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### **Submission**

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## **RESPONSE TO THE CONSULTATION OF DRAFT LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES**

### **Introduction**

Institute for Policy Research and Advocacy (ELSAM) thanks to the Open-Ended Intergovernmental Working Group (IGWG) for this opportunity to comment on the Draft of a legally binding instrument on business and human rights.

ELSAM is a human rights civil society organization, based in Jakarta, Indonesia established since August 1993. Our objectives are to actively participate in the efforts to develop, promote and protect civil and political rights and other human rights, as mandated by the 1945 Constitution and Universal Declaration of Human Rights (UDHR).

The development issues of business and human rights has always been one of our organization main concern. We have substantial and long experience working to research and advocate the importance of applying human rights principle in business activities, either in the national or international level. Hence, we are very keen to contribute to the formulation of this legally binding instrument by providing a response to the current draft.

### **Aligning the definition of “victims” with existing international law instrument**

The current draft of the legally binding instrument recognized two important notions essential in a definition of victims. Firstly, it introduces the notion of a direct and indirect victim where the scope does not limit to only individuals who are personally suffered from violations, yet it also covers the immediate family or dependents of the direct victim and individuals who are injured trying to intervene on behalf of a victim.<sup>1</sup> Secondly, it includes the notion of ‘collective victim’ hence the group of individuals, community, organization or entities whose human rights are

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<sup>1</sup> Mahmoud Cherif Bassiouni, "International Recognition of Victims' Rights", *Human Rights Law Review*, Volume 6, Issue 2, 2006, p. 256 - 257.

infringed will be considered as a subject of a victim.<sup>2</sup> These two essential elements are needed to construct a proper definition, it is linear with most of existing principle and definition of victims recognized under international law which has been widely used as a legitimate reference either in an international court judgment or domestic court judgment and legislation.<sup>3</sup>

Nonetheless, unlike another international law instrument, the definition of victim in article 4(1) of the draft does not mention the underlying legal basis to measure harms or violation it is intended, therefore it is unclear which standards would be used to assess the acts and omissions. Shortly, it defines victims as “persons who individually or collectively alleged to have suffered harm including substantial impairment of their human rights through acts or omissions in the context of business activities of a transnational character”. Conversely, the UN Principles on Reparations in 2005 explicitly mention in the definition of victims that “the acts or omissions constitute gross violations of international human rights law or serious violations of international humanitarian law”. Similarly, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 also further elaborates that “the acts or omissions are in violation of criminal laws operative within the Member States including those laws proscribing criminal abuse of power”.

From two aforementioned voluntary legal instrument, it can be easily perceived that elements of act or omission under the definition of a victim shall refer to a clear and specific legal basis to measure it. For instance, in the case above, it clearly points out the international human rights law, international humanitarian law, and criminal law as a basis to assess whether or not an act or omission can constitute a violation of the law and human rights as it is crucial to avert a vague and abstract definition. Whereas in the context of this draft of a legally binding instrument, the content in article 3 with regard to the scope of a treaty is essentially ideal to complete the current loopholes in the definition. By putting it together, the definition of ‘victims’ can be revised to sound the following “the acts or omissions recognized under this treaty occur in the context of any business activities of a transnational character which constitutes a violation of international human rights law and rights recognized under domestic law”. Such additional explanation is expected to ease the interpretation process by the court which will initially decide the qualification of persons as a victim by analyzing the fulfillment of each element in a definition. Through such clear provision, the court is supposedly able to properly decide if someone is entitled to reparation due to the violation of human rights she/he had experienced.<sup>4</sup>

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<sup>2</sup> *Ibid*, p. 257.

<sup>3</sup> Cordula Droege, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners’ Guide*, Geneva: International Commission of Jurists, 2006, p. 34 – 40; United Nations, “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”, 1985; United Nations, “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 (UN Principles on Reparations)”, 2005.

<sup>4</sup> Cordula Droege, *Ibid*, p. 32.

