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## ESCR-Net Position Paper on the Revised Draft of Treaty on Transnational Corporations and Other Business Enterprises with Respect to Human Rights

October 2019

ESCR-Net members appreciate the important improvements to the [revised Draft Treaty](#) echoing several points from our [collective position papers](#) issued last year in reaction to the zero Draft. These include improved language on conflict-affected areas, on the protection of indigenous peoples, and on the protection of human rights defenders working to protect and promote the rights of all people facing abuses or violations as a result of business activities, human rights due diligence and legal liability of business corporations. At the same time, **the revised Draft has several gaps**, identified by ESCR-Net members, that must be addressed to ensure the full protection of the rights of people, including in the improved areas mentioned above. Some of these gaps form red lines that if crossed, could undermine the purpose and goals of the Treaty.

### Necessary changes:

- Noting the broadened scope of the revised Draft Treaty to include **all businesses**, it is vital that a strong focus remain **on transnational corporations** (TNCs) operating through global value chains in order to ensure that the revised Treaty is able to hold those corporations accountable for human rights violations or abuses;
- As it relates to the situation of **human rights defenders**, the Treaty must ensure consistency with the UN Declaration on the Rights of Human Rights Defenders to avoid gaps and foster harmonization with the spirit of the declarations.
- The Treaty must include guarantees of **access to information** for victims and affected individuals or communities to prevent corporate abuses and violations prior to the commencement of and during the business activity as well as in the remedy process;
- The Treaty must guarantee the right to “**Free, Prior and Informed Consent**” of **indigenous peoples (FPIC)**. Consent and not mere consultation should be maintained in the Draft as a key principle as it offers a broader protective measure for marginalized communities beyond mere consultation. It advances within the broader FPIC principle protection of community values and consensus building. Consent must be continuous - with information provided at every stage of the project for subsequent consent;
- A non-binary gender, youth and children lens should be adopted and streamlined throughout the text. Most significantly, the text must enable the appointment of **gender experts** in the Committee that oversees the implementation of the treaty;
- The Treaty must adopt stronger safeguards against **corporate capture** (undue corporate influence). It is fundamental to protect the integrity of the policymaking space, its

participants, and outcomes from the interests of these corporations—including any potential, perceived, or actual conflicts of interest. It is imperative to develop good governance measures that safeguard against corporate political interference at the national, international, and intergovernmental levels, whether in the current discussions that pertain to the Treaty’s content, negotiations, implementation and monitoring.

- To ensure prevention of human rights abuses and violations by corporate activities **in conflict-affected areas, fragile and post conflict States**, mandatory enhanced due diligence is necessary and must include a requirement not to pursue or start operations in certain situations in which no due diligence can guarantee that there will not be complicity or contribution to violations that in some cases may amount to international crimes. It is important also to introduce more urgent and immediate preventive measures, divestment and disengagement policies, to avoid corporate involvement in and/or contribution to human rights violations in their activities and relationships.
- The Treaty must ensure the responsibility of the parent company for the actions of companies in its value and supply chain that are companies with whom it has a **business relationship** that can be different from a mere contractual relationship with the parent company;
- The Treaty must reflect the **primacy of human rights** obligations over those under bilateral or multilateral trade, investment or other agreements. Reference to economic and trade agreements is weaker in the revised Draft and can be further strengthened to ensure human rights obligations always take precedence over trade agreements;
- States must take additional steps and exercise a higher standard of care to prevent and protect from abuses and violations related to **State-owned enterprises** or in areas where the State is an economic actor.
- **Extraterritorial obligations** can benefit from clearer language articulating responsibilities of home and host States. For example, the concept of *forum non conveniens* is not explicitly marked as not applicable for the purposes of this Treaty and this creates a redundancy in ensuring that courts will take on the case brought forth to them even if other courts also have jurisdiction.

The following collective position will reflect alternative language suggested by members of ESCR-Net that would ensure the above-mentioned red lines are not crossed.

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## Preamble

We note that there has been additional language introduced to the preamble that is encouraging. Specifically, the emphasis that “...civil society actors, including **human rights defenders** have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises”. Our call to further strengthen the preamble requires adding language in several provisions that encompasses wider protection of human rights defenders and victims of violations and/or abuses resulting from corporate activities.

Current text: “Reaffirming that all human rights are universal, indivisible, interdependent and inter-related;” it should expand to highlight all attributes of human rights which includes that they are inalienable, equal and non-discriminatory.

**Proposed text for amendment:** “Reaffirming that all human rights are universal, **inalienable**, indivisible, interdependent, **equal and non-discriminatory**”

Current text: “Reaffirming the fundamental human rights and the dignity and worth of the human person, the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations

**Proposed text for amendment:** “Reaffirming fundamental human rights – including the rights to life, liberty and security of person, and the right to self-determination, non discrimination and permanent sovereignty over natural resources – and the dignity and worth of the human person, the equal rights of men, women and LGBTQ+, and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations

**Current text:** “Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law”

**Proposed text for amendment:** “Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lies with the State, and that its failure to comply with such obligations amounts to human rights violations”.

**Proposed text for adding:** “Recalling that States’ obligation to protect includes protection against human rights abuse by business enterprises, within their territory and/or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights and humanitarian law”.

**Current text:** “Recognizing the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities.”

**Proposed text for amendment:** “Recognizing the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, members of the LGBTQ+ community, indigenous peoples, persons with disabilities, labourers, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities.”

