

Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (version of 28 October 2016 – corrected by Secretariat)

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I. Introduction

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 A/HRC/RES/26/9 (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 first two sessions of the working group should be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument. Following its first session, which was held in Geneva, from 6 to 10 July 2015, the open-ended intergovernmental working group presented its first progress report to the Council at its thirty-first session.¹

According to the annual programme of work of the Human Rights Council, it was decided that the second session of the working group would take place in Geneva, from 24 to 28 October 2016.

The second session was opened by a video message from the United Nations High Commissioner for Human Rights, who congratulated the Chairperson-rapporteur for the discussions in the interim-session period on the scope, nature and form of the international instrument. He also highlighted that business entities have passed and growing impact on peoples' lives including on gender relations within society, environment, neighbourhoods and access to land and other resources. Moreover, he stressed that when businesses pay insufficient attention to human rights issues, they will often infringe on people's human rights. Likewise, he underlined that the need for the victims of business related human rights abuses to be able to access remedy cries out for much more attention, as well as the importance of preventing and redressing business related human rights abuses, and ensuring greater accountability and remedy. The High Commissioner referred to the outcomes of the OHCHR Accountability and Remedy project², suggesting it could provide some guidance to the discussion of the intergovernmental working group. Moreover, he welcomed the embrace of civil society's forces and the constructive discussions of States and other stakeholders in these discussion, reiterating the fully support of the Office of the High Commissioner as well as success in its deliberations. This message was reinforced by the Director of the Thematic Engagement, Special Procedures and Right to Development Division from the Office of the UN High Commissioner for Human Rights, who emphasized the need for improved mechanisms of accountability for corporate human rights abuses.³

II. Organization of the session

A. Election of the Chair-Rapporteur

The working group elected H.E. María Fernanda Espinosa Garcés, Permanent Representative of Ecuador to the United Nations in Geneva, as Chair-Rapporteur by acclamation, following

¹ A/HRC/31/50

² A/HRC/32/19

³A webcast of the entire second session of the working group is available from <http://webtv.un.org/live-now/watch/2nd-session-of-open-ended-intergovernmental-working-group-on-transnational-corporations/4473498426001>

her nomination by the representative of Honduras on behalf of the Group of Latin American and Caribbean States.

B. Attendance

Representatives of the following States Members of the United Nations attended the meetings of the working group: Algeria, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Chile, China, Colombia, Costa Rica, Cuba, the Czech Republic, The Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Kenya, Japan, Kazakhstan, Libya, Luxembourg, Mauritania, Mauritius, Malaysia, Mexico, Mongolia, Morocco, Myanmar, Namibia, Nicaragua, Netherlands, Niger, Norway, the Republic of Korea, , Pakistan, Panama, Peru, Portugal, Qatar, Romania, the Russian Federation, Rwanda, Saint Kitts and the Nevis, Saudi Arabia, Serbia, Slovakia, Singapore, South Africa, Spain, Switzerland, Tajikistan, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom, Uruguay, Venezuela (Bolivarian Republic of).

The following non-member States were represented by observers: the Holy See and the State of Palestine.

The following intergovernmental organizations were represented: the Council of Europe, the European Union, International Committee of the Red Cross (ICRC) the International Labour Organization (ILO), the United Nations Conference on Trade and Development (UNCTAD), The United Nations Programme Environmental Programme (UNEP).

Non-governmental organizations (NGOs) in consultative status with the Economic and Social Council were also represented (see Annex III).

C. Documentation

The working group had before it the following documents:

- (a) Resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights;
- (b) The provisional agenda of the working group (A/HRC/WG.16/2/1);
- (c) Other documents — including a concept note, a list of panellists and their curricula vitae, a list of participants, contributions from States and other relevant stakeholders — were made available to the working group through its website.⁴

D. Adoption of the agenda and programme of work

In her opening statement, the re-elected Chair-Rapporteur expressed her gratitude for the renewed trust placed in her Chairpersonship and pledged to maintain transparency and openness to dialogue. She stressed that in a context of large scale outsourcing of production and global value chains spanning different jurisdictions, international human rights standards

⁴ <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>

must play a central role. She further recalled that the initiative of a binding instrument was based on respect for the principles of fairness, legality and justice that should prevail for the benefit of all in the international context and that the objective of the process was to fill in the gaps of the international system of human rights, and to provide better elements for access to justice and remedy for victims of abuses of human rights by TNCs. This objective in no way aims at undermining host States or business sector, but to level the playing field with regard to the respect to human rights.

The Chair-Rapporteur proceeded to present the draft programme of work, informing participants about the thematic focus and modalities of the six panels.

There were no comments on the programme of work and it was adopted as proposed. Professor Jeffrey Sachs delivered a message via video conference as keynote speaker. He expressed his support for an international legally binding instrument by which transnational corporations could be held accountable and compliant with human rights standards. He noted that the most important location for enforcement of human rights and access to remedies for victims should be in national judicial systems. To move in that direction, Professor Sachs underlined the need for every country to incorporate international human rights standards in their national legislation and to facilitate access to justice. He noted that the biggest obstacle at present to achieving effective access to justice was the weak enforcement of judgments and stressed the international responsibility to honour judgements rendered, including in developing countries which are often hosts of transnational corporations. He concluded that an international treaty could strengthen the capacity of governments to ensure remediation. He also expressed that transnational corporations are more powerful than many governments, therefore they should be accountable and comply with human rights for the decent development of the world economy. Moreover, he expressed that it is important to close the gap between where society was today and where it would like to be with the rule of law, since even though there are laws, it is almost impossible to use the legal system.

III. General statements

States' delegations acknowledged the work of the Chair-Rapporteur and the transparent and inclusive process of consultations, as well as flexibility from States and other relevant stakeholders in the preparation of the program of work. The struggle of more than forty years on the part of States and other relevant stakeholders, including civil society organizations, to develop global effective standards to hold companies accountable for human rights abuses was also recalled.

A regional group highlighted that the global reach of Transnational Corporations and other business enterprises in their operational activities have had social and political impacts, disproportionate to their legal and social obligations, nationally and internationally. While there are positive measures undertaken nationally and regionally, in order to assist the global compliance with a uniform standard, actions must be initiated for the development of an international legally binding instrument. This would thus be an effective response to many of the issues that arise in the context of the widely perceived inequality in rights and obligations that exist between TNCs and Other Business Enterprises on one side and the victims on the other side, whose plight must be at the centre of our discussions. Likewise, serious concerns of violations of human rights by these entities such as in the area of child labour;

environmental degradation and decent work and wages affects marginalised and impoverished groups disproportionately and exacerbates existing human rights concerns in the continent. Moreover, they remained committed to the letter and spirit of Framework Resolution 26/9, in particular in relation to the commencement of the negotiation of the instrument at the next Session of the Working Group. To this end, it encouraged the Chairperson-Rapporteur to distil a draft base negotiating text based on the deliberations hitherto, including her own initiatives in this regard.

They asserted that a legally binding instrument was needed in order to redress the current imbalance between the progressive recognition of rights and the economic and political guarantees extended to TNCs. Without corresponding obligations on corporations to respect human rights, these rights were being undermined.

It was reiterated by many delegations that TNCs and other business enterprises should respect all human rights, including access to public services, and the right to development. One State mentioned its positive experience of improving people access to water and sanitation. Some delegations reiterated their support for the United Nations Guiding principles on business and human rights (UNGPs), and its implementation through national action plans. It was recognized by many delegations that the UNGPs and the intergovernmental working group with the mandate of elaborating an international legally binding instrument are mutually reinforcing processes and represented positive steps towards protecting human rights.

A political group commended that the programme of work encompasses other business enterprises in addition to TNCs, and expressed its willingness to participate in the second session. It stressed the importance of including civil society organisations, trade unions and the private sector in the deliberations. It also highlighted that the process should not undermine the implementation of the UNGPs. One state delegation furthermore called for the implementation of the OECD guidelines for multinational enterprises in this field.

Another political group expressed interest in continued engagement with the intergovernmental working group and referred to the Recommendation on human rights and business recently adopted by its Committee of Ministers, building on the UNGPs as well as and incorporating access to remedy, with some additional guidance in relation to particular vulnerable groups, including children, workers and indigenous people.

Many delegations welcomed the full involvement in this process of civil society organisations and the private sector and noted that transparency, openness and inclusiveness were key to constructive dialogue between stakeholders.

Some delegations noted that local businesses operate in global supply chains and should therefore fall under the scope of a legally binding instrument. A delegation noted that any legally binding instrument on TNCs and human rights should include the challenges posed by conflict areas and areas under occupation, and look forward to the data based project on businesses operating in the occupied territories, under HRC resolution 31/35.

Several delegations stressed the importance of having a victim-centred approach and a focus on access to remedies and reparations. Even if there are positive measures to protect victims from human rights violations by TNCs, either binding or soft law, at national level, there must also be measures, standards and mechanisms in a binding instrument at international level. Additionally, TNCs must fulfil binding obligations on human rights according to international law. UNGPs and the international legally binding instrument should be mutually reinforcing processes, and all the improvements achieved in the field of business and human rights in the framework of the universal system must be taken into account for the elaboration

of a legally binding instrument. Delegations also mentioned that the mandate to elaborate an international legally binding instrument does not duplicate other efforts at international level.

Delegations also stressed that enterprises can support countries' development and economy while respecting human rights, and also, that constructive dialogue in the process towards an international legally binding instrument is essential. The importance of prevention, detection, investigation, punishment and redress through clear and concrete measures was also mentioned, as well as States' willingness to share their experiences, including through the application of national action plans. Another issue was the needed balance between judicial obligations from States and their primary responsibility to promote and protect human rights.

Delegations reaffirmed the importance of fulfilling the mandate of Resolution 26/9 and to include different stakeholders in the process, with the common goal of protecting human rights. In this respect, strengthening of law at national level and international cooperation can be helpful to protect human rights from corporate abuses.

One delegation noted that different national circumstances need to be taken into account while respecting and protecting human rights. Most NGOs which took the floor expressed their support for the process of elaborating a legally binding instrument and deemed it as urgently necessary to strengthen the system for the effective protection of human rights of victims from violations committed by TNCs. Most referred to the need of balancing the concentration of economic and political power by TNCs with the obligation to respect human rights.

One NGO welcomed the constructive participation of member states in the working group, and highlighted the need to ensure the compliance of human rights obligations by businesses. NGOs concurred that any binding instrument must clearly establish the obligation of TNCs to comply with environmental, health and labour standards as well as international humanitarian law. It would also need to outline the rights of individuals and affected communities to ensure access to justice, including accountability for parent companies of transnational corporations, protection of human rights defenders, and the right of self-determination.

