

The 2020 UN revised draft of a legally binding instrument on business and human rights

A child rights-based analysis



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Acknowledgments

This document was elaborated by the International Commission of Jurists at the request of DKA Austria - Hilfswerk der katholischen Jungschar. It benefitted from the expertise of a wide range of experts, including: Mikiko Otani, member of the UN Committee on the Rights of the Child; Agnés Gracia Corberó, Child Rights Connect; Danielle Anne Pamplona, Julia Stefanello Pires, Marcella Oldenburg Almeida Britto, Human Rights Clinic - Pontifical Catholic University of Paraná, Brazil; Sandra Epal-Ratjen, Franciscans International; Andrew Mawson, Child Rights and Business, UNICEF. The ICJ and DKA are grateful to them.

Special thanks from DKA Austria - Hilfswerk der Katholischen Jungschar to the International Commission of Jurists

Special thanks are directed to Anita Goh, who has dedicated her expertise and many long hours in conducting the research and writing the paper, to Carlos Lopez, who has provided not only comments and reviews but has also been supporting us in the quest to bring child rights to the foreground of the LBI on business and human rights and last but not least to Ian Seiderman who took over the final legal review of the study.

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Introduction

Business enterprises through their conduct significantly affect children in all aspects of their lives. As the Committee on the Rights of the Child highlighted, “children are both rights-holders and stakeholders in business”.¹

Children are potential consumers targeted by marketing strategies and prone to using harmful or unsuitable products and services, off and online.² Many are workers³ in the formal or informal economy. They are family members of business employees and, as such, they may be directly affected by their working conditions and environment. Children are also members or residents of communities and environments, which are affected by business activities or in which business operates.

Children are “often disproportionately affected by the adverse impact of business activities”.⁴ Yet, the impact of business on children and their rights is often still invisible to many stakeholders: governmental authorities and decision makers within the business sector, but also human rights advocates. The special focus typically given by companies to child labour or product responsibility towards children has often diverted attention from the full range of other impacted human rights.

To regulate business activities and their impact on human rights, including children’s rights, the UN Human Rights Council endorsed in 2011 the Guiding Principles on Business and Human Rights. In 2013, the UN Committee on the Rights of the Child also adopted General Comment No. 16 on States obligations under the Convention on the Rights of the Child concerning the business sector (CRC General Comment No. 16).⁵ Since 2014, a new legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (LBI) is being negotiated by an open-ended Working Group of the United Nations Human Rights Council. Will it serve to regulate and mitigate and redress the negative impacts of business activities on children and their human rights? How does the latest draft LBI integrate children’s rights?

¹ Committee on the Rights of the Child, General Comment No. 16 on States obligations under the Convention on the Rights of the Child concerning the business sector (CRC General Comment No. 16), 2013, para 2, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

² It is worth recalling in that regard that children benefit from the same rights and protection online as they do offline, see Resolution of the UN Human Rights Council “The promotion, protection and enjoyment of human rights on the Internet”, A/HRC/RES/38/7, adopted on 5th July 2018, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/38/7

³ It is important to recall at the outset the difference between appropriate work for children, which is legal, and child labor, which consists of work that is harmful to children, as defined under art. 32 CRC. When mentioning “child workers”, this paper refers to child work permitted under the CRC and does not in any way condone child labor.

⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (CESCR General Comment No. 24), 2017, para 8, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fGC%2f24&Lang=en.

⁵ CRC General Comment No. 16, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

To assess these questions and identify how this new treaty could most effectively serve the protection and advancement of children's rights in the context of business activity, this paper analyses the 2020 revised draft LBI from a child rights perspective and provides recommendations, including wording proposals, to strengthen the text in that regard. While all children's human rights may be affected by business activities, the paper will focus on the most salient issues of importance for the prevention and protection of children's rights and children's effective access to justice and remedy in case of violations or abuses of their rights.

After examining the 2020 revised draft LBI in relation to children's rights in general, the paper will present a legal analysis of a child rights-based approach to business activities, followed by an article by article analysis of the text.

I. The 2020 draft LBI and children's rights: a general outlook

A. Key features of the text

1) Background

In resolution 26/9 of 26 June 2014,⁶ the UN Human Rights Council (HRC) established the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG)⁷ with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. The OEIGWG has been chaired by diplomatic representatives from Ecuador.⁸

Between 2014 and 2019, the OEIGWG held five sessions in Geneva, involving the participation of States, independent experts, civil society, and business representatives. The two first sessions were dedicated to discussing in general terms the content, scope, nature and form of the future international instrument.⁹ On the basis of those discussions, the OEIGWG then considered elements for a draft LBI¹⁰ during its third session. The debates of the fourth session focused on a “zero draft” LBI,¹¹ and zero draft optional protocol on a national implementation mechanism and a communications procedure,¹² both produce by the OEIGWG Chairperson. Following this new round of negotiations, a revised draft LBI was released in July 2019, omitting the optional protocol.

⁶ UN Human Rights Council (HRC) Resolution A/HRC/RES/26/9 on the “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, adopted by a vote of 20 to 14, with 13 abstentions on 26 June 2014, available at:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

⁷ For information on the sessions of the OEIGWG, see

<https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>

⁸ The OEIGWG elected Ms María Fernanda Espinosa Garcés, Permanent Representative of Ecuador, as its Chair-Rapporteur for sessions 1 and 2, M. Guillaume Long, Permanent Representative of Ecuador, as its Chair-Rapporteur for session 3, M. Luis Gallegos, Permanent Representative of Ecuador, as its Chair-Rapporteur for session 4 and M. Emilio Rafael Izquierdo Miño, Permanent Representative of Ecuador, as its Chair-Rapporteur for session 5.

⁹ See the reports of the first and second sessions of the OEIGWG respectively available here:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/50 and

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/47

¹⁰ See the document entitled “Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, 29 September 2017, presented by the Chairmanship of the OEIGWG available here:

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

¹¹ “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, Zero draft”, presented by the Chairmanship of the OEIGWG, 16 July 2018, available here: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

¹² “Draft optional protocol to the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (Zero draft OP to the LBI), presented by the Chairmanship of the OEIGWG, available here:

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>

It served as the basis for intergovernmental negotiations during the fifth session¹³ of the OEIGWG, which was held from 14 to 18 October 2019.

In view of the OEIGWG sixth session planned from 26 to 30 October 2020, a second revised draft¹⁴ was circulated on 7 August 2020 as a basis for the forthcoming discussions.

2) Structure of the text

The 2020 second revised draft legally binding instrument (“LBI”) is a draft international human rights treaty.

The text is divided into four parts:

- The **Preamble**, which sets out the main international standards, principles and values underlining the LBI.
- **Section I**, which defines the general framework of the text (Art. 2 and 3) and definitions of the key terms of the text: “victims”, “human rights abuse”, “business activities”, “business activities of a transnational character”, “business relationship” and “regional integration organization” (Art.1).
- **Section II**, which contains the core provisions of the text, namely:
 - Substantive legal provisions on the rights of victims, how they should be protected and access remedy (Art. 4, 5 and 7) and on the prosecution and punishment of human rights abuses in business related contexts (Art. 8, 9, 10 and 11),
 - Preventative legislative and policy measures to be undertaken by States parties to ensure that all business enterprises within their jurisdiction respect human rights and prevent human rights abuses, including through human rights due diligence and impact assessments (article 6),
 - Provisions for the cooperation and collaboration between States Parties for an effective investigation and prosecution of claims covered by the LBI (articles 12 and 13), and
 - How the LBI is to be interpreted and applied with regard to international and domestic law (article 14).

¹³ See the Report of the fifth session of the OEIGWG, A/HRC/43/55, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/43/55

¹⁴ “Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, OEIGWG Chairmanship Second Revised Draft” (2020 draft LBI), 6 August 2020, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

- **Section III**, which sets out the more technical aspects of the LBI and includes provisions on:
 - The implementation of the LBI itself and its monitoring at the international level through a new treaty body (Art.15 and 16),
 - The relationship between the LBI and its potential optional protocols (Art.17), and
 - Final clauses the type of which can usually be found in international human rights treaties, such as the settlement of disputes between States parties on the interpretation or application of the LBI, signature, ratification, accession, entry into force, amendments, reservations, denunciation and designation of the depositary, and languages of the authentic texts (articles 18 to 24).

3) Purpose and scope of the text (Art. 1, 2 and 3)

The 2020 draft LBI aims at establishing a new international protection framework that would:

- Clarify and facilitate the effective implementation of States’ human rights obligations in the context of business activities, as well as business enterprises’ responsibilities in this regard;
- Prevent business-related human rights abuses committed by businesses;
- Ensure access to justice and remedy for victims of business-related human rights abuses; and
- Facilitate and strengthen mutual legal assistance and international cooperation to achieve these objectives.¹⁵

It covers (a) all internationally recognized human rights and fundamental freedoms emanating from the Universal Declaration of Human Rights; (b) core international human rights treaties,¹⁶ including the Convention on the Rights of the Child (CRC) and its three Optional Protocols, to which a State is a party and (c) fundamental ILO Conventions,¹⁷ including ILO Convention No. 138 on Minimum Age and ILO Convention No. 182 on Worst Forms of Child Labour, to which the State is a party, and (d) customary international law.

It applies to **all business enterprises**, including transnational corporations and State-owned enterprises, which conduct business activities, defined as “any for profit economic or other activity undertaken by a natural or legal person”.

¹⁵ See Art. 2 of the 2020 draft LBI.

¹⁶ For the list of the nine core international human rights treaties, see: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>

¹⁷ For the list of the eight fundamental ILO Conventions, see: <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

It protects “**victims**”, defined as “any person or group of persons who individually or collectively have suffered harm (...) through acts or omissions in the context of business activities, that constitute human rights abuse” (Art. 1.1). Immediate family members and dependents of the direct victim, as well as those “who have suffered harm in intervening to assist victims (...) or to prevent victimization”, such as human rights defenders or legal representatives, are also considered as “victims”.

Finally, it **protects against “any harm”** including “physical or mental injury, emotional suffering, or economic loss, or substantial impairment of [...] human rights (...) **that constitute human rights abuse**” “**committed by a business enterprise**, through acts or omissions in the context of business activities”.

“Human rights abuse” is further defined in Art. 1.2 as any such harm “that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including environmental rights”.

B. How children’s rights are included in the text

As previously mentioned, children’s rights under the CRC, its Optional Protocols and ILO Conventions No. 138 and No. 182 form part of the human rights covered by the 2020 draft LBI.¹⁸

In addition to this, the text includes three explicit mentions of children and two references to girls:

- The distinctive and disproportionate impact of business-related human rights abuses to girls and children, amongst other groups in vulnerable situations, as well as their specific circumstances and vulnerabilities in this particular context, are “recognized” in Paragraph 14 of the Preamble;
- Children are one of the groups requiring special attention in human rights due diligence measures undertaken by business enterprises (Art. 6.3.c) and in the implementation of the LBI by States (Art. 14.4);
- The differentiated risks and impacts experienced by girls are included in the gender perspective that States must ensure that business enterprises shall integrate in their human rights due diligence measures (Art. 6.3.b.).

In addition, several international child rights instruments, resolutions, or interpretative documents were listed as a source of inspiration to the 2019 draft LBI,¹⁹ which preceded and served as a basis for the 2020 draft LBI, namely:

- The CRC: for the Preamble and article 13 on institutional arrangements;

¹⁸ See p.6 of this paper and art. 3.3 of the 2020 draft LBI.

¹⁹ See the “Updated non-exhaustive list of instruments and documents used by the Chairmanship of the OEIGWG, as sources for the preparation of the revised draft legally binding instrument on business and human rights”, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Preparation_OEIGWG_RevisedDraft_LBI.pdf

- The OPSC and the Optional Protocol to the CRC on a communications procedure (OPIC): for article 4 on the rights of victims;
- The Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime 2000: for article 6 on legal liability; and
- CRC General Comment No. 16: for article 7 on adjudicative jurisdiction.

In that regard, it is fair to observe that article 3 OPSC, for example, has greatly inspired article 8.9 of the 2020 draft LBI.

However, it is quite striking that no specific provision addresses the specific measures, obligations and duties that should be undertaken and implemented to address and implement children’s rights, whereas there is some recognition of the specificities of women’s rights and indigenous peoples’ rights.²⁰

There is no evidence based on the discussions in the sessions of the OEIGWG that the omission of children’s rights stems from any principled opposition to their inclusion. Rather, there seemed to be a simple lack of interest or even neglect on the part of States and other stakeholders, which could well be addressed in the next rounds of negotiations and OEIGWG sessions. Looking back at the first five sessions of the OEIGWG, the discussions did not seem to include much more than general mentions of the rights of children and a general consensus on the fact that they could constitute a group in vulnerable situations.

No champion emerged to put children’s rights at the heart of the negotiations: only one child rights expert was invited as a panelist during the first session.²¹ A few States made three child rights-based proposals on three articles²² and only three oral statements with child-rights based proposals were

²⁰ See for instance, PP4 and PP16 of the Preamble, Art.4.2.e, Art. 6.3.b and e, Art. 16.3 of the 2020 draft LBI.

²¹ See the presentation of CRC member Mr Hatem Kotrane during Panel V of the first session of the OEIGWG [*in French only*], available at

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel4/Hatem_Kotrane.pdf.

²² Namibia asked to include “suitable remedial measures, including psychosocial and rehabilitative therapy” and pay particular attention to children “who might have suffered abuse during early childhood, but are only able to articulate their claims later in life” in article 6.2 and that “time should not run against children” during the investigation and prosecution of the violation” in article 8.2, see the Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/43/55), p. 42 and 49 respectively, available at:

https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex_CompilationStatements_5th_session.pdf. The report of the fifth session also mentions that some State delegations “proposed that in article 4(3),

references should be added to (...) the rights of children”, A/HRC/43/55, para. 49, available at

http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/43/55

delivered by NGOs.²³ Other mentions of children or children's rights throughout the five sessions only concerned general calls for specific provisions for children (along other groups in vulnerable situations) to be included in the text, without specific wording suggestions.²⁴

²³ See the oral statement of DKA Austria calling for the integration of a child rights based approach in the text during the fourth session at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/DKA_AustriaArticles1_14_15.docx and the two joint oral statements of Child Rights Connect/DKA Austria/IBFAN-GIFA on articles 4.5 and 6 of the 2019 revised draft LBI during the fifth session, respectively available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/DKAAustria-Article%204.docx> and <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/ChildRightsConnect-DKAAustria-GenevaInfantFeedingAssociation-art6.pdf>

²⁴ See, for example, the European Union's statement in the Addendum to the report on the fourth session of the OEIGWG, A/HRC/40/48/Add.1, p.98, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/A_HRC_40_48_Add.1.docx

II. Applicable child rights framework in the context of business activities

A. Key elements of a child rights approach to business activities.

While there is no international treaty containing provisions that expressly address children’s rights in the context of business activities, a range of global and regional legally binding instruments, and other standards guiding principles²⁵ and recommendations are applicable to aspects of the question.

