

Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights

February, 2020

The International Commission of Jurists (ICJ) welcomes the opportunity to submit comments on the Revised draft legally binding instrument to regulate, in international law, the activities of transnational corporations and other business enterprises (Revised draft),¹ in accordance with the invitation contained in the Recommendations and Conclusions (section VII.A (c)) of the report from the 5th session of the Open Ended Intergovernmental Working Group (OEIGWG) in charge of the elaboration of the instrument.² These comments do not constitute a comprehensive assessment of the draft, but rather address select provisions of priority concern to the ICJ and provide concrete recommendations on possible amendments to some provisions in the draft. The ICJ may submit additional comments on other provisions at a later stage.

The Revised draft, released on 16 July 2019 and discussed at the 5th session of the OEIGWG presents important and wide ranging changes to the zero draft published in 2018.³ It is now a more coherent, well-constructed and reasonably mature text, although further modifications are still in order. The draft maintains a strong focus on issues of legal accountability of business enterprises and access to justice, remedy and reparations for those who allege harm by a business enterprise which, if adopted, would contribute to fill existing human rights protection gaps in international law.

The ICJ particularly welcomes the clarification of the scope of the proposed treaty to encompass all business enterprises, including domestic businesses, which can be large and bring significant human rights impacts. Nonetheless, the revised draft retains a strong focus on business of a transnational nature in response to particular existing gaps and challenges in that respect, including jurisdictional concerns relating to access to justice.

The Revised draft draws on existing obligations and language from international instruments. A cross-reference exercise reveals that many substantive provisions reflect text already existing in various instruments listed in an annex document provided by the Chair.⁴ In all cases, it is crucial that those provisions are sufficiently adapted to meet the challenges and gaps that exist in the field concerned by the present Revised Draft. Other provisions included are reflective of the proposals and comments made by State delegations and observers in the previous sessions of the OEIGWG.

The Preamble

The ICJ considers that the Revised draft presents significant improvements to the preamble in the zero draft, particularly by its inclusion of references to several important international instruments,

¹ Human Rights Council ("HRC"), Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights ("OEIGWG"), *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (2019), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

[“Revised draft”].

² HRC, OEIGWG, Rep. on the Fifth Session of the OEIGWG, U.N. Doc. A/HRC/43/55 (9 January 2020).

³ HRC, OEIGWG, *Zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises* (2018, July 16), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

including the UN Guiding Principles on Business and Human Rights. The ICJ supports the reference to the international instruments and proposes that the nine core UN human rights treaties, including their substantive protocols, and the eight ILO fundamental conventions referred to in a preambular paragraph be expressly identified in the text. Other international legally binding instruments have made such references irrespective of whether those instruments have been ratified or not by all States.⁵

The fourth preambular paragraph reads: "*Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations.*" While this content is unobjectionable in content, the ICJ believes it could benefit from a more concise formula at the end of the phrase by simply referring to "obligations under international law".

In the ninth preambular paragraph, references to the United Nations Charter articles 55 and 56 should be put in a more precise context, as these articles are relevant to more than just international cooperation for the protection of human rights. While article 56 concerns international cooperation with the UN, article 55 is about the promotion of rights more broadly. Therefore the text might better read "recalling UN Charter articles 55 and 56 on the promotion of human rights and international cooperation...." In addition, references to Resolutions of the Human Rights Council and Human Rights Commission, some of which are transitory or procedural in nature, may not be entirely appropriate for a human rights treaty preamble, and are not contained in other human rights treaties. Therefore the ICJ suggests the deletion of this preambular paragraph. On the other hand, the ICJ suggests a reference be made to the ILO Tripartite Declaration on Social Policy and Multinational Enterprises, and the ILO Declaration on Fundamental Principles and Rights at Work 1998. The ICJ also supports a reference to the UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, a major normative instrument adopted by consensus of the UN GA which has clearly had an important influence on the draft treaty.

