

# Analysis of the Third Draft of the UN Treaty on Business and Human Rights

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# Imprint

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**About CIDSE**

CIDSE is an international family of Catholic social justice organisations, working together to promote justice, harness the power of global solidarity and create transformational change to end poverty and inequalities. We do this by challenging systemic injustice and inequity as well as destruction of nature. We believe in a world where every human being has the right to live in dignity.



## Foreword

# Legal Opinion on the Third Draft of the UN Treaty

**W**henever companies prioritise profits over the common good they can destroy the environment and livelihoods of people and communities around the world. By generating jobs and incomes, business activities have the potential to alleviate poverty and hunger. However, all over the world, our member organisations and their partners continue reporting forced evictions, exploitation, pollution of air and water, deforestation and violence against human rights and environmental defenders. Very often, transnational corporations domiciled in the European Union have been involved directly or indirectly in such human rights violations and the destruction of our common home. Due to legal and practical barriers, only in very few cases the affected people were able to seek or obtain justice in European courts. The imbalance of power between corporations and those defending their lives and environment urgently needs to be addressed.

In 2014, CIDSE and hundreds of civil society organisations worldwide welcomed the mandate of the UN Human Rights Council for an open-ended intergovernmental working group to elaborate an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. Based on the exchanges during and between the previous six sessions, the Ecuadorian Chairmanship has now presented a third draft text for the Treaty, which will be the basis for formal negotiations during the seventh session, from 25 to 29 of October 2021. With this Treaty, the adhering states would commit to legally oblige companies to prevent human rights abuses in the activities and business relationships. States would have to provide affected people access to civil and criminal courts when their human rights have been abused by companies. States would also be obliged to make

sure that trade and investment agreements do not infringe on their obligations to respect, protect and fulfil human rights.

With this publication, CIDSE and its member organisations present a legal analysis by Prof. Markus Krajewski of the third draft of the Treaty. This analysis aims to support states, academics, and civil society organisations in their own analyses and inspire the negotiations towards a finalisation of this Treaty. The main message of the study is that the draft provides “a useful, appropriate and sufficiently clear basis for substantial negotiations”, but still needs to be improved in various details to be more precise and effective enough to protect human rights and the environment. While the study is an independent legal opinion of the author, CIDSE and its member organisations share the assessment and fully support the recommendations for amendments compiled in the Annex. We will also be proposing further amendments to the Treaty in our own statement/s on issues that were out of the scope of this study.

More than a hundred states have regularly participated in the sessions of the open-ended intergovernmental working group since 2014, most of them from the Global South. On the other hand, some important global players, such as the US, Canada, Japan and Australia, have remained aside so far. The EU has participated in the sessions but refused to enter into negotiations and limited its contributions to general statements questioning the content of earlier drafts and the process itself. **CIDSE and its member organisations call on the EU and absentee states to engage actively and constructively in the negotiations of the seventh and future sessions of the working group in order to protect human rights in the global economy, to enable a level-playing field**

for business enterprises all over the world and to strengthen multilateralism.

Recent developments at the national and regional levels show that the political will is growing. In 2017, France had already passed its Loi de vigilance. In 2021, Germany now passed the Lieferkettensorgfaltspflichtengesetz. The UK and Netherlands have also passed legislations with a focus on modern slavery and child labour, respectively. In many more states, legislations are under discussion, and the EU Commission has announced a human rights and environmental due diligence regulation. Time is ripe for the Treaty. Governments should seize the opportunity.



**Josianne Gauthier**  
CIDSE Secretary General



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# I. Introduction

On the 17 of August 2021, the Chairmanship of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) published the Third Revised Draft of a legally binding instrument (LBI) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The Third Draft will be discussed and revised during the Seventh Session of the OEIGWG. Human rights organisations, stakeholder representatives and other civil society groups have been following the development of the LBI closely and submitted various proposals for amendments and changes in the draft texts for the LBI in previous sessions. Relevant issues concern prevention of human rights abuses, access to remedies for victims, legal liability of corporations, environmental risks, as well as the impact of trade and investment agreements on human rights, to name but a few. The present study assesses the Third Draft from these perspectives and proposes amendments to the Third Draft where needed.

The study is organised as follows: The next part will briefly recall the historical background and the recent developments which led to the Third Draft and discuss which steps could follow (II.). The next section will then provide a general assessment of the Third Draft in particular in comparison to the Second Draft (III.). The main part of this study (IV.)

will present a detailed analysis of specific aspects of the Third Draft of the LBI and propose amendments and revisions of the LBI to address shortcomings of the current draft. After a brief discussion of the scope and core concepts of the LBI, the study will focus more thoroughly on the questions surrounding legal liability of enterprises for human rights abuses, including the relationship between civil and criminal liability, liability for human rights abuses by other persons and joint liability and the impact of human rights due diligence on legal liability. Subsequently, the provisions of the LBI on access to remedy and justice, including the different forms of adjudicative jurisdiction and various instruments aimed at effective access to justice, such as reversal of the burden of proof or statute of limitations, will be addressed. The study then turns to the analysis of the LBI's rules on trade and investment agreements and finds room for improvement of the LBI. Similarly, the study argues that the role of human rights defenders could be recognised better in the LBI and suggests respective treaty language. Last, the study turns to the question if and how the LBI addresses environmental rights and due diligence. Finding that the mandate of the OEIGWG is limited to human rights, the study argues that the LBI should be restricted to those environmental standards which have a human rights link. The last section of the study summarises its main findings. An Annex brings the proposed amendments to the LBI together.

## II. The road to the Third Draft and next steps

**A**dverse impacts of transnational corporations on human rights and the environment and the lack of accountability for such impacts are not a phenomenon of the recent past, as the gas leak in Bhopal or oil pollution of the Amazon rainforest or the Niger delta highlight.<sup>1</sup> Attempts to regulate multinational enterprises in international law date back to the 1970s and 1980s when the UN Commission on Transnational Corporations proposed a “Code of Conduct on Transnational Corporations”.<sup>2</sup> In the early 2000s, the Sub-commission on the Promotion and Protection of Human Rights developed “Norms on the Responsibilities of Transnational Corporations<sup>2</sup> and Other Business Enterprises with regard to Human Rights”. However, both attempts of creating binding obligations for transnational companies failed due to opposition from industrialised countries and business associations.<sup>3</sup> In the meantime and following the zeitgeist of voluntary approaches towards corporate responsibility, the UN Global Compact was established in 2000.<sup>4</sup> Still within the logic of non-binding responsibilities for corporations, the

UN Guiding Principle on Business and Human Rights (UNGPs) were adopted in 2011 and became the main reference frame of the business and human rights discourse.<sup>5</sup> Despite the dominance of the UNGP’s approach, civil society organisations, human rights organisations and governments in many countries of the Global South<sup>6</sup> insisted that voluntary norms would not be sufficient to hold business enterprises accountable.

Reacting also to specific experiences with human rights violations of transnational corporations and the difficulty of obtaining remedies and justice, Ecuador and South Africa proposed a resolution to the Human Rights Council with a view to begin a process towards a treaty on business and human rights. In 2014, the Human Rights Council adopted resolution 26/9 establishing “an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with a mandate to elaborate an international legally binding instrument to regulate, in interna-

1 J. Nolan, Business and human rights in context, in: D. Baumann-Pauly/J. Nolan (eds), *Business and Human Rights: From Principles to Practice*, Routledge 2016, pp. 2-8.

