

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

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23 – 27 October 2017

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## I. Introduction

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014, and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. In the resolution, the Council decided that the Chairperson-Rapporteur should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group, taking into consideration the discussions held at its first two sessions.<sup>1</sup>

2. The third session, which took place from 23 to 27 October 2017, opened with a video statement by the United Nations High Commissioner for Human Rights. He congratulated the former Chair-Rapporteur of the working group for successfully steering the first two sessions in a manner that laid a fertile ground for the preparation of the document of elements and recognized that the treaty process enters a new phase to discuss such document. He noted that the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>2</sup> was an important step towards extending the human rights framework to corporate actors. He stated that there was no inherent dichotomy between promoting the UNGPs and drafting new standards at the national, regional, or international level aimed at protecting rights and enhancing accountability and remedy for victims of corporate related human rights abuses. He reiterated his commitment and full support to the working group, and expressed his hope that the recommendations from the Accountability and Remedy Project, conducted by the Office of the UN High Commissioner for Human Rights (OHCHR), could provide useful contributions to the discussion during the third session.

3. The High Commissioner's remarks were followed by a statement of the President of the Human Rights Council, who emphasised the role that human rights must have in relation to business in a globalized world. He noted that seeking consensus and engaging in constructive cooperation and dialogue has been the spirit of the first two sessions and will be key to fulfilling the mandate provided by resolution 26/9. The President further recalled the close link between the 2030 Agenda and the development of human rights which justifies its use as a starting point to form the objectives of the working group process.

4. The Director of the Thematic Engagement, Special Procedures and Right to Development Division of the OHCHR referred to the recommendations of the OHCHR Accountability and Remedy Project, aimed at enhancing the effectiveness of domestic judicial systems in ensuring accountability and access to remedy, including in cross-border cases, which could inform the working group process. She expressed the willingness of the OHCHR to provide further substantial or technical advice to the working group as appropriate.

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<sup>1</sup> See A/HRC/31/50; A/HRC/34/47.

<sup>2</sup> A/HRC/RES/17/4.

## **II. Organization of the session**

### **A. Election of the Chair-Rapporteur**

5. The working group elected Guillaume Long, Permanent Representative of Ecuador, as Chair-Rapporteur by acclamation following his nomination by the delegation of Jamaica on behalf of the Group of Latin American and Caribbean States.

### **B. Attendance**

6. The list of participants and the list of panellists and moderators are contained in annexes I and II, respectively.

### **C. Documentation**

7. The working group had before it the following documents:

- (a) Human Rights Council resolution 26/9;
- (b) The provisional agenda of the working group (A/HRC/WG.16/2/1);
- (c) Other documents, notably a document setting out elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights (hereinafter “Elements Document”), a programme of work, and contributions from States and other relevant stakeholders, made available to the working group through the dedicated website.<sup>3</sup>

### **D. Adoption of the agenda and programme of work**

8. In his opening statement, the Chair-Rapporteur explained how the third session will involve substantive negotiations based on the Elements Document that was distributed in advance of the session. The elements set out in the document were based on deliberations during the first two sessions as well as over 200 meetings held since 2014 involving multiple stakeholders. At the core of the elements is the protection of victims of business-related human rights abuse, the elimination of impunity, and access to justice. He invited everyone to participate actively, including civil society, trade unions, national human rights institutions (NHRIs), and victims organizations, as their role is crucial to the success of the process. He emphasized that future generations should have the right to live in a world where human rights take primacy over capital and money.

9. The Chair-Rapporteur presented the draft programme of work and invited comments. A delegation representing a group of States expressed its regret that consultations on the draft programme of work did not occur until 18 October, providing little time for negotiations on such an important document. This delegation recalled that, despite the short notice, all attendees had worked hard to find a compromise and praised the Permanent Mission of Ecuador for the

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<sup>3</sup> <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

compromise tentatively reached on 18 October whereby there would be two additional elements included in the programme of work. First, a debate reflecting on the implementation of the UN Guiding Principles on Business and Human Rights would be included at the start of the session. Second, a footnote that was included in the second session programme of work would be reproduced, stating “this Program of Work does not limit the discussions of this Intergovernmental Working Group, which can include TNCs as well as all other business enterprises.” While this delegation representing a group of States acknowledged that the first element of the compromise was mostly incorporated (albeit without any panellists to lead the discussion), it was concerned that the footnote was excluded apparently due to the objection of one State. It stressed that this was not a procedural issue, but a substantive one with wide implications, as the inclusion of the footnote would ensure that the working group could also consider abuses in activities related to domestic enterprises companies. Therefore, it requested an amendment to the programme of work to include the footnote.

10. Immediately after, one delegation intervened to express their support for the programme of work as proposed by the Chair-Rapporteur, and was supported by others requesting the flexibility to adopt it to start negotiations. Several other delegations supported the proposal the delegation representing a group of States and regretted the lack of consensus with regard to the programme of work.

11. The delegations that rejected the footnote to the draft programme of work broadening the scope to all enterprises stressed that the mandate in resolution 26/9 – limited to transnational corporations - is clear and that there was no need to advance substance or prejudice content to be discussed and negotiated. They considered that the footnote to the programme of work would improperly attempt to amend a resolution of the Human Rights Council. Other delegations saw the merit to include the footnote to broaden the scope of the discussion, and in line with the Program of Work adopted for the second session.

12. The delegation representing a group of States recalled that resolution 26/9 restricts the scope and, therefore, prejudices the outcome of the negotiations. While respecting resolution 26/9, the same delegation recalled that the Program of Work was a working modality to allow for an inclusive process. It found it puzzling that one could object to the proposal to broaden the scope of discussions, as it sent a message to civil society, human rights defenders, and victims that abuses by domestic enterprises should not be treated with equal rigor. Additionally, it reaffirmed that this was a compromise proposal that nobody objected to during the consultations except for one State, that the footnote was part of the Program of Work for the second session. The same delegation stated that such unfortunate situation, if the Chairmanship can not build on past agreements, raised serious questions as to whether any agreement on basic principles, let alone language, can be forged in the future.

[PARA. 12 SHOULD BE MOVED AFTER PARA. 13]

13. Another delegation did not agree that any compromise was reached at the 18 October meeting since many delegations had not been present and recalled that it is not just one State against the compromise. Additionally, the delegation found it peculiar that the same delegations voting against resolution 26/9 are now calling for an expansion of the mandate with the intention to block this session. Another delegation noted that the

discussion was unreasonably delaying negotiations and was ultimately harming those they were trying to protect through this process.

14. The Chair-Rapporteur shared the view that a compromise had not been reached to amend the program of work and pointed out that further discussion could take place during the panel devoted to the scope of the treaty. He suggested that the working group adopt the programme of work as presented and that all delegations' views be reflected in the report. As no delegation expressed objections to this proposal, the programme of work was adopted.

### **III. Opening statements**

#### **A. Keynote Speeches**

15. María Fernanda Espinosa, Minister of Foreign Affairs of Ecuador, and former Chairperson-Rapporteur of the working group, delivered a keynote statement that explained the background to the establishment of the working group. Discussions surrounding the regulation of TNCs at the international level date back to the 1970s. Since then, globalization had brought great power to TNCs, leading to positive consequences for economic development but also many negative social consequences. Non-binding, voluntary rules had been valuable but had been unable to ensure victims' access to remedy in cases of corporate human rights violations. The particular date of 26 June 2014 of the adoption of resolution 26/9 was a milestone, representing a paradigm shift in the efforts to address corporate abuse. The working group process led by Ecuador and South Africa to fill a gap in international law is supported by a wide range of stakeholders including a large number of civil society organizations. Serious companies support it since they want a level playing field. She stressed the importance of prevention in the document of elements, which could have been a key tool to avoid disasters like Rana Plaza, the Niger Delta pollution, and the destruction of lives in the Amazon by Chevron-Texaco. States support it since they recognize that the two paths of obligatory and voluntary are mutually reinforcing, as demonstrated by the recent French law and several other examples. Ms. Espinosa expressed her appreciation that hundreds of people have signed up to participate in the process and hoped that everyone would engage constructively and with respect for diverse viewpoints.