Article 1: Definitions

Article 1.1 "victims"- The present definition is based the UN Basic Principles and Guidelines on right to a remedy (art 8). The expressions "where appropriate, and in accordance with domestic law" in the definition may undercut the integrity of the definition provided, but any definition has to be comprehensive enough to account for all kind of victims of a violation or abuse. The ICJ accordingly suggest adopting a wording closer to that of Article 24 of the Convention on Enforced Disappearances, i.e: "'victim' means any person who has suffered harm as a direct result of the violation or abuse." This could go beyond only "immediate family and dependents", but might also include, for example civil partners and other loved ones with whom there is an established relationship.

Article 1.2 "violation or abuse" - In relation to the notion of "human rights violation or abuse", the ICJ agrees with the differentiation between "violation" and "abuse", where the former applies to States' conduct and the latter to the conduct of private actors, including business enterprises. Regardless of the nature of the offending party however, both human rights violations and abuses

⁵ For example, the preamble to the Convention on the Rights of Persons with Disabilities contains the following paragraph: "*Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families."

may cause harm. The person who suffers violation or abuse as result of any unlawful conduct should be entitled to reparations.

The treaty should contain a definition of "human rights" for the purposes of this treaty as follows: "internationally recognized human rights that are binding upon the State Party or State under whose jurisdiction the violation or abuse occurs or are applicable to a business enterprise." If a State has incurred human rights obligations by becoming party to a human rights treaty, then that treaty should be applicable to obligations under this Convention. "Human rights" also includes those "human rights relating to the enjoyment of a safe, clean and healthy environment" UNHRC Resolution OP 21, otherwise called "environmental rights". To better ensure that all States party to the new instrument respect a minimum set of foundational human rights standards a clause similar to Principle 12 of the UNGP⁶ or article 3 on Fundamental Rights and Principles of the ILO Maritime Labour Convention⁷ could also be considered for inclusion.

Article 1. 4, containing a definition of "contractual relationship," is undoubtedly intended to be comprehensive, essentially equivalent to the notion of "business relationship" or "commercial relationship". However, a contractual relationship requires the existence of a contract, whereas not all business activities of relevance for the present treaty or business-related human rights abuses occur in situations governed by contract. The text thus appears under-inclusive with reference to intended scope of all business-related activities. It would be better to use the term "business relationship" for the sake of clarity.

Article 2. Statement of purpose

Both articles 1(b) and 1(c) are missing a crucial element of redress, namely reparation. Article 2.1(c) could be improved by reference to "effective access to justice remedy **and reparation**". This is to ensure that "remedy" is geared toward a reparative outcome and is not just a procedural device. Otherwise, the ICJ in principle concurs with the statement of purposes of the agreement and with the emphasis in international cooperation to tackle cross-border transnational violations and abuses.

Articles 3. Scope

The ICJ welcomes the express affirmation in the revised draft that the proposed treaty will cover all business enterprises and all their activities, while at the same time placing particular emphasis upon those businesses with transnational activities (Art. 3(1)), which is reflective of the actual content of the revised draft.

This clarification also aims to respond to concerns expressed by many State delegates along with NGO and business observers during previous IGWG sessions.⁸ As the ICJ explained in a previous

⁶ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, principle 12 (2011): "The responsibility of business enterprises to respect human rights refers to internationally recognized 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."

⁷ International Labour Conference, *Maritime Labour Convention, Fundamental Rights and Principles*, article 3 (2006):

"Each Member shall satisfy itself that the provisions of its law and regulations respect, in the context of this Convention, the fundamental rights to: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."

⁸ HRC, Addendum to the report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, at 70-78, U.N. Doc. A/HRC/40/48/Add.1 (2019, March 6), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/A_HRC_40_48_Add.1.docx

paper⁹, the emphasis is perfectly compliant with the mandate contained in Resolution 26/9 in that the draft treaty continues to regulate, in human rights law, the activities of transnational corporations.

Article 3.2 signals to those critical of the adopted “broad scope” approach, the particular attention being paid in the treaty to transnational business phenomena.

However, there does not appear to be a clear reason to have 3.3 (coverage of all human rights) be part of the scope once it has been specifically articulated in the definitions, unless the definition is also referenced here.

Article 4. Rights of victims

Much of Article 4 remains a restatement of international law and standards on the right to an effective remedy and reparation and access to justice, including to a fair trial with due process of law guarantees. Consequently, the heading of the article could be amended to “Right to a remedy and reparations” to reflect that fact. However, because it addresses a number of important obstacles to access to remedy and reparation, it may be better that this is split into two separate articles.

