
ESCR-Net Advocacy Paper on the Second Revised Draft Treaty

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We are central to the Treaty process

Social movements and civil society organisations, both members and allies of ESCR-Net, have played an instrumental role in the establishment and development of the UN Treaty process as a push back against the status quo of corporate impunity. Our voices remain most relevant to this urgent and much needed process. We stress that social movements and affected communities must be central to the Treaty process - with their lived experiences and demands for justice informing moves forward.

COVID-19 and the new normal

The COVID-19 crisis has illustrated that domestic law and policy in most countries around the world is not set up to protect the people against the interests of corporate elites and the wealthiest one percent. Long before COVID-19, the one percent was already the priority for many governments. This pandemic has exacerbated this reality, and many of us feel it impacting our daily lives, health, livelihood, and communities. We need a new reality. We demand a new normal. We call for a Legally Binding Instrument (Treaty) that would bring us a step closer to ending corporate impunity and making human rights a reality for all.

Maintaining improvements in the draft Treaty

We warmly welcome some key improvements in the second revised draft Treaty, such as having a stronger gender approach and improved language on the rights of human rights defenders and 'victims'. We urge States to maintain these improvements. We also welcome that:

1. State-owned enterprises are now part of the definition of business activities under Article 1. This is significant to ensure wider accountability measures.
2. The right of Indigenous Peoples to Free, Prior and Informed Consent (FPIC) was recognised under Article 6. This is a key legal standard that must be maintained and strengthened.
3. Access to justice for victims was expanded with the inclusion of international doctrines of *forum non-conveniens* in Art 7(5), and *forum necessitatis* in Art 9(5) of the revised draft. This is key for extraterritorial jurisdiction in bringing cases for accountability.
4. The notion of primacy of human rights in relation to trade and investment agreements was strengthened in Art 14(5). This is a particularly significant amendment.

On the above-mentioned, we believe the language could still be fine-tuned to further strengthen the draft Treaty – this is addressed in our collective ESCR-Net written submission [here](#).

What are our priorities for a stronger Treaty?

At its essence, this Treaty is meant to address gaps in corporate accountability and ensure legal liability for human rights abuses. Additionally, the Treaty should also continue addressing State obligations to fulfil as primary duty bearers required to respect, protect, and fulfil human rights, including the right to self-determination, the right to a healthy environment, and workers' rights. We want a stronger Treaty addressing corporate and especially State obligations when it comes to business-related human rights abuses and/or violations. We address this in depth in [our collective submission](#).

How to make the Treaty stronger Article by Article

Our [collective submission](#) suggests detailed language to strengthen the Treaty text (or LBI text), in this summary we wish to highlight some of our key demands for a stronger Treaty:

Preamble

1. Our key ask for the preamble is that language on the well-established right to **self-determination** is added - this is a foundational right for peoples' whose lands are often impacted by corporate abuse and violations - and therefore this right should be incorporated throughout the text.
2. We also see that it is essential to ground this Treaty 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. This process of developing a binding Treaty should be part of the broader **decolonisation** process.
3. Taking the lead from ESCR-Net's feminist analysis on the dangers of retrogression of rights during the COVID-19 crisis, it is important that in the preamble we introduce, in a new paragraph, the principle of **non-retrogression**. No matter what the circumstances are, human rights must come first.
4. We also suggest that the text takes cognisance of the fact that the **gender perspective** is not only synonymous with women's rights but also underscores the importance of other gender vulnerabilities that undermine protections of other gender minorities.
5. It would also be key to add a provision acknowledging that **human rights defenders**, including women and LGBTI+ defenders, face a particular risk when resisting business activities impacting land and natural resources - and that such resistance is key to ensuring rights to a healthy environment and to address the climate crisis.
6. It is important to emphasize **State obligations** in the preamble as they relate to business activity. A good way to do this would be to add a new provision referencing General Comment 24 by the UN Committee on Economic, Social and Cultural Rights on State obligations related to business activities.
7. Finally, the preamble should affirm the **primacy of human rights** over trade and investment agreements, in development and responses to the climate crisis, and over business contracts. We propose that a new provision on this is added.

You can see specific language suggestions on all the above demands [here](#).

Article 1 - Definitions

1. In Article 1(2), the definition of human rights abuses should include **workers' rights**. Workers' rights are human rights and it is important to reaffirm this.
2. In Article 1(3), the definition of "business activities" should include both **non-for-profit** and for-profit activity. In this case, we ensure that even international organizations such as the UN and charitable organizations are not providing profit for corporate elites in conflict and other settings.
3. In Article 1(5), the definition of "business relationships", should clarify that both State and non-State entities could be a part of such relationships. This must be addressed to avoid State impunity when complicit or wholly responsible for human rights infringements related to business

activities. Furthermore, additional language is needed to ensure corporate accountability across the **value chain** - whether we are dealing with a subsidiary or even a store facilitating the flow of unlawful goods for public consumption.

You can see specific language suggestions on all the above demands [here](#).

