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English only

Human Rights Council
Open-ended intergovernmental working group
on transnational corporations and other business
enterprises with respect to human rights
Eighth session
24–28 October 2022

**Suggested Chair proposals for select articles of the legally
binding instrument with the concrete textual proposals
submitted by States during the eighth session**

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Conference room paper

Article 1. Definitions (additions and changes)

“Adverse human rights impact” shall mean a harm which corresponds to a reduction in or removal of a person’s ability to enjoy an internationally recognized human right.

“Human rights abuse” shall mean any acts or omissions that take place in connection with business activities and results in an adverse human rights impact.

“Human rights due diligence” shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. While these processes will vary in complexity with the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise, these processes will in every case comprise the following elements:

(a) identifying and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;

(b) taking appropriate measures to prevent and mitigate such adverse human rights impacts;

(c) monitoring the effectiveness of its measures to address such adverse human rights impacts; and

(d) communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.

“Remedy” shall mean the restoration of a victim of a human rights abuse to the position they would have been had the abuse not occurred, or as nearly as is possible in the circumstances. An **“effective remedy”** involves reparations that are adequate, effective and prompt; are gender and age responsive; and may draw from a range of forms of remedy such as restitution, compensation, rehabilitation, satisfaction (such as cessation of abuse, apologies, and sanctions), and guarantees of non-repetition.

“Relevant State agencies” means judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this LBI to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State-based non-judicial mechanisms.

(amend to “State-based judicial and non-judicial grievance mechanisms” or clarify term: USA)

Article 6. Prevention

6.1. Each State Party shall adopt appropriate legislative, regulatory, and other measures to:

6.1. **Consistent with domestic legal and judicial systems, Each State Party should take steps to ~~shall~~ adopt ~~appropriate~~ legislative, regulatory, and other measures, as appropriate,** to: **(USA)**

(a) prevent the involvement of business enterprises in human rights abuse;

(b) enhance respect by business enterprises for internationally recognized human rights;

(b) ~~enhance~~ **ensure** respect by business enterprises for internationally recognized human rights; **(Mexico, Panama)**

(c) strengthen the practice of human rights due diligence by business enterprises; and

(c) ~~strengthen~~ **ensure** the practice of human rights due diligence by business enterprises; and **(Mexico, Panama)**

(d) promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations and community-based organizations, in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.

(d) promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations, **indigenous peoples** and community-based organizations, in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse. **(Mexico, Peru)**

(d) promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations and community-based organizations, **affected or potentially affected persons** in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse. **(Panama)**

6.2. Each State Party shall ensure that competent authorities relevant to the implementation of Article 6.1 have the necessary independence, in accordance with the fundamental principles of its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.

6.3. Measures to achieve the ends referred to in Article 6.1 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that such human rights due diligence:

6.3. ~~Measures to~~ **To achieve the ends identified referred to in Article 6.1 (a)-(d), States Parties shall take steps to encourage ~~include legally enforceable requirements for~~ business enterprises to undertake human rights due diligence, as well as such supporting or ancillary measures as may be needed to ensure that such human rights due diligence: proportionate to their size, risk of human rights abuse and the nature and context of their operations and their business activities and relationships. (USA (and delete all sub-provisions))**

(a *ante*) **Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments prior and throughout their operations; (Panama)**

(a) takes full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced by women and girls;

(a) **to integrate a gender and age perspective, and** takes full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced by women and girls; **(Panama, Mexico, Peru)**

(b) takes particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;

(c) has been informed by meaningful consultation with potentially affected groups and other relevant stakeholders;

(d) ensures the safety of those who may be at risk of retaliation; and

(d) ~~ensures~~**protects** the safety of **human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as** those who may be **subject to at risk of** retaliation; and **(Mexico)**

(e) insofar as engagement with indigenous peoples takes place, is undertaken in accordance with the internationally recognized standards of free, prior and informed consent.

6.4. Each Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases.

6.4. Each Party shall take ~~necessary such~~ measures ~~as may be necessary, and consistent with its domestic legal and administrative systems~~, to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases. **(Mexico)**

6.5. State Parties shall periodically evaluate the legislative, regulatory, and other measures referred to in Article 6.1 and with a view to determining their adequacy for meeting the aims set out in that Article and shall revise and extend such measures as appropriate.

