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PROPOSAL: Access to Information & Participation

ESCR-Net & FIDH Joint [Treaty Initiative Project](#)¹

KEY PROPOSAL: States must ensure that civil society has access to relevant, sufficient, quality information in connection with each stage of corporate activity, to facilitate meaningful participation in the prevention of and response to human rights impacts.

SUMMARY: Where corporate activity could impact or has impacted on the enjoyment of human rights, those involved must have enough information to be able to understand and discuss the situation fully, in order to make informed decisions on what action to take to prevent and address human rights violations. Currently, there is a serious lack of information available to local communities and the general public about corporate decisions and practices. In particular, access to relevant, sufficient, quality information necessary for meaningful participation is lacking at each stage of corporate activity: (1) prior to corporate activity, (2) during corporate activity, and (3) when seeking accountability if human rights abuse occurs. The failure to gather and/or disclose necessary information can affect many other rights such as the right to a remedy. The proposed treaty offers the opportunity to outline the State obligation to provide/strengthen (independent access to) key information and therefore reduce the information gaps.

Why is this important to address in the proposed treaty?

No meaningful public participation can take place without due access to information. Cases such as the Bhopal gas leak disaster in India² and the toxic waste dumping in Cote d'Ivoire³ demonstrate the pivotal role of information in various stages. After the explosion at the Bhopal gas plant, reports of the parent company and subsidiary involved stated that the effects of the gas leak were limited and without long term effects. However, generations born after the explosion are still suffering from its

¹This paper was produced following online and in-person consultations with over one hundred and fifty civil society organisations (CSOs) in Asia, Africa, Latin America. The drafting of this proposal was lead primarily by Nicola Jägers, reflecting on CSO inputs, and it attempts to provide ideas for how the forthcoming treaty may address issues raised by CSOs in the aforementioned consultations. As such, the views expressed here are not necessarily the views of the lead author or the institutional position of either ESCR-Net and FIDH. This proposal, as well as others produced in this [Treaty Initiative](#) project, is primarily designed as a resource to support members and partners of ESCR-Net and FIDH, as well as diplomats, INGOs and others, to prepare their own positions on the treaty (either as supporting documentation or to help refine contrasting views).

² Amnesty International (2014) 'Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy', available at: <https://www.amnesty.org/download/.../pol300012014en.pdf>

³ Business & Human Rights Resource Centre, 'Trafigura Lawsuits (re Cote d'Ivoire)' available at: <https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire>

effects. Years later, internal documents revealed that the companies were aware of the toxic nature of the gas plant. In the case of the dumping of toxic waste in Cote d'Ivoire, the trading company failed to provide information concerning the effects of the waste to the Ivorian company. In these and other cases, people were unaware of basic facts because companies withheld critical information and states have been unable or unwilling to compel the disclosure of the information.⁴

The right to know/access to information can be referred to as a gateway-right. Without relevant information many other rights such as, for instance, right to an effective remedy, remain illusive. A lack of access to information can be an obstacle in legal proceedings. For example, complex legal structures can make it difficult for victims of corporate human rights abuse to start legal proceedings against a multinational corporation. These include the 'corporate veil', which separates the actions and liabilities of corporations from the decision-making individuals within the corporations. Aside from the corporate veil, corporate structure is also defined by its shareholders, stakeholders and associate companies (subsidiaries and holding) both domestic and international. These characteristics in the structure of a corporation make it difficult for claimants because the hierarchical structure and responsible party is not always clear and this information is key to making a successful legal claim or engage in related advocacy activities in defence of the human rights of people affected by corporate operations. Legal claimants face an additional challenge when corporations do not make information available, the government institution responsible for providing public information is uncooperative and/or one or both are not under the purview of meaningful legal access to information procedures. Moreover, in many countries acquiring documents needed in court for the sake of evidence can prove difficult as a result of different national rules regarding provision of evidence. An example is the difficulty plaintiffs experienced in acquiring certain documents in the ongoing oil spill litigation against *Shell* before Dutch courts.⁵ A major obstacle that the claimants faced in bringing their claims was difficulty in accessing internal information – from both Shell and its subsidiary Shell Nigeria – regarding the operations of the business. The court held that under Dutch Law that there was no obligation on the part of the company to disclose the requested information. As noted by Friends of the Earth Netherlands, this “seriously affect[ed] the equality of the legal parties” resulting in a “fundamental imbalance in the conduct of the case”.⁶

What is the relevant legal context?