Several NGOs also noted that the treaty should include international mechanisms for implementation, and possibly an international tribunal. Ultimately, such instrument would also allow states to regain policy space and sovereignty for the protection of human rights.

NGOs warned that there should be no space for corporate capture in the negotiation of a binding instrument, States having the responsibility to act in the interests of their people and not in the interests of transnational corporations. In that respect, reference was made to the integration of new principle drawn from the WHO Framework Convention on Tobacco Control to protect against interference by business.

Some NGOs called for gender perspectives to be taken into account as a mainstream element in the instrument since adverse human rights violations by transnational corporations may exacerbate pre-existing inequalities and have negative gender impacts. Women's participation and consultation, particularly of affected groups, should be required in negotiations with TNCs on issues that affect their lives or livelihoods. It was also noted that there is a clear correlation between corporate power and violence against women, particularly in the context of extractive activities. Gender perspective need to be addressed for the human rights impact assessment of planned projects and activities by TNCs, including the problems faced by women's human rights defenders.

An organization stated that the most critical work to be done was to equip individual states to fulfil their duty to protect human rights, in line with the first pillar of the UNGPs, particularly

principle 3. It was noted that the most effective way to encourage respect for human rights and to enhance remedies for human rights violations was for the host States of transnational corporation activities to have regimes that include robust human rights protections, including through adopting National Action Plans to implement the UNGPs and the UN Human Rights Council require governments to take steps to implement the UNGPs and to report on their progress through its supervisory machinery. States could also engage in technical cooperation, exchanges of experience and national action plan exchanges. As far as the scope of a future instrument, the organization called upon the inclusion of all business enterprises. It was noted that access to remedy was particularly focused on the agenda, but stressed that any instrument must equally address all three pillars of the UNGPs which are interrelated and must be addressed equally

IV. Panel discussion

Panel I. Overview of the social, economic and environmental impacts related to transnational corporations and other business enterprises and human rights, and their legal challenges

The first panellist noted that many transnational corporations fall into impunity after committing human rights violations. International investment treaties have granted rights to transnational corporations to bring claims against states for regulating in the public interest which may have a detrimental impact on law-making, and does not leave citizens with recourse. All this could be remedied by a treaty to hold transnational corporations and other corporate actors accountable for human rights violations resulting from their operations, including in their global value chains, as well as to allow for individual liability of leaders involved in the decision making process. The treaty could be paramount to a right of appeal and make courts accessible to individuals and communities, free of charge. Companies should not be allowed to define the treaty. In addition to ILO and WHO standards, the treaty process should recognise the need for an international climate court.

The second panellist noted the relevance of the working group process to the SDG agenda, the success of which hinges on a massive investment push and on the need for everyone to be included. However, both these features are challenged by the current state of the global economy, an unhealthy investment climate, and growing inequalities. Modern development has seen close collusion between finance and corporate behaviour, since investment for delivering Agenda 2030 is not based on credit, but in the reinvestment of corporations' profits. Nonetheless, studies have demonstrated that the nexus between profits and investments is increasingly breaking down. A robust fiscal base is necessary for public investment for development, but is eroded by a combination of tax evasion and tax avoidance by large corporations and high net-worth individuals. While big companies have great potential for delivering social progress, they often contribute to a race to the bottom with regard to taxes and labour costs, and large international firms are also mobile, which must also be considered. Similarly, free trade agreements carry downstream economic risks and may handover control of some factors of the economy from the public to the private sector. An international legally binding instrument would address these issues and provide an alternative to trade agreements negotiated behind closed doors.

A third panellist acknowledged the failure of soft law and voluntary approaches to regulate international business and emphatically mentioned that the Unions' Global movement supported the development of a binding instrument which should build on, and not undermine, the UNGPs, which are a critical step forward in raising the bar for business responsibility. Such an instrument must cover workers' rights, particularly those set out in the ILO Declaration on Fundamental Rights and Principles at Work, and should be applicable to

TNCs but not exclude other businesses to avoid accountability gaps. A treaty should focus on obliging states to adopt measures on Human Rights Due Diligence, clarify the steps that companies should take in this regard, establish legal liability and extra-territorial jurisdiction for human rights abuses. Furthermore, it is important to ensure that the instrument be drafted in a way that reflects the structure of transnational corporations and their supply chain.

A fourth panellist stressed that the reality is that the companies' legal structures make it difficult to hold them accountable. She pointed to the problem of enhanced protection of investors' rights in investment treaties and in chapters of free trade agreements on issues which are already protected in national laws, e.g. expropriation and fair and equitable treatment. The enhanced protection in such treaties and agreements furthermore provides a right for investors to have their claims settled in international arbitration rather than in national courts. The threat of litigation has a chilling effect on developing countries in terms of regulatory measures. States worry about their reputation as a place to invest and often settle cases. A way to remedy this situation would be to allow victims access to courts in the home States of the investors, which is often where the assets of transnational corporations are located. Another way to address this would be to establish an international mechanism to consider business-related human rights abuses. A binding instrument could provide guidance for the development of trade and investment instruments, including stipulating the requirement of *ex ante* and *ex post facto* human rights impact assessments and setting out appropriate investor obligations. This is reflected in the UNCTAD Investment Framework for Sustainable Development and in South African and Indian law.

Investment treaties could clash with State obligations to protect human rights, and the threats of international investor-state dispute settlement (ISDS) proceedings. States worry about these threats and often settle cases. This also brings imbalance of power between different actors because ISDS gives a remedy to one stakeholder, the ISDS claims are always brought by businesses against the host state and communities cannot bring claims, although they might directly participate through amicus reports, but they are not a party to the process. States worry about their reputation as a place to invest and often settle cases. A way to remedy this situation would be to allow victims' access to courts of the home States of the investors, which is often where assets of the TNCs are located. Another way to address this would be to establish an international mechanism to consider business-related human rights violations. A binding instrument could provide guidance for the development of trade and investment instruments, including stipulating the requirement of *ex ante* and *ex post facto* human rights impact assessments and setting out appropriate investor obligations. This is reflected in the UNCTAD Investment Framework for Sustainable Development and in South African and Indian law. A fifth panellist noted that the principles of separate legal identity and limited responsibility of corporate law, often act together in relation to the acts of subsidiaries against human rights, allowing the mother company to escape responsibility. There are legal doctrines, for example piercing the corporate veil and unit principles, which are design to resolve this kind of problems. The international binding instrument could identify standards to operationalize these principles. On the scope of the instrument, he suggested that the aim of the instrument is to identify mechanisms allowing the objective of protecting human rights to be attained, and a new instrument does not require a unique understanding of what a transnational corporation is. The panellist furthermore expressed the view that a binding instrument would fill the void on access to remedy and reparation for harm caused with extraterritorial elements.

A sixth panellist focused on the concept of corporate social responsibility. She criticized the practice of tax evasion by companies and suggested country-by-country tax reporting. The belief by States that they must sign bilateral investment treaties in order to attract FDI was

seen as the source of the ISDS system. However, she was of the view that such bilateral treaties are a threat to democracy, removing the control of the judiciary, and could interfere with the legislative processes.

Most delegations concurred that voluntary standards are not sufficient and that a binding instrument should affirm that human rights obligations prevail over commercial law. States have obligations to regulate in the public interest, to defend the rights of people from privatisation, strengthen mechanisms for due diligence, and to ensure that transnational corporations do not use their influence to avoid accountability and the payment of reparations to victims. A delegation suggested that maximal deterrence could be achieved by imposing criminal liability.

Several delegations referred to the asymmetry between rights and obligations of TNCs as contained in instruments such as bilateral investment treaties and free trade agreements. Concern was expressed about access to international arbitration against States, while there are no corresponding mechanisms to address the obligations of corporations to respect human rights.

A number of delegations referred to specific cases to demonstrate how transnational corporations use bilateral and multilateral agreements to challenge measures taken by States to protect human rights. One delegation referred to a case where this failed, highlighting that when States meet their human rights obligations, they have tools to defend themselves properly before international arbitration tribunals.

Another delegation affirmed the right of the state to regulate in the public interest and referred to its Protection of Investment Act, which is aimed at securing balanced in the rights and responsibilities of investors.

Some delegations reiterated their view that it was not feasible to compare transnational corporations and local companies since domestic law could hold the latter accountable.

A delegation raised the issue of unilateral economic sanctions and asked whether States could force corporations to enforce these in light of their negative impacts on human rights.

Most NGOs reiterated their support for a binding instrument and noted their satisfaction with States' involvement in the process. It was recommended that a binding instrument should not be conceived as an isolated human rights instrument, but should take into account other legal fields, such as international trade and investment agreements. These agreements were said to hamper states' ability to regulate in the public interest and creating obstacles to the effective recognition and implementation of pre-existing human rights obligations and recognised that the future international instrument must include a hierarchical clause establishing the primacy of human rights over trade and investment agreements. A legally binding instrument should address critical gaps in assessing and monitoring the impact of trade and investment agreements. Calls were made for the establishment of an international tribunal/mechanism to investigate and ensure accountability of transnational corporations.

Citing undue influence of corporations on national regulatory processes, allegations were made concerning conflicts of interest when there is corporate involvement in the development of law and policies.

Some NGOs stressed that adverse human rights impacts include land grabbing, loss of biological diversity, loss of independence and power to decide on means of production, harm to food, ecosystems and bio diversity, confiscation of natural resources, destruction of the social fabric of peasant communities, criminalisation and persecution of peasant movements, pollution of water sources and extinction of plant and animal species due to climate change.

were also mentioned in relation to the activities of transnational corporations, as well as the phenomenon of some governments being co-opted by corruption. , seeds and land, by

The adverse impacts on the rights of Indigenous peoples were mentioned, and calls were made for the binding instruments to include protection of indigenous peoples from abuse by mining and other extractive industries. It was noted that very few countries have adopted national laws in accordance with the ILO Convention No. 169.

Other NGOs referred to the threat posed by corporations to the democratic order and sovereignty of States, where pressure on States in terms of costs and profit leads to lower standards. in working conditions, such as happened in the Rana Plaza disaster, undermining the rights of workers.

It was also stated that a binding treaty should include provision for transparency of corporate financial information where there is public interest, and accountability for direct/indirect impacts, including remote and accumulative impacts.

