)(b), we suggest the following addition: “Integrating a gender perspective, in consultation with potentially impacted **at-risk groups including** women, women’s organizations **and other gender minorities**, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls, **whereby women are involved in the collection of data and that data is disaggregated by gender and other categories.**”

Article 15 – Institutional Arrangements

To ensure that States are reviewed according to a more coherent non-binary gender responsive approach in the implementation phase, it is necessary to include a reference to gender expertise in Article 15 (1)(a). Gender balance among human rights treaty bodies experts is still far from being reality. For instance, 94% of experts in the Committee on the Rights of Persons with Disabilities are men; 72% of experts in the Committee on Economic, Social and Cultural Rights are men; 70% of experts in the Committee on Enforced Disappearances are men; and 60% of experts in the Committee against Torture are men.

As such Article 15(1)(a) should read: “The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts - **no more than half of them men**. After an additional sixty ratifications or accessions to the (Legally Binding Instrument), the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members. The members of the Committee shall serve in their personal capacity and shall be of high moral standing, **gender expertise**, and recognized competence in the fields of human rights, public international law, or other relevant fields.”

State and Corporate Obligations

There is a clear gap in international law regarding corporate accountability and obligations, whether direct or indirect. While States are the primary duty bearers in international law and have a well-founded obligation to respect, protect, and fulfil human rights, corporations – particularly those operating transnationally – have largely enjoyed impunity because internationally binding mechanisms of accountability do not yet consider them systematically as duty bearers with obligations. For the most part, initiatives to ensure that corporations respect human rights have been voluntary despite the fact that there are several precedents establishing that corporate entities have direct obligations in international

treaties.¹⁴ In addressing corporate-related abuses or violations, international accountability measures as part of this process must address the direct and indirect obligations and the continued impunity of both State and corporate entities. In the context of individual criminal responsibility, both States and individuals can be held responsible for the same offence – one does not undermine or replace the other.¹⁵ The same principle should apply under international law in relation to corporate obligations.¹⁶

While addressing the gap in corporate accountability, the LBI must also reassert State obligations and liability for violations connected with business activity, without undermining the accountability of corporate actors. As it stands, there is no clear indication in regional or international human rights courts that State liability exists when involved in acts or omissions of corporate-related violations or abuses. While there are some precedents of liability, these are not sufficient and need reinforcing so that States are able to properly respect, protect, and fulfil human rights in the context of business activity. This LBI is an important opportunity to do this.

Accordingly, it is of concern that the key word “violations” was taken out from the first draft text of the LBI. With this word taken out, it is more difficult to address state impunity when involved in business-related human rights violations. State human rights violations related to business activity can occur in the context of State-owned enterprises or state investments in business activities.¹⁷ They can also happen when States fail in their legislative and administrative systems to protect human rights in the context of business activities by deliberately or non-deliberately creating or failing to overcome structural barriers to corporate accountability.¹⁸ A State can also be liable for business-related human rights violations based on its

¹⁴ See Menno Kamminga, ‘Corporate Obligations under International Law’, and see the 1969 Convention on Civil Liability for Oil Pollution Damage which provides that the owner of a ship (which may be a company) shall be liable for any pollution damage caused by it: Art. III, International Convention on Civil Liability for Oil Pollution Damage (1969): ‘... the owner of a ship at the time of an incident, or where the incident consists of a series of occurrences at the time of the first such occurrence, shall be liable for any pollution damage caused by oil which has escaped or been discharged from the ship as a result of the incident’, and see: the 1982 UN Convention on the Law of the Sea which prohibits not only states but also natural and juridical persons from appropriating parts of the seabed or its minerals: Art. 137(1), UN Convention on the Law of the Sea (1982): ‘No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized’.

¹⁵ See André Nollkaemper, ‘Concurrence Between Individual Responsibility and State Responsibility in International Law’, 52 ICLQ (2003) 615-640.

¹⁶ See Menno Kamminga, ‘Corporate Obligations under International Law’
<https://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc#:~:text=In%20international%20law%20there%20is,to%20go%20in%20that%20direction>.

¹⁷ For example, in Abrill Alosilla v. Peru, the Inter-American Court of Human Rights found the State liable for labor-related violations involving a state-owned water and sewage utility. See Inter-American Court of Human Rights, Abrill Alosilla v. Peru, Judgment, 2011. In Kichwa Indigenous People of Sarayaku v. Ecuador, the Inter-American Court found the State liable in connection with the conduct of State-owned enterprise Petroecuador. See Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment, 2012. In Mykhaylenky v. Ukraine, the European Court of Human Rights held the State liable for the debts of a State-owned enterprise to its workers, citing numerous characteristics of the company’s operations for doing so. European Court of Human Rights, Mykhaylenky v. Ukraine, Judgment, Eur. Ct. H.R (Second Section), 2005, par. 45. See also European Court of Human Rights, Dimitar Yordanov v. Bulgaria, App. No., 3401/09, 2018, par. 60 (detailing its rationale for affirming State liability in connection with a state-owned mining enterprise).

¹⁸ For example, the European Court of Human Rights, in a case concerning state liability for pollution from a privatized former State-owned enterprise, explained that State liability could stem from omissions and failures of oversight: “The

delegation (for example, via outsourcing/subcontracting) of a public function, like healthcare, to a private party, such as a business.¹⁹ Finally, State human rights liability for business related activities can also occur in cases where State agents are involved in or adopt the conduct at issue or are protecting (physically or otherwise) corporate entities and their activities.²⁰ There are no specifications or guarantees spelled out in the current text highlighting and clarifying State obligations along these lines, except for paragraph 8 in the Preamble of the second revised LBI text. It is important that State obligations and liability when addressing abuses or violations related to business activities are explicitly delineated in the text, as this would amplify the discussion around liability and the nature of human rights due diligence conduct.

The LBI text must ensure that States too have a dedicated provision clarifying that they could be held accountable for involvement in business activity, both at home and abroad. The revised text must also reiterate the extraterritorial obligations of States. Equally, the text must clearly signal that States should be held accountable if they fail to ensure that corporations based in and/or operating within their jurisdiction are complying with the provisions of the binding instrument, including in respect to other international instruments and standards of human rights and humanitarian law.²¹

authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 [right to respect for private and family life] of the [European] Convention [on Human Rights]." European Court of Human Rights, *Fadeyeva v. Russia*, Judgment, 45 Eur.Ct.H.R. 10, 2005, par. 92; the European Court has also found State violations for failure to provide accountability, for human rights abuses connected to business activities, for instance, by not properly investigating. European Court of Human Rights, *Khadija Ismayilova v. Azerbaijan*, Judgment, App. 65286/13 and 57270/14, 2018, par. 125; see also European Court of Human Rights, *Kurşun V. Turkey*, Judgment, App.. 22677/10, par. 114-115. In relation to the International Covenant on Economic, Social and Cultural Rights, the UN Committee on Economic, Social and Cultural Rights explained in its General Comment 24 on State obligations under the ICESCR in the context of business activities that: "The obligation to protect means that State parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that State Parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective protection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies." United Nations Committee on Economic, Social and Cultural Rights, General Comment 24, par. 14.

¹⁹ As affirmed by the Inter-American Court of Human Rights in a case affirming State liability for human rights violations occurring at a private mental health institution receiving government funds, *Ximenes Lopes v. Brazil* paragraph 96: "Rendering public services implies the protection of public interests, which is one of the objectives of the State. Though the States may delegate the rendering of such services, through the so-called outsourcing, they continue being responsible for providing such public services and for protecting the public interest concerned. Delegating the performance of such services to private institutions requires as an essential element the responsibility of the States to supervise their performance in order to guarantee the effective protection of the human rights of the individuals under the jurisdiction thereof and the rendering of such services to the population on the basis of non-discrimination and as effectively as possible." Additionally as articulated in paragraph 97, "The States have the duty to respect the rights recognized in the [American] Convention [on Human Rights] and to organize their power so as to guarantee the free and full exercise of human rights to the individuals under the jurisdiction thereof, such duty encompassing all government levels, as well as other institutions to which the States delegate their authority. (internal citations omitted), Inter-American Court of Human Rights, *Ximenes Lopes v. Brazil*, Judgment, July 4, 2006, par. 96-97.

²⁰ See Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, United Nations International Law Commission, 2001, Art. 4, 8, 11 and commentaries.

²¹ A good reference to review in relation to State obligations would be General Comment 24 (GC24) of the UN Committee on Economic, Social and Cultural Rights. GC24 clearly outlines State obligations to protect, respect and

In the coming sections, we highlight positive developments regarding state and corporate obligations – both direct and indirect – but offer significant suggestions related to language in order to avoid red lines that, if crossed, could undermine the LBI.

