# E. Article 6 (Legal Liability)

## Article 6 (Legal Liability); A Conceptual Analysis of the Conundrums of "Legal" Liability.

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Article 6, like Article 5, appear to have been drafted in the shadow of the UNGPs and more precisely the UNGPs' Second Pillar. Article 5 focused on human rights due diligence; now translated (and perhaps narrowed) into a facility for state regulated compliance and risk mitigation. Article 6 makes a more pronounced incision—it moves from Article 5's legalization of the modalities of the UNGPs Second Pillar corporate responsibility, to the dismantling of corporate responsibility itself as a concept, and in the process brushes away in its entirety the whole edifice of governmentalization beyond the state.

It is in this sense among the most reactionary of the provisions of the Drat LBI; and not just reactionary but from the "progressive" standpoint that serves as its justification, it is also counterrevolutionary in its essence. It would effectively sweep aside the core principles of societal governance through markets that over the last thirty years made it even possible to grasp the notion of corporate responsibility and to make it a governable object of regulation. Perhaps despite their best conventional intentions, the drafters of the LBI had a brilliant insight that poked its head out ever so tentatively in Article 1. That insight could be reduced to the following—all economic activity are expressions of human rights in action; that is all human activity inevitably touches on human rights (and responsibilities). Human rights (and inversely the responsibility to observe them) serve as the core principle of governance and the central purpose of government. It then followed that harms caused to people (and others) in the context of economic activity ought to be prevented, and if not prevented, then mitigated (both touching on a compliance/administrative regulatory function), and if not mitigated, then remedied (a judicial role).

Yet the drafters then appear to have lost their way. Perhaps they were trapped by their history or politics. The body of the Treaty is springing of that trap. It walls create the barriers that effectively reduce this transformative idea in the body of the text by the constraints of the transnational, by its limitation to economic actors, by its insistence on

human rights listings and by its conflation of administrative-compliance and judicial-remedial functions in ways that neither reflect the realities of government nor those of public or private governance. So, in the place of self-reflective compliance in Article 5, one is treated to an abbreviated version of human rights due diligence detached from its normative sources and developed in a way that creates incentives toward regulatory incoherence across territories. And in place of the societal sphere through which it is possible to develop regimes of self-reflexive governmentalized economic commercial institutions (whether owned by private or public persons) Article 6 offers little more than the false hope of a set of promises to legalize specific principles and objectives articulated in international instruments in an instrument that by its fundamental nature itself invites both a rejection of the premise or a waiver of its specific mandates.

But in the process of legalizing in Article 6, what is defined in Article 1 as "human rights violations and abuses" it reduces its scope through a listing exercise that shifts the emphasis of protection from "harms" to "rules." Consider that Article 1 Paragraph 2 defines human rights violation or abuse as a (1) harm (2) committed by a state or business enterprise (3) through acts or omissions (4) in the context of business activities (5) against any person or group of persons (6) which harm could be measured in specified ways to include injury emotional suffering economic loss or substantial impairment of human rights. Article 6 then (with some redundancies) imposes on states a duty to construct a comprehensive and adequate system of legal liability around that definition but does this in a way that might then be understood to be limited by its own provisions in Paragraphs 2-9.

That approach effectively changes the character of the definition from one grounded in harm to one grounded in violation of a set of quite specific provisions which, by their listing also acquire the character of international law binding when appropriately transposed (subject to state reservation). That leaves one with the possibility that the human rights referenced in Article 1 (economic activities that cause harm) are actually reduced to a subset of those harms defined by the provisions referenced in Article 6. That, in turn, creates a dissonance with the scope provisions of Article 3 Paragraph 3 ("This legally binding instrument shall cover all human rights"). Though in fairness, the scope provision provides no grounding—it can as easily reference all legally mandatory provisions that are styled "human rights" or all harm that impacts humans. Within Article 3's studied vagueness stand two potentially distinct ways of approaching the solidification of obligation (to which legal liability may be attached). On the one hand we have a harm principle and on the other a rights principle.

