**Intervention by Sandra EPAL RATJEN – Franciscans International**

**On Articles 3 and 4 of the zero draft Legally Binding Instrument**

*Fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*

**General remarks**

The issue of the scope of the treaty as proposed in article 3 of the zero draft (Annex nº1), read in conjunction with the definitions of article 4 of the same zero draft, is at the core of the negotiations. Even if these articles are short, they are very decisive for the whole endeavour.

The way the scope will be defined will have implications for virtually all other provisions of the future legally binding instrument.

Having carefully listened to the various positions over the last years, it seems to me, and it resonates with what has been said by my co-panellists, that, to go forward, we will need to strike the right balance between addressing the key and specific regulatory, protection and accountability gaps in the context of transnational business activities, on the one hand; and the concern that many of us have not to create conditions for new or increased impunity.

In that regard, the language of the footnote to the PPs of Resolution 26/9 (Annex nº 2) is telling about the complexity of the matter. The footnote opposes transnational activities: “businesses with transnational character in their operational activities”, to “local businesses registered in terms of relevant domestic law”. This can be confusing as we have on one hand the activities and on the other the nature or organisational structure and registration of the business. And, in reality, we know that TNCs and global economic groups operate and are composed of locally registered businesses.

**What the zero draft is doing/saying**

As it is, article 3.1 (and the definition of article 4.2) is, I think, a clear attempt to be faithful to the mandate given by the Resolution 26/9, including the footnote, while trying to take into consideration the issues and preoccupations raised by various delegations in past sessions about an exclusion of local businesses, or activities without transnational character (not taking place in more than one jurisdiction).

However, the definition in article 4.2, as it is currently trying to be as broad as possible in capturing what could be considered having a transnational character, could have implications for actors that may not the ones we want to focus on, while missing others.

In particular, by excluding certain types of activities from the realm of the future instrument, we could:

a) “miss” important violations of human rights that are not well covered under domestic law or caused by activities happening “only” in one jurisdiction;

b) put an extra burden on alleged victims who would have to prove the transnational character of the activities at the origin of the violations/harm (and we know how difficult that may prove);

c) create separate regimes and asymmetric legal situations (eg. in criminal liability- just on the ground of the nature of the activities of the perpetrator or defendant - or concerning due diligence).

In addition, the definition given in article 4.2 has potential for unclarity/uncertainty and room for (mis) interpretation (eg. what are for-profit economic activities other than commercial or productive ones?).

As far as article 3.2 of the current zero draft is concerned, there are issues with the scope concerning the rights covered.

I think that it is positive that the language of article 3.2 is broad in saying all international human rights and those rights recognized under domestic law. However, here again, as we heard from several delegations, some clarity may be needed. It is not really clear or it could be subject to interpretation what international human rights are. There may also be rights or limitations thereof that are enshrined in domestic law, which may not be compatible with international human rights law. And catalogues of rights may then be very different between the various States/jurisdictions that could be concerned by a case of violations involving transnational business activities.

**Specific proposals for future drafts**

Taking into account these issues, I would like to make following suggestions or share following thoughts to provoke further discussions for future drafts.

***We need provisions to address the issues raised by the exclusion of certain types of activities***

There could be a general restatement of State obligations to protect and, at the same time, responsibility of businesses to respect HR in the body of the text (not only in the preamble but in the first articles of the future instrument). For that, we can be inspired by existing wording in other international instruments. Something along the following lines could be added in a reworked draft and future instrument:

*“Nothing in the present convention should be interpreted as undermining the existing international HR obligations, and in particular the obligation of States to protect human rights that requires to prevent the violation of any individual’s rights by any other individual or non-State actor; or when the infringement occurred, to preclude further violations and to guarantee access to legal remedies for victims.*

*Nothing in the present convention should be interpreted as undermining the responsibility of businesses to respect human rights as internationally recognised in the UNGPs.”*

An alternative or complementary clause that could be added in the first articles of a reworked draft could be adapted from other instruments such as from the Agreement for the implementation of the provisions of the United Nations Convention on the Law of the Sea (Annex nº 3). More specifically, here an adaptation from its Article 3 on application:

