International Commission of Jurists' Commentary and Recommendations on the Third Revised Draft Legally Binding Instrument on Business and Human Rights

October 2021

A third revised version of a Legally Binding Instrument to regulate transnational corporations and other business enterprises[1] has been produced by the "Chairmanship" of the UN Open-Ended Intergovernmental Working Group (OEWG) and published by the UN Office of the High Commissioner for Human Rights. This draft is to serve as basis for negotiations that will take place during the 7th session from 25 to 29 October 2021 pursuant to a mandate by the UN the Human Rights Council.[2] The ICJ welcomes this third revised draft as a good basis for these negotiations. It also supports the work of the OEWG with a view to an expeditious agreement on the proposed treaty.

The 7th session will take place again in a still difficult and uncertain working environment marked by the persistence of the COVID-19 pandemic and the continued restrictions to counter its spread, mitigating its impacts on human rights. In relation to the 7th Session of the OEWG, the ICJ is especially concerned at the adverse impact of the restrictions imposed on civil society participation. These restrictions derive from the rules adopted by the UN for the holding of meetings, and while it is understandable that meetings might not be held in the normal manner, every effort should be made to guarantee and increase the substantial participation of all civil society representatives, especially those from those areas mostly of the Global South to whom travel restrictions and inadequate access to vaccination impose an unfair burden and limitations.

As with the second Revised Draft that was the subject of the 2020 negotiations, the Third draft treaty incorporates mostly positive changes that complete, clarify and strengthen some of the provisions while maintaining the overall structure and organization of the text.[3] The changes increase the overall coherence of the draft and add some precision in certain cases. On the other hand, the drafters have failed to address adequately certain of the most crucial outstanding questions concerning access to an effective remedy and

[1] Chairmanship of the OEWG, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, Third Revised Draft, 17.08.2021, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf The Second Revised Draft (2020) may be found at: 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] HRC Resolution 26/9, June 2014

[3] An Unofficial comparison between the 2nd and 3rd Drafts provided by the OEWG Secretariat can be found at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/igwg-comparing-third-and-second-revised-drafts.pdf

legal liability for businesses' human rights abuses, which are central to and effective outcome. While the ICJ continues to consider the Third Revised draft as an improvement that advances the negotiations, it still needs further work to gather the wider support necessary for its adoption.

The proposed legally binding instrument offers a unique opportunity for the international community of States, business, trade unions, civil society groups and individuals to take a crucial step to close governance and international law gaps in relation to the human rights responsibility of business enterprises. It also would add an effective tool to build 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 ultimate success of the conduct and conclusion of the negotiations will require the active participation from a broad range of States from various political and geographical groupings and other stakeholders. The ICJ regrets that many States, including notably most States of the Western and other group (WEOG), plus a few others, maintain their reluctance to participate meaningfully in negotiations. Such refusal is not compatible with stated commitments towards multilateral cooperation and universal respect for human rights. The ICJ continues to call on all States, and in particular the recalcitrant ones, to work to overcome political obstacles and make substantial progress towards completing its work on this much needed treaty.

The Third Revised Draft: from gradual progress to successful conclusion of negotiations

The Third Revised Draft (the "Draft") maintains the character of the proposed treaty as one that substantially addresses existing gaps in prevention, accountability and reparation in the context of business activities and human rights abuses. The Third Draft offers 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. It also adopts a semantic move away from the language of "responsibilities" to that of "obligations" for business enterprises. In this way, the proposed treaty would contribute to the creation of an environment where business enterprises become legally accountable actors in human rights, and potentially responsible player in contributing to the pursuit of the UN Sustainable Development Goals (SDGs) and the effective fight against climate change.

In the following sections, the ICJ provides an analysis of parts of most articles in the Draft, but it is far from exhaustive. We identify some areas of improvement and weaknesses providing suggestions of how to strengthen the text. Among the positive changes reflected in the draft are a more explicit recognition of the differentiated impact of business activities over workers and children while keeping a gender sensitive language. In 2020, the ICJ and DKA prepared a study with recommendations on the rights of the child in the Second revised draft.[4] Some of those proposals were supported by delegates and incorporated in the Third revised draft, but others equally important, remain relevant and should be considered.

