

International Commission of Jurists

Commentary and recommendations on “zero draft” of an International Legally Binding Instrument on Business and Human Rights

In July 2018, it was published the “zero draft” of what is expected to be the first universal treaty addressing business and human rights. The document was authored by Ecuador’s Ambassador in Geneva acting as chair of the Intergovernmental Working Group (IGWG) in charge of drafting the instrument.¹ The draft is strongly focused on issues of legal accountability of business enterprises and access to justice and remedy for those who allege harm by a business enterprise. The draft was presented and discussed in “first reading” by States and observers during the fourth session of the IGWG in October 2018.

The present commentary is not intended as a comprehensive assessment of the draft, but it rather addresses select provisions of priority concern to the ICJ on first reading. It contains recommendations on the way to strengthen them in accordance with human rights and rule of law principles.

Background

In 2014, the United Nations Human Rights Council adopted resolution 26/9 creating an Intergovernmental Working Group to elaborate a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (a treaty on business and human rights).² The IGWG has held four sessions, most recently in October 2018.³ The next session is scheduled for October 2019, where a “first draft” is expected to be presented by the Chairperson Rapporteur.⁴

The zero draft adopts a model of a treaty focused on access to remedy and justice by alleged victims of corporate abuse and legal accountability of transnational corporations. Other options on the table included a framework treaty based on the implementation of the Guiding Principles on Business and Human Rights,⁵ and a

¹ <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

² http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

³ See relevant programme of work, report and participation at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx> . Expert commentary can be found on a series of blogs and short articles at: <http://opiniojuris.org/2018/07/23/towards-an-international-convention-on-business-and-human-rights-part-i/> and <https://www.business-humanrights.org/en/about-us/blog/debate-the-treaty/reflections-on-the-zero-draft>

⁴ See Report of the fourth session of the OEIGWG on transnational corporations and OBE, A/HRC/40/48, 02 January 2019; and Addendum, available at <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/session4/pages/session4.aspx>

⁵ Claire Methven O’Brien, For a business and human rights treaty based on progressive national implementation of the UNGPs and modelled after the WHO Framework Convention on Tobacco Control,

treaty that would focus on creating or recognizing a series of “direct” human rights obligations for businesses under international law.⁶ In the zero draft, business human rights “duties” are only recognized as such in the preamble, which provides that all business enterprises “shall respect all human rights.”

The zero draft draws on existing obligations or language from existing instruments, legally binding or not. A cross-reference exercise reveals that most substantive provisions reflect text already existing in various instruments listed in an annex document provided by the Chair.⁷ While using existing text maybe reassuring for States that do not want to assume expansive new normative international obligations, the strategy is not conducive to a homogenous, focussed and complete text, but may lead to a collation of disparate parts with unclear connection with each other and glaring substantive gaps or repetition. The ICJ recommends the cautious use of existing language in international instruments enjoying wide acceptance or adopted by recognized human rights bodies, and stresses the need to pay special attention to coherence and adaptation to specific issues critical to protection of human rights in the context of business operations.

The focus on remedies and accountability for business enterprises’ abuses is necessary and commendable, and the treaty’s structure, tackles head-on some of the most pressing issues, including legal liability of corporations, victims’ rights, jurisdiction and mutual legal assistance. All of these make the draft treaty a viable proposal that would enjoy wide, even if not unanimous, support. However, there is a need to improve in precision and clarity while preserving many good proposals already included in the text. In any case, having a full draft for discussion has undoubtedly helped delegations to focus on the underlying issues.

The following commentary addresses key sections and articles in the zero draft, providing analysis and also suggestions about the way forward in developing or improving further the text. The text of the zero draft is wide in scope in respect of issues relating to accountability and access to remedy.

The Preamble (Article 1)

The preamble is a key element in any international treaty. It is normally used to set out the purpose of the treaty, some historical antecedents and to state a normative framework of principles for the operative text to follow. The preamble should reflect what States intend to achieve with the treaty. All parts of a preamble are usually related to each other in a unified way. As such the preamble’s importance lies in that it provides a necessary element of context to fully understand the content of the substantial obligations to the parties contained in the provisions of the treaty.

submission to the 2nd session of the OEWG, at <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>

⁶ See CETIM and Friends of the Earth’s submission to the 2nd session of the OEWG, available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>

⁷ Non-exhaustive list of documents consulted during the preparations, available at: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ListDocuments.pdf>

Article 31.1 of the Vienna Convention on the Law of Treaties provides that the interpretation of the terms of a treaty should take place in their context and in the light of the object and purpose of the treaty. The context includes the other provisions of the treaty, the preamble, annexes and other related documents agreed on by the parties in relation to the treaty (art. 31.2). Both context and object and purpose are many times to be found in the preamble, hence the relative importance of careful attention to the drafting of the preamble.