6.5 bis. In setting and implementing their public policies and legislation with respect to the implementation of this (Legally Binding Instrument), States Parties shall act in a transparent manner and protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character. (Panama)

Article 7. Access to Remedy

7.1. Each State Party shall, consistent with its domestic legal and administrative systems:

(a) develop and implement effective policies to promote the accessibility of its relevant State agencies to victims and their representatives, taking into account the particular needs and interests of those victims who may be at risk of vulnerability or marginalisation;

(replace “relevant State agencies” with “relevant State-based judicial and non-judicial grievance mechanisms”: USA, Panama)

(replace “victims” with “rights holders” throughout the text: USA)

(opposes change: Panama)

(b) progressively reduce the legal, practical and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing such State agencies for the purposes of seeking an effective remedy; and

(c) ensure that relevant State agencies can either deliver, or contribute to the delivery of, effective remedies.

(c) work towards ensuring ensure that relevant State agencies can either deliver, or contribute to the delivery of, effective remedies. **(USA)**

7.2. The policies referred to in Article 7.1(a) shall address, to the extent applicable to the State agency in question:

(a) the need to ensure that procedures and facilities for accessing and interacting with such agencies are responsive to the needs of the people for whose use they are intended;

(b) the need to ensure that victims have ready access to reliable sources of information about their human rights, the role and capacity of relevant State agencies in relation to helping victims obtain an effective remedy, and appropriate support to enable them to participate effectively in all relevant processes;

(c) the implications in terms of access to remedy of imbalances of power as between victims and business enterprises; and

(d) risks of reprisals against victims and others.

7.3. The measures to achieve the aims set out in Article 7.1(b) shall include, to the extent applicable to the State agency in question and necessary to address the obstacle in question:

(a) reducing the financial burden on victims associated with seeking a remedy, for instance through the provision of financial assistance, waiving court fees in appropriate cases, and/or granting exceptions to claimants in civil litigation from obligations to pay the costs of other parties at the conclusion of proceedings in recognition of the public interest involved;

(b) providing support to relevant State agencies responsible for the enforcement of the measures referred to in Article 6;

(c) ensuring that there is effective deterrence from conduct that may amount to reprisals against victims and others;

(d) reversing or reducing evidential burdens of proof for establishing liability, such as through the application of presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases;

(d) States Parties shall adopt measures to facilitate the production of evidence, when appropriate and as applicable, such as the reversal of the reversing or reducing evidential burdens of proof and the dynamic burden of proof for establishing liability, such as through the application of presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases; (Mexico, Panama)

(e) ensuring fair and timely disclosure of evidence relevant to litigation or enforcement proceedings; and

(f) ensuring that rules of civil procedure provide for the possibility of group actions in cases arising from allegations of human rights abuse.

7.4. For the purposes of achieving the aims set out in Article 7.1(c), States shall adopt such legislative and other measures as may be necessary:

(a) to enhance the ability of relevant State agencies to deliver, or to contribute to the delivery of, effective remedies;

(b) to ensure that victims are meaningfully consulted by relevant State agencies with respect to the design and delivery of remedies; and

(c) to enable relevant State agencies to monitor a company's implementation of remedies in cases of human rights abuse and to take appropriate steps to rectify any non-compliance.

Article 8. Legal Liability

8.1. Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to establish the liability of legal and natural persons for non-compliance with its legally enforceable measures established pursuant to Article 6.

8.2. Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in this Article shall be criminal, civil or administrative, as appropriate to the circumstances. Each State Party shall ensure, consistent with its domestic legal and administrative systems, that the type of liability established under this article shall be:

- (a) responsive to the needs of victims as regards remedy; and
- (b) commensurate to the gravity of the human rights abuse.

8.3. Subject to the legal principles of the State Party, the liability of legal and natural persons shall be established for:

- (a) conspiring to commit human rights abuse; and
- (b) aiding, abetting, facilitating and counselling the commission of human rights abuse.

8.4. Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that, in cases concerning the liability of legal or natural persons in accordance with this article:

- (a) the liability of a legal person is not contingent upon the establishment of liability of a natural person;
- (b) the criminal liability (or its functional equivalent) of a legal or natural person is not contingent upon the establishment of the civil liability of that person, and vice versa; and

(has reservations: Panama)

(c) the liability of a legal or natural person on the basis of Article 8.3 is not contingent upon the establishment of the liability of the main perpetrator for that unlawful act.

8.5. Each State Party shall ensure, consistent with its domestic legal and administrative systems, an appropriate allocation of evidential burdens of proof in judicial and administrative proceedings that takes account of differences between parties in terms of access to information and resources, including through the measures referred to in Article 7.3(d), as appropriate to the circumstances.

8.6. Each State Party shall ensure that legal and natural persons held liable in accordance with this Article shall be subject to effective, proportionate and dissuasive penalties or other sanctions.