The Treaty is indifferent to the resolution of this potential tension, and that can only produce bad law. And, indeed, it is possible to see in this the tragedy of the transformation of law from tool to fetish. By making a fetish of the law of human rights, the drafters reduced the value of human rights as a basis for framing the remedial rights of individuals (protection from harm in economic activities) and for using law as a powerful (framework) tool for organizing markets and regulatory bases for compliance, prevention, and mitigation. This was underscored recently by John Ruggie himself, for, writing to clarify the issue of the amenability of the UNGPs human rights due diligence principles to legalization suggested

that there was nothing in the UNPGs themselves that suggested that states were unable to legalize human rights due diligence, or portions thereof, to suit the legislatively expressed desires of states. Professor Ruggie noted, in response to a position taken by business elements in the context of the Swiss Responsibly Business Initiative, that "there is no inconsistency in states adopting measures that require businesses to meet their responsibility to respect human rights through legislation."[2]

Yet merely because a state has the power to legalize human rights due diligence it does not necessarily follow either that they should use it, or that they ought to use it to fashion a particular legislative product within the vacuum in which states sometimes appear to believe that their domestic legal orders exist. What might in some quarters be viewed as a positive or even necessary progression,[3] others may conclude may pose substantial risks to the development of coherence in those regulatory gap spaces that gave rise to the need for measures such as the UNGPs in the first place. These possibilities of state augmented incoherence, now rife in this Treaty draft at virtually every point in its drafting, is the encouragement or indifference to the creation of potentially distinctive (and ultimately incoherent) silos of human rights due diligence practice across production chains.

We have considered some of the conceptual issues of Draft LBI Article 6 (Legal Liability). There is a tension between Article 3 (scope), Article 1 (definitions) and Article 6. That tension arises from the very large gap left by the failure to define "human rights" and the law to which it refers. Article 3 reminds us of a broad scope but in in search of definition. Article 1 defines human rights violations and abuses but not the content of those human rights which may be violated or abused. We had suggested a generalized harm standard tied to economic activity. But Article 6 appears to lead in a different direction. Though it does not purpose to define "human rights" it effectively creates a universe of meaning by quite specifically focusing on a list of rights with respect to which states are obligated to construct legal liability.

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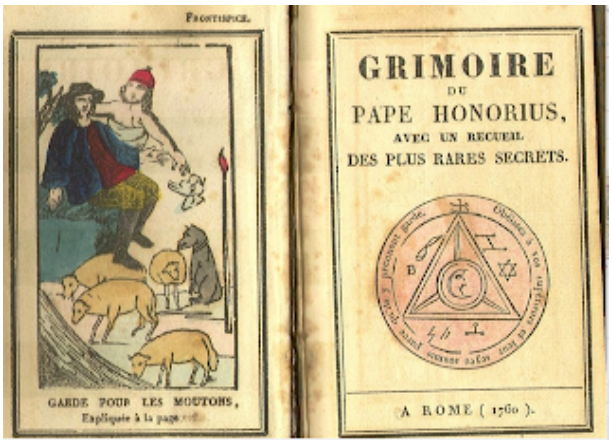
2 John G. Ruggie, *Letter to Ms. Saskia Wilkes and Mr. Johannes Blankenbach*, Sept. 19, 2019, available at https://www.business-humanrights.org/sites/default/files/documents/19092019_Letter_John_Ruggie.pdf

3 John G. Ruggie, *The New Normal of Human Rights Due Diligence*, translated and reproduced in *John Ruggie Weighs In on Swiss Debate on Mandatory Human Rights Due Diligence: Our Chair John Ruggie writes in a leading Swiss newspaper about the importance of the Swiss Parliament's current consideration of a proposal to require human rights due diligence by Swiss business,* SHIFT, March 22, 2018, available at https://www.shiftproject.org/news/john-ruggie-weighs-in-on-swiss-debate-on-mandatory-human-rights-due-diligence/ Ruggie notes:

> Switzerland would not be alone by undertaking progressive change in this space; indeed, it risks falling behind. Anti-slavery legislation has been adopted in a number of jurisdictions, ranging from California to the UK. France has adopted a "due vigilance" law. Canada has just established the office of ombudsperson with authority to compel witnesses and documentation from Canadian companies operating overseas that have been accused of human rights violations. The new German government, as part of its coalition agreement, will require companies to have human rights due diligence measures in place if, by 2020, fewer than half of German companies with more than 500 employees have not adopted them. The European Commission is examining corporate governance rules, requiring boards of directors to adopt and disclose their sustainability strategy, including appropriate due diligence throughout their supply chains. This list is not exhaustive, but it does underscore the new normal of human rights due diligence by firms.