At the outset it should be underscored that human rights law generally, including all of the human rights treaties, requires that States not only respect human rights in regard to the conduct of its own agents and authorities, but that they act to protect people from the impairment of human rights by private actors such as business enterprises. Therefore, while human rights treaties typically, though with a few exceptions, do not contain provisions mentioning businesses, it is well established that their conduct necessarily comes into play under this general obligation to protect.

The United Nations Guiding Principles on Business and Human Rights (UNGPs), the only global standards²⁶ in the area of business and human rights that have been endorsed by States,²⁷ do not specifically mention the CRC. According to Principle 12 of the UNGPs, the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights [the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)], and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.

However, the official Commentary to Principle 12 makes clear that:

*“Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; **children**; persons with disabilities; and migrant workers and their families.”*²⁸

²⁵ See the Children’s Rights and Business principles, for instance, available at:

https://www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf.

²⁶ Parallel to this UN set of principles, a number of regional guidelines, such as the [OECD Guidelines for Multinational Enterprises](#) have also emerged, see Annex II.

²⁷ The UN Human Rights Council endorsed the UNGPs in its resolution A/HRC/RES/17/4, adopted on 16 June 2011 by consensus, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4.

²⁸ See the UNGPs and their commentary, p.19, available at:

https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

In addition, the protections of the ICCPR and ICESCR apply equally to children and the jurisprudence of their supervisory bodies has made clear that the interpretation and application of their provisions will need to take into account the particularities of children.

The UNGPs should therefore, where applicable, be interpreted from a child rights perspective, as any other general human rights standards. Read in conjunction with the full complement of law and standards concerning children's rights, they serve to clarify the child rights normative framework applicable to this specific context (for a list of relevant resources, see Annex II).

At the core of this framework stands the Convention on the Rights of the Child (CRC), the most widely subscribed and nearly universal human rights treaty with 196 States parties and one State which has signed but not ratified (the United States). The CRC protects civil, cultural, economic, political, and social rights of children.

The CRC does not contain express provisions on the role and obligations of States and businesses to protect children's rights in the context of business activities.²⁹ However, the UN Committee on the Rights of the Child (the Committee), the supervisory body of the CRC, has clarified the nature and scope of the obligation to protect arising from the impact of the activities of business enterprises on children's rights in its General Comment No. 16.³⁰ This General Comment describes how States can ensure that business operations and relationships, including at the global level, do not adversely impact the rights of the child, or can be remedied in case of violations or abuses, to comply with their obligations under the CRC.

At the outset, it clearly affirms that States have obligations regarding the impact of business activities and operations on children's rights and that these "duties and responsibilities", extend "beyond the State and State-controlled services and institutions and apply to private actors and business

²⁹ Some provisions, such as art. 32.2 CRC, in the context of labor rights, or art. 2 and 3 of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC) address issues directly linked to potential business activities, while others remain more general.

³⁰ See CRC General Comment No. 16, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>. It is worth noting that regional and international intergovernmental bodies have increasingly referred to this General Comment, see for instance Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human rights and business (2016), para 62, available at: <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>. It is also worth observing that at the regional level, the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights published on January 2020 its report on "Business and Human Rights: Inter-American Standards" (REDESCA Report), see http://www.oas.org/en/iachr/media_center/PReleases/2020/014.asp which also provides a systematic and evolving analysis of the business context to clarify States' obligations in that regard.

enterprises”.³¹ This is especially true when States undertake privatization or contracts private actors to deliver public services,³² but these obligations also extend to not for profit and religious actors.³³

“Business activities and operations can impact on a broad range of children’s rights.”³⁴ This means that business activities and enterprises can potentially affect *all* children’s rights³⁵ and that under the CRC, States have the obligation to ensure that *all* children’s rights are respected, protected and violations or abuses in the context of business activities and operations are redressed.

In order to do so, States need to take into account: (1) the four “core principles” of children’s rights; (2) children’s special and dependent status; (3) the potential intersectional discrimination and vulnerability affecting children; (4) the need for child-sensitive procedures to ensure effective justiciability and reparation of children’s rights violations; and (5) the specific protection required for certain groups of children and certain children’s rights. These are summarized in turn below.

1) The four core principles of children’s rights

Among the 54 articles that compose the CRC, the Committee has identified four articles (articles 2, 3, 6 and 12), which serve as essential keys to understanding the Convention as a whole. They are

³¹ See CRC General Comment No. 16, para 8, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>. See also for a concurring opinion, African Committee of Experts on the Rights and Welfare of the Child General Comment No 5 on article 1 of the African Children’s Charter on “State Party Obligations under the African Charter on the Rights and Welfare of the Child (Article 1) and systems strengthening for child protection”, 2018 (ACERWC General Comment No. 5), p. 4, available at: <https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf>.

³² Committee on the Rights of the child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, paragraphs 43–44, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en and ACERWC General Comment No. 5, p.17 and 47, available at: <https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf>. With regard to the duties and obligations of States when they transfer maternal health function to private agencies, see also the concurring interpretation of the Committee on the Elimination of Discrimination against Women in its General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap. I, §17, available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf. On States’ obligation relating to budget allocation for children with disabilities in the case of decentralization or privatization of services and on the protection of children with disabilities in private institutions, see Committee on the Rights of the Child, General Comment No. 9 on the rights of children with disabilities (CRC General Comment No. 9), 2006, respectively para. 20 and para 42–44, available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f9&Lang=en.

³³ CRC General Comment No. 16, para 24, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

³⁴ Ibid, para 32

³⁵ For examples and cases studies of businesses’ impact on a variety of rights, see, for instance: “Children are everyone’s business: Workbook 2.0 – A guide for integrating children’s rights into policies, impact assessments and sustainability reporting”, Second edition, UNICEF, available at:

https://www.unicef.org/csr/css/Workbook_2.0_Second_Edition_29092014_LR.pdf

the four general principles which should base all States parties' decisions and actions for an effective implementation of children's rights, namely:³⁶

- The obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind (article 2);
- The best interests of the child as a primary consideration in all actions concerning children (article 3, paragraph 1 and CRC General Comment No. 14);³⁷
- The child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the, survival and development of the child (article 6); and
- The child's right to express his or her views freely in "all matters affecting the child", those views being given due weight (article 12 and CRC General Comment No. 12).³⁸

These four general principles also apply in the context of business activities and operations.

For example, to protect children's **right to non-discrimination**, "States need to ensure that all legislation, policies and programs that deal with business issues are not intentionally or unintentionally discriminatory towards children" or their parents or caregivers.³⁹ The right to non-discrimination is also particularly important with regard to access to justice by children from particularly vulnerable groups as additional particular measures may be required.

Where business activities or operations directly or indirectly impact on children, especially where business enterprises act as private or public social welfare bodies, States must ensure that their **best interest** is a primary consideration in all decision-making and has been weighed against other considerations.⁴⁰ There are "no limitations to the domains or sectors within which the best interests of the child must apply".⁴¹

³⁶ CRC General Comment No. 5, para 12, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en

³⁷ Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (CRC General Comment No.14), 2013, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en.

³⁸ Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard (CRC General Comment No. 12), 2009, available at: <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

³⁹ CRC General Comment No. 16, para 13, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁴⁰ CRC General Comment No.14, para 14 (c), available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en and CRC General Comment No. 16, para 15-17, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

⁴¹ ACERWC General Comment No. 5, p.11, available at: <https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf>

The **right to life, survival and development** of the child can be impacted by business activities in different ways, from the contamination of the environment where they live or the water they drink, to the marketing of products that have a negative long-term impact on their health.⁴² Business employment practices may also serve to prevent parents or caregivers from fulfilling their domestic and childcare obligations, especially in the case of young children.⁴³ To prevent these violations or abuses of children's rights, States must ensure that the child's "physical, mental, spiritual, moral, psychological and social development" is not negatively affected by business activities or operations.⁴⁴

Finally, children's **right to be heard** in all matters affecting them is also applicable when it comes to business activities. Children, including children of minority or indigenous groups⁴⁵ and children with disabilities,⁴⁶ should be heard when business related legislation or policies that may affect them are being developed,⁴⁷ they should be heard in "judicial proceedings and mechanisms of conciliation and arbitration that concern abuses of children's rights caused or contributed to by business enterprises"⁴⁸ or in consultations led by businesses with communities that may be affected by a potential business project.⁴⁹

⁴² See CRC General Comment No. 16, paras. 14, 19, 20, 56 and 57, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>; Committee on the Rights of the Child, General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) (CRC General Comment No. 17), 2013, paras 46–47, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f17&Lang=en; World Health Organization, Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children (2010), available at: <https://www.who.int/dietphysicalactivity/publications/recsmarketing/en/>; and World Health Organization, A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children (2012), available at: https://apps.who.int/iris/bitstream/handle/10665/80148/9789241503242_eng.pdf;jsessionid=A1FCD5568AEDAB21542A91EF39352301?sequence=1.

⁴³ See Article 18.3 of the CRC, Committee on the Rights of the Child, General Comment No. 7 on implementing child rights in early childhood (2005), paras 20–21, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f7%2fRev.1&Lang=en and Principle 3.d of the Children's Rights and Business principles, available at: https://www.unicef.org/csr/css/PRINCIPLES_23_02_12_FINAL_FOR_PRINTER.pdf

⁴⁴ CRC General Comment No. 16, para 18 and 19, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>

⁴⁵ For details on the specific obligations related to the indigenous child's right to be heard, see Committee on the Rights of the Child, General Comment No. 11 on indigenous children and their rights under the Convention (CRC General Comment No. 11), 2009, paras 38–39, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f11&Lang=en.

⁴⁶ CRC General Comment No. 9, para 32 and 48, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f9&Lang=en

⁴⁷ CRC General Comment No. 16, para 21, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁴⁸ Ibid, para 22.

⁴⁹ Ibid, para 23.

In all these situations, States and businesses should comply with the basic requirements for the implementation of their right to be heard. Children's participation must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable.⁵⁰

2) Children's special and dependent status

Integrating a child rights perspective in the context of business activities also means taking into account the special and dependent status of children.⁵¹ Childhood is a unique period of development, which means that any violation or abuse of children's rights may result in severe, irreversible, long-lasting or lifelong or even transgenerational impact and damage.⁵² Environmental degradation can also prejudice children's rights and should be taken into account in child rights' impact assessments.⁵³

Children's dependent status also means that they are more likely to be impacted by violations or abuses of their parents' or caregivers' human rights. For instance, the absence of proper maternal health care protection can have detrimental effects on a child's right to life, survival and development and right to health.⁵⁴ Likewise, children of farmworkers exposed to agricultural pesticide may suffer violations of these same rights.⁵⁵

⁵⁰ CRC General Comment No. 12, para 132-134, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

⁵¹ CRC General Comment No. 5, para 24, , available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en.

⁵² See CRC General Comment No. 16, para 4 (a) and 31, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf> and the REDESCA report, January 2020 [*in Spanish only*], available at <http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>.

⁵³ See Report of the Office of the High Commissioner of the United Nations High Commissioner for Human Rights, Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child, available at: <https://undocs.org/en/a/hrc/35/13>; Committee on the Rights of the Child, Day of General Discussion "Children's Rights and the Environment", 23 September 2016, report available here:

<https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2016.aspx> and ACERWC General Comment No. 5,

p.48, available at: [https://www.acerwc.africa/wp-](https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf)

[content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf](https://www.acerwc.africa/wp-content/uploads/2019/09/ACERWC%20General%20Comment%20on%20General%20Measures%20of%20Implementation%20African%20Children's%20Charter.pdf).

⁵⁴ For the relationship between pre-natal and post-natal health care for mothers, see Art. 24, para. 2 (d) of the CRC and Committee on the Rights of the Child, General Comment No.15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), paras 51-55, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en. Specific provisions protecting women employees in that regard can be found under the ILO Maternity Protection Convention No. 183 (2000), available at :

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 and Article 8 of

the European Social Charter, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b642>.

⁵⁵ See for instance "Understanding the Impacts of Pesticides on Children: a discussion paper", Unicef, January 2018, available at https://www.unicef.org/csr/files/Understanding_the_impact_of_pesticides_on_children-Jan_2018.pdf

Violations may entail additional obstacles when pursuing remedies for breaches of their rights, especially in the absence of child sensitive procedures available to them and their representatives.⁵⁶

3) The potential of intersectional discrimination and vulnerability affecting children

Being a child, i.e. a person under 18 years of age, is only one aspect of a child's identity. Children are not a homogenous group: each child is unique and may have "different kinds and degrees of vulnerability" according to which his/her situation must be assessed when applying the core child-rights principles.⁵⁷

Indeed, their vulnerability as children, coupled with their status situation requiring additional protection, such as gender, sexual orientation and gender identity, disability, being a worker in the formal or informal economy, acting as a human rights defender,⁵⁸ being a migrant,⁵⁹ citizenship status, belonging to indigenous or minority communities, being a transboundary citizen or living in poverty or in situations of conflict or humanitarian disasters. In such cases, full enjoyment of their rights would require combining the rights protections provided to them as children with those protected under other human rights law and standards related to these situations.⁶⁰

For instance, child workers⁶¹ should benefit both from child rights protective measures, as laid out in article 32 CRC and ILO Conventions No. 138 and 182 with relation to admission to work and working conditions for children and under the CRC with regard to their rights as children, such as the right to education,⁶² and from the rights of workers' protected under a number of

⁵⁶ CRC General Comment No. 5, para 24, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en

⁵⁷ CRC General Comment No. 14, paras 48-49 and para. 76, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en.

