EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS

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February 2020 submission to the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

The European Center for Constitutional and Human Rights aims to hold perpetrators of serious human abuses to account through conventional or innovative legal means. Our goal is to provide justice and redress to those affected, deter future abuse and develop the international legal framework against impunity.

Based in Berlin, ECCHR works with partners around the world on international crimes and accountability, business and human rights, as well as migration, and runs a training programme for future human rights lawyers.

ECCHR would like to support the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. Indeed, it is the only global process with the capacity to establish a common legal standard on business and human rights.

This submission is in response to the working group's call for additional textual suggestions for the development of a legally binding instrument (LBI) on transnational corporations and other business enterprises. It is based on ECCHR and its partners' experience litigating specific cases and aims to provide practical contributions.

Preamble

1. We recommend that the preamble refer explicitly to the UN Declaration on Human Rights Defenders (1998), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), and ILO C169 – Indigenous and Tribal Peoples Convention (1989), as many of the treaty's provisions must be interpreted in light of the standards set by these instruments.

Article 1: Definitions

2. We recommend changing the concept of "victims" under Article 1(1) to a broader concept of "rights-holders." We recommend changing the term throughout the text, specifically Article 4. The broader concept of "rights-holders" better serves the LBI's aspirations and purpose, especially with regards to the central issue of prevention as articulated in Article 5.

3. We advise extending explicit coverage to individuals and groups whose rights are at risk. Currently, Article 1(1) together with Article 1(2), may be give rise to the interpretation that the LBI would only cover violations and abuses committed against individuals. This would exclude collective groups such as trade unions and communities, as well as other human rights defenders.

4. Finally, the current definition of "victims," combined with recourse to national law in Article 1(1) and Article 4, has far-reaching implications. The current language limits the definition to direct victims, while a larger group of people (e.g. family members or unions) could equally be victims, yet potentially disenfranchised if the current language is maintained.

5. The definition of "human rights violation or abuse" in Article 1(3) could be interpreted as limited to violations and abuses committed intentionally "against" a person or group of people (see also above on how a group itself can be at risk of being a victim. However, this might not provide sufficient coverage of the entire range of violations and abuses, such as negligent behaviour. We would therefore suggest expanding the definition to also include "human rights violations or abuses which result from business activities."

6. The notion of a "contractual relationship" in Article 1(4) poses problems. Although the definition itself provides an expansive relationship, using "contractual relationship" invites unnecessary ambiguity. A more appropriate wording would be "business relationship," which also include a number of non-contractual relationships. Replacing the notion of "contractual relationship" with "business relationship" in this article, as well as Articles 5, 6 and 7, would also ensure consistency with the three authoritative instruments in the field of business and human rights:
    1. The United Nations Guiding Principles (2011) uses the term "business relationship" in Foundational Principle 13, and Operational Principles 7, 17, 18 and 19;
    2. The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (as amended in 2017) consistently uses the term "business relationship" and does not use the term "contractual relationship," notably in an explicit effort to align with the above UN Guiding Principles;[1]
    3. The OECD Guidelines for Multinational Enterprises (as revised in 2011) consistently uses the term "business relationship," notably in the paragraphs that are most relevant to the LBI.[2]

[1] ILO (2017), Tripartite Declaration on MNEs, para. 10.
[2] OECD (2011) Guidelines for Multinational Enterprises, para. 12 and 43.

Case study: Criminal investigation of RINA and *Specific Instance AEFAA et al. v. RINA*

A fire at the Ali Enterprises textile factory in Karachi, Pakistan, on 11 September 2012 killed over 250 people and injured 30 more. Just three weeks before the fire, RINA awarded the factory – which mainly produced for German retailer KiK (see case study below) – with the international SA 8000 certificate, which is supposed to guarantee safety and other workplace standards.

At the factory, many of the windows were barred, emergency exits were locked, and the building had only one unobstructed exit, impeding employees who suffocated or were burned alive from escaping. RINA could have prevented hundreds of deaths had it done its work properly by correctly identifying these defaults and demanding necessary safety renovations before awarding the certificate.

