



Preliminary comment to the Revised Draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

In July 2019, a revised draft of the international binding instrument to regulate in international human rights law the activities of transnational companies and other business enterprises was published. FIDH welcomes the efforts made by the Chair of the Open-Ended Intergovernmental Working Group (IGWG) to give stakeholders time before the session to study and comment on the new text. We are pleased to notice that the Revised Draft takes into account some of the comments made by FIDH and other civil society organizations during the last negotiation session, particularly by reinforcing the language on human rights defenders and conflict-affected areas and by extending the scope of the treaty.

In spite of these improvements, and in order for the treaty to represent a substantial step forward in the protection of human rights from corporate abuses, the current text still needs to fill some important gaps. FIDH particularly recommends amendments to the articles on prevention and liability, as well as on applicable law and jurisdiction.

Since 2014 and the launch of the IGWG mandated to elaborate this treaty on business and human rights, FIDH has been committed to providing substantive inputs to states engaged in the discussions. The full record of written and oral statements and publications can be found on a dedicated website page.¹

Published before the fifth session of the IGWG, this contribution aims at analyzing a selection of articles of the Revised Draft that FIDH considers particularly crucial. It has been drafted taking in account the inputs and concrete proposals collected from FIDH member organisations and proposes concrete recommendations for improvement, in view of providing constructive inputs to the negotiating parties. For an easier reading, the concrete suggestions regarding the wording of the text are displayed in **bold**.

In addition to this comment, FIDH contributed or co-signed analyses of the Revised Draft published by two coalitions, [ESCR-net](#) and the Feminists for a Binding Treaty, which usefully complement the present text.

¹ FIDH, *FIDH advocates for the adoption of an international legally binding instrument to regulate the activities of corporations in relation to human rights*, available at : <https://www.fidh.org/en/issues/globalisation-human-rights/fidh-advocates-for-the-adoption-of-an-international-legally-binding>

PREAMBLE

The preamble now refers explicitly to the Universal Declaration of Human Rights with a specific reference to the "right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized". This is an important addition: As it has been noted, it might become relevant in terms of interpretation of the future binding instrument, in light of Art. 31(2) of the Vienna Convention on the Law of Treaties.²

The revised preamble also makes explicit reference to the United Nations Guiding Principles on Business and Human Rights (UNGPs) and sets itself as a complementary progression from the latter framework,³ while taking in account the work done by the Commission on Human Rights, notably in the context of the 'Draft Norms'. Although political issues rendered the elaboration of these norms unsuccessful, reflections and studies developed in the process have largely contributed to advance legal doctrine on corporate liability for human rights violations and have clearly led to the development of the current treaty process.

Recommendations

- The preamble should refer explicitly to the Declaration on Human Rights Defenders and the ILO Convention 169 on Indigenous and Tribal Peoples, as many of the treaty's provisions must be interpreted in light of the standards set by these instruments.
- The binding instrument could emphasize that: "***civil society actors, including human rights defenders, have a positive, important and legitimate role in the promotion and protection of human rights as they relate to business activities***" and that "***states have a corresponding obligation to take all appropriate measures to ensure a safe and enabling environment for the exercise of such role, including through adequate frameworks of meaningful participation in decision and law-making processes and, in situations affecting indigenous peoples, respect for the right to free, prior and informed consent***".
- In the eighth paragraph of the preamble, it must be explicitly stated that States have the duty to protect against human rights abuses by third parties, including business enterprises, within their territory and/or jurisdiction, and to ensure the implementation and respect for international law, encompassing all its sources, including international human rights law and international humanitarian law.
- In paragraph 14 of the preamble, it is important to also include protected populations or persons in high-risk settings to the different categories mentioned, in order to acknowledge the distinctive and disproportionate impact that corporate human rights abuses have on them. This is particularly necessary to ensure that content of the rest of the text is mirrored in the preamble.

DEFINITIONS (ARTICLE 1)

The section on definitions in the draft treaty is crucial in order to define the scope of application of the future instrument and to ensure its effective implementation.

² N. Bernaz, *The Draft UN Treaty on Business and Human Rights: the Triumph of Realism over Idealism*, available at <https://www.business-humanrights.org/en/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism>.