The zero draft preamble is curiously presented as "article 1" giving rise to confusion as to its position and status within the treaty. It refers to a series of considerations of duties and responsibilities of States and businesses, but also to the UN Charter Articles 55 and 56. As such, the reference to rights of every person to access to justice and effective remedy, the primary responsibility of States to protect all human rights, and the responsibility of business enterprises to respect all human rights, provide important elements as to the reasons why States conclude the treaty. Similarly, references to the UN Charter are important to tie the draft to universal human rights obligations, in particular highlighting the obligation of international cooperation. References to other instruments such as the main UN treaties and the Guiding Principles on Business and Human Rights may usefully be included as source of States' duty to protect, the business responsibilities to respect human rights or the rights of individuals to and effective remedy and reparation. It is important of course that instruments referred to enjoy wide acceptance.

It is revealing that the statement of purpose (Article 2) reflects the main substantive considerations of the preamble in relation to the State duty to protect human rights, the responsibility of businesses to respect human rights, the right to access justice and remedy and the need for international cooperation, which underscores the relevance of the preamble. and strongly suggests the pertinence of deleting Article 2 when the purpose of the treaty is to be found already in the preamble.

Articles 3 and 4: scope and definitions

Draft Article 3.1 provides "This Convention shall apply to human rights violations in the context of any business activities of a transnational character", and Article 4 defines "Business activities of a transnational character" as "any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions or omissions, persons or impact in two or more national jurisdictions."

The question of whether the treaty is limited to transnational companies or might include businesses operating only within the territory of one state has been contentious throughout the process. Draft articles 3 and 4 purport to operate a shift by focusing on the conduct or "activity" of the business enterprise rather than on the enterprise itself. While this scope might be appropriate and effective for provisions relating to legal liability (i.e. Article 10) does not solve the issue for the full range of treaty obligations, such as Article 9, where the subject is responsibilities of human

rights due diligence. The combined result of draft articles 3 and 4 is a focus on the conduct of transnational corporations and other business enterprises that have “transnational activities” only. Actions or omissions by businesses acting only within domestic jurisdictions would not be covered no matter how egregious they are and irrespective of the size of the business enterprise.

The limitation in scope is in detriment of a broader scope including all business operations, as advocated by the ICJ and several other stakeholders. This limited scope has been a matter of contention since the start of the process and is perhaps the single most important factor in the success or failure of this initiative towards a business and human rights treaty.⁸ The scope has an impact on the reach and consistency of several treaty provisions whose focus is the definition of grounds of legal liability (mainly civil and criminal) for businesses and access to remedy and reparation.

For the ICJ, this limitation to the scope of the treaty is misguided and not necessarily based on the text and intent of Resolution 26/9. The overriding intent of the resolution was to establish a process in which all States could discuss a treaty regulating business and human rights with a view to developing a text that all States might adopt, ideally by consensus. This intent is reflected in operative paragraphs 2 and 3 which mandate an open discussion about form, “scope and content” of the treaty. It would be inconsistent with that intent to suggest that the resolution at the same time must be interpreted to limit the discussion on the scope of the treaty. In addition, the supposed limitation in scope contained in resolution 26/9 is in fact a footnote to one of the references in the preamble to past work of the Commission on Human Rights.⁹ As the ICJ has shown, the significance of this footnote is overstated. It is unjustifiable to assign such an overriding weight to an otherwise peripheral and even contradictory footnote.

Going forward, there are several alternatives for a new draft to correct or mitigate the disruptive effects of the proposed limited scope to “transnational activity”. There is no reason why a treaty cannot contain provisions of general application to all business enterprises and at the same time include additional provisions specifically targeting the operations of multinational enterprises. Such an approach would be totally consistent with resolution 26/9. Among those provisions that cannot be limited only to “transnational activities” without breaching fundamental rule of law principles of legality and equality under the law, are those relating to legal liability of business enterprises. Under the current scope and definitions, only criminal conduct (no matter its seriousness) that occurs in more than one jurisdiction may be punishable, which may lead to the absurd outcome that egregious criminal conduct (for instance crimes against humanity) may not be punishable if committed by businesses acting only within one jurisdiction unless there is specific domestic legislation that provides so, which is precisely what many countries lack.

