

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

Chair-Rapporteur: Luis Gallegos

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I. Introduction

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014, and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights.

2. The fourth session, which took place from 15 to 19 October 2018, opened with a statement from the United Nations Deputy High Commissioner for Human Rights. She congratulated the Chair-Rapporteur on the release of the Draft Legally Binding Instrument (Draft LBI) and Draft Optional Protocol, noting that these texts mark a key milestone in the process and provide a welcome basis for the start of substantial negotiations. She stressed that the treaty should focus on the needs of people affected by business-related human rights abuses and should take into account the differential impacts such abuses have on different groups of rights-holders. Noting that there is no inherent conflict between the Guiding Principles on Business and Human Rights (UNGPs) and the development of a legally binding instrument, she stressed that the treaty process should build on the progress made with the Guiding Principles and relevant initiatives aimed at improving access to remedy for victims of corporate abuses, such as the Office's Accountability and Remedy Project. The Deputy High Commissioner noted the shared goal and aspirations amongst those present to end corporate abuse. She expressed deep appreciation to the civil society organizations driving this process forward and reminding all of the aims of this process. Finally, she invited all stakeholders to engage constructively and work collaboratively during the session.

II. Organization of the session

A. Election of the Chair-Rapporteur

3. The working group elected Permanent Representative of Ecuador, Luis Gallegos, as Chair-Rapporteur by acclamation following his nomination by the delegation of Mexico on behalf of the Group of Latin American and Caribbean States.

B. Attendance

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

C. Documentation

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

(a) Human Rights Council resolution 26/9;

(b) The provisional agenda of the working group (A/HRC/WG.16/4/1);

(c) Other documents, notably the Chair-Rapporteur's zero draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (hereinafter, "Draft LBI"), the Chair-Rapporteur's zero draft optional protocol to the Draft LBI, and a programme of work, all of which were made available to the working group through its website.¹

¹ See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

D. Adoption of the agenda and programme of work

6. In his opening statement, the Chair-Rapporteur explained that the Draft LBI was the result of joint efforts over many years. Its core aims are the protection against business-related human rights abuse, the elimination of impunity and access to justice for victims. The Draft LBI is based on discussions held during the first three sessions, as well as several consultations and over 100 bilateral meetings held in 2018 involving multiple stakeholders. He recalled that the gaps and obstacles faced by victims of business-related human rights abuse with respect to access to remedy have been clearly identified and can be addressed only by the adoption of a binding legal instrument. The Chair-Rapporteur noted that the Draft LBI can and should be improved; thus, he wished for States to contribute constructively during the session.

7. The Chair-Rapporteur presented the draft programme of work and invited comments. As there were no comments by States, the programme of work was adopted.

III. Opening statements

A. Keynote speech

8. Dominique Potier, Member of the French National Assembly, highlighted the fact that we are at a new dawn for globalization, which should be based on the recognition of rights for all. He called for this generation to shift the discourse away from the idolization of markets and towards the respect for human rights. Mr. Potier insisted that the fight for human dignity and the survival of our planet are part of the same battle. Drawing upon the French experience in the field of business and human rights, he shared three lessons to guide the working group's discussions. First, was the need to align with the UNGPs and avoid redefining parameters. Second, the discussion should be grounded in a realistic vision that could garner international and national engagement. Third, he noted that defining the scope of companies to regulate can be challenging, and that France has found success in taking a gradual approach. Mr. Potier also noted that prevention is key to any successful regime, and that should at least be part of the focus of the working group's deliberations.

B. General statements

9. Delegations congratulated the Chair-Rapporteur on his election, with many expressing their full support for the Chair's leadership going forward.² Many delegations also thanked the Chair delegation for the release of the Draft LBI and Optional Protocol in advance of the session, noting that these documents represented a significant step in the process of the working group. Further, several delegations recognized the importance of civil society as a driving force behind the process.

10. Several delegations and many non-governmental organizations (NGOs) reminded the working group of the multiple reasons for further development in the business and human rights field. General issues were raised, such as the unfair power imbalance between companies and rights-holders, the growing power of companies *vis-à-vis* States, the increased rights of companies on the international stage without corresponding obligations, and the lack of effective regulation in conflict and post-conflict settings. Specific types of abuses were mentioned, such as the negligent exposure of children to toxic chemicals and the

² Copies of those oral statements by States and observer organizations during the 4th session that were shared with the secretariat are available at: <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>. A webcast of the entire session is available at <http://webtv.un.org/>.

displacement and murder of indigenous peoples. Many delegations and NGOs saw these issues as evidence of gaps in the international legal order, brought on by globalization and requiring a legally binding instrument to rectify.

11. Some delegations and observer organizations recalled regional and international standards and initiatives relevant to business and human rights, stressing the importance of building upon the work that has already been achieved. Reference was made to conventions of the International Labour Organization, the OECD Guidelines for Multinational Enterprises and other EU regulations and directives, the work of the Office of the High Commissioner for Human Rights (particularly with respect to its Accountability and Remedy Project) as well as the Working Group on Business and Human Rights. Some delegations and organizations affirmed the importance of the UNGPs and emphasized that the Draft LBI must build upon and borrow from them. While several delegations recognized the influence of the UNGPs on the Draft LBI, others pointed out the lack of any explicit reference to the UNGPs in the document. A business organization noted that it did not support the Draft LBI and argued that it undermined the UNGPs because, in their view, provisions of the draft diverged from the accepted approach of the UNGPs.

12. The majority of the discussion centred on the Draft LBI itself. Many delegations considered the draft to be a good starting point for negotiations and noted that it was a major improvement on the elements document which was the basis for discussions during the third session of the working group. It was particularly appreciated that the Draft LBI recognized that the primary responsibility to promote, respect, protect and fulfil human rights and fundamental freedoms lies with States. While many delegations noted approvingly that the Draft LBI imposed obligations on States only, some delegations questioned whether this was actually the case. One delegation pointed out that, throughout the document, there are references to human rights “violations” committed in the context of business activities and insisted that the word “violations” refers to breaches of obligations; thus, in its view, it would be more accurate to refer to human rights “abuses” if the Draft LBI was not discussing direct obligations of companies. Another delegation and several NGOs considered it unproblematic to impose direct obligations under international law on companies and hoped the Draft LBI could clearly establish such obligations.

13. There were some calls by delegations and observer organizations for more clarity and precision in the language of the document, given the legal nature of the text. The articles covering scope, definitions, jurisdiction, applicable law, rights of victims, legal liability and international cooperation were specifically called out in this regard. A regional organization and some delegations reserved their position on the draft as a whole, arguing that the current Draft LBI risks jeopardizing the UNGPs and current implementation efforts. Additionally, one delegation noted that many provisions in the Draft LBI merely restated general international law obligations and principles and suggested that these provisions be removed to avoid unnecessary duplication.

14. Specific provisions of the Draft LBI were also addressed during the general discussion. Many delegations and organizations commented on the scope of companies to be covered by the instrument, arguing that the language in the draft had too narrow a scope because it focused on companies with transnational activities. It was noted that the structure or nature of a company is irrelevant to victims, that they should be entitled to access to remedy regardless of the company committing the abuse, that many multinational companies own or have relationships with strictly domestic companies, and that, in practice, it is difficult to differentiate between transnational and national companies. Thus, it was suggested that all companies be covered by the future instrument (despite some arguing that resolution 26/9 restricted the scope to just transnational corporations). Some delegations and observers also raised concern over the Draft LBI’s restriction to “for-profit” economic activity, arguing that this could exclude many companies responsible for documented abuses, such as State-owned enterprises. A couple of delegations suggested that developing countries require special

consideration, and that State-owned enterprises, as well as micro and small businesses, in these countries should be subject to more lenient treatment.

15. Some delegations requested more clarity with respect to the rights to be covered under the instrument. They noted that “all international human rights and those rights recognized under domestic law” can vary from State to State since States consent to different human rights treaties and have different domestic legislation. It was queried whether such differentiation would cause implementation issues.