³ https://www.fidh.org/IMG/pdf/panel_v_complementarity_fidh_icj.pdf

The definition of *business activities* is substantially different from the definition provided in the Zero Draft. FIDH notes with satisfaction that it takes out the ‘for profit’ criterion that could have led to exclude state-owned enterprises from the scope of the instrument. However, this definition should be amended in order to allow more flexibility and for the treaty to apply to the wide range of existing business activities.

Furthermore, the definition of *contractual relationship* is very large and it clearly aims at taking in account all the different relationships that compose complex global supply chains. However, the use of the expression ‘contractual relationship’ contains an unnecessary limitation that may lead to restrictive interpretations. Equity relationships, which are usually the type of link between parent companies and their subsidiaries, are not contractual, and thus risk being excluded during the application of the instrument.

Recommendations

- Integrate the definition of *business activities* in a way that encompasses **“everything that a company does in the course of fulfilling the strategy, purpose, objectives and decisions of the business. This may include but is not limited to activities such as mergers and acquisitions, research and development, design, construction, production, distribution, purchasing, sales, provision of security, contracting, human resource activities, marketing, conduct of external/government relations including lobbying, engagement with stakeholders, relocation of communities, social investment and the activities of legal and financial functions, among others.”**
- Substitute the expression ‘contractual relationship’ with **“business relationship”**, a wording already used by the UNGPs, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration which are widely accepted and understood.⁴
- Include a definition of “Human Rights abuse” separate from the definition of human rights violation: **“Human rights abuse shall mean any harm committed by business enterprises through acts or omissions, against any person or group of persons, individually or collectively, that produces an impairment of their civil, political, economic, social and cultural rights, including environmental damage”.**
- The treaty should include an autonomous definition of environmental violation or environmental damage which includes **“any loss, damage or disruption of the environment, understood as natural resources, both abiotic and biotic, such as air, soil, water, fauna and flora, climate, atmospheric marine or terrestrial life, landscape, as well as the alteration of the interactions among these factors. In addition, environmental harm/violation includes effects on cultural heritage or socio-economic conditions resulting from alterations to the above mentioned factors”.**
- While the legally binding instrument is reflecting more of its core purpose to be “victim-centric” by including provisions on the protection of victims and human rights defenders, paragraph 1 of Article 1 should also include human rights defenders, vulnerable groups and populations in high-risk settings in the

⁴ For example, the UNGP Reporting Framework defines Business relationships as « *the relationships a company has with business partners, entities in its value chain and any other State or non-State entity directly linked to its operations, products or services. They include indirect relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures.* » See www.ungpreporting.org

proposed definition of victims. Victims could also include workers and employees who have been coerced to work in illegally active corporations or on illegally acquired land in occupied territory, in violation of international law.

SCOPE (ARTICLE 3)

FIDH welcomes the amendments to broaden the scope of the treaty. In order to ensure an effective and thorough protection of human rights in the context of business activities, we rest convinced of the necessity to advance international law by affirming the responsibility of all businesses to respect human rights in a legally binding instrument.

However, it is also paramount for the text to keep a particular focus on setting standards and processes that will prevent businesses of transnational character from escaping accountability for their human rights impacts. In this respect, it is important to note that beyond article 3.1, the future instrument needs to take effectively into account the role played by parent companies when human rights violations occur in global supply and value chains. It is indeed essential that further provisions of the text such as those on jurisdiction, applicable law, international cooperation, prevention and liability be specifically designed to better protect human rights violations precisely in this context, as suggested below in this comment. The future instrument should also ensure that the scope includes also financial relationships and online companies.

RIGHTS OF VICTIMS (ARTICLE 4)

Article 4 on Rights of Victims is a central provision, since it puts at the center of the future instrument the rights-holders who often face considerable barriers when seeking access to justice and effective remedy, particularly in the context of business-related human rights abuses. The revised article includes positive additions that take into account previous civil society comments: a specific reference to human rights defenders has been added, as well as provisions directed at preventing criminalization of defenders.

Nevertheless, several provisions of article 4 still need to be reinforced with stronger language or more concrete provisions in order to ensure better access to justice in cases of corporate abuses.

