

Annex to the report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (A/HRC/43/55)

Note by the Secretariat

Summary

The present annex contains a compilation of the concrete textual suggestions on the revised draft legally binding instrument presented during the fifth session of the working group on transnational corporations and other business enterprises with respect to human rights by States and other relevant stakeholders. It has been prepared in accordance with paragraph 101 (a) and (b) of A/HRC/43/55. Only the concrete textual suggestions received by the Secretariat are part of this compilation and have been reproduced as received and in the original language of submission.

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I. Concrete textual suggestions

A. States

1. Azerbaijan

The principles of sovereign equality and territorial integrity are the primary principles setting the basis for any further engagement whether political or economic. We therefore welcome and strongly support the upholding of this principle in the Preamble of the new draft of the Legally Binding Instrument.

Humanitarian law will play crucial role in ensuring the protection of human rights at times of conflicts and in post conflict situations and we strongly support the acknowledgement of its importance in the Preamble of the draft LBI as well as throughout the document.

The list of persons disproportionately impacted of certain business-related human rights abuses shall also include internally displaced persons (paragraph 14 of the Preamble) as they are also a vulnerable group.

The scope of the future Legally Binding Instrument shall be in line with HRC Resolution 26.9 and cover business activities of transnational corporations and other business enterprises.

We welcome the reference to the activities undertaken by electronic means in Paragraph 3 of Article 1 as this is an unavoidable mean of conducting business in contemporary times and draft LBI shall be proactive and cover contemporary challenges especially when it comes to the protection of human rights. We also suggest inserting reference to electronic means in Paragraph 4 of Article 1.

The expression "contractual relationship" used throughout the draft LBI may limit the application of the LBI in the future. We therefore wish to work on the wording. We may consider replacing the word "contractual" with "business".

We believe that Paragraph 3 of Article 3 is a bit vague when referring to all human rights. We believe that it should be edited in terms that it refers to all universally recognized human rights and those rights recognized under domestic law.

Regarding Article 4 we believe that this article should be considered together with Paragraph 1 of Article 1. While the definition of victims given in Paragraph 1 of Article 1 is somehow broad, Article 4 seems to avoid victims in times of conflict. We therefore believe that the definition of victims provided in Article 1 should be broadened further to include victims in conflict and post conflict situations, as well as the family members and dependents of the victims under this future legally binding instrument.

For the similar reason we believe that Article 4 should be strengthen further by adding reference to humanitarian law.

In Paragraph 8 of Article 4 we would also like to seek clarification on the type of justification needed to act on behalf of victims.

2. Brazil

In preparation for the 5th session of the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, the Brazilian Government engaged several ministries in the analysis and consideration of the revised version of the draft Legally Binding Instrument to Regulate, in International Human Rights Law (draft LBI), the Activities of Transnational Corporations and Other Business Enterprises.

During the abovementioned session, the Brazilian delegation participated constructively and presented questions, suggestions and proposals aimed at improving the text. The delegation

reserved position on the whole document, since further internal consultations are still needed to define the national position in relation to key aspects of its content. Below, we summarize the main preliminary contributions presented by the delegation during the fifth session of the OEIGWG.

As stressed by the Brazilian delegation during the session, the revised version of the draft LBI, as circulated by the Chairperson-Rapporteur, aims at regulating abuses to human rights by Transnational Corporations and other Business enterprises and reflects to a great extent the discussions occurred in the framework of the OEIGWG in previous years. It is particularly commendable the widening of the scope of the draft LBI, in order to include all business activities. Other cross-cutting issues such as business responsibility in relation to crimes against humanity and incentives for companies committed to a human rights agenda are also present. The draft LBI may, therefore, be considered a satisfactory basis for initial discussion among States.

Preamble

The delegation noted that reference to *nine* core international human rights instruments and to *eight* fundamental conventions adopted by the International Labor Organization in paragraph 3 of the Preamble and indicated the possibility of using alternative language, such as a general reference to internationally legally binding instruments, without specifying or quantifying them.

Article 1. Definitions

The delegation explained that Brazil is not convinced of the added value of including a definition of victims and alleged victims in the draft LBI. However, in case there remains such definition, Brazil favors a clear distinction between the concepts of victims and alleged victims, in a way that differentiates claimants from victims that are recognized by a judicial, administrative or any other recognized means.

