

#FEMINISTS4BINDINGTREATY

POSITION PAPER ON THE REVISED DRAFT DATED 16.07.2019 OF THE LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

9 October 2019

INTRODUCTION

The #Feminists4bindingtreaty is a global coalition of over 25 organisations, comprising a large and diverse collective network, working together since 2016 to integrate a gender perspective into the legally binding instrument on the activities of transnational corporations and other business enterprises (the "**Instrument**") and to ensure that a gender approach and women's voices, rights, experiences and visions are meaningfully included and prioritised throughout the negotiation process.

As recognised by affected communities, civil society organisations, academics, UN committees and experts, women experience adverse impacts of business activities differently and disproportionately, and may also face additional barriers in seeking access to effective remedies. From Maquila women workers in México to women displaced by dam projects in North of Sudan and oil mining in Uganda, women around the globe are affected differently and often disproportionately by business activities due to intersecting and multiple forms of discrimination.

However, as the Working Group on the issues of human rights, transnational corporations and other business enterprises (the "**WG BHR**") noted starkly this year, "neither States nor business enterprises have paid adequate attention to gender equality in discharging their respective obligations and responsibilities under the Guiding Principles." The WG BHR set out a three-step gender framework guidance to states and business regarding the integration of a gender perspective in the implementation of the UN Guiding Principles on Business and Human Rights (the "**UNGPs**"), which consists of gender-responsive assessment, gender-transformative measures and gender-transformative remedies. The Instrument should reflect the guidance explicitly.

We welcome the fact that in the 4th session of the Open-Ended Intergovernmental Working Group many States reaffirmed the importance of inclusion of a gender dimension in the process. Now is the time to take a bolder position and to move beyond a tokenistic approach to gender issues. The strength of a feminist analysis of the Draft Instrument is in the highlight and promotion of lived experiences and perspectives, with an emphasis on women and gender issues as well as on marginalised voices generally, and in the associated identification of systemic and structural issues that perpetuate lack of accountability in relation to business-related human rights abuses and violations.

In line with this approach, we suggest strengthening the draft text to address the following issues:

- Preamble: full recognition of the context and rationale for the Instrument and recognition of the need for a gender-responsive and inclusive approach in addressing business-related human rights abuses and violations
- Clearer and wider definitions of the scope of business activities and of business relationships to be covered by human rights due diligence
- Prevention: a strengthened, gender-responsive regulation of business activities and a more proactive role for the State in prevention
- Strengthened obligations of the State in relation to State-related business activities, including but not limited to State-owned enterprises
- Clearer and stronger provisions on the prevention of business-related human rights abuses in armed conflict-affected areas, including situations of occupation
- Access to justice: ensuring gender-transformative remedies
- Stronger provisions on the protection of human rights defenders

Each issue is accompanied by specific suggestions for amendments to the draft text of the Instrument which are in the **Annex** to this document.

The undersigned organisations,

ActionAid International

Anima Mundi Law Initiative

AWID (Association for Women's Rights in Development)

CaL (Coalition of African Lesbians)

CAWEE (Center for Accelerated Women's Empowerment)

CELS (Centro de Estudios Legales y Sociales, Argentina)

DAWN (Development Alternatives with Women for a New era)
Federation of Women Lawyers (FIDA Kenya)
FIAN International
FIDH
Franciscans International
Gender and Development Network
NAPE (National Association of Professional Environmentalists)
NAWAD (National Association for Women's Action in Development)
PODER (Project on Organizing, Development, Education, and Research)
SIHA Network - Strategic Initiative for Women in the Horn of Africa
Womankind Worldwide
WILPF - Women's International League for Peace and Freedom

1. PREAMBLE

The preamble should: recall the Declaration on Human Rights Defenders; connect the role of human rights defenders with a corresponding State duty to ensure enabling environments; elucidate the context for the elaboration of the Instrument, including the reality of continuing business-related human rights violations and abuses and the need for the inclusion of diverse perspectives in the development of a robust regulatory framework.

The Preamble should recall as part of relevant declarations, the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, commonly referred to as the Declaration on Human Rights Defenders.¹ It should also connect the role of human rights defenders with a corresponding State duty to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role.²

In line with other major human rights treaties, the Preamble should also set out in a more balanced way the context and necessity for the development of the Instrument, noting the global concern for the continuing business-related human rights violations and abuses, and human rights implications of business-related environmental damage. Similarly, the Preamble should recognise the need for an inclusive, integrated and gender-responsive approach to ensure robust regulation in practice.

