United Nations A/HRC/43/55

General Assembly

Distr.: General
9 January 2020

Original: English

Human Rights Council
Forty-third session
24 February–20 March 2020
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

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

Chair-Rapporteur: Emilio Rafael **Izquierdo Miño**

* The annexes to the present report are circulated as received, in the language of submission only.

GE.20-00296(E)

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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, established by the Human Rights Council in its resolution 26/9 of 26 June 2014, was 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 working group's fifth session, which took place from 14 to 18 October 2019, opened with a statement from the United Nations Deputy High Commissioner for Human Rights. She congratulated the Chair-Rapporteur on the release of the revised draft legally binding instrument, which provided a solid basis on which to commence substantive negotiations. For her, a future treaty could help ensure effective prevention, protection and remedy for those subjected to business-related human rights abuses, just as it could help to open up more sustainable, equitable and inclusive development. She recalled that business-related human rights abuses impacted different groups of people and rights holders differently, and some disproportionally. In that context, she mentioned that a business and human rights treaty was not a cure, but it could and must be part of the solution. She welcomed the recent positive legislative trends in many jurisdictions, while taking note of the diversity of views regarding the treaty, which she considered essential for the outcomes of the process of implementing Council resolution 26/9. She reminded participants that the High Commissioner urged everyone to recall that the Guiding Principles on Business and Human Rights and the new treaty could and should be mutually reinforcing and complementary. In that sense, she recalled that the Guiding Principles themselves called for States to consider a smart mix of measures, including relevant and meaningful legal developments at the international, regional and national levels. The High Commissioner saw the potential of the treaty process to deliver enhanced protection of human rights in the context of business activities, and most importantly to improve accountability and access to effective remedy for those harmed by business activities. The Deputy High Commissioner stressed that the treaty process should not be used to undermine or stop action on the implementation of the Guiding Principles, at least until such time as a stronger normative framework was in place. She recalled the work of the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Accountability and Remedy Project, noting that the outcomes of the project could already be used to improve access to State-based remedial mechanisms, and recommended that members of the working group use its outcomes as a helpful resource during negotiations. Additionally, she highlighted the record number of civil society representatives present at the session and their key role in the process. She also commended the invited experts for offering their independent advice during the session. Lastly, she stressed the urgency that the High Commissioner felt for that important work and therefore encouraged all stakeholders to engage constructively and work collaboratively during the forthcoming session.

II. Organization of the session

A. Election of the Chair-Rapporteur

3. The Permanent Representative of Ecuador, Emilio Rafael Izquierdo Miño, was elected Chair-Rapporteur by acclamation following his nomination, on behalf of the Group of Latin American and Caribbean States, by the delegation of Nicaragua.

B. Attendance

4. The list of participants, the list of experts and the summary of statements by experts are contained in annexes I, II and III, 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.16/5/1);

(c) Other documents, including the Chair-Rapporteur's revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, and a programme of work, all of which were made available to the working group on its website.[1]

D. Adoption of the agenda and programme of work

6. 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. General statement and introductory remarks by the Chair-Rapporteur

7. In his opening statement, the Chair-Rapporteur thanked the Group of Latin American and Caribbean States for nominating him and thanked all Member States for their support and trust. He invited everyone to participate in the widest possible manner in the deliberations and negotiation of the text for a legally binding instrument on business and human rights. He recalled the numerous bilateral discussions and multi-stakeholder consultations that had taken place during the intersessional period, and noted that the revised draft of the legally binding instrument incorporated the views, thoughts and ideas that had been expressed during those discussions and consultations, as well as in the more than 40 written submissions received and the oral interventions made at the fourth session.[2] The aim of the revised draft was to protect and defend victims, to prioritize the needs of human beings and eliminate any negative misperception of the process. The Chair-Rapporteur also highlighted efforts that had been made to align the text with other relevant initiatives, particularly the Guiding Principles on Business and Human Rights, the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the Conventions of the International Labour Organization (ILO) and domestic regulatory measures. In that regard, he invited all participants to jointly determine a set of rules that were clear, coherent and generally acceptable to govern the relationship between business and human rights on the basis of existing principles, frameworks and current developments. That was an unavoidable responsibility of States and business enterprises. He hoped that the revised draft would help mark the beginning of a new phase in the process with substantive negotiations aiming at filling a gap in international human rights law.

B. General statements

8. Delegations congratulated the Chair-Rapporteur on his election, with many indicating their support for his leadership and his proposed programme of work for the fifth session.[3] Several delegations thanked him for the work that had been put into the process since the

[1] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx.

[2] See www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx.

[3] Copies of the oral statements made by States and observer organizations during the fifth session that were shared with the secretariat are available at www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session5/Pages/Session5.aspx. A webcast of the entire session is available at http://webtv.un.org/.

fourth session, particularly with respect to the development of an improved revised draft legally binding instrument.

9. Many delegations and non-governmental organizations recalled instances of business involvement in human rights abuses where there had been no accountability or remedy for those affected. Those incidents – many of which had involved environmental and human rights defenders being killed or attacked, destruction of the climate and biodiversity, pharmaceutical companies exploiting those in dire need of medicine, attacks on indigenous peoples, and abuses in situations of armed conflict – were a powerful reminder of the need for increased action to prevent and address business-related human rights harm.

10. While several delegations shared developments made at the domestic level, such as new or amended legislation and national action plans on business and human rights, most emphasized the fact that international legal developments were needed to enhance the protection and respect of human rights. On the international agenda, delegations cited several objectives, including increasing legal certainty and predictability to help ensure a level playing field; enhancing prevention and mitigation of business-related human rights abuse; improving access to remedy for those harmed; closing existing gaps in protection and international law; and increasing coordination among members of the international community. Some delegations and many non-governmental organizations emphasized that those efforts must focus on the people who had been, or were at risk of being, harmed in the context of business activities, particularly those at heightened risk of vulnerability or marginalization.

11. Many delegations and non-governmental organizations welcomed the revised draft legally binding instrument as an improvement on the zero draft.[4] Civil society, in particular, emphasized welcome developments with respect to provisions on human rights defenders, indigenous peoples, gender and conflict-affected areas. Some delegations and non-governmental organizations thanked the Chair-Rapporteur for addressing their concerns with the previous draft and for incorporating suggestions they had provided. However, most delegations acknowledged there was still room for improvement in the revised draft. There were many calls for more precise language and more concrete measures throughout the draft. One delegation noted that implementing the revised draft, as currently presented, would involve high costs, and questioned the added value of the instrument over the existing Guiding Principles on Business and Human Rights.

12. Much discussion focused on the need for the legally binding instrument to avoid duplication of, and be consistent with, existing relevant standards and initiatives, such as those emanating from the Human Rights Council and regional organizations, human rights treaties, the Sustainable Development Goals, the OECD Guidelines for Multinational Enterprises and chiefly, the Guiding Principles on Business and Human Rights. Many delegations and organizations emphasized their support for the Guiding Principles and noted how the revised draft was compatible with them and complemented them. Several delegations noted welcome changes that indicated the stronger alignment of the revised draft with the terminology and concepts used in the Guiding Principles, including the explicit reference to them in the preamble. However, other delegations and organizations considered that some parts of the revised draft diverged from the Guiding Principles and that there was still room for closer alignment.

13. Many delegations raised the issue of the relationship between the revised draft legally binding instrument and development. It was recognized that transnational corporations and other business enterprises played an important role in promoting development and attaining the Sustainable Development Goals. Some delegations highlighted the fact that the aim of the draft legally binding instrument was not to vilify business; rather, it should be seen as an attempt to improve certainty and the conditions in which quality investments could be made. While there were some references to development in the preamble, some delegations called for increased emphasis on the development agenda in the text.

[4] The zero draft of the legally binding instrument is available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.

14. Many provisions of the draft were addressed in the general statements. Several delegations welcomed the clear statement in the preamble stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lay with the State, and that States must protect against human rights abuse by third parties, including business enterprises. Some delegations and non-governmental organizations also welcomed the references in the preamble to international humanitarian law and situations of conflict, while noting that there was still room for stronger language.