An NGO recalled that the overall impact of global trade and foreign investment can be positive for development and sustainable growth. Nevertheless, some adverse impacts on human rights were still recognized, including unacceptable labour practices in cross border and domestic supply chains and, other unacceptable labour practices, were still recognized. .. Rather than international governance gaps, it was argued that the problems stem rather from national governments lacking capacity to regulate and enforce their laws.

Panel II: Primary obligations of States, including extraterritorial obligations related to transnational corporations and other business enterprises with respect to protecting human rights

Subtheme 1 – Implementing international human rights obligations: Examples of national legislation and international instruments applicable to transnational corporations and other business enterprises with respect to human rights

The first panellist pointed to the paradox of States promoting and signing investment treaties that protect the rights of TNCs and directly interfere with their national sovereignty while opposing binding obligations. The significant efforts going into drafting such treaties contrast with the resources devoted to national legislative drafting, including when drafting human rights legislation. Since governments are under pressure to deregulate and are often unwilling or unable to regulate the actions of TNCs and other business enterprises, a binding treaty must address this regulatory shortfall by elaborating on existing human rights standards; it must clarify the responsibility of States to protect human rights; build capacity for effective measures and criminalisation of human rights abuses by transnational corporations; and give standards to protect public policy in bilateral investment treaties. States must be bound to adopt regulations and enforcement measures, including codes of conduct and human rights due diligence processes, which could be regulated extraterritorially, in order to ensure that human rights are respected by TNCs.

The second panellist recognized that business is capable of affecting all human rights of communities but drew attention to the fact are many existing mechanisms that are relevant in this respect that must be considered. There also exists a vast array of human rights treaties recalling States' obligations to protect, respect and fulfil human rights. . Yet the compliance with regional court judgements is poor. If a binding instrument seeks to expand responsibilities and liabilities for human rights violations these need to be upheld and acted

upon by States. Many countries already have national laws in place that create civil accountability for violations, such as genocide, crimes against humanity and war crimes. It was opined that while the arbitration system is not perfect, it is working overall.

The third panellist referred to relevant international standards that may be useful to the content of an international instrument, citing as an example the Maastricht Principles on Extraterritorial Obligations of States in the Areas of Economic, Social and Cultural Rights, particularly the following Principles contained therein: 8, 9, 25, 26, 29, 36, 37.

The fourth panellist noted that infringement on human rights by transnational corporations happens in the context of an overall architecture of impunity. A new binding instrument is an opportunity to change this state of play. Such an instrument could remedy the asymmetry between rights and obligations of transnational corporations and allow for monitoring of their human rights compliance by both home and host States, as well as by citizens. It would also be an opportunity to extend the obligations on transnational corporations in relation to contracting with suppliers. It was asserted that there is a need for an international court to enforce the treaty to maximum level, as well as for extraterritorial obligations and universal jurisdictional mechanisms.

A delegation, aligning itself with the general statement made the previous day on behalf of the EU, noted that States are expected to uphold human rights both at home and abroad and advocated for the implementation of the UNGPs. The delegation referred to domestic agreements on promoting respect for human rights in the areas of government procurement, policy review, funding as well as responsible business conduct agreements.

Another delegation recalled the States' primary obligation to protect human rights including as concerns transnational corporations and emphasized the need for both, home and host countries, to adopt effective regulations to this effect. Examples of domestic law were cited, requiring companies to accept monitoring by the government and members of the public, e.g. in the areas of areas of labour, environmental law and consumer protection. It was also proposed to include the issue of environmental protection in international investment co-operations. Furthermore, it was recommended that countries should make human rights a key factor to considering international activities and investment.

A delegation stated that having a legally binding instrument is required to uphold the rights of peoples, since States have the duty to protect citizens and peoples. Additionally, a query was raised on the supremacy of legal order - how could the position of developing countries be strengthened in light of the need to protect human rights above all other interests?

Another delegation noted the need to agree on clear standards which would prevent transnational corporations from avoiding their extraterritorial obligations and turning to international arbitration bodies to protect their interests. States have the primary obligation to prevent and punish abuses by transnational corporations and other business enterprises, and regional courts have acknowledged that corporate abuses can lead to States violating their own human rights obligations to exercise due diligence. A binding instrument would allow both home and host States to protect human rights and redress of violations by transnational corporations.

Another delegation noted that the extraterritorial dimension can be dealt with as per the practice of treaty bodies which have stated that home States have duties in relation to extra-territorial operations of transnational corporations without infringing on the sovereignty of host States. Also, there was a question about how public inspections could be carried out, taking into account existing restrictions in the international legal framework, and given the cross-border nature of transnational corporations.

Another delegation shared the serious concern on the state obligations and commitment for avoiding complicity while dealing with business abuses, and how TNCs and other business enterprises could exploit weaknesses in legislations and labour, and also that a corrupting influence may take many forms, including lobbies and unlimited resources at their disposal. It was suggested that a binding instrument must address the issue of State complicity. The delegation explained that in its jurisdiction, human rights are an important pillar of domestic and foreign policies and enshrined in the constitution which has enabled the judicial system to successfully adjudicate against corporate human rights violations. However there have been challenges of enforcement following closure or relocation of corporate operations. The delegation referred to domestic guidelines on good practices of domestic companies operating abroad.

Some delegations challenged the value of investor State- dispute settlements, referring to the failure of bilateral investment agreements to lead to benefits to the country and describing how unfair arbitration processes led to major economic costs. It was pointed out that victims of human rights violations generally don't have access to arbitration, even in local courts, and national rulings are frequently not complied with. Other questions concerned how to reconcile States' sovereignty with the notion of extraterritorial and universal jurisdiction, or how to guarantee the implementation of decisions adopted by host States regarding violations of human rights by TNCs, when they flee from such jurisdictions.

NGOs conveyed experiences of assisting victims of abuse by transnational corporations and highlighted the multiple procedural and legal obstacles experienced in this regard, including because of difficulties in holding parent companies accountable for abuses by subsidiaries.. A binding instrument should overcome such obstacles, with the Maastricht Principles providing key elements for addressing the extraterritorial scope.

Reference was made to examples of national initiatives seeking to impose corporate human rights due diligence, including as regards their operations abroad, and a reversal of the burden of proof. However, it was reported that those initiatives faced strong resistance from the business community, and it was therefore recommended that the business community should not be allowed to influence the process of developing a binding instrument.

It was also emphasized that a binding instrument should ensure through national legislation that States comply with international criminal and humanitarian law in countries where they operate. In this context reference was also made to the importance of standards reflecting the special needs of societies trying to overcome armed conflict and the need to hold those responsible for human rights violations, including corporations, accountable in order to achieve a successful transitional justice.

Calls were made for the creation of a body to receive and investigate complains submitted by affected communities or their representatives, as well as for the reversal of the burden of proof in investigating such complaints.

It was proposed that the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters should form the basis for participation, access to justice and remedy provisions in a binding instrument (public participation, and the free prior and informed consent of indigenous peoples. should be included)

An NGO highlighted the need to incorporate a gender dimension in the discussions and referred to the CEDAW Committee which has elaborated extraterritorial obligations with regard to discrimination against women, extending to acts of national corporations operating extraterritorially. e.g. women conditions in A binding instrument should require transnational

corporations to determine the gender effects of their activities and the extent to which these violate or uphold women's rights.

An organization referred to the network of international instruments creating obligations for States to regulate and to implement regulation to protect human rights. It was stated that there is already a well-developed human rights regime which is applicable to companies via States. In addition, much legislation exists at national level; the UNGPs were defined with national context and conditions as the starting point.

One panellist echoed support for the Maastricht Principles as a basis for defining States' extraterritorial obligations in a binding instrument. It was noted that sovereignty is infringed by ISDS arbitration tribunals and that high financial costs can be imposed on States. It was also suggested that there is a need to assess the impact of investment agreements e.g. NAFTA and others, with respect to human rights, to reveal also who benefits, as the mere increase of GDP does not automatically lead to improved wellbeing for the majority. Common welfare must be protected from trade and investment.

Another panellist shared the view that there is a need to provide the most vulnerable groups with legal tools to claim their rights, including via capacity-building in host countries to help protect victims and enable them to lodge a complaint anywhere that the companies' corporate activities take place. Cooperation between States and between judicial bodies is essential to ensure implementation of decisions. Support was again echoed for reversing the burden of proof.

One panellist did not share the view that trade agreements can result in adverse human rights impacts and disagreed with the view that all investment arbitration tribunals align with the interests of investors. Furthermore, it was submitted that a State can denounce and withdraw from an investment treaty at any time. On the question of how power can be rebalanced vis-à-vis corporations, it was posited that there are many positive initiatives in this respect, for example the G7 CONNEX Initiative on Capacity Building and Transparency, as well as work that is being conducted by UNCTAD on this matter. Regarding the proposed reversal of the burden of proof, the panellist warned that this would not be in line with due judicial process.

Another panellist noted that while market neoliberal capitalism is good at producing economic growth the benefits are often not shared equitably - appropriate instruments and regulations are therefore necessary in order to protect human rights. It was asserted that the existence of law to protect investment treaties and corporations runs counter to the need to protect the human rights of people.

Panel II, Subtheme 2: Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty

The first panellist noted that extraterritorial jurisdiction derives from jurisprudence that States are not prohibited from adopting legislation intended to apply outside their territory with a view to protecting internationally recognized human rights. The International Court of Justice has clarified in that respect that human rights obligations apply beyond the State's territory when there is a link between the State and the activity taking place outside its territory. A binding instrument should clarify the home State's responsibility to impose an obligation on transnational corporations to comply with certain norms wherever they operate (due diligence requirements for prevention of harm; disclosure requirements; reporting requirements); and

well as the jurisdiction of courts in that home State for corporate human rights abuses committed anywhere the business operates.

The second panellist recalled that corporations have obligations under international law and asserted the need to close legal gaps. While States have obligations to protect citizens from corporate human rights violations, it was noted when a State fails to meet these obligations or is too weak to do so, there is often no liability in front of international tribunals or domestic courts of other countries. It was argued that placing obligations on States to create national legal frameworks could also risk undermining human rights by resulting in differential standards. In the race to the bottom, corporations could relocate their operations to those States with lesser protections.

The third panellist noted that five different levels could or should exist to provide a reasonable opportunity for victims to obtain a fair remedy for human rights abuses by transnational corporations. Level 1 referred to national and sub-national legal systems. Level 2 could or should entail a role for an international or regional ombudsperson who could intervene on behalf of weaker plaintiffs against more powerful corporations or States. At the level of the home State or a country with a significant presence of assets held by transnational corporations, there could or should be a specific role for extra-territorial application of law, classified as level 3. At the international, or fourth level, there could or should also be a role for a specific international court on transnational corporations and human rights. It was proposed that there could or should be a fifth level, including a register of all pending cases concerning transnational corporations and human rights. Each of these levels should have a separate provision in a future instrument.