[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 ICJ has also elaborated an update to this study taking into account the changes made to the Third Revised draft.

The Preamble

The preamble of a legally binding instrument is important to offer guidance and context for the correct interpretation and application of the treaty provisions. It is therefore crucial that it contains the necessary elements in a proper language. The Draft incorporates significant changes to the Preamble some of which are improvements while others risk to create more ambiguity. A few issues have not been changed and remain outstanding.

In relation to PP2, the ICJ reiterates its recommendations issued in 2019 and 2020 that there is a proper reference to all the principal core human rights treaties, including their substantive protocols, and relevant labour rights ILO Conventions in the preamble.[5] Making reference to numbers "nine" core human rights treaty would become obsolete if in the future more human rights treaties are concluded and it will not be evident to many which "eight" core ILO conventions are contemplated.

In addition, the purpose of making reference only to a closed number of core or fundamental conventions seems to be defeated when in PP3 a reference is made to "all relevant" ILO Conventions in the middle of reference to a wide diversity of Declarations and all "internationally agreed Declarations". The ICJ believes it is better to keep conventions and other legally binding instruments separate from references to declarations and other recommendatory instruments. It is always clearer to make explicit reference to certain instruments, avoiding references to "all" other relevant instruments that do not provide unambiguous guidance.

The few other changes contained in the preamble are generally positive and strengthen the text, but the ICJ recommends that in regard to international instruments, references are limited to those of highest importance and relevance such as international treaties and declarations.

The ICJ reiterates some of its previous recommendations to strengthen the preamble:

In PP3 the ICJ repeats its recommendations in support of a reference to the "UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law",[6] which is a major normative instrument adopted by consensus of the UN General Assembly with an important influence on the draft treaty's articles 4, 5 and 7.

[5] PP2 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 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

[6] 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. Available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx

Lack of reference to the Basic Principles would be a major omission that will hamper an adequate understanding and application of the treaty.

In relation to PP4, while the ICJ considers the content unobjectionable, it believes it could benefit from a more concise formula at the end of the phrase by simply referring to "obligations under international law" instead of "obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations." In the same PP4, there should be recognition of the "status of the child as a subject of rights with evolving capacities" after reference to men and women. This should not be controversial, given that almost all States are party to the UN Convention on the Rights of the Child

In PP6, as well as other parts of the draft, reference to "reparations" in addition to access to a remedy has to be made explicit.

In PP8, references to the United Nations Charter articles 55 and 56 should be put in a more precise context, as these articles are relevant to more than just international cooperation for the protection of human rights. While article 56 concerns international cooperation with the UN, article 55 is about the promotion of rights more broadly. Therefore, the text might better read "recalling UN Charter articles 55 and 56 on the promotion of human rights and international cooperation..."

In PP15, references to Resolutions of the Human Rights Council and Human Rights Commission, some of which are transitory or procedural in nature, may not be entirely appropriate for a human rights treaty preamble, and are not contained in other human rights treaties. Consequently, the ICJ suggests the deletion of that reference inn PP15.

Article 1: Definitions

The definitions of terms in a legally binding instruments is justified when such terms are novel or are used in the body of the treaty in a way different from its ordinary meaning in other human rights treaty. There is no strict necessity to include definitions of terms that are understood in their normal and ordinary meaning.

Victims.- The definition of "victims" has been shortened, mostly in a sensible way. But it remains incomplete in two respects. First, a victim is defined by reference to a human rights abuse, a term usually taken to refer attributable to the conduct of a private actor, such as a business enterprise or armed group. Because in many cases of abuses by companies there is participation (in the modality of complicity or otherwise) by a state agent, it is important that the term "violation" is added here to account for situations of State involvement in the causing harm to the victim. The word "violations", as referring to States causing harm in breach of their international law obligation, should be restored and inserted in the text where relevant. Secondly, the deletion of "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" from the definition of "victims" weakens this definition in a manner inconsistent with international human rights standards set in the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[7] That part of the definition should be restated.