⁵⁸ See the Committee on the Rights of the Child's 2018 DGD outcome report, available at:

https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2018/crc_dgd_2018_outcomereport_en.pdf.

⁵⁹ See for instance, the Inter-American Court of Human Rights' Advisory Opinion 18/03 on Juridical Condition and Rights of Undocumented Migrants, available at https://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf, paras 135-136, 140.

⁶⁰ See, for instance, in the context of a child's best interest assessment CRC General Comment No. 14, para. 75, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en.

⁶¹ On the difference between child work and child labor, see footnote 3.

⁶² See, for instance, Committee on the Rights of the Child, General Comment No. 16, paras 19 and 37 for instance, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf> and the Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education (Abidjan Principles), available at :

<https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5dc414bb9f409d285dc9abf2/1573131454068/Online+version+A4+WEB+COUV%2BTEXTE+THE-ABIDJAN-PRINCIPLES+Nov+2019.pdf>

international instruments, such as the right to collective bargaining, social protection⁶³ and to just and favorable conditions of work.⁶⁴ Indigenous children should be consulted prior to the approval of any project affecting their lands, territories and resources, following the standards of the child's right to be heard and indigenous rights.⁶⁵ Special attention should be given to the disproportionate impact that employment practices, such as working long or unusual hours, may have on girls if parents and caregivers are obliged to delegate their domestic and childcare obligations to them.⁶⁶

In this regard, the situation of children living in border areas – also called “transboundary citizens” – who suffer from the impacts of globalization and transnationality in their daily lives should be subjected to protection. In addition to bordering cities, indigenous communities can also be included in transboundary citizenships questions, which require the attention and action of two (or more) States and may engage the extraterritorial obligation of the State. In such situations, the protections of the State are necessarily weak. Multiple and often intersecting forms of discrimination or vulnerability that may affect children thus need to be considered to conduct proper assessments of the impact business activities may have on them and their rights.

4) The need for child-sensitive procedures to ensure effective justiciability and effective remedy and reparation of children's rights violations

Children are rights-holders and, as such, they should be able to challenge violations of their rights to obtain an effective remedy and reparation like anyone else, regardless of their age. In fact, since violations and abuses of their rights may result in greater damage than those of adults, access to justice and remedy should be “facilitated and reinforced”.⁶⁷

⁶³ For more details on these rights and protections, see Council of Europe, Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States on Human rights and business (2016), paras 58–60, available at: <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html> and UN Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the European Social Charter, the European Social Charter (revised) and the fundamental conventions of the International Labour Organization, see Annex II.

⁶⁴ See, for instance, Committee on Economic, Social and Cultural Rights General Comment No. 23 (2016) on the right to just and favourable conditions of work (CESCR General Comment No. 23), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2FC.12%2fGC%2f23&Lang=en

⁶⁵ Article 32 of the UN Declaration on the Rights of Indigenous Peoples read in conjunction with Article 12 of the CRC.

⁶⁶ CRC General Comment No. 16, para 19, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁶⁷ See the report of the Special Rapporteur on the independence of judges and lawyers on the protection of children's rights in the justice system, A/HRC/29/26, 2015, para 30, available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_26_ENG.DOCX

Yet, they often face more barriers than adults because of their minority and dependent status, let alone the case of children facing multiple grounds of vulnerability.⁶⁸

In her report on children's rights in the justice system, the Special Rapporteur on the independence of judges and lawyers identified six categories of factors and circumstances that constitute particular barriers for children and their representatives: 1) physical barriers, 2) psychological impediments, 3) social and/or cultural barriers, 4) lack of information on accessing justice and remedies, 5) lack of financial autonomy and means and 6) lack of legal capacity, legal standing or even legal identity and dependence on parents/legal guardians.⁶⁹

These are the practical hurdles that must be addressed to appropriately adapt all judicial proceedings for child victims – and also witnesses⁷⁰ and offer them child-sensitive procedures that will enable them to effectively access justice and reparation for violations of their rights.

In the case of violations or abuses resulting from business activities or operations, the Committee highlighted the following arrangements as being particularly important:

- Child-sensitive mechanisms – criminal, civil or administrative – should be in place and “known by children and their representatives, [and be] prompt, genuinely available and accessible, [which can] provide adequate reparation for harm suffered”.⁷¹

To this end, States should “put in place a legal framework conducive to the development and reinforcement of a child-sensitive justice system, in line with international human

⁶⁸ See the previous section on intersectional discrimination and vulnerability of children. For an illustration of additional measures that are needed in such cases, see, for instance, with regard to children with disabilities: Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD), CRC General Comment No. 12 (2009) on the right of the child to be heard, para 21; and, with regard to indigenous children: HRC Expert Mechanism's study on access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, A/HRC/24/50, 2013, paras 32,34, 53-54, 59, 63, 65 and 67, available at:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/50; and Expert Mechanism Advice No. 6 (2014):

Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, A/HRC/27/65, 2014, paras 3 and 10, available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A-HRC-27-65_en.doc

⁶⁹ See the report of the Special Rapporteur on the independence of judges and lawyers on the protection of children's rights in the justice system, A/HRC/29/26, 2015, paras 31-32, available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_26_ENG.DOCX

⁷⁰ See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant” (2004), CCPR/C/21/Rev.1/Add. 1326, para 15, available at:

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en and CRC General Comment No. 12, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

⁷¹ CRC General Comment No. 16, para 30, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

rights instruments relating to children”⁷² and create or strengthen training programs in that regard to justice operators;⁷³

- Children and their representatives “should be allowed to initiate proceedings in their own right and have access to legal aid and the support of lawyers and legal aid providers in bringing cases against business enterprises to ensure equality of arms;”⁷⁴
- Children’s privacy should be respected and protected;⁷⁵
- Children “should be kept informed of progress at all stages of the process, giving due weight to the child’s maturity and any speech, language or communication difficulties they might have”;⁷⁶
- States where collective complaints, such as class actions and public interest litigation, are not yet possible “should introduce these as a means of increasing accessibility to the courts for large numbers of children similarly affected by business actions;”⁷⁷ and
- Reparation should be determined “taking into account that children can be more vulnerable to the effects of abuse of their rights than adults and that the effects can be irreversible and result in lifelong damage”, as well as “the evolving nature of children’s development, “be timely to limit ongoing and future damage to the child or children affected” and include, where relevant, medical and psychological assistance, legal support and measures of rehabilitation as well as guarantee of non-recurrence.”⁷⁸

5) Specific protection required for certain groups of children and certain children’s rights.

Additional State obligations and duties exist regarding the impact of the private sector on particular groups of children or rights, including in relation to:

⁷² See the report of the Special Rapporteur on the independence of judges and lawyers on the protection of children’s rights in the justice system, A/HRC/29/26, 2015, para 96, available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A_HRC_29_26_ENG.DOCX

⁷³ Ibid, para 93.

⁷⁴ CRC General Comment No. 16, para 68, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁷⁵ Ibid, para 69

⁷⁶ Ibid, para 69

⁷⁷ Ibid, para. 68

⁷⁸ Ibid, para 31.

- Child workers,⁷⁹ unaccompanied and separated children,⁸⁰ migrant children,⁸¹ indigenous children⁸² and children with disabilities;⁸³
- Children's right to health,⁸⁴ education⁸⁵ and their right to rest, leisure, play, recreational activities, cultural life and the arts,⁸⁶ and

⁷⁹ See, inter alia, Art. 7 and, Art. 10.3 ICESCR, CESCR General Comment No. 23, Article 32 CRC, ILO Convention No. 138 and No. 182 and the Report of the independent expert for the United Nations study on violence against children (2006), A/61/299, para. 113 regarding the workplace environment, available at: <https://undocs.org/A/61/299>.

⁸⁰ Committee on the Rights of the Child, General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin (2005), especially paras. 3, 89-90 and 97, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en.

⁸¹ see Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, (2017) CMW/C/GC/3-CRC/C/GC/22, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/59/PDF/G1734359.pdf?OpenElement> and Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, CMW/C/GC/4-CRC/C/GC/23, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/343/65/PDF/G1734365.pdf?OpenElement>

⁸² See CRC General Comment No. 11, paras 69-71, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f11&Lang=en.

⁸³ See CRC General Comment No. 9, para 75 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f9&Lang=en.

⁸⁴ See Committee on the Rights of the Child, General Comment No. 15 on the right of the child to the highest attainable standard of health (CRC General Comment No. 15), 2013, paras 42, 77, 80-81 (on the obligations of the private sector in general), 82 (on the duties of the pharmaceutical sector), 83 (on the obligations of private health insurance companies) and 84 (on the responsibilities of mass media organizations), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en.

⁸⁵ See CRC General Comment No. 16, paras 19 and 37 for instance, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf> and the Abidjan Principles, available at: <https://static1.squarespace.com/static/5c2d081daf2096648cc801da/t/5dc414bb9f409d285dc9abf2/1573131454068/Online+version+A4+WEB+COUV%2BTEXTE+THE-ABIDJAN-PRINCIPLES+Nov+2019.pdf>, recognized, inter alia, by the European Committee of Social Rights (<https://rm.coe.int/general-intro-2019-rev-en-/16809e09f3>), the African Commission on Human and People's Rights, in Resolution 434 (EXT.OS/ XXVII1) 2020 (<https://www.achpr.org/sessions/resolutions?id=465>), the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the Organization of American States (<http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>) and the UN Human Rights Council in Resolution A/HRC/RES/41/16 (<https://undocs.org/A/HRC/RES/41/16>). The Abidjan Principles notably recall that "States must take all effective measures, including particularly the adoption and enforcement of effective regulatory measures, to ensure the realization of the right to education where private actors are involved in the provision of education" (Overarching Principle 4.) and set minimum standards applicable to private instructional educational institutions to that end.

⁸⁶ See CRC General Comment No. 17, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f17&Lang=en.

- Children’s rights violations under the OPSC⁸⁷
- and also, more generally, each time that States “outsource or privatize services that impact on the fulfilment of children’s rights”, such as the provision of services like clean water, sanitation, transport, alternative care, security and detention facilities.⁸⁸

B. Obligations and duties of States and businesses towards children in a business-related context

1) States’ obligations

As the duty-bearers of international child rights obligations, States must ensure that all actors, including business actors, respect children’s rights and not collaborate with or invest in businesses that abuse children’s rights.⁸⁹

In doing so, States shall “take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children’s rights” and “investigate, adjudicate and redress” such breaches.⁹⁰

Among such preventative measures, States should:

- Conduct impartial and independent child rights impact assessments,⁹¹ and
- Require businesses to “carry out children’s rights due diligence (...), including across their business relationships and within any global operations”, have “an effective monitoring system”, “publicly communicate their reports on their impact on children’s rights, including regular reporting” and make their efforts public.⁹²

Additional obligations apply where global operations of business are concerned, such as extraterritorial and international cooperation obligations,⁹³ as well as specific duties to prevent the infringement of business enterprises operating abroad⁹⁴ for States in general but also for home and host States specifically.⁹⁵

⁸⁷ See the OPSC, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>.

⁸⁸ See CRC General Comment No. 16, para. 25 and 33 for instance, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁸⁹ Ibid, para 26–27.

⁹⁰ Ibid, para 28.

⁹¹ Ibid, para 78–81.

⁹² Ibid, para 62–65.

⁹³ Ibid, para 40–41.

⁹⁴ Ibid, para 45.

⁹⁵ Ibid, para 38–46.

2) Businesses' duties and responsibilities

Under the monitoring of States, all business enterprises have a responsibility to “recognize, respect and fulfil their responsibilities to the child.”⁹⁶

In order to ensure that risks of abuses of children’s rights are prevented or mitigated, all business enterprises are required to exercise due diligence,⁹⁷ which comprises conducting child-rights impact assessments, seeking views of children and ensuring that consultations processes are “accessible, inclusive and meaningful to children and take into account the evolving capacities of children and their best interests at all times”, and that their participation is voluntary and occurs in a “child-friendly environment that challenges and does not reinforce patterns of discrimination against children.”⁹⁸

Business enterprises should also “provide for or cooperate in remediation” each time they identify that they have “caused or contributed to adverse impacts on children’s rights” including through “operational-level grievance mechanisms” in accordance with UN Guiding Principle 22.⁹⁹ “Operational level mechanisms should be accessible to girls and boys, their families and those who represent their interests, and meet the effectiveness criteria for non-judicial grievance mechanisms set out in Principle 31 of the Guiding Principles on Business and Human Rights”.¹⁰⁰ Such grievance mechanisms can be useful alternatives as they may be in the child’s best interests given the celerity and flexibility they could provide.¹⁰¹ However they can only be alternatives to judicial remedies and should never replace them.¹⁰² Finally, if business enterprises fail to provide for effective remedy

⁹⁶ Ibid, para 26-27 and CRC General Comment No. 15 para 76, available at

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en.

⁹⁷ CRC General Comment No. 15, para 80, available at

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f15&Lang=en.

⁹⁸ CRC General Comment No. 16, para 23, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

⁹⁹ See Principle 1 of the Children’s Rights and Business Principles, developed by UNICEF, Save the Children and the United Nations Global Compact, p. 16, available at:

https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf and “Children Are Everyone’s Business: Workbook 2.0” which provides practical guidance for implementing the Children’s Rights and Business Principles, p.18-19, available at:

https://www.unicef.org/csr/css/Workbook_2.0_Second_Edition_29092014_LR.pdf

¹⁰⁰ See Principle 1 of the Children’s Rights and Business Principles, p. 16, available at:

https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FCRBP%2FChildrens_Rights_and_Business_Principles.pdf. For Principle 31 of the Guiding Principles on Business and Human Rights, see Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations

“Protect, Respect and Remedy” Framework, A/HRC/17/31, available at: <https://undocs.org/A/HRC/17/31>, p.20-21. Effectiveness criteria include accessibility, legitimacy, predictability, equitability, rights compatibility, transparency, continuous learning and dialogue.