Article 9. Jurisdiction

9.1. Each State Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to establish its jurisdiction in respect of human rights abuse in cases where:

- (a) the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that State Party;
- (b) the relevant harm was sustained, in whole or in part, within the territory or jurisdiction of that State Party;
- (c) the human rights abuse was carried out by either
 - i. a legal person domiciled in the territory or jurisdiction of that State party; or
 - ii. a natural person who is a national of, or who has his or her habitual residence in the territory or jurisdiction of, that State Party; and
- (d) a victim seeking remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of, that State Party.

9.2. For the purposes of Article 9.1, a legal person is considered domiciled in any territory or jurisdiction in which it has its:

- (a) place of incorporation or registration;
- (b) principal assets or operations;
- (c) central administration or management; or
- (d) principal place of business or activity.

9.3. Each State Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:

(has reservations: Panama)

- (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or
- (b) the coordination of actions as contemplated in Article 9.4.

9.4. If a State Party exercising its jurisdiction under this Article has been notified, or has otherwise learned, of judicial proceedings taking place in another State Party relating to the same human rights abuse (or any aspect of such human rights abuse), the relevant State agencies of each State shall consult one another with a view to coordinating their actions.

Article 10. Limitation Periods

10.1. Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that no limitation period shall apply in judicial proceedings in relation to human rights abuse constituting a war crime, a crime against humanity or the crime of genocide.

10.2. In judicial proceedings regarding human rights abuse not falling within the scope of Article 10.1, each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that limitation periods for such proceedings:

10.2. In judicial proceedings regarding human rights abuse not falling within the scope of Article 10.1, each State Party shall adopt such measures as may be necessary, ~~and consistent with its domestic legal and administrative systems,~~ to ensure that limitation periods for such proceedings: **(Mexico)**

- (a) are of a duration that is appropriate in light of the gravity of the human rights abuse;
- (b) are not unduly restrictive in light of the context and circumstances, including the location where the relevant human rights abuse took place or where the relevant harm was sustained, and the length of time needed for relevant harms to be identified; and
- (c) are determined in a way that respects the rights of victims in accordance with Article 4.

Article 11. Applicable Law (removed)

(opposes removal: Palestine, Mexico)

Article 12. Mutual Legal Assistance

12.1. States parties shall afford one another the greatest measure of assistance in connection with criminal, civil and administrative proceedings relevant to the enforcement of the measures referred to in Articles 6-8, including assistance to expedite requests from private parties for the transmission and service of documents and for the taking of evidence in civil proceedings.

12.1. States parties shall afford one another the greatest measure of assistance, **in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them**, in connection with criminal, civil and administrative proceedings relevant to the enforcement of the measures referred to in Articles 6-8, ~~including assistance to expedite requests from private parties for the transmission and service of documents and for the taking of evidence in civil proceedings.~~ (China)

12.2. States Parties shall carry out their obligations under Article 12.1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them.

12.3. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the enforcement of the measures referred to in Articles 6-8. States Parties shall, in particular, take the necessary steps:

(a) To establish, maintain and enhance channels of communication between their relevant State agencies and their counterparts in other States Parties in order to

- i. facilitate the secure and rapid exchange of information concerning all aspects of the enforcement of the measures referred to in Articles 6-8, including for the purposes of the early identification of breaches of such measures; and
- ii. share information concerning issues, challenges, and lessons learned in the prevention of business involvement in human rights abuse, including with a view to enhancing the effectiveness of competent authorities, agencies and services; and

(b) To facilitate effective coordination between their relevant State agencies and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers.

12.4. For the purposes of meeting their obligations under this article, each State Party shall:

(a) ensure that its relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make effective use of the treaties and arrangements referred to in Article 12.2; and

(b) consider entering into or enhancing bilateral or multilateral agreements or arrangements aimed at improving the ease with which and speed at which

- i. requests for mutual legal assistance can be made and responded to; and
- ii. information can be exchanged between relevant State Agencies for the purposes of enforcement of the measures referred to in Articles 6-8, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

Article 13. International cooperation

13.1. States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention of business involvement in human rights abuse and for the remedy of harms arising from such abuse. States Parties shall also promote international cooperation and coordination between their relevant State agencies, national and international non-governmental organizations and international organizations.

13.2. States Parties shall promote international cooperation to:

- (a) raise public awareness about
 - i. human rights in the context of business activities and how they are protected;
 - ii. the different ways in which business enterprises can become involved in adverse human rights impacts and their obligations under international and domestic law in such contexts and circumstances;
 - iii. best practices for identifying, preventing and mitigating adverse human rights impacts;
 - iv. how victims and potential victims can defend their rights and seek remedies for adverse human rights impacts; and

(b) assist and support victims and potential victims to defend their human rights and obtain an effective remedy.

13.3. States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes for the purposes of realising the aims of this LBI.