A worrying element in the article remains, with the recurrent reference to domestic law: this reference subjects the recognition of victims' rights to domestic provisions and allows States to make exceptions in granting such rights in a completely discretionary manner. This needs to be corrected in the context of the negotiation process or it will risk undermining the strength of the relevant obligations and the usefulness of this instrument in protecting victims of human rights abuses. States' obligations towards victims as defined in international law should also be reaffirmed as a guarantee of effective protection and promotion of victims' rights and the treaty provisions should guide, rather than be subject to domestic law. We recall that in a great number of cases, domestic law has been adopted in order to favour economic operations that violate human rights. This could happen in various ways, e.g. through establishing extensive protection of business confidentiality, preventing victims from accessing information or even criminalizing the work of their representatives and of human rights defenders. Subjecting such provisions to domestic laws is one of the most significant weaknesses of the present instrument and may undermine its entire purpose. Of course, this does not apply in cases where domestic law is more protective than treaty provisions.

Recommendations

- The treaty could simply include a general clause stating that: ***“The provisions contained in this Convention are without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”***⁵In addition, while putting victims at the centre is certainly an important step, the future instrument should not leave out those individuals who are potentially affected by corporate activities but have not yet suffered concrete harm, otherwise this risks leading to a restricted application of the rights and protections granted by the treaty.
- Certain provisions on the rights of victims must also be reinforced:
 - the right to precautionary measures and to guarantees of non-repetition must respectively be included to article 4.4 and 4.5.a.
 - Article 4.5 should make clear the autonomous character of harm caused to the environment. In other words, the treaty should clearly state that harm caused to the environment constitutes a violation in itself, that shall not depend upon the existence of harm to other human rights.
 - The provisions on access to information for communities, but also human rights defenders, must be strengthened to ensure meaningful participation in preventing and answering human rights impact by corporations. Article 4.9 must explicitly enumerate the protections guaranteed to human rights defenders.
 - The reversal of the burden of proof has been placed here instead of in the article on liability. It is vital for the future instrument to permit the reversal of the burden of proof in specific cases, since one of the biggest barriers in access to justice in the context of corporate human rights abuses is precisely linked to the lack of balance between victims and companies in terms of access to information and evidence. The current formulation of the provision, however, is still too vague and conditioned to domestic law:⁶ this the reference to domestic law should be eliminated. Moreover, the text could introduce a number of rebuttable presumptions that could facilitate victims’ access to justice and alleviate the burden of proof they bear. In this respect a rebuttable presumption of effective control by the parent company when it has direct or indirect ownership or controlling interest over the entities part of a group should be introduced (see also comment on article 6). This kind of presumption is already used in other areas of law, for example in EU competition law.⁷
- The rule according to which victims who have seen their claim fail cannot be liable for reimbursement of the other party's legal expenses should not be limited to victims that lack sufficient economic resources. Article 4.12.e should rather state that ***“no victim should be subject to such reimbursement unless it has been proven beyond doubt that the complain was abusive”***.

5 GA Resolution n. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987).

6 See R. Meeran, The "Zero Draft": Access to judicial remedy for victims of multinationals' abuse, September 2018, available at <https://www.business-humanrights.org/en/the-“zero-draft”-access-to-judicial-remedy-for-victims-of-multinationals’-“mncs”-abuse>.

7 See European Court of Justice, Case C-97/08 *Akzo Nobel NV and Others v Commission*, 10 September 2009 and related doctrine.

- Article 4.12 should include an additional paragraph on the rights of victims to have access to international independent experts, whenever the claims require a scientific or technical evaluation.

PREVENTION (ARTICLE 5)

Article 5 on prevention aligns with existing and accepted wording of human rights due diligence (HRDD) in lieu of the vaguer clauses setting ‘due diligence obligations’ that were found in the Zero Draft. It also clarifies the different components of HRDD in line with existing standards found in the UNGPs and the OECD Guidelines. If adopted, this article would represent a significant push on states to adopt mandatory human rights due diligence legislation for businesses at the domestic level. It also specifically refers to enhanced HRDD for conflict affected areas.

Despite these positive developments, FIDH is convinced that the article on prevention still needs to be considerably improved and linked to liability provisions in order to represent a valuable international standard able to effectively prevent human rights abuses occurring in global value chains.