Article 4.1 and 4.2 guarantee dignity and the rights of victims of violations or abuses of their human rights, thus the two could be merged, giving 4.2 a broader scope to guarantee victims (as defined in article 1 above) all of their human rights and not just those currently listed. Article 4.9 and 4.15 provide much needed protection of human rights defenders drawing on language from the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú agreement).¹⁰ It would be better to cluster one after the other to improve coherence. In addition, the ICJ recommends the inclusion of a new provision to provide protection to parties to legal proceedings in the public interest and their legal representatives against harassment and intimidation through judicial complaints or counter-complaints (so called Strategic Lawsuits Against Public Participation- SLAPP). Also, article 4.3 should be redrafted to ensure consistency with the definition of victims provided in article 1.1.

The ICJ considers that Article 4.5 could benefit from some further amendment. In addition to effective and prompt remedies, the article should mention other fundamental attributes of effective remedies. First among these is “accessibility”, as affirmed by international jurisprudence. People have the right to access remedies before an independent authority, whether judicial or administrative, capable of providing enforceable decisions. In addition, the remedy must be capable of leading to the cessation of the violation or abuse, as well other forms of reparation. Article 4.5(a) lists various forms of reparation, but the term “reparation” as such is not used.¹¹ Therefore, the words “and reparation” should be added after “remedies”.

In addition to the five forms of reparation indicated, contemporary human rights law has established the right to the truth as closely linked to the right to a remedy, investigation and reparation, which should be mentioned in article 4(5). The provision should also include reference to the right to a judicial remedy in case of gross human rights violations or abuses where administrative remedies alone would not suffice. References to “environmental remediation” and

⁹ ICJ, The scope of a legally binding instrument on business and human rights: Transnational corporations and other business enterprises, May 2015, available at: <https://www.icj.org/wp-content/uploads/2015/07/Global-Report-ScopeBusinessTreaty-2015.pdf>

¹⁰ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (ECLAC), available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf

¹¹ See, International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations, A Practitioners’ Guide*, Revised edition, at pp. 52-81 (2018).

“ecological restoration” and the examples provided are justified only if they are forms of reparation for the violation of human rights related to the environment.

The first sentence of article 4.8 overlaps with 4.5 and could be shifted to avoid repetition. The rest of the article is important and makes possible claims submitted on behalf of children, and other groups in similar situations. While the second sentence of this sub-article implicitly recognizes the possibility that persons may file complaints on behalf of other persons, for example children, it does not require that States provide for collective complaints or group claims. This article should be amended to contemplate collective complaints in addition to group claims. To this end, it may draw language from article 13 of the UN Basic Principles and Guidelines which provides that: “In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.”¹²

Some States allow class actions without necessarily obtaining the prior consent of all class members (or with an opt-out option), as there can be practical impediments to doing this where, for instance, the class is particularly large. This does not mean that all potential members of an affected class need to avail themselves of a remedy. The OEIWG should contemplate the use of group complaint procedures that in certain cases omit the individual consent requirement.

The last sentence of the article seems misplaced, as it pertains to the question of jurisdiction, covered under article 7.

Article 4.12 pertaining to legal assistance reflects, in part, international standards on access to justice. Article 4.12(e) could however be problematic. The first sentence seems obvious: the victims who are successful in judicial proceedings should not pay the legal cost of the companies responsible of the wrongdoing. However, the second part perhaps more controversially contemplates the case of an *unsuccessful* complainant not being liable for paying legal costs of the winning party when the loser does not have sufficient economic means to do so. Some language is unclear and should be streamlined or clarified: “appropriate redress or relief as a remedy”, as well as the meaning of “alleged victim” in this context. Overall, this provision is a substantive improvement over the zero draft which simply provided: “in no case shall victims be required to reimburse any legal expenses of the other party to the claim.” (Zero draft, art. 8(5)(d)).

Article 4.16 provides: “Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof, for the purpose of fulfilling the victim’s access to justice and remedies”.

