



**University of Dundee**

**Draft text for Business and Human Rights Treaty (Revised version of July 2021)**

Methven O'Brien, Claire

*Publication date:*  
2021

*Document Version*  
Other version

[Link to publication in Discovery Research Portal](#)

*Citation for published version (APA):*

Methven O'Brien, C. (2021, Jul 14). Draft text for Business and Human Rights Treaty (Revised version of July 2021).

**General rights**

Copyright and moral rights for the publications made accessible in Discovery Research Portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

# Draft text for Business and Human Rights Treaty<sup>1</sup>

Revised version of 14 July 2021

## Preamble

The Parties to this Treaty,

*Recalling* the Charter of the United Nations,<sup>2</sup>

*Considering that*, in accordance with the principles and purposes proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,<sup>3</sup>

*Recalling further* the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work,<sup>4</sup>

*Recognizing that*, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his or her civil, political, economic, social and cultural rights,<sup>5</sup>

*Recognizing* the Protect, Respect and Remedy Framework and Guiding Principles on Business and Human Rights, and their contribution to advancing respect for human rights in the business sphere, on which further progress should be made, to contribute to a socially and environmentally sustainable globalization,<sup>6</sup>

*Acknowledging* that the promotion and protection of human rights, including in the context of business activities, and the implementation of the 2030 Agenda for Sustainable Development, are interrelated and must be mutually reinforcing,<sup>7</sup>

*Recalling* States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms,<sup>8</sup> and stressing that the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lies with the State,<sup>9</sup>

*Recalling* the positive contribution which business enterprises that comply with all applicable laws and respect human rights can make to economic and social progress and the realization of decent work for all,<sup>10</sup>

---

<sup>1</sup> Cf. [Claire Methven O'Brien's 2020 Draft Text for a Business and Human Rights Treaty](#).

<sup>2</sup> Cf. 2RD Preambular para.1.

<sup>3</sup> Cf. ICESCR, Preamble.

<sup>4</sup> Cf. UNGPs, Commentary to UNGP 12; OECD Guidelines for MNEs, Ch. IV, para.39. Cf. 2RD preambular paras. 2, 3.

<sup>5</sup> Cf. ICESCR, Preamble.

<sup>6</sup> Cf. UN Working Group BHR, A/HRC/47/39, 22.04.21.

<sup>7</sup> Cf. UN HRC Res. 37/24.

<sup>8</sup> Cf. UNGPs p. 1.

<sup>9</sup> Cf. HRC Res 17/4, Preamble; 2RD Preambular para. 9.

<sup>10</sup> Cf. ILO Tripartite Declaration, para.2; cf. UNGPs p. 1; see also COE Recommendation, Preamble.

*Recognizing* that proper regulation, including through national legislation, of transnational corporations and other business enterprises, and their responsible operation can contribute to the promotion, protection and fulfilment of and respect for human rights and assist in channelling the benefits of business towards contributing to the enjoyment of human rights and fundamental freedoms,<sup>11</sup>

*Concerned* that weak national legislation and implementation have failed effectively to mitigate the negative impact of globalization on vulnerable economies, fully realize the benefits of globalization or derive maximally the benefits of activities of transnational corporations and other business enterprises, and that therefore efforts to bridge governance gaps at the national, regional and international levels are necessary,<sup>12</sup>

*Recalling* the need for rights and obligations to be matched to appropriate, effective and accessible remedies when breached, including where human rights abuses occur in the context of business activities,<sup>13</sup>

*Emphasizing* the importance of multi-stakeholder dialogue, analysis and capacity building of all actors better to manage challenges in the area of business and human rights and build on progress achieved to date,<sup>14</sup>

*Desiring* to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the responsibilities of businesses in that regard<sup>15</sup>; to prevent the occurrence of human rights abuses in the context of business activities and provide access to justice and effective remedy to victims of such abuses,<sup>16</sup>

Have agreed as follows,

---

<sup>11</sup> Cf. UN HRC 8/7, Preamble; UN HRC 17/4, Preamble.

<sup>12</sup> Cf. UN HRC 8/7, Preamble, UN HRC 17/4, Preamble.

<sup>13</sup> Cf. UNGPs p. 1.

<sup>14</sup> Cf. UN HRC Res. 17/4, para.5; UN HRC 17/4, Preamble.

<sup>15</sup> Cf. 2RD, ultimate Preambular para.

<sup>16</sup> Cf. 2RD, Art.2.