¹⁰¹ CRC General Comment No. 16, para 71, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

¹⁰² Ibid.

to such infringements, the State must discharge its obligation to ensure effective remedy through direct recourse to State based mechanisms.¹⁰³

Additional duties apply to non-State service providers, which should, inter alia, “take into account the provisions of the [CRC] when conceptualizing, implementing and evaluating their programs, including when sub-contracting other non-state service providers”¹⁰⁴ and “develop self-regulation mechanisms which would include a system of checks and balances” following the criteria detailed by the Committee.¹⁰⁵

¹⁰³ Ibid, para 68

¹⁰⁴ Committee on the Rights of the Child, Day of General Discussion on the Private Sector as a Service Provider and its Role in Implementing Child Rights (2002), unedited report, para 16, available at: <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2002.pdf>

¹⁰⁵ Ibid, Recommendation 17, p.11.

III. Article by article legal analysis of the 2020 draft LBI from a child rights perspective

At the outset, it is worth noting that a proper integration of children's rights in a treaty or legislative document does not mean – and cannot be achieved by – simply adding the word “child” or “children” in different parts of the text.

Rather, it is about reading the provisions at stake with children's rights in mind and analyzing whether the implementation of such provisions, as they stand, would respect, protect and fulfil them. Where necessary, children's rights obligations may need to be made explicit or additional language may be required to encompass them while not transforming the document into a “child rights only” instrument.

For the purpose of this paper, each provision of the 2020 draft LBI will therefore be examined from a child rights perspective and language proposals (**in bold**) will be recommended, where relevant, to ensure that the provision at stake is appropriate to protect children too. This approach does not imply however that children's rights should be the overarching framework, nor that children's protection is more important than the protection of other individuals or groups in vulnerable situations.

General remarks

The 2020 draft LBI only refers to “human rights abuse” committed by “a business enterprise”.¹⁰⁶ In fact, all references to human rights violations committed by States have been stricken out of the draft, thus departing from the language used in the Zero draft LBI (“human rights violations”) and the language used in the 2019 draft LBI (“human rights violation or abuse”).

It appears that the use of the terms “human rights violations” stirred some confusion as to whether businesses could in fact “violate” human rights and therefore be human rights duty-bearers along with States. The LBI is probably not the place to resolve the contentions around specific issue. However, this instrument should not exclude coverage of human rights violations committed by States in the context of business activities entirely from the text, especially as all the obligations provided in the draft LBI are directly imposed on States only. Such an omission could have some serious implications with regard to the accountability of States when implementing these obligations. There are also situations where States human rights violations and abuses by companies occur together, where State actors, for example security forces, are allegedly complicit with or otherwise maintain co-responsibility with businesses in conduct that may lead to human rights abuses. In such situations, the resulting harm would necessarily be characterized as both an abuse and violation.

¹⁰⁶ See Art. 1.2 and 2.1.b of the 2020 draft LBI for instance.

Wording suggestion:

Revert back to the language of the 2019 draft LBI by replacing “human rights abuse” by “**human rights abuse and violation**” throughout the text, and reintegrating the definition of a “human rights violation” as any harm “**committed by a State**” in Art. 1.2.

Alternatively: Reintegrate the definition of a “human rights violation” as any harm “**committed by a State**” in Art. 1.2. and replace “human rights abuse” by “human rights abuse and violation” in : PP14, PP15, PP20, Art.1.1, Art.2, Art.4.1, Art. 4.2.g., Art.5.3, Art. 7.3.d., Art.7.7, Art. 8, Art. 11.2, Art. 12.10, Art.13.2, Art.14.3, Art. 16.4.

Preamble

The Preamble of an international human rights treaty sets the general framework of the treaty by spelling out the values and principles on which it is based. It also informs the interpretation and application of the substantive provisions by the States Party to the treaty.¹⁰⁷

PP3 refers to the “nine core International Human Rights Instruments adopted by the United Nations” and the “eight fundamental Conventions adopted by the International Labour Organization”.

As explained under Section I of this paper, these references include both CRC and its three Optional Protocols, and ILO Convention No. 138 on Minimum Age and ILO Convention No. 182 on Worst Forms of Child Labour.

This means that every mention of “human rights” in the 2020 draft LBI also covers children’s rights, as long as the State concerned is party to the relevant treaties. The content of “human rights” as they pertain to the rights of the child must be interpreted through the lens of the CRC, its three Optional Protocols as construed by the Committee’s General Comments and jurisprudence, as well as these ILO Conventions where children are concerned.

Children’s rights are also implicitly referred to in PP4, notably under the “2030 Agenda for Sustainable Development”, which are “all relevant to children’s well-being, the fulfilment of their potential and the protection and realization of their human rights.”¹⁰⁸

Children – as a group – as well as “girls”, are explicitly mentioned in PP15, which acknowledges their “specific circumstances and vulnerabilities”. The 2020 draft LBI corrects two weaknesses of the 2019 draft LBI. First, it recognizes the impact that *all* – not just “certain” – business-related human rights abuses have a “distinctive and disproportionate impact” on groups in such vulnerable

¹⁰⁷ See Art. 31, para. 2 of the Vienna Convention on the Law of Treaties, available at <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>

¹⁰⁸ See the “Protection of the rights of the child in the implementation of the 2030 Agenda for Sustainable Development Report” of the UN High Commissioner for Human Rights submitted to the UN Human Rights Council, A/HRC/34/27, 15 December 2016, para. 19, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/27

situations. Second, it also seems to acknowledge that, when taking into account their “specific circumstances and vulnerabilities”, rights-holders should be considered individually rather than as members of only one group in a particularly vulnerable situation.

Besides these two references, children are also comprised in the terms “human person” and “every person”, as are children’s rights under the terms “human rights”, and are thus *de facto* included in the scope of all the paragraphs referring to these terms.

What is missing?

▪ Although there are other relevant child rights instruments¹⁰⁹ than those referred to under PP3, including regional instruments, these do constitute the core global child rights instruments in the context of business and human rights. Given PP3’s focus, it would not seem appropriate to suggest adding references to additional instruments here, as the function of a treaty of this nature is not to exhaustively set all interpretive instruments.

However, for clarity purposes and to avoid any misinterpretation, it would be important to expressly identify which international instruments are referred to in PP3 in the text. Other international legally binding instruments have made such references irrespective of whether those instruments have been ratified/acceded to or not by all States.¹¹⁰

Wording suggestion:

PP3: *Recalling also the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming at the abolition of the death penalty; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, its Optional Protocol on the sale of children, child prostitution and child pornography; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention for the Protection of all Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities, as well as their respective Optional Protocols, and the Freedom of Association and Protection of the Right to Organise Convention (No. 87), the Right to Organise and Collective Bargaining Convention (No. 98), the Forced Labour Convention (No. 29) and its Protocol, the*

¹⁰⁹ See Annex II of this paper.

¹¹⁰ For example, the preamble to the CRPD contains the following paragraph: “Recalling the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.”, see

<https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx>

Abolition of Forced Labour Convention (No. 105), the Minimum Age Convention (No. 138), the Worst Forms of Child Labour Convention (No. 182), the Equal Remuneration Convention (No. 100), and the Discrimination (Employment and Occupation) Convention (No. 111), adopted by the International Labour Organization;

- **PP5** is general and universal in nature but does include a specific mention regarding the “equal rights of men and women”, which suggests that it could be a good place to insert a phrase regarding the general status of children as well.

Wording suggestion:

PP5: Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women, **the status of the child as a subject of rights with evolving capacities** and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;

- **PP8** is the only preambular paragraph dedicated to the question of access to justice and remedy, one of the main purposes of the treaty. It is drafted in general terms for “every person”. As mentioned in Section II of this paper, access to justice and effective remedy is generally far more challenging and cumbersome for children than for adults. In the absence of child-sensitive procedures, it is almost unreachable.¹¹¹ Additional language underlining this particular situation seems necessary.

Furthermore, while PP8 stresses the importance of “access to justice and remedy”, it overlooks the issue of reparation. The right to an effective remedy and reparation for human rights violations is a well-established general principle of law, agreed on by all States at the UN General Assembly in its adoption in Resolution 60/147 of the UN Basic Principles and Guidelines on the Right to Remedy and Reparation.¹¹² In fact, the very purpose when pursuing remedies for violations or abuses of one’s rights is to obtain reparation for the damage caused.

Wording suggestion:

PP8: Upholding the right of every person, **including children**, to have equal access to effective remedy and **reparation**, in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;

- **PP14** recognizes the role of civil society and human rights defenders. While nothing in the current text excludes children human rights defenders *per se*, they are typically not recognized in that context. As recalled by the UN Committee on the Rights of the Child: “there is no minimum age” to be a human rights defender: “Children who take actions to promote, protect and fulfil their

¹¹¹ See pp 17-18 of this paper

¹¹² See the ICJ’s revised practitioner guide on “The Rights to a Remedy and Reparation for Gross Human Rights Violations”, which contains a range of sources and relevant jurisprudence, available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

own human rights, or the human rights of their peers or of others, including adults, are human rights defenders, even if they do not see themselves as such, or are not considered and called as such by others.”¹¹³ Given that such a recognition is still in its infancy, it would be important to explicitly include children in this group. Furthermore, “young people” who have just entered adulthood would also benefit from such an explicit mention as they often still suffer a similar stigma because of their young age. Additional language taken from the 2019 HRC resolution on environmental human rights defenders¹¹⁴ which is similar to the language used in Art. 5.2, could ensure they are not overlooked– while also benefitting other human rights defenders.

Wording suggestion:

PP14: Emphasizing that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises, **and that a safe and empowering context should be provided to them, including for children and young people;**

0) **PP15** recognizes that children (and girls) are among the groups of people who are especially vulnerable to business-related human rights abuses. But such a statement does not suffice to operationalize this reality into action. Given the stated purpose of the 2020 draft LBI,¹¹⁵ and its focus on victims, a more concrete provision, in the form of a separate paragraph, which would also provide a child-rights based *chapeau* to the entire text, should be added.¹¹⁶ This would be further justified given that an entire preambular paragraph, PP16, is dedicated to gender mainstreaming and another one, PP19, is dedicated to an ILO Declaration.

Additionally, while the 2020 version of PP15 seems to acknowledge some sort of individualized examination of rights holders specific circumstances and vulnerabilities, it still refers to groups in vulnerable situations in silo and overlooks the fact that a person does not necessarily fall into one of these groups only but may belong to two or more of these groups.

Wording suggestions:

PP15: Recognizing the distinctive and disproportionate impact of business-related human rights **violations and** abuses on women and girls, children, indigenous peoples, persons with disabilities,

¹¹³ See the outcome report of the Committee’s Day of General Discussion on “Protecting and Empowering Children as Human Rights Defenders” on 28 September 2018 (2018 DGD outcome report), available at: https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2018/crc_dgd_2018_outcomereport_en.pdf.

¹¹⁴ See OP14 (e) of HRC Resolution “Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development”, A/HRC/RES/40/11 adopted on 21 March 2019, available at: <https://undocs.org/en/A/HRC/RES/40/11>.

¹¹⁵ See Article 2 of the 2020 draft LBI.

¹¹⁶ Such an approach is not new and has been used in thematic resolutions of the HRC: see, for instance, PP17–19 of HRC resolution A/HRC/RES/29/6 on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers, adopted on 2 July 2015; PP14 of HRC resolution A/HRC/RES/42/11 on human rights in the administration of justice, including juvenile justice, adopted on 26 September 2019; PP15 of HRC resolution A/HRC/RES/35/20 on human rights and climate change, adopted on 22 June 2017; PP28 of HRC resolution A/HRC/RES/35/17 on the protection of the human rights of migrants, adopted on 22 June 2017

migrants, refugees, stateless persons, transboundary citizens¹¹⁷ and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders, **including potential intersectional vulnerabilities.**

PP15 *bis*: Recognizing in particular that the best interests of the child should be a primary consideration in all decisions affecting children and that appropriate child-sensitive procedures to pursue remedies for violations and abuses of their rights should be available to them at all levels, in judicial and non-judicial processes alike,

Article 1. Definitions

Article 1 defines the main terms used in the 2020 draft LBI: “victim”, “human rights abuse”, “business activities”, “business activities of a transnational character”, “business relationship” and “regional integration organization”.

Article 1.1. “Victim”

Art. 1.1 provides a broad definition of the “victim” protected by the LBI. It includes immediate family members or dependents of the direct victim, which is essential to encompass the impact that violations or abuses of the rights of parents or caregivers have on children’s rights. It also extends the term “victim” to those who have suffered harm “in intervening to assist victims in distress or to prevent victimization”, thereby strengthening the protection against reprisals (see Art. 5.1 and 5.2) broadening the scope of protection much farther than the 2019 draft LBI.

Even where they will not have suffered direct harm from a State or a business enterprise, children may also see their own rights adversely affected or violated from the impact of the harm caused to their parents or caregivers, making them “indirect” victims. While Art. 1.1 does not use this term, by extending the term of “victim” to the immediate family or dependents of the direct victim, it does include indirect child victims in its realm.

However, in doing so, it limits the child victims concerned to those belonging to “immediate” family members or “dependents” contrary to the CRC definition of “family”, which includes children cared by members of the “extended family or community as provided for by local custom” in addition to parents, legal guardians and “other persons legally responsible for the child”.¹¹⁸

It is a welcome development that Art.1.1 of the 2020 draft LBI no longer subjects this extensive interpretation to “domestic law”, thus removing the possibility that domestic provisions that would be inconsistent with and undermine the international standard are able to supersede it. As a

¹¹⁷ The term “transboundary citizens” refers to those who live in border areas and cities, see p.13 of this paper,

¹¹⁸ See Article 5 CRC.

consequence, States Parties would be required to integrate the LBI definition as it stands into their domestic law.

Other improvements from the 2019 draft LBI include the insertion of several illustrations of the types of “harm” covered by the text,¹¹⁹ which show how extensive this term is meant to be, and an explicit recognition that harm may be caused by “acts or omissions”, which is also an indication of the broad scope of protection that is intended by the text.