These form part of the larger challenge for the Draft LBI—to actually provide the draft of a legal document, rather than a framework document, from out of which the harder work of legal drafting may be undertaken. If that is the case, then there is no "law" in Article 6—there is merely a recipe book for the project of law making. But it is a recipe in which the key ingredients have been badly sorted. An examination of the seven paragraphs that make up the article might provide arguments to support the conclusion that there is no "law" here; or it might suggest instead that there is sufficient for its purpose—to direct adhering states in their duty to draft law. Yet if that is the case—that Article 6 is indeed a legal grimoire (and that would not be unusual), it is a grimoire with a tremendous flexibility, and thus a greater likelihood of producing the sort of incoherence between domestic legal orders that started the process of internationalizing this project in the 1970s in the first place. Except, this time the incoherence would have been directed by the very drive toward internationalization which was meant to have avoided that result.

In the shadow of Article 3's scope provision, and Article 1's definition of violation and abuse grounded in contextually defined harm caused by a quite specific class of actors, it is possible to understand both the psychology of Article 6, and the way that its nine sections then undermine the project of expanding the legal liability of an identified class of actors for the harms that are caused by their economic activities. We take those provisions one at a time.

### *Paragraph 1*

Paragraph 1 is short but potentially potent. It provides: "State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

Let's try to read that as law.

The text is addressed (as should all of these provisions) to state parties. It speaks to the legislative obligations of state parties. Treaty provisions like this are always problematic. They write into law a tension between the authority of the state to bind itself (under international law) to do or not do certain things, a promise made to other states, and their ability to deliver on these promises. This is especially the case in liberal democratic states where it is sometimes the case that those political actors with the power to commit a state to international obligations may not have an equal ability to control the internal that are themselves beyond their power to promise. Of course, states have done this all the time through a variety of treaties. That, of course, has never been a problem for international law. And courts have rejected arguments based on constitutional or political impediment (effectively the problem when the polity rejects the action of its representative organs which may have lawfully committed the state to international obligations). From this perspective any objection on these grounds appears frivolous, and a matter asked and answered over a generation ago.

But the object of this treaty, one would hope, is not the production of yet another elegantly drafted document whose form is impeccable, but which is functionally impossible to apply. And, indeed, Paragraph 1 raises the crucial and practical issue of implementation. The failure to conform its domestic law to meet its international obligations might, in certain cases, give rise to liability, and may open the door to action by other state parties—but in the end it does little to compel a state to breach its own constitutional orders ensure that legislation is enacted to suit its treaty obligations. Thus, typical of this type of treaty, the provision of Paragraph 1 is directed to a formal analysis and interpretation—states have formally agreed to a program of legal and constitutional reform (the later when necessary). More likely provisions like this one will produce the usual herd of reservations. Where reservations become impossible, withdrawal may become a viable option. Thus, in the end, what this provision buys is a formal "optics" and the certainty that many states will be unable to comply.

Beyond that the provision includes the usual problems of principles-based drafting. The terms "comprehensive and legally adequate" are difficult to translate into legal standards. And certainly, they are impossible to translate into legal standards that may be applied with reasonable similarity everywhere. Moreover, the term "legal liability for human rights violations or abuses in the context of business activities" is itself troublesome.

First, it is not clear what sort of legal liability is intended. Does this refer to criminal or civil. Later parts of the Treaty suggest that the drafters were indifferent. But that is also a bit of a problem—certainly form the perspective of the creation of a more uniform approach to liability; and in the process to reduce the inevitable exploitation of difference strategically by enterprises and lawyers.