The qualifications “subject to domestic law” may render this provision ineffective and inapplicable in some jurisdictions and should be deleted. The duty (or freedom) to reverse the burden of proof will not be an exclusive function of the courts, but may require legislative or other measures by the State in order to make this possible in law. Therefore, the article needs to articulate that State parties have an affirmative obligation to ensure that judicial authorities have capacity, where required, to reverse the burden. In addition, it is advised that there be more flexibility and clarity in this provision, particularly as regards the qualification “where needed”. An obligation to reverse the burden of proof without reference to the circumstances where this is warranted may run against due process guarantees.

Comparative practice shows important developments in the attribution of the burden of proof in civil proceedings within certain jurisdictions. In the Latin American region, for instance, some States have undertaken various procedural reforms in civil matters, specifically, some have introduced more flexible evidentiary rules considering the context of inequality of the parties and the principles of good faith and procedural loyalty that govern the judicial process. Therefore,

¹² U.N. General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147, article 13 (21 March 2006).

certain standards have been introduced, such as the "dynamic burden of proof" principle, that is, where one of the parties may be asked to prove a fact when it is in a better position to do so.

In Colombia, for example, this question is regulated in an exceptional way in article 167 of the General Procedural Code: "(...) according to the particularities of the case, the judge may, ex officio or at the request of a party, distribute the burden of proof when ordering the production of evidence, during its production or at any time during the process before taking a decision, requesting the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts by virtue of its proximity to the evidence, for having the object of evidence in its possession, for special technical circumstances, for having intervened directly in the events that gave rise to the dispute, or due to a state of defencelessness or disability in which the counterpart is, among other similar circumstances."

Another useful example can be found in article 8.3 of the Escazú agreement which requires in this respect: "measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof".¹³ The revised draft could draw from those precedents to arrive to a more nuanced and acceptable provision on evidence and the burden of proof.

The ICJ suggests that a new clause be included in a new Revised draft treaty drawing from article 14 of the UN Basic Principles and Guidelines on the Right to a Remedy which guarantees access to international remedial processes: "An adequate, effective and prompt remedyshould include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies."¹⁴

Article 5: Prevention

The wording of article 5 clearly adopts the definition of businesses' human rights due diligence established in Principle 17 of the United Nations Guiding Principles on Business and Human Rights (UNGPS),¹⁵ including the elements of identification, prevention and mitigation, monitoring and communicating. One element, however, is missing: the obligation of integration of the assessment findings into company's policies and operations, as required by Principle 17 of the UNGPS.

The draft makes the choice of including the detail of measures that could be taken within each step of the due diligence process in a separate paragraph (5.3), but those measures could also be listed, illustratively, within each of the steps, unless relevant for more than one step.

Article 5.2 would require States party to the instrument to ensure mandatory human rights diligence by business enterprises in relation to their own activities and also in their contractual relations. In the particular context of business' human rights due diligence, the ICJ considers that it is preferable to use the expression "business relationships" rather than "contractual relationships" throughout article 5 (for similar reasons to those previously discussed re: article 1.4). Business relations may develop in broader ways other than mere contractual relationships might suggest or indicate. It is also important to qualify mandate human rights due diligence as "ongoing" to underscore its continuous nature.

Article 5.3(a) refers to environmental and human rights impact assessments to be performed by businesses. There is good reason to keep a reference to environmental assessments due in no small part to the growing relevance of a healthy environment for the enjoyment of human rights as highlighted, among others, by the Special Rapporteur on the issue of human rights obligations

¹³ *Supra.* note 10, art. 8.3.

¹⁴ *Supra.* note 12, art. 14.

¹⁵ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

relating to the enjoyment of a safe, clean, healthy and sustainable environment,¹⁶ and the Human Rights Council,¹⁷ provided that those assessments are somehow linked to human rights assessments. The UNGP also explicitly makes mention of social and environmental impact assessment (commentary to GP 18). The Framework Principles on human rights and the environment provide that “States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights” (Principle 1); and that “To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights” (Principle 8).

