

## Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

### Comments on Revised Draft of 16 July 2019

*By: Minority Rights Group International & Lex Justi*

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Minority Rights Group International (MRG), an international non-governmental organization working to secure the rights of minorities and indigenous peoples<sup>1</sup>, and Lex Justi, a law practice with a business and human rights specialty<sup>2</sup>, would like to submit comments on the Revised Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* dated 16 July 2019. This submission complements our 28 February 2019 [Comments on Zero Draft of 16 July 2018](#), with attached Case Studies.

We initially would like to express our appreciation to the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights for the Revised Draft. We find that the language in the Revised Draft has been refined, the structure clarified, and the content elaborated and rendered more consistent with the UN Guiding Principles on Business and Human Rights (UNGPs).

We would like to take this opportunity to provide comments and recommendations on the Revised Draft from the perspective of the protection of the rights of minority and indigenous peoples who are, or potentially may be, negatively impacted by businesses.

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<sup>1</sup> **Minority Rights Group International (MRG)** is an international non-governmental organisation that campaigns worldwide with around 130 partners in over 60 countries to ensure that disadvantaged minorities and indigenous peoples, often the poorest of the poor, can make their voices heard. MRG has over 40 years experience of working with non-dominant ethnic, religious and linguistic communities. We have consultative status with the United Nations Economic and Social Council (ECOSOC) and observer status with the African Commission for Human and Peoples' Rights. Website : <https://minorityrights.org>

<sup>2</sup> **Lex Justi** is a specialist law firm that provides legal consulting services to a range of clients, including international and nongovernmental organizations, law firms, and multi-national companies, including on business and human rights issues, in order to further the responsibility of businesses to respect human rights. Website : <http://www.lexjusti.com/cl/business-and-human-rights-services>

## I. Provisions on Particular Groups of Persons: preambular para. 14, Arts. 5.3.b and 14.4

We are disappointed that the Revised Draft has not included ‘national or ethnic, religious and linguistic minorities’ in the provisions that recognize the special attention required for groups of persons that face heightened risks of violations and disproportionate impacts on their human rights from businesses’ activities (14th preambular paragraph, and Articles 5.3.b and 14.4), as we suggested in our Comments on Zero Draft of 16 July 2018. This omission is starkly discordant with international human rights law and deviates from the approach of the UNGPs. While we do not intend to fully repeat the comments made on this point in our earlier Comments, we would like to briefly summarize and expand upon those Comments.

The foundational international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, provide for respect for the rights of persons without distinction or discrimination ‘of any kind’ as to, among other grounds, race, colour, language, religion, and national origin (see Articles 2.1 and 2.2, respectively). In addition to the protection against discrimination, ‘ethnic, religious or linguistic minorities’ ‘in community with the other members of their group,’ have the right ‘to enjoy their own culture, to profess and practice their own religion, or to use their own language’ (ICCPR, Article 27).

The UNGPs list ‘national or ethnic, religious and linguistic minorities’ as one of the groups of persons that require special attention. They even note that businesses may need to consider United Nations instruments that ‘have elaborated further on the[ir] rights’ (see UNGPs, GP 12, Commentary), which include the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination and the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Violations of the rights of minorities occur in all regions of the world but have not yet received appropriate attention within the business and human rights field. **Some selected examples that highlight significant violations of their rights and the need for minorities to be specifically mentioned as a particular group** in the draft treaty include:

- **African Americans in the United States** who face increased pollution related health problems, including cancer risk, due to siting of high polluting facilities close to or in predominantly African-American communities;
- **Afro-descendants in Latin America** who have suffered economic, social, cultural and environmental impacts as a result of extractive and development projects, the subject of an extensive 2015 report by the Inter-American Commission on Human Rights;
- **Ahwazi Arabs in Iran** who had their land confiscated to such an extent that it amounts to a policy of dispossession, and who also live in poverty and suffer ill health from industrial pollution from oil and gas industries;
- **Dalits, especially Dalit women, in South Asia** who are disproportionately affected by extremely poor and abusive working conditions in a range of industries, particularly garment manufacturing;

- **Karakalpaks in Uzbekistan** who have endured poor quality of drinking water and health problems, such as stunted growth, low fertility, cancer as a result of toxic chemicals used in the cotton fields; and
- **Tibetans** who have had their land seized for mining projects and rivers that they rely on as sources of drinking water diverted.

