

# Opinion on the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

*Plenary session of 15 October 2019  
Voting result: adopted unanimously*

## Summary

The "*business and human rights*" theme is a long-standing focus of the CNCDH, which has been closely following the work of the United Nations Human Rights Council these past five years on drafting a "legally binding international instrument" in this area. It has examined the revised draft of the instrument, in line with its 2 October 2018 statement on the so-called "zero draft".

The Commission commends the extension of the instrument's scope to encompass all business activities – beyond solely transnational activities. It welcomes the express reference to the *Guiding Principles on Business and Human Rights (the Ruggie Principles)*, as well as to the international human rights instruments in order to ensure consistency as regards international law. It notes the improvements made to provisions bearing on different forms of liability, but stresses the importance of more clearly distinguishing between civil, administrative and criminal liability. It commends the central role afforded to due diligence, but considers it essential to more effectively combine prevention and remedies.

Moreover, despite decisive improvements, major shortcomings remain, and these are spelled out in this opinion. The CNCDH recommends that France, in conjunction with its European partners, play a leading role during the fifth session of the open-ended intergovernmental working group.

## Introduction

1. The National Consultative Commission on Human Rights (CNCDH) hails the publication of a revised draft legally binding instrument<sup>1</sup> to regulate, in international human rights law, the activities of transnational corporations and other business enterprises by the open-ended intergovernmental working group (OEIGWG), on 16 July 2019<sup>2</sup>. However, it finds it once again regrettable that this revised draft has not been translated into the six official

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<sup>1</sup> The form of this legally binding instrument (hard law) will be clarified during negotiations (pact, convention, treaty, etc.).

<sup>2</sup> See Appendix 2.

languages of the United Nations<sup>3</sup> and can only drive home the fact that this lack of translation is a barrier to the instrument's accessibility, understanding and adoption by States as well as by all of the stakeholders likely to be concerned (including businesses, trade unions, civil society groups and victims of rights' violations by a business)<sup>4</sup>.

2. For more than two decades, the "*business and human rights*" theme has been a key focus for the Commission,<sup>5</sup> which has been the independent national rapporteur on implementation of France's *National Action Plan for Implementing the Guiding Principles on Business and Human Rights* since 2017<sup>6</sup>, and is paying close attention to the preparatory work. On 2 October 2018 it adopted a statement on the previous draft instrument (the so-called "zero draft")<sup>7</sup>, following a contribution to the OEIGWG, published on 29 April 2019<sup>8</sup>.

3. The Commission renews its support for negotiations on a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. This instrument may herald a step forward in the process of holding businesses accountable in this area. It would constitute a meaningful addition to the international instruments, particularly those adopted within the United Nations, International Labour Organisation (ILO) and Organisation for Economic Co-operation and Development (OECD)<sup>9</sup>. Their development has prompted States to better regulate business activities that can have an impact on human rights and encouraged good

<sup>3</sup> The CNCDH thanks the *Organisation internationale de la Francophonie* for having distributed a courtesy translation of the revised draft legally binding international instrument in French.

<sup>4</sup> The CNCDH had expressed this regret in its 2 October 2018 statement (CNCDH, *Déclaration sur l'adoption d'un instrument international contraignant sur les entreprises et les droits de l'Homme*, Plenary session of 5 October 2018, Official Journal of the French Republic (JORF) no. 0238 of 14 October 2018, text no. 100, available at <https://www.cncdh.fr/fr/publications/declaration-sur-ladoption-dun-instrument-international-contraignant-sur-les-entreprises>) and in its 29 April 2019 contribution (CNCDH, *Contribution au projet de traité contraignant sur les entreprises et les droits de l'Homme*, adopted on 29 April 2019, available at <https://www.cncdh.fr/fr/actualite/contribution-au-projet-de-traité-contraignant-sur-les-entreprises-et-les-droits-de-lhomme-0>).

<sup>5</sup> Follow-up on work accomplished by the former Sub-Commission on the Promotion and Protection of Human Rights; Research carried out by Olivier Maurel for the CNCDH, *La responsabilité des entreprises en matière de droits de l'Homme, Volume I – Nouveaux enjeux, nouveaux rôles ; Volume II – État des lieux et perspectives d'action publique*, La Documentation française, 2008 and 2009, available at [https://www.cncdh.fr/sites/default/files/etude\\_responsabilite\\_des\\_entreprises\\_vol\\_1.pdf](https://www.cncdh.fr/sites/default/files/etude_responsabilite_des_entreprises_vol_1.pdf) and [https://www.cncdh.fr/sites/default/files/etude\\_responsabilite\\_des\\_entreprises\\_vol\\_2.pdf](https://www.cncdh.fr/sites/default/files/etude_responsabilite_des_entreprises_vol_2.pdf); *Avis sur les enjeux de l'application par la France des Principes directeurs des Nations Unies*, Plenary session of 24 October 2013, JORF no. 0266 of 16 November 2013, text no. 56 <https://www.cncdh.fr/fr/publications/entreprises-et-droits-de-lhomme>, issued following a formal request from the Government; CNCDH, *Avis sur les accords internationaux de commerce et d'investissement : Ne sacrifions pas les droits de l'Homme aux intérêts commerciaux - l'exemple du CETA*, Plenary session of 15 December 2016, JORF no. 0056 of 7 March 2017, text no. 65, available at <https://www.cncdh.fr/fr/publications/ne-sacrifions-pas-les-droits-de-lhomme-aux-interets-commerciaux-avis-sur-le-ceta-et-les>. The CNCDH also took part in the activities of the *Plateforme RSE* (platform on corporate social responsibility) aimed at drawing up a national action plan: *Avis de la Plateforme RSE sur le Plan national d'action d'application des Principes directeurs des Nations Unies pour les droits de l'Homme et les entreprises*, France Stratégie, La Documentation française, December 2016, 86 p., available at <https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/174000024.pdf>.

<sup>6</sup> France's *Plan national d'action pour la mise en œuvre des principes directeurs des Nations Unies relatifs aux droits de l'Homme et aux entreprises* has entrusted the Commission with "[the task of carrying out the] monitoring and assessment of the National Action Plan [...] and outcome of the actions taken", 26 April 2017, p. 6, available at [https://www.diplomatie.gouv.fr/IMG/pdf/3\\_-\\_pnadh\\_fr\\_version\\_finale\\_bandeau\\_cle0be656.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/3_-_pnadh_fr_version_finale_bandeau_cle0be656.pdf); Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 21 March 2011, A/HRC/17/31, available at: [https://www.ohchr.org/Documents/Publications/guidingprinciplesbusinessshr\\_EN.pdf](https://www.ohchr.org/Documents/Publications/guidingprinciplesbusinessshr_EN.pdf).

<sup>7</sup> Open-ended intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, 4<sup>th</sup> session, 16 July 2018, available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

<sup>8</sup> *Op. cit.*, note 4.