International and comparative law

The right to information is part of the participatory framework which also includes the right to participate in public-decision-making and access to justice. These three pillars are interrelated. Participatory rights including the right to information have notably developed in two branches of international law: human rights law and environmental law. To include progressive provisions on access to information (and generally participatory rights) in the treaty interesting parallels may be drawn with existing treaties and jurisprudence in these two fields.

In human rights law a right to information and a corresponding duty upon States to enable access to information has developed based mainly on the 'freedom to seek, receive and impart information and

⁴ For overviews of these cases, and for more examples of corporate human rights abuse and the role that the lack of information played see: Amnesty International, Injustice Incorporated- Corporate Abuses and the Human Right to Remedy, 7 March 2014, Index number: POL 30/001/2014

⁵ [case reference]. On appeal the court in The Hague ordered Shell to make available to the court documents that might shed light on the cause of the oil spills and whether leading managers were aware of them.

⁶ See Oruma Subpoena, Milieudefensie, <https://www.milieudefensie.nl/publicaties/bezwarenuitspraken/subpoena-oruma/view> (in Dutch).

ideas of all kinds’ – this is guaranteed through, notably, Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The right to know, seek, obtain, receive, hold and disseminate information on human rights is fundamental to the effective promotion of human rights. The major regional human rights systems have also acknowledged access to information as a human right.⁷ Human rights monitoring bodies have recognized the collection, analysis and publication of information as critical to ensuring that human rights are protected. For example, the Committee on Economic, Social and Cultural Rights (CESCR) has highlighted that as part of the State’s obligation to protect, “states should also ensure that third parties do not limit people’s access to health-related information and services”.⁸ In relation to the human right to water the CESCR has stated that ‘individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.’⁹

While the focus in international law has traditionally been on the access to information by members of the public from public authorities, to ensure the enjoyment of human rights in a way that recognizes the increasing influence and power of corporations, it may be necessary to take more concrete steps to ensure that members of the public have the right to request information directly from corporations allegedly responsible for harming human rights. According to Principle 1 of the UN Principles on Freedom of Information Legislation, “private bodies themselves should also be included [in legislation] if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health.”¹⁰ In some countries such legislation exists. For example, in South Africa, the Promotion of Access to Information Act requires private bodies to disclose information which is ‘required for the exercise or protection of any right’.¹¹ This is also provided in the Declaration of Principles on Freedom of Expression in Africa, which states: “[e]veryone has the right to access information held by private bodies which is necessary for the exercise or protection of any right”.¹²

At the international level, there are several conventions that rely on the State to ensure information is gathered and dispensed to encourage participation of members of the society to ensure accountability for human rights abuse and/or environmental degradation.

In the *Convention on the Rights of Persons with Disabilities* (CRPD), the General Obligations clause commits all public actors under a “shall” provision to “closely consult with and actively involve persons

⁷ *Inter-American Declaration of Principles on Freedom of Expression* (2000); *Declaration of Principles on Freedom of Expression in Africa*, (2002); Council of Europe, Recommendation No. R(81)19 on *Access to Information Held by Public Authorities*.

⁸ Committee on Economic, Social and Cultural Rights, General Comment 14: The right to the highest attainable standard of health (Article 12) UN Doc E/C.12/2000/4, 11 August 2000, para 35.

⁹ General Comment 15: the right to water (articles 11 and 12), UN Doc. E/C.12/2002/11, 20 January 2003, para 48.