⁸ International Commission of Jurists, The scope of a legally binding instrument on business and human rights: Transnational corporations and other business enterprises, May 2015
<https://www.icj.org/submission-on-scope-of-future-treaty-on-business-and-human-rights>

⁹ Ibid., p. 9

One approach to overcome these problems is to draft the articles most concerned by the limited scope (i.e. Articles 9 and 10) in such a way that they are not limited to transnational activities of business enterprises. This approach is adopted in the present commentary in the respective sections. Another approach would be to include a clause inspired by Article 34.2 of the UN Convention on Transnational Organized Crime to expand the scope of substantive provisions to all business legal entities.¹⁰

This clause could be inserted towards the end of the draft treaty, in the section on “final provisions” or at the beginning under “scope”, for instance. This clause would have the effect of making the main obligations relating to substance applicable across the board, to all potential abuses companies may be responsible for and not only those committed transnationally.

Article 5: Jurisdiction

It would be better to place article 5 after or closer to article 10 because it focuses on the jurisdiction of national courts in relation to law suits concerning abuses committed by companies. It also appears to relate only to jurisdiction over civil claims, leaving aside the question of jurisdiction over criminal cases, which could be addressed in other additional provisions.

In terms of content, the wording of this provision is insufficiently clear and, in certain respects, far-reaching, going beyond what is generally recognized as grounds for jurisdiction of domestic courts or the concept of domicile. For instance, under article 5.2(d) a legal persons’ domicile include the place where they have its “subsidiary, agency, instrumentality, branch, representative office or the like”, which greatly opens up the concept of domicile.

Article 5.1 should be clarified to refer exclusively to jurisdiction in civil claims and for that matter the language about acts or omissions that “result in violations of human rights covered under this convention” should be clarified. A civil claim should be connected to claims for damages caused in violation of human rights norms allegedly suffered by the claimant and not to the breach of a human rights obligation per se.

Article 5.1 adopts domicile as the main ground for jurisdiction. This is a convenient choice that should be supported. Article 5.2 defines what counts as “domicile”: a) the statutory seat, or b) place of central administration, or c) place of substantive business interest or a d) place where it has a “subsidiary, agency, instrumentality, branch, representative office or the like”. The last ground of jurisdiction opens up too much the concept of domicile, increasing the real risk of parallel conflicting judicial processes and subsequent confusion. If it is going to remain, this paragraph needs further precision by requiring a level of connection with the main company.

These provisions should be supplemented with at least two additional ones on connected claims and on the “*forum necessitatis*”: the courts of a State shall have

¹⁰ UN Convention on Transnational Organized Crime
<https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

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.¹¹

In relation to criminal cases (and so far this is relevant because article 10.8 provides for criminal liability for enterprises), one good formula to start discussions could be something based on 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. The Convention against Torture 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.

The drafters may also consider adding a paragraph with language drawn from the relevant provision of the Convention against Torture on universal jurisdiction: Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present or domiciled in any territory under its jurisdiction and it does not extradite him or her when the alleged offender is a natural person.

The treaty should also clearly state that its provisions on jurisdiction are without prejudice to norms 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 finally be defined in the equivalent of current article 10.8.

Article 5.3 refers to claims submitted on behalf of individuals or groups and as such is better located with other provisions relating to procedural aspects. In the current draft the best place for it would be closer to or within article 8 on the "rights of victims".

Article 6: Statute of limitations

Article 6 of the zero draft contains a provision that is largely based on existing international law, but its formulation should be tightened for the sake of clarity and completeness. It presently states:

"statutes of limitations shall not apply to violations of international human rights law which constitute crimes under international law. Domestic statutes

¹¹ Council of Europe Recommendation 2016/3, para 35

of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive and shall allow an adequate period of time for the investigation and prosecution of the violations, particularly in cases where the violations occurred abroad.”