However, there is one major change of concern. The 2020 draft LBI, unlike the 2019 draft LBI, identifies victims only as those who “have suffered harm” and does not include those who “have alleged to have suffered”¹²⁰ harm anymore, thereby creating some uncertainty as to when people alleging to have suffered harm may be considered as victims. As it may not be appropriate to include alleged victims each time that the term “victim” is used in the LBI, we recommend reverting to the previous language tempered with the addition of “where relevant”. Another possibility would be to add “or those alleged to have suffered harm” to various other points in the text where victims are referenced, and this is relevant.

Finally, additional language taking into consideration the particular effect violations or abuses may have on child victims, especially regarding irreversible or lifelong damage, should be included here to ensure that it applies throughout the text. As this constitutes one specific form of harm to one specific group, Art. 1.1 would be a more appropriate place than Art. 1.2 which aims to provide a general definition of what constitutes “human rights abuse”.

Wording suggestion:

Art.1.1: “Victim” shall mean any persons or group of persons who individually or collectively have suffered, **or, where relevant, have alleged to have suffered** harm, including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse. The term “victim” shall also include the immediate family members or dependents of the direct victim, **as well as any child under the care of the direct victim, whether provided by law or by local custom**, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted. **When the victim is a child, harm should contemplate the impacts on their development and health.**

¹¹⁹ Such as “physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights” (Art. 1.1 of the 2020 draft LBI) and the impediment of “the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights” (Art. 1.2 of the draft 2020 draft LBI), including when it “may be identifiable only after a long period of time” (Art. 10.2 of the 2020 draft LBI).

¹²⁰ See Art.1.1 of the 2019 draft LBI.

Article 1.2. “Human rights abuse”

Art. 1.2 provides a general definition of the terms “human rights abuse”. The definition is appropriate and can apply to all persons concerned.

However, as mentioned at the beginning of the legal analysis, the 2020 draft LBI now only covers “human rights abuses” and excludes human rights violations committed by States from its scope, which is a worrying gap.

Wording suggestion:

Art. 1.2.: “Human rights abuse **or violation**” shall mean any harm committed by a business enterprise **or a State**, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights.

Article 1.3. “Business activities”

Art. 1.3 defines what is meant by “business activities”. While the explicit mention of State-owned enterprise is a welcome addition from the 2019 draft LBI, the current formulation makes it unclear what activities are covered under the term “for profit” and whether State-owned enterprises generating revenue that is reinvested in the State would fall under this category or not. To cure this deficiency, Art. 1.3 should also include a definition of “for profit”, which would reduce the scope of business activities concerned.

Recommendation:

Art. 1.3: *Add a definition of “for profit” activities.*

Article 2. Statement of purpose

Article 2 sets the four main objectives of the LBI and thus the framework of interpretation of the entire instrument. No specific change appears to be needed from a child rights perspective.

It is nevertheless worth observing that one of the stated purposes of the LBI is to “clarify and facilitate effective implementation” of States’ obligations to “respect, protect and promote human rights in the context of business activities” (Art. 2.1.a.), which seems incomplete if the LBI does not address human rights violations, alongside abuses, where relevant (see details under the above section “General remarks”).

Article 3. Scope

Article 3 specifies that all business enterprises, including those that “undertake business activities of a transnational character” are covered and that all “internationally recognized human rights and fundamental freedoms emanating from the [UDHR], core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law” (Art.3.3).

It is unclear why only these human rights obligations should be covered by the LBI if the State party has ratified, acceded to and/or approved– and thus accepted as binding – other human rights treaties or international instruments.¹²¹ Furthermore, it differs from the phrase used under Art. 8.9 of the 2020 draft LBI which refers to “international human rights law binding on the State Party” and could create confusion as to which human rights obligations of the State party shall apply to which provision of the LBI.

Likewise, the use of the terms “unless stated otherwise” in Art. 3.1 could unduly restrict the scope of the LBI and should therefore be deleted.

Wording suggestion:

Art. 3:

~~1. Unless stated otherwise,~~ This (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character.

~~3. This (Legally Binding Instrument) shall cover all internationally recognized human rights law and fundamental freedoms~~ binding on the State Party, including core international human rights treaties, the fundamental ILO conventions, and any other UN human rights treaty that may be hereafter adopted and come into force, as well as ~~Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party,~~ and customary international law, including the Universal Declaration of Human Rights.

Article 4. Rights of Victims

Article 4 details at length the rights afforded to victims of human rights abuses in the context of business activities.

The 2020 version of this article is much shorter and structured than the 2019 version, as several of the elements of the 2019 article can now be found under Art. 5 and 7 of the 2020 draft LBI.

In addition to these minor changes, welcome improvements have been integrated. One new key element is the possibility of class actions “in appropriate cases” envisaged in Art. 4.2.d. This is an especially important option for children given their special status, the particular difficulties they face when seeking remedies and the additional risks they may incur, not to mention the additional costs and resources typically incurred by victims where damages in cases of mass injury are pursued individually. Furthermore, class actions could also provide some anonymity to child victims where appropriate, which is essential to guarantee all children’s effective access to justice, remedy and reparation.

¹²¹ For example, some instruments, such as the [ILO 1998 Declaration on Fundamental Principles and Rights at Work](#) is of obligatory character for ILO Member States regardless of ratification or accession.

Another significant improvement is the inclusion of “access to legal aid” as one of the victims’ rights in Art. 4.2.f.

What is missing?

- Art. 4.1 guarantees victims the right to enjoy “all internationally recognized human rights and fundamental freedoms”. However, it fails to take into account the special needs and rights of groups and individuals in situations of particular vulnerability, such as children.

Wording suggestion:

Art. 4.1: Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms, **and due regard should be given to children in respect of their special needs.**

- In the same vein, Art. 4.2, which lists specific rights of victims, does not provide differentiated measures to address such vulnerabilities.

- Art. 4.2.c uses the term “remedies” for reparation. As highlighted under PP8 and Art. 2.1. the inclusion of the term “reparation” throughout the text is important to clarify it forms an integral part of redress. Accessibility of remedies, especially for child victims, is another key component of effective remedies and should also be explicitly mentioned here. The right to the truth, established by contemporary human rights law,¹²² should also be referenced as a means of reparation. Finally, at least regarding gross human rights violations and serious violations of international humanitarian law, it is essential that a judicial remedy is always available for victims to ensure proper redress.¹²³

- Art. 4.2.d remains silent as to what “appropriate cases” would be for class actions to be initiated, who would determine what is appropriate and how this determination would be made. It is possible that this formulation could be construed so as to delegate this appreciation to the domestic law governing the jurisdiction or the rules of the competent court – and whether or not they recognize class actions. This limitation should be mitigated by different formulation of Art. 7.1 (see below).

¹²² See Art. 24.2 of the Convention for the Protection of All Persons from Enforced Disappearances and General Comments No. 10 on the right to the truth in relation to enforced disappearance and No. 12 on children and enforced disappearances of the Committee in this regard, available at:

<https://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>, as well as the ICJ publication : *Right to a Remedy and Reparation for Gross Human Rights Violations, A Practitioners’ Guide*, pp. 52-81 which describes the concept as developed through the practice and jurisprudence of international human rights bodies and regional human rights courts, available at: <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>

¹²³ See the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles), Resolution 60/147 of the UN General Assembly, adopted on 16 December 2005, Principle 12, available at:

https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/147.

- Art. 4.2.e. acknowledges the need for gender responsive protective and support services but fails to recognize children respective needs.

- Art. 4.2.f guarantees access to information regarding the pursuit of remedies to victims but does not take into account the special needs of children and other groups in vulnerable situations in that regard.

Wording suggestion:

Art.4.2.: Without prejudice to the paragraph above, victims shall: (...)

c. be guaranteed the right to **accessible**, fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy **and reparation**, in accordance with this [Legally Binding Instrument] and international law, such as restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, injunction, ~~environmental remediation, and ecological restoration~~ **and the right to the truth, as well as environmental remediation, and ecological restoration, in addition to individual or collective reparations;**

c. *bis* be generally guaranteed the right to a judicial remedy, which must be available without exception in case of gross human rights violations or abuses and serious violations of international humanitarian law;

d. be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms, **without prejudice to the right to judicial remedy**, of the State Parties.

e. be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, before, during and after any proceedings have been instituted, as well as from revictimization in the course of proceedings for access to effective remedy, including through appropriate protective and support services that are gender responsive **and child sensitive. Child victims' identity shall not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned.**

f. be guaranteed access to information **in relevant languages and accessible formats to adults and children alike, including those with disabilities**, and legal aid relevant to pursue effective remedy;

- Integrating a child-rights perspective in this article could also be done by adding a stand-alone paragraph on child victims, instead of amending Art.4.2.e., which could provide a more comprehensive and coherent consideration of their special needs.

Wording suggestions:

Alternative stand-alone article

New Art.4.2.bis:

Child victims shall be guaranteed access to child-sensitive procedures, which can provide for effective remedy and adequate reparation for violations or abuses of their rights, taking into account their individual situation of vulnerability, evolving capacities and best interest. They shall be heard in all matters affecting them, provided that their participation is voluntary and occurs in a child-friendly environment. Their identity shall not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned.

Article 5. Protection of Victims

Article 5 is a new article of the 2020 draft LBI, mostly based on Art. 4.3, 4.9 and 4.10 of the 2019 draft LBI.

As it now covers not only victims of human rights abuses but also human rights defenders, the title of the article is not appropriate anymore and should be modified accordingly to “Protection”.

What is missing?

Art. 5.2 requires States to take specific measures for human rights and environmental defenders generally. As explained under PP8, while this does not exclude children *per se*, an explicit inclusion of them is preferable.

Wording suggestion:

Article 5. Protection of Victims

Art.5.2: State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, **including for children and young people**, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.

Article 6. Prevention

Article 6 is dedicated to preventative measures States should take to ensure business activities are conducted in a manner that respects human rights and prevent and mitigate risks of human rights abuses.

The language used in the 2020 draft LBI is much stronger than that contained in Art. 5 of the 2019 draft LBI. In particular, Art. 6 provides for compulsory human rights due diligence to be undertaken by all business enterprises, proportionately to their size, risk of severe human rights impacts and

nature and context of their operations (Art. 6.2). It extends the reach of such due diligence to all the enterprises “business relationships”, in accordance with the terms used in the UNGP and by the Committee in CRC General Comment No. 16, instead of limiting it to their “contractual relationships” – as was the case in the 2019 draft LBI – and provides for compulsory, commensurate sanctions to be taken by States if business enterprises fail to comply with this obligation (Art. 6.6).

What is missing?

- Art. 6 focuses heavily on human rights due diligence and impact assessments to be undertaken by businesses leaving little room for other types of preventative measures that can be undertaken by States – or businesses, and that could empower potentially affected people and communities to defend their rights ‘before the fact’.
- From a child-rights perspective, prevention of violations and abuses is key to the protection of children’s rights. A system relying overly on a liability regime would place a disproportionate burden on children, especially given the particular obstacles they face to access justice and would allow unnecessary risks of irreversible damages to their health or development.
- Additional measures undertaken by States that would strengthen the prevention of children’s rights violations and abuses include: establishing robust legislative and administrative frameworks to enforce and protect children’s rights at the outset, including by integrating their core principles into relevant legislative, administrative and practical measures; building capacity and providing technical assistance to businesses on children’s rights for them to develop children’s rights statements of policies, as suggested in Principle 16 of the UNGP¹²⁴; ensuring children’s access to appropriate and child-friendly relevant information and enabling children’s participation in decision-making.

Wording suggestions:

Art. 6.1: State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that **their domestic legislation reflects their international human rights obligations and that** business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.

¹²⁴ UNGP Principle 16 states that: “As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that: (a) Is approved at the most senior level of the business enterprise; (b) Is informed by relevant internal and/or external expertise; (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.”

New Art. 6.1.bis: States Parties shall also provide capacity-building and technical assistance opportunities to business enterprises on human rights to assist them with developing human rights statements of policies, while paying special attention to the rights of groups and individuals in situations of particular vulnerability. States Parties shall also ensure that information regarding business enterprises' obligations with regard to human rights is easily accessible in appropriate formats by all.

- Art. 6.3.a tackles environmental and human rights impact assessments in general terms. Given the importance given to individuals and groups in vulnerable situations in the 2020 draft LBI, it would be important to stress that such assessments shall pay special attention to their rights.

- Art 6.3.b. requires the integration of a gender perspective in human rights due diligence measures to address the “differentiated risks and impacts experience by women and girls” but only foresees consultations with women.

- Similarly, Art. 6.3.d. singles out how consultations should be conducted with indigenous peoples but fails to address other specificities applying to other potential groups such as children.

Wording suggestion:

Art. 6.3.a: Undertaking regular environmental and human rights impact assessments, **paying special attention to the rights of groups and individuals in situations of particular vulnerability, including children**, throughout their operations”.

Art.6.3.b.: Integrating a gender perspective, in consultation with potentially impacted women **and girls** and women’s **and girls’** organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls;

Art.6.3.d.: Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent; **and that consultations with children are undertaken in accordance with the principle of the child’s right to be heard.**

Article 7. Access to Remedy

Article 7 is a new article of the 2020 draft LBI, mostly based on Art. 4.11-4.16 of the 2019 draft LBI. It mirrors Art. 4 by stating the States’ obligations in order to guarantee victims’ rights.

What is missing?

- Art. 7 overlooks the issue of reparation. As explained with regard to PP8 of the 2020 draft LBI, the right to an effective remedy and reparation for human rights violations is a well-established general principle of law.¹²⁵

¹²⁵ See p. 25 of this paper.

- Art. 7 raises similar concerns as Art. 4 : the language used is too general to encompass the special needs and rights of children and it should be amended to that end.

Wording suggestion:

Article 7. Access to Remedy **and** Reparation

1. States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this [Legally Binding Instrument] to enable victims' access to adequate, timely and effective remedy **and reparation.**

(...)

3. State Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:

a. Making information available to victims of their rights ~~and~~ the status of their claims **and the timing of the proceedings in relevant languages and accessible formats to adults and children alike, including those with disabilities;**

b. Guaranteeing the rights of victims to be heard in all stages of proceedings **according to their special needs and rights** ~~as consistent with their domestic law,~~ **keeping in mind that child victims may only be heard and participate voluntarily, within a child-friendly environment and through the use of child-sensitive methods;**

(...)

d. Providing assistance to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character **and providing, where needed, free legal aid to child victims;** and,

e. Ensuring that rules concerning allocation of legal costs at the conclusion of legal proceedings do not place an unfair and unreasonable burden on victims.