¹⁰ United Nations (2000) ‘The Public’s Right to Know: Principles on Freedom of Information Legislation’, Principle 1. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement>

¹¹ Promotion of Access to Information Act 2 of 2000 (2000), s 50(1)(a): ‘Right of access to records of private bodies; A requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights’. Available at: http://www.dfa.gov.za/departments/accessinfo_act.pdf

¹² African Commission on Human and Peoples’ Rights (2002) ‘Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa’, s IV (2). Available at: http://www.achpr.org/files/sessions/32nd/resolutions/62/achpr32_freedom_of_expression_eng.pdf

with disabilities ...in the development and implementation of legislation and policies to implement the present Convention and in other decision making processes concerning issues” affecting their lives.¹³

The *UN Convention on Corruption*¹⁴ provides that States should ensure “that the public has effective access to information”.¹⁵ It also requires that States respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption subject to certain restrictions.¹⁶

The *Aarhus Convention*¹⁷ is the most advanced environmental agreement also in providing for public participation, by setting relatively detailed minimum standards for different participatory procedures. It requires that States guarantee the rights of access to information to stakeholders, as it is in their power to make domestic laws and provide incentives for corporations to assist them in achieving this goal while creating institutional and structural adjustments to ensure the objective is achieved.¹⁸ In 2010 the global, non-binding Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (*Bali Guidelines*) were adopted.¹⁹

The UN Guiding Principles

As contained in the *UN Guiding Principles on Business and Human Rights* (UNGPs) human rights due diligence requires corporations to identify, prior to any activity, potential human rights impacts.²⁰ Article 21 of the UNGPs encourages business enterprises to provide sufficient information on possible human rights risks arising from their operations to their stakeholders to enable them “evaluate an enterprise’s response to the particular human rights impact.

While this recognizes the importance of the provision of information, this does not impose any *mandatory* responsibilities on States and corporations to ensure that information on corporate activity is sought, gathered and provided to those affected for matters that concern corporations.

State implementation of this obligation

It is increasingly being recognized that the right to information entails a positive duty for States to collect and disseminate information on human rights violations. States are under an obligation to take practical steps – including through legislation – to give effect to the right to freedom of information and access to information.²¹ Most countries have Access to Information/Freedom of Information

¹³ Art 4.3 UN General Assembly, Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106

¹⁴ UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422

¹⁵ Ibid Article 13 (1) b

¹⁶ Ibid Article 13 (1) d

¹⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Oct. 30, 2001, 2161 U.N.T.S. 447. The Convention was approved on behalf of the European Community on 17 February 2005. Council Decision 2005/370, 2005 O.J. 2005 (L 124) 1

¹⁸ In the environmental field participatory rights including the right to information have found recognition in Principle 10 of the 1992 Rio Declaration on Environment and Development

¹⁹ [insert citation]

²⁰ UNGP 17.

²¹ Toby Mendel, Freedom of Information as an internationally Protected Human Right, <https://www.article19.org/data/files/pdfs/publications/foi-as-an-international-right.pdf> – on the importance of Freedom of Information; UN 1946 General Assembly Resolution 59(1) - on the importance of Freedom of Information; IACHR, The Inter-American Legal Framework regarding the Right to Access to Information, Second Edition, Offices of the Special Rapporteur for Freedom of Expression, March 7, 2011 para. 35. The State has the

legislation which grants individuals access to information held by the State. This right to information concerns mostly information held by bodies that fall under State control. This includes bodies that are owned or substantially funded by the State or which undertake public functions. There are some resources on this subject that show the impact the success of access to information.²²

What are the components of the proposal?

Participatory rights consist of several interrelated components: public access to information; public participation in decision-making proceedings; and access to review procedures and remedies. The focus is here on the right to information but all these components are interrelated.