Positive developments

Article 1 – Definitions

In Article 1(3), the second revised LBI text mentions State-owned enterprises as part of the definition of business activities for the first time. This is a welcomed and significant addition.

Article 7 – Access to Remedy

In Article 7(5), the text finally addressed an issue that was of concern for many social movements and civil society organisations by stipulating that “State Parties shall ensure that the doctrine of *forum non conveniens* may not be used by courts to dismiss legitimate judicial proceedings brought forth by victims even when there is legitimacy to bring them to court in a different jurisdiction.” This too is a very welcomed addition to the text and can be even further strengthened with the removal of the word *legitimate* prior to judicial proceedings as it is not clear what legitimate means.

Article 9 – Adjudicative Jurisdiction

In Articles 9(4) and 9(5), State Parties’ courts can now bring together claims that are closely connected and, in accordance with the concept of *forum necessitatis*, are also able to exercise jurisdiction over claims concerning companies that are not domiciled in the territory of the State if no other effective forum is available and if there is a sufficiently close connection to the State concerned.

What can be improved?

Preamble

1. It is important to emphasize State obligations in the Preamble as they relate to business activity. A good way to do this would be via the following suggested language, referencing UN CESCR General Comment 24 on State obligations under the ICESCR in the context of business activities (GC24) and State obligations related to business activities: “Emphasizing that States have an obligation to protect, respect and fulfil human rights in the context of all business activities under their jurisdiction both at home and abroad in accordance with the International Covenant on Economic Social and Cultural Rights.”
2. In paragraph 19, the second revised text aims to clarify State obligations in the context of the LBI. In doing so, however, it has narrowed this down only to business abuses and not to State violation of human rights linked to business activities. This would be problematic in terms of access to justice and

fulfil human rights in the context of business activity. For example, GC24 stipulates that States have an obligation to prevent effectively infringements of economic, social and cultural rights in the context of business activities - requiring State Parties to adopt legislative and other appropriate measures against human rights infringements by companies.

impunity given that States are often complicit in infringements related to human rights and business. As such, this paragraph should be amended accordingly: “Desiring to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the responsibilities and legal liability of business enterprises and States in that regard.”

Article 1 – Definitions

1. In Article 1(3), the second revised draft discusses “Business activities” and defines them as “any for profit economic or other activity”, but this does not encompass not-for-profit activities, for example, the procurement activities conducted by international organisations or public services entrusted to private or public companies. To this effect, consider the following amendments that would encompass a wider scope of accountability related to business: ““Business activities” means any not-for-profit and for profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures, undertaken by a natural or legal person. This will include activities undertaken by electronic means.”
2. In Article 1(5), the second revised LBI text talks about business relationships without articulating that both State and non-State entities could be a part of this relationship. This must be addressed to avoid State impunity when complicit or wholly responsible for human rights infringements related to business activities. Additional language is needed to ensure corporate accountability across the value chain – whether we are dealing with a subsidiary or a supermarket facilitating the flow of unlawful goods for public consumption. To this effect, consider the following amendments: ““Business relationship” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities. The term includes including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, entities in the value and supply chain, or any other structure or contractual relationship as provided under the domestic law of the State, any other non-State or State entity linked to its business operations, products or services even if the relationship is not contractual, including as well as activities undertaken by electronic means.”

Article 2 – Statement of Purpose

1. In Article 2(1)(b), we suggest amendments to the text that would incorporate the prevention of State violations and environmental harm as a fundamental purpose of this treaty: “To prevent the occurrence of human rights abuses and violations as well as environmental harm resulting from in the context of business activities in both conflict and non-conflict affected areas by creating and enacting effective and binding mechanisms of monitoring and enforceability.”
2. In Article 2(1)(c), the word “violations” must be reintroduced to ensure that State violations in the context of business activities are clearly understood. Accordingly, we suggest the following amendment as follows: “To ensure access to justice and effective remedy for victims of human rights abuses and violations in the context of such business activities.”
3. In Article 2(1)(d), the word “violations” must be reintroduced to ensure that State violations in the context of business activities are clearly understood. The suggestion to amend the text is as follows: “...to facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses and violations in the context of business activities and provide access to justice

and effective remedy and reparations to victims of such abuses or violations - paying particular attention to women and girls, including those affected by conflict."

Article 3 – Scope

In Article 3(1), it must be clearly stated that transnational corporations (TNCs) are of particular focus in the scope of the LBI, especially as it relates to the need to establish extraterritorial obligations to adjudicate cases where TNCs operate, including where subsidiaries in their value chain are involved – whether in their home or host States. As such, we recommend the following amendments: "Unless stated otherwise²², this (Legally Binding Instrument) shall apply to all business enterprises and all business activities, with particular focus on transnational corporations and other business enterprises in the value chain that undertake business activities of a transnational character."

Article 4 – Rights of Victims

1. As mentioned above, it is important to establish that the rights of victims are protected under the LBI whether they are infringed upon in the context of non-State agents or by State agents. To this effect, we recommend that in Article 4(1), the word "violations" is added after abuses: "Victims of human rights abuses and violations in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms."
2. We notice with regret that some important components of the rights of victims to access justice and effective remedies have been deleted, which were in Article 4(5) of the previous draft. We therefore propose to include additional components of reparation for victims under current article 4(2)(c), which better reflect the immediate and long-term measures which should be taken and the importance for long-term monitoring of such remedies. Accordingly we recommend the text be amended to ensure that 'victims': "...be guaranteed the right to fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, ecological restoration, including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right for long-term monitoring of such remedies."
3. Effective remedies and reparation measures should take into account the differentiated impacts of human rights abuses on specific groups in order to respond adequately to these impacts and their particular needs. In order to guarantee this, it is important for the remedy process to be transparent, independent and count with the full participation of those affected. We propose the inclusion of an additional paragraph to this article for this purpose, ensuring that victims: "...be guaranteed full participation, transparency and independence in reparation processes, which take into account the differentiated impacts of human rights abuses on specific groups of people and respond adequately to these impacts and their particular needs."

²² A note that having "unless stated otherwise" in this provision makes it redundant as such should be removed.

Article 5 – Protection of Victims

1. The LBI draft lacks a provision that clearly describes State obligations to regulate business activity in protection of victims upon the signing and ratification of the LBI. It is generally understood in international customary law, and in particular reference to the Vienna Convention on the Law of Treaties²³, that States must observe an international legally binding instrument upon ratification. That said, it is also known that in some countries with a monist system, signing and ratifying international legally binding instruments automatically make its provisions superior to those set domestically. In the context of a dualist system, States would still need to introduce domestic laws to incorporate the ratified instrument into their legal system. This State obligation is not clearly laid out or addressed in the LBI. As such, ratification of the LBI alone does not guarantee setting an international standard to regulate business activity and an end to corporate impunity. To avoid this challenge, it is necessary to introduce a provision outlining that States that do not, within a reasonable timeframe, operationalise the content of the LBI to become part of a domestic corporate regulatory framework in all recommended aspects, will be held accountable for failing to fulfil their obligations to protect, respect and fulfil the rights enshrined in the LBI and beyond. As such, we suggest the addition of the following provision under Article 5: "**States who fail to enshrine the provisions of this LBI into their domestic legislation in a timely manner (within 4 years maximum) or fail to amend any laws that may contradict it, will be held liable.**"
2. In Article 5(3), we recommend adding that both human rights abuses and violations shall be investigated in the context of human rights infringements related to business activity: "State Parties shall investigate all human rights abuses **and violations** covered under this (Legally Binding Instrument), effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, in accordance with **domestic and** international law."