Current text: “Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;”

**Proposed text for amendment:** “Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development ~~through an increased productivity~~, inclusive human development and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;”

**Current text:** “Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations,”

**Proposed text for amendment:** “Underlining that all business enterprises, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their ~~own~~ activities, and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are ~~directly~~ linked to their operations,”

## Article 1 – Definitions

There are several gaps that must be addressed in this Article in order to ensure that the definitions operate as solid pillars when the Treaty is in its implementation phase.

The definitions of “human rights violation” and “human rights abuse” should explicitly include social and cultural rights. In further details details, a distinction must be made between human rights violations and abuses so as not to undermine the international responsibility of States if they fail to fulfill their primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms, including protection against human rights abuse by business enterprises. At the same time, corporations shall be held accountable for any harm committed through acts of commission or commissions against any person or group of persons, individually or collectively, that produces an impairment of their human rights and / or environmental damage. It is important to note that throughout the text of the revised Draft Treaty, environmental harm should also be incorporated in an autonomous manner to human rights; otherwise, complainants will always have to prove the nexus between environmental damage and a human rights abuse or violation.

Further, the definition of what is now “contractual relationship” should be changed to “business relationship.” Having contractual in this definition could undermine the purpose of this Treaty in ensuring that *inter alia* parent companies of TNCs could still be held accountable for violations or abuses of international law even if there was no contractual relationship between the parent company and one of its subsidiaries or affiliates. Additionally, in the definition of “business activities,” the Treaty must also illustrate that such activity can be more than economic. It must also include both acts of commission or omission to ensure protection of victims in either case..

Proposed amendments and additions to the revised Draft must encompass the following in order to provide stronger pillars to the implementation of the Treaty.

**Current text – Art 1(2):** “Human rights violation or abuse” shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

**Proposed new text in substitution to current art. 1(2) - a split in the Article.**

**Art. 1(2) “Human rights abuse” shall mean any harm committed by business enterprises through acts of commission or omission, against any person or group of persons,**

individually or collectively, that produces an impairment of their human rights, including environmental damage. This must include but is not limited to the impairment of civil, political, economic, social and cultural rights.

Art. 1(2) bis “Human Rights violation” shall refer to State’s international responsibility for failing to fulfill their primary obligation to respect, protect, fulfill and promote human rights and fundamental freedoms, including protection against human rights abuse by business enterprises and encompassing civil, political, economic, social and cultural rights.

**Current text – Art 1(3):** “Business activities” means any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.”

**Proposed text for amendment:** “Business activities” means any economic **or other** activity, **particularly** of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means **and including both acts of commission or omission.**

**Current text – Art 1(4):** “Contractual relationship” refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.

**Proposed text for amendment:** “**Business** relationship” refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship **as provided under the domestic law of the State. Business relationships include business partners, entities in its value and supply chain, and any other non-State or State entity linked to its business operations, products or services [Source for last sentence: UNGPs, Principle 13] even if the relationship is not contractual.**

## **Article 2 – Statement of Purpose**

It is imperative to recognize that many trade, **development** and business agreements between States already exist and require systematic reforms in the legislative and judicial system in order to ensure the primacy of human rights. To that effect, this purpose must be articulated and added as Article 2(1)(d) bis.

**Proposed text for inclusion as Art 2(1)(d) bis:** “**To ensure the primacy of human rights over all international agreements, including those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security obligations.**”

It would be important to highlight in the following Articles of the Treaty how the primacy of human rights over all international agreements could be addressed to reflect possible State action domestically. This will be addressed under the prevention section of the Treaty.

### Article 3 – Scope

If States decide to broaden the scope of the revised Draft Treaty, the Treaty must maintain a strong focus on the accountability of TNCs as a primary objective. The Treaty to regulate business activity must ensure that States are adopting domestic legislation, mechanisms, and policies towards corporate accountability for violations and / or abuses resulting from business activity, particularly business activity of a transnational character.

The Treaty can provide uniform and strong legal standards for States to prevent and hold accountable national business enterprises operating domestically. However, for the Treaty to be most effective, it must ensure that TNCs operating both within their home and host States are being held to internationally adopted legal standards to protect local communities that face *inter alia* colonial or postcolonial exploitation, particularly of land and natural resources. TNCs operating abroad have long been able to escape accountability because of a lack of regulations both at the home and host States. This particularly occurs when corporations have undue influence on the judicial and legal system of their home and host States. The Treaty provides an opportunity for States to adopt international legal standards that, if implemented, could ensure that corporations face proper legal consequences for abuses or violations that they or their subsidiaries commit or contribute to the Treaty should sufficiently and adequately addresses how TNCs can be held accountable, particularly when operating outside of their home States. This should be reflected throughout the Treaty – specifically in sections pertaining to prevention, jurisdiction and applicable laws. To further improve and strengthen the text of this Treaty we propose the following amendment to Article 3(1).

Current text – Art 3(1): This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.

**Proposed text for amendment:** This (Legally Binding Instrument) shall apply to all business activities and business relationships, **particularly but not limited to those of a transnational character.**

### Article 4 – Rights of Victims

With the definition of human rights violations and abuses in Article 1 of the revised Draft, the text of a final negotiated Treaty must reflect the protection of victims against both violations and abuse. This must be streamlined throughout the text.