<sup>9</sup> Including: ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 5<sup>th</sup> Edition, March 2017, available at [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf); OECD (2011), *OECD Guidelines for Multinational Enterprises, OECD Publishing*, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

business practices. That said, a legally binding international instrument is still necessary so as to guarantee more effective protection of human rights, by enhancing prevention of violations committed by businesses and improving victims' access to effective remedy<sup>10</sup>. Its adoption at global level would also help to harmonise the obligations already incumbent upon certain businesses under European Union law, and thus foster greater legal certainty and avoid unfair competition between businesses for whom the playing field is not level enough as regards their obligations. The CNCDH sets store by the compatibility between this legally binding instrument and the other standards on business and human rights, which it shores up<sup>11</sup>. Such compatibility must be consistent and help to achieve more effective protection of human rights.

4. Several of the recommendations outlined in its statement and contribution<sup>12</sup> on the "zero draft" have been taken on board in the draft instrument published in July 2019, and the Commission commends this. Its general structure has thus become clearer and its scope broadened. Similarly, the preamble recalls the core international human rights instruments<sup>13</sup> and makes an express reference to the *Guiding Principles on Business and Human Rights (the Ruggie Principles)*<sup>14</sup>. However, there would be merit in further fine-tuning the text in terms of both substance and form. In addition, concerns and gaps remain. Whilst the opinion does not aim at presenting an exhaustive analysis of the revised draft legally binding instrument, the Commission would like to draw attention to certain points.

## Clarify the scope and definitions of the instrument

5. The Commission welcomes the extended scope of the revised draft legally binding instrument. No longer limited solely to the activities of transnational corporations, it now applies to those of all business enterprises<sup>15</sup>. The Commission hails this opening, which comes hand-in-hand with the need for States to support businesses, not least small- and medium-sized enterprises (SMEs)<sup>16</sup>, in the development of their business model to ensure that the key social and environmental issues are taken on board. By the same token, the new wording in the draft instrument no longer excludes public activities from its scope<sup>17</sup>.

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<sup>10</sup> On this subject: CNCDH, *Déclaration sur l'adoption d'un instrument international contraignant sur les entreprises et les droits de l'Homme*, 2 October 2018, *op. cit.*, note 4; also see the *ENNHRI Statement on Occasion of the 4th session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, 12 October 2018, available at [http://www.ennhri.org/IMG/pdf/ennhri\\_statement\\_on\\_zero\\_draft.pdf](http://www.ennhri.org/IMG/pdf/ennhri_statement_on_zero_draft.pdf).

<sup>11</sup> The CNCDH has already spoken out on the lack of competition between the two approaches: *op. cit.*, note 4.

<sup>12</sup> *Op. cit.*, note 4.

<sup>13</sup> The Commission notes that some references are selective, such as the ones to the nine core human rights instruments adopted by the United Nations, which seems to exclude the treaties for which there is no provision for treaty bodies as regards their monitoring.

<sup>14</sup> *Op. cit.*, note 6.

<sup>15</sup> See Article 3 of the draft instrument on the scope. This extension is also indicated right in the title itself, which specifies both transnational corporations and other business enterprises.

<sup>16</sup> At present, Article 5, Point 6 of the revised draft instrument stipulates that "States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens". In this regard, it chimes with Principles 14 and 17 of the *UN Guiding Principles*, *op. cit.*, note 6. Principle 14 states as follows: "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts". Similarly, Principle 17 recognises that human rights due diligence "will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations" (b).

<sup>17</sup> The definition of business activities no longer refers to for-profit economic activity (Article 4, Point 2, in the "zero draft", *op. cit.*, note 7), but covers any economic activity of transnational corporations and other business

6. The Commission also commends the broad definition of the term “contractual relationship”, which refers to activities conducted particularly through affiliates, subsidiaries, agents or suppliers (Article 1, Point 4). However, it recommends that precedence be given to the term “business relationship”, since there is a high risk that “contractual relationship” could be interpreted in a restrictive manner. Moreover, this preferred term would resonate with that of positive international law, with which the State and businesses are already familiar<sup>18</sup>. In this way, the draft instrument would gain in clarity, and the relationship between parent companies and their subsidiaries would not be excluded<sup>19</sup>.
7. The CNCDH also welcomes the special attention paid to activities conducted by businesses in occupied or conflict-affected areas<sup>20</sup>.
8. Furthermore, a systemic understanding of human rights is adopted<sup>21</sup>. The draft instrument covers “all human rights”<sup>22</sup> and mentions environmental rights in particular (Article 1, Point 2)<sup>23</sup>. This understanding is in keeping with the human rights-based approach advocated by the CNCDH, grounded in their universality, indivisibility and interdependence<sup>24</sup>.
9. That said, it would be worth fine-tuning certain definitions so as to clarify the scope of the revised draft instrument. In particular, the distinction between human rights “violations” and “abuses” committed in the context of business activities (Article 1, Point 2) would merit further clarification. In addition, the definition of victim (Article 1, Point 1) should be clarified. In this regard, the Commission recommends that the notion of “relatives” be chosen over that of “immediate family or dependents of the direct victim”<sup>25</sup>.
10. Finally, the CNCDH considers that the role of trade unions and civil society actors in promoting and protecting all human rights – social and environmental rights in particular – should be mentioned in the main text of the instrument<sup>26</sup>. Although Article 11 refers to measures that States must undertake, particularly in partnership with civil society, to promote, inter alia, technical cooperation, the sharing of good practices and studies on violations of human rights in the context of business activities, it is vital that the instrument

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enterprises, any productive or commercial activity, undertaken by a natural or legal person (Article 1, Point 3, of the revised draft instrument). This wording is more in line with Principle 4 of *the Ruggie Principles*, *op. cit.*, note 6.  
<sup>18</sup> The *OECD Guidelines*, *Ruggie Principles* (Principle 17) and the *ILO Tripartite declaration of principles* all refer to the notion of “business relationship”, *op. cit.*, notes 6 and 9. For more detailed explanations, see, in particular, *OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct*, available at <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

<sup>19</sup> Interview with Olivier De Schutter, 16 September 2019.

<sup>20</sup> Articles 5, Point 3 e) and 14, Point 3 of the revised draft instrument. These clarifications are squarely in keeping with *the Ruggie Principles* (Principle 7), *op. cit.*, note 6. The CNCDH had thus recommended that France provide for a stronger legal framework governing the activities of French businesses with regard to certain high-risk products, sectors or areas: CNCDH, *Avis sur les enjeux de l'application par la France des Principes directeurs des Nations Unies*, 2013, *op. cit.*, note 5, Paras 42 – 43.

<sup>21</sup> See, in particular, the various international human rights instruments referred to in the Preamble (despite the fact that the references are selective, mentioned above in note 13).

<sup>22</sup> Article 3, Point 3; particularly those enshrined in the Charter of the United Nations.

<sup>23</sup> As developed particularly by the CNCDH in its *Avis sur le développement, l'environnement et les droits de l'Homme*, Plenary session of 16 April 2015, JORF no. 0119 of 24 May 2015, text no. 50, available at [https://www.cncdh.fr/sites/default/files/15.04.16\\_avis\\_developpement\\_environnement\\_et\\_dh\\_0.pdf](https://www.cncdh.fr/sites/default/files/15.04.16_avis_developpement_environnement_et_dh_0.pdf) and by Special Rapporteur John H. Knox in his *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/73/188, 19 July 2018, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3287944](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3287944).

