

Suggested Chair Proposals for Select Articles of the LBI

General observations and explanations

The approach taken in drafting the suggested Chair proposals has been the following:

- (a) streamline the text and making the provisions easier to understand;
- (b) clarify the linkages between different Articles, with clearer cross-referencing and more consistent use of terminology;
- (c) use language used in other treaties and instruments addressing human rights and business-related harms;
- (d) take into account the views expressed by States on the wording and approach of different Articles in the Working Group's discussions since the presentation of the zero draft in October 2018 to date;
- (e) ensure an appropriate level of flexibility for State implementation of the obligations of the instrument, given the differences in legal systems, but without in any way undermining or diminishing the instrument's ability and effectiveness to achieve its objectives;
- (f) provoke new reflections and debates on the text of the instrument

Given the need for the LBI to be implemented by States with different legal structures and systems, many of the provisions in these proposals are drafted flexibly, such that the implementation be "consistent with [the State's] domestic legal and administrative systems."

This wording, which is used in other treaties, was chosen to recognize that different States will have to implement obligations differently, and it in no way suggests that the obligations may be avoided because of the existence of domestic laws that may conflict with LBI obligations.

These drafting proposals suggest some new or changed definitions to simplify the drafting and to aid understanding.

These definitions are explained in relation to the articles in which they are most relevant. However, some are particularly cross-cutting. For instance, the addition of a definition of "adverse human rights impact" and the revised definition of "human rights abuse" are proposed to draw a clear conceptual distinction between the acts and omissions that cause harm and the harm itself and to make clearer the interrelationships between these concepts. Revising the definition in this way allows the drafting of the LBI to be simplified in a number of respects.

Article 6. Prevention

The Chair's proposal for Article 6 seeks to present the substantive content of Article 6 of the 3rd revised draft LBI (on "Prevention") in a more simplified and accessible format.

The language and structures used reflect more closely the language and structures of other treaties addressing human rights and other business-related harms, and as such should be more known or "familiar" to States and all actors.

For the purposes of this drafting proposal, certain definitions in Article 1 are needed, and these are set out in the draft provided.

Article 6.1 corresponds to Articles 6.1 and 6.2 of the 3rd revised draft LBI. This Article sets out the fundamental and general obligations of States as regards the prevention of human rights abuse by companies.

Article 6.2 is designed to capture the intent of Article 6.8 of the 3rd revised draft, albeit using a wider form of wording that potentially covers more situations and contexts. This clause refers specifically to the conduct and decision-making of competent authorities. The importance of transparency more generally is reinforced by the inclusion of an additional provision in Article 6.1 of the drafting proposal.

Article 6.3 is based on Article 6.1 of the drafting proposal by making it clear that a necessary part of fulfilling States Parties' obligations will be enacting effective laws on human rights due diligence. This clause, together with the proposed new definition of "human rights due diligence" (to be included in Article 1), is intended to capture the substance of the provisions that appear at Article 6.3 of the 3rd revised draft. To streamline and simplify the drafting, it is proposed to move the enumeration of the basic and uniform elements of human rights due diligence to the new definition, and to focus, for the purposes of this provision, on the methodological issues that will need particular attention in human rights due diligence, and which should be reflected in the regulatory arrangements put in place by States pursuant to Article 6.

The content of Article 6.4 of the 3rd revised draft, on special considerations in relation to the conduct of human rights due diligence, has been integrated into the revised, streamlined set of provisions set out in Article 6.3 of the drafting proposal with three exceptions, corresponding to subparagraphs (e), (f) and (g) in the 3rd revised draft.

Sub-paragraphs (f) and (g) have been omitted on the basis that matters of technical implementation in specific contexts could be better dealt with in more targeted ways, for instance as part of implementation monitoring. Sub-paragraph (e) on non-financial reporting has been omitted on the basis that such measures are potentially encompassed by Articles 6.1 and 6.3 of the drafting proposal, when read together with the new proposed definition of "human rights due diligence."

Should States Parties decide to reference non-financial reporting explicitly in this Article, then a standalone provision would seem to be preferable, which takes account of the fact that non-financial reporting regimes may cover a wider range of matters than companies would be expected to report on as part of human rights due diligence.

Article 6.4 is concerned with situations in which harm has resulted from the activities of a third party that is controlled, managed or supervised by a business enterprise. This provision seeks to establish the core duties reflected in Articles 8.6 and 8.7 of the 3rd Revised Draft LBI. The consequent liability for failing to prevent harm is addressed in Article 8 of the Chair's proposal.

The provisions which appeared in Article 6.5 (on incentives) and Article 6.6 (on compliance) of the 3rd revised LBI have been removed on the basis that these are duplicative of the content of Articles 6.1 to 6.4 of this drafting proposal. Article 6.7 of the 3rd revised draft has been moved to article 8 on liability.