2 N. Bernaz, *Business and Human Rights: History, law and policy – Bridging the Accountability Gap*, Routledge 2017, pp. 163-176.

3 B. Hamm, *The Struggle for Legitimacy in Business and Human Rights Regulation – a Consideration of the Processes Leading to the UN Guiding Principles and an International Treaty*, *Human Rights Review* 2021, <https://link.springer.com/content/pdf/10.1007/s12142-020-00612-y.pdf>

4 N. Bernaz, above note 2, pp. 176-185.

5 A. Sanders, *The Impact of the ‘Ruggie Framework’ and the ‘United Nations Guiding Principles on Business and Human Rights’ on Transnational Human Rights Litigation*, in: J. Martin/K. Bravo (eds), *The Business and Human Rights Landscape*, 2015, p. 289. On the relationship between the UN Guiding Principle and the proposal of a binding legal instrument see D. Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 2016, pp. 203-227.

6 D. Uribe/Danish, *Designing an International Legally Binding Instrument on Business and Human Rights*, South Centre 2020, <https://www.southcentre.int/wp-content/uploads/2020/07/Designing-an-International-Legally-Binding-Instrument-on-Business-and-Human-Rights-REV.pdf>, p. 7.

tional human rights law, the activities of transnational corporations and other business enterprises”<sup>7</sup>. The resolution was not adopted unanimously, but by a vote of 20 to 14, with 13 abstentions in a Human Rights Council divided along the traditional industrialised/developing country lines.

After holding two informative sessions in 2015 and 2016 and the release of an Elements Paper in 2017, the Chairmanship of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) released a first draft of a Legally Binding Instrument (LBI) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises in 2018. Since then, the OEIGWG continued to hold annual sessions discussing this draft and subsequent revisions with significant input from civil society.<sup>8</sup> Equally a lively academic debate accompanied the development of the LBI.<sup>9</sup> Despite the significant interest by non-governmental stakeholders, not many states have participated seriously in the process. While many states participated in the sessions of the OEIGWG and provided suggestions and proposals for revisions of the document, states have not yet started engaging in substantial intergovernmental negotiations, which would be vital for the drafting of a text open for signature. Furthermore, a number of UN Member States including the United States, Canada and Australia have indicated that they would not want to be associated with the process at all while others such as China and Russia formally remained part of the efforts, but do not seem to support it enthusiastically. The EU played a particular ambivalent

role pointing to the lack of a negotiating mandate by EU Member States which prevented it from taking a formal position and criticising the process and draft(s) nevertheless.

After a discussion of the Second Draft LBI during the Sixth Session of the OEIGWG in October 2020 which was subject to severe restrictions due to the COVID-19 pandemic, the Chairmanship of the OEIGWG held informal online consultations in May and June 2021. Based on the proposals by states and non-state actors, the OEIGWG chairmanship published a Third Draft LBI on the 17 of August 2021.<sup>10</sup> The Third Draft will be the basis for discussions in the Seventh Session of the OEIGWG from 25 to the 29 of October 2021.

It remains to be seen if the Third Draft will be the basis of meaningful intergovernmental text-based negotiations. Such negotiations would, however, be necessary to reach a text which could be adopted and opened for signature. The modus operandi of the past sessions of the OEIGWG was mostly characterised by the collection of proposals to change certain elements of the Treaty to be implemented in new drafts by the Chairmanship. Such an approach cannot lead to a meaningful consensus, because states are not engaging in multilateral dialogues and discussion, but rather in a series of bilateral conversations with the Chairmanship. While it is appropriate for non-state actors, in particular civil society organisations, to formulate proposals and demands towards the OEIGWG (and its Chairmanship), states need to begin to negotiate with each and other now and should not continue in an exercise of drafting and redrafting further proposals without putting them to a formal vote.

7 Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 14 July 2014.

8 A. Franco/D. Fyfe, Voluntary vs. Binding: Civil Society's Claim for a Binding Instrument. In J. Letnar Cernic & N. Carrillo-Santarelli (Eds.), *The Future of Business and Human Rights: Theoretical and Practical Considerations for a UN Treaty*, Intersentia 2018, pp. 139-160.

9 See e.g. O. De Schutter, Towards a New Treaty on Business and Human Rights, *Business and Human Rights Journal* 2015, pp. 41-67; D. Bilchitz, The Necessity for a Business and Human Rights Treaty, *Business and Human Rights Journal* 2016, pp. 203-227; D. Cassel, The Third Session of the UN Intergovernmental Working Group on a Business and Human Rights Treaty, *Business and Human Rights Journal* 2018, pp. 277-283; N. Bernaz/I. Pietropaoli, Developing a Business and Human Rights Treaty: Lessons from the Deep Seabed Mining Regime Under the United Nations Convention on the Law of the Sea, *Business and Human Rights Journal* 2020, pp. 1-21.

10 OEIGW Chairmanship, Third Revised Draft, Third revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, 17.08.2021, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>.





## III. General assessment of the Third Draft

The Third Draft of the LBI does not deviate significantly from the Second Draft. A table comparing the two drafts published by the Chairmanship of the OEIGWG<sup>11</sup> reveals that the Third Draft maintains the structure of the Second Draft and does not add any new articles. In a few articles, the Third Draft splits paragraphs into two leading to an increased number of paragraphs in some articles (e.g. Article 6, 7 and 12) whereas in other articles paragraphs were merged resulting in a lower number of paragraphs (e.g. Article 8). Some changes concerned linguistic and stylistic revisions (e.g. “States Parties” instead of “State Parties”) or the use of more precise terminology (e.g. in Article 7.1.: “States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction” instead of “the necessary competence”).

In addition to these revisions which do not change the contents of the texts, the Third Draft also contains a number of concretisations which add further clarity to the text. This includes the inclusion of the term “irrespective of nationality or place of domicile” in definition of victim in Article 1.1. or the reference to “the presence of the claimant on the territory of the forum; the presence of assets of the defendant; or a substantial activity of the defendant” in defining the “sufficiently close” connection between a person raising a claim and the country in whose courts the claim is raised in Article 9.5.

Furthermore, the Third Draft also deletes or adds certain words or terms which slightly change the meaning of an article or reduce its ambivalence. For example, while the Second Draft defined business activities as “for profit” activity, the Third Draft deletes the term “for profit” and thus widens the scope to economic activities which may not be profitable, but which could nevertheless have severe negative impact on human rights. Another example of an expansion from the Second to the Third Draft is Article 6.1. which previously only required the regulation of enterprises “domiciled” within the state’s territory or jurisdiction, the Third Draft obliges states to regulate all enterprises “within their territory, jurisdiction, or otherwise under their control”. The latter addition seems to go beyond a traditional jurisdictional approach. Modifications like these led some commentators to conclude that the OEIGWG “sharpened” the LBI with the Third Draft.<sup>12</sup>

The Third Draft also aims at a better alignment of its obligations with the UNGP. For example, while Article 6.2. lit b) of the Second Draft simply requires business enterprises to prevent and mitigate “human rights abuses, including in their business relationships“, the respective article of the Third Draft (Art 6.3. lit. b) refers to “human rights abuses, which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages” as well as to “abuses to which it

11 Comparison of third and second revised drafts of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/iqwq-comparing-third-and-second-revised-drafts.pdf>.

