

Second Revised Draft of Binding Treaty

Reflections on the text in preparation of the 6th Session of the IGWG

On Friday 7 August 2020, the Chair of the UN Open-ended intergovernmental working group (IGWG) in charge of developing a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises published the [Second Revised Draft](#) of the LBI.

The elaboration of this instrument, mandated in 2014 by Resolution 26/9 of the UN Human Rights Council, aims to complement and go beyond the UN Guiding Principles on Business and Human Rights (UNGPs) which were adopted in 2011. Its objective is to eliminate major gaps remaining in the protection of human rights against corporate abuses. Five sessions of negotiations of the LBI have already taken place in Geneva; they witnessed the participation and engagement of many civil society organisations from around the world, including [FIDH](#) and its members. During the fifth session, many States, including some that were reluctant to participate in the process three years ago, expressed their agreement on the continuation of the negotiations. The publication of the Second Revised Draft marks one step further towards the adoption of a UN Legally Binding Instrument on business and human rights and represents a good basis to hold substantive negotiations next 26-30 October 2020 in Geneva.

FIDH welcomes the efforts made by the Chairmanship of the IGWG to publish the new draft of the LBI ahead of the 6th session in Geneva (October 2020). It is pleased to note that the text takes into account some of the comments made by civil society organisations during the latest negotiation session and in recent months. This publication summarises FIDH's **main reflections on the text** and outlines some of the main challenges that still remain in the current draft. We hope that this exercise will be helpful to our members and partners, and will stimulate the work of civil society and of governmental delegations in preparation of the October session.

As a preliminary consideration, the following aspects of the new text represent positive developments that should be kept in the course of the negotiations:

- Explicit inclusion of State-owned enterprises in the definition of ‘business activities’;
- Reference to ‘business relationship’ instead of ‘contractual relationship’ to define the scope of application of the LBI provisions;
- Inclusion of persons who suffer harm in assisting victims or in preventing victimisation, in the paragraph entailing the definition of victims;
- Integration of a more specific gender perspective in art. 6;
- Reference to free, prior and informed consent for indigenous peoples in art. 6.3;
- Clarification in art. 7.7 of the need for State parties to ensure liability in cases where businesses contribute to harm; and improvement of the definition of control that will give rise to liability for the ‘lead company’;
- Explicit clarification in art. 7.8 that complying with human rights due diligence (HRDD) cannot be used as a ‘safe harbour’ to escape liability when a company has caused or contributed to human rights abuses;
- Obligation for courts of the State of domicile of the business to exercise jurisdiction no matter where the victims are from, thus giving up on the doctrine of *forum non conveniens* in such cases;
- Inclusion of art. 8.4 and art. 8.5 referring to the possibility for State parties’ courts to reunite claims that are closely connected and to exercise jurisdiction over claims concerning companies that are not domiciled in the territory of the State if no other effective forum is available and if there is a close connection to the State concerned (*forum necessitatis*);
- Explicit obligation for new trade and investment agreements to be compatible with the LBI.

In spite of these numerous substantive improvements, and in order for the treaty to truly allow a significant step forward in protecting human rights from corporate abuses, the current text still has **several substantial shortcomings that must be addressed, and that are** summarised below:

- It is essential to ground this instrument in the UN Declaration on the Granting of Independence to Colonial Countries and Peoples and to reassert that colonialism - whether driven by States or corporate interests - must be eradicated. Accordingly, we propose the following provision in the preamble: **“Reaffirming the principles of the Declaration on the Granting of Independence to Colonial Countries and Peoples, also known as the United Nations General Assembly Resolution 1514.”**

- Despite the explicit mention of State owned enterprises, the new text falls short of addressing the **role of the State** both as a regulator and as an economic actor, as well as its duty to respect human rights in the context of business activities and not only to prevent abuses linked to companies. In this respect, we recommend to:
 - refer to ‘**violations and abuses**’ throughout the text, in order to better capture the State obligation to respect human rights under international law;
 - add a specific article on ‘**Monitoring and Enforcement**’ with an aim to reaffirm the role of the State as a guarantor and enforcer of rights, rather than leaving enforcement almost fully to victims through private complaint procedures;
 - better address the obligation for a **State to conduct due diligence** when it engages in economic activities or when it offers financial or other support to businesses, such as granting export licenses, conducting commercial transactions with businesses, including procurement and privatisation of services, etc.

- In general, articles dealing with the **protection of victims and participation** need to be significantly improved. To this aim, we suggest at minimum:
 - To change the title of Article 4 to ‘**Right to Remedy**’ and refer to “rights-holders” instead of “victims”. This article refers to a broad range of rights and protections which already exist in international law and should be guaranteed not only to victims of corporate abuses but to all individuals. Moreover, Article 4.c should encompass a broad understanding of the right to access to justice and to reparation, as outlined by the Inter-American Human Rights system. Namely, it should establish “**the right to fair, adequate, effective, prompt, non-discriminatory and gender-responsive access to justice and adequate, prompt and effective remedy in accordance with this (Legally Binding Instrument) and international law. Such remedies shall include, but shall not be limited to restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration, include covering of expenses for relocation of victims, replacement of community facilities, comprehensive emergency assistance and long-term health monitoring**”;
 - To better detail, throughout the text (Art. 4, 5, 6), the **right to information** victims and rights-holders should have access to and the means through which the State can guarantee this. This can also be done by adding a specific article on the right to information in the text. The current shortcomings of the text on the right to information is particularly worrying considering that lack of access to information is one of the most serious and recurrent barriers limiting access to justice and effective remedy for victims of corporate related human rights abuses and violations. Moreover, there is also a need for stronger language on access to clear, complete and relevant information to give full effect to the right to participate in decision-making processes related to business activities that can impact human rights. In this respect, clearer provisions on the reversal of the burden of proof are also essential to address the imbalances created by the lack of access to information of individuals and communities in the context of economic activities.
 - To establish, in Article 6.3, that **local communities, members of the LGBTIQ+ community, peasants and other rural workers as well as ethnic and linguistic minorities** are entitled to free, prior and informed consent.
 - To include a specific provision that explicitly places victims and victims’ needs at the heart of **reparation processes** in Article 4. It would also be important to refer to a broad range of reparations that could be needed as a result of environmental disasters, including long term needs as well as the need for reparation measures to be taken in consultation with affected communities. Specific reference to support services that ensure psychological well-being of victims should also be added.
 - To better address a **State’s duty to remedy** its own failures (which operates alongside its duty to ensure remedy is granted in cases of corporate abuse). In this respect, Article 5 should require States to adopt provisions to investigate wrongdoings by public servants tasked with overseeing corporate activity and to take measures to ensure that individuals and communities whose human rights are at risk from business activities have access to effective precautionary measures to prevent imminent or irreversible harm.