*“1. Unless otherwise provided, this [instrument] applies to business activities of a transnational character, that go beyond single national jurisdictions, except that articles …. apply also to the business activities within single national jurisdictions.*

*2. In the exercise of its sovereign rights for the purpose of regulating business activities within single national jurisdictions, the State shall apply mutatis mutandis the principles contained in article(s)….”*

Since it is not clear what provisions will stay in and be added, it is difficult to be comprehensive at this stage on which other provisions/clauses and safeguards should be added in various relevant parts of the text in addition to this general (re)statement. Nevertheless, an alternative or complementary fix to such general statement would be to make sure that provisions that should definitively apply to all businesses are clearly/explicitly appearing as such.

***We need clarifications / provisions on the scope in terms of the rights covered***

I think article 3.2 could follow the wording of the UN Guiding Principles that refer to a minimum package of core internationally recognized human rights, composed of the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work (like UNGPs).

This may be a good basis, because it’s a minimum package. However, it could be usefully complemented by a *safeguard, specifying that, it should be without prejudice of States international human rights obligations under the treaties they are parties to*.

In addition to this, to address the potential contentious issue around the rights recognized under domestic law, various conventions can serve as inspiration for language along the following lines - e.g adapted from article 14 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Annex nº 4) or from article 34. 3 of UN Convention on Transnational Organized Crime (Annex n°5):

*“1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:*

*(a) stricter domestic measures than those provided for by this [instrument] for preventing and remedying human rights violations in the context of business activities*

*b) extended list of legal protections of rights in compliance with international human rights law.”*

***We need clarifications in the definition about victims***

The definition in article 4.1 makes clear that in the rest of the text victims should be understood as alleged victims. However, considering concerns expressed by some delegations, if it is felt necessary or for more accuracy and legal certainty, “alleged” could be added in relevant places all through the draft.

Last very specific proposal: because of the way that the word “person” is used all through the document, otherwise meaning most of the time both a legal and natural person, I think it could be interesting here and potentially important to add “natural” before person in the definition of victims. And that would be in line with the Rule 85 of the rules of procedure of the Rome Statute (Annex nº 6) for instance.

**ANNEXES**

**ANNEX Nº 1 – Zero draft of the legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises**

**Article 3. Scope**

1. This Convention shall apply to human rights violations in the context of any business activities of a transnational character.

2. This Convention shall cover all international human rights and those rights recognized under domestic law.

**Article 4. Definitions**

1. “Victims” shall mean persons who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights, through acts or omissions in the context of business activities of a transnational character. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

2. “Business activities of a transnational character” shall mean any for-profit economic activity, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means, that take place or involve actions, persons or impact in two or more national jurisdictions.

**ANNEX Nº 2 – Footnote of 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights**

“Other business enterprises” denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law.

**ANNEX Nº 3** **– Agreement for the Implementation of the Provisions of the United nations Convention of the Law Sea, of 10 December 1982, relating to the conservation and management of straddling fish stocks and highly migratory fish stocks (89 Parties + 11 signatures):**

**Article 3**

**Application**

1. Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.

2. In the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal State shall apply mutatis mutandis the general principles enumerated in article 5.

3. States shall give due consideration to the respective capacities of developing States to apply articles 5, 6 and 7 within areas under national jurisdiction and their need for assistance as provided for in this Agreement. To this end, Part VII applies mutatis mutandis in respect of areas under national jurisdiction.

**ANNEX Nº 4 – CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora - 183 State Parties)**

**Article XIV**

**Effect on Domestic Legislation and International Conventions**

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

(a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

(b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

**ANNEX Nº 5 –** [**UN Convention on Transnational Organized Crime**](https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf)

**Article 34**

**Implementation of the Convention**

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party 36 independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

**ANNEX Nº 6 – Rules of Procedure and Evidence of the Rome Statute**

**Rule 85**

**Definition of victims**

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.