

# FEMINISTS FOR A BINDING TREATY

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## KEY RECOMMENDATIONS ON THE THIRD REVISED DRAFT DATED 17 AUGUST 2021 OF THE LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES

5 October 2021

Feminists for a Binding Treaty (F4BT) is a coalition of over 30 human rights organizations, representing a large and diverse network of women's lived experiences, shared analysis and expertise from around the world. We have been working collectively since 2016 to advocate for a gender-responsive treaty that tackles structural barriers to corporate accountability and proposes measures to make constructive changes. This document:

- Recalls the key principles of our feminist analysis of business and human rights issues, as framework guidance to support States' continued gender analysis throughout the negotiation and subsequent implementation of the draft Legally Binding Instrument (Instrument), as well as in States' development of regional and national legislation; and
- Summarizes our key recommendations on the text. Specific text suggestions are provided in the Annex.

F4BT stands in solidarity with the Corporate Accountability Working Group of ESCR-Net, the Treaty Alliance, the Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity, and other like-minded groups and organizations demanding an end to corporate impunity. In the current times of crisis when corporate power, patriarchy and unequal gendered division of labor combine with the impacts of COVID-19, climate change, political instability, and a decreasing space for civil society, the call for a Legally Binding Instrument is now more urgent than ever.

### A. FEMINIST ANALYSIS OF BUSINESS AND HUMAN RIGHTS ISSUES - KEY PRINCIPLES

1. **Non-discrimination:** All women's rights, in all their diversity, must be respected in the context of business activities, without direct discrimination or indirect discrimination (e.g. where an apparently neutral law, policy or practice affects women adversely in a disproportionate way, because of biological difference and/or the ways in which women are situated or perceived in the world through socially and culturally constructed gender differences), on any ground prohibited under international human rights law. In the context of this Treaty on business enterprises, it is important to recognize that Indigenous women, women from other minorities, peasant, and rural women whose rights to land may be less formal or not recognized due to gender discrimination, are particularly impacted by

displacement related to large-scale development projects. Further, women are over-represented in the informal sector and in dangerous work with poor working conditions in which they can be subject to exploitation and abuse. This includes sexual abuse, particularly in extractive industry operations.<sup>1</sup>

2. **Substantive equality:** All women must be ensured substantive equality in the context of business activities. This requires a multifaceted approach which redresses disadvantage (based on historical and current social structures and power relations that influence women's enjoyment of human rights ); addresses stereotypes, stigma, prejudice, and violence (within business enterprises and in connection with business activities); transforms institutional structures and practices (which are often male-oriented and ignorant or dismissive of women's experiences); and facilitates inclusion and participation - in all formal and informal decision- making processes within business enterprises and concerning business activity regulation.

3. **Gender analysis:** Is key to help recognize, understand and make visible the gendered nature of abuses committed by businesses, including their specific and differential impact on women, men and people across the gender spectrum, as well as human rights abuses based on gender that specifically target lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) persons. It can help to identify differences in the enjoyment of all human rights and fundamental freedoms in all spheres of life. It also seeks to analyze power relations within the larger sociocultural, economic, political and environmental contexts to understand the root causes of discrimination and inequality.<sup>2</sup> Gender analysis in the context of business activities should be carried out through gender-responsive human rights due diligence and gender human rights impact assessments, meaningful consultations with affected women and independent gender experts, and the collection of gender disaggregated data. Any regulation of corporate activities with regard to human rights including the Treaty should also address the protection of women human rights defenders, the particular barriers that women face in accessing remedies and gender responsive reparations.

4. **Leadership and meaningful participation at all stages:** Women and other individuals and groups affected by business human rights abuses — recognizing their diverse experiences and intersectional identities — must be central to all stages of developing, implementing and monitoring the effective regulation of business activities, rather than being positioned retrospectively as passive victims of adverse business-related human rights impacts.

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<sup>1</sup> See Human Rights Council, 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, Forty-first session, 24 June–12 July 2019.

<sup>2</sup> U.N. Office of the High Commissioner, Integrating A Gender Perspective Into Human Rights Investigations Guidance And Practice (2018).

5. **Intersectionality:** Women are not a homogenous group and can experience multiple forms of discrimination (including based on race, caste, class, age, health status, social status, sexual orientation and gender identity, health status, etc.), which combine, overlap, or intersect especially in the experiences of individuals or groups in situations of marginalization.