4. States Parties shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases, **such as cases concerning child victims.**

Article 8. Legal liability

Article 8 sets the rules for the legal liability of legal and natural persons in the case of human rights abuses in the context of business activities, including transnational ones.

It clearly separates the obligation of conducting human rights due diligence from legal liability by providing that undertaking such due diligence “shall not automatically absolve” enterprises “from liability for causing or contributing to human rights abuses or failing to prevent such abuses” (Art.8.8).

It also emphasizes States Parties' obligation to ensure that their domestic law is in line with and covers human rights abuses that amount to crimes under international human rights law binding them, as well as customary international law. With regard to children's rights, these can notably be found under OPSC and OPAC, as well as ILO Convention 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999.

What is missing?

- While Art. 8 addresses the relationship, or lack thereof, between human rights due diligence and legal liability, it remains silent with regard to non-judicial grievance mechanisms. An additional provision clearly stating that non-judicial grievance mechanisms shall not exclude legal liability should be inserted.

Wording suggestion:

New Art. 8.2.bis: Neither the use or availability of company operational grievance mechanisms and similar non-judicial mechanisms can forfeit the right to access to courts and the potential legal liability of business enterprises.

- Art. 8.6 requires States to ensure that business enterprises “establish and maintain financial security [...] to cover potential claims of compensation”. While Art. 12.3.viii tackles how assets could be recovered through mutual assistance and international cooperation, the draft LBI does not address situations where assets would be otherwise moved or made unavailable to avoid paying compensation.

Wording suggestion:

Art. 8.6: States Parties may require legal or natural persons conducting in business activities in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security **and availability of assets**, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

Article 9. Adjudicative Jurisdiction

Article 9 deals with the determination of jurisdiction over civil claims and suggests three potential jurisdictional bases, namely the courts of the State where (a) the human rights abuse occurred; (b) an act or omission contributing to the human rights abuse occurred; or (c) the legal or natural person alleged to have committed such act or omission is domiciled.

These jurisdiction grounds may further be complemented by other grounds provided in other international treaties or national law.

Art. 9 corrects a number of gaps that were detrimental to victims' access to justice:

- It forbids courts designated by Art. 9.1 from using the *forum non conveniens* doctrine and declining to examine a case brought under the LBI;

- It allows “closely connected” claims to be joined before the same court if one of them is against a legal or natural person domiciled in the territory of the court, meaning, for instance that a foreign subsidiary or a business partner could be sued in the home State of a transnational corporation.;
- It allows courts to establish their jurisdiction over claims which have a “sufficiently close connection” to their States if no other effective court can guarantee a fair trial (*forum necessitatis* clause), a possibility that was recommended by the Committee.¹²⁶

Where cases concern cross-border violations or abuses of children’s rights, a key concern for the effective access to justice of children is to find a court that will assume jurisdiction over the case. Nothing in Article 7 provides such a guarantee, as any of the potential jurisdictions identified could reject jurisdiction over the claim. To solve this situation, a *forum necessitatis* clause should be added in Article 7.1, as recommended by Mexico and other States, and the ICJ in its own comments to the 2019 Revised draft.¹²⁷ Such clause would allow courts to establish their jurisdiction, if no other forum is available and a “reasonable link”¹²⁸ can be found with the case.

These adjustments are welcome and particularly significant, especially in the case of cross-border violations or abuses of children’s rights where no court may otherwise find itself competent. They avoid the risk of a mere denial of victims’ access to justice and remedy and make the proceedings more accessible for child victims.

What is missing?

- It is unfortunate that the courts of the place where the victim is domiciled has been struck out as one of the forum options in the 2020 draft LBI. It is fair to note that courts of the place where the human rights abuse occurred have been added as a new ground, but this jurisdiction does not necessarily coincide with the place of the victim’s domicile. For example, children migrant workers or children trafficked for economic exploitation may be domiciled in yet another State, which may be the easiest place to go to, particularly for victims in vulnerable situations. Even if it may not always be the most effective jurisdiction, it is essential to preserve this option to ensure access to justice.

¹²⁶ CRC General Comment No. 16, para 44, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

¹²⁷ For States interventions, see the Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/43/55, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/Annex_CompilationStatements_5th_session.pdf; For ICJ position, see its Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights February, 2020, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/ICJcommentsReviseddraft_treaty2019.pdf

¹²⁸ CRC General Comment No. 16, para 44, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

- Although it does not specify it explicitly, Art. 9 only addresses the issue of jurisdiction over civil complaints, leaving aside criminal complaints, despite Art. 8's provisions allowing for possible criminal liability for business enterprises, and administrative complaints.

Children's rights violations or abuses in the context of business activities can certainly engender criminal liability and there should be a specific provision here. A universal jurisdiction clause in that regard, for crimes under international law, should also be included. In addition, the article should include administrative complaints, and not only those before "courts".

- Art. 9.1 only refers to claims brought by "victims". While it could be understood as implicitly including their representatives, an explicit reference to them would be more child sensitive.

Wording suggestion:

Art. 9. 1: Jurisdiction with respect to **civil** claims brought by **or on behalf of** victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

a. the human rights abuse occurred;

b. an act or omission contributing to the human rights abuse occurred;

b. *bis* the victims are domiciled; or

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.

(...)

New Art. 9.3. Provision regarding jurisdiction with respect to criminal claims, including the provision for universal jurisdiction for certain crimes.

New Art. 9.4. Provision regarding jurisdiction with respect to administrative claims.

Article 10. Statute of limitations

Article 10 sets out the applicability of domestic statutory or other limitations, i.e. time prescriptions, with regard to crimes under international law identified as for those "which constitute the most serious crimes of concern to the international community as a whole" and others.

Article 10.2 introduces the idea of "reasonableness" for determining the period of time needed for the investigation and prosecution of violations that do not constitute "most serious crimes". While there is no indication as to how such a "reasonable period of time" could be evaluated, these terms

appear to be consistent with the terms “not unduly restrictive” used in para. 6 and 7 of the UN Basic Principles on remedy and reparations,¹²⁹ from which this article is inspired.

The 2020 draft LBI is an improvement from the similar provision in the 2019 draft LBI in the sense that it does no longer subject this provision to the States’ domestic law, thus creating a fully-fledged obligation for States to amend their domestic legislation in order to comply with this provision.

Furthermore, it includes as one of the two explicit reasons requiring States to allow enough time to investigate and prosecute violations the case where “harm may be identifiable only after a long period of time”, which is particularly relevant for children as they may suffer harm at an early age and only realise it much later in life.

What is missing?

The criteria used in Article 10 to differentiate between “most serious crimes of concern to the international community as a whole” and other violations of international human rights law and international humanitarian law is not grounded in international law and standards. This phrase has been used in the Preamble of the Rome Statute establishing the International Criminal Court and refers to the crimes under its jurisdiction, which clearly do not exhaust the possible crimes in the present context.

The universal standard for this subject matter is found in the set of principles for the protection and promotion of human rights through action to combat impunity,¹³⁰ recommended to all States and UN institutions by the Human Rights Commission (predecessor the UN Human Rights Council), in its resolution 2005/81. This simply uses the term “serious crimes under international law”, and provides a non-exhaustive list in Definition B. With regard to statutes of limitations, identified as “prescription” in the Principles, Principle 23 provides that:

“Prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available.”

Prescription shall not apply to crimes under international law that are by their nature imprescriptible.

When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries. Indeed, all violations of international human rights law and international humanitarian law would be “of concern to the international community as a whole” albeit not being all “crimes”.

¹²⁹ See the UN Basic principles, available at: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/147.

¹³⁰ See the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”, Addendum to the report of the independent expert to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, available at: <https://undocs.org/E/CN.4/2005/102/Add.1>.

Despite the inclusion of some understanding as to how statute of limitations may particularly affect children, among others, it is worth underlining that time limits generally pose a serious accessibility obstacle to children, even when harm is instantly identifiable.

They may need more time to secure legal representation, because of their minority, or may not even be able to seize the courts until their majority.

For these reasons, flexibility and extension of standard limits should be specifically envisaged in the case of child victims. As Namibia raised during the fifth session of the OEIGW: “Time should not run against children during the investigation and prosecution of the violation”.¹³¹ While the language suggested for a new Art. 10.2 bis leaves States Parties free to interpret how this should be translated into their domestic laws, to ensure the best protection, we would recommend that domestic statutes of limitations do not start before the alleged victim reaches the age of 18.

Wording suggestion:

Art.10:

1. The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of ~~all~~ violations of international human rights law and international humanitarian law which constitute ~~the most serious crimes of concern to the international community as a whole~~ **under international law.**

2. Domestic statutes of limitations applicable to civil claims or to violations that do not constitute ~~the most serious crimes of concern to the international community as a whole~~ **under international law shall not run for such period as no effective remedy is available and shall not apply to civil or administrative actions sought by victims seeking reparation for their injuries. In all cases, they must** allow a reasonable period of time for the investigation and commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.

2bis. In the case of child victims, States Parties shall take all legislative or other measures necessary to ensure that statutory or other limitations will not deprive them from their right to access justice, remedy and reparation because of the particular impediments due to their age and/or special and dependent status.¹³²

Article 11. Applicable law

Art. 11 defines which laws may be applicable by the competent court regarding matters of procedure and substance. Art. 11.1 links back to Art. 9.1 by providing that unless Art. 11.2 applies,

¹³¹ See footnote 22 of this paper.

¹³² Such measures are already in force in several common law jurisdictions, such as England and Wales, for example, see CRIN/ICJ, Rights, Remedies and Representation: A global report on access to justice for children, 2016, p. 30–31, available at: https://archive.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf.

the applicable law should be the law of the State of the competent court, i.e. (a) where the human rights abuse occurred, (b) where the act or omission contributing to the human rights abuse occurred or (c) where the legal or natural persons alleged to have committed such act or omission are domiciled.

Art. 11.2 is an improved version of former Art. 9.2 of the 2019 draft LBI. It provides the possibility for the victim or their representatives, to choose a law other than that of the State of the competent court and does not subject the possibility of this choice to domestic law anymore. The victim may thus request to have the case governed by the law of the place where the “acts or omissions that result in violations of human rights [...] have occurred” or where the “natural or legal person alleged to have committed (such) acts or omissions” is domiciled” (as understood under Art. 9.2 of the 2020 draft LBI).

This change allows the victim to choose the national law that is most favorable to their case out of the three possible options provided under Art. 11, regardless of the competent court. This possibility will be particularly important for children in the preparation of their cases (albeit it implies having adequate legal assistance to make the best choice).

What is missing?

- As noted above, it would be important that the place where the human rights abuse occurred is among the options offered to the choice of the victim. In the 2019 draft LBI, there was an additional option, namely the law of the place where the victim is domiciled. – This will not always be the best option, as the place of domicile will not necessarily coincide with the place of the damage and as child migrant workers or children trafficked for economic exploitation may be domiciled in yet another State. The best option will depend on the circumstances, but these must provide for multiple possibilities to ensure that there will be always be an effective forum of jurisdiction. In fact, any additional applicable law that could be chosen by the victim increases the chances of access to justice and protection of the victims and should therefore be considered.

Wording suggestion:

Art. 11.2: Notwithstanding Art. 9.1, all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where:

a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or

a) *bis* the harm or damage has occurred; or

a) *ter* the victim is domiciled; or

b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.

Article 12. Mutual Legal Assistance and International Judicial Cooperation

Article 12 looks at the ways States Parties shall provide mutual legal assistance to each other and cooperate judicially in order to initiate and carry out investigations, prosecutions and other proceedings promptly in the context of the LBI.

Children may be impacted and/or witness cross-border violations or abuses, including serious violations such as sale of children, child prostitution, child pornography, forced child labour or trafficking in children. It is therefore important to ensure that the procedures envisaged respect the special needs and rights of children and are child sensitive. The non-exhaustive list of mutual legal assistance requests and measures provided under Art.12.3 seems to be sufficient in that regard.

No other particular comment or analysis seems required with regard to children's rights.

Article 13. International Cooperation

Article 13 focuses on international cooperation between and among States. It reflects States' obligations to "engage in international cooperation for the realization of children's rights beyond their territorial boundaries."¹³³ It also opens the possibility for States to cooperate with international and regional organizations and civil society "as appropriate" and provides a list of measures that could be undertaken by States in that regard. It complements Article 12.

What is missing?

- As mentioned under Art.12, children may be impacted and/or witness transnational violations or abuses, including serious violations. Yet, the examples of measures provided under Art.13.2, while important, overlook other critical measures. These include protection for victims and other persons requiring protection (art.5.1) and reparation of harm caused (not yet expressly covered in the purposes of the LBI under art.2.1.c), which may need to take place in a country other than that where the proceedings are conducted or where reparation is awarded.
- Additional specific language detailing when States should cooperate, but also how national bodies should cooperate, for instance along the lines of the language used in Article 7.1 OPAC or Article 10 OPSC, would significantly strengthen this provision.
- The Committee envisaged under Article 15 should also be given a role to encourage and enable international cooperation, including with international organizations, such as UN specialized agencies, and civil society for instance, along the lines of the language used in Article

¹³³ CRC General Comment No. 16, para 41, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>, CRC General Comment No. 5, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en and the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted by 40 international law and human rights experts in September 2011, and its commentary, both available at: <https://www.icj.org/protecting-human-rights-beyond-borders/>

45 (a) and (b) CRC and Article 15 OPIC. Such inclusion would require a change of place of Article 13 in order to appear after the mention of the Committee. Given that international cooperation is closely linked to the implementation of the LBI, it could be moved after Article 16 as a new Article 16 bis, or, alternatively, the present Article 16 could be collapsed into Article 13.

Wording suggestion:

Either Art 13 or a new Art.16bis:

1. States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument), **including in the prevention and detection of any activity contrary thereto and in the rehabilitation, physical and psychological recovery, social reintegration and repatriation of victims, especially children.**

[2. State Parties recognize the importance of international cooperation...]

