# Revised Draft of the Business and Human Rights Treaty

Submission to the Chair-Rapporteur of the OEIGWG

7 July 2020

## Background

In the report of the 5th session of the open-ended intergovernmental working group (OEIGWG) negotiating an international legally binding instrument in the field of business and human rights (LBI), the Chair-Rapporteur recommended "regional and political groups, intergovernmental organizations, national human rights institutions, civil society organizations and all other relevant stakeholders, as appropriate, to organize consultations at all levels, including in particular at the regional and national level, with a view to exchanging comments and inputs on the revised draft legally binding instrument".

In line with this recommendation, the Public Law and Human Rights Forum at City University of Hong Kong and the Law Futures Centre at Griffith University, Brisbane, Australia organized an Asia Pacific virtual consultation on 23 June 2020. About 45 participants representing academics, lawyers and civil society organization registered for the consultation. About 30 participants from several Asia Pacific countries discussed how to improve the revised draft of the proposed LBI.

## Specific Comments

Based on views expressed during the consultation, the organisers would like to provide the following specific suggestions for kind consideration of the OEIGWG's Chair-Rapporteur. If any further information is needed about any of these suggestions, please contact Sarah Joseph (sarah.joseph@griffith.edu.au) or Surya Deva (suryad@cityu.edu.hk).

### Preamble

- The purpose(s) of the LBI should be mentioned in the Preamble.
- The gender perspective should be deeply embedded into the LBI throughout, rather than making sporadic references to gender / women in certain provisions.
- A reference should also be made to the Convention on the Rights of the Child.

### Article 1

- The definition of 'victims' should include survivors as well. Moreover, the term 'alleged to

have suffered' violation/abuse seems to devalue the notion of 'victims'. One should also consider how to differentiate between victims and other affected stakeholders including communities.

- The meaning of the word 'person' should be defined to make it explicit that it refers only to natural (and not legal) persons, unless expressly indicated otherwise.
- The definition of 'human rights abuse or violation' should make it clear that the relevant harm referred to is characterisable as a breach of a relevant human right.
- The definition of 'business activities' should make an explicit reference to state-owned enterprises, public-private partnerships, and international financial institutions.
- The terminology / definition of 'contractual relationship' should be replaced with that of 'business relationship' under the UNGPs and include informal supply chains.
- The definition of 'business activity of a transnational character' may be moved from Article 3 to Article 1.

Article 2

- Although no disagreement with the stated three purposes was raised, it was observed that the LBI was perhaps trying to achieve too much in one instrument. This consideration should be kept in mind by the drafters of the LBI to keep it manageable.
- Consider whether the purpose of providing and ensuring victims' effective access to remedies should be designated a stand-alone purpose, rather than clubbed with other goals under b) and c).
- Another purpose of the LBI should be to prevent collusion or complicity of state agencies with businesses in human rights abuses.

Article 3

- Diverse views were expressed about scope of the LBI, both in relation to whom it should apply and which human rights it should include. There was, however, a consensus that the current draft of Article 3 needs to be revised to make it workable.
- The term 'busines activities of a transnational character' is ambiguous: it will be difficult to decide in practice which activities are (and are not) of a transnational character. On the other hand, calls to apply the LBI to 'all' business enterprises are perhaps made because lawyers struggle to distinguish between TNCs and other businesses, but this would make the LBI too broad.
- One option may be to apply the LBI to all businesses enterprises but then differentiate in terms of the nature and extent of their precise obligations. For example, under the UNGPs, the scale and complexity of the means through which businesses meet their responsibility to respect human rights may vary as per their size, sector, operational context, ownership, structure and the severity of adverse human rights impacts.
- The term 'all human rights' in Article 3(3) is too broad, e.g., not all states have ratified all human rights treaties.
- As a potential solution to overcome this broadness, several options were proposed: (i) refer to all human rights contained in international human rights treaties ratified by state parties; (ii) use the term 'all internationally recognised human rights' but do not define it so as to benefit from constructive ambiguity and the gradual evolution for human rights; and (iii) provide a

definition of human rights in relation to an illustrative list of instruments such as the none core human rights treaties, eight fundamental ILO Conventions, and the Rome Statute.
- The term 'human rights' should include the right to a clean, healthy and sustainable environment.