This article is partially based on provisions contained in the 2005 UN Principles and Basic Guidelines on the right of victims of gross violations of international human rights norms and grave violations of international humanitarian law to remedy and reparations (Principles and Guidelines on the right to a remedy and reparation, especially principles 6 and 7), adopted by the UN General Assembly in 2005; and also the UN Updated Principles for the protection and promotion of human rights through the fight against impunity (Impunity Principles 23 and 32).¹²

Time limitations are an impermissible limitation to the right, and in some instance the obligation, of the State to prosecute and punish a serious offence, curtailing in this way the right to an effective remedy in certain cases. However, they are not the only limitations that have these effects and are, for these reasons, inadmissible in international law. Amnesties, pardons, immunities and similar measures (i.e. waivers of responsibility or rights) may be included in this category.

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 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” (bold type added).¹³ 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 on the state obligation to repair by

¹² 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, General Assembly Resolution A/RES/60/147, 2005; 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

¹³ 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 at 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

reason of the nature of the very serious nature of the events and does not depend on the type of legal action used.¹⁴

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

Article 8.- Rights of victims

Much of Article 8 is 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 all due process of law guarantees included. They could be more specifically tailored or adapted to address specific issues in relation to human rights abuses by business enterprises.

Article 8.1 declares the "right to fair, effective and prompt access to justice and remedies". This notion needs explanation, especially as regards the requirement of "fair". The article then moves immediately to the issue of reparation, spelling out the various possible forms of reparation -a notion that is quite settled in international law in respect of State responsibility, but adds, without definition, references to "environmental remediation" and "ecological restoration". The provision also needs to be supplemented by provision of remedies and reparations against the state when this fails in its duty to protect against business infringements of rights.

Article 8.2 focuses on the access to courts mixed with jurisdictional issues, whose place is best under the article on jurisdiction in the treaty. Article 8.3 is a paraphrase of Principle 3.b in the UN Basic Principles on the right to a remedy, and a standard already generally accepted as law. The rest of Article 8 is dedicated to address issues relating to procedural and financial nature that constitute obstacles to access to justice. Among them, the issue of costs, declaring that "in no case shall victims be required to reimburse any legal expenses of the other party to the claim." (Art. 8(5)(d)), which stands out as potentially controversial since it may be misused also by those with sufficient financial means to litigate or seen as an incentive to frivolous litigation, though that problem could be addressed through a means-testing system. The draft treaty also provides for the establishment of a Fund for Victims (Art. 8(7)), which although desirable may not be feasible or even effective.

It would be helpful to reformulate this article by starting with a provision on the right to an effective remedy for those that allege harm to their human rights resulting from the conduct of a business enterprise. It should continue with a paragraph on access to justice or to courts, including a fair and prompt trial. Article 8.3 should remain.

Enforcement of judgements is tacked in article 8.8, but couched as enforcement of "remedies". The formula could be streamlined.

¹⁴ Ibsen Cardenas v. Bolivia Ibid., para 95

Article 8.11 needs to be expanded to include protections to human rights defenders who assist victims of human rights abuse by business enterprises.

Article 9: Prevention

This article on preventative measures is a welcome element in the zero draft. Preventative measures by States and business enterprises are always a necessary step and preferable to the need to prosecution and redress once the harm has occurred. Prevention measures are also usually cost-effective, and should involve actions both by the State and by the business enterprise. But the zero draft treaty takes a partial and heterodox approach to well-known and largely consensual understandings about certain preventative measures such as human rights due diligence. In fact, article 9 draws from various sources of uneven stance in international law: the UN Guiding Principles on Business and Human Rights, France's law on *devoir de vigilance*, and European Union Directive on non-financial reporting, among others.¹⁵ Elements with preventative functions from those instruments are listed together with others of not so clear preventative character such as the establishment of financial security (Article 9 2(h)). The article also takes distance from generally accepted definitions, potentially creating confusion among States and business enterprises.

Article 9 should be redrafted to include a number of preventative measures the State must take in relation to business enterprises, including the requirement of human rights due diligence (and not simply "due diligence"), a company-wide human rights statement of policy, and policies and mechanisms of remediation of negative impacts of business operations as proposed in Guiding Principle 15. It would be also desirable to keep the order and wording of paragraphs as close as possible to the prescriptions in the UNGP as this is a generally accepted source of standards on this matter. This should not be an obstacle to spelling out more in detail certain due diligence steps in relation to impact assessments and consultation with persons from marginalized or disadvantaged groups such as indigenous peoples.