Certification companies and social compliance initiatives play a key role in and exercise significant leverage over today's supply chains, despite being widely criticized for flaws in their methodological approach. In many cases, the certifiers or compliance initiatives are either paid by the companies under audit or lead brands. Moreover, in the case of Ali Enterprises, the factory commissioned RINA's Pakistani subsidiary to do the audit, however RINA, with which the factory had no contractual relationship, made the decision to grant the SA 8000 certificate. Auditors, certifiers and social compliance initiatives' failure to identify, report or remediate human rights risks and violations can therefore significantly contribute to human rights abuses despite contractual relationships.

Article 4: Rights of Victims

7. The article refers to domestic law in several instances, making recognition and concrete applicability dependent on domestic provisions. This allows states to make exceptions by granting essential rights entirely at their own discretion. Given the specific purpose of this LBI, it risks undermining this article in practice, other articles including articles 5 and 6, as well as the LBI's broader relevance in protecting and empowering rights-holders in the context of business and human rights

8. The article spells out rights for rightsholders and State Party obligations. We would propose a new introductory article, as well a State Party obligation to guarantee the rights as they are now spelled out in Article 4(1-8). Furthermore, the text could further benefit from subdividing Article 4 to deal with separate dimensions, such as access to remedy, the ability to defend human rights, etc.

9. Although the remedies provided in Article 4(5) are not exhaustive, it would be appropriate to further expand the non-exhaustive list of remedies and specifically include the right to truth, reinstatement and an apology.

Case study: Criminal complaint against Heckler and Koch

On the night of 27 September 2014, security forces attacked college students at Ayotzinapa. During the police operation, seven students from Ayotzinapa were killed, and 43 were forcefully "disappeared" and reportedly handed over to a criminal syndicate. There is still no trace of the students. Many other students were injured, among them Aldo Gutiérrez Solano, who has remained in a coma ever since. Mexican investigators found that at least seven policemen used G36 rifles that originated from non-authorized exports.

In September 2016, ECCHR requested access to Stuttgart proceeding case files on behalf of Gutiérrez Solano, whose parents represent his interests. The Regional Court of Stuttgart rejected the request, blocking avenues for additional investigative steps in the context of a possible civil claim against arms manufacturer Heckler and Koch, or in ongoing proceedings against police and government officials in Mexico. This decision impeded the family from obtaining information about what happened to Gutiérrez Solano and the other students.

10. The right of information in the pursuit of remedy under Article 4(6) would benefit from further clarification that it should be a state's obligation to facilitate the access of company information. Indeed, it is crucial to recognise both information as an "enabling right," as well as the practical barriers that potential claimants have in terms of obtaining information about the company, the company's exact knowledge, the nature and scope of certain internal decisions, etc. A useful model for such access and disclosure of information can be found in Article 32(1) of the South African constitution, which provides that "[*e*]*veryone has the right of access to* [...] *any information that is held by another person and that is required for the exercise or protection of any rights.*"[3]

11. Given the additional challenges of obtaining information in the context of transnational litigation, it would furthermore be appropriate to prescribe access to information held within another jurisdiction. The US Foreign Legal Act provides an avenue for access to information that is held by corporations or individuals in the United States, which can be useful or necessary to a case in a court or tribunal outside the US. Section 1782 allows those with an interest in a case to obtain that information and may provide inspiration for further elaborating the LBI on this point.[4]

12. Article 4(9) is crucial and can be strengthened further by including specific provisions explicitly protecting whistle-blowers and trade unions.

[3] Constitution of the Republic of South Africa, 1996.

[4] 28 US Code § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals. Under this statute, "interested parties" to an action in a foreign domestic proceeding can ask a federal court to obtain documents and testimony from people or companies located in the US that may have relevant information.