Article 6 – Prevention

1. A key concern regarding the second revised draft text is that the Article on prevention removes a mention – included in the first revised draft LBI – of a State requirement to conduct their own human rights and environmental impact assessments where it might be involved in business activities whether via investments or through a State-owned enterprise. This must be reincorporated into the text and clearly articulated as a requirement under this Article and, as such, we suggest adding the following language, which is almost identical to what was in the first revised LBI text: "**State Parties shall take all necessary additional steps, including particularly through human rights and environmental impact assessments, to respect and protect human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes but is not limited to, State ownership or control in business activities, State engagement in business activities with companies or other States, State regulatory oversight, or political or financial support.**"

²³ Vienna Convention on the Law of Treaties (1969):

<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

2. In order to address the obligation of States to prevent human rights abuses and violations whenever participating in multilateral platforms such as the UN, we also propose the following text: "When participating in decision-making processes or actions as Members States of international organisations, State Parties shall do so in accordance with their human rights obligations and obligations under the present (legally binding instrument), and shall take all necessary steps to ensure that such decisions and actions by the international organisations do not contribute, cause, or be directly linked to human rights abuses and violations in the context of business activities of a transnational character."
3. Once again, we reiterate that States must prevent both State and non-State infringements of human rights. Accordingly in Article 6(1), it is important to add the word "violations" to the provision so it can become: "State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses and violations throughout their operations."
4. In Article 6(2), it is important to highlight 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 assessment. Accordingly, we recommend the text be changed to the following provision: "...for the purpose of Article 6(1), State Parties shall require business enterprises and other actors across the full value chain – including State entities, to undertake ongoing and frequently updated human rights and environmental due diligence ~~proportionate to their size, risk of severe human rights impacts and the nature and context of their operations~~, as follows..."
5. In accordance with the above, Article 6(3) should be updated to: "State Parties shall ensure that human rights and environmental due diligence measures undertaken by business enterprises and other actors across the value chain under Article 6.2 shall include..."
6. In Article 6(3)(g) on conflict-affected areas, State violations, as well as the responsibility of those involved across the value chain are key to highlight. It is also important to make a distinction between the responsibility for those already conducting business in conflict-affected areas and those yet to venture into business therein. To this effect, we recommend the following amendment: "Adopting and implementing enhanced human rights and environmental due diligence to prevent human rights and violations 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 must refrain from pursuing or starting operations in situations where no independent due diligence assessment can guarantee neither directly causing, contribution or being directly linked to human rights abuses or violations of human rights and humanitarian law standards²⁴ arising from business activities, or from contractual business relationships across the value chain, including with respect to their products and services; entities already engaged in business activity in

²⁴ As in commentary to UNGP 12

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.”

7. Concerning the prevention obligations of States, we propose the following text as 6(8) bis: “For the purposes of article 6(1), State Parties shall conduct human rights, environment and gender impact assessments of all their policies, projects, activities and decisions involving business activities of a transnational character. This obligation shall apply to all branches and bodies of the State.”

Article 7 – Access to Remedy

1. While it is positive that Article 7(5) finally addressed concerns related to *forum non conveniens*, this text can be further strengthened with the removal of the word “legitimate”, as it is not clear how the term is being defined. To this end, we suggest the following amendment to the text: “State Parties shall ensure that the doctrine of *forum non conveniens* may not be used by courts to dismiss **legitimate** judicial proceedings brought forth by victims even when there is legitimacy to bring them to court in a different jurisdiction.”
2. As stipulated in Article 7(7), States must also enforce remedies when they are involved in human rights infringements related to business activity. As such, we recommend the following amendment: “State Parties shall provide effective mechanisms for the enforcement of remedies for human rights abuses and violations, including through prompt execution of national or foreign judgements or awards, in accordance with the present (Legally Binding Instrument), ~~domestic law~~ and international legal obligations.”

Article 9 – Adjudicative Jurisdiction

1. In Article 9(1) of the second revised LBI draft, we are concerned that the victims’ domicile was dropped from the first draft as a component of extraterritorial obligations for adjudication in cases where human rights infringements due to business activity are raised. Furthermore, victims and their families should be able to decide where to adjudicate a case. To this effect, we suggest the following amendment to the text: “...jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall upon the victims and their family's choice vest in the courts of the State where: a. the human rights abuse occurred; b. an act or omission contributing to the human rights abuse or violation occurred; c. the victims are domiciled, or; d. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.”
2. In Article 9(2) of the second revised LBI draft, it is important to articulate what is meant by the word “domicile”. This should include both where the company is headquartered, but also, the place where its assets are located to ensure remedy for affected communities. Accordingly, we recommend the following addition to the provision: “Without prejudice to any broader definition of domicile provided for in any international instrument ~~or domestic law~~, a legal or natural person conducting business

activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its: a. place of incorporation; or b. statutory seat; or c. central administration; or d. principal place of business; or **e. where substantial assets are held.**"

Article 12 – Mutual Legal Assistance and International Judicial Cooperation

States must not withhold information key to corporate accountability. We are concerned that according to Article 12(10)(b), the second revised draft LBI allows States to refuse to provide necessary legal assistance to initiate and carry out effective, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered by the LBI, including access to information and supply of all evidence at their disposal that is relevant for the proceedings. **This provision should be removed**, as it is contrary to the duty to protect and fulfil the right to information which requires states to "make every effort to ensure easy, prompt, effective and practical access to information which might be of public interest, including by proactively making this information available and putting in place necessary procedures which enable prompt, effective, practical and easy access to information".²⁵ Providing legal assistance is key to corporate accountability and is a foundational rule of international customary law stipulating an obligation on the State to "not invoke the provisions of its internal law as justification for its failure to perform a treaty."²⁶

Indigenous Peoples and Self-Determination

The history of colonialism is demonstrated by the atrocities committed against Indigenous Peoples, their lands, and natural resources. Corporate elites, particularly those involved in extractive industries, have been an unrelenting force of the colonial enterprise, reaping the benefits of imperialist endeavours. Today, the impacts of colonialism are ongoing as corporations continue to infringe upon Indigenous Peoples' rights. There are many parallels in relation to conflict – driven in many cases by imperialist agendas, corporations have long enjoyed impunity while profiting from business activities that displace communities, despoil lands, desecrate sacred sites, deplete resources and destroy livelihoods.²⁷ All peoples, particularly Indigenous Peoples, have a fundamental right to self-determination and to shape their own future. This right was first established in the context of decolonisation, but currently also applies to contexts in which peoples are living under belligerent occupation or under an apartheid regime, to name a few examples.

Recognizing these realities, we call on States to ensure that the right to self-determination be clearly stated in the text of the LBI. As previously stated by ESCR-Net members, the LBI must address the ramifications of business activities on the fundamental rights of communities and peoples, particularly the fundamental right to self-determination, including in situations of conflict and occupation. According to the UN Charter, respect for the right to self-determination of peoples is presented as one of the purposes of the United Nations. The right to self-determination of all peoples was confirmed by the United Nations General Assembly (GA) in the Declaration of Friendly Relations, which was unanimously adopted in 1970 and is

²⁵ <https://undocs.org/A/HRC/23/36>

²⁶ See: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

²⁷ See this report for more information: <http://www.piplinks.org/system/files/IPs-and-the-Extractive-Sector-Towards-a-Rights-Respecting-Engagement.pdf>

considered an authoritative indication of customary international law. Article 1, common to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), reaffirms the right of all peoples to self-determination, and lays upon State Parties the obligation to promote and to respect it. Indigenous Peoples' rights to self-determination – among various other rights, such as the right to Free, Prior and Informed Consent (FPIC) – are also recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Explicit reference should be made throughout the LBI in this regard, including in the Preamble. In Article 3(3), it is important that the provision is expanded to cover all international human rights and fundamental rights, including the right to self-determination in addition to international humanitarian law.²⁸

Positive developments

Article 6 – Prevention

In Article 6(3)(d), the language on consultation with Indigenous Peoples was revised in the second revised text to be more in line with the UNDRIP, echoing the right to FPIC. While this is positive, the language could be further strengthened to ensure that FPIC is required of Indigenous Peoples at every stage of a business activity. This will be addressed in the upcoming section.

What can be improved?

Preamble

1. Add a paragraph on the right to self-determination: "Recalling the UN Charter and one of the fundamental purposes of the United Nations being the respect for the right to self-determination of peoples, recalling also, the confirmation of the right of all peoples to self-determination according to the UN General Assembly (GA) Declaration of Friendly Relations, unanimously adopted in 1970 and considered an authoritative indication of customary international law, recalling finally that Article 1, common to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), reaffirms the right of all peoples to self-determination, and lays upon state parties the obligation to promote and to respect it."
2. Profit and greed in business has enabled and, in some instances, driven colonial and post-colonial endeavours. In some ways, corporate actors – particularly transnational corporations – are creating a new form of colonialism. The pillage, looting, extractivism and exploitation of land and natural resources because of colonialism and imperialism remains a reality for many communities and peoples. In contrast, profit margins are rising for corporate elites. This process of developing a binding mechanism is part of the broader decolonization process. Accordingly, we see it as essential to ground this LBI in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples and to reassert that colonialism – whether driven by States or corporate interests – must be eradicated. Accordingly, we propose the following provision in the Preamble²⁹: "Reaffirming the

²⁸ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/SubmissionLater/AI-Haq.pdf>

²⁹ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>

principles of the Declaration on the Granting of Independence to Colonial Countries and Peoples, also known as the United Nations General Assembly Resolution 1514.”

Article 3 – Scope

As mentioned above, it is important that the scope of this LBI specifically covers the right to self-determination, as well as international humanitarian law and international criminal law. Accordingly, we propose the following amendment to Article 3(3): “This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a State is a party, international humanitarian law, international criminal law, and customary international law.”

