

Recommendations on the Revised Draft for an international Legally Binding Instrument in the field of business and human rights (LBI)

Following a recommendation of the Chair-Rapporteur of the open-ended intergovernmental working group (OEIGWG) negotiating an international legally binding instrument in the field of business and human rights (LBI) in his report of the 5th session of the OEIGWG “to organize consultations at all levels, including in particular at the regional and national level, with a view to exchanging comments and inputs on the revised draft legally binding instrument” the British Institute of International and Comparative Law (BIICL) held a virtual consultation on 1 July 2020.

About 90 persons representing academia, civil society and other relevant stakeholders from Europe and the United States participated in the consultation led by Irene Pietropaoli (United Kingdom), Nadia Bernaz (Netherlands) and Robert McCorquodale (United Kingdom). The consultations covered the Preamble and Articles 1 to 12 of the Revised Draft of the LBI.

The following recommendations are based on proposals discussed during this regional consultation. They rely in written inputs by Daniel Aguirre (United Kingdom), Claire Bright (Portugal), Jernej Letnar Čerňič (Slovenia), Shane Darcy (Ireland), Antoine Duval (Netherlands), Markus Krajewski (Germany), Maddalena Neglia (France), Tara Van Ho (United Kingdom), Mariëtte van Huijstee (Netherlands) and Maysa Zorob (United States).

Preamble

- The preamble should be shortened and follow examples of preambles found in similar UN human rights treaties. The structure of the preamble should be revised so that it would first refer to the relevant international documents in business and human rights and beyond. Second, it should thereafter refer to values, principles, rights, rights-holders, state obligations and access to remedy.
- The Preamble should refer to the principle of the rule of law. Many problems victims of human rights violations and abuses in the context of business activities are connected with general, systematic and structural deficiencies in the exercise of the rule of law. The rule of law, often defined as the absence of arbitrary power by ruling institutional elites, therefore needs to be mentioned in the preamble and throughout the treaty, perhaps even in a separate provision at the beginning of the treaty.
- The preamble should clarify that the primary objective of the proposed LBI is to protect human dignity of rights-holders. Human dignity should therefore be placed at the heart of preamble.

Article 1

- The explicit recognition of environmental rights within the definition of ‘Human rights violation or abuse’ in Article 1(2) and the comprehensive definition of ‘Business activities’ in Article 1(3) are welcomed and should be maintained.

- It is problematic that the draft defines a victim as a person who has suffered and '[w]here appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim.' This language undermines well-established approaches to recognizing victims within international human rights law. A better approach, and one that would help unify international human rights law, would be to draw on the language of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 24 to create the following definition:
 - *"victims" shall mean any persons or group of persons who individually or collectively have suffered, or allege to have suffered, as a result of a human rights violation or abuse as defined in Article 1 paragraph 2 below.*
- It is also recommended to reverse the order of the articles on Definitions and Purpose, i.e. start with the purpose.

Article 2

- The revised draft contains a succinct and clear statement of purpose, and one that is appropriate for the remit of this treaty. However, the treaty's current design and content does not meet the stated purpose as it should. In particular, the complete lack of any reference to international investment, trade, and finance treaties or agreements is concerning and will undermine efforts to strengthen respect for human rights in the context of business activities (For concrete textual proposals see below Article 12).

Article 3

- While widening the scope of the LBI to all business activities including those of a transnational character in the Revised Draft has been perceived as a positive step, the Draft can still be improved to guarantee a better alignment with the UNGPs and secure legal certainty. In particular, the personal scope can be clarified and simplified.
- It is unclear why the text of the Revised Draft focuses on business activities and does not adopt the more general (and all encompassing) conceptual vocabulary of the UNGPs that refers to "business enterprises". Moreover, the Article claims that the LBI will be applicable to all business activities, but then turns unexpectedly to defining only business activity of a transnational character in Article 3(2). This confusing, and contradictory structure could be simply bypassed by specifying that the LBI is applicable to all business enterprises, with a particular (but not exclusive) attention to transnational corporations. Article 3(1) could be formulated as follows:
 - *This (Legally Binding Instrument) shall apply to all business enterprises, including particularly but not limited to transnational corporations. Furthermore, this would also lead to the deletion of the current Article 3(2), which is a useless source of confusion.*
- The Revised Draft currently provides that it "shall cover all human rights". This is an extremely broad and vague statement, which might be problematic from the point of

view of legal certainty. Instead, the substantial scope of the future Instrument should be aligned with the UNGPs and the OECD Guidelines, e.g. that Article 3(2) provides:

- *This (Legally Binding Instrument) shall cover all internationally recognised human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.*
- Considering that important existing international human rights instruments (such as CEDAW and the UN Declaration on the Rights of Indigenous Peoples) are not expressly mentioned in Principle 12 of the UNGPs, they could be added to the text of Article 3(2). In any event, it is important to point out that the commentary to Principle 12 of the UNGPs provides that “Depending on circumstances, business enterprises may need to consider additional standards”. It is thus clear that the instruments listed in UNGP 12 and the proposed Article 3(2) are not to be understood as an exhaustive list and that the context of operation of each business might bring other instruments into the substantial scope of the future Instrument.