The fourth panellist suggested learning lessons from the experiences of two international instruments designed to protect human rights from abuses by transnational corporations, the International Code of Marketing of Breastmilk Substitutes and the Framework Convention on Tobacco Control (FCTC), both developed under the auspices of the WHO. Firstly, it is critically important to have the data to support the treaty provisions, especially data that demonstrates the ways governments bear the costs of repairing the damage caused by human rights abuses of transnational corporations, e.g. costs in healthcare, water and sanitation, and repair for environmental damage. Secondly, use the precedents in the FCTC to protect the process from conflicts of interest and corporate interference (Art. 5.3) and to develop a civil and criminal liability regime (Art. 19). The FCTC treaty has been ratified by 180 countries, including most if not all the Member States participating in the OEIGWG process.

The last panellist stressed the importance of holding transnational corporations accountable, also for failure to prevent harm. It was noted that the statute of the International Criminal Court excludes consideration of crimes linked to the economy. However, the experience and rulings of the Permanent Peoples' Tribunal demonstrate that crimes committed by transnational corporations can be adjudicated, including when they constitute crimes against humanity. The importance of the precautionary principle was also flagged in this regard. It was posited that there should be a way of involving people before they become victims and to enable citizens to play a role in deciding what their rights are, as this is part and parcel of the struggle for democracy.

Delegations stressed the importance of States adopting measures to protect human rights at the domestic law level and noted that many States were indeed regulating corporate behaviour in relation to issues such as health and safety of workers. It was noted that some countries already have extraterritorial jurisdiction in place for certain issues.

Delegations also noted that there is frequently a lack of cooperation between home States and host States which results in victims not having access to justice. It was stated that a binding instrument must strengthen such cooperation, including by fortifying legislation of home States to prevent cases from being rejected on jurisdictional grounds.

Another element raised by delegations was the establishment of a national mechanism, such as an office of the Ombudsman, which could receive complaints and produce reports on cases. .

The issue of extraterritoriality was again highlighted, by delegations, noting that several UN treaty bodies have recognized States' obligation to prevent third parties from violating human rights. It was suggested that the work of the treaty bodies could also be instructive as regards the need for preventative measures (e.g. CESCR and CRC) . They have stressed the need for States to take measures to protect against companies violating human rights abroad, as long as there is a reasonable link between a State and the company's activities These elements could be considered by the working group to make home states take action against companies operating abroad and could materialize in domestic measures with extraterritorial effect.

NGOs reiterated their support for a transparent, participative and inclusive process. They raised again the issue of asymmetry in terms of access to justice: while transnational corporations have access to justice, victims of corporate human rights abuses do not have such access, , especially in cases where national level institutions are weak - a binding instrument would need to address this problem. There is a need for protection of environmental activists who have been threatened or lost their lives in the context of campaigning against corporate human rights abuses and it was advocated that the treaty must include an obligation to protect them. It was advocated that States where enterprises have committed harmful activities must open their tribunals to victims. Another element that would need to be addressed is the non-enforcement of decisions adjudicated in favour of the plaintiffs.

NGOs also raised another asymmetry: while transnational corporations have access to justice, victims do not have such access, and a binding instrument would need to address this problem. Another element that would need to be addressed is the application and enforcement of decisions adjudicated in favour of plaintiffs but which fail in practice to hold them accountable for human rights abuses.

A participant draw attention to a number of successful cases adjudicated in courts worldwide involving corporate actors. Out of these cases, approximately half found the corporate actor to bear the primary responsibility for violations, while in the other half, the State or its agents were found to be the primary actor, with the company being complicit in the state's action.

An organization recalled that States have the duty to prevent human rights abuses from being committed in their territory. It was recommended that any binding instrument should oblige States to provide effective access to remedy at the local level.

Parties to a future instrument should cooperate in terms of enforcement of judgments, and such cooperation could address a lot of the challenges faced in terms of access to remedy. The panellist referred to multiple models of instruments at the inter-American level and in the arbitration sphere where States have designed instruments for cooperation on enforcement of judgments.

Another panellist highlighted that investment protection treaties contain a broad and loose definition of protected investment, which widens the possibility of forum shopping.

Another panellist stressed that a binding instrument would need to clarify that human rights are truly universal, and the fact that an entity is incorporated in a particular jurisdiction should not be used to avoid liability. There is a need to impose obligations on all actors with capacity to violate human rights. A treaty would also need to deal with jurisdictional challenges that rise in the context of complex investment flows and also address evidentiary and procedural obstacles.

Panel III: Obligations and responsibilities of TNCs and other business enterprises with respect to human rights

Subtheme 1 – Examples of international instruments addressing obligations and responsibilities of private actors

The first panellist presented the example of the Tobacco Control Convention as an opportunity to enhance public health and change business models that place profit before human interest. The Convention prompted the UN to work on global tobacco control and it now has 180 parties. The treaty provides the possibility for mutual reinforcement and of holding corporations accountable for making products that are harmful to consumers.

The second panellist referred to several instruments adopted over the last four decades relevant to the human rights responsibility of business enterprises, such as the OECD Guidelines on MNEs, the ILO Declaration on MNEs, the UN Global Compact and ISO 26000. All these instruments are in line with the UNGPs, which distinguish clearly between the duties of governments and responsibilities of companies. The instruments mentioned are not intended to replace or undermine the state duty to protect, but to complement the efforts of governments. A possible treaty could require States to provide companies with guidance on national law and human rights obligations, support companies with relevant information and undertake an assessment of the biggest obstacles for companies to fulfil their responsibility to respect human rights.

The third panellist presented the work of the International Labour Organisation (ILO) in relation to the responsibilities of business enterprises with regard to human rights. ILO has adopted numerous conventions, protocols and recommendations setting out standards to protect workers and promote economic growth. Governments have the responsibility of promoting compliance with international labour standards by business through mechanisms at the national level. Through the 1998 ILO Declaration on Fundamental Principles and Rights at Work, ILO members and constituents committed to adhering to fundamental principles and rights in the areas of freedom of association and collective bargaining, forced and compulsory labour, effective abolition of child labour, employment and occupation. The ILO tripartite Declaration on Multi-National Enterprises highlights the roles and responsibilities of governments, businesses and social partners, deriving from international labour standards.

The fourth panellist referred to the rapid growth of corporate social responsibility and sustainability. It was noted that there is still only limited legislation regulating transnational corporations and they generally oppose new legislation. It was submitted that some regulation is needed to help business respect human rights. The fifth panellist referred to the relationship between international law and private actors, including business enterprises, in terms of human right obligations. International law was originally conceived between States, which can impose direct obligations on private non-state actors in international law and these will play a more critical role in enforcing international law in the years to come. The UNGPs set

out responsibilities of business enterprises with regard to human rights. Human rights obligations imposed on private actors in a binding instrument will make it easier for victims to seek remedy without the help of State agencies and enhance the ability of victims to achieve out of court remedies.

A delegation referred to its support to all initiatives on business and human rights, and the work done by the Working Group on Business and Human Rights. It also mentioned the existence of regional instruments where general principles on the responsibility of businesses are recognized, such as Article 36 of the Charter of Inter American States.

Another delegation said that there is not a comprehensive international instrument which addresses globally to corporate accountability, leaving the door open to a legal vacuum and violations which need to be attended as a matter of urgency and necessity. In the current globalized world, every organ of society must be accountable in the framework of duties and obligations to contribute to the global common good, where TNCs and other business enterprises are key drivers of globalization and owners of global wealth, and therefore have the responsibility to not harm human rights, and if so happens, they must provide redress. Moreover, the existing voluntary mechanisms cannot be compared to effective legally binding rules, and in the elaboration of such an instrument, a chapter must be devoted to the recognition of TNCs and other business enterprises direct human rights obligations. .

A delegation said that in the elaboration of a legally binding instrument, the existent experiences must be taken into account, as well as international law resources, and examples such as the application of the FCTC should be further studied.

For another delegation, the Universal Declaration on Human Rights provides the obligation to respect human rights to all actors of society, including TNCs, who have the responsibility to prevent, protect and compensate for damage and harm done for violations of human rights. TNCs must contribute to national development while respecting the sovereignty, laws of States, and all human rights. The legally binding instrument must include provisions to protect public services of common interest, like the right to water or respect to mother earth; as well as individual and collective human rights, including the rights of peasants. A monitoring mechanism should be also implemented.

For another delegation, national systems of justice are experiencing a challenge in preventing TNCs from committing HR violations, in prosecuting them and in obliging them to compensate victims of violations of human rights. There is a need for more clarity in the definition of business activities so that there are no doubts on international standards. Normative clarity would also lead to more certainty to mitigation and compensation measures, as it has been said in many debates. Additionally, the debate shows that TNCs may have direct obligations, as it has been proved in various cases where international instruments have recognized that non state actors do have human rights obligations derived from international instruments, such as the Universal Declaration on Human Rights.

Another delegation noted that the ILO MNE Declaration has been around for around 40 years, but it is weak in human rights language and is being reviewed now by a working group for possible adoption of recommendations in March 2017.

Another delegation stressed the need to set out clearly the obligations of corporations to respect human rights, and a possibility is to use similar elements that have been incorporated in other instruments in the UN. A more encompassing approach in a binding legal fashion is needed, while recognizing that one cannot equate TNCs to States, as the breach of such laws are exclusive prerogatives of States. Several delegations supported the notion that a binding instrument should set out direct responsibilities and obligations for legal persons, such as

transnational corporations, while making clear distinctions between obligations borne by companies and those borne by States. It was stressed that there must be no loopholes for transnational corporations to escape their responsibilities, and that it would be important to establish a mechanism or tool by which it is possible to evaluate the due diligence applied by companies.

It was also pointed out that transnational corporations have responsibility to respect national laws and to contribute to national development strategies, while having responsibility to respect all human rights.

Many NGOs expressed the view that voluntary principles are not effective in ensuring effective regulation of transnational corporations. References were made to food corporations and their impact and responsibilities in terms of public health, where non-binding standards are inefficient in holding market leaders responsible for harmful impacts of their products.

Other points raised in the discussion included recalling the responsibilities of international financial institutions and banks that provide corporate funding, and the need for a binding instrument to thus apply also to financial institutions. One NGO that took the floor drew attention to the so-called Panama Papers, which have shown that corporations avoid taxes and obtain fiscal benefit to maximize profits, thereby contributing to exacerbate inequality and poverty - such tax frauds must be addressed by international institutions.