15. Several delegations called for clearer definitions in article 1. It was noted that the definition of "victims" should be clearer regarding how it applied to alleged victims, relatives and those assisting victims. Some delegations and a business organization suggested that the definition of "human rights violation or abuse" was too broad and vague, and could conflict with the principle of legality. Several delegations and non-governmental organizations took issue with the term "contractual relationship", noting that it could be interpreted to exclude important relevant business relationships.

16. Many delegations and organizations discussed the expanded scope of the revised draft of the legally binding instrument as compared to the zero draft. Some were of the view that the application of the instrument to all business activities exceeded the mandate of Council resolution 26/9, which referred to the regulation of "transnational corporations and other business enterprises" and in the preamble of which a footnote specified that "other business enterprises" denoted all business enterprises that had a transnational character in their operational activities, and did not apply to local businesses registered in terms of relevant domestic law. Other delegations suggested that, while the expanded scope was compatible with resolution 26/9, more focus was needed on transnational corporations in the legally binding instrument. However, most delegations and organizations welcomed the expanded scope in the revised draft, as they believed that it closed significant gaps in coverage of the legally binding instrument and enhanced rights holders' access to justice.

17. Most other provisions of the revised draft legally binding instrument were briefly commented on in the general statements. Some delegations requested greater clarification in article 12 (6) on the relationship between the legally binding instrument and trade and investment agreements. Many non-governmental organizations insisted that the provision should be expanded to indicate clearly the primacy of human rights over such agreements. Additionally, delegations emphasized the need for an effective mechanism to ensure implementation of the legally binding instrument, although there was disagreement as to whether the committee referenced in article 13 was the best approach.

18. Some delegations and non-governmental organizations recommended potential additions to the text, including provisions addressing non-judicial mechanisms, data protection, customary international law and State-owned enterprises. Additionally, several non-governmental organizations requested that the text better reflect the gender dimension to business and human rights.

19. There were many calls for increased engagement in the process in the future. A regional organization called for greater cross-regional support from developing and developed countries to ensure the success of the process. However, that organization reserved its position on the revised draft legally binding instrument, noting that it needed to obtain a formal negotiating mandate before being able to fully engage on the content of the instrument. Many other delegations committed to engage on the substance and participate in direct substantive intergovernmental negotiations during the session.

IV. Negotiation of the revised draft legally binding instrument[5]

20. During each session of the negotiation of the revised draft instrument, the Chair-Rapporteur introduced the relevant article or articles. After his introduction, experts provided

[5] The present section should be read in conjunction with the revised draft instrument, available at www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf.

their views,[6] followed by a general debate. At the end of each session, the Chair-Rapporteur provided some preliminary reflections and answers to several of the questions raised.

A. Preamble and articles 1 and 2

21. The Chair-Rapporteur noted that, in response to the contributions that had been submitted, the preamble now included more explicit reference to international instruments and standards, such as the Guiding Principles on Business and Human Rights and international humanitarian law, as well as to human rights defenders and groups disproportionately affected by business-related human rights abuses, such as women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees. He emphasized how crucial the five definitions contained in article 1 were to understanding the rest of the text, drawing attention to the new definitions of the terms "human rights violation or abuse" and "contractual relationship". He noted that there had been no significant changes to article 2.

22. It was noted that the preamble and articles 1 and 2 set a foundation for the whole instrument, and there were calls for more precision in their formulation. Some delegations called for greater reliance on the language of Council resolution 26/9, suggesting that the revised draft make greater use of the term "transnational corporations and other business enterprises" as defined in the resolution.

23. One delegation proposed replacing all references to "business enterprises" in the preamble with "transnational corporations and other business enterprises". Another delegation called for more consistency and accuracy throughout the preamble.

24. A few delegations noted that the preambular paragraph recalling the nine core international human rights instruments of the United Nations and the eight fundamental Conventions of the International Labour Organization lacked flexibility and could potentially be problematic for those States that had chosen not to ratify all of those instruments. It was suggested that the more flexible language found in principle 12 of the Guiding Principles on Business and Human Rights be adopted. Another delegation suggested employing a general reference to "human rights instruments" throughout the preamble, instead of trying to list all the relevant instruments. Additionally, one delegation proposed moving the reference to the Universal Declaration of Human Rights to the first preambular paragraph, given the importance of that document.

25. Two delegations suggested merging the preambular paragraphs referencing Article 2 and Articles 55 and 56 of the Charter of the United Nations. Regarding the paragraph citing Article 2 of the Charter, one delegation welcomed the emphasis on sovereign equality and territorial integrity, whereas another delegation recommended adding a reference to the principle of non-interference. Yet another delegation recommended simply referring to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, rather than listing a subset of the principles referenced in that document.

26. Regarding the preambular paragraph underlining the responsibility of all business enterprises, one delegation proposed referring to "abuses" rather than "adverse human rights impacts" to harmonize the text. A business organization noted a discrepancy between that paragraph and the Guiding Principles on Business and Human Rights, as the paragraph referred to "the responsibility to respect all human rights", whereas the latter referred to the responsibility to respect internationally recognized human rights.

27. Several delegations and non-governmental organizations appreciated the reference in the preamble to human rights defenders.

28. Delegations had various suggestions with respect to the preambular paragraph recognizing the distinctive and disproportionate impact of certain business-related human rights abuses on different groups of people. One delegation recommended that it would be more appropriate to refer to the groups' situations of vulnerability rather than the groups'

[6] See annex III for a summary of the statements made by experts.

vulnerabilities. Some delegations suggested adding reference in that paragraph to sexual orientation and gender identity and to internally displaced persons. Other delegations recommended adding an open-ended phrase to the list, such as “and others” or “and other vulnerable groups”, to make it clear that the list was non-exhaustive.

29. Several delegations approved of the inclusion in the preamble of the reference to the Guiding Principles on Business and Human Rights.

30. Some delegations questioned whether it made sense to single out the ILO Violence and Harassment Convention, 2019 (No. 190) in its own paragraph, given that all eight fundamental ILO Conventions were already referenced in a previous paragraph.

31. One delegation questioned the rationale for including references to international humanitarian law and international human rights law in the final preambular paragraph, when the paragraph could simply refer to international law in general. Other delegations suggested removing the reference to international humanitarian law, considering it more appropriate to focus on human rights law. However, that suggestion was challenged by two delegations and two experts.

32. Several delegations and organizations suggested including other references in the preamble, such as to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; the 2030 Agenda for Sustainable Development and the Sustainable Development Goals; the capacity of business to foster economic well-being, development, technological improvement and wealth; and climate change. Additionally, at least one delegation and several non-governmental organizations called for greater focus in the preamble on the gender dimension.

33. Many delegations focused on the need for clearer language in article 1, with some delegations arguing that the article unreasonably expanded the scope of the legally binding instrument beyond transnational harm.

34. Some delegations voiced doubts over the definition of “victims” in article 1 (1), questioning whether its inclusion was necessary. If the definition were to remain, some delegations and organizations called for more precision, particularly with respect to how a “victim” could be determined and the distinction between victims and alleged victims. A few delegations also stressed the need to differentiate between genuine victims and those bringing unjustifiable claims, and questioned the extent to which “victims” included immediate family members or dependents. One delegation suggested removing the phrase “individually or collectively” from the text, believing it to be redundant. Some non-governmental organizations proposed changing the term “victims” to “affected populations” or “complainants”.

35. Much of the discussion on article 1 centred on the definition in article 1 (2) on “human rights violation or abuse”. There were several calls for more precision. Some argued that the provision was far too broad, as it covered “any harm” against “any person”. Others questioned what level of harm had to be present to constitute a human rights abuse or violation. There were multiple calls for greater consideration of the distinction between “violation” and “abuse”, with a few delegations suggesting that the revised draft refer only to “abuses” throughout the document. Another delegation and a non-governmental organization suggested defining “abuse” and “violation” separately. Some delegations proposed removing the reference to the “State”, since the instrument focused on transnational corporations and other business enterprises. There were calls to clarify or remove the references to “emotional suffering” and “economic loss”. Additionally, a number of delegations proposed removing the reference to “environmental rights”, with two delegations requesting clarification of the meaning of that term. However, some non-governmental organizations insisted on retaining the reference to “environmental rights” and recommended adding an explicit reference to economic, social and cultural rights.