Article 6 – Prevention

1. For the LBI to be in line with appropriate international standards for consultations with affected communities, human rights and environmental impact assessments should be carried out throughout all phases of corporate operations. Accordingly, Article 6(3)(a) should read: “Undertaking regular environmental and human rights impact assessments throughout all phases of their operations – taking into consideration workers' rights – such impact assessments shall be undertaken by independent third parties with no conflicts of interests.”
2. In Article 6(3)(c), we propose adding a reference to the principle of consent, as well as a guarantee to non-interference in consultations: “Conducting meaningful consultations – in line with principles of Free, Prior and Informed consent and throughout all phases of operations – with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, Indigenous Peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas - such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests - 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.”
3. In Article 6(3)(d), the concept of consent should be in accordance with the elements of FPIC as addressed by the United Nations Permanent Forum on Indigenous Issues (UNPFII)³⁰ and, as such, we propose the following amendments to the text: “Ensuring that consultations with Indigenous Peoples are undertaken in accordance with the internationally agreed standards all elements of Free, Prior and Informed consent endorsed by the UNPFII at its Fourth Session in 2005, and in accordance with international human rights standards. business activities must not go forward without the continuous consent of affected communities. Consent must be continuously attained at every stage of business activity and in correspondence to change in

³⁰ See: <https://www.unclearn.org/wp-content/uploads/library/un-redd05.pdf> and see: Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005.

business plans, by providing genuine information and carrying out timely and meaningful consultations.”

4. Under Article 6(3), an operational paragraph on the right to self-determination should be added in line with the suggested text in the Preamble. Here is the suggested Article 6(3)(d) bis: “Respecting that peoples have a right to self-determination and, therefore, a right to refuse business activity on their land.”

Access to Information and Community-led Documentation

From a human rights law perspective, information is a precondition for the exercise of any right. The right to information is guaranteed under Article 19 of the International Covenant on Civil and Political Rights and other relevant instruments.³¹ Information is essential to guarantee the rights to participation and self-determination, covered above. In the context of business activities, access to adequate, timely, relevant information at all stages of a project is essential to truly guarantee FPIC of communities affected by business activities and to ensure they can meaningfully participate in making decisions about business activities that affect them directly. Information is also essential for civil society and those seeking to prevent and address human rights infringements due to business activity. This includes access to sufficient, relevant, timely and quality information prior to the commencement of a project, and throughout the duration of the project to ensure adequate monitoring of its impact on the community and the environment, and guarantee access to remedies when needed.

While there is no one-size-fits-all standard for accessibility, the LBI should include language to mandate that information is provided in a timely way (at a relevant time and with enough advance for communities to interpret it) and in a format and language that all community members can understand. While the burden to provide information rests on business entities, in light of legal duties arising from international law³² and in order to ensure the right to participation and self-determination, States should play a significant role in guaranteeing meaningful access to relevant and timely information. This should include putting in place adequate laws and policies or removing barriers, where they exist, to freedom of information requests, mandating full disclosure of relevant information on businesses entities and activities. The latter could include legal persons constituting the respective economic group or holding, relevant business

³¹ See for instance the Convention on the Rights of the Child (Article 13); American Convention on Human Rights (Article 13); Convention on the Rights of Persons with Disabilities; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 13); Convention on the Elimination of All Forms of Discrimination against Women (Articles 10, 14 and 16).

³² The right to participation is enshrined in numerous international human rights instruments, including the Universal Declaration of Human Rights (arts. 21 and 27), the International Covenant on Civil and Political Rights (art. 25), the International Covenant on Economic, Social and Cultural Rights (arts. 13(1) and 15(1), the Convention on the Elimination of All Forms of Discrimination Against Women (arts. 7, 8, 13(c) and 14(2), the International Convention on Elimination of All Forms of Racial Discrimination (art. 5(e)(vi)), the Convention on the Rights of the Child (arts. 12 and 31), the Convention on the Rights of Persons with Disabilities (arts. 3(c), 4.3, 9, 29 and 30), the International Convention on the Rights of All Migrant Workers and Members of their Families (arts. 41 and 42(2), the United Nations Declaration on the Right to Development (arts. 1(1), 2 and 8(2) and the United Nations Declaration on the Rights of Indigenous Peoples (arts. 5, 18, 19 and 41).

relationships along the global value chain, places in which assets of the company are located that are relevant to ensuring access to remedy for affected communities, contracts with involved states, etc.

Information is relevant when it addresses the specific needs of communities affected by business activities. Very often this includes, but is not limited to, scientific and technical information on the impacts of business activities on health, the environment and the job market, but also, disaggregated data on the impact on business activities on marginalised groups such as women, youth, and Indigenous Peoples. Communities should always be able to request and obtain specific types of information which they deem relevant to making informed choices that relate to business activities.

From another angle, with relation to the reversal of the burden of proof, the current draft stipulates that it would be dependent on national laws. The reversal of the burden of proof should be mandated directly in the text of the LBI, drawing on international legal standards and particularly for cases in which the information needed to prove the liability of the defendant is not publicly available. Furthermore, there is a widespread tendency to rely on 'hard evidence' developed by States and corporations, while disregarding other forms of evidence (often qualitative data) which reflects the perspectives and experiences of communities as biased and not credible. This leads to a de facto exclusion of communities from meaningfully participating in decision making, particularly more marginalised members who, very frequently, are not adequately represented in external data collection processes. Therefore, considering the legal framework pertaining to the rights to participation and self-determination, the LBI should recognise and uphold the legitimacy and validity of data produced by communities themselves. To this end, it is essential to introduce a provision emphasizing the need for a human rights-based, and more democratic, approach to data, which recognises different forms and kinds of data, paying adequate attention to qualitative data reflecting communities' perspectives and knowledge. Existing data gathering efforts, including those led by private businesses, should integrate community-generated data or, at a minimum, use qualitative methods and tools that allow communities to fully express their views and perspectives about issues that matter to them.

Accordingly, we think it is of paramount importance that access to information be guaranteed in facilitation with the State as part of this LBI in these aspects, including prior to the commencement of business projects, during the course of the project and in the remedy process where a legal case is opened. Further, the LBI shall include more detailed wording on the kind of information that must be disclosed or at least include some examples. Since there were no positive developments in this section of the second revised draft LBI, to follow is our suggestions for much stronger language on access to information in the LBI.

What can be improved?

Article 6 – Prevention

With regards to the right to access information, Article 4(2)(f) is too limited as it pertains only to remedy, though it remains a crucial provision under Article 4. In looking at prevention of human rights abuses and violations, it would then be key to address access to information under Article 6. Most often, communities need information as a preventative measure or for purposes of monitoring and enforcing compliance of companies and State-sponsored business activities with international law. Accordingly, we propose the

added paragraphs to Article 6 highlighting the access to information must be available at all stages of corporate operation:

1. **"States and corporations shall provide individuals and communities, including human rights defenders, safe access to relevant, timely, sufficient, and quality information in connection with each stage of business activities, in order to facilitate meaningful participation in the prevention of and response to human rights and environmental impacts. Information should be made available in language and formats that are truly accessible to relevant stakeholders within the community and civil society. The choice of what information should be made available should respond to specific needs of affected communities, who are best placed to determine what information is relevant to them in order to make informed decisions about projects."**
2. **"States should strengthen the capacity of community groups to gather their own data and to carry out their own assessment of development projects without placing a burden of proof on them. Community-led data and should be recognised as legitimate and valid and play a key role in informing decisions which impact the community."**

Article 7 – Access to Remedy

1. In Article 7(2), States Parties to the LBI 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/recognising the validity of different forms of data and information gathered by communities. Accordingly, we recommend that Article 7(2) be amended to the following: "State Parties to this LBI shall ensure that their domestic laws facilitate access to information **from both States and corporate entities enabling courts to allow proceedings in all cases**, through: **(a) international cooperation, (b) facilitating requests for disclosure of State or corporate finances or relations and other relevant information such as the legal persons constituting the respective economic group or holding, relevant business relationships along the global value chain, places in which assets of the company are located that are relevant to ensuring access to remedy for affected communities, contracts with involved states, and (c) expanding admissible evidence to include different types of evidence, such as oral and visual, in efforts to prioritize that which is more suitable for communities to remove barriers for community-led data.**"
2. In Article 7(6) on burden of proof, we recommend that the provision be strengthened to the benefit of victims, which is an essential element in granting access to effective remedy in cases of human rights abuses or violations linked to business activities. To this effect, we recommend the following amendment: "State Parties **may shall**, consistent with **the rule of law requirements international human rights standards**, enact or amend **domestic** laws to reverse the burden of proof **in appropriate cases in order** to fulfil the victims' right to access to remedy – **requiring corporate and State entities involved in the case to provide sufficient evidence for acquittal.**"