Responding to one of the panellist presentations which had discussed the example of the Framework Convention on Tobacco Control, it was underlined that it would be important for the working group to replicate its article 5.3 to avoid undue influence from commercial and other vested interests.

At the same time it was stressed that business enterprises are not democratically elected and accountable and cannot be placed as bearers of equal duties to States.

In responding to questions, a panellist argued that there is an emerging international principle of law that business has a responsibility to respect human rights. This is increasingly established at the national level and therefore also emerges on the international level. The UNGPs are not creating new law, but restating already established international law on the responsibility of business to respect human rights.

Another panellist noted that the ILO MNE Declaration is currently under review. The review process is looking at new instruments and how to better implement the law and create an environment where compliance is the normal way of doing business. Responsible investment and responsible supply chains also come into play.

According to another panellist, national laws are in place, but they must be enforced and we need to create a bottom up approach where respecting human rights is considered non-voluntary. Access to remedy also needs to be improved.

Finally it was emphasised that political will is necessary to make it possible to negotiate a binding instrument. It is States' responsibility to protect populations from harm and civil society will be important to voice what is happening on the ground.

Subtheme 2 – Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of TNCs and other business enterprises

The first panellist addressed the issue of the scope of human rights obligations of corporations, and the need for a binding instrument to address that gap. A binding instrument would not have to specify each obligation of corporations with regard to human rights, but should provide an analytical framework with guidance on how to determine those obligations, for treaty bodies or domestic courts to develop further. The question of scope has also arisen in domestic constitutional law and reference was made to the South African Constitution which provides for the direct application of constitutional rights obligations on private actors. The approach taken by the Constitutional Court in this regard can be instructive in determining the scope of the obligations of transnational corporations: first, is there a *prima facie* infringement? Second stage: is the infringement justifiable? Proportionality would also be a key principle in that determination. It would also have to be for a legitimate purpose, and in the lack of an alternative less harmful possibility.

The second panellist outlined standards of civil liability for human rights abuses applicable to multinational parent companies in English law and their wider potential implications. The duty of care under English tort (common) law requires reasonable steps to be taken to avoid harm to those to whom a duty of care is owed. That duty is owed in respect of activities that present a foreseeable risk of harm; where the relationship with the victim is sufficiently close (proximate) to make the imposition of a duty "fair, just and reasonable". This approach has resulted in successful claims. To overcome the legal obstacle of corporate veil, the approach has been to focus on direct negligence of parent companies in their functions and responsibilities, leading to harm. It was suggested that a tort law approach is a powerful mechanism for achieving legal accountability of transnational corporations in a variety of circumstances and places.

The third panellist noted that the legal philosophies of decolonisation, feminism and general principles of equality and fairness should be used as a frame in the working group process, and the content of a future binding instrument. With regard to court jurisprudence, the working group could find evidence of corporate civil and criminal liability in domestic and international law. The constitutions of Gambia, Ghana, Kenya, Malawi and South Africa include specific reference to legal persons. In the case of the South African Constitution, as interpreted by the courts, it includes both positive and negative obligations. A number of countries also include corporate criminal liabilities within their criminal codes, which in some cases attach liability to corporations on a strict or vicarious basis. In addition, the African Union Draft Protocol on the Protocol of the Statute of the African Court of Justice and Human Rights of 2014 includes provision for corporate criminal liability on a regional basis in Africa.

The fourth panellist noted that it was important to consider which countries would ratify such a treaty and what capacities they would have to enforce the liability of corporations. The treaty should focus on clarifying standards. Another issue in the alien tort claim is the necessity of *mens rea* which requires that the harm was caused intentionally.

The fifth panellist drew upon his experience in litigation and the gaps encountered in enforcement and implementation for corporate accountability, represent the biggest obstacles in access to remedy for victims. He proposed a couple of basic principles: first, corporations should be legally liable in civil, criminal and administrative matters. There should be no possibility for corporations to escape liability for an offence for which a natural person would be held accountable. The binding instrument should make corporations liable for abuse within their sphere of influence, when they have caused, profited from it, contributed to or

failed to prevent the harm, reflecting liability principles common to all legal system. Victims should have the right to hold transnational corporations liable either in the place where the subsidiaries operate and where the harm occurred, or in other places where the company is present. A key related issue is the use of the *forum non-conveniens* doctrine by companies to avoid responsibility. The panellist recommended the working group to give consideration to the EU's approach in this regard. He also recommended that a binding instrument should eliminate any statutes of limitation in human rights cases, both in civil and criminal matter; liberalize rule of discovery which would make it easier for victims to prove and a wide range of practical measures to enhance international cooperation. He finally recommended considering using the UN anti-corruption convention as a model on issue of technical expertise, information among states, burden of proof, etc.

The last panellist presented the activity of shipbreaking in Bangladesh to demonstrate issues related to liability and how corporations escape accountability thanks to the lack of a binding standard. Such activity, badly regulated, poses health and safety issues for workers in the industry and for protection of the environment from end-of-life ships. Voluntary guidelines in this area have not worked and there is a need for binding standards which would ensure that polluters pay for the harm caused by this activity.

Delegations welcomed the presentations on the three different areas for legal liability of transnational corporations involved with human rights violations and abuses: administrative, civil and criminal liability. The need to have clear national and international regulations to prevent abuse and hold corporations accountable for abuse was stressed. Administrative liability was connected to administrative sanctions, such as fines, ending operation permits, cancellation of concessions, or even the dissolution of the company, but at the end, it does not solve the main problem, which is the protection of the victims of corporate violations against human rights. It was also noted that while civil liability could be a possible avenue to secure accountability, it often involved lengthy procedures and the enforceability of administrative and civil sanctions was made difficult when transnational corporations were domiciled in a third country. As for criminal liability, a binding instrument would redress the historical failure, and correct it by making legal persons liable, as it was expected during the debates of current article 25 of the Rome Statute of the International Criminal Court, in order to attribute criminal responsibility to corporations.

Questions were raised in relation to the choice of the courts for victims between corporations "home" or "host" courts, as well as on the definition of liability standards. In this regard, a delegation stressed the interest for the international legally binding instrument to address the jurisdictional challenges to identify the courts. Other questions concerned the kind of criteria to be used to establish liability, and the implications for the principles of universality, interdependence and interrelatedness of all human rights. For a delegation, some clarification was needed regarding the nature of the rights or principles of international human rights as one of the points to decide which is the right court for the case, as it may bring to think that some rights are treated differently. Other questions concerned how to address damage that affects a whole population or a long-term damage, not limited to a time period. Another issue raised related to the criminal liability elements which are to be fulfilled in principle by individuals and how these would apply to the company itself and possibly its managers, taking into account that intention of individuals is fundamental in criminality.

Another delegation brought up the issue of corporate liability and breaches of international humanitarian law which, while being well-known concepts, are rarely addressed together. It was noted that corporations increasingly operate in conflict-related areas. A binding instrument should incorporate references to both international humanitarian law, international

human rights law and national law, and make clear that transnational corporations must exercise due diligence prior to starting operations in conflict-related areas to ensure that they are not contributing to violations of international humanitarian law.

Some delegations shared the view that transnational corporations have the obligation to avoid harms, but they also have positive obligations to take active steps to realize human rights for all. This should include contributing to the mobilization of resources for the realization of the right to development and economic, social and cultural rights globally with the aim to end poverty.

A delegation mentioned this year's report of the International Law Commission, which includes a section written by the Special Rapporteur on crimes against humanity, where there are arguments to support the international criminal liability of legal entities.

Some clarification was needed, according to a delegation, in cases of States' obligation regarding violations of human rights by third parties, and the practical measures to take. A delegation reiterated that in addition to liability standards, the treaty should also include international cooperation for investigations and enforcement, as it is the case in the UN Anti-Corruption Convention and contain no statutory limitation in order to give time to victims to collect evidence and present it.

Some NGOs recalled the legal obstacles to establish civil liability of transnational corporations at the national level and the need to overcome such obstacles. It was emphasized that self-regulation and regulation without monitoring by third party and voluntary codes do not work. It was stressed that there has to be a binding instrument and a court to enforce it. Even those States with invested commercial interests should see such binding instrument as a way to protect their own rights by setting common standards to all corporations everywhere and to the whole supply chain. The enforceability across borders of human rights obligations must be the objective for all.

Other proposals for elements to be included in a treaty were: compulsory disclosure of companies' structures subsidiaries, supply chain; transnational corporations should do everything reasonable to prevent harm, not only due diligence; the need to define criminal liability for complicity in crimes and violations committed by subsidiaries.

For a participant it was noted that the OECD guidelines and the National Contact Points (NCPs) have been key in establishing what expectations States have from companies. NCPs have contributed to raising corporate performance with regard to human rights through mediation and have the distinct advantage of being able to bring justice to victims more quickly than through litigation. It was also noted that the UNGPs have been a game-changer for companies and should be the basis of the working group process. Reference was also made to the recommendations of the OHCHR Accountability and Remedy Project which should form the basis for treaty binding instrument in terms of improving access to remedy.

Panel IV. Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument

The first panellist concentrated his presentation on the scope of the treaty and definition of TNCs, maintaining that the changing character of TNCs makes it very difficult to define them. However, he considers that a definition of TNC and of other business enterprises is not required. It was asserted that TNCs and their affiliates represent a distinct grouping within the larger category of business enterprises, taking into account that from a universe of 200 million enterprises, only 3200 have operations of transnational nature accounting for less than one percent of all registered enterprises, while the remaining 99 percent are mainly domestic, small and medium enterprises. The operations of TNCs are internalized within a corporate

structure that functions outside the full scrutiny, protection and regulation of individual national legal regimes. It was acknowledged that the operations of TNCs may prove beneficial, but can also evade, contravene or run afoul of national measures or objectives. States can respond with unilateral or extraterritorial actions – however, harmonized action was identified as preferable, through a jointly agreed code of conduct based on the UNGPs and a complementary binding treaty.

Remaining on the theme of scope, another panellist expressed her surprise to hear a regional group calling for the treaty to cover all enterprises, while the scope used for European laws is much narrowly defined (e.g. EU Non-Financial reporting Initiative, which covers only companies with over 500 employees). Nevertheless, it was asserted that the priority focus should be TNCs, and apply to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that perpetrate, or are complicit in Human Rights violations, since a victim of corporate abuse it is not that relevant if their rights are being violated by a national company or a TNC. - Likewise, many TNCs are more wealthy and powerful than the States trying to regulate them, or they can influence judicial institutions or block binding regulation through heavy lobbying communities, and finally they can easily relocate to other countries, thus leaving victims without redress.; It was also argued that the role of public finance and foreign investment should be addressed by the Treaty, with the panellist urging States not to shy away from the debate on investor-state dispute settlement (ISDS).