¹ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx>

² Such duty is derived from the State's primary obligation to protect all human rights, which includes guaranteeing the right of everyone, individually and in association with others, to promote and strive for the protection and realization of human rights and fundamental freedoms at the national and international level, see Human rights defenders, A/66/203, 28 July 2011, paras. 54-56, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/66/203

→ See our suggested amendments to preambular paragraphs 4, 9, 15 and 16 in the Annex.

2. KEY DEFINITIONS

Article 1: The definition of “business activities” in article 1.3 and of “contractual relationships” in article 1.4 must be clarified and expanded to be aligned with current understandings of these terms and of the scope of human rights due diligence under the UNGPs.

2.1 Contractual relationships

The use of the term “contractual relationships” is too restrictive to define the parameters of effective human rights due diligence. The term “business relationships” would more accurately characterize the scope of human rights due diligence responsibilities as elaborated by Treaty Bodies, Special Procedures, and the UNGPs.³

Human rights due diligence should be required not only for the company’s own activities but also the activities of other entities “directly linked to its operations, product or services by its business relationships,”⁴ other entities over which it has influence (including subsidiaries), and the company’s business partners (including suppliers).⁵ Human rights due diligence applies to activities beyond the first tier in the supply chain.⁶

³ For instance, the Special Rapporteur on Contemporary Forms of Slavery recommended that: “All businesses’ human rights policies and procedures and the systems to implement them should integrate measures reaching beyond the first tier in supply chains and include clear guidelines and indicators to assist those operating at the lower tiers and in the informal economy to identify human rights violations, including contemporary forms of slavery, and ensure compliance with international human rights standards”, para. 69 c), A/HRC/30/35, 8 July 2015, available at: <https://undocs.org/A/HRC/30/35>

⁴ Guiding Principles on Business and Human Rights, see Principle 17 a), available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf

⁵ The Committee on Economic, Social and Cultural Rights in its General Comment No. 24 on business activities define the scope of human rights due diligence includes “entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party’s laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors)”; General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 33, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQclMOuuG4TpS9jwlhCjCxiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSubw6ujInCawQrJx3hIK8Odk6DUwG3Y>

⁶ See e.g. A/HRC/30/35, para. 69 (c) (“All businesses’ human rights policies and procedures and the systems to implement them should integrate measures reaching beyond the first tier in supply chains and include clear guidelines and indicators to assist those operating at the lower tiers and in the informal economy to identify human rights violations, including contemporary forms of slavery, and ensure compliance with international human rights standards.”)

Although the definition of “contractual relationships” is broad, the general understanding of the term “contract” and the reference to “*any other structure or contractual relationship as provided under the domestic law of the State*” could unnecessarily restrict the scope of relationships - and associated liability - to those which are recognized as contracts under domestic law, omitting a broader range of business relationships and limiting human rights due diligence responsibilities to the first tier of the supply chain. The broader definition of business relations is flexible and as such capable of covering future developments in the forms and structures of business activities, such as online-related activities.

2.2 Business activities

The deletion of the reference to “profit” making activities from the definition of business activities is welcome as it created uncertainty as to the coverage of certain activities such as State-owned enterprises from the scope. To clarify the scope further, in line with the approach set out in the UNGP Reporting Framework and its implementation guidance, activities covered should be related to everything that is linked to the company’s products and services including for instance, government relations/lobbying and engagement with stakeholders.⁷

→ See our suggested amendments to article 1.3 and 1.4 in the Annex. The change to the definition of “contractual relationship” to “business relationships” must also be updated in article 5, 6, 7, and 14.

3. PREVENTION

Article 5 on Prevention should be strengthened through explicit reference to gender-sensitive assessment and the inclusion of additional State Parties measures to create an enabling environment for prevention.

