

Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises

Statement on the draft elements proposed by the OEIGWG Chair

20 October 2017

The undersigned organisations welcome and sincerely appreciate efforts by the Chair-Rapporteur on the Draft Elements in seeking to address the most significant governance and accountability gaps with regards to corporate-related human rights abuses and his commitment to ensure the adoption of a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (the “treaty”). The Draft Elements could be strengthened through a more meaningful integration of a gender perspective.

In early August 2017, several of our organisations, responding to the Chair-Rapporteur’s open invitation for input, sent a written contribution (in annex) to the Mission of Ecuador. The contribution highlights three key areas of recommendations that can help ensure a meaningful inclusion of a gender perspective in the Draft Elements of the legally binding instrument.¹ It follows on recommendations on the importance of integrating a gender perspective into the treaty made by civil society and experts, including in the first and second sessions of the OEIGWG.² The CESCR’s recent General Comment No 24, as well as the recent report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (a.k.a. Working Group on Business and Human Rights) to the General Assembly, also provide strong rationales to support the inclusion of a gender analysis in any effort to regulate business-related impacts on human rights.³

A gender perspective is not about treating women as a “vulnerable group”; it should not be a separate “tick the box” exercise; and is not only about women and girls. Integrating a gender approach into the treaty means analysing how businesses may have different, disproportionate, or unanticipated impacts on women or men, as a result of their different gender-based social, legal, cultural roles and rights. This approach is thus essential to the very purpose of the prospective treaty if it is to put the concerns of rights holders at the center and to effectively ensure the prevention, protection and remediation of business-related harms **for all**.



1) Mandatory gender impact assessments of the impacts on human rights of business operations; gender sensitive justice and remedy mechanisms; and ensuring respect, protection and an enabling environment for women human rights defenders.

2) Human Rights Council, 31st Session, *Report of the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* (“IGWG 1st Sess. Report”), A/HRC/31/50 (5 February 2016), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/018/22/PDF/G1601822.pdf?OpenElement>, paragraph 64; Human Rights Council, 34th Session, *Report of the second session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights* (“IGWG 2nd Sess. Report”), A/HRC/34/47 (4 January 2017), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/000/94/PDF/G1700094.pdf?OpenElement>.

3) UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, paragraph 8, 23 June 2017, E/C.12/GC/24, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en; Human rights and transnational corporations and other business enterprises, Note by the Secretary-General, A/72/162, paragraphs 28-30, available at: <https://daccess-ods.un.org/TMP/3995596.17042542.html>

With this in mind, we recommend that States participating in the upcoming session of the OEIGWG take duly into account the following aspects when discussing the Draft Elements.

These are based on our more detailed contribution in annex to this statement:

Section (3.1) on obligations of States: States Parties shall conduct human rights-based gender impacts assessments and shall take all necessary and appropriate measures to ensure that TNC and OBEs have the obligation to undertake human rights-based gender impact assessments that cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations. Such assessments shall be conducted by an independent entity chosen by, or agreed upon, the community and the women from whom information will be gathered, in a process of Free, Prior and Informed Consent (FPIC). States shall ensure non-discrimination by TNCs and OBEs in their jurisdiction and shall not discriminate based on gender in their activities related to TNCs and OBEs. States shall take all necessary measures to ensure the full and active participation of women, represented at least in equal proportions to men, in any relevant consultation, including in the design and definition of the scope of impact assessments, decision-making and remedial processes.

Section (4.) on preventive measures should clearly set forth that the proposed vigilance plan consisting of due diligence procedures, including human rights risk assessments, should be completed by a human rights-based gender impact assessment. Such gender impact assessments shall be conducted by an independent entity chosen by, or agreed upon, the community and the women from whom information will be gathered, in a process of Free, Prior and Informed Consent (FPIC). Impact assessments shall be conducted with the meaningful participation of women from affected communities, including in the

design and definition of the scope of impact assessments, and should be made public and accessible.

Section (6.) on access to justice should be revised to put rights holders at the center of the remedy mechanisms; in particular, remedies should be responsive to the diverse experiences and expectations of women. Women should be consulted meaningfully in creating, designing, reforming and operating remedial mechanisms. Instead of being framed as vulnerable groups, there should be a clear recognition of the heightened risk of discrimination against certain groups, including women, and of the additional barriers they face in accessing remedies. States should take positive measures to ensure effective access to remedies, without discrimination, to women.

