

Written submission

In response to the invitation for States and other relevant stakeholders to submit their comments and proposals on the draft legally binding instrument, as per A/HRC/40/48, para 91 (a)

Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

February 2019

Introduction

1. Franciscans International (FI) wishes to express its gratitude to the Chairman-Rapporteur of the Open-ended intergovernmental working group on transnational corporations and other business enterprises (TNCs and OBEs) with respect to human rights (hereafter the IGWG), for his invitation to submit comments and proposals on the draft legally binding instrument (hereafter draft LBI) to regulate in international human rights law the activities of TNCs and OBEs.

2. As a member of the civil society coalition in favour of a future LBI, the “Treaty Alliance”, and as a member of the international network for economic, social and cultural rights, “ESCR-Net”, FI has been one of the human rights NGOs supporting the process towards such a future instrument since its inception in 2014. The main reason for FI to promote such a process is the need to improve accountability for and protection against human rights violations occurring in the context of business activities. This need is exemplified by FI’s day-to-day work with local and national partners living and working with communities affected by human rights abuses committed by business enterprises.

3. In this submission, FI does not provide a comprehensive reaction to the zero draft LBI. Rather, FI is sharing its positions and views on the following major questions: 1) the issue of the scope of the future instrument; 2) the issue of jurisdiction; 3) the issue of liability; and 4) the institutional arrangements. In doing so, the present submission is reiterating the positions taken by the organization in its written and oral contributions to the IGWG sessions in the past years.¹

¹ Among others, this submission is based on FI’s Submission to the 1st Session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, from June 2015. Accessible at: https://franciscansinternational.org/fileadmin/media/2017/Global/UN_Work/FI_submission_for_Treaty_on_TNCs_and_other_Business_Enterprises.pdf

4. In general, FI is convinced that the objective of the future instrument which is to regulate, in international human rights law, the activities of TNCs and OBEs,² shall always remain the priority concern of negotiating parties. Therefore, any future instrument must be based and build upon already existing human rights standards towards an always greater protection, addressing today's obstacles to the realization of human rights for all without discrimination.

5. The discussions and negotiations taking place in the IGWG represent a key and timely opportunity to finally develop binding, international human rights law rules for a better protection of rights-holders against harms, generated by business activities, to their human rights and to the environment on which they depend. Therefore, FI thinks that this opportunity must not be missed.

I. Scope

6. The scope of the future instrument shall thus cover the broadest ground possible, fill as many legal gaps as possible and hence live up to the legitimate expectations that people have to be effectively protected against the negative impacts of business activities. In particular, this means that the future legally binding instrument shall have a comprehensive coverage/application in terms of the rights covered, but also in terms of the business actors that will be subject to the regulation prescribed by the instrument.

The future instrument shall cover all human rights

7. FI is convinced that everything that would fall short of a comprehensive coverage as far as the catalogue of human rights is concerned would be a missed opportunity and a denial of the interdependence of the rights in the lived experience of victims. A comprehensive scope in terms of rights covered is also the only way to avoid creating a hierarchy of rights or of their abuses. All rights being indivisible, their equal protection is an inherent feature of an effective international human rights system.

8. As FI already stated in its 2015 submission: "The principles of universality, indivisibility, and interdependence of all human rights in business-related issues should be guaranteed in the Treaty. Because of the interlinkages of human rights abuses committed by business enterprises, a Treaty that would only cover gross human rights violations fails to ensure protection to all victims because it would exclude most of the human rights abuses committed by companies (including the adverse impact on rights to food, housing, water, health, self-determination, and adequate standard of living). In order to ensure full protection, the Treaty should refer to all human rights, including the impacts on lives and health of people caused by environmental damage."

² Human Rights Council Resolution A/HRC/RES/26/9, from 14 July 2014, paragraph 1.

