

# EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS



## February 2020 Submission to the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights.

*The European Centre on Constitutional and Human Right (ECCHR) aims to hold perpetrators of serious human abuses to account through conventional or innovative legal means. Our goal is to provide justice and redress to those affected, deter future abuse and develop the international legal framework against impunity.*

*Based in Berlin, ECCHR works with partners around the world on international crimes and accountability, business and human rights as well as migration, and runs a significant training programme for future human rights lawyers.*

*The ECCHR wants to support to the work of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Indeed, it is currently the only global process capacitated to establish a common legal standard on Business and Human Rights.*

*With this submission, the ECCHR responds to the invitation by the Working Group on additional textual suggestions for the development of a Legally Binding Instrument (LBI) on Transnational Corporations and Other Business Enterprises. The submission is based on past experiences from the ECCHR and its partners on litigating specific cases and aims to provide practical contributions.*

### **Preamble**

1. We recommend for the preamble to refer explicitly to the UN Declaration on Human Rights Defenders (1998), United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) ILO C169 - Indigenous and Tribal Peoples Convention (1989), as many of the treaty's provisions must be interpreted in light of the standards set by these instruments.


### **Article 1: Definitions**

2. We recommend changing the concept of “*victims*” under article 1 (1) to a broader concept of “*rights-holders*”. We recommend changing the term throughout the text, and in specific article 4. The broader concept of “*rights-holders*” serves better the aspirations and purposes of the LBI, especially with regards to central place occupied by prevention as articulated in article 5.
3. It would be advisable to extend explicit coverage to individuals and groups whose rights are at risk. Currently, article 1 (1) together with article 1 (2), may give rise to the interpretation that the LBI would only extend coverage to violations and abuses

—  
EUROPEAN CENTER FOR  
CONSTITUTIONAL AND  
HUMAN RIGHTS e.V.

—  
ZOSSENER STR. 55-58  
AUFGANG D  
10961 BERLIN, GERMANY

—  
PHONE +49.(030).40 04 85 90  
FAX +49.(030).40 04 85 92  
MAIL INFO@ECCHR.EU  
WEB WWW.ECCHR.EU



committed against individuals. This would exclude collective groups such as trade unions and communities, as well as other human rights defenders.

4. Finally, the current definition of victims, combined with the recourse towards national law in article 1 (1) and article 4, has far reaching implications. The current language limits to direct victims, while a larger group of people (e.g. family members, unions) could equally be a victim, yet potentially disenfranchised if the current language is maintained.
5. The definition of “*human rights violation or abuse*” in article 1 (3) could be interpreted to be limited to violations and abuses to those committed intentionally “*against*” person or group of persons. (see also supra on the notion of collectivities) However, this might not provide sufficient coverage to the range of violations or abuses, including negligent behaviour. We would therefore suggest expanding the definition to also include “*human rights violations or abuses which result from business activities*”.
6. The notion of contractual relationship in article 1 (4) poses problems. Although the definition itself provides an expansive relationship, using “*contractual relationship*” invites an unnecessary form of ambiguity. A more appropriate wording would be “*business relationship*” which also include a number of non-contractual relationship. Replacing the notion of “*contractual relationship*” with “*business relationship*” in this article, as well as articles 5, 6 and 7 would also ensure consistency with the three authoritative instruments in the field of business and human rights:
  - a. The United Nations Guiding Principles (2011) uses the term “*business relationship*” in Foundational Principle 13 and Operational Principles 7, 17, 18 and 19;
  - b. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (as amended in 2017) consistently uses the term “*business relationship*” and does not use the term “*contractual relationship*”, notably in an explicit effort to align with the UN Guiding Principles above;<sup>1</sup>
  - c. The OECD Guidelines for Multinational Enterprises (as revised in 2011) consistently uses the term “*business relationship*”, notably in the paragraphs who are most relevant for the LBI.<sup>2</sup>

---

<sup>1</sup> ILO (2017), Tripartite Declaration on MNEs, para. 10.

<sup>2</sup> OECD (2011) Guidelines for Multinational Enterprises, para. 12 and 43.