The disproportionate impact on minorities extends to their lack of access to remedies. In all of the above cases, affected communities have been caught in a decades-long struggle to gain substantive improvements to their situation and redress for the harm caused to them.

Indeed, for instance, **in its landmark 2007 *Saramaka v. Suriname* decision, the Inter-American Court of Human Rights held that the Saamaka people, descendants of self-liberated slaves, had such a close, long-standing and deep connection to their ancestral lands that their rights were analogous to that of indigenous peoples** under international law. Yet, despite the ground-breaking judgement, the community continues to struggle against an invasion by Chinese logging and other extractive companies. The parallel to indigenous peoples in *Saramaka* is particularly crucial in this context, as the draft treaty does include indigenous peoples in its list of enumerated groups at particular risk of harm by businesses.

Therefore, we remain concerned that the failure to explicitly mention minorities in the draft treaty is inconsistent with international human rights law and a significant step backwards for minority rights compared with the UNGPs.

Moreover, since in our view, the draft treaty not only reflects, but also, arguably, influences developments in the business and human rights area, the inclusion of minorities in the draft would send an important message both to States, which should be explicitly addressing minorities in their National Action Plans, and to businesses, which need to give particular attention to minorities. The consequence of the failure of States and businesses to accord special attention to minorities in connection with development, extractive, and other projects often results in further marginalization of such persons. For example, **failure by States and businesses to ensure meaningful consultation of minority communities and allow them to participate in decisions that concern them, a right specifically protected in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic Religious and Linguistic Minorities, can have severe impacts on their rights**, including their rights to land, their cultural and/or religious practices, as well as their livelihoods.

We welcome the new 14<sup>th</sup> preambular paragraph that acknowledges that certain groups of persons are at particular risk of being exposed to human rights infringements by businesses and note that it complements the more specific references to such groups in connection with due diligence (Article 5.3.b) and States' implementation of the treaty (Article 14.4). However, in citing 'the distinctive and disproportionate impact' of businesses' human rights abuses, the preambular paragraph limits the reason why certain groups of persons merit 'the need for a perspective that takes into account their specific circumstances and vulnerabilities.'  
**Certainly, the negative impacts of a business may affect persons who are marginalized more severely than others, particularly those who are majority members**

of a community, but the impact on marginalized groups is not the only determinative factor.

These persons also encounter the heightened risk of having their rights violated by businesses due to their marginalization, disadvantaged or excluded situation within a society. Thus, the phrase, ‘distinctive and disproportionate impact,’ in the preambular paragraph should be augmented by wording that also reflects the **heightened risk of human rights violations for such groups of persons**. This change would bring the paragraph in line with the wording in Articles 5.3.b and 14.4, and the UNGPs, including the General Principles of the UNGPs (UNGP, pg. 2). The change would also more accurately reflect the actual challenges faced by such persons.

While we urge the drafters to specifically mention ‘national or ethnic, religious and linguistic minorities’ in the list of enumerated groups, we can agree that the drafters, in Articles 5.3.b and 14.4, have wisely opted to provide illustrative examples of groups requiring particular attention, as opposed to an exhaustive enumeration of such groups, through their use of ‘such as’ before the reference to particular groups. This wording ensures flexibility as other groups and communities are recognized as **marginalized or discriminated against** within the changing political, economic, social and cultural contexts. Thus, the term ‘such as’ should similarly be added to preambular paragraph 14 that mentions particular groups of persons.

Also, **the references to groups of persons should be made consistent** in order to ensure that they are viewed as examples. For example, we note that while Article 5.3.b includes ‘protected populations under occupation or conflict areas,’ this group is not mentioned in any of the other references and the preambular paragraph does not include internally displaced persons, although they are included in the substantive Articles.