Human rights abuse.- The definition of "human rights abuse" in the Draft is now detached from any conduct by a business enterprise. As it stands, an "abuse" may be committed by business enterprises and States alike. While "abuse" can theoretically refer to a wrong by any kind of actor, in international human rights law the term "violations" is used to refer to conduct attributable to States. Departure from that practice would create confusion and

[7] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Available at: https://www.ohchr.org/en/professionalinterest/pages/victimsofcrimeandabuseofpower.aspx

lead to inconsistencies in usages in the generally applied human rights lexicon. The revised Draft should avoid unduly conflating the usages of both "abuse" and "violation". The changes may respond to the new language adopted in the draft treaty whereby businesses have "obligations" rather than "responsibilities" to respect human rights, similar to the way States have also international legal obligations. The main difference recognized under the UN Guiding Principles on business and human rights between the obligations of both actors would be that States' obligations encompass the respect, protection and fulfilment of human rights, whereas businesses' obligations are limited to the level of "respect". There are of course other differences in terms of privileges and competencies among the two types. The ICJ is of the view that the term "abuse" should be reserved for business' conduct and the term "violations" to state conduct to reflect the different position of each actor under international law.

Business activities.- The ICJ is concerned by the open ended broad definition of "business activities" in Article 1.3 that can potentially encompass also other persons and organizations as well as any of their activities under its purview. The provision defines "business activities" that covers "any economic or other activity", …undertaken "by a natural or legal person", including a number of actors. As such this definition risks to encompass also activities carried by NGOs, trade unions, churches that are proper to their function and purpose and have nothing to do with commercial or economic activities. If adopted, this definition would take the scope of this treaty far beyond its original mandate and could pose undue impediments to the legitimate activities of other actors.

To remedy this, it is proposed to define "business activities" as follows: "any activity of economic or commercial nature or associated activity", …undertaken "by a natural or legal person". This definition more clearly circumscribes the world of "business".

Article 2: Statement of Purpose

The statement of purposes of the treaty in article 2 has been slightly amended, including with the language in 2.1(b) that one purpose is to "clarify and ensure respect and fulfilment of the human rights obligations of business enterprises." Consistent with language in the Preamble, this new purpose refers to "obligations" rather than "responsibilities" of business enterprises. However, there is no visible section or provision in the draft treaty that fleshes out this purpose and, and therefore, no clear impact of this change of terms. This defect could be remedied by a provision that restates, in the main body of the treaty, the language of current PP11 just before article 6 (prevention):

> "Business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships; "

In this same paragraph, while ensuring fulfilment makes sense it is not clear at all how the proposed treaty can "ensure respect" of business obligations. It probably means "to ensure the respect of human rights obligations by business enterprises". An alternative would be to replace "respect and fulfilment" with "implementation".

The ICJ reiterates its remark that both subparagraphs 1(d) and 1(e) are missing a crucial element of redress, namely reparation. They need to be improved by reference to "effective access to justice remedy and reparation". This is to ensure that "remedy" is geared toward a reparative outcome and is not just a procedural device.

Article 3: Scope

The ICJ welcomes the changes operated in Article 3 which serve to maintain a broad scope to all business activities while having a special focus on the activities of businesses with activities of transnational nature.

In relation to Article 3.3, the ICJ also welcomes the changes made to clarify the scope of the treaty over human rights "binding on the State Party" which includes obligations from all sources.

Article 4: Rights of victims

Article 4 sets out a list of rights of victims of human rights abuse which need to be protected. This list reflects and builds on existing and well-established standards of international human rights law, including the UN Basic Principles on the right to a remedy a reparation, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the UN Updated Set of Principles to combat impunity.[8] This article is to be read in conjunction with the current article 5 and 7, which restate in a modified way parts of the standards originating from those existing UN instruments (which should also be recognized in the Preamble). Although already existing, the respect and compliance with these standards for victims' protection could significantly be reinforced by their incorporation in a legally binding instrument.

The Article needs to be drafted as an obligation for States Parties to the treaty to take measures to recognize and guarantee the rights of victims enumerated in it without prejudice to other rights recognized under international law or to a greater extent.

The ICJ recognizes the efforts to align article with adopted language in existing UN instruments, but it also stresses that the draft needs much more alignment, always acknowledging the need to adapt and update them to the context of protecting rights in the context of business human rights abuse may require amendment. In this regard, the ICJ welcomes the recent changes operated in this article incorporating more clearly a gender perspective, collective reparations and age-sensitive approaches.