Article 6.5 sets out the basic elements of a process for ensuring that the regulatory efforts of States Parties under this Article are responsive to changing circumstances. This is a new addition, although the language used here is common to many treaties relating to the regulation of private entities to prevent harms.

Further recommendations with respect to implementation and monitoring

Human rights due diligence is a complex and context dependent exercise. There are many technical complexities which are difficult to reflect in the LBI, but which are important nonetheless.

On the question of the level of detail to include in the LBI, this Chair's drafting proposal has drawn the line at those elements of human rights due diligence that are fundamental and universal.

However, it will be possible to supplement these general provisions through further recommendations by the Committee established under Article 15, which could be tailored to specific contexts and circumstances, or to specific internationally recognized human rights, and which could build upon the guidance contained in the UN Guiding Principles and other relevant standards.

Such supplementary guidance, which could be conveyed through the format of general comments and normative recommendations provided for under Article 15.4 could make an important contribution to the future development of State and corporate practice as regards the prevention of business-related human rights abuse.

General Comments on Articles 7 and 8

This proposal seeks to present the key elements of Articles 7 and 8 in a more streamlined way so as to:

- (a) draw a clearer distinction between legal and policy elements relevant to access to remedy and those relevant to liability;
- (b) draw a clearer distinction between the procedural and substantive aspects of remedy;
- (c) give due prominence to the different sources of liability that may be relevant and to strike an appropriate balance between them; and
- (d) make the material easier to follow by grouping together connected elements in a manner that allows for a more logical narrative flow.

To streamline the drafting, the inclusion of a new definition of "relevant States agencies" is recommended as a catch-all term to cover the many and varied State bodies, agencies and services that will be relevant to implementation of the measures referred to in Article 6, ensuring access to remedy and proper enforcement of standards in accordance with Articles 7 and 8, issuing and responding to requests for legal assistance under Article 12 and cooperating with counterparts in other States Parties in accordance with Article 13.

Article 7. Access to Remedy

Article 7.1 sets out the overarching obligations of States Parties as regards access to remedy. Sub-paragraphs (a) and (b) refer to "procedural" aspects of remedy, whereas sub-paragraph (c) refers to the "substantive" aspects of remedy.

Article 7.2 builds upon Article 7.1(a) by setting out, in broad terms, the general areas that need to be addressed by a State Party in order to effectively promote access to remedy in cases of human rights abuses. It emphasizes the importance of access to information and the need to pay special attention to the needs of people at risk of vulnerability or marginalization, thus drawing in elements from Articles 7.1-7.3 of the 3rd revised draft LBI.

Article 7.3 builds upon Article 7.1(b) by setting out an illustrative list of steps that States Parties can take to address obstacles to obtaining remedies in concrete cases. These actions are intended to mirror much of the material in the 3rd revised draft relating to "obstacles," including measures to address the costs of legal action and reversing or reducing burdens of proof.

Article 7.4 builds upon Article 7.1(c) and draws attention to areas that States should be focusing on in order to increase the likelihood that victims will be able to obtain effective remedies for business-related harm in practice. It draws in elements from article 7.6 as regards enforcement of remedies, but expressed in broader terms.

This new Article 7 omits some elements from Article 7 of the 3rd revised draft on the basis that those issues are better dealt with in other parts of the instrument. For instance, it is

suggested that references to the rights of victims to be heard be addressed in Article 4 on the rights of victims, and the issue of *forum non conveniens* be dealt with in Article 9 on jurisdiction.

Article 8. Legal Liability

Article 8.1 is explicitly linked to the Chair's new proposal for Article 6, which requires States Parties to put in place appropriate legislative, regulatory, and other measures for purposes that include the prevention of human rights abuse, strengthening corporate respect for human rights and for strengthening the practice of human rights due diligence. Under Article 8.1, States Parties are required to ensure that these measures (which may take many different forms in practice) are appropriately backed up with legal liability, which should extend to both legal persons and natural persons.

Article 8.2 details the types of liability that States should consider imposing, emphasizing the importance of aligning the type of liability with the needs of victims and the gravity of the human rights abuse. Drafted in this way, the Article provides more flexibility to States (compared to Article 8.8 of the 3rd revised draft LBI) as regards how best to enforce the LBI, but still counsels in favor of more rigorous regimes, potentially backed up with penal sanctions (or their functional equivalent) for serious abuses, as well as enabling private enforcement by victims as a means of obtaining an effective remedy.

Article 8.3 addresses the establishment of liability based on the "secondary" involvement of a person in an unlawful act (often referred to as "secondary liability"). This clause broadly corresponds to the substance of Article 8.10 of the 3rd revised draft, although in this drafting proposal its scope is expanded to cover civil liability, and the terminology is more closely aligned with other treaties that address secondary liability.