Case study: criminal investigation against RINA and Specific Instance AEFAA et al. v. RINA:

A fire at the Ali Enterprises textile factory in Karachi, Pakistan, on 11 September 2012 killed over 250 people and injured 30 more. Just three weeks before the fire, RINA awarded the factory - which mainly produced for German retailer KiK (see also case study below) - with the international SA 8000 certificate which is supposed to guarantee safety and other workplace standards.

At the factory, many of the windows were barred, emergency exits were locked, and the building had only one unobstructed exit, impeding the exit of employees who suffocated or were burned alive inside. RINA could have prevented hundreds of deaths had it done its work properly by correctly identifying these defaults and demanding necessary safety renovations before awarding the certificate.

Certification companies and social compliance initiatives play a key role in today's supply chains and exercise significant leverage over supply chains, despite being widely criticized for flaws in their methodological approach. In many cases, the certifiers or compliance initiatives are either paid by the companies under audit or by the lead brands. Moreover, in the case of Ali Enterprises, the factory commissioned the audit by the Pakistani subsidiary by RINA, but the actual decision to grant the SA 8000 certificate was made by RINA to which the factory did not have a contractual relationship. The failures to identify, report or remediate human rights risks and violations by auditors, certifiers and social compliance initiatives can therefore contribute significantly to human rights abuses despite any contractual relationship.

#### **Article 4: Rights of Victims**

7. In general, the article refers at several instances to domestic law, making the recognition and the concrete applicability dependent to domestic provisions. This allows States to make exceptions in granting essential rights entirely at their own discretion. Given the specific purpose of this LBI, it risks undermining this specific Article in practice, other articles including articles 5 and 6, as well as the broader relevance of the LBI in protecting and empowering rightsholders in the context of business and human rights
8. The current article spells out both rights for rightsholders and obligations of State Parties. We would propose a new introductory article to ensure it is as well State Party obligation to guarantee the rights as they are now spelled out in article 4 (1-8). Furthermore, the text could further benefit from subdividing article 4 in subheadings each dealing with a separate dimension such as access to remedy, ability to defend human rights, ...
9. Although the remedies provided in article 4 (5) are not exhaustive, it would be appropriate to further expand the non-exhaustive list of remedies and to include specifically the right to truth, reinstatement and an apology.

Case study: criminal complaint v. Heckler and Koch:

On the night of 27 September 2014, security forces attacked college students at Ayotzinapa. During the police operation, seven students from Ayotzinapa were killed and 43 were forcefully "disappeared" and reportedly handed over to a criminal syndicate. There is still no trace of the students. Many other students were left injured, among them Aldo Gutiérrez Solano who has been in a coma ever since. Mexican investigators found that at least seven policemen used G36 rifles that originated from non-authorized exports.

In September 2016, ECCHR requested access to the case files in the Stuttgart proceedings on behalf of Gutiérrez Solano, whose interests are represented by his parents. The regional court of Stuttgart rejected the request to access the case file, blocking any avenue for additional investigative steps in the context of a possible civil claim against Heckler & Koch or in ongoing proceedings against police and government officials in Mexico. This decision impeded the family to obtain information about what happened to Aldo Gutiérrez Solano and the other students.

10. The right of information in the pursuit of remedies under article 4 (6) would benefit from further clarification that it should be a State obligation to facilitate the access of information held by companies. Indeed, it is crucial to recognise both information as an “enabling right” as well as the practical barriers that potential claimants have in terms of obtaining information about the company, the exact knowledge of the company, the nature and scope of certain internal decisions etc. A useful model for such access and disclosure of information can be found in article 32 (1) of the South African constitution which provides that “[e]veryone has the right of access to [...] any information that is held by another person and that is required for the exercise or protection of any rights.”<sup>3</sup>
11. Given the additional challenges of obtaining information in the context of transnational litigation, it would be furthermore appropriate to prescribe access to information held within another jurisdiction. The U.S. Foreign Legal Act provides an avenue for access to information that is held by corporations or individuals in the United States, which can be useful or necessary to a case in a court or tribunal outside the United States. Section 1782 allows those with an interest in the case to obtain that information and may provide inspiration for further elaborating the LBI on this point.<sup>4</sup>
12. Article 4 (9) is a crucial article but it can be further strengthened by including specific provisions explicitly protect whistle-blowers and trade unions.