3.1 Gender-sensitive assessment

The adverse human rights and environmental impacts of corporate activities are not gender neutral; they may cause gender-specific harms and discrimination or exacerbate pre-existing gender roles and structures within a community. Research demonstrates that applying a specific human rights lens to due diligence practices results in a significant increase in the identification and attention to relevant human rights issues, by business enterprises and as

⁷ See definition of business activities, available at: <https://www.ungpreporting.org/resources/glossary/>

connected with their business relationships.⁸ Similarly, as noted by affected communities, civil society organisations, academics, UN committees and experts, and others over many years, a specific gender lens is required to address the continuing inequality and human rights violations and abuses faced by women in the context of business activities. For example:

- The WG BHR set out clear guidance, adopted by the Human Rights Council in June 2019, for the integration of a gender perspective in implementing the Guiding Principles on Business and Human Rights, proposing a three-step gender framework comprising gender-responsive assessment, gender-transformative measures and gender-transformative remedies.⁹
- In 2017, the Committee on Economic, Social, and Cultural Rights (CESCR) underlined in its General Comment No. 24 both the disproportionate adverse impacts of business activities on women and the need to incorporate a gender perspective into all measures to regulate business activities that might adversely affect economic, social and cultural rights.
- In 2018, the OECD published its Due Diligence Guidance for Responsible Business Conduct, which explicitly provides practical guidance on how to integrate gender in due diligence, including by collecting and assessing sex-disaggregated data.¹⁰ Such collection, retention, processing and sharing must be in line with international human rights norms and standards, including privacy and data protection standards.
- In 2019, the UN Independent Expert on foreign debt and human rights affirmed that: “The validity and credibility of the data collected [in human rights impact assessments] need to be assessed in light of clearly articulated and transparent standards, which reflect the principles of non-discrimination, inclusion and participation. In order to ensure compliance with the human rights requirements of non-discrimination and that due attention is paid to the situation of groups at risk of marginalization or vulnerability, it is essential that indicators used provide information disaggregated by gender, disability, age group, region, ethnicity, income segment and any other grounds considered relevant, based on a contextual, country-level appreciation of groups at risk of marginalization.”¹¹

⁸ McCorquodale, R., Smit, L., Neely, S. & Brooks, R., “Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises” (2017), *Business and Human Rights Journal*, 2(2), 195-224.

⁹ Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23 May 2019, available at: <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>

¹⁰ OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, available at: <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

¹¹ Guiding Principles on human rights impact assessment of economic reforms, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, A/HRC/40/57, 19 December 2018, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/443/52/PDF/G1844352.pdf?OpenElementforms>

Gender-sensitive assessment must be conducted with the meaningful participation of women from all affected communities, as well as relevant women’s organisations and gender experts, and take into account, inter alia, impact of operations on gender roles and gender-based discrimination, women’s health including prenatal and maternal health, gender-based and sexual violence, gendered division of labor on family and community levels, and access to and control of social and economic resources. In such assessment, multiple and/or intersecting forms of discrimination should be addressed.

3.2 State measures to ensure an enabling environment for prevention

We welcome the recognition of mandatory human rights due diligence as a central component of the measures needed to prevent human rights violations and abuses in the context of business activities. The recognition of an obligation to exercise human rights due diligence per se implies that businesses which do not comply with this obligation shall be held accountable. It should nevertheless also be made clear that compliance with this obligation does not automatically shield businesses from liability for human rights abuses.

To support human rights due diligence practices, we recommend the inclusion of reference to necessary State measures to ensure an enabling environment, including:

- the promotion of the Instrument to human rights defenders and others;
- the meaningful engagement of all relevant stakeholders whose human rights have been affected by business activities in the development of legal and policy measures to implement the Instrument;
- measures to support the meaningful engagement of all relevant stakeholders across all stages of human rights due diligence, to provide parallel information and to conduct assessment directly;¹²
- to identify the sectors, occupations and work arrangements in which human rights violations and abuses are particularly prevalent;¹³
- to develop tools, guidance, education and training to support business enterprises in their human rights due diligence obligations;
- and to ensure knowledge and coherence across relevant State policies and institutions regarding business-related human rights issues.

¹² Inspired by recommendation 22.5 of the Guiding principles on human rights impact assessments of economic reforms, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/443/52/PDF/G1844352.pdf?OpenElement>

¹³ Inspired from article 8 b) of ILO Convention 190 on Violence and Harassment, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190

Further, we recommend that the Instrument align with the internationally agreed standards of free, prior and informed *consent* rather than consultation with regard to consultation of indigenous peoples.¹⁴

→ See our suggested amendments to article 5 Prevention in the Annex in this regard including amendments to article 5.3 and the addition of new sub-paragraphs with article 5.4 bis and 5.5 bis.