Paragraph (b) of 4.2 should be deleted as it overlaps with and effectively contradicts 4.1., which already guarantees all human rights for victims, whereas paragraph (b) unnecessarily only recognizes a few. This would signal an inappropriate expression of hierarchy among human rights, where certain rights are accorded or perceived to be accorded enhanced protected status, contrary to the principle of indivisibility and interrelatedness of human rights, affirmed by all States in the Vienna Declaration and Programme of action.

The ICJ reiterates its recommendation to include a reference to the "right to truth" as stated in the UN Updated Principles on impunity:

> "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. (Principle 2, first part)

[8] Basic Principles on remedy reparation, Op. Cit., note 6; 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

> Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate. (Principle 4)"

This and other provisions should also explicitly capture some child-specific elements to ensure that critical child protections do not go unaddressed. For instance, in article 4 (2) (e), although "age responsive" protective and support services have been added, a stronger emphasis on child rights should be considered by adding the words "**and child sensitive"** together with further reference to the requirement that "a child victim's 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: Protection of Victims

Article 5.1 provides for an obligation to the protect victims and their representatives, families and witnesses against "unlawful interference" with their rights and "re-victimization in the course of these proceedings". It constitutes a repetition of what article 4.2 (e) provides for and could therefore be deleted, provided also that the definition of "victims" there also refers to representatives, families and witnesses, as proposed by the ICJ.

It also contains in 5.2. protections for human rights defenders, which still should be further strengthened 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.

In addition, Art. 5 (2) should integrate "harassment and retaliation" at the end of the provision to protect victims, human rights and workers' rights defenders against such conduct by businesses and States.

In many respects, this article is a continuation of and closely connected to article 4, and it may be sensible for the two articles to be merged in a single one. In fact, the standards in the original instruments from which articles 4 and 5 are taken were originally formulated largely together. This article also includes under its purview the representatives, families and witnesses of the victims, as well as their defenders (legal or non-legal), which is an additional argument for the inclusion of those persons and groups in the definition of "victims" in article 1.

While Article 5.3. is also critical for the protection of the rights of victims, it is a State's procedural obligation more intrinsically linked to access to remedy and to justice for the victim and would therefore be better placed under article 7 (Right to an effective remedy).

Article 6: Prevention

The ICJ has proposed above (under the discussion of Article 2) that a new provision be inserted before this article 6, or, alternatively, within this article as a first paragraph, that recognizes the human rights obligations of business enterprises, to be consistent with the preamble and to develop and give full meaning to its statement of purpose in Article 2.1 (b).[9]

[9] See supra commentary Article 2

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 reiterates its recommendation to give priority attention to this area in the negotiations to ensure it adequately address the most important policies and tools that states may use to prevent human rights abuses by companies and ensure full respect of their obligations by these companies.

Processes of human rights due diligence (HRDD) to be adopted by business enterprises are given a central place in this chapter. This is justified by the respective central place HRDD occupies in the UNGPs (Pillar II), and also by the great interest of certain governments and stakeholders in legislation mandating HRDD. However, inclusion of HRDD as an obligatory process for businesses should not serve to limit the general purview of article 6(1) that requires action that goes beyond measures of HRDD. Indeed, States should not limit their arsenal of measures they can possibly take to the models (HRDD and grievance mechanisms) provided in the UNGP.

The ICJ's view is that 6.3 should be formulated in a manner that is the closest possible to its formulation in the UNGPs (Principles 17, 18 and 19), where it is already very expansive and endorsed by the Human Rights Council. Any additional elements to be included in the HRDD process are contained in 6.4. of the Draft.

The ICJ reiterates its recommendation to add specific attention to the rights of individuals from groups in situations of vulnerability, including children, in impact assessments. The new Article 6.4 (a) requires attention to various groups and situations in carrying out human rights impact assessment. A reference to "children's rights" should be added in that paragraph, and "and girls" should be added after "impacted women" in 6.4 (b).

In 4.6 (c) or (d) it should be added that "consultations with children should be undertaken in accordance with the principle of the child's right to be heard." This is a set of standards on consultation and participation of children that cannot be left aside.

