



ICJ calls on States to act seriously and purposefully towards progress in business and human rights treaty negotiations.

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As the sixth session of the Open-Ended Intergovernmental Working Group (OEWG) working on a draft treaty convenes, the ICJ welcomes the Revised Draft treaty and calls on States to work to overcome political obstacles and make substantial progress towards completing its work on this much needed treaty.

The session, which takes place from 26 to 30 October, has before it a second Revised Draft of a Legally Binding Instrument¹, presented by the Chairmanship of the OEWG. The ICJ welcomes this draft as a very good basis for negotiations, though it considers that certain provisions still require revision and refinement.

The session takes place in the difficult and uncertain backdrop of the COVID-19 pandemic, with its serious impacts on human rights such as the right to health and strains on the capacity of States and society to tackle its consequences. The ICJ is especially concerned at the adverse impact of the restrictions imposed on civil society participation deriving from the rules adopted by the UN for the holding of meetings, while at the same time understanding that meetings cannot be held in the normal manner particularly given the recent increase of COVID cases in Geneva.

In general and with some exceptions, the Second revised Draft LBI reflects changes in the text, structure and organization of the draft articles that improve its potential to serve as an effective protective instrument, as well as increase its overall coherence. The ICJ considers the second Revised draft as a good starting point for negotiations which states should engage into without further delay.

The COVID impact and context

The ICJ considers that the ravages brought about by the COVID pandemic heightens the need to fill the gap in global human rights protection that a business and human rights treaty would provide. As the ICJ has documented in its report,² the COVID 19 pandemic has exposed the existing social and economic fractures in most countries, both in the North as in the Southern hemisphere, which impose impediments to the equal and universal enjoyment of human rights. The prevalent model of economic globalization has created or exacerbated structural inequalities within and among States, which has been one of the determinants in the coping capacity of persons different social groups to the immediate effects and the long term effects of the pandemic.

Nowhere have those inequalities carried more impact than in the substantially weaker and diminished coping capacity of poor, marginalized and economically disadvantaged layers of societies. Among these are people and communities that globalization has not benefited or benefitted only marginal and superficially or harmed. Evidence suggests that the pandemic has claimed the highest toll among indigenous peoples and minority communities, small peasants, workers, and women and children from among all those groups. Even those workers engaged in the global production networks of large corporations have paid a toll when top buyers cancelled or

¹ Chairmanship of the OEWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Second Revised Draft, 06.08.2020, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

² ICJ, Like People who Die Slowly, 2020 <https://www.icj.org/ici-new-global-report-shows-that-the-right-to-health-must-be-central-to-state-responses-to-covid-19/>

suspended orders or did not honour existing contracts. These have often left small and medium sized enterprise's workers without a job and income in the midst of a lethal pandemic in the context where these workers lacked safety nets or savings in their own countries.³ At issue are the precarious and unfair way in which affected populations have been integrated in the globalized economy.

The proposed legally binding instrument offers a unique opportunity for the international community of States, business, trade unions and civil society and individuals to start building a fairer and more sustainable economic and social system, where economic globalization and transnational corporations as the main actors of globalization assume a fairer contribution and responsibility towards the common good.

The Second Revised Draft- a promising basis for progress

The Second Revised Draft has both a strong emphasis on preventative measures that business enterprises should adopt to avoid causing or contributing to human rights abuses in their own operations or through their business relationships, and also an equally strong emphasis on effective remedies and reparations for the victims of those abuses. In this way, the Draft provides an expansive framework for the prevention of human rights abuses related to business operations, creating an environment where business enterprises become actors able to contribute to the pursuit of sustainable development goals, and the effective fight against climate change.

The 6th session of the OEWG offers the opportunity for a progressive negotiation towards the finalization and adoption of this much needed international instrument. It is time in this session for all States from the full range of regional groups, including those that have been inactive in previous sessions, to engage seriously with the actual text of the draft, and not just in broad abstractions. The 6th session will allow for the strengthening of the text by operating some needed changes and adopting decisions on the way forward with a view to the conclusion of negotiations.

