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*Reference: LW/ns*

28 февраля 2020 года

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Управлению Верховного комиссара ООН
по правам человека

г. Женева

**Comments of the Russian Federation on the revised draft legally binding instrument**

## General Comments

The Russian Federation continues to be unconvinced about the timeliness of the drafting of this kind of legally binding document. On that understanding, we highlight some general approaches on the draft prepared by the Ecuadorian chair person.

1. First of all, one thing that very much stands out is the excessively broad scope of the document; this applies both to the sphere of action, the terms of reference of a potential convention, which is to apply to, or to be extended to, any activity of a transnational nature, even if it simply concerns just foreign jurisdictions. The extremely broad scope of the draft by subject composition has become even more "blurred". If earlier it was a question of any activity of a transnational nature carried out by TNCs and other commercial enterprises, the new version of the draft proposes to extend the Convention not only to any business activity of these legal entities, regardless of the presence of a foreign element in it (article 1, paragraph 3, paragraph 1), but also to States and regional integration organizations to which States have delegated authority in this area (article 1, paragraphs 2 and 5). Nor can the idea of artificially expanding the subject structure by introducing the term "contractual relations" and an analogue of the institution of "removing the corporate veil" (article 1, paragraph 4, and article 6, paragraph 6) be supported. We believe that the scope of application of the Convention should be narrowed to the protection of human rights in the activities of TNCs.

2. The scope of rights that will be protected by the provisions of the future Convention is also formulated in a very general way, which does not meet the principle of legal certainty. We would like to emphasize that this approach is

not justified, since it can cause serious problems in the implementation of the Convention, given that the scope and content of the rights provided for in national legislation are not the same in different legal systems. Article 1, paragraph 2, of the draft provides a very broad definition of "Human rights violation or abuse", which has a basic meaning for the entire document. This definition is not only unduly broad, but also goes far beyond the legal regulation of such fundamental international human rights treaties as the international Covenant on civil and political rights and the European Convention for the protection of human rights and fundamental freedoms. We believe that it is impossible in principle to build a regime for a future "legally binding document" on the basis of such a definition.

3. One of the key definitions of the draft Convention remains the definition of the term "victim". The Russian Federation insists that this definition still requires conceptual revision.

4. Some provisions of the draft Convention duplicate existing and widely recognized human rights in international law. For example, article 4 repeats existing obligations of States, which seems redundant. It should be noted that state obligations are often formulated outside of their connection with the transnational activities of legal entities, which in general does not apply to the subject of the future Convention (in particular, article 4, paragraphs 7 to 12).

In addition, article 4 of the draft contains a number of provisions that appear to impose very broad, far-reaching obligations on States and, in some ways, are also discriminatory in nature, which does not comply with the principle of equality of the parties to judicial proceedings.

5. We cannot find it justified to fix in the draft an unconditional obligation of the state to provide an effective mechanism for the execution of decisions on compensation for damage from human rights violations through the prompt execution of national and foreign judicial decisions (article 4, paragraph 14).

6. As the Russian Federation repeatedly noted on previous occasions, bringing legal entities to criminal responsibility is a concept unknown to many legal systems including the Russian one. The Russian delegation insists that the draft Convention should set standards for the protection of human rights in the area under consideration, rather than prescribe specific mechanisms by which the state could ensure them, including specific types of responsibility. In this context, we would consider it important to exclude, in particular, the ambiguous phrase "criminal liability and its equivalent".

The list of crimes for which the state should establish criminal, civil or administrative liability of legal entities (article 6, paragraph 7) also raises questions.

Nor can we support article 6, paragraph 9, which explicitly provides for the obligation of States to establish the criminal liability of legal entities for criminal offences as defined in their legislation ("criminal offences as defined by their domestic law"). The establishment of such a general obligation of the state, without connection to the protection of human rights in a specific area, cannot be the subject of the draft Convention and is not within the mandate of the Working group.

We strongly object to the idea of abolishing the Statute of limitations for a wide range of acts, the vast majority of which clearly do not relate to serious international crimes (such as war crimes or the crime of genocide). This kind of "progressive rule-making" would seriously damage the fundamental principles of criminal justice and the public order of states.