12 A. Crockett/A. Matthew, UN sharpens draft treaty on Business and Human Rights, 31 August 2021, <https://www.herbertysmithfreehills.com/latest-thinking/un-sharpens-draft-treaty-on-business-and-human-rights>.

is directly linked through its business relationships”. By using the three options of causing, contributing or being linked to, the Third Draft incorporates key concepts of the UNGP. Carlos Lopez therefore rightly concluded that the Third Draft contains “modest steps forward, but much of the same”<sup>13</sup>.

In light of the above, it can be argued that Ecuador stayed within limits of its legal and political mandate

as no major changes were proposed by members of OEIGWG. It is hoped that states seize the opportunity during the Seventh Session of the OEIGWG and begin with a meaningful text-based negotiating exercise. Considering the limited changes from the Second to the Third Draft, states also had plenty of time to study the proposals and form their own policy objectives and negotiating strategies based in the proposed LBI.

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13 C. Lopez, *The Third Revised Draft of a Treaty on Business and Human Rights: Modest Steps Forward, But Much of the Same*, 3 September 2021, <http://opiniojuris.org/2021/09/03/the-third-revised-draft-of-a-treaty-on-business-and-human-rights-modest-steps-forward-but-much-of-the-same>.



## IV. Analysis of specific aspects and proposals for improvement

### 1. Scope and core concepts

The Third Draft maintained the key terminology and concepts of the Second Draft but revised and sharpened some terms and definitions. Among them are – as already mentioned – the deletion of the qualification “for profit” in the definition of business activities which is welcome change. The term “business relationship” is broadened because the Third Draft omitted the term “contractual” in the context of “any other structure or relationship” thus also covering relationships between legal and natural persons which are not based on a legal contract, but on a factual relationship.

It is also noteworthy that the preamble of the Third Draft of the LBI refers to the “obligation” of business enterprises to respect internationally recognised human rights instead of “responsibility” which is the term used in the UNGP and which was also used in the Second Draft. This terminological change seems to suggest that the LBI wants to revive the idea that corporations have direct human rights obligations under international law. However, the term “obligation” of enterprises can only be found in the preamble. The contents of LBI itself do not address enterprises and contain only obligations of states. This raises the question if the terminological change in the preamble could have an effect on the interpretation of the LBI. The reference to obligations of enterprises in the preamble could be used to interpret the LBI in such a way that states should establish direct human rights obligations for enterprises in their domestic law which could then lead to direct legal actions against corporations based on a human rights violation. Currently, the LBI only obliges states to regulate en-

terprises and to engage in human rights due diligence as enshrined in Article 6.2. LBI. Another possibility would be that the LBI envisages future international legal instruments with such obligations and therefore invites the states parties to revisit this idea at a later stage. In either way, the reference to human rights obligations of enterprises in the preamble of the LBI would not have an immediate effect but could lead to changes in the future.

The scope of the LBI with regards to human rights was also clarified by referring to those rights which are binding on the State Parties. It could be questioned if the reference to the plural “State Parties” means that only those treaties which are binding on all states parties are covered by the LBI. However, the subsequent reference to the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions “to which a State is a Party” makes it clear that the scope of the LBI is linked to the treaties ratified by the individual state party. This seems reasonable: A state remains bound by the relevant international human rights treaties it is a party when becoming a party to the LBI. At the same time, joining the LBI cannot indirectly bind the state to a human rights treaty to which it is not a party.

Like the Second Draft, the Third Draft maintains the term “victims” as the key concept when referring to persons and groups which are harmed by human rights abuses. References to “victims” have often been met with criticism as it creates an image of a helpless individual and runs counter to the normative idea of self-empowerment.<sup>14</sup> Consequently, it

14 See e.g. M. W. Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, Harvard International Law Journal 2001, pp. 227-233.

has been argued that the terms “rights-holder” or “affected person” are preferable. However, the term “victim” is an established legal term in human rights treaties and jurisprudence. It denotes a rights-holder whose rights have been violated or who claims that his or her rights have been violated. Only “victims” or those who claim to be victims have access to courts or other forms of legal remedies. While this approach restricts access to courts and remedies for persons or groups who have been affected by a human rights violation or abuse, but do not want to claim a violation of individual rights, focussing on victims is in line with the current law of international human rights.

A core regulatory concept of the LBI is enshrined in Article 6 entitled “prevention”. In essence, this article contains an obligation of states to effectively regulate business activities and to require due diligence. The Third Draft sharpened the obligation of corporations to take preventive measures by requiring them not only to take measures to prevent and mitigate actual or potential risks, but also to “avoid” such risks.<sup>15</sup> Furthermore, Article 6.4. extended the impact assessment to climate change and included a reference to trade unions in the obligation to conduct consultation. Like the Second Draft, the Third Draft does not specify further how states should implement these obligations in their domestic legal systems. In particular, the LBI is silent on the question if specific mandatory human rights due diligence laws should be passed or if states can also implement human rights due diligence in other laws such as corporate laws or sector-specific regulations. However, it should be noted that regulations which only cover some sectors would not be sufficient. Article 6.4. LBI contains a number of specific human rights due diligence elements which need to be implemented in domestic laws. Again, this provision contains an obligation of result for states, but not of specific regulatory instruments. This seems appropriate for an international treaty which aims at establishing obligations applicable to – potentially – all states in the world as different legal systems may approach

the question of how to regulate human rights due diligence.

## 2. Legal liability

A central question in the context of business and human rights concerns the legal liability of corporations for human rights violations through their own activities or through activities of others, because liability for harm provides not only an incentive for preventive measures but is also of specific relevance for access to remedies and justice in the form of compensation for damages.<sup>16</sup> While most legal systems provide some form of liability for acts or omissions which directly caused or contributed to human rights abuses, type of liability, standard of causation, burden of proof or amount of compensation may differ between different legal regimes and sometimes lead to de facto impunity for corporations or insufficient remedies. Furthermore, it is often difficult if not impossible to establish liability for human abuses that a corporation is linked to through its business relationships, in particular if liability is – as in many legal regimes – fault-based. In these cases, a mere “link” to a human rights abuse will not be sufficient to establish legal liability. It is therefore of particular interest if and how the LBI addresses these questions.

### a) Civil and criminal liability

Article 8.1. LBI addresses the general obligation of states to ensure that domestic law provides for a comprehensive and adequate system of legal liability of persons conducting business activities within their territory, jurisdiction or otherwise under their control. The Third Draft deleted the words “domiciled or operating” in the context of territory which seems useful, because these words could have been understood in a limiting way and raised the question if businesses not “operating” in a territory in a narrow sense, but only supplying goods or services, could have been excluded from liability.

15 For a critique of the scope of due diligence in the Third Draft, see D. Cassel, *The New Draft Treaty on Business and Human Rights: How Best to Optimize the Incentives?* August 2021, [https://media.business-humanrights.org/media/documents/Treaty\\_draft\\_8.21\\_dwc\\_incentives\\_draft.pdf](https://media.business-humanrights.org/media/documents/Treaty_draft_8.21_dwc_incentives_draft.pdf), p. 3.

16 O. De Schutter, *International Human Rights Law – Cases, Materials, Commentary*, 3rd edition, CUP 2019, p. 530.

While Article 8.1. does not explicitly refer to civil, criminal, and administrative liability, the context of the provision suggests that LBI intends to cover all forms of liability. The reference to a “comprehensive and adequate system of legal liability” indicates that liability should be established as part of a comprehensive liability regime. As civil and criminal liability are the two main and established forms of legal liability<sup>17</sup>, a regime which does not provide for civil and criminal liability would neither be “comprehensive” nor a “system”.