36. Although many delegations praised the expanded scope of the revised draft legally binding instrument, some delegations called for the definition of “business activities” in article 1 (3) to be restricted to transnational corporations. One delegation suggested reverting to the definition contained in the zero draft of “business activities of a transnational

character". Another delegation proposed expanding the definition to include "economic or other activity".

37. Several delegations and non-governmental organizations called for careful consideration of the definition of the term "contractual relationship" in article 1 (4). In the view of some, there was a danger that the term could be interpreted narrowly, excluding certain relevant relationships (e.g., equity-based relationships). Many delegations and non-governmental organizations recommended replacing the phrase with "business relationship", as contained in the Guiding Principles on Business and Human Rights, while another proposed "economic relationship". Another delegation warned that that definition was already too broad and could inappropriately extend legal responsibility.

38. Some delegations had differing views as to whether article 1 (5) was necessary, with one asking for its removal, another asking for more clarification, and another asking for the definition to be expanded.

39. At least one delegation and one non-governmental organization recommended that article 2 be moved from the operative part of the legally binding instrument to the preamble. Other delegations welcomed article 2, but thought the language could be brought more into line with that used in Council resolution 26/9, or that the article should go beyond the scope of the Guiding Principles on Business and Human Rights by creating positive, justiciable obligations for transnational corporations and other business enterprises.

B. Articles 3 and 4

40. The Chair-Rapporteur noted that, in order to strengthen the protection of human rights throughout global supply chains, and in response to the requests of several States and other relevant stakeholders, the scope of the instrument, as covered in article 3, had been expanded to cover all business activities, including, inter alia, those of a transnational character, and all human rights. Article 4 reaffirmed and clarified victims' minimal procedural rights and States' existing obligations with regard to access to justice. He highlighted the fact that article 4 now included provisions on the protection of human rights defenders, gender-sensitive support services, non-judicial grievance mechanisms and the reversal of the burden of proof.

41. Delegations had differing views on the scope covered in article 3. Several argued that the scope of article 3 (1) was much too broad since it covered more than just transnational corporations. In their view, the focus of the legally binding instrument should be limited to the specific terms used in Council resolution 26/9, which referred to transnational corporations and other business enterprises that had a transnational character in their operational activities. However, several other delegations and organizations welcomed the expanded scope, with some thanking the Chair-Rapporteur for addressing one of their major concerns with the zero draft. In their view, a distinction between transnational corporations and other business enterprises would be difficult to maintain in practice. Moreover, it would create gaps in the coverage of the legally binding instrument as corporate structures could be created so as to avoid falling within the scope of the instrument. Furthermore, it was immaterial to persons affected by business activities whether the entity that had harmed them was a transnational or a domestic company. One delegation suggested removing the reference in article 3 (1) to business activities of a transnational character and another proposed emphasizing that the scope apply to business activities "regardless of their size, sector, operational context, ownership and structure". However, other delegations and at least one non-governmental organization argued that it would be beneficial to retain a focus on transnational corporations even if the legally binding instrument applied to all business activities. Some delegations and organizations also requested that article 3 (1) more clearly address State-owned enterprises, development finance institutions and the role of parent companies.

42. Some delegations questioned the necessity of article 3 (2), given the expanded scope of the legally binding instrument, while others proposed moving the provision into article 1 on definitions. One delegation noted that the reference to "any contractual relationship" in article 3 (2) (b) was limiting. Another found the references in the same provision to "direction", "control" and "designing" to be problematic. Several delegations sought

clarification of the meaning of the term "substantial effect" in article 3 (2) (c). Some delegations also recommended additions to article 3 (2), for instance in relation to projects on transboundary natural resources and activities undertaken by electronic means.

43. Many delegations and some organizations voiced concern over the reference in article 3 (3) to "all human rights". The delegations argued that the formulation was overly broad and vague. That could lead to implementation challenges, since the formulation might not comply with the principle of legality, and different States could interpret it in different ways, causing different standards to apply among the States parties to the instrument. Several alternative formulations were proposed, such as "international human rights law", "internationally recognized human rights" and "all human rights obligations undertaken by the States parties". References could also be made to "fundamental freedoms" and/or "international humanitarian law". Some delegations suggested aligning the text with other instruments, such as the Guiding Principles on Business and Human Rights, the Universal Declaration of Human Rights or Council resolution 26/9. One delegation proposed deleting the provision altogether, arguing that it added little value, while others argued it was a key provision that should remain.

44. Two delegations and business organizations considered article 4 to be generally problematic. In the view of some, the article was redundant given that the rights of victims were already adequately provided for in international and domestic law. One delegation argued that a detailed article in that context could have the consequence of giving victims harmed by transnational corporations greater rights than those harmed by States. However, some States and non-governmental organizations considered article 4 to be one of the most important articles in the instrument, and critical to ensuring that those harmed had effective access to justice. In their view, the article should be retained and any particular issues could be addressed on a case-by-case basis.

45. Two delegations and a non-governmental organization called on the working group to consider amending the title of the article. One delegation noted that, as the article covered both the rights of victims and the obligations of States, the current title ("Rights of victims") should be amended to make it more accurate, and the provisions should be more clearly categorized. Another delegation and a non-governmental organization thought it would be more appropriate for the title of the article to focus on "Access to remedy" or "Access to justice", since that was the focus of the article. It was suggested that, given the focus on access to remedy, it would be more logical for the article to be moved to after article 5, on prevention, and article 6, on legal liability. Some delegations proposed ways of reformulating the article in a clearer way. For instance, one delegation suggested categorizing all of the provisions under three headings: (a) substantive rights of victims; (b) procedural rights of victims; and (c) State obligations to protect the rights of victims. Another delegation suggested that the article categorize the rights and obligations according to type of proceeding (e.g., criminal, civil or non-judicial).

46. Several delegations and non-governmental organizations made specific textual suggestions. For instance, it was suggested that each provision refer only to "abuses", or to "violations and abuses", as there was some inconsistency in the terminology used in that article and the terminology used in the rest of the revised draft legally binding instrument. One delegation recommended replacing all instances of "victims shall" with reference to victims' rights, with "States shall" with reference to guaranteeing or protecting the rights of victims. There were also several calls to make additions to the text, for instance by inserting references to victims of conflict situations, international humanitarian law, parts of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the State duty to protect and global justice mechanisms.

47. One delegation suggested that article 4 (1) was unnecessary, although it did not oppose retaining the provision. The same comment was made in relation to articles 4 (2) and 4 (3). One business organization called for the text to be clearer, particularly with respect to the definition of "psychological well-being". One delegation proposed adding a reference to fundamental freedoms, and several non-governmental organizations called for the article to reference gender-responsive assistance to victims.

48. One delegation considered article 4 (2) to be redundant and asked for its removal, while another considered the article to lack clarity. Some delegations proposed alternative language, for instance a reference to "all recognized human rights and fundamental freedoms" instead of the current list of rights.

49. Some delegations proposed that in article 4 (3), references should be added to interim measures and the rights of children, and that the word "reprisal" should be used instead of "retaliation".

50. While two delegations questioned the reference to "re-victimization" in article 4 (4), with one suggesting the terminology be changed to "further abuse", two other delegations welcomed the inclusion of that provision, considering it particularly important for enhanced protection based on gender.

51. With respect to article 4 (5) (a), one non-governmental organization proposed adding apologies and reinstatement of employment to the list of remedies. Some delegations and one business organization sought more clarification regarding the appropriateness of referring to "environmental remediation and ecological restoration" in article 4 (5) (b). They questioned whether such reparation fell within the mandate of the working group, and one delegation called for references to environmental remediation to be consistent with existing international law.

52. Several non-governmental organizations suggested that the reference to the right to access to information should be strengthened in article 4 (6), with one emphasizing that it should apply explicitly to information held by private enterprises.

53. Some delegations voiced their approval of article 4 (7) on diplomatic and consular assistance and proposed changes to improve the article, for instance by making a specific reference to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, and by clearly differentiating between diplomatic and consular assistance and legal assistance. However, some delegations considered the provision to be redundant and argued that its inclusion in the legally binding instrument was inappropriate.

54. Several delegations requested clarification as to which circumstances would justify one person submitting a claim on behalf of a victim without the victim's consent, as provided for in article 4 (8). One delegation noted that the provision could be problematic within its domestic legal order, along with articles 4 (12) (e), 4 (13) and 4 (16).