## Improve the definitions of “transnational character”

Olivier De Schutter in his comment towards the zero drafts in October 2018 urges that it is appropriate to base the scope of application of the future instrument on the transnational nature of the activity rather than on the nature of the corporation itself.<sup>5</sup> The latter will lead to confusion to distinguish between transnational corporations (TNCs) and other business enterprises (OBEs), a rigid dichotomy that could end up being counterproductive when facing human rights issues. The terms of “transnational character” illustrates that the decisive element is contingent upon to what extent the corporation deploys its economic activities across different national jurisdictions, regardless of their TNCs or OBEs characteristics.<sup>6</sup>

However, he further elaborates that the definition of “transnational character” in article 4(2) is vague, it can be too broad as its reliability on impacts or being too narrow since it does not clarify whether the activities concerned should be those committed by the corporation itself or could be those of a subsidiary, a franchise, a business partner or a distinct company in which the company concerned has an investment or contractual link.<sup>7</sup> In response to that problem, our organization thoroughly urge to revise the current definition. The proposed changes by Olivier De Schutter is worth to be regarded as an ideal reference. He proposed several additional elements by rewording the business activities of a transnational character as an activities that a corporation conducts in another jurisdiction than where it is domiciled, the activities should be direct; through branches, subsidiaries, or affiliates; or through business partners with which the corporation has a continuous business relationship, thus affecting the human rights of individuals or groups located outside the jurisdiction where the corporation is domiciled.<sup>8</sup>

This proposal addresses the complexities of global supply chains in transnational business by referring to activities conducted not just by a company in general but also by its branches, subsidiaries, affiliates or even continuous business partners. Such detailed provision is vital as without it a company might find loopholes and justification that avoid their liability under this treaty. However, to preclude any obscurities in using Schutter’s proposal, it should be further discussed what are the limitations and types of cooperation that can be regarded as a “continuous business relationship”.

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<sup>5</sup> Olivier De Schutter, “The “Zero Draft” for a legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises: A Comment”, Catholic University of Louvain, 2018, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>, accessed on 25<sup>th</sup> February 2019.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

## **Accommodate the liability of state-owned enterprises (SOEs) in transnational business activities**

The scope of this convention in article 3 underlines that it applies to human rights violations in the context of any business activities of a transnational character. In previous comments towards the zero draft in 2018, this provision was criticized by few expert and organizations due to its unclear stance as to whether the transnational business conducted by SOEs can be covered under this treaty.

There has been a fruitful discourse in international level to hold SOEs accountable for their transnational business misconduct. For instance, UN Working Group on Business and Human Rights' report to the UN Human Rights Council in June 2016 expressed their concern about the lack of attention to the human rights impacts and responsibilities of SOEs and the duty of States to protect against abuses by these state enterprises.<sup>9</sup> Accordingly, it was suggested to set clear expectation and human rights obligation that SOEs ought to comply.<sup>10</sup> Taking this issue into account, it becomes critical to accommodate the liability of SOEs in the future treaty. We suggest modifying the scope in article 3 by emphasizing that this convention applies to all corporations, irrespective of their control, ownership, size, and mode of creation. By that, the liability of SOEs will eventually be recognized.

Furthermore, we strongly suggest adding an article to deal with SOEs specialized characteristics. The SOEs have intrinsic characters which differentiate them from other corporation in general. Firstly, through their strong connection to the State, SOEs possess certain advantages, such as avoidance of takeover and bankruptcy.<sup>11</sup> This special position, in fact, requires higher supervision and control to keep SOEs activities in line with human rights standards.<sup>12</sup>

Secondly, unlike another corporation which merely focuses on profit-oriented business, SOEs work in between public and private interests. Besides operating business for profit, they should perform the governmental function to provide public services usually by taking control of trade in vital areas, such as electricity, water, healthcare, and transportation.<sup>13</sup> It renders states to have a dual character. At one point, state serves as the "owner" of the SOEs (an object of law like other owners) who put concern to gain profit, while at another point states simultaneously act as a

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<sup>9</sup> Larry Catá Backer, "The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy", V ANDERBILT JOURNAL OF TRANSNATIONAL LAW, Volume 50, Number 4, 2017, p. 844; OHCHR, "Summary of the UN Working Group on Business and Human Rights", [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE\\_report-HRC32.pdf](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session32/Documents/ExSummary-WGBHR-SOE_report-HRC32.pdf), accessed on 27<sup>th</sup> February.

<sup>10</sup> OHCHR, *Ibid*.