16. Delegations and NGOs expressed their appreciation for the article on jurisdiction since, in their view, the use of extraterritorial jurisdiction by home States was crucial to ensuring companies could not avoid accountability. However, other delegations voiced concern over the use of extraterritorial jurisdiction.

17. Many delegations and organizations welcomed a focus on prevention, with several NGOs stressing the importance of mandating due diligence activities.

18. Divergent views were expressed with respect to the article on legal liability. While some delegations and organizations argued that the provision of criminal, civil or administrative liability in the Draft LBI was crucial for victims, other delegations questioned whether it was appropriate to discuss criminal liability of legal entities since this was not possible in their jurisdictions. Concern was also raised over the provision authorizing universal jurisdiction.

19. Differing views were discussed with respect to the relationship between the future instrument and trade and investment agreements. At least one delegation and several organizations stressed the importance of affirming the primacy of human rights over such agreements. However, some delegations voiced concern that such an affirmation would prioritize one branch of international law over another and could restrict States’ negotiating positions. With respect to investment more generally, delegations noted the importance of sustainable development and argued that a legally binding instrument would not have a negative effect on investment; rather, it would create a level playing field and ensure that investment occurred in a context in which human rights standards were respected. In this regard, several delegations recalled the UN 2030 Agenda and pointed out that the Sustainable Development Goals recognize the positive role business can have.

20. Many NGOs and a network of national human rights institutions suggested additions to the draft text. In their view, the instrument could more clearly discuss the role and protection of human rights defenders and other at-risk populations. Particular attention was called to indigenous peoples and the importance of free, prior and informed consent. Calls were also made for a greater structural integration of a gender perspective.

21. Concerning the process for elaborating the Draft LBI, delegations thanked the Chair for its intersessional consultations and for leading an inclusive, transparent process. However, a regional organization expressed the view that the Chair’s delegation had not addressed their concerns. The first was a request that the Chair seek a new Human Rights Council resolution to guide the process. Second, the organization had requested that a footnote be added to the programme of work to clarify that the working group could discuss all business enterprises. Third, it had suggested inviting John Ruggie to join as a keynote speaker.

22. Some delegations noted that the treaty process was not anti-business and that there should be a greater voice of business in the process. A business organization agreed that businesses should be included more, noting that there has been a lack of meaningful discussion with its members on important substantive issues. Several NGOs disagreed that business should be given a greater voice and warned against corporate capture of the process.

23. In addition, delegations and organizations raised the need of increasing State participation in the process. They noted the risks involved with partially-supported treaties

and argued that any legally binding instrument will need traction among many States to be effective. Many NGOs called on States and a regional organization to engage more proactively going forward.

24. Many delegations pledged to constructively engage in the fourth session of the working group and expressed their hopes for an open, frank, and productive dialogue.

C. General introduction to the Draft LBI and its elaboration

25. The Chair-Rapporteur provided background to the elaboration of the Draft LBI, noting that the text derived from the voices of thousands of victims, many bilateral and multilateral meetings, and the input of experts from different backgrounds. Following the distribution of the draft instrument on 20 July, the Chair has received a number of comments from States, civil society, lawyers, academics, and other experts.

26. He explained that the text is based upon basic principles of international law and human rights and rests upon four pillars.

27. The first, and primary, pillar focuses on prevention. It incorporates elements taken from the UNGPs; experiences from national, regional, and international systems; and takes into account discussions held in earlier sessions of the working group.

28. The second pillar concerns the rights of victims, and specifically access to justice. There is an emphasis on the removal of practical obstacles faced by victims in their pursuit of redress. This pillar drew inspiration from previous working group discussions as well as regional regulations facilitating jurisdiction.

29. The third pillar regards international cooperation, which recognizes the transnational nature of contemporary practices and the need for States to work together to ensure justice is done.

30. The fourth pillar focuses on monitoring mechanisms, which are discussed in the Draft LBI and, more prominently, in the Optional Protocol. Inspiration was drawn from other human rights treaties that have successful monitoring mechanisms.

31. While the text is based upon four pillars, all the parts are interrelated, and the Draft LBI should be read as a whole, in its entirety.

IV. First reading of the Draft LBI

A. Articles 2 and 8

32. The Chair-Rapporteur introduced articles 2 and 8 of the Draft LBI, highlighting some key aspects. He noted that the primary objectives of the instrument can be found in article 2(1)(b), which focuses on human beings as victims of business-related harm and their ability to have effective access to justice and remedy. Article 8 likewise focuses on the rights of victims, and its provisions seek to resolve many practical obstacles to victims' access to justice.

33. The first panellist acknowledged that the Draft LBI touches upon very important issues. He noted two trends: increasing recognition of the indivisibility of human rights, and increasing protection in specialized areas. When such notions overlap, a beneficial impact occurs when there is allocation of resources and synergies with existing normative standards. These exist in the Draft LBI, and the enhanced protection of victims can be seen in the provisions on protection of victims and national implementation mechanisms.

34. The second panellist noted that, although article 8 is based on existing standards, it is important to include specific provisions on remedy and prevention. She underlined that victims often face obstacles when seeking to access justice, such as difficulties encountered when trying to prove a causal link between the acts of businesses within a supply chain and damage suffered. She welcomed the inclusion of certain provisions, such as those covering the right to collective action, the establishment of a victims' fund and those facilitating judicial remedy. Additionally, she suggested more clarity in certain articles, particularly 8(2) and 8(4).

35. The third panellist made several suggestions to improve article 2, namely giving prevention a more prominent role, including corporate accountability, and seeking to empower individuals and communities whose rights are at risk. The panellist noted that, given the purpose of prevention, article 8 should add protections for those who are at risk of becoming victims, such as human rights defenders, and cover issues such as procedural protections and injunctive relief. While article 8 recognizes the right to access to justice, she noted that it does not clearly oblige States to remove barriers to justice. Additionally, she suggested that several provisions be clarified, such as 8(3) in relation to which States are addressed and article 8(4) with respect to the kind of information referred to.

36. The fourth panellist shared a story of a human rights defender who had been attacked and who was unable to stop abuses by a transnational corporation through the use of domestic laws. The panellist argued that this demonstrates the need for creating a legally binding instrument to address the power imbalance between those seeking to vindicate rights and powerful companies. She called for an extension of the international rule-based system to address the consequences of globalization, and noted the collective responsibility for protecting everyone, no matter where they live.

37. Delegations and organizations welcomed the inclusion of articles 2 and 8 and voiced their opinion that articles setting out the purposes of the instrument and rights of victims were crucial to include. However, many argued that these provisions would need more precision and clarity, particularly if the instrument was to be applied in national courts. Additionally, some delegations noted that it would be more appropriate if the references to "victims" in both articles (and elsewhere in the document) were changed to "alleged victims" so as to ensure the document's impartiality.

38. With respect to the discussions surrounding article 2, delegations debated the appropriate scope of the instrument due to the multiple references to "business activities of transnational character." Several delegations and organizations reaffirmed their positions that the future LBI should apply to all companies without distinction, including national and public companies. Others contested this, arguing that transnational corporations are the ones escaping regulation; thus, the LBI should focus on them. One delegation suggested that the debate could be solved by focusing on the transnational nature of the activity rather than the nature of the business. Some delegations and many NGOs also argued that the future LBI should establish direct obligations for transnational corporations, and this should be reflected in the purposes of the document.

39. Several delegations called for greater precision in the wording of article 2. At least one delegation expressed the view that references to human rights violations "in the context of" business activities was too vague for courts to apply. With respect to article 2(1)(b), there was some concern about the use of the word "violations," as some delegations and a business organization preferred to refer to "abuses" or at least "violations and abuses." It was also questioned what rights were covered in this provision. While several delegations welcomed the reference to international cooperation in 2(1)(c), they questioned whether the Draft LBI was being too comprehensive and suggested to qualify that a purpose of the instrument would be to advance international cooperation with respect to the activities of business.

40. Some delegations also suggested adding more to article 2, specifically including references to the UNGPs; the universal, indivisible, interdependent and interrelated nature of human rights; the aim of bolstering domestic systems; and the aim of outlining international standards. Some NGOs requested an explicit reference to the primacy of human rights over trade and investment agreements.