Recommendations

- ***“[T]hroughout their operations”*** and ***“business relationship”*** should be added at the end of Article 5.1 to ensure a broad scope of mandatory HRDD.
- Article 5.2 should substitute ‘including those of transnational character’ with ***“particularly those of transnational character”***. This will underline that business enterprises with activities of transnational character are specifically targeted by this provision. Human rights due diligence here should be a reflection of the UNGPs and relevant obligations under international law.
- The remedial component of HRDD is still missing. It is imperative to include this step of HRDD in the future instrument in order for it to represent an effective tool, capable not only to prevent abuses from occurring but also to mitigate, stop and remedy those that have occurred. Art. 5.2.a should write ***“Identify, assess and remedy...”***. HRDD should not only identify and assess actual or potential human rights violations, it should also constitute the basis for the company to mitigate and take remediation action against those violations as has been clarified by the recently adopted OECD Due Diligence Guidance for Responsible Business Conduct. The purpose of identifying a human rights violations is on the one hand to prevent them but also to ensure measures to cease or mitigate them when they already happened or are ongoing. Finally, as other experts have argued, when the company identifies that it has contributed or caused a human rights violation, it should address such violation, provide remedy or cooperate in the remediation process. This should neither undermine the preventive character of HRDD, nor exempt the company from being sanctioned for non-compliance with HRDD rules. Mitigation and remediation are fundamental and complementary steps of corporate accountability and should be a necessary part of HRDD obligations.
- Art. 5.2.b should substitute ‘contractual relationship’ by ***“business relationship”*** in order to avoid limiting the scope of HRDD to mere contractual relationships and thereby excluding a large number of business relationships that are not contractual, such as equity relationships (see paragraph on definitions above)

- Art. 5.2.b should substitute "appropriate" by **"effective"**, since HRDD obligations need to be appreciated in practice and not only in theory. This could avoid HRDD from becoming a mere box-ticking exercise.
- Art. 5.2.d should feature an obligation to publicly report on policies and measures adopted as a result of HRDD and on pre and post impact assessment carried out in this context.
- Art. 5.3.a should reinsert **"pre and post"** impact assessment in order to ensure that careful analyses are conducted, in consultation with affected communities, before and after a business activity. It should also include **"gender and labor rights impact assessments"**.
- Art. 5.3.b. should move from "passive" obligations to undertake meaningful consultation to a language of **"meaningful engagement"** that seeks to ensure **consent** of affected communities at all steps of the implementation of business activities, in accordance with the principle of free, prior and informed consent when operations affect indigenous communities.
- Article 5.3.e requires the adoption and implementation of enhanced human rights due diligence to prevent violations or abuses arising from business activities or contractual relationships in occupied or conflict-affected areas. This includes both goods and services. However, the legally binding instrument should further ensure that states impose mandatory *enhanced* human rights due diligence for businesses that are operating or plan to operate in conflict-affected areas, including more urgent and immediate preventive measures, divestment and disengagement policies to avoid corporate involvement or contribution to human rights abuses.
- Art. 5 should insert a specific provision stating that **"State Parties shall ensure that adequate sanctions are imposed as a result of the failure to comply with obligations laid down under this Article and in relation with provisions contained under Article 6 of this instrument"**. The existence of adequate sanctions and liability for non-compliance with HRDD is fundamental in order to make the HRDD provision effective. The current text could be more explicit in making the link between failure to enact due diligence and the liability of the company. For example, the text could explicitly link art. 5 to art. 6b. However, this should not entirely exonerate a company or its management from liability in the event that it is responsible for human rights abuses *but has respected its HRDD obligations*. HRDD should not be a shield from responsibility but a tool for effective prevention.
- Art. 5.5 should eliminate the word 'incentive' and should simply state that **"States may provide measures to facilitate compliance"**.

LEGAL LIABILITY (ARTICLE 6)

In order to represent a meaningful response to existing challenges of corporate accountability, the article should require states to establish a clear duty of care on business enterprises, and particularly on those with transnational character, over human rights violations that take place in their global value chain. The fact that liability for human rights violations exists independently from human rights due diligence is a positive element, since it will avoid HRDD from becoming a mere procedural requirement to escape liability. Of course, the fact that the company has

proper due diligence measures in place will contribute to help the judge clarify the 'foreseeability' requirement.