Below is a summary of the ICJ's analysis, highlighting a few strengths and weaknesses of the Revised Draft and identifying some areas where it should be improved. Among these are a more explicit recognition of the differentiated impact of business activities over workers and children. Thus, the treaty should mandate tailored protection and prevention measures, including in the way in which remedies and reparations are determined and delivered. The ICJ, together with DKA, has prepared a separate study on the rights of the child in the present proposed treaty which is now brought to the attention of all delegations.⁴ The ICJ delegation will detail these positions further during the 6th session of the OEWG.

Purposes and scope

In relation to the preamble, the ICJ reiterates its recommendations issued in relation to the First Revised Draft (2019) that there is a proper reference to all of the principal core human rights treaties, including their substantive protocols, and labour rights conventions in the preamble, which currently makes reference only to some of them.⁵

³ ILO, The supply chain ripple effect: How COVID-19 is affecting garment workers and factories in Asia and the Pacific, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_758428/lang-en/index.htm

⁴ ICJ/DKA, The 2020 UN revised draft of a legally binding instrument on business and human rights: A child rights-based analysis; 2020. https://www.dka.at/fileadmin/user_upload/DKA-ICJ_Study_on_BHRTreaty-and-Child-Rights_202010.pdf

⁵ PP3 should recall the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming at the abolition of the death penalty; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, its Optional Protocol on the sale of children, child prostitution and child pornography; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention for the Protection of all Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities, as well as their respective Optional Protocols, and the Freedom of Association and Protection of the Right to Organise

The definitions contained in article 1 as drafted are roughly in line with existing standards in international law. The ICJ welcomes the now broader definition of the term "victims", "human rights abuse" and "business relationship" which effectively capture the wide spectrum of abuses that occur in the context of business operations. This language should be strengthened by ensuring that it encapsulates situations where States have also contributed to the situation of abuse of by business enterprises. Therefore, the word "violations", which was included in previous drafts but omitted in this version, should be restored and inserted in the text where relevant. The notion of "business activities" should also be revised as it appears at the moment too broad.

The statement of purposes of the treaty in article 2 has been slightly amended, including with a welcome recognition that facilitating and strengthening mutual legal assistance and international cooperation will be a purpose of the treaty. However, unlike in previous drafts, there is no longer a reference to environmental rights. The ICJ considers that this is a step backward that should be reconsidered, particularly in light of the growing recognition of the right to a healthy and sustainable environment and the linkages between climate change and other environmental devastation and human rights protection.

The ICJ also supports the statement of scope laid out in Article 3 as it has a strong focus on the activities of businesses with activities of transnational nature and in doing so addresses one of the major gaps in the international protection of human rights, while at the same time keeping a broad reach to all business enterprises including national business. However, the range of human rights need further fine tuning to ensure that it also covers the fundamental principles and rights at work as recognized by the ILO 1999 Declaration on Fundamental Principles and Rights at Work which all States Members of the ILO should respect by virtue of their membership in the organization, although it is not a treaty subject to ratification. In this regard, the expression "shall cover all internationally recognized human rights law and fundamental freedoms **binding on the State Party...**" may better serve the purpose of inclusiveness in relation to rights.

Rights and protection of victims

Article 4 sets out appropriate and expansively the right of victims to be protected. To strengthen the purview of this article, the ICJ proposes to add "individual or collective reparation" after "access to justice" and reference to the "right to truth" as a form of reparation. These and other provisions should also explicitly capture some child-specific elements to ensure that critical child protections will not go unaddressed. For instance, in article 4 (2) (e) the words "**and child sensitive**" could be added together with further reference to the requirement that a child victims' identity not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned.

Article 5 provides for welcome protection to victims and their representatives, families and witnesses. It also contains protections for human rights defenders, which should be further developed by adding a specific reference to trade unionists as human rights defenders, which seems necessary on the face of persistent and growing risk of threats and attacks to unions and workers. Because of its focus, this article may be better titled "protection of victims and human rights defenders" or simply "protection", and further developed.