41. While many delegations and NGOs signalled their appreciation of article 8 and its focus on victims, several delegations suggested trimming down the article since much of it reiterated accepted norms of international law, and one delegation suggested removing the entire article. Beyond calls to remove particular provisions (articles 8(9-13) were mentioned), there were also calls to use more accurate and legalistic language.

42. With respect to article 8(1), some delegations asked for more clarity regarding the definition of terms (e.g., “satisfaction”) and who would be subject to the obligations in the article. Several delegations and a business organization voiced concern over the reference to “environmental remediation and ecological restoration” in article 8(1)(b), noting that the terms are not defined, go beyond the UNGPs, and are outside the scope of the working group.

43. Concern was also raised in article 8(2)(b) suggesting that it could be read as authorizing extraterritorial jurisdiction (any discussion of which, in their view, should be confined to article 5). One delegation also requested that references to claims of groups should be removed since such actions were not permitted in their legal system.

44. A couple of delegations criticized article 8(3) for being too general and going beyond the preferred scope of the LBI.

45. Several NGOs stressed the importance of keeping article 8(4), as it would have practical benefits for victims.

46. At least one delegation voiced concern over the vagueness of art. 8(5)(c), specifically questioning what constituted “unnecessary” formalities, costs or delays. In its view, such vague terminology would lead to inconsistent application between States and could be rendered meaningless unless better defined. A couple of delegations raised strong objections to the clause in article 8(5)(d) which provided that “in no case” shall victims be required to reimburse legal expenses of other parties to a claim. In their view, cost shifting is sometimes reasonable and necessary to prevent frivolous lawsuits; thus, unjustified claims should be excluded from the provision. In the same vein, some delegations raised the importance of including language to protect against vexatious litigation, either in this provision or in a separate provision (such as article 8(6)) or in a new, standalone provision.

47. Much discussion centred on the potential establishment of an International Fund for Victims provided for in article 8(7). Several delegations welcomed the idea in principle, with many seeking greater clarity as to the modalities of the Fund and how it would be funded and managed. Several delegations thought the establishment of the Fund deserved its own separate article in the future LBI. However, some delegations signalled their reservations to this provision, voicing their concern that States might be expected to pay for the harms of companies.

48. A couple of delegations also voiced concern over the potentially broad scope of articles 8(8) and 8(9) and requested that they were refined to be brought more in line with existing international law and relevant cases on these matters.

49. Additionally, several delegations and NGOs requested numerous additions to article 8, for instance a greater gender perspective, protections for human rights defenders, and the inclusion of groups as victims. One delegation also suggested that the differing capacities of States be taken into account, particularly for articles 8(5) and 8(6).

B. Articles 6, 7 and 13

50. The Chair-Rapporteur introduced articles 6, 7 and 13 of the Draft LBI. Noting that short statutes of limitation are often a barrier to victims' ability to bring claims, he stressed the importance of including article 6 in the future LBI. The Chair-Rapporteur discussed how article 7 acknowledges that human rights standards can vary across jurisdictions and emphasizes that victims should be given the option to decide which human rights standards apply. Concerning article 13, he noted that consistency is one of the key aspects required of any international treaty. As such, article 13 aims to streamline the interpretation of international law.

51. The first panellist emphasized the need for transnational corporations' obligations to be clearly enshrined in a future instrument. Regarding article 13, she noted two key issues: first, the adherence of domestic law with international law should be clearer, and second, the primacy of human rights over trade and investment treaties should be prominently stated. With respect to article 7, the panellist suggested including stronger language favouring victims' choice of law and referring to all human rights.

52. The second panellist discussed the Framework Convention on Tobacco Control and encouraged the working group to take into consideration several provisions and guidance interpreting those provisions. For instance, the working group could borrow language and lessons from art. 5(3) of the Framework Convention with respect to preventing corporate capture. With respect to Draft LBI articles 13(6) and 13(7), the panellist queried how they relate to most favoured nation clauses, and pointed out that interpretation of trade and investment agreements are often done by dispute resolution mechanisms, not States.

53. The third panellist noted that article 6 is particularly useful and a good building block for the treaty, emphasizing that it should cover certain acts that are not part of the Rome Statute of the International Criminal Court. He voiced some concern over article 7, noting that it may go too far and that the reference to "competent" courts was ambiguous. Concerning article 13, the panellist pointed out that the ending qualification in article 13(2) could create a big loophole with respect to the treaty's application. Additionally, he suggested simplifying article 13 and making it more explicit that international human rights law enjoys primacy over investment and trade agreements.

54. The fourth panellist found articles 6 and 7 generally helpful but suggested that certain language be clarified. With respect to article 13, she expressed two key concerns. First, the provisions relating to trade and investment could be made stronger: the primacy of human rights should be clearly stated and there should be a new provision requiring human rights language to be placed in trade and investment agreements. Second, she voiced concern that article 13(1), which reaffirms principles of sovereign equality and territorial integrity, could be used to justify restrictions of other parts of the instrument, in particular in relation to extraterritorial jurisdiction.

55. Delegations had differing views as to article 6. Some expressed their support for an article regarding statutes of limitation, at least one suggested that the article be removed, and many other delegations pointed out issues with the drafting. With respect to the first clause of article 6, many delegations and a business organization sought clarification as to the meaning of "crimes under international law." It was noted that there is no agreed-upon and exhaustive definition for the concept; thus, unless it was to be defined, there could be implementation issues as States would have divergent views. If "crimes under international law" meant the core crimes covered in the Rome Statute (i.e., genocide, crimes against humanity, war crimes, and the crime of aggression), several delegations expressed their view that international law was already clear that no statutes of limitation applied, and so the clause in the Draft LBI would be unnecessary. It was queried whether the phrase also covered crimes having an international character, such as piracy, trafficking, and terrorism. Some

delegations suggested focusing on gross human rights violations or all international human rights violations instead of crimes under international law as a way to address the definitional issue.

56. Some delegations and an NGO also raised concern over vague language in the second clause of article 6, in particular the references to “unduly restrictive” and “adequate period of time.” In their view, there would need to be more clarity in this clause for it to be effective. One delegation suggested using the phrase “unnecessarily restrictive” rather than “unduly restrictive.” A couple of delegations also raised the issue of variations in domestic law regarding statutes of limitation, with one insisting that the LBI should not interfere with national laws in this regard.

57. There were also a range of views with respect to article 7. Some delegations and NGOs viewed the article as crucial, arguing that it could even be expanded to include references to competent regional courts and indigenous peoples’ laws and customs. Other delegations supported the article but requested that the language be made more precise. It was queried what was meant by “competent” courts and “involved persons.” There were calls to ensure the article’s coherence with existing standards of private international law, and one State suggested consulting the International Law Commission for assistance. Several delegations raised concerns over the formulation of article 7(2). Some delegations expressed unease with the fact that their courts could be burdened with trying to decipher foreign laws, potentially in different languages and coming from foreign cultures, with respect to complex issues. A few delegations noted that permitting some flexibility in choice of law rules could be acceptable in some cases with respect to civil lawsuits but would be unacceptable with respect to criminal prosecutions; thus, they requested that the text be altered to remove criminal suits from its ambit. One delegation considered this provision to bring too much uncertainty and suggested its removal from the LBI.

58. Concerning Articles 13(6) and 13(7), some states and many insisted that such provisions should be included and strengthened so that it was explicitly stated that human rights enjoys primacy over trade and investment agreements. One delegation suggested that these provisions take into account ongoing efforts to revise such agreements, and some NGOs suggested that the provisions should require human rights impact assessments and consultations prior to entering such agreements. However, a couple of delegations warned that going too far could undermine development. Further, several delegations reserved their positions on these articles and noted their concern that the provisions risked unacceptably creating a hierarchy in international law, and even potentially violating customary international law. Moreover, one delegation cautioned that there should be careful consideration of the language used as it could impact the huge networks of agreements that many States are a part of.

59. In the context of this discussion, reference was made to article 13(3), since some delegations and NGOs considered there to be a conflict between the provisions. Several NGOs suggested removing article 13(3) from the text, or at least the first sentence of the provision.