Article 8.4 is concerned with rules on sequencing that seek to make one type of liability contingent upon the establishment of another, and which may undermine the goals of accountability and remedy. Under this Article, States Parties are required to remove these types of requirements to the extent that this is possible under their domestic legal and administrative systems, with a view to enhancing victim's choices about the best mechanisms to approach for their needs, and in which order. It gathers together in one place the various provisions set out in the 3rd revised draft (Articles 8.2 and 8.9) that are concerned with this problem.

Article 8.5 is concerned with the reversal of burdens of proof and requires States to consider the implications of imbalances in information and resources (especially between victims and companies). Because of the importance of these kinds of measures as a potential way of reducing barriers to remedy, they are also referenced (in more detailed terms) in Article 7.3(d) of the Chair's proposal.

Article 8.6 makes it clear that legal liability must be backed up with appropriate sanctions. This provision covers similar ground as Articles 6.7 and 8.3 of the 3rd revised draft.

Some elements of Article 8 of the 3rd revised draft have been moved or removed in the Chair's proposed text. For drafting reasons, elements of Article 8.4 of the 3rd revised draft have been moved to the suggested definitions of "remedy" and "effective remedy," as well as Article 7. For similar reasons, that part of Article 8.6 of the 3rd revised draft relating to legal duties to prevent human rights harms by controlled entities has been moved to Article 6 on prevention. While positions have differed as to the appropriateness of blanket prohibitions on certain types of defences, the concerns underlying Article 8.7 of the 3rd revised draft (which sought to ensure that human rights due diligence would not be an automatic defence to legal liability) have been addressed in two provisions designed to ensure that the allocation of evidential burdens of proof (including the possible imposition of strict or absolute liability) are appropriate in light of the key overarching objectives of prevention of harm and access to remedy (see Article 7.3(d) and Article 8.5). This is bolstered further by Article 8.2 which obliges States to ensure that decision-making with regards to the type of liability is driven by the needs of victims as regards remedy, as well as being commensurate to the gravity of the human rights abuse.

Additionally, this drafting proposal omits the requirement in Article 8.5 of the 3rd revised draft for financial security to be obtained from companies on the basis that this level of detail seemed out of place in a treaty of this kind, and is likely unworkable as a general proposition.

Comments on Articles 9, 10 and 11

The aims of this drafting proposal are

- (a) to clarify how jurisdiction is to be established and exercised in both criminal law and civil law contexts;
- (b) to address the possibility of conflicting or overlapping jurisdiction in cross border cases; and
- (c) to align the wording of Articles 9 and 10 with the language and structures used for the Chair's proposals in other articles.

Article 9. Jurisdiction

Article 9.1 sets out the basis on which States agree to establish jurisdiction in cases of human rights abuse. This clause is designed to be well-aligned to both the criminal law and civil law context, and to take account of the possibility of both public and private enforcement of relevant legal standards. Sub-clauses (a), (b) and (c) are designed to apply to both contexts. Sub-clause (d), however, is limited to the civil context. This is in recognition of the limited use, in practice, of the doctrine of "passive personality" as a

basis on which to assert jurisdiction with respect to public law offences. However, there is nothing in this drafting proposal that would prevent a State Party from asserting jurisdiction on this basis. This article retains the core elements of Article 9.1 of the 3rd revised draft LBI, and is broad enough to cover most cases covered by Articles 9.4 and 9.5 of the 3rd revised draft, which have been omitted in the Chair's proposal.

Article 9.2 explains the meaning of "domicile" as used in Article 9.1. This definition is substantially the same as that which appears in Article 9 of the 3rd revised draft, though the drafting has been streamlined.

Article 9.3 requires States to ensure that decision-making about the use of jurisdiction in specific cases, such as in response to an application to stay proceedings on the grounds of *forum non conveniens*, or for the purposes of coordinating actions in the event of overlapping or conflicting legal proceedings, respects the rights of victims in accordance with Article 4 of the LBI. Of particular relevance is Article 4.2(c) of the 3rd revised draft, which states that victims shall be guaranteed the right to effective and prompt access to justice and remedy. An important way of realizing this right is to ensure that, where there is more than one forum with jurisdiction in respect of a claim for a remedy, victims have the right to choose the forum that best meets their needs. The Working Group may consider amending Article 4 to make express reference to a victim's right to have their choice of forum respected.

Article 9.4 obliges States to work together to resolve challenges that may arise when judicial proceedings are commenced in more than one State Party with respect to the same human rights abuse.