Prevention

Article 6 covers prevention, which is among the most critical components of any human rights protection system and rightly has become a prominent and well-developed element of the proposed treaty. The ICJ suggest that priority attention be accorded to this area in the negotiations to ensure it adequately address the most important elements relating to responsibilities and strategies for companies to undertake to prevent human rights abuses.

Convention (No. 87), the Right to Organise and Collective Bargaining Convention (No. 98), the Forced Labour Convention (No. 29) and its Protocol, the Abolition of Forced Labour Convention (No. 105), the Minimum Age Convention (No. 138), the Worst Forms of Child Labour Convention (No. 182), the Equal Remuneration Convention (No. 100), and the Discrimination (Employment and Occupation) Convention (No. 111), adopted by the International Labour Organization

In this regard, Article 6(2) appropriately addresses mandatory human rights due diligence legislation and is an important element. However, its inclusion should not obscure the general purview of article 6(1) that goes beyond this measure in line with the UNGPs. According to Article 6(1), States

“shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.”

The ICJ suggest added attention to the rights of individuals from groups in situations of particular vulnerability, including children, in impact assessments under Article 6.(3) (a). Meaningful consultations prescribed in art. 6(3)(c) should include meaningful engagement with trade unions and other affected groups. Children should be engaged in consultations in accordance with the principle of the child’s right to be heard.

Remedies and reparation

In relation to Article 7 (access to remedy) adding “and reparations” to “access to remedy” will make clear that both remedy and reparations are an essential part of access to justice, as recognized under international law and standards. In respect of article 7 (3) (a), the information to be made available to victims on their rights and the status of their claims should also be in **relevant languages and accessible formats to adults and children alike, including those with disabilities. The same article (b) should guarantee the** rights of victims to be heard in all stages of proceedings **according to their special needs and rights keeping in mind that child victims may only be heard and participate voluntarily, within a child-friendly environment and through the use of child-sensitive methods.**

Access to remedy in article 7 should also include provisions on non state-based grievance mechanisms, which under certain strict conditions of transparency and social participation, can play a role in providing rapid redress to harms caused. However, in no circumstance should these grievance mechanisms be considered as a waiver of the right to a judicial remedy.

Legal liability and adjudicative jurisdiction

Article 8 on legal liability is fundamental to ensuring the fair administration of justice around business human rights abuses, and the appropriate allocation of responsibility. In Article 8 (7) there is provision for legal liability for a company’s participation in abuses that involve companies under its supervision or control. This provision may lead to an interpretation in which only the parent or lead buyer in a commercial relationship is legally accountable, while the controlled company or supplier is not. To avoid such an interpretation, this article should recognize joint and several liability in cases where both companies were involved in activities that caused the harm. In other cases, the responsibility of each company has to remain separate for the level of its participation and the damage caused.

The ICJ generally agrees with the new provision in Article 8 (8) clarifying that the implementation of a human rights due diligence process by a company does not provide an automatic immunity from legal liability to the same company. But the provision’s language needs to be streamlined to emphasize that a judicial authority remains empowered to weigh all available evidence, including and beyond human rights due diligence, in its assessments, taking into account criteria of reasonableness and effectiveness of the measures taken by the company.

Article 8 (9) is a necessary element in the equation, but it has been amended and greatly reduced in length, resulting in diminished clarity. It needs to be further clarified in its scope and content if it is going to play any significant role. The language used obscures the fact that this provision is about legal liability for abuses that amount to crimes as defined under international law. While the special gravity of these acts is adequately reflected in the type of liability it attracts, there should also be some space for civil liability in these cases without prejudice to the corresponding criminal responsibility.

In relation to adjudicative jurisdiction (Article 9), the ICJ notes that it is essentially focused on civil jurisdiction, leaving criminal proceedings that could possibly arise out of provisions such as art 8 (9), outside its purview. The ICJ considers that this provision needs to also address the issue of jurisdiction in criminal cases,⁶ to be consistent with the provision on crimes under international law which are seemingly foreseen in Article 8 (9) and the statute of limitations to the same crimes addressed in article 10. In that regard, it suggests, the introduction of a new Article 9 (3) provision regarding jurisdiction with respect to criminal claims, including the provision for universal jurisdiction for certain crimes.