60. With regard to article 13(1), one delegation signalled its approval of the reference to State sovereignty and territorial integrity, while another delegation expressed concern that States could attempt to rely on the reference to avoid assisting with international cooperation. One delegation questioned why only some international law principles from the 1970 Friendly Relations Declaration were cited and suggested either including all or none of them so as not to be seen as favouring some over others.

C. Article 9

61. The Chair-Rapporteur opened the debate on article 9 by elaborating the various texts consulted when drafting this provision. Chief among these texts were the UNGPs, ILO guidelines, EU rules on non-financial reporting, national legislation such as the French duty of vigilance law, and General Comments of the Human Rights Committee and Committee on Economic, Social and Cultural Rights.

62. The first panellist stressed the importance of including an article on prevention in the Draft LBI. States remain the main actor to protect human rights, and while non-binding instruments have provided guidelines for improving human rights protection, gaps remain in domestic systems (such as the lack of human rights safeguards and non-recognition of corporate criminal responsibility). This instrument has the potential to improve human rights due diligence systems on a large scale. She suggested that guidance could be sought from the recently-released 2018 report of the Working Group on Business and Human Rights to the General Assembly on human rights due diligence.

63. The second panellist emphasized the well-documented harm caused by companies' reckless handling of hazardous substances. In order to address this, he argued that States should compel companies to actively monitor, notify and prevent violations. Mandatory human rights due diligence should go beyond what is in article 9(2) and make sure it is transparent and traceable through the supply chain. Additionally, it should cover actual and potential exposure to toxic waste.

64. The third panellist agreed that article 9 is a crucial aspect of the Draft LBI and noted that the text should reference "human rights" due diligence so as to distinguish it from the due diligence conducted in business transactions. He suggested aligning the text better with that of the UNGPs and OECD guidelines, specifically with respect to the mitigation and tracking of impacts. The panellist warned against permitting exemptions in article 9(5) for small and medium-sized enterprises, as corporations would find a way to exploit this. Additionally, he advocated the inclusion of a defence for companies who took all precautions possible.

65. The fourth panellist did not support the Draft LBI and Optional Protocol and reaffirmed the business community's support for the UNGPs. In her view, article 9 unhelpfully departs from the UNGPs and adopts an unrealistic, results-based standard. The panellist also challenged the idea that transnational corporations operate in a legal vacuum. She noted that all companies operate in particular countries, which each have the ability to regulate those operations. The first line of defence for rights abuses should be a strong and effective domestic rule of law. Shifting the burden onto companies to inspect themselves would be inappropriate.

66. Many States and observer organizations welcomed an article dedicated to prevention and discussed how this is one of the key articles of the Draft LBI. Of these, many agreed with a panellist that it would be more appropriate to refer to "human rights" due diligence throughout the article. Similarly, there were several calls for the provision to align more closely with the letter and spirit of the UNGPs and to build upon them where necessary. In this regard, some delegations and a business organization took issue with what they perceived to be an approach that focused on results rather than conduct. Additionally, multiple delegations reiterated their call for the LBI to cover all companies, both national and transnational. While several delegations and NGOs called for more precision in the text of the article, some States criticized the text for attempting to prescribe too much. In their view, the article would be more effective if it outlined general standards and left it to each State to determine how best to implement them. Several NGOs insisted that the article include direct obligations on transnational corporations; however, some delegations voiced concern that the article risked inappropriately transferring some obligations of the State onto business.

Additionally, at least one delegation voiced concern of overburdening certain companies and called for the article to include consideration of the needs for States' development.

67. Throughout the discussion, several suggestions were raised for other considerations to be included in the text. For instance, some delegations requested greater recognition of the varying capacities of States. Other delegations suggested including provisions addressing situations of conflict and the need for enhanced due diligence therein. Several NGOs raised the need for an independent monitoring body, suggested including explicit references to global supply chains, insisted on a greater recognition of gender issues and structural inequalities, and made several proposals for other forms of prevention beyond human rights due diligence, such as increased access to information, protection of human rights defenders, and the provision of injunctive relief.

68. With respect to article 9(1), many NGOs signalled their approval for mandating due diligence by companies. One delegation thought the text should be expanded to reference indirect effects of business activities, suggesting that the provision refer to the impacts resulting from "or associated with" such activities. A business organization, on the other hand, criticized the provision for being too broad and asked the working group to reconsider the provision's reference to "all persons."

69. Most of the discussion involved article 9(2) and its many sub-provisions. There were many calls for this provision's greater alignment with the concepts and terminology of the UNGPs (as well as the OECD Guidelines and guidance on due diligence). Some delegations and organizations specifically noted that some of the stages referred to in the UNGPs with respect to human rights due diligence were missing or altered, and that new elements were added. In their view, the stages of the UNGPs should be strictly followed, with new elements added only where necessary. Some delegations further suggested making clearer references to the different forms of participation companies can have to adverse human rights impacts.

70. In article 9(2)(c), one delegation suggested changing "prevent" to "seeking to prevent" human rights violations. In article 9(2)(d), another delegation requested that reporting on "financial matters" should occur in addition to non-financial matters. And in article 9(2)(e), some NGOs called for the inclusion of gender impact assessments.

71. A few delegations took issue with article 9(2)(f). They noted it was too broad to refer to "all" contractual relationships given the many different types of commercial contracts States enter into and requested that the provision be given more precision or be removed from the text.

72. Article 9(2)(g) was welcomed by some delegations and many NGOs. It was noted that "meaningful consultations" was likely too restrictive and vague; thus, there was a call to remove the term "meaningful" and to elaborate on the types of consultations needed. Some delegations and many NGOs suggested including a specific reference to free, prior and informed consent (and the notion of continuous consent) in this provision. Additionally, some NGOs requested that a stronger gender perspective be included. While there were some calls for adding to the categories of peoples at heightened risks (in particular, LGBTI and those with chronic diseases), one delegation suggested removing specific reference to any group as including some groups could be interpreted as excluding others.

73. Some delegations sought more clarity with respect to what was expected in article 9(2)(h). Additionally, one delegation and a business organization suggested removing article 9(4) due to its lack of clarity (and taking into account their concerns with other parts of article 9).

74. With respect to Article 9(5), some delegations supported the provision as written, with one pointing out the need for developing countries to rely on small and medium sized enterprises. A couple of delegations recognized the risk of overburdening such enterprises but voiced their opinion that there should be no exemption here. Several other delegations

and a business organization criticized the ambiguity of the provision, noting that there is no accepted definition of “small and medium-sized undertakings,” there are no standards put forth for authorizing exemptions, and it is unclear what “selected obligations” would be exempted. It was argued that this provision leaves far too much discretion to each State and would weaken the article. In view of this, and of their view that the LBI should apply to all companies without distinction, they argued for the removal of this provision.

D. Articles 10, 11 and 12

75. The Chair-Rapporteur began the session by introducing articles 10, 11 and 12. With respect to article 10, he noted that previous discussions of the working group highlighted the need for the inclusion of legal liability in the Draft LBI, and in particular reference to civil, criminal and administrative liability. He emphasized that the draft attempts to balance prescription and flexibility to allow States the freedom to figure out how best to implement the provision. The provisions on civil liability focused on broadly accepted principles. Those on criminal liability allowed for States to apply non-criminal, effective sanctions in order to garner broader acceptance by states. The Chair noted that articles 11 and 12 on mutual legal assistance and international cooperation are devoted to fill jurisdictional gaps, and he hoped that they would help realise the implementation of the convention.

76. The first panellist noted that any binding instrument should build on and complement the UNGPs. He noted that article 10 omits details on administrative penalties and preventive remedies, and suggested it might be useful to consider non-judicial mechanisms. He emphasized that the obligations in article 10(1) should be limited to the territory or jurisdiction of the relevant states. Additionally, he expressed doubts over article 10(4), concerning the reversal of the burden of proof, since legal reforms would be needed to implement the provision. He also questioned the appropriateness of restricting criminal liability in article 10(8) to “intentional” acts. With respect to article 11, he asked for greater elaboration regarding provisions on the recognition and enforcement of judgments. Additionally, he suggested that the international cooperation in article 12 could include national human rights institutions and civil society.