## SECTION I.

### ARTICLE 1. DEFINITIONS

For the purposes of this treaty:

- a) “Human rights” means internationally-recognised human rights, such as those expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work;
- b) “Businesses” means all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure;<sup>17</sup>
- c) “Parties” means, unless the text otherwise indicates, Parties to this Treaty;
- d) “Regional economic integration organization” means an organization constituted by sovereign States of a given region which has competence in respect of matters governed by this Treaty or its protocols and has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to the instruments concerned.<sup>18</sup>

### ARTICLE 2. OBJECTIVES<sup>19</sup>

The objectives of this Treaty are:

- a. To advance the effective implementation of the obligation of states to respect, promote, protect and fulfil human rights in the context of business activities;
- b. To ensure that businesses fulfil their responsibilities to respect human rights;<sup>20</sup>
- c. To prevent human rights violations and abuses in the context of business activities;<sup>21</sup>
- d. To ensure access to justice and effective remedy for victims of human rights violations and abuses in the context of business activities, including through mutual legal assistance;<sup>22</sup>
- e. To promote and strengthen international cooperation to prevent and remedy business-related human rights violations and abuses, and to harmonize measures and bridge governance gaps at national, regional and international levels towards the achievement of social and environmental sustainability.<sup>23</sup>

---

<sup>17</sup> Cf. UNGPs p. 1.

<sup>18</sup> Cf. Ozone Art 1(6), UNFCCC Art 1.

<sup>19</sup> Cf. 2RD Art.2.

<sup>20</sup> Cf. 2RD Art 2(1)(a).

<sup>21</sup> Cf. 2RD Art 2(1)(b); UN Secretary General Prevention Agenda <https://www.un.org/sg/en/priorities/prevention.shtml>

<sup>22</sup> Cf. UNGP 25: “access to effective remedy”; 2RD Art 2(1)(c).

<sup>23</sup> Cf. 2RD Art 2(1)(d).

### ARTICLE 3. GENERAL OBLIGATIONS

1. Each Party shall take effective and appropriate measures to achieve this Treaty's objectives.
2. In implementing this article, each party to this agreement shall have regard to the need:
  - a. to protect victims of human rights abuses and enhance their access to effective remedies for business-related violations and abuses,<sup>24</sup> including those of a transnational character;<sup>25</sup>
  - b. to consider groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and the different risks that may be faced by women and men;<sup>26</sup>
  - c. to regulate business enterprises to ensure they respect human rights in practice, through the application of appropriate and proportionate measures, including due diligence, as well as incentives and sanctions;
  - d. to ensure effective respect for human rights in the context of international trade, investment<sup>27</sup> and finance;
  - e. to identify emerging risks to human rights from business activities and take preventive measures as appropriate.
3. To this end the Parties shall,
  - a. Periodically review their national legislation, policies and practice, including practices of business enterprises, to evaluate implementation and observance of this Treaty and its guiding principles;<sup>28</sup>
  - b. Develop, periodically review and update national action plans on business and human rights,<sup>29</sup> or adapt for this purpose existing strategies, plans or programmes,<sup>30</sup> and ensure, by appropriate means and action, their effective implementation and wide dissemination amongst competent authorities and stakeholders;<sup>31</sup>
  - c. Co-operate in the formulation of proposed measures, procedures and guidelines for the implementation of this Treaty, and involve stakeholders as appropriate in this regard;<sup>32</sup>

---

<sup>24</sup> Cf. 2RD Arts. 4 and 5, 7; 2RD Art. 6(3)(c).

<sup>25</sup> Cf. 2RD Arts. 4 and 5, 7; 2RD Art. 6(3)(c).

<sup>26</sup> Cf. UNGPs, p1.

<sup>27</sup> Cf. 2RD Art 14(5).

<sup>28</sup> Cf. COE Recommendation, para.1.

<sup>29</sup> Cf. COE Recommendation para.2.

<sup>30</sup> Cf. CBD Art.6 (a).

<sup>31</sup> COE Recommendation para.2.

<sup>32</sup> WHO FCTC, Art 5(4).

- d. Cooperate with competent international and regional intergovernmental organisations, regional economic integration organizations and stakeholders to achieve the objectives of this Treaty.<sup>33</sup>

4. Under this article, the parties will have regard to the role and value of:<sup>34</sup>

- i. Technical cooperation and capacity-building among policy makers, national human rights institutions, and operators, as well as users of domestic, regional and international grievance mechanisms;
- ii. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present agreement;
- iii. Raising awareness about the rights of victims of business-related human rights abuses and the obligations of States and responsibilities of businesses in relation to this agreement;
- iv. Facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of a transnational character.
- v. Additional Protocols, Annexes, Guidelines, Recommendations or other instruments adopted under this Treaty, in advancing its objectives.

#### **ARTICLE 4. GENERAL PRINCIPLES<sup>35</sup>**

1. In their actions to achieve the objectives of this Treaty and to implement its provisions, the Parties shall be guided by the UN Framework and Guiding Principles on Business and Human Rights, as set out in Annex I to this Treaty.
2. The participation of stakeholders, such as businesses, business associations, labour and workers' associations, civil society organisations, rights-holders and their representatives, and human rights defenders is essential in achieving the objectives of this treaty.<sup>36</sup>

---

<sup>33</sup> WHO FCTC, Art 5(5).