The delegation also remarked that Brazil is not convinced of the added value of including a definition of violations and abuses in the draft LBI. In case such definitions are retained, Brazil suggests differentiating the concepts of *violation* and *abuse* of human rights. We suggest also clarifying the idea of *harm*, in order to distinguish which harms would be tolerable or acceptable as inherent to business or state activities.

Article 3. Scope

Brazil supports the decision to broaden the scope of the draft LBI.

Brazil reserves its position regarding the use of the term "activities", as we consider it still requires more in depth discussion and indicates that it would be useful to recall the language of the UNGPs, which refers to "all business enterprises or activities regardless of size, sector, location, ownership and structure".

Brazil is not convinced of the need to include Article 3.2 in the text. In addition, paragraph 3.2 (c) lacks precision when it refers "substantial effect" of a business activity. Brazil also considers the language of this Article 3.3 unclear.

Article 4. Rights of victims

Brazil understands that Article 4 refers to effective remedies for claimants and victims and would welcome adjustments in the language to reflect that. The article is also focused on providing access to justice by removing legal and financial barriers to claimants and ensuring effectiveness to judicial decisions. However, as currently drafted, the article does not differentiate between what claimants may demand - from a company or from the State - during judicial proceedings from actual obligations undertaken by the States. Brazil favors more clarity and the separation of obligations and duties of different actors.

In relation to Article 4.5, Brazil understands that reparatory measures granted in case of environmental damage should be in accordance with the conceptual basis provided by international law. Additionally, Brazil suggests differentiating the right of every

individual to consular and diplomatic assistance from judicial or legal assistance. Concerning Article 4.8., the delegation sought clarification regarding the rationale of allowing others submit a claim on behalf of an alleged victim without his or her consent.

Article 5. Prevention

The Brazilian delegation commended the inclusion of an article fully dedicated to the issue of prevention in the draft LBI and highlighted the importance of acting in advance and avoiding damage and harm, and humanrights violations.

Regarding paragraph 5.3 (a), which stipulates the need for an assessment of environmental impact, the delegation once again stressed that such an assessment should be in accordance with the conceptual basis provided by international law. Brazil is also concerned that the reach and envisaged costs of the human rights impact assessments are not sufficiently clear.

In relation to paragraph 5.3 (c), Brazil is not in a position to endorse the use of non-consensual language on consultations with affected communities. We recall that the ILO Convention on Indigenous and Tribal Peoples, adopted in 1989, establishes that "consultations (...) shall be undeliaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures".

Article 6. Legal liability

As expressed by the Brazilian delegation, domestic law enshrines criminal responsibility of legal persons in a few cases, such as violations against the economic and financial order of the country, among others. We consider that, according to each situation, criminal, civil or administrative liability may apply.

The delegation commended the suppression of references to "universal jurisdiction".

Article 7. Adjudicative jurisdiction

The Brazilian delegation sustained the importance of limiting the application of the principle of *forum non conveniens*, in the understanding that it may unduly impair the effectiveness of justice.

Article 8. Statute of limitations

The Brazilian delegation stressed that Article 8.1 lacks necessary clarity when it refers to the "most serious crimes of concern to the international community as a whole".

3. Cuba

OEIGWG Chairmanship revised draft

Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises ¹ (revisar mayúsculas)

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¹ “Other business enterprises” denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law. (Verbatim foot note resolution 26/9)

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Preamble

The State Parties to this (Legally Binding Instrument),

Recalling the principles and purposes of the Charter of the United Nations,

Recalling also the nine core International Human Rights Instruments adopted by the United Nations, and the eight fundamental Conventions adopted by the International Labour Organization;

Recalling further the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, and the UN Declaration on the Rights of Indigenous Peoples, as well as other internationally agreed human rights-relevant declarations;

Reaffirming the fundamental human rights and the dignity and worth of the human person, ~~in~~ the equal rights of men and women and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations;

Stressing the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realized consistent with the purposes and principles of the United Nations as stated in the Universal Declaration of Human Rights;

Reaffirming that all human rights are universal, indivisible, interdependent and inter-related;

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

Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control, and ensure respect for and implementation of international human rights law;

Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of race, sex, language or religion;

Upholding the principles of sovereign equality, peaceful settlement of disputes, and maintenance of the territorial integrity and political independence of States as set out in Article 2 of the United Nations Charter;

Acknowledging that all business enterprises have the capacity to foster the achievement of sustainable development through an increased productivity, inclusive economic growth and job creation that protects labour rights and environmental and health standards in accordance with relevant international standards and agreements;

Underlining that ~~all business enterprises~~ **transnational corporations**, regardless of their size, sector, operational context, ownership and structure have the responsibility to respect all human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities and addressing such impacts when they occur, as well as by preventing or mitigating adverse human rights impacts that are directly linked to their operations, products or services by their business relationships;

Emphasizing that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for the adverse human rights impacts of ~~business enterprises~~ **transnational corporations**,

Recognizing the distinctive and disproportionate impact of certain business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities.