77. The second panellist underscored the weakness of the State-based model that the Draft LBI adopted, arguing that it would be advisable to privilege a system of direct liability of corporations. He also noted a failure of the draft to fully engage with corporate law, and suggested to recognize and address the notion of fiduciary duty in order to recognize the responsibility of natural persons, in particular directors of corporations.

78. The third panellist highlighted that the future LBI can help facilitate legal action in the home states of transnational corporations since victims often do not have access to justice where abuses occur. While noting that article 10(6) covers many important situations, he suggested that the wording be made clearer. Additionally, he suggested that the provision on legal liability will not have much effect if practical obstacles victims’ face are not removed; thus, the inclusion of issues like access to information in article 8(4) are crucial to the success of the treaty and should be read along with article 10.

79. The fourth panellist welcomed the introduction of article 10(4) on the reversal of the burden of proof, but criticized the qualification that it be subject to domestic law and suggested the qualification’s removal. While noting that article 10(6) should be explicitly linked to article 9 on prevention, she suggested that liability not be limited to the failure to comply with due diligence. Additionally, the panellist argued that requiring “intentional” conduct to establish criminal liability was too high a threshold and suggested that the instrument include more elaboration on administrative penalties.

80. Several delegations and NGOs welcomed the inclusion of an article on legal liability, with many NGOs voicing appreciation that it covered civil, criminal and administrative

liability. While some considered the draft to make appropriate distinctions between natural and legal persons, a few delegations suggested that the distinction be made clearer in several provisions of article 10. In this regard, many NGOs requested that this article reference direct obligations of transnational corporations. There were also calls for the article to more clearly address aspects of corporate law, in particular separate legal personality and fiduciary duties. Most NGOs requested clearer provisions on piercing the corporate veil, whereas one business organization found that the current draft already disregards separate legal personality and unfairly imposes legal risks on companies that may have very tenuous connections to abuses. Additionally, several delegations and one NGO asked for provisions focusing on situations of conflict. One delegation suggested adding references to international humanitarian law throughout the article, while another suggested including language on aiding and abetting liability, particularly in situations of occupation.

81. Two delegations sought clarification with respect to article 10(3), with one questioning whether States would be expected to bear financial responsibility for the acts of private parties.

82. States had divided positions concerning article 10(4) on the reversal of the burden of proof. Some delegations and a business organization considered the provision to be too broad, risking violations of due process and the rights of defendants. Other delegations found the provision to be problematic if it did not clearly exclude criminal cases, as this would run counter to the presumption of innocence. Several delegations and NGOs welcomed the inclusion of this provision. While State delegations appreciated the inclusion of the condition that burden shifting should be “subject to domestic law,” many NGOs insisted that such a condition be removed and that the reversal of the burden of proof be mandated by the instrument.

83. There were many calls for clarity and increased precision in article 10(6). State delegations specifically questioned what was meant by “control” in 10(6)(a) (with one delegation suggesting to change the wording to “sufficient control”), “sufficiently close relation” in 10(6)(b) and “strong and direct connection” in the same provision. This ambiguity was noted by an NGO and a business organization who both argued that, as written, the provision could impose unreasonable legal risk on companies through their business relationships, regardless of their control over events. Despite this, one delegation suggested expanding the article to cover harms indirectly related to companies, and several NGOs suggested including more references to supply chains and the piercing of the corporate veil.

84. Some delegations raised serious concerns with article 10(8) as they interpreted it to require the imposition of criminal liability on legal entities, which is not possible in their legal systems. One delegation further made it clear that the references to dissuasive non-criminal sanctions in articles 10(10) and 10(12) as an alternative did not resolve this issue for them, and it stated that it would be unable to accede to any instrument that obliges corporate criminal liability. Some delegations appreciated the provision and suggested making it even stronger, for instance by lowering the threshold of “intentional” acts to something easier to prove in practice. There were also calls for clarification as to what crimes were being referenced in the provision, with one NGO cautioning that the principle of legality could be violated if the crimes were not defined with sufficient clarity.

85. Many delegations also voiced concerns over the inclusion of universal jurisdiction in article 10(11). There were several requests for clarity as to the scope of crimes envisaged by the provision. It was pointed out that universal jurisdiction was a very controversial subject with no common agreement, and that it had been abused by some States in the past; thus, in their view, it was better to remove any reference to it. Other delegations noted their concerns and suggested deferring to other processes or experts on the matter (such as the General

Assembly's Sixth Committee or the International Law Commission). Additionally, one delegation questioned why this provision was in article 10 and not article 5 on jurisdiction.

86. In general, delegations seemed to approve of articles 11 and 12, considering them to have a foundation in existing international law and to be important for the future LBI. However, some delegations expressed concern with article 11, in particular its obligatory nature, its lack of sufficient regard for the difficulties developing countries may have in implementing it, and the imbalance regarding procedural rights for defendants. One State suggested incorporating a dual-criminality component in some provisions to ensure the provision would not be abused. With respect to article 12, some delegations suggested including references to the UN Charter and UNGPs, referencing cross-border issues more explicitly, and allowing transnational corporations and other business enterprises to formally join international cooperation efforts.

E. Articles 3 and 4

87. The Chair-Rapporteur explained that the previous working group discussions informed the wording of articles 3 and 4. With respect to article 3, a broad approach of referring to all human rights recognized internationally and domestically was chosen to take into account disparities between different legal systems. Further, the Draft LBI maintained and strengthened the approach adopted in the third session concerning focusing on "activities of a transnational character." Article 4 defines this phrase and notably includes activities undertaken by electronic means. The article also defines "victims" in broad terms so as to include "the immediate family or dependents of victims."

88. The first panellist noted the division regarding the scope of the Draft LBI. In his view, a victims-oriented approach requires that human rights violations are recognized and remedied regardless of the nature of activities of the perpetrator, be it a transnational corporation or a State. Further, he noted that most businesses are locally-based and if the focus is on the transnational character of activities, the LBI will be subject to loopholes. Thus, he proposed amending the scope so that transnational activity refers to "economic activity existing not solely for local purposes" and "taking place as a network of relationships that cross boundaries."

89. The second panellist noted the impossibility of distinguishing between transnational corporations and other business enterprises. While the LBI could focus on the transnational character of the activities, its definition in article 4 should be refined. First, it should not exclude State-owned enterprises. Second, it should clarify that the activities could be those of the corporation or of the subsidiaries with whom they have a contractual link.

90. The third panellist highlighted the need to strike a balance between addressing accountability gaps of transnational corporations and making sure that no new conditions for impunity are created in the LBI. She supported the broad approach of article 3(2) but suggested clarifying the meaning of "international human rights" to avoid divergent interpretations. In her view, adopting a minimum core of human rights approach would set a floor and allow States to establish greater protections.

91. The fourth panellist argued that the Draft LBI covers all entities regardless of their legal nature. Thus, domestic companies are covered so long as they have the capacity to commit human rights violations and their activities span two or more jurisdictions. She noted that no place in the Draft LBI excludes national companies; rather, article 9(5) even suggests they are covered as it references small and medium-sized enterprises, which include national companies.

92. While delegations indicated that articles 3 and 4 were necessary to include in the LBI, there were divergent views as to what they should consist of. With respect to article 3(1), many States and organizations insisted that the LBI should cover all business enterprises

regardless of any transnational element, noting that this approach would be consistent with the UNGPs. In their view, what was important was the seriousness of the human rights impact, not the type of activity or nature of the company. Some delegations called for the instrument to cover just transnational corporations as such. Several other delegations considered the approach of the Draft LBI, which focuses on the transnational character of business activities, to be a fair compromise that was consistent with the footnote of resolution 26/9 and should satisfy those who want the instrument to cover more than transnational corporations. Other delegations disagreed, arguing that such an approach was vague and potentially too broad. In addition to the issue of scope, some delegations and organizations reasserted their position that it was inappropriate to refer to “violations” when referencing business activity. It was suggested that the Draft LBI should refer to either “abuses” or “adverse human rights impacts.”