## II. Definitions

The placement of ‘victims,’ as the first definition, emphasises the importance the drafters have given to persons whose rights have been impacted. However, from our experience, in addition to ‘the immediate family or dependents of the direct victim’ (Article 1.1) being affected by the violation of a person’s rights, **the wider minority or indigenous community may well also be impacted**. For example, the arrest of a member of the community for vocal opposition to a project will undoubtedly have a negative impact on the rights to free speech and association of the entire minority or indigenous community.

The definition of ‘human rights violation or abuse’ in Article 1.2 raises several problems considered from the perspective of persons harmed. First, the fact that the harm has to be ‘committed by a State or business ‘against’ a person could potentially exclude minority or indigenous communities harmed indirectly by a business’s actions. For example, a business might improperly store or dispose of ‘harmful chemicals.’ The chemicals could pollute nearby rivers thereby endangering the health and the livelihoods of the community. The company’s action would certainly not be ‘against’ the community, but the impacts nevertheless would significantly impact them. In a similar fashion, the publication of hate speech and incitements to violence published via corporate social media

platforms, such as Facebook and WhatsApp, that are then disseminated and result in advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence against minorities, would not be an action by a business ‘against’ a group of persons, but could result in a violation of their rights.

**Also, in Article 1.2, ‘[s]ubstantial impairment’ of human rights does not provide a clear legal standard and leaves too much room for interpretation.** The same weakness could be cited for the phrase ‘in the context of business activities.’ Thus, the definitions of ‘victims’ and ‘human rights violation or abuse’ require further consideration that ensures that impacted persons are not excluded from their scope.

### III. Scope

**When a business is denying the rights of minorities, indigenous peoples, or other impacted persons, the transnational character of the business is irrelevant to those harmed.** Yet, the wording in Article 3 suggests, on the one hand, that the treaty should apply to ‘all business activities’ but then on the other hand, qualifies this wording with ‘except as stated otherwise’ and ‘including particularly but not limited to those of a transnational character’ followed by a detailed definition of ‘transnational character.’ Other references to the transnational character of businesses also pop up in the draft, such as under Article 5.2 on Prevention. We also note here that Article 5.2 makes numerous references to ‘contractual relationships,’ which should be ‘business relationships’ in order to be consistent with the UNGPs and the treaty’s preambular paragraphs. While the drafters appear to be trying to appease States that have differing views on the scope of coverage of businesses under the draft treaty, the result is less than clear language that may only lead to confusion and an additional legal hurdle that would need to be overcome for impacted persons to succeed in holding companies legally liable.

While we welcome the drafters’ mention of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), in the third preambular paragraph of the Revised draft treaty, **the reference in Article 5.3.b to the standard for consultations with indigenous peoples, as ‘free, prior and informed consultations’ is inconsistent with UNDRIP’s standard of ‘free, prior and informed consent’ (FPIC), which is the internationally recognized standard. Thus, the word ‘consultations’ should be changed to ‘consent’ in Article 5.3.b.**

We must emphasize the profound importance of this point, especially as the international community has repeatedly affirmed the principle of FPIC, e.g. in the UNDRIP as well as the 2014 Outcome Document of the high-level plenary meeting of the UN General Assembly known as the World Conference on Indigenous Peoples.

**In addition, we are concerned that the ‘as applicable’ wording at the end of subparagraph b suggests that FPIC may only be appropriate in certain cases.** Consequently, States or businesses might construe the last sentence in this subparagraph in a manner that would deny indigenous peoples their right to exercise their free, prior and informed consent. Thus, the words ‘as applicable’ should be removed.

#### **IV. General and Specific Provisions**

MRG and Lex Justi acknowledge the challenge the working group faces in formulating a treaty that embodies the principles contained in the UNGPs, upon which there is wide consensus by States, and that also reflects developments in the obligations of States and the responsibilities of businesses since the endorsement of the UNGPs by the UN Human Rights Council in 2011. In an effort to reflect the developments, we note that the drafters have supplemented the Zero Draft's provisions on the rights of victims, prevention and legal liability, which in our view were already quite detailed, with additional particularized provisions in the Revised Draft.