**Current text** - Art 4(1): Victims of human rights violations shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.

Proposed text for amendment: Victims of human rights violations **and abuses** shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.

With increasing attacks against human rights defenders, particularly in the context of corporate abuse or violations, the Treaty needs stronger provisions to ensure this protection in its operational paragraphs. Emphasizing their role in promoting the respect of human rights in the current Draft of the preamble is an important and positive step forward from the zero Draft, however, it falls short from providing the necessary protection required to allow these human rights defenders to continue highlighting abuses and violations by companies. In Article 4(3), the Treaty must explicitly highlight the duty of the State to protect individuals and groups against from any unlawful interference against their security and from intimidation or retaliation during any proceedings with regards to corporate activities.

Current text – Art 4(3): Victims, their representatives, families, **communities** and witnesses shall be protected by the State Party from any unlawful interference, **whether by State or non-State actors**, against their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted.

**Proposed text for amendment:** **State parties shall fulfil their obligations under international law to protect** victims, their representatives, families, communities, and witnesses from any human rights violations **or abuse whether by State or business enterprises**, against their privacy and from intimidation, and retaliation **or reprisals**, before, during and after any proceedings have been instituted.

With regard to the rights of victims, there is a need to strengthen the Treaty. In particular, while Art 4(4) provides for “special considerations and care to avoid re-victimisation”, it needs to expressly provide victims the right to precautionary measures in terms of immediate halting of harm by businesses as the process of remediation takes place.

Current text - Art 4(4): Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice.

**Proposed text for amendment:** Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice. **Victims shall also have a right to precautionary measure that require businesses halting the alleged harm as the process of remediation is ongoing.**

**Furthermore, guarantees of non-repetition must be planned to benefit victims and the wider community, with an approach based on prevention of new violations of human rights. In this regards to propose the following amendment.**

Current text - Art 4(5): Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

- a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;
- b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.

**Proposed text for amendment:** Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

- a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims and other affected or potentially affected persons or communities;
- b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.

With regards to the right to access information, Article 4(6) is too limited as it pertains only to remedy. 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 following amendment to the text.

Current text – Article 4(6): Victims shall be guaranteed access to information relevant to the pursuit of remedies

**Proposed text for amendment:** Victims shall be guaranteed access to information relevant to the pursuit of remedies and States must ensure that individuals and communities, including human rights defenders, have access to relevant, sufficient, quality information in connection with each stage of corporate activity, to facilitate meaningful participation in the prevention of and response to human rights impacts.

At present, most of the claims against corporations do not get to a final remedy. In many good-faith-cases the victims are defeated in their administrative or judicial claims. With this rule, those claimants would be put in the obligation to prove their lack of resources in order to avoid payment of the large corporate legal defense expenses. This can impact adversely on the funding of civil society organizations that promote access to human rights for victims. This rule is an obstacle to guarantee a safe access to justice and remedy, and contradicts article 4 (9) which mandates States to “guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment”. This economic menace is an effective deterrent for victims around the world to seek for justice and to stop corporate impunity.

**Current text - Art 4(8):** Victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victims’ access to adequate, timely and effective remedies.

**Proposed text for amendment:** Victims, as well as institutions and organizations, shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties, without prejudice to the judicial standing of monitoring institutions and other public agencies charged with the protection of human rights. Where a claim is submitted by a person or an organization on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the

necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for the victim's access to adequate, timely and effective remedies.

While we appreciate and acknowledge efforts to protect individuals defending human rights in the context of violations or abuses by corporate entities in Article 4(9), this Article should explicitly mention human rights defenders (HRDs) and refer to States' obligation to (a) guarantee in all circumstances, the physical and psychological integrity of all HRDs, including by developing effective protection strategies in consultation with them; (b) protect human rights defenders from any unlawful interference with their privacy and from any form of threat, attack or criminalization; and (c) provide victims and human rights defenders, including women human rights defenders, appropriate access to information at any time in relation to business activities.

**Current text** - Art 4(9): State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.

**Proposed text for amendment:** " State Parties shall take adequate and effective measures to fulfil their obligations under international law to protect human rights defenders in adherence to the UN Declaration on Human Rights Defenders, and must create a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.

With the definition of human rights violations and abuses in Article 1 of the revised Draft, the text of a final negotiated Treaty must reflect the protection of victims against both violations and abuse. This must be streamlined throughout the text.

**Current text** - Art 4(12)(e): In no case shall victims that have been granted the appropriate remedy to redress the violation, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the alleged victim shall not be liable for such reimbursement if such alleged victim demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the alleged victim.

**Proposed text for amendment:** In no case shall victims that have been granted the appropriate remedy to redress the violation or abuse, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the alleged victim shall only be liable for the legal expenses of the other party if it is proved beyond doubt that the claim was reckless and groundless. Under no circumstances shall the alleged victim be charged for legal expenses when there is proven lack or insufficiency of economic resources.

**Current text - Art 4(14):** "States Parties shall provide effective mechanisms for the enforcement of remedies for violations of human rights, including..."

**Proposed text for amendment:** "States Parties shall provide effective mechanisms for the enforcement of remedies for violations and abuses of human rights, including..."