<sup>11</sup> Camilla Wee, "Regulating the Human Rights Impact of State-owned Enterprises: Tendencies of Corporate Accountability and State Responsibility", International Commission of Jurists, 2008, p. 16.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*, p. 13.

regulator (the generator of the laws that are applied to SOEs) which needs to ensure that it fulfills public needs.<sup>14</sup> According to Larry Catá Backer, that fluidity is even more complex in the transnational sphere because SOEs are usually characterized as instrumentalities of foreign states to which exceptions to rules of sovereign immunity may apply.<sup>15</sup> Besides that, they might have certain leverage to project their own laws and policies in exercising SOEs leadership, other issues that recently being encountered is the duties of states as investors of transnational business.<sup>16</sup>

Due to its complexities, it becomes imperative to address SOEs characters in the future treaty. One vital issue needs to be determined is the liability of human rights abuses caused by SOEs. To some extents, the state may hold responsible and attributable to their SOEs misconduct, it means the obligation to provide remedies will rely on them.<sup>17</sup> On the other hand, it is also possible to exclude any states responsibilities and perceived SOEs as single enterprise who possess their own legal personality different from the state, as it should be understood there are many substantial different of types and degree of state involvement towards SOEs in each country.<sup>18</sup> According to the International Commission of Jurists, the decision as to what extent states responsibility apply in this matters must be determined by the degree of control and direction the state has towards SOEs.<sup>19</sup> To enlighten the making of this provision, we suggest taking reference from the judgment of various international human rights tribunals and the International Law Commission Commentary on Responsibility of States for Internationally Wrongful Acts.<sup>20</sup>

### **Rights of victims: address gender-based corporate abuse and establish precautionary measures**

Business with a transnational character often places women in a more prone condition compare to man. Research suggests that women suffered differentiated and disproportionate gender-specific abuse, including but not limited to rape, discriminatory low-wage, unsafe working condition, sexual harassment, sexual trafficking, and others physical or mental abuses specifically attacked women's weaknesses on the ground of socially constructed gender biases.<sup>21</sup>

Article 8 of the draft legally binding instrument pertaining rights of victims is inadequate in accommodating the aforesaid issue. As a reference, the draft treaty can reflect on several key

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<sup>14</sup> Larry Catá Backer, *Op.Cit*, p. 857.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Camilla Wee, *Op.Cit*, p. 20.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid*, p. 21-30.

<sup>20</sup> *Ibid.*

<sup>21</sup> Edna Eerz, "Women as Victims and Survivors in the Context of Transnational Human Trafficking for Commercial Sex Exploitation", *Revue Internationale de Droit Pénal*, Volume 81, 2010, p. 554; Immamuddin Khoso (et.al), "Problems and Challenges Faced by the Rural Women: A Case Study of Balochistan", *Asian Culture and History*, Volume 3, Number 1, 2011, p. 161;

points in Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Firstly, establish legal measures, including penal sanctions, civil remedies, and compensation to protect women against all kinds of human rights abuses in the business sector.<sup>22</sup> Secondly, provide assistance to victims according to the nature of the harm inflicted and gender-sensitive approach.<sup>23</sup> For instance, women's victim of corporate abuse may need medical treatment, physiological assistance or another form of specialized treatment. Hence, it becomes critical to acknowledge the distinctive characters of gender-based abuse in the future legally binding instrument.<sup>24</sup>

Additionally, we urge the precautionary measures to be included as part of the article under the subject of "Right of Victims". The precautionary measure is a mechanism to ensure a rapid response by the court in serious and urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons.<sup>25</sup> It is "precautionary" in the sense of preserving a legal situation, or the subject of a petition and "protective" in the sense of preserving the exercise of human rights.<sup>26</sup> In the context of transnational business activity, often times it gives irreparable damages to the rights of individuals, groups, and environments. Under certain circumstances, there is a tangible urgency to prevent such damage which can be accommodated by the precautionary measures.

An ideal model of mechanism can be acquired by looking into the positive practices in international human rights bodies that issue precautionary measures such as the Committee against Torture, Inter-American Commission on Human Rights, European Court on Human Right and International Court of Justice.<sup>27</sup> Typically, the measure can be requested by parties including victims; the court will examine the gravity of the situations and the qualifications of the alleged victim to be potential beneficiaries of the measures, and the mechanism is available during the entire course of the court proceedings.<sup>28</sup> Providing precautionary measure in the future treaty will facilitate access to justice and create proper remedies for victims.

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<sup>22</sup> OHCHR & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Geneva: United Nations, 2003, p. 772.

<sup>23</sup> *Ibid*, p. 796.

<sup>24</sup> *Ibid*.

<sup>25</sup> OAS, "Consultation on Module II: Precautionary Measures", [http://www.oas.org/en/iachr/consultation/2\\_measures.asp](http://www.oas.org/en/iachr/consultation/2_measures.asp), accessed on 26<sup>th</sup> February 2019.