Article 12 – Mutual Legal Assistance and International Judicial Cooperation

States must also not withhold information key to corporate accountability. We are concerned that via Article 12(10)(b), the second revised draft LBI allows States to refuse providing necessary legal assistance to initiate and carry out effective, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered by the LBI, including access to information and supply of all evidence at their disposal that is relevant for the proceedings. **This provision should be removed**, as it is contrary to the duty to protect and fulfil the right to information which requires states to “make every effort to ensure easy, prompt, effective and practical access to information which might be of public interest, including by proactively making this information available and putting in place necessary procedures which enable prompt, effective, practical and easy access to information”.³³ Providing legal assistance is key to corporate accountability and is a foundational rule of international customary law stipulating an obligation on the State to “not invoke the provisions of its internal law as justification for its failure to perform a treaty.”³⁴

Conflict-affected Areas

The second revised draft LBI is much weaker on ensuring accountability and helping to prevent corporate abuses and violations in conflict-affected areas, including situations of occupation. While enhanced due diligence is still mentioned in the text, it falls short of ensuring that, across the value chain, both corporate actors and State entities involved in business activity will not cause, contribute, or be directly linked to human rights abuses and other serious international crimes by incorporating a mandatory clause when they cannot mitigate non-engagement, divestment and disengagement. We also assert that the re-inclusion of a provision on universal jurisdiction would ensure a more comprehensive approach to criminal liability. The LBI must do more to ensure that conflicts, including situations of occupations, do not become incentivised in a manner that prolongs situations of conflict, rather than bring them to an end.

To ensure prevention of human rights abuses and violations by business activities in conflict-affected areas, mandatory enhanced due diligence is necessary. However, it must include a requirement not to pursue or start operations in certain contexts that have been deemed unlawful and in situations where no due diligence assessment can guarantee that there will not be complicity or contribution to violations. It is also important to introduce urgent and immediate measures of divestment and disengagement policies to avoid corporate involvement in and/or contribution to human rights violations and other applicable legal frameworks in their activities and relationships. It is also essential to establish State obligations pertaining to situations of conflict; it is quite common that, in such situations, States would create structures that violate their own obligations, and the role of businesses is closely tied to these structures.

Since there were no positive developments in this section of the second revised draft LBI, to follow are our suggestions for stronger language on conflict-affected areas in the LBI.

³³ <https://undocs.org/A/HRC/23/36>

³⁴ See: <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

What can be improved?

Preamble

Profit and greed in business has enabled and, in some instances, driven colonial and post-colonial endeavours. In some ways, corporate actors - particularly transnational corporations - are creating a new form of colonialism. The pillage, looting, extractivism and exploitation of land and natural resources because of colonialism and imperialism remains a reality for many communities and Peoples. In contrast, profit margins are rising for corporate elites. This process of developing a binding mechanism is part of the broader decolonization process. Accordingly, we see it is essential to ground this LBI in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples and to reassert that colonialism - whether driven by States or corporate interests - must be eradicated. Accordingly, we propose the following provision in the Preamble³⁵: "Reaffirming the principles of the Declaration on the Granting of Independence to Colonial Countries and Peoples, also known as the United Nations General Assembly Resolution 1514."

Article 3 – Scope

As mentioned above, it is important that the scope of this LBI specifically covers the right to self-determination as well as international humanitarian law and international criminal law. Accordingly, we propose the following amendment: "This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, international humanitarian law, international criminal law, and customary international law."

Article 6 – Prevention

1. The obligation for States to take precautionary measures in the case of serious or urgent situations of imminent human rights abuses or violations leading to irreparable harm, established in the proposed article 4(4), should also be reflected in this article on prevention. We therefore propose an additional paragraph after article 6(1), which would read as follows: "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."
2. For the LBI to be in line with appropriate international standards for consultations with affected communities, human rights and environmental impact assessments should be carried out throughout all phases of corporate operations. Accordingly, Article 6(3)(a) should read: "Undertaking regular environmental and human rights impact assessments throughout all phases of their operations - taking into consideration workers' rights – such impact assessments shall be undertaken by independent third parties with no conflicts of interests."
3. Under Article 6(3)(c), it is important to highlight that conducting consultations in conflict-affected areas may not be realistic. Accordingly, we propose the following amendment: "Conducting meaningful consultations – in line with principles of Free, Prior and Informed consent and throughout all

³⁵ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Independence.aspx>

phases of operations – with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, Indigenous Peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas - **such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests** - where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless a reasonable representation of the oppressed population deems the business activity beneficial to them.”

4. In Article 6(3)(g) on conflict-affected areas, State violations, as well as the responsibility of those involved across the value chain are key to highlight in this provision. It is also important to make a distinction between the responsibility for those already conducting business in conflict-affected areas and those yet to venture into business therein. To this effect, we recommend the following amendment: “Adopting and implementing enhanced human rights **and environmental** due diligence to prevent human rights **and violations** 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 must refrain from pursuing or starting operations in situations where no independent due diligence assessment can guarantee neither directly causing, contribution or being directly linked to human rights abuses or violations of human rights and humanitarian law standards**³⁶ **arising from business activities, or from contractual business relationships across the value chain, including with respect to their products and services; 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.**”
5. It is important to include in Article 6 (or reinclude from the zero Draft) that 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. Proposed text to reinclude as Article 6(8) bis: “**Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes.**”

Article 14 – Consistency with International Law Principles and Instruments

To ensure that all bilateral and multilateral trade and investment agreements shall be compatible with and not undermine both human rights and humanitarian law obligations, we propose including a reference to international humanitarian law throughout Article 14(5):

1. In Article 14(5)(a), stronger language is required to ensure that existing trade and investment agreements are amended to comply with the provisions of the LBI and the principle of primacy of

³⁶ As in commentary to UNGP 12

human rights. To this effect, we recommend the following change: "...any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity to fulfil reviewed, adapted and implemented in compliance with and in a manner that does not undermine their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights and humanitarian law conventions and instruments."

2. To ensure that all bilateral and multilateral trade and investment agreements shall be compatible with and not undermine human rights or humanitarian law obligations, Article 14(5)(b) shall be amended as follows: "Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties' human rights and humanitarian law obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights and humanitarian law conventions and instruments."
 3. In order to compliment the changes above, it is essential that a new paragraph be introduced here in what would be Article 14(5)(c) bis and it would read: "To this effect, new³⁷ trade and investment agreements shall be designed, negotiated and concluded to fully respect the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, and related human rights and humanitarian law conventions and instruments, through *inter alia*:
- a. Undertaking human rights and sustainability impact assessments prior to signing and ratification of the proposed agreement and periodically throughout their application period, and ensuring these agreements are in accordance with the results of these impact assessments; and
 - b. Ensuring the upholding of human rights in the context of business activities by parties benefiting from trade and investment agreements."

Legal Liability

Accountability is limited without sanctions designed to instate a price for infringing upon the human rights of people and to protect people from future human rights abuses and violations. Corporate and State impunity in relation to business activity is enabled by a dominant economic and political system that rewards greed and mass production for profit at any cost over the rights of workers and communities, the environment, and the public interest. The costs are poorer livelihoods, exploitation of workers, and degradation of land, water, and other natural resources. For these reasons, the LBI must ensure that State signatories will adopt domestic legislation that facilitates claims to damages and the imposition of sanctions and other punitive measures in the implementation of the LBI on both legal or natural persons involved in a case of civil, criminal or administrative liability. While accountability for not carrying out due

³⁷ 'New' would mean any agreement that has not come into force at the time that this LBI has been concluded.

diligence is key, it is also essential that accountability for committing or contributing to crimes be clearly established.

In particular, criminal liability should be strengthened in relation to complicity in war crimes, crimes against humanity, genocide and other breaches of international human rights and humanitarian law – especially in the context of conflict-affected areas, including situations of occupation.³⁸ Last year, the draft LBI listed several crimes that would bring about criminal liability and corporate responsibilities to respect international law and we are concerned that it was removed in this current LBI draft instead or amended and strengthened. In this regard, the 2019 Draft was clearer than the 2020 draft. The business of war has been one of the most lucrative throughout history and the profits reaped by multinational corporations total billions of dollars, according to modest estimates. Accordingly, a detailed outline of prosecution and criminal liability for acts or omissions contributing to such serious international crimes is paramount. Many domestic or regional courts will not be willing or able to take on such cases. In these instances, the jurisdiction of another proper international court should be considered. The negotiating process of the LBI is an opportune moment to introduce provisions that would provide space both for an independent court looking into all corporate-related acts or omissions and referrals to international courts such as the International Criminal Court (ICC), while taking into consideration the limited definition of crimes under the Rome Statute and the need for it to be extended and revised.