Article 6.8. should be strengthened to require States to enact laws enhancing transparency regarding business donations to political parties, corporate lobbying, awarding of licenses, public procurement, and the "revolving door" practice.[10]

Article 7: Access to Remedy

Access to effective remedy is a universal right already recognized in international instruments, including the main human rights treaties. The inclusion of provisions to address some of the specific problems in the implementation of this right in the context of business activities and abuses, and the existing obstacles that victims face to find justice and reparation are a central contribution of the proposed treaty to international law.

Article 7.1 however seems to deal with the jurisdiction of courts, which is most properly addressed under article 9. To avoid repetition and overlapping, 7.1 could be redrafted as follows:

> "7.1. States Parties shall ~~provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable~~ guarantee victims access to adequate, timely and effective remedy, including judicial remedy. **They shall take measures** ~~and~~ to

[10] *Ibid.*

overcome the specific obstacles which **individuals and groups in** vulnerable and marginalized **situations** ~~people and groups~~ face in accessing such ~~mechanisms and~~ remedies."

Article 7.2 relating to access to information is currently drafted in a too general and ambiguous way. It should more clearly identify which kind of information and from whom is to be obtained. In this regard, victims should be entitled to "Access to relevant information concerning violations and reparation mechanisms both from businesses and state agencies." [11] The last sentence in 7.2 ("and enable courts to allow proceedings in appropriate cases") should be made clearer or deleted as it seems ~~does not belong to~~ not appropriately placed in this article. One way to make it clearer is to refer it to "proceedings to claim access to information".

Article 7.3 addresses some of the most important obstacles to access justice faced by victims of human rights abuse by requiring the provision of access to legal assistance in legal proceedings. In fact, it would be better to modify the chapeau of this article by referring more generally to "measures" since the issues addressed under this heading go beyond legal assistance.

7.3 (a) adds an important and welcome precision by incorporating children as one of the groups to provide information. To keep consistency, 7.3.(b) should also refer to the rights of children to be heard in an appropriate time and manner:

> "b. Guaranteeing 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 in a child-friendly setting and manner**."

The ICJ reiterates its recommendations to add "and reparations" to "access to remedy" as to make clear that both remedy and reparations are an essential part of access to justice, as recognized under international law and standards.

7.3 (c) should use "Eliminating" instead of "Avoiding".

7.3 (d) addresses judicial doctrines such as *forum non conveniens* used in certain countries by judges to relinquish jurisdiction that they would otherwise have over a case when they judge another more appropriate forum exists. As such, this issue is more clearly already addressed and drafted under article 9 and should be deleted from article 7.

Article 7.5 addresses obstacles presented by the inability of complainants to access relevant information of evidentiary value in legal proceedings to substantiate their claim before a court of law. Such inability may be determined by lack of means or simply legal and physical impediments to access the relevant information because it is legally in the possession or control of the defendant (a business enterprise in this case) or a third party. This problem has an impact on the fairness of the legal proceedings and its outcome and could breach the due process principle of equality of arms. But addressing the problem in an inappropriate manner may also breach due process rights of the defendant. For these reasons, it is recommended to slightly reformulate this provision to enable judges to order reversal of the burden of proof when necessary and taking into account the circumstances of the case. The following is proposed:

[11] Building in Art. 11 (c) of the 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. Available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx

"States Parties shall ~~enact or amend laws allowing~~ adopt measures to empower judges in civil proceedings concerning human rights abuses, when appropriate and as applicable, to order the reversal of the burden of proof or the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts."[12]

The ICJ also recalls that 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, it should be made explicitly clear that in no circumstance should these grievance mechanisms be considered as a waiver of the right to a judicial remedy.

Article 8: Legal liability

Article 8 on legal liability is fundamental to ensuring the fair administration of justice around business human rights abuses, the appropriate allocation of responsibility and the access to reparation for victims of abuse. But the Draft does not contain revisions that were most needed to provide this article with full clarity and strength. This is an oversight that should be corrected in the present round of revisions.