However, and despite the steps forward, the article needs substantial improvements in order to be effectively applied and to hold companies, particularly those with transnational activities, accountable for human rights violations committed throughout their value chain.

Recommendations

- Article 6.2. states that "liability of legal persons shall be without prejudice to the liability of natural persons". However, it falls short of clarifying when one type of liability or the other should be engaged.
- Article 6.6 will not be easy to apply to situations where companies violated human rights if the victim is required to prove effective control or supervision of the parent company over the subsidiary's activities or the wrong behaviour or failure of the parent company to undertake due diligence. It will be indeed quite easy for the company at the top of the chain to claim that it does not have control or supervision over the activities of its subsidiary or affiliate. The difficulty for victims to prove elements like effective control or foreseeability is one of the most recurrent barriers that impede access to justice in such cases. The instrument tries to face these difficulties, by allowing better access to information for victims and the reversal of the burden of proof. Nonetheless, as stressed above, the latter is subject to domestic law, which could significantly undermine the scale of this innovative provision. A stronger provision on the reversal of the burden of proof and on the adoption of relevant presumptions would considerably improve and strengthen this part of the treaty. For this reason we suggest to include a rebuttable presumption of effective control when there is direct or indirect ownership or a controlling interest of the parent company (see above the section on rights to victims).
- Moreover, art. 6.6 needs to clearly address the barriers to access to justice that are linked to the use of the 'corporate veil' doctrine in cases of human rights violations linked to corporate activities. One of the ways to resolve such gaps, as it has been put forward inter alia by the General Comment N. 24 of the UN Committee on ESCR, would be to impose a duty of care on the parent company and thus create a parent-based extraterritorial regulation imposing a liability on the parent company for failure to prevent human rights arms in its value chain.
- Hence, in order to be more clear and to respond to abovementioned gaps in terms of corporate accountability for human rights violations, art. 6.6 should be reframed as follows: ***"States Parties shall ensure that their domestic legislation provides for the liability of legal persons conducting business activities, including those of transnational character, for its failure to prevent other natural or legal person(s), with whom it has a business relationship, from causing or contributing by means of acts or omissions a human rights violation or abuse against third parties rights or the environment when the former:***
 - a. have the ability to control, or exercise decisive influence over the relevant entity that caused or contributed to the violation or abuse, or***

b. should have foreseen the risks of human rights violations or abuses in the conduct of its business activities, regardless of where the activity takes place.

Effective control shall be presumed in situations of majority ownership or controlling interest by the parent company.

- Art. 6.7 is not sufficiently clear on the nature of the responsibility it foresees. Since this article is clearly directed at instituting a criminal corporate liability for gross human rights violations that are already sanctioned in international law, it would be preferable to **eliminate reference to criminal, civil or administrative liability** from art. 6.7. It should state instead ***“Each State party shall adopt such measures, as may be necessary, consistent with its legal principles, to establish criminal liability of legal persons for the following offences...”***.⁸ Moreover, in order to allow for further developments in international law, this paragraph should include a general clause that allows and encourages States to extend the list of crimes for which they can institute corporate criminal liability in their domestic system.

JURISDICTION (ARTICLE 7)

Article 7 on Jurisdiction rightly has been named ‘adjudicative jurisdiction’ since it deals only with the circumstances in which a State has jurisdiction over a dispute and does not refer to ‘prescriptive jurisdiction’, that is the capacity to regulate extra-territorially.

It is positive that the new article refers to territory **or** jurisdiction, in line with international doctrine and jurisprudence that has progressively considered these two separate and non overlapping concepts.

Furthermore, the article clarifies the existing duty of States to exercise extraterritorial jurisdiction in cases of corporate human rights abuses, in line with what is stated in ICESCR's General Comment n. 24. In particular :

- an additional criterion concerning the victim’s domicile has been added to the list of criteria used to establish jurisdiction
- the criteria of domicile of the defendant has been defined more clearly. It now includes the place of incorporation, which is the criterion generally used in common law systems to establish jurisdiction and applicable law of a corporation;⁹ it also adds three further criteria. It is important to stress that the third criterion of ‘substantive business interest’ is already often used in some legal systems and case law as a criterion for establishing jurisdiction.¹⁰

Recommendations

- It is imperative for the future instrument to better clarify that domestic courts of state parties are able to exercise jurisdiction over claims concerning business-

8 See Art. 10 UN Convention Against Transnational Organised Crime

9 FIDH, *Corporate Accountability for Human Rights Abuses A Guide for Victims and NGOs on Recourse Mechanisms*, (2016 ed.), available at https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf, p. 250.