In terms of burden of proof, where one of the parties is in a better place to present evidence or there is a structural situation of inequality between the parties in dispute, principles of international law mandate to "soften" the classical rules on the burden of proof. In the case of corporate human rights abuses or violations, there is a hugely asymmetrical relation between the parties, and the alleged perpetrator is, in many cases, in a better position to produce evidence, much more than the alleged victims. Particularly, in the analysis of Article 6 (6) on failure-to-prevent liability, the burden of proof reversal shall be applicable for assessing if the parent company did or did not "sufficiently controls or supervises the relevant activity that caused the harm" or if the company "should foresee or should have foreseen risks of human rights violations or abuses", considering that such assessment may be highly complex and dependent upon information that is not publicly available.

**Current text** - Art 4(16): Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof, for the purpose of fulfilling the victim's access to justice and remedies

**Proposed text for amendment:** ~~Subject to domestic law,~~ Courts asserting jurisdiction under this (Legally Binding Instrument) may require reversal of the burden of proof, for the purpose of fulfilling the victim's access to justice and remedies. This rule shall be especially applicable to assess the liability of natural or legal persons conducting business activities under article 6 (6).

Bringing Articles 4(9) and Article 4(15) closer together could also read better, giving a more complete protection to human rights defenders working to protect and promote rights where corporate activities are involved. The Treaty could also benefit from having Article 4 be retitled to reflect that it addresses the protection of victims and human rights defenders. Otherwise, Articles 4(9) and Articles 4(15) could be separated into a new Article addressing the rights and protection of HRDs. As mentioned previously, there are many gaps that have been addressed in this revised Draft of the Treaty. One of those pertains to the burden of proof and a provision in Article 4(16) to ensure that the burden of proof will not fall on victims of violations or abuses resulting from corporate activities. This is an extremely positive development and must be commended, safeguarded and strengthened.

## Article 5 – Prevention

While there are some noted strengths to this Article in the revised Draft, a further refined and comprehensive text must be achieved in order to fill some gaps that are of serious concern. In contrast to last year's zero Draft of the Treaty, this revised Draft fails to emphasize that a failure by companies to fulfil human rights due diligence obligations would result in liability and remedial measures. To that effect, the text of the Treaty must reflect an obligation on the company to respect human rights and conduct human rights due diligence in compliance with legal standards adopted by States in the Treaty. In a previous ESCR-Net [position paper](#) on the Treaty, members highlighted that the Treaty must recognize that corporations have legal responsibilities to respect human rights, and as such outline a framework for ensuring these legal responsibilities are observed in practice. This can be done through processes of mandatory human rights due diligence encompassing FPIC principles and environmental protection.

The human rights due diligence process must be an outward looking and transparent multi-stakeholder approach. While Article 5(2) outlines the various elements of human rights due diligence, one fundamental aspect has been left out and needs to be emphasized as an obligation for companies to fulfil – that is with regards to **integration**. Ongoing integration of what is learned by the process of human rights due diligence must reflect human rights and social impact assessments based on unhindered input from the communities affected. This is key to prevention of abuses or violations by corporate entities. It must also be noted that States must be part of this multi-stakeholder human rights impact assessment and due diligence process and therefore an obligation on States to conduct its own human rights impact assessment must be articulated. To follow are several suggestions for supplementary text. In Article 1, the State obligation to prevent abuses and violations of human rights as a result of corporate activity must be articulated. Furthermore, public procurement procedures should be expressly mentioned in the Treaty since States are directly responsible for how companies perform their obligations under such contracts, usually in the name of the State.

Current text – Art 5(1): State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose, States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.

**Proposed text for amendment:** State Parties **have an obligation to prevent human rights abuses or violations resulting from activities by business entities and shall therefore regulate the operations and activities of these entities whether in the home or host States.** For this purpose, States shall ensure that their domestic legislation and public procurement procedures require all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and the environment and prevent human rights violations and abuses.

As highlighted in the zero Draft of the Treaty, corporations must be held liable for failing to conduct human rights due diligence. We regret that this was removed from the revised Draft and urge an inclusion of this liability in the Treaty – proposed language to follow.

**Proposed text to add as Article 5 (2) bis:** **States shall require that business enterprises shall be held liable for failing to conduct human rights due diligence and impact assessment as articulated in this Article.**

To follow, we suggest the following amendments to ensure the meaningful participation of all stakeholders in the assessment of any actual or potential human rights violations or abuses that may arise from business activities or from their contractual relationships.

Current text – Art 5 (2)(a): Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships;

**Proposed text for amendment:** Identify and assess **with the meaningful participation of affected communities, ombudspersons, human rights defenders, credible independent experts and others** any actual or potential human rights abuses or environmental harm that may arise from business activities, or from their **business** relationships – **whether contractual or not.**

In Article 5 (2)(b), it should be clearer that parent companies will have a prevention responsibility regarding companies in its supply chain or subsidiaries that fall under its control even if there are no direct contracts between these companies. Accordingly, the following amendment is suggested.

**Current text** – Art 5(2)(b): Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships;

**Proposed text for amendment:** Take appropriate actions to prevent human rights abuses, including environmental harm, in the context of its business activities and **business relationships, including those by companies in their supply / value chain or those in any form of business relationship with the parent company – whether contractual or not.**

**Current text** - Art 5(2)(c): Monitor human rights impact of their business activities, including those under their contractual relationships;

**Proposed text for amendment:** Monitor human rights **and environmental** impact of their business activities **and business relationships**, including those under their contractual relationships;

**Current text** - Art 5(2)(d): Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.

**Proposed text for amendment:** **Report publicly** ~~Communicate to stakeholders~~ and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights ~~violations or abuses~~ **and environmental harm** that may arise from their activities, or from those under their ~~business contractual~~ relationships.

