CNCDH
COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L'HOMME
RÉPUBLIQUE FRANÇAISE

OPINION ON THE UPDATED DRAFT BUSINESS AND HUMAN RIGHTS TREATY (A – 2020-3)

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Adopted unanimously

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Summary

As the ninth negotiating session of the intergovernmental working group responsible for drafting "*an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*" approaches, the CNCDH once again recommends that France continue its efforts to ensure that the European Union finally be given a negotiating mandate. It notes that the updated draft instrument published in July 2023 introduces improvements to the terminology used and strengthens certain provisions, but contains major setbacks to which it draws attention. The CNCDH stresses the importance of maintaining a broad scope of application, improving the definition of due diligence and liability in order to promote legal certainty and accountability, and preserving and strengthening the protection of rights holders and access to remedies in order to avoid denials of justice.

Introduction

1. The ninth session of the open-ended intergovernmental working group whose mandate has, since 2014, been to "*elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*" is to be held from 23 to 27 October 2023.[1] The aim of this process is to adopt binding international norms that complement the United Nations Guiding Principles on Business and Human Rights adopted in 2011,[2] in order to strengthen respect for and protection of human rights in the context of business activities, create a level-playing field worldwide and improve access to justice and effective remedies for rights holders.

2. This ninth session will focus on the updated draft international legally binding instrument published on 31 July 2023[3] (hereinafter "updated draft treaty").[4] Beforehand, the Chair of the Working Group invited the stakeholders involved in the process (States, international organisations, national human rights institutions, non-governmental organisations, employers' organisations, trade unions, etc.) to submit written contributions.[5] The Friends of the Chair (FOCH) group[6] has also organised regional consultations[7] to encourage the broadest possible cross-regional support and to advance work on the draft treaty, which has been under way for nine years.[8]

3. To date, while a significant number of States participate in the sessions of the Intergovernmental Working Group, the process has not involved a sufficiently representative number of States, particularly those in which multinational companies are headquartered, and major differences on substance remain. The French National Consultative Commission on Human Rights (CNCDH) has already had occasion to highlight the long road travelled since the launch of this process and the emerging consensus on the need to adopt a legally binding international instrument to fill the gaps in positive law, including the weaknesses noted in the implementation of the United Nations Guiding Principles on Business and Human Rights.[9] The aim is to meet the legitimate expectations of victims of human rights violations in the context of business activities,[10] while strengthening legal certainty and

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[1] Human Rights Council, Resolution 26/9 of 26 June 2014, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, A/HRC/RES/26/9, §1.

[2] Human Rights Council, Resolution 17/4 of 16 June 2011, *Human rights and transnational corporations and other business enterprises*, A/HRC/RES/17/4. The Guiding Principles are available at www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[3] Chair of the Intergovernmental Working Group, *Updated draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, 31 July 2023. A version in tracked changes has also been published on the Intergovernmental Working Group website.

[4] The exact form of the draft legally binding instrument (pact, convention, treaty, etc.) will be determined during the negotiations, but it is commonly referred to as "treaty".

[5] See the Compilation of written inputs published on 5 April 2023.

[6] The Chair of the Intergovernmental Working Group, held by Ecuador, has announced its intention to invite a group of Ambassadors to act as Friends of the Chair ahead of the seventh negotiating session in 2021, to help advance work on the draft treaty between negotiating sessions. This group of Friends was formed after the eighth session in 2022 and the announcement of Cameroon's wish to join Azerbaijan, France, Indonesia, Portugal and Uruguay, bringing together a group of States representative of the different regional groups of the United Nations.

[7] See the Compilation of the outcomes of the friends of the Chair intersessional consultations published on the Intergovernmental Working Group website.

[8] See the Guidelines published by the Chair of the Intergovernmental Working Group on 23 March 2023.

[9] Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights at 10: taking stock of the first decade*, 22 April 2021, A/HRC/47/39.

[10] See France's intervention during the general discussion at the eighth session, which called on States to move forward more quickly because "*international public opinion [*and] *the victims of human rights abuses expect it*", while also stressing the need

fair competition by harmonising obligations in this area. Given the heterogeneity of national or regional legislation aimed at regulating these issues,[11] this negotiation process within the UN multilateral framework offers a unique opportunity for the adoption of an ambitious instrument at global level. To this end, the substantial involvement of the European Union and its Member States, alongside those of other regions, is more necessary than ever.[12] The European Union's reluctance to become more actively involved until now is all the less understandable now that negotiations on the EU Directive on Corporate Sustainability Due Diligence have moved forward,[13] a majority of its Member States are in favour of an EU mandate to negotiate on their behalf,[14] and many of its concerns have been taken on board.[15] On the contrary, only an active and constructive commitment will enable it to assert its priorities and contribute to supporting the objectives pursued by the process, for the benefit of greater respect for human rights and environmental protection in global value chains. The CNCDH would like to pay tribute here to the leading role played by France in mobilising its European partners in this direction, as illustrated by its participation, alongside Portugal, in the Friends of the Chair Group. The CNCDH recommends that France continue its efforts to ensure that the European Union is given a mandate to negotiate on behalf of its Member States at future sessions without further delay, and that it affirms its intention to do so at the ninth session.

4. The CNCDH, which has commented on the gradual improvements and persistent shortcomings of the various versions of the draft treaty[16], examined the latest version published last July (hereinafter "the updated draft").[17] It notes that the new text has been streamlined and includes a number of improvements in terms of the use of certain terms, the structure of the various provisions (although the general structure remains the same) or with regard to protection against reprisals. On the whole, however, the updated draft contains major setbacks to which the CNCDH wishes to draw attention by

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for the draft treaty to be "*more realistic, balanced and sufficiently clear and precise in legal terms*", so that it could be effectively implemented.

[11] See, for example, the following maps and comparative tables on legislation around the world (Ius Laboris, *Map of Supply Chain Due Diligence Laws*, April 2022) and in Europe (ECCJ, *Comparative table: Corporate due diligence laws and legislative proposals in Europe*, 21 March 2022). The African Commission on Human and Peoples' Rights has also mandated a working group to prepare a draft African regional legally binding instrument to regulate the activities of transnational corporations and other business enterprises (Resolution on Business and Human Rights in Africa, 21 March 2023, CADHP/Res. 550 (LXXIV) 2023).

[12] The CNCDH notes that the United States, home to many multinational companies, for the first time became more substantially involved in the process at the eighth negotiating session, taking a position on several provisions of both the third revised draft treaty and the informal suggested proposals published in parallel by the Chair of the Intergovernmental Working Group, even though the country continues to express concerns about the substance of the draft treaty and the negotiating process.

[13] The trilogues began after adoption by the European Parliament (on 1 June 2023) of its negotiating position on the proposal for a directive published by the European Commission on 23 February 2022, following that of the Council of the EU on 1 December 2022. The CNCDH also points out that the two processes should in any event be conducted in parallel, mutually enriching and ambitiously driven (CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration pour une implication substantielle de la France et de l'Union européenne dans les négociations*, Plenary Meeting of 28 October 2021, §11, JORF No 0260 of 7 November 2021, text No 67).

[14] However, some EU Member States are still expressing reservations on this point or are not taking a position.

[15] See the examples cited in the CNCDH's 2021 declaration, *op. cit*. Beyond the EU, the updated draft published by the Chair of the Intergovernmental Working Group on 31 July 2023, which largely reproduces its suggested proposals of 2022, seems to reflect its desire to take greater account of the concerns of the Western European and Others States Group (WEOG) (see the results of the WEOG consultations, *op. cit*.). In this opinion, however, the CNCDH stresses that this updated draft represents a step backwards on several points.

[16] CNCDH, *Déclaration sur l'adoption d'un instrument international contraignant sur les entreprises et les droits de l'Homme*, Plenary Assembly of 5 October 2018, JORF No 0238 of 14 October 2018, text No 100; CNCDH, *Opinion on the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, Plenary Assembly of 15 October 2019, JORF No 0244 of 19 October 2019, text No 86; CNCDH, *Follow-up Opinion on the draft legally binding instrument on transnational corporations and other business enterprises and human rights*, Plenary Assembly of 15 October 2020, JORF No 0260 of 25 October 2020, text No 64; CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration pour une implication substantielle de la France et de l'UE dans les négociations*, 28 October 2021, *op. cit*.

[17] Once again, the CNCDH regrets that the updated draft treaty has not been translated into the six official languages of the United Nations.

making recommendations relating to the scope of application, the due diligence and the associated legal liability, as well as access to remedies and redress.

Maintaining a broad scope to cover all human rights violations committed in the context of business activities

5. The draft treaty has gradually been extended to cover all business activities, while emphasising the specific nature of transnational business activities.[18] The CNCDH welcomed this broadening of the scope of application and the express inclusion of State-owned enterprises.[19] It points out that only a broad scope of application can create the conditions for fairer competition by establishing a common binding framework at global level and a minimum common base of protection for rights holders applicable to all business enterprises, in accordance with the United Nations Guiding Principles[20], while ensuring that the obligations incumbent on them can be modulated according to their size, sector, operational context or the severity of the impact on human rights.[21] However, the CNCDH reiterates its recommendation to define more precisely the responsibility of States as economic actors.[22] Companies owned or controlled by States must also respect human rights, and States are obliged, under the duty to protect, to use public procurement, project finance and export insurance and guarantees as levers to ensure that business enterprises respect human rights.[23]

6. In contrast, the updated draft treaty defines the material scope less clearly and potentially more restrictively. While the new Article 3.3 continues to cover "*all internationally recognised human rights and fundamental freedoms*", the clarification that these are rights "*binding on the States Parties*", combined with the removal of any reference to customary international law,[24] risks excluding from the scope of the treaty human rights deriving from non-conventional international obligations. In addition,

[18] According to Article 3.1 of the updated 2023 draft, the draft treaty applies "*to all business activities, including business activities of a transnational character*". For a definition of "business activities" and "business activities of a transnational character", see Article 1.4 and 1.5 of the updated 2023 draft.

[19] CNCDH, *Projet de traité entreprises et droits de l'Homme: déclaration* (…), 28 October 2021, *op. cit.*, §4 (which also cites its previous opinions along these lines). See in particular Article 1.4 which, in defining business activities, expressly refers to State-owned enterprises.

[20] See Guiding Principle 14: "*The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure*." In this respect, the reminder, in paragraph 12 of the preamble to the updated draft, that "*business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally recognized human rights*" is welcome. However, the CNCDH recalls that it recommends using the term "violation" rather than "abuse" or, failing that, systematically using both terms together (CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §7, recommendation 5).

[21] See Articles 1.8 (definition of human rights due diligence) and 3.2 (scope) of the updated 2023 draft treaty. The UN Guiding Principles also recognise that "*the scale and complexity of the means through which enterprises meet* [their responsibility to respect human rights] *may vary according to* [their size, sector, operating context, ownership and structure] *and the severity of the enterprise's adverse human rights impacts*" (Guiding Principle 14).