---

<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> 28 U.S. Code § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals. Under this statute, “interested parties” to an action in a foreign domestic proceeding can ask a federal court to obtain documents and testimony from people or companies located in the U.S. who may have relevant information.

Case study: criminal complaint v. Nestlé:

On 10 September 2005, trade unionist, human rights activist and former Nestlé-Cicolac employee Luciano Romero was kidnapped, tortured and murdered by members of a paramilitary group. His murder came after a number of death threats that arose in the context of a long-standing labour dispute between the Colombian trade union Sinaltrainal and the Nestlé factory Cicolac. Indeed, after warned about death threats against union leaders, failed to take the necessary precautionary measures. Instead, local Nestlé-Cicolac managers were reported to have spread libellous rumours that Luciano Romero and his colleagues were reputed to be members of the guerrilla, rumours which put these individuals in even greater danger.

The parent company Nestlé in Switzerland failed to take actions to prevent the threats and defamations. Criminal proceedings were launched in Colombia resulting in the conviction of the direct perpetrators of the murder of Luciano Romero. In his verdict the Colombian judge stated that Nestlé's role in the crime was of particular relevance and ordered an investigation to look into the matter in more detail. The Colombian prosecution authorities, however, has to date failed to take up the issue.

On 5 March 2012, the widow filed a criminal complaint against Nestlé and some of its top managers with the Swiss prosecution authorities in Zug. The complaint accuses the Nestlé managers of being in breach of their obligations by failing to prevent this crime of the Colombian paramilitary groups and failing to adequately protect the trade unionist Romero. This murder was part of a systematic persecution against trade unions in Colombia, a crime, which remains in impunity. However, the trade union, which was also directly targeted and directly affected by this crime, did not have legal standing in the Swiss proceeding, as only the widow was considered "affected."

13. Article 4 (16) could be further strengthened by specifying in greater detail the conditions of the process triggering the reversal of the burden of proof. In this regard, a stronger linkage with, or even moving it to, the obligation to do Human Rights Due Diligence under Article 5 and the liability in terms of harm or failure to do Human Rights Due Diligence under Article 6 and more specifically (6) would be appropriate.

### **Article 5: Prevention**

14. In line with earlier comments on the notion of contractual relationship, (see above) we would encourage to align article 5 (2) more closely with the UN Guiding principles and extend a company Duty for Prevention to include actual and potential impacts to which a company may be directly linked to its operations, products or services by its business relationships. The article could read as follows:

*“For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:*

- a) *Identify and assess actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its own activities,*

*or which may be directly linked to its operations, products or services by its business relationships;*

*b) Take appropriate actions to prevent or mitigate actual or potential adverse human rights that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships*

*c) Track and monitor the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;*

*d) Communicate and account on how impacts are being addressed and showing stakeholders – in particular affected stakeholders – that there are adequate policies and processes in place to identify, assess, prevent and monitor any actual or potential human rights violations that the enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”*

15. Article 5 (2) subsection b. gives a broad mandate for meaningful “*consultation*” to be sought with a range of groups. In this context, we would recommend a stronger level of engagement resulting in a duty for companies to pro-actively consult with relevant stakeholders.
16. In addition, it would be appropriate to add (either to article 5 (2) subsection b, or in a new subsection) an additional obligation for companies to organise a mechanism where stakeholders themselves can at their own initiative signal new and emerging risks. For example, the French Devoir de Vigilance law mandates a more permanent “warning mechanism” for risks that materialise which needs to be developed together with trade unions.<sup>5</sup> Although the mechanism foreseen under the French Law is exclusive to trade unions present in the company, we want to draw attention to both the permanent character of the mechanism as well as its openness towards parties beyond the company to raise specific risks and or violations. Building upon the logic already developed within article 5 (2), it seems appropriate to define such an alert mechanism to a broader group of relevant interests.
17. Given the detailed list of groups who need to be consulted under article 5 (2) subsection b. we would strongly encourage to include explicitly trade unions in there. Indeed, democratic and independent trade unions, where they exist, can equally be at heightened risk of violations.
18. We also believe it would be good to dedicate a new subsection in article 5 (3) between subsection b. and c. providing specific space to Indigenous Peoples, taking over and expanding upon the last sentence of article 5 (3) subsection b. Such a distinction is warranted as Free, Prior and Informed Consent, or Consultation depending on the circumstances, with Indigenous Peoples are specifically recognised under international law, especially under ILO C169 - Indigenous and Tribal Peoples Convention (1989),