4. ARMED CONFLICT-AFFECTED AREAS, INCLUDING SITUATIONS OF OCCUPATION

The Instrument should identify the various situations in which stricter rules for prevention should apply. This includes armed conflict-affected areas including situations of occupation. In that regard, States as part of Prevention under article 5 should ensure that: businesses conduct enhanced human rights due diligence in armed conflict-affected areas; and that business activities must either not be undertaken, must be suspended or terminated in circumstances where it might not be possible to prevent or mitigate risks of violations or abuses of human rights and/or of violations of international humanitarian law. Indeed, in certain situations, the immitigability of adverse human rights impacts is such, that no due diligence exercise can ensure the effective respect of international human rights law and of international humanitarian law.¹⁵

¹⁴ In line with article 10 of the UN Declaration on the rights of Indigenous Peoples, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf; General Comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 12, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOUuG4TpS9jwIhCjCxiuZ1yrkMD%2FSj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujInCawQrJx3hIK8Odk6DUwG3Y>

¹⁵ See, in particular, the Report of the UN High Commissioner for Human Rights, Database of all enterprises involved in the activities detailed in paragraph 96 of the report of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem, A/HRC/37/39, 1 February 2018, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/021/93/PDF/G1802193.pdf?OpenElement>
Para. 40 “The scale, scope and immitigability of the human rights impacts caused by settlements must be taken into consideration as part of businesses’ enhanced due diligence exercises.”; Para. 41 “OHCHR notes that, considering the weight of the international legal consensus concerning the illegal nature of the settlements themselves, and the systemic and pervasive nature of the negative human rights impact caused by them, it is difficult to imagine a scenario in which a company could engage in listed activities in a way that is consistent with the Guiding Principles and international law. This view was reinforced in Human Rights Council resolution 34/31 on the Israeli settlements, in which the Council referred to the immitigable nature of the adverse impact of businesses’ activities on human rights.”

The Instrument should use a terminology that takes into consideration existing work and positions by UN mechanisms. In particular, the Instrument should use “armed conflict-affected areas, including situations of occupation”, instead of the “occupied or conflict-affected areas”.¹⁶

In armed conflict-affected areas, including situations of occupation, the risk of businesses becoming involved in gross violations or abuses of human rights and of violations of international humanitarian law is particularly severe.¹⁷ Research by civil society organisations shows that businesses are still contributing to human rights violations and conflict, notably because they still lack proper policies and effective home-State government regulation to address the risks of operating in armed conflict-affected and high-risk areas.¹⁸

There are existing soft-law and legislative frameworks relevant to business activities in conflict-affected areas, often focused on the extractive sector, but there are no internationally agreed and comprehensive legal standards despite increasing concerns over the risk of complicity of businesses in gross human rights violations and abuses and serious violations of international humanitarian law for instance in relation to the arms industry and to platforms and social media companies.¹⁹

¹⁶ See, for instance, the Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, Working Group on the issue of human rights and transnational corporations and other business enterprises, 6 June 2014, available at:

<https://www.ohchr.org/Documents/Issues/Business/OPTStatement6June2014.pdf>

“A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically.” (p.2), “While the Guiding Principles do not explicitly address the situations of occupation, an area under occupation falls within the term “conflict-affected area” in the Guiding Principles.” (p.3)

¹⁷ According to John Ruggie, former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, “*The most egregious business-related human rights abuses take place in conflict-affected areas and other situations of widespread violence. Human rights abuses may spark or intensify conflict, and conflict may in turn lead to further human rights abuses (...).*” See Business and human rights in conflict-affected regions: challenges and options towards State responses, A/HRC/17/32, 27 May 2011, available at:

<http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>;

OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris, available at: <http://dx.doi.org/10.1787/9789264252479-en>

¹⁸ Fragile! Handle with Care: Multinationals and Conflict, Lessons from SOMO’s Multinational Corporations in Conflict-Affected Areas programme, November 2016, p. 55, available at: <https://www.somo.nl/wp-content/uploads/2016/11/Report-Fragile.pdf>; European Center for Constitutional and Human Rights, see for examples: <https://www.ecchr.eu/en/case/lafarge-in-syria-accusations-of-complicity-in-grave-human-rights-violations/>; <https://www.ecchr.eu/en/case/european-responsibility-for-war-crimes-in-yemen/>; <https://www.ecchr.eu/en/case/involvement-of-mining-company-in-crimes-of-the-argentine-military-dictatorship/>