93. Regarding article 3(2), many delegations and some organizations sought clarity regarding the meaning of “all international human rights and those rights recognized under domestic law.” Some delegations considered this formulation could be read to impose obligations on States which they had not consented to, and cautioned that this could make States averse to signing the future instrument. These delegations suggested moving such language to the preamble, or alternatively changing the text to read “all treaties adopted by States.” Other delegations considered the formulation in the Draft LBI to be too broad and open to differing interpretations, thus potentially causing implementation problems. It was suggested that the instrument use the terminology from Guiding Principle 12 regarding internationally recognized human rights. Additionally, some delegations suggested expanding the wording of article 3(2) to cover international humanitarian law, or human rights and fundamental freedoms. Some NGOs also provided suggestions for rights to include, such as environmental rights, gender equality, the right to self-determination, and the collective rights of indigenous peoples.

94. With respect to article 4(1), many delegations requested more precision for the definition of victims. Some considered the definition to be overbroad, and there was concern that it could be abused by people who did not even need to establish a link to harmful activities of a company. At least one delegation and one NGO noted that the list of harms was not entirely clear, and others questioned why there was a threshold for “substantial” impairment of human rights. Another delegation and NGO challenged the use of the term “victim” in general and suggested it would be more appropriate to refer to “person” or “rights-holder.” Moreover, some delegations and NGOs suggested including references to particular groups, such as “peoples” or “communities,” vulnerable populations, and human rights defenders.

95. The discussions over article 3(1) were also applicable to article 4(2). Additionally, there were arguments made specifically regarding the latter. Some delegations and NGOs challenged the restriction in article 4(2) regarding “for-profit” economic activity, arguing that this unnecessarily narrowed the scope of the instrument and exempted certain companies that are responsible for human rights abuses. There were also calls for references to parent companies and/or global supply chains, as well as “transnational corporations and other business enterprises” explicitly.

F. Article 5

96. The Chair-Rapporteur opened the panel clarifying that the goal of article 5 is to allow victims to choose the forum where their legal cases should be heard. He recalled that prior discussions of the working group identified this as key to ensure effective access to justice. Additionally, he recalled the various sources relied upon when drafting this article, in particular EU regulations, General Comment 24 of the Committee on Economic, Social and Cultural Rights and General Comment 16 of the Committee on the Rights of the Child.

97. The first panellist suggested a couple of textual revisions to the article, specifically removing references to “natural” persons and, potentially, “association of natural or legal persons.” He then provided five remarks on the article. First, he noted that article 5 adds nothing beyond what is already authorized under international law, as it focuses on jurisdiction based on the principles of territoriality and active personality. Second, article 5 concerns adjudicative jurisdiction rather than prescriptive or enforcement jurisdiction. Third, the jurisdiction is to uphold international human rights rather promoting States’ unique sovereign interests. Fourth, the article establishes a duty to assert jurisdiction rather than merely permitting it. Finally, he noted that the formulation in article 5(2)(c) is potentially too broad and vague.

98. The second panellist considered article 5 to be largely superfluous as it reflected existing rules of international law. He made three suggestions. First, the doctrine of *forum non conveniens* should be prohibited. Second, it should be clearer that courts in home States of multinational corporations should have jurisdiction over their subsidiaries. Third, article 5(3) should be revised so as to make it easier to institute opt-out class action suits.

99. The third panellist considered the jurisdictional scope of the Draft LBI to be sweeping and overbroad as it permits claimants or activists to bring claims in home States for actions abroad, allows them to choose an applicable law outside of the forum jurisdiction and provides for universal jurisdiction. He noted three concerns with this approach; according to his view, such an approach likely violates international law and principles, threatens State sovereignty, and could increase the risks of legal liability which could lead to a decrease in investments.

100. Several delegations and many NGOs stressed the importance of including an article on jurisdiction and noted that transnational corporations and other business enterprises often escape accountability by taking advantage of gaps and differing rules among States regarding jurisdiction. Thus, they hoped that the LBI could address such gaps and provide some uniformity in this area. There were several calls for clearer provisions in article 5 and for ensuring internal coherence with other parts of the Draft LBI (in particular, articles 7 and 10). An NGO also questioned whether article 5 solely addressed civil jurisdiction and wanted clarification about the approach of the Draft LBI to criminal jurisdiction.

101. Regarding article 5(1), delegations signalled their support for provision 5(1)(a), as it reaffirmed jurisdiction on the basis of territoriality. There was greater discussion surrounding article 5(1)(b) as it could permit the exercise of extraterritorial jurisdiction. A business organization argued this threatened States’ sovereignty and that it would divert attention away from the need to strengthen access to remedy where harms occur. Some delegations raised similar concerns, noted that such jurisdiction has been abused by States in the past, and requested that it be appropriately limited. Many NGOs disregarded these concerns and argued that the basis for jurisdiction in article 5(1)(b) was accepted in international law – States have the right to regulate the actions of its nationals abroad. There were also calls to include additional bases of jurisdiction in article 5(1). A couple of delegations suggested permitting courts to assert jurisdiction when the victim is a national or domiciliary of the forum State. Additionally, an NGO suggested including universal jurisdiction.

102. Some delegations voiced concern over article 5(2) (particularly sub-provisions (c) and (d)) as they considered it to be too broad. There were several calls to refine the language, with one delegation suggesting to look to private international law for clarity regarding the concept of “domicile.” While there was no concerns over articles 5(2)(a-b), several delegations and some organizations considered 5(2)(c) to be problematic, noting that there was no accepted definition of “substantial business interest.” There was similar unease with article 5(2)(d). In particular, clarity was sought with respect to the meaning of “instrumentality” or “of the like.” It was suggested to delete these provisions or otherwise

revise them. Despite the concerns expressed with article 5(2)(d), some delegations and NGOs requested that the provision be strengthened such that it would more clearly address issues of corporate structures and separate legal personality. These delegations insisted that the provision be worded such that article 5 would permit jurisdiction against parent companies and other entities with established commercial relationships with the entity causing harm.

103. While one delegation suggested deleting article 5(3) (in its view, this was a procedural issue to be governed by national law), other delegations welcomed the inclusion of the provision. Several delegations took issue with the clause permitting actions to be taken on behalf of victims without their consent if it could be justified. In their view, this could be subject to abuse and it would be inappropriate to bring claims without people's consent. The Chair-Rapporteur clarified that consent would not be necessary only in exceptional circumstances, such as where serious violations prevent the presence of a victim. One panellist insisted that the clause be retained as it was necessary to effectuate class action suits (which can have elaborate procedural systems to ensure that people can opt out if they do not want to be part of an action). One delegation suggested removing references to actions brought by groups of individuals since their legal system did not permit class action suits.

104. There were also calls to address additional issues in article 5. Some delegations and many NGOs insisted that *forum non conveniens* be prohibited. Several NGOs also suggested including a provision on *forum necessitatis*. One delegation requested that special attention be made to situations of conflict. Additionally, several delegations requested that the article (or Draft LBI) address the issue of conflict of jurisdictions. They expressed several concerns over the consequences of the broad approach of article 5 to jurisdiction, in particular relating to forum shopping and the issue of parallel proceedings. Neither article 5 or article 7 provided rules for deciding how to resolve issues between competing jurisdictions. One delegation proposed that the court first seized should get priority to decide a case. A panellist agreed that the issue should be addressed but warned that the proposed solution could be subject to abuse.

G. Articles 1, 14 and 15

105. The Chair-Rapporteur began the session by introducing articles 1, 14 and 15. He noted that article 1 is based on the major instruments and principles of international human rights law, and he emphasized certain paragraphs in the preamble. The Chair-Rapporteur explained that article 14 was derived from provisions of the other major human rights treaties. Additionally, he noted that article 15 covers certain final provisions, particularly those of a procedural nature.

106. The first panellist provided several practical comments on the Draft LBI. Addressing substance first, he suggested a number of revisions to article 14, such as clarifying whether members can be re-elected, requiring supplementary reports every five years instead of four, and aligning the Committee's functions with other human rights treaties. Regarding article 15, he proposed specific revisions to the language concerning regional integration organizations, and he suggested having a low threshold for entry into force. He also proposed a number of revisions to the format of the Draft LBI, including taking the preamble out of the operative sections of the LBI and splitting articles 14 and 15 into several articles.