The inclusion of a provision (article 7 (5)) ruling out the jurisdictional doctrine of *forum non conveniens* and the emphasis on the obligatory character of jurisdiction makes parallel proceedings in different jurisdictions more likely. But the Revised draft does not address this issue in a consistent fashion.

Article 12(9) (b) on Mutual Legal assistance and recognition of foreign judgements, is the only place that addresses the issue of parallel judgements, refusing recognition to one judgement when it is "irreconcilable with an earlier judgment...with regard to the same cause of action and the same parties" given by a court in the State in which recognition is sought. It is necessary that the treaty addresses the consequences of possible parallel proceedings in a more consistent way.⁷

On statute of limitations, in Article 10, the ICJ considers that some changes are in order, including in relation to the special position of certain groups such as children, who should not be deprived of access to justice and reparation because of the particular impediments due to their age and/or dependent status.

Mutual Legal Assistance and International Judicial Cooperation

Article 12 generally addresses mutual legal assistance, but it is still largely focused on criminal investigations and proceedings resembling those contemplated in such treaties as the convention on transnational organized crime or against corruption. However, the Second Revised draft as well as the first Revised draft have a strong focus on civil liability, with a too greatly reduced role for criminal liability for business enterprises. To improve the internal consistency of the proposed treaty, it would be necessary to amend and adapt the provisions on mutual legal assistance also to civil cases.

Consistency with international law

The Revised Draft addresses the relationship of the proposed treaty with international law at large and with other treaties in particular, including in the trade and investment realm, under the perspective of consistency between those instruments under Article 14. In Article 14(5) (b), it would be better to clarify that the impact assessments to be carried out to ensure the compatibility of other agreements with the treaty, **"should be conducted prior to concluding such agreements and whenever necessary during the time the agreement is in force. Such assessments should evaluate and address any foreseeable effects of such agreements on the enjoyment of human rights and be undertaken through full and public consultation with all stakeholders."**

The OEWG should seriously consider the option of including a new sub-paragraph under art. 14 (5) (c) regarding the obligation of States to integrate binding and enforceable human rights, environment and labour clauses in their trade and investment agreements. Moreover, art. 14(5)

⁶ See ICJ comments to the 2019 revised Draft: ICJ, Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights, February, 2020, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/ICJcommentsReviseddrafttreaty2019.pdf>

⁷ Joseph, S. & Keyes, M. The Business and Human Rights Treaty and Private International Law, Blog Symposium, 09, September 2020 at: <http://opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law/>

should require the inclusion of investors' human rights obligations in trade and investment agreements.

Institutional arrangements

The ICJ has stated on previous occasions that it is essential to further develop and bolster the envisaged mechanisms for the monitoring, supervision, implementation, and enforcement of this treaty, currently in Article 15 (institutional arrangements). This 6th session of the IGWG is the occasion to fill that gap. Other than a Committee of experts that should have a strengthened mandate to review reports of States and business performance of this treaty, the OEGWG should also reinforce the powers and agenda of the Conference of States Parties (COP) by expanding their powers to address issues relating to business human rights responsibilities that are not addressed or are addressed in an insufficient way in the present general treaty, and elaborate and adopt further commitments and protocols with binding force to the States party at regular periods of time. This arrangement will spare the need to establish an ad hoc procedure each time within the Human Rights Council.

The participation of the widest range of stakeholders is the most essential in new institutional arrangements if they are going to be effective and transparent, marking a difference with institutions of the past. Such participation includes labour unions, NGOs, and other less formal associations that have a mission relative to the economic life and the operations of companies. Such participation is essential in the selection and functioning of the expert committee, but also in the COP meetings and the discharge of its functions. The draft treaty should make explicit provision for a strengthened role for civil society and other stakeholders.