Second, the term is itself misleading in the context of the definition of "human rights violations or abuse." What appears to be meant is that a certain class of harms that are the product of human rights violations and abuse are actionable. But then this suggests that the extent of the scope of actionable human rights related harms is smaller than the extent of the definition of the harm itself. And that then appears to run counter to the scope provisions of Article 3. This was probably not intended, but the language trips over itself across at least three different provisions. At a minimum, though, it suggests that the Treaty does not contemplate that all human rights violations or abuse will be actionable.

Third, the reference to "comprehensive and adequate" does not solve the problem. The reference to comprehensive and adequate can as easily reference those harms made actionable, as it might refer to the scope of the obligation to extend "actionability" to a full range of harms. But that is also conjecture. And it is not a good beginning for a treaty to invite this level of conjecture.

### *Paragraph 2*

This provision appears straightforward: "Liability of legal persons shall be without prejudice to the liability of natural persons." And yet the provision belies challenges. In many jurisdictions, complex systems of law, administrative regulation, and guidance on the exercise of administrative discretion tends to substantially constrain the ability of a state to treat legal and natural persons in a similar way. To the extent that the provision is read to mandate that equivalence, it will require substantial changes to administrative practice, to the authority of prosecutors to determine whether individuals or corporations or both will be charged, to settled notions of corporate liability, and of master-servant rules. Not that these changes may not be worth the effort. Many of the legal doctrines are worth reconsideration. But this is hardly the way to open the door to that task. Moreover, in some states, some of these issues may touch on core issues of governance, and of the nature of the political-economic system. For criminal and civil jurisdiction that may arise form statute and administrative regulation, the effect on such systems of guidance and practice remains mysterious. And treaties ought not to be in the habit of cultivating mystery.

Moreover, beyond issues of state practice in charging or regulating natural and legal persons in the context of complex enterprise organization, the provision also suggests the potential for challenging the core principle of corporate law—asset partitioning. While academics enjoy criticizing the concept—neither legislatures nor courts appear to have moved toward the reconsideration of a principle now at least a century old in many places. Indeed, even courts that have been willing to consider liability across enterprises have been careful to distinguish concepts of direct involvement in a specific set of liability tinged acts from the concept of veil piercing. But this provision might be read more broadly still—to the extent it also suggests a principle of joint and several liability in a corporate context, the provision will be problematic, especially if courts are invited to use this provision as the gateway.

### *Paragraph 3*

This provision, "Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts," means well. It is useful as a guide to legislation. And it serves a useful purpose—to avoid reducing the scope of liability by making the power to remedy harms against individuals a finding of criminal culpability for actions brought by the state. On the other hand, it is not clear why the state ought not to have the power to determine whether it, rather than individuals, ought to reserve to themselves the power to bring actions for human rights wrongs—with the obligation to make recovery available in accordance with a fair legally binding standard. It may also be legitimate for the state to keep all recovery under certain circumstances with the obligation to use t for the public good. There is precedent, even in developed state domestic legal orders for both approaches. The provision assumes a particular form of domestic legal order both for liability and remedy. Yet it offers no reason fro such a restriction, nor does it make its ideological choices explicit, preferring instead to embed them in provisions like this one.

### *Paragraph 4*

This is an interesting provision, with many of the same sorts of challenges already noted with earlier provisions.

> States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.

First, it is not clear what is meant by "legal and other measures." To the extent it references non-state nob-judicial mechanisms that is to be praised. Yet one is unsure because there is nothing in the text that directs the reader in any particular direction.

Second, the lofty phrase "effective, proportionate, and dissuasive sanctions and reparations" also may create challenges. Principal among these are a a cluster of issues around "dissuasive sanctions." In some jurisdictions, the issue, in the context of punitive damages, has been constitutionally managed. In others, the idea of punitive damages is viewed as against public policy. Moreover, there is great controversy about awarding an individual damages that are meant to punish an offender rather than to compensate a rights holder. Those perhaps ought to revert to the state. But none of this ever makes it way to the text of the provision. It is not clear that this principle is either free from controversy, interpretive ambiguity or a strong foundation in principles of procedural and substantive fairness, at least at a societal level.

