

**#FEMINISTS4BINDINGTREATY**  
**KEY RECOMMENDATIONS**  
**ON THE SECOND REVISED DRAFT DATED 6 AUGUST 2020 OF**  
**THE LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW,**  
**THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES**

**19 October 2020**

Feminists for a Binding Treaty (**F4BT**) is a coalition of over 25 human rights organisations, 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
- Summarises our key recommendations on the text. Specific text suggestions are provided in the Annex. A longer version of our analysis, including rationale and references for recommendations on the text, will be made available closer to the sixth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.<sup>1</sup>

F4BT stands in solidarity with the [Corporate Accountability Working Group of ESCR-Net](#), the [Treaty Alliance](#), the [Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity](#) and other like-minded groups and organisations demanding an end to corporate impunity. In the current times of crisis when corporate power, patriarchy and unequal gendered division of labor are exacerbated, the call for a Legally Binding Instrument is not only necessary, it is urgent.

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<sup>1</sup> <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx>

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

1. **Non-discrimination:** All women, in all their diversity, must be ensured the enjoyment and full realisation of their human rights 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.
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.<sup>2</sup>
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 analyse power relations within the larger sociocultural, economic, political and environmental contexts to understand the root causes of discrimination and inequality.<sup>3</sup>
4. **Leadership and meaningful participation at all stages:** Women and other individuals and groups affected by business human rights abuses — recognising 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>2</sup> Building on the growing international level consensus for a four-dimensional framework for substantive equality, as outlined in Sandra Fredman and Beth Goldblatt, [Gender Equality and Human Rights](#) (2015) UN Women Discussion Paper No. 4.

<sup>3</sup> [https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective\\_EN.pdf](https://www.ohchr.org/Documents/Publications/IntegratingGenderPerspective_EN.pdf)

5. **Intersectionality:** Women are not a homogenous group and can experience multiple forms of discrimination (including based on race, class, social status, sexual orientation and gender identity, health status, etc.), which combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.<sup>4</sup>
6. **Diversity of perspectives:** Beyond an emphasis on the experiences of women specifically, feminist analysis 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 identification of key barriers that perpetuate lack of accountability and of the effective regulation of business activities.
7. **Human activities in alignment with human rights and ecological boundaries:** Situations of discrimination or marginalisation 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 marginalisation. 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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<sup>4</sup> 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, 16 December 2010, para. 18, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement>.

## 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 fact that during the 5<sup>th</sup> session of the Open-Ended Intergovernmental Working Group (2019), many States reaffirmed the importance of including a gender dimension in the process, and that the Instrument explicitly: references the need to integrate a gender perspective in all State and business enterprise measures, in line with relevant international standards; calls for gender-responsive rights of victims; requires the integration of a gender perspective in human rights due diligence measures; requires gender-responsive reparations for victims; and calls for States to give special attention to those facing heightened risks of human rights abuses within the context of business activities, including in conflict-affected areas.
- We ask that all States support and ensure that these provisions be kept in the text, and work constructively and collectively to build on these developments further.

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

- **Context:** We welcome the explicit preambular: acknowledgement of the distinctive and disproportionate impact of business-related human rights abuses on women and girls, among others; 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) 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).
  - (2) amend the paragraph on business enterprises to more strongly emphasise that all business activities must be in accordance with human rights and environmental standards, and removing the connection between capacity to foster achievement of sustainable development with economic growth (in line with the recognised neutrality of the UN towards the means of State realisation of human rights and

the increasing recognition of the implications of emphasising economic growth on a finite planet).

- **State obligations and State-related business activities:** We suggest reintroducing the notion of human rights violation in the text as it is essential 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 PP15, PP20, Art.1(1), Art.2, Art.4(1), Art. 4(2)g., Art.5(3), Art. 7(3)d., Art.7(7), Art. 8, Art. 11(2), Art. 12(10), Art.13(2), Art.14(3), Art. 16(4)]. We also recommend an additional clarification regarding preventive measures in this context [see Article 6(5bis)].
- **Scope:** We recommend a non-exhaustive definition of ‘internationally recognised human rights’ that recognises 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 recognised human rights.” [see Article 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.

### 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’; adding reference to the ‘meaningful engagement in all stages of decision-making processes about the effective regulation of business activities’; and including guidance towards substantive equality in practice [see Preamble].
- **Protection of Victims (Article 5):** We recommend: that measures to guarantee a safe and enabling environment for human rights defenders be ‘gender-responsive’ [see Article 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 [see Article 6(3)(b)]; the need to conduct meaningful consultations ‘at all stages of human rights due diligence processes’ [see Article 6(3)(c)]; 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 [see Article 6(5)].

- **Access to Remedy (Article 7):** We recommend: reference to gender-responsive legal assistance to victims throughout the legal process [see Article 7(3)]; and emphasis on those facing heightened barriers in accessing remedy [see Article 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) [see Article 10(2)].
- **Institutional Arrangements (Article 15):** We recommend that Committee members be required to have gender expertise [see Article 15(1)(a)].
- **Implementation (Article 16):** We recommend that the language be strengthened to emphasise participation, gender-transformative engagement and different forms of impact or discrimination [see Article 16(4)].
- **Existing UN guidance:** We recommend that States recall and integrate the three-step gender framework to facilitate gender-responsive assessment, gender-transformative measures and gender-transformative remedies in the context of business activities, as recommended by the UN Working Group on the issues of human rights, transnational corporations and other business enterprises (also known as Working Group on Business and Human Rights.)<sup>5</sup>

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

- **Terminology:** 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 [see new Preambular paragraph 15, and Article 6(3) (g) and article 16(3)].
- **Expectations on business enterprise conduct in high-risk contexts:** We recommend that enhanced human rights due diligence should apply, in addition to conflict-affected areas and situations of occupation, to other operating contexts that pose risks of severe human

<sup>5</sup> UN Working Group on the issue of human rights and transnational corporations and other business enterprises, [Gender dimensions of the Guiding Principles on Business and Human Rights](#) (23 May 2019), UN Doc A/HRC/41/43.

rights impacts. Such due diligence should include conflict-sensitivity analysis, continuous monitoring, and suspension or termination of operations if necessary, to prevent serious human rights abuses and violations of international humanitarian law [**new Preambular paragraph 15 and Article 6(3)(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 [**see Article 6(3)g Article 8(9), 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 [**see Article 6(3)(b)**]; and more robust protection against undue corporate influence of government decision-making in the context of business activities generally [**see Article 6(7)**].
- **Legal liability (Article 8):**
  - (1) 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 [**see Article 8(8)**];
  - (2) We recommend reintroducing the list of violations recognised 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. [**see Article 8(9)**].
- **Adjudicative Jurisdiction (Article 9):** We recommend adding a clarification that jurisdiction may vest in the courts of the State where a victim is domiciled [**see Article 9(1)**].
- **Applicable law (Article 11):** We recommend clarifying that applicable law may also be the law of the State where a victim is domiciled [**see Article 11(2)c**].
- **Mutual Legal Assistance and International Judicial Cooperation (Article 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 [**see Article 12(9)(c)**].