Another panelist, while endorsing his predecessors, made reference to the UNGPs as a good step in the right direction, but deplored that they are voluntary and incomplete, including to address issues such as the obligation of TNCs to pay their fair share of taxes, which could be interpreted as part of due diligence, but nevertheless is not incorporated in the UNGPs. Likewise, in order to address the right to access to information, he recalled the recommendation he made to the UNGA to add protection of whistleblowers, taking into account that in several occasions sensitive information relevant to business related human rights violations is kept in secret by TNCs and/or by States. He also invites States to put teeth in the UNGP, develop monitoring mechanisms, prohibit aggressive tax avoidance and tax heavens.

Another panellist described a degree of convergence amongst the different views expressed concerning the category of companies that should be subject to a binding instrument and the rights to be covered. Two options for the subjective scope had been identified: to apply it to all companies or only to those with transnational operations. It was noted that the respective choice could have important consequences when it comes to negotiation and implementation of the Treaty. The panelist recalled efforts at the OECD and ILO to define TNCs and stated that for the case of the legally binding instrument, the subjective scope is clearly defined in the footnote of Resolution 26/9. In that regard, he criticized the arguments against such footnote, quoting the common practice in the WTO jurisprudence and other frameworks that assign to the footnotes, exactly same legal weight than to the paragraphs of an instrument, resolution or decision. It was posited that addressing the Treaty to TNCs would not entail any discrimination, as local companies are already subjected to regulations and don't have the possibility to evade their responsibilities in the same way as TNCs. In terms of which human rights should be included, it was observed that a consensus seemed to be emerging around the core human rights covenants, and the need to ensure a broad coverage.

One panellist claimed that the UNGPs do not provide robust remedies in cases of human rights abuses by TNCs. It was reported that some States argue a treaty is not necessary because of the UNGPs; while others claim the GPs represent a sound framework but that the

remedy pillar should be strengthened. The panellist also noted that some States had mentioned it would be useful to refer to WTO plurilateral agreements as an example of relevant and strong instruments for remedy, which could work in a complementary fashion to the UNGPs. For example, the Montreal Protocol on Substances that Deplete the Ozone Layer sets out general principles followed by articles on procedural aspects and includes an annex that can be expanded and modified by the conference of parties to ensure precision and flexibility. It was suggested the Treaty could include a section on enhanced compliance to hold business accountable; a section on due diligence; and a functional legal platform to provide support to national legal systems.

One panellist focused his presentation on what the potential form of the treaty might be, explaining that the form and structure would make a difference – several possibilities were posited: a detailed treaty setting out both substantive and procedural matters, similar to the Rome Statute on the ICC; a framework treaty setting out key principles and approaches, such as the Framework Convention on Climate Change (but which might delay the creation of binding rules); or a core treaty with a series of annexes to deal with supervisory mechanisms and developments in international law, such as the Vienna Convention on Ozone Layer; or an optional protocol to an existing human rights treaties. Concerning the entities to be covered by the Treaty, it was asserted that that Treaty should expressly cover business enterprises that are State-owned or controlled and should also address the responsibilities of international organizations. In terms of the rights to be covered, these should include the rights contained in the core human rights conventions, as well as customary international law, treaties to which State is a party and IHL.

One delegation expressed the position that for the purpose of the treaty, there is a need to first agree on an accepted definition of TNCs and that ILO or OECD definitions could be used. Without such definition, it will be difficult to adopt a uniform approach. Another delegation objected to that position, referring to concepts such as terrorism or violent extremism which are not universally defined and highlighted the need to seize the opportunity of drafting a legally binding instrument to define TNCs. The same delegation asked the panellists for a list of treaties that define corporations, both national and transnational. Another delegation asserted that a pragmatic approach was needed that did not require a definition.

Another delegation referred to the need to ensure a clear reference to existing principles, including the UNGPs, but also to instruments relating to environment, social security and transparency, amongst others. On the issue of the scope of the instrument, it was the opinion of some delegations and NGOs that resolution 26/9 is clear in this respect and seeks to go beyond the domicile of a company in order to fill any governance gaps and to prevent human rights violation and provide remedy to victims. A practical approach is required to prevent TNCs from evading their responsibilities due to lack of domestic regulation and the possibility for them to avoid their responsibility by relocating. Some delegations pointed out that companies with domestic dimensions that are regulated by domestic regulations, do not have any possibility to evade their responsibilities and they therefore cannot be treated equally to TNCs; hence an instrument regulating TNCs, including subsidiaries, decision-making bodies and the supply chain, will place the TNCs and domestic business enterprises on a more equal footing. The primary purpose of the binding instrument would be to fill protection gaps in international human rights law.

Some delegations pointed to the phenomenon of globalization and its impact on development. Criminal liability of TNCs is a matter to be considered in the context of the binding instrument which will offer the possibility to enforce extraterritorial obligations. There seemed to be agreement that the treaty should cover all human rights, including the right to

development, and the principles of universality, indivisibility, interdependence, equality and non-discrimination. It was suggested that a legal mechanism should be established to receive allegations of violations and prosecute cases. Some NGOs proposed in that respect the establishment of an international court for victims of corporate human rights violations. An NGO noted that the experience provided by national truth commissions should also be considered in this context.

A delegation noted that the binding instrument would need to adapt itself in a way that could cover any future strategies that TNCs might develop to evade their responsibilities.

NGOs specifically requested for the binding instrument to guarantee indigenous rights, as well as access to safe drinking water and other resources.

A delegation and a State specifically referred to the work of the Independent Expert on International Order which has demonstrated that the money that States lose in arbitration awards could be used instead for social services.

Several NGOs indicated that a treaty should address international financial institutions (IFIs) and international investment agreements as they promote regulations or place conditionality on loans that can result in human rights violations. On trade and investment, the treaty should reaffirm the sovereignty of states and their duty to respect human rights in the interest of citizens. The treaty should counter the current ISDS system provide affordable remedies for victims and robust protection for human rights defenders and affected communities. The issue of tax evasion should also be considered in the treaty.

An organization reiterated the view that a binding instrument should include all enterprises, including State owned enterprises and small scale enterprises.

Panel V: Strengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels

Subtheme 1 – Moving forward in the implementation of the United Nations Guiding Principles on Business and Human Rights

Before the beginning of the panel, there was a presentation of a video-message from Mr. Nils Mužnieks, Council of Europe Commissioner for Human Rights, who recognized that business practices can have a negative impact on a variety of human rights, citing several examples of concern in that regard. He expressed support for the UNGPs which had formed the basis for a Recommendation on Human Rights and Business adopted recently by the Committee of Ministers of the Council of Europe. He recalled that the European Union has also recognized the UNGPs as the authoritative policy framework in addressing corporate social responsibility, and that the European Commission has encouraged the development of National Action Plans for the implementation of the UNGPs. However, he acknowledged that much remains to be done, including with broad and inclusive participation in the process of implementation, all of which will feed into the work of the OEIGWG in charge of elaborating an international legally binding instrument, notwithstanding the time that this process may take.

The first panellist noted that the UNGPs had led to some progress with regard to business and human rights but also recognized that the extent of their influence in national legislation is limited since not all have the same scope and not all rules have followed the UNGPs. For that reason she stressed the need to reflect and to act, in order to offer genuine remedy and

accountability. In France, a first draft national legislation built on the UNGPs which would impose civil and commercial liability, as well as criminal liability for companies with over 500 salaried employees for human rights abuse, was rejected in January 2015. A less ambitious draft legislation establishing a duty of care on certain French companies was subsequently presented to Parliament, aiming to ensure that no human rights are violated and no serious environmental damage or health risks from activities of companies or those they control or subcontractors be committed. It also contains specific provision to prevent active or passive corruption and non-compliance results in accountability for the company, including sanctions. The panellist expressed the hope that this draft proposal would be adopted soon, as well as the “Green Card Initiative”, through which national parliaments can jointly propose for the European Commission new legislative or non-legislative actions, or changes to existing legislation in the interest of sustainability.

The second panelist presented the OHCHR “Accountability and Remedy Project “and how it might be relevant to the discussion of the working group. The Project was initiated by the Office of the High Commissioner for Human Rights in May 2013 to support more effective implementation of pillar 3 of the UNGPs to ensure effective accountability and remedy for business-related human rights abuses. The Project aimed to identify solutions to legal, practical and financial barriers victims face, based on an extensive multi-stakeholder process and data and information from more than 60 jurisdictions. The outcome of the Project was presented to the Human Rights Council (A/HRC/32/19 and add.1). The guidance covers public and private law regimes and also addresses challenges appearing in cross-border contexts. The Human Rights Council welcomed the work in a consensus resolution (A/HRC/RES/32/10). The Guidance can be implemented through national processes (for example, national action plans, legal review processes) or sub-regional, regional, or international process like this working group. Civil society and NHRIs can also act on guidance in terms of their advocacy at the national level and also in forums like this working group. Another panellist underlined that national actions plans are one of the most important tools to implement the UNGPs and States need to urgently develop these. The process of developing a national action plan should also help in assessing what a future binding instrument should contain and how to implement it at the domestic level. The Working Group on Business and Human Rights has produced a guidance document on how to develop national action plans, an updated version of which will be presented at the Forum on Business and Human Rights in November 2016. The UNGPs should be used as a starting point for elaborating a binding instrument. Such an instrument should strengthen the state of play in four different areas: It should require states to: enact laws and policies for mandatory human rights due diligence on business in their territory and jurisdiction; include human rights provisions in bi-lateral investment treaties, conduct human rights evaluations and make investors compliant on human rights norms. The binding instrument should furthermore pay attention to those most at risk of vulnerability or marginalisation, including women, people with disabilities, and migrant workers. It should also consider including other human rights instruments including CRC, CEDAW, and the UN Declaration on rights of indigenous people, and how to strengthen access to remedy for victims by removing barriers (principle 26 of the UNGPs).

In responding to the panellists, a political group expressed support for the OHCHR Accountability and Remedy Project and its recommendations, including on improved cooperation between states on cross border cases. A commitment was expressed to developing peer learning, including across different geographic regions. Business enterprises need to have clear frameworks which can act as an effective deterrent, and some leading

enterprises have shown remarkable progress, while others still need to see benefit of respecting human rights.