<sup>24</sup> CNCDH, *Avis pour une approche fondée sur les droits de l'Homme*, Plenary session of 3 July 2018, JORF no. 0161 of 14 July 2018, text no. 104, available at: [https://www.cncdh.fr/sites/default/files/180703\\_avis\\_approche\\_fondée\\_sur\\_les\\_droits\\_de\\_lhomme\\_vdef.pdf](https://www.cncdh.fr/sites/default/files/180703_avis_approche_fondée_sur_les_droits_de_lhomme_vdef.pdf). Also see the *Avis CETA*, *op. cit.*, note 5.

<sup>25</sup> This is the case, for example, in the *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December, available at [https://treaties.un.org/doc/source/docs/A\\_RES\\_61\\_177-E.pdf](https://treaties.un.org/doc/source/docs/A_RES_61_177-E.pdf).

<sup>26</sup> This role is currently mentioned in the Preamble only, Paragraph 14.

more specifically underscore State Parties' obligation to undertake all appropriate measures for ensuring a safe environment conducive to trade unions and civil society actors performing their roles, not least by providing them with effective information and consultation.

## Strengthen due diligence

11. The Commission once again commends the central role given to due diligence in the revised draft instrument, particularly Article 5 on prevention<sup>27</sup>. This provision resonates with the legislation France has adopted on due diligence<sup>28</sup>, which has set in motion a movement aimed at putting into practice the notion of due diligence outlined in *the Ruggie Principles*<sup>29</sup>, *the OECD Guidelines*<sup>30</sup> and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*<sup>31</sup>, and which seems to be gaining ground across other States. Due diligence is a way of preventing any adverse effect that business activities might have, by identifying their impact on human rights, their prevention and mitigation of their effects<sup>32</sup>.
12. Article 5 of the revised draft instrument thus requires State Parties to ensure that all persons conducting business activities, in their territory or jurisdiction, undertake human rights due diligence, namely to respect them and prevent human rights violations or abuses. To that end, a certain number of measures that State Parties must require of businesses are described. The instrument should elaborate further on this point, in accordance with *the Ruggie Principles*. It is vital that both the definition of the content of the due diligence obligation and that of "effective national procedures" which State Parties shall ensure are in place to guarantee compliance therewith, include all of the dimensions of *the Ruggie Principles*, particularly those concerning remedies<sup>33</sup>. The CNCDH recommends that a line e) be added to Point 2 of Article 5 to factor in the obligation to provide for remedies and to cooperate with victims, as well as with persons, groups, trade unions or organisations which lend them support, to facilitate victims' access to appropriate and effective remedies<sup>34</sup>. Likewise, Article 5, Point 4, should provide that State Parties ensure that any harm resulting from a lack of due diligence incurs the liability of the business enterprise in question and gives rise to compensation<sup>35</sup>.

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<sup>27</sup> CNCDH, *Déclaration sur l'adoption d'un instrument international contraignant sur les entreprises et les droits de l'Homme*, 2 October 2018, *op. cit.*, note 4.

<sup>28</sup> Act no. 2017-399 of 27 March 2017 *on due diligence on the part of parent companies and principals*, which has added Articles L. 225-102-4 and L. 225-102-5 to the French Code of Commerce.

<sup>29</sup> See, in particular, Principles 17 and 15 of *the Ruggie Principles*, *op. cit.*, note 6.

<sup>30</sup> *Op. cit.*, note 9.

<sup>31</sup> *Ibidem*.

<sup>32</sup> CNCDH, *Avis sur les enjeux de l'application par la France des Principes directeurs des Nations Unies*, Plenary session of 24 October 2013, *op. cit.*, note 5.

<sup>33</sup> The state duty to protect human rights (pillar I), the corporate responsibility to respect human rights (pillar II) and access to remedy for victims of business-related abuses (pillar III), *Guiding Principles*, *op. cit.*, note 6. The CNCDH has already maintained that any regulations on the "due diligence" principle must be designed to provide victims with effective remedies (CNCDH, *Déclaration "Garantir un travail décent – un enjeu de l'économie mondiale"*, Plenary session of 26 May 2016, JORF no.0131 of 7 June 2016, text no. 47).

<sup>34</sup> Interview with Olivier De Schutter, 16 September 2019. In this regard, Principle 15 of *the Ruggie Principles* provides that business enterprises must particularly know and show how they "enable the remediation of any adverse human rights impacts they cause or to which they contribute". Similarly, according to Principle 22, "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes". Also see the two principles on non-State-based grievance mechanisms (Principles 28 and 29, *op. cit.*, note 6).

<sup>35</sup> See, for example, the current Article L. 225-102-5 of the Code of Commerce, introduced by the aforementioned *legislation on due diligence*, note 27: "under the terms set out in Articles 1240 and 1241 of the Civil Code, failure to fulfil the obligations defined in Article L. 225-102-4 herein incurs the liability of the party at fault, who shall be required to compensate the loss that fulfilment of said obligations would have avoided".



13. The Commission is pleased to note that the adequate, effective and prompt remedies which State Parties must set up to guarantee access to justice for victims include, but are not limited to, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims (article 4, Point 5 a), and environmental remediation and ecological restoration (b)<sup>36</sup>. The requirement that States provide for non-judicial grievance mechanisms is also specified (Article 4, Point 8). *The Ruggie Principles* encourage States to roll out "a comprehensive State-based system for the remedy of business-related human rights abuse."<sup>37</sup>

## Put an end to denials of justice

14. The Commission considers that access to effective remedy is essential for victims of human rights violations committed by businesses, both judicial and non-judicial. This plays a part in the necessary fight against impunity. In this respect, it highlights the importance of Article 4 on rights of victims, which shores up the third pillar of the *UN Guiding Principles* on access to remedy<sup>38</sup>. The Commission particularly welcomes Article 4, Point 12, which sets out the measures that State Parties must undertake to provide proper and effective legal assistance to victims throughout the legal process. This provision fosters due respect of their rights, not least amid disincentives adopted to deter victims or their defenders<sup>39</sup>. Similarly, Article 4, Point 9, which requires State Parties to 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", is positive, even though this provision must also expressly mention trade unions. Furthermore, the CNCDH stresses the importance of Article 4, Point 12 e): "In no case shall victims that have been granted the appropriate remedy to redress the violation, be required to reimburse any legal expenses of the other party to the claim." And yet, where the claimants fail to obtain appropriate redress or relief as a remedy, the scenario adopted for not being held liable for such reimbursement is restrictive: the alleged victim must demonstrate a lack or insufficiency of economic resources. The Commission recommends providing that, as long as the lawsuit is not vexatious or abusive (notion of arguable claim), the judge should not hold claimants who fail to obtain redress liable for the legal expenses<sup>40</sup>.

15. The Commission welcomes the fact that the possibility of reversing the burden of proof in civil proceedings is upheld<sup>41</sup> (Article 4, Point 16) in order to ensure access to justice and remedy for the victim<sup>42</sup>. This provision, in cases of particularly unequal balance of power between perpetrators and alleged victims of human rights violations, makes it possible to avoid denials of justice. That said, the current wording of the revised draft instrument does

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<sup>36</sup> The revised draft instrument also provides that State Parties "may require natural or legal persons engaged in business activities to establish and maintain financial security [...] to cover potential claims of compensation" (Article 6, Point 5).