[22] CNCDH, *Projet de traité entreprises et droits de l'Homme: déclaration* (…), 28 October 2021, *op. cit*., §5; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, recommendation 2. The use of the term "violation" in the draft treaty (rather than alternately "violation" and "abuse") would make it clearer that both private and State-owned enterprises are covered.

[23] See UN Guiding Principle 4. For recommendations addressed to France on this point, see CNCDH, *Entreprises et droits de l'Homme. Respecter, protéger, réparer*, La Documentation française, 2023, to be published on 4 November 2023.

[24] The reference to customary international law has been deleted not only from Article 3.3 on scope, but also from Article 8 on legal liability, whereas Article 8.8 of the third revised draft of 17 August 2021 referred to it in connection with international crimes. Moreover, the reference to customary international law is still missing from Article 14 on consistency with international law, whereas the CNCDH recommends that this provision should refer not only to treaty obligations, but also to non-treaty obligations (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, recommendation 19).

the new Article 3.3 deletes any reference to specific instruments,[25] without expressly referring to the conventions, treaties and declarations cited in the preamble.[26] Similarly, the deletion of references to international instruments dealing with specific groups of persons is all the more regrettable given that successive versions of the draft treaty have evolved to better recognise the differentiated impact of business activities on certain groups of persons, who are often disproportionately affected, and to integrate a gender perspective.[27] The CNCDH recommends that Article 3.3 make express reference not only to the "core treaties" on human rights and the 10 fundamental conventions of the ILO, but also to other relevant treaties, conventions and declarations adopted by the United Nations and the ILO. It also recommends reintroducing a specific reference in the preamble to the United Nations Declaration on Human Rights Defenders and the United Nations Declaration on the Rights of Indigenous Peoples,[28] as well as adding a reference to the Guiding Principles on Extreme Poverty and Human Rights and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Workers.[29]

7. The CNCDH also regrets the deletion of the express reference to the right to a clean, healthy and sustainable environment,[30] which is recognised by the Human Rights Council and the General Assembly of the United Nations.[31] The inclusion of this right in a legally binding instrument would consolidate this recognition and promote an interpretation that takes due account of the interdependence between human rights and the environment, climate and biodiversity.[32]

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[25] Compare with Article 3.3 of the third revised draft treaty, which referred to the Universal Declaration of Human Rights (UDHR), the ILO Declaration on Fundamental Principles and Rights at Work, the core international human rights treaties and the fundamental ILO conventions. This deletion does, however, make it possible to correct the unnecessary reference to "*to which a State is a party*" in the case of ILO fundamental conventions (CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, note 16).

[26] Paragraph 2 of the preamble to the updated draft treaty refers to the nine "*core international human rights treaties*" and the eight fundamental ILO conventions, and adds a reference to "*other relevant international human rights treaties and conventions adopted by the United Nations and by the International Labour Organization*". This addition is welcome, in particular so that the reference to "core treaties" in the field of human rights does not exclude treaties that do not provide for a treaty body to monitor them. The CNCDH notes, however, that since the 110th session of the International Labour Conference in June 2022 and the inclusion of a safe and healthy working environment in the framework of fundamental principles and rights at work, there are 10 fundamental ILO conventions, and calls for this oversight to be corrected. Paragraph 3 of the preamble mentions the UDHR, the Vienna Declaration and Programme of Action and a new, generic reference to "*all other internationally agreed human rights declarations*", replacing the express reference in the third revised draft to the United Nations Declaration on Human Rights Defenders and the United Nations Declaration on the Rights of Indigenous Peoples. Other instruments are cited in paragraph 15 in connection with the need to integrate a gender perspective, such as the Convention on the Elimination of All Forms of Discrimination against Women. The new paragraph 9 uses the language of the Convention on the Rights of the Child, emphasising that the best interests of the child shall be a primary consideration, but without making any express reference to it.

[27] The CNCDH had welcomed the fact that the draft treaty, while recalling the interdependence and indivisibility of human rights, recognised the differentiated impact on certain groups of persons, and insisted on the integration of a gender perspective, in order to contribute to substantive and not only formal equality (CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration* (…), 28 October 2021, *op. cit.*, §5; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §12).

[28] This reference would be useful, in particular, for interpreting Article 6.4 (f) on consultations with indigenous peoples and respect for free, prior and informed consent as components of the due diligence obligation.

[29] See on this subject: CNCDH, *Avis sur la Déclaration sur les droits des paysans et des autres personnes travaillant dans les zones rurales*, Plenary Assembly of 2 October 2018, JORF No 0238 of 14 October 2018, text No 98.

[30] Compare Article 1.3 of the updated draft treaty of 2023 with Article 1.2 of the third revised draft treaty of 2021, which referred to "*the right to a safe, clean, healthy and sustainable environment*".

[31] Human Rights Council, Resolution 48/13 of 8 October 2021, *The human right to a clean, healthy and sustainable environment*, A/HRC/RES/48/13; General Assembly, Resolution 76/300 of 28 July 2022, *The human right to a clean, healthy and sustainable environment*, A/RES/76/300.

[32] The CNCDH notes that this is the approach taken by the French legislator, with Law No 2017-399 of 27 March 2017 *on the duty of vigilance of parent companies and instructing undertakings* (JORF No 0074 of 28 March 2017, text No 1) covering human rights and the environment. Similarly, the forthcoming EU Directive on due diligence will cover adverse impacts on human rights and the environment. Moreover, the OECD Guidelines have just been updated to strengthen the recommendations relating in particular to the environment, biodiversity and climate change and thus respond to the "*urgent social, environmental, and technological priorities facing societies and businesses*" (OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, updated 8 June 2023, p. 3).

Improving the definition of due diligence and liability to promote legal certainty and accountability

8. The draft treaty gives a central role to human rights due diligence among the measures that States Parties must adopt to "*regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control*".[33] The contours of this due diligence have been clarified in successive versions of the draft treaty. The updated draft improves the terminology used by distinguishing prevention of violations from risk mitigation,[34] although confusion remains in places.[35] It now defines the content of the human rights due diligence in Article 1.8, with Article 6.2 (c) and 6.4 specifying what States must impose on business enterprises in this respect. The relationship between these two provisions, one dealing with definitions and the other with prevention, needs to be clarified. The CNCDH also notes that the definition of due diligence still has a number of shortcomings, falling short of the United Nations Guiding Principles.

9. The definition of due diligence in Article 1.8 covers the identification and assessment of human rights impacts (a), measures to prevent and mitigate impacts and monitor their effectiveness (b and c)[36] and regular communication in this regard (d). Article 6.4 adds impact assessments (a), integration of a gender and age perspective and consideration of particular risks of vulnerability or marginalisation (b and c), consultation of potentially affected groups and other relevant stakeholders (d), protection of human rights defenders (e) and respect for free, prior and informed consent of indigenous peoples (f). On the other hand, the draft treaty does not include any reference to integrating the responsibility of business enterprises to respect human rights into their policies and management systems.[37] Similarly, the establishment by business enterprises of grievance mechanisms and the remediation they must provide for, as referred to in the United Nations[38] and the OECD[39] Guiding Principles, are omitted from the draft treaty. In addition, the continuous nature of the due diligence is not expressly stated.[40] The CNCDH therefore reiterates its recommendation that the definition of the content of the due diligence should include all the dimensions developed by the United Nations Guiding Principles on Business and Human Rights, in particular by including provisions on policy commitment, grievance mechanisms and

[33] Article 6.1 of the updated draft treaty.

[34] See paragraph 12 of the preamble to the updated draft treaty which, unlike paragraph 11 of the preamble to the third revised draft to which it corresponds, no longer refers to the prevention and mitigation of violations (or abuses), but to the prevention of violations (or abuses) and the mitigation of risks. Similarly, the reference to "mitigation of abuses" has been removed from Article 6. The CNCDH recommended that these references be deleted and that due diligence includes both measures to identify and mitigate risks and measures to prevent human rights violations, in accordance with General Comment No 24 of the Committee on Economic, Social and Cultural Rights (CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration* (…), 28 October 2021, *op. cit.*, §6; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §10, recommendation 8).

[35] See Article 2(e) of the updated draft treaty, which still refers to the prevention and mitigation of human rights "abuses", whereas abuses (or violations) are not to be mitigated but avoided, while risks can be mitigated. See also Article 1.8, which mentions, without distinction, the identification, prevention, mitigation and accountability of the way in which business enterprises deal with their adverse human rights impacts.

[36] The CNCDH reiterates its recommendation that the draft treaty should be supplemented by a requirement for States to ensure that business enterprises monitor the impact of their activities on human rights, including in the context of their business relationships, in addition to monitoring the effectiveness of preventive and mitigating measures taken to address them (CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit*., §11).

[37] See Guiding Principles 16, 15(b) and 19(a) of the United Nations Guiding Principles on Business and Human Rights, *op. cit.*, and the OECD Guidelines for Multinational Enterprises. This is the first of the six stages of the due diligence process according to the OECD's guide on the subject (*OECD, OECD Due Diligence Guidance for Responsible Business Conduct*, 2018, pp. 22ff.).

[38] See the United Nations Guidelines 15(c), 22, 29 and 30*, op. cit.*, on the establishment by business enterprises of grievance mechanisms at operational level (or participation in such mechanisms as part of joint initiatives) and the remediation they must provide for (or cooperate with).

[39] See the sixth stage of the due diligence process as per the OECD guide, *op. cit.*

[40] According to UN Guiding Principle 17(c), human rights due diligence "[s]*hould be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve*".

remediation, as well as a clearer reminder of its ongoing nature. It also recommends that Article 1(8) specify that the measures mentioned as being part of any human rights due diligence process should be non-exhaustive.[41]

10. The CNCDH also regrets the deletion of the reference to "*actual or potential*" adverse human rights impacts,[42] insofar as it could lead one to believe that only reductions or removals of a person's ability to enjoy an internationally recognised human right that are actually observed should be taken into account under the due diligence obligation.[43] However, the preventive approach based on actual or potential risks advocated by the UN Guiding Principles requires all risks to be taken into account[44] and prioritised according to their severity or irremediable nature,[45] in order to mitigate them and prevent violations. This distinction also has an impact on the behaviour that business enterprises should adopt when faced with their adverse impacts: potential impacts should be dealt with through mitigation measures, while actual impacts call for the adoption of corrective measures.[46]

11. This preventive approach should also lead us to prefer the term "rights holder" to "victim". The limitation of the rights referred to in Article 4 to "victims" alone,[47] and of the protection that must be conferred under Article 5, might suggest that only those persons or groups of persons whose rights have actually been violated (or who allege such violation) are taken into account. The CNCDH recommends using the term "rights holders" to include all individuals and groups whose human rights may be threatened, actually or potentially, by business activities. The term "victims" could be retained when referring to persons who allege a violation of their rights or whose rights are found to have been violated.