Third, the last phrase is unclear since at best it is redundant, and at worst it invites courts to read a further constraint into the provision.

### *Paragraph 5*

Here the treaty transposes ancient concepts of surety and guaranty, usually imposed by law (and sometimes contract) on bailors, fiduciaries, trustees and the like, to (effectively) all business enterprises.

> State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation

That it is discretionary does not tale away from its potential scope. The economic effects of such a procedure, of course, is unlikely to favor developing states. And the 1970s and 1980s is littered with examples of the disastrous economic effects of provisions designed to significantly increase the cost of operation—especially to indigenous enterprise. But that is politics—the treaty just makes such regimes possible (though of course they were possible under the domestic orders of most states without the treaty too. And that is fair.

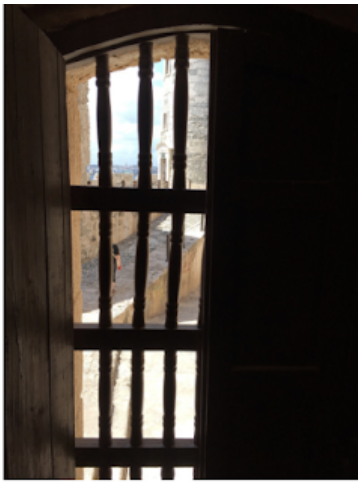
### *Paragraph 6*

This is an important provision, and one that is meant to solve the problem of collective liability along a production chain where the control relationships are not grounded in ownership.

> States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.

Fair enough; the "control or supervise" and the "foreseeable risk" standards are not new. They do point in quite different directions. And to the extent that they implicate (common law) tort standards, they pose a problems of transposition to civil law jurisdictions. Moreover, standards based on foreseeability raise issues of causation that are themselves at

the heart of a debate about standards for tort liability especially in the context of climate change.[4] There are additional curiosities here as well which are worth considering.



First, contractual relationships are defined in Article 1(4) to include virtually every sort of relationship between entities, including those generally covered by rules of joint liability in the context of ownership relationships. So it not clear how one reads Article 1(4) together with this Article 6(6).

Second, that issue becomes more complicated when one considers that the extent of inter-contractual relationship liability is further constrained by a thresh hold standard of "sufficient control and supervision" plus causation, or foreseeability. The constant repetitions of the trigger phrases business activity becomes a distracting fetish, especially since its inclusion has already been framed in Article 1. At some point in this provision one begins to question the value of Article 1, or the difficulties of interpretation posed by the use of key terms within terms in the ways used here. A cleaner drafting would solve that problem.

Third, "regardless of where the activity took place" works well as a principal of harm to which liability may attach. However it leaves unanswered the question of jurisdiction. That will be answered later in the Treaty, presumably. A cross reference at this point would be helpful.

### *Paragraph 7*

This is the longest of the provisions in Article 6, but ironically the one that requires the smallest set of observations. Paragraph 7 effectively compels a state party to "ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the . . . criminal offences" listed. This is followed by a list of 11 sometimes specific provisions and sometimes generic classes of offenses. The only real comment worth making here is that there is likely to be a (sometimes irresistible) tendency top read Article 6 (1) and (7) together to produce a conclusion that the meaning of " comprehensive and adequate system of legal liability" in Article 6(1) is defined in total (at least for purposes of treaty compliance) by the list of offenses in Article 6(7).

It is unlikely that this is what the drafters meant. But the law of a Treaty is embodied in its text, not in the objectives and desires of those who put pen to paper (or today typed words onto a word processing program). While there are some jurisdictions whose jurisprudence embeds the "law" in the objectives and principles of its drafters, in most the

[4] See, e.g., Jane Stapleton, *Scientific and Legal Approaches to Causation,* in CAUSATION IN LAW AND MEDICINE (Ian Freckleton, ed, Hampshire: Ashgate Publishing) 14; .

text is the law, and that produces some difficulties here where the text itself may be read in ways that might, form one perspective anyway, undo its intent. And in any case this increases the likelihood of substantial differences interpretation (and application across domestic legal orders). In this sense the Treaty does much, as drafted, to encourage an ordered anarchy.