<sup>37</sup> See, in particular, Principle 27 of the *Guiding Principles*, *op. cit.*, note 6.

<sup>38</sup> *Op. cit.*, note 6.

<sup>39</sup> It thus aims at addressing the spread of so-called "strategic lawsuits against public participation".

<sup>40</sup> On that note: Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 24 (2017) 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, Point 44: "The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies".

<sup>41</sup> In the "zero draft" of the draft instrument, the positioning of this provision implied that a reversal of the burden of proof was possible in civil and criminal proceedings alike. The former Article 10, Point 4 previously came at the top of the details on civil and criminal liability (*op. cit.*, note 7). This point had prompted misgivings on the part of several States.

<sup>42</sup> Also see CESCR, *General comment No. 24*, *above*, note 40, Point 45: "Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant".

not represent progress: for it is “subject to domestic law” that courts asserting jurisdiction under this legally binding instrument “may” require, “where needed”, reversal of the burden of proof, for the purpose of fulfilling the victim’s access to justice and remedies.

16. The Commission also hails the improvements made to the text under Article 6 on legal liability. Sufficient distinction has however still not been drawn between civil, administrative and criminal liability, or between the liabilities of natural and legal persons. The purpose of this provision seems to be to require States to guarantee the accessibility of civil remedies for any human rights violations or abuses and to provide for a limited list of serious human rights violations or abuses justifying a criminal response<sup>43</sup>. The CNCDH nevertheless recommends that the criminal offences set out under Article 6, Point 7, not be limitative but rounded off particularly by the offences listed in the *United Nations Convention against Corruption*<sup>44</sup>. Corrections are also necessary, as Article 6, Point 7 c), incorrectly refers to Articles 7 and 25 of the *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>45</sup>. What is more, the Commission suggests improving the link between Articles 5 and 6. The revised draft instrument should more clearly stipulate that States must ensure that failure to comply with due diligence obligations laid down by Article 5 shall incur the liability of the business enterprises concerned. On the other hand, it recommends that Article 6 clarify that the fact that a business enterprise honours these due diligence obligations does not prevent it from being held liable on other grounds, pursuant to national and international law.
17. With respect to claims brought by victims for acts or omissions that result in violations of human rights covered under the draft instrument, Article 7 confers jurisdiction on the courts of the State where said acts or omissions occurred, or where the victims are domiciled<sup>46</sup> or where the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, are domiciled (Point 1). The CNCDH commends the fact that a broad notion of domicile has been selected: the business enterprise is considered domiciled at the place where it has its place of incorporation (a), statutory seat (b), central administration (c) or substantial business interests (d). This interpretation of the notion of domicile is not new in international law. It is similar to the notion of "principal place of business" of the European Brussels I Regulation, as amended in 2012<sup>47</sup>. Moreover, the Committee on the Rights of the Child has stipulated that "States should enable access to effective judicial and non-judicial mechanisms to provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially when there is a reasonable link between the State and the conduct concerned"<sup>48</sup>. In the Committee's opinion, "a reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned."<sup>49</sup>

<sup>43</sup> Interview with Olivier De Schutter, 16 September 2019.

<sup>44</sup> *United Nations Convention against Corruption*, 2004, available at [https://www.unodc.org/documents/brussels/UN\\_Convention\\_Against\\_Corruption.pdf](https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf).

<sup>45</sup> Enforced Disappearance is defined by Article 2 of this Convention, *op. cit.*, note 25.

<sup>46</sup> This requirement on the part of the State where the victims are domiciled to provide remedies is particularly welcomed, in that it plays a part in combating impunity for human rights violations committed by business enterprises, registered in one State, but with capital in another State (interview with Olivier De Schutter, 16 September 2019).

<sup>47</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Article 63 c), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN>.

<sup>48</sup> Committee on the Rights of the Child, *General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights*, CRC/C/GC/16, 17 April 2013, available at <https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.16.pdf>.

<sup>49</sup> *Op. cit.*, p. 7. The CESCR refers to this comment of the Committee on the Rights of the Child in its general comment no. 24 and, with respect to extraterritorial obligations, deems that: "Extraterritorial obligations arise when a State party may influence situations located outside its territory, consistent with the limits imposed by international law, by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction, and thus may contribute to the effective enjoyment of economic, social and cultural rights outside its national territory" (CESCR, *General Comment No. 24, op. cit.*, note 40, Point 28).

18. The Commission finds it regrettable, however, that the revised draft instrument makes no provision for the exception based on related actions, i.e. jurisdiction for a court to rule on two claims which are closely connected, when another court would have jurisdiction, so as to avoid incompatible rulings being pronounced. Similarly, the draft does not address the question of plurality of defendants either, when this configuration is common in practice. Furthermore, the Commission recommends that the draft instrument include the forum of necessity (*forum necessitatis*) in order to guarantee effective access to remedies for victims. Likewise, an express prohibition of the *forum non conveniens* would be necessary to that end<sup>50</sup>.
19. Regarding the statute of limitations, the Commission welcomes the clarification in Article 8, Point 1, according to which "statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole".<sup>51</sup> Domestic statutes of limitations for other types of human rights violations "shall allow a reasonable period of time for the investigation and prosecution of the violation" (Article 8, Point 2). Although this notion is not defined, it should be interpreted so as to allow for a long enough period of time in proportion to the gravity of the alleged violation.
20. The Commission also recommends that the wording of Article 9 on applicable law be improved, for the way it is currently written, it is unclear how the first two paragraphs are related. What is more, Article 9, Point 2, does not expressly spell out who chooses, and according to what criteria, between the application of law of the State where the alleged acts or omissions have occurred (a), the State where the victim is domiciled (b) or the State where the alleged perpetrator is domiciled (c). Although the possibility of alternatively applying several laws reflects current practice – not least within the context of the conventions of the Hague Conference on International Private Law – the CNCDH recommends that the text clarify that it is the victims' place to make such a choice.

## Articulate the instrument with positive international law

21. The Commission welcomes the clause which stipulates that the instrument "shall [not] affect any provisions that are more conducive to the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims", which may be contained in the domestic legislation of a State Party or any other regional or international treaty or agreement in force for that State (Article 12, Point 3). Nevertheless, it recommends that this clause also include the international obligations outside the framework of conventions.
22. The CNCDH commends the improvements that Article 12, Point 6, makes to the wording of the former Article 13 of the "zero draft"<sup>52</sup> as regards the consistency of the instrument with bilateral or multilateral agreements, including regional or sub-regional ones,

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<sup>50</sup> In this regard: CESCR, *General comment No. 24, above*, note 40, Point 43. The CNCDH drew attention to the risk of denial of justice in its 2013 opinion, where it outlined recommendations for the French Government: CNCDH, *Avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies*, 24 October 2013, JORF no. 0266 of 16 November 2013, text no. 56, available at <https://www.cncdh.fr/fr/publications/entreprises-et-droits-de-lhomme>.