12. In addition, the CNCDH regrets the deletion from Article 6 of the updated draft treaty of "*enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation".*[48] On the contrary, the increased risk of human rights

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[41] The words "including" or "in particular" should therefore be included in Article 1.8. In the same vein, the European Network of National Human Rights Institutions (ENNHRI) recommends that the future EU Directive on Corporate Sustainability Due Diligence should define a non-exhaustive list of appropriate measures that a company should take in response to adverse impacts, in order to promote effective risk-based due diligence without stifling innovation (*ENNHRI Statement in the Context of the EU Trilogue Concerning the EU Corporate Sustainability Due Diligence Directive*, October 2023). ENNHRI also recommends incorporating effectiveness criteria into the definition of appropriate measures.

[42] Compare Article 1.8 of the updated draft treaty with Article 6.3 (a) of the third revised draft.

[43] See the definition of adverse human rights impact in Article 1.2. The European Parliament has adopted a similar definition of adverse human rights impact in the context of the negotiations on the Directive on Corporate Sustainability Due Diligence, unlike the European Commission and the Council of the European Union (see ENNHRI's recommendation to favour the definition proposed by the European Parliament): ENNHRI, *ENNHRI Statement in the Context of the EU Trilogue Concerning the EU Corporate Sustainability Due Diligence Directive*, October 2023).

[44] Guiding Principle 17 expressly mentions "*actual and potential human rights impacts*". Similarly, French Duty of Vigilance Law mentions, in connection with the mechanism for alerting and collecting reports, "*the existence or* (…) *the realisation of risks*" (Article L225-102-4 I paragraph 6 4° of the French Commercial Code).

[45] See Guiding Principle 24.

[46] See the commentary on Guiding Principle 17 and step 3 of the due diligence process in the OECD guide, *op. cit.*

[47] Article 1.1 of the updated draft treaty defines a victim as "*any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality or domicile of the victim".* Also included are "*the immediate family members or dependents of the direct victim*". The CNCDH reiterates its recommendation that the notion of "relatives" be preferred to that of "immediate family members or dependents of the direct victim", as is the case in the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, §9, recommendation 4; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit*., recommendation 6). The CNCDH also regrets that the updated draft deletes the reference to individual and collective harm, as business activities can also have an adverse impact on collective rights, particularly where indigenous peoples are concerned (see in this regard: CCFD-Terre Solidaire, ECCHR, ProDESC, *Des droits à la réalité. Garantir une application du devoir de vigilance axée sur les détenteurs de droits*, 2023). It reiterates here that the definition of victim should use the term "violation" and not "abuse", in order to cover more clearly the abuses that may result from the State.

[48] Compare Article 6.4 (g) of the third revised draft treaty (which incorporates Article 6.3 (g) of the second revised draft of 6 August 2020) with Article 6.4 of the updated draft treaty. The specific attention paid to the activities carried out by business enterprises in areas affected by conflict or occupied territories was one of the improvements welcomed by the CNCDH since

violations – and of international humanitarian law – in conflict situations calls for an enhanced due diligence obligation.[49] The updated draft recognises these increased risks of violations that may result from the activities of business enterprises and their business relationships in conflict-affected areas, but only in Article 16.3[50] (provision on implementation) and merely requires States to pay special attention to them. However, the draft treaty should also include, in the very design of due diligence measures, as part of prevention, a description of the specific measures that States must impose on business enterprises in order to exercise enhanced due diligence in this context.[51] It could usefully be based on UN Guiding Principle 7 and the recommendations made by the Working Group on the issue of human rights and transnational corporations and other business enterprises.[52] The CNCDH therefore recommends that the obligation of enhanced due diligence applicable in occupied territories or areas affected by conflict be reintroduced in Article 6 on prevention, and that its content be detailed.[53] It also points out that in situations of armed conflict, business enterprises must respect international humanitarian law[54] and recommends that the draft treaty reaffirm this in its preamble, alongside a useful reminder of the obligation of States to respect and ensure respect for international humanitarian law in all circumstances.[55]

13. The updated draft treaty also contains significant gaps in the definition of the obligations of business enterprises with regard to the conduct of third parties and the legal liability to be associated with it. It no longer makes clear the distinction between the human rights impacts that business enterprises cause or contribute to through their own activities and those that are directly linked to their operations, products or services through their business relationships, and what they must do to address them. This lack of clarity (which results both from the wording of certain provisions and from gaps in their articulation) is problematic, not only for the definition of the due diligence obligation but also for the determination of the legal liability to be associated with it. It has consequences both in terms of legal certainty and in terms of accountability and access to justice and remediation, risking an inadequate response to human rights violations in global value chains.

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the revised draft treaty of 16 July 2019 (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, §7).

[49] The CNCDH thus recommends that France impose an enhanced due diligence obligation on business enterprises operating in situations of armed conflict and details the measures that France should take in this respect (CNCDH, *Entreprises et droits de l'Homme. Respecter, protéger, réparer*, 2023, p. 362, recommendations 139 and 140).

[50] Article 16.3 of the updated draft treaty requires that "[s]*pecial attention* (…) *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*" be undertaken and mentions the special attention that must be paid to "*gender-based and sexual violence, the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour*".

[51] The CNCDH notes that a reference to "*occupied or conflict-affected areas*" was included in the 2019 revised draft, both in the article on prevention (Article 5.3 (e), which also mentioned products and services) and in the article on implementation (Article 14.3).

[52] United Nations General Assembly, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: towards heightened action*, 21 July 2020, A/75/212.

[53] See CNCDH, *Follow-up Opinion* (…),15 October 2020, *op. cit.*, §12, on the second revised draft, recalling that international human rights law and international humanitarian law apply in a complementary manner in times of armed conflict. The CNCDH also regrets the deletion from the updated draft treaty of the recognition of the differentiated impact of business activities on "*protected populations under occupation or conflict areas*", mentioned in the third revised draft (Article 6.4 (c)) and in the second revised draft (Article 6.3 (c)).

[54] See the commentary on UN Guiding Principle 12 (p. 16). For an introduction to the rights and obligations of business enterprises under international humanitarian law (IHL), see: ICRC, "Business and international humanitarian law", 30 November 2006; SPOERRI Philip, Q&A: International Humanitarian Law and Business, International Review of the Red Cross (IRRC), volume 94, 2012/3; DAVIS Rachel, "The UN Guiding Principles on Business and Human Rights and conflict-affected areas: state obligations and business responsibilities", *IRRC*, No 887, September 2012.

[55] See paragraph 7 of the preamble to the updated draft treaty, which should, however, expressly refer to Article 1 common to the Geneva Conventions of 12 August 1949 (see the recommendation to this effect made by the CNCDH: CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, note 8). The CNCDH also regrets the deletion of the reference to IHL in paragraph 6 of the preamble, in the context of access to justice and remedy. The updated draft also mentions IHL in Article 16.5, which states that the application and interpretation "of these articles" must be consistent with international law, including international human rights law and IHL.

14. The content of the due diligence, whether in Article 1.8 (definition) or Article 6 (prevention) of the updated draft treaty, does not sufficiently reflect what is stated in the preamble, i.e. the responsibility of business enterprises to respect internationally recognised human rights "*including by avoiding causing or contributing to human rights* [violations] *through their own activities and addressing such* [violations] *when they occur, as well as by preventing human rights* [violations] *or mitigating human rights risks linked to their operations, products or services by their business relationships*".[56] In this respect, the deletion of Article 6.3 (b) of the third revised draft[57] in the updated draft treaty is particularly problematic. Article 6 of the updated draft treaty no longer refers to the distinction between a business enterprises causing, contributing to or being directly linked to adverse human rights impacts (or even violations). Article 6.2 (a) now only uses the vague formula of the obligation for States to "*prevent the involvement of business enterprises in human rights abuse*", without clarifying what degree of involvement is required. However, this clarification is important in terms of legal certainty. It is also particularly important to make it clear, by using the words "contribute to", that it also covers cases in which the business enterprise does not cause the human rights impact (or violation), but may contribute to it and must, to this end, "*take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible*".[58] Similarly, Article 1.8, while covering both the impacts that may result from the business enterprise's activities and its business relationships, uses the term "involvement", without echoing the different degrees of participation of business enterprises contained in the UN Guiding Principles (causing, contributing or being directly linked to).[59] These distinctions are nevertheless useful in determining the measures that a business enterprise is required to take and what it can be held liable for.[60] However, Article 6.5 of the updated draft is a welcome addition in that it deals directly with corporate responsibility for human rights violations committed by third parties and the obligation for

[56] Paragraph 12 of the preamble to the updated draft treaty (which, however, uses the term "abuse" rather than "violation"). This statement echoes UN Guiding Principle 19, which states that the measures that business enterprises must take as part of their human rights due diligence vary depending on whether the business enterprise is at the origin of the adverse impact ("*causes*") or contributes to it, or whether it is involved only because the impact is directly linked to its operations, products or services through a business relationship. For more details, see the commentary on Guiding Principle 19.

[57] Article 6.3 (b) of the third revised draft mentions, among the measures under the due diligence, "*appropriate measures* [that States must require business enterprises to take] *to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses, that the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages*" as well as "*reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships*".

[58] Commentary on UN Guiding Principle 19. See also the position of the German Institute for Human Rights, which insists on the use of the words "contribute to" to indicate that "joint causality" may be sufficient (German Institute for Human Rights, « The ball is in the EU's court », September 2023).

[59] The CNCDH also notes that the terminology used in Article 1.8 of the updated draft treaty is more restrictive than that used in Article 6.3 (a) of the third revised draft: the new provision refers to the adverse human rights impacts in which the company "*may be involved*" as a result of its own activities or business relationships, whereas the previous version referred to the impacts that "*may arise*" as a result of these activities or relationships. The use of these more restrictive terms is all the more questionable given that this provision concerns the identification and assessment of impacts and that Article 8.1, which deals with legal liability, refers to violations ("*abuses*") that "*may arise*" as a result of the business enterprise's activities or business relationships. Furthermore, the new definition of "human rights abuse", which refers to "*any acts or omissions that take place in connection with business activities and results in an adverse human rights impact*" (emphasis added), could be interpreted restrictively as meaning that the damage must be the direct result of the act or omission in question (compare Article 1.3 of the updated draft with Article 1.2 of the third revised draft, which defined human rights abuse as "*any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognised human rights and fundamental freedoms*").

[60] ENNHRI notes that, in the context of the EU Directive on Due Diligence, the latter should specify that the company should take into account not only the impacts it causes, but also those to which it contributes, whether by causing an impact jointly with other actors, or by facilitating or incentivising another entity to cause an impact through, for example, its purchasing practices. In addition, it should be noted that a company must consider its leverage when determining the appropriate measures to be taken to change the behaviour of entities that cause or contribute to an impact to which the company is directly linked (ENNHRI Statement in the Context of the EU Trilogue Concerning the EU Corporate Sustainability Due Diligence Directive, October 2023).