16. Dominique Potier, Member of the French National Assembly highlighted the importance of ethics in guiding any discussion on human rights. At the heart of those regulatory processes, there always was the respect for human dignity. Historically, attempts to fight slavery and provide labour protections were challenged as regulations leading to "the end of the world", but ended up being the "dawn of a new era." Such efforts led to significant drops in abuse. The recent French duty of vigilance law was a contemporary regulation that can serve as an inspiration for this working group. The law is based on UN principles, including the UNGPs; is process-oriented; focuses on nationality rather than be restricted by territory; and is progressive in that it targets the largest companies so they can lead by example.

## **B. General Statements**

17. Delegations congratulated the Chair-Rapporteur on his election and thanked the former Chair-Rapporteur on her success leading the first two sessions. Many delegations expressed appreciation for what they considered a transparent and inclusive process and reaffirmed their trust in the Chair delegation in overseeing this third session.

18. Many delegations voiced their support for establishing a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. While recognizing that business can and do have a positive impact on human rights, especially with respect to economic development, several delegations, including a regional group, and NGOs stated that companies have undermined human rights and contributed to adverse human rights impacts with impunity. Efforts to address this accountability gap have been ongoing for over 40 years with little success.

19. Delegations recognised that initiatives such as the UNGPs have been a large step forward, but found that voluntary principles have not been enough; a mandatory regulatory framework was needed to ensure accountability and access to justice. Creating a legally binding instrument would be complementary to, and not in opposition of, the UNGPs. Legal lacunae in the UNGPs could be addressed with international obligations, and certain aspects of the UNGPs should be made mandatory.

20. A legally binding instrument would benefit victims of business-related human rights abuse by ensuring that companies are held accountable and that victims have access to prompt, effective, and adequate remedies. Additionally, several delegations considered that such an instrument could be beneficial to business since it would create a level playing field. Uniform rules across jurisdictions would create legal certainty that business would appreciate.

21. Many delegations welcomed the Elements Document put forward by the Chair delegation as being comprehensive, imposing obligations on TNCs and other business enterprises, and contributing to victims' access to justice. One delegation representing a group of States, noted that the Chairmanship of the Intergovernmental Working Group opted for the option of an "all-encompassing business and human rights negotiation" which risked delaying progress. This and several other delegations reserved their position on the document.

22. Several delegations voiced concern over the elements,. These delegations, as well as some NGOs, regretted that the Elements Document was published three weeks before the session, allowing insufficient time to fully analyse and formulate official positions on the content.

23. One delegation representing a group of States reminded that the UNGPs recall the existing obligations of States and that full implementation of the existing human rights obligations would probably respond to the numerous cases documented by civil society organisations and human rights defenders.

24. Some delegations thought that discussions on a legally binding instrument were premature. The UNGPs were unanimously adopted six years ago, and more time was needed to allow for States to implement the UNGPs. This process risked distracting attention away from such implementation. Other delegations agreed that primacy should be afforded to the UNGPs but acknowledged that both the UNGPs and a legally binding

instrument would have common objectives, and that a smart mix of voluntary and regulatory measures could be beneficial.

25. Many delegations agreed that States have the primary duty to protect against human rights abuse by third parties, including business enterprises, and commended the Elements Document for reflecting this consensus. However, there was disagreement as to which business enterprises should be covered by a legally binding instrument. Several delegations expressed the view that transnational corporations and all other business enterprises should be covered by the instrument, a view shared by many NGOs. Given the complex nature of corporate structures and the prevalence of domestically incorporated subsidiaries, these delegations feared that transnational corporations could find ways to fall outside the scope of an instrument regulating only transnational activities. While some delegations expressed the view that resolution 26/9 and the proposed elements permitted all business enterprises to be covered, other delegations rejected this as expanding the mandate in resolution 26/9 and noted that domestic laws already regulate domestic companies.

26. Delegations disagreed about the extent to which an instrument should permit the exercise of extraterritorial jurisdiction. One delegation suggested that the instrument could incorporate extraterritorial obligations as laid out in the Maastricht Principles, while another delegation rejected the idea that a legally binding instrument should permit States to exercise any form of extraterritorial jurisdiction.

27. Multiple delegations welcomed that the Elements Document include provisions on international cooperation and capacity building. The legally binding instrument should recognize the differing capacities of States and allow for assistance in order to ensure effective implementation of the treaty.

28. Some delegations and multiple NGOs insisted that the treaty ensure specific protections for certain vulnerable populations, such as indigenous peoples. Given the disproportionate effect that human rights abuse has on women and girls, there was a call for a gendered approach to the treaty.

29. Some delegations and NGOs also discussed the need for the instrument to take account of conflict situations and provide special protections in cases of occupation and other types of armed conflict.

30. While several NGOs called for the instrument to clearly assert the primacy of human rights over trade and investment agreements, one delegation argued that there is no hierarchy between norms in international law, with the exception of *jus cogens* norms.

31. There was wide consensus among most delegations and civil society that, going forward, the process would benefit from a transparent, inclusive, and constructive dialogue involving multiple stakeholders. However, some delegations and business organizations were concerned that business was not well represented in the process.

### **C. Debate: Reflections on the implementation of the United Nations Guiding Principles on Business and Human Rights and other relevant international, regional and national frameworks**

32. One regional group expressed its appreciation for including this session in the Programme of Work. It recalled how in the last six years, there have been numerous positive initiatives aimed at implementing the UNGPs. Since the working group process



can be expected to take a long time to conclude, it was suggested that States and business enterprises should take further steps to implement the UNGPs now in order to prevent abuses and ensure protection for victims.

33. A number of delegations expressed their support for the UNGPs, as they were unanimously endorsed as an authoritative global standard. Additionally, delegations discussed different initiatives implementing the UNGPs, in particular national action plans. Support was expressed for the OHCHR Accountability and Remedy Project, the Working Group on Business and Human Rights, as well as the annual Forum on Business and Human Rights.

34. Some delegations noted that the UNGPs are not purely voluntary since they discuss substantive obligations of States under international human rights law. Other delegations and one NGO did not agree that the UNGPs could guarantee protection of human rights.

## **IV. Panel discussions**

34 bis - Before engaging in the discussion, several delegations reserved their position on the Elements Document. Only X number of delegations engaged in the discussion of the Elements Document.

### **A. Subject 1: General framework**

35. The first panellist noted that these negotiations are the product of a strong grassroots process. Consumers need access to information to influence business habits; thus, there should be transparent human rights due diligence processes throughout supply chains. She noted that the European Parliament has mandated its representative to maintain a constructive dialogue with the working group because it believes that there needs to be a legally binding instrument regulating business and human rights. The panellist invited States to engage constructively.