The Inter-American Commission and Inter-American Court of Human Rights have affirmed that the obligation to carry out environmental impact assessments should be recognized not only in respect of Indigenous Peoples’ rights but in relation to any activity that may cause significant damage to the environment. The purpose is not only to have some objective measure of the possible impact on land and people, but also to ensure that members of the village are aware of the possible risks, including environmental and health risks, so that they can evaluate whether to accept the proposed development or investment plan, with knowledge and voluntarily.¹⁸ For these reasons, the obligations to carry out pre and post establishment human rights and environmental due diligence (9.2(e)) should be associated with measures of meaningful consultation.

Article 5.3(b) refers to requirements for companies to conduct “meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other stakeholders”. This provision has met some criticism at the 5th IGWG session¹⁹ because of its alleged departure from international standards in ILO Indigenous and Tribal Convention (1989 No. 169) or “free, prior and informed consent” standards in the UN Declaration on the Rights of Indigenous Peoples.²⁰ This criticism is certainly well-founded with respect to the last sentence of 5(b), which presently reads: “Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable.”

Indigenous peoples have a right to “prior and informed consent”. The rights of Indigenous People have to be respected by all actors and it is important to ensure coherence across the obligations of both States and business enterprises to avoid States outsourcing of their duties and tasks to business with lower levels of obligations. This does not mean that the duties of States and business are identical and that is sensible to automatically transpose standards conceived for States to business enterprises. In fact, the provision in the revised draft is textually taken from UNGP 18(b): “Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.” To ensure consistency, there should be a requirement for business enterprises to carry out consultations in a way that are consistent with the right of indigenous people to free

¹⁶ HRC, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. [A/HRC/37/59](#) (2018).

¹⁷ HRC, Human Rights and the Environment, U.N. Doc. A/HRC/RES/37/8 (9 April 2018).

¹⁸ Inter-American Commission on Human Rights (IACoHR), Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation and development activities, para 156 (2015). See also, *inter alia*, Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, para. 129; Case of the Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, paras. 31 to 39; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, para. 205; Case of the Garifuna Community Triunfo de la Cruz and Its Members v. Honduras, Merits, Reparations and Costs, Judgment of October 8, 2015, Series C, No. 305, para. 156, and Case of the People Kaliña and Lokono v. Suriname, paras. 214, 215. Cf. Case of the Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, para. 40, and Case of the Villages of Kaliña and Lokono v. Suriname, para. 214.

¹⁹ *Supra*. note 2, paras 66, 67.

²⁰ G.A. Decl. 61/295, U.N. Doc. A/RES/61/295 (2 October 2007).

prior and informed consent. Whatever kind of consultations States and/or business take jointly or separately these measures should always be respectful of the rights of indigenous people as recognized in international instruments.

Article 5 sets out an obligation of conduct and not of result, therefore Article 5.4 relating to “effective national procedures” to ensure compliance with those obligations necessarily refers to those obligations of conduct/process. It is generally good to strengthen compliance mechanisms for rules on preventative measures which seek to avoid violations and abuses of human rights. However, it is not enough to speak of “effective national procedures”, if they are not backed up by law and sanctions, and the possibility for stakeholders to trigger enforcement procedures in the event that these obligations are breached.

Article 6.- Legal liability

Article 6 if adopted and implemented would represent a major advance in the area of legal liability for business enterprises in international law making possible the application of human rights international law and standards to business enterprises through national action.

However, the formulation of Article 6.1 needs more precision. This provision potentially encompasses a range of forms of civil, criminal and administrative liability that would be difficult to fully enumerate in the text. The text might at least explicitly name those three broad categories of legal liability: civil, criminal or administrative. In addition, it should be clear in paragraph 6.1 that legal liability attaches not only for abuses and violations caused by the company, but also for abuses or violations to which it has contributed and may bear liability for complicity, including that with the State.

Article 6.6 proposes a standard of legal responsibility for one company in relation to the harm caused by another company, no matter where the latter is located, in circumstances when the former company controls or supervises the activities that caused or contributed to the harm or foresees or should have foreseen the risks of violations or abuses. This provision aims at establishing a minimum level of fairness in the relationship between workers and communities on one side and companies on the other side in the context of global value chains, currently characterized by a situation where companies are able to draw the benefits from the use of global value chains while not assuming the responsibility for the human and social costs incurred in the operation of that chain. As such, this standard would potentially cover the responsibility of parent companies in relation to subsidiaries’ wrongs and in other similar situations, and is supported by recent jurisprudence.²¹ However, it is seemingly limited by the reference to the “contractual relationship” between the two companies involved and such qualification should be changed as proposed above in relation to article 5. The provision also includes a standard on foreseeability of risks (the phrase “or should foresee or should have foreseen risks of human rights violations or