Taking into account all the work undertaken by the Commission on Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises with respect to human rights, and all relevant previous Human Rights Council resolutions, including in particular Resolution 26/9.

Noting the role that the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework have played in that regard;

Noting also the ILO 190 Convention concerning the elimination of violence and harassment in the world of work;

Desiring to contribute to the development of international law, international humanitarian law and international human rights law in this field;

Hereby agree as follows:

Section I

Article 1. Definitions

1. “victims” shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim.

2. “Human rights violation or abuse” shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities of **transnational corporations**, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

3. “Business activities” means any economic activity of transnational corporations and other business enterprises **that have a transnational character in their operational activities**, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.

4. “Contractual relationship” refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association,

joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.

5. “Regional integration organization” shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this (Legally Binding Instrument).

Article 2. Statement of purpose

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

(a) To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities **of transnational corporations and other business enterprises that have a transnational character in their operational 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 **such** business activities;

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

Article 3. Scope

1. This (Legally Binding Instrument) shall apply, ~~except as stated otherwise,~~ to all business activities, ~~including particularly but not limited to those of a transnational character,~~ **of transnational corporations and other business enterprises that have a transnational character in their operational activities.**

2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:

(a) It is undertaken in more than one national jurisdiction or State; or

(b) It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State; or

(c) It is undertaken in one State but has substantial effect in another State.

3. This (Legally Binding Instrument) shall cover all human rights.

Section II

Article 4. Rights of Victims

1. Victims of human rights violations shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.

2. **Victims shall be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement. Note: The provisions in this paragraph and in general in the Draft legally binding instrument, should not overlap with other Human Rights instruments and shall not go beyond specific obligations of States in that regard.**

3. Victims, their representatives, families and witnesses shall be protected by the State Party from any unlawful interference against their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted.

4. Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice.

5. Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:

(a) Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;

(b) Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.

6. Victims shall be guaranteed access to information relevant to the pursuit of remedies.

7. Victims shall have access to appropriate diplomatic and consular means, as needed, to ensure that they can exercise their right to access justice and remedies, including but not limited to, access to information required to bring a claim, legal aid and information on the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.

8. Victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies.

9. State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment **in the context of business activities of transnational corporations**, so that they are able to act free from threat, restriction and insecurity.

10. State Parties shall **effectively, promptly, thoroughly and impartially** investigate all human rights violations and abuses **in the context of business activities of transnational corporations** ~~effectively, promptly, thoroughly and impartially~~, and where appropriate, take action against those natural or legal persons found responsible, in accordance with domestic and international law.

11. State Parties shall ensure that their domestic laws and courts facilitate access to information through international cooperation, as set out in this (Legally Binding Instrument), and in a manner consistent with their domestic law.

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

(a) Making information available to victims of their rights and the status of their claims in an appropriate and adequate manner;

(b) Guaranteeing the rights of victims to be heard in all stages of proceedings as consistent with their domestic law;

(c) Avoiding unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards;

(d) Providing assistance with all procedural requirements for the presentation of a claim and the start and continuation of proceedings in the courts of that State Party. The State Party concerned shall determine the need for legal assistance, in consultation with the victims, taking into consideration the economic resources available to the victim, the complexity and length of the issues involved in the proceedings;

(e) In no case shall victims that have been granted the appropriate remedy to redress the violation, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a remedy, the alleged victim shall not be liable for such reimbursement if such alleged victim

demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the alleged victim.

13. Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this (Legally Binding Instrument). State Parties shall assist victims in overcoming such barriers, including through waiving costs where needed. State Parties shall not require victims to provide a warranty as a condition for commencing proceedings.

14. State Parties shall provide effective mechanisms for the enforcement of remedies for violations of human rights, including through prompt execution of national or foreign judgements or awards, in accordance with the present (Legally Binding Instrument), domestic law and international legal obligations.