¹⁹ OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris, available at: <http://dx.doi.org/10.1787/9789264252479-en>; Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 10, available at:

https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf;

<https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>;

<https://www.amnesty.org/en/latest/news/2019/09/arms-companies-failing-to-address-human-rights-risks/>

The UNGPs partially address this specific concern under Guiding Principle 7, by requiring States to provide guidance, early warning indicators and assistance to businesses in the prevention of human rights-related risks in conflict-affected areas.²⁰ They also require States to “warn business enterprises of the heightened risk of being involved in gross abuses of human rights in conflict-affected areas” and to “review whether their policies, legislation, regulations, and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business”.²¹

The Instrument must require States to place an obligation for businesses to conduct enhanced human rights due diligence in such contexts.²² Existing examples of conflict-related enhanced due diligence obligations in high-risk sectors include:

- United States legislation regarding imports of conflict minerals;²³
- European Union Regulation 2017/821 on conflict minerals,²⁴ which explicitly recognises the link between the exploitation of natural resources and armed conflict, as well as the human rights violations that often derive from them.²⁵ Under this regulation, EU-based importers of minerals must exert specific due diligence which comprises conflict and high-risk sensitive strategies to ensure that their imports have not been produced in a way that funds conflict;
- European Union Regulation 995/2010 on timber, which recognises the detrimental social impacts of illegal logging, often linked to conflicts over land and resources, as well

²⁰ Guiding Principles for Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Guiding Principle 7, available at:

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

²¹ Ibid

²² Several guidance documents exist in relation to enhanced human rights due diligence in conflict and high risk areas, see: OECD (2016), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, OECD Publishing, Paris, available at: <http://dx.doi.org/10.1787/9789264252479-en>; https://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Essentials/swisspeace-Essential_5_2016.pdf; https://www.international-alert.org/sites/default/files/Economy_HumanRightsDueDiligence_EN_2016.pdf; The UN Working Group on Transnational Corporations, other business enterprises and human rights is also currently developing guidance in this regard, see: <https://www.ohchr.org/EN/Issues/Business/Pages/ConflictPostConflict.aspx>:

²³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Section 1502, available at: <https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf>

²⁴ REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>

²⁵ REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Preamble, paras. (1), (2), (3), (10), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>

as to the disempowerment of local and indigenous communities and armed conflicts,²⁶ and prescribes a due diligence obligation encompassing a conflict-sensitivity approach in risk assessment procedures, which should take into consideration the prevalence of armed conflict in the country of harvest and/or region where the timber was harvested.²⁷

In addition, where risks cannot be prevented or mitigated, business activities should not be undertaken, should be suspended or terminated depending on the level of risks.²⁸ States should also take an active role in prevention by cautioning business enterprises operating in their territory and/or jurisdiction against operating in armed conflict-affected and high-risk areas where it might not be possible to prevent or mitigate risks, as well as ensuring that adequate and effective liability regimes are in place to deter and sanction businesses which would still engage in activities in such areas. States should also create disincentives, including withdrawal of economic diplomacy and financial support, to deter business enterprises domiciled in their territory and/or jurisdiction from causing, contributing to, or being directly linked to human rights abuses and violations arising from their business activities or business relationships in occupied territories, armed conflict-affected and high-risk areas.²⁹

The draft treaty currently only mentions “conflict-affected and areas of occupation”. Several soft law and legally-binding instruments also refer to “high-risk areas” in relation to enhanced human rights due diligence by businesses, including OECD and UN Global Compact guidelines, as well as the EU conflict-minerals regulation. While there is no unified legal definition of “high-risk areas”, they seem to refer to situations of political instability and repression that may lead to violent conflict.³⁰ High-risk areas could also cover internal disturbances and tensions (which

²⁶ REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Preamble, para. (3), art. 6 (1) (b), available at: http://ec.europa.eu/environment/forests/timber_regulation.htm

²⁷ REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, Article 6 (1) (b), available at: http://ec.europa.eu/environment/forests/timber_regulation.htm

²⁸ Recommendations to this effect have been made by the Independent Fact-finding mission on Myanmar in its report “The economic interests of the Myanmar military”, see para.189 a) to e), A/HRC/42/CRP.3, 5 August 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

²⁹ Business and human rights in conflict-affected regions: challenges and options towards State responses, A/HRC/17/32, 27 May 2011, see paras. 17 and 18, available at: <http://www.ohchr.org/Documents/Issues/TransCorporations/A.HRC.17.32.pdf>

³⁰ The EU conflict minerals regulation provides the following definition:

“conflict-affected and high-risk areas’ means areas in a state of armed conflict or fragile post-conflict as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”, see REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Article 2 f), available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:130:FULL&from=EN>; The OECD Guidelines on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas provide the following definition:

would include riots, isolated and sporadic acts of violence), not reaching the threshold of an [non-international] armed conflict under international humanitarian law, as well as certain post-conflict situations where there has been a general close of military operations but there is still violence/ high risk of violence breaking out.