And a last point, one that applies equally to Paragraphs 8 and 9. it is not clear how these provisions will apply either to State Owned Enterprises, or to the people they employ. More importantly, it says nothing about either the liability of the state, where the state itself effectively controls the enterprise. Nor does it have much to say about the liability of individuals within the state apparatus who are active principles in the violations listed.

### *Paragraph 8*

This paragraph again inadvertently creates difficulties because of its drafting. It provides: "Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offenses."

First "such liability" appears to reference back to Article 6(7). But that is not made clear. It is as possible to read this as relating to Article 6(3). Perhaps it is meant to supplement both. One does not know and courts are invited to guess. Assuming this is meant to supplement Article 6(7), then it suggests that the provisions in have a particular character that must be transposed into domestic law. And, given that rigid categorization (as inherently criminal or civil), the state is permitted to draft analogous legislation to criminalize the conduct that is apparently meant to produce a codex of civil liability under Article 6(7).

Second, it appears that the object of this is to ensure at least some minimum legal basis for civil liability that in turn would provide the basis for remedial recovery by harmed individuals. That is fair. Yet in doing so one might ask whether such recovery is now limited to those bases; one might ask whether it forecloses other means of recovery that might have predated the treaty; and it might raise the question of pre-emption—whether the treaty now limits recovery strictly to the bases described in Article 6(7).

### *Paragraph 9*

Again, one encounters a provision whose intent is good but the drafting of which raises interpretive issues. Paragraph 9 provides:

> State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offense in accordance with Article 6 (7) and criminal offences as defined by their domestic law.

A first reading causes confusion. Article 6(8) suggested the civil character of the harms defined in Article 6(7). But Article 6(9) suggests that the offenses described in Article 7(7) may be criminal in nature without reference to the possibility of dual character (and the implied need to preserve a civil liability space for those offenses) as specified in Article 6(8). The result is confusion; confusion about the relationship and meaning of Articles 6(7)-(9) when read together.

Second, the scope of the application of the provision beyond its own terms is not clear. The reference to domestic law in this context is ambiguous. On the other hand what appears to be attempted is to induce states to include in their criminal law predicate crimes of complicity, participation and attempt. That is fair. Though why the limitation "as defined by their domestic law" in this provision and not in others is curious. A court might either be inclined to see in the inclusion a permission to deviate here in ways not permitted in other parts of the Treaty. Or it may read this phrase into every section of the treaty.

Third, this provision brings to the foreground the issue of the application of these rules to both SOEs and to state officials who may well be instrumental in directing the actions that cause the sort of harm for which liability arises under Article 6. Paragraph 9 also foregrounds the inverse of the usual problem—enterprise complicity in state violation of actionable human rights. Here it is possible to impose on states a duty to bring both civil and criminal proceedings against state officials who are themselves complicit in liability producing activities of enterprises. Yet, again, there is nothing here from which such liability can be based, especially where such an effort brings us (and the Treaty) back to the issue of sovereign immunity.

What does "Legal Liability" mean in a world in which regulatory governance and markets sometimes have far more reach than the law of any state? What if, indeed, law becomes fused with administrative practice?; it might then reduce itself to sets of privileges and restrictions that follow from systems of rating performance based on systems. These then shift the modalities of managing populations from law to rankings based systems that in turn center the project of data driven governance. That in turn transforms law into the means through which the demand for a constant stream of data might be satisfied. The realities of regulation may well leave Article 6 and its quaint focus on old fashioned law based structures far behind.[5]

5 Larry Catá Backer, *Next Generation Law: Data-Driven Governance and Accountability Based Regulatory Systems in the West, and Social Credit Regimes in China*, LAW &: SOUTHERN CALIFORNIA INTERDISCIPLINARY LAW JOURNAL 28(1):123-172 (2018).