As formulated in the United Nations Guiding Principles on Business and Human Rights,¹⁶ human rights due diligence is a four-step process whereby business enterprises should identify, prevent, mitigate and account for how they address their adverse human rights impacts (Principle 15, and 17 to 21). The zero draft adds "meaningful consultation" with affected groups (9.2(g)), the requirement of financial security to cover potential compensation claims (9.2(h)), and the incorporation of some measures into businesses' transnational contracts (9.2(f)). Meaningful consultation can easily fit as part of the first step in the process: identification and

¹⁵ Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (FR) ; Directive 2014/95/EU of the European Parliament and the Council regarding disclosure of non-financial and diversity information by certain large undertakings and groups (22 October 2014)

¹⁶ United Nations Guiding Principles on Business and Human Rights
https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

assessment of actual or potential risks. Its wording should be improved to reflect also more clearly its relevance for the protection of the rights of indigenous people.

The closely connected nature of a healthy environment with the enjoyment of a host of human rights has been stressed by the Special Rapporteur on human rights and environment at the UN.¹⁷ 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)

For both the Inter-American Commission and Inter-American Court of Human Rights 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.

In the zero draft, failure to comply with due diligence duties as set out in Article 9 may lead to legal liability (article 9.4). This provision may create significant confusion with article 10 where rules on legal liability are developed in full.

Article 9.3 talks about “effective national procedures” to “enforce compliance” with obligations set out under Article 9. Enforcement of laws and obligations is generally weak in many parts of the world, and as such this provision is a positive measure. While the aim of this provision is positive, it appears to require direct enforceability of international obligations by national courts without regard to domestic constitutional arrangements and practices that may require incorporation as a first step. Further, both businesses and governments will find it hard to comply or

¹⁷ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, [A/HRC/37/59](#), 2018

¹⁸ IAComHR, Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation and development activities, 2015, para 156. See, *inter alia*, 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 Garífuna 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 and 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

monitor compliance respectively unless these obligations of due diligence are further defined and strengthened.

It would also be desirable to add additional measures that States should adopt to prevent abuses by businesses, drawing from UNGP Principle 3: taking measures requiring business enterprises to respect human rights; Ensure that other laws, such as corporate law, enable business respect for human rights; require business enterprises to communicate how they address their human rights impacts.

Article 10.- Legal liability

The zero draft treaty provisions on legal liability are the central element of the legally binding instrument, and constitute one of its main purposes. As with the rest of the zero draft, the provisions are applicable only to situations that arise in the “context of business activities of transnational character”, which limit their potential value and introduces language and expressions of unclear meaning. For instance, “business activities of transnational character” is a definitional element of the violation, but it may also be merely understood as the context in which *any* violation may occur.

The need for Article 10.1 is not apparent as it provides for a clause that grants States ratifying this treaty with flexibility to use civil or criminal or administrative liability in relation to “violations of human rights”. International practice shows that this kind of flexibility clause is usually needed when the relevant treaty requires the criminalization of certain conduct when performed by natural persons, and is premised on the recognition that certain countries do not recognize in their legal systems the possibility of corporate criminal responsibility. It is in relation to these offences, such as corruption, various forms of transnational organized crime, including human trafficking, and sale of children and child pornography that treaties contemplate the option of civil, criminal or administrative liability in relation to “legal persons”. In this Article 10.1, the clause refers to (presumably all) “violations of human rights”. The proposal would be to reserve this flexibility clause to the section of Article 10 that addresses responsibility for gross human rights violations and/or crimes under international law. Therefore, Article 10.1 could be deleted.

Article 10.2 establishes a rule that could have a positive effect, but it is limited to cases where some form of civil responsibility is attached to the criminal proceedings. In fact, this provision is requiring civil liability proceedings independent from criminal proceedings, without ruling out the latter altogether, which is a positive feature. This article also overlaps, and to certain extent duplicates, Article 10.7. Because of its general application, it is proposed that this provision is kept in its current form in Article 10.2 and Article 10.7 be deleted.

Article 10.3 may be completed by clarifying that the business person should reimburse the State when it has already provided reparation for “the same act” that constitutes the basis of the claim against the business person. As it stands, this provision may be applicable to all and any reparation provided by the State, including reparation for its own violations of human rights.