Other delegations also expressed support for the UNGPs and referred to actions taken at the national level to support their implementation. It was noted that there must be complementarity between the UNGPs and a binding instrument. Some delegations stated their position that the UNGPs are insufficient to address the human rights challenges posed by transnational corporations as they do not constitute binding legal obligations for transnational corporations and do not adequately cover all the problems, including in relation to access to remedy for victims.

Subtheme 2 – The relation between the United Nations Guiding Principles and the elaboration of an international legally binding instrument on TNCs and other business enterprises

The first panelist stressed that for any binding treaty to be practically meaningful, it needs to improve victims' access to both a court and effective legal representation. Legal remedies and procedures must be sufficiently effective in practice - particularly financial procedures - to deter human rights violations. A binding instrument should focus on improving access to remedy in home states of transnational corporations and address all the interrelated legal, procedural and practical barriers that exists in this regard. The panellist outlined how all these barriers are interrelated in tort law claims, including issues of jurisdiction in home court; the corporate veil; reversal of the burden of proof, access to documents/information; the absence of class action mechanisms; legal representation and funding; costs; and levels of damages.

The second panellist referred to the existing general obligations for international cooperation under international human rights law, contained in the UN charter articles 55 and 56 which stipulate that all members will provide joint and separate means to achieve certain goals, including universal respect for human rights and fundamental freedoms). The UNGPs require cooperation between states to be effectively applied (principle 10 for example in the area of States participating in multilateral institutions). A binding instrument would offer an opportunity for the creation of international cooperation for execution of treaty and other international standards, especially necessary for legal and judicial cooperation. Access to justice poses serious practical challenges with regard to investigation of cross border cases: effective investigation of complaints of grave human rights violations in another country necessities securing cooperation of police and judicial authorities of the host country and the evidence collection in transnational crime is difficult, aggravated by the complex structures of corporations. The existing international and regional framework of legal cooperation and mutual legal assistance is only a partial and fragmented system of rules which has not fostered cooperation at all. The following elements in that regard should be considered for inclusion in a binding instrument: States' obligations to enter into bilateral and multilateral agreements to facilitate requests for legal assistance and to ensure cross border investigations; establishment of mechanisms for exchange of information; providing adequate training and information and support for law enforcement and legal bodies to ensure mutual legal assistance.

Some delegations noted that while there has been an advance in standard setting, more progress is needed in terms of access to justice and remedy to avoid transnational corporations avoiding their responsibilities. The non-binding nature of the UNGPs was considered as insufficient to ensure compliance and prevent violations as well as ensuring access to justice and remedy for victims. A binding instrument would be complementary to

the UNGPs, with regard to both fundamental and operational principles. It would strengthen States' duty to protect, in particular with regard to effective compensation and reaffirm their regulatory capacity and lay down legal foundations for accountability. It was stated that a binding instrument must be created out of existing international obligations. One delegation noted that the UNGPs were not intergovernmentally negotiated and therefore not part of codified international law.

Some delegations also insisted that any further steps must be inclusive, rooted in the UNGPs and address all types of companies. More experience on the basis of UNGPs is required before it is clear on what basis a legally binding instrument should be established. Efforts should also be made to achieve broad international consensus and awareness among transnational corporations on a new instrument, to ensure impact and implementation. Civil society organizations and human rights defenders must also be involved in the process. It was also noted that as an intergovernmental process, there needs to be as many governments as possible on board to obtain a strong treaty.

Another delegation expressed support for the work of OHCHR and the work of the Working Group on business and human rights, noting that national action plans would be essential for the implementation of the UNGPs, and emphasizing that civil society and private actors must be involved in the process.

Some NGOs noted that national action plans need to meet certain requirements. They need to be based on the UNGPs, adapted to the national context, ensure dialogue and transparency and be revised periodically. Some processes on national action plans have serious faults, and are not necessarily showing the required results as human rights violations by TNCs continue to happen. They do not ensure effective access to justice or effective remedy, especially in terms of violations of vulnerable communities. A legally binding treaty may be the way to ensure appropriate access to justice and create a common standard.

Some NGOs provided examples of cases where TNCs had violated their right to defend human rights and where the State has provided no adequate access to justice. When opposing activities of TNCs, human rights defenders face harassment, discrimination, and even racism. Indigenous communities face particular barriers in terms of access to justice, language can pose particular obstacles and the situation is aggravated when there is an international dimension to a case.

A NGO noted that there is still progress to be made on implementing the UNGPs and support for States' efforts to adopt national action plans. Continuous improvements and time is required to ensure institutionalization of new practices. Companies need to be provided with assistance, training and education to ensure understanding and implementation of the UNGPs. Civil society and companies should work together to solve problems on the ground. Still, States have a central role as arbiters of law and holders of police power.

An NGO put forward the complementarity of national action plans and a legally binding instrument.

Some NGOs noted that strengthening the international normative framework is interdependent with efforts to strengthen national and regional frameworks. They should be mutually reinforcing.

Panel VI: Lessons learned and challenges to access to remedy (selected cases from different sections and regions)

The first panellist discussed some of the practical challenges and opportunities that a binding instrument on business and human rights could address. A case study further illuminated some of the particular challenges for countries emerging from conflict which should be kept in mind in elaborating a binding instrument. Failure to provide for effective remedies and redress has a range of legal, practical and political causes. Among the most common are weak rule of law in a country (including the independence of the judiciary and the legal profession), inability or unwillingness of officials to counter resistance by corporate interests against introducing effective regulation, public officials who lack knowledge or capacity to implement and enforce regulations, corruption, limited resources, and other procedural hurdles that create a system of disincentives to litigation against companies. A binding instrument must require measures to ensure access to effective remedies and redress for persons and groups of persons that suffer abuse arising from the conduct of business enterprises. It should codify and develop provisions for access to an effective remedy for wrongful conduct against both States and business enterprises. For States, the remedy would be in respect of situations of complicity or participation in business activity or for failing to discharge their duty to protect against the conduct of business enterprises. The possibility for victims to initiate judicial complaints against companies directly in their domicile (whether it is in a host State or the home State) will further help to redress the inequality in rights and obligations that exist as between companies on one side and people on the other side.

The second panellist exposed the barriers to access to justice and her experience in supporting communities affected by project in the extraction of natural resources on a large scale. In the first place, in the original phase of developing a project which will grant exploitation rights, main obstacles faced deal with (i) the lack of transparency on the part of the entities and companies that have interests in the territories, (ii) lack of access to information and (iii) the lack of spaces for participation and free prior informed consent of the population in the decisions that have to do with the fate of their territories. At the stage of licensing phase, they are no real possibilities to challenge a project. While there are mechanisms within States which could be used to prevent, assess and mitigate the potential impact of a project, these mechanisms suffer many weaknesses, such as conflict of interests. At the operational stage, companies often refuse to recognize the damage caused and the breadth of its impact as their main objective is the maximization of profits, whereas the prevention of damage and the introduction of remedial measures increase the costs of operation. Host States are often left with the task of dealing with the devastation of territories and the impacts on the population. A binding instrument would need to prevent violations, and provide for the mitigation and remedy of impact and highlight the negative environmental elements of activities or extractive industries. It needs to reflect on effective adequate and appropriate measures bearing in mind the multi-dimensional nature of these large scale projects.

A third panellist noted the importance of access to remedy to end impunity of human rights violations by corporations. Corporate human rights violations tend to affect the most vulnerable, those marginalized by society, the most disenfranchised and those for whom access to justice is particularly difficult. Corporations seek conditions where their investment involves the least risk, where they have easy access to natural resources without risk of high environmental standards and democratic opposition by local communities, and where there are low labour costs. Several examples of cases were put forward to illustrate lack of legal standing in the requested courts. There is a need for a broader definition of legal standing, based on contextualised understanding of human rights violations and the possibility for

representative, class and group actions. There also needs to be a shift in the burden of proof, which cannot be placed entirely upon those affected. Even public prosecution authorities are at times reluctant to investigate cases involving corporate human rights violations. In situations of foreseeable risk, due diligence serves as an analytical tool to manage human rights risks, but liability standards should include strict liability and precautionary principles and be secured for example through the reversal of burden of proof and rebuttable presumptions. Jurisdictions should be allowed to consider the complementary responsibility of various corporate actors, although their place of domicile is different. Non-judicial remedies, to be effective, must address the imbalance of power often existing between parties and States must serve as guarantors.

A fourth panellist gave an overview of the Alien Tort Statute (ATS) which grants US Courts jurisdiction over claims by a non-US citizen physically present in the US for violation of international law. From the mid-1990s plaintiffs began to file human right cases against corporations and there are good examples of how the ATS corporate-defendant litigation has held corporations accountable and provided remedies to survivors who had no other means of redress. However, over the past few years the US Supreme Court has severely limited ATS litigation, particularly in corporate-defendant cases, limiting the extra-territorial scope of the ATS. ATS demonstrates that a robust system of litigation could lead corporations to pay closer attention to the adverse impacts of their operations. The lawsuits also provided an opportunity for victims to expose corporate abusive behaviour and meaningful monetary compensation was obtained. However, ATS litigation was lengthy and complex, with questions of jurisdiction, content of human rights norm, access to remedy and protection of plaintiffs and witnesses. A treaty would need a standardizing of rules of jurisdiction and human rights norms and address barriers to access to justice.

Several delegations thanked the Chair for the way she conducted the session and the courageous leadership of her delegation.

A delegation asked whether it would be relevant for a treaty not only to mention legal but also non legal complaint mechanisms such as the national human rights institutions complaints mechanisms and what would be the added value for the treaty to have such a wide range of redress avenues, both formal and informal, to strengthen the access to reparation. The issue of the necessity of an international court or other mechanisms under the treaty was also raised by several delegations.

Another delegation acknowledged that there had not been much progress in implementation of the UNGPs third pillar and offered information about an in-depth study that had been conducted on how to hold its national corporations accountable even when operating abroad which could be of interest to the working group as the first study of that kind. The study shows ample opportunities in terms of access to justice, including through criminal laws.

In response to a delegation's question concerning scientific evidence and use of specific technologies to prove the damage and very different levels of access across nations, a panellist recalled the international obligation of scientific cooperation in environmental law and the need for a binding instrument to shift the burden of proof, but very importantly also pointed out to the necessity to increase education of the judiciary, in particular civil and criminal lawyers, as well as of prosecutors on international human rights law

A member of the UN Working on Business and Human Rights informed in relation to UNGPs Pillar 3 that the Group would focus on it in the coming years through reports and

noted that the 2017 forum on business and human rights will be focused on access to remedy. He also encouraged all stakeholders to use the communication procedures.