The future instrument should cover all businesses

9. FI acknowledges that there are significant gaps in human rights protection due to the lack of regulation and accountability of TNCs as well as to the ineffective application of human rights law to development, investment, and trade agreements. TNCs are cross-border by nature and have a high degree of mobility and fluidity in relation to the country of incorporation, production, management, and financial investment. Their role in the global market is increasing and TNCs are able to escape accountability by placing themselves in-between legislations and taking advantage of territorial limitations of jurisdictions. Therefore, differential consideration of the modus operandi of TNCs should be clearly addressed as one of the main elements within the scope of the future instrument.

10. However, a future instrument that would focus only on TNCs would fail to effectively address the reality of the global phenomenon and thus limiting the scope to TNCs would undermine the very objectives of the future instrument. As detailed by FI in its 2015 submission, several arguments support that the scope must include all business enterprises:

- The human rights principle of non-discrimination requires that all business enterprises, irrespective of their size, sector, and the domestic or global nature of their operations be held responsible for respecting human rights throughout their operations. Victims of abuses by local business companies are entitled to the same human rights protection as victims of abuses by TNCs. In other words, if a LBI is developed for the purpose of protecting those who are negatively impacted by business activity, it should not matter whether the business enterprise is a TNC or a domestic company. For the victim, the form of corporate organization is irrelevant.

- Much of what is referred to as “domestic business” is in fact part of a globalised chain and is fully integrated as a key piece of the international business architecture. Should domestic companies not fall under the scope of the LBI, this could imply the exclusion of the supply chain that feeds the international market but is technically considered national. If there are no rigorous provisions regarding human rights due diligence in the supply chain, those companies would fall outside the scope of the LBI.

- The size and magnitude of many domestic companies enable them to significantly shape policies for their own profit and advantage. Their impact on human rights can be comparable to TNCs.

- Millions of people across the world, especially in jurisdictions with low enforcement of laws and regulations, experience human rights abuses in the workplace. Most domestic legal systems fail to adequately address issues of human rights abuses by business enterprises. The LBI could contribute to create a level playing field and fill in national governance gaps.

11. FI is of the view that, to go forward, negotiating States will need to strike the right balance between addressing the key and specific regulatory, protection and accountability gaps in the context of transnational business activities, on the one hand; and the concern that FI shares with many allies not to create conditions for new or increased impunity.

12. In that regard, the language of the footnote to the PPs of Resolution 26/9 is telling about the complexity of the matter. The footnote opposes transnational activities: “businesses with transnational character in their operational activities”, to “local businesses registered in terms of relevant domestic law”. This can be confusing as we have on one hand the activities and on the other the nature or organisational structure and registration of the business.

13. Against this backdrop, FI has a number of remarks and proposals in relation to the issue of the scope of the treaty as proposed in Article 3 of the zero draft, read in conjunction with the definitions of Article 4 of the same zero draft. The way the scope will be defined will have implications for virtually all other provisions of the future legally binding instrument. FI is thus giving in this submission special and extended attention to these fundamental provisions.

What the zero draft is saying

14. As it is, Article 3.1 (and the definition of Article 4.2) can be considered as an attempt to be faithful to the mandate given by the Resolution 26/9, including the footnote, while trying to take into consideration the issues and preoccupations raised by various delegations in past sessions about an exclusion of local businesses, or activities without transnational character (not taking place in more than one jurisdiction).

15. However, the definition in Article 4.2, as it is currently trying to be as broad as possible in capturing what could be considered having a transnational character, could have implications for actors that may not be the priority focus, while missing others. In particular, by excluding certain types of activities from the realm of the future instrument, a future LBI could:

- a) “miss” important violations of human rights that are not well covered under domestic law or caused by activities happening “only” in one jurisdiction;
- b) put an extra burden on alleged victims who would have to prove the transnational character of the activities at the origin of the violations/harm (and we know how difficult that may prove);
- c) create separate regimes and asymmetric legal situations (eg. in criminal liability- just on the ground of the nature of the activities of the perpetrator or defendant - or concerning due diligence).

In addition, the definition given in Article 4.2 has potential for unclarity/uncertainty and room for (mis) interpretation (eg. what are for-profit economic activities other than commercial or productive ones?).

