

ICJ's Intervention Regarding Article 9 Prevention on 16 Oct. 2018

Mr Chairman-Rapporteur,

Prevention is a central element in any approach to business and human rights, not least because it is always preferable to prevent than to cure or remedy the harm done. The International Commission of Jurists welcomes the principle of prevention enshrined in Article 9 of the draft treaty, but underlines that its language is not entirely satisfactory. In the text, prevention amounts in fact only to human rights due diligence but the draft could contemplate other additional ways for states to prevent human rights abuses by companies or to require companies to prevent abuses in the context of their operations.

The draft asks States to implement a form of human rights due diligence that departs without further explanation from the existing understanding of due diligence. Article 9 brings into the traditional four-step process of due diligence some additional requirements, such as “meaningful consultation” with affected groups, the requirement of financial security to cover potential compensation claims, and the incorporation of some measures into businesses’ transnational contracts. In this respect, greater alignment with the UNGPs, particular GPs 17-21 and existing leading practice on human rights due diligence would be desirable.

In addition, taking into account international practice, and notably the French *Loi de devoir de Vigilance*, a separate article should be included to provide more specific guidance on the content of the human rights due diligence process required in the future article on prevention. The French law contains specific elements concerning the content of human rights due diligence plan. These elements include

- a) identification, analysis and prioritization of risks;
- b) Procedures for periodic evaluation of the situation of subsidiaries, suppliers and subcontractors with whom an established commercial relationship is maintained, with regard to identified risks;
- c) Measures to mitigate risks or prevent serious harm;
- d) An alert mechanism on the risks of abuses
- e) A mechanism for monitoring the measures implemented and evaluating their effectiveness.

Beyond human rights due diligence, it is important that a new draft treaty addresses other forms or measures of prevention. Those measures of prevention that States should implement could be modeled on those identified in UNGP Principles 3 and 15 as well as General Comments 16 of the Committee on the Rights of the Child and General Comment 24 of the Committee on Economic, Social and Cultural Rights.

Thank you.