7. The provisions of the draft concerning the institutional mechanism to be established for the implementation of the future Convention (article 13) have not changed. There are already functioning mechanisms in the human rights sphere, whose activities will potentially overlap with the functions of the bodies envisaged in the draft. The Russian Federation supports that the discussion on this

section of the draft should be preceded by a substantive and detailed analysis of the feasibility of creating new bodies, including an assessment of the costs of the UN to create and maintain such bodies and their officials. The Russian Federation takes a similar position with regard to the establishment of an International Fund for victims to provide them with legal and financial support (article 13, paragraph 7). We believe that it is obviously premature to have a substantive discussion on this section of the draft in the absence of explanations from the authors regarding the mechanism for forming such a Fund and its functioning.

**Article 1 (Definitions)**

1. The extremely broad scope of the draft by subject composition has become even more "blurred". If earlier it was a question of any activity of a transnational nature carried out by TNCs and other commercial enterprises, the new version of the document proposes to extend the Convention not only to any business activity of these legal entities, regardless of the presence of a foreign element in it (article 1, paragraph 3, paragraph 1), but also to States and regional integration organizations to which States have delegated authority in this area (article 1, paragraphs 2 and 5). It seems that the idea of artificially expanding the subject structure by introducing the term "contractual relations" and an analogue of the institution of "removing the corporate veil" (article 1, paragraph 4, and article 6, paragraph 6) cannot be supported either.

The Russian Federation believes that the scope of application of the Convention should be narrowed to the protection of human rights in the activities of TNCs.

2. Article 1, paragraph 2, of the draft provides a very broad definition of "Human rights violation or abuse", which has a basic meaning for the entire document. This definition is not only unduly broad, but also goes far beyond the legal regulation of such fundamental international human rights treaties as the international Covenant on civil and political rights and the European Convention

for the protection of human rights and fundamental freedoms. We believe that it is impossible in principle to build a regime for a future "legally binding document" on the basis of such a definition.

3. One of the key definitions of the draft Convention remains the definition of the term "victim". In this regard, we consider it important to continue to insist that this definition requires a conceptual revision. A wide range of subjects that can be recognized as victims, as well as the use of streamlined language, when defining the category of "human rights violations" significantly increases the risk of abuse of rights by "victims", including in the context of their protection of their "violated rights". In this case, according to the new version of the draft, the "victims" can address their demands to the state.

There is also little distinction between the status of genuine victims and those who make unsubstantiated claims; the latter are still considered victims ("alleged victims").

It also mentions categories that do not have universally recognized content, such as "environmental rights" and "substantial impairment". In addition, "economic damage" is classified as a form of human rights violation without further explanation. This, in fact, allows any person, in the case of, for example, a loss-making transaction with a TNC, to accuse the latter of violating their rights.

The definition of the term "business" also includes individuals who are not convinced of the validity of this approach and its compliance with the Group's mandate. It is obvious that the human rights consequences of the activities of a TNC, on the one hand, and an individual, on the other, are not comparable in volume. It would be wrong and counterproductive to put them on the equal footing in one document, especially since the mechanisms and effect of legal impact on individuals and legal entities are completely different. In this regard, we consider it necessary to exclude individuals from the above definition.

**Article 3 (Scope)**

The scope of the Convention is too general. In fact, any activity that in any way affects two or more States may fall within the scope of the instrument.

In the context of globalization and the digital economy, this approach makes it possible to apply the Convention to almost any commercial transaction, including those involving the Internet. In our view, this does not meet the provisions of the HRC resolution 2014. There is a broad, unfounded and, ultimately, unfair interpretation of the Working group's mandate.

The scope of rights that will be protected by the provisions of the future Convention is also formulated in a very general way, which does not meet the principle of legal certainty. Thus, according to article 3, paragraph 3, any human rights ("all human rights") fall within the scope of the Convention. The Russian Federation would like to stress that this approach is not justified. It can cause serious problems in the implementation of the Convention, given that the scope and content of the rights provided for in national legislation are not the same in different legal systems. Differences in the definition by States of the category of human rights "when the draft provides for the possibility of referring" victims " to forums in different jurisdictions (article 7), among other things, may lead to situations where a person will be held accountable for actions that do not constitute an offence in their national legal order.

**Article 4 (Rights of Victims)**

In the opinion of the Russian Federation article 4, like a number of other provisions of the draft Convention, essentially creates a special, privileged mechanism for the protection of human rights in the context of the activities of TNCs and other enterprises. This approach goes against the basic principles and the very concept of human rights, leads to the undermining of the integrity of the justice system and discrimination against victims of human rights violations based on the criteria of the subject of such a violation. The Russian Federation like many other states is struggling with attempts to fragment the system of human rights

protection, supports strengthening of its integrity, including through the adoption of appropriate decisions and resolutions, and the unjustified allocation of some privileged groups and categories of rights. Article 4 of the draft Convention actually has a diametrically opposite purpose. We cannot agree with this approach.