States to impose "*a legal duty to prevent such* [violation] *in appropriate cases*".[61] This provision thus echoes the situation in which a business enterprise does not contribute to such a violation, but the latter is directly linked to its operations, products or services through its business relationships with another entity.[62] However, the wording used is more restrictive, as it is limited to situations in which it "*controls, manages or supervises the third party*". It would exclude many types of business relationships, insofar as a parent company's relationships with most suppliers or other entities in its value chain do not fall within such a situation of control, management or supervision. There is therefore a risk that it will be limited in practice to the business enterprise's own activities and only to first-tier suppliers with whom it has very close links, whereas the aim of the treaty is to prevent and respond to human rights violations committed in global value chains. The CNCDH recommends that Article 6.5 be amended to provide that each State Party shall ensure that business enterprises take appropriate steps to prevent human rights violations committed by third parties when these are directly linked to their operations, products or services through their business relationships, including by imposing a legal obligation to prevent such violations.

15. Article 6.5 echoes – without providing for an express reference, which is necessary to clarify the relationship between prevention and liability – Article 8.7, which deals with the liability of business enterprises for the actions of third parties with whom they have business relationships. First, the CNCDH notes that there appears to be a transcription error in the updated draft, with this provision appearing in the version in track changes,[63] but not in the "clean version".[64] It then notes that the new wording of Article 8.7 is more restrictive than that of the third revised draft treaty. States Parties must ensure that their domestic law provides for the civil liability of legal and/or natural persons engaged in business activities "*for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights* [violations]" only on the following twofold condition: that there exists "*a situation of control, managements* (sic) *or supervision over the legal or natural person or the relevant activity that caused or contributed to the human rights* [violation] *at the time it happened*" (a) and that this violation "*was foreseeable, or in their business relationships, but adequate preventive measures were not adopted*" (b). These conditions were not cumulative, but alternative, in the third revised draft treaty.[65] This new wording considerably limits the possibilities for a business enterprise to be held liable for acts or omissions of third parties with whom it has business relationships, which cause or contribute to human rights violations to which the business enterprise is directly linked through its operations, products or services. This is a key provision for addressing to human rights violations in value chains. The CNCDH recommends that the transcription error relating to Article 8.7 be corrected and that the wording be improved so as not to limit the liability of business enterprises solely to cases of control, management or supervision, but also to include, as in Article 8.6 of the third revised draft, failure to fulfil the obligation to prevent human rights violations that they have or should have foreseen and to which they are directly linked by their business relationships.

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[61] According to article 6.5 of the updated draft treaty, "[e]*ach Party shall take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights* [violation] *by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such* [violation] *in appropriate cases*" (the updated draft uses the term "abuse", which the CNCDH recommends be replaced by "violation").

[62] See the commentary on UN Guiding Principle 19.

[63] See the version of the updated draft treaty in track changes, which includes the changes made in relation to the third revised draft, the suggested Chair's proposals and the textual proposals and comments submitted by States, p. 49.

[64] See the clean version of the updated draft treaty.

[65] Article 8.6 of the third revised draft treaty: "*States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities* (…) *for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights* [violations]*, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights* [violation]*, or should have foreseen risks of human rights* [violations] *in the conduct of their business activities* (…) *or in their business relationships, but failed to take adequate measures to prevent the* [violation]" (emphasis added; the updated draft uses the term "abuse", which the CNCDH recommends replacing with "violation").

16. More generally, the relationship between Article 6 on prevention and Article 8 on liability is even less clear in the updated draft treaty. The absence of any cross-reference seems to separate the two provisions, despite the fact that this is one of the main purposes of the treaty. In particular, the CNCDH recommends that Article 8 should expressly state that a breach of the due diligence referred to in Article 6 (and Article 1.8) may give rise to liability and an obligation to remedy. It also regrets the deletion of the provision in the third revised draft that human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights violations or failing to prevent them.[66] Another source of confusion stems from the new concept of "*relevant State agencies*", whose definition certainly includes jurisdictional bodies,[67] but which no longer makes it possible to clearly distinguish between jurisdictional and non-jurisdictional mechanisms, in accordance with the United Nations Guiding Principles. The CNCDH also refers to its comments below on the wide margin of manoeuvre given to States, in particular with regard to Article 8 on legal liability.

Safeguarding and strengthening the protection of rights holders and access to remedies to avoid denial of justice

17. The CNCDH had welcomed the strengthening of the protection of rights holders and access to remedy for victims in successive versions of the draft treaty.[68] It would like to highlight the improvements brought about by the updated draft, particularly with regard to access to information and protection against reprisals, but would like to draw attention to the major setbacks that risk restricting the draft treaty's contribution to the implementation of the third pillar of the UN Guiding Principles,[69] which has been identified as "*a major and urgent priority for the next decade – and a critical issue for realizing human rights and sustainable development for all*".[70]

18. The CNCDH welcomes the strengthening of information rights in the updated draft treaty, which are fundamental to prevention and access to remedy. Access to information has been strengthened in Article 4 on the rights of "victims",[71] in particular by adding that they must be guaranteed "*full participation, transparency, and independence in reparation processes*".[72] Similarly, Article 7.3 (b) (on access to remedy) reinforces the language relating to access to "*reliable sources of information*" for victims about their human rights and the status of their claims, by also including their representatives

[66] Article 8.7 of the third revised draft treaty (using, however, the term "abuse"). The CNCDH had welcomed the introduction of this provision in the second revised draft (Article 8.8): CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §14.

[67] According to Article 1.10 of the updated draft treaty, "relevant State agencies" refers to "*judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this (Legally Binding Instrument) to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State-based non-judicial mechanisms*".

[68] CNCDH, *Projet de traité entreprises et droits de l'Homme: déclaration* (…), 28 October 2021, *op. cit.*, §8; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §§17ff; CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, §§14ff.

[69] The implementation of this third pillar is the one that faces the most obstacles (Human Rights Council, *Guiding Principles on Business and Human Rights at 10: taking stock of the first decade. Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, 22 April 2021, A/ HRC/47/39).

[70] Working Group on Business and Human Rights, *Raising the Ambition – Increasing the Pace. A roadmap for the next decade of business and human rights*, 2021, goal 4.

[71] The CNCDH reiterates that it recommends using the term "rights holder" rather than "victim" (see above).

[72] See the new Article 4.2 (g) of the updated draft treaty, according to which these reparation processes must "*take into account the differentiated impacts of human rights abuses on specific groups of people and respond adequately to these impacts and their particular needs*". Article 4.2 (f) has also been clarified, drawing on the language of Article 7.3 (a) of the third revised draft, to emphasise the provision of information (held by business enterprises or the State) to victims in the relevant languages and accessible formats to adults and children, including people with disabilities.

and information relating to the role and capacity of "relevant State agencies" to assist victims in obtaining an effective remedy, but also the need to provide them with "*appropriate support to enable them to participate effectively in all relevant processes*".[73] The express mention that this support includes facilitating requests for disclosure of relevant information on business-related activities or relationships linked to a human rights violation is particularly welcome here.[74] The same applies to the obligation on States to ensure "*fair and timely disclosure*" of relevant evidence in litigation or enforcement proceedings.[75] The CNCDH reiterates its recommendation that, in the context of legal proceedings, internal documents that may shed light on the causes of damage and the decision-making processes should be accessible to victims and their representatives.[76]

19. The differences between the parties in terms of access to information and resources, as well as the objective of "*progressively reduc*[ing] *the legal, practical, and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing* (…) *an effective remedy*"[77] are among the reasons expressly invoked by the updated draft treaty, in its provisions relating to the burden of proof.[78] Under the new Article 8.5, States shall ensure "*an appropriate allocation of evidential burdens of proof in judicial and administrative proceedings*", including, "*as appropriate to the circumstances*", through the measures referred to in Article 7.4.[79] These include measures to facilitate the production of evidence, such as, "*when appropriate and as applicable*", the reversal of the burden of proof and the "*dynamic burden of proof*".[80] Despite the limitations of these provisions, linked in particular to the reference to consistency with domestic legal and administrative systems,[81] the express mention of the dynamic burden of proof[82] and the link between the reversal of the burden of proof and the imbalances between the parties[83] as well as the obstacles to access to effective remedy are welcome.[84]

20. The updated draft treaty maintains the right of victims (provided for in the third revised draft) to be able to submit, "*in appropriate cases*", claims by a representative or through class action, brought before the courts or non-judicial grievance mechanisms of the States Parties.[85] It adds a new provision requiring States to "*ensur*[e] *that rules of civil procedure provide for the possibility of group actions in cases arising from allegations of human rights* [violation]".[86] This new provision is welcome. The

[73] Article 7.3 (b) of the updated draft treaty.
[74] *Ibid*.
[75] Article 7.4 (e) of the updated draft treaty. However, this provision leaves the Member States a wide margin for manoeuvre, in particular by referring to Article 7.2, which refers to being "*consistent with its domestic legal administrative systems*".
[76] CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration* (…), 28 October 2021, *op. cit.*, §7; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §20 and recommendation 14. The CNCDH also recommends strengthening access to information by stipulating that it must be provided by the State and by business enterprises at every stage of a project's implementation (*ibid*.).
[77] Article 7.2 (b) of the updated draft treaty. The "structural" or "specific" obstacles encountered by certain "vulnerable and marginalised" persons and groups of persons are also expressly mentioned (paragraph 14 of the preamble; article 7.1 of the updated draft treaty).
[78] See Article 8.5 and Article 7.4 (d) (which refers to the objectives of Article 7.2) of the updated draft treaty.
[79] Article 8.5 of the updated draft treaty.
[80] Article 7.4 (d) of the updated draft treaty. This provision echoes Article 8.3 (e) of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018 ("Escazú Agreement").
[81] The reference to this consistency is made in Article 8.5 and results from the reference from Article 7.4 to Article 7.2 (b) of the updated draft treaty.
[82] On the dynamic burden of proof, see in particular: GIANNINI Leandro J., "New Insights on the 'Dynamic Burden of Proof' Doctrine", *Revista Iberoamericana de Derecho Procesal*, year 5, No 9, January–June 2019, pp. 215–266.
[83] The CNCDH emphasised that the possibility of reversing the burden of proof is essential, particularly where there is an unequal balance of power between perpetrators and victims of human rights violations (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit*., §15; see also the recommendations made by the CNCDH on the burden of proof in its 2020 opinion: CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit*., §21 and recommendation 15).
[84] The CNCDH notes that the suggested Chair's proposals of 2022 contain other suggestions, such as the application of presumptions as to the existence of certain facts or the imposition of "*strict or absolute liability in appropriate cases*" (Article 7.3 (d)) of the Suggested Chair proposals, 2022).
[85] Article 4.2 (d) of the updated draft treaty, which reproduces the same provision from the third revised draft.
[86] Article 7.4 (f) of the updated draft treaty (using the term "abuse").