Article 8.6 provides for legal liability for a company's participation in abuses that involve companies under its supervision or control. This provision deals with the delicate and pressing issue of establishing legal responsibility of a parent/lead company in the context of triangular relationships, where there is a parent or lead company, a subsidiary or business partner and the affected people. The incorporation of this explicit and detailed provision is in itself a step forward, but its content needs further development. In its current form it mixes in a single provision different modalities of civil liability (tort based on negligence and what appears to be at least two forms of strict liability), and it is not clear about the cases in which a discharge or rebuttal of presumption of responsibility by the defendant company would be allowed. This provision outlines three situations or modalities of civil responsibility in a triangular relationship: a) when the parent/lead company controls, manages or supervises another company; b) when the parent/lead

[12] This proposal builds on Article 8.3 of the Escazú Agreement which requires in this respect: "measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof". Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (ECLAC), available at: https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf ;
Paragraph 43 of the Council of Europe Recommendation on Business and Human Rights addresses the issue in a general fashion: "Member States should consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims' claims of business-related human rights abuses, with due regard for confidentiality considerations."
Legislation from Colombia provides for an example of dynamic burden of proof in article 167 of the General Procedural Code: "(...) according to the particularities of the case, the judge may, ex officio or at the request of a party, distribute the burden of proof when ordering the production of evidence, during its production or at any time during the process before taking a decision, requesting the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts by virtue of its proximity to the evidence, for having the object of evidence in its possession, for special technical circumstances, for having intervened directly in the events that gave rise to the dispute, or due to a state of defencelessness or disability in which the counterpart is, among other similar circumstances."
See, 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

company controls, manages or supervises another enterprise's activity or conduct that harm; and c) when the parent/lead company should have foreseen the risks of human rights abuse. The responsibility arises in these three cases when the company fails to take adequate measures to prevent the abuse from materializing.

The same provision could be drafted in a more coherent way, differentiating each of the modalities of responsibility. For example, it could say:

> "Article 8.6 civil liability for the conduct of a third person
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> States Parties shall ensure that their domestic law provides for the civil liability of one business enterprise, for harm caused or contributed to by another legal or natural person, when:
>
> a. the business enterprise has controlled, taken over, supervised, advised, intervened with or otherwise sufficiently influenced the other person's activity that caused the harm and failed to prevent this person from causing the harm; or
>
> b. the business enterprise (legally or factually) controls such other person, unless the business enterprise demonstrates that the harm was caused notwithstanding the reasonable and necessary measures it had taken to prevent it; or
>
> c. the business enterprise should have reasonably foreseen the risk of harm in the activity that caused the human rights abuse and this is linked to its operations, products or services, unless the business enterprise demonstrates that the harm resulted notwithstanding the reasonable and necessary measures it had taken to prevent it."

The ICJ generally agrees with the Article 8.7 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. However, it should be drafted in terms of an obligation for States to empower the judicial authority presiding in a case to weigh 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. At present, it seems to suggest that compliance with human rights due diligence would by itself have a decisive role in determining liability or not.

Article 8.8 had already been amended and greatly reduced in length, resulting in diminished clarity, in the Second revised draft of 2020. It needs to be further developed 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. To provide better guidance, the paragraph should include an illustrative list of widely accepted offences under international law. While the special gravity of these acts is adequately reflected in the type of liability it attracts, still, there should also be some space for civil liability in these cases without prejudice to the corresponding criminal responsibility or its equivalent in certain jurisdictions. Another option would be to leave this article to be developed in an additional protocol to the main treaty.

Article 9: Adjudicative jurisdiction

In relation to adjudicative jurisdiction (Article 9), there are a few welcome changes that would serve to require a more expansive scope of courts jurisdiction on civil claims. Grounds for jurisdiction now would include the country where the victim is a national (Article 9.1). Where place of domicile is invoked as a ground of jurisdiction, the definition of "domicile" has been extended to include the "place where the assets are held" (Article 6.2).