As for the specific rights enshrined in it, many of them are already recognized in international law, and States already have obligations to guarantee their compliance regardless of whether TNCs are involved in the process of violations. For example, the right to access to justice and a fair trial has long been enshrined in international law with a set of relevant material and procedural guarantees. In particular, the right to fair, effective and prompt access to justice is derived from the universal Declaration of human rights of 1948, the International Covenant on civil and political rights of 1966, and the European Convention for the protection of human rights and fundamental freedoms of 1950. There are such key requirements in international law as competence of the courts, their independence and impartiality, establishment of courts on the basis of law, equality before the law and court, etc. In these circumstances, we believe that the detailed description of existing rights and procedural guarantees in article 4 is unnecessary.

It should be noted separately that state obligations are often formulated outside of their connection with the transnational activities of legal entities, which in general does not apply to the subject of the future Convention (in particular, article 4, paragraphs 7 to 12).

In addition, article 4 of the draft contains a number of provisions that appear to impose very broad, far-reaching obligations on States and, in some respects, are also discriminatory in nature, which does not comply with the principle of equality of the parties to judicial proceedings. We also note that such norms have no analogue in the existing international legal instruments in the field of human rights with the participation of the Russian Federation. (Article 4, paragraph 9). Another example is subparagraph (e) of paragraph 12, which prohibits "victims" from recovering the costs of the defendant's legal expenses – even if their claims have

been proved to be baseless in court; this risks abuse in the form of unfounded claims ("frivolous claims"), which will nevertheless cause economic damage to businesses and/or the state (which is proposed to impose these costs).

Paragraph 16 of article 4 provides for "inversion of the burden of proof", which is unacceptable because it directly contradicts the presumption of innocence (article 14 of the Criminal procedure code of the Russian Federation) and the obligation to prove the circumstances referred to by the party to the civil procedure (article 56 of the Civil procedure code of the Russian Federation).

We cannot find it justified to fix in the draft an unconditional obligation of the state to provide an effective mechanism for the execution of decisions on compensation for human rights violations through the prompt execution of national and foreign judicial decisions (article 4, paragraph 14).

**Article 5 (Prevention)**

In the Russian Federation's view, States that accept obligations under the Convention should be able to independently determine the forms and mechanisms that will be used at the national level to ensure compliance with these obligations and prevent violations by individuals. Thus, state will be able to take due account of its legal system, financial and administrative capabilities, regional circumstances and legal traditions. The main thing is to provide a universal standard. In this regard, we do not see the need, in principle, to include such detailed provisions on preventive measures in the Convention.

In general it seems that this and many other provisions of the draft Convention, although obviously based on good intentions and theoretical knowledge of human rights, are still somewhat disconnected from the reality and context in which these obligations are proposed to be fulfilled. What can work effectively in the form of recommendation guidelines is not always viable in the form of commitments.

In this regard, we would prefer not to include provisions on preventive measures in the Convention. It seems that it would be more appropriate to formalize them as comments or recommendations on the implementation of the obligations contained in it (following the example of the UNCITRAL practice), which, among other things, would allow these provisions to be adjusted as the practice of implementing the Convention develops.

**Article 6 (Legal Liability)**

On many occasions the Russian Federation stressed that the concept of criminal liability of legal entities is not used in the Russian legal system and the existence of such an obligation would be an obstacle to Russia's accession to an international Treaty. We proceed from this when evaluating article 6 of the draft, the core of which is the idea of bringing legal entities to criminal responsibility.

The Russian Federation insists that the draft Convention should set standards for the protection of human rights in the area under consideration, rather than prescribe specific mechanisms by which the state could guarantee them, including specific types of responsibility. In this context, we would consider it important to exclude, in particular, the ambiguous phrase "criminal liability and its equivalent".

The list of crimes for which the state should establish criminal, civil or administrative responsibility of legal entities (article 6, paragraph 7) also raises questions. First, most of the crimes listed in this paragraph clearly relate to issues of international humanitarian law and not to the protection of human rights in the context of TNCs' business activities. In this regard, we again have to state that the scope of regulation of the future Convention is "blurred".

