

Summary: Second Revised Draft of the Binding Treaty on Business and Human Rights

This is an unofficial summary of the [second revised draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises](#). This Draft was published on 6 August 2020 by the UN Human Rights Council's open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG).

Purpose

The purpose of the Treaty, as stated in Article 2, is to “clarify and facilitate the effective implementation of States’ obligation to respect, protect and promote human rights in the context of business activities, as well as the responsibilities of business enterprises”, “prevent the occurrence of human rights abuses” in this context, “ensure access to justice and effective remedy for victims” and “facilitate and strengthen mutual legal assistance and international cooperation to prevent human rights abuses in the context of business activities.”

Scope and Adjudicative Jurisdiction

The Treaty covers “all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is party, and customary international law” (Article 3).

Jurisdiction vests in the courts of the State where the human rights abuse occurred, an act or omission contributing to the abuse occurred, or the legal or natural persons alleged to have committed an act or omission causing or contributing to the abuse are domiciled (Article 9).

Definitions

Victims are defined as “any persons or group of persons who individually or collectively have suffered harm, including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse.” This also includes “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” (Article 1.1).

Business activities are defined as “any profit economic or other activity undertaken by a natural or legal person, including State-owned enterprises, transnational corporations, other business enterprises, and joint ventures, undertaken by a natural or legal person.” This includes activities undertaken by electronic means (Article 1.3)

Business relationship is defined as “any relationship between natural or legal persons to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State, including activities undertaken by electronic means” (Article 1.5).

Rights and Protection of Victims

Article 4 affirms that victims in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms. Article 4 further recognizes the right of victims to:

- be treated with humanity and respect for their dignity and human rights (Art 4.2 (a))
- be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement (Art 4.2 (b))

- be guaranteed the right to fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy in accordance with the Treaty and international law (Art 4.2 (c))
- be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the State Parties (Art 4.2 (d))
- be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, as well as from re-victimization in the course of proceedings for access to effective remedy (Art 4.2 (e))
- be guaranteed access to information and legal aid relevant to pursue effective remedy (Art 4.2 (f))
- be guaranteed access to appropriate diplomatic and consular means to facilitate access to effective remedy (Art 4.2 (g))

Article 5 outlines the duty of States to “protect victims, their representatives, families and witnesses from any unlawful interference with their human rights and fundamental freedoms.” Paragraph 2 of that article includes States’ obligation to “take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.”

Prevention and Due Diligence

States shall take all necessary legal and policy measures to ensure that business enterprises, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations (Article 6.1).

States shall require business enterprises to undertake human rights due diligence, as follows:

- Identify and assess any actual or potential human rights abuses that may arise from their business activities or business relationships (Art 6.2 (a))
- Take appropriate measures to prevent and mitigate effectively the identified human rights abuses (Art 6.2 (b))
- Monitor the effectiveness of their measures (Art 6.2 (c))
- Communicate regularly and in an accessible manner to stakeholders, particularly affected or potentially affected persons. (Art 6.2 (d))

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

- Undertaking regular environmental and human rights impact assessments (Art 6.3 (a))
- Integrating a gender perspective in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls (Art 6.3 (b))
- Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected, “while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas” (Art 6.3 (c))
- Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent (Art 6.3 (d))
- Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas. (Art 6.3 (g))

Failure to comply with the duties in Article 6.2 and 6.3 shall result in commensurate sanctions, including corrective action where applicable (Article 6.6).

Access to Remedy

States shall provide adequate and effective legal assistance to victims, including by: making information available to victims on their rights and the status of their claims (Article 7.3 (a)), providing assistance to initiate proceedings in the courts of another State Party in appropriate cases (Article 7.3 (d)), ensuring that rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims (Article 7.3 (e)).

Article 7.5 provides that States shall ensure that the doctrine of *forum non conveniens* is not used by their courts to dismiss legitimate juridical proceedings brought by victims.

Article 7.6 provides that State Parties may, consistent with the rule of law requirements, enact or amend laws to reverse the burden of proof in appropriate cases to fulfil the victims' right to access to remedy.

Legal Liability

Article 8.1 provides that "State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities" or "from their business relationships."

States shall adopt legal and other measures necessary for "effective, proportionate, and dissuasive criminal and/or administration sanctions where legal or natural persons conducting business activities" have caused or lead to human rights abuses (Article 8.4).

States shall also ensure that legal or natural persons conducting business activities are held liable for their failure to prevent another legal or natural person with whom they have a business relationship, from causing or contributing to human rights abuses, "when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities... or in their business relationships, but failed to put adequate measures to prevent the abuse." (Article 8.7)

Human rights due diligence will not automatically absolve a legal or natural person conducting business activities from liability. "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." (Article 8.8)

States shall ensure that their domestic law provides for the criminal or functionally equivalent liability of legal persons for human rights abuses that amount to criminal offences under international human rights law binding on the State Party, customary international law, or their domestic law. (Article 8.9)

Mutual Legal Assistance and International Judicial Cooperation

States "shall make available to one another the widest measure of mutual legal assistance and international judicial cooperation in initiating and carrying out effect, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered" by the Treaty. (Article 12.1)

International Fund for Victims

States shall establish an International Fund for Victims covered under the Treaty to provide legal and financial aid to victims. (Article 15.7)

Implementation

States shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of the Treaty. (Article 16.1)

In implementing the Treaty, States shall address the specific impacts of business activities on victims while giving special attention to those facing heightened risks of human rights abuse within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons. (Article 16.4)