3. **States Parties shall promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.**

4. **The Committee may invite international or regional organizations and agencies and other competent bodies, as it may consider appropriate, to provide expert advice on the implementation of the (Legally Binding Instrument) in areas falling within the scope of their respective mandates. It shall further transmit, as it may consider appropriate, to international or regional organizations and agencies and other competent bodies any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with any observations and recommendations from the Committee, on these requests or indications.**

[5. **The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of complaints considered under the present (Legally Binding Instrument) that may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States parties in achieving progress in the implementation of the present (Legally Binding Instrument).**]¹³⁴

Article 14. Consistency with International Law

Article 14 details how States should implement the LBI in accordance with international law. It partly addresses a gap in the 2019 draft LBI version, notably with regard to the relationship between the LBI and other bilateral or multilateral agreements on issues relevant to business activities – such

¹³⁴ If such a communications procedure were to be integrated in the LBI directly, as recommended p. 46–47
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as trade or investments agreements - that may be concluded by States parties, whether they had been agreed prior or after the ratification or accession to the LBI.

In particular, Art. 14.5.b. envisages the relationship between the LBI and new bilateral or multilateral trade or investment agreement. It requires States to ensure the compatibility of such agreements with the LBI and its optional protocols, “as well as other relevant human rights conventions and instruments”, an element that was missing in the 2019 draft LBI.

What is missing?

- To be consistent with the set purpose of the LBI, this provision should require States Parties to apply the same standards to themselves as those that are applicable to the business enterprises under article 6. This would ensure a greater scope of protection for all, including children. A number of guiding principles developed by UN experts could be used for inspiration in that regard.¹³⁵

Wording suggestion:

Art. 14.5.: States Parties shall ensure that:

[...]

b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties’ human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments. **In order to ensure such compatibility, State Parties should carry out environmental and human rights impact assessments prior to concluding such agreements and whenever necessary during the time the agreement is in force. Such assessments should evaluate and address any foreseeable effects of such agreements on the enjoyment of human rights and be undertaken through full and public consultation with all stakeholders.**

Article 15. Institutional Arrangements

Article 15 provides for the establishing of three different international mechanisms to assist with the implementation of the LBI: (1) a new Committee, similar to the treaty bodies established by the core international human rights treaties; (2) a Conference of States Parties, similar to those established by the core international human rights treaties and (3) an International Fund for Victims.

What is missing?

- A more in-depth discussion and reflection appear to be needed to conceive a proper and effective monitoring mechanism of the LBI, which could also take into account the special needs and rights of individuals and groups in the most vulnerable situations, possibly

¹³⁵ See, for instance, the 2011 Guiding Principles on human rights impact assessments of trade and investment agreements, developed by the UN Special rapporteur on the right to food, Olivier De Schutter, A/HRC/19/59/Add.5, available at: http://www.srfood.org/images/stories/pdf/officialreports/20120306_hria_en.pdf

looking at how existing treaty bodies, such as the Committee on the Rights of the Child, could be involved to that end.

- States parties to the CRC, which include all UN Member States except for the United States are already under the obligation to “provide information on whether the impact of activities by business corporations (extractive, pharmaceutical, agro-industry, among others) is likely to affect the enjoyment by children of their rights are evaluated and whether measures are taken to investigate, adjudicate, repair and regulate.”¹³⁶
- A communications procedure should be considered in the treaty (see below). This does not require an optional protocol, though there could be provision made for States to opt out.
- The option of requiring States to set up national mechanisms to that end – but also collect information on human rights impact assessments and possibly receive complaints – should be considered and certainly more accessible to victims.

Article 16. Implementation

Article 16 contains two paragraphs that are of particular significance for children’s rights: paragraph 3 regarding business activities in conflict-affected areas and paragraph 4 regarding the recognition of the specific impacts of business activities on children, among other groups.

What is missing?

- Article 16.3 addresses the specific impact of business activities in conflict-affected areas and while it highlights gender-based and sexual violence, it fails to stress the major impact they can also have on children and their rights. For instance, private security and military companies are known to use child soldiers and children are sometimes exploited to extract natural resources needed to finance hostilities, contributing to detrimental effects on children’s right to life, health, development or education.

Wording suggestion:

Article 16.3

Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence, **the use of child soldiers, child labour**

¹³⁶ See the Committee’s treaty specific guidelines regarding the form and content of periodic reports, CRC/C/58/Rev.3, 3 March 2015, para. 20, available at:

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsr1ZWeb%2bRuDNd9qD0iCL6ikRB2cflhMR51%2f10eGSYFCtruq1Ql9a7QWVRO8Mi60ohmvtNns63WFivVgw0QS1DEXFP1BZCTpSZeZGbTrhQAY5> and CRC General Comment No. 16, para 86, available at: available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

and the general impact such activities and relationships may have on the human rights of all persons living in these areas, including children.

- Article 16.4 only focuses on impacts without addressing the specific protection measures that should derive from them.

Wording suggestion:

Article 16.4

In implementing this (Legally Binding Instrument), State Parties shall give ~~address the specific impacts of business activities on while giving~~ special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, **transboundary citizens**, migrants, refugees, stateless persons and internal displaced persons, **and undertake measures necessary for their protection.**

- Finally, the present Article 16 could be collapsed into Article 13.¹³⁷

Article 17. Relation with protocols

The question of the establishment of a communications procedure is addressed below in the section on provisions missing in the draft.

Final provisions: Articles 18, 19, 20, 21, 22, 23 and 24.

Article 19 provides for “regional integration organizations” to become party to the treaty, which is a welcome innovation.

Article 22 should be revised to forbid any reservations to this treaty. While Art.22.1 does forbid reservations incompatible with the object and purpose of the LBI, as in any event required under international treaty law, it is difficult to conceive of any reservation that could be compatible with the LBI’s object and purpose.

Wording suggestion:

Article 22

No reservations to the present Protocol shall be permitted.

~~1. Reservations incompatible with the object and purpose of the present [Legally Binding Instrument] shall not be permitted.~~

~~2. Reservations may be withdrawn at any time.~~

¹³⁷ See p. 42 of this paper.

Provisions missing in the 2020 draft LBI

An integrated communications mechanism

As the 2020 draft LBI focuses on the rights of victims and their access to justice and remedy, the absence of a communications (complaints) mechanism of some sort is a glaring omission.

While such a mechanism has been contemplated in a separate instrument in the zero draft,¹³⁸ discussions about it have been paused since the 4th session of the OEIGWG.

There is no reason that a communications mechanism must be contained in a separate optional protocol. The core international human rights instruments referred to in the Preamble allow for both options. Some treaties contain Optional Protocol (ICCPR, ICESCR, CEDAW, CRPD, CRC), while others integrate specific provisions in their core text, which are only actionable pending an additional declaration from States parties to the core text. This is the case of the Convention Against Torture (Art. 22), the Convention on the Elimination of Racial Discrimination (Art. 14), the Convention on Enforced Disappearances (Art. 31).

Integrating a communications mechanism along the lines of the provisions of the Zero draft optional protocol into the draft LBI would further contribute to reaching the goals set in the LBI. It will ensure a holistic vision of access to justice and remedy at all levels and mitigate the risk of having potentially conflicting visions between the domestic and the international level if discussions were to be held separately.

If the amendments suggested on child-sensitive justice were to be accepted, an international complaints mechanism embedded in the LBI would further set a clear child rights-based standard for domestic procedures.

Such an inclusion would mean that States would be encouraged, but not compelled to accept a communications procedure. Rather, a declaratory system could be built in. Given the purpose of the LBI, the best system would be the “opt-out” system according to which States parties to the LBI could make a declaration that they do not accept the complaints mechanisms at the time of signature, ratification, or accession.¹³⁹

¹³⁸ See the Zero draft OP to the LBI, available here:

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.pdf>

¹³⁹ See, for instance, the “opt-out” provisions in article 28 CAT; article 10 of the Optional Protocol to CEDAW (OP CEDAW); article 8 of the Optional Protocol to CRPD (OP CRPD); article 13(7) of the Optional Protocol on a communications procedure to CRC (OPIC) regarding the inquiry procedure.

It would be important that the communications mechanism allows for the possibility of collective complaints. Indeed, the Committee has raised on several occasions that effective collective complaints mechanisms would drastically increase access to justice for children.¹⁴⁰

In addition to the communications mechanism, the treaty should also provide for the possibility of an inquiry procedure to address systemic issues in States parties, as is available in other human rights treaties and Optional Protocols. These could also be on an “opt-out” basis.

[An article on the dissemination, awareness-raising, translation into national languages and appropriate formats, including in a child-friendly version, of the LBI](#)

The 2020 draft LBI also lacks a provision that is increasingly common and critical in international instruments and resolutions, especially when they concern the rights of individuals and groups in vulnerable situations, and in particular children: wide dissemination of the text at stake in appropriate languages and formats.¹⁴¹

Wording suggestion:¹⁴²

New Article 17 bis – Dissemination of and information on the (Legally Binding Instrument)

Each State party undertakes to make widely known and to disseminate actively the present (Legally Binding Instrument) and to facilitate access to information about the views and recommendations of the Committee, in particular with regard to matters involving the State party, to all local and national stakeholders, including parliament, executive agencies and ministries, the judiciary, business enterprises operating nationally or transnationally and civil society, by translating it into relevant languages and making accessible formats to adults and children alike, including those with disabilities.

¹⁴⁰ See, for instance, CRC General Comment No. 16, para 68 and 76, available at:

<https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

and the Committee’s comments on the draft OPIC, A/HRC/WG.7/2/3 para 13, available at:

https://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2FWG.7%2F2%2F3. For further detailed information on collective complaints and children’s rights, see the submission made by expert Mr. Peter Newell to the Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child ahead of its first session <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGCRC/Session1/A-HRC-WG-7-1-CRP-2.doc>

¹⁴¹ See, for instance, article 13 OP CEDAW, article 16 OP ICESCR, article 17 OP CRPD and article 17 OPIC.

¹⁴² Wording suggestion based on article 17 OPIC and paras. 85–86 of CRC General Comment No. 16, available at: <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

Annex 1 – Compilation of wording proposals

General wording suggestion:

Revert back to the language of the 2019 draft LBI by replacing “human rights abuse” by “**human rights abuse and violation**” throughout the text, and reintegrating the definition of a “human rights violation” as any harm “**committed by a State**” in Art. 1.2.

Alternatively: Reintegrate the definition of a “human rights violation” as any harm “**committed by a State**” in Art. 1.2. and replace “human rights abuse” by “human rights abuse and violation” in: PP14, PP15, PP20, Art.1.1, Art.2, Art.4.1, Art. 4.2.g., Art.5.3, Art. 7.3.d., Art.7.7, Art. 8, Art. 11.2, Art. 12.10, Art.13.2, Art.14.3, Art. 16.4.

Preamble:

PP3: *Recalling also the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Second Optional Protocol aiming at the abolition of the death penalty; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, its Optional Protocol on the sale of children, child prostitution and child pornography; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention for the Protection of all Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities, as well as their respective Optional Protocols, and the Freedom of Association and Protection of the Right to Organise Convention (No. 87), the Right to Organise and Collective Bargaining Convention (No. 98), the Forced Labour Convention (No. 29) and its Protocol, the Abolition of Forced Labour Convention (No. 105), the Minimum Age Convention (No. 138), the Worst Forms of Child Labour Convention (No. 182), the Equal Remuneration Convention (No. 100), and the Discrimination (Employment and Occupation) Convention (No. 111), adopted by the International Labour Organization;*

PP5: Reaffirming the fundamental human rights and the dignity and worth of the human person, in the equal rights of men and women, **the status of the child as a subject of rights with evolving capacities and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;**

PP8: Upholding the right of every person, **including children, to have equal access to effective remedy and **reparation**, in case of violations of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;**

PP14: Emphasizing that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of business enterprises, **and that a safe and empowering context should be provided to them, including for children and young people;**

PP15: Recognizing the distinctive and disproportionate impact of business-related human rights **violations and** abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants, refugees, **stateless persons, transboundary citizens**¹⁴³ and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders, **including potential intersectional vulnerabilities.**

PP15 bis: Recognizing in particular that the best interests of the child should be a primary consideration in all decisions affecting children and that appropriate child-sensitive procedures to pursue remedies for violations and abuses of their rights should be available to them at all levels, in judicial and non-judicial processes alike,

Article 1

Art.1.1: “Victim” shall mean any persons or group of persons who individually or collectively have suffered, **or, where relevant, have alleged to have suffered harm** [*Alternatively: add “or those alleged to have suffered harm” to various other points in the text where victims are referenced, and this is relevant*], including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights, through acts or omissions in the context of business activities, that constitute human rights abuse. The term “victim” shall also include the immediate family members or dependents of the direct victim, **as well as any child under the care of the direct victim, whether provided by law or by local custom**, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted. **When the victim is a child, harm should contemplate the impacts on their development and health.**

Art. 1.2.: “Human rights abuse **or violation**” shall mean any harm committed by a business enterprise **or a State**, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including regarding environmental rights.

Art. 1.3: Add a definition of “for profit” activities.

¹⁴³ The term “transboundary citizens” refers to those who live in border areas and cities, see p.13 of this paper,
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Article 3:

~~1. Unless stated otherwise,~~ This (Legally Binding Instrument) shall apply to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character.