6. **Diversity of perspectives:** Beyond an emphasis on the experiences of women specifically, feminist analysis of corporate abuse seeks to highlight and promote the multiplicity of lived experiences, particularly the perspectives of those individuals and communities facing the most significant and widespread business-related human rights abuses. Taking a feminist analysis means putting the experience and expertise of affected individuals and groups at the center of the effective regulation of business activities. It also means analyzing and tackling structural barriers to accountability of businesses.

7. **Human activities in alignment with human rights and ecological boundaries:** Situations of discrimination or marginalization experienced by individuals and communities around the world are not inevitable or due to inherent characteristics, but rather due to social, economic, political, geographical and other circumstances. The laws, policies and practices put in place by States, and the specific and cumulative actions taken by non-State actors including business enterprises can cause or aggravate such discrimination and marginalization. Adverse impacts of current systems, including in the context of business activities, have been exacerbated by the COVID19 pandemic, escalating climate and ecological crises and decades of deregulation and neoliberal economic policies, which have undermined labor rights and social safety nets. Our feminist analysis supports a vision of socio-economic justice for all and concrete steps towards the long-delayed regulation of business activities in line with human rights and the protection of the environment.

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## **B. SUMMARY OF KEY RECOMMENDATIONS**

We request that States review and incorporate each of the specific text amendments set out in the Annex, and we highlight the following key recommendations to support this process:

### **1. Maintain and build on progress so far:**

We warmly welcome the many comments made by States, civil society organizations and national human rights institutions on the importance of ensuring a gender perspective in the instrument and we welcome provisions to that effect, including in relation to access to justice and human rights due diligence, and in the explicit mention of the Gender Guidance for the Guiding Principles on Business and Human Rights [PP14].

We also appreciate the reference to the right to a safe, clean, healthy, and sustainable environment in the definition of human rights abuse [Art. 1.2].

We also support the broad definition of business activities and relationships, which occur throughout the supply chain and now includes financial institutions and investment funds [Arts. 1.3]. We also welcome the clarification in the definition of business relationships that they include and include state and non-state entities [Arts. 1.3] and [Art. 1.5]

We strongly support the reference to corporate obligations, rather than responsibilities, and encourage the Parties to further define and give force to these obligations throughout the Instrument. [PP11, Art. 2.1(b)]. We also welcome the reference to effective mechanisms of monitoring and enforceability, which are essential to State implementation of obligations under the treaty [Art. 2.1(c)].

We strongly welcome the reference to “gender-sensitive access to justice” and to the concept of individual or collective reparation and remedy [Art. 4.2 (c)]. We also welcome references to age-responsive support services for victims [Art. 4.2 (e)] and reparations [Art. 8.4]

We welcome the provision identifying forum non conveniens as a legal obstacle that needs to be removed [Art. 7.3(d)].

We additionally appreciate the clarification that jurisdiction may vest in the courts of the State where a victim is domiciled [Art. 9(1)].

## **2. Clarify the context, application and scope of the Instrument:**

- **Context:** We welcome the explicit preambular acknowledging the distinctive and disproportionate impact of business-related human rights abuses on women and girls and the need to integrate a gender perspective and the reference to the UN Declaration on Human Rights Defenders and to the legitimate role of human rights defenders in promoting the respect of human rights by business enterprises. We recommend that States consider preambular amendments that:
  - (1) Remove the connection between capacity to foster achievement of sustainable development with economic growth (in line with the recognized neutrality of the UN towards the means of State realization of human rights and the increasing recognition of the implications of emphasizing economic growth on a finite planet). [PP10].
  - (2) Explicitly acknowledge the current context, concern and urgency regarding the continued business-related human rights abuses around the world (in line with other core international human rights treaties which record explicit concern about

prevalent issues and the contextual basis for the relevant treaty) [*NEW PP12 BIS*; PP13].

(3) Emphasize the need for a gender-responsive approach [PP 14].