Case study: Criminal complaint against Nestle

On 10 September 2005, trade unionist, human rights activist and former Nestlé-Cicolac employee Luciano Romero was kidnapped, tortured and murdered by members of a paramilitary group. His murder came after a number of death threats in the context of a long-standing labour dispute between the Colombian trade union Sinaltrainal and the Nestlé factory Cicolac. Indeed, after the company was warned about death threats against union leaders, it failed to take the necessary precautionary measures. Instead, local Nestlé-Cicolac managers reportedly spread libellous rumours that Luciano Romero and his colleagues were guerrilla fighters, putting them in even greater danger.

The Swiss parent company Nestlé failed to take action to prevent the threats and defamations. Criminal proceedings were launched in Colombia, resulting in the conviction of Romero's direct murderers. In his verdict, the Colombian judge stated that Nestlé's role in the crime was of particular relevance, and ordered an investigation to look into the matter in more detail. The Colombian prosecution authorities, however, have failed to take up the issue.

On 5 March 2012, Romero's widow filed a criminal complaint against Nestlé and some of its top managers with Swiss prosecution authorities in Zug. The complaint accuses the Nestlé managers of breaching their obligations by failing to prevent the Colombian paramilitary groups from committing this crime and failing to adequately protect Romero. This murder was part of the systematic persecution of trade unions in Colombia, a crime, for which the perpetrators still enjoy impunity. However, the trade union, which was also directly targeted and affected by this crime, did not have legal standing in the Swiss proceedings, as only the widow was considered "affected."

13. Article 4(16) could be further strengthened by specifying in greater detail the conditions of the process triggering the reversal of the burden of proof. In this regard, a stronger linkage with, or even moving it to, the obligation to do human rights due diligence under Article 5, and liability in terms of harm or failure to do human rights due diligence under Article 6, and more specifically (6), would be appropriate.

Article 5: Prevention

14. In line with earlier comments on the notion of contractual relationships (see above), we would encourage aligning Article 5(2) more closely with the UN Guiding Principles and extend a company's duty for prevention to include actual and potential impacts directly linked to its operations, products or services by its business relationships. The article could read as follows:

> "*For the purpose of Paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of a transnational character, undertake human rights due diligence as follows:*
>
> *a) Identify and assess actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its activities, or which are directly linked to its operations, products or services by its business relationships;*

> *b) Take appropriate action to prevent or mitigate actual or potential adverse human rights impacts that the enterprise may cause or contribute to through its activities, or which may be directly linked to its operations, products or services by its business relationships*
> *c) Track and monitor the effectiveness of measures and processes to address adverse human rights impacts in order to know if they are working;*
> *d) Communicate and report how impacts are being addressed, and show stakeholders – in particular those affected – that there are adequate policies and processes in place to identify, assess, prevent and monitor any actual or potential human rights violations that the enterprise may cause or contribute to through its activities, or which may be directly linked to its operations, products or services by its business relationships.*"

15. Article 5(2b) gives a broad mandate to seek meaningful "*consultation*" with a range of groups. In this context, we would recommend a stronger level of engagement, resulting in a duty for companies to pro-actively consult with relevant stakeholders.

16. In addition, it would be appropriate to add (either in Article 5(2b) or a new subsection of Article 5(2)) an additional obligation for companies to organise a mechanism where upon their own initiative, stakeholders can signal new and emerging risks. For example, the French Devoir de Vigilance law mandates a more permanent "warning mechanism" for risks that materialise, which need to be developed together with trade unions.[5] Although the mechanism foreseen under the French law is exclusive to trade unions representing company employees, we want to draw attention to both the permanent character of the mechanism, as well as its openness towards parties beyond the company raising specific risks and/or violations. Building upon the logic already developed within Article 5(2), it seems appropriate to give such an alert mechanism to a broader group of relevant interests.

17. Given the detailed list of groups that need to be consulted under Article 5(2b), we would strongly encourage the explicit mention of trade unions. Indeed, democratic and independent trade unions, where they exist, can equally have at heightened risk of violations.

