



NGO Statement for the Sixth Session of the Open-ended intergovernmental working group for the elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with respect to human rights, Resolution A/HRC/26/9 - 26 to 30 October 2020

Thank you, Chair.

I would like to make a statement on behalf of the [Mind the Gap consortium](#), a group of 11 NGOs from every region of the world exposing harmful corporate strategies that result in the avoidance of responsibility for human rights or environmental impacts. We welcome the general direction in which the draft text has evolved and, as requested by the secretariat, hereby, **concrete wording (text in *italic*) to improve the text of the LBI on item 4 Article 8. on Legal Liability.**

To 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.

We suggest including the wording: "**causing or contributing to human rights abuses**", in addition to their failure to prevent as criteria for legal liability, as follows:

8.7. States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting business activities, including those of transnational character, for ***causing or contributing to human rights abuses, and for*** their failure to prevent another legal or natural person with whom it has 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, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse.

It will also be pertinent to add a clear definition of control and a presumption of control in certain cases under two new sub-Articles under Art 8.7 as follows:

- a) The existence of control or supervision shall be assessed on the basis of financial participation, rights, contracts or any other means, either separately or in combination, and having regard to the considerations of fact and law involved.***
- b) States Parties shall ensure that, when victims establish, before a court or other competent authority, reasonably available facts from which it may be presumed that a legal or natural person is under the control or supervision of another legal or natural person, it shall be for the respondent to prove otherwise.***

On Art 8.8. 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. We also suggest adding a provision clarifying 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. The re-worded article should read as follows:

8.8. Human rights due diligence shall not automatically 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 8.7. The court or other competent authority will decide the liability of such entities after an examination of **effective** compliance with applicable human rights due diligence standards as outlined in article 6.

States Parties shall ensure that, when victims establish, before a court or other competent authority, reasonably available evidence to support their claim, it shall be for the respondent to clarify the nature of its relationship with the natural or legal person who caused or contributed to human rights abuses, and to prove whether the respondent took all reasonable measures to prevent the abuse.

Finally, we suggest that **Articles 8.9, 8.10 and 8.11, concerning provisions on criminal liability** for companies who commit or are complicit of human rights crimes **shall be clearly distinguished** from provisions on civil liability and therefore should go under a **new additional article after article 8**.

Thanks.

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