Section (6.) on access to justice should also clarify that to ensure effective access to remedies, rights holders should incur no harm or fear of harm. Stronger and clearer language on the protection of rights holders adversely affected by business activities or those challenging corporate abuses, including human rights defenders and whistleblowers, should hence be added in the Draft Elements. Such measures should take into account the gender-specific risks entailed by specific groups of human rights defenders, such as women human rights defenders.

Including a gender perspective in the prospective treaty will address an essential dimension of human rights violations and help to ensure that States to effectively discharge their obligations to respect, protect and fulfill women's and girls' human rights.

List of Signatories

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- (AWID) ASSOCIATION FOR WOMEN'S RIGHTS IN DEVELOPMENT
- (CELS) CENTRO DE ESTUDIOS LEGALES Y SOCIALES
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GENERO
- (CIEL) CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
CONECTAS DIREITOS HUMANOS
- (FIAN) FOOD FIRST INFORMATION AND ACTION NETWORK
- (FIDH) INTERNATIONAL FEDERATION FOR HUMAN RIGHTS
- (FOEE) FRIENDS OF THE EARTH EUROPE
- (FOEI) FRIENDS OF THE EARTH INTERNATIONAL
- (ISHR) INTERNATIONAL SERVICE FOR HUMAN RIGHTS
- (IWRAW
AP) INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH ASIA
PACIFIC
- (PODER) PROJECT ON ORGANIZING, DEVELOPMENT, EDUCATION, AND
RESEARCH
- (WILPF) WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND
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ANNEX

Key suggestions for inclusion in the Draft Elements of the international legally binding instrument on transnational corporations and other business enterprises

By: Asia Pacific Forum on Women, Law and Development (APWLD), Association for Women’s Rights in Development (AWID), Center for International Environmental Law, FIAN International, International Women’s Rights Action Watch Asia Pacific (IWRAW AP), Project on Organizing, Development, Education, and Research (PODER), and Women’s International League for Peace and Freedom (WILPF)

Submitted to the Permanent Mission of the Republic of Ecuador to the United Nations Office and other international organizations in Geneva

Contents:

1) Mandatory Gender Impact Assessment	2
2) Gender - sensitive Justice and Remedy Mechanism	5
3) Ensuring Respect, Protection and an Enabling Environment for Women Human Rights Defenders	8

1) Mandatory Gender Impact Assessments

Recommended wording:

The treaty should mandate Gender Impact Assessments of planned and existing operations.

Gender Impact Assessments should be conducted by an independent entity chosen by, or agreed upon, the community and the women from whom information will be gathered, in a process of Free, Prior and Informed Consent (FPIC).

Gender Impact Assessments should be conducted with the meaningful participation of women from all affected communities, 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 labour on family and community levels, and access to and control of social and economic resources. In this assessment, multiple and/or intersecting forms of discrimination should be addressed. Gender Impact Assessments should be made public and accessible to all affected communities.

Human Rights Impact Assessments and Environmental Impact Assessments should also include a gender analysis and account for the differentiated impact on women and girls.¹

¹) All references to “women” in this document include women and girls.

The treaty should also mandate the development and implementation of a Gender Risk Awareness Strategy by transnational corporations and other business enterprises to ensure that ongoing decision-making and other activities incorporate a gender perspective to prevent abuses and violations of women’s human rights.

Rationale:

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. The disproportionate adverse impacts of business activities on women has been underlined by the Committee on Economic, Social, and Cultural Rights (the “CESCR”) in its recently issued General Comment No. 24.¹ Such negative impacts manifest in fewer employment opportunities, social restrictions impeding economic independence, and the disproportionate representation of women in the informal and vulnerable employment. For example, women and girls face gender-based violence connected to mining and other extractive industries and are often disproportionately impacted by the detrimental socio-economic and environmental changes caused by their construction and operation². Migration of hundreds or thousands of men in and out of construction sites completely changes the lives of women and girls.