Like the Second Draft the Third Draft requires states to provide for liability for legal persons independent of liability of natural persons and not to make civil liability accessory to criminal liability. This means that to establish civil liability it is not necessary to establish criminal liability first. This is important as criminal law usually requires a higher threshold of establishing liability. However, the LBI does not require states to introduce criminal liability for legal persons as this would be in conflict with those legal systems in which legal persons cannot be criminally liable (*societas delinquere non potest*).<sup>18</sup> Yet, Article 8.8. maintains that states which do not provide for criminal liability of legal persons should ensure that their legal regime provides for liability which is “functionally equivalent” to criminal liability. Liability for administrative offences which imply significant fines could be considered functionally equivalent to criminal liability. Furthermore, it is clear that criminal liability for natural persons should not be affected by the absence of criminal liability for legal persons as spelled out in Article 8.2. LBI.

It should be noted that the Third Draft adds “civil” to the requirements to provide effective sanctions in Article 8.3. of the LBI. This is an important and helpful addition as some legal systems rely on civil sanctions, such as punitive damages, which should not be excluded in the context of liability for human rights abuses. Article 8.3. does not imply that states

can choose between different forms of liability, because the paragraph refers to the types of sanctions, but not the liability system in general. As pointed out above, a comprehensive system of legal liability includes civil liability in any case.

#### **b) Liability for human rights abuses by other persons and joint liability**

Article 8.6. LBI addresses the crucial question of liability for harm caused by others. The provision addresses two types of situations. In the first situation a company failed to prevent another person with whom they have had a business relationship from causing or contributing to human rights abuses, when the company in question “controls, manages or supervises” the other person or the relevant activity. The second situation concerns the failure to prevent another person from causing or contributing to human rights abuses, when the company in question “should have foreseen risks of human rights abuses (...), but failed to take adequate measures to prevent the abuse.” The first scenario seems to suggest a standard of strict liability which does not require any negligence or fault on behalf of the respective enterprise. The only requirements are causation or contribution to human rights abuses by a person and a situation of control, management or supervision of that person by an enterprise.<sup>19</sup> The second scenario establishes a form of negligence to the extent that the enterprise in question foresaw a risk and failed to act on that basis. Both scenarios go beyond standards which currently exist in many legal systems and would therefore increase the basis of liability.

The Third Draft did not change much in Article 8.6., but two details are noteworthy: First, the Third Draft deleted the term “legally or factually” in the context of control. However, this does not seem to alter the meaning, because control can only be exercised legally or factually and not in any other means.

17 “Liability”, Black’s Law Dictionary, 11th Ed. West, 2019.

18 A. Peters et al., Business and Human Rights: Making the Legally Binding Instrument Work in Public, Private and Criminal Law, Max Planck Institute for Comparative Public Law & International Law, Research Paper No. 2020-06, pp. 14-15.

19 See e. g. D. Cassel, above note 16, pp. 4-5.

Second, and more importantly, the Third Draft changes the tense in the context of control: While Article 8.6. in the Second Draft referred to a person with whom the company “has” a business relationship, the Third Draft refers to persons with whom the companies “have had” a business relationship. In other words, the language of the Second Draft required that the business relationship was still ongoing which may however no longer be the case when the liability of the company is established. The wording of Article 8.6. LBI in the Third Draft could be misunderstood in such a way that ongoing relations are excluded. It would therefore be beneficial to include the present and past tense and state “for their failure to prevent another legal or natural person with whom they have or have had a business relationship”.

The central aspect of Article 8.6. is the notion of “control”. The LBI does not specify situations in which control can be assumed and does not include a rebuttable presumption of control in certain situations. To establish legal liability, it must therefore be proven in each individual case based on the respective circumstances that a company exercised control over another person or activity. This can be difficult, because corporate relations between different companies (percentage of shares, appointment of directors, voting rights such as “golden shares”) are often not clear to third parties. Similarly, if control is exercised through contractual relations (right to unilaterally determine price, quality and quantity of products) it may be difficult to prove control without access to these contracts. In light of the variety of situations of control and the differences between legal systems, the LBI should not attempt to find a one-size-fits-all definition or to assume a rebuttable presumption of control in certain circumstances, but rather leave this to states and the idiosyncrasies of the respective legal systems. Nevertheless, the LBI could require states to ensure that their domestic systems provide for situations in which control in the meaning of Article 8.6. is presumed to reduce the difficulties of proving control on a case-by-case basis.

Such a provision could be added as second sentence to Article 8.6. and could be worded as follows:

*“States parties shall determine in their domestic law conditions under which it is presumed that a legal person controls another legal person taking corporate, contractual and other business relations between the former and the latter into account.”*

The LBI does not address the question of joint or several liability of the corporation causing or contributing to the human rights abuse (e.g. the local subsidiary) and the corporation controlling the former but not preventing it from causing or contributing to the violation (e.g. the parent company). Both types of liability are important to provide for compensation for human rights abuses, but are regulated in different legal systems in different ways which is why the LBI should refrain from providing a particular model of joint liability. However, the LBI could clarify that joint and several liability should not be excluded. A respective provision could read as follows:

*“States parties shall ensure that their domestic law includes the possibility of joint and several liability in addition to liability for own business activities and liability activities for other persons”*

### **c) Due diligence and legal liability**

Another question is to which extent due diligence may be used as a defence against legal liability. Business representatives and some legal commentators have argued that enterprises need an incentive to fulfil the requirements of human rights due diligence which could be the prospect to rely on due diligence requirements to avoid legal liability.<sup>20</sup> Yet, it is important that the mere fact that a company engaged in due diligence does not exclude legal liability. Article 8.7. LBI addresses this question and tries to strike a balance by stating in its first sentence that human rights due diligence shall not “automatically” absolve a natural or legal person from liability. The second sentence then calls on the competent courts or authority to decide on liability “after an examination with applicable human rights due diligence standards”.

<sup>20</sup> See e. g. D. Cassel, above note 16, pp. 4-5.

The general idea behind Art. 8.7. seems appropriate: When determining liability, adherence to human rights due diligence standards should be taken into account, but the mere fact that a corporation followed such standards would not absolve it from liability. However, the wording of Art. 8.7. could be improved. The term “automatically” creates ambiguities and should be avoided. The article should also begin by explaining the general relationship between human rights due diligence and liability and then state the limits of this relationship. It is suggested to revise Article 8.7. in the following way:

*“When determining the liability of a natural or legal person for causing or contributing to human rights abuses or failing to prevent such abuses as laid down in Article 8.6., the competent court or authority can take into account if the person undertook adequate human rights due diligence measures, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso iure.”*

### 3. Access to remedy and justice

Access to remedy following a human rights violation is in itself a human right.<sup>21</sup> The UNGP emphasise the importance of access to remedy by devoting the entire pillar 3 to this issue. Yet, in practice remedies are often difficult if not impossible to achieve by victims of human rights violations in a business context.<sup>22</sup> Improving access to remedy should therefore be a key objective against which the LBI needs to be measured. The LBI addresses access to remedy issues in Articles 7, 9, 10 and 11. Article 7 contains the general obligations, while Articles 9 to 11 refer to access to remedies through judicial proceedings (adjudicative jurisdiction, statute of limitations and applicable law). It should be noted that there are some overlaps in these articles and the structure of

the articles could be questioned: For example, why is one article devoted to statute of limitations (Art. 10) while the equally important issue of reversal of the burden of proof is addressed in a paragraph of Article 7?