To address integration and the obligation of companies to put into practice the human rights due diligence and impact assessments, we propose adding the following provision to Article 5(2).

**Proposed text to add as Article 5 (2)(e):** **Integrate outcomes of human rights due diligence and independent impact assessments in periodic public reports to avoid risks of abusing or violating human rights of individuals and/or communities, and maximize on the improvement of the quality of life and conditions of individuals and communities as expressly articulated in their feedback to business plans.**

The key external participation and supervision by ombudspersons, human rights defenders, credible independent experts and others of human rights impact assessments and other elements of human rights due diligence must also be articulated separately as a key provision to this mandatory requirement to prevent human rights violations. To that effect we recommend the following amendment to the text.

When addressing human rights, environmental and social impact assessments specifically it must be clearly articulated that companies as well as States have an obligation to conduct these impact assessments with a view to publishing them at the supervision of the State. This could be through an independent ombudsman office investigating incidents where corporate entities fail this obligation - the office could request the State then to interfere and prosecute the corporation.

There would need to be consequences where there is failure to comply with obligations. As such, a clear text calling for mandatory human rights and social impact assessments is necessary and must be carried out in different formats to encompass environment, gender, and human rights impact assessments, and assessments of impact when operating in situations of conflict. It must also be clear that these impact assessments must be carried out to cover all business relations whether contractual or not. *For example, if a company is receiving supplies from occupied territories, it must ensure in its impact assessment to determine whether those supplies are tied to human rights violations or abuses.* Accordingly, we suggest the following alteration to the text.

**Proposed text to add as Article 5(7)bis:** Companies have an obligation to (1) undertake environmental, gender, labour, social and human rights prior and post impact assessments as mandatory due diligence in relation to its activities and those of its business relationships, (2) publish these assessments, (3) integrate the results of such assessments into relevant internal functions and processes, and taking appropriate actions.

The revised Draft of the Treaty has integrated further groups to be consulted in efforts to prevent violations or abuses by corporate entities. These groups have been identified to be at heightened risk of human rights abuses or violations and now included in the revised Article 3(b) of the text migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. In addition, this provision should also refer to the LGBTQ+ community that in many States still requires further protection as a group that is regularly targeted and subject to attacks.

In this same provision, the current language to ensure protection indigenous peoples against human rights violations and abuses by business activity through consultation undermines their ability to prevent such violations or abuses against their people and land. The current text requires that these communities only be consulted on projects that could harm them. In this case, if an indigenous community opposes a business project following consultations, there is no requirement for companies to ensure their consent. This strips indigenous peoples of their inherent right to self-determination and to decide what happens to their lands and natural resources. The language on consultation as it currently stands in the revised Draft undercuts the business and human rights project, it also defies pre-established language adopted by UN member States in the UN Declaration on the Rights of Indigenous Peoples which stipulates under Article 5 (3)(b) of the Declaration that indigenous peoples have a right to “Free, Prior and Informed Consent”.

To further strengthen the protection of indigenous communities, the text of the Treaty must also reflect that this consent must be periodic. Essentially, business entities must inform communities of detailed activities that might occur on their land and the consent of these communities, without any form capture by the company of their decision-making processes, must precede any activity to take place on that land. More-over, if at any point in a consensual business project, plans for operations change – those must also be consented. In the case that business enterprises receive not consent to go ahead with their projects in lands that are inhabited by indigenous communities, then an independent juridical body may interfere to reach a consensual agreement between the communities and the companies involved. To this effect the following added language is suggested to Article 3(b).

Current text – Article 3(b): Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving

special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable.

**Proposed text for amendment:** Carrying out meaningful consultations with groups whose human rights and environmental rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities **and business relations**, such as women, children, **members of the LGBTQ+ community**, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken to obtain their free, prior and informed **consent** in accordance with the international human rights standards, particularly the UN Declaration on the Rights of Indigenous Peoples. **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 business plans.**

The Treaty must incorporate language that will reduce barriers to ensuring parent companies and TNCs remain liable to the actions of companies in their value chain even if that relationship is not bound by a contractual obligation. To that effect, we suggest the following amendment to Article 5 (3)(d).

Current text – Article 5(3)(d): Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed.

**Proposed text for amendment:** Integrating human rights, **social** and environmental due diligence requirements in **business** relationships which involve business activities **specifically when they are** of a transnational character, including through financial contributions where needed.

To ensure prevention of human rights abuses and violations by corporate activities in conflict-affected areas, mandatory enhanced due diligence is necessary and must include a requirement not to pursue or start operations in certain situations in which no due diligence assessment can guarantee that there will not be complicity or contribution to violations. It is important also to introduce more urgent and immediate preventive measures, divestment and disengagement policies, to avoid corporate involvement in and/or contribution to human rights violations in their activities and relationships. To that effect, we suggest the following language amendments to Article (5)(3)(e).