16. As far as Article 3.2 of the current zero draft is concerned, there are issues with the scope concerning the rights covered. FI considers that it is positive that the language of Article 3.2 is broad in saying all international human rights and those rights recognized under domestic law. However, some clarity may be needed. In particular, it could be subject to interpretation

what international human rights are. There may also be rights or limitations thereof that are enshrined in domestic law, which may not be compatible with international human rights law. And catalogues of rights may then be very different between the various States/jurisdictions that could be concerned by a case of violations involving transnational business activities.

Specific proposals for future drafts

17. Taking into account these issues, FI would like to make following suggestions to be considered for future drafts LBI. These proposals are not mutually exclusive.

Provisions to address the issues raised by the exclusion of certain types of activities are needed

18. There could be a general restatement of State obligations to protect and, at the same time, of the responsibility of businesses to respect human rights in the body of the text (not only in the preamble but in the first articles of the future instrument). For that, existing wording in other international instruments may offer interesting inspiration. Thus, a revised draft LBI could include provisions safeguarding against a misinterpretation of the future LBI to undermine the existing international human rights obligations, and in particular the obligation of States to protect human rights. This obligation requires to prevent the violation of any individual's rights by any other individual or non-State actor; or when the infringement occurred, to preclude further violations and to guarantee access to legal remedies for victims. Such restatement should also safeguard against any interpretation of the future LBI that would undermine the responsibility of businesses to respect human rights as internationally recognised, including in the UN Guiding Principles on Business and Human Rights.³

19. An alternative or complementary clause that could be added in the first articles of a revised draft LBI could be adapted from other instruments⁴ and ensure that provisions that should definitively apply to all businesses are explicitly appearing as such.

³ Part II of the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council in June 2011 in its resolution 17/4.

⁴ See for instance Article 3 of the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea, of 10 December 1982, relating to the conservation and management of straddling fish stocks and highly migratory fish stocks, that adapted to the purpose of the future LBI could read:

"1. Unless otherwise provided, this [instrument] applies to business activities of a transnational character, that go beyond single national jurisdictions, except that Articles apply also to the business activities within single national jurisdictions.

2. In the exercise of its sovereign rights for the purpose of regulating business activities within single national jurisdictions, the State shall apply mutatis mutandis the principles contained in Article(s)...."

Clarification is needed concerning the rights covered by the future LBI

20. The current Article 3.2 of the zero draft LBI could follow the wording of the UN Guiding Principles on Business and Human rights that refer to a minimum package of core internationally recognized human rights, composed of the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.⁵

21. Nevertheless, FI considers that this is a minimum package that could be usefully complemented by a safeguard, specifying that, it should be without prejudice of States international human rights obligations under the treaties they are parties to. In addition to this, to address the potential contentious issue around the rights recognized under domestic law, various conventions⁶ can serve as inspiration for useful provisions that could be added in a revised draft LBI, reserving the right of State Parties to adopt domestically stricter and additional legal protections and rights in compliance with international human rights law.

Clarification is needed concerning the definition about victims

22. The definition in the current Article 4.1 of the zero draft LBI makes clear that, in the rest of the text, victims should be understood as alleged victims. However, for more clarity and legal certainty, “alleged” could be added in relevant places all through the revised draft LBI.

23. Last but not least, with regard to the definition in Article 4.1, FI would recommend specifying that “natural persons” are meant in this definition (and not only “persons”),

⁵ Principle 12 of the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by the Human Rights Council in June 2011 in its resolution 17/4.

⁶ See for instance: Article XIV of the Convention on International Trade in Endangered Species of Wild Fauna and Flora - Effect on Domestic Legislation and International Conventions: “1. *The provisions of the present Convention shall in no way affect the right of Parties to adopt:*

(a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

*(b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.”; or Article 34 of the UN Convention on Transnational Organized Crime - Implementation of the Convention: “1. *Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.**

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party 36 independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.”

because of the way that the word “person” is used all through the document, otherwise meaning most of the time both a legal and natural person. This would be in line with the rules of procedure of the Rome Statute⁷ for instance.