Some elements of Article 9 of the 3rd revised draft have been removed in the Chair's proposed text. Article 9.4 (on connected claims) is omitted on the basis that, for the rare cases that do not come within the bases of jurisdiction specific in Article 9.1, these matters are best governed by principles of domestic conflicts of law, and there is nothing in the LBI to prevent a State from taking jurisdiction on this basis in any event. Article 9.5 (on *forum neccessitas*) is omitted on grounds of the substantial overlap of this basis of jurisdiction (as defined in the 3rd revised draft) and the bases of jurisdiction set out in Article 9.1.

Article 10. Limitation Periods

Article 10 is aimed at ensuring that there are no limitations periods for proceedings relating to human rights abuse that amounts to a war crime, crime against humanity, or genocide, and that in other cases any limitations periods reflect the gravity of the abuse, are fair in light of the circumstances, and are in accordance with the rights of victims set out in Article 4.

The Chair's proposal retains the core elements found in Article 10 of the 3rd revised draft LBI, but drafted in a way that should be less vague and more acceptable to States.

Article 11. Applicable law

Article 11: Article 11 is recommended to be deleted on the basis that it covers matters that are best left to be dealt with under prevailing domestic rules on conflicts of law. Aside from this, Article 11 of the 3rd revised draft LBI is problematic in several respects (as highlighted by several States during past sessions of the IGWG) due to

- (a) the suggestion that the criminal law of one State could be applied within the territory of another, and in a manner that appears to undermine fundamental principles of territorial sovereignty; and
- (b) the suggestion than victims could unilaterally decide which system of law could apply (potentially in both civil and criminal contexts), and the implications of this for considerations of fairness, predictability and due process more broadly.

Comments on Articles 12 and 13

The 3rd revised draft LBI contains detailed provisions on mutual legal assistance, with an apparent emphasis on criminal proceedings. While provisions of this kind appear in several treaties relating to the detection, investigation and prosecution of specific types of transnational crimes, this level of detail departs from the approach to mutual legal assistance taken in human rights treaties, which typically affords more flexibility to States.

This drafting proposal therefore has three main aims:

- (a) To streamline and simplify the wording on mutual legal assistance and international cooperation towards a format that more closely resembles the approach taken in human rights treaties;
- (b) To ensure that the provisions on mutual legal assistance are as relevant and appropriate to enforcement through civil and administrative proceedings as they are to enforcement through criminal proceedings; and
- (c) To make a clearer distinction between cooperation with respect to enforcement in cross-border cases, and international cooperation associated with advancing the aims of the LBI more generally.

Article 12. Mutual Legal Assistance

Articles 12.1 and 12.2 set out the fundamental obligations of States Parties as regards mutual legal assistance using wording drawn from provisions found in several human rights treaties. An adjustment has been made to this fairly standard wording to reflect and reinforce the important role that civil and administrative proceedings are expected to play in the enforcement of measures established by States under this LBI.

The language used is designed to be sufficiently broad to capture the essence of the provisions that appeared in Articles 12.1-12.3 of the 3rd revised draft LBI, though in a much more truncated form.

In the interests of streamlining the text, the provisions that previously appeared in Article 12.4 (on the procedure for making requests for mutual legal assistance), Articles 12.10-12.11 (on recognition of foreign judgements) and Article 12.12 (on refusals of requests for mutual legal assistance) have been omitted on the basis that these requirements would be more appropriately covered by the treaties referred to in Article 12.2. The material covered by Articles 12.5-12.9 and Article 12.13 of the 3rd revised draft has been omitted on the basis that these detailed requirements, while suited to treaties relating to combatting specific transnational crimes, are overly prescriptive and out of place in the context of a human rights treaty of this kind.

Article 12.3 concerns legal and regulatory cooperation between States. The wording covers various forms of legal cooperation with a view to enhancing the effectiveness, responsiveness and capabilities of regulatory agencies with responsibility for implementing the domestic measures contemplated by the LBI. It also aims to capture the idea implicit in the old wording of Article 13.2 that there should be greater cooperation between domestic regulatory agencies for the purposes of knowledge sharing.

Article 12.4 sets out the various practical supporting measures that are or may be important for ensuring that the various modes of mutual legal assistance and cooperation encompassed by Article 12 can operate as intended.

Article 13. International cooperation

Article 13.1 sets out the requirements of States Parties regarding international cooperation in terms that closely mirror corresponding provisions in other human rights treaties. The second sentence (on agency level cooperation) covers similar ground as Article 13.2(a) of the 3rd revised draft LBI.

Article 13.2 sets out some specific objectives for international cooperation, drawing from Article 13.2 of the 3rd revised draft and reorganizing and reframing key items to give them a more logical flow.

Article 13.3 sets out requirements as regards financial, technical and other assistance. It is a short form provision that mirrors the language found in other human rights treaties.