107. The second panellist offered a gender-based perspective and proposed that this perspective be adopted throughout the treaty. Emphasizing the special risks women face, she proposed revising article 1 so that it acknowledges gender equality as a fundamental right. Additionally, she suggested revising article 14 so that a gender balance be "achieved" in the Committee. She also noted that article 15 contains crucial provisions that need to be fleshed out in other articles; for example, article 15(4) should have a corresponding obligation in article 9.

108. The third panellist covered three main topics. First, he suggested enhancing the provisions on the Committee, for instance by including provisions prohibiting conflicts of interest for Committee members and for ensuring the participation of civil society and UN agencies. Second, he proposed that the functions of the Conference of States Parties be clarified and expanded. Third, he suggested including a provision to cover dispute resolution between States regarding the interpretation and application of the instrument.

109. Much of the discussion centred on the preamble in article 1. Several delegations and some observer organizations suggested taking the preamble out of the operative parts of the text. There were also several comments made regarding making the current text more precise. In clause 2, one delegation suggested revising the text to read “in case of harm decisive for the enjoyment of their human rights.” Regarding clauses 3 and 8, several delegations suggested adding a reference to international humanitarian law, whereas another delegation proposed deleting the reference to “international human rights law” since it was subsumed under “international law.” One delegation argued that clause 3 added little to the text and should be deleted. Another delegation signalled its approval of the formulation in clause 4 stating “or otherwise under their jurisdiction or control.” With respect to clause 6, a delegation and business organization suggested changing the word “shall” to “should” in order to bring the text more in line with the UNGPs. However, another delegation and several NGOs preferred the text as is and insisted that there be more references to the direct obligations of transnational corporations and other business enterprises in the preamble. Additionally, some delegations called for losing the reference to “all” business enterprises because of their view that the LBI should address only transnational corporations. A business organization also questioned whether it was consistent to include the reference to all business enterprises when the rest of the Draft LBI referred to businesses with activities of a transnational character. Regarding clause 7, one delegation and an NGO suggested adding more principles to the list; however, another delegation questioned whether including some principles could be seen as favouring them over others, while a third delegation suggested referring to principles of international law generally rather than listing specific ones. Additionally, there was a call to delete clause 9 referring to resolution 26/9.

110. There were also many suggestions for additions to the preamble. Several delegations recommended making reference to the principles and purposes of the UN Charter (with one delegation suggesting reference to the Charter as a whole). There were also several calls for references to the importance of sustainable development and the positive role that companies may play. Some delegations and many NGOs suggested including stronger language with respect to gender. Many NGOs also requested references to the primacy of human rights. Additionally, there were calls by various delegations for a number of other references, including regarding fundamental rights and freedoms, the UNGPs, and the right to a sustainable environment.

111. Regarding article 14, some delegations and NGOs signalled their approval for the establishment of a Committee, and they suggested numerous powers that the Committee should have, in particular the ability to receive and review complaints and to issue binding decisions. Other delegations raised concerns with rushing to create a new Committee. It was suggested that the working group consider the ongoing review process regarding treaty body strengthening. In order to avoid the risk of fragmentation and duplication of efforts, some delegations suggested relying on existing mechanisms to be in charge of the implementation and interpretation of the future LBI. These delegations also raised the issue of funding implications of establishing a new body. Another delegation argued it was premature to discuss this issue before reaching a stronger consensus on the substance of the Draft LBI. Some NGOs argued that the article should go further and establish more powerful international bodies, such as a court or monitoring centre.

112. With respect to specific provisions under article 14, some delegations called for the inclusion of a clause prohibiting conflicts of interest in 14(b). Other delegations requested

five years to meet the reporting requirements of 14(2) instead of four. It was also suggested that article 14(4)(e) be removed or revised so that the Committee itself undertakes studies.

113. There was general approval of article 15, though one delegation suggested separating the first six provisions on implementation away to form a new article. A delegation considered article 15(1) to be redundant and argued States should be allowed to determine how to implement their treaty obligations. Some delegations wanted greater consideration of the capacities of developing States and argued against the need to include article 15(2) in addition to the reporting requirements of 14(2). Some delegations and many NGOs welcomed the inclusion of article 15(3), considering it to be important to retain in the LBI and potentially replicated in article 9 and/or the preamble. However, some other delegations voiced concern that the provision risked creating opposition of business to the human rights agenda and argued it would be better to include the views of all interested parties. One delegation suggested either deleting provisions 15(4-6) or moving them to the preamble. However, some delegations and NGOs requested that article 15(4) be strengthened, in particular the references to gender-based and sexual violence, which, in their view, deserved a standalone provision. Similarly, some delegations and NGOs approved of article 15(5) and requested its replication in other parts of the Draft LBI. While one delegation proposed adding more groups to the list of those facing heightened risks of violations of human rights, another warned against including a list as the inclusion of some groups could be read as excluding others. A delegation and NGO recommended that articles 15(10-11) be removed from the text along with the references to regional international organizations. Additionally, some delegations requested that the working group decide upon a reasonable number of States to be required under article 15(12) regarding entry into force. One delegation also agreed with a panellist that a provision should be added to cover dispute resolution between States regarding the interpretation and application of the instrument.

V. Presentation of the Draft Optional Protocol

114. The Chair-Rapporteur introduced the Draft Optional Protocol to the working group, explaining that the text was inspired by previous to future developments and (potentially) future protocols. The protocol working group discussions, the views of experts, and documents such as the Optional Protocol to the Convention against Torture. He explained that this was to be a living document, subject focuses on access to justice for victims and provides for their ability to bring complaints at both the national and international levels. For that purpose, the provisions of the Committee proposed in the Draft LBI will be complemented by the strengthening or establishment of national implementation mechanisms which will have numerous competencies, such as the ability to receive complaints, recommend measures, propose legislative reforms, and collaborate with and help bolster national institutions.

VI. Panel on “The voices of victims”

115. Four panellists introduced the session by discussing specific incidents of abuses by companies and noting attacks on the freedom of assembly, environmental crimes, land grabbing, and the disproportionate impact of business-related harm on women. They argued that accountability has been elusive (including throughout supply chains) and voluntary mechanisms have not sufficiently addressed these harms; thus, it was imperative to have an LBI that focuses on the need for effective remedy. Some suggested that the Draft LBI include more language on human rights defenders; free, prior and informed consent; precautionary measures; and accountability throughout entire supply chains.

116. The panellists’ presentations were followed by several interventions raising instances of business-related abuses, particularly in relation to indigenous peoples, conflict-affected

areas, and human rights defenders. Several delegations and NGOs agreed with the panellists that the plight of victims needs to be addressed and that victims' right to access to justice and effective remedy should be ensured. Some delegations shared domestic laws and initiatives that could help the working group address these issues. While it was noted that all victims should enjoy the same rights and protections, a regional organization and some NGOs considered it would be beneficial to better address the needs of certain disproportionately-affected groups in the Draft LBI, such as indigenous peoples, women, children, and ethnic and religious minorities. A stronger gender perspective was also advocated for the LBI as a whole. Additionally, a regional organization and several delegations noted that human rights defenders face specific risks, and any form of retaliation against those who speak out against abuse is completely unacceptable. It was suggested that States generally increase protections in this respect and that the LBI include greater protections for human rights defenders. Several resources were cited to aid the working group with this, including the Declaration related to human rights defenders, certain reports of the Special Rapporteur on the situation of human rights defenders, EU laws, and examples from national action plans on business and human rights.

VII. Recommendations of the Chair-Rapporteur and conclusions of the working group

A. Recommendations of the Chair-Rapporteur

Following the discussions held during the fourth session, and acknowledging the different views and suggestions on the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises expressed therein, the Chair-Rapporteur makes the following recommendations:

(a) Invites States and other relevant stakeholders to submit their comments and proposals on the draft legally binding instrument referred above, no later than the end of February 2019.