18. We also believe it would be good to dedicate a new subsection in Article 5(3) between subsection b and c, specifically to indigenous peoples, taking over and expanding upon the last sentence of Article 5(3b). Such a distinction is warranted as "Free, Prior and Informed Consent," (FPIC) or "consultation," depending on the circumstances, with indigenous peoples who are specifically recognised under international law, especially in ILO C169 – Indigenous and Tribal Peoples Convention (1989), the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), international customary law, as well as national law and jurisprudence.

19. Also, and in contrast with the other consultation under the remainder of Article 5(3b), it is essential to clarify that "consultation" and "free, prior and informed consent" as

[5] Loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre. "Un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société."

remain a State Party obligation. The company's responsibility should be to assess whether such processes have taken place and whether they meet international standards. In case such processes have not taken place, or lack the necessary quality, it would be problematic if enterprises would be required to perform them themselves. Instead, the article needs to insist these processes are duly organised before a business activity starts or continues.

Case study: Amicus brief in *Border Timbers et al. v. Republic of Zimbabwe*

The cases concern territories in Zimbabwe in which the claimants, a group of European investors, currently operate timber plantations. During the course of Zimbabwe's land reform program, the government compulsorily acquired these properties. The claimants sought the land's return, along with a full legal title and exclusive control of the properties.

In the petition, the indigenous chiefs sought to draw the tribunal's attention to the fact that these properties are located on ancestral territories of native peoples. The petitions argued that in reaching its decision, the tribunal must take into account consultation with and property rights of the indigenous groups under international law. The relevance of human rights law to determine investment disputes has been repeatedly recognized in previous ICSID cases.

The tribunal rejected the petition of amicus curiae status, despite acknowledging that the proceedings may well impact the rights of affected indigenous communities.

Case study: *Indigenous human rights defenders et al. v. EDF*

The French company Électricité de France (EDF) – through its local subsidiaries EDF EN México and Eólica de Oaxaca – is seeking to develop a Gunaa Sicarú wind park in Unión Hidalgo. As a result of the Mexican state's failure to implement and enforce the community's right to free, prior and informed consent, and the company's failure to fulfil its obligation to respect this right, the community has suffered internal divisions and escalating, even violent, conflict.

On 1 October 2019, indigenous human rights defenders, supported by local and global NGOs, sent a formal notice urging EDF to identify and mitigate human rights risks for local communities posed by its windpark project in Oaxaca.

20. Both the notice against the French company EDF[6] and the case brought by Border Timbers[7] demonstrate the need and added value of an explicit and independent reference to FPIC with Indigenous Peoples. This would add significant value to the LBI's scope.

21. In the context of Article 5, and more specifically Article 5(3), it would be good to provide additional guidance on the step to "identify and assess" to ensure methodological rigor and quality commensurate to the risks and violations one would typically expect. While there is an established industry of social audit companies, certifiers and social compliance initiatives proffering to adequately perform such

[6] ECCHR, 2019, "Civil society space in renewable energy projects: A case study of the Unión Hidalgo community in Mexico" https://www.ecchr.eu/fileadmin/Publikationen/ECCHR_PP_WINDPARK.pdf accessed on 27 February 2020.

[7] The case actually concerns two related cases: *Border Timbers Limited, Border Timbers International (Private) Limited, Hangani Development Co. (Private) Limited v. Republic of Zimbabwe* (ICSID Case No. ARB/10/25) and *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No. ARB/10/15).

functions, there is equally ample documentation that most of these organisations fail to properly identify and document human rights risks and violations.[8]

Case study: *Criminal complaint against TÜV*

In January 2019, a dam burst at an iron ore mine near the small Brazilian town of Brumadinho, killing 272 people. Toxic sludge contaminated large sections of the Paraopeba River, poisoning the drinking water of thousands of people. Only four months earlier, the Brazilian subsidiary of German certifier TÜV SÜD confirmed the dam's safety, despite known safety risks.