55. Many non-governmental organizations welcomed the inclusion of article 4 (9), considering it important to ensure the protection of human rights defenders.

56. One delegation proposed moving articles 4 (11) and (14) to article 10 on mutual legal assistance.

57. There were multiple calls for clarification with respect to the provisions of article 4 (12). One delegation wanted to know what time frame was envisaged for making information available to victims under article 4 (12) (a). Another delegation sought clarification as to what constituted an "unnecessary" delay in article 4 (12) (c). Many delegations and business organizations voiced concern about the inflexibility in article 4 (12) (e) with respect to cost shifting. In their view, nothing in the provision protected against entirely frivolous claims. They were therefore concerned about the possibility of vexatious and unmeritorious claims placing a financial burden on defendants.

58. There were diverse views expressed with respect to the reversal of the burden of proof covered in article 4 (16). Several non-governmental organizations considered that to be a crucial provision, which should be strengthened and made obligatory. However, some delegations and organizations called for clarification regarding the circumstances under which reversing the burden of proof would be considered appropriate. In their view, depending on the situation, reversing the burden of proof could contravene the presumption of innocence or fundamental provisions of due process protected under domestic and international law.

C. Article 5

59. The Chair-Rapporteur, introducing article 5, on prevention, said that the provisions on human rights due diligence now focused on conduct rather than results, drawing on the text and the spirit of the Guiding Principles on Business and Human Rights. He emphasized that such diligence would be met only through genuine efforts and ongoing impact assessments, as opposed to a one-off "check list" exercise. He also highlighted the inclusion in the article of an open-ended list of measures States might adopt, as minimum standards, to assist and encourage businesses to conduct human rights due diligence. He stressed that those measures should include an evaluation mechanism of such measures.

60. Several delegations and non-governmental organizations emphasized the importance of including an article on prevention, believing it to be one of the key components of the legally binding instrument. It was noted that preventing harm in the first place was preferable to attempting to remedy it after the fact. However, some delegations voiced concern about how article 5 was currently drafted. In their view, the article was too prescriptive, creating too many State obligations while restricting States' flexibility with regard to the best means of implementing those obligations. At the same time, other delegations and organizations contended that the article was too vague and broad and would need to be made more precise, particularly if there was an intention to link criminal penalties to it.

61. Several delegations discussed the need for a clear link between article 5 and article 6, on legal liability. Some delegations and many non-governmental organizations stressed the need for there to be adequate sanctions for those companies that failed to conduct human rights due diligence in accordance with article 5. However, at least one delegation and one business organization argued that, in the revised draft, the current standard of establishing liability for the failure to prevent another entity's harm could be unfair to companies, which could potentially be subject to liability despite doing everything in their power to comply with article 5. It was argued that the working group should fine-tune articles 5 and 6 to create the proper incentives to prevent harm.

62. Various suggestions were made for improving article 5. Several delegations and organizations called for the phrase "contractual relationships" to be replaced with "business relationships". It was argued that such a change would increase the scope of protection and would bring the revised draft legally binding instrument into better alignment with the Guiding Principles on Business and Human Rights. Some delegations called for greater alignment of that article with the language of Council resolution 26/9. One delegation recommended removing all references to "violations" in the text and referring only to "human rights abuses". Additionally, there were calls to include reference to gender-responsive assessments, unilateral sanctions, immitigability and procedural rights of plaintiffs, such as in relation to participation and injunctive relief.

63. One delegation questioned the added value of the first sentence of article 5 (1), noting that States already regulated the activities of companies within their territory and jurisdiction. Some other delegations argued for strengthening the provision to make it clear that States had an obligation to regulate companies both in home and host States.

64. On article 5 (2), it was noted that there was room for greater alignment with the Guiding Principles on Business and Human Rights. For instance, one business organization highlighted that the article should take into account consideration for the different sizes and capacities of different entities. However, one regional organization and one delegation warned that transferring concepts from a set of guiding principles directly into a legal document could risk changing the meaning of certain concepts.

65. With respect to article 5 (3) (a), some delegations suggested removing the reference to environmental impact assessments. However, other delegations and organizations argued that such assessments were important and should remain in the document. Additionally, one delegation recommended adding a reference to social and economic impact assessments.

66. While some delegations appreciated the reference to consultations with indigenous peoples in article 5 (3) (b), another delegation noted that the provision diverged from the accepted language found in the ILO Indigenous and Tribal Peoples Convention, 1989 (No.

169). That delegation stated that it was not in a position to endorse non-consensual language regarding consultations with indigenous communities. Several delegations and many non-governmental organizations argued that the reference to "free, prior and informed consultations" was not in line with accepted international law and was not protective enough. Instead, there should be a clear, mandatory reference to the need to obtain "free, prior and informed consent". Additionally, there were calls to expand the list of protected groups found in article 5 (3) (b) in order to protect against sexual harassment and gender-based violence, as well as to protect peasants and farmers. However, one delegation proposed referring generally to the protection of groups in situations of vulnerability instead of listing specific groups.

67. At least one delegation and several non-governmental organizations welcomed the reference in article 5 (3) (e) to the need for enhanced human rights due diligence in occupied or conflict-affected areas, although they called for that to be expressed in stronger language.

68. At least one delegation and several non-governmental organizations welcomed the inclusion of article 5 (5) on corporate capture, asking for it to be included and strengthened in future drafts.

D. Article 6

69. The Chair-Rapporteur noted that article 6 of the revised draft legally binding instrument, on legal liability, had undergone significant changes since the previous draft, and now explicitly included the obligation of States to ensure that their domestic laws provided for a comprehensive and adequate system of legal liability. In the revised draft, liability was more clearly based on the notion of control or supervision over business activities that caused foreseeable harm, and there was an obligation to adopt sanctions and reparations in cases of abuse. He highlighted some new elements, such as article 6 (5), on financial guarantees, and article 6 (7), which required States to ensure that their domestic law provided for criminal, civil or administrative liability for a non-exhaustive list of offences.

70. Many delegations and non-governmental organizations considered the article on legal liability to be a core element of the legally binding instrument, and it was noted that article 6 was an improvement on the version of the article on legal liability in the zero draft. However, some delegations considered the current version of the article to be overly prescriptive and inflexible, limiting States' freedom to determine how best to implement the legally binding instrument. Any language suggesting a need to establish criminal liability of legal entities was considered particularly problematic, since such liability was not possible in the legal systems of several States. One delegation called for the development of an approach to the article that would be sufficiently robust, while allowing States flexibility in terms of implementation. Several delegations and organizations considered the article to be too ambiguous and broad, advocating for greater conceptual and terminological clarity. Additionally, a few delegations called for the article to be better aligned with Council resolution 26/9 and for there to be a greater focus on transnational corporations.

71. There were many additions suggested to the article. As in the discussion on article 5, some delegations and non-governmental organizations requested that an explicit link be made between articles 5 and 6. A business organization requested a provision recognizing those companies that took meaningful steps to prevent abuse within their supply chains. Additionally, there were calls for an increased gender perspective and a child-specific approach, and provisions covering, among other things, economic, social and cultural rights, compensation levels, legal barriers, and the direct obligations of transnational corporations.

72. Two delegations requested clarification of the meaning of the phrase "comprehensive and adequate system of legal liability" in article 6 (1), with one noting that it could agree with the provision as long as it did not imply that States would be required to adopt new, specialized legislation. Other delegations requested that that and other provisions of article 6 refer to transnational corporations and other business enterprises in accordance with Council resolution 26/9. A request was made to delete the words "violations or" from the phrase "human rights violations or abuses" in the article.

73. Some delegations requested greater clarification as to the extent of liability of legal persons (including with respect to criminal law) envisaged in articles 6 (2) and (3). Additionally, one delegation proposed merging articles 6 (3) and (4). While one delegation welcomed article 6 (5), another delegation and a business organization suggested removing it from the text.

74. Several delegations and organizations called for greater clarity and stronger wording in article 6 (6), particularly with respect to parent/subsidiary relationships. Replacing the phrase "contractual relationships" with "business relationships" would help in that regard. However, some delegations and business organizations voiced the concern that, as it was currently worded, article 6 (6) could be interpreted as unfairly placing liability on companies for failing to prevent harm committed by distant third parties.