II. Jurisdiction

24. One of the most significant legal gaps to be filled towards more accountability for human rights violations occurring in the context of business activities is the lack of regulation of such activities transcending borders, which includes the issue of access to justice for victims of these violations across jurisdictions.

25. For this reason, it is FI’s conviction that a very specific attention to the issue of jurisdiction in its adjudicative aspect shall be paid in the future LBI. In that regard, FI welcomes that Article 5 of the zero draft LBI is proposing a broader basis for the exercise of adjudicative jurisdiction that is not, among others, constrained to an essentially territorial approach. It is important that victims of human rights violations that occur in the context of business activities, especially when these have a transnational character and involve a complex fabric of business entities, have the possibility to turn not only to the courts in the host State of the business activities but also, as relevant, to the courts of the home State of the TNCs involved or to courts in States that have a reasonable link and sufficient connection⁸ with the actions or omission that are at the origin of the violations and hence constitute a reasonable basis for their courts to exercise jurisdiction.

26. Considering this, the conception of “domicile” that is proposed in Article 5.2 enables to encompass a good share of these different scenarios. However, the exact wording of the list of elements that may constitute “domiciliation” for the purpose of the treaty may benefit from further refining and consideration in a future revised draft LBI.

27. In addition, a revised draft LBI would benefit from a consideration of the issue of jurisdiction and of the current Article 5 in conjunction with other provisions including those currently under Article 8 (Rights of Victims) and under Articles 11 and 12 (respectively Mutual Legal Assistance and International Cooperation). This is obviously of particular relevance to address possible conflicts between various domestic laws and between different jurisprudence or judicial proceedings.

28. In general, the way the issue of adjudicative jurisdiction and of liability will be handled in the future LBI will be of paramount importance to fight against the denial of justice that victims of human rights violations often face in the context of business activities. In that perspective, FI joins the many statements that have already been made in favour of an inclusion of provisions addressing the (mis) use of the doctrine of *forum non conveniens* that

⁷ Rule 85, Rules of Procedure and Evidence of the Rome Statute, Definition of victims.

⁸ As defined for instance by the *forum necessitates* doctrine.

remains a major obstacle to access to courts in the home States of TNCs by victims of human rights abuses who cannot rely on effective remedies in their own domestic judicial system either.

29. In that regard, FI notes that there have been encouraging legal and judicial developments that could support the inclusion of provisions towards the prohibition of the use of the *forum non conveniens* doctrine in cases of business abuses.⁹ Clear provisions in the future LBI towards the prohibition of the use of the *forum non conveniens* doctrine will also allow to avoid ad hoc and uncertain interpretations of what constitutes a more suitable alternative forum and how to assess the ability of another (mostly the court of the host State) forum/jurisdiction to deliver justice to victims and guarantee their right to an effective remedy as defined by international human rights law.

III. Liability

30. In its Article 10 on liability, the zero draft LBI is making the link between liability and the issue of jurisdiction (especially in a transnational, extraterritorial dimension), by starting with the following provision: "*State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character*". In doing so, the zero draft LBI tries to address the reality of widespread impunity of business actors involved in human rights violations but who escape liability because of normative and jurisdictional barriers that prevail due to the complexity of the structures of global economic groups, networks and supply chains; or because of the inadequacy of domestic liability and procedural law regimes.

31. The issue of liability, especially if considered comprehensively in civil, criminal and administrative law, is extremely complex. This complexity is illustrated by the wording of the current Article 10 of the zero draft that aggregates a whole range of issues, some of which may be better dealt with, for the sake of clarity, in other parts of a revised draft LBI (parts concerning jurisdiction or access to justice for instance). Keeping this mind, FI would like to limit itself in the present submission to highlight two main related points regarding the issue of legal liability: the link between due diligence and liability; and the expansion of the regime of liability to address liability within complex economic structures and supply chains.

⁹ See for instance, *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401 - Canadian court accepting to exercise jurisdiction in a case of forced labour in Eritrea involving a Canadian mining company who through a chain of subsidiary corporations owned 60% interest in the mine where the human rights abuses occurred; see also the very recent *Budha Ismail Jam v. International Finance Corp.*, No. 17-1011 - U.S. Supreme Court decided that international organizations, here the International Finance Corporation of the World Bank Group can be sued in U.S. courts for their commercial activities and investment projects harming communities and the environment abroad.