15. State Parties shall take adequate and effective measures to recognize, protect and promote all the rights recognised in this (Legally Binding Instrument) to persons, groups and organizations that promote and defend human rights and the environment **in the context of business activities of transnational corporations**.

16. Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof, for the purpose of fulfilling the victim's access to justice and remedies.

Article 5. Prevention

1. State Parties shall regulate effectively the activities of **business enterprises transnational corporations** within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, **including those** of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.

2. 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 transnational character, to undertake human rights due diligence as follows:

(a) Identify and assess any actual or potential human rights violations or abuses that may arise from their **own** business activities, or from their contractual relationships;

(b) Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships;

(c) Monitor the human rights impact of their business activities, including those under their contractual relationships;

(d) Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.

3. Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to:

(a) Undertaking environmental and human rights impact assessments in relation to its activities and those under their contractual relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions;

(b) Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable;

(c) Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships;

(d) Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed;

(e) Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services.

4. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.

5. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.

6. States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

Article 6. Legal Liability

1. 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.

2. Liability of legal persons shall be without prejudice to the liability of natural persons.

3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.

4. 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.

5. 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.

6. 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.

7. Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences:

(a) War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;

(b) Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;

(c) Enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;

(d) Extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;

(e) Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957;

(f) The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999;

(g) Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;

(h) Slavery and slavery-like offences;

(i) Forced displacement of people;

(j) Human trafficking, including sexual exploitation;

(k) Sexual and gender-based violence.

8. Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offences.

9. 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 offence in accordance with Article 6 (7) and criminal offences as defined by their domestic law.

Article 7. Adjudicative Jurisdiction

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

(a) Such acts or omissions occurred; or

(b) The victims are domiciled; or

(c) The natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.

2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:

(a) Place of incorporation; or

(b) Statutory seat; or

(c) Central administration; or

(d) Substantial business interests.

Article 8. Statute of limitations

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

2. Domestic statutes of limitations for violations that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred in another State.

Article 9. Applicable law

1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws.

2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:

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

(b) The victim is domiciled; or

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

3. The (Legally Binding Instrument) does not prejudice the recognition and protection of any rights of victims that may be provided under applicable domestic law.

Article 10. Mutual Legal Assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings in relation to claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations.

2. The requested State Party shall inform the requesting State Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

3. Mutual legal assistance under this (Legally Binding Instrument) is understood to include, but is not limited to:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Facilitating the freezing and recovery of assets;

(j) Assistance to, and protection of, victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to

international legal requirements including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment;

(k) Assistance in regard to the application of domestic law;

(l) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit and exchange information relating to criminal offences covered under this (Legally Binding Instrument) to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this (Legally Binding Instrument). The transmission and exchange of information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information.

5. States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are subject of investigations, prosecutions or judicial proceedings under this (Legally Binding Instrument), the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

6. States Parties shall carry out their obligations under the previous paragraph in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance to the fullest extent possible under domestic and international law.

7. State Parties shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution, in accordance with their domestic laws.

8. State Parties shall provide legal assistance and other forms of cooperation in the pursuit of access to remedy for victims of human rights violations covered under this (Legally Binding Instrument).

9. Any judgement of a court having jurisdiction in accordance with this (Legally Binding Instrument) which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized and enforced in any State Party as soon as the formalities required in that State Party have been completed, whereby formalities should not be more onerous and fees and charges should not be higher than those required for the enforcement of domestic judgments and shall not permit the re-opening of the merits of the case.

10. Recognition and enforcement may be refused, at the request of the defendant, only if that party furnishes to the competent authority or court where the recognition and enforcement is sought, proof that:

(a) The defendant was not given reasonable notice and a fair opportunity to present his or her case; or

(b) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or

(c) Where the judgement is likely to prejudice the sovereignty, security, *ordre public* or other essential interests of the Party in which its recognition is sought.

11. Mutual legal assistance under this article may be refused by a State Party if the violation to which the request relates is not covered by this (Legally Binding Instrument) or if it would be contrary to the legal system of the requested State Party.

12. A State Party shall not decline to render mutual legal assistance in claim involving liability for harms or criminal offences, within the scope of this (Legally Binding Instrument) on the ground that the request is considered to involve fiscal matters or bank secrecy.

