

D. Article 2 (Purpose)

Concept and Context in Article 2

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Article 2. Statement of purpose

1. The purpose of this (Legally Binding Instrument) is:

- a. To strengthen the respect, promotion, protection and fulfillment of human rights in the context of business activities;
- b. To prevent the occurrence of such violations and abuses and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;

“To prevent the occurrence of such violations and abuses”: Here the DLBI reinstates the principle of prevention, without resolving the ambiguities and ambivalence introduced by the language of Article 1. The treaty operates pre-emptively, also when an actual harm has not been caused yet. To trigger the pre-emptive operation of the treaty, the mere allegation of a potential future harm seems to be sufficient. The language of Article 1 allows such an allegation to be made without the knowledge of the persons who, in a future, may (or may not) suffer harm. Limited to this treaty, the principle of prevention may be invoked or else used by States, NGOs, individuals, collective entities such as social movements against one or more of these actors and entities. The treaty enables potential scenarios where the principle of prevention can be used to achieve goals other than human rights protection.

“To ensure effective access to justice and remedy”: access to justice and access to remedy have substantive and procedural aspects. Different actors may place the emphasis on the aspects that are more useful to reaching their own goals and objectives. It can be expected that some actors will stress the procedural aspects of access to justice and access to remedy, while others will place the emphasis on their substantive aspects. The questions remain of what justice measures and remedies are effective and when; how effectiveness is defined,

measured, and assessed, and whether it is possible to argue that a causal relation exists between:

- a) variables that pertain to the governance system of signatory states
- b) the choice to sign or not sign the treaty
- c) the public, private or hybrid nature of certain remedial mechanisms
- d) judicial and non-judicial mechanisms

and the concept of effectiveness. We may witness the emergence of different conceptions of effectiveness, and of different metrics elaborated by public and private, domestic and transnational actors.

c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

From discussions held at the Fourth Session, it is clear how a shared understanding about international cooperation has not been reached yet. In the absence of such a consensus among stakeholders, Article 2.c may remain dead letter. In any case, this paragraph allows to delay implementation of the treaty on grounds that signatory states possess a limited capacity. But, Article 2.c can also encourage a variety of cooperation and capacity building initiatives. A result may be a healthy competition among donors. Articles 1 and 2 (as well as other articles in the treaty) can however be interpreted and used to limit such competition.