(b) The Chair-Rapporteur should prepare a revised draft legally binding instrument, on the basis of the discussions held during the fourth session of the working group, an annex to the report of the fourth session prepared by the Secretariat no later than the end of December 2018 containing a compilation of statements from States, the submissions referred in subparagraph a), and the informal consultations to be held, and present that revised text no later than the end of June 2019, for consideration and further discussion.

(c) Direct substantive intergovernmental negotiations on the draft legally binding instrument should take place during the fifth session of the OEIGWG to be held in 2019, on the basis of the revised version referred in subparagraph b) above, in order to fulfil the mandate of Resolution 26/9;

(d) A second briefing of the draft optional protocol, presented by the Chair-Rapporteur as an annex to the draft legally binding instrument, should take place during the fifth session of the OEIGWG referred above;

(e) Informal consultations with Governments, regional groups, intergovernmental organizations, United Nations mechanisms, civil society and other relevant stakeholders should be held by the Chair-Rapporteur before the fifth session of the working group;

(f) The Chair-Rapporteur should prepare an updated programme of work, on the basis of the discussions held during the fourth session of the working group and the informal consultations to be held, and present that text before the fifth session of the working group for consideration and further discussion thereat.

B. Conclusions of the working group

At the final meeting of its fourth session, on 19 October 2018, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9:

(a) The working group welcomed the opening message of the Mrs. Kate Gilmore, United Nations Deputy High Commissioner for Human Rights and thanked Dominique Potier, Member of the French Assembly for serving as keynote speaker. It also thanked a number of independent experts and representatives who took part in the first reading of the draft legally binding instrument, and took note of the proposals, comments, suggestions and questions received from Governments, regional and political groups, intergovernmental organizations, civil society, NGOs and all other relevant stakeholders on substantive as well as procedural issues related to the draft legally binding instrument;

(b) The working group acknowledged the dialogue focused on the content of the draft legally binding instrument, as well as the participation and engagement of Governments, regional groups, civil society, experts, intergovernmental organizations and relevant stakeholders, and took note of the inputs received from them;

(c) The working group noted the shared concern about the victims from abuses caused by Transnational Corporations and other Business Enterprises, and the serious challenges faced by, especially of those in most vulnerable situations, and the need to respect, promote, protect and fulfil their human rights;

(d) The working group took note with appreciation the recommendations of the Chair-Rapporteur and looks forward for the revised version of the draft legally binding instrument, the informal consultations ahead of, and the updated programme of work for its fifth session.

VIII. Adoption of the report

129. At its 10th meeting, on 19 October 2018, after an exchange of different views on the report and some of its elements, the working group adopted *ad referendum* the draft report on its fourth session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Council for consideration at its fortieth session.

Annex I: List of participants

States Members of the United Nations

Afghanistan, Albania, Algeria, Angola, Argentina, Austria, Azerbaijan, Bahrain, Belgium, Bolivia (Plurinational State of), Brazil, Cameroon, Chile, China, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cuba, Czech Republic, Democratic Republic of the Congo, Denmark, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Germany, Ghana, Greece, Guatemala, Haiti, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxemburg, Madagascar, Malaysia, Malta, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Moldova, Romania, Russian Federation, Rwanda, Saudi Arabia, Senegal, Slovenia, Sri Lanka, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Ukraine, United Kingdom of Great Britain and Northern Ireland, Uruguay, Venezuela (Bolivarian Republic of), Zimbabwe

Non-member States represented by an observer

Holy See, State of Palestine.

United Nations funds, programmes, specialized agencies and related organizations

WHO Framework Convention on Tobacco Control (WHO FCTC)

Intergovernmental organizations

European Union, International Chamber of Commerce, International Organisation of La Francophonie (IOF), Organisation for Economic Cooperation and Development (OECD), Permanent Court of Arbitration, South Centre.

Special procedures of the Human Rights Council

Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes,

National human rights institutions

Commission Nationale des droits de l'homme et des libertés (Cameroon), European Network of National Human Rights Institutions, German Institute for Human Rights, Danish Institute for Human Rights, National Human Rights Council of the kingdom of Morocco.

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

Al-Haq, ActionAid, American Bar Association, Amnesty International, Asia Pacific Forum on Women, Law and Development (APWLD), Associação Brasileira Interdisciplinar de AIDS (ABIA), Association for Women's Rights in Development (AWID), Catholic Agency for Overseas Development (CAFOD), Center for Constitutional Rights, Center for International Environmental Law (CIEL), Centre de documentation, de recherché et

d'information des peuples Autochtones (DOCIP), Centre Europe — Tiers Monde — Europe-Third World Centre (CETIM), Centre for Human Rights, Comité Catholique contre la Faim et pour le Développement (CCFD), Conectas Direitos Humanos, Congregation of Our Lady of Charity of the Good Shepherd, Conselho Indigenista Missionário (CIMI), Coopération Internationale pour le Développement et la Solidarité (CIDSE), Coordinadora Andina de Organizaciones Indígenas (CAOI), Corporate Accountability International (CAI), Development Alternatives with women for a new era, DKA Austria, Dominicans for justice and peace – order of preachers, FIAN International e.V., Franciscans International, Friends of the Earth International, Global Policy Forum, Indian Council of South America (CISA), Indian Movement “Tupaj Amaru,” Indigenous Peoples’ International Centre for Policy Research and Education (Tebtebba), Institute for Policy Studies (IPS), International Association of Democratic Lawyers (IADL), International Commission of Jurists, International Corporate Accountability Roundtable (ICAR), International Federation for Human Rights Leagues (FIDH), International Indian Treaty Council (IITC), International Institute of Sustainable Development, International-lawyers.org, International Organisation of Employers (IOE), International Trade Union Confederation, Iuventum e.V, Le Pont, MISEREOR, Public Services International (PSI), Réseau International des Droits Humains (RIDH), Social Service Agency of the Protestant Church in Germany, Swiss Catholic Lenten Fund, Tides Center, Verein Sudwind Entwicklungspolitik, Women’s International League for Peace and Freedom (WILPF). World Federation of Trade Union (WFTU)

Annex II: List of panellists

Monday, 15 October 2018

Keynote speaker

- Dominique Potier, Member of the French National Assembly

Subject I – Articles 2 and 3 (15:00-18:00)

- Ibrahim Salama, Office of the United Nations High Commissioner for Human Rights
- Ana María Suárez Franco, Fian International
- Gabriela Quijano, Amnesty International

Tuesday, 16 October 2018

Subject I – Articles 6, 7 and 13 (10h00-13h00)

- Lilián Galán, Member of the Parliament of Uruguay
- Nicolas Guerrero, Senior Legal Officer, WHO FCTC Secretariat
- Sam Zia-Zarifi, Secretary General, International Commission of Jurists
- Makbule Sahan, International Trade Union Confederation

Subject I – Article 9 (15h00-18h00)

- Baskut Tuncak, UN SR on human rights and toxics
- Elżbieta Karska, UN Working Group on Business and Human Rights
- Robert McCorquodale, Inclusive Law
- Gabriella Rigg Herzog, USCIB

Wednesday, 17 October 2018

Subject I – Articles 10, 11 and 12 (10h00-13h00)

- Surya Deva, UN Working Group on Business and Human Rights
- David Bilchitz, University of Johannesburg
- Richard Meeran, Leigh Day
- Maddalena Neglia, FIDH

Subject I – Articles 3 and 4 (15h00-18h00)

- David Bilchitz, University of Johannesburg
- Olivier De Schutter, Professor, University of Louvain
- Sandra Ratjen, Franciscans International
- Kinda Mohamadieh, South Centre

Thursday, 18 October 2018

Subject I – Article 5 (10h00-13h00)

- Olivier De Schutter, University of Louvain
- Richard Meeran, Leigh Day
- Lavanga Wijekoon, Littler

Subject I – Articles 1, 14 and 15 (15h00-18h00)

- Bradford Smith, OHCHR
- Carlos Lopez, ICJ
- Layla Hughes, CIEL

Friday, 19 October 2018

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

- Ana María Suárez Franco, FIAN
 - Iván González, Trade Union Confederation of the Americas
 - Tchenna Masso, MAB
 - Wandisa Phama, University of Witwatersrand – CALS
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