- On **Prevention** there are still substantial shortcomings in the proposed text. To address them, FIDH proposes the following:
 - to **align the language** used in Article 6 with the steps of human rights due diligence ‘codified’ by existing international standards such as the UNGPs and OECD Guidelines. It is essential for the future legally binding instrument to take stock of the existing standards when they are more protective of human rights and that it improves them when they are not sufficient. In this respect, it is also

- paramount to clarify that companies should “**prevent and mitigate risks**” and “**prevent abuses**”, **not “mitigate abuses**”. This language is consistent with General Comment 24 of the ESCR Committee, par. 16 and represents a step forward in the understanding of human rights due diligence as defined by the UNGPs;
- to address compliance with due diligence obligations for companies that provide goods and services to States or receive subsidies from States;
 - To better include **protection of human rights defenders** as a key element for an effective prevention of human rights abuses and violations in the context of business activities, and explicitly clarify that human rights defenders, members of the LGBTIQ+ community, peasants and other rural people and ethnic and linguistic minorities should be consulted throughout the planning, implementation and follow-up of a given economic project.
- Despite positive improvements, the current text should further integrate provisions on preventing **abuses and serious violations in conflict-affected areas**. In particular:
- The text should clarify in the preamble and throughout the text that **International Humanitarian Law** is integrated in the scope of the legally binding instrument and should better recall the existing duties of States under international law in such contexts.
 - To clarify that appropriate action in these contexts may include **refraining from or ceasing** certain operations or business relationships in circumstances in which due diligence cannot guarantee respect for human rights and the rules of international humanitarian law.
- The Second revised draft, as mentioned above, includes some significant positive steps towards better access to justice and remedy in the context of business-related human rights abuses and violations, particularly those of transnational character. However, further improvements in the provisions of the text addressing **liability and access to justice** are needed:
- Article 8 on legal liability should better clarify between provisions addressing
 - liability in cases of harm caused or contributed by a company’s own activities or operations, and
 - liability in cases of harm caused or contributed by the activities or operations of a company that it controls, or for failure to prevent harm directly linked to its business relationships.
 - While there is some clarification in the provisions on **control**, the text should provide a clear definition of control. A provision establishing a presumption of control in certain cases should also be added, in order to avoid restrictive interpretations by States which will ultimately hamper the possibility to hold controlling companies liable for human rights harm.
 - Due diligence shall never act as a shield from liability. In Article 6, the text should make clear that courts should establish the liability of such entities after an examination of compliance with effective **human rights due diligence measured in concrete** and not simply because the company has adopted a certain standard.
 - The text should include a provision in Article 8 clearly stating that it **rests on the defendant business enterprise to demonstrate** that it took every reasonable step to avoid causing or contributing to a human rights violation or abuse, or prevent such violation or abuse. This type of provision is well established in different national and international legal instruments and case law, and is here suggested for civil claims. It thus does not conflict with the ‘presumption of innocence’ principle which is a criminal law principle.
 - Provisions on **criminal liability** for companies who commit or are complicit of human rights crimes should be clearly distinguished in the text from provisions on civil liability. A dedicated article could be a good solution in this respect.
 - Include in the adjudicative jurisdiction criteria in Article 9.1 a specific criterion allowing jurisdiction of courts located where business enterprises have ‘**substantial business interests**’, in order to avoid that companies escape compensation because they do not have significant assets in the country where they are domiciled.
 - Insert a definition of ‘**sufficient connection**’ allowing the forum of necessity as per Article 9.5, in order to avoid a restrictive interpretation of this clause.
 - Insert ‘**lis pendens**’ provisions in Article 9 clarifying how courts should deal with cases that are brought simultaneously in different jurisdictions. Such provisions should aim at prioritising the claims where the court can give a judgement capable of being recognised and, where applicable, enforced in that State Party.
 - Insert a specific article on **adjudicative criminal jurisdiction** to clarify the jurisdiction criteria in criminal cases. Existing instruments such as the Convention against Torture and the Convention for the Protection of all Persons from Enforced Disappearance could be used as models for this article.

FIDH will address these concerns during the 6th IGWG session and in its conversations with other involved organisations and delegations. We also encourage FIDH members who share these concerns to include them in their analysis of the Treaty, in their communication with State delegations and partners and to outline them in their interventions on this topic.

We call upon negotiating States—especially those who have repeatedly called for substantive discussions to take place, those who declare being committed to achieve a more sustainable globalisation, as well as those who are contemplating the adoption of domestic mandatory HRDD measures—to prepare and engage with the draft’s content, as well as to make efforts to strengthen the text in view of making the protection of human rights more effective in cases of corporate abuse.