Applying a gender perspective means to seek to prevent and address negative impacts on women and girls, and by extension on the entire community, and to identify appropriate responses. Gender perspective should take into account the intersection of gender with other identities and forms of discriminations (such as ethnicity or socio-economic status).

1) UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, Paragraph 8, 23 June 2017, E/C.12/GC/24, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en

2) As documented, for example, in the Report to the UN Committee on the Elimination of Discrimination Against Women, submitted by EarthRights International, Human Rights Research and Education Centre of the University of Ottawa, and MiningWatch Canada. https://miningwatch.ca/sites/default/files/eri_hrc_mwc_cedaw_committee_report_october_3_2016.pdf

Recognising the greater risk of intersectional and multiple forms of discrimination incurred by women and girls as a result of business activities, the CESCR recommended that: “States Parties address the specific impacts of business activities on women and girls, including indigenous women and girls, and incorporate a gender perspective into all measures to regulate business activities that may adversely affect economic, social and cultural rights, including by consulting the Guidance on National Actions Plans on Business and Human Rights.”³

The treaty should hence require the undertaking of Gender Impact Assessments of planned or existing business operations, which should start with an analysis of the social, cultural and economic context in which the activities are to be undertaken so as to understand the political economy. This should then inform the assessment of how activities will either cause harm, reinforce the status quo or how they can be used as a vehicle for positive change. For example, a focus on those at the end of their supply chains to assess gender violence in communities, access to, among others, land, tools, documentation, differences in wages, barriers to access markets for women. It would also mean requiring companies to ensure that any consultation process, done as part of the due diligence requirement, is carried out with sensitivity to women’s needs, for example, by having women interviewers, who are familiar with the cultural dynamics within local communities and speak their languages.

3) UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, Paragraph 9, 23 June 2017, E/C.12/GC/24, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en

2) Gender-sensitive Justice and Remedy Mechanisms

Recommended wording:

States shall review their substantive, procedural, and practical barriers to women's access to justice and remedies in relation to activities by transnational corporations and other business enterprises, including extra-territorial activities. This review should include meaningful participation of women from all affected communities, in the process of shaping, implementing, monitoring and evaluating remedies and reparations programs, including to determine which remedies are acceptable and pursuable in practice. Reparations should strive to have a transformative potential on existing inequalities, rather than reinstate or reinforce the structural conditions within society that inform violence and discrimination against women.¹

States shall take into account the specific needs of women in remote and rural communities, such as obstacles to access judicial mechanisms due to, inter alia, poverty, geographical distance, lack of infrastructure, gender stereotypes, and legal and/or social exclusion of women from access to, and control over, resources.

States shall fully comply with their obligation to ensure the provision for legal aid at all stages of civil, administrative and criminal legal procedures so to ensure that justice systems are physically, economically and socially accessible to women.²

1) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 23 April 2010 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.22.pdf>

2) International Covenant on Civil and Political Rights, Article 14, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

Rationale:

All victims of human rights violations and abuses have a right to an effective remedy and reparation. This right lies at the very core of international human rights law. It is based on the legal obligations of states to respect and protect human rights against violations by the state and its agents, and from abuses by non-state actors.

Remedies need to take into account the unequal gendered power relations that govern the context of corporate abuses, particularly as women 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 should also be taken into account.

All justice systems, both formal and quasi-judicial systems, should be secure, affordable and physically accessible to women, and are adapted and appropriate to the needs of women including those who face multiple and/or intersecting forms of discrimination.

All components of the system should adhere to international standards of competence, efficiency, independence and impartiality and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. They should also be contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive, and take account of the increasing demands for justice by women.

Restitution, a key aspect of reparation, is intended to restore the victim to the original situation that they were in before the violation took place. But if this involves restoring a situation that entrenches discrimination and disadvantage, a more transformative approach is required. As Rashida Manjoo, the United Nations Special Rapporteur on violence against women, has stated: "Reparations for women cannot be just about returning them to the situation in which they were found before

the individual instance of violence, but instead should strive to have a transformative potential. This implies that reparations should aspire, to the extent possible, to subvert instead of reinforce pre-existing patterns of cross-cutting structural subordination, gender hierarchies, systemic marginalization and structural inequalities".¹

In order to develop effective remedies, States need to:

- review the high cost of utilising formal remedies and judicial processes;
- ensure accessibility of remedies in remote areas of the countries, such as rural areas;
- ensure that the burden of proof is not disproportionately shouldered by claimants seeking a remedy;
- establish courts and other quasi-judicial or other bodies across the state in urban, rural and remote areas, and ensure their adequate maintenance and funding.