When assessing the current contents of the LBI two complexes seem particularly relevant in the context of access to remedies: First, does domestic law enable affected persons to sue corporations for human rights abuses in domestic courts or can courts reject such lawsuits on the basis that they lack (adjudicative) jurisdiction? Second, and assuming that a court has jurisdiction, can victims obtain effective remedies or are there institutional, procedural or substantive legal obstacles which make effective judicial remedies less likely?

#### a) Adjudicative jurisdiction

Access to courts depends on the competence of a court to hear a case (adjudicative jurisdiction) which is regulated in private international procedural law.<sup>23</sup> Within the EU the relevant legal instrument is the Brussels Ia-Regulation which vests jurisdiction with the courts of the country where the defendant is domiciled.<sup>24</sup> This principle is also enshrined in Article 9.1. lit c) LBI. In transnational cases, the domicile of a company may not be the country where the harm occurred or where the victim lives. Hence, Article 9.1. also includes these cases as grounds for jurisdiction in Article 9.1. lit. a) and c) LBI. Furthermore, the Third Draft added the domicile of the victim as a forum state which is a useful and welcome addition (Article 9.1.lit. d) LBI), because there may be cases in which victims may want to sue a transnational corporation in their own country. However, it is unclear if the plaintiff shall have the right to choose from different jurisdictions or whether states parties can choose from the list of Article 9.1 LBI. If the former

21 S. Shah, Detention and Trial, in: D. Moeckli/S. Shah/S. Sivakumaran, Sandesh (editor), International Human Rights Law, 3rd edition, Oxford, 2018, p. 263.

22 See e.g. ECCJ, Suing Goliath, 2021, <https://corporatejustice.org/wp-content/uploads/2021/09/Suing-Goliath-FINAL.pdf>.

23 D. Cassel, State jurisdiction over transnational business activity affecting human rights, in: Deva, S./Birchall, D. (editor), Research Handbook on Business and Human Rights, 2020, p. 201.

24 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20 December 2012, p. 1.

was intended, it might be better to replace the word “or” between the different grounds of jurisdiction with the word “and”.

A key challenge in this context is the legal doctrine of *forum non conveniens* which allows courts to reject a case if they deem the courts of another country to be more appropriate, because they are more closely linked to the case. While the doctrine does not play a prominent role in continental European law, it is relevant in Common Law.<sup>25</sup> It is therefore of crucial importance that the LBI requires states parties to remove legal obstacles to proceedings including the doctrine of *forum non conveniens* as stated in Article 7.3. lit d) and Article 9.3.

Two further issues need to be considered: Sometimes, victims would like to sue different defendants in one court to reduce litigation costs and to ensure coherence.<sup>26</sup> In such cases, the victim may want to sue the parent company in their home country alongside the subsidiary. However, these courts may not have jurisdiction over the subsidiary unless domestic law establishes an additional ground for jurisdiction based on factual connectivity.<sup>27</sup> Article 9.4. of the LBI addresses this issue by establishing jurisdiction for courts “if the claim is connected” with a claim against a person domiciled in that country. The Third Draft simply requires connection and deleted the term “closely” in this context which gave rise to ambiguities.

Another problem is that sometimes the competent courts of the respective country do not seem independent, certain stakeholders may not have legal standing or face high financial obstacles which effectively deny the victim the right to remedies. In such cases, the victim may want to raise the claim in a more favourable jurisdiction. Courts can accept such

cases if they have jurisdiction based on the doctrine of *forum necessitatis*.<sup>28</sup> However, many legal systems do not provide for such a forum. Article 9.5. LBI reacts to this problem and provides for such a forum by giving jurisdiction to courts “if no other effective forum guaranteeing a fair judicial process is available” and if the claimant is present on the territory of the forum, or if the defendant has assets there or is engaged in substantial activity. The Second Draft only required a “sufficiently close connection” to the forum state which was too vague. By clarifying the conditions of the connection for *forum necessitatis* the Third Draft makes this provision more acceptable to states. It should be noted that this does not establish a principle of universal jurisdiction, because victims cannot sue corporations in whichever court they deem fit, but the conditions of *forum necessitatis* in Article 9.5. LBI seem reasonable and address the relevant problems sufficiently.

It can thus be concluded that Article 9 contains enough grounds of adjudicative jurisdiction to facilitate access to judicial remedy for victims in claims against corporate actors and would close significant gaps in some jurisdictions.

## b) Effective access to justice

The rules on adjudicative jurisdiction in Article 9 LBI address the issue which courts are competent to hear a case. However, finding a competent court is only the first step. High court costs and legal fees, difficulties of meeting the standard of the burden of proof or statute of limitations may raise actual obstacles in access to justice. The LBI therefore needs to find suitable solutions to these problems.

A first issue concerns court fees and legal costs. Article 7.4. LBI addresses this by requiring states

25 L. Chaplin, Third draft of UN business and human rights treaty launched, [https://media.bhrrc.org/media/documents/Blog\\_-\\_3rd\\_draft\\_UN\\_BizHR\\_Treaty\\_20.09.21.pdf](https://media.bhrrc.org/media/documents/Blog_-_3rd_draft_UN_BizHR_Treaty_20.09.21.pdf).

26 See examples in ECCJ study.

27 D. Cassel, above note 24, p. 198. Jurisdiction on grounds of connectivity is not common in continental legal systems. For example, Germany civil procedural law does not contain such a jurisdictional basis.

28 A. Marx/C. Bright/J. Wouters, 2019, Access To Legal Remedies For Victims Of Corporate Human Rights Abuses In Third Countries. Belgium: European Parliament, [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\\_STU\(2019\)603475\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf), pp. 111-112.



to “ensure that court fees and rules concerning the allocation of costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings” and “that there is a provision for possible waiving of certain costs in suitable cases”. This provision adds welcome clarity to the respective wording of Article 7.4. LBI in the Second Draft. However, the reference to “rules concerning allocation of costs” may be too narrow. In some cases, it may not be the rules themselves which become a barrier, but their application or the practice based on these rules. It is therefore suggested to delete words “rules concerning” in Art. 7.4. LBI which would then read:

*“States Parties shall ensure that court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings (...)”.*

Article 7.5. LBI addresses the question of the burden of proof. Unlike the Second Draft, the Third Draft establishes a clear obligation of states (“shall” instead of “may”) to enact or amend laws allowing a reversal of the burden of proof in appropriate cases where consistent with international and domestic constitutional law. While the mandatory obligation is a welcome revision, the term “allowing judges” could be misunderstood as giving judges the discretion when to reverse the burden of proof. It would be more appropriate if the domestic law would contain cases in which the reversal of the burden of proof is mandatory or at least indicate that the decision should not be only left to the judges. Hence, Article 7.5. LBI could be reformulated as follows:

*“States Parties shall enact or amend laws allowing judges to reversing the burden of proof in appropriate cases or enabling courts to reverse the burden of proof to fulfill the victims’ right to access to remedy where consistent with international law and its domestic constitutional law.”*