<sup>34</sup> Cf. 2RD Art.13.

<sup>35</sup> Cf. UNFCCC Art 3, CBD Art 3, WHO FCTC Art 4.

<sup>36</sup> Cf. WHO FCTC Art. 4(7).

## **ARTICLE 5. RELATIONSHIP BETWEEN THIS TREATY AND OTHER AGREEMENTS AND LEGAL INSTRUMENTS**

1. In order to promote the achievement of this Treaty's objectives, Parties are encouraged to implement measures beyond those required by this Treaty, and nothing in this Treaty shall prevent a party from imposing stricter requirements that are consistent with this Treaty and in accordance with international law.<sup>37</sup>
2. The provisions of this Treaty shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant or additional to this Treaty, provided that such agreements are compatible with their obligations under this Treaty.<sup>38</sup>

## **ARTICLE 6. JURISDICTIONAL SCOPE<sup>39</sup>**

1. States Parties shall carry out their obligations under this Treaty in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.<sup>40</sup>
2. Nothing in this Treaty shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law or international law.<sup>41</sup>
3. Without prejudice to Articles 6 (1) and (2), this Treaty does not exclude the exercise of any jurisdiction established by a State Party under its domestic or international law.

---

<sup>37</sup> Cf. WHO FCTC Art 2(1); Istanbul Convention Art. 71(1).

<sup>38</sup> Cf. WHO FCTC Art 2(2); Istanbul Convention Art 71(1).

<sup>39</sup> Cf. RD Art. 12 Consistency with International Law and Art 7 Adjudicative Jurisdiction

<sup>40</sup> Cf. Palermo Convention, Art. 4(1).

<sup>41</sup> Cf. Palermo Convention, Art 4(2).

## SECTION II.

### ARTICLE 7. CONFERENCE OF THE PARTIES<sup>42</sup>

1. A Conference of the Parties is hereby established.
2. The Conference of the Parties shall promote the development, implementation, evaluation<sup>43</sup> and harmonization of measures to advance the objectives of this Treaty and its observance by businesses as well as Parties.
3. To this end, the Conference of the Parties shall:
  - a. Keep under regular review the implementation and observance, including by businesses, of this Treaty and any related legal instruments that the Conference of the Parties may adopt;
  - b. Take, within its mandate, the decisions necessary to promote the effective implementation and observance of this Treaty;
  - c. Develop and adopt, as appropriate, Guidelines and Recommendations relating to the implementation of this Treaty;<sup>44</sup>
    - a. Promote and facilitate the exchange of information;<sup>45</sup>
    - b. Establish such subsidiary, expert or technical bodies as it deems necessary for the implementation of this Treaty;<sup>46</sup>
    - c. Consider and adopt, as appropriate, protocols to this treaty;
    - d. Seek, where appropriate, the services of competent international bodies, regional organisations and other stakeholders, in activities pertinent to the objectives of this Treaty, and make use as appropriate of information from these bodies and actors;
    - e. Consider and undertake any additional action that may be required for the achievement of the objectives of this Treaty.
4. The Conference of the Parties shall by consensus agree upon and adopt rules of procedure and financial rules for itself and of any subsidiary bodies it may establish.
5. The Conference of the Parties may establish a secretariat to perform such functions as may be determined by the Conference of the Parties.

---

<sup>42</sup> Cf. UNFCCC, Art 7, CBD Art 23, WHO FCTC Art 23; 2RD Art 15 (5), (6).

<sup>43</sup> WHO FCTC, Art 23(5)(c).

<sup>44</sup> Various guidelines have been developed and formulated under the WHO FCTC:

[https://www.who.int/fctc/treaty\\_instruments/adopted/en/](https://www.who.int/fctc/treaty_instruments/adopted/en/) . Such guidelines under a BHR treaty could address e.g.

- Remedy, drawing on OHRHC ARP project
- Measures to promote HRDD
- Measures to promote HR reporting
- Human rights impact assessment
- Children's rights – could build on UNCRC General Comment No.16
- Sector specific issues, building on e.g. OECD sector guidance
- Effective multi-stakeholder initiatives.

<sup>45</sup> Cf. WHO FCTC, Art 23(5)(a).

<sup>46</sup> Cf. UNFCCC, Art. 7.