Some more problematic changes have been introduced in article 9.5 (concerning a forum of necessity). The first of them is the substitution of "fair trial" by "fair judicial process.", This could be construed to entail lesser guarantees, a judicial process may be only a portion of what is required by full fair hearing or trial. The other changes concern the detailed definition of what a connection with the forum state would mean: a) the presence of the claimant on the territory of the forum; b) the presence of assets of the defendant; or c) a substantial activity of the defendant. Defining so exhaustively (even is broadly) the possible connection that the claim may have with the forum State so as to create a basis for jurisdiction may have unintended consequences in excluding other possible ways of establishing connection. The ICJ recommends restating a well-accepted definition of *forum necessitatis* as an extraordinary grounds for jurisdiction that can be invoked when the business enterprise is not domiciled in the forum State but the other conditions are present:

> Where business enterprises are not domiciled within their jurisdiction, States should empower their domestic courts to exercise jurisdiction over civil claims concerning business- related human rights abuses against such a business enterprise, if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.[13]

The ICJ also notes that Article 9 continues to be essentially focused on civil jurisdiction, leaving criminal proceedings that could possibly arise out of provisions such as art 8.8 outside its purview. The ICJ considers that this provision needs to also address the issue of jurisdiction in criminal cases,[14] to be consistent with the provision on crimes under international law which are seemingly foreseen in Article 8.8 and the provisions on statute of limitations in article 10. In that regard, the ICJ reiterates its recommendation on the introduction of a new Article 9.6 provision regarding jurisdiction with respect to criminal offences.

There should be a provision requiring States to exercise universal jurisdiction in respect of crimes that need to be prosecuted on that basis under international law, while allowing States discretion to exercise such jurisdiction in respect to other crimes. In respect to certain crimes such as torture or enforced disappearance, States are required to exercise universal jurisdiction when the alleged offender is in its territory.[15]

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[13] Formulation based on article 36 of Council of Europe's Recommendation 2016 on Business and Human Rights, Ibid.

[14] 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

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

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

Article 10: Statute of Limitations

Article 10.1 has been amended to insert "legal proceedings," instead of "prosecution and penalty," so that prescriptions and other statutory limitations do not apply to all kinds of legal proceedings, including criminal, civil or administrative proceedings, in cases concerning crimes under international law. This is an expansive and progressive formulation of a norm that traditionally limited the effect of statutory time limitations only to criminal prosecution and penalties in cases concerning crimes under international law.

Article 10.2 would require that time limitations applicable to other violations and civil claims are "reasonable", taking into account difficulties in cases concerning transnational violations.

The ICJ considers that changes are in order in this article. One of them relates to the place or 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.

Article 10 has maintained some parts of the text from the Second draft that do not accurately reflect international law well. For instance, it includes a reference to "violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole," which is not an appropriate formulation. All human rights by definition are "of concern to the international community as whole" by virtue of their *erga omnes* legal character and numerous treaties and other standards, including the UN Charter itself. The term is misplaced in this context. The ICJ recommends that the zero draft's formula "violations of international human rights law which constitute crimes under international law" be restated in both 10.1 and 10.2 because it is simpler and reflects better existing international law and standards.

The term "civil claims" should be deleted in 10.2 because there is no reason to single out only civil claims when 10.1 encompasses all kinds of legal proceedings. The rule that prescriptions "shall not run for such period as no effective remedy is available" from the UN Updated Principles on the fight against impunity (principle 23) should also be included at the end of 10.2.

This article is supported by provisions contained in the International Convention on Enforced Disappearances (article 8),[16] the UN Principles and Basic Guidelines on the right of victims of gross violations of international human rights and serious violations of international humanitarian law to remedy and reparations (especially principles 6 and 7), and also the UN Updated Principles for the protection and promotion of human rights

[16] With the exclusion of enforced disappearance as a crime against humanity where prescriptions do not apply: "8.1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
(*a*) Is of long duration and is proportionate to the extreme seriousness of this offence;
(*b*) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.
8.2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation."

through the fight against impunity (Impunity Principles 23 and 32).[17] It should be noted that the Impunity Principles adopts the term "prescription" to refer to statutes of limitation, and it therefore may be appropriate to amend the text to read "...other measures necessary to ensure that prescription, including statutory or similar limitations...". This would make clear that it covers the full range of prescription measures, particular in systems that apply different legal terminology to cover this concept.