Adding substantive detail to the draft treaty, however, raises the risk that the treaty will become submerged in detail. Also, this detail fixes specifics that then inappropriately limit what States are required to do to fulfill their treaty obligations and at the same time, rapidly becomes outdated as developments continue to occur. For example, while the drafters rightly recognize that the rights of victims, negatively impacted by businesses, is a crucial topic, and have included insights from the Accountability and Remedy Project of the Office of the High Commissioner for Human Rights, Article 4 nevertheless remains underinclusive. We mention here just a few examples, from the perspective of minority and indigenous peoples, for illustrative purposes:

- **Paragraph 2 of Article 4 does not acknowledge that other rights of minorities and indigenous communities need to be protected from unlawful interference, such as the denial of the right to practice their livelihoods, their culture and religion, which can have significant negative impacts on the community, and may even lead to its ultimate disintegration.**
- **Under paragraph 3 of this same Article, other members of a minority or indigenous community should be protected from unlawful interference against their privacy and intimidation and retaliation.**

**Further, the bifurcated approach to due diligence measures, through the use of general principles and specific details in Article 5, also poses some problems.** General measures are provided in paragraph 2 of Article 5, and somewhat parallel, but could be more closely aligned with, the UNGPs, including by explicitly mentioning the integration of findings and the taking of appropriate action. **More detailed measures are mentioned in the following paragraph 3 of Article 5 but could be extensively supplemented.** As just one example, the involvement of minorities and indigenous peoples in designing the due diligence in which they will be involved should also be mentioned. Moreover, the wording seems unclear as to whether the 'measures' in Article 5.3 are measures that the State should 'adopt' as provided in 5.2 or that the State should require businesses to adopt and thus, results in confusion in interpreting the Article.

**Thus, we agree that the Articles on prevention, the rights of victims, and legal liability should be elaborated, since they are essential topics that merit detailed provisions.** However, in light of the concerns raised above and the fact that such

elaboration will necessarily require significant more time, work, and further development, **we wonder whether these topics might be better treated in the draft treaty in the form of general principles that are aligned with the UNGPs. The detailed provisions could then be left to separate instruments**, in the same way, for example, that the European Union has created a directive that solely and extensively deals with victims' rights (see Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime). **This separation of general principles in the draft treaty and specific measures in separate instruments, such as protocol(s), would ensure that these crucial topics, prevention, the rights of victims, and legal liability, receive the full amplification they deserve.**

## **V. Conclusion & Recommendations**

In sum, we laud the drafters for their persistence and believe that their work can make a significant contribution to further developments in the business and human rights area. **Yet, we remain concerned that if the drafters do not include explicit mention of minorities in the treaty, it will represent a significant inconsistency with international human rights law and a step backwards for minority rights compared with the UNGPs. We are also very worried that the draft, if unchanged, would represent a serious step backwards when it comes to indigenous peoples' right to FPIC.** More broadly, if the drafters remain on a level of general principle, focus on ensuring that the treaty provisions are closely aligned with the UNGPs, and supplement the treaty with detailed measures in separate instruments, such as protocols, they may obtain broader support for the treaty discussions and move toward a more rapid finalisation and approval of the treaty. We look forward to the treaty discussions in October. We present the drafters with **the following recommendations** on the basis of our comments above:

- i. 'National or ethnic, religious and linguistic minorities' should be mentioned in provisions requiring special attention to particular groups of persons;**
- ii. The reason why minorities, indigenous peoples and other groups of persons are accorded special attention should be supplemented;**
- iii. Illustrative not exhaustive enumeration of particular groups is appropriate; lists and references to enumerated groups should be made consistent throughout the text;**
- iv. The definitions of 'victims' and 'human rights violation or abuse' require further consideration;**
- v. References to the 'transnational character' of businesses should be deleted and references to 'contractual relationships' replaced with 'business relationships';**
- vi. The FPIC standard must be written as 'free prior and informed consent', rather than 'consultations', and the words 'as applicable' removed in Article 5.3.b; and**

**vii. The draft treaty should cover general principles reflecting those already affirmed in the UNGPs.**