²¹ In *Vedanta v. Lungowe*, the United Kingdom Supreme Court recognized that multinational companies can be organized in a wide variety of ways (para 51) but, in reference to whether one company could be responsible for the harm caused by another company, stressed that “[i]t is apparent that the general principles which determine whether A owes a duty of care to C in respect of the harmful activities of B are not novel at all.” The Court referred to case law in which the negligent discharge of the responsibility to supervise other people under its control was recognized. The ownership relationship of one company over another company is not determinant nor the main criterion in establishing the degree of intervention or control by one company over the other. The Court adopted a flexible standard to assess whether control or supervision exists, consisting of a series of actions or measures that show one company took control or supervision over the concrete activities of another that caused the damage. This standard of control or supervision may also be applicable to any triangular relationship where there are two companies, with one controlling relevant activities of the other, and people (employees or not) to whom harm has been caused, including supply chain relationships. *Vedanta v. Lungowe*, UKSC (2019), <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>

abuses”) in addition to the standard of control or supervision as basis of civil legal liability. These notions ought to be separated out rather than conflated in order to avoid confusion.²²

Article 6.7 focuses on the legal responsibility of business enterprises (as legal entities) and reparations for victims in relation to some of the most serious human rights violations, including crimes under international law. If adopted, it would undoubtedly contribute to the effective implementation of international law prohibitions of those atrocities which may be committed by individuals and businesses alike. But there are some elements of the provision that need to be adjusted to improve its clarity, its acceptance among a diversity of stakeholders and its effectiveness in practice.

First, it would be advantageous to locate paragraph 6.7 as a separate article in a revised draft to stress its autonomy and importance in relation to the rest of article 6 and also to have more leeway to develop some of its components such as the list of crimes, as advocated by several States during the 5th session of the IGWG.²³ Secondly, the ICJ would support the idea that the list of offences be non-exhaustive, with a view to include other serious human rights offences not currently in the list and others that may become accepted in the future (such as environmental offences). This could be achieved by inserting a catch-all additional element to the list such as: “any other offence established as a crime under international which gives rise to the obligation for the State to establish criminal liability.” Other international treaties that establish similar obligations do not contain such open-ended clauses.²⁴

The article offers a list of the most serious offences, which is subject to negotiation and revision. For the ICJ, the current list should be seen as a minimum base and the offences defined by reference to recognized international standards in order to better enhance legal certainty and promote homogenous approaches. The use or acceptance of the definition of certain offences in a given international treaty (such as the Rome Statute for the International Criminal Court or the Convention on Enforced Disappearances) does not imply in any way a non-party State’s consent to be bound by that particular instrument. Some States have expressed concern in this regard at the 5th session of the IGWG,²⁵ but that concern is unfounded. Borrowing a given definition is not equivalent to acceptance of the instrument as such.

The most problematic part of 6.7, however, is that it is under-inclusive as to consequences. It is underinclusive because it appears to allow for only civil or criminal liability, rather than criminal liability for crimes under international law constituting gross human rights violations. Although it is true that some jurisdictions do not provide for criminal liability of legal persons, in all jurisdictions at the very least individual officers and upper level managers of a company can be held criminally liable for actions undertaken while in their corporate positions. So article 6(7) should therefore be without prejudice to the obligation to provide for criminal liability of legal and natural persons in respect of their actions.

Article 7: Adjudicative Jurisdiction

This article relates only to jurisdiction over civil claims, leaving aside the question of criminal jurisdiction which still needs to be addressed. Article 6 deals generally with legal liability (civil, criminal or administrative) of business enterprises for abuses of human rights, yet there are no corresponding provisions in article 7 to guide States in relation to their courts’ criminal jurisdiction.

²² Yilmaz, Anil Vedanta v. Lungowe Symposium: Potential Implications of the UKSC’s Decision for Supply Chain Relationships, <http://opiniojuris.org/2019/04/23/vedanta-v-lungowe-symposium-potential-implications-of-the-ukscs-decision-for-supply-chain-relationships/>

²³ *Supra.* note 2, para 75.