Article 2 - Statement of Purpose

1. In general, Article 2 should have a stronger focus on the prevention of **State violations** of human rights related to business
2. In Article 2(1)(b), the purpose of this Treaty can further be strengthened by not only adding language that addresses State violations of human rights as well as **environmental harms** resulting from business activities in both **conflict and non-conflict areas** and that this could be done by creating and/or enacting binding enforcement mechanisms.
3. In Article 2(1)(d), both access to effective remedy and **reparations** should be at the core of the Statement of purpose.

You can see specific language suggestions on all the above demands [here](#).

Article 3 - Scope

1. Article 3(1) on the scope should clarify that the Treaty shall apply to **all business activities** as the previous draft had done. It should also specify that the Treaty would apply to all other business enterprises in **the value chain**.
2. In Article 3(3), **international humanitarian law** and **international criminal law** must be explicitly mentioned.

You can see specific language suggestions on all the above demands [here](#).

Article 4 - Rights of Victims

1. While the inclusion of the words “gender responsive” is positive under Article (2)(e), this provision can be further strengthened by introducing language about **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) on access to information in the remedy process, stronger language is needed to ensure that **barriers facing at risk groups**, such as Indigenous Peoples, as well as women and girls, are addressed in order to guarantee access to legal aid and information by businesses and others relevant to the pursuit of remedies. Furthermore, the provision must highlight that 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.
3. 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, the importance for long-term monitoring of such remedies such as covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance.

4. 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.

You can see specific language suggestions on all the above demands [here](#).

Article 5 - Protection of Victims

1. It is necessary to introduce a provision outlining that States, who do not incorporate the Treaty provisions into their corporate regulatory framework in a reasonable time, will be held accountable for failing to fulfil their obligations to protect, respect and fulfil the rights enshrined in the Treaty and beyond. As such, we suggest the addition of the following provision under Article 5: “**States** who fail to enshrine the provisions of this Treaty 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. This would be in line with our demand for strengthened language on State accountability throughout the text.

You can see specific language suggestions on all the above demands [here](#).

Article 6 - Prevention

1. We reiterate that States must prevent both **State** and non-State infringements of human rights. Accordingly, in Article 6(1), it is important to amend the language to reflect this.
2. 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.
3. In Article 6(3)(a), the Treaty must be in line with appropriate international standards of **consultations** with affected communities. Human rights and environmental impact assessments should be carried out independently throughout all phases of corporate operations while taking workers’ rights into consideration.
4. In Article 6(3)(b), human rights due diligence measures 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. While this is generally a positive addition, the language in this provision can be further improved to address a wider range of at risk groups, including gender minorities, the involvement of women in data collection, and finally the need to have disaggregated data by gender and other relevant categories.

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5. In Article 6(3)(c), we propose adding a reference to the principle of consent, as well as a requirement that an independent body carry out **consultations** with transparency, and where it is not possible to conduct meaningful consultations such as in conflict affected areas, business operations should refrain from operating unless it is for the benefit of the oppressed population.
 6. 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.
 7. 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). Consent must be continuously attained at every stage of business activity and in correspondence to change in business plans, by providing genuine information and carrying out timely and meaningful consultations.
 8. Article 6(3)(g) on **conflict-affected areas** is not clear and can be much stronger to ensure that States and corporations are not directly linked to or are not causing and contributing to human rights abuses and violations. In this provision, it is also important to make a distinction between the responsibility of corporations already conducting business in conflict-affected areas and those yet to venture into business therein. In general, 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, contributing to, nor being directly linked to human rights abuses or violations of human rights and humanitarian law standards arising from business activities or from contractual business relationships across the value chain, including with respect to products and services. Entities already engaged in business activity in conflict-affected areas, including situations of occupation, shall adopt and implement urgent and immediate measures, such as divestment and disengagement policies.
 9. 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. This was mentioned in the zero Draft under Article 6 and should be reintroduced.
 10. 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 also 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 adding paragraphs to Article 6 highlighting the access to information must be available at all stages of corporate operation.
 - a. 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

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- 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.
- b. 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 on proof on them. Community-led data should be recognised as legitimate and valid and play a key role in informing decisions which impact the community.
11. A key concern in the second revised draft text is that the Article on prevention removes a mention from the first revised draft Treaty of a **State requirement to conduct their own human rights and environmental impact assessments of all their policies, projects, activities and decision** where it might be involved in business activities, whether via investments or as part of a State-owned enterprise. This obligation must be reintroduced in the text and must apply to all branches and bodies of the State.
12. 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 propose that 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 draft Treaty, and shall take all necessary steps to ensure that such decisions and actions by the international organisations do not contribute to, cause, or be directly linked to human rights abuses and violations in the context of business activities of a transnational character.”
13. 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.
14. It is positive that the current draft Treaty pronounces that in Article 6(6), a failure to conduct human rights due diligence shall result in commensurate sanctions, including corrective action where applicable - but by virtue of Article 6(2) and 6(3) this is limited to businesses. 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 their own human rights and environmental impact assessments are not carried out when involved in business activity whether via investment or ownership. 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.
15. It is key that in Article 6(7) on conflict of interest or **corporate capture**, 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 with relation to the Treaty, these are protected from commercial and other vested interests. This said, the provision can be further strengthened by adding language to limit corruption including an obligation on States to 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.
16. We also propose adding language under Article 6 highlighting that the **protection of human rights defenders** is an essential element of the prevention of corporate-related abuses or violations.