With regards to statute of limitations, the Third Draft maintains the general approach of the Second Draft which excludes the applicability of statutory or other limitations to human rights violations which

constitute the most serious crimes of concern to the international community as a whole. This would include crimes such as genocide, war crimes or crimes against humanity. For other human rights violations, Article 10.2. LBI requires states to ensure that limitations “allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time”. This approach seems plausible and addresses the key concerns in this regard. However, Article 10.2. does not contain a minimum number of years which might be a helpful indication for states. Furthermore, the reference to “legal proceedings” could be clarified in the sense that it refers to civil, criminal and administrative proceedings. Based on this, Article 10.2. LBI could be amended as follows:

*“The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable period of time of at least [5] years for the commencement of civil, criminal, administrative or other legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time.”*

#### 4. Trade and Investment Agreements

International trade and investment agreements can have significant negative impacts on the human rights communities and stakeholders affected by trade and foreign investment.<sup>29</sup> In particular, the enforcement of International Investment Agreements (IIA) through investor-state dispute settlement (ISDS) mechanisms can have a chilling effect on regulatory activities of states and therefore pose a threat to the state’s ability to protect and fulfil human rights. The Working Group on the issue of human rights and transnational corporations and other business

29 De Schutter, above note 17, p. 541.

enterprises – the special procedure of the Human Rights Council mandated with the implementation of the UNGP – highlighted the relevance on investment treaties and their implementation in its recent report to the General Assembly and also pointed out investor-state claims “tend to create a regulatory chill not only in States involved in such claims but also in bystander States”.<sup>30</sup>

The impact of international trade and investment agreements on human rights has also been a key issue in negotiations on the LBI.<sup>31</sup> Many states and various stakeholders have argued that the LBI should therefore contain obligations of the State Parties concerning international investment agreements and contracts in line with Principle 9 of the UNGP.<sup>32</sup>

#### a) Interpretation and implementation of existing agreements

The Third Draft contains specific references to trade and investment agreements in Article 14.5. which are almost identical to the same provision in the Second Draft. The legal analyses of this provision therefore remain applicable to Article 14.5. of the Third Draft.<sup>33</sup> Article 14.5. lit. a) requires state parties of the LBI to ensure that trade and investment agreements – like all other international agreements – “shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments”. The provision addresses existing agreements and requires that the interpretation and implementation is in line

with the LBI and general human rights obligations. The latter is of particular importance because the implementation of trade and investment agreements can have negative impacts on all human rights and may not just affect the implementation of the LBI. However, the treaty provision does not specify how states should ensure their obligations.<sup>34</sup>

Investment treaties are usually interpreted by ISDS arbitration tribunals. While the LBI cannot dismantle ISDS as laid down in IIAs, the LBI should take the challenges to their legitimacy into consideration. Members of an ISDS tribunal are often lawyers with a background in commercial law and exercise considerable power and influence over the interpretation and implementation of these treaties. For example, in the recently rendered award in *Eco Oro v Colombia* two arbitrators considered the prohibition of mining activities in a high-altitude wetland as a violation of the applicable investment treaty, while a third arbitrator – a human rights lawyer – considered that the state’s measures were justified.<sup>35</sup> The *Eco Oro* award therefore highlights the importance of appointing arbitrators with expertise in human rights and environmental law. The LBI should therefore require states to ensure that the tribunals take human rights obligations into account when interpreting these treaties.

In addition to ensuring that arbitrators with human rights knowledge and expertise are appointed to ISDS tribunals, states also need to frame their defences in ISDS proceedings based on human rights so that tribunals are made aware of the relevance of human rights in the respective proceedings. To ensure this

30 Working Group on the issue of human rights and transnational corporations and other business enterprises, Human rights-compatible international investment agreements, A/76/238, 21 July 2021, para 21.

31 A/76/238, note 31, para 50.

32 M. Krajewski, Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights, CIDSE March 2017.

33 See e.g. Daniel Uribe, BHR Symposium: Bolstering Human Rights within International Economic Agreements–Reconciling Two ‘Separate Regimes’? <http://opiniojuris.org/2020/09/10/bhr-symposium-bolstering-human-rights-within-international-economic-agreements-reconciling-two-separate-regimes/>.

34 A/76/238, note 31, para 51.

35 See e.g. D. Uribe, BHR Symposium: Bolstering Human Rights within International Economic Agreements–Reconciling Two ‘Separate Regimes’? <http://opiniojuris.org/2020/09/10/bhr-symposium-bolstering-human-rights-within-international-economic-agreements-reconciling-two-separate-regimes/>.

Article 14.5. lit. a) of the Third Draft could be amended as follows:

- *“All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, inter alia by ensuring that members of a dispute settlement entity charged with interpreting and implementing these agreements have specialised knowledge in human rights law and by referring to the obligations under this LBI as well as other relevant human rights conventions and instruments in their submissions to such a dispute settlement entity”*

#### **b) New agreements and revision of existing agreements**

While Article 14.5. lit a) refers to existing agreements, lit. b) of that provision addresses future agreements and requires State Parties to ensure that “[a]ll new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments.” Again, this provision is almost identical to the respective provision in the Second Draft. Requiring states to not only address the interpretation and implementation of existing treaties, but to ensure that future treaties are not drafted in a manner which has negative effects on human rights, is a crucial element of the Treaty. However, the LBI could provide more guidance to states how to fulfil this obligation. In this regard, a reference to Human Rights Impact Assessments

(HRIAs) of trade and investment treaties as suggested by CIDSE in their submission to the OEIGWG in 2020 would be useful.<sup>36</sup> Reference could also be made to the UN Guiding principles on human rights impact assessments of trade and investment agreements proposed by the then Special Rapporteur on the right to food, Olivier De Schutter in 2011.<sup>37</sup> In addition, the LBI could require states to include specific exception clauses which would increase the policy space for states to respect, protect and fulfil human rights.<sup>38</sup> Hence, Article 14.5. b) could be amended with the following sentence:

“To ensure the compatibility of these agreements with States Parties’ human rights obligations, States Parties shall

- *conduct impact assessments based on the UN Guiding principles on human rights impact assessments of trade and investment agreements before and during the negotiations, before the ratification and periodically after the entry into force of such agreements.*
- *include specific exception clauses in all new trade and investment agreement to allow States Parties to fulfil their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments with measures which would otherwise violate their obligations under the respective trade and investment agreement.”*

Furthermore, the LBI could require states to revise trade and investment treaties which can have negative effects on human rights.<sup>39</sup> To achieve this, Article 14.5. could include the following additional letter c):

- *“All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument)*

36 CIDSE et al., Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights October 2020.

37 O. De Schutter, Report of the Special Rapporteur on the right to food, Guiding Principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5, 19 December 2011.

38 It should be noted that in *Eco Oro*, a majority of the tribunal rejected the application of a general exception clause to the obligation to pay damages. This highlights that in addition to the inclusion of such clauses, states need to ensure that arbitrators take human rights considerations into account.

39 CIDSE Study 2017.

*and its protocols, including trade and investment agreements, shall be reviewed in light of their impact on States Parties' obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, and shall be revised if necessary."*

## 5. Human Rights Defenders

The pivotal role and impact of human defenders on the protection of human rights and the environment has been recognised in the international human rights framework since the 1999 UN Declaration on Human Rights Defenders.<sup>40</sup> The UNGP also acknowledge the role and relevance of human rights defenders. The commentary to Guiding Principle 26 clarifies that States should ensure that "the legitimate and peaceful activities of human rights defenders are not obstructed". The UNGP recognise the critical role of human rights defenders therefore also with regards to businesses.