36. The second panellist offered a development perspective to the discussion. He discussed the economist, Joseph Stiglitz, who has argued that globalization distinctly disadvantaged developing countries, and that large financial corporations pose a particular barrier to development in the Global South. Market failure and the dominant role of finance not only affected inequality between nations, but also within nations, including within advanced economies. The high prevalence of rent-seeking behaviour by corporations creates a “winner takes most society.” For example, intellectual property rights have become a way for corporations to corner markets and gouge citizens rather than being a source of innovation and entrepreneurial drive. It was argued that the predatory features of the current economy impede the SDGs, but that there is a growing trend to combat this. For example, the United States is revisiting its long history of anti-trust legislation and the OECD is attacking tax avoidance by large internet companies.

37. The third panellist addressed the accelerating pace of challenges faced by the global community with respect to development and the recognition of human rights. He found the proposed elements useful in reflecting the main perspectives expressed during the previous two sessions. The panellist highlighted three objectives in the draft elements: (1) guaranteeing the respect, promotion, and fulfilment of human rights, (2) guaranteeing access to remedies, and (3) strengthening international cooperation.

38. Some delegations found that the chapter on the “General framework” in the Elements Document should be made more concise, while others expressed appreciation for the comprehensive approach. To facilitate shortening the chapter, it was proposed merging the subsections on “Principles,” “Purpose,” and “Objectives.” Other delegations thought that only the subsections on “Purpose” and “Objectives” should be merged and questioned what the difference was between the two given that there were similar elements in both categories.

39. With respect to the “Preamble,” several delegations commented on the selection of instruments listed, with some arguing that there were too many instruments and others arguing that certain instruments were missing (e.g., ILO Declaration on Social Justice for a Fair Globalization, Sustainable Development Goals, environmental treaties and declarations, Declaration on Human Rights Defenders, Declaration on the Rights of Indigenous Peoples, and WHO Framework Convention on Tobacco Control). One regional group and some NGOs questioned why treaties were contained in the same list as non-binding instruments.

40. Some delegations suggested that there should be reference to the positive impact business can have on human rights, while other delegations suggested including reference to the negative effects of TNCs in the context of globalization. Additionally, NGOs recommended that language should be included regarding corporate capture.

41. Several delegations appreciated the references made to the right to development and economic, social, and cultural rights. Additionally, delegations and NGOs welcomed the reaffirmation of the UNGPs, showing this process is complementary to the UNGPs. However, one delegation found it inappropriate to include reference to the UNGPs since they were not developed and negotiated by States. One business organization questioned why there was a reference to the norms on the responsibilities of TNCs when that process was abandoned by the UN over a decade ago. In his response, the Chair Rapporteur pointed out that many elements contained in those norms were cited approvingly in the first two sessions.

42. Much discussion focused on the sub-section of the elements on “Principles”. Many delegations and NGOs welcomed the recognition of the primacy of human rights obligations over trade and investment agreements. However, one regional group and other delegations questioned the legal basis for this and wondered how it would apply in law and practice. It was queried whether this would require the renegotiation of existing treaties, and whether this implied that States could disregard provisions of trade and investment treaties, citing human rights. Concern was also expressed whether this could result in the fragmentation of international law.

43. Delegations questioned whether recognizing special protection of certain human rights signalled a hierarchy of certain human rights over others. One regional group noted that this provision could potentially conflict with another provision discussing the universality, indivisibility, interdependence, and interrelationship of all human rights. The Chair Rapporteur clarified that the intention of the provision was not to create a hierarchy but to note specific rights that are more likely to be affected by business activities.

44. Some delegations voiced concern over the language used to recognize the special protection of vulnerable groups. Acknowledging that certain groups require differentiated treatment, it was feared that including a list of some groups could indicate the exclusion of

others. Others requested that the language be altered to reflect even a more positive, empowering tone.

45. One delegation noted that the reference to the duty of States to prepare human rights impact assessments was inappropriate in this section since this was not a “principle.” The same delegation also expressed concern about the provision recognizing the responsibility of States for private acts since it believed it was worded too generally and failed to recognize that such responsibility only arises in certain circumstances

46. Several elements under the section on “Purpose” also received attention. While some delegations approved of a reference to the civil, administrative, *and* criminal liability of business, one delegation did not agree with the reference since many States’ legal systems do not criminally punish legal entities. This delegation thought it should be up to States’ discretion as to how to enforce the treaty.

47. Delegations and NGOs welcomed the reaffirmation that States’ human rights obligations extend beyond territorial borders, with some requesting that the contours of this should be elaborated in the instrument. One regional group questioned whether this provision conflicted with one in the preamble reaffirming the sovereign equality and territorial integrity of States, the latter risking to undermine the important progress in other areas such as the “responsibility to protect.”

48. Regarding the “Objectives” of the instrument, delegations welcomed the provision referencing international cooperation and mutual legal assistance as necessary for the effective implementation of the instrument.

## **B. Subject 2: Scope of application**

49. The first panellist noted that the Elements Document refers to the activities of TNCs and other business enterprises that have a transnational character, regardless of the mode of creation, control, ownership, size or structure. This indicates an inclusive approach in line with the UNGPs. The panellist also noted that the focus of the Elements Document is on business “activities” rather than their corporate ownership. Thus, the legally binding instrument will cover parents and subsidiaries so long as they operate across different jurisdictions. Finally, she supported the scope of application to cover all internationally recognized human rights.

50. The second panellist also expressed support for extending the scope of application to all internationally recognized human rights, reflecting their universality, indivisibility, and interdependence. She also supported reference to labour and environmental rights, as well as corruption. The panellist questioned restricting the elements to acts of a transnational character since from the victim’s perspective it is irrelevant whether an act is domestic or transnational. She suggested that the instrument should make reference to omissions of companies when these result in a deprivation of human rights. The panellist also suggested that the instrument not be restricted to regional economic integration organizations and apply to other national and regional organizations as well.

51. The third panellist emphasized that the working group is acting under a mandate of the Human Rights Council; thus, human rights must prevail, not investment and trade. There should also be more of a focus on human rights defenders. This panellist noted that a

legally binding instrument should address gaps in voluntary initiatives, and direct obligations on business should be explored.

52. With respect to the rights covered by a binding instrument, most delegations agreed that all internationally recognized human rights should be included. Delegations mentioned that this covers certain rights, such as the right to development, the right to property, and the right to permanent sovereignty over natural resources. It was suggested that the instrument should also ensure protection of nationally-recognized rights. Another delegation suggested that the wording of this provision in the Elements Document was overbroad by including “other intergovernmental instruments” beyond human rights treaties since these instruments were neither binding nor universal.

53. Other delegations disagreed that all human rights should be included due to the lack of universality of many human rights.

54. Regarding the provision covering acts subject to the instrument’s application, a delegation representing a group of States and some NGOs were concerned that it was unclear what was included and suggested that the phrase “business activity that has a transnational character” be defined to ensure effectiveness of the instrument. It was noted that if liability is involved, defining the phrase is mandatory. While a delegation and panellist disagreed, it was suggested that guidance could be drawn from international instruments covering transnational crime without borrowing definitions.

55. A delegation representing a group of States indicated that, in addition to the lack of definition, there were several questions as to whether the paragraph 2.2. is aimed to establish causation, or a contribution to an abuse, or a linkage; as well as the unclarity of language such as “indirectly controlled” .

56.

A delegation raised questions relating to the acts to be covered by a future instrument, including whether the provision discriminated between foreign and domestic companies if domestic companies were categorically excluded from the scope. In response, a panellist disagreed that this would constitute discrimination since the provision focuses on conduct, not nationality.

57. Concerning which actors should be subject to the instrument, some argued that only States would be the proper subjects. Another delegation was open to the provision covering organizations of regional economic integration but questioned why these were not mentioned elsewhere in the document. Further, there was concern that these organizations would be difficult to regulate in practice given the relationship between individual States and such institutions.