possibility for rights holders to defend their rights collectively against violations committed by business enterprises, through representative actions and group actions, promotes greater access to remedy.[87] The same applies to legal aid, which is now mentioned not only in Article 4 on victims' rights,[88] but also in Article 7 on access to remedy and,[89] more broadly, in the provisions aimed at reducing the financial burden on victims associated with seeking a remedy. The updated draft covers waiving court fees and adds the possibility of granting exceptions so that victims do not have to bear the costs of the proceedings "*in recognition of the public interest involved*".[90] However, the CNCDH again recommends that, as long as the action is not vexatious or abusive (concept of "arguable claim"), the court should not require unsuccessful claimants to bear the costs of the proceedings.[91]

21. The CNCDH welcomes the strengthening of the provisions on protection against reprisals in the updated draft treaty,[92] which includes the issue in the measures forming part of the due diligence under Article 6[93] and now makes the link between the risk of reprisals and access to remedies under Article 7.[94] These additions are essential given the scale of the threats faced in particular by human rights defenders and the environment who warn of irresponsible business practices and take action to ensure that companies and investors effectively assume their responsibility to respect human rights.[95] Similarly, the addition of two provisions on precautionary measures, hitherto absent from the draft treaty, is welcome. States must adopt them (at least in the context of litigation) in the face of "*urgent situations that present a serious risk of or an ongoing human rights abuse*".[96]

22. While these aspects related to the protection of rights holders are strengthened, the updated draft weakens the provision relating to stakeholder consultation among the due diligence measures. Article 6.4 (d) now refers only to "*meaningful consult*[ations] *with potentially affected groups and other relevant stakeholders*",[97] whereas the third revised draft expressly referred inter alia to trade union organisations, which the CNCDH welcomed, while recommending that it be extended to all human rights defenders.[98] In addition to an overly concise reference to consultations, the reporting and transparency obligations of business enterprises have also been weakened in the updated draft.[99]

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[87] To this end, the CNCDH makes recommendations concerning group actions in France in its report *Entreprises et droits de l'Homme. Respecter, protéger, réparer*, 2023, pp. 357ff., recommendation 138, to be published on 4 November 2023.

[88] Article 4.2 (f) of the updated draft treaty, which incorporates the third revised draft on this point.

[89] Article 7.3 (a) of the updated draft treaty. See also Article 7.4 (a), which refers to financial assistance for victims seeking a remedy.

[90] Article 7.4 (a) of the updated draft treaty.

[91] CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §22. See: CESCR, *General comment No. 24 on State obligations under the international Covenant on economic, social and cultural rights in the context of business activities*, 10 August 2017, E/C.12/GC/24, §44. In its 2020 opinion, the CNCDH noted the weakening of the wording relating to legal costs in successive versions of the draft treaty.

[92] The new provisions of the updated draft (mentioned below) are in addition to those taken over from the third revised draft (Article 4.2 (e) and Article 5.2, which adds the terms "*harassment or reprisals*").

[93] See Article 6.4 (e) of the updated draft treaty, which adds, among the measures of due diligence, "*protect*[ion of] *the safety of human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as persons who may be subject to retaliation*".

[94] The measures that States shall adopt to facilitate access to remedies must take into account the risk of reprisals against victims and others (Article 7.3 (d)) and ensure that there is "*effective deterrence*" against conduct that may amount to such reprisals (Article 7.4 (c)).

[95] These defenders are among those who suffer the most attacks, in every region of the world and in every sector of activity. See the database set up by the Business and Human Rights Resource Centre (BHRRC) or the Global Witness report *Standing Firm. The Land and Environmental Defenders on the Frontlines of the Climate Crisis*, September 2023.

[96] Articles 4.4 and 5.4 of the updated draft treaty.

[97] Examples of stakeholders are introduced in Article 6.2 (d) of the updated draft treaty (trade unions, civil society, non-governmental organisations, indigenous peoples and community-based organisations), but only in relation to the development and implementation of laws, practices and other measures that States must adopt to prevent the involvement of business enterprises in human rights abuses.

[98] CNCDH, *Projet de traité entreprises et droits de l'Homme : déclaration* (…), 28 October 2021, *op. cit.*, §8; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, footnote 23.

[99] The updated draft removes the obligation to publish the identification and assessment of adverse human rights impacts (compare Article 6.3 (a)) of the third revised draft with Article 1.8 of the updated draft). Similarly, it removes the obligation of "[r]*eporting publicly and periodically on non-financial matters, including information about group structures and suppliers as*

23. Furthermore, the updated draft treaty considerably weakens, if not completely deletes, several provisions that are key to remedying denials of justice. It weakens the wording already weakened by the third revised draft[100] relating to the prohibition of *forum non conveniens* by making only an implicit reference to it and widening States' room for manoeuvre in this respect.[101] On the contrary, the CNCDH recommends reverting to the wording of the second revised draft, according to which, when victims choose to bring an application before a court in accordance with Article 9.1, jurisdiction is compulsory and the courts cannot therefore reject it on the basis of *forum non conveniens*.[102] The updated draft treaty also deletes two provisions that are essential for access to remedies: the provision relating to the related actions exception, where there are multiple related cases in different States,[103] and the provision relating to the forum of necessity, which confers jurisdiction on courts to hear claims against legal or natural persons not domiciled in the State of the forum, subject to two conditions: "*if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party* (…)".[104] However, an interesting provision has been introduced to encourage cooperation between judges hearing cases involving the same parties and similar facts at the same time.[105]

24. The CNCDH welcomes the fact that Article 11 on applicable law has been retained in the updated draft.[106] It encourages further discussions on this essential provision for litigation relating to human rights violations committed in the context of business activities with foreign elements, with a view to establishing conflict of laws rules in this area.[107] The CNCDH stresses the importance of retaining the clarification that the choice of applicable law (for substantive issues) rests with the victim.[108]

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well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards throughout their operations, including in their business relationships" (Article 6.4 (e)) of the third revised draft).

[100] Articles 7.3 (d) and 9.3 of the third revised draft.

[101] Article 9.3 of the updated draft treaty: "*State Parties shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction* (…) *shall respect the rights of victims in accordance with Article 4, including with respect to: (a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter*" (emphasis added).

[102] Article 9.3 of the second revised draft (see also Article 7.5). The introduction of a ban on *forum non conveniens* was one of the recommendations made by the CNCDH: CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, recommendation 26.

[103] However, the wording of Article 9.4 had been improved in the third revised draft, by deleting the requirement of a "close link", as recommended by the CNCDH (CNCDH, *Projet de traité entreprises et droits de l'Homme: déclaration* (…), 28 October 2021, *op. cit.*, §9; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, recommendation 17). The CNCDH again notes that there is no provision for multiple defendants, despite the fact that many cases involving human rights abuses committed by business enterprises involve more than one defendant.

[104] Article 9.5 of the third revised draft, which sets out three hypotheses of a connecting link that may bring the necessity requirement into play. The CNCDH welcomed these clarifications, but recommended that the list of hypotheses be formulated in a non-exhaustive manner (CNCDH, *Projet de traité entreprises et droits de l'Homme: déclaration* (…), 28 October 2021, *op. cit.*, §9). The CNCDH suggested including the words "including" or "in particular" in Article 9(5), as in the Sofia Guidelines on best practices for international civil litigation for human rights violations, annexed to Resolution 2/2012 of the International Law Association (Article 2.3).

[105] Article 9.4 of the updated draft treaty.

[106] The Chair's informal proposals suggested the deletion of Article 11, considering that this issue should be governed by existing national conflict of laws rules and noting the criticisms expressed by several delegations (Chair of the Intergovernmental Working Group, *Suggested Chair Proposals for Select Articles of the LBI. General observations and explanations*). Some delegations and many civil society organisations spoke out in favour of retaining this provision at the eighth session. Article 11 distinguishes between procedural matters, for which it provides for the application of the law of the court seized on the matter (11.1), and substantive matters which may, at the victim's request, be governed by the law of another State: where the acts or omissions have occurred or produced effects (11.2 (a)); or where the natural or legal person alleged to have committed the acts or omissions is domiciled (11.2 (b)).

[107] These conflict of law rules already exist in positive law, but with a limited scope of application or on limited issues. See the examples cited in the FIDH statement (made on behalf of FIDH and Franciscans International) at the eighth negotiating session in 2022. See also the criticisms of the European Group of Private International Law (GEDIP) concerning the absence of provisions relating to private international law in the proposal for an EU directive on due diligence and the resulting difference in treatment between the victim of environmental damage (who will be able to choose the law applicable to

25. Finally, with regard to the relationship of the draft treaty with international and national law, the CNCDH regrets first of all the deletion, in the updated version, of Article 14.5 (b) of the third revised draft. While Article 14.5 of the updated draft still refers to the explicit obligation to interpret and implement existing bilateral, international and regional agreements, including trade and investment agreements, in a manner consistent with their obligations under this draft instrument and any other human rights conventions or instruments, this obligation disappears for future trade and investment agreements. However, the CNCDH had welcomed this provision and recommended that it be extended to include non-conventional international obligations.[109] The CNCDH recommends that the wording of Article 14.5 be broadened to include future trade and investment agreements and that reference also be made to non-conventional obligations, including Article 14.3.

26. The CNCDH then notes with concern the introduction of a large number of references to "consistency with domestic legal and administrative systems"[110] in provisions that should be key to remedying denials of justice. This is the case with Article 8 on legal liability. While paragraph 1, which requires States to provide a "*comprehensive and adequate system of legal liability of legal and natural persons*" for human rights violations committed in the context of business activities, does not refer to such a criterion,[111] the following paragraphs do.[112] This would give States considerable leeway, for example,[113] in determining the nature of the legal liability (criminal, civil or administrative) of legal or natural persons implicated in human rights violations committed in the context of business activities,[114] including those that might fall within the scope of international criminal law or international humanitarian law.[115] Measures relating to the accessibility of remedies, including those designed to remove obstacles encountered by victims, are also subject to the condition of consistency with domestic legal and administrative systems.[116] The same applies to Article 9.3, which not only only implicitly prohibits *forum non conveniens*, but also makes it subject to the same condition.[117] The CNCDH considers that these references to "*consistency with domestic legal and administrative systems*" (or to the "*legal principles*" of the States Parties) leave States so much room for manoeuvre

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liability) and the victim of a human rights abuse, who will not: GEDIP's recommendation on the Proposal for a directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its recommendation to the Commission of 8 October 2021, adopted at its meeting in Oslo on 9–11 September 2022. The draft treaty could fill this gap.

[108] This has been expressly provided for in Article 11.2 since the third revised draft. The CNCDH had made a recommendation along these lines (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, recommendation 17; CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §24).