Civil liability

Article 10.5 constitutes the main substantive provision on civil responsibility of general application within Article 10. It has certain parallels to paragraph 32 of the Council of Europe Recommendation 3/2016: "Member States should apply such legislative or other measures as may be necessary to ensure that human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability under their respective law." However, the reference to the actor ("caused by business enterprises") is missing and needs to be added. As it stands, the zero draft, is incomplete.

The responsibility of parent companies or lead/buyer companies in respect of abuses committed by their subsidiaries, supplier companies and other business relationships are key elements of the existing gaps and where clear and robust rules are most needed. Draft Article 10(6) attempts to tackle this complex and contested issue by mandating certain parameters whereby a "person with business activities of transnational character" (presumably a business corporation) will be liable for harm caused in the context of those operations. It states:

"6. All persons with business activities of a transnational character shall be liable for harm caused by violations of human rights arising in the context of their business activities, including throughout their operations:

- a. to the extent it exercises control over the operations, or
- b. to the extent it exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim, or
- c. to the extent risk[s] have been foreseen or should have been foreseen of human rights violations within its chain of economic activity."

This provision is an effort to cover all possible ways in which a company may be involved in the harm caused by companies associated to their business operations. However, the way it is drafted creates confusion and legal uncertainty that may lead to unnecessary or excessive risks of legal responsibility for companies. For instance, the provision would make companies responsible for harm caused "by violations of human rights arising in the context of their business activities", when (c) "risks have been foreseen or should have been foreseen", independently of whether the company acts in a capacity of controlling, monitoring or supervising the subsidiary or supplier and without clearly defining the latter as direct or immediate perpetrators of the act.

In *Vedanta V Lungowe*¹⁹, the United Kingdom Supreme Court recognized that multinational companies can be organized in limitless ways (para 51) but, in reference to whether one company could be responsible for the harm caused by

¹⁹ *Vedanta V Lungowe*, UKSC 2019 <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>

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 made reference 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. In this regard,

Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken. (para 53)

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.²⁰

Article 10.6 may be redrafted to reflect the above standards and require, in simple and brief terms, that states adopt legislative or other necessary measures to provide for the civil liability of companies that fail to prevent the causing of harm by other companies’ activities that they control or supervise.

“Criminal liability”

The provisions on criminal legal liability (Art. 10(8)– (12)) are aimed at addressing the important issue of legal liability of business enterprises for the commission of gross human rights abuses, but their formulation is problematic and needs serious work to address difficulties in precision and feasibility of objectives. The draft treaty not only calls for criminal liability for “human rights violations that amount to a criminal offence”, including crimes recognized under international law and “domestic law” but also continues to limit the definition and sanction of those offences only when committed by “persons with business activities of a transnational character”. This is a major flaw that causes disruptions to fundamental rule of law principles and should be corrected.

²⁰ 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/>

As it stands, Article 10.8 leaves open a large window for divergent and potentially arbitrary approaches. Its lack of necessary clarity and precision in the definition of crimes runs against the principle of legality, a general principle of law and rule of customary international law.²¹ During the fourth session of the IGWG²² several State delegations spoke against this article. These include countries such as Argentina and the Russian Federation, whose legal systems do not recognize criminal responsibility for legal entities. Indeed, Article 10.8 does not provide the necessary flexibility that recognizes the differences in legal systems and traditions in relation to the types of legal liability applicable to legal entities, which was so useful in other instances of international treaty making to overcome objections and discrepancies.

Article 10.8 should be redrafted, first under the title "Legal liability for gross human rights abuses and crimes under international law", and drawing language, for instance, from Article 3(4) of the UN Optional Protocol to the Convention on the Rights of the Child on the Sale of Children and Child Pornography's (OPSC), in relation to legal accountability (criminal, civil or administrative) of legal entities, including business corporations, and other similar Conventions.²³ But, in this treaty, reference should be made to business enterprises and not to "legal entities", which is a more general category including entities without for-profit purposes such as civil associations, foundations, and trade unions.

The OPSC in turn draws on provisions incorporated in the UN Conventions on combating corruption and organized crime.²⁴ There are several other conventions adopted within the framework of the Council of Europe that provide for legal liability of legal persons. These include the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public

²¹ ICRC IHL Database, Customary IHL, Rule 101 https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule101 ; ICTY Stakic case, Judgment 31 July 2003 § 719-722; ICTY Stakic case, Judgment on Appeal, 2006, § 315; ICTY *Hadžihasanović case*, Appeals Chamber Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 2003, § 34-35

²² See Addendum of states interventions...