It is important to make clear that the legal framework governing such high-risk situations is different from that governing armed conflicts (mainly in that international humanitarian law is not applicable). However, it is our view that the Instrument should define “high-risk areas” and extend enhanced human rights due diligence to these situations in order to ensure more effective and comprehensive prevention of business-related human rights abuses.

→ See our suggested amendments in the Annex to article 5 Prevention, particularly to article 5.3 b) and the suggestion of a new article 5.4 bis g).

5. THE STATE’S OBLIGATIONS AS AN ECONOMIC ACTOR

The Instrument should clarify under article 5 Prevention 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,³¹ agribusiness,³² in the arms industry,³³ and in the infrastructure sector.³⁴ These

“Conflict-affected and high-risk areas – Areas identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.”, see OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Third Edition, see p. 66: <https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf>; Finally, the UN Global Compact Guidance on Responsible Business in Conflict-Affected and High-Risk Areas provides the following definition: *“Conflict-affected or high-risk areas are countries, areas, or regions: that are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely, in which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present, that are currently experiencing violent conflict, including civil wars, armed insurrections, inter-state wars and other types of organized violence, that are currently in transition from violent conflict to peace.”* Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors A joint UN Global Compact – PRI publication, United Nations Global Compact, 2010, p. 7, available at: https://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf

³¹ <https://www.globalwitness.org/en/press-releases/south-sudans-leadership-uses-state-owned-oil-company-nilepet-funnel-millions-brutal-security-services-and-ethnic-militias/>; Recommendations to this effect have been made by the Independent Fact-finding Mission on Myanmar in its report “The economic interests of the Myanmar military”, see paragraph 189 a) to e),

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).³⁵ State-owned enterprises are active in a wide range of sectors, including in energy, infrastructure, public utilities, finance and are increasingly operating globally.³⁶
- 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).³⁷

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.³⁸ 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”.³⁹

A/HRC/42/CRP.3, 5 August 2019, available at:

<https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/EconomicInterestsMyanmarMilitary.aspx>

³² See, e.g. <https://www.fian.org/en/struggle/the-business-of-land-in-matopiba-brazil>

³³ <https://www.amnesty.org/download/Documents/ACT3008932019ENGLISH.PDF>

³⁴ See, e.g., <https://www.ciel.org/project-update/panama-transmission-line-iv/>

³⁵ When enterprises are considered as quasi-State organs or agents, see Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, 4 May 2016, paras. 29-34

³⁶ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, 4 May 2016, para. 13

³⁷ Guiding Principles on Business and Human Rights, see Principles 4, 5, 6, 8, 9, 10, available at:

https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf; when they negotiate and enforce trade and investment agreements and through privatisation, see General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, E/C.12/GC/24, 10 August 2017, para. 13, 21, 22 29, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQcIMOUuG4TpS9jwihCjCxiuZ1yrkMD%2Fsj8YF%2BSXo4mYx7Y%2F3L3zvM2zSUBw6ujInCawQrJx3hK8Odk6DUwG3Y;>

³⁸ Guiding Principles on Business and Human Rights, see Principle 4, available at:

https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf; Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/32/45, 4 May 2016, paras. 22-34

³⁹ Committee on the Rights of the Child General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights, CRC/C/GC/16, 17 April 2013, para. 64, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en

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.⁴⁰

→ See our suggested amendments in the Annex to article 5 Prevention with the addition of two new subparagraphs, article 5.4 bis and 5.5 bis.

6. GENDER RESPONSIVE ACCESS TO JUSTICE AND GENDER-TRANSFORMATIVE REMEDIES

Article 4 Rights of Victims should require: gender-responsive access to justice, including the removal of gendered obstacles to justice, beyond financial barriers; gender-transformative remedies; and participatory remedial mechanisms.