Article 4

- This provision should document rights of all victims, though it is not necessary to mention specifically all vulnerable, marginalised or minority groups.
- Rights of victims in Article 4 should be separated from corresponding obligations of states. For example, there should be a distinct article that sets out state duties to investigate human rights abuses in the context of business activities.
- Article 4(5) should also include 'accessible'. This would then obligate courts and non-judicial mechanisms to ensure effective access (including for persons with disabilities) through innovative use of technologies or otherwise.
- Article 4 should enable victims to seek remedies through non-state-based grievance mechanisms if they wish to do so.
- There should be a specific provision to safeguard victims from strategic legal action against public participation (SLAPP). Victims should also be protected against intimidation and harassment inflicted by businesses acting in collusion with government bodies or law enforcement agencies.
- The LBI should address how to provide effective remedies to victims in situations when state agencies are in collusion / complicity with the relevant business enterprises.
- Reversal of burden of proof in Article 4(16) is very important. However, it is better if this is done by the legislature rather than by courts on a case-by-case basis, as is presently implied. For this reason, such a provision may be more appropriate within articles related to liability frameworks, rather than Article 4.

Article 5

- Effective prevention is critical because there are so many barriers in seeking remedies after abuses have taken place.
- The current draft is better aligned with human rights due diligence (HRDD) provision of the UNGPs than its predecessor. However, there is still scope for refinement. For example, the term 'contractual relationships' should be replaced with 'business relationships'. Also, remediation – which is part of Pillar II of the UNGPs – is not included in Article 5.
- Article 5(2) should also require businesses to conduct regular dialogue with civil society organisations.
- Article 5(3)(b) must include 'consent' (not merely consultation) with indigenous peoples as part of the free, prior and informed consent (FPIC).
- Article 5(3)(e) should include sexual harassment and gender-based violence, as risks of such abuses are higher in conflict-affected areas.
- Article 5(3) should specifically mention taking effective measures to comply with occupational health and safety regulations, including in supply chains.
- Heightened HRDD should be required of businesses operating in hazardous sectors.
- HRDD may be considered as a potential defence to businesses in certain situations.

- Many small and medium size enterprises (SMEs) may not be a position to conduct mandatory HRDD, so some flexibility should be built into legislation at the national level.
- Article 5(5) contains a vital provision to safeguard against corporate capture. There should also be provisions to overcome close state-business nexus, undermining both effective HRDD and corporate accountability.

Article 6

- There is much that is good about Article 6. It is appropriate that it differentiates distinct consequences that should flow from distinct types of harms, including a failure to prevent provision, versus a provision focussing upon serious crimes. The liability of legal persons is emphasised without prejudice to the liability of natural persons. It is also crucial that the LBI is explicit in the need for remedies to be effective, proportionate and dissuasive. There are, however, certain problems or points of contention within Article 6.

- The order of provisions in Article 6 could be more systematic. At present, paragraphs addressing state obligations to establish liability frameworks are interrupted by paragraphs on remedies, raising uncertainty as to how they interrelate.

- Article 6(4) requires 'effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims'. This drafting could be refined as not all states characterise the imposition of sanctions (particularly under some domestic criminal or quasi-criminal law) as formally directed toward victim benefit.

- The 'failure to prevent' provision in Article 6(6) is arguably too wide, considering the current definition of 'contractual relationship' under Article 1. This provision imposes liability on a natural or legal person for failing to prevent a harm *even where they did not have the capacity to direct the related entity not to behave a certain way and in circumstances where the abuse may not be connected to a person's business other than being committed by a contractual partner.*

- Article 6(7) leaves to the state the decision as to whether corporate liability shall be criminal, administrative or civil. It could be stronger in demanding liability be criminal except in such states where corporate criminal liability is not recognised and on the proviso that they ensure sanctions remain effective, proportionate and dissuasive (see OECD Bribery Convention). Another model, which is less rigorous, is from Article 8 of the ILC Draft Crimes Against Humanity Convention.