---

<sup>5</sup> Loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre. “Un mécanisme d’alerte et de recueil des signalements relatifs à l’existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société.”

the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007) and international customary law as well as under national law and jurisprudence.

19. Also, and in contrast with the other consultation under the remainder of subsection b of Article 5 (3) it is essential to clarify that both consultation and Free, Prior and Informed Consent as well as Consultation remains an obligation of the State Party. The responsibility of the company should be to assess whether such processes have taken place and whether they meet above International Standards. In case such processes have not taken place or lack the necessary quality, it would be problematic if enterprises would be required to perform these themselves. Instead they would need to insist these processes still are duly organised before the business activity starts or continues.

Case Study: Amicus Brief in Border Timbers et. al. v. Republic of Zimbabwe:

The cases concern territories in Zimbabwe in which the claimants, a group of European investors, currently operate timber plantations. During the course of Zimbabwe's land reform program, the government compulsorily acquired these properties. The claimants sought the return of the land along with full legal title and exclusive control of the properties.

In the petition, the indigenous chiefs, sought to draw the tribunal's attention to the fact that these properties are located on the ancestral territories of the native peoples. The petitions argued that in reaching its decision, the tribunal must take into account the consultation and property rights of the indigenous groups under international law. The relevance of human rights law to the determination of investment disputes has repeatedly been recognized in previous ICSID cases.

The tribunal rejected the petition of amicus curiae status, despite acknowledging that the proceedings may well impact upon the rights of the affected indigenous communities.

Case Study: indigenous human rights defenders et. al. v. EDF:

The French company EDF—through its local subsidiaries EDF EN México and Eólica de Oaxaca—is seeking to develop a Gunaa Sicarú wind park in Unión Hidalgo. As a result of the Mexican state's failure to implement and enforce the community's right to free, prior and informed consent, and the company's failure to fulfil its obligation to respect this right, the community has suffered internal divisions and escalating, even violent, conflict.

On 1 October 2019, indigenous human rights defenders, supported by local and global NGOs sent a formal notice urging French company Électricité de France (EDF) to identify and mitigate human rights risks for local communities posed by its windpark project in Oaxaca.

20. Both the notice against EDF<sup>6</sup> and the case brought by Border Timbers<sup>7</sup> demonstrates the need and the added value that an explicit and independent reference to FPIC with Indigenous Peoples adds significant value in the context of the scope of the LBI.

<sup>6</sup> ECCHR, 2019, “Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico” [https://www.ecchr.eu/fileadmin/Publikationen/ECCHR\\_PP\\_WINDPARK.pdf](https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_WINDPARK.pdf) accessed on 27 February 2020.

<sup>7</sup> The case actually concerns two related cases: Border Timbers Limited, Border Timbers International (Private) Limited, Hangani Development Co. (Private) Limited v. Republic of Zimbabwe (ICSID Case No. ARB/10/25) and Bernhard von Pezold and others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15).

21. In the context of article 5, and more specifically article 5 (3) it would be good to provide additional guidance on the step to “identify and assess” to ensure adequate quality and methodological rigor which should be commensurate with the risks and violations one would typically expect. While there is an established industry of social audit companies, certifiers and social compliance initiatives proffering to adequately perform such functions, there is equally ample documentation that most of these organisations fail to properly identify, document human rights risks and violations.<sup>8</sup>

Case: Criminal Complaint against TÜV

In January 2019, a dam burst at an iron ore mine near the small Brazilian town of Brumadinho, killing 272 people. Toxic sludge contaminated large sections of the Paraopeba River, poisoning the drinking water of thousands of people. Only four months earlier, the Brazilian subsidiary of German certifier TÜV SÜD confirmed the dam's safety, despite known safety risks.