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17. Finally, in addressing State obligations to prevent human rights abuses and violations related to business, the provision should reflect that State parties shall ensure that the 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, count with independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected.”

You can see specific language suggestions on all the above demands [here](#).

Article 7 - Access to Remedy

1. In Article 7(2), States party to the Treaty should ensure that their **domestic laws facilitate access to information** both through assisting with the provision of information when corporations fail to provide meaningful access to information, and by taking into due consideration and recognising the validity of different forms of data and information gathered by communities.
2. In Article 7(3)(e), it must be clear that **economic barriers** should be considered a valid reason to waive legal fees and costs. Legal costs should not place an unfair and unreasonable burden on victims.
3. 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 proceedings related to abuses or violations, for instance, via legal aid from public defenders/ombudspersons’ offices.
4. In Article 7(4), it must be more strongly articulated that not being able 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 to bring cases forward.
5. While it is positive that Article 7(5) now addresses concerns related to **forum non conveniens**, this text can be further strengthened with the removal of the word *legitimate* as it is not clear what legitimate means.
6. 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. Accordingly, this provision should require corporate and State entities involved in the case to provide sufficient evidence for acquittal.
7. In Article 7(7), States must enforce remedies when **State-entities** are also involved in human rights infringements related to business activity.

You can see specific language suggestions on all the above demands [here](#).

Article 8 - Legal Liability

1. Legal liability of corporations, particularly of parent companies, must be more explicitly addressed in the second draft revised Treaty. To ensure that this Treaty advances corporate accountability, particularly of transnational corporations, we must have a strong standard of **legal liability of corporations** that could be incorporated into the domestic legal systems of

State signatories. In the second revised draft, this focus is currently weak even in articles that try to make this link; the formulation is not clear and can lead to abusive interpretations. Consequently, Article 8 should also include a provision reaffirming the joint and several responsibilities between all companies involved in an abuse or a violation, be it along the **global value chain** or in the time of armed conflict.

2. 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 withdrawal of licenses or termination of contracts for company projects and so on.
3. 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 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 of a due diligence procedure, but on the **harm caused**, according to the principles of the duty of care and extracontractual civil liability.
4. In Article 8(9), it would be crucial to ensure that criminal liability is triggered also by a business activity that violates war crimes, crimes against humanity, and other grave breaches of international human rights and **humanitarian law**. This would ensure that the gravity of the abuse, the public interest and justice is reflected in the kind of legal liability attributed to the perpetrator and the **sanctions** applied.
5. It is also worth exploring that a new provision be added 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. Community-led documentation or civil society documentation should also be considered as primary resources in the evidence gathering process.

You can see specific language suggestions on all the above demands [here](#).

Article 9 - Adjudicative Jurisdiction

1. In Article 9(1) of the second revised Treaty 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 this provision be amended.
2. In Article 9(2) of the second revised Treaty draft, it is important to articulate what is meant by domicile - this should include both where the company is headquartered but also the **place where its substantial assets are held** to ensure remedy for affected communities.

You can see specific language suggestions on all the above demands [here](#).

Article 12 - Mutual Legal Assistance and International Judicial Cooperation

States must not withhold information key to corporate accountability. We are concerned that Article 12(10)(b) in the second revised draft Treaty 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 Treaty, 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”. Providing legal assistance is key to corporate accountability and is an accepted 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.”

Article 14 - Consistency with International Law Principles and Instruments

1. Article 14(3) should be clarified to ensure not only that the Treaty **shall not “affect” applicable provisions** in domestic and international law more conducive to the full enjoyment of human rights or any regional or international Treaty or agreement or customary international law, but rather that it will not be interpreted as limiting such provisions.
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 Treaty and the principle of the primacy of human rights. Agreements shall be reviewed, adapted and implemented in compliance with and in a manner that does not undermine their obligations under the Treaty 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 accordingly.
4. In order to compliment the changes aforementioned, it is essential that a new paragraph be introduced articulating that **new trade and investment agreements** shall be designed, negotiated and concluded, fully respecting the State Parties’ human rights obligations under the Treaty 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.

You can see specific language suggestions on all the above demands [here](#).

Article 15 - Institutional Agreements

To ensure that, in the implementation phase, States are reviewed in a more coherent non-binary gender responsive approach, it is necessary to include gender expertise under 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. In line with ESCR-Net ethos, we believe Article 15(1)(a) should ensure that no more than half of the expert body are men and that an expert on gender be appointed among the experts.

You can see specific language suggestions on all the above demands [here](#).