On the questions raised by several delegations on the type of remedies, a panellist indicated that a wide range of option in terms of types of remedies could be established through a treaty but that all would need to fulfil the requirement of accessibility, independence, effectiveness, and affordability. Local non-judicial remedies are important since they are often more accessible, but these remedies cannot replace judicial mechanisms and are only complementary, such as corporate grievance mechanisms, national human rights institutions, ombudspersons, national contact points. They require also lesser burden of proof and might allow for more creativity in the types of remedies granted, but procedural warranties should be put in place when reaching such agreements.

In response to a question by some delegations on the type of international mechanism that ought to be put in place in an instrument, such as an international civil or criminal court, a panellist indicated that it would rather use the monitoring system put in place by the human rights treaty bodies which could receive complaints and authoritatively interpret through general recommendations the standards in the treaty.

Several NGOs reiterated the need to include people's right to development as a founding and enforceable right in the treaty. Access to land, water and other resources as well as the situation of migrant's worker should be taken into account.

An organization reiterated that the utmost priority should be given to access to remedy on a domestic level through promotion of rule of law, which is more efficient, cost and time wise. Both OHCHR recommendation and UNGPs Pillar 3 contains guidance which the working group should consider in improving state-based judicial remedies and build upon its work on the principles already agreed on.

Some NGOs noted that the binding instrument must remove obstacles to access to remedies both in host and home States and should require states to abolish the corporate veil, recognize all companies of a group as one company and presume parent company liability. The treaty should further oblige States to provide for civil and criminal liability in case of human rights abuses. It should include provision for redress. Transparency and access to information should be ensured. To avoid irreparable harm, affected communities should have affordable access. In case of abuse, the treaty should require full reparation. Remedies should be culturally appropriate and gender sensitive.

Some NGOs called on the working group to ensure the binding instrument guarantee the right of affected people to participation and explicitly guarantee that any agreement or non-judicial mechanisms should not interfere with the right to judicial remedies.

Some NGOs stressed the importance of considering gender dimensions of the issue, in particular in relation to access to justice, and suggested drawing on existing sources of analysis on access to remedy and justice in regional and international bodies, including from the Special rapporteur on violence against women and the Special Rapporteur on indigenous peoples.

Recommendations of the Chairperson-Rapporteur and Conclusion of the Working Group

A. Recommendations of the Chairperson-Rapporteur

Following the discussions held in the Working Group and acknowledging the different views and suggestions on the way forward, the Chairperson-Rapporteur recommends:

- (a) That a third session of the open-ended intergovernmental working group be held in 2017 according to the mandate of the Human Rights Council in resolution A/HRC/RES/26/9 from 26 June 2014, in particular its Operative Paragraph no. 3;**
- (b) That informal consultations with governments, regional groups, intergovernmental organizations and UN mechanisms, civil society, as well as other relevant stakeholders, be held by the Chairperson-Rapporteur before the third session of the open-ended intergovernmental working group;**
- (c) That the Chairperson-Rapporteur be entrusted with the preparation of a new programme of work based on the discussions held during the first and second session of the open-ended intergovernmental working group and on the basis of the informal consultations to be held, and to present this text before the third session of the open-ended intergovernmental working group for consideration and further discussion thereat.**

B. Conclusions

At the final meeting of its second session, on 28 October 2016, the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights adopted the following conclusions, in accordance with its mandate established by Human Rights Council resolution 26/9:

- (a) The Working Group welcomed the opening message of the United Nations High Commissioner for Human Rights and thanked Mr. Jeffrey Sachs for his role as keynote speaker, as well as a number of independent experts and representatives who took part in panel discussions; and took note of the inputs received from Governments, regional and political groups, intergovernmental organisations, civil society, non-governmental organizations and all other relevant stakeholders.**
- (b) The Working Group welcomed the recommendations of the Chairperson-Rapporteur and looked forward for the informal consultations and the new programme of work for the third session of the open-ended intergovernmental working group.**

VII. Adoption of the report

At its tenth meeting, on 28 October 2016, the Working Group adopted *ad referendum* the draft report on its second session and decided to entrust the Chairperson-Rapporteur with its finalisation and its submission to the HRC for consideration at its thirty-fourth session.

Annex I

List of speakers for panel discussions

Monday, 24 October 2016

Keynote speaker

- Mr. Jeffrey Sachs, Columbia University (video-conference)

Panel I (15:00- 18:00)

Overview of the social, economic and environmental impacts related to transnational corporations and other business enterprises and human rights, and their legal challenges

- Jean Luc Mélenchon, Member of the European Parliament
- Richard Kozul-Wright, Director of the Division on Globalization and Development Strategies, UNCTAD
- Christy Hoffman, Deputy Secretary General, UNI Global Union
- Nathalie Bernasconi-Osterwalder, Group Director, Economic Law & Policy programme, International Institute for Sustainable Development
- Carlos Correa, South Centre
- Susan George, Transnational Institute

Tuesday, 25 October 2016

Panel II (10h00-13h00)

Primary obligations of States, including extraterritorial obligations related to TNCs and other business enterprises with respect to protecting human rights.

Subtheme 1: Principles for an International Legally Binding Instrument on Transnational Corporations (TNCs) and other Business Enterprises with respect to human rights

- Daniel Aguirre, International Commission of Jurists, Myanmar
- Ariel Meyerstein, US Council for International Business
- Ana María Suárez-Franco, FIAN International
- Juan Hernández-Zubizarreta, University of the Basque Country

Panel II – cont'd (15h00-18h00)

Subtheme 2: Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty

- Kinda Mohamedieh, South Centre

- David Bilchitz, Professor, University of Johannesburg, Director of South African Institute of Advanced Constitutional, Public, Human Rights and International Law
- Harris Gleckmann, Centre for Governance and Sustainability, University of Massachusetts, Boston
- Leah Marguiles, Corporate Accountability International
- Gianni Tognoni, Secretary General, Permanent Peoples' Tribunal

Wednesday, 26 October 2016

Panel III (10h00-13h00)

Obligations and responsibilities of TNCs and other business enterprises with respect to human rights

Subtheme 1: Examples of international instruments addressing obligations and responsibilities of private actors

- Vera Luisa da Costa e Silva, Head of the Secretariat of the Framework Convention on Tobacco Control
- Linda Kromjong, Secretary General, International Organization of Employers
- Githa Roelans, Head of Multinational Enterprises and Enterprise Engagement Unit, ILO
- Michael Hopkins, CSR Finance Institute
- Surya Deva, Associate Professor, School of Law, City University of Hong Kong, and Member of UN Working Group on Business and Human Rights

Panel III – cont'd (15h00-18h00)

Subtheme 2: Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of TNCs and other business enterprises

- David Bilchitz, Professor, University of Johannesburg and Director of South African Institute of Advanced Constitutional, Public, Human Rights and International Law
- Nomonde Nyembe, Attorney, Business and Human Rights, Centre for Applied Legal Studies
- Richard Meeran, Partner, Leigh Day & Co.
- Michael Congiu, Shareholder, Littler Mendelson
- Michelle Harrison, Earth Rights International
- Rizwana Hasan, Friends of the Earth, Bangladesh

Thursday, 27 October 2016

Panel IV (10h00-13h00)

Open debate on different approaches and criteria for the future definition of the scope of the international legally binding instrument

- Khalil Hamdani, Visiting Professor at the Graduate Institute of Development Studies, Lahore School of Economics, Pakistan
- Anne van Schaik, Friends of the Earth, Europe
- Alfred de Zayas, Independent Expert on the promotion of a democratic and equitable international order
- Carlos Correa, South Centre
- Harris Gleckmann, Centre for Governance and Sustainability, University of Massachusetts, Boston
- Robert McCorquodale, Director, British Institute of International and Comparative Law

Panel V (15h00-18h00)

Strengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels

Subtheme 1: Moving forward in the implementation of the United Nations Guiding Principles on Business and Human Rights

- Danielle Auroi, Member of the National Assembly of the French Republic
- Nils Muižniekis, Commissioner for Human Rights, Council of Europe (video message)
- Lene Wendland, Adviser on Business and Human Rights, OHCHR
- Surya Deva, Associate Professor, School of Law, City University of Hong Kong, and Member of UN Working Group on Business and Human Rights

Friday, 28 October 2016

Panel VI (10h00-13h00)

Lessons learned and challenges to access to remedy (selected cases from different sectors and regions)

- Daniel Aguirre, International Commission of Jurists, Myanmar
- Elizabet Pèriz Fernández, Tierra Digna
- Claudia Müller-Hoff, European Center for Constitutional and Human Rights
- Beth Stephens, Professor, Rutgers-Camden Law School

Annex II

Participation of non-governmental organizations

The following National Human Rights Institutions attended the Working Group: The National Human Rights Council of Morocco,

The following non-governmental organizations in consultative status with the Economic and Social Council were represented: American Bar Association, Amnesty International, Asia Pacific Forum on Women, Law and Development (APWLD), BADIL Resource Centre for Palestinian Residency and Refugee Rights, Caritas International, Center for Accompaniment of Unemployed Girls (CAFID), Centre Europe-Tiers Monde (CETIM), Centro de Estudios Legales y Sociales (CELS), Comité Catholique contre la faim et pour le développement (CCFD), Coopération Internationale pour le Développement et la Solidarité (CIDSE), Corporación Centro de Estudios de Derecho Justicia y Sociedad (DEJUSTICIA), Corporate Accountability International (CAI), Dominicans for Justice and Peace, Earthrights International, Education International, Federation International des Droits de l'Homme, Fondation des Oeuvres pour la Solidarité et le Bien Etre Social (FOSBES), FoodFirst Information and Action Network (FIAN) International, Franciscans International, Friends of the Earth International, Gifa Geneva Infant Feeding Association, Institute for Policy Studies, International Baby Food Action Network (IBFAN), International Accountability Project, International Association of Democratic Lawyers, International Chamber of Commerce, International Commission of Jurists, the International Federation for Human Rights (FIDH), International Institute of Sustainable Development, International NGO Forum on Indonesian Development, International Service for Human Rights (ISHR), International Organisation of Employers (IOE), International Union for Conservation of Nature (IUCN), Peace Brigades International, Plataforma Internacional contra la Impunidad, Public Services International, , Réseau International des Droits de l'Homme, (RIDH), Society for International Development, South Centre, Women's International League for Peace and Freedom.