

Written submission

In response to the invitation for States and other relevant stakeholders to submit additional textual suggestions on the revised draft legally binding instrument following the 5th session of the

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

March 2020

Introduction

1. 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”, Franciscans International (FI) is pleased to respond to the call of the Chair-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 OEIGWG), to submit additional textual suggestions on the revised draft legally binding instrument (hereafter revised draft LBI) to regulate in international human rights law the activities of TNCs and OBEs.

2. FI very much welcomes the constructive and substantive engagement of an important number of States during the 5th session of the OEIGWG that took place on 14- 18 October 2019. Based on a further elaborated draft by the Chair-Rapporteur, this engagement of States on concrete textual proposals for a future LBI represents a key step in the process.

3. Before going into specific comments including textual proposals, FI wishes to emphasize how vital this negotiation and more generally the regulation of business conduct and activities are for better protection and fulfilment of human rights. This is vital because of the privatization of public services and more generally the increasing and all-pervading participation of the business sector in the provision of goods and services that are either a human right in and of themselves like education, housing or health, or that play a key role in the realization of human rights like transportation. This participation takes place through various modalities, such as delegation of services, sub-contracting or public-private partnerships.

4. However, this is also vital because of the role that private actors including businesses are playing in the implementation of global agendas that the UN and States have adopted, including the 2030 Agenda and its Sustainable Development Goals, and the climate commitments under the UNFCCC and Paris agreement. FI and other civil society actors are deeply concerned at the human rights implications of this role and, in particular, what this means for the policy-making space for States who are the duty-bearers and shall guarantee the realization of human rights. FI also observes with great concern the fact that each of these agendas gives further opportunities for businesses to

develop projects that still too often contribute to the violations of a whole range of human rights of the local communities hosting them, while not delivering on their promised positive impact for “greener” solutions and for development that benefits the population. These projects and their negative impacts continue in a context of widespread impunity and not rarely with the contribution of public funds.

5. Against this backdrop and keeping these concerns in due consideration, FI is more committed than ever to make its contribution to shaping a future legally binding instrument that responds to the urgent challenges and that fills some of the major gaps in business accountability for a better enjoyment of human rights by all. The present written submission builds upon the positions taken by the organization in its written and oral contributions to the OEIGWG sessions in the past years. It also gathers and elaborates on some of its major concerns and suggestions that were made through individual and joint oral statements during the 5th session of the OEIGWG, but it also provides additional textual suggestions on various parts of the revised draft LBI.

Preamble

6. FI strongly encourages to either rephrase or delete the list of rights highlighted in the 7th paragraph of the Preamble, concerning the right to effective remedy. FI would like to highlight that victims of violations of all human rights should be able to access effective remedy and reparation. The emphasis on three rights in particular bears the risk of creating a hierarchy of rights and suggesting that access to justice and remedies is to be prioritised for these rights as compared to others.

7. In the same vein, FI is of the view that the list that appears at the 9th paragraph regarding the prohibited grounds for discrimination is not helpful. Important grounds are missing and FI would suggest not to start listing at all so as not to create a sense that there may be grounds that are more important than others, but also so as to make sure that the future LBI will still be relevant on the longer run, not pre-empting important developments of international human rights law. As a consequence, FI would suggest replacing the current wording of “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion” by the following more general wording: “universal respect for, and observance of, human rights for all without discrimination on grounds that are prohibited by international human rights law”.

8. Concerning the 11th paragraph of the Preamble, FI is concerned about the statement it makes on the positive contribution of businesses to sustainable development through increased productivity and economic growth. The relevance of such statement may be questioned considering the objective and focus of the LBI that is not primarily to promote sustainable development but the improved realization of human rights. It also raises issues of evidence and pertinence of the argument that increased productivity and economic growth would contribute to the realization of human rights, especially in times when the world cannot ignore the urgency of rethinking models to adapt to and address environmental destruction and climate change. If the paragraph is kept in a future draft, FI is of the view that it could limit itself to mention the role of businesses in respecting human rights and in creating environments in which rights can be better respected, protected and fulfilled.