~~3. This (Legally Binding Instrument) shall cover all internationally recognized human rights law and fundamental freedoms~~ **binding on the State Party, including core international human rights treaties, the fundamental ILO conventions, and any other UN human rights treaty that may be hereafter adopted and come into force, as well as Human Rights, any core international human rights treaty and fundamental ILO convention to which a state is a party, and customary international law, including the Universal Declaration of Human Rights.**

Article 4

Art. 4.1: Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms, **and due regard should be given to children in respect of their special needs.**

Art.4.2.: Without prejudice to the paragraph above, victims shall: (...)

c. be guaranteed the right to **accessible**, fair, adequate, effective, prompt and non-discriminatory access to justice and effective remedy **and reparation**, in accordance with this [Legally Binding Instrument] and international law, such as restitution, compensation, rehabilitation, satisfaction, guarantees of non-repetition, injunction, ~~environmental remediation, and ecological restoration~~ **and the right to the truth, as well as environmental remediation, and ecological restoration, in addition to individual or collective reparations;**

c. *bis* be generally guaranteed the right to a judicial remedy, which must be available without exception in case of gross human rights violations or abuses and serious violations of international humanitarian law;

d. be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms, **without prejudice to the right to judicial remedy**, of the State Parties.

e. be protected from any unlawful interference against their privacy, and from intimidation, and retaliation, before, during and after any proceedings have been instituted, as well as from revictimization in the course of proceedings for access to effective remedy, including through appropriate protective and support services that are gender responsive **and child sensitive. Child victims' identity shall not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned.**

f. be guaranteed access to information **in relevant languages and accessible formats to adults and children alike, including those with disabilities**, and legal aid relevant to pursue effective remedy;

Alternative stand-alone article

New Art.4.2.bis:

Child victims shall be guaranteed access to child-sensitive procedures, which can provide for effective remedy and adequate reparation for violations or abuses of their rights, taking into account their individual situation of vulnerability, evolving capacities and best interest. They shall be heard in all matters affecting them, provided that their participation is voluntary and occurs in a child-friendly environment. Their identity shall not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned.

Article 5. Protection of Victims

Art.5.2: State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, **including for children and young people**, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.

Article 6

Art. 6.1: State Parties shall regulate effectively the activities of all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character. For this purpose States shall take all necessary legal and policy measures to ensure that **their domestic legislation reflects their international human rights obligations and that** business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character, within their territory or jurisdiction, or otherwise under their control, respect all internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations.

New Art. 6.1.bis: States Parties shall also provide capacity-building and technical assistance opportunities to business enterprises on human rights to assist them with developing human rights statements of policies, while paying special attention to the rights of groups and individuals in situations of particular vulnerability. States Parties shall also ensure that information regarding business enterprises' obligations with regard to human rights is easily accessible in appropriate formats by all.

Art. 6.3.a: Undertaking regular environmental and human rights impact assessments, **paying special attention to the rights of groups and individuals in situations of particular vulnerability, including children**, throughout their operations”.

Art.6.3.b: Integrating a gender perspective, in consultation with potentially impacted women **and girls** and women's **and girls'** organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experience by women and girls;

Art.6.3.d: Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent; **and that consultations with children are undertaken in accordance with the principle of the child's right to be heard.**

Article 7. Access to Remedy and Reparation

1. States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary jurisdiction in accordance with this [Legally Binding Instrument] to enable victims' access to adequate, timely and effective remedy **and reparation.**

(...)

3. State Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:

a. Making information available to victims of their rights ~~and~~ the status of their claims **and the timing of the proceedings in relevant languages and accessible formats to adults and children alike, including those with disabilities;**

b. Guaranteeing the rights of victims to be heard in all stages of proceedings **according to their special needs and rights** ~~as consistent with their domestic law,~~ **keeping in mind that child victims may only be heard and participate voluntarily, within a child-friendly environment and through the use of child-sensitive methods;**

(...)

d. Providing assistance to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses resulting from business activities of a transnational character **and provide, where needed, free legal aid to child victims;** and,

e. Ensuring that rules concerning allocation of legal costs at the conclusion of legal proceedings do not place an unfair and unreasonable burden on victims.

4. States Parties shall ensure that court fees and other related costs do not become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases, **such as cases concerning child victims.**

Article 8

New Art. 8.2.bis: Neither the use or availability of company operational grievance mechanisms and similar non-judicial mechanisms can forfeit the right to access to courts and the potential legal liability of business enterprises.

Art. 8.6: States Parties may require legal or natural persons conducting in business activities in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security **and availability of assets**, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

Article 9

Art. 9.1: Jurisdiction with respect to **civil** claims brought by **or on behalf of** victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

- a. the human rights abuse occurred;
- b. an act or omission contributing to the human rights abuse occurred;
- b. *bis* the victims are domiciled; or**
- c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.

(...)

New Art. 9.3. Provision regarding jurisdiction with respect to criminal claims, including the provision for universal jurisdiction for certain crimes.

New Art. 9.4. Provision regarding jurisdiction with respect to administrative claims.

Article 10

Art. 10.1. The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of ~~all~~ violations of international human rights law and international humanitarian law which constitute ~~the most serious crimes of concern to the international community as a whole~~ **under international law**.

Art. 10.2. Domestic statutes of limitations applicable to civil claims or to violations that do not constitute ~~the most serious crimes of concern to the international community as a whole~~ **under international law shall not run for such period as no effective remedy is available and shall not apply to civil or administrative actions sought by victims seeking reparation for their injuries. In all cases, they must allow a reasonable period of time for the investigation and**

commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.

Art. 10.2bis. In the case of child victims, States Parties shall take all legislative or other measures necessary to ensure that statutory or other limitations will not deprive them from their right to access justice, remedy and reparation because of the particular impediments due to their age and/or special and dependent status.¹⁴⁴

Article 11

Art. 11.2: Notwithstanding Art. 9.1, all matters of substance regarding human rights law relevant to claims before the competent court may, upon the request of the victim of a business-related human rights abuse or its representatives, be governed by the law of another State where:

a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or

a) *bis* the harm or damage has occurred; or

a) *ter* the victim is domiciled; or

b) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.

Article 13

Article 13 could be collapsed into Article 16 [or Article 16 could be collapsed into Article 13].

13.1. States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument), **including in the prevention and detection of any activity contrary thereto and in the rehabilitation, physical and psychological recovery, social reintegration and repatriation of victims, especially children.**

[...]

13.3. States Parties shall promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.

¹⁴⁴ Such measures are already in force in several common law jurisdictions, such as England and Wales, for example, see CRIN/ICJ, Rights, Remedies and Representation: A global report on access to justice for children, 2016, p. 30-31, available at: https://archive.crin.org/sites/default/files/crin_a2j_global_report_final_1.pdf.

13.4. The Committee may invite international or regional organizations and agencies and other competent bodies, as it may consider appropriate, to provide expert advice on the implementation of the (Legally Binding Instrument) in areas falling within the scope of their respective mandates. It shall further transmit, as it may consider appropriate, to international or regional organizations and agencies and other competent bodies any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with any observations and recommendations from the Committee, on these requests or indications.

[13.5. The Committee may also bring to the attention of such bodies, with the consent of the State Party concerned, any matter arising out of complaints considered under the present (Legally Binding Instrument) that may assist them in deciding, each within its field of competence, on the advisability of international measures likely to contribute to assisting States parties in achieving progress in the implementation of the present (Legally Binding Instrument).]¹⁴⁵

[Article 14](#)

Art. 14.5.: States Parties shall ensure that:

[...]

b. Any new bilateral or multilateral trade and investment agreements shall be compatible with the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments. **In order to ensure such compatibility, State Parties should carry out environmental and human rights impact assessments prior to concluding such agreements and whenever necessary during the time the agreement is in force. Such assessments should evaluate and address any foreseeable effects of such agreements on the enjoyment of human rights and be undertaken through full and public consultation with all stakeholders.**

[Article 16](#)

Article 16 could be collapsed into Article 13 [or Article 13 could be collapsed into Article 16]

Article 16.3

Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence, **the use of child soldiers, child labour and the general impact such activities and relationships may have on the human rights of all persons living in these areas, including children.**

¹⁴⁵ If such a communications procedure were to be integrated in the LBI directly, as recommended p. 46-47

Article 16.4

In implementing this (Legally Binding Instrument), State Parties shall ~~give~~ ~~address the specific impacts of business activities on while giving~~ special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, **transboundary citizens**, migrants, refugees, **stateless persons** and internal displaced persons, **and undertake measures necessary for their protection.**

[Article 17](#)

New Article 17 bis – Dissemination of and information on the (Legally Binding Instrument)

Each State party undertakes to make widely known and to disseminate actively the present (Legally Binding Instrument) and to facilitate access to information about the views and recommendations of the Committee, in particular with regard to matters involving the State party, to all local and national stakeholders, including parliament, executive agencies and ministries, the judiciary, business enterprises operating nationally or transnationally and civil society, by translating it into relevant languages and making accessible formats to adults and children alike, including those with disabilities.

[Article 22](#)

No reservations to the present Protocol shall be permitted.

~~1. Reservations incompatible with the object and purpose of the present [Legally Binding Instrument] shall not be permitted.~~

~~2. Reservations may be withdrawn at any time.~~

A new Article on a communications mechanism, including an individual and collective complaints procedure and an inquiry procedure.

Annex 2 – List of relevant resources on children’s rights in the context of business activities

I. United Nations instruments, guidance and recommendations

A. International treaties

- [Convention on the Rights of the Child](#) (CRC - 1989)
- [Optional Protocol to the CRC on the sale of children, child prostitution and child pornography](#) (2000)
- [Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict](#) (2000)
- [Optional Protocol to the CRC on a communications procedure](#) (2011)
- [International Covenant on Economic, Social and Cultural Rights](#) (1966)
- [International Covenant on Civil and Political Rights](#) (1966)
- [Convention on the Elimination of All Forms of Discrimination against Women](#) (1979)
- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#) (1990)
- [Convention on the Rights of Persons with Disabilities](#) (2006)
- [Convention against Transnational Organised Crime](#) (2000) and Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“the Palermo Protocol”)

B. International guidance and recommendations

- United Nations [“Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights](#) adopted by the Human Rights Council (2011)
- Committee on Economic, Social and Cultural Rights’ [“Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights”](#) (2011)
- Committee on Economic, Social and Cultural Rights’ [General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities](#) (2017).
- Committee on the Elimination of Discrimination against Women’s [General Recommendation No. 24: Article 12 of the Convention \(Women and Health\)](#) (1999)
- Committee on the Rights of the Child, [General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child](#) (2003).
- Committee on the Rights of the Child, [General Comment No. 6 on treatment of unaccompanied and separated children outside their country of origin](#) (2005).
- Committee on the Rights of the Child, [General Comment No. 7 on implementing child rights in early childhood](#) (2005).

- Committee on the Rights of the Child, [General Comment No. 9 on the rights of children with disabilities](#) (2006).
- Committee on the Rights of the Child, [General Comment No. 11 on indigenous children and their rights under the Convention](#) (2009).
- Committee on the Rights of the Child, [General Comment No. 12 on the right of the child to be heard](#) (2009)
- Committee on the Rights of the Child, [General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration](#) (2013).
- Committee on the Rights of the Child, [General Comment No. 15 on the right of the child to the highest attainable standard of health](#) (2013).
- Committee on the Rights of the Child's [General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights](#) (2013)
- Committee on the Rights of the Child, [General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts](#) (2013).
- Committee on the Rights of the Child, [Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography](#) (OPSC Guidelines) and [explanatory memorandum](#) (2019)
- Human Rights Committee, [General comment No. 32 on the right to equality before courts and tribunals and to a fair trial](#) (2007)
- World Health Organization, [Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children](#) (2010)
- World Health Organization, [A Framework for Implementing the Set of Recommendations on the Marketing of Foods and Non-Alcoholic Beverages to Children](#) (2012)

C. Other international relevant resources

- Committee on the Rights of the Child, [Day of General Discussion on Economic exploitation](#) (1993)
- Committee on the Rights of the Child, [Day of General Discussion on the Private Sector as a Service Provider and its Role in Implementing Child Rights](#) (2002).
- The [United Nations Study on Violence against Children](#) (2006)
- [Reports of the Human Rights Council Open-ended Working Group on an optional protocol to the Convention on the Rights of the Child to provide a communications procedure](#) (2009-2011)
- Human Rights Council Expert Mechanism's [study on access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities](#) (2014)
- [Report of the Special Rapporteur on the independence of judges and lawyers – Protecting children's rights in the justice system](#) (2015)

- [OHCHR report “Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child”](#), A/HRC/35/13 (2017)
- The [United Nations Global Compact](#) (UNGC)
- The [UNWTO Convention on Tourism Ethics](#), Resolution 668 (XXI) adopted by the UNWTO General Assembly.

II. International Labour Organisation (ILO) Conventions

- [Forced Labour Convention No. 29](#) (1930)
- [Freedom of Association and Protection of the Right to Organise Convention No. 87](#) (1948)
- [Right to Organise and Collective Bargaining Convention No. 98](#) (1949)
- [Equal Remuneration Convention No. 100](#) (1951)
- [Abolition of Forced Labour Convention No. 105](#) (1957)
- [Discrimination \(Employment and Occupation\) Convention No. 111](#) (1958)
- [Minimum Age Convention No. 138](#) (1973)
- [Indigenous and Tribal Peoples in Independent Countries Convention No. 169](#) (1989)
- [Worst Forms of Child Labour Convention No. 182](#) (1999)
- [Maternity Protection Convention No. 183](#) (2000)

III. Regional instruments and recommendations

A. Regional treaties

- [European Convention for the Protection of Human Rights and Fundamental Freedoms](#) (1950)
- [European Social Charter](#) (1961)
- [American Convention on Human Rights](#) (1969)
- [African Charter on the Rights and Welfare of the Child](#) (1990)
- [European Convention on the Exercise of Children’s Rights](#) (1996)
- [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#) (2007)

B. Regional guidance and recommendations

- [Council of Europe Recommendation CM/Rec\(2016\)3 of the Committee of Ministers to Member States on Human rights and business and its Appendix](#) (2016)
- [ACERWC General Comment no 5 on article 1 of the African Children’s Charter on “State Party Obligations under the African Charter on the Rights and Welfare of the Child \(Article 1\) and systems strengthening for child protection”](#) (2018)

- [“Business and Human Rights: Inter-American Standards”](#)(2020), report of the Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights [available in Spanish only].

IV. Other relevant sources

- The [Children’s Rights and Business Principles](#) (2012), developed by UNICEF, the UN Global Compact and Save the Children
- [“Children are everyone’s business: Workbook 2.0 – A guide for integrating children’s rights into policies, impact assessments and sustainability reporting”](#), (2014), Second edition, UNICEF
- [Children’s Rights and Business Atlas](#), a joint initiative by Global Child Forum and UNICEF.
- [Abidjan Principles on the human rights obligations of States to provide public education and to regulate private involvement in education](#) (2019)