



Joint trade union proposals for textual amendments to the third revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

Introduction

The global trade union movement welcomes the Open-ended Intergovernmental Working Group's request for specific textual proposals on the third revised draft of the Legally Binding Instrument.

The third revised draft builds on previous versions by introducing further conceptual clarity and a text that is politically viable for States and non-State actors alike. Among other things, we welcome the following new elements which address our previous comments and observations:

- better overall gender integration through an explicit reference to the Gender Guidance for the Guiding Principles on Business and Human Rights and a provision for gender-sensitive access to justice;
- recognition of the distinctive and disproportionate impact of business-related human rights abuses on people of African descent and older persons;
- acknowledgement of the importance of health and safety in the drive towards sustainable development;
- reference to the right to a safe, clean, healthy, and sustainable environment;
- reference to obligations of business enterprises to respect human rights;
- a stronger definition of human rights abuse covering direct and indirect harm;
- a definition of business activities that includes activities undertaken by financial institutions and investment funds;
- an explicit reference to fulfilment of human rights in the Article concerning the purpose of the Legally Binding Instrument;
- express provision that human rights due diligence should be informed by meaningful engagement with trade unions; and
- inclusion of the domicile of the victim as a basis for jurisdiction.

We would like to recall that, throughout this process, we have advocated for the following key priorities:

- A broad substantive scope covering all internationally recognised human rights, including fundamental workers' and trade union rights, as defined by relevant international labour standards.
- The coverage of all business enterprises regardless of size, sector, operational context, ownership and structure.
- Parent company-based extraterritorial regulation and access to justice for victims of transnational corporate human rights violations in the home State of transnational corporations.
- Regulatory measures that require business to adopt and apply human rights due diligence policies and procedures.
- Reaffirmation of the applicability of human rights obligations to the operations of companies and their obligation to respect human rights.
- A strong international monitoring and enforcement mechanism.

Based on these expectations, we provide the following comments on the third revised draft:

Textual amendments

Preamble

PP3

Recalling also the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples, **relevant ILO Declarations and Conventions**, and recalling further the 2030 Agenda for Sustainable Development, as well as all internationally agreed human rights Declarations;

We recommend a reference to all ILO Declarations and Conventions, in addition to the already-referenced fundamental Conventions of the ILO. ILO Declarations and international labour standards help States implement their obligations concerning human rights at work.

Proposed new PP5

Recalling that international labour standards provide States with the tools to implement their obligations concerning human rights at work and establish mechanisms for labour inspection and enforcement necessary to realize decent work for all.

We strongly recommend the inclusion of this new paragraph to better articulate the scope of labour rights within the context of the Legally Binding Instrument.

PP8

Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction **of race, colour, sex, language or religion** OR **based on the principles of equality and non-discrimination in international human rights law;**

A formulation based on the principles of equality and non-discrimination in international human rights law would ensure that no protected characteristics are left out of an otherwise exhaustive list in this paragraph.

Proposed new PP [10]

Reaffirming the primacy of international human rights law over any other international agreement, including those related to trade and investment;

Reaffirming the primacy of international human rights law over trade and investment agreements reflects the spirit of Article 103 of the Charter of the United Nations and helps set the context for Article 15.5(b).

Proposed new PP12

Recognizing that inclusive and concerted action is essential to realize human rights, achieve social justice, promote universal and lasting peace, and acknowledging that the failure to respect and fulfil human rights constitutes a threat to social progress;

We strongly recommend the inclusion of a new paragraph highlighting the importance of fulfilling and respecting human rights in a business context for the achievement of social justice.

Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, **workers**, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders; and the structural obstacles for obtaining remedies for these persons;

With the COVID-19 pandemic once again exposing the fragility of global supply chains and business models built on non-standard forms of employment and informality, the Legally Binding Instrument represents a unique opportunity to end the impunity for corporate human rights abuses. As such, we believe it is important to highlight the clear, distinctive and disproportionate impact of business-related human rights abuses on workers.

Section I

Article I

“**Victim**” shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm through acts or omissions, in the context of business activities, that constitute human rights abuse. The term “victim” may also include the immediate family members or dependents of the direct victim, **and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization**. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

A comprehensive definition of victim should include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization so that human rights defenders, including trade unionists, are implicitly covered by the term.

“**Business activities of a transnational character**” means any business activity described in Article 1.3 above, when:

- a. It is undertaken in more than one jurisdiction or State; or
- b. It is undertaken in one State but a **significant** part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
- c. It is undertaken in one State but has a **significant** effect in another State or jurisdiction.

We strongly recommend the deletion of the undefined and vague qualifying term significant, which could lead to unnecessary debates about what constitutes a business activity of a transnational character.

Article 3.3 [re-order]

This Legally Binding Instrument shall cover all internationally recognized human rights and fundamental freedoms which the State Parties of this (Legally Binding Instrument) have ratified, including:

- a. those recognized in the Universal Declaration of Human Rights;
- b. all core international human rights treaties;
- c. ILO Conventions;

as well as those to which they are otherwise bound, including,

- d. the ILO Declaration on Fundamental Principles and Rights at Work; and
- e. customary international law.