Current text – Article (5)(3)(e): Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services;

**Proposed text for amendment:** Adopting and implementing enhanced human rights and environmental due diligence, and **urgent and immediate preventive measures, including divestment and disengagement policies, to avoid corporate involvement in or contribution**

to human rights abuses in their activities and relationships, as well as measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual business relationships across the value chain, including with respect to their products and services; companies must further not to pursue or start operations in certain situations in which no due diligence assessment can guarantee that there will not be complicity or contribution to violations.

It is important to reiterate as mentioned above that throughout the text of the revised draft Treaty, Environmental harm should be incorporated in an autonomous manner to human rights; otherwise, complainants will always have to prove the nexus between environmental damage and a human rights abuse or violation.

Current text - Art 5(4): State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.

**Proposed text for amendment:** State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights and the environment resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.

On corporate capture, the Treaty must adopt stronger safeguards against corporate capture (undue corporate influence). It is fundamental to protect the integrity of the policymaking space, its participants, and outcomes from the interests of these corporations—including any potential, perceived, or actual conflicts of interest. It is imperative to develop good governance measures that safeguard against corporate political interference at the national, international, and intergovernmental levels, whether in the current discussions that pertain to the Treaty's content, negotiations, or implementation. To that effect, we propose the following amended language to be incorporated in Article 5(5) of the Treaty.

Current text – Article 5(5): In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.

**Proposed text for amendment:** In setting and implementing their public policies with respect to the implementation of this [binding Treaty on TNCs and other business enterprises], State Parties shall act to protect these policies, policymaking processes and government bodies from commercial and other vested interests of transnational corporations and other business enterprises.

The Draft Treaty should also clarify the obligation of the State to respect, protect, and fulfil human rights when it itself acts as an economic actor - directly or in conjunction with non-State actors - in the context of business activities.

Business-related human rights violations and abuses linked to actions by States as economic actors have been documented in a variety of sectors and countries, including in the extractive sector,, agribusiness, in the arms industry,, and in the infrastructure sector. These violations and abuses occur through various mechanisms of direct State involvement and support to non-State actors. For example, States may violate their obligation to respect or to protect in connection with:

- Activities of State-owned enterprises (which are owned by the State or under its control). State-owned enterprises are active in a wide range of sectors, including in energy, infrastructure, public utilities, finance and are increasingly operating globally.
- when they engage in contracts or commercial activities with companies (e.g. public-private partnerships, public procurement, privatisation of services, investment through a sovereign wealth fund), and with other States (as a member of multilateral institutions that deal with business-related issues, as well as when entering into trade and investment agreements).

States must take additional steps and exercise a higher standard of care to prevent and protect from abuses and violations related to State-owned enterprises or in areas where the State is an economic actor. For instance, the Committee on the Rights of the Child has considered that: “States should lead by example, requiring all State-owned enterprises to undertake child-rights due diligence and to publicly communicate their reports on their impact on children’s rights, including regular reporting. States should make public support and services, such as those provided by an export credit agency, development finance and investment insurance conditional on businesses carrying out child-rights due diligence”.

In addition, domestic laws and policies can support and shape business activities, such as through granting of authorisations for business activities and financial or trade support. States must uphold their human obligations and ensure policy coherence with such obligations in all areas where State-based institutions come into contact with, support, or shape business activity.

Proposed text to add as Article 5(6)bis: **States Parties shall take all necessary additional steps, including through human rights impact assessments, to respect and protect against 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 enterprises 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.**

In small and medium sized enterprises (SMEs), it is usually much simpler to “pierce the corporate veil” in attributing responsibility for those committing human rights abuses and violations. It is true that some measures in this Treaty may burden smaller sized enterprises, however, given that their size is smaller, reporting and mandatory human rights due diligence and impact assessments will also be less burdensome. While the State might provide some measures to facilitate these processes further for SMEs, providing “incentives” is unclear. Providing incentives could cause additional burdens on the State and it could also undermine the process of ensuring corporate responsibility of its own actions. Accordingly, we propose the following amendments to Article 5(6).

Current text – Article 5(6): States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

**Proposed text for amendment:** State Parties **may provide measures** to facilitate compliance with requirements under this Article by small and medium sized **enterprises** conducting business activities to avoid causing undue additional burdens.

Seeing as TNCs are usually based in different countries in order to reduce their payment of taxes, this generates a significant reduction of the resources of the State parties. Many UN bodies, such as the ESCR Committee, link tax avoidance as a practice that violates human rights (see ESCR Committee General Comment N° 24). To that end, it is important that States are obliged to face the following practice.

**Proposed text to add as - Art 5(7)bis:** **State Parties should prevent business companies from evading tax payments. Particularly, to combat abusive tax practices of TNCs, States must face transfer pricing practices and intensify international cooperation in tax matters.**

## Article 6 – Legal Liability

In order to ensure the legal liability of companies in both home and host States, the Treaty must clearly articulate this Article. This Article must also address several doctrines of international law that might undermine efforts to seek legal liability such as *forum non conveniens* (power to dismiss a case where another forum may more conveniently hear the case) and the corporate veil doctrine, which are legal concepts frequently used to avoid liability and other forms of responsibility of “parent companies” and shareholders of transnational enterprises involved in human rights violations. To that effect, there are several language proposals to follow encouraging a stronger Article on legal liability. While Article 6(1), provides a clearer provision on legal liability than the zero Draft, there are still some ambiguities that must be addressed, including the reference to comprehensive and adequate system of liability.