In October 2019, five Brazilians who lost close family members in the dam failure, ECCHR and MISEREOR filed a criminal complaint against a TÜV SÜD employee, as well as a law infringement complaint against TÜV SÜD. In the complaint, TÜV SÜD is accused of having contributed to the dam failure near Brumadinho. Despite obvious safety risks, TÜV SÜD did not prevent its Brazilian subsidiary from issuing the required dam stability declaration.

In fact, in an inspection, TÜV SÜD's Brazilian employees found that the dam failed to meet the necessary stability factor, which would prevent them from deeming it stable. Commissioned by Vale, the employees looked instead for new calculation methods to achieve the desired results. In the end, TÜV SÜD confirmed the dam's stability against its better judgment and in contrast with the facts on the ground. As a result, neither the mine operator nor did the authorities initiate stabilization or evacuation measures.

22. Unfortunately, the TÜV SÜD case is not an isolated one of an auditor failing to identify risks or being pressured by its customer for a specific result. Indeed, a similar issue occurred in the above-mentioned RINA case. It would therefore also be prudent to elaborate a specific regime of state oversight and liability for audit companies to ensure adequate human rights due diligence.

23. Finally, it seems appropriate under Article 5(3) to propose additional measures to ensure the public and accurate disclosure of corporate structures, subsidiary ownership, and disaggregated supplier information detailing the company's supply chain. On the one hand, a number of jurisdictions including the United States and India make it possible to obtain import/export data that elaborates a company's supply chain. Similarly, a growing number of companies in the garment and textile, tea and wider agri-food sectors already disclose such information, enabling human rights defenders to track supply chains and contribute to due diligence, remedy and/or accountability. We therefore would propose adding a new subsection of Article 5(3) that could read as follows:

> "*Disclosure of information regarding corporate structures and subsidiary ownership; as well as disclosure of current and up-to-date supplier information detailing the company's supply chain.*"

[8] See for example LeBaron and Lister, 2016, "Ethical audits and the supply chains of global corporations"; LeBaron, Lister and Dauvergne, 2017, "Governing global supply chain sustainability through the ethical audit regime"; Van Ho and Terwindt, European Review of Private Law, 2019, "Assessing the duty of care for social auditors"; Terwindt and Armstrong, 2018 "Oversight and Accountability in the Social Auditing Industry – the Role of Social Compliance Initiatives"; Terwindt and Saage-Maaß, 2016, "Liability of Social Auditors In The Textile Industry"; Clean Clothes Campaign, 2005, "Looking for a quick fix: How weak social auditing is keeping workers in sweatshops"; Clean Clothes Campaign 2019, "A fig leaf for fashion".

Article 5: Liability

24. Article 6(6) is one of LBI's keystones. The UN Guiding Principles and other authoritative instruments differentiate and recognise "causing," "contributing" and "directly linked." We think it is important to, at a minimum, recognise both "causing" and "contribution" as grounds for liability. The basis for triggering Article 6(6) should be clearer, specifying that liability is established based on control or supervision of their subsidiaries or suppliers, or another connection between companies. The current language could be considered ambiguous, given that the concepts of "control," "supervision," and "foreseeability" are not clearly defined.

25. One way of making these notions clearer is to develop grounds of liability based on "control" and "supervision," while also separately specifying clear and developed grounds for liability of human rights risks and violations a company causes or contributes to, and that were, or should have been, foreseen. For example, it could read:

> "*States Parties shall ensure that their domestic legislation provides for liability of legal persons conducting business activities when these fail to prevent, or prevent other natural or legal person(s) with whom it has a business relationship, from causing, or contributing to, acts or omissions leading to a human rights violation or abuse against third parties' rights or the environment, when the former:*
>
> *a. Has the ability to control, or to exercise influence over the relevant entity that caused or contributed to the violation or abuse, or*
>
> *b. Should have foreseen the risk of human rights violations or abuses in line with Article 5 of the LBI.*"

26. Article 6(7) and 6(9) establishes company liability for criminal, as well as secondary offences. As both the Lafarge case[9] and the ICC communication[10] describe herein, this liability is a crucial component of a functioning LBI and it is important to maintain such provisions.