58. Several delegations considered that TNCs and other business enterprises should be subject to the instrument but not domestic companies. Other delegations noted that such companies are subject to national laws and need not be included in the instrument; in this regard, they emphasized that negotiations must go on guided by the mandate of resolution 26/9. One intergovernmental organization pointed out that TNCs are regulated by the national laws of the countries they operate in. It was highlighted that domestic businesses should be included as they can also be responsible for human rights abuses. There was a call for the inclusion of online corporations in the scope of application. Several delegations emphasized that the discussions about the scope should continue within the mandate of resolution 26/9.

59. Some delegations voiced concern over the provision subjecting natural persons to the instrument, taking into account the mandate of resolution 26/9, noting this was unnecessary since international criminal law covers individuals. Other delegations were of the opinion that individuals should be subject to the instrument.

60. Some delegations emphasized the importance of including regulations of business activities in conflict and post-conflict areas as businesses can exploit these situations for natural resources.

### **C. Subject 3: General obligations**

61. The first panellist explained that, under international law, States have the duty to regulate business activity to protect human rights. A treaty could ensure that victims have access to remedy by clarifying that States must regulate the extraterritorial actions of companies domiciled within their jurisdiction. Additionally, States can ensure that companies disclose information about their operations when acting transnationally. Various domestic laws already require this, particularly for larger companies. The panellist also discussed the obligation of companies to comply with internationally recognized human rights law, regardless of whether the host State has ratified a particular convention. With respect to international organizations, the panellist noted that these organizations already have a duty to respect human rights and that States must ensure these organizations comply. Given all of this, the elements largely reaffirm international human rights law, and are therefore not unorthodox.

62. The second panellist did not support the content of the Elements Document and voiced concern over imposing international law obligations on companies. Establishing human rights obligations on companies could lead to States delegating their duties to the private sector, undermining the full protection of human rights. Furthermore, generally imposing such duties on all TNCs and other business enterprises was impractical given the amount and diversity of the actors involved. This panellist warned that reopening the debate on business and human rights would lead to confusion and could subvert the UN's authoritative voice on these issues.

63. The third panellist saw many positive aspects of the Elements Document but decided to focus his remarks on gaps in the document. With respect to the obligations of States, he regretted that concepts of corporate law, such as separate legal personality, were absent from the ambit of the elements. Corporations are creatures of statute, and a successful instrument must address these issues. Regarding the obligations of companies, it would be important to go beyond the UNGPs by placing binding legal obligations on corporations. However, for this to be effective, the instrument should clarify what constitutes an actionable violation. Additionally, the instrument could impose positive obligations on companies.

64. The fourth panellist emphasized workers' support of the working group and noted that labour rights must be included. States should uphold human rights in all legal agreements and not support any legislation contrary to human rights. Furthermore, the instrument should oblige companies to exercise due diligence and provide remedies. While acknowledging that some provisions in the Elements Document are vague, more detail could be developed during the negotiation process.

65. While many delegations supported the proposed elements under “General obligations,” some noted the need to continue with negotiations on certain specific provisions. More specifically, provisions of a legally binding instrument must be worded clearly if legal consequences will attach.

66. Regarding the provisions on “State obligations,” it was noted that many elements seemed to restate existing obligations, and it was questioned what added value there would be. There was concern that the provisions requiring States to adapt domestic legislation and impose restrictions on public procurement contracts interfered with the internal affairs of States, as it should be up to each State to determine how to implement its treaty obligations. Additionally, there were calls for more specificity in the provisions regarding reporting and disclosure requirements, as well as the provision requiring States to ensure that human rights be considered in their contractual engagements.

67. Other delegations commended the drafting of the section, specifically voicing support for the recognition that States have the primary duty to protect human rights and must take measures to prevent, investigate, punish, and redress violations to ensure companies respect human rights throughout their activities. Some welcomed the provision requiring States to ensure that companies conduct human rights and environmental impact assessments. However, one delegation expressed that it was beyond the working group’s mandate to discuss environmental impact assessments.

68. Throughout the discussion, there were several suggestions regarding what could be added to this section, including reference to international cooperation and mutual legal assistance, clarification as to extraterritorial obligations, regulation of State-owned companies, reference to conflict-areas, and the protection of human rights defenders.

69. Concerning the inclusion of a section on “Obligations of transnational corporations and other business enterprises”, some delegations asked for information on the legal basis for imposing international human rights obligations on companies. Additionally, questions were raised as to how this would work in practice and whether this would be appropriate in the absence of a structure capable of law enforcement. Other delegations found it appropriate to impose international obligations on companies and referenced several treaties establishing obligations on legal entities. In their view, such obligations were necessary to ensure the effectiveness of the instrument.

70. Delegations suggested that additional obligations should be imposed on companies, including to mandate human rights due diligence and reporting; ensure free, prior, and informed consent when operations could adversely affect communities; prevent corporate capture; oblige companies to pay taxes in countries they operate in; and to positively promote human rights.

71. With respect to the section on obligations of international organizations, it was questioned whether the provision belonged under “General obligations” since it appeared to concern an obligation of States and not international organizations as such. To the extent that the provision did create obligations for international organizations, some delegations expressed their disfavour in making limitations on bodies created by different instruments with different mandates.

#### **D. Subject 4: Preventive measures**

72. The first panellist noted that, among the many allegations of human rights abuses received as Special Rapporteur, most involved corporate activities and affected vulnerable groups. In his view, this illustrated not only an existing accountability gap for victims, but also the gross failure of States to prevent such human rights abuses. Thus, the panellist argued that the instrument should oblige States to require effective and binding due diligence processes from all companies. This should not be limited to the supply chain but should include the complete lifecycle of a product, including its disposal. He also stressed the need to clarify the types of activities to which preventive measures should apply. He noted that several provisions in the section on “Preventive measures” did not seem directly relevant to prevention and suggested moving them to a more appropriate section.

73. The second panellist argued that preventive measures in the treaty should focus on two components: (1) preventing acts by TNCs that adversely affect human rights, and (2) preventing corporate capture. Regarding corporate capture, the panellist proposed that States should ensure transparency and disclosure of documents and contracts with TNCs. Additionally, States should prohibit political contributions from TNCs and forbid outsourcing of security services to companies.

74. The third panellist highlighted the essential character of preventive measures in the instrument. She made several recommendations as to how the elements could be strengthened in this respect, including by referring to due diligence obligations relating to development institutions, the use of independent assessors in case of impact studies, the coverage of labour and environmental rights, the inclusion of a gender perspective, the use of *ex ante* and *ex post* impact assessments, as well as the inclusion of the free, prior, and informed consent principle.

75. Delegations and NGOs highlighted the importance of prevention and welcomed a section dedicated to it in the document. It was questioned whether, conceptually speaking, the elements in this section should be linked with the section on obligations as the provisions addressed the obligations of States and companies. Some sought more precision in the wording of the provisions, wanting to know whether the terms “adequate” or “necessary measures” took proper account of differing capacities among States. One business organization expressed concern that the language used reopened an issue that had been resolved in the UNGPs, potentially causing confusion and unintended consequences.

76. Some delegations welcomed the provision requiring States to mandate companies to adopt and implement due diligence policies and processes. It was suggested that this provision should ensure that States implement uniform, minimum standards. A delegation and several NGOs thought risk assessments under this provision should address environmental impacts. Concern was expressed that since these measures were to apply to “all the TNCs and OBEs in [a State’s] territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain,” it would allow States to exercise extraterritorial jurisdiction improperly. The Chair-Rapporteur clarified that the due diligence obligation was meant for the parent company domiciled in a State, and that a company was to assess risks throughout its supply chain.