[109] CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §9; CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, recommendation 20. The CNCDH also recommends that the clause stating that the instrument does not affect provisions that are more favourable to the respect, protection, fulfilment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedies for victims be extended to non-conventional obligations (Article 14.3) (CNCDH, *Opinion on the draft legally binding instrument* (…),15 October 2019, *op. cit.*, §21, recommendation 19). The CNCDH also again questions Article 14.4, which is maintained in the updated draft, according to which the instrument does not affect the rights and obligations of States Parties deriving from State immunity, in terms of access to justice for victims of human rights abuses in the context of business activities.

[110] The updated project uses the following concepts: "*consistent with its domestic legal and administrative systems*" or "*subject to the legal principles of the State Party*".

[111] In its 2022 suggested proposals, the Chair of the Working Group proposed adding such a reference to Article 8.1.

[112] With the exception of Article 8.6.

[113] See also Article 8.3 of the updated draft treaty on liability for conspiring, aiding, abetting, facilitating and counselling, and Article 8.4 on the links between the legal liability of natural and legal persons, between criminal and civil liability and between the liability of the main perpetrator and that of other persons involved.

[114] Article 8.2 of the updated draft treaty.

[115] The CNCDH regrets the deletion of an explicit reference to criminal liability for these international crimes (see Article 8.8 of the third revised draft, which dealt specifically with this point, and the recommendations made by the CNCDH regarding the similar provision in the second revised draft: CNCDH, *Follow-up Opinion* (…), 15 October 2020, *op. cit.*, §15). The third revised draft only referred to the respect for the "*legal principles*" of the States Parties in relation to the criminal liability (or functionally equivalent liability) of legal persons (Article 8.8 of the third revised draft).

[116] Articles 7.2 and 7.4 (by reference) of the updated draft treaty.

[117] This is another step backwards compared with the third revised draft. On the other hand, it is to be welcomed that Article 9.1 does not include such a condition, as suggested in the Chair's 2022 informal proposals.

that they could hamper the treaty's ability to truly harmonise obligations in this area and raise the question of the effectiveness of its provisions.[118] It therefore recommends that they be deleted.

27. The CNCDH reiterates its support for negotiations on a legally binding instrument to regulate the activities of transnational corporations and other business enterprises with regard to human rights. It encourages France to use its influence to take part in the collective mobilisation needed to consolidate the improvements made to the draft treaty, to remedy the remaining weaknesses, to oppose new setbacks and to contribute to the adoption of a treaty likely to contribute to responsible business conduct in favour of full respect for human rights throughout the world and the duty of States to protect.

CNCDH recommendations

Recommendation 1: The CNCDH recommends that France continue its efforts to ensure that the European Union is given, without further delay, a mandate to negotiate on behalf of its Member States at forthcoming sessions and that it affirms its intention to do so at the ninth session.

Recommendation 2: The CNCDH recommends that the responsibility of States as economic actors be defined more precisely in accordance with Guiding Principle 4 of the United Nations Guiding Principles on Business and Human Rights.

Recommendation 3: The CNCDH recommends that Article 3.3 make express reference to the "core treaties" on human rights and the 10 fundamental conventions of the ILO, as well as to other relevant treaties, conventions and declarations adopted by the United Nations and the ILO.

Recommendation 4: The CNCDH recommends reintroducing, in the preamble, an express reference to the United Nations Declaration on Human Rights Defenders and the United Nations Declaration on the Rights of Indigenous Peoples, as well as adding a reference to the Guiding Principles on Extreme Poverty and Human Rights and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Workers.

Recommendation 5: The CNCDH recommends that the draft treaty reintroduce an explicit reference to the right to a healthy, clean and sustainable environment in order to enshrine its international recognition in a legally binding instrument and promote an interpretation that takes due account of the interdependence between human rights, the environment, climate and biodiversity in the context of business activities.

Recommendation 6: The CNCDH recommends that the definition of the content of the due diligence include all the dimensions developed by the United Nations Guiding Principles on Business and Human Rights, in particular by including provisions on political commitment, grievance mechanisms and remediation, as well as a clearer reminder of the ongoing nature of the due diligence obligation.

[118] In its 2019 opinion, the CNCDH drew attention to the fact that the revised draft treaty's references to the domestic legislation of States should be interpreted in accordance with international law, i.e. as a reference to national law for its implementation, and not as its subordination to domestic law (CNCDH, *Opinion on the draft legally binding instrument* (…), 15 October 2019, *op. cit.*, §23). In its contribution of April 2019, it considered that these references carried the risk of subordinating the application of the treaty to national law, which could annihilate the binding scope of the obligations it contains (CNCDH, *Contribution au projet de traité contraignant sur les entreprises et les droits de l'Homme*, 29 April 2019).

Recommendation 7: The CNCDH recommends that Article 1.8 specify that the measures mentioned as being part of any human rights due diligence process are non-exhaustive.

Recommendation 8: The CNCDH recommends that express reference be made once again to taking account of "actual or potential" adverse human rights impacts, in order to encourage the anticipation of risks and the prevention of violations.

Recommendation 9: The CNCDH recommends using the broader term "rights holders" rather than "victims" when referring to all persons or groups of persons likely to be affected, actually or potentially, by the activities of business enterprises.

Recommendation 10: The CNCDH recommends that the obligation of enhanced due diligence applicable in occupied territories or areas affected by conflict be reintroduced into Article 6 on prevention and that its content be detailed by specifying the measures that States must impose on business enterprises in order to identify and mitigate the increased human rights risks arising from their activities and business relationships, to prevent and remedy violations.

Recommendation 11: The CNCDH recommends that the preamble to the draft treaty reiterate the obligation of business enterprises to respect international humanitarian law, alongside the obligation of States to respect and ensure respect for this law in all circumstances.

Recommendation 12: The CNCDH recommends that Article 6.5 be amended to provide that each State Party must take the necessary measures to ensure that business enterprises take appropriate steps to prevent human rights violations committed by third parties when these are directly linked to their operations, products or services through their business relationships, including by imposing a legal obligation to prevent such violations, non-compliance with which may render them liable, by referring to Article 8.

Recommendation 13: The CNCDH recommends that Article 8.7 be amended to provide that business enterprises are also liable for failing to prevent foreseeable human rights violations to which they are directly linked through their business relationships, unless they can prove that they have taken all appropriate measures to prevent such violations.

Recommendation 14: The CNCDH recommends that the relationship between Article 6 on prevention and Article 8 on liability be clarified, in particular by expressly stating that a breach of the human rights due diligence obligation may give rise to liability and to an obligation to remedy on the part of the business enterprise that causes, contributes to or is directly linked to the breach through its operations, products and services.

Recommendation 15: The CNCDH recommends that Article 7.4 (a) be amended to provide that as long as the action is not vexatious or abusive, unsuccessful applicants will not be required to reimburse the legal costs of the other party to the proceedings.

Recommendation 16: The CNCDH recommends reintroducing an express reference to the prohibition of *forum non conveniens*, which provides that when victims choose to bring an application before a court in accordance with Article 9.1, jurisdiction is compulsory and the courts cannot reject it on the basis of *forum non conveniens*.

Recommendation 17: The CNCDH recommends reintroducing a provision dealing with the exception of related actions, as provided for in Article 9.4 of the third revised draft treaty.

Recommendation 18: The CNCDH recommends that Article 9.5 of the third revised draft treaty on the forum of necessity should be reintroduced, setting out a non-exhaustive list of possible connections with the State Party.

Recommendation 19: The CNCDH recommends that non-conventional obligations be included in Article 14 on the relationship between the draft treaty and international law, and that future trade and investment agreements be referred to again in Article 14.5.

Recommendation 20: The CNCDH recommends deleting the excessive number of references to "consistency with domestic legal and administrative systems" in the updated draft treaty, particularly those that are likely to undermine the effectiveness of its provisions.

Annex 1: List of participants in an informal meeting organised by the CNCDH with a view to the next round of negotiations on the draft treaty

- **Clara Alibert,** *Economic Actors Advocacy Officer, CCFD-Terre Solidaire*
- **Amélie Chenin,** *Editor, Sub-Directorate for Human Rights and Humanitarian Affairs, Directorate for the United Nations, International Organisations, Human Rights and the Francophonie, Ministry of Europe and Foreign Affairs*
- **Sacha Feierabend,** *Senior Programme Officer, Business, Human Rights and the Environment, FIDH (CNCDH member)*
- **François Gave,** *Special Representative for Corporate Social Responsibility and the Social Dimension of Globalisation, Directorate-General for Globalisation, Ministry of Europe and Foreign Affairs*
- **Kathia Martin-Chenut,** *Director of Research at the CNRS, Rapporteur for the CNCDH's "Business and Human Rights" working group*
- **Maddalena Neglia,** *Director of the Business, Human Rights and Environment Office, FIDH (CNCDH member)*
- **Pauline Poisson,** *CNCDH, General Secretariat*
- **Juliette Renaud,** *Campaigner, Regulation of Multinationals, Friends of the Earth*
- **Anaïs Schill,** *CNCDH, General Secretariat*

Annex 2: Updated draft legally binding instrument (clean version) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

Preamble

The States Parties to this (Legally Binding Instrument),

(PP1) *Reaffirming* all the principles and purposes set out in the Charter of the United Nations;

(PP2) *Recalling* the nine core international human rights treaties adopted by the United Nations, and the eight fundamental conventions adopted by the International Labour Organization, as well as other relevant international human rights treaties and conventions adopted by the United Nations and by the International Labour Organization;

(PP3) *Recalling also* the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and all other internationally agreed human rights Declarations, as well as the 2030 Agenda for Sustainable Development;

(PP4) *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;

(PP5) *Reaffirming* that all human rights are universal, indivisible, interdependent, interrelated, and inalienable, and should be applied in a non-discriminatory way;

(PP6) *Reaffirming* the right of every person to be equal before the law, to equal protection of the law, and to have effective access to justice and remedy in case of violations of international human rights law;

(PP7) *Stressing* that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lies with the State, and that States must protect against human rights abuses by third parties, including business enterprises, and to ensure respect for and implementation of international human rights law, and to respect and ensure respect for international humanitarian law in all circumstances;

(PP8) *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 any kind;

(PP9) *Recognizing* that, in all actions concerning children, including in the context of business activities, the best interests of the child shall be a primary consideration, and shall be respected in pursuing remedies for violations of the rights of the child;

(PP10) *Acknowledging* that all business enterprises have the potential to foster sustainable development through an increased productivity, inclusive economic growth and job creation that promote and respect internationally recognized human rights and fundamental freedoms;

(PP11) *Emphasizing* that business enterprises play a crucial role in the social and economic development as well as the implementation of the Agenda 2030 for Sustainable Development;

(PP12) *Underlining* that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing human rights abuses or mitigating human rights risks linked to their operations, products or services by their business relationships;

(PP13) *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 in seeking effective remedy for business-related human rights abuses, and that States have the obligation to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role;

(PP14) *Recognizing* the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situations, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons;

(PP15) *Emphasizing* the need for States and business enterprises to integrate a gender perspective in all their measures, in line with the Convention on the Elimination of All Forms of Discrimination against Women, the Beijing Declaration and Platform for Action, the ILO Convention 190 concerning the elimination of violence and harassment in the world of work, the Gender Guidance for the Guiding Principles on Business and Human Rights, and other relevant international standards;

(PP16) *Taking into account* the work undertaken by the United Nations 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, in particular Resolution 26/9;

(PP17) *Recognizing* the contribution and complementary role that the United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework have played in that regard and to advancing respect for human rights in business activities;

(PP18) *Noting* the ILO Declaration on Fundamental Principles and Rights at Work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy;

(PP19) *Desiring* to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the responsibilities of business enterprises in that regard;

Have agreed as follows:

Article 1. Definitions

1.1. **"Victim"** shall mean any person or group of persons who suffered a human rights abuse in the context of business activities, irrespective of the nationality or domicile of the victim.
The term "victim" may also include the immediate family members or dependents of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

1.2. **"Adverse human rights impact"** shall mean a harm which corresponds to a reduction in or removal of a person's ability to enjoy an internationally recognized human right.