[9] ECCHR, 2016, "CASE REPORT: Lafarge in Syria: Accusations of complicity in war crimes and crimes against humanity", http://www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Lafarge_Syria_ECCHR.pdf accessed on 25 February 2020.

[10] ECCHR, 2020, "CASE REPORT: Made in Europe, bombed in Yemen: How the ICC could tackle the responsibility of arms exporters and government officials", http://www.ecchr.eu/fileadmin/Fallbeschreibungen/CaseReport_ECCHR_Mwatana_Amnesty_CAAT_Delas_Rete.pdf, accessed on 25 February 2020.

Case study: Criminal complaint against Lafarge and Lafarge Cement Syria~~:~~

Since the beginning of the armed conflict in Syria, an extensive war economy has developed involving trade in weapons, raw materials and other goods of interest to conflict parties, states and corporations. The escalation of violence prompted several transnational corporations, like Total, to leave the area. Lafarge took a different strategy and allegedly made arrangements with the Islamic State and several other armed groups in order to keep its Jalabiya cement factory plant in north eastern Syria open and running between 2012 and 2014. The judicial inquiry has since identified that these arrangements amounted to at least 13 million euros. Lafarge allegedly purchased commodities such as oil and pozzolan from IS, and paid taxes to IS to allow~~ing for~~ free passage of its employees and cement. By allegedly funding it, not only did Lafarge seriously endanger the lives of its employees and but it could also be found complicit in the crimes against humanity committed by the Islamic State in Syria.

The proceedings against Lafarge and its subsidiary Lafarge Cement Syria are the result of a criminal complaint filed in November 2016 by eleven former Syrian employees together with Sherpa and ECCHR. The Investigation Chamber of the Paris Court of Appeals confirmed the charges against the multinational for deliberately endangering the lives of its Syrian subsidiary workers and for financing terrorism in relation to large amounts of money transfers allegedly made to the Islamic State. The judicial inquiry, in which eight former Lafarge executives are also indicted, remains open against the company on all charges.

Case: ICC communication against Airbus Defence et al.

Since 2015, thousands of civilians have been killed in the armed conflict in Yemen; many more have died from famine and disease. While human rights violations are committed by all conflict parties, one of the main causes of civilian casualties are airstrikes by the Saudi/UAE-led military coalition, which launched its intervention in Yemen in March 2015.

Despite these documented attacks on civilian homes, markets, hospitals and schools, transnational companies based in Europe continue to supply Saudi Arabia and the UAE with weapons, ammunition and logistical support. European government officials authorized the exports by granting licenses.

In their joint communication, NGOs call upon the ICC to investigate the legal responsibility of corporate and political actors from Germany, France, Italy, Spain and the UK. The communication focuses, among others, on Airbus Defence and Space GmbH, BAE Systems Plc., Dassault Aviation S.A., Leonardo S.p.A. and Rheinmetall AG.

Article 8: Statute of Limitations

27. On the applicable statute of limitations in Article 8(2), it would be hard to establish an internationally aligned definition, or even a mere expectation, of what constitutes a "reasonable period of time" across jurisdictions and/or possible violations. The zero draft used the term "not unduly restrictive," which seems more appropriate but suffers from a similar lack of clarity. The current language provides insufficient guidance on what constitutes an "appropriate," "reasonable" or "not unduly" restrictive statute of limitations, especially given the complex and differentiated nature of some cases of businesses' human rights violations, as well as the added complexity of a case's transnational character.

Case study: *Jabeer et al. v. KiK Textilien und Non-Food GmbH*
Two hundred and fifty-eight people were killed in the factory fire on 11 September 2012, a further 32 were injured. As the factory's main client, it should have been an easy task for KiK to demand improvements in fire safety. The company's failure to do so means that KiK is jointly responsible for the 258 deaths. Muhammad Hanif, Muhammad Jabbir, Abdul Aziz Khan Yousuf Zai and Saeeda Khatoon filed a legal action against KiK in March 2015 at the Regional Court in Dortmund. The four plaintiffs – one survivor and three bereaved – are members of the Ali Enterprises Factory Fire Affectees Association and sought €30,000 each in compensation from KiK.