6. The Conference of the Parties may establish an international fund to support the achievement of the objectives of this agreement.<sup>47</sup>
7. No later than six months after the entry into force of the present (Legally Binding Instrument), the Conference of the Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General of the United Nations biennially or upon the decision of the Conference of Parties.<sup>48</sup>

#### **ARTICLE 8. ADOPTION OF PROTOCOLS<sup>49</sup>**

1. The Conference of the Parties may adopt protocols pursuant to Article 7.
2. The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a meeting.
3. The requirements for the entry into force of any protocol shall be established by that instrument.
4. Only Parties to this Treaty may be Parties to a protocol.
5. Decisions under any protocol shall be taken only by the Parties to the protocol concerned.

#### **ARTICLE 9. SETTLEMENT OF DISPUTES<sup>50</sup>**

1. If a dispute arises between two or more State Parties about the interpretation or application of this agreement, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this agreement, or at any time thereafter, a State Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any State Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice;

(b) Arbitration in accordance with the procedure and organization mutually agreed by both State Parties.

3. If the State Parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the State Parties agree otherwise.

---

<sup>47</sup> Cf. 2RD, Art.15(7).

<sup>48</sup> 2RD Art. 15(6).

<sup>49</sup> UN FCCC Art. 17. Cf. 2RD Art 17.

<sup>50</sup> Cf. 2RD Art 18.

## **ARTICLE 10. SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL AND ACCESSION<sup>51</sup>**

1. The present agreement shall be open for signature by all States and regional integration organizations at United Nations Headquarters in New York as of [date].
2. The present agreement shall be subject to ratification, acceptance or approval by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the agreement.
3. This agreement shall apply to regional integration organizations within the limits of their competence; subsequently they shall inform the depositary of any substantial modification in the extent of their competence. Such organizations may exercise their right to vote in the Conference of States Parties with a number of votes equal to the number of their member States that are Parties to this treaty. Such right to vote shall not be exercised if any of its member States exercises its right, and vice versa.

## **ARTICLE 11. ENTRY INTO FORCE**

1. The present agreement shall enter into force on the thirtieth day after the deposit of the [---] instrument of ratification or accession.
2. For each State or regional integration organization ratifying, formally confirming or acceding to the agreement after the deposit of the [---] such instrument, the agreement shall enter into force on the thirtieth day after the deposit of its own such instrument.

## **ARTICLE 12. AMENDMENTS<sup>52</sup>**

1. Any State Party may propose an amendment to the present agreement and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals.
2. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two-thirds of the State Parties present and voting in the Conference of the Parties shall be submitted by the Secretary-General to all State Parties for acceptance.

---

<sup>51</sup> Cf. 2RD Art.19.

<sup>52</sup> Cf. 2RD Art.21

### **ARTICLE 13. RESERVATIONS<sup>53</sup>**

1. Reservations incompatible with the object and purpose of the present agreement shall not be permitted.
2. Reservations may be withdrawn at any time.

### **ARTICLE 14. DENUNCIATION<sup>54</sup> [WITHDRAWAL]**

A State Party may denounce the present agreement by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

### **ARTICLE 15. DEPOSITARY AND LANGUAGES [AUTHENTIC TEXTS]**

1. The Secretary-General of the United Nations shall be the depositary of the present agreement.
2. The Arabic, Chinese, English, French, Russian and Spanish texts of the present agreement shall be equally authentic.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present [treaty].

### **ARTICLE [X]. INTERIM ARRANGEMENTS**

### **ARTICLE [X]. ADOPTION AND AMENDMENT OF ANNEXES TO THE TREATY**

### **ARTICLE [X]. COMMUNICATION OF INFORMATION RELATED TO IMPLEMENTATION**

### **ARTICLE [X]. COMMITTEE OF EXPERTS/WORKING GROUP**

### **ARTICLE [X]. FINANCIAL MECHANISM**

---

<sup>53</sup> Cf. 2RD Art.22.

<sup>54</sup> Cf. 2RD Art.23.

## **ANNEX I. GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS**

### **DRAFT GUIDELINES OF THE CONFERENCE OF STATES PARTIES**

- I. DRAFT GUIDELINES FOR IMPLEMENTATION OF PILLAR III OF THE UN FRAMEWORK AND UNGPS: RIGHTS AND PROTECTION OF VICTIMS OF BUSINESS-RELATED HUMAN RIGHTS VIOLATIONS AND ABUSES<sup>55</sup>
- II. DRAFT GUIDELINES FOR IMPLEMENTATION OF PILLAR III OF THE UN FRAMEWORK AND UNGPS: ACCESS TO REMEDY FOR BUSINESS-RELATED HUMAN RIGHTS VIOLATIONS AND ABUSES<sup>56</sup>
- III. DRAFT GUIDELINES ON NATIONAL MEASURES TO PROMOTE CORPORATE HUMAN RIGHTS DUE DILIGENCE <sup>57</sup>

---

<sup>55</sup> Cf. 2RD Arts. 4 & 5.

<sup>56</sup> Cf. 2RD Art.7-12

<sup>57</sup> Cf. 2RD Art.6.