32. The relationship between Article 9 and Article 10 of the current zero draft LBI, and more precisely between the issues of due diligence and liability, should be considered further in a revised draft LBI. Learning from concrete cases of human rights violations in the context of business activities, including experiences with impact assessments as an element of due diligence processes, FI is convinced that the risk is too high that due diligence processes become or remain purely procedural measures whereby companies may only “tick the box” to be shielded against liability. In addition, due diligence and assessment processes are often delegated by companies to other specialized private actors, which often raises issues of independence and impartiality of these processes and impact assessments.

33. For these reasons, it is appropriate that the zero draft LBI provides for liability for the failure to comply with due diligence obligations (as per current Article 9.4). Nevertheless, a revised draft LBI will have to clearly establish that carrying out due diligence processes shall not be a guarantee to escape liability. Within complex business groups and supply chains, addressing impunity and denial of justice requires to address the issue of liability, notably by expanding the regime of civil, administrative and criminal liability. The application of strict liability (i.e. even in the absence of fault or intent), including vicarious liability, in cases involving mother companies for instance should be considered and addressed.

34. Article 10.6 lists already an interesting package of scenarios in which a business actor may be held liable for violations occurring within its group or supply chain. However, FI is of the view that it will be important to deal more with the specific issue of control, which could benefit from further discussions and elaboration. In particular, it could be useful to review and, as appropriate, find inspiration in other areas of international law and in private law. To mention only one example, it could be useful to consider elements of the concept of negative control in trust law that establishes the possibility to oppose and control decisions/conducts by an operating entity in a trust by one of the investors not based on the level of assets/ownership but based on the powers to veto as established through governance and other documents.

IV. Institutional Arrangements

35. Articles 14 and 15 of the zero draft LBI are proposing provisions concerning the monitoring system of the implementation of the future LBI. Although it is a general principle of law and an obligation of States who ratify or accede to an international treaty to implement its provisions in good faith, FI welcomes the inclusion of provisions establishing national implementation and monitoring mechanisms in the text of a future LBI as in other existing instruments such as in the Convention of Rights of Persons With Disabilities.

36. In particular, FI welcomes that Article 14 of the zero draft LBI follows existing international human rights law standards and creates the treaty body, that is to say the committee, that shall monitor the implementation of the treaty by States parties through a procedure of reviewing reports of these States parties. Article 14 also specifies that the

committee shall have an interpretative role and, like any other already existing human rights treaty bodies, shall be able to clarify provisions of the future LBI and guide States in better complying with their obligations under the LBI.

37. As far as it is concerned, Article 15 proposes provisions on the conference of parties. FI considers this explicit inclusion interesting. It corresponds to the current standard set by recent human rights treaties.¹⁰ In particular, it is interesting that Article 15 provides for the regular meetings of the States parties, which would give a formal forum for necessary amendments and for the vote of evolving provisions if needed be.

Conclusions

38. FI considers that the zero draft LBI prepared by the Chairperson-Rapporteur provides an interesting basis for discussion. It tries to concentrate on fundamental gaps in the current international legal framework by focusing on improving access to justice for victims and by tackling issues linked to the operations of businesses across borders.

39. At the 4th session of the IGWG in October 2018, the discussions showed that negotiating on the basis of a text can help States to work towards useful legal solutions, and to "demystify" and transcend important political issues. Undoubtedly, much more work is needed and a revised draft LBI will have to take into due consideration the legitimate concerns as well as the concrete proposals that were expressed by the participants at the 4th session. In particular, as illustrated by the present submission, one of the major building sites that will require work and attention is the fundamental issue of the scope of the future LBI. With progress on the scope and clarity on that matter, the review of any other provision of the draft LBI will be much more effective and coherent, based on real life experiences of victims of human rights violations in the context of business activities.

¹⁰ See for instance Article 40 of the Convention of Rights of Persons With Disabilities.