Remedies must address the unequal gendered power relations that govern the context of corporate abuses, particularly as women and women human rights defenders often face gender-specific violence, stigma, reprisals and job insecurity for reporting business-related abuses. The multiple and/or intersecting forms of discrimination experienced by women from marginalized groups must also be acknowledged and addressed. All justice systems, both formal and quasi-judicial systems, should be secure, affordable and physically accessible to women, and adapted and appropriate to the needs of women including those who face multiple and/or intersecting forms of discrimination.

In line with CEDAW's General recommendation on women's access to justice, the gender guidance on the implementation of the UNGPs adopted by the Human Rights Council in June 2019 also recommends that: "States should take proactive and targeted measures to reduce additional barriers that may be faced by women in holding businesses accountable for human rights abuses, for example a low level of literacy, limited economic resources, gender stereotyping, discriminatory laws, patriarchal cultural norms and household responsibilities."⁴¹ Remedies should also be gender-transformative and include preventive, redressive and

⁴⁰ Guiding Principles on Business and Human Rights, see Principle 8, available at: https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf; The CEDAW Committee has for instance repeatedly made recommendations to States to ensure rigorous, transparent and gender-sensitive human rights impact assessments of arms transfers, in which State authorities play a central role in the authorisation processes of transfers. See: CEDAW/C/SWE/CO/8-9, paras. 27 (h) and 35; CEDAW/C/DEU/CO/7-8, para. 28; CEDAW/C/ITA/CO/7, para. 20; CEDAW/C/NLD/CO/6, para. 46 (a); CEDAW/C/CHE/CO/4-5, para. 17 (c) and CEDAW/C/FRA/CO/7-8, para. 23

⁴¹ Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23 May 2019, see Guiding Principle 26, available at: <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>

deterrent elements as well as seek to subvert instead of reinforce pre-existing patterns of structural discrimination.⁴²

Provisions on access to justice should also be aligned with the content of the rights as enshrined in international human rights law, including the rights to an effective remedy, to non-discrimination, to equality before the law and to a fair trial, as well as to relevant information concerning violations and reparation mechanisms.⁴³

→ See our suggested amendments in the Annex to Article 4.1, 4.2, 4.5, 4.12, 4.13 and 4.14.

7. PROTECTION OF HUMAN RIGHTS DEFENDERS

The Instrument should make explicit reference to the UN Declaration on human rights defenders in the preamble, acknowledge in a more balanced manner the risks faced by human rights defenders in relation to business-related human rights abuses and violations and articulate more clearly States' obligations regarding human rights defenders in Article 4 Rights of victims and Article 5 Prevention.

Human rights defenders working on business-related abuses and environmental issues are particularly at risk, as recognised by Human Rights Council Resolutions and by the Special Rapporteur on Human Rights Defenders.⁴⁴ Women human rights defenders are exposed to the same types of risks as all other defenders. However, as women, they experience these violations in gender-specific ways, and they are exposed to or targeted for additional gender-based and sexual violence and gender-specific risks. For example, criminalisation differently affects women who are primary caretakers in their families, or have less access to financial resources for legal aid.

⁴² Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23 May 2019, see Guiding Principle 40, available at: <https://www.ohchr.org/EN/Issues/Business/Pages/GenderLens.aspx>

⁴³ Article 8 Universal Declaration on Human Rights, International Covenant on Civil and Political Rights art. 2 (3); General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007; Principle 11, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International humanitarian Law, A/RES/60/147, 21 March 2006

⁴⁴ Situation of human rights defenders, A/71/281, 3 August 2016; HRC resolution A/HRC/40/L.22/Rev.1, Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development, preambular para.11 and HRC resolution A/HRC/31/32, Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights

We recommend that:

- As noted above, the preamble expressly mentions the UN Declaration on Human Rights Defenders so as to frame the interpretation of relevant provisions on human rights defenders in the text.
- Article 4(9) be incorporated into Article 4(3) to clarify the rights of human rights defenders with respect to access to justice.
- Article 4.15 which recognises that States should take measures to respect, protect and fulfil the rights of human rights defenders be moved to Article 5: Prevention. In addition the limitation in article 4.15 “to recognize, protect and promote all the rights recognised in this (Legally Binding Instrument)” should be deleted as the Instrument does not create new rights and all rights of human rights defenders under international human rights law should be respected, protected and fulfilled.

→ See our suggested amendments in the Annex to preambular paragraph 4, article 4.3 and 5.3.