<sup>26</sup> *Ibid*.

<sup>27</sup> Center for Justice and International Law & International Human Rights Law Clinic, University of Berkeley, "Comparative Analysis of the Practice of Precautionary Measures Among International Human Rights Bodies", 2012, p.1, [https://www.law.berkeley.edu/files/IHRLC/Precautionary\\_Measures\\_Research\\_Paper\\_%28FINAL%29\\_121210.pdf](https://www.law.berkeley.edu/files/IHRLC/Precautionary_Measures_Research_Paper_%28FINAL%29_121210.pdf), accessed on 25<sup>th</sup> February 2019.

<sup>28</sup> *Ibid*, p. 9; *Loc.Cit*.

## **Strengthen Preventive Mechanism**

Article 9 of the current draft obliges business activities of transnational character to undertake due diligence obligations. This paper will highlight several issues and encourage a stronger preventive mechanism.

### **1) Terminology choice: Human Rights Due Diligence**

This article uses the term of “due diligence”, apparently the use of this terminology is problematic as Robert McCorquodale said it was a business term conducted by business entities to identify and manage its own commercial risks.<sup>29</sup> For the purpose of this treaty, the term “human rights due diligence” (HRDD) introduced by the United Nations Guiding Principles on Business and Human Rights (UNGPs) is more desirable. In contrast with the meaning of due diligence, HRDD stresses on the actual and potential human rights impacts that business enterprise may cause or contribute through its activities.<sup>30</sup> That being the case, it is reasonable to apply HRDD terminology for this legally binding instrument which relies on international human rights law as a central consideration.

### **2) Potential risks in excluding responsibility of small and medium-sized businesses (SMEs)**

It is stipulated under article 9(5) that states parties may exempt (SMEs) undertakings from the purview of selected preventive obligations. It has been clearly affirmed by UNGPs that some SMEs can have severe human rights impacts, which will require corresponding measures regardless of their size.<sup>31</sup> This severity of impacts can be judged by their scale, scope and irremediable character.<sup>32</sup> Under those circumstances, giving states an authority to exclude SMEs might render to some risks. First, it undermines the importance of preventing damages from SMEs business operation which lead to malicious incidents affecting human rights and environments. Second, it widely opens possibilities for transnational corporations to build a series of SMEs in order to avoid obligation under this treaty. Thus, the future treaty must consider the existence of this specific article and looking forward a suitable solution to cater two main issues, which are the difficult character of SMEs in conducting HRDD and a strategy to maintain its compliance with human rights standards.

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<sup>29</sup> Robert McCorquodale, “Prevention in the Zero Draft on a Business and Human Rights Treaty”, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>, accessed on 26<sup>th</sup> February 2019.

<sup>30</sup> Kendyl Salcito & Mark Wielga, “What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?”, *Business and Human Rights Journal*, Volume 3, Issue 1, 2018, p. 114.

<sup>31</sup> OHCHR, “Guiding Principles on Business and Human Rights”, United Nations, 2011, Guiding Principle 14, p. 15.

<sup>32</sup> *Ibid.*

### **3) Adding indispensable procedural rights**

There are at least two procedural rights which are important to be included as part of a preventive mechanism.

First, the right to access information shall be listed as a procedural right to prevent the breach of certain human rights in business operation. It is noted that article 8(4) on the Rights of Victims has granted rights to access relevant information to the pursuit of remedies. Alongside the importance of certain information as legal proof in defending a claim, it should be further understood that the rights to access information are equally critical to prevent the occurrences of harm at the very first place.

Second, to include the Free Prior and Informed Consent (FPIC) particularly to respect and protect the rights of the communities and Indigenous People. As what has been mandated by United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the application of FPIC will oblige an objective and participative consultation with the communities prior to the establishment of any activities that will affect their lives and environment.<sup>33</sup> In the context of this treaty, a proposed business activity shall obtain voluntarily communities consent. In addition, the communities must fully knowledge the impact and gravity of the business before deciding their approval or disapproval.

### **4) Integrate gender impact assessments in HRDD**

Gender impact assessment defines as an ex-ante evaluation, analysis or assessment of a policy or program that makes it possible to identify the likelihood of a given decision having negative consequences for the state of equality between women and men.<sup>34</sup> This assessment also becoming familiar to assess business conduct, for instance, it is recognized in the new OECD Due Diligence Guidance for Responsible Business Conduct.<sup>35</sup> As what has been mentioned previously, using a gender-sensitive lens, we can examine the distinct impact of corporate activities to men and women, thereby this type of assessment would be beneficial to prevent any human rights violation on the grounds of gender and disproportionate impact of the business operation to a vulnerable group.

