

D. Article 1 (Definitions)

Changes from the Zero Draft in Article 1

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Article 1. Definitions [revisions from Zero Draft in **BOLD**]

1. “victims” shall mean any person **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 or non-State actor, 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 international 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).

Comment

Article 1 now provides a definition of “victims”, “human rights violations of abuse”, “business activities”, “contractual relationship”, and “regional international organizations”. In the Zero Draft, definitions were set by Article 4. This article was amended, and saw the addition of a paragraph providing a different definition of ‘business activities’, and one defining ‘contractual relationships’. The fifth paragraph of Article 1 was moved over from Article 15 of the Zero Draft. During the Fourth Sessions of the OEIGWG, various suggestions on the amendment of what is now article 1 were made. None of them seems to have been adopted during the revision of this article.

The definition of victims adopted by the LBI was carried over from the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law with the following changes The Zero Draft bestowed the status of ‘victim’ on persons harmed by acts or omissions in the context of transnational business activities, on their family, their dependants, and on those who assisted them. The definition of victims was broadened, because according to the Basic Principles it included only those affected by “gross violations of international human rights law”, or “serious violations of international law”. A simple allegation of having suffered harm was sufficient to acquire the status of ‘victim’, while under the Basic Principles this status could be acquired only if an actual harm had occurred.

The Revised Draft has instead tied the status of victims to the suffering of human rights violations and abuses, or to allegations about such a suffering. The harm that can be inflicted is no longer a generic “harm” as in the Zero Draft. The Revised Draft has defined harm as “human rights violation of abuse”. This is a broad concept, including any harm arising from commissive or omissive acts in the context of business activities. Before, the subjects who could cause harm were not specified. Harm could just occur “in the context of business activities of a transnational character”. Now, the agents of harm have been defined as the State, business enterprises, and non-State actors.

The definition of “business activities” is no longer limited to the for-profit activities of multinational corporations. It now includes all types of economic activities, such as — it seems — not for profit activities, and activities of enterprises operating exclusively on the domestic market. This change has allowed to overcome the restrictions initially set by the footnote in Resolution 26/9 [2].

Paragraph 4 of Article 1 introduces the notion of “contractual relationship”. A definition of “contractual relationship” was absent from the Zero Draft, which mentioned such a relationship in passing only in Article 9.2(f). This definition is important, because it allows to hold each member in a supply chain responsible for the harm it has caused, or for allegations of such a harm.

The definition of "regional international organizations" has been carried over from the Zero Draft without changes.

The provisional result is an instrument with the ambition to provide remedies to all violations of human rights committed by transnational but also by domestic enterprises, by the State, and by non-State actors throughout a supply chain. This instrument is, as its name says, "legally binding". The legally binding nature of this document depends not on the words used for its name (*Legally Binding Instrument...*), but on whether the document will obtain the minimum number of ratifications required to enter into force. In other words, despite all good intentions, the LBI still maintains the "voluntaristic" approach of the UNGPs. This is the first and most important constraint within which the LBI will have to operate in a future. This constraint depends on the very decision to regulate businesses through hard law, and to use national states and regional organizations as a proxy (or a substitute) for self-regulation by enterprises. Given this decision, other constraints may be posed by the reservations States will inevitably express, given how the LBI attempts to regulate also small and medium sized domestic enterprises, and their contractual relationships with MNCs.

Then, there is the question of states' capacity to effectively regulate private businesses. Some of the states involved in negotiations may have such a capacity, due to their adoption of sophisticated data- and algorithm-driven modes of governance. It is however doubtful that such a capacity exists throughout the Global South, or that it can be built from scratch within a reasonable time-span through international development cooperation.

A last point concerns not only the state's capacity to regulate non-state actors, but most importantly the point of whether the state ought to regulate autonomous actors broadly understood. This is an important contradiction in the LBI: do actors who are not the state include domestic and global civil society organizations, religious groups, aid agencies, popular protest movements, and independent media organizations? If the LBI admits of the possibility for the state to regulate these non-state actors, then Article 1 needs to be further amended to be fully coherent with existing resolutions on civil society space.

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Inputs not included in the Revised Draft:

1. Argentina [definition of victims should be narrower]
2. David Bilchitz, University of Johannesburg [definition of business activity; addition of a new provision titled General Principles of International Law]
3. China [definition of business activities; definition of victims should be more precise than the one provided by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law]
4. Olivier De Schutter, Professor, University of Louvain [definition of business activity]
5. FIAN [definition of victims; definition of business activity]

6. FIDH FIAN [definition of business activity]
7. Friends of the Earth International [definition of business activity]
8. India [definition of victims, and environmental rights; definition of business activity]
9. International Organization of Employers [definition of business activity]
10. Mexico [definition of victims – allegations of harm]
11. Peru [environmental rights]
12. South Africa [definition of victims; definition of business activity]
13. South Center [definition of business activity]

Inputs included in the Revised Draft:

none

Inputs not available on the OHCHR website:

Written comments by **Sandra Ratjen, Franciscans International** and **Kinda Mohamadi, South Centre**

[1] V. Victims of gross violations of international human rights law and serious violations of international humanitarian law

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. 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.

9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

[2] “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.