



Statement by His Excellency Archbishop Ivan Jurkovič
Permanent Observer of the Holy See to the UN and Other International Organizations in Geneva
at the Open-ended Intergovernmental Working Group on Transnational Corporations
and Other Business Enterprises with Respect to Human Rights
Legal liability – Item 5
25th October 2017

Mr. Chair,

“The twenty-first century, while maintaining systems of governance inherited from the past, is witnessing a weakening of the power of nation states, chiefly because the economic and financial sector, being transnational, tend to prevail over the political”¹. Sometimes, as we will see, these economic entities “exercise more power than States themselves”².

The financial crisis has demonstrated the difficulty of relying on business to voluntarily self-regulate. Economic theory has explained why we cannot rely on the pursuit of self-interest, and the experiences of recent years have reinforced that conclusion. In particular, weak and poor States suffer the consequences of an asymmetry in the international system whereby the rights of business companies are backed up by hard laws and strong enforcement mechanisms, while their obligations are backed up only by soft laws, like voluntary guidelines. Therefore, “there are numerous people, especially immigrants, who, compelled to work ‘under the table’, lack the most basic juridical and economic guarantees.”³ Another concern regards the ability of international corporations partially to escape territoriality and carve for themselves an “in-between” existence that evades national legislation. This allows them to navigate national legislations, take advantage of regulatory arbitrage and choose the jurisdictions that may offer the best return in terms of profit. But profit cannot be the only rational goal of business activity. When human rights are neglected, a systemic exclusion of the vulnerable comes about. What is needed is stronger norms, and stronger laws and regulations to ensure that those who do not behave in ways that are consistent with these norms are held accountable.

In response to this challenge, it is important to recognize that there are good reasons why international law might devote specific attention to transnational corporations and in particular their accountability for human rights abuses. An international legal instrument has the potential to make corporations criminally, civilly, and administratively liable, while guaranteeing the protection of human rights, providing access to judicial remedy, and adding an important tool for accountability. The protection

¹ Pope Francis, Encyclical Letter *Laudato si*, n. 175.

² Pope Francis, Encyclical Letter *Laudato si*, n. 196.

³ Pope Francis, Address to Participants in the World Congress of Accountants. Rome, 14 November 2014.

of human rights is traditionally understood as something within the realm of public law, including constitutional, administrative and criminal law. In this sense, it could be useful to assign to that branch of domestic law a predominant role in upholding human rights *vis-à-vis* potential corporate abuses.

Also of critical importance is the liability of financial institutions incentivizing, supporting, or financing projects that jeopardize the enjoyment of human rights. The international legal instrument must also take these into consideration and address them. Financial institutions must be held accountable when the projects they promote replicate the devastating effects of corporate violations of human rights.

Article 19 of the WHO Framework Convention on Tobacco Controls provides a helpful precedent asking Parties to “consider taking legislative action or promoting their existing laws, to deal with criminal and civil liability, including compensation where appropriate.” It calls for international cooperation between host and home courts, and exchange of information. A treaty to hold transnational corporations accountable for their violations of human rights should include a clear provision, such as this one, that enshrines this obligation of the State.

The Holy See is aware that there are no easy solutions to address the multifaceted challenges of business and human rights, or to provide the effective remedy and accountability that victims legitimately seek as a matter of urgency. We need international cross-border enforcement, including broader and strengthened laws, giving broad legal rights to bring actions that can hold companies that violate human rights accountable in their home countries. Soft law—the establishment of norms of the kind reflected in the Guiding Principles on Business and Human Rights—are critical; but they will not suffice. We need to move towards a binding international agreement enshrining these norms.

Mr. Chair,

Legal liability for business enterprises in domestic law typically includes responsibility under criminal, civil and administrative law. Business liability is thus a combination of public and private law substantive and procedural elements. However, the reality shows that those affected by business abuses, especially in certain jurisdictions, tend also to use private law, which needs to be transformed to respond better to those challenges. Practice across jurisdictions is thus divergent, as noted by, among others, the report of OHCHR on Improving Accountability and Access to a Remedy. In this sense, it could be critical that the offences need to be defined with sufficient clarity in the treaty and always on condition that criminal liability of the legal entity does not exclude the personal individual criminal responsibility of company directors or managers.

States Parties to the agreement must adopt effective legislative and administrative measures, in accordance with their national legal systems and principles, to establish the legal liability of business enterprises for business conduct that result in human rights abuses at home and abroad. Such responsibility should, as appropriate, be criminal, civil or administrative.

Thank you, Mr. Chair.