75. Most of the debate centred on article 6 (7) and its many provisions. Many delegations and organizations welcomed the list of crimes to which criminal, civil or administrative liability were to attach, although there were many calls for clarification as to whether the list was meant to be exhaustive. Most argued that the list should be open-ended, as it was likely that important offences had been omitted and flexibility in the article could ensure that it captured future legal developments. Several delegations supported the proposal that the words "inter alia" be added before the phrase "for the following criminal offences". Additionally, there were several proposals, which received relatively broad support, for other crimes to be included, such as environmental crimes and crimes relating to economic, social and cultural rights, corruption, privacy and financing of terrorism. One non-governmental organization also requested the deletion of the reference to domestic law at the beginning of article 6 (7).

76. However, several delegations voiced serious concerns about the article as drafted. Some questioned whether several of the article's provisions were applicable to non-State actors. Additionally, several delegations took issue with the fact that many of the crimes listed were defined by reference to instruments that their States had not accepted. That was most evident with respect to article 6 (7) (a) and its reference to the Rome Statute of the International Criminal Court, as well as article 6 (7) (c) regarding the International Convention for the Protection of All Persons from Enforced Disappearance. There was concern that the inclusion of those references would make it politically difficult to become a party to the future legally binding instrument. Several delegations also considered articles 6 (7) (h) and (k) to be too vague, and requested that they be properly defined.

77. Two delegations voiced concern over the wording of article 6 (9), as it could be read as requiring the imposition of (criminal) legal liability on legal entities. One delegation proposed adding the phrase "criminal, civil or administrative" before "legal liability" to clarify the meaning.

E. Articles 7, 8 and 9

78. Introducing articles 7, 8 and 9, the Chair-Rapporteur noted that article 7 had been clarified and restructured, and the title had been changed to "Adjudicative jurisdiction" to highlight that the article dealt with the key role of courts in achieving justice for victims. The text of article 8 on statute of limitations had been bolstered and amended to expand States' leeway with respect to determining the best means of implementation. The new text called for a "reasonable" period of time for the investigation and prosecution of violations, particularly for cases involving another State, in which processes took longer due to the need for mutual legal assistance and cooperation. Article 9 had been revised to ensure consistency with article 7 and to give courts a broader range of options when determining the appropriate law. The new wording provided for the possibility for matters of substance to be governed by the law of the State where the violations had occurred or where the victim was domiciled, so long as it was in the best interest of the victims and their rights to access to justice and effective remedy.

79. There was general appreciation for the fact that article 7 on adjudicative jurisdiction had been included, as rights holders' claims were often rejected on jurisdictional grounds. Two delegations and at least one non-governmental organization welcomed the greater

precision in the title of the article than the title used in the previous draft ("Jurisdiction"). It was broadly agreed that article 7 could lead to courts asserting jurisdiction over actions taking place extraterritorially, although there was significant disagreement over the desirability of that. Several delegations and non-governmental organizations welcomed the greater choice of forums for potential claimants, and argued that victims should have greater agency over where their claims should be adjudicated. However, some delegations noted that that could lead to conflicts of jurisdiction and suggested that the legally binding instrument clarify how to address competing claims of jurisdiction. Other delegations and business organizations voiced concern over an expansive view of jurisdiction and argued that it would be inappropriate to allow claimants to forum shop. In their view, permitting extraterritorial jurisdiction in an expansive way could violate the principles of sovereign equality and territorial integrity.

80. Many delegations and non-governmental organizations proposed expanding article 7 to include *forum necessitatis* (particularly for situations of conflict), and there were also calls to prohibit the doctrine of *forum non conveniens*. Many non-governmental organizations requested clearer language regarding jurisdiction with respect to harm in supply chains. Furthermore, some delegations and non-governmental organizations proposed adding references to universal jurisdiction, competent regional courts and the creation of an international court.

81. With respect to article 7 (2), the question was asked whether the reference to "natural" person was needed; one delegation suggested amending the language of the provision if the reference were to stay in the legally binding instrument. Several delegations called for clarification over what constituted "substantial business interests" in article 7 (2) (d).

82. While some delegations appreciated the inclusion of an article on statute of limitations and called for it to be strengthened, others considered the wording of article 8 to be problematic. Many delegations sought clarification, in article 8 (1), of the meaning of "all violations of international human rights law and international humanitarian law which constitute the most serious crimes of concern to the international community as a whole". They argued that the provision would be difficult to apply without more guidance. One delegation argued that statutes of limitations were already not applicable to a wider range of offences than those referenced in article 8 (1), and was concerned that that provision could restrict the current state of the law. The question was asked whether the article applied only to criminal cases. Two delegations recommended deleting the reference to "international humanitarian law".

83. Some delegations and organizations considered article 8 (2) to be unclear, particularly the reference to a "reasonable" period of time. At least one delegation rejected the notion that statutes of limitations should be removed for offences that were less serious than the most serious crimes. Some delegations proposed ways to ensure a fairer conception or application of statutes of limitations, for instance, by making statutes of limitations longer for more serious abuses, taking into account the continuous nature of some offences, and tolling statutes of limitations for children, for those who could not have known of the harm earlier, and for some persons with disabilities.

84. Delegations requested clarification of and more precise language in article 9. At least two delegations called for a clear distinction to be made between civil and criminal actions, with one delegation arguing it would not be appropriate for article 9 to apply to criminal cases. Some delegations sought clarification as to when article 9 (2) would apply and who would make the determination as to the applicable law. At least one delegation and several non-governmental organizations suggested that victims should have the ability to choose the appropriate law. One delegation considered article 9 (2) (b) to be problematic, as it provided for too much uncertainty and arbitrariness, potentially contravening principles of due process. Additionally, one delegation recommended deleting article 9 (3), while another suggested amending the provision to replace "prejudge" with "preclude".

F. Articles 10, 11 and 12

85. The Chair-Rapporteur introduced article 10 by explaining that, while the procedures and substantive preconditions for accessing mutual legal assistance remained unchanged from the previous draft, certain modifications had been made to add precision and ensure consistency with other international instruments. He noted that, beyond the reordering of clauses, article 11 was substantially the same. Certain improvements had been made to article 12 in line with the Convention on the Elimination of All Forms of Discrimination against Women and the World Health Organization Framework Convention on Tobacco Control. Article 12 (6) had been made less prescriptive without undermining the goal of ensuring compatibility between the legally binding instrument and other instruments, both with respect to interpretation and implementation.

86. Several delegations and non-governmental organizations recognized the importance of articles 10, 11 and 12, particularly articles 10 and 11, for the effective implementation of the future legally binding instrument. However, there were some calls for the text to be made more concise and precise.

87. With respect to article 10, several delegations requested that a clearer distinction be made between those provisions applicable to civil matters and those applicable to criminal matters. One delegation also raised administrative matters. It was noted that procedural rules and legal principles differed, sometimes substantially, depending on the type of proceeding. Thus, it would aid implementation if the legally binding instrument treated civil and criminal matters separately. If a future draft were to focus more on criminal matters, some delegations suggested including language covering extradition. There were several requests for clarification on how the legally binding instrument should be interpreted and implemented in relation to other mutual legal assistance treaties, particularly in cases involving States that were not parties to the legally binding instrument. Some delegations recalled the breadth of instruments and mechanisms already available to aid mutual legal assistance; there were calls to avoid duplication and to ensure coherence with other processes. Specifically regarding the recognition and enforcement of judgments in articles 10 (9) and 10 (10), the proposal was made that the working group seek guidance from the recently adopted text of the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, as well as the United Nations Convention on International Settlement Agreements Resulting from Mediation.

88. Several suggestions were made to amend the text of the many provisions in article 10. One delegation recommended adding a reference to “international judicial cooperation” in article 10 (1). Another proposed adding “criminal, civil or administrative” before the word “proceedings” in the same provision. As for article 10 (3), one delegation proposed removing article 10 (3) (j) since, in its view, it went beyond traditional mutual legal assistance principles. Another delegation argued for the provision to remain and to be strengthened, potentially by borrowing language from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Some delegations proposed that more flexibility was needed in article 10 (5), requesting that the word “shall” be replaced with “may”. One delegation requested clarification as to the meaning and scope of article 10 (8), and another suggested removing the provision. Some non-governmental organizations argued that article 10 (10) should be strengthened by removing potential grounds for refusing recognition and enforcement of foreign judgments. There were calls in particular to remove article 10 (10) (c). However, some delegations considered that the provision did not provide enough flexibility to States. One delegation stated it would be unable to support the current text, and another proposed allowing State authorities to trigger the grounds found in article 10 (10) (c) in addition to defendants.