Legal liability of corporations, particularly of parent companies, must be more explicitly addressed in the second draft revised LBI. To ensure that this legally binding instrument delivers on the advancement of corporate accountability, particularly regarding transnational corporations, we must have a strong legal standard of legal liability of corporations that could be incorporated into the domestic legal systems of States signatories. Currently, in the second revised draft, this focus is weak; even in articles that try to make this link, the formulation is not clear and can lead to harmful interpretations. Consequently, Article 8 should also include a provision reaffirming the joint and several responsibilities of all companies involved in an abuse or a violation, be it along the global value chain or in the time of armed conflict. Below, we share some positive developments in the text of the draft LBI and provide suggestions for improvements.

Positive developments

Article 6 – Prevention

It is positive that the current draft LBI articulates in Article 6(6) that a failure to conduct human rights due diligence shall result in commensurate sanctions, including corrective action where applicable; however, as dictated by Article 6(2) and 6(3), this is limited to businesses. This provision could also be further strengthened to include that a failure to conduct an environmental impact assessment would also lead to the same punitive measures. Sanctions on State entities should also be imposed as part of this provision in cases where they fail to monitor business responsibilities to conduct due diligence and in cases where

³⁸ International law has been developing in this direction for years. For instance, the Malabo Protocol, adopted by the African Union in 2014 (not yet entered into force), would afford the corresponding regional Court jurisdiction for individual and corporate criminal liability regarding crimes under international and transnational crimes, such as war crimes, crimes against humanity, and genocide. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, African Union, adopted 2014, arts. 46(b)-46(c).

their own human rights and environmental impact assessments are not carried out when involved in business activity whether via investment or ownership. Suggested language to improve this will be offered in the upcoming section.

Article 8 – Legal Liability

The definition of control seems to have expanded in Article 8(7), more clearly giving rise to liability for parent and lead companies, which is key for concerns about liability across the value chain. It is positive that in Article 8(8), State Parties are expected to ensure that liability in cases where business is contributing to harm, as well as committing a crime, is not automatically discarded by virtue of having carried out due diligence alone. However, as detailed below, this text can be significantly strengthened. Additionally, the definition of control giving rise to liability for parent companies is key.

What can be improved?

Article 6 – Prevention

1. As mentioned above, sanctions were listed as a punitive measure for a failure to conduct human rights due diligence. However, this text should be further strengthened to encompass sanctions following a failure to conduct environmental due diligence and sanctions on States if they fail to conduct human rights and environmental assessments when involved in business activity, as well as if they ignore a failure by corporations to carry out due diligence measures in their jurisdiction. To this end, we suggest the following change to the text in Article 6(2): "...for the purpose of Article 6(1), State Parties shall require business enterprises and other actors across the full value chain – including State entities, to undertake ongoing and frequently updated human rights and environmental due diligence proportionate to their size, risk of severe human rights impacts and the nature and context of their operations, as follows:..."
2. In line with the point above, Article 6(3) should also be amended accordingly: "State Parties shall ensure that human rights and environmental due diligence measures undertaken by business enterprises and State entities involved in business under Article 6(2) shall include:..."

Article 8 – Legal Liability

1. In Article 8(4), 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 the withdrawal of licenses, the termination of contracts for company projects, among others. Accordingly, we encourage the expansion of this Article to include these examples: "State Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal and/or administrative sanctions where legal or natural persons conducting business activities, have caused or contributed to criminal offences or other regulatory breaches that amount or lead to human rights abuses - such as withdrawal of licenses, termination of contracts for company projects, or inclusion on a prohibited list of companies for business."
2. Article 8(8) is the corollary to article 6(6) regarding the link between human rights due diligence obligations and the determination of liability. These two articles are particularly important to avoid due

diligence requirements becoming a procedural ‘check-list’ exercise and, as such, a tool for transnational corporations and other business enterprises to escape liability. We, therefore, recommend the deletion of the second phrase in this paragraph, which may result in contradicting the purpose of the paragraph and suggest that liability depends on the compliance with human rights due diligence standards. The aim of this deletion is to ensure that the adjudicator does not focus on the implementation or not of a due diligence procedure, but on the harm caused, according to the principles regarding the duty of care or the principles of extracontractual civil liability. We, therefore, propose the deletion of the following sentence in Article 8(8): “Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8(7). ~~The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.~~”

3. In Article 8(9), it would be crucial to articulate that criminal liability is also triggered 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. Accordingly, we recommend the following change in the text of the LBI: “~~Subject to their legal principles~~, State Parties shall ensure that their domestic law provides for the criminal-~~or functionally equivalent~~-liability of legal persons for human rights abuses ~~or violations~~ that amount to criminal offences under international ~~human rights~~ law ~~binding on the State Party, including but not limited to~~ customary international law, ~~or their domestic law, and humanitarian law~~. ~~When appropriate, States should refer cases where corporations or/and State officials are causing or contributing to war crimes, crimes against humanity, aggression, genocide, and environmental crimes~~³⁹ to the International Criminal Court, in accordance with Rome Statute rules. State Parties shall ensure that the applicable penalties are commensurate with the gravity of the offence. State Parties shall individually or jointly advance their criminal law to ensure that the criminal offences covered in the listed areas of international law are recognized as such under their domestic criminal legislation and that legal persons can be held criminally or administratively liable for them. This Article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offences.”
4. In line with our analysis above, Article 8 should also include a provision reaffirming the joint and several responsibility of all companies involved in an abuse or a violation, both along the global value chain and at the same time: “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.”
5. Given the difficulty for victims to prove the links of control, supervision and of business relationships between different legal entities, particularly in cases where business enterprises fail to comply with their obligations to disclose information (see articles 4(2)(f) and 6(3)(e)), courts should be able to make a rebuttable presumption of control by the controlling or parent company. They should also have competence to reverse the burden of proof, in accordance with Article 7(6). We, therefore,

³⁹ Considering that the ICC has opened the door to begin investigating environmental crimes

propose the inclusion of an additional paragraph: “State Parties shall ensure that their domestic law provides for a rebuttal presumption of control of the controlling or parent company in order to determine the joint and several liability of the involved natural or legal persons when business enterprises fail to disclose information, in accordance with their obligations under article 4(2)(f) and 6(3)(e).”

Corporate Capture

The COVID-19 pandemic has exposed and intensified grave systemic injustices all over the world. At the forefront of these injustices is the entrenched ability of corporations to capture decision-making processes to maximize profit at the expense of our fundamental human rights. The corporate capture of State policies and decision making has been multiplied in these recent months as States look to the corporate and finance sectors to rebuild the capitalist economy. Accordingly, it has become even more urgent for us to protect our spaces and reclaim our rights. For this reason, corporate capture must be restricted both in the ongoing IGWG process and, through the LBI text, by ensuring that corporations are not allowed to monopolise decision-making spaces – whether domestic, regional, international, bilateral, or multilateral. It is fundamental to protect the integrity of the policymaking space, its participants, and outcomes from corporate interests – 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 LBI’s content, negotiations, or implementation.

Outlined below is one section in which we see some positive development in the provision to protect against corporate interests and several other components that are necessary and key to ensuring that corporate capture is addressed appropriately in the text of the LBI.

Positive developments

Article 6 – Prevention

It was key that in Article 6(7), the words “in accordance with domestic law” were removed. This would have been a major obstruction to ensuring that when the State sets or implements public policies in relation to the LBI, these are protected from commercial and other vested interests. That said, this provision should be further strengthened.

What can be improved?