9. The 14th paragraph of the Preamble is posing a similar issue to those highlighted for paragraphs 7 and 9 (see above). Any list that is not exhaustive bears the risk of missing important elements. Here, the list may exclude groups and sectors of the population who are very much at risk and marginalized. FI thus suggests to clearly states that the list is not exhaustive by saying: “Recognizing the distinctive disproportionate impact of certain business-related human rights abuses on specific groups and sectors of the population, including (...), and the necessity of a perspective that takes into account their specific circumstances and needs.”

Article 1: Definitions

10. FI welcomes the efforts that have been made in the revised draft LBI to clarify this crucial part of the future instrument. Nevertheless, FI would like to suggest addressing two issues that it identifies in the current draft. The first of these issues is the potential lack of legal clarity or certainty that **Article 1.1** entails. Here, it would be useful to keep the definition of victims as applying only to those who have suffered the violation or abuse. Whenever relevant in parts of the future LBI, “alleged victims” could be used explicitly, for cases in which the violation or abuse has not been proved yet.

11. Regarding **Article 1.2**, FI joined others in advocating for the clarification of the concepts of human rights violation and human rights abuse, in joint oral statements delivered during the 5th session of the OEIGWG. In addition, there are other aspects of the paragraph that may be confusing since it is equating a violation /abuse with harm, which could be interpreted as excluding situations that require preventive measures and where harm has not occurred (yet) but still qualifies as a violation or abuse under international human rights law. Furthermore, FI would like to highlight the specific need to clarify and revise the part of the paragraph that is particularly confusing and states that a human right violation or abuse is an harm committed through acts or omission, including (...) “substantial impairment of their human rights”. FI understands that a part of this wording is directly inspired by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. However, in that document, this wording applies to victims and not to violations or abuses. It may therefore be useful to reconsider following more closely the original provision of the Basic Principles, if still relevant, in a further revised draft LBI. Overall, Article 1.2 thus needs substantial revision to serve its envisaged purpose or be deleted if it does not bring clarity.

12. **Article 1.3** defines “business activity” as meaning economic activity. FI does not consider appropriate to restrict the nature of the activities covered by the future LBI by using the unnecessary qualifier of “economic” as some activities that may lead to human rights violations and abuses may not be of economic nature. In FI’s view, if this paragraph remains in a further revised draft LBI, it would be appropriate to delete the qualifier “economic”.

13. Regarding **Article 1.4**, FI wishes to reiterate its position that the definition of the contractual relationship in the current draft LBI may be broad and aiming to take into account the different relationships that constitute complex global supply chains. However, FI wishes to point to the unnecessary limitation that is contained in the use of the phrase “contractual relationship”, which may lead to restrictive interpretations. FI supports the substitution of the phrase “contractual relationship” by the phrase “business relationship” throughout the text. This wording is already

used by the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, which is widely accepted and understood.

14. For further clarification, FI suggests to add the following at the end of **Article 1.4**: "Business relationships include business partners, entities in its value and supply chain, and any other non-State or State entity linked to its business operations, products or services even if the relationship is not contractual."

Article 2: Statement of purpose

15. For the sake of clarity, FI suggests amending the wording of current sub-paragraph b. to read as follows:

"b. To prevent the occurrence of human rights violations and abuses in the context of business activities and to ensure effective access to justice and remedy for victims of such violations and abuses;"

Article 3: Scope

16. **Regarding Article 3.2, "contractual relationship"**: FI considers that Article 3.2 is too restrictive, thereby failing to include a number of situations in which business relationships may not be of a contractual nature, but would nonetheless engender shared responsibilities and liability of a business enterprise within a supply chain or similar setting.

17. **Regarding Article 3.3, the instrument shall cover all human rights**: As FI already stated in past submissions and oral statements in sessions of the OEIGWG, while it is important not to limit the scope of the future LBI in terms of rights covered, it remains also important to address the concerns raised by various States regarding the lack of clarity of what human rights mean, especially considering that different States have ratified different regional and international instruments.

