



Comments by Organizations of the NGO Mining Working Group at the UN
to the
**The Intergovernmental Working Group on Transnational
Corporations and Other Business Enterprises with Respect to Human
Rights**
regarding
The Elements for the Draft Legally Binding Treaty

28 February 2018

A. About the NGO Mining Working Group

The NGO Mining Working Group (MWG) is a coalition of NGOs that, in partnership with our members and affected local communities, advocates at and through the United Nations for human and environmental rights as related to extractive industries. The MWG addresses unjust and unsustainable extractive practices and policies through the lens of the rights of local communities and indigenous peoples and Earth's carrying capacity. The MWG promotes a human and ecological rights framework as the foundation for sustainable and just natural-resource management, through: just and transparent international policies; national laws and practices that meet the highest international standards and obligations; and interventions to address violations. In this context the Group also advocates for the use of economic benefits of resource extraction for the holistic and long-term social, economic, and sustainable development needs of local communities.

B. Overview

The NGO Mining Working Group welcomes the opportunity to submit this input on the elements of the Draft Legally Binding Treaty and reiterates comments and acts in solidarity with NGO's that have contributed to the formulation of the Zero Draft. The NGO Mining Working Group affirms that this Draft Treaty has the potential to achieve a breakthrough in relation to human rights violations committed by corporations. In line with the NGO Mining Working Groups' mandate, we welcome international cooperation that insists that human rights are at the forefront of any corporate activity.

C. Contextualizing our Input

The NGO Mining Working Group would like to give input regarding accountability and responsibility for promotion and protection of human rights, address Article 8 "Rights of Victims" and Article 9 "Prevention" within the Draft Treaty; as well as mechanisms for promotion, implementation, and monitoring.

1. Accountability and responsibility for promotion and protection of human rights

When violations against people and the earth occur as a result of corporate activities, who is accountable; is it the State? Or corporations? Evidence suggests that international corporations hold significant monetary and political power, and yet often commit violations with impunity. According to recent statistics, 25 corporations of the world, have a greater revenue than 170 states combined.¹ With such powerful financial leverage, transnational corporations have a legal

¹ Sandoval, Greg; "25 Companies that are bigger than entire countries" *Business Insider*. July 25, 2018 <https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7>. Another related article from 2016 was published on the World Economic Forum website: <https://www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/>

and ethical obligation to be transparent and act with integrity. Why then, are corporations not held accountable for human rights violations?

The 2011 UN Guiding Principles on Business and Human Rights provided a clear mechanism forward for corporate accountability but are extremely limited as a sole tool for accountability; the experiences of our members and partners on the ground in over 100 countries indicate that human rights continue to be violated despite corporations being signatories to the Guiding Principles. This is particularly apparent where extractive industries have exploited local communities through land grabbing, intimidation, and gendered violence, demonstrating how corporate self-regulation has failed to look beyond profit.

We want to ensure that loopholes present in the Guiding Principles that enable corporations to act with impunity are addressed. We believe that both the Guiding Principles and the Legally Binding Treaty to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises should be complementary. We argue for Harris Gleckman's approach which calls for 'the establishment of clear and effective standards, rules and procedures to counterbalance those which have disproportionate power today'.²

The Guiding Principles state "The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions".³ We however, argue that they should be intersectional. Legal liability is addressed in Article 10 of the Draft Treaty, but must address liability and obligations of corporations. In addition, corporations with human and environmental rights abuses must be suspended or delisted from the UN Global Compact.

The time is now for Member States to step up and incorporate clear provisions and obligations that regulate corporate human rights due diligence policies, including those with supply chains, subsidiaries and private investors, into their domestic laws, as well as ensure legal liability of corporations.

2. Article 8 "Rights of Victims"

The Draft Treaty's focus on the rights of victims and access to justice and remedy is key. Many of these forums are lacking in current State legislation, especially for victims of business-related human rights abuses.

The NGO Mining Working Group affirms aspects of the UN Guiding Principles on Business and Human Rights which are complementary and see the opportunities within the third pillar, particularly with the "synergies and cross fertilization with the OHCHR project on Access to Remedy". The UN Guiding Principles on Business and Human Rights also stress "that the state has a duty to protect against human rights abuses by third parties including businesses and that

² Gleckman, Harris "Counterbalancing Disproportionate Power: A Response to John Ruggie" November 2018. <https://www.opendemocracy.net/harris-gleckman/counterbalancing-disproportionate-power-response-to-john-ruggie>

³ Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie "Guiding Principles on business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" March 2011. Pg 14 https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

there is a corporate responsibility to respect human rights and the need for more effective access to remedies”⁴.

We welcome the inclusion of Article 8.4 on access to information relevant to the pursuit of remedies. This includes information on corporate structures and activities which can substantiate claims of victims and be crucial to determine the role of corporations in human rights abuses.

In regards to the rights of victims, we promote the establishment of forums where those most affected, in particular women, can testify, safely and privately, in regards to injustices (Article 8.11 and 8.12). We also highlight the need to strengthen the gender dimension to ensure its intersectionality throughout the text.

We affirm the efforts of human and environmental rights defenders who give evidence and detail the challenges to effective judicial remedy and barriers to grievance mechanisms. We hold to account States’ responsibility for listening to and protecting the human rights of all peoples.