Article 4

- Article 4 of the Revised Draft includes key improvements when it comes to acknowledging and protecting the critical work of human rights defenders. The following suggestions are aimed at supplementing Article 4 and strengthening existing provisions.
- In order to eliminate any uncertainty when it comes to the rights of direct victims of corporate abuse and rights that can be collectively exercised by their immediate family members or dependants (such as in paragraph 4) the text might refer to “Victims, *including* their representatives, families and witnesses” in paragraph 3 and other relevant provisions.
- The Revised Draft does not include an explicit state obligation to guarantee the right of victims to pursue their claims collectively as a group (including as opt-out class actions). It is suggested that Article 4 be reworded in line with what was initially proposed in Art. 8(2) of the Zero Draft: “State Parties shall guarantee the right of victims, *individually or as a group*, to present claims to their Courts...”
- In order to ensure that victims have effective access to justice and remedy, paragraph 5 should be amended to guarantee victims’ rights to independent and impartial justice and to precautionary measures.
 - The current drafts omits the right to independent and impartial access to justice, which are two essential elements of the right to a fair trial and the rule of law, and should therefore be added the instrument.
 - Remedies in Article 4 are based only on ex post judicial action for individuals or groups who have already suffered harm; a preventative dimension is lacking and should be added. Victims’ rights to precautionary measures is a critical element in ensuring that their human rights are respected and is closely linked to prevention as addressed in Article 5. Paragraph 5 should be amended to include victims’ right to precautionary measures.

- Given the importance of Article 4, paragraph 16 on the reversal of the burden of proof, the text must be strong, clear and actionable. The current formulation is too vague and open-ended. The provision could be strengthened by introducing rebuttable presumptions and by ensuring supremacy over domestic law. For example, a “rebuttable presumption of effective control by the parent company when it has direct or indirect ownership or controlling interest over the entities part of a group.” Furthermore, the reference to domestic law should be deleted in this paragraph to prevent States from using national legislation to circumvent the reversal of burden of proof, which could render this treaty provision meaningless.
- Explicit references could be made to persons facing heightened risks of human rights abuses as acknowledged in the preamble (e.g. women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or in conflict areas).

Article 5

- The focus on prevention in article 5 is important, but the treaty remains unbalanced in favour of liability after violations have occurred. This may be addressed by strengthening Article 5, especially regarding state human rights law obligations. In particular, paragraph 1 needs to be strengthened by referring to the rule of law and human rights while the rest of the article needs to reference the state duty to protect human rights. The following text is proposed for paragraph 1:
 - *1. State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose, States shall ensure that their domestic legislation conforms with international human rights law and requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.*
- For paragraph 4, it is recommended that “natural and legal persons having a legitimate interest, in accordance with domestic law” be replaced with “stakeholders”.
- State obligations must be emphasised throughout paragraph 2, and it is suggested that the opening sentence be redrafted as follows:
 - *For the purpose of paragraph 1 of this Article, State Parties shall adopt effective policies, legislation, regulations and adjudication measures to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:*
- The scope of paragraph 2 must be extended beyond contractual relationships and it is recommended that this phrase be replaced with “business relationships” throughout.
- Paragraph 3 should include strengthened provisions concerning marginalised groups, indigenous peoples, and business in conflict drawing on international standards and

best practices. For example, the text should refer to consultations with indigenous peoples in accordance “with the internationally agreed standards of free, prior and informed consent”. Consideration should also be given to a provision on enhanced due diligence for situations of conflict, which could be drawn from the UNGPs.

- Paragraph 5 is somewhat vague but hints at the pressure facing States, particularly in the context of international investment law. Paragraph 5 could be strengthened by adopting some of the language of the UNGPs concerning adequate oversight, domestic policy space in the context of investment treaties or contracts and membership of multilateral institutions.