18. In that regard, FI reiterates its support for a language resembling that anchored by the UNGPs. This would include, at a very minimum, 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), together 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. However, a provision should be added to explicitly states that the establishment of this "minimum package" shall be without prejudice of additional States international human rights obligations.

Article 4: Rights of Victims

19. Besides the positions supported by FI in joint statements delivered at the 5th session on Article 4, and notably on Article 4.6, in its current version, FI would like to suggest revising Article 4.1 and 4.2. As they are currently worded, these two paragraphs may be confusing and do not bring as

much added value as they intend to. Here again, FI recognizes that the language is directly inspired by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation. However, as far as paragraph 2 is concerned, the list of specific human rights which seems to be exhaustive is not helpful as it is unclear why these rights are selected and not others, and is redundant with paragraph 1. FI thus suggests replacing both paragraphs by one single paragraph, possibly closer to the original language of the UN Basic Principles and Guidelines.

20. **Access to justice / rights of victims:** FI believes that access to justice / rights of victims should come after provisions on prevention and liability. It would therefore suggest the reversal of the order of the Articles in a further revised draft LBI with current Article 4 that would become after current Article 5 on prevention and Article 6 on liability.

Article 5: Prevention

21. **Article 5.2, due diligence:** This provision of the current draft outlines that businesses that do not comply with the obligation of due diligence shall be held liable for their failure. This is important. However, FI has followed and worked on concrete cases which have demonstrated that due diligence can easily become a merely procedural or 'ticking the box' exercise, raising significant concern with regard to independence, expertise and transparency within these processes. FI therefore reiterates the importance that the future LBI explicitly states that the mere compliance with this obligation will not automatically shield businesses from liability for human rights abuses.

22. **Article 5.3.b, prevention:** FI recommends that the terminology used in the current draft is harmonized and streamlined. In particular, FI would like to encourage the consideration of the work of other UN mechanisms, such as the Working Group on the issue of human rights and transnational corporations and other business enterprises, which has addressed the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory in a statement. Notably, it employed the following terminology: "armed conflict-affected areas, including situation of occupation", as opposed to "occupied or conflict-affected areas". The statement explains that: "A situation of military occupation is considered to be a conflict situation even if active hostilities may have ceased or occur periodically or sporadically." Hence, an area under occupation falls within the term "conflict-affected area".

23. **Article 5.3.b, "meaningful consultation (...) with other relevant stakeholders":** FI is unclear about who would be "other relevant stakeholders" who have to be included in meaning consultation besides groups whose human rights could be affected. This could be either deleted or clarified in a future revised draft LBI.

Article 6: Legal Liability

24. **Article 6.1:** FI states that article 6.1 would benefit from the insertion of the phrase "causing or contributing" in the following way: "[...] adequate system of legal liability for causing or contributing to human rights violations or abuses".

25. **Article 6.6 "Contractual Relationship":** as already mentioned under other relevant parts, FI reiterates that "business relationship" as used in the UN Guiding Principle, include but are not restricted to contractual relationships, and would better serve the purpose of the future LBI.

26. **Article 6.7, international crimes:** FI is concerned that the current formulation of Article 6.7 is confusing and lends itself to a narrow interpretation, suggesting that other offenses, such as the violation of economic, social and cultural rights, do not require a comprehensive system of liability. Moreover, the specific list of offenses could also be interpreted to suggest that no offenses other than those outlined, should be met with criminal liability under domestic law.

27. FI would thus like to reiterate the importance that the treaty clarifies the necessity of imposing liability for a broad range of human rights violations (including economic, social and cultural rights) and that it requires States to continue to develop criminal liability beyond the specific offenses listed. As it is currently, **Article 6.7** could also be read so as to suggest that administrative liability could suffice for international crimes. Additionally, if a list is to remain in this paragraph, then it should remain clear that it is not exhaustive and the wording for crimes that are recognized in existing instruments should be following more systematically agreed language.