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<sup>33</sup> FAO, "Free, Prior and Informed Consent", <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>, accessed on 27th February 2019.

<sup>34</sup> European Institute for Gender Equality, *Gender Impact Assessment: Gender Mainstreaming Toolkit*, Luxembourg: European Union, 2016, p. 8.

<sup>35</sup> OECD, "OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector", [https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector\\_9789264252462-en](https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en), accessed on 27<sup>th</sup> February 2019.



## **Solving jurisdictional matters**

We encounter at least two issues needed to be addressed in article 5 in regards to jurisdiction. First, the article determines the domicile of association of natural or legal persons as a basis for jurisdiction. It will create confusion as a transnational activity can consist of a certain corporation with separate legal entities. Therefore, without hampering the spirit for a victim to access justice and seek reparation, the future treaty shall reconstruct the wording and detailing the information of this particular article to avoid any equivocal narratives. Second, article 5 is silent in terms of what type of jurisdiction it is intended to address. It possibly only stressed on civil jurisdiction, however, to align it with the content about legal liability under article 10, we urge article 5 to explicitly differentiate and accommodate the jurisdictional matters for both civil and criminal liability.

## **A dedicated provision on Human Rights Defenders (HRDs)**

A research conducted by ELSAM on the condition of Environmental Human Rights Defenders (EHRD) in Indonesia throughout 2018 reported a significant amount of violation towards EHRD, specifically 188 individuals and 586 groups are considered to be a victim of numerous violation conducted either by government officials or cooperation, including those who seemingly involves in business project with transnational character.<sup>36</sup> Globally, the World Report on the Situation of Human Rights Defenders in 2018 published by United Nations confirms that HRDs violations are a severe issue in most countries.<sup>37</sup> Most often, they become a strong opponent to lucrative business which hampers people's fundamental rights and environment.<sup>38</sup> This phenomenon clearly demonstrates the nexus between impairing business operations and the breach of HRD's human rights.

Considering the issue has become prevalent over the years, the making of a legally binding treaty on transnational business activity can be an appropriate momentum to push a positive agenda in this matter. Accordingly, a dedicated provision on Human Rights Defenders will be highly valuable to address current challenges in protecting HRDs, peculiarly due to the lack of domestic regulation taking it into account. A specific provision shall cover a range of issues related to HRDs, including but not limited to; a) recognize a proper definition of HRDs under international law (which can be further discussed later on); b) grant HRDs right to access relevant information; c)

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<sup>36</sup> Muh. Azka Fahriza, *Dalam Bayang-Bayang Kekerasan Negara dan Perusahaan: Laporan Situasi Pembela Hak Asasi Manusia atas Lingkungan Periode November 2017- Juli 2018*, Jakarta: ELSAM, 2019, p. 18; Muh. Azka Fahriza, *Menanti Perlindungan yang Tak Kunjung Datang: Laporan Situasi dan Pelanggaran Terhadap Pembela HAM atas Lingkungan di Indonesia (Agustus 2018-Desember 2018)*, Jakarta: ELSAM, 2019, p. 11-12.

<sup>37</sup> United Nations Special Rapporteur on the Situation of Human Rights Defenders, "World Report on The Situation of Human Rights Defenders", 2018, <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/UNSR%20HRDs-%20World%20report%202018.pdf>, accessed on 25<sup>th</sup> February 2019.

<sup>38</sup> *Ibid.*

build a protective and preventive measures against unlawful arrest and systematic attacks on HRDs by a state or non-state actor; d) reinforce a fair litigation and non-litigation dispute mechanisms to investigate, prosecute and punish attacks against HRDs and provide accessible remedies; e) gender and culturally sensitive perspective shall be taken into consideration in providing redress, hence the treaty must acknowledge the distinct challenges facing by women HRDs and ensure special protection pertaining to such characteristics can be provided. Also, it should be highly considered to mention the importance of HRD's protection in the treaty's preamble.

### **Conclusion**

In general, the substance of the draft legally binding instrument has performed many positives points to enhance the liability of corporation in transnational business activities and prevent undesirable human rights violations to happen. However, as we mention above, there are also significant improvements needed to be made. Our organization is looking forward to the positive progress of this draft and would willingly assist in assuring the outcome of the treaty is acceptable and fully adhere to the current international human rights law.