Article 6

- Article 6 of the Revised Draft substantially improves the previous text, including, for example, by removing previous repetition concerning sanctions, presenting criminal, civil and administrative liability as alternatives and clarifying the extent to which violations/crimes are to be included.
- Legal liability gives rise to a number of complex inter-related issues, several of which are addressed in Article 6, although it may also be appropriate to follow the precedent of previous treaties by codifying the obligation to provide for legal liability and deferring to States as regards the appropriate means to implement the obligation in national legal systems. Such an approach could facilitate a simplification of Article 6. Notwithstanding, there remains a need for greater clarity at times in the present text. Several structural and substantive changes are also recommended.
- The structure of Article 6 should be revised so as to be presented in a more logical fashion. Sub-issues, such as the relationship between the liability of legal and natural persons (para 2), and that between civil and criminal liability (para 3) might appear later in the Article, possibly being subsumed into other paragraphs. Sanctions are addressed in paragraph 4, before the matter of legal liability itself, so this paragraph should appear later in Article 6. There is repetition between paragraphs 2 and 8, so these should be combined (and possibly subsumed in another paragraph).
- From a substantive perspective, the following recommendations are made:
 - The call for a comprehensive and adequate system of legal liability might be moved to the Preamble or Article 2 as a statement of purpose
 - Paragraph 5 concerning financial security is recommendatory, therefore it is recommended that either the language be strengthened (e.g. “shall”) or the provision be omitted.
 - The text of paragraph 6 could be strengthened as follows:
 - *1 Legal liability of a natural or legal person conducting business activities, including those of transnational character, for its failure to prevent, or prevent other natural or legal person(s), with whom it has a business relationship, from causing or contributing by means of acts or omissions a human rights violation or abuse against third parties rights or the environment when the former:*
 - *a. has the ability to control, or to exercise decisive influence over the relevant entity that caused or contributed to the violation or abuse, or*

- *b. should have foreseen the risks of human rights violations or abuses in line with Article 5 of the legally binding instrument*
- The text of paragraph 7 should clarify if the list of crimes is exhaustive. Some concern was raised with the inclusion of a detailed list of violations considered as crimes for purposes of legal liability, as it includes treaties which States may not have ratified, as well as soft law instruments, may not be consistent with existing treaty obligations (e.g. the obligation to criminalise torture only under the Convention Against Torture) and may involve duplication (e.g. the “use of child soldiers” provision duplicates war crimes). Some offences in the list would require further clarification. In light of these issue, it may be appropriate to present a shortened, non-exhaustive list along the following lines:
 - *Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for serious violations of human rights including slavery, trafficking in persons, forced labour, torture, enforced disappearances, sexual exploitation of children and for international crimes, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 or other war crimes as defined by international agreements to which it is a Party*
- The purpose of paragraph 9 requires clarification as it seems to address modes of liability (and might be read as mandating corporate criminal liability). It is suggested that the paragraph could follow the approach in Article 6 of the Enforced Disappearances Convention if the purpose is to address modes of liability. Alternatively, the provision could be omitted, allowing deference made to national law concerning modes of liability (as has seemingly been done in relation to issues of attribution of liability to legal persons).

Article 7

- Article 7 is fundamental to addressing barriers to access to justice linked to the use of the ‘corporate veil’ doctrine. It is suggested that “civil” be added to the chapeau to make clear that this article is dealing exclusively with civil jurisdiction, leaving open the possibility of additional provisions dealing with criminal and administrative jurisdiction.
- For paragraph 1, a provision might be added setting out that the paragraph does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or national law (e.g. victims’ domicile)
- For paragraph 2, existing criticisms of the text in the Revised Draft might be overcome by replacing “substantial business interests” with “principal place of business”, which is more aligned with the current existing rules on domicile of corporate entity (i.e. Brussels I Recast) and could achieve a better consensus. Alternatively, a non-exhaustive list could elaborate on substantial business interest (i.e. assets, decision making structures de facto, significant thresholds of business). In either case, the following paragraph should be added to preserve more protective rules on domicile that might exist in national or international law:
 - *The preceding is without prejudice to any broader definition of domicile provided for in any international instrument or domestic law.*

- It is proposed that three new paragraphs be added to prohibit the application of the *forum non conveniens* doctrine, to regulate joint claims and to address *forum necessitatis*:
 - 3. *Where victims choose to bring a claim in the court of the domicile of a business enterprise jurisdiction shall be obligatory and courts may not decline it on the basis of forum non conveniens.*
 - 4. *Courts shall have jurisdiction over claims against business enterprises not domiciled in the territory of the forum state if the claim is closely connected with a claim against a business enterprise domiciled in the territory of the forum state.*
 - 5. *Courts shall have jurisdiction over claims against business enterprises not domiciled in the territory of the forum state if no other effective forum guaranteeing a fair trial is available and there is a sufficient connection to the State Party concerned.*