- (1) **Prior to corporate activity (Design):** Possible treaty provisions should mandate human rights impact assessment including provisions on disclosure of effective consultation with communities. Another issue that emerged during the regional consultations is that information regarding contracts needs to be more accessible. The *Aarhus Convention* and the *Bali Guidelines* may provide examples as they prescribe, among other things, that the public must be informed at an early stage in decision-making, and the kind of information to be made available as a minimum in such procedures. The importance of access to key information prior to corporate activity has been explicitly acknowledged by the Inter-American Court of Human Rights.²³ This issue is further explored in the *Treaty Initiative Proposal on the Rights of Indigenous People*, specifically in relation to the right to free, prior and informed consent.
- (2) **During corporate activity (Monitoring):** A second dimension is the flow of information during corporate activity. This concerns issues of transparency, reporting and disclosure. The treaty should require States to adopt legislation aimed at enhancing transparency and disclosure by (parent) companies. There are various legislative developments at the national and regional levels that mandate access to information, including the *Dodd Frank Act* (United States),²⁴ the *Modern Slavery Act* (United Kingdom),²⁵ and the *EU Directive on the disclosure of non-financial information by certain large companies*.²⁶ Besides mandating corporations to disclose

obligation to produce or gather the information it needs to fulfil its duties, pursuant to international, constitutional, or legal norms.

²² Sandra Coliver, The Importance of the Right of Access to Information Held by Public Authorities, and the Need for the United Nations to Take Steps to Further Elaborate, Codify, Protect and Promote this Right, presented to the UN Conference on Anti-Corruption Measures, Good Governance and Human Rights, Warsaw, 8- 9 November 2006. Available at:

<http://www2.ohchr.org/english/issues/development/governance/docs/Coliver.pdf>; Good Law & Practice, Right2Info, RTI Case Law, <http://www.right2info.org/cases>

²³ *Claude Reyes et al. v. Chile*, Inter-American Court of Human Rights, Judgment on merits, reparations and costs of 19 September 2006, Inter-Am. Ct. H.R., (Ser. C) No.151 (2006), para 77. In this case, Chile had refused to provide the petitioners with information on a foreign investment contract related to a forestry exploitation project. The Inter-American Court of Human Rights found that the State breached its international obligations by refusing to provide the information requested or providing a justification for not doing so. Significantly, the Court considered that when projects affected public interest, such as the exploitation of natural resources, the information held by the State, though related to a private company's activities, must as a rule be publicly accessible.

²⁴ S. 1033 Dodd Frank Wall Street Reform and Consumer Protection Act 2010, available at: <https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>

²⁵ UK Modern Slavery Act 2015, see s. 48 (6) (e) and 54 (5) and Schedule 2 s. 3 available at: http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf

²⁶ EU Directive on the disclosure of non-financial information by certain large companies - Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32014L0095>

information, States themselves should be mandated, based on the above-described duty, to generate, collect, assess and update information on adverse human rights impact of corporate activity and disseminate that information to the general public, particularly those that may be adversely affected.

- (3) **Accountability (review):** A third dimension is the right for individuals to acquire certain information needed to ensure access to a remedy. The proposed treaty can set out procedural requirements aimed at providing information on complex legal structures, as needed in court cases. The proposed treaty could address the inequality of arms in legal proceedings by laying down minimum standards of access to certain documents and testimony.²⁷

How is this related to other key proposals?

This proposal interrelates with several of the other proposals in this project. See, the Proposal on the issue of Free, Prior and Informed Consent (FPIC) concerning access to information in the specific context of indigenous peoples. See also the Proposal on Human Rights Due Diligence (HRDD), which addresses the need to communicate on the generation and dissemination of information by corporations. However, from the perspective of participation, access to information must go beyond the corporate ‘knowing and showing’ dimension of HRDD. In order to participate in a meaningful manner affected communities and the public require independent access to information on, among other things, decision-making; corporate legal structures and available remedies. Regarding institutional pathways that may be explored to strengthen the right to information, see also the proposals on effective remedies and supervisory mechanisms.

²⁷ An interesting development in this respect is the Foreign Legal Assistant Act in the US (FLA). The FLA is a US statute that allows advocates from other countries to obtain documents and testimony to use in their cases. Any “interested person” in a foreign lawsuit or other legal process can ask a U.S. court to order U.S. corporations to turn over relevant documents and testimony.