²³ See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002:

"Article 3

1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:

(a) In the context of sale of children as defined in article 2:

(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:

- a. Sexual exploitation of the child;
- b. Transfer of organs of the child for profit;
- c. Engagement of the child in forced labour;

(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;

(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;

(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.

....

4. Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative."

²⁴ United Nations Convention against Transnational Organized Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003

health; the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse; the Convention on Action Against Trafficking in Human Beings; and the Convention on Cybercrime.²⁵

A relatively recent Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (still not in force), Article 46C grants the Court jurisdiction over a series of crimes committed by legal persons including crimes against humanity, war crimes, various trafficking offences and mercenaryism.²⁶ This Protocol constitutes one of the few instances of international instruments providing only for criminal responsibility for businesses.

The most practical option at this stage is to allow states the same degree of flexibility provided in those Conventions to ensure effective legal accountability of businesses enterprises. In all cases, the offences have to be defined with sufficient clarity to meet the requirements of legality. Therefore the crimes for which legal liability should be established include war crimes, crimes against humanity and genocide, torture or other cruel, inhuman or degrading treatment, enforced disappearance, extrajudicial execution, slavery and slavery-like offences, forced labour and similar forms of forced labour, forced displacement of people, forced eviction, the use of child soldiers and sexual violence.²⁷

²⁵ Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Convention on Action against Human Trafficking (ETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201), the Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS No. 210)

²⁶ Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights STC/Legal/Min/7(I) Rev. 1; In: The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, EX.CL/846(XXV) 20 -24 June 2014 "Article 46C - Corporate Criminal Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.

....

6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes."

"Article 28A

International Criminal Jurisdiction of the Court

1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

- 1) Genocide
- 2) Crimes Against Humanity
- 3) War Crimes
- 4) The Crime of Unconstitutional Change of Government;
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources
- 14) The Crime of Aggression"

²⁷ See, for instance, Convention against Torture and other cruel, inhuman or degrading treatment or punishment (Art. 4); International Convention for the Protection of All Persons from Enforced Disappearance (Arts. 7 and 25); Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Art. 3); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Art. 4); Protocol to Prevent,

The offences that current zero draft Article 10.8 constitute serious violations of human rights amounting to crimes recognized under international law and, as such, they should lead to criminal responsibility for the perpetrator. In a series of decisions, the UN Human Rights Committee has held that “purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant [ICCPR], in the event of particularly serious violations of human rights.”²⁸ Because of their severity in relation to the importance of the protected rights and their impact on public policy, gross human rights violations call for criminal sanctions. However, the diversity of legal systems and the non universal reception of corporate criminal liability across the globe makes it difficult to require only criminal responsibility and a flexible approach may allow also for the use of civil and administrative liability. But the sanctions to ensue the finding of legal responsibility should be of severity commensurate to the gravity of the offence. In fact, the penalties should be of criminal nature.

Proposed text to replace article 10.8:

States party shall adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish in law the legal liability of for-profit legal entities, subject to their jurisdiction for business conduct that results in harm to human rights. Such responsibility should, as appropriate, be criminal, civil or administrative. Sanctions should be commensurate with the gravity of the offence

Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Art. 5); Inter-American Convention to Prevent and Punish Torture (Art. 6); Inter-American Convention on Forced Disappearance of Persons (Art. III); and Inter -American Convention on the Prevention, Punishment and Eradication of Violence against Women (Art. 7). See also: Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 1); Declaration on the Elimination of Violence against Women (Art. 4); Declaration on the Protection of All Persons from Enforced Disappearance (Art. 4); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Art. 7); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Principle 7). The UN Human Rights Committee has affirmed in its General Comment 31 that for certain obligations under the ICCPR there is an obligation for States to criminalize, at the very least, conducted amounting a violation of the right to life (eg, extrajudicial executions), torture and cruel, inhuman or degrading treatment or punishment and enforced. See Human Rights Committee General Comment 31: The nature of the General Legal Obligation Imposed on States Parties to the Covenant, adopted 29 March 2004, para 18; Human Rights Council, Basic Principles and Guidelines on Development based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Document No. A/HRC/4/18. Online Version: http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf; UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Principles and Guidelines on Reparation), adopted by GA Resolution 60/147 of 16 December 2005, UN Set of Principles for the Protection and Promotion of Human Rights through action to Combat Impunity (UN Impunity Principles), recommended by UN Commission on Human Rights resolution 2005/81 of 21 April 2005; Guidelines adopted by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers’ Deputies, available at http://www.coe.int/t/dgi/publications/others/h-inf_2011_7en.pdf