1.3. **"Human rights abuse"** shall mean any acts or omissions that take place in connection with business activities and result in an adverse human rights impact.

1.4. **"Business activities"** means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by a natural or legal person, including State-owned enterprises, financial institutions and investment funds, transnational corporations, other business enterprises, joint ventures, and any other business relationship undertaken by a natural or legal person. This includes activities undertaken by electronic means.

1.5. **"Business activities of a transnational character"** means any business activity described in Article 1.4 above, when:

(a) It is undertaken in more than one jurisdiction or State; or
(b) It is undertaken in one State but a significant part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
(c) It is undertaken in one State but has significant effect in another State or jurisdiction.

1.6. **"Business relationship"** refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship, including throughout their value chains, as provided under the domestic law of the State, including activities undertaken by electronic means.

1.7. **"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). Such organizations shall declare, in their instruments of formal confirmation or accession, their level of competence in respect of matters governed by this (Legally Binding Instrument), and they shall subsequently inform the depositary of any substantial modification to such competence. References to "States Parties" in the present (Legally Binding Instrument) shall apply to such organizations within the limits of their competence.

1.8. **"Human rights due diligence"** shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. While these processes will vary in complexity with the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise, these processes will in every case comprise the following elements:

(a) identifying and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business

relationships;
(b) taking appropriate measures to prevent and mitigate such adverse human rights impacts;
(c) monitoring the effectiveness of its measures to address such adverse human rights impacts; and
(d) communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.

1.9. **"Remedy"** shall mean the restoration of a victim of a human rights abuse to the position they would have been in had the abuse not occurred, or as nearly as is possible in the circumstances. An "effective remedy" involves reparations that are adequate, effective, and prompt; are gender and age responsive; and may draw from a range of forms of remedy such as restitution, compensation, rehabilitation, satisfaction, such as cessation of abuse, apologies, and sanctions, as well as guarantees of non-repetition.

1.10. **"Relevant State agencies"** means judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this (Legally Binding Instrument) to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State-based non-judicial mechanisms.

Article 2. Statement of Purpose

The purpose of this (Legally Binding Instrument) is:

(a) To clarify and facilitate effective implementation of the obligation of States to respect, protect, fulfil and promote human rights in the context of business activities, particularly those of transnational character;
(b) To clarify and ensure respect and fulfilment of the human rights responsibilities of business enterprises;
(c) To prevent the occurrence of human rights abuses in the context of business activities by effective mechanisms for monitoring, enforceability and accountability;
(d) To ensure access to gender-responsive, child-sensitive and victim-centred justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities;
(e) To facilitate and strengthen mutual legal assistance and international cooperation to prevent and mitigate human rights abuses in the context of business activities, particularly those of transnational character, and provide access to justice and effective, adequate, and timely remedy for victims.

Article 3. Scope

3.1. This (Legally Binding Instrument) shall apply to all business activities, including business activities of a transnational character.

3.2. Notwithstanding Article 3.1 above, when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), States Parties may establish in their law, a non-discriminatory basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context or the severity of impacts on human rights.

3.3. This (Legally Binding Instrument) shall cover all internationally recognized human rights and

fundamental freedoms binding on the States Parties of this (Legally Binding Instrument).

Article 4. Rights of Victims

4.1. Victims of human rights abuses in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms.

4.2. Without prejudice to Article 4.1 above, victims shall:

(a) 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;
(b) be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement;
(c) be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;
(d) be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties to this (Legally Binding Instrument);
(e) be protected from any unlawful interference against their privacy, and from intimidation, and reprisals, before, during and after any proceedings have been instituted, as well as from re-victimization in the course of proceedings for access to effective, prompt and adequate remedy, including through appropriate protective and support services that are gender and age responsive;
(f) be guaranteed access to information, provided in relevant languages and accessible formats to adults and children alike, including those with disabilities, held by business enterprises or relevant State agencies, and legal aid relevant to pursue effective remedy; and
(g) be guaranteed full participation, transparency, and independence in reparation processes, which take into account the differentiated impacts of human rights abuses on specific groups of people and respond adequately to these impacts and their particular needs.

4.3. Nothing in this provision shall be construed to derogate from any higher level of recognition and protection of any human rights of victims or other individuals under international, regional, or national law.

4.4. Victims shall have the right to request States Parties, pending the resolution of a case, to adopt precautionary measures related to urgent situations that present a serious risk of or an ongoing human rights abuse.

Article 5. Protection of Victims

5.1. States Parties shall protect victims, their representatives, families, and witnesses from any unlawful interference with their human rights and fundamental freedoms, including before, during and after they have instituted any proceedings to seek access to effective, prompt, and adequate remedy, as well as from re-victimization in the course of these proceedings.

5.2. States 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, so that they are able to exercise their human rights free from any threat, intimidation,

violence, insecurity, harassment, or reprisals.

5.3. States Parties shall investigate human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly, and impartially, and where appropriate, take action against those natural or legal persons responsible, in accordance with domestic and international law.

5.4. States Parties, pending the resolution of a case, shall adopt, either ex officio or on request by the victim, precautionary measures related to urgent situations that present a serious risk of or an ongoing human rights abuse.

Article 6. Prevention

6.1. States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character.

6.2. States Parties shall adopt appropriate legislative, regulatory, and other measures to:

(a) prevent the involvement of business enterprises in human rights abuse;
(b) ensure respect by business enterprises for internationally recognized human rights and fundamental freedoms;
(c) ensure the practice of human rights due diligence by business enterprises; and
(d) promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations, indigenous peoples, and community-based organizations, in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.

6.3. States Parties shall ensure that competent authorities relevant to the implementation of Article 6.2 have the necessary independence, in accordance with its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.

6.4. Measures to achieve the ends referred to in Article 6.2 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that business enterprises while carrying out human rights due diligence:

(a) undertake and publish on a regular basis human rights impact assessments before and throughout their operations;
(b) integrate a gender and age perspective, and take full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced by women and girls;
(c) take particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;
(d) meaningful consult with potentially affected groups and other relevant stakeholders;
(e) protect the safety of human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as those who may be subject to retaliation; and
(f) insofar as engagement with indigenous peoples takes place, undertake such process in accordance with the internationally recognized standards of free, prior, and informed consent.

6.5. Each Party shall take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in

appropriate cases.

6.6. States Parties shall periodically evaluate the legislative, regulatory, and other measures referred to in Article 6.2 and with a view to determining their adequacy for meeting the aims set out in that Article and shall revise and extend such measures as appropriate.

Article 7. Access to Remedy

7.1. States Parties shall provide their relevant State agencies with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims' access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women and groups in vulnerable or marginalized situations face in accessing such mechanisms and remedies.

7.2. States Parties shall, consistent with their domestic legal and administrative systems:

(a) develop and implement effective policies to promote the accessibility of their relevant State agencies to victims and their representatives, taking into account the particular needs and interests of those victims who may be at risk of vulnerability or marginalization;
(b) progressively reduce the legal, practical, and other relevant obstacles that, individually or in combination, hinder the ability of a victim to access such State agencies for the purposes of seeking an effective remedy; and
(c) ensure that relevant State agencies can either deliver, or contribute to the delivery of, effective remedies.

7.3. The policies referred to in Article 7.2(a) shall address, to the extent applicable to the State agency in question:

(a) the need to ensure that procedures and facilities for accessing and interacting with such agencies are responsive to the needs of the people for whose use they are intended, including by providing appropriate, adequate, and effective legal aid throughout the legal process;
(b) the need to ensure that victims have ready access to reliable sources of information, in relevant languages and accessible formats to adults and children alike, including those with disabilities, for victims and their representatives, about their human rights, the role and capacity of relevant State agencies in relation to helping victims obtain an effective remedy, the status of their claims, and appropriate support to enable them to participate effectively in all relevant processes, including by facilitating requests for disclosure of relevant information of business-related activities or relationships linked to a human rights abuse;
(c) the implications in terms of access to remedy of imbalances of power as between victims and business enterprises; and
(d) risks of reprisals against victims and others.

7.4. The measures to achieve the aims set out in Article 7.2(b) shall include, to the extent applicable to the State agency in question and necessary to address the obstacle in question:

(a) reducing the financial burden on victims associated with seeking a remedy, for instance through the provision of financial assistance, waiving court fees in appropriate cases, or granting exceptions to claimants in civil litigation from obligations to pay the costs of other parties at the conclusion of proceedings in recognition of the public interest involved;
(b) providing support to relevant State agencies responsible for the enforcement of the measures referred to in Article 6;
(c) ensuring that there is effective deterrence from conduct that may amount to reprisals against victims and others;

(d) adopting measures to facilitate the production of evidence, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof;
(e) ensuring fair and timely disclosure of evidence relevant to litigation or enforcement proceedings; and
(f) ensuring that rules of civil procedure provide for the possibility of group actions in cases arising from allegations of human rights abuse.

7.5. For the purposes of achieving the aims set out in Article 7.2(c), States shall adopt such legislative and other measures as may be necessary:

(a) to enhance the ability of relevant State agencies to deliver, or to contribute to the delivery of, effective remedies;
(b) to ensure that victims are meaningfully consulted by relevant State agencies with respect to the design and delivery of remedies; and
(c) to enable relevant State agencies to monitor a company's implementation of remedies in cases of human rights abuse and to take appropriate steps to rectify any non-compliance.

Article 8. Legal Liability

8.1. Each State Party shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their business activities or relationships, including those of transnational character.

8.2. Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in this Article shall be criminal, civil, or administrative, as appropriate to the circumstances. Each State Party shall ensure, consistent with its domestic legal and administrative systems, that the type of liability established under this Article shall be:

(a) responsive to the needs of victims as regards remedy; and
(b) commensurate to the gravity of the human rights abuse.