<sup>51</sup> That said, it would be worth specifying in this provision whether the notion refers solely to crimes coming under the *Rome Statute of the International Criminal Court* (adopted on 17 July 1998, A/CONF.183/9, available at [https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)), or to gross and systematic human rights violations as well.

<sup>52</sup> *Op. cit.*, note 7.



particularly in terms of trade and investment. Consistency between international human rights law and international business law capable of guaranteeing effective protection of human rights is paramount for the CNCDH<sup>53</sup>. As such, there are still clarifications to be made. In any event, the CNCDH recommends that the restriction in Article 12, Point 6, aiming only for "issues relevant to this (Legally Binding Instrument) and its protocols" be removed, and that the requirement for compatibility be clarified by applying to "any provision" in bilateral and multilateral agreements, and not just agreements in their entirety. Lastly, clear mention of trade and investment agreements would be highly desirable.

23. The Commission also draws attention to the fact that the references of the revised draft instrument to domestic legislation should be interpreted in keeping with general international law<sup>54</sup>, namely as reference to domestic law for the implementation of the instrument, and not as being subject to domestic law<sup>55</sup>.

## Encourage the instrument's implementation

24. The Commission regards Articles 10 and 11 on mutual legal assistance and international cooperation as essential, as impunity is often the result of a lack of cooperation between States<sup>56</sup>. In this respect, the fact that mutual legal assistance is subject to compliance with rules of fair trial<sup>57</sup> provides a way for strengthening them at global level in its opinion. The instrument could, nevertheless, expressly refer to the multilateral conventions on mutual legal assistance, in terms of both civil and criminal cases.

25. The Commission recommends resuming all of the preparatory work on the monitoring mechanisms to set up to ensure effective implementation of the instrument, and ensuring that they are attributed the necessary financial, human and legal means for their effective operation. It is once again disappointed that the national mechanism – a key and central provision of the optional protocol – is separate from the main text of the instrument<sup>58</sup>. It welcomes the idea of an International Fund for Victims (Article 13, Point 7).

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26. The Commission once again encourages France to play a leading role during the fifth session of the open-ended intergovernmental working group, scheduled in Geneva from 14 to 18 October. It particularly recommends that its European partners and the European Union play an active and constructive part in these, with a view to adopting a legally binding international instrument that fosters greater legal certainty and more effective protection of human rights.

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<sup>53</sup> Such consistency was a matter of concern for the CNCDH particularly in the *CETA opinion*, *op. cit.*, note 5; also see the 2 October 2018 statement, *op. cit.*, note 4. It is particularly addressed in Principles 9 and 10 of *the Ruggie Principles*, *op. cit.*, note 6.

<sup>54</sup> See, in particular, Article 26 of the *Vienna Convention on the Law of Treaties*, adopted on 23 May 1969, available at [http://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>55</sup> In its April 2019 contribution, concerning the former version of Article 13, the CNCDH considered that the risk of subjecting the application of the instrument to domestic law cancelled out the binding nature of the obligations it contains, *op. cit.*, note 4.

<sup>56</sup> In October 2018, the CNCDH had already praised the emphasis placed on mutual cooperation between States, Aforementioned *Déclaration*, note 4.

<sup>57</sup> See, for example, Article 10, Point 10 ("fair opportunity to present his or her case"), of the revised draft instrument.

<sup>58</sup> Aforementioned statement of 2 October 2018 on the "zero version", note 4. In this statement, the CNCDH was concerned about the consistency between the two texts, with the protocol addressing both national and international monitoring mechanisms.

## The CNCDH's recommendations

**Recommendation no.1:** The CNCDH recommends ensuring that the forthcoming versions of the legally binding draft instrument are translated into the official languages of the United Nations, including French, so as to guarantee their accessibility, understanding and adoption by everyone.

*Clarify the scope and definitions of the instrument:*

**Recommendation no.2:** The CNCDH recommends ensuring that the instrument covers the activities of all business enterprises, transnational or other, with account also taken of the specifics of small- and medium-sized enterprises.

**Recommendation no.3:** The CNCDH advocates giving precedence to the term "business relationship" instead of "contractual relationship", to be consistent with positive international law and ensure the inclusion of relationships between parent companies and their subsidiaries.

**Recommendation no.4:** The CNCDH recommends fine-tuning certain definitions so as to clarify the scope of the instrument, especially by explaining the distinction between "violations" and "abuses" of human rights committed in the context of business activities. It also recommends that the notion of "relatives" be selected instead of "immediate family" in the definition of victims.

**Recommendation no.5:** The CNCDH recommends highlighting in the main text of the instrument the role of trade unions and civil society actors, particularly human rights defenders, in promoting and protecting all human rights – social and environmental rights in particular.

*Strengthen due diligence:*

**Recommendation no.6:** The CNCDH recommends strengthening the content of the obligation incumbent on State Parties to ensure that all persons conducting business activities, in their territory or jurisdiction, undertake human rights due diligence.

**Recommendation no.7:** In addition, it recommends that the definition of its content, and of the national procedures that State Parties must set up to guarantee compliance therewith, more expressly include the remedy dimension of *the Ruggie Principles*. To that end, a line e) should be added to Point 2 of Article 5 to factor in the obligation to provide for remedies and to cooperate with victims, as well as with persons, groups, trade unions or organisations which lend them support, to facilitate victims' access to appropriate and effective remedies.

**Recommendation no.8:** Likewise, the Commission recommends that Article 5, Point 4, provide that State Parties ensure that any harm resulting from a lack of due diligence incurs the liability of the business enterprise in question and gives rise to compensation.

*Put an end to denials of justice:*

**Recommendation no.9:** The CNCDH recommends extending Article 4, Point 12 e), and to stipulate that, as long as the lawsuit is not vexatious or abusive (notion of arguable claim), the judge should not hold claimants who fail to obtain redress liable for the legal expenses of the other party to the claim.

**Recommendation no.10:** The CNCDH recommends considering more precise wording for Article 4, Point 16, on the possibility of reversal of the burden of proof in civil claims.

**Recommendation no.11:** The CNCDH stresses the need to draw a clearer distinction between civil, administrative and criminal liability.

**Recommendation no.12:** The CNCDH recommends that the list of criminal offences set out under Article 6, Point 7, not be limitative and rounded off particularly by the offences set out in the *United Nations Convention against Corruption*. Moreover, corrections are also necessary as regards the definition of enforced disappearance.

**Recommendation no.13:** The CNCDH also recommends that the instrument more clearly stipulate that States must ensure that failure to comply with due diligence obligations laid down by Article 5 shall incur the liability of the business enterprises concerned. By the same token, the instrument should clarify that the fact that a business enterprise honours these due diligence obligations does not prevent it from being held liable on other grounds, pursuant to national and international law.

**Recommendation no.14:** The CNCDH recommends providing for the exception based on related actions and factoring in the plurality of defendants.

**Recommendation no.15:** The CNCDH recommends that the instrument include the forum of necessity in order to guarantee effective access to remedies for victims.