- **State obligations and State-related business activities:** While recognizing that the definition of human rights abuse is now broader and not limited only to business conduct, we suggest reintroducing the notion of human rights violation in the text as it would provide clarity with regard to the accountability of States when implementing their obligations under the treaty. This notion would also make clear that the instrument applies to violations committed by the State or its agents in the context of business activities [see *NEW PP12 BIS*, PP13, PP18, Art. 1(1), Art. 2(1), Art. 4(1), Art. 4(2)(g), Art. 5(3), Art. 6(2), Art. 6(4)(g), Art. 7(3)(d) & (e); Art. 7(6), Art. 8(1), Art. 8(4), Art. 8(6), Art. 13(c), Art. 13(d), Art. 14(3), Art. 16(4)]. We also recommend an additional clarification regarding preventive measures in this context [Art. 6(5bis)].
- **Scope:** We recommend a non-exhaustive definition of ‘internationally recognized human rights’ that recognizes all relevant sources of these obligations and is not conditional upon ratification by States. We also believe that using “universal human rights” is preferable to “internationally recognized human rights”, which would pose issues of legal certainty about what “all internationally recognized human rights” mean in specific cases. [Art. 3(3)]. This would notably be in line with the UNGPs, which made clear that business’ responsibility to respect exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations. In addition to customary international law, Article 3(3) also should underscore States’ obligations under international humanitarian law in situations of armed conflict and under international criminal law.

### 3. Further ensure the effectiveness of the Instrument for women, and for affected communities around the world

- **Preamble:** We recommend clarifying the prohibition on discrimination on “grounds that are prohibited by international human rights law” rather than solely on “race, sex, language or religion” and including guidance towards substantive equality in practice [PP8]. We also recommend explicit reference to the right to self-determination [PP19].
- **Definitions:** Female human rights defenders face gender-specific risks, which exploit existing inequalities and perceptions about their role in society. Additionally, victims would be better protected by including in the definition of victims those in imminent risk of irreparable harm [Art. 1.1].
- **Protection of Victims (Article 5):** We recommend that measures to guarantee a safe and enabling environment for human rights defenders be “gender-responsive.” We also recommend including specific examples of adequate and effective measures. [Art. 5(2)].
- **Prevention (Article 6):** We recommend adding references to “leadership” as well as to the

meaningful engagement of women and the collection of disaggregated data with regard to the obligation to integrate a gender perspective in human rights due diligence [Art. 6(4)(b)]; and strengthened language on participation in the development of national measures, and regarding necessary State measures to support an enabling environment for the development of national measures, including to facilitate direct engagement by affected communities in human rights due diligence [Art. 6(5)].

- **Access to Remedy (Articles 4 and 7):** We appreciate the addition of gender-specific access to remedies in Article 4.2. While we welcome that Article 7.1 recognizes the specific obstacles encountered by women and others in accessing remedy, we suggest using less victimizing language to clarify that individuals are not inherently vulnerable or marginalized, but rather in situations of discrimination and inequality which result in them being marginalized. We also recommend reference to gender-responsive legal assistance to victims throughout the legal process [Art. 7(3)]; and emphasis on those facing heightened barriers in accessing remedy [Art.7(4)].
- **Statute of Limitations (Article 10):** We recommend adding that domestic statute of limitations applicable to civil claims or to violations that do not constitute the most serious crimes of concern to the international community as a whole shall allow a reasonable and gender-responsive period of time for the investigation and commencement of prosecution or other legal proceedings. This should also apply where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological state (to support, in particular, justice for victims of sexual and gender-based violence, as well as children and persons with disability) [Art. 10(2)].
- **Institutional Arrangements (Article 15):** We recommend that Committee members be required to have gender expertise [Art. 15(1)(a)].
- **Implementation (Article 16):** We recommend that the language be strengthened to emphasize participation, gender-transformative engagement and different forms of impact or discrimination [Art. 16(4)].

#### 4. Set very clear expectations regarding business activities in contexts of heightened risk, including conflict

- **Terminology:** Being located in a conflict-affected area will impact rights holders' access to remedies, and the type of remedies which will practically be available. For example, judicial mechanisms for seeking recourse may have broken down due to the instability of the political system. Victims may be forced to relocate to a different jurisdiction to ensure their safety, meaning that they are prevented from participating in the judicial system of their home country. The difficulties are compounded for women and girls, since sexual violence may be used as a tool of warfare, and patriarchal structures already impede women and girl's ability to seek recourse. We recommend adding to situations of conflict and of occupation, a reference to "operating contexts which pose risks of severe human rights impacts", which is language used in the UNGPs. This is because while conflict is

the most obvious trigger for enhanced due diligence, other contexts can put a State under such a level of stress that it becomes more prone to serious human rights abuses [New PP12 BIS, Art. 6(4)(g), Art. 16(3)].