77. Concern was expressed about the provision requiring consultation processes, as one delegation was unsure when this would be required and for what purpose. Other delegations and several NGOs saw value in the provision. Some NGOs suggested that this

provision should clearly require free, prior, and informed consent of communities, in particular indigenous communities, when TNC projects threatened adverse human rights impacts.

78. Concerning the provision requiring dissemination of the instrument to everyone in a State's territory in a language they can understand, some delegations stressed the importance of the populace knowing their rights; however, one delegation felt this provision interfered with States' right to determine how to implement the instrument.

79. Some sought clarification on the provisions requiring periodic reporting, with one NGO indicating that this provision would have no teeth without an enforcement mechanism.

80. Some delegations and NGOs suggested adding language in this section aimed at preventing the capture of public institutions by vested business interests, and drew attention to article 5(3) of the WHO Framework Convention on Tobacco Control for guidance. Additionally, there was a call for the section to include enhanced due diligence for businesses operating in the context of armed conflict.

## **E. Subject 5: Legal liability**

81. The first panellist welcomed a section in the Elements Document on legal liability, although he noted that a "sue and damages" approach should be complemented by prevention. He emphasized that the instrument should cover environmental, health and safety, and workers' rights, as well as corporate complicity in State violations. Criminal liability will be hard to enforce given a range of pragmatic difficulties, including lack of motivation by regulators; thus, the focus should be on civil liability for multinational parent companies. Several challenges arise in the civil context as well, particularly issues related to extraterritorial jurisdiction, *forum non conveniens*, lack of access to information, and legal assistance. Unless these challenges are resolved, it will remain difficult for victims to obtain redress.

82. The second panellist noted the comprehensive nature of the provisions on legal liability and recognized how they could be relevant in a variety of legal systems. Focusing his remarks on criminal legal liability, the panellist described increasing recognition at the international and regional levels of criminal liability of legal entities and their agents. Specifically, he recalled the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice; and Council of Europe Recommendation CM/Rec (2016)3 on human rights and business. He stressed the necessity of criminal liability to serve as a deterrent, better protect individuals and communities' rights, and provide access to justice for victims.

83. The third panellist appreciated that the elements called for the adoption of legal measures on the national level and recognized differences in national legal systems. Additionally, he welcomed the inclusion of a provision ensuring that civil liability should not be made contingent upon a finding of criminal liability. The panellist cautioned against including provisions that mandate specific legal actions, as this could be contrary to certain legal systems and counterproductive to the goals of the instrument. He further suggested that the provision discussing due diligence procedures should be placed in a different section.



84. Delegations signalled their approval for including a section on legal liability, although some suggested this section should be clearer and more concise. Some recognized legal liability could also encompass natural persons. Most delegations and NGOs agreed that criminal, civil, and administrative liability should attach to legal entities, and some delegations shared national laws that imposed these types of liability on companies. It was noted that the different types of liability were complementary; however, some delegations were concerned at the lack of differentiation between them. In their view, differentiated language was needed to reflect whether a provision referred to criminal, civil, or administrative liability. Furthermore, it was noted that some legal systems do not allow for the imposition of criminal liability on legal entities; thus, provisions requiring such liability would be inappropriate. States should have the flexibility to choose how best to incorporate the treaty into domestic law. Concerns were also raised about the appropriateness of imposing international obligations on legal entities.

85. Some delegations called for greater detail and clear, minimum standards regarding the measures States must take to establish the different forms of legal liability in their jurisdictions. Others appreciated the flexibility provided for in the elements, allowing States to adopt their own legal measures in accordance with their national systems.

86. It was noted that the two provisions dealing with the commission and attempt of criminal offenses were unnecessary given the general provision in the section covering civil, criminal, and administrative offenses. It was also questioned why “international applicable human rights instruments” was used in these sections when other sections used different terminology.

87. Clarification was sought as to the meaning of the provision establishing civil liability for companies for participating in the “planning, preparation, direction of or benefit from human rights violations” caused by other companies, with one delegation suggesting this should cover indirect benefits as well. Similarly, some delegations called for more precision as to the contours of the provisions dealing with immunities, State responsibility for the actions of companies under their control, and complicity. Regarding the issue of complicity, it was queried whether States would become automatically responsible for any harm committed by a company.

88. One delegation also considered that the provision promoting decent work in supply chains fell outside the scope of the mandate given by resolution 26/9.

89. It was suggested that language should be added to the section to address parent company liability. Additionally, an NGO suggested that international crimes should be included in the section.

## **F. Subject 6: Access to justice, effective remedy and guarantees of non-repetition**

90. The first panellist noted that a binding instrument must build on and complement existing international standards, such as the UNGPs. Certain ambiguities exist in the Elements Document, and he hoped that these would be resolved as negotiations progressed. Regarding access to remedy, the panellist discussed the importance of national action plans in facilitating victims’ access to justice. The remedy process should be sensitive to the experiences of different groups of rights-holders, requiring consideration of the gender dimension and preventing victimization of rights-holders and human rights defenders

seeking remedies. Furthermore, rights-holders must be able to seek, obtain, and enforce different types of remedies.

91. The second panellist stated that there is a clear legal basis to establish liability, in the and the elements could be made clearer on this. He also welcomed the provision on legal aid. In order to strengthen this provision, he suggested that an online resource could be established which would provide information to victims, such as the relevant law and the applicable burden of proof, and which would link victims to NGOs and lawyers willing to help. Additionally, the panellist noted the importance of recognition and enforcement of judgments

92. The third panellist discussed how important it would be was for victims to have access to courts in the home States of TNCs without experiencing delays caused by jurisdictional challenges. To better confront problems such as piercing the corporate veil, he recommended reversing the burden of proof and improving victims' access to disclosure. He also suggested that damages should be calculated based on home State calculations, called for the abolishment of the "loser pays" principle, and hoped for proper cost recovery mechanisms to encourage legal representation.

93. Delegations and NGOs welcomed the inclusion of this section in the document, noting that it was crucial to address gaps in legal protection and that doing so would constitute important added value of a future instrument. In particular, efforts to remove practical and legal barriers to effective access to justice were appreciated; however, some NGOs warned that by listing specific barriers, it could be read as excluding others not mentioned. It was suggested that the section should clearly state the right of everyone to have access to remedy regardless of the perpetrator, borrowing language from the UN 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.

94. One delegation represented a group of States indicated that the assessment in the chapeau seemed acceptable but questioned whether the provisions mostly restated existing obligations. Another delegation suggested the complete removal of the section, arguing that a more holistic approach was warranted and that the current approach would force States to adopt a system that could be inappropriate in local circumstances. A business organization noted that the root problem regarding access to justice was a lack of the rule of law, and the instrument would need to find ways of incentivizing States to implement existing obligations.

95. States and many NGOs appreciated the inclusion of a provision emphasizing the need for access to justice for vulnerable groups; however, it was suggested that more empowering and positive language should be employed. An NGO also suggested that language from the UN Declaration on the Rights of Indigenous Peoples should be included, in particular to recognize the different legal systems and customs of certain communities. One delegation was concerned that specific groups were being recognized at all, indicating that there would be unfair and special treatment for those listed. A panellist disagreed, arguing that fairness dictated that different groups be treated differently.

96. Clarification was requested regarding the provision concerning non-judicial mechanisms not being a substitute for judicial mechanisms. It was mentioned that recourse to non-judicial mechanisms could be in the interest of victims, as they are sometimes faster and more appropriate. One panellist agreed that non-judicial mechanisms have a role to

play, but argued they are complementary, noting that judicial mechanisms should always be available.