Article 6 – Prevention

1. With regards to Article 6(3), including obligations regarding impact assessments, as well as meaningful consultations, it currently fails to set standards on how these should be undertaken. In

- relation to Article 6(3)(a) on impact assessments, we propose the following amendments: “Undertaking regular environmental and human rights impact assessments throughout all phases of their operations – **taking into consideration workers’ rights – such impact assessments shall be undertaken by independent third parties with no conflicts of interests.”**
2. Pertaining to Article 6(3)(c) regarding meaningful consultations, these should be conducted in a continuous manner, both prior to, as well as during the business activities. The LBI should also set standards for meaningful consultations. These shall respect the principles of transparency, independency, and participation, meaning that these shall be undertaken by an independent State body and protected from any undue influence from the business enterprises concerned by the prospective business activities. We, therefore, propose the following amendment to Article 6(3)(c): Conducting meaningful consultations – **in line with principles of Free, Prior and Informed consent and throughout all phases of operations** – with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, while giving special attention to those facing heightened risks of business related human rights abuses, such as women, children, persons with disabilities, Indigenous Peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas – **such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests - 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.**
 3. As mentioned above, Article 6(7) should be further strengthened to limit corporate capture of the State. Accordingly, we recommend the following amendments to the text: “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.**⁴⁰”

Article 8 – Legal Liability

It is also worth exploring the inclusion of a new provision in this section to criminalise undue influence on government laws and policies, particularly in instances where a link – however minimal – can be established in connection with a human rights abuse or violation. In this instance, the onus to prove the disconnection would be on the corporate or State entity involved in business activity, but both community-led documentation or civil society documentation should also be considered as primary resources in the evidence-gathering process. To this effect, we suggest adding the following paragraph under Article 8: **“State Parties shall ensure that their domestic law provides for the criminal liability of legal or natural persons for acts that directly or indirectly contribute, cause or are linked to human rights abuses or violations.”**

⁴⁰ See this for additional legal analysis: <https://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/>

Workers' Rights are Human Rights

Labour markets around the world continue to be impacted by the COVID-19 crisis. The International Labour Organisation (ILO) estimates a loss of 400 million jobs worldwide. The forthcoming estimates from the ILO are likely to see these figures rise, with more severe impacts on workers in the informal economy – who are disproportionately women. For women, COVID-19 has intensified the double and, often, triple burden women confront. On top of the loss of paid work, the amount of time women need to dedicate to unpaid care work has increased because of the closure of schools and day care centres, cuts in services for the elderly and people with disabilities, and the need to look after dependents suffering from COVID-19. Women's employment is also at greater risk than men's, as they are over-represented in the informal and service sectors, which have been particularly badly impacted by the economic disruption. In addition, women dominate in front-line occupations – including healthcare – making them more directly at-risk.

In this context, workers' rights, particularly those in the informal sector and the rights of peasants and other people working in rural areas, must be addressed in the LBI. Stated simply, workers' rights are human rights, and this is not sufficiently expressed in the second revised draft. There's an absolute obligation on States to regulate corporations in a manner that will ensure worker rights are protected.⁴¹ This includes the protection of care workers, frontline workers, workers in informal economies, and workers in the extractive sectors, to name a few. Amidst the COVID-19 pandemic, we have seen that care workers, a majority of whom are women. This LBI must ensure that in carrying out human rights and environmental due diligence, workers' rights are prioritised and should encompass international standards of protection as part of the due diligence process, e.g. ensuring safe conditions of work. In so doing, it should be clearer that a failure to respect workers' rights, whether in an informal economy or a formal one, would give rise to criminal, civil or administrative liability.

Given the lack of provisions dedicated to workers' rights in the second revised draft LBI on, we suggest the following key additions to the text.

⁴¹ State duties to protect workers' rights are derived, *inter alia*, from the International Covenant on Economic, Social and Cultural Rights (Arts. 6-10), the International Covenant on Civil and Political Rights (Art. 8), the African Charter on Human and Peoples' Rights (Arts. 5, 15), the American Convention on Human Rights (Art. 6, 26), and the European Convention on Human Rights (Art. 4), and dozens of International Labour Organization (ILO) conventions, including eight that enjoy 92% of all possible ratifications and are identified as "fundamental" by the ILO: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111). See Conventions and Recommendations, International Labour Organisation, available at: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>.

What can be improved?

Preamble

The Preamble and all those clauses referring to the groups that are most vulnerable to corporate abuses should also include the mention of peasants and other people working in rural areas. Furthermore, when recalling international human rights standards in the Preamble, the UN declaration on the Rights of Peasants and other People Working in Rural Areas (UNDROP) should be included.

Article 1 – Definitions

In order to ensure that human rights abuse also refers to the infringement of workers' rights, we propose the following amendment to Article 1(2): "Human rights abuse" shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights **and workers' rights**."

Article 6 – Prevention

1. In Article 6(2)(a), the text should be amended to specifically include a reference to workers' rights as a way to seriously consider such rights in the conduct of both human rights and environmental due diligence by corporations and/or States active in business. We recommend that the provision change accordingly: "Identify and assess any actual or potential **environmental risks and/or** human rights abuses **or violations** that may arise from their own business activities, or from their business relationships - **including those that infringe upon workers' rights**"
2. Similarly, in Article 6(3)(a), the text should be amended to include specifically a reference to workers' rights: "Undertaking regular environmental and human rights impact assessments throughout **all phases of** their operations - **taking into consideration workers' rights – such impact assessments shall be undertaken by independent third parties with no conflicts of interests.**"

Primacy of Human Rights: Trade and Investment

A common position that ESCR-Net members have strongly adopted from the start of the IGWG process has been the need for the LBI to be consistent with the primacy of human rights obligations over those under bilateral or multilateral trade, investment or other agreements. Many trade agreements and neoliberal, pro-austerity and pro-privatisation policies pushed forward by international financial and trade institutions limit the capacity of states, particularly in the Global South, to ensure people have access to and control over resources, public goods and services. A legal argument prepared by ESCR-Net members on the primacy of human rights can be found [here](#). States must reaffirm the primacy of human rights, as guaranteed by their pre-existing obligations to respect, protect, and fulfil human rights, in the context of negotiation, interpretation and dispute resolution of trade and investment treaties. Therefore, the

provisions of the LBI must supersede pre-existing obligations between States and other parties and, in order to retain the discretion necessary to meet their human rights obligations, the LBI shall include a provision to ensure that commercial, trade, and investment treaties do not impose limits and/or setbacks on their ability to protect human rights or require that disputes over human rights be decided through binding international arbitration.

What can be improved?

Preamble

The Preamble should affirm the primacy of human rights over trade, investment, development, environment, and climate as well as business agreements. Accordingly, we propose the following: “To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements.⁴²”

Article 14 – Consistency with International Law Principles and Instruments

1. Article 14(3) should be clarified to ensure not only that the LBI shall not “affect” applicable provisions in domestic and international law more conducive to the full enjoyment of human rights, but rather, that it will not be interpreted as limiting such provisions. Accordingly, we propose the following: “Nothing in The present (Legally Binding Instrument) shall affect be interpreted in consonance with, and without limiting, any provision in the domestic legislation of a State Party, or in any regional or international treaty or agreement or customary international law that is more conducive to the respect, protection, fulfilment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedy and reparations to victims of human rights abuses in the context of business activities, including those of a transnational character.⁴³”
2. In Article 14(5)(a), stronger language is required to ensure that existing trade and investment agreements are amended to comply with the provisions of the LBI and the principle of primacy of human rights. To this effect, we recommend the following change: “...any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that will not undermine or limit their capacity

⁴² See: Vienna Convention on the Law of Treaties (VCLT) 30(3): “When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”, and see also, United Nations’ Guiding Principles on Business and Human Rights (UNGPs), Principle 9. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also Principle 10 regarding the position of States when acting as members of multilateral institutions that deal with business-related issues. See also Principles 11, 23, and 31.

⁴³ Article 29 in the American Convention on Human Rights', which the Inter-American Court has cited to read in a pro persona principle and an evolutive interpretation of the treaty informed by the full range of human rights law. (see footnote 91 of https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf). The suggested edit also adds in customary international law and a reference to reparations that was included in analogous suggestions in the Feminist Perspectives section above.

to fulfil reviewed, adapted and implemented in compliance with and in a manner that does not undermine their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights and humanitarian law conventions and instruments.”

3. To ensure that all bilateral and multilateral trade and investment agreements shall be compatible with and not undermine human rights or humanitarian law obligations, Article 14(5)(b) shall be amended as follows: “Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties’ human rights and humanitarian law obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights and humanitarian law conventions and instruments.”
 4. In order to compliment the changes above, it is essential that a new paragraph be introduced here in what would be Article 14(5)(c)bis and it would read: “To this effect, new⁴⁴ trade and investment agreements shall be designed, negotiated and concluded to fully respect the State Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, and related human rights and humanitarian law conventions and instruments, through *inter alia*:
- a. Undertaking human rights and sustainability impact assessments prior to signing and ratification of the proposed agreement and periodically throughout their application period, and ensuring these agreements are in accordance with the results of these impact assessments; and
 - b. Ensuring the upholding of human rights in the context of business activities by parties benefiting from trade and investment agreements.”

Human Rights Defenders

It is a positive development that the UN Declaration on Human Rights Defenders is now mentioned in the Preamble of the revised LBI text. However, several additions are required in order to ensure the utmost protection of human rights defenders given that they are at a particularly heightened risk of human rights abuses and violations for carrying out their work in monitoring and addressing problems arising from business activities. This has been recognized both by Human Rights Council resolutions and by the Special Rapporteur on Human Rights Defenders.⁴⁵

⁴⁴ ‘New’ would mean any agreement that has not come into force at the time that this LBI has been concluded.

⁴⁵ Situation of human rights defenders, A/72/170, 19 July 2017;

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

What can be improved?