Article 11. International Cooperation

1. States Parties shall cooperate in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument).

2. State Parties recognize the importance of international cooperation and its promotion for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. Such measures could include, but are not limited to:

(a) promoting effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international grievance mechanisms;

(b) Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);

(c) Facilitating cooperation in research and studies on the challenges and good practices and experiences for preventing violations of human rights in the context of business activities, including those of a transitional character.

Article 12. Consistency with International Law

1. States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Notwithstanding art 7.1, nothing in this (Legally Binding Instrument) entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

3. Nothing in the present (Legally Binding Instrument) shall affect any provisions that are more conducive to the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities which may be contained:

(a) In the domestic legislation of a State Party; or

(b) In any other regional or international, treaty or agreement in force for that State.

4. The provisions of this (Legally Binding Instrument) shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgements in force between State Parties.

5. This (Legally Binding Instrument) shall not affect the rights and obligations of the State Parties under the rules of general international law with respect to the international responsibility of States.

6. States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

Section III

Article 13. Institutional Arrangements

Committee

1. There shall be a Committee established in accordance with the following procedures:

(a) The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts. After an additional sixty ratifications or accessions to the (Legally Binding Instrument), the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields;

(b) The experts shall be elected by the State Parties, consideration being given to equitable geographical distribution, the differences among legal systems, gender balanced representation and ensuring that elected experts are not engaged, directly or indirectly, in any activity which might adversely affect the purpose of this (Legally Binding Instrument);

(c) The members of the Committee shall be elected by secret ballot from a list of persons nominated by State Parties. They shall be elected for a term of 4 years and can be re-elected for another term. Each State Party may nominate one person from among its own nationals. Elections of the members of the Committee shall be held at the Conference of State Parties by majority present and voting. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the State Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the State Parties;

(d) The initial election shall be held no later than six months after the date of the entry into force of this (Legally Binding Instrument). The term of six of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in this Article;

(e) If a member of the Committee dies or resigns or for any other cause can no longer perform his or her Committee duties, the State Party which nominated him or her shall appoint another expert from among its nationals to serve for the remainder of his or her term, subject to the approval of the majority of the States Parties;

(f) The Committee shall establish its own rules of procedure and elect its officers for a term of two years. They may be re-elected;

(g) The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this (Legally Binding Instrument). The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure;

(h) With the approval of the General Assembly, the members of the Committee established under the present (Legally Binding Instrument) shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide through the established procedures.

2. State Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State Party concerned. Thereafter the State Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

3. The Secretary-General of the United Nations shall transmit the reports to all State Parties.

4. The Committee shall have the following functions:

(a) Make general comments and normative recommendations on the understanding and implementation of the (Legally Binding Instrument) based on the examination of reports and information received from the State Parties and other stakeholders;

(b) Consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include this suggestions and general recommendations in the report of the Committee together with comments, if any, from State Parties;

(c) Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the (Legally Binding Instrument);

(d) Submit an annual report on its activities under this (Legally Binding Instrument) to the State Parties and to the General Assembly of the United Nations;

(e) [The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the present (Legally Binding Instrument)].

Conference of States Parties

5. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the (Legally Binding Instrument), including any further development needed towards fulfilling its purposes.

6. No later than six months after the entry into force of the present (Legally Binding Instrument), the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the Secretary-General of the United Nations biennially or upon the decision of the Conference of States Parties.

International Fund for Victims

7. States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund.

Article 14. Implementation

1. State Parties shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).

2. Each State Party shall furnish copies of its laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.

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

4. In implementing this (Legally Binding Instrument), State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.

5. The application and interpretation of these Articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.

Article 15. Relation with protocols

1. This (Legally Binding Instrument) may be supplemented by one or more protocols.
2. In order to become a Party to a protocol, a State or a regional integration organization must also be a Party to this (Legally Binding Instrument).
3. A State Party to this (Legally Binding Instrument) is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.
4. Any protocol to this (Legally Binding Instrument) shall be interpreted together with this (Legally Binding Instrument), taking into account the purpose of that protocol.

Article 16. Settlement of Disputes

1. If a dispute arises between two or more State Parties about the interpretation or application of this (Legally Binding Instrument), they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to this (Legally Binding Instrument), or at any time thereafter, a State Party may declare in writing to the Depository that, for a dispute not resolved in accordance with paragraph 1 of this article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any State Party accepting the same obligation:
 - (a) Submission of the dispute to the International Court of Justice;
 - (b) Arbitration in accordance with the procedure and organization mutually agreed by both State Parties.
3. If the State Parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the State Parties agree otherwise.