97. Organizations appreciated the provision on reducing regulatory, procedural and financial obstacles in access to remedy, in particular mentioning the importance of ensuring class actions, access to information, and limiting *forum non conveniens*. Many welcomed inclusion of a provision concerning the reversal of the burden of proof; however, one business organization argued this provision would upset a fair balance between parties and potentially violate due process. Panellists disagreed, noting that, in some cases, raising a displaceable presumption would be appropriate, and that reversing the burden of proof exists in some domestic systems.

98. Several delegations and NGOs welcomed a provision addressing the need to guarantee the security of victims, witnesses, and human rights defenders, although it was questioned whether the provision went beyond what States are already obliged to do. NGOs thought the provision could be stronger by prohibiting interference with human rights defenders, and giving defenders a legal claim if they experience retaliation.

99. States and NGOs also expressed support for a number of other provisions, including on the different forms of remedy, the right to equality of arms and legal aid, and access to information relevant to substantiating claims.

100. Multiple NGOs suggested that a provision addressing piercing of the corporate veil should be explicitly included in the section.

## **G. Subject 7: Jurisdiction**

101. While the first panellist welcomed the inclusion of a dedicated section in the Elements Document on the topic of jurisdiction, she noted that a number of key concepts related to State obligations and access to justice still need clarification. In this respect, she mentioned that provisions on jurisdiction could also be included in other parts of the instrument. Taking into account that this section was focused on the concept of prescriptive jurisdiction, as opposed to adjudicative or enforcement jurisdiction, she stressed that international law already allows the exercise of this type of jurisdiction extraterritorially. Care should be taken when referring to territory and jurisdiction to avoid a restrictive interpretation. In her view, enforcement jurisdiction should be given careful attention in cases involving extraterritoriality or transnational elements and should be addressed in the section on international cooperation.

102. The second panellist expressed serious caution with regards to the broad approach to the concept of jurisdiction adopted in the Elements Document. Extending jurisdiction beyond the host State ignores the reality of corporate relationships, where companies often have no control over downstream suppliers. Asserting extraterritorial jurisdiction over entities with a tenuous connection to the forum State could raise issues relating to the principles of international comity and exhaustion of local remedies. He recommended that voluntary efforts undertaken by companies to ensure their suppliers are compliant with international standards should not be subject to a threat of liability but rather be positively encouraged. Although many countries have relevant legislation, enforcement remains an issue and attention should be focused on strengthening incentives to enforce existing laws. The panellist insisted that the instrument address the particular situation of State-owned enterprises and cautioned that sovereign immunity could attach to these entities.

103. The third panellist argued that States should address accountability gaps related to TNCs by recognizing jurisdiction over domestic companies whose activities have impacts abroad. She insisted on the need to establish relevant laws, ensure their enforcement and recognize jurisdiction to address abuses. In particular, the instrument should clearly indicate when a cause of action arises in the home State. Additionally, barriers to access of justice should be removed, in particular the doctrine of *forum non conveniens* since it is often used maliciously as a delaying and obstructive tactic.

104. Delegations and NGOs agreed on the importance of containing a section on “Jurisdiction,” in the Documents Elements as many TNCs and other business enterprises escape liability through jurisdictional challenges. This section was considered essential to address accountability gaps, clarify when courts could consider claims for abuses occurring abroad, and enhance victims’ access to justice. Given the importance of this section, some delegations emphasized the need for clarity. While many found that the elements formed a good starting point calls were made for more precision in the provisions. For instance, some questioned the contours of the definition of “under the jurisdiction” in the section’s chapeau, asking for clarity as to the meaning of “substantial activities in the State concerned” and the extent of control needed by parent companies. Some NGOs called for coherence between the concepts in this section and references to “territory and/or jurisdiction” elsewhere in the document, as well as the reaffirmation in the “Purpose” section that State obligations do not stop at their territorial borders.

105. Most of the discussion centred on whether the language should permit extraterritorial jurisdiction and the extent of that jurisdiction. Several delegations and NGOs found it crucial that the instrument permit courts to consider claims arising out of activities abroad. These delegations indicated that the use of extraterritorial jurisdiction has been approved by a range of judicial bodies and instruments, including domestic court cases, treaties, and other international instruments. Other delegations suggested that clear references to the bases for jurisdiction should be included. In their view, international law required a real and substantial link between a forum and the parties and claims concerned. This could be based on prescriptive jurisdiction principles such as nationality, passive personality, and the protective principle. Additionally, too much reliance on home State jurisdiction could disincentive host States from ensuring access to justice. Concerns were raised that an expansive view of jurisdiction had the potential to violate the territorial integrity and sovereign equality of States, principles which are reaffirmed in the preamble of the Elements Document. However, panellists considered that these risks were overstated as this section did not authorize extraterritorial enforcement jurisdiction, and risks associated with such jurisdiction were allayed with the inclusion of a section on “International cooperation.”

106. With respect to specific provisions, delegations expressed most concern with the provision authorizing jurisdiction over “subsidiaries throughout the supply chain domiciled outside [States’] jurisdiction.” Additionally, concern was raised over the provision permitting jurisdiction over “abuses alleged to have been committed by TNCs and OBEs throughout their activities, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.” These delegations argued that this wording was too broad and could cover legal entities with little connection to the forum State.

107. Clarification was sought as to the provision permitting claims by victims within a State's jurisdiction. It was queried whether this referred to nationals, residents, or something else.

108. Additionally, it was proposed that certain provisions be added to this section. Some delegations and NGOs suggested explicitly prohibiting the use of *forum non conveniens*. Another delegation and NGO recommended adding a provision to address conflict of laws. Calls were made to address conflict situations, as local courts are often unavailable in situations of armed conflict. One delegation suggested that jurisdiction over online enterprises be addressed. Further, it was proposed that universal jurisdiction be established for conduct constituting international crimes.

## **H. Subject 8: International cooperation**

109. The first panellist noted that in a globalized economy, domestic legal systems remain fragmented and disjointed, leaving room for TNCs to take advantage of a lack of cooperation between States. Thus, a section on international cooperation was an important means of addressing this fundamental problem. The panellist suggested two ways to strengthen this section. First, he called for the inclusion of sub-sections to address cooperation in the civil, criminal, and administrative contexts separately. Second, he suggested that a public register be established to help with the coordination of research. The panellist further encouraged delegations and NGOs to provide creative and pragmatic models that could be used in the instrument.

110. The second panellist stressed the importance of international cooperation in ensuring access to remedy. He discussed how cooperation should generally address treaty implementation, helping States with national implementation, and enforcement of judgments. Additionally, the panellist suggested five specific ways to ensure appropriate international cooperation. First, States should ensure access to information for investigatory functions. Second, rules should be adopted to ensure mutual judicial cooperation. The European Convention on Mutual Assistance on Criminal Matters could help in this regard. Third, States should ensure adequate standards of due process. Fourth, States should consider reflecting the principle of comity in the instrument. Fifth, inspiration for the means of international cooperation should be drawn from existing instruments and standards.

111. Many delegations and NGOs agreed on the importance of international cooperation. One of the main obstacles to the effective regulation of TNCs is the fact that they operate in multiple jurisdictions; thus, cooperation between States is necessary to ensure abuses are properly addressed. NGOs shared cases where victims were unable to obtain redress due to a lack of international cooperation. Major obstacles to justice for these victims, such as difficulties in obtaining information, could be rectified with proper cooperation between States. Thus, it is important for States to agree on certain standards to ensure efficient investigation, prosecution, and enforcement. Some delegations referred to other processes and instruments for guidance, such as the UN Convention against Transnational Organized Crime and UN Convention against Corruption.