8.3. Subject to the legal principles of the State Party, the liability of legal and natural persons shall be established for:

(a) conspiring to commit human rights abuse; and
(b) aiding, abetting, facilitating, and counselling the commission of human rights abuse.

8.4. Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that, in cases concerning the liability of legal or natural persons in accordance with this Article:

(a) the liability of a legal person is not contingent upon the establishment of liability of a natural person;
(b) the criminal liability, or its functional equivalent, of a legal or natural person is not contingent upon the establishment of the civil liability of that person, and vice versa; and
(c) the liability of a legal or natural person on the basis of Article 8.3 is not contingent upon the establishment of the liability of the main perpetrator for that unlawful act.

8.5. Each State Party shall ensure, consistent with its domestic legal and administrative systems, an appropriate allocation of evidential burdens of proof in judicial and administrative proceedings that takes account of differences between parties in terms of access to information and resources, including through the measures referred to in Article 7.4(d), as appropriate to the circumstances.

8.6. Each State Party shall ensure that legal and natural persons held liable in accordance with this Article shall be subject to effective, proportionate, and dissuasive penalties or other sanctions.

[8.7. States Parties shall ensure that their domestic law provides for civil liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, provided that

(a) there is a situation of control, managements or supervision over the legal or natural person or the relevant activity that caused or contributed to the human rights abuse at the time it happened; and

(b) the human rights abuse was foreseeable, or in their business relationships, but adequate preventive measures were not adopted.]

Article 9. Jurisdiction

9.1. States Parties shall take such measures as may be necessary to establish its jurisdiction in respect of human rights abuse in cases where:

(a) the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that State Party;
(b) the relevant harm was sustained, in whole or in part, within the territory or jurisdiction of that State Party;
(c) the human rights abuse was carried out by either

i. a legal person domiciled in the territory or jurisdiction of that State Party; or
ii. a natural person who is a national of, or who has his or her habitual residence in the territory or jurisdiction of, that State Party; and

(d) a victim seeking remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of, that State Party.

9.2. For the purposes of Article 9.1, a legal person is considered domiciled in any territory or jurisdiction in which it has its:

(a) place of incorporation or registration;
(b) principal assets or operations;
(c) central administration or management; or
(d) principal place of business or activity.

9.3. States Parties shall take such measures as may be necessary, and consistent with their domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:

(a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or
(b) the coordination of actions as contemplated in Article 9.4.

9.4. If a State Party exercising its jurisdiction under this Article has been notified, or has otherwise learned, of judicial proceedings taking place in another State Party relating to the same human rights abuse, or any aspect of such human rights abuse, the relevant State agencies of each State shall consult one another with a view to coordinating their actions.

Article 10. Statute of Limitations

10.1. States Parties shall adopt such measures as may be necessary to ensure that no limitation period shall apply in relation to the commencement of legal proceedings in relation to human rights abuses which constitute the most serious crimes of concern to the international community as a whole, including war crimes, crimes against humanity or crimes of genocide.

10.2. In legal proceedings regarding human rights abuse not falling within the scope of Article 10.1, each State Party shall adopt such measures as may be necessary to ensure that limitation periods for such proceedings:

(a) are of a duration that is appropriate in light of the gravity of the human rights abuse;
(b) are not unduly restrictive in light of the context and circumstances, including the location where the relevant human rights abuse took place or where the relevant harm was sustained, and the length of time needed for relevant harms to be identified; and
(c) are determined in a way that respects the rights of victims in accordance with Article 4.

Article 11. Applicable Law

11.1. All matters of 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 seized on the matter.

11.2. All matters of substance which are not specifically regulated under this (Legally Binding Instrument) may, upon the request of the victim, be governed by the law of another State where:

(a) the acts or omissions have occurred or produced effects; or
(b) the natural or legal person alleged to have committed the acts or omissions is domiciled.

Article 12. Mutual Legal Assistance

12.1. States Parties shall afford one another the greatest measure of assistance in connection with criminal, civil and administrative proceedings relevant to the enforcement of the measures referred to in Articles 6 to 8, including assistance to expedite requests from private parties for the transmission and service of documents and for the taking of evidence in civil proceedings.

12.2. States Parties shall carry out their obligations under Article 12.1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them.

12.3. States Parties shall cooperate closely with one another to enhance the enforcement of the measures referred to in Articles 6 to 8. States Parties shall, in particular, take the necessary steps:

(a) to establish, maintain and enhance channels of communication between their relevant State agencies and their counterparts in other States Parties in order to

i. facilitate the secure and rapid exchange of information concerning all aspects of the enforcement of the measures referred to in Articles 6 to 8, including for the purposes of the early identification of breaches of such measures; and
ii. share information concerning issues, challenges, and lessons learned in the

prevention of business involvement in human rights abuse, including with a view to enhancing the effectiveness of competent authorities, agencies and services; and

(b) to facilitate effective coordination between their relevant State agencies and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers.

12.4. For the purposes of meeting their obligations under this article, each State Party shall:

(a) ensure that its relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make effective use of the treaties and arrangements referred to in Article 12.2; and
(b) consider entering into or enhancing bilateral or multilateral agreements or arrangements aimed at improving the ease with which and speed at which

i. requests for mutual legal assistance can be made and responded to; and
ii. information can be exchanged between relevant State agencies for the purposes of enforcement of the measures referred to in Articles 6 to 8, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.

Article 13. International Cooperation

13.1. States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument).

13.2. States Parties recognize the importance of international cooperation, including financial and technical assistance and capacity building, for the realization of the purpose of this (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 include, but are not limited to:

(a) promoting effective technical cooperation and capacity-building among policy makers, parliaments, judiciary, national human rights institutions, business enterprises and operators, as well as users of domestic, regional and international grievance mechanisms;
(b) sharing experiences, good practices, challenges, information and training programmes on the implementation of this (Legally Binding Instrument);
(c) raising awareness about the rights of victims of business-related human rights abuses and the obligations of States under this (Legally Binding Instrument);
(d) facilitating cooperation in research and studies on the challenges, good practices and experiences in preventing human rights abuses in the context of business activities, including those of transnational characters;
(e) contributing, within their available resources, to the International Fund for Victims referred to in Article 15.7 of this (Legally Binding Instrument).

Article 14. Consistency with International Law

14.1. States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with, and fully respecting, the principles of sovereign equality and territorial integrity of States.

14.2. Notwithstanding Article 9, 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's jurisdiction.

14.3. Nothing in this (Legally Binding Instrument) shall affect any provisions in the domestic legislation of a State Party or in any regional or international treaty or agreement that is more conducive to the respect, protection, fulfilment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedy to victims of human rights abuses in the context of business activities, including those of transnational character.

14.4. This (Legally Binding Instrument) shall not affect the rights and obligations of the States Parties under the rules of general international law with respect to State immunity and the international responsibility of States. Earlier treaties relating to the same subject matter as this (Legally Binding Instrument) shall apply only to the extent that their provisions are compatible with this (Legally Binding Instrument), in accordance with Article 30 of the Vienna Convention on the Law of Treaties.

14.5. All existing bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfil their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments.

Article 15. Institutional Arrangements

Committee

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

(a) The Committee shall consist of, at the time of entry into force of this (Legally Binding Instrument), (12) experts. After an additional sixty ratifications or accessions to this (Legally Binding Instrument), the membership of the Committee shall increase by six members, attaining a maximum number of (18) 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 States Parties, consideration being given to equitable geographical distribution, the differences among legal systems, gender and age 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 States Parties. They shall be elected for a term of four years and can be re-elected for another term. Each State Party may nominate one person from among its own nationals.

(d) Elections of the members of the Committee shall be held at the Conference of States 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 States 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 Party which has nominated them, and shall submit it to the States Parties.

(e) 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.

(f) 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.

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

(h) 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.

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

15.2. States 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 this (Legally Binding Instrument) for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

15.3. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

15.4. The Committee shall have the following functions:

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

(b) Consider and provide concluding observations and recommendations on reports submitted by States 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 these suggestions and general recommendations in the report of the Committee together with comments, if any, from States Parties;

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

(d) Submit an annual report on its activities under this (Legally Binding Instrument) to the States 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 this (Legally Binding Instrument).

Conference of States Parties

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

15.6. No later than six months after the entry into force of this (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 of Victims

15.7. States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims, taking into account the additional barriers faced by women, children, persons with disabilities, Indigenous peoples, migrants, refugees, internally displaced persons, and other vulnerable or marginalized persons or groups in seeking access to remedies. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). The Conference of States Parties shall define and establish the relevant provisions for the functioning of the Fund.

Article 16. Implementation

16.1. States 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).

16.2. Each State Party shall furnish copies (including in electronic form or online links) 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, within [6 months] of their enactment, to the Secretary-General of the United Nations, which shall be made publicly available.

16.3. 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, the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour.

16.4. In implementing this (Legally Binding Instrument), States Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of human rights abuse within the context of business activities, such as, but not limited to, women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees and internally displaced persons.

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

16.6. In implementing this Legally Binding Instrument, States Parties shall protect public policies and decision making spaces from undue political influence by businesses.

Article 17. Relations with Protocols

17.1. This (Legally Binding Instrument) may be supplemented by one or more protocols.

17.2. In order to become a Party to a protocol, a State or a regional integration organisation must also be a Party to this (Legally Binding Instrument).

17.3. 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.

17.4. 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 18. Settlement of Disputes

18.1. If a dispute arises between two or more States 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.

18.2. 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 Depositary 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 States Parties.

18.3. If the States 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 States Parties agree otherwise.

Article 19. Signature, Ratification, Acceptance, Approval and Accession

19.1. This (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).

19.2. This (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 this (Legally Binding Instrument).

19.3. 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 20. Entry into Force

20.1. This (Legally Binding Instrument) shall enter into force on the thirtieth day after the deposit of the [---] instrument of ratification or accession.

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

Article 21. Amendments

21.1. Any State Party may propose an amendment to this (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 of 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 States Parties present and voting in the Conference of the States Parties shall be submitted by the Secretary-General to all States Parties for acceptance.

21.2. 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 States 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 States Parties which have accepted it.

21.3. 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 States Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of States Parties at the date of adoption of the amendment.

Article 22. Reservations

22.1. Reservations incompatible with the object and purpose of this (Legally Binding Instrument) shall not be permitted.

22.2. Reservations may be withdrawn at any time.

Article 23. Denunciation

A State Party may denounce this (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 24. Depositary and Languages

24.1. The Secretary-General of the United Nations shall be the depositary of this (Legally Binding Instrument).

24.2. The Arabic, Chinese, English, French, Russian and Spanish texts of this (Legally Binding Instrument) shall be equally authentic.

In witness thereof the undersigned plenipotentiaries, being duly authorised thereto by their respective Governments, have signed this (Legally Binding Instrument):

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