Secondly, the paragraph is based, among other things, on the conceptual apparatus of the International criminal court with a direct reference to the Rome Statute (Russia withdrew its signature under it). Third, it is not clear in all cases what the authors mean by a particular crime (sub-paragraphs " h " – " k " of this paragraph). The lack of a clear understanding of the content of the listed in the

article crimes creates risks of ambiguous interpretation of the future document, which will cause additional difficulties in its implementation. At the same time, it is important to emphasize that some of the listed crimes are obviously absent in Russian legislation – including "extrajudicial execution", "forced eviction", and "gender-based violence".

Nor can we support article 6, paragraph 9, which explicitly provides for the obligation of States to establish the criminal liability of legal entities for criminal offences as defined in their legislation ("criminal offences as defined by their domestic law"). The establishment of such a general obligation of the state without regard to the protection of human rights in a specific area cannot be the subject of the draft Convention and is not within the mandate of the Working group.

For similar reasons, in our view, article 8, paragraph 1, which establishes the obligation of States to take the necessary legislative and other measures to ensure that separate procedural mechanisms are not applied to the consideration of all violations of international human rights and international humanitarian law that constitute the most serious crimes for the international community as a whole ("all violations of international human rights law and international humanitarian law"), should be finalized. It is not clear what exactly is meant by "the most serious crimes" in this paragraph, or whether this concept covers all "violations of international human rights law", as it should be when reading this provision literally.

The Russian Federation strongly objects to the idea of abolishing the Statute of limitations for a wide range of acts, the vast majority of which clearly do not relate to serious international crimes (such as war crimes or the crime of genocide). This kind of "progressive rule-making" would seriously damage the fundamental principles of criminal justice and the public order of States.

**Article 7 (Adjudicative Jurisprudence)**

In the view of the Russian Federation, the concept of jurisdiction laid down in article 7 is too broad. In the elements proposed in this article, the state is given jurisdiction over violations based on a number of criteria, some of which are traditional (for example, the place of incorporation of the company or the place of the offense), while others, on the contrary, blur these traditional criteria. We are referring to the extension of judicial competence to States that have a "substantial business interest". We believe that there is no common understanding of the term "substantial business interest" in international law. Taking into account the fact that these are mainly large transnational corporations, such a broad definition of their place of incorporation (domicile), in fact, allows arbitrary and unjustified claims to be filed throughout the production and supply chain, to the detriment of the jurisdiction of the only state that is actually the proper place of prosecution. We are not ready to accept such a broad approach.

A serious omission of the article is the lack of provisions on how the issue of conflict of national jurisdictions should be resolved. Such incomplete wording creates serious risks of extraterritorial application of legislation to the detriment of the sovereignty of other states and in violation of the principle of sovereign equality. In these circumstances, we would suggest changing the logic of article 7 – it would be better not to try to maximize the possibilities for applying the jurisdiction of multiple states, but rather to provide a clear and effective mechanism for establishing the appropriate jurisdiction in which the case should be considered. As practice shows, in recent years, individual states have been particularly active in using the possibilities of their extraterritorial legislation for unfair competition and pressure on the national business of developing countries in order to promote the interests of their own companies. It is important that the Convention, by streamlining its jurisdictional provisions, does not create an international legal basis for such arbitrary and unfair interpretation by states of their own jurisdiction, as well as for promoting purely commercial interests under the guise of fighting for human rights. Finally, in the context of comments on the

expediency of excluding individuals as potential human rights violators from the scope of the Convention, we consider it necessary to remove reference to them in paragraph 1 (C) and article 7 (2).

**Article 8 (Statute of Limitations)**

In the view of the Russian Federation, article 8, paragraph 1, which establishes the obligation of States to take the necessary legislative and other measures to ensure that separate procedural mechanisms are not used for the consideration of all violations of international human rights and international humanitarian law that constitute the most serious crimes for the international community as a whole ("all violations of international human rights law and international humanitarian law"), should be finalized. It is not clear what exactly is meant by "the most serious crimes" in this paragraph, or whether this concept covers all "violations of international human rights law", as it should be when reading this provision literally. There should be absolute clarity in such matters, since they relate not only to the rights of victims, but also to those who are being held accountable.

We strongly object to the idea of abolishing the statute of limitations for a wide range of acts, the vast majority of which clearly do not relate to serious international crimes (such as war crimes or the crime of genocide). This kind of "progressive rule-making" would seriously damage the fundamental principles of criminal justice and the public order of States.