In one of its most recent reports, the Working Group on Business and Human Rights also highlights the need for addressing the adverse impact of business activities on human rights defenders.<sup>41</sup> In this report, the Working Group points out that "[t]hreats to human rights defenders and to civic freedoms are increasing concerns globally (...) A large number of human rights defenders are under threat and attack because they raise concerns about adverse human rights impacts of business operations (...). At the same time, the space for civil society actors to raise concerns about human rights impacts is shrinking, and human rights defenders face reprisals including criminalisation of their engagement in public protest or civil dissent."<sup>42</sup>

In light of the pertinence of the issue, it has hence been suggested that the LBI should also include lan-

guage addressing the special situation and the needs for protection of human rights and environmental defenders.<sup>43</sup> This would be beneficial as the UNGPs only provide a voluntary framework and do not pose any binding obligations on states or businesses. It would therefore be important that the LBI contains binding rules for a better protection of human rights defenders and the rights they seek to defend. However, like the Second Draft, the Third Draft contains no operative articles specifically referring to human rights defenders. Instead, the Third Draft only contains a reference to the UN Declaration on Human Rights Defenders in the third preambular paragraph and has a special preambular paragraph emphasising that human rights defenders "have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for business-related human rights abuses". These references were already contained in the Second Draft. While references in the preamble often remain aspirational goals and provide guidance when the Treaty is to be interpreted, they do not constitute any binding obligations on states.

Furthermore, Article 5.2. requires states to "take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity." In light of the preambular paragraphs mentioned above this article could be read in conjunction with the UN Declaration on Human Rights Defenders and other relevant international documents on human rights defenders and therefore be understood as a provision which includes human rights defenders. However, Article 5.2. could be amended to clarify this by adding the term "human rights defenders" in parentheses. Consequently,

40 A. M. Nah, Protecting Human Rights Defenders at Risk, 2020; M. Lawlor, Report of the Special Rapporteur on the situation of human rights defenders, Final warning: death threats and killings of human rights defenders, UN A/HRC/46/35, 24 December 2020.

41 Working Group on the issue of human rights and transnational corporations and other business enterprises, The Guiding Principles on Business and Human Rights: guidance on ensuring respect for human rights defenders, 22 June 2021, A/HRC/47/39/Add.2.

42 A/HRC/47/39/Add.2, note 42, para 1.

43 PBI Mexico, Why do we need a binding treaty for Business and Human Rights?, <https://pbi-mexico.org/news/2018-09/why-do-we-need-binding-treaty-business-and-human-rights>.

the title of Article 5 should also not only refer to the protection of victims but include human rights defenders as well, because human rights defenders are not victims in the meaning of Article 1.1. of the LBI. It is therefore suggested to change the title into “Protection of victims and human rights defenders” and to include the term “human rights defenders” in Article 5.2. of the LBI to make the reference explicit.

In addition, the LBI should clarify the obligations of states to protect human rights defenders. In drafting such a provision, inspiration could be taken from the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the so-called Escazú Convention) which entered into force in April 2021.<sup>44</sup> Based on Article 9 of the Escazú Convention, Article 5 of the LBI could be amended with a special article on human and rights defenders in a business context. Such a provision could be worded as follows:

*“5.3. States Parties shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders may suffer while exercising their human rights.”*

In order to ensure that business enterprises respect the rights of human rights defenders, Article 6 of the LBI could be amended by an additional paragraph:

*“6.X States Parties shall enact legislation, regulations and enable effective adjudication to ensure that business enterprises respect the rights of human rights defenders.”*

## 6. Environmental Rights and Due Diligence

In line with its mandate and the institutional context of the OEIGWG the LBI focuses on human rights and

does not address environmental norms as separate legal obligations. In this regard, the LBI is narrower in scope than some national human rights due diligence laws, such as the French *Loi de Vigilance* or the German *Lieferkettensorgfaltspflichtengesetz* which extend the due diligence obligations to environmental risks. It should be noted that the OECD Guidelines for Multinational Enterprises also contain a chapter on environmental protection. It can therefore be argued that the LBI falls short of the most recent standards on corporate due diligence obligations.

However, it must be recalled that the mandate of OEIGWG is “to elaborate an international legally binding instrument to regulate, in international human rights law”. The mandate is therefore restricted to human rights law and not to due diligence in a broader sense. Furthermore, the OEIGWG is a subsidiary body of the Human Rights Council which is also restricted to the field of human rights law. Consequently, it would go beyond the mandate of the OEIGWG if the LBI would refer to environmental due diligence in general. Nevertheless, states would of course be free to include environmental or other obligations in a legally binding instrument if they deem this useful. Yet, the mandate and the institutional setting of the OEIGWG are meanwhile limited to the human rights framework.

There is, however, a significant overlap between human rights and the protection of the environment.<sup>45</sup> The specific relationship between human rights and the protection of the environment is at the heart of the growing recognition of the right to a safe, clean, healthy and sustainable environment.<sup>46</sup> In this regard, it constitutes a clear improvement that Article 1.2. of the Third Draft refers explicitly to this right, instead of the term “environmental rights” which was the respective term in the Second Draft. Even if “environmental rights” may seem broader than the “right to a safe, clean, healthy and sustainable en-

44 Economic Commission for Latin America and the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, 2018, [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf).

45 J. H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 19 July 2018, A/73/188. See also J. H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 24 January 2018, A/HRC/37/59.

46 Human Rights Council, *The human right to a safe, clean, healthy and sustainable environment*, 5 October 2021, A/HRC/48/L.23/Rev.1; C. Macchi, *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’*, *Business and Human Rights Journal* 2021, p. 93.

vironment”, the former lacks precision and remains vague while the latter clearly aligns the Third Draft with current human rights language and practice.

The inclusion of the right to a safe, clean, healthy and sustainable environment in the definition of human rights abuse also indicates the horizontal relevance of this right in the LBI. Explicit references to this right elsewhere<sup>47</sup> therefore do not seem necessary. In particular, the inclusion of the right to a safe, clean, healthy and sustainable environment in the definition of human rights abuse is also relevant for the scope of the due diligence obligation defined in Article 6.3. lit a) LBI. As this provision and the specific elements of due diligence (identifying risks, taking appropriate measures, monitoring, and communicating) all refer to “human rights abuses” it is clear that the due diligence required by companies includes the right to a safe, clean, healthy and sustainable environment. This is supported by the reference to “environmental and climate change impact assessments” in Article 6.4. a) LBI.

The Third Draft does not include additional rights, such as rights of nature and territory as suggested by civil society actors.<sup>48</sup> While it may be considered regrettable that the Third Draft does not consider these more innovative and progressive approaches which have been recognised in constitutional law in some countries such as Ecuador<sup>49</sup>, it should be kept in mind that such rights are not yet recognised as explicit rights in global human rights treaties and

that there is also no global consensus on such rights. If the LBI aims at an alignment with internationally accepted human rights, references to the rights of nature in the LBI may seem premature.