112. One delegation and a business organization argued that the existence of these other processes and instruments on international cooperation made a section on this unnecessary. In their view, international cooperation should be developed generally and not focus on this

specific regime. There was a fear that developing new obligations on international cooperation could conflict with other processes or send contradictory messages as to UN standards. Instead, States should focus on strengthening existing international cooperation mechanisms.

113. One delegation representing a group of States referred to the OHCHR Accountability and Remedy Project, as it provides recommendations on how to strengthen mutual legal assistance and cross border investigations in current regimes. However, it questioned whether the provision in this section would allow for implementation and pragmatic steps given the current constraints such as the lack of resources of prosecutor's office to investigate cases involving TNCs and OBEs; Some delegations and a panellist suggested that provisions on technical assistance could be included to address some of these challenges..

114. Delegations called for greater specificity in the provisions of this section. Specifically, there were multiple suggestions to differentiate the section based on whether cooperation was needed for civil, criminal, or administrative matters, and to include more precise provisions on the means of cooperation needed for these different types of regimes. Additionally, there were calls for more detail into what processes should be required, in particular for evidence collection and sharing. It was also noted that a provision should be included to ensure reciprocity would be respected amongst States.

## **I. Subject 9: Mechanisms for promotion, implementation and monitoring**

115. The first panellist suggested that drafters focus on four principles when developing the section on "Mechanisms for promotion, implementation and monitoring." The first is accountability. The panellist suggested drawing lessons from other processes that regulate business conduct outside of the human rights context, such as the World Bank Inspection Panel. The second principle is transparency. Access to information is so important, the panellist thought it could warrant its own section in the instrument. Third, the principle of participation deserves attention, but the panellist cautioned against abuse by the private sector. Finally, a principle of cooperation should be ensured at the national, regional, and international levels.

116. The second panellist discussed cases where victims were unable to achieve justice through existing institutions. Noting this lack of judicial oversight over TNC abuses at the national level, she argued for the creation of an international court for affected individuals and communities to hold TNCs accountable. While supportive of the creation of an ombudsman, as proposed in the elements, she claimed that this would not be an adequate substitute for an international judicial body.

117. The third panellist welcomed this section in the Elements Document and noted that international mechanisms are needed. Implementation lies foremost with national jurisdictions, but a complementary international court should exist when national jurisdictions fail. This court should have enough resources to ensure its proper functioning. The treaty body proposed in the elements would also be welcome and should be endowed with the ability to make recommendations, as well as referrals to the international court.

118. Several delegations and NGOs welcomed the inclusion of this section and the creation of mechanisms to promote, implement, and monitor a future instrument. Many

called for the ability of victims to directly access these mechanisms, and it was mentioned that a provision should be included to protect against retaliation by those who engaged these mechanisms. Some argued that without enforcement mechanisms, the instrument would not be properly implemented. Other delegations questioned the usefulness of creating a new mechanism, arguing that the focus should be on strengthening existing institutions. One delegation expressed the view that States have the prerogative to decide how to enforce its treaty commitments and argued against establishing any mechanism. It was also noted that there should be more reliance on national action plans.

119. Several delegations approved of the establishment of an international judicial mechanism to hear complaints regarding violations by TNCs, noting that victims and certain States have been calling for the creation of such institutions for some time. However, questions were raised as to whether an international court could be effective, and there were concerns of budgetary and political issues involved with establishing a court. A question was asked whether this referred to past deliberations over the International Criminal Court, whether it was an appeal to broaden the jurisdiction of the ICC, and whether the proposal was feasible.

120. Delegations expressed support for the creation of an international committee to monitor the treaty, although it was noted that the creation of a committee did not exclude the possibility of creating other institutions. Some delegations approved of the proposed functions of this committee in the elements, including examining periodical reports and individual and collective communications. It was suggested that this body could also foster international cooperation, technical assistance, and share best practices.

121. Additionally, some delegations proposed the establishment of a non-judicial, peer review mechanism, and some NGOs suggested creating a monitoring centre that could be jointly run by States and civil society.

## **J. Subject 10: General provisions**

122. One NGO welcomed a provision in the section on “General provisions” regarding the primacy of a future instrument over other obligations from trade and investment legal regimes. This organization also stressed the importance of allowing for the participation of civil society and affected communities.

123. Another NGO thanked the working group for the opportunity to participate in the session and requested clarification as to the next steps of the process.

## **K. Panel: The voices of the victims**

124. Five panellists provided introductory remarks, commenting on a range of issues, including violations of indigenous peoples’ rights, abusive practices in drug patenting and pricing, harms of agricultural projects, impunity relating to toxic pollution, development projects displacing communities, and the role of international financial institutions in supporting harmful practices.

125. The panellist presentations were followed by interventions from delegations and NGOs, highlighting specific cases of abuse as well as lack of State implementation of existing human rights obligations. Some delegations called for the strengthening of

existing institutions and implementation of existing instruments, such as the UNGPs, and noted that guidance in this regard could be drawn from initiatives like the OHCHR Accountability and Remedy Project. Others expressed the view that existing institutions and instruments are failing to ensure protection of victims, and that the creation of a legally binding instrument to oblige States and TNCs and OBEs to comply with human rights standards, and the creation of mechanisms to enforce such obligations, are necessary to address shortcomings in the current system. Delegations and NGOs stressed the importance of victims' participation in these processes, the need to ensure that they obtain redress when their rights are violated, and the importance of protecting human rights defenders.

126. One delegation representing a group of States stated that those who have suffered human rights violations by States as well as those that are victims of abuses by non-state actors have a right to access justice and a right to effective remedy. The same delegation insisted that States must implement existing obligations and asked how can victims expect to have access to justice and to remedy in cases of abuses related to business activities in a State where the legislation fails to comply with existing international human rights law, in a State where the judiciary system is not independent, in a State where corruption impacts negatively on the fulfilment of all human rights. This delegation also wondered, if a new legal instrument was to be created, why would victims believe that those States currently failing to protect human rights would implement new obligations.

## **V. Recommendations of the Chair-Rapporteur and conclusions of the working group**

### **A. Recommendations of the Chair-Rapporteur**

[QUESTION AS TO WHETHER THIS SECTION WILL BE AMENDED IN LIGHT OF THE DIVERGING VIEWS]

127. Following the discussions held during the first three sessions of the OEIGWG, in particular discussion of the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights presented by the Chair-Rapporteur, and pursuant to its mandate, as spelled out in operative paragraph 1 of Resolution 26/9, and acknowledging different views expressed, the Chair-Rapporteur should:

(a) Invite States and different stakeholders to submit their comments and proposals on the draft element paper no later than the end of February 2018.

(b) Present a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, on the basis of the contributions from States and other relevant stakeholders, at least four months before the fourth session of the Working Group, for substantive negotiations during its fourth and upcoming annual sessions until the fulfilment of its mandate.

(c) Convene a fourth session of the Working Group to be held in 2018 and undertake informal consultations with States and other relevant stakeholders on its programme of work.



## B. Conclusions of the working group

128. At the final meeting of its third session, on 27 October 2017, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9:

(a) The Working Group welcomed the opening messages of the United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein and of the President of the Human Rights Council, Joaquín Alexander Maza Martelli, and thanked the Minister of Foreign Affairs of Ecuador, Minister María Fernanda Espinosa Garcés, and the Member of the French National Assembly, Dominique Potier, for their participation as keynote speakers. It also thanked the independent experts and representatives who took part in panel discussions, the interventions, proposals and comments received from Governments, regional and political groups, intergovernmental organizations, civil society, NGOs and all other relevant stakeholders, which contributed to the substantive discussions of this session.

