



**British Institute of
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Intergovernmental Working Group on Transnational Corporations
Office of the High Commission for Human Rights
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Submission further to invitation for States and stakeholders to submit comments and proposals on the draft elements for the legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The British Institute of International and Comparative Law ("BIICL") welcomes the Draft Elements Document ("the draft"). We believe the draft may benefit from the following suggestions:

While we welcome the provision in Part 1.2 on Principles that provides for the 'observance of domestic laws, regulations and administrative practices', we note that in practice, transnational corporations (TNCs) and other business enterprises (OBEs) are frequently faced with conflicts between domestic laws or practices and international human rights standards. This issue is addressed in UN Guiding Principle (UNGPs) 23 (a) and (b) and considered, though not entirely resolved in the Office of the High Commissioner for Human Rights (OHCHR) Interpretive Guide on the Corporate Responsibility to Respect.

Our research suggests that UNGPs-consistent options for companies to respond to such conflicts vary, and that there is a call from TNCs for State Parties to ensure that domestic laws and practices are aligned with 'all internationally recognised human rights' (as included in **Part 2.1** of the draft elements). The treaty provides a unique opportunity to confirm these international human rights law obligations of State Parties.

In addition, in order to ensure clarity, consideration should be given to how to resolve the issue of conflicting laws and standards in the treaty. In particular, it may be considered whether State Parties' obligations to ensure that domestic laws or practices are aligned with international human rights standards should lead to binding obligations which may be enforced by affected rights-holders or business enterprises.

Part 3.2 on Obligations of Transnational Corporations and Other Business Enterprises should include mandatory human rights due diligence (HRDD). The draft should reflect the elements of effective HRDD as set out in the UNGPs. In this regard we refer to our published work on human rights due diligence, including the chapter by Robert McCorquodale and Lise Smit 'Human Rights, Responsibilities and Due Diligence: Key Issues for a Treaty' in Deva and Bilchitz *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, October 2017), which elaborates on what HRDD could look like in a treaty. In particular, it considers the implications of HRDD for state obligations, parent company liability, and HRDD

as a defence. In its appendix, it sets out possible HRDD treaty provisions, both for State Parties and for companies as follows:

Possible Human Rights Due Diligence Treaty Provisions

State Obligations

1. Each State Party to the treaty undertakes to ensure that all business enterprises domiciled within its territory and/or subject to its jurisdiction, including state-owned enterprises, carry out mandatory human rights due diligence processes and provide periodic reports on them in order to meet their responsibility to respect human rights, notwithstanding that the actual or potential human rights impacts have or may occur outside the relevant State Party's territory or jurisdiction.
2. Each State Party shall take the necessary steps, in accordance with its constitutional processes, to adopt such laws or other measures to establish a standard of conduct for business enterprises undertaking human rights due diligence processes, including a responsibility to identify, prevent, mitigate and account for how they address their impacts on human rights both of their own activities and of those with whom they have business relationships.
3. Each State Party undertakes to monitor and enforce the implementation of any laws or other measures adopted in accordance with this article, preferably through judicial mechanisms.
4. Where a State chooses to allow a defence of human rights due diligence where a business enterprise has caused, contributed to or is directly linked through a business relationship to an adverse human rights impact, then it shall create a defence if the business enterprise can prove that it took all reasonable precautions, had an effective policy and procedure in place, and exercised all human rights due diligence to prevent the adverse impact.

Business Enterprises

1. All business enterprises must carry out human rights due diligence processes to identify, prevent, mitigate and account for how they address their impacts on human rights.
2. Human rights due diligence processes must include identification, prevention mitigation and remediation of all adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships with other state or business parties in any territory or jurisdiction.
3. Human rights due diligence processes must be ongoing and include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how impacts are addressed.
4. The scope of the human rights due diligence a business enterprise is required to carry out in the circumstances will depend on factors such as, but not limited to:
 - a. The size of the business enterprise;
 - b. The risk of severe human rights impacts;
 - c. The nature of the business enterprise's operations;
 - d. The context of its operations;
 - e. The state of its relevant operations;
 - f. Whether the impact is caused or contributed to by the business enterprise itself or by a third party entity in its value chain;
 - g. If caused or contributed to by a third party in the business enterprise's value chain, the extent to which the business enterprise has leverage over the relevant third party's conduct, the manner

- in which the business enterprise exercises its leverage and the extent to which it seeks to increase its leverage;
- h. Any other circumstances which may be relevant.
5. Where a business enterprise has caused, contributed to or is directly linked through a business relationship to an adverse human rights impact, it shall be a defence for the business enterprise to prove that it took all reasonable precautions, had an effective policy and procedure in place, and exercised all due diligence to prevent the adverse impact.

We further welcome the provision for extraterritorial application of jurisdiction over human rights violations allegedly committed by TNCs and OBEs in **Part 7 on Jurisdiction**. It is noted that the rules of civil procedure may require that a company be registered or own assets in a jurisdiction before a domestic court can exercise jurisdiction over such company as a defendant. As a result, claimants may be unable to bring claims in host state courts against TNCs which have impacts in the host states without the TNC being registered or owning assets there. In these circumstances, the only courts with potential jurisdiction over the relevant companies are those of the company's home state. Where such home state courts refuse to exercise jurisdiction based on exceptions of extraterritoriality, the result is that claims cannot be brought in the host state or the home state, leading to a lack of access to remedy. In this regard we refer to Skinner, McCorquodale and De Schutter *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, 2013, available at <https://www.biicl.org/research-accesstojudicialremedy>.

Part 6 on Access to Justice, Effective Remedy and Guarantees of Non-Repetition should include a provision requiring State Parties to establish effective mechanisms for collective redress in respect claims related to alleged human rights violations by TNCs and OBEs in order to facilitate access to remedy for victims.

BIICL has long-standing expertise in providing independent and authoritative analysis of business and human rights issues. It works with law firms, companies, governments, international organisations, scholars and non-governmental organisations. Some of its work can be found at the following link: <http://www.biicl.org/pilresearch>.

More information on our work on HRDD is available at <https://www.biicl.org/duediligence> and on addressing conflicts between international human rights standards and national laws is available at <https://www.biicl.org/conflicts-between-human-rights-law-and-nat-practice>.

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