Current text – Art 6(1): State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

**Proposed text for amendment:** State Parties shall ensure that their domestic law, **in accordance with this Treaty and international law**, provides for a comprehensive and adequate system of **criminal, civil, and administrative** legal liability of **both natural and legal persons** for **committing or contributing to** human rights violations or abuses and environmental harm in the context of business activities **and business relationships**, including those of transnational character **at home or host State**.

In order to ensure direct liability of companies in the implementation of the Treaty, there must be a provision outlining this liability. The following proposed provision attempts to illustrate how to incorporate such language through Article 6 (3) bis.

**Proposed text to add as Article 6 (3) bis:** **Corporations are liable for human rights abuses that cause harm to third parties when the former controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of**

human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

Any reparations provided to victims must be comprehensive as such we propose the following amendment to Art 6(4).

Current text - Art 6(4): States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.

**Proposed text for amendment:** States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and comprehensive reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.

To be more coherent throughout the text of the Treaty and in consistency with amendments suggesting that the reference to contractual relationship be replaced with business relationships, we propose the following amendment to Article 6 (6).

Current text – Art 6(6): States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

**Proposed amendment to Article 6(6) in relation to company liability:** “States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a **business** relationship, from causing harm to third parties or the environment when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights ~~violations or~~ abuses in the conduct of business activities **or as a consequence of their business relations**, including those of transnational character, regardless of where the activity takes place”.

**Proposed text for amendment:** or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

In Article 6(7), the language can be made stronger by ensuring that access to justice cannot be hampered by any stakeholder involved when facing either criminal, civil, or administrative liability. In addition, the inclusion of a reference to domestic law twice in this provision weakens the Article as a whole making it redundant. To that effect, we propose the following amendments.

Current text – Article 6 (7): Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences...

**Proposed text for amendment:** State Parties shall ensure that their domestic legislation provides for criminal, civil, **and** administrative liability or its equivalent of legal persons for the following criminal offences...

The reference to specific criminal offenses in Article 6.7 could be interpreted narrowly, to indicate that other offenses do not require a comprehensive system of liability, such as the violation of economic, social, and cultural rights. In addition, the specific list of offenses could be interpreted to suggest that no other offenses should be met with criminal liability under domestic law. Therefore, it is important that the Treaty clarifies the necessity of imposing liability for a broader range of human rights violations and that states should continue, jointly and individually, to develop criminal liability beyond the specific offenses that are listed. As such, we propose the following amendment to Article 6(9).

Current text - Article 6(9): State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offence in accordance with Article 6 (7) and criminal offences as defined by their domestic law.

**Proposed text for amendment (to be added to 6.9):** State Parties shall **also** provide measures under domestic law to establish **administrative and civil legal liability for acts that are not considered criminal offenses. State Parties shall also develop their criminal liability to include acts that go beyond traditional criminal offenses to include serious violations of a broader range of human rights, including economic, social, and cultural rights.**

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 and can be reintroduced as it was Drafted last year in Article 6 (9) bis.

**Proposed text to reinclude as Article 6 (10) 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 7 – Adjudicative Jurisdiction**

The revised Draft Treaty does not adequately address States' extraterritorial obligations (ETOs). It even backtracked on language in the zero Draft that mentions the obligation to provide remedies and to comply with due diligence duties in both home and host states of offending companies. A failure to ensure States' ETOs would undermine the purpose of this Treaty and mandate to look at the actions of TNCs. First, States must take necessary measures to ensure that TNCs which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State – this is covered by Article 5(1) on prevention. Second, States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their ETOs,

extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible and effective remedy in the TNC's home State.

There is little clarity on some Adjudicative Jurisdiction issues that are very important to guarantee an effective remedy. There is no clarity whether the options given by article 7.1 is for the claimants, the defendants or whoever, and the revised Draft does not foresee a *forum necessitatis* clause, nor regulates the *forum non conveniens* exception. The Sofia Guiding Principles on best practices on human rights civil litigation approved in the 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012 has some useful proposals.

**Current text art. 7 (1):** Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

**Proposed text for amendment:** Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in abuses or violations of human rights covered under this (Legally Binding Instrument), shall, **upon the claimant choice**, vest in the courts of the State where:...

This Article must also further detail how it will address the issue of *forum non conveniens* (power to dismiss a case where another forum may more conveniently hear the case) as well as the corporate veil doctrine – both are legal tools frequently used to avoid liability and other forms of responsibility of “parent companies” and shareholders of transnational enterprises involved in human rights violations. The Treaty should further provide for specific provisions, encouraging *forum necessitatis*, especially for cases relating to corporate abuse in conflict-affected settings and situations of occupation where access to remedy and justice are often deliberately hindered and denied. If no court is able to found able to hear a case where corporate violations or abuse is ongoing, a court of any member State to the Treaty should be able to hear the case even if it does not fulfil the criteria set with regards to jurisdiction. To address these issues, the following text is a suggested addition to Article 7.