- **Expectations on business enterprise conduct in high-risk contexts:** There is a need to avoid operating in high-risk areas where local consent cannot be obtained, and where potential human rights abuses or violations of IHL cannot be mitigated. We recommend that enhanced and ongoing human rights due diligence should apply, in addition to conflict-affected areas, including situations of occupation, to other operating contexts that pose risks of severe human rights impacts. Such due diligence should include conflict-sensitivity analysis, continuous monitoring including in regards to the broader political and judicial system, and suspension or termination of operations if necessary, to prevent serious human rights abuses and violations of international humanitarian law [new PP12 BIS and Art. 6(4)(g)].
- **Reference to international humanitarian law:** The text should clarify in the preamble and throughout the text where relevant, that international humanitarian law is integrated in the scope of the legally binding instrument and should recall the existing obligations of States and businesses under international humanitarian law [Art. 3.3, Art. 6(4)(g) Art. 16(3)].

## 5. Strengthen other specific provisions:

- **Prevention (Article 6):** We recommend: the term “impacts” instead of “abuses” with respect to the identification and communication stages of human rights due diligence, in line with current practice and the UNGPs [PP11, new PP12 BIS, Art. 6(4)(g), Art. 6(8), Art. 16(3)]; and more robust protection against undue corporate influence of government decision-making in the context of business activities generally [Art. 6(7)]. Article 6.7 should also clarify that severing business ties is an appropriate remedy.
- **Injunctive relief (Article 6):** The current Article 6 on prevention does not provide for injunctive relief, which is an essential judicial tool to prevent human rights violations before they happen. We recommend adding language to clearly provide for injunctions. [Art. 6.7, Art. 7.3(b)].
- **Access to information (Article 7):** We recommend clarification of the right to access information, to ensure that courts facilitate “discovery” processes where victims can obtain evidence—particularly women and girls who may have difficulty accessing the evidence needed for their cases [Art. 7.2].
- **Burden of Proof (Article 7):** We applaud the Third Draft’s effort to place the burden of proof on those alleged to have violated human rights, as many victims, particularly disempowered women and girls, are not in a position to amass the level of evidence that many courts would require to fulfill a burden of proof against a violator. We recommend additional language to more clearly provide for shifting the burden of proof to the party in the best position to provide evidence [Art. 7.5].
- **Legal liability (Article 8):** We strongly recommend that reference to the decision of

courts on liability of businesses after an examination of compliance with applicable human rights due diligence standards be deleted, or at the very least be qualified to clarify that this is one factor among others to consider when determining liability for human rights abuses in the context of business activities [Art. 8(7)]. We also recommend that business enterprises be held responsible for failing to conduct due diligence and for undue influence (corporate capture) on governments. Further, there is a need to clarify the administrative remedies available [Art. 8(3)].

- **Criminal liability (Article 8):** We recommend reintroducing the list of violations recognized as crimes under international law and for which international law requires the imposition of criminal sanctions and we suggest they should trigger corporate criminal liability. We recommend adding to this list attacks on human rights and environmental defenders and long-term damage to the environment which endangers peace or prevents the population from enjoying a healthy environment. [Art. 8(8)].
- **Applicable law (Article 11):** We recommend clarifying that applicable law may also be the law of the State where a victim is domiciled [Art. 11(2)(c)].
- **Mutual Legal Assistance and International Judicial Cooperation (Articles 4, 12):** We recommend clarifying that refusal of assistance and cooperation on the basis of a State's *ordre public* may only occur as interpreted in accordance with international human rights law and customary international law [Art. 12(11)(c)]. We also ask that you include reference to diplomatic and consular assistance [Art. 4(2)(g)].
- **Costs:** The high costs of seeking a remedy remain a huge barrier to achieving justice. We support the use of collective reparation to economize access to justice by groups whose rights have been violated [Art. 4.2(c)], along with additional provisions to reduce economic barriers to justice [Art. 7.4].