89. Several delegations and non-governmental organizations highlighted the importance of article 11 on international cooperation and called for it to be strengthened. The suggestion was made that the article include language on technical assistance. At least two delegations supported a proposal for the creation of a fund to help States with capacity-building.

90. Several delegations requested clarification as to how article 12, on consistency with international law, should be interpreted with respect to States that were not parties to the

legally binding instrument. That was specifically raised in relation to articles 12 (3) (a) and 12 (6). One delegation questioned why article 12 (1) referenced only some of the principles from the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and requested that all the principles be included. Another delegation proposed removing the phrase "by its domestic law" from article 12 (2), since international law was also relevant in that context; it proposed simply ending the sentence after the word "jurisdiction". Many non-governmental organizations called for article 12 (6) to be strengthened and to assert more clearly the supremacy of human rights over trade and investment treaties. Some delegations requested more clarification as to how the provision was to be interpreted, while another delegation proposed reverting back to the text of articles 13 (6) and 13 (7) of the zero draft, arguing that they had been clearer with regard to the relationship between the legally binding instrument and trade and investment agreements.

G. Article 13

91. Introducing article 13, on institutional arrangements, the Chair-Rapporteur noted that inspiration had been drawn from other human rights instruments, including the Convention on the Rights of Persons with Disabilities and the Convention against Torture. He also noted that the recommendations mentioned in article 13 (4) should be interpreted as having the same status as those of other treaty bodies. He further noted that the provision on the international fund for victims had been moved to article 13 and that the details of its entry into force and operation had been left open, to be decided by the conference of States parties.

92. Although it was recognized that an article on institutional arrangements was needed in order to ensure proper implementation of the legally binding instrument, some delegations considered it premature to debate the specifics of the article before more progress had been made on the substantive sections of the instrument. Those delegations also suggested delaying discussion on the committee, in particular, until the outcome of the review of the treaty body system in 2020. There was concern that creating a new treaty body could be costly and it could duplicate the work of other mechanisms. Some delegations therefore urged the working group to think outside the box to determine an efficient way of leveraging systems already in place.

93. With respect to the composition of the committee, there was support for the fact that article 13 (1) called for the consideration of equitable geographic distribution and gender-balanced representation for the election of experts. Additionally, some delegations and non-governmental organizations expressed appreciation for the inclusion of language in article 13 (1) (b) ensuring that elected experts did not have any conflict of interest, although they sought clarity regarding how that could be ensured. In that regard, one non-governmental organization proposed a ban on appointing persons who held government or business positions. At least one delegation and several non-governmental organizations recommended that the committee include members of minority groups, such as indigenous peoples, or civil society organizations. Some non-governmental organizations also called for article 13 (1) (c) to grant civil society the ability to nominate committee members.

94. Regarding the functions of the committee, one delegation sought clarification as to the role and non-binding nature of its recommendations, and another delegation voiced concern about the risk that consideration of State reports could be politicized. There were several calls, mostly from non-governmental organizations, to strengthen the powers of the committee. For instance, it was recommended that the committee be able to consider individual complaints (and otherwise permit direct access of rights holders), directly review the conduct of business, undertake country visits and provide technical assistance to States on issues beyond those referenced in article 13 (4) (c). Additionally, many non-governmental organizations called for the establishment of an international tribunal to investigate and adjudicate claims against transnational corporations and other business enterprises, and for the establishment of an international mechanism to monitor the activities of transnational corporations and other business enterprises.

95. Some delegations welcomed, in articles 13 (5) and 13 (6), the creation of a conference of States parties, although it was noted that the provisions were vague. One delegation asked for clarification of the role of the conference.

96. Several delegations requested much more detailed information on the international fund for victims proposed in article 13 (7), including in relation to how the fund would be established, what its scope would be, how it would be governed, how it would be funded, and the eligibility criteria for determining who would be entitled to aid. Some delegations noted that it would be difficult to form an official position on the provision until more was known. Non-governmental organizations urged States to establish the fund, since the lack of legal and financial aid was a major obstacle for those seeking access to remedy.

H. Articles 14 to 22

97. Introducing articles 14 to 22, the Chair-Rapporteur recalled that there had not been significant discussion of those provisions during the fourth session. Consequently, no major changes had been made in the revised draft legally binding instrument. He drew attention to some textual improvements and reordering of the articles, including the moving of the article on commercial and vested interests and the article defining regional integration organizations to other parts of the legally binding instrument. He highlighted two new articles in the text. Article 15 had been introduced to clarify the relationship between the legally binding instrument and any additional protocols. Article 16 had been added to cover the settlement of any disputes. He noted that both of the new articles used the same models as those found in other relevant treaties.

98. Although one delegation argued it was premature to discuss articles 14 to 22 before more agreement had been reached on the content of the rest of the legally binding instrument, several delegations and non-governmental organizations made comments and suggestions on article 14, on implementation, and to a lesser extent on the remaining articles.

99. With regard to article 14 (1), one delegation called for the provision to include a reference to the creation of a central authority, whereas two other delegations proposed removing the provision. Some delegations supported a proposal for article 14 (2) to refer to an executive summary of each State's legal and policy framework, rather than copies of their laws and regulations. However, other delegations requested clarification as to the objective and rationale behind article 14 (2), with one suggesting deleting the provision. Some delegations and several non-governmental organizations welcomed the reference in article 14 (3) to situations of conflict, although they suggested altering the text to refer to "conflict-affected areas and occupied territories". Several non-governmental organizations noted their appreciation of the focus on gender in the provision and recommended that reference be made to gender-responsive human rights impact assessments. Appreciation was also expressed regarding the recognition in article 14 (4) of groups facing heightened risks of harm. One delegation and some non-governmental organizations recommended that the list of groups be non-exhaustive and that particular attention be paid to the intersecting forms of discrimination faced by persons belonging to more than one group. There were also calls to include peasants in the list. Another delegation proposed removing the reference to migrants. Different views were expressed regarding the desirability of retaining the reference to international humanitarian law in article 14 (5), and some delegations proposed removing the provision altogether. Additionally, many non-governmental organizations suggested inserting a provision in article 14 on corporate capture.

100. One delegation and some non-governmental organizations considered the means of dispute settlement referenced in article 16 to be inappropriate. In the delegation's view, any dispute settlement should be done solely through consultations and negotiation. Another delegation questioned the rationale for including article 16 (3). Some delegations also questioned the necessity of including article 17 (3) and its system of voting rights for regional integration organizations.

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

A. Recommendations of the Chair-Rapporteur

101. **Following the discussions held during the fifth session, and acknowledging the different views, comments and concrete textual suggestions on the revised 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) **That the Chair-Rapporteur invite States and other relevant stakeholders to provide to the Secretariat their concrete textual suggestions on the revised draft legally binding instrument presented during the fifth session of the working group, no later than 30 November 2019;**

(b) **That the Secretariat prepare a compilation of the concrete textual suggestions on the revised draft legally binding instrument presented during the fifth session of the working group and provided before the deadline indicated in subparagraph (a), to be made available no later than the end of December 2019, and to be included as an annex to the present report. Additionally, the Secretariat would prepare a compilation of the written statements from States delivered during the fifth session of the working group, also to be made available no later than the end of December 2019, and to be included as an additional annex to the present report;**

(c) **That the Chair-Rapporteur invite States and other relevant stakeholders to submit their additional textual suggestions on the revised draft legally binding instrument no later than the end of February 2020;**

(d) **That the Chair-Rapporteur invite and encourage regional and political groups, intergovernmental organizations, national human rights institutions, civil society organizations and all other relevant stakeholders, as appropriate, to organize consultations at all levels, including in particular at the regional and national level, with a view to exchanging comments and inputs on the revised draft legally binding instrument;**

(e) **That the Chair-Rapporteur invite a group of experts from different regions, legal systems and fields of expertise to provide independent expertise and advice in relation to the preparation of the second revised draft legally binding instrument, in accordance with operative paragraph 6 of Human Rights Council resolution 26/9;**