²⁴ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, article 3.

²⁵ *Supra.* note 2, para 76.

The existing provisions should also be supplemented with at least two additional ones to address connected civil claims and the issue of “*forum necessitatis*”: the courts of a State shall have jurisdiction in relation to claims against subsidiaries or commercial partners of enterprises domiciled in the jurisdiction of that State if the claims are closely connected with civil claims against the latter enterprises. The courts of a State should also have jurisdiction over claims against an enterprise not domiciled within its jurisdiction if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the State Party concerned.²⁶

Criminal cases should be addressed given that Article 6 provides for possible criminal liability for enterprises (at the choice of the concerned State). One useful formula to ground discussions could be the language of the UN Convention on Transnational Organized crime (art 15), the Convention Against Torture (art 5) and/or Council of Europe recommendation 2016/3 (para 35). The Convention against Torture, for instance, provides that a State’s courts would have jurisdiction when: a) The offence is committed in any territory under its jurisdiction, or on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed; b) The alleged offender is a national of that State or is domiciled within that State; c) When the victim is a national of that State, if the State considers it appropriate.²⁷

There should be a provision requiring States to exercise universal jurisdiction in respect of crimes that need to be prosecuted on that basis under international law, while allowing States discretion to exercise such jurisdiction in respect to other crimes. In respect to certain crimes such as torture, States are required to exercise universal jurisdiction when the alleged offender is in its territory.²⁸

The treaty should also clearly state that its provisions on jurisdiction are without prejudice to principles of general international law, and that it does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

These proposals may have to be adapted to the kind of criminal offences that will be further defined in article 6.

Article 8: Statute of limitations

Article 8 of the revised draft has amended some parts of the text in the zero draft that better reflect international law. For instance, it includes a reference to “violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole” which is not an appropriate formulation. All human rights by definition are “of concern to the international community as whole” by virtue of their *erga omnes* legal character and numerous treaties and other standards, including the UN Charter itself. The term is misplaced in this context. The ICJ recommends that the zero draft’s formula “violations of international human rights law which constitute crimes under international law” be restated because it is simpler and reflects better existing international law and standards.

This article is supported by provisions contained in the UN Principles and Basic Guidelines on the right of victims of gross violations of international human rights and serious violations of international humanitarian law to remedy and reparations (especially principles 6 and 7), and also the UN Updated Principles for the protection and promotion of human rights through the fight

²⁶ Council of Europe Recommendation 2016/3, para 35.

²⁷ U.N. General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, art. 5, available at: <https://www.refworld.org/docid/3ae6b3a94.html> [accessed 21 May 2020]

²⁸ *Suleymane Guengueng et al v Senegal*, Committee against Torture Communication 181/2011, UN Doc CAT/C/36/D/181/2001 (2006), para 9.3-9.5; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Judgment of 20 July 2012, para 74.

against impunity (Impunity Principles 23 and 32).²⁹ It should be noted that the Impunity Principles adopts the term “prescription” to refer to statutes of limitation, and it therefore may be appropriate to amend the text to read “...other measures necessary to ensure that prescription, including statutory or similar limitations...”. This would make clear that it covers the full range of prescriptive measures, particular in systems that apply different legal terminology to cover this concept.

Time limitations are an impermissible limitation to the obligation of the State to prosecute and punish these serious offences, and may effectively abrogate the exercise of the right to an effective remedy in certain cases. They are assuredly not the only limitations that have these effects but are nonetheless inadmissible under international law. As affirmed in the UN Impunity Principles, amnesties, pardons, immunities and similar measures (i.e. waivers of responsibility or rights) ought also to be barred. Waivers of responsibility of the kind sometimes signed by victims after negotiating with companies, when the underlying conduct constitutes a crime under international law, are legally invalid and shall not preclude the obligation of States to prosecute.³⁰

The UN Impunity principles provide in Principle 24 that “amnesties and other measures of clemency shall be without effect with respect to the victims’ right to reparation... and shall not prejudice the right to know.” In addition, perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to investigate and prosecute (Principle 24(a) and Principle 19).