²⁸ *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995), para 8.2. See also *Jose Vicente y Amado Villafañe et al vs Colombia*, Communication No. 612/199, 5 para. 8.2, and the UN Basic Principles and Guidelines on the right to a remedy, *Ibid.*; UN Principles on the fight against impunity, *Ibid*

States should adopt legislative and other measures to ensure that the for-profit legal persons found responsible for the commission of offences defined in this Convention (current article 10.8) shall be subject to effective, proportionate and dissuasive sanctions, including monetary sanctions.

States Party shall adopt legislative and other measures to enable the confiscation or otherwise of the instrumentalities and proceeds of criminal or other offences established in this Convention, or property the value of which corresponds to such proceeds.

“Zero draft” Articles 10.9 can be maintained in the text, but Article 10.11 should be deleted as it does not correspond to this article but to the section on jurisdiction.

Article 13: Consistency with international law

Article 13 aims at ensuring consistency of the terms of the legally binding instrument with international law, presumably general international law, customary international law, and treaty law. As such its objective seems to reassure States that the present treaty will have little or no interference with their existing international obligations, including in respect of trade and investment treaties or, controversially in the current draft, domestic affairs.

Articles 13.1 and 13.2 are not controversial, although language could be adapted to mirror more closely Article 2 of the UN Charter that seems to be the source of inspiration. However, Article 13.3 contains a provision of broad application that may have negative consequences. In fact, it seems to provide that the new treaty on business and human rights would not restrict or derogate from existing obligations under international law and domestic law. Some States may interpret this clause to justify inaction in the incorporation of the treaty into national law or simply to justify inaction in enacting any legislation pursuant the treaty when this restricts or derogates from existing national obligations. The second part of this provision is even more astonishing because it seems to subject (“without prejudice”) the present treaty to other treaties or customary international law, and should be deleted. This provision seems to be repeated under Article 13.4. But, at the same time, Article 13.6 requires signatories not to conclude other agreements “in conflict” with the present treaty.

Similarly, Article 13.7 is welcome, but may be ineffective as presently formulated.. It provides that “all existing and future” trade agreements shall be interpreted in a way that is “least restrictive” on their ability to perform the present treaty notwithstanding other obligations and rules of international law. This provision would be fully effective when there is a third party adjudicating body in a dispute between parties to the present treaty (if a non party to the present treaty is party to the dispute, this rule will not apply to it), or if the States parties that interpret the treaty without an adjudicator are also parties to the present treaty. A State that is not party to the present treaty has no obligation to interpret it or to apply it in a “least restrictive” way.

International institutional arrangements

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. 14), 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, issue reports on specific issues, and provide guidance for state and company implementation of the treaty.

By early August, the Chair Rapporteur released a draft optional protocol to this treaty containing provisions for a National Implementation Mechanism and a complaints function for the expert Committee created under Article 14 of the main treaty. A National Implementation Mechanism looks like a good idea, but its functions and coordination with existing monitoring and remediation mechanisms needs further refinement to avoid gaps or duplications. Similarly, although receiving complaints is a welcome function for the international expert Committee, the applicable procedure and final outcomes are far from clear and effective. These aspects deserve a separate analysis.

Conclusion

The zero draft of a legally binding instrument on TNCs and other business enterprises is an important step forward, although it will require significant revision and refinement. Many doubted the process would ever advance to the stage of having a full draft for negotiations, but this process has provided a positive signal that the rail track is set and the train has already departed. A powerful indication for many government delegations and stakeholders that the best course of action is now to take part in the improvement of the draft or face an outcome that may not reflect their positions or interests.

The process is in its fourth year and moving forward despite the many challenges. But the drafting of the treaty needs considerable work to measure up to the high expectations and needs expressed by the international community and especially those in need of justice and reparation. At this stage, and in the preparation of the next draft for the 2019 session, there is a need to pay special attention not only to the individual provisions, but to their coherence in a whole. The critical benchmarks always must be whether they serve their purpose of enhancing access to remedy and justice for those negatively affected by business conduct and operations.