Article 8

- The text of Article 8 on statutes of limitations improves the predecessor text, although it addresses an issue that has not been especially prominent in the business and human rights context to date. As the article duplicates existing international law to an extent, Article 8 could be deleted or moved in part to the Preamble (allowing States parties to “Reaffirm the non-applicability of statutes of limitations to serious violations of human rights, including war crimes, crimes against humanity, genocide and aggression”). This would not prevent a future monitoring body from raising the matter with States where statutes of limitations prevent access to remedy.
- If the article is to be retained, it might be subsumed into Article 6, with the following textual changes.
 - Paragraph 1 could be revised as follows:

States parties shall ensure that statutory or other temporal limitations shall not apply to the prosecution and punishment of serious violations of human rights and humanitarian law constituting international crimes, in particular genocide, war crimes, crimes against humanity, and aggression
 - The reference to a “reasonable” period of time in paragraph 2 gives rise to some uncertainty, which it might not be possible to resolve in the instrument. Nevertheless, the following wording is suggested:

States parties shall ensure that statutory or other temporal limitations as do exist shall not prevent access to remedy, particularly in cases where violations have occurred outside the State where legal proceedings are pursued.

Article 9

- Article 9, paragraph 1 leaves the door open to *renvoi* which could prove problematic as this can be “manipulated” to escape from the law otherwise applicable. The exclusion of *renvoi* is predominant in private international law instruments and an

explicit exclusion in the LBI would serve legal certainty. This could be done, for instance, by stating, in paragraph 1 that:

- *Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, to the exclusion of its conflict of laws rules .*
- In Article 9, paragraph 2, it is unclear what 'all matters of substance regarding human rights law' refers to, and it is therefore suggested that this paragraph be redrafted so as to provide for greater legal certainty. In addition, the choice between the various options of applicable law set out in the article is left to the forum (on the basis of its conflict of law rules) which is a step back compared to the Zero Draft which left the choice in the hands of the victim. Choice-of-law provisions are not uncommon and offering a choice of law to victims would take into consideration the specific nature of the business-related human rights claims and redress the power imbalance between the parties. In the LBI, these elements could be incorporated, by stating for instance, that:
 - *The law applicable to civil claims arising out of business-related human rights or environmental damage sustained by persons or property shall be governed by the domestic law of the competent court, unless the person(s) seeking compensation for damage choose(s) to base their claim on the law of another State where:*
 - a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or*
 - b) the victim is domiciled; or*
 - c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.*
- It is recommended to specify in the LBI that the domestic measures on mandatory human rights due diligence adopted pursuant to Article 5 should form the basis for overriding mandatory rules, so as to ensure their applicability in civil liability cases irrespective of the content of the applicable law. This would be particularly important to ensure their effectiveness in the situation in which the governing law is the law of a State that has not ratified or implemented the LBI. This could be done, for instance, by adding a last paragraph in Article 9 indicating that:
 - *The measures adopted on the basis of Article 5 shall apply irrespective of the law applicable under private international law.*

Article 10

- Specific obligations concerning mutual legal assistance are very welcome. However, it is recommended to shorten and streamline the article and align it with the current state of affairs of mutual legal assistance in international law.

Article 11

- International cooperation is of significant importance which is why the article should contain concrete obligations instead of relying on mostly hortatory language.

Article 12

- The impact of international investment agreements and their enforcement through investor-state dispute settlement mechanisms can have significant negative impacts on the human rights of affected communities and stakeholders. It is therefore recommended that the LBI contain obligations of the State Parties concerning international investment agreements and contracts in line with UNGP Principle 9.
- The LBI should therefore contain an additional substantive article articulating (1) an obligation on states to ensure that agreements and international treaties that provide rights to corporations, businesses, and foreign investors do not undermine the protection of human rights; and (2) a statement on how conflicts between human rights and trade and investment agreements should be resolved.
- In particular, the LBI should require states to conduct human rights impact assessments (HRIA) before, during and after the negotiations of investment treaties and contracts and periodically while these agreements are in force. Such HRIA should be based on objective standards, transparent and include affected stakeholders.
- Another clause should require states involved in investor-state dispute settlement cases to ensure that arbitrators or other individuals involved in the dispute settlement have sufficient knowledge and expertise in the field of human rights.

Questions referring to the above recommendations can be addressed to

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