**Recommendation no.16:** The CNCDH recommends, to that end, that the *forum non conveniens* be expressly prohibited.

**Recommendation no.17:** The CNCDH encourages improvements in the wording of Article 9, particularly by clarifying that it is the victims' place to choose the applicable law, pursuant to the terms set out in this provision.

*Articulate the instrument with positive international law:*

**Recommendation no.18:** The CNCDH recommends ensuring that the legally binding international instrument currently being negotiated is compatible with the other standards on business and human rights, which it shores up – particularly the *United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles)*. Such compatibility guarantees greater legal certainty and more effective protection of human rights.

**Recommendation no.19:** The CNCDH recommends that the clause according to which the instrument shall not affect any provisions that are more conducive also include international obligations outside the framework of conventions (Article 12, Point 3).

**Recommendation no.20:** The CNCDH recommends clarifying the link between international human rights law and international economic law. It recommends that the specification of agreements on "issues relevant to this (Legally Binding Instrument)" be removed (Article 12, Point 6) and that an explicit reference to trade and investment agreements be added.

**Recommendation no.21:** The CNCDH draws attention to the fact that the instrument's references to domestic legislation must be interpreted in keeping with general international law and under no circumstances may they be taken to mean that this instrument is subject to domestic legislation.

*Encourage the implementation of the legally binding instrument:*

**Recommendation no.22:** The CNCDH recommends that the instrument expressly refer to multilateral agreements on mutual legal assistance under the auspices of the Hague Conference on International Private Law.

**Recommendation no.23:** The CNCDH encourages to resum the work on monitoring mechanisms and to ensure that they are attributed the necessary financial, human and legal means for their effective operation.

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## Appendix 1: List of experts interviewed

CNCDH members attended the fourth session of the open-ended intergovernmental working group for the drafting of a legally binding international instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, which took place in Geneva from 15 to 18 October 2018.

- Swann Bommier, Advocacy Officer for multinational Business Regulation, CCFD Terre Solidaire (15 January 2019).
- Claire Bright, Research Fellow in Business and Human Rights, British Institute of International and Comparative Law (4 February 2019).
- Arnaud de Nanteuil, Public Law Professor, University of Paris-Est Créteil Val de Marne, Specialist in International Business Law and Investment Law (23 January 2019).
- Olivier de Schutter, Professor, UCL (Louvain), Member of the UN Committee on Economic, Social and Cultural Rights (CESCR) (4 February 2019 and 16 September 2019).
- Denis Douvèneau, Deputy Assistant Director for Human Rights and Humanitarian Affairs, United Nations and International Organisations Directorate, Ministry for Europe and Foreign Affairs (18 September and 13 December 2018).
- Mathilde Dupré, Campaign Officer for Liability in Trade Agreements, Institut Veblen (15 January 2019).
- Parvine Ghadami, Deputy Head of the Office of Expertise and Institutional Matters (European and International Affairs Delegation), Ministry of Justice (13 December 2018).
- Catherine Kessedjian, Emeritus Professor, University of Panthéon-Assas Paris II, President of the French Branch and Vice-Chair of the ILA, associate member, Institute of International Law (IDI-IIL) (4 February 2019).
- Christelle Hilpert, Head of the Office of EU Law, Private International Law and Mutual Civil Assistance (Civil Affairs and Seals Directorate), Ministry of Justice (13 December 2018).
- Julien Morino-Ros, Deputy Head of the Office of European and International Criminal Negotiations (Criminal Matters and Pardons Directorate), Ministry of Justice (13 December 2018).
- Robert Roth, Honorary Professor, University of Geneva, Specialist in International Criminal Law (23 January 2019).
- Adelin Royer, Ministry for Europe and Foreign Affairs, United Nations and International Organisations Directorate, Sub-Directorate for Human Rights (16 September 2019).
- Geneviève Van Rossum, Special Representative for Bioethics and Corporate Social Responsibility, General Directorate for Globalisation, Culture, Education and International Development, Ministry for Europe and Foreign Affairs (18 September and 13 December 2018).



## **Appendix 2: Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, OEIGWG Chairmanship revised draft 16.7.2019**

### Preamble

*The State Parties to this (Legally Binding Instrument),*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Hereby agree as follows:*

## **Section I**

### **Article 1. Definitions**

1. “victims” shall mean any persons or group of persons who individually or collectively have suffered or have alleged to have suffered human rights violation or abuse as defined in Article 1 paragraph 2 below. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim.
2. “Human rights violation or abuse” shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.
3. “Business activities” means any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.
4. “Contractual relationship” refers to any relationship between natural or legal persons to conduct business activities, including but not limited to, those activities conducted through

affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or contractual relationship as provided under the domestic law of the State.

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

## **Article 2. Statement of purpose**

1. The purpose of this (Legally Binding Instrument) is:
  - a. To strengthen the respect, promotion, protection and fulfilment of human rights in the context of business activities;
  - b. To prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities;
  - c. To promote and strengthen international cooperation to prevent human rights violations and abuses in the context of business activities and provide effective access to justice and remedy to victims of such violations and abuses.

## **Article 3. Scope**

1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.
2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:
  - a. It is undertaken in more than one national jurisdiction or State; or
  - b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place in another State;or
  - c. It is undertaken in one State but has substantial effect in another State.
3. This (Legally Binding Instrument) shall cover all human rights.

## **Section II**

### **Article 4. Rights of Victims**

1. Victims of human rights violations shall be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured.
2. Victims shall be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement.
3. Victims, their representatives, families and witnesses shall be protected by the State Party from any unlawful interference against their privacy and from intimidation, and retaliation, before, during and after any proceedings have been instituted.
4. Victims shall have the right to benefit from special consideration and care to avoid re-victimization in the course of proceedings for access to justice and remedies, including through appropriate protective and support services that ensures substantive gender equality and equal and fair access to justice.

5. Victims shall have the right to fair, effective, prompt and non-discriminatory access to justice and adequate, effective and prompt remedies in accordance with this instrument and international law. Such remedies shall include, but shall not be limited to:
  - a. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims;
  - b. Environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims and replacement of community facilities.
6. Victims shall be guaranteed access to information relevant to the pursuit of remedies.
7. Victims shall have access to appropriate diplomatic and consular means, as needed, to ensure that they can exercise their right to access justice and remedies, including but not limited to, access to information required to bring a claim, legal aid and information on the location and competence of the courts and the way in which proceedings are commenced or defended before those courts.
8. Victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties. Where a claim is submitted by a person on behalf of victims, this shall be with their consent, unless that person can justify acting on their behalf. State Parties shall provide their domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies.
9. State Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to act free from threat, restriction and insecurity.
10. State Parties shall investigate all human rights violations and abuses effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, in accordance with domestic and international law.
11. State Parties shall ensure that their domestic laws and courts facilitate access to information through international cooperation, as set out in this (Legally Binding Instrument), and in a manner consistent with their domestic law.
12. State Parties shall provide proper and effective legal assistance to victims throughout the legal process, including by:
  - a. Making information available to victims of their rights and the status of their claims in an appropriate and adequate manner;
  - b. Guaranteeing the rights of victims to be heard in all stages of proceedings as consistent with their domestic law;
  - c. Avoiding unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards;
  - d. Providing assistance with all procedural requirements for the presentation of a claim and the start and continuation of proceedings in the courts of that State Party. The State Party concerned shall determine the need for legal assistance, in consultation with the victims, taking into consideration the economic resources available to the victim, the complexity and length of the issues involved in the proceedings.
  - e. In no case shall victims that have been granted the appropriate remedy to redress the violation, be required to reimburse any legal expenses of the other party to the claim. In the event that the claim failed to obtain appropriate redress or relief as a

remedy, the alleged victim shall not be liable for such reimbursement if such alleged victim demonstrates that such reimbursement cannot be made due to the lack or insufficiency of economic resources on the part of the alleged victim.