**Article 9 (Applicable Law)**

Article 9, paragraph 2. It provides for the right of the victim of a violation to request that matters of substance be considered by the court under the law of the other party. In general, the choice of applicable law is a category of civil law. This usually refers to the right of two parties to a commercial transaction with a foreign element to agree that it will be subject to the law of a particular state. As far as we know, this principle is not applied in criminal proceedings. The national court

considers a criminal case and passes a sentence under the law of its state, if necessary, taking into account the law of the place where the crime was committed.

It is difficult to imagine, that, for example, a judge in Ecuador will pass a sentence on someone based on the Criminal code of the Russian Federation. This possibility is now referred to in article 9, paragraph 2 – it is not limited to civil claims. Even so, it is unclear how this logic relates to the principle of equality of the parties to the dispute before the law and the court.

**Article 10 (Mutual Legal Assistance)**

The Russian Federation proposes to delete article 10, paragraph 10, on the grounds that it is appropriate to regulate recognition and enforcement issues at the international level within the framework of a single document.

The inclusion of this paragraph in a Convention dealing with a different subject may significantly complicate the negotiation process for agreeing on the text of this Convention. Therefore, the inclusion of a list of grounds for refusal to recognize and enforce a foreign judgment in this Convention is not supported. In the event that an international instrument is not adopted, the issues of recognition and enforcement of foreign judgments may be regulated by the national legislation of the state where such recognition is sought.

In addition, we note that the list of grounds for refusal of cooperation is unreasonably short (article 10, paragraph 11), where only "contradiction to the legal system of the Requested Party" appears.

**Article 12 (Consistency with International Law)**

Paragraph 1 of Article 12 does not list all the principles of international law. For example, the principle of peaceful settlement of international disputes, the

principle of equal rights and self-determination of peoples are not mentioned for some reason.

In our view, it is necessary either to list all the principles as defined in the Declaration on principles of international law concerning friendly relations and cooperation among States in accordance with the UN Charter adopted by the General Assembly in 1970, or not to single out some principles at the expense of others at all.

**Article 13 (Institutional Arrangements)**

The Russian Federation notes that the provisions of the draft concerning the institutional mechanism to be established for the implementation of the future Convention (article 13) have not changed. The Committee's functions are related to monitoring the implementation of a future legally binding document, including by reviewing regular reports from States submitted through the UN Secretary-General. In the area of human rights, there are already mechanisms that could potentially overlap with the functions of the bodies envisaged in the draft (for example, UNCTAD, the Committee on economic, social and cultural rights, the UN human rights Committee, etc.).

With regard to article 13, other serious questions arise regarding the establishment of the Committee. First, the order of its formation seems to be excessively restrictive and does not guarantee any representation of the minority. Secondly, the rule that gives the Committee provisions for issuing "normative recommendations on the understanding and implementation" of the Convention is far-reaching, which is a very intrusive interference in the sphere of state prerogatives, including in matters of interpretation and application of international treaties.

The Committee is also expected to be empowered to evaluate reports of states parties on the implementation of the Convention and issue recommendations on the results of the evaluation. Due to the high degree of independence of the

Committee and the proposed (problematic) mechanism for its formation, there is a high probability that the Committee's mechanism can be used for political purposes, including pressure on individual States.All above said is also relevant to the establishment of an International Fund for victims to provide them with legal and financial support (article 13, paragraph 7).

The Russian Federation considers it obviously premature to have a substantive discussion on this section of the draft in the absence of explanations from the authors regarding the mechanism for forming such a Fund and its functioning (the volume and frequency of state contributions; what needs will be allocated funds; who decides on this; what requirements applicants must meet to receive assistance, etc.).

**Articles (14-22)**

With regard to the final provisions of the draft Convention, the discussion of which, the Russian Federation notes that it would be most preferable to fix the procedure for resolving disputes on the interpretation and implementation of the future Convention exclusively through consultations and negotiations.

In addition, we note that further clarification is required on the application of international humanitarian law to interpret the provisions of the future Convention (article 14, paragraph 5).

We are also not convinced that it is appropriate to classify migrants as persons at increased risk of human rights violations (article 14, paragraph 4, of the draft Convention). It seems that the fact of migration (change of country of residence) does not put these people in a particularly vulnerable position from the point of view of human rights.

The voting procedure in the Conference of the parties to the Convention, which gives unnecessary advantages to regional organizations (such as the EU), which are automatically granted all the votes of their member States participating

in the Convention, without restraining mechanisms that would guarantee the rights of other States (article 17, paragraph 3), also raises questions.