10 Brussels I regulation, Article 63(c) uses the term “principal place of business” as a notion that is distinguished from the statutory seat and the central administration. Pointing therefore towards a notion that would reflect the reality of the activities of the company, which in some cases are located elsewhere. The same notion is cited by the Committee on the Rights of the Child in General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children’s rights.

related human rights abuse even when the defendant enterprise is not domiciled within the jurisdiction of the state, if no other effective forum guaranteeing fair trial is available and if there is a connection to the state concerned. This would explicitly recognize the application of the *forum necessitatis* doctrine as a consequence of the duty of all states to ensure that victims of transnational human rights abuses are not deprived of access to a judicial remedy.¹¹ Ten European Member States already have a national provision on *forum necessitatis* and this could serve as inspiration for the future instrument (Netherlands, Austria, France, Poland, Germany, Luxemburg, Belgium, Portugal, Estonia, Romania). Normally, some connection with the State is required in order to apply the forum of necessity, but in the Netherlands such connection is not required. Dutch law thus establishes a sort of universal jurisdiction when there is a lack of available forum abroad.¹²

- **Art. 7** should thus contain the following provision: ***“Where no court of a State party has jurisdiction under this Article, the courts of any other State Party may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, despite the absence of substantial connection: (a) if proceedings cannot reasonably be required to be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the State party of the court seized under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied”***¹³
- Where a member State owns or controls a business enterprise or contracts with a business enterprise to provide public services, it should ensure that claims in connection with human rights abuses by such enterprises may be brought before domestic courts, and that it will refrain from invoking any privileges or immunities. An exception or mandatory waiver of immunities should also apply when state-owned enterprises operating extra-territorially are the subject of claims before the jurisdiction of a third state.

APPLICABLE LAW (ARTICLE 9)

Art. 9 on applicable law has been modified from the previous version and the contested provision that gave victims the possibility to choose the applicable law to the dispute has been removed.

FIDH finds this change problematic since it weakens protections granted to victims of corporate abuses. While it would still be possible, according to the current text, to apply the law of the domicile of the defendant, the conditions that would permit such application are not very clear. This represents a step backwards for the text, because

11 See UN Committee of Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, August 2017, E/C.12/GC/24. and O. de Schutter, *Towards a New Treaty on Business and Human Rights*, Business and Human Rights Journal, Cambridge, 1(2015), p. 51-52.

12 The European Commission suggested the inclusion of forum necessitatis provision in the reform of Brussels I regulation in 2010. This proposal was then rejected by Member States. See [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2010\)0748_/com_com\(2010\)0748_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2010)0748_/com_com(2010)0748_en.pdf) article 25 and 26.

13 Ibid.

of the number of shortfalls we have witnessed in the application of *lex loci damni* and of *lex commissi delicti*.

Recommendations

- Clarify when the different criteria to choose applicable law may apply. We recommend an endorsement by the drafters of the *favor laesi* principle, according to which the most favourable law for the victims is applied and it belongs to the victim to choose the applicable law in order to keep the case in the judicial system victims are more familiar with.¹⁴ The article should thus contain a provision stating that ***“the criteria under a, b, or c of this article should be applied at the choice of victim”***.

14 There are in general 29 codifications around the world which already opted somehow for the *favor laesi* principle in cross border torts cases either express at the choice of victim or the court or implied (among which Germany, Italy, Uruguay at the choice by victims, Peru , Angola, Portugal at the choice by the courts and China, Switzerland Hungary and Korea implied in case law) and other 23 which have the principle for some categories of torts (Rome II European Regulation for environmental damages for example). See D. Symon C. Symeonides *Codifying Choice of Law Around the World: An International Comparative Analysis*, pp/ 60 and ss.