In October 2019, five Brazilians who lost close family members in the dam failure, ECCHR and MISEREOR filed a criminal complaint against a TÜV SÜD employee, as well as a law infringement complaint against TÜV SÜD. In the complaint TÜV SÜD is accused of having contributed to the dam failure near Brumadinho in the complaints. Despite obvious safety risks, TÜV SÜD did not prevent its Brazilian subsidiary from issuing the required dam stability declaration.

In fact, in an inspection, TÜV SÜD's Brazilian employees found that the dam failed to meet the necessary stability factor, which would prevent them from deeming it stable. Commissioned by Vale, the employees looked instead for new calculation methods to achieve the desired results. In the end, TÜV SÜD confirmed the dam's stability against its better judgment and in contrast with the factual situation. As a result, neither the mine operator nor the authorities initiated stabilization or evacuation measures.

22. Unfortunately, the TÜV SÜD case is not an isolated case of an auditor failing to identify risks or being pressured by those commissioned for a specific result. Indeed, a similar issue occurred in the above-mentioned case of RINA. It would therefore be prudent to also elaborate a specific regime of state oversight and liability for audit companies to ensure adequate performance within the context of Human Rights Due Diligence.
23. Finally, it seems appropriate under article 5 (3) to propose additional measures to ensure the public and accurate disclosure of corporate structure, ownership of subsidiaries and disaggregated supplier information detailing the company's supply chain. While on the one hand, a number of jurisdictions including the United States and India, make it possible to obtain import/export data that elaborates a company's supply chain. Similarly, a growing number of companies in the garment and textile sector, tea-sector

---

<sup>8</sup> See for example LeBaron and Lister, 2016, "Ethical audits and the supply chains of global corporations"; LeBaron, Lister and Dauvergne, 2017, "Governing global supply chain sustainability through the ethical audit regime"; Van Ho and Terwindt, European Review of Private Law, 2019, "Assessing the duty of care for social auditors"; Terwindt and Armstrong, 2018 "Oversight and Accountability in the Social Auditing Industry – the Role of Social Compliance Initiatives"; Terwindt and Saage-Maaß, 2016, "Liability of Social Auditors In The Textile Industry"; Clean Clothes Campaign, 2005, "Looking for a quick fix: How weak social auditing is keeping workers in sweatshops"; Clean Clothes Campaign 2019, "A fig leaf for fashion".



and wider agri-food sector are already disclosing such information, enabling human rights defenders to track supply chains and contribute to due diligence, remedy and/or accountability. We therefore would propose to add a new subsection article 5 (3) that could read as follows:

*“The disclosure of information regarding corporate structure and ownership of subsidiaries; as well as the disclosure of contemporary and up-to-date supplier information detailing the company’s supply chain.”*

## **Article 5: Liability**

24. Article 6 (6) is one of the keystones of the LBI. The UNGPs and other authoritative instruments differentiate and recognise causing, contributing and directly linked. We think it is important to at a minimum recognise both causing and contribution as grounds for liability. The basis for triggering article 6 (6) should be more clearly specifying that liability will be established on the basis of control or supervision by, or other connection between companies with regard to their subsidiaries or suppliers. The current language could be considered ambiguous given that the concepts of "*control*" "*supervision*" and also "*foreseeability*" are not clearly defined.
25. One way of developing these notions more clearly to develop the grounds of liability based on the notion of control and supervision while also specify separately clear and developed ground for liability regarding human rights risk and violations to which a company causes or contributes and that have or should have been foreseen. For example, it could read:

*“States Parties shall ensure that their domestic legislation provides for the liability of legal persons 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 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 LBI”*

26. Article 6 (7) and 6 (9) establish a liability for companies for criminal offences, as well as for secondary offences. This part is crucial as it establishes the figure of criminal liability for companies under the scope of the articles. As both the Lafarge case<sup>9</sup> and the ICC communication<sup>10</sup> described hereunder, this liability is a crucial component of a functioning LBI.