The treaty must also remove obstacles to women's access to justice and effective remedies, including by clearly defining the extraterritorial dimension of states' obligations to ensure remedy for abuses and violations committed by businesses that occur outside their territories. Such a clarification would be consistent with the jurisprudence of the Committee on the Elimination of Discrimination Against Women ("CEDAW") establishing that under the Convention: "The obligations of States parties requiring them to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination and to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, also extend to acts of national corporations operating extraterritorially."²

1) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/14/22, 23 April 2010, op. cit.

2) UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paragraph 36, 19 October 2010, CEDAW/C/2010/47/GC.2, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>. See also UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 34 on the rights of rural women, paragraph 13, 4 March 2016, CEDAW/C/GC/34, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf and UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, paragraphs 20 and 24 b), 14 July 2017, CEDAW/C/GC/35, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf

3) Ensuring Respect, Protection and an Enabling Environment for Women Human Rights Defenders

Recommended wording:

States shall ensure respect, protection and enabling of the work of human rights defenders and whistle-blowers, with specific and enhanced protection mechanisms for women human rights defenders to make the environment in which they operate a safer, more enabling and supporting one.³

States must publicly recognize the important role of human rights defenders in the promotion and protection of human rights and fundamental freedoms. States must recognize women human rights defenders in all their diversity, and address harmful attitudes, practices, and gender stereotypes that fuel violence against women in general, and against women human rights defenders in particular.

States must refrain from bringing criminal charges against human rights defenders speaking out about corporate-related human rights abuses and violations and participating in legitimate protests or demonstrations to defend and promote human rights.

States should adopt prompt, effective and impartial measures to provide remedy to human rights defenders who have suffered an attack or are at risk of attack, and provide compensation to human rights defenders who have been victims of abuses, including gender-specific violence, due to their work.

States must refrain from initiating, pursuing, encouraging or in any other ways permitting defamation campaigns against human rights defenders, including defamation and stigmatization of women human

3) Promotion of 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: protecting women human rights defenders, A/RES/68/181, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/450/31/PDF/N1345031.pdf>

rights defenders. State officials are under the responsibility not to engage in such campaigns. States must take all possible measures to publicly condemn and stop such defamation campaigns, and ensure an environment for defending human rights without fear of reprisal or intimidation.

States should fully, promptly and independently investigate attacks and intimidation of human rights defenders, including women human rights defenders, and ensure access to justice and remedies in cases of intimidation, defamation, or attacks.

Rationale:

Meaningful consultation with those affected by corporate projects depends on a safe environment where people can speak their mind without fearing reprisals. The right to defend rights is fundamental, and the individual and collective work of human rights defenders is indispensable for human societies and the rule of law. Because human rights defenders often challenge powerful economic and political interests, they face grave violations, from defamation to criminalization, torture and killings.

Women human rights defenders acting to address business related human rights violations, particularly in armed conflict and post-conflict situations, face heightened risks of death, intimidation, harassment, exclusion, defamation and stigmatization in addition to threats and acts of rape and sexual harassment at the hands of state security and private security forces.

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 lesser access to financial resour-

ces for legal aid. Stigmatization and smearing campaigns against women human rights defenders will exploit degrading and misogynist stereotypes of women's sexuality or question her role as a mother to delegitimize her in the community. Women human rights defenders are subject to additional violence because by acting in the public sphere, women challenge gender norms and stereotypes. The gendered nature of crimes against women human rights defenders further deepens gender inequality and the exclusion of women from public life.

These attacks are perpetrated by corporate, state and non-state actors, including public and private security forces. Much of the violence against women, and particularly against women human rights defenders, takes place on a daily basis, and many times it is invisible and treated with absolute impunity.

Violations against women human rights defenders aim to deter them and every other member in their community from defending human rights. Respecting, protecting and enabling the work of women human rights defenders is a necessary condition to the realization of human rights and the rule of law.