(f) **That the Chair-Rapporteur prepare a second revised draft legally binding instrument on the basis of the discussions held during the fifth session of the working group, of the annexes to the present report, of the submissions referred to in subparagraph (c) and of the informal consultations to be held, and present the second revised text no later than the end of June 2020, for consideration and further discussion;**

(g) **That the Chair-Rapporteur, when presenting the second revised draft legally binding instrument, also prepare a document containing an outline of the key issues and a structure of the revised draft which could serve as a tool to assist direct negotiations;**

(h) **That the Chair-Rapporteur promote State-led direct substantive intergovernmental negotiations on the preparation of a third draft legally binding instrument during the working group's sixth session, to be held in 2020, on the basis of the second revised draft referred to in subparagraph (f), in order to fulfil the mandate of Human Rights Council resolution 26/9. The format of the sixth session should be organized in a manner that allows different stakeholders to present their views regarding the draft legally binding instrument;**

(i) **That the Chair-Rapporteur hold comprehensive and periodic informal consultations with Governments, regional and political groups, intergovernmental**

organizations, United Nations mechanisms, civil society and other relevant stakeholders before the working group meets for its sixth session;

(j) **That the Chair-Rapporteur prepare a programme of work for the sixth session, on the basis of the discussions held during the fifth session of the working group and of the informal consultations, and make available that programme before the sixth session of the working group, for consideration and further discussion.**

B. Conclusions of the working group

102. **At the final meeting of its fifth session, on 18 October 2019, the working group adopted the following conclusions, in accordance with its mandate established by Council resolution 26/9:**

(a) **The working group welcomed the opening message of the United Nations Deputy High Commissioner for Human Rights and thanked the invited experts and representatives who took part in the negotiation of the revised draft legally binding instrument and took note of the comments, questions, clarifications and concrete textual suggestions received from Governments, regional and political groups, intergovernmental organizations, national human rights institutions, civil society and all other relevant stakeholders on substantive issues related to the revised draft instrument;**

(b) **The working group acknowledged the dialogue focused on the content of the revised draft legally binding instrument, as well as the participation and engagement of Governments, regional and political groups, intergovernmental organizations, national human rights institutions, civil society and all other relevant stakeholders, and took note of the input they had provided;**

(c) **The working group took note with appreciation of the recommendations of the Chair-Rapporteur and looked forward to the second revised draft legally binding instrument, the informal consultations and the programme of work for its sixth session.**

VIII. Adoption of the report

103. **At its 10th meeting, on 18 October 2019, after an exchange of views on the report and its content, the working group adopted ad referendum the draft report on its fifth session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Council for consideration at its forty-third session.**

Annex I

List of participants

States Members of the United Nations

Afghanistan, Algeria, Angola, Argentina, Austria, Azerbaijan, Belgium, Bolivia (Plurinational State of), Botswana, Brazil, Burkina Faso, Burundi, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cuba, Czechia, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Italy, Jordan, Kenya, Lebanon, Liberia, Liechtenstein, Luxembourg, Mauritania, Mexico, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Nigeria, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Russian Federation, Saudi Arabia, Serbia, Sierra Leone, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sweden, Switzerland, Thailand, Togo, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Venezuela (Bolivarian Republic of), Zambia.

Non-member States represented by an observer

Holy See, State of Palestine.

Intergovernmental organizations

European Union, International Chamber of Commerce, Permanent Court of Arbitration, Office of the United Nations High Commissioner for Human Rights (OHCHR), South Centre.

Special procedures of the Human Rights Council

Working Group on the issue of human rights and transnational corporations and other business enterprises.

National human rights institutions

Association Francophone des Commissions Nationales des Droits de l'Homme (AFCNDH), Danish Institute for Human Rights, European Network of National Human Rights Institutions, German Institute for Human Rights, Independent National Commission on Human Rights of Liberia, National Human Rights Council of the kingdom of Morocco.

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

ActionAid, Al-Haq (Law in the service of Man), Amnesty International, 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 Legal and Social Studies (CELS), Centre de documentation, de recherche et d'information des peoples Autochtones (DOCIP), Centre Europe-Tiers Monde – Europe-Third World Centre (CETIM), Centre for Human Rights, Child Rights Connect, Christian Aid, Comité catholique contre la faim et pour le développement (CCFD), Coopération internationale pour le développement et la solidarité (CIDSE), Corporate Accountability International (CAI), DKA Austria, European Center for Constitutional and Human Rights, European Environmental Bureau (EEB), FIAN International e.V.,

Franciscans International, Friends of the Earth International, Geneva Infant Feeding Association, Genève pour les droits de l'homme: formation internationale, Global Policy Forum, Humanist Institute for Co-operation with Developing Countries, 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 (ICJ), International Federation for Human Rights Leagues (FIDH), International Indian Treaty Council (IITC), International Institute of Sustainable Development, International Organisation of Employers (IOE), International Trade Union Confederation (ITUC), Medico International, MISEREOR, Sikh Human Rights Group, Social Service Agency of the Protestant Church in Germany, Third World Network, Tides Center, United States Council for the International Business Incorporated (USCIB), Verein Sudwind Entwicklungspolitik, Womankind Worldwide, Women in Europe for a Common Future, Women's International League for Peace and Freedom (WILPF).

Annex II

List of experts

Monday, 14 October 2019

Preamble, articles 1 and 2 (3–6 p.m.)

- Carlos López, International Commission of Jurists
- Robert McCorquodale, Inclusive Law
- Kinda Mohamadieh, Third World Network

Tuesday, 15 October 2019

Articles 3 and 4 (10 a.m.–1 p.m.)

- Surya Deva, Associate Professor at the School of Law of City University of Hong Kong and member of the Working Group on the issue of human rights and transnational corporations and other business enterprises
- David Bilchitz, University of Johannesburg
- Ana Maria Suárez Franco, FIAN International

Article 5 (3–6 p.m.)

- Olivier de Schutter, University of Louvain and Member of the Committee on Economic, Social and Cultural Rights
- Makbule Sahan, International Trade Union Confederation
- Robert McCorquodale, Inclusive Law

Wednesday, 16 October 2019

Article 6 (10 a.m.–1 p.m.)

- Jelena Aparac, Lecturer and Legal Adviser in International Law and member of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination
- Carlos López, International Commission of Jurists
- Richard Meeran, Leigh Day

Articles 7, 8 and 9 (3–6 p.m.)

- David Bilchitz, University of Johannesburg
- Markus Krajewski, University of Nuremberg
- Richard Meeran, Leigh Day
- Ana Maria Suárez Franco, FIAN International

Thursday, 17 October 2019

Articles 10, 11 and 12 (10 a.m.–1 p.m.)

- Surya Deva, Associate Professor at the School of Law of City University of Hong Kong and member of the Working Group on the issue of human rights and transnational corporations and other business enterprises

- Lavanga Wijekoon, Littler Mendelson PC
- Joe Zhang, Institute for Sustainable Development

Article 13 (3–6 p.m.)

- Carlos Correa, Executive Director – South Centre
- Jelena Aparac, Lecturer and Legal Adviser in International Law and Member of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

Annex III

Summary of statements by experts

Negotiation of the revised draft legally binding instrument

A. Preamble and articles 1 and 2

1. The first expert discussed the distinction between "violation" (which refers to a State breach of an obligation) and "abuse" (which can refer to business conduct). The International Law Commission has already clarified the concept of violation, though the expert noted a need for further reflection on what constitutes "abuse" and the standards applicable thereto. He also called for clarification on the relationship between "harm" and the concepts of "violation" and "abuse", as there could be instances where a violation or abuse occurs without there necessarily being harm. With respect to article 2, the expert noted it was unusual for there to be an article stating the purposes of an instrument in human rights treaties, though this could be found in other types of treaties. He asked the working group to consider moving the contents of article 2 to the preamble.

2. Recognizing the enhanced alignment of the revised draft legally binding instrument with the Guiding Principles on Business and Human Rights, the second expert welcomed the draft as a strong basis for negotiations. He expressed concern at the lack of a gender perspective in the draft and suggested that prominent references to women, gender-based violence, discrimination and harassment be included in the text. He further proposed the inclusion of explicit references to climate change and to the Declaration on Human Rights Defenders in the preamble. Additionally, the second expert called for greater clarity about which entities were to be covered by the treaty and counselled for including State-owned enterprises, international organizations, development finance institutions as well as public procurement and export credit agencies. He also made suggestions to replace "victim" with "rights holder", and "human rights violation or abuse" with "adverse human rights impact".