Article 12: Mutual Legal Assistance and International Judicial Cooperation

Article 12 addresses mutual legal assistance, 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 Draft, as well as the Second and First Revised drafts are mainly concerned with civil liability, with a too limited role for criminal liability for business enterprises. To improve the internal consistency of the proposed treaty, it would be important to amend and adapt the provisions on mutual legal assistance also to civil cases, which requires detained and informed consideration of each article. The fact that there are only minor changes to this article, reflecting the scant attention paid by States and stakeholders to it, and the complex nature of this issue (in particular recognition of judgements), suggests that it might be more feasible to discuss this issue later on, possibly in an additional protocol.

The inclusion of a provision (article 9.3) 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 Draft still fails to address this issue in a consistent fashion.

Article 12.11 (c) 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. The ICJ recalls that it is necessary that the treaty addresses the consequences of possible parallel proceedings in a more consistent way.[18] It would be important that the treaty addresses this situation by including a rule on *litis pendens* (when a suit is pending in another jurisdiction) as a possible basis for courts to refuse jurisdiction.

Article 14: Consistency with International Law principles and instruments

The Draft addresses the relationship of the proposed treaty with international law at large and with other treaties, particularly including in the trade and investment realm, under the perspective of consistency between those instruments under Article 14.

The Draft contains only minor changes to the Second Draft. In this context, the ICJ would reiterate its comments and proposals made to the Second draft which are still relevant.

In Article 14.5 (b), it would be sensible 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**

[17] Supra. note 12; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005.
[18] 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 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 ICJ reiterates that the OEWG should seriously consider the option of including a new sub-paragraph Article 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) should require the inclusion of investors' human rights obligations in trade and investment agreements, as of prescribing specific tools as an *ex-ante* impact assessment of trade and investment agreements to achieve compatibility.[19]

Article 15: 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). As explained in the 2019 ICJ commentary,[20] the selected committee of expert's traditional composition and functions have already been existing in similar bodies. The point is that 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. The ICJ suggests that, 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.

This 7th session of the OEWG offers another occasion to fill that gap and the ICJ reiterates its advice in this regard. A Committee of independent experts with a strengthened mandate to review reports of States and business performance of this treaty remains critical. However, beyond that the OEWG should also include provisions to reinforce the mandate 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 would 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 must include 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 ICJ finally recalls that the draft treaty should make explicit provision for

[19] See, Report by the Working Group on Business and Human Rights, International Investment Agreements (IIAs) and Human Rights: Report on human rights-compatible international investment agreements, A/76/238, 2021. See also, Deva, S. The Business and Human Rights Treaty in 2020–The Draft is "Negotiation-Ready", but are States Ready? Blog Symposium, 09, September 2020 at: http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/

[20] ICJ Comments and Recommendations on the Revised draft (2019), Op. Cit., supra note 12

a strengthened role for civil society and other stakeholders in the monitoring of compliance with its provisions by states and business enterprises.

There is only one significant change in 15.7 (International Fund for Victims) that calls attention to the special additional barriers to remedy experienced by certain persons and groups. This change is welcome as it inserts further precision in recognize the necessity of addressing the particular situation of persons from marginalized and disadvantaged groups and those with special needs. However, the language used should be modified to refer to "persons and groups in vulnerable or marginalized situations" rather than "vulnerable or marginalized persons and groups".

Article 16: Implementation

The Draft contains only minor changes to this article, except in relation to 16.3 where there is a welcome addition: "the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour." However, this whole provision seems to address business enterprises human rights due diligence processes (identify, prevent and mitigate risks) and as such it would be better located under article 6 (prevention), which focuses on business's management of human rights risks.

Article 16.5 calls for the application and interpretation of the proposed treaty in a manner consistent with international human rights and humanitarian law. This is important, but since Article 14 already addresses consistency with international law issues, it would make more sense to move this part of the provision to that article and leave the rest, on non-discrimination, in article 16.

Likewise, it is important that the treaty contains a general provision providing for the application and interpretation of the treaty in a manner that does not derogate from higher levels of protection recognized in international law or domestic law. This provision will expand the scope or replace current Article 4.3:

> "Nothing in the present [LBI] shall affect any provisions which are more conducive to the realization and protection of human rights in the context of business activities, and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent."[21]

[21] Adapted from Article 4.4 from the UN Convention on the rights of persons with disabilities, 2006 available at: https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html#Fulltext