13. Inability to cover administrative and other costs shall not be a barrier to commencing proceedings in accordance with this (Legally Binding Instrument). State Parties shall assist victims in overcoming such barriers, including through waiving costs where needed. State Parties shall not require victims to provide a warranty as a condition for commencing proceedings.
14. State Parties shall provide effective mechanisms for the enforcement of remedies for violations of human rights, including through prompt execution of national or foreign judgements or awards, in accordance with the present (Legally Binding Instrument), domestic law and international legal obligations.
15. State Parties shall take adequate and effective measures to recognize, protect and promote all the rights recognised in this (Legally Binding Instrument) to persons, groups and organizations that promote and defend human rights and the environment.
16. Subject to domestic law, courts asserting jurisdiction under this (Legally Binding Instrument) may require, where needed, reversal of the burden of proof, for the purpose of fulfilling the victim's access to justice and remedies.

#### **Article 5. Prevention**

1. State Parties shall regulate effectively the activities of business enterprises within their territory or jurisdiction. For this purpose States shall ensure that their domestic legislation requires all persons conducting business activities, including those of a transnational character, in their territory or jurisdiction, to respect human rights and prevent human rights violations or abuses.
2. For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:
  - a. Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships;
  - b. Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships;
  - c. Monitor the human rights impact of their business activities, including those under their contractual relationships;
  - d. Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships.
3. Measures referred to under the immediately preceding paragraph shall include, but shall not be limited to:
  - a. Undertaking environmental and human rights impact assessments in relation to its activities and those under their contractual relationships, integrating the results of such assessments into relevant internal functions and processes, and taking appropriate actions.
  - b. Carrying out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative



institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable.

- c. Reporting publicly and periodically on financial and non-financial matters, including policies, risks, outcomes and indicators on human rights, environment and labour standards concerning the conduct of their business activities, including those of their contractual relationships.
  - d. Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed.
  - e. Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services;
4. State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest, in accordance with domestic law.
  5. In setting and implementing their public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these policies from commercial and other vested interests of persons conducting business activities, including those of transnational character, in accordance with domestic law.
  6. States Parties may provide incentives and other measures to facilitate compliance with requirements under this Article by small and medium sized undertakings conducting business activities to avoid causing undue additional burdens.

#### **Article 6. Legal Liability**

1. State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.
2. Liability of legal persons shall be without prejudice to the liability of natural persons.
3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.
4. States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.
5. State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

6. States Parties shall ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, for its failure to prevent another natural or legal person with whom it has a contractual relationships, from causing harm to third parties when the former sufficiently controls or supervises the relevant activity that caused the harm, or should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities, including those of transnational character, regardless of where the activity takes place.
7. Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for the following criminal offences:
  - a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;
  - b. Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;
  - c. enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;
  - d. extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;
  - e. Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957;
  - f. The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999;
  - g. Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;
  - h. slavery and slavery-like offences;
  - i. Forced displacement of people;
  - j. Human trafficking, including sexual exploitation;
  - k. Sexual and gender-based violence.
8. Such liability shall be without prejudice to the criminal liability under the applicable domestic law of the natural persons who have committed the offences.
9. State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offence in accordance with Article 6 (7) and criminal offences as defined by their domestic law.

## **Article 7. Adjudicative Jurisdiction**

1. Jurisdiction with respect to claims brought by victims, independently of their nationality or place of domicile, arising from acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument), shall vest in the courts of the State where:
  - a. such acts or omissions occurred; or
  - b. the victims are domiciled; or
  - c. the natural or legal persons alleged to have committed such acts or omissions in the context of business activities, including those of a transnational character, are domiciled.
2. A natural or legal person conducting business activities of a transnational character, including through their contractual relationships, is considered domiciled at the place where it has its:

- a. place of incorporation; or
- b. statutory seat; or
- c. central administration; or
- d. substantial business interests.

#### **Article 8. Statute of limitations**

1. The State Parties to the present (Legally Binding Instrument) undertake to adopt, in accordance with their domestic law, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole.
2. Domestic statutes of limitations for violations that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow a reasonable period of time for the investigation and prosecution of the violation, particularly in cases where the violations occurred in another State.

#### **Article 9. Applicable law**

1. Subject to the following paragraph, all matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court, including any rules of such law relating to conflict of laws.
2. All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance with domestic law, be governed by the law of another State where:
  - a) the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) have occurred; or
  - b) the victim is domiciled; or
  - c) the natural or legal person alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled.
3. The (Legally Binding Instrument) does not prejudice the recognition and protection of any rights of victims that may be provided under applicable domestic law.

#### **Article 10. Mutual Legal Assistance**

1. States Parties shall afford one another the widest measure of mutual legal assistance in initiating and carrying out investigations, prosecutions and judicial and other proceedings in relation to claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations.
2. The requested State Party shall inform the requesting State Party, as soon as possible, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request.

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

- a. Taking evidence or statements from persons;
- b. Effecting service of judicial documents;
- c. Executing searches and seizures;
- d. Examining objects and sites;
- e. Providing information, evidentiary items and expert evaluations;
- f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- h. Facilitating the voluntary appearance of persons in the requesting State Party;
- i. Facilitating the freezing and recovery of assets;
- j. Assistance to, and protection of, victims, their families, representatives and witnesses, consistent with international human rights legal standards and subject to international legal requirements including those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment;
- k. Assistance in regard to the application of domestic law;
- l. Any other type of assistance that is not contrary to the domestic law of the requested State Party.

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

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

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

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

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

9. Any judgement of a court having jurisdiction in accordance with this (Legally Binding Instrument) which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review shall be recognized and enforced in any State Party as soon as the formalities required in that State Party have been completed, whereby formalities should not be more onerous and fees and charges should not be higher than those required for the enforcement of domestic judgments and shall not permit the re-opening of the merits of the case.
10. Recognition and enforcement may be refused, at the request of the defendant, only if that party furnishes to the competent authority or court where the recognition and enforcement is sought, proof that:
  - a. the defendant was not given reasonable notice and a fair opportunity to present his or her case; or
  - b. where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
  - c. where the judgement is likely to prejudice the sovereignty, security, ordre public or other essential interests of the Party in which its recognition is sought.
11. Mutual legal assistance under this article may be refused by a State Party if the violation to which the request relates is not covered by this (Legally Binding Instrument) or if it would be contrary to the legal system of the requested State Party.
12. A State Party shall not decline to render mutual legal assistance in claim involving liability for harms or criminal offences, within the scope of this (Legally Binding Instrument) on the ground that the request is considered to involve fiscal matters or bank secrecy.