A similar argument can be made about a reference to the precautionary principle enshrined in the 1992 Rio Declaration on Environment and Development. According to this principle, lack of full scientific certainty shall not be used as a reason not to prevent environmental harm if there is a risk of a serious or irreversible damage. Even though this principle has been incorporated into many domestic environmental laws, the legal nature of this principle under international law remains unclear.<sup>50</sup> Like earlier drafts of the LBI, the Third Draft does not refer specifically to the precautionary principle. It could be argued that the precautionary approach should inform the due diligence required by businesses in accordance with Article 6.3. lit. b) LBI which explicitly requires “appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses” and “reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships”. The revised language of Article 6.3. lit b) LBI underlines the importance of avoidance and prevention which could imply a precautionary approach. Such an interpretation could be based on the reference to the 2030 Agenda for Sustainable Development which in turn refers to the 1992 Rio Declaration.<sup>51</sup>

47 CIDSE 2020, above note 37.

48 CIDSE 2020, above note 37.

49 Constitución de la República del Ecuador, [Constitution of the Republic of Ecuador], Official Registry No. 449, October 20, 2008.

50 International Court of Justice, *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), I.C.J. Reports 1997, p.7, European Parliament, The precautionary principle – Definitions, applications and governance, 2016, [https://www.europarl.europa.eu/ReqData/etudes/IDAN/2015/573876/EPRS\\_IDA\(2015\)573876\\_EN.pdf](https://www.europarl.europa.eu/ReqData/etudes/IDAN/2015/573876/EPRS_IDA(2015)573876_EN.pdf).

51 General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1.



## V. Summary

The Third Draft of the LBI provides a useful, appropriate and sufficiently clear basis for substantial negotiations. It is based on the current consensus with regards to basis and human rights and aims to develop this consensus further in a meaningful manner. Concluding a treaty on the basis of the LBI would be a significant step forward in human rights law. The Third Draft does not deviate significantly from the Second Draft. The structure, main concepts and principles, as well as the core obligations, remain similar if not identical. Nevertheless, the Third Draft contains a number of welcome textual and linguistic improvements and offers clarifications of the provisions. Here and there, the Third Draft sharpens the LBI and contains modest improvements.

This study found that the provisions on legal liability in Article 8 address the key questions in this context and maintain the idea that enterprises can be liable for their own business activities as well as for activities in their business relationships, in particular, if one entity controls, manages or supervises another entity. In this regard, the LBI could be improved with language addressing the presumption of control and of joint liability. The LBI could also clarify that adherence to human rights due diligence standards can be one but should not be the only factor to be considered when determining liability.

The study highlighted the improvements of the Third Draft in terms of adjudicative jurisdiction, in particular the clear rejection of the doctrine of forum non conveniens as well as concerning the reversal of the burden of proof. However, the study also showed that

minor changes in the text could clarify the respective provisions in this regard as well as the rules on financial obstacles and statute of limitations.

Concerning the treatment of trade and investment agreements, the study argued that the general principles contained in the LBI could be strengthened by adding obligations concerning human rights impact assessments for new trade and investment agreements as well as obligations in the context of dispute settlement. The study also suggested that the LBI should oblige states to monitor and revise existing agreements if necessary.

With regards to human rights defenders, the study showed that the references to them in the preamble of the LBI could be complemented by specific obligations of states to protect human rights defenders inspired by the Escazú Convention and by the requirement to also oblige business enterprises to respect the rights of human rights defenders.

Lastly, the study assessed if and how the LBI addresses environmental rights and due diligence standards. The Third Draft limited references to environmental issues to the right to a safe, clean, healthy and sustainable environment in line with recent developments in human rights law. Without denying the general desirability to regulate human rights and environmental obligations of business enterprises, the study finds that the approach of the Third Draft follows from the mandate of the OEIGWG and its institutional context and argues that the LBI should stay within those limits.



# Annex:

## Proposed amendments

### Article 5.

#### Protection of victims and human rights defenders

5.2. States Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment (human rights defenders), so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.

5.3. States Parties shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders may suffer while exercising their human rights.

#### *Explanation*

*The proposed changes and amendments to Article 5 would clarify that human rights defenders are explicitly protected in the LBI and would further concretise the respective state obligation.*

### Article 6.

#### Prevention

6.X. States Parties shall enact legislation, regulations and enable effective adjudication to ensure that

business enterprises respect the rights of human rights defenders.

#### *Explanation*

*The proposed additional paragraph of Article 6 would require states to include the protection of human rights defenders in their domestic legislation by requiring business enterprises to respect their rights.*

### Article 7.

#### Access to remedy

7.4. States Parties shall ensure that court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument)

and that there is a provision for possible waiving of certain costs in suitable cases.

7.5. States Parties shall enact or amend laws allowing judges to reversing the burden of proof in appropriate



cases or enabling courts to reverse the burden of proof to fulfill the victims' right to access to remedy where

consistent with international law and its domestic constitutional law.

*Explanation*

*These changes clarify that the actual allocation of costs and not just the relevant rules may become a burden on victims and requires states not to leave the decision on the reversal of the burden of proof to the discretion of the judges.*

**Article 8.**

**Legal liability**

8.6. States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, or their failure to prevent another legal or natural person with whom they have or have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse. States parties shall determine in their domestic law conditions under which it is presumed that a legal person controls another legal person taking corporate, contractual and other business relations between the former and the latter into account. States parties shall ensure that their domestic law includes the possibility of joint and several liability in addition to liability for own business activities and liability activities for other persons.

8.7. Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. The court or other competent authority will decide the liability of such legal or natural persons after an examination of compliance with applicable human rights due diligence standards. When determining the liability of a natural or legal person for causing or contributing to human rights abuses or failing to prevent such abuses as laid down in Article 8.6, the competent court or authority can take into account if the person undertook adequate human rights due diligence measures, but compliance with applicable human right due diligence standards shall not absolve from liability ipso iure.

*Explanation*

*The proposed amendments to Article 8.6. would require states to include presumption of control in their domestic laws taking the peculiarities of the relevant legal systems into account and to ensure that joint liability is not excluded. The change in the language in Article 8.7. would be in line with the idea of the LBI, but clarify that compliance with human rights due diligence standards can be taken into account without absolving liability on the sole basis that such standards were observed.*

**Article 10.**  
**Statute of Limitations**

10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a

reasonable period of time of at least [5] years for the commencement of civil, criminal, administrative or other legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time.

*Explanation*

*To avoid different results concerning the same case when moving from one jurisdiction to another the “reasonable period” referred to in Article 10.2. should have a minimum number of years. It should also be clear that the reference to “civil claims” in the first sentence does not exclude criminal or administrative proceedings which also need to have a longer period for the statute of limitations.*

**Article 14.**  
**Consistency with International Law Principles and Instruments**

**14.5. States Parties shall ensure that:**

- a. All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, inter alia by ensuring that members of a dispute settlement entity charged with interpreting and implementing these agreements have specialised knowledge in human rights law and by referring to the obligations under this LBI as well as other relevant human rights conventions and instruments in their submissions to such a dispute settlement entity.
- b. All new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments. To ensure the com-

patibility of these agreements with States Parties’ human rights obligations, States Parties shall

- conduct impact assessments based on the UN Guiding principles on human rights impact assessments of trade and investment agreements before and during the negotiations, before the ratification and periodically after the entry into force of such agreements.
- include specific exception clauses in all new trade and investment agreements to allow States Parties to fulfil their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments with measures which would otherwise violate their obligations under the respective trade and investment agreement.
- c. All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be revised in light of their impact on States Parties’ obligations

under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human

rights conventions and instruments, and shall be revised if necessary.

*Explanation*

*The proposed amendments would add concrete steps and policies states could refer to in implementing the obligation of Article 14.5. The respective instruments are steps to ensure that trade and investment agreements are interpreted and applied consistent with human rights and the conduction of human rights impact assessments before, during and after the negotiations of trade and investment agreements.*



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