Article 17. Signature, Ratification, Acceptance, Approval and Accession

1. The present (Legally Binding Instrument) shall be open for signature by all States and by regional integration organizations at United Nations Headquarters in New York as of (date).
2. The present (Legally Binding Instrument) shall be subject to ratification, acceptance or approval by signatory States and to formal confirmation by signatory regional integration organizations. It shall be open for accession by any State or regional integration organization which has not signed the (Legally Binding Instrument).
3. This (Legally Binding Instrument) shall apply to regional integration organizations within the limits of their competence; subsequently they shall inform the depositary of any substantial modification in the extent of their competence. Such organizations may exercise their right to vote in the Conference of States Parties with a number of votes equal to the number of their member States that are Parties to this (Legally Binding Instrument). Such right to vote shall not be exercised if any of its member States exercises its right, and vice versa.

Article 18. Entry into force

1. The present (Legally Binding Instrument) shall enter into force on the thirtieth day after the deposit of the [---] instrument of ratification or accession.
2. For each State or regional integration organization ratifying, formally confirming or acceding to the (Legally Binding Instrument) after the deposit of the [---] such instrument, the (Legally Binding Instrument) shall enter into force on the thirtieth day after the deposit of its own such instrument.

Article 19. Amendments

1. Any State Party may propose an amendment to the present (Legally Binding Instrument) and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two-thirds of the State Parties present and voting in the Conference of the Parties shall be submitted by the Secretary-General to all State Parties for acceptance.
2. An amendment adopted and approved in accordance with this Article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of State Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those State Parties which have accepted it.
3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with this Article which relates exclusively to the establishment of the Committee or its functions, and the Conference of States Parties shall enter into force for all State Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of State Parties at the date of adoption of the amendment.

Article 20. Reservations

1. Reservations incompatible with the object and purpose of the present (Legally Binding Instrument) shall not be permitted.
2. Reservations may be withdrawn at any time.

Article 21. Denunciation

A State Party may denounce the present (Legally Binding Instrument) by written notification to the Secretary-General of the United Nations. The denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Article 22. Depositary and Languages

1. The Secretary-General of the United Nations shall be the depositary of the present (Legally Binding Instrument).
2. The Arabic, Chinese, English, French, Russian and Spanish texts of the present (Legally Binding Instrument) shall be equally authentic.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present (Legally Binding Instrument).

4. Iran (Islamic Republic of)

Suggestions regarding the text from preamble to article 5

Preamble

The state parties to this legally binding instrument,

Para to add

Stressing the right of all business enterprises to have free access to the world economic, business, financial, insurance and banking system in order to do their business activities which is being considered in line with the right to development

Recalling that Unilateral coercive measures in the form of unlawful sanctions including secondary sanctions against other states and business companies lead to gross human rights abuses and violations against business companies as well as their staff, families and the community which the company is located.

Article 1. Definitions

2. Human rights violation or abuse” shall mean any harm committed by a State or a business enterprise, through acts or omissions, **Unilateral coercive measures in the form of unlawful sanctions** including secondary sanctions in the context of business activities, against any **state**, person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

6 bis: Unilateral sanctions means any sanctions against another states or its companies and people through financial, assurance, banking and business issues

Section II

Article 4. Rights of Victims

The victims in this section shall be divided to states and people, it should be two groups. As for states we suggest:

1. bis: Victim can be a state under unilateral sanction, and Business companies, staff, individual, and their families that are subject to an illegal sanction.

5 bis: A victim state or company or individual shall have the right to fair, effective, prompt and nob discriminatory access to justice and adequate, effective and prompt remedies.

5 prevention.

1bis. State Parties shall not adopt unilateral illegal sanction and assure respect to human rights and prevent human rights violations or abuses towards states, companies and persons conducting business activities, including those of a transnational character, in their territory or jurisdiction,

2. 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 transnational character, to undertake human rights due diligence as follows:

(a) Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, **Unilateral coercive measures in the form of unlawful sanctions including secondary sanctions** or from their contractual relationships;

(b) Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including , **Unilateral coercive measures in the form of unlawful sanctions including secondary sanctions and** those under their contractual relationships;

(c) Monitor the human rights impact of their business activities, **including their adoption of Unilateral coercive measures in the form of unlawful sanctions and** including those under their contractual relationships;

(d) Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, including through **Unilateral coercive measures in the form of unlawful sanctions** or from those under their contractual relationships.