---

<sup>9</sup> ECCHR, 2016, “CASE REPORT: Lafarge in Syria: accusations of complicity in war crimes and crimes against humanity”, [http://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case\\_Report\\_Lafarge\\_Syria\\_ECCHR.pdf](http://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf) accessed on 25 february 2020.

<sup>10</sup> ECCHR, 2020, “CASE REPORT: Made in Europe, bombed in Yemen: How the ICC could tackle the responsibility of arms exporters and government officials”, [http://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport\\_ECCHR\\_Mwatana\\_Amnesty\\_CAAT\\_Delas\\_Re te.pdf](http://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Re te.pdf), accessed on 25 february 2020.

Case: Criminal Complaint against Lafarge and Lafarge Cement Syria:

Since the beginning of the armed conflict in Syria, an extensive war economy has developed involving trade in weapons, raw materials and other goods of interest to conflict parties, states and corporations. The escalation of violence prompted several transnational corporations, like Total, to leave the area. Lafarge took a different strategy and allegedly made arrangements with IS and several other armed groups in order to maintain its Jalabiya cement factory plant in northeastern Syria open and running between 2012 and 2014. The judicial inquiry has since identified that these arrangements amounted to at least 13 million euros. Lafarge allegedly purchased commodities such as oil and pozzolan from IS, and paid taxes to IS for the circulation of its employees and cement. In case Lafarge funded it has seriously endangered the lives of its employees and could also be found complicit in the crimes against humanity committed by the Islamic State in Syria.

The proceedings against Lafarge and its subsidiary Lafarge Cement Syria are the result of a criminal complaint filed in November 2016 by eleven former Syrian employees together with Sherpa and ECCHR. The Investigation Chamber of the Paris Court of Appeals confirmed the charges against the multinational for deliberately endangering the lives of its Syrian subsidiary workers and for financing terrorism in relation to large amounts of money transfers allegedly made to the Islamic State. The judicial inquiry, in which eight former Lafarge executives are also indicted, remains open against the company on all charges.

Case: ICC Communication against Airbus Defence et al.

Since 2015, thousands of civilians have been killed in the armed conflict in Yemen; many more have died from famine and disease. While human rights violations are committed by all conflict parties, one of the main causes of civilian casualties are airstrikes by the Saudi/UAE-led military coalition, which launched its intervention in Yemen in March 2015.

Despite these documented attacks on civilian homes, markets, hospitals and schools, transnational companies based in Europe continue to supply Saudi Arabia and the UAE with weapons, ammunition and logistical support. European government officials authorized the exports by granting licenses.

In their joint Communication, NGOs call upon the ICC to investigate the legal responsibility of corporate and political actors from Germany, France, Italy, Spain and the UK. The Communication focuses, among others, on Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG.

## Article 8: Statute of Limitation

27. On the applicable statute of limitation in article 8 (2), it would be hard to establish an internationally aligned definition or even a mere expectation of what constitutes a “reasonable period of time” across jurisdictions and/or possible violations. The zero-draft utilised the term “not unduly restrictive” which seems more appropriate but suffers from a similar lack of clarity. The current language does not provide for sufficient guidance on what constitutes an appropriate, reasonable or not unduly restrictive statute of limitation, especially given the complex and differentiated nature of some of the cases of human rights violations by business as well as the added complexity of the transnational character of the case.

Case: Jabeer et al. v. KiK Textilien und Non-Food GmbH:

258 people were killed in the fire on 11 September 2012, a further 32 were injured. As the factory's main client, it should have been an easy task for KiK to demand improvements in fire safety. The company's failure to do so means that KiK is jointly responsible for the 258 deaths. Muhammad Hanif, Muhammad Jabbar, Abdul Aziz Khan Yousuf Zai and Saeeda Khatoon filed a legal action against KiK in March 2015 at the Regional Court in Dortmund. The four plaintiffs – one survivor and three bereaved – are members of the Ali Enterprises Factory Fire Affectees Association and were seeking €30,000 each in compensation from KiK.