In August 2016, the court issued an initial decision: it accepted jurisdiction and granted legal aid to the claimants to cover their costs. This was a first step towards addressing human rights abuses committed by German companies abroad in German courts. The only court hearing in the case was held in November 2018. However, it did not address KiK's responsibility, but the question of statutory limitation.

Although KiK originally agreed to waive the potential statute of limitations (a possibility for parties under German procedural law), it later rescinded this waiver. Invoking this argument, the court rejected the application in May 2019 and found the claims went beyond the statute ~~on~~of limitations, citing the Pakistani statutory limitation of one year. The case was thus decided on procedural issues rather than content.

28. We propose that State Parties to the LBI allow claimants to request an exception to the applicable statute of limitations in complex cases. Such an exception could read as follows:

> "*A Judge or Chamber may, proprio motu or on good cause being shown by motion, and independent of whether the statute of limitations has already expired*
> *(i) Lengthen or reduce the statute of limitations prescribed; or*
> *(ii) Recognise as valid any act carried out after statute of limitations expires, so prescribed and on such terms, if any, as is thought just."*

29. Relating to other judicial investigations or proceedings in Article 8(2), we would propose seeking inspiration from other international statutes that deal with similar matters. The ICC Rules of Procedure and Evidence offer one such example. Under Rule 164(2), they propose that, "*The period of limitation shall be interrupted if an investigation or prosecution has been initiated during this period, either before the Court or by a State Party …".*[11]

Article 9: Applicable Law

30. Although this article provides a broad choice of law, we would suggest that competent court not determine the applicable law, but instead confer that choice to the rights-holder who brought the dispute to court, allowing the rights-holder to choose the most favourable law. A similar option was included in the zero draft.

[11] ICC Rules of Procedure and Evidence, 2013, https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf, accessed on 5 February 2020.

Article 12: Consistency with International Law

31. Article 12(5) and (6) insufficiently clarifies potential conflicts between the LBI and other bodies of international law, especially trade and investment agreements. Nevertheless, there is ample evidence of, as well as political attention on, the conflictual relationship between business and human rights in the context of trade and investment agreements. It would therefore be advisable to clearly spell out the preference or primacy of human rights law in trade and investment agreements, both in terms of substantive law, as well as in rights-holders' standing in such agreements' respective dispute settlement mechanisms. Such an approach would also increase coherence with Operational Principle 9 in the UN Guiding Principle.

Case study: Amicus brief in *Gabriel Resources v. Romania*

Gabriel Resources planned for open-pit gold mine in Romania, which would include the use of cyanide, a highly toxic substance linked to serious environmental risks. Residents of three villages would have had to be resettled, and four mountains were due to be levelled. The planned mining also threatened one of Romania's most important archaeological sites. For two decades, community members in Rosia Montana and the surrounding villages successfully advocated for Romania to acknowledge the major environmental risks, as well as cultural heritage and property rights. In response, the Canadian-British mining company Gabriel Resources sued Romania in an investor-state dispute settlement (ISDS) case for compensation of 3.3 billion US dollars.

In November 2018, a number or Romanian and international NGOs filed a petition to intervene as amici curiae. The amicus curiae briefs were accepted by the International Centre for Settlement of Investment Disputes (ICSID). In the submission, civil society explained the need to consider local residents' rights, as well as the extraordinary cultural, archaeological and regional significance of the region in and around Rosia Montana. However, the arbitration tribunal refused to hear the witness statements of those affected and rejected the brief's legal arguments.

32. The case against Romania clearly demonstrates that without proper clarification of the primacy of human rights over trade and investment agreements, many of the concrete advances rendered possible through this LBI will not translate into tangible changes for rights-holders.