3 Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to:

(a) Undertaking environmental and human rights impact assessments in relation to its activities **including Unilateral coercive measures in the form of unlawful sanctions** and those under their contractual relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions;

(b) Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, **including Unilateral coercive measures in the form of unlawful sanctions** such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable;

(c) Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, **including Unilateral coercive measures in the form of unlawful sanctions** including those of their contractual relationships;

(d) Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed;

(e) Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, **including Unilateral coercive measures in the form of unlawful sanctions** or from contractual relationships, including with respect to their products and services.

4. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, **including Unilateral coercive measures in the form of unlawful sanctions and** those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.

5. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law, **and from Unilateral coercive measures in the form of unlawful sanctions**

6. States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

B. Observer States

1. Holy See

The Holy See welcomes this opportunity to comment on the Draft Legally binding instrument presented during the 5th Session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights. As noted by the Permanent Observer of the Holy See to the UN and Other International Organizations in Geneva at the opening of the 4th Session of the Open-ended working group:

The starting point for any discussion surrounding a treaty in this area must be the concern for the protection of fundamental human rights, which "derive from the inherent dignity of the human person". A binding instrument would raise moral standards, change the way international corporations understand their role and activity and help clarify the extraterritorial obligations of States regarding the acts of their companies in other countries.²

Aware of the many challenges that must be overcome to attain a balanced and effective instrument to address the existing gaps in the global legal framework, the Holy See therefore expresses its appreciation for the positive and transparent approach that has been adopted in the development of this text.

General Observations

The current draft appears imprecise both in the use of legal terminology and in its scope. Under existing international human rights law, States already have the legal duty to protect persons under their jurisdiction from human rights abuses, including those that may occur in connection with economic activities. Hence, it is not immediately clear what the new text would add to the already existing human rights legal regime. Therefore, it would seem preferable to tailor the proposed instrument narrowly, so that it would focus on ensuring that the presumptive victims of human rights abuses by transnational corporations have the right to present legal claims in the jurisdiction where the enterprise was its legal seat or its main economic interests. Such a focused approach would not only fill a real gap in the existing human rights system but it might also facilitate reaching consensus.

Specific Proposals

P.p. 7. The draft should encourage the respect for all human rights. Therefore, the expression "*including the rights to non-discrimination, participation and inclusion*" should be deleted.

P.p. 18. Since there is no generally agreed definition of "*human rights defenders*" in International Law, the term should be defined.

New P.P. It would be useful to introduce the concept of "*responsible stewardship*" so that political decisions seek the long-term common good and concrete solidarity among generations. It is, therefore, proposed to introduce a new p.p. reading: "*Stressing that the urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development*".

Art. 1.1 The draft must conform to the principle of innocence. Thus, it is necessary to distinguish, throughout the text, between the presumptive victims, who claim to have been wronged, and the actual victims, who already have been found to have suffered a wrongful action. The proposed definition of "*victim*" confuses both categories of persons and should be amended.

² Statement by His Excellency Archbishop Ivan Jurkovic, Permanent Observer of the Holy See to the UN and Other International Organizations in Geneva, at the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights Item 4-General Statements, 15 October 2018, <http://www.nuntiusge.org/images/STATEMENTS/20181015.pdf>.

Art. 1.2 It is also necessary to distinguish between the wrongful actions attributable to private entities and a violation of human rights obligations by States. Therefore, a *"Human rights abuse"* should be defined as *"any wrongful action or omission by transnational corporation that gravely impedes the enjoyment of internationally recognized human rights and fundamental freedoms"*; while a *"Human rights violation"* should be defined as *"any breach, by a State or international organization, of their obligations under international law regarding the respect, protection and promotion of human rights and fundamental freedoms, including the prevention of and protection from human rights abuses by transnational corporations"*. The differentiation between these two concepts should be applied to the successive articles of the draft, notably in articles 6 to 9.

Art. 1.3 The current definition of *"business activities"* appear open-ended. The draft should be limited to *"for-profit"* activities, thus excluding charitable and humanitarian activities from the scope of application of the new instrument. It would also be useful to define *"transnational corporation"* and *"enterprise group"*.

Art. 1.4 The term *"contractual relationship"* should be replaced with the term *"business relationship"*, already used in the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration.

Art. 2

Art. 3

Art. 4

This article does not set forth any legal provision but it contains rather a description of the purpose of the text. It should be moved to the preamble.