(b) The Working Group took note of the elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights, prepared by the Chair-Rapporteur in accordance with operative paragraph 3 of HRC Resolution 26/9 and the substantive discussions and negotiations and the presentation of various views thereof.

(c) The Working Group requests the Chair-Rapporteur to undertake informal consultations with States and other relevant stakeholders on the way forward on the elaboration of a legally binding instrument pursuant to the mandate of Human Rights Council Resolution 26/9.

## VI. Adoption of the report

[THE SECTION WAS ADDED AFTER THE ADOPTION OF THE REPORT: ONE OPTION IS TO REMOVE VI OR ALTERNATIVELY TO AMEND IT]

129. One delegation representing a group of States stated its reservation on the whole report, recalled that there were diverging views on the provisions contained in section V.A. and expressed the hope that the chairmanship will work on a revised draft, which can be agreeable to all to send a positive signal and allow progress on the issue.

130. **At its 10th meeting, on 27 October 2017, the working group adopted *ad referendum* the draft report on its third session** with a two-week period for comments by all delegations; .

131. The Chair-Rapporteur committed that the final report would send a positive signal to all and would take into account all opinions and points raised during the session session

# **Annex I**

## **List of participants**

### **States Members of the United Nations**

Algeria, Angola, Argentina, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Burundi, Central African Republic, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czechia, Democratic Republic of the Congo, Ecuador, Egypt, Estonia, Ethiopia, Finland, The Former Yugoslav Republic of Macedonia, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Ivory Coast, Jamaica, Jordan, Kazakhstan, Kenya, Lesotho, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malta, Mauritania, Mexico, Monaco, Morocco, Mozambique, Myanmar, Namibia Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Rwanda, Saudi Arabia, Serbia, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sudan, Sweden, Syrian Arab Republic, Switzerland, Thailand, Trinidad & Tobago, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of), Zambia.

### **Non-member States represented by an observer**

Holy See; State of Palestine.

### **United Nations funds, programmes, specialized agencies and related organizations**

United Nations Conference on Trade and Development.

### **Intergovernmental organizations**

European Union, International Chamber of Commerce, International Development Law Organization, Organisation of Islamic Cooperation, South Centre.

### **Special procedures of the Human Rights Council**

Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Independent Expert on the promotion of a democratic and equitable international order.

## **National human rights institutions**

The National Human Rights Council of Morocco, German Institute for Human Rights, Danish Institute for Human Rights.

## **Non-governmental organizations in consultative status with the Economic and Social Council**

Academic Council on the United Nations System; Al-Haq; Law in the Service of Man; American Bar Association; Amnesty International; Asia Pacific Forum on Women, Law and Development (APWLD); Association for Women's Rights in Development (AWID); Centre Europe – Tiers Monde – Europe-Third World Centre (CETIM); Center for International Environmental Law (CIEL); Comité Catholique contre la Faim et pour le Développement (CCFD); Conectas Direitos Humanos; Coopération Internationale pour le Développement et la Solidarité (CIDSE); Corporate Accountability International (CAI); Fondation pour l'étude des relations internationales et du développement; FIAN International e.V.; Franciscans International; Friends of the Earth International; Global Policy Forum; Indian Movement "Tupaj Amaru;" Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba); Institute for Policy Studies (IPS); Instituto Para la Participación y el Desarrollo-INPADE-Asociación Civil; International Association of Democratic Lawyers (IADL); International Commission of Jurists; International Federation for Human Rights Leagues (FIDH); International Institute of Sustainable Development; International Organisation of Employers (IOE); International Service for Human Rights (ISHR); International Trade Union Confederation; IT for Change; iuventum e.V.; Legal Resources Centre; Oxfam International; Public Services International (PSI); Réseau International des Droits Humains (RIDH); Sikh Human Rights Group; Social Service Agency of the Protestant Church in Germany; Society for International Development; Stichting Global Forest Coalition; Swiss Catholic Lenten Fund; Tides Center; Verein Sudwind Entwicklungspolitik; Women's International League for Peace and Freedom (WILPF).

## Annex II

### List of panellists and moderators

**Monday, 23 October 2017**

#### **Keynote speakers**

- H.E. María Fernanda Espinosa, Minister of Foreign Affairs of Ecuador, and former Chairperson-Rapporteur of the open-ended intergovernmental working group
- Dominique Potier, Member of the French National Assembly

#### **Subject I – General framework (15:00-18:00)**

- Lola Sánchez, Member of the European Parliament
- Richard Kozul-Wright, Director of the Division of Globalization and Development Strategies, UNCTAD
- Vicente Yu, Deputy Executive Director, South Centre

**Tuesday, 24 October 2017**

#### **Subject II – Scope of application (10h00-13h00)**

- Kinda Mohamedieh, South Centre
- Sigrun Skogli, Professor, University of Lancaster
- Manoela Roland, Professor, Universidade Federale de Juiz de Fora

#### **Subject III – General obligations (15h00-18h00)**

- Olivier De Schutter, Professor, Université de Louvain
- Linda Kromjong, Secretary-General of the International Organization of Employers
- David Bilchitz, Professor, University of Johannesburg and Director, South African Institute of Advances Constitutional, Public, Human Rights and International Law
- Makbule Sahan, representative of the International Trade Union Confederation

**Wednesday, 25 October 2017**

#### **Subject IV – Preventive measures (10h00-13h00)**

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Ana María Suárez-Franco, FIAN International
- Iván González, representative of the Confederación Sindical de Trabajadores de las Américas, CSA

**Subject V – Legal liability (10h00-13h00)**

- Richard Meeran, Partner, Leigh Day & Co.
- Carlos López, International Commission of Jurists
- Humberto Cantú Rivera, Professor, University of Monterrey

**Subject VI – Access to justice, effective remedy and guarantees of non-repetition (15h00-18h00)**

- Surya Deva, Chairperson of the United Nations Working Group on Business and Human Rights
- Gilles Lhuillier, Professor, Ecole Normale Supérieure (ENS) Rennes, France
- Richard Meeran, Partner, Leigh Day & Co.

**Thursday, 26 October 2017**

**Subject VII - Jurisdiction (10h00-13h00)**

- Sandra Epal Ratjen, International Advocacy Director, Franciscans International
- Gabriela Quijano, Amnesty International
- Lavanga Wijekoon, Littler Mendelson

**Subject VIII – International cooperation (10h00-13h00)**

- Harris Gleckman, Center for Governance and Sustainability, University of Massachusetts, Boston
- Vicente Yu, Deputy Executive Director, South Centre

**Subject IX - Mechanisms for promotion, implementation and monitoring (15h00-18h00)**

- Baskut Tuncak, UN Special Rapporteur on hazardous substances and wastes
- Anne van Schaik, Friends of the Earth Europe
- Melik Özden, CETIM

**Subject X – General provisions (15h00-18h00)**

**Friday, 27 October 2017**

**Panel – The voices of the victims (selected cases from different sectors and regions) (10h00-13h00)**

- Alfred de Zayas, United Nations Independent Expert on the promotion of a democratic and equitable international order
- Lorena di Giano, Red Latinoamericana por el Acceso a los Medicamentos

- Mohamed Hakech, La Vía Campesina MENA region
  - María del Carmen Figueroa, Asamblea Nacional de Afectados Nacionales
  - Hemantha Withanage, Friends of the Earth – CEJ
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