#### **Article 11. International Cooperation**

1. States Parties shall cooperate in good faith to enable the implementation of commitments under this (Legally Binding Instrument) and the fulfilment of the purposes of this (Legally Binding Instrument).
2. State Parties recognize the importance of international cooperation and its promotion for the realization of the purpose of the present (Legally Binding Instrument) and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organizations and civil society. Such measures could include, but are not limited to:
  - a. promoting effective technical cooperation and capacity-building among policy makers, operators and users of domestic, regional and international grievance mechanisms;
  - b. Sharing experiences, good practices, challenges, information and training programs on the implementation of the present (Legally Binding Instrument);
  - c. Facilitating cooperation in research and studies on the challenges and good practices and experiences for preventing violations of human rights in the context of business activities, including those of a transitional character.

#### **Article 12. Consistency with International Law**

1. States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.
2. Notwithstanding art 7.1, nothing in this (Legally Binding Instrument) entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance



of functions that are reserved exclusively for the authorities of that other State by its domestic law.

3. Nothing in the present (Legally Binding Instrument) shall affect any provisions that are more conducive to the respect, promotion, protection and fulfilment of human rights in the context of business activities and to guaranteeing the access to justice and remedy to victims of human rights violations and abuses in the context of business activities which may be contained:
  - a. In the domestic legislation of a State Party; or
  - b. In any other regional or international, treaty or agreement in force for that State.
4. The provisions of this (Legally Binding Instrument) shall be applied in conformity with agreements or arrangements on the mutual recognition and enforcement of judgements in force between State Parties.
5. This (Legally Binding Instrument) shall not affect the rights and obligations of the State Parties under the rules of general international law with respect to the international responsibility of States.
6. States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

### **Section III**

#### **Article 13. Institutional Arrangements**

##### **Committee**

1. There shall be a Committee established in accordance with the following procedures:
  - a. The Committee shall consist, at the time of entry into force of the present (Legally Binding Instrument), (12) experts. After an additional sixty ratifications or accessions to the (Legally Binding Instrument), the membership of the Committee shall increase by six members, attaining a maximum number of eighteen members. The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields.
  - b. The experts shall be elected by the State Parties, consideration being given to equitable geographical distribution, the differences among legal systems, gender balanced representation and ensuring that elected experts are not engaged, directly or indirectly, in any activity which might adversely affect the purpose of this (Legally Binding Instrument)
  - c. The members of the Committee shall be elected by secret ballot from a list of persons nominated by State Parties. They shall be elected for a term of 4 years and can be re-elected for another term. Each State Party may nominate one person from among its own nationals. Elections of the members of the Committee shall be held at the Conference of State Parties by majority present and voting. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the State Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties which have nominated them, and shall submit it to the State Parties.
  - d. The initial election shall be held no later than six months after the date of the entry into force of this (Legally Binding Instrument). The term of six of the members elected at the first election shall expire at the end of two years; immediately after the

first election, the names of these six members shall be chosen by lot by the chairperson of the meeting referred to in this Article.

- e. If a member of the Committee dies or resigns or for any other cause can no longer perform his or her Committee duties, the State Party which nominated him or her shall appoint another expert from among its nationals to serve for the remainder of his or her term, subject to the approval of the majority of the States Parties.
  - f. The Committee shall establish its own rules of procedure and elect its officers for a term of two years. They may be re-elected.
  - g. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this (Legally Binding Instrument). The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.
  - h. With the approval of the General Assembly, the members of the Committee established under the present (Legally Binding Instrument) shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide through the established procedures.
2. State Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State Party concerned. Thereafter the State Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.
  3. The Secretary-General of the United Nations shall transmit the reports to all State Parties.
  4. The Committee shall have the following functions:
    - a. Make general comments and normative recommendations on the understanding and implementation of the (Legally Binding Instrument) based on the examination of reports and information received from the State Parties and other stakeholders;
    - b. Consider and provide concluding observations and recommendations on reports submitted by State Parties as it may consider appropriate and forward these to the State Party concerned that may respond with any observations it chooses to the Committee. The Committee may, at its discretion, decide to include this suggestions and general recommendations in the report of the Committee together with comments, if any, from State Parties;
    - c. Provide support to the State Parties in the compilation and communication of information required for the implementation of the provisions of the (Legally Binding Instrument);
    - d. Submit an annual report on its activities under this (Legally Binding Instrument) to the State Parties and to the General Assembly of the United Nations;
    - e. [The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the present (Legally Binding Instrument)].

#### Conference of States Parties

5. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the (Legally Binding Instrument), including any further development needed towards fulfilling its purposes.
6. No later than six months after the entry into force of the present (Legally Binding Instrument), the Conference of the States Parties shall be convened by the Secretary-General of the United Nations. The subsequent meetings shall be convened by the

Secretary-General of the United Nations biennially or upon the decision of the Conference of States Parties.

#### International Fund for Victims

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

#### **Article 14. Implementation**

1. State Parties shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).
2. Each State Party shall furnish copies of its laws and regulations that give effect to this (Legally Binding Instrument) and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations, which shall be made publicly available.
3. Special attention shall be undertaken in the cases of business activities in conflict-affected areas including taking action to identify, prevent and mitigate the human rights-related risks of these activities and business relationships and to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence.
4. In implementing this (Legally Binding Instrument), State Parties shall address the specific impacts of business activities on while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees and internal displaced persons.
5. The application and interpretation of these Articles shall be consistent with international human rights law and international humanitarian law and shall be without any discrimination of any kind or on any ground, without exception.

#### **Article 15. Relation with protocols**

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

#### **Article 16. Settlement of Disputes**

1. If a dispute arises between two or more State Parties about the interpretation or application of this (Legally Binding Instrument), they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.

2. When signing, ratifying, accepting, approving or acceding to this (Legally Binding Instrument), or at any time thereafter, a State Party may declare in writing to the 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 State Parties.
3. If the State Parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of this article, the dispute may be submitted only to the International Court of Justice, unless the State Parties agree otherwise.

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

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

#### **Article 18. Entry into force**

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

#### **Article 19. Amendments**

1. Any State Party may propose an amendment to the present (Legally Binding Instrument) and submit it to the Secretary-General of the United Nations. The Secretary-General shall communicate any proposed amendments to States Parties, with a request to be notified whether they favour a conference of States Parties for the purpose of considering and deciding upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of two-thirds of the State Parties present and voting in the Conference of the Parties shall be submitted by the Secretary-General to all State Parties for acceptance.

2. An amendment adopted and approved in accordance with this Article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of State Parties at the date of adoption of the amendment. Thereafter, the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. An amendment shall be binding only on those State Parties which have accepted it.
3. If so decided by the Conference of States Parties by consensus, an amendment adopted and approved in accordance with this Article which relates exclusively to the establishment of the Committee or its functions, and the Conference of States Parties shall enter into force for all State Parties on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of State Parties at the date of adoption of the amendment.

#### **Article 20. Reservations**

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

#### **Article 21. Denunciation**

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

#### **Article 22. Depositary and Languages**

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

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