Preamble

In the Preamble, it is key to acknowledge that human rights defenders face a particular risk when resisting business activities that impact their peoples, families and communities. Furthermore, the text must address the particular vulnerabilities and heightened risks of certain categories of human rights defenders confronting corporate interests, such as women and LGBTI+ human rights defenders, indigenous and environmental human rights defenders, human rights defenders working in isolated and rural areas and human rights defenders engaged in the protection of land, territory and natural resources. As such we propose the addition of the following paragraph to the Preamble: “Recognizing that human rights defenders are particularly targeted when challenging business activity, taking into consideration particular vulnerabilities and heightened risks for certain groups of human rights defenders including women and LGBTI+ human rights defenders, indigenous and environmental human rights defenders, human rights defenders working in isolated and rural areas and human rights defenders engaged in the protection of land, territory and natural resources, and the obligation of States to protect defenders against any harm.”

Article 4 – Rights of Victims

In Article 4(2)(f), we suggest language that would support the right of human rights defenders to access information. Frequently, defenders are targeted – arrested, assaulted and killed – for attempting to gather key information on business activities that could support victims in their claim for remedy. As such, the rights of human rights defenders must be protected and articulated accordingly as part of the right to victims to: “...be guaranteed access to legal aid and information and legal aid held by businesses and others relevant to the pursuit of remedies, paying particular attention to greater barriers that at-risk groups face, such as Indigenous Peoples’, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents; and...”

Article 6 – Prevention

1. With regards to the right to access information, Article 4(2)(f) is too limited, as it pertains only to remedy though it remains a crucial provision under Article 4. In looking at prevention of human rights abuses and violations, it would then be key to address access to information under Article 6.⁴⁶ Most often, communities need information as a preventative measure or purposes of monitoring and enforcing compliance of companies and business activities with international law. Accordingly, we propose the added paragraph to Article 6, highlighting that access to information must be available

⁴⁶ See for example this recommendation by UN independent experts on how governments must promote and protect access to and free flow of information during the COVID-19 pandemic
<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25729&LangID=E>

at all stages of corporate operation: “States and corporations shall provide individuals and communities, including human rights defenders, safe access to relevant, timely, sufficient, and quality information in connection with each stage of business activities, in order to facilitate meaningful participation in the prevention of and response to human rights and environmental impacts. Information should be made available in language and formats that are truly accessible to relevant stakeholders within the community and civil society. The choice of what information should be made available should respond to specific needs of affected communities, who are best placed to determine what information is relevant to them to make informed decisions about projects.”

2. We also propose adding language to highlight that the protection of human rights defenders is an essential element of the prevention of corporate-related abuses or violations. Here is the suggested language: “State Parties shall prioritize the safety and protection of human rights defenders as a foundational element to the principle of prevention.”

Addressing Inequality

The dominant economic and political system allows for the richest 1% to have significantly more wealth than that of the 99%.⁴⁷ This significantly impacts peoples' access to remedy and information when faced with a corporate or financial giant that spends millions, if not billions of dollars shielding itself from any liability for human rights abuses or violations. This is done through corporate capture and undue legislative and judicial influence public decision making, as well as, by building layers upon layers of barriers for those seeking justice, establishing what is known as the corporate veil. To this end, the LBI text must address this large discrepancy and ways to close such gaps as integral steps towards ending corporate impunity.

The current text of the LBI is weaker than the last in reducing barriers to access to remedy by better providing for legal costs. This draft is a step backwards and should restore the previous language and include additional language to avoid unfair payments and better address gender-specific barriers.

What can be improved?

Article 7 - Access to Remedy

1. In Article 7(3)(e), it must be clear that economic barriers should be considered a valid reason to waive legal fees and costs. Accordingly, we encourage the following amendment to the text: “Ensuring that rules concerning allocation of legal costs at the conclusion of legal proceedings are adapted to allow for waiving of legal fees and costs where economic barriers exist, and that legal costs do not place an unfair and unreasonable burden on victims.”
2. Beyond the waiving of legal fees and costs where economic barriers exist, Article 7(3) should also incorporate an obligation on the State to ensure robust legal representation throughout all

⁴⁷ <https://www.oxfam.org/en/press-releases/worlds-billionaires-have-more-wealth-46-billion-people>

proceedings related to abuses or violations, for instance, via legal aid from public defenders/ombudspersons offices. As such, we propose the following: **“States shall ensure robust legal representation throughout all proceedings related to abuses or violations in the context of this LBI, for instance, via legal aid from public defenders/ombudspersons offices.”**

3. In Article 7(4), it must be more strongly articulated that the inability to afford legal fees and costs to start a court case in relation to corporate-related human rights abuses or violations will not hinder the possibility of bringing cases forward. To this effect, we suggest the following language amendments: “State Parties shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs **where economic barriers exist for victims of corporate-related human rights abuses and violations.”**

Right to a Healthy Environment and Climate Justice

ESCR-Net members have identified environmental degradation and climate change as one of five common conditions threatening communities globally, highlighting corporate impunity, the extractive nature of our dominant economic system and the commodification of nature, all of which are driven by big polluters and corporate giants. Environmental destruction and the climate crisis threaten human survival and the enjoyment of all human rights for present and future generations, including the rights to life, health, housing, food, land, water and sanitation, livelihood and non-discrimination. Thus, States must take urgent action to address environmental destruction and the climate crisis, including through regulating and holding corporate and financial actors accountable to meeting their obligations to respect, protect and fulfil human rights, domestically and extraterritorially. Climate solutions must not violate human rights.

Accordingly, it is essential that the LBI more systematically incorporate language to strengthen human rights relating to a healthy environment and address the climate crisis, including through requiring companies and States to ensure that mandatory due diligence and impact assessments are focused on human rights, including on environment and climate related considerations. To this end, throughout the text of the LBI, human rights and environmental due diligence and impact assessments must be streamlined.

What can be improved?

Preamble

1. In the Preamble, it is key to acknowledge that human rights defenders face a particular risk when resisting business activities impacting land, territory and natural resources, and recognizing that such resistance is important to ensure human rights relating to a healthy environment and effectively address the climate crisis.⁴⁸ As such we propose the addition of the following paragraph

⁴⁸ See this for more on the right to a healthy environment: <https://www.escr-net.org/rights/adequate-healthy-environment/>

to the Preamble: “Recognizing that human rights defenders are particularly targeted when challenging business activity, taking into consideration particular vulnerabilities and heightened risks for certain groups of human rights defenders including women and LGBTI+ human rights defenders, indigenous and environmental human rights defenders, human rights defenders working in isolated and rural areas and human rights defenders engaged in the protection of land, territory and natural resources , and the obligation of States to protect defenders against any harm.”

2. An additional paragraph to the Preamble should affirm the primacy of human rights over trade, investment, development, environment, and climate as well as business agreements. Accordingly, we propose the following: “To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements.⁴⁹”

Article 2 – Purpose

In Article 2(1)(b), we suggest amendments to the text that would incorporate the prevention of State violations and environmental harm as a fundamental purpose of this treaty: “To prevent the occurrence of human rights abuses and violations as well as environmental harm resulting from in the context of business activities in both conflict and non-conflict affected areas by creating and enacting effective and binding mechanisms of monitoring and enforceability.”

Article 6 – Prevention

1. In Article 6(2)(a), the text should be amended to include specifically a reference to environmental due diligence, requiring corporations and States involved to carefully study the impacts of their business activities. We recommend the provision to change accordingly: “Identify and assess any actual or potential environmental risks and/or human rights abuses or violations that may arise from their own business activities, or from their business relationships – including those that infringe upon workers' rights;...”
2. A key concern regarding the second revised draft text is that the Article on prevention removes a mention of the State requirement to conduct their own human rights and environmental impact assessments when involved in business activities, whether via investments or through a State-owned enterprise. This must be reincorporated into the text and clearly articulated as a requirement under this Article. As such, we suggest adding the following language, which is almost identical to what was included in the first revised LBI text: “State Parties shall take all necessary additional steps, including particularly through human rights and environmental impact assessments, to

environment and see: <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>, and, https://www.ipcc.ch/site/assets/uploads/2019/08/4.-SPM_Approved_Microsite_FINAL.pdf

⁴⁹ See: Vienna Convention on the Law of Treaties (VCLT) 30(3): “When all the parties to the earlier treaty are parties also to the later treaty . . . the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”, and see also, United Nations’ Guiding Principles on Business and Human Rights (UNGPs), Principle 9. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. See also Principle 10 regarding the position of States when acting as members of multilateral institutions that deal with business-related issues. See also Principle 11, 23, and 31.

respect and protect human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes but is not limited to, State ownership or control in business activities, State engagement in business activities with companies or other States, State regulatory oversight, or political or financial support.”

3. We also propose adding the following paragraph: “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 those affected, [including women...] 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.”