- Regarding Article 6(7), it would be preferable to explicitly add liability for complicity. Given the nature of the crimes, corporate liability is more likely to arise with regard to complicity than direct commission.

- It is not clear how the language in Article 6(7) relates to the language in Article 8(1) regarding statutes of limitations. This should be clarified.

- In Article 6(9), the reference to both participation and complicity is unnecessarily confusing. In this respect, an appropriate model could be Article 6(2) of the ILC Draft Crimes Against Humanity Convention.

Article 7

- Article 7 does not cover claims brought by States, which is something that should be considered.

- The definition of "domicile" for legal persons is good, but it is problematic and artificial with regard to natural persons.

- Universal jurisdiction should be considered with regard to some extreme human rights abuses, such as a subset of those offences mentioned in Article 6(7). In any event, consideration should be given to including the duty of states to extradite or prosecute offenders charged with serious crimes and found on a states' territory. In this respect, an appropriate model could again be Article 7 of the ILC Draft Crimes Against Humanity Convention.

- The LBI must incorporate a mechanism to deal with the issue of parallel proceedings. Alternatively, there is at the very least a need for a process of consultation between states where more than one claims jurisdiction (see, e.g., OECD Bribery Convention). However, a specific provision is strongly recommended.

- There seems to be a potential inconsistency between Articles 7(1) and 4(8). Is one provision subject to the other (most likely 4(8) being subject to 7(1))? Any hierarchy should be made explicit.

Article 10

- Designation of a 'central authority' by states under Article 10(7) should be done in consultation with civil society organisations.
- Article 10(10)(b) is different to most *lis pendens* provisions because it defers to the judgment of the court which is first pronounced. Most *lis pendens* provisions defer to the judgment of the court first seized. The problem with the criterion in Article 10(10)(b) is that it incentivises substantive litigation in two forums and a race to produce a judgment. The normal criterion stops proceedings in courts which are not first seized.
- It would be desirable (as a matter of consistency) to use the same *lis pendens* provision in the judgments rules as whatever is placed in the jurisdiction rules (see above regarding parallel proceedings).
- The allowance for refusal of mutual legal assistance in Article 10(11) is not reflected in the OECD Bribery Convention or the Draft Crimes Against Humanity Convention. It is preferable to follow those models.

Article 11

- Article 11(1) should incorporate the language of compulsion, and establish an overarching duty of cooperation.

Article 12

- Article 12(6) raises potential issues of inconsistency between this LBI (once it comes into being) and bilateral investment treaties (BITs) and regional/global trade agreements, including those under the auspices of the WTO. While this provision would bind states, it is not clear how they would bind relevant decision-makers such as WTO panels and investor-state arbitral tribunals. Further drafting should restrict the scope for BITs' interference with the implementation of this LBI, particularly under so-called umbrella clauses. It should be clarified that state sanctions against corporations and private claims by victims of human rights violations are not concerned with the notion of 'investments' under BITs (unless of course they are discriminatory, arbitrary and constitute a taking, directly or indirectly) and hence do not give rise to BIT-related claims on the part of investors.
- The LBI should also require states to manage adverse impacts of multilateral trade and finance institutions as well as the 'ease of doing business index' on their human rights obligations.

Other comments based on a case study

The following other strategies could improve business compliance with human rights:

- Increase in powers of host states to make claims to recover funds from home states of businesses where business has not complied with the LBI and this has resulted in losses for the host state.
- Incentives for businesses higher in the supply chain to be joined in actions, with proportional liability.
- Encouraging states to consider the imposition of a wide range of sanctions where legal persons breach human rights norms.
- Provisions for creative remedies which reflect the problems at the heart of non-compliance such as collective agreements to create trust in supply chain management.
- Provision for non-financial remedies, since financial remedies have been shown not to act as a disincentive for all business. One such non-financial remedy is suspension of intellectual property rights in egregious human rights abuse. Other non-financial remedies include stopping access to import licences or disallowing legal persons from state tenders.
- Incentives for civil society actors to represent and assist vulnerable affected communities such as *qui tam* action.
- Incentives for state inspectorates to monitor and enforce law.