We strongly recommend a re-ordering of Article 3.3 to cover more clearly the internationally recognized human rights applicable to States by virtue of ratification and those to which they are otherwise bound.

Section II

Article 4.2(c)

c. be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, **reinstatement in employment, apology**, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;

We believe that this non-exhaustive list of remedies should include apologies (both public and private) and, most importantly, reinstatement in employment. A significant challenge for workers exercising their right to freedom of association is the fear of discriminatory dismissal. In such cases, the remedy must be reinstatement, given that compensation alone may continue to contribute to an atmosphere of intimidation in the workplace.

Article 6.2

States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations, business activities and relationships. **Such measures may include injunctive relief, precautionary or protective measures, and strict liability for human rights abuses, as appropriate.**

We strongly recommend including a non-exhaustive list of legal and policy measures that States can take to ensure that business enterprises respect all internationally recognised human rights and prevent and mitigate human rights abuses. This would help re-emphasise the scope of this Article, which is intended to cover an array of preventive measures above and beyond human rights due diligence.

Article 6.3(b)

b. Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take **reasonable and** appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;

While the UNGPs set out a greater number of factors to be considered where there is a business relationship in order to determine what appropriate action may be required, there is no suggestion that the action to be decided on as appropriate is lesser or limited to only what is reasonable. For this reason, we would recommend the deletion of the term *reasonable* here.

Article 6.4.

States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:

c. Conducting meaningful consultations **with individuals, communities, workers, and workers' representatives** whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

It would be important to highlight the specific need to consult workers and their representatives as rights-holders themselves.

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in ***situations of instability and national stress or*** in occupied or conflict-affected areas, including situations of occupation.

This formulation would meet the recommendations of the UN Working Group on Business and Human Rights' guidance on human rights due diligence in conflict situations.

Article 7.2

States Parties shall ensure that their domestic laws facilitate ***disclosure OR discovery*** and access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.

A reference to the judicial process of disclosure or discovery would help further clarify the intent of this Article.

Article 7.5

States Parties shall enact or amend laws ***allowing judges*** to reverse the burden of proof in appropriate cases to fulfill the victims' right to access to remedy where consistent with international law and its domestic constitutional law.

We recommend that this important provision allowing for the reversal of the burden of proof in favour of victims not be left up to the discretion of judges.

Article 8.6 [re-order]

States Parties shall ensure that their domestic law provides for the liability of business enterprises for human rights abuses caused or contributed to by another legal or natural person where a business enterprise:

- a. that controls, manages, supervises or otherwise assumes responsibility of another legal or natural person with whom they have a business relationship fails to prevent that person's activity which caused or contributed to human rights abuse; or
- b. effectively controls another legal or natural person that caused or contributed to human rights abuse; or
- c. should have reasonably foreseen the risk of human rights abuses in its business activities or business relationships but failed to prevent the human rights abuse.

Breaking down Article 8.6 in this way helps clarify the type of liability applicable to the three listed scenarios, namely negligence, strict liability, and strict liability for risk.

Article 8.7

Human rights due diligence shall not ***automatically necessarily*** absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. ***The court or other competent authority will decide the liability of such legal or natural persons after an examination of compliance with applicable human rights due diligence standards.***

We believe that our suggested formulation better articulates the intention behind this Article. It is our firm view that while the requirement to implement human rights due diligence is critical in ensuring that companies take a proactive and hands-on approach to ensure human rights are fully complied with in the supply chain

or the corporate group, it cannot become a substitute for ensuring a right to remedy for victims of corporate negligence. While this important distinction seems to be reflected in the text, the second part of this Article indicates that “the court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.” This sentence seems to suggest that the implementation of human rights due diligence standards does determine the liability of business entity, which seems to be in conflict with Article 6 and the first part of the present Article. This text should therefore be deleted.

Article 11.2

All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where:

- a. the acts or omissions have occurred or produced effects; or
- b. the natural or legal person alleged to have committed the acts or omissions is domiciled; or
- c. the victim is domiciled.**

The law of the domicile of the victim should be included as an option in order to, among other things, balance the ability of transnational companies to choose host countries with weak legal and governance frameworks.

Section III

New Article 15.4

States Parties recognise the competence of the Committee to receive and consider communications and complaints from individuals, communities, or their representatives concerning human rights abuses by business enterprises contrary to the provisions of the LBI and violations by a State Party of any of the rights set forth in the LBI.

OR

State Parties recognise the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals or their representatives who claim to be victims of a violation by a State Party of the provisions of the LBI or victims of human rights abuses by business enterprises contrary to the provisions of the LBI.

This new Article reflects our consistent demand that the functions and powers of the Committee should be strengthened by, among other things, having the ability to hear individual complaints.