3. Article 9 “Prevention”

The Draft Treaty includes important ways for States Parties to strengthen preventative mechanisms of human rights abuses from “business activities of transnational character...taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities” (Article 9.1) into their domestic legislation.

We call for the integration of preventative mechanisms, as outlined in the four step due diligence approach of the UN Guiding Principles on Business and Human Rights within the legally binding treaty. Article 9.2 within the Draft Treaty strengthens this text by giving it a legally binding nature within national legislation, and goes deeper to include the activities of business subsidiaries.

Human rights violations on account of corporate activities is a complex multi-faceted issue often resulting in inequality, gendered violence, social and economic marginalization. In particular, this systematic oppression is exacerbated in the lives of women and those living in rural and indigenous communities. “Groups and communities that have a particularly close tie to the land and its ecosystems...suffer the destruction or tampering of biodiversity in a particularly negative way. Given these close ties and interdependence between the Earth and their culture, fracking and its negative consequences can affect the internationally protected cultural rights of members of these groups as well”⁵.

We affirm that comprehensive and inclusive community consultations prior any corporate activity must be undertaken. This is to ensure that any concerns of the community can be raised.

⁴ Aine, O’Connor, Mercy International Association, *A Guide to Rights Based Advocacy: International Human Rights Law and Fracking*, June 2015, pg. 52. <https://waubrafoundation.org.au/wp-content/uploads/2016/04/A-Guide-to-Rights-Based-Advocacy-International-Human-Rights-Law-and-Fracking-1.pdf>

⁵ Aine, O’Connor, Mercy International Association, *A Guide to Rights Based Advocacy: International Human Rights Law and Fracking*, June 2015, pg. 46. <https://waubrafoundation.org.au/wp-content/uploads/2016/04/A-Guide-to-Rights-Based-Advocacy-International-Human-Rights-Law-and-Fracking-1.pdf>

We recommend that regulations mandate, not only “pre and post environmental and human rights impact assessments” (Article 9.2e), but assessments that are ongoing and regular be established with all corporations. Impact assessments must include the social, environmental, and economic factors affecting individuals and communities.

a. Protection of human rights defenders

The focus on individuals that are affected by corporate human rights abuses within Article 8, must include human and environmental rights defenders and a State’s obligation to protect them. This inclusion in the text would close gaps existing in the Guiding Principles. States must address the particular threats and attacks against this group of defenders, in particular the specific risks faced by women human rights defenders, to combat impunity for attacks against them, and ensure full civil society participation in development and the management of natural resources. States must also address a company’s obligation to respect, consult and protect defenders. References with specific measures should be incorporated within Article 9 as well.

In regards to the protection of human rights defenders, the Escazú Agreement could be used as a reference for best practice. The Escazú Agreement obliges states to protect the people and groups that defend the environment. It details “rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development”.⁶

4. Mechanisms for promotion, implementation and monitoring

In line with Article 15.1, strong international enforcement mechanisms, as well as implementation and monitoring is crucial to the success of the Draft Treaty.

We call for the implementation of an effective and transparent review mechanism that holds corporations accountable. This should be closely monitored by an independent body that encompasses international, regional and national entities. International cooperation and action is necessary to address gaps and strengthen national judicial systems.

D. Moving Forward

“Given the manifold violations around the world, a legally binding international treaty on business and human rights is desperately needed and can make an important contribution to the efforts for greater accountability of private actors. Until then, however, the international human

⁶ Report of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean. March 2018. Pg. 14
https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf

rights system does provide strong norms and mechanisms to spur States toward improved policies and practices vis-a-vis corporate action within their jurisdiction.”⁷

The NGO Mining Working Group reaffirms that this Draft Treaty has the potential to achieve a breakthrough in relation to human rights violations committed by corporations. We welcome international cooperation that insists that human rights are at the forefront of any corporate activity.

This issue cannot be addressed in silos, with a top down approach, solely involving the private sector or those working on trade and investment policy; partnerships and solutions must include a whole of society approach to ensure no one is left behind.

This treaty assists in bridging the United Nations Development Agenda and Human Rights Agenda. Therefore, the 2030 Agenda for Sustainable Development offers integrative approaches and targets to protect the rights of people and the earth. The implementation of the frameworks and principles within the 2030 Agenda into domestic law and corporate regulations are necessary to prevent abuses, particularly against women and girls, and protect affected communities.

It is our hope and understanding that our contributions will ensure the ratification of a strong legally binding treaty that places the rights of people and the earth before profit of corporations.

Contributing Organizations:

Congregation of Our Lady of Charity of the Good Shepherd
Edmund Rice International
Maryknoll Office of Global Concerns
Partnership for Global Justice
Pax Christi International
Religious of the Sacred Heart of Mary
Sisters of Charity Federation
Sisters of Mercy of the Americas

⁷ Aine, O’Connor, Mercy International Association, *A Guide to Rights Based Advocacy: International Human Rights Law and Fracking*, June 2015, pg. 64. <https://waubrafoundation.org.au/wp-content/uploads/2016/04/A-Guide-to-Rights-Based-Advocacy-International-Human-Rights-Law-and-Fracking-1.pdf>