**Proposed text to add as Article 7 (3) bis:** *Where victims find that in complex cases, no court is able to adjudicate where violations or abuses by corporate entities may have occurred, forum necessitatis may be applied; in contrast and knowing that in regular cases more than one case will be able to adjudicate cases, the doctrine of forum non conveniens will not be allowed to be instituted.*

**Proposed text to add as article 7 (4)bis:** *In order to avert a denial of justice when no other court is available or the claimant cannot reasonably be expected to have access to justice or access to remedy, the courts of any State with a connection to the dispute shall have jurisdiction. This connection may consist in the presence of the claimant in a State Party's territory; the claimant or defendant's nationality; the existence of assets of the defendant under a State Party's jurisdiction; the defendant's activity in a State party or any analogous circumstance.*

**Proposed text to add as article 7 (5)bis:** *A court shall not decline its jurisdiction to hear a case on the basis that there is another Court that also has jurisdiction, in accordance with the adjudicative jurisdiction criteria contained in article 7 (1) .*

## Article 8 – Statute of Limitations

The language in this Article is vague. When looking at serious crimes, there should be a clear reference to international criminal law as it is much more widely defined.

Current text – Art 8 (1): The State Parties to the present (Legally Binding Instrument) undertake to adopt, in accordance with their domestic law, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole.

**Proposed text for amendment:** The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international criminal law **encompassing violations of** international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole.

With the definition of human rights violations and abuses in Article 1 of the revised Draft, the text of a final negotiated Treaty must reflect the protection of victims against both violations and abuse. This must be streamlined throughout the text.

Art. 8 (2): “Domestic statutes of limitations for human rights violations or abuses that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation or abuse, particularly in cases where they occurred in another state”

## Article 9 – Applicable Law

The language in Article 9 is not clear and in some parts contradicts international law. The way it is currently drafted risks taking us back to square one where in cases of weak domestic court systems, remedy will not be attained, and no other option is clearly prescribed in the Article to ensure alternative means of remedy. This is directly connected to the concept of ETOs that must be addressed throughout the text of the Treaty. In this Article, the Treaty must again point to the primacy of human rights and address international principles pertaining to the applicability of the law. To this effect, this Article should emphasize that its implementation is to be carried out without any discrimination of any kind or on any ground, without exception.

With the definition of human rights violations and abuses in Article 1 of the revised Draft, the text of a final negotiated Treaty must reflect the protection of victims against both violations and abuse. This must be streamlined throughout the text.

Current text - Art. 9(2)(a): “The acts or omissions that result in violations of human rights covered under this LBI...”

**Proposed amended text Art. 9 (2) (a):** “The acts or omissions that result in violations or abuses of human rights covered under this LBI...”

Current text - Art. 9 (2)(c) “The natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this LBI is domiciled”.

**Proposed amended text Art. 9(2)(c):** “The natural or legal person alleged to have committed the acts or omissions that result in violations or abuses of human rights covered under this LBI is domiciled”.

**Proposed text to add as Article 9 (4) bis:** All matters of substance or procedure regarding claims before competent courts must adhere to the implementation of the fundamental principle of non-discrimination of any kind or on any ground, without exception.

This Article must also emphasize the overarching primacy of human rights over all international agreements, including those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security obligations. This is particularly important as there are growing and systemic trends of undue corporate influence or corporate capture of government institutions and decisions, which often orient policies, legislation and even security forces towards the narrow interests of corporate actors instead of respecting, protecting and fulfilling human rights obligations, embodied in international treaties and often domestic law. 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 Treaty 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 Treaty shall include a provision to ensure that commercial, trade, and investment treaties do not impose limits on their ability to protect human rights or require that disputes over human rights be decided through binding international arbitration.

**Proposed text to add as Article 9 (5) bis:** In all agreements with other States relating to business activities, States shall affirm the primacy of human rights and their obligations under this agreement. States shall review existing agreements to ensure consistency with human rights and humanitarian law and this agreement, and revise these agreements to achieve consistency, if necessary. States shall ensure that all disputes involving human rights and business activities are adjudicated by entities with competence in international human rights and humanitarian law.

## **Article 10. Mutual legal assistance**

With the definition of human rights violations and abuses in Article 1 of the revised Draft, the text of a final negotiated Treaty must reflect the protection of victims against both violations and abuse. This must be streamlined throughout the text.

Current text - Art. 10(6): “State Parties shall provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations and abuses covered under this LBI.”

Proposed text for amendment to Art. 10(6) “State Parties shall provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations and abuses covered under this LBI.

#### Article 12. Consistency with International Law

To ensure the utmost protection and promotion of human rights, States should have an obligation to conduct human rights impact assessments before signing any new international agreements in order to prevent the undermining of States obligations and victims’ rights.

proposed text to add as article 12 (7)bis: **Before signing any new international agreements, States parties shall conduct human rights impact assessment, carried out by independent and multistakeholder bodies, to prevent the undermining of the States obligations and victims’ rights under this (LBI). Once this (LBI) enters into force, States shall implement a human rights impact assessment over the currently in-force agreements, carried by independent and multistakeholder bodies. If the assessment finds that these agreements undermine States obligations or victims’ rights under this (LBI), those agreements should be reviewed.**

#### Article 13 – Institutional Arrangements

In building a strong Committee that will be able to see the implementation of this Treaty, States must consider that experts are needed to ensure proper assessment and analysis of cases brought forth to the Committee. To this effect, it would be in continuation of streamlining of gender and an attempt to make the Treaty more coherent to include a reference to gender expertise in Article 13 (1)(a).

Current text – Art 13 (1)(a): The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts. 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 and recognized competence in the field of human rights, public international law or other relevant fields.

**Proposed text for amendment:** The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts. 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.

Ends