The Inter-American court of human rights has held that “in certain circumstances, international law considers statutes of limitations to be inadmissible and inapplicable, as well as amnesty laws and the establishment of exemptions of responsibility, in order to maintain in force the punitive power of the State on conducts that, because of their seriousness and to avoid their repetition, need to be repressed.”³¹ The Court has also declared inadmissible the application of statutes of limitation and other exemptions of responsibility to civil and administrative claims in relation to gross human rights violations such as enforced disappearances, and torture committed as crimes against humanity in certain circumstances. Such rule is founded upon the State’s obligation to repair by reason of the nature of the very serious nature of the events irrespective of the type of legal action used.³²

For the foregoing reasons it would be important that this article follows established international law and standards, restating the principle that statutes of limitation and other exemptions of responsibility will not apply in cases (civil or criminal) concerning gross human rights violations constituting crimes under international law.

Article 12: Consistency with international law

Article 12 in the revised draft is also an improvement in relation to the zero draft which contained some provisions that were problematic. Those elements risked possible conflicts between treaty obligations and obligations under certain trade and investment agreements.

The current text aims at ensuring compatible interpretation and application of trade and investment agreements with the proposed treaty on business and human rights:

²⁹ *Supra.* note 12; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005.

³⁰ See, International Commission of Jurists, *Effective Operational Grievance Mechanisms*, 2019.

³¹ *Ibsen Cardenas and Ibsen Peña v. Bolivia*, Merits, Reparations and Costs, Judgment 1 September 2010, Series C, No. 217, para 207 (footnotes omitted); *Ordenes Guerra et al v. Chile*, Merits, Reparations and Costs, judgment 29 November 2018, para. 77. See also *Case of Albán Cornejo et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment of November 22, 2007, Series C, No. 171, para. 111; *Case of Barrios Altos v. Peru*, Merits, Judgment of March 14, 2001, Series C, No. 75. paras. 41; *Case of Anzualdo Castro v. Peru*, *supra* note 44, para. 182, and *Case of “Las Dos Erres” Massacre v. Guatemala*, *supra* note 7, para. 129

³² *Ibsen Cardenas v. Bolivia*, *Ibid.*, para 95

States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

However, future drafts should require or recommend to States party the use of certain policy instruments that have demonstrated to be effective to avoid or mitigate possible collision such as social, environmental and human rights impact assessments before the conclusion of trade and investment agreements. A revised draft should also refer to the need for States party to “ensure upholding human rights in the context of business activities by parties benefiting from trade and investment agreements”. A provision in this regard would be justified given that an increasing number of trade and investment agreements contain provisions obligating States party to promote responsible business conduct. States may also assume the obligation to subject trade and investment agreements to specific vetting and approval procedures, among others.

Article 13. International institutional arrangements

The international institutional arrangements envisaged in the Revised draft lack innovative elements appropriate to address the special character of this treaty, as opposed to the other principal human rights treaties.

The draft treaty would create a committee of experts to monitor and promote the implementation of the treaty and a conference of States Parties (Art. 13), but confines its selection, composition and functions to the traditional functions performed by existing similar bodies. The limitations in terms of effectiveness of the current international system of monitoring and supervision based on expert committees are well known. This system is already insufficient in examining State compliance with classic human rights treaties and may be even less effective in relation to practices and policies of business enterprises. Rather than entirely replicating the existing system, the new treaty on business and human rights could build on the best elements of that system but move beyond them and establish practices and mechanisms to strengthen the functions and enhance the effectiveness of the international system of treaty monitoring and supervision. These practices may include the options of carrying out country visits to monitor compliance with the present treaty, issuance of reports on specific issues, and providing guidance for State and company implementation of the treaty. The selection methods of the expert members of the Committee could also be more innovative, providing for consultation with or initiative from business associations or civil society groups, and the possibility for States to nominate an expert from a local region to be elected.

By early August 2018, the Chair Rapporteur released a draft optional protocol to this treaty containing provisions for a National Implementation Mechanism and a communications (complaints) function for the expert Committee created under Article 13 of the main treaty. A National Implementation Mechanism and communications function should be part of the main treaty rather than left to a future optional protocol.