The draft should focus on ensuring that presumptive victims of human rights abuses are able to present legal claims in the jurisdiction of legal incorporation or of main economic interest of the enterprise. Abuses committed within the territory of a single State, without involving foreign entities or persons, fall within the purview of already existing international treaties. Hence, the scope of the proposed instrument should be limited to activities of a transnational character.

The current draft article should be divided into at least four different provisions: one regarding the procedural rights of the claimants (current paragraphs 5-8); another one on the rights of those whose claims have been legally recognized (pp. 3, 5.a); a further one on the rights of all persons (current paragraphs 1-2 and 9-10); and a final one on the obligations of State parties (current paragraphs 11-16).

Art. 4.6 The right of the claimants to relevant information is essential for the successful pursuit of legal remedies. This provision should require State Parties to ensure that their legal systems allow the discovery of relevant information in the course of the proceedings.

Art. 4.8 This paragraph contains perhaps the most important provision of the whole text. However, it should be linked to draft art. 7 on the jurisdiction of the State. The proposed instrument should not create a sort of *"universal jurisdiction"*. Instead, it should require an effective link between the presumptive victims or the defendant and the State that seeks to exercise jurisdiction. The possibility of submitting claims without the consent of the presumptive victims, including class-actions, deserves to be treated separately and must be subject to the basic legal principles of each State.

Art. 4.9 The proposed reversal of the burden of proof, set forth in such broad terms, could be extremely detrimental to the rights of the defense. It should be deleted.

Art. 5 The requirements regarding prevention and due diligence must always take into account the size, nature, context and risk of the business activities. Notwithstanding the provision for incentives foreseen in paragraph 6, the preventive measure would create an undue burden for small and medium sized enterprises and for low-risk activities. Consequently, the chapeaux of paragraph 2 should read: *"For the purpose of paragraph 1 of this Article, State Parties shall adopt measure necessary to ensure that all*

transnational corporations and enterprises undertake human rights due diligence commensurate with the size, nature, context and risk of their business activities such as:..." In the chapeaux of paragraph 3, the term "*shall*" should be replaced with "*may*". Under paragraph 3, a new letter should be added suggesting the possibility of assessing, at the various stages, the impact of business activity on women.

Art. 6.1 This paragraph would benefit from the insertion of the phrase "*causing or contributing*" as follows: " ... *adequate system of legal liability for causing or contributing to human rights abuses in the contest of their business activities*".

Art. 6.7 This provision, regarding the liability for international crimes, seems redundant insofar as article 6, paragraphs 1 and 6, foresees the liability of legal persons for all human rights abuses committed in the contest of their activities. Moreover, if included, the crimes referred to in letters g) to k) must be defined precisely in accordance with the principle of legality. In defining international crimes, the draft must follow faithfully the language of the relevant international treaties.

Art. 7.2 This provision should follow *mutatis mutandis* the text of the *UNCJTRAL Model Law on Enterprise Group Insolvency* as follows:

2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered to be domiciled at:

- (a) the place of citizenship or where a business enterprise is registered;
- (b) principal place of business or where management of an enterprise is located;
- (c) the place where an enterprise has its principal assets or operations; or
- (d) the place where a business enterprise conducts the administration of its interests with respect to the activity in question on a regular basis as ascertainable by third parties."

Art. 12.5 This provision should mention also the rules of general international law on State immunity.

Art. 12.5 This provision should be redrafted to require that other relevant agreements between State Parties be compatible with their obligations under the new instrument, so that any provision of a previous agreement that is incompatible with the new instrument shall not apply (*cf.* *Vienna Convention on the Law of Treaties*, art. 30, para 3-4).

Art. 12, new paragraph A specific clause should be added requiring that new trade and investment agreements respect of human rights obligations by requiring, *inter alia*, human rights and sustainability impact assessments prior to the start of trade negotiations, and securing the primacy of human rights obligations in Investor-State Dispute Settlement (ISDS) mechanisms.

Art. 13 Since the proposed instrument does not set forth new human rights, the creation of a treaty body to receive and assess periodic reports appears unnecessary and might create an additional burdens for State Parties. This article should therefore be deleted.

Art. 14.1 It is unclear whether the monitoring mechanisms mentioned in this paragraph are to be created at the domestic level or at a supranational level. The provision should specify that it refers to domestic monitoring mechanism.