In August 2016, the court issued an initial decision: it accepted jurisdiction and granted legal aid to the claimants to cover their costs. This decision was a first step towards addressing – in front of German courts – human rights abuses committed by German companies abroad. The only court hearing in the case was held in November 2018. However, it did not address KiK's responsibility, but the question of statutory limitation.

Although KiK had originally agreed to waive any potential statutory limitation (a possibility foreseen to parties under German procedural law), it afterwards rescinded this waiver. Invoking this argument, the court rejected the application in May 2019 and found the claims were statute barred, drawing upon the Pakistani statutory limitation of 1 year. The case was thus decided on issues of process rather than content.

28. We would propose that State Parties to the LBI foresee the possibility for claimants to request an exception to the applicable statute of limitation in case the complexity of the case would warrant this. Such an exception could read as follows:

*“a Judge or Chamber may, proprio motu or on good cause being shown by motion, and independent of whether the statute of limitation already expired*  
*(i) enlarge or reduce the statute of limitation prescribed; or*  
*(ii) recognise as validly done any act carried out after the expiration of the statute of limitation so prescribed and on such terms, if any, as is thought just.”*

29. On the relation with other judicial investigations or proceedings in article 8 (2), we would propose to seek inspiration with other international statutes which have dealt with similar matters. The ICC Rules of Procedure and Evidence offer one such example, as under Rule 164 (2) they propose that *“The period of limitation shall be interrupted if an investigation or prosecution has been initiated during this period, either before the Court or by a State Party ...”*.<sup>11</sup>

## Article 9: Applicable Law

30. Although this article provides a broad choice of law, we would suggest that the choice of applicable law is not determined by the competent court, but instead would confer the choice to the rightsholder who brought a dispute to the respective court. This way the rightsholder can choose the most favourable law. A similar option was present in the zero draft.

<sup>11</sup> ICC Rules of Procedure and Evidence, 2013, <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>, accessed on 5 February 2020.

## Article 12: Consistency with International Law

31. Article 12 (5) and (6) do not sufficiently clarify potential conflicts and between the Legally Binding Instrument other bodies of International Law, especially trade and investment agreements. Nevertheless, there is ample evidence as well as political attention to the conflictual relationship between business and human rights in the context of Trade and Investment agreements. It would therefore be advisable to more clearly spell out the preference or the primacy of human rights law in trade and investment agreements both in terms of substantive law as well as to standing of rightsholders within the respective dispute settlement mechanisms of such agreements. Such an approach would also increase coherence with Operational Principle 9 in the UN Guiding Principles.

### Case Study: Amicus Brief in Gabriel Resources v. Romania:

Gabriel Resources planned for open-pit gold mine in Romania which would include the use of cyanide, a highly toxic substance linked with serious environmental risks. Residents of three villages would have had to be resettled while four mountains were due to be levelled. The planned mining also threatened one of Romania's most important archaeological sites. For two decades, community members in Rosia Montana and the surrounding villages in Romania have successfully advocated for Romania to acknowledge the major environmental risks, the on cultural heritage as well as property rights. In response, the Canadian-British mining company Gabriel Resources sued Romania in an investor-state dispute settlement (ISDS) case for a compensation of US\$3.3 billion.

In November 2018, a number of Romanian and International NGOs filed a petition to intervene as amici curiae. The amicus curiae brief was accepted by the International Centre for Settlement of Investment Disputes (ICSID). In the submission, civil society explained the need to consider the rights of the local residents as well as the extraordinary cultural, archaeological and regional significance of the region in and around Rosia Montana. However, the arbitration tribunal refused to hear the witness statements of affected persons and rejected the legal arguments of the brief.

32. The case against Romania clearly demonstrate that without proper clarification of the primacy of human rights over trade and investment agreements, many of the concrete advances rendered possible through this Legally Binding Instrument will not translate into tangible changes of rightsholders.