3. The third expert noted that the notion of "contractual relationship" as defined in article 1 presented a non-exhaustive list of potential relationships that suits the dynamic and evolving nature of business activities. However, she expressed concern that the use of the word "contractual" could lead to a restrictive interpretation, narrowing the scope of the legally binding instrument. To ensure that other types of relationships beyond contractual are covered, she recommended the use of the phrase "business relationship", which is the phrase used in the Guiding Principles on Business and Human Rights.

B. Articles 3 and 4

4. The first expert welcomed the expanded scope found in article 3 (1), noting this was more in line with the Guiding Principles on Business and Human Rights, and questioned the necessity of defining "business activities" in article 1 (3) given this expansion. He called for greater precision in article 3 (3) as some States recognize different rights. Recognizing that individuals, communities and organizations could all be negatively affected by business activities, he recommended using the term "rights holder" instead of "victim" in article 4 (as well as throughout the legally binding instrument). Additionally, he called for the instrument to require States to strengthen both judicial and non-judicial mechanisms by vesting them with independence, suitable jurisdiction, adequate powers and necessary resources.

5. The second expert noted that, given the expanded scope provided for in article 3 (1), the description of business activity of a transnational character in article 3 (2) could cause confusion and questioned whether it needed to be retained. Instead, particular provisions within the instrument could address specific issues related to transnational activities. Pointing to the importance of considering the substance of a relationship over its form, he emphasized the need to avoid the possibility of corporations evading liability by changing their formal name or ownership. Finally, he welcomed article 4 (16) covering the reversal of the burden

of proof in certain circumstances and recommended the deletion of the phrase "subject to domestic law" and the clarification of the phrase "where needed" in the provision.

6. The third expert underscored the importance of recognizing the rights contained in article 4, as there was a need to address the imbalance of power between rights holders and corporations. One important way to address this imbalance is through increased access to information, and she called for the working group to expand upon and strengthen articles 4 (6) and 4 (11) on that topic. The expert requested more clarity as to the role of non-judicial mechanisms and their potential to impede access to justice. She also welcomed article 4 (16), considering the reversal of the burden of proof particularly helpful to address challenges related to access to information.

C. Article 5

7. Underlining the importance of going beyond a "comply and explain" approach, the first expert emphasized the need for companies to take proactive measures to prevent human rights harm when conducting human rights due diligence. He called for the legally binding instrument to clarify that conducting human rights due diligence will not automatically absolve a company from liability. However, the expert recommended that, when a company has established it has conducted human rights due diligence, the burden of proof should be shifted to the victim to demonstrate that the company could have implemented actions that could have prevented the harm.

8. The second expert insisted that explicit reference be made to trade unions in article 5 (3) and to the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in the preamble. She stressed that human rights due diligence requirements should take into account freedom of association and collective bargaining. She also called for article 5 (3) (b) to reference "free, prior and informed consent" instead of "consultations" in order to bring the provision more in line with the ILO Indigenous and Tribal Peoples Convention. Additionally, the expert commended the inclusion in article 5 (5) of language recognizing the issue of undue corporate influence, as well as the removal in article 5 (6) of exemptions for small and medium-sized undertakings from human rights due diligence requirements.

9. The third expert highlighted recent developments in various States' national laws with respect to human rights due diligence, particularly in the fields of child labour and modern slavery. He recognized the closer alignment of the revised draft legally binding instrument with the Guiding Principles on Business and Human Rights with respect to human rights due diligence, though he provided several suggestions for ensuring greater complementarity. For instance, he suggested adding in an explicit mention that such diligence is supposed to be an ongoing process, and, noting limitations in the phrase "contractual relationships", he recommended the use of the phrase "business relationships" throughout the text. Additionally, he requested the working group to consider a limited defence for companies based upon a showing of human rights due diligence.

D. Article 6

10. The first expert, speaking in her personal capacity, noted that before talking about legal liability, one first has to establish the applicable law; however, in her view, it was unclear what legal standards apply, and to who, in the revised draft legally binding instrument. She argued that certain areas of international law (such as the grave breaches provisions in international humanitarian law) already apply to non-State actors, including companies, and she advocated for the legally binding instrument to clearly impose direct obligations on companies. The expert further suggested that article 6 be restructured such that there would be sections covering general principles, how acts could be attributable to companies, and on the relationship of the treaty with other areas of law.

11. The second expert considered article 6 to be a major development in setting international standards in this field. In his view, the article can be divided into three categories. The first category covers the legal liability of a business for abuses it, itself

commits. Article 6 (1) fits in this category, and the expert called for more guidance on what was meant by the provision's reference to a "comprehensive and adequate system of legal liability". The second category covers the liability of a business for its contribution or participation in an abuse committed by another entity. Article 6 (6) fits in here. Finally, the third category (covered by article 6 (7)) establishes liability for a business' commission of certain crimes defined under international law.

12. The third expert emphasized the importance of effective access to remedy, noting that while the easiest target for civil redress is the local operating company that directly caused the harm, there are significant barriers preventing remedy in many host States. He argued article 6 (5) could be useful to ensure companies will be able to afford covering the costs of their harms. Article 6 (6) can be key to holding companies liable for the harms of their subsidiaries; however, in the expert's view, the current wording of the provision (particularly the use of the phrase "contractual relationship") is problematic. Finally, the expert highlighted that, in practice, legal liability will succeed only if barriers to accessing remedy are reduced, such as those relating to access to information, class actions, the protection of witnesses and legal costs.

E. Articles 7, 8 and 9

13. The first expert argued that article 7 should permit jurisdiction wherever a corporation has an operational presence, either prohibit or significantly restrict the use of *forum non conveniens*, and include a provision covering *forum necessitatis*. With respect to article 8 on statutes of limitation, the expert expressed concern at the notion of "reasonable time" and suggested that statutes of limitation should not start until victims become aware of any harm. Stressing the importance of applicable law, the expert took the view that victims should be entitled to choose which laws should apply to their claims.

14. The second expert welcomed the improved article 7 in the revised draft legally binding instrument, which now referred to "Adjudicative jurisdiction". He suggested that it be made clear that the article applies only to civil jurisdiction and should not be construed as limiting criminal jurisdiction (including universal jurisdiction). He also recommended that article 8 on statutes of limitation also clearly differentiate between civil and criminal cases. Further, the expert called for article 9 to be more aligned with private international law, and he considered it would be more logical if article 9 appeared before the article on statutes of limitation in the legally binding instrument.

15. Noting the various options for asserting jurisdiction in article 7, the third expert questioned who would decide which jurisdiction would be appropriate. If the decision were left to courts, there was a risk of perpetuating *forum non conveniens*; in his view, this doctrine should be expressly prohibited. The third expert also questioned how article 7 should be reconciled with existing laws such as the Brussels I Regulation. With respect to article 8, he emphasized that victims of human rights abuses involving multinational companies generally need significant time to institute legal proceedings due to various factors, for instance because it takes time for harm to materialize, to identify witnesses, and to secure legal representation. Given this, he recommended that the statute of limitations should not run until the victim has obtained knowledge of the harm, its cause and the responsible wrongdoer.

16. The fourth expert supported the views expressed by the other experts on these articles and focused her remarks on a few key points. First, she suggested that the legally binding instrument make clear references to access to justice, including access to appeals and enforceable justice. She further stressed the importance of differentiating between the criteria for civil and criminal jurisdiction. With respect to article 9, she noted that the criteria for selecting the applicable law was unclear and suggested including the place where the harm was committed in article 9 (2).

F. Articles 10, 11 and 12

17. The first expert, speaking in his personal capacity, identified the lack of mutual legal assistance as a major barrier to access to justice. Thus, he argued for article 10 to clarify that

mutual legal assistance applies to all civil, criminal and administrative proceedings, and he encouraged States to provide technical assistance to support those lacking expertise or capacity. He also recommended that States collaborate with national human rights institutions, trade unions and women's organizations. The expert criticized the grounds on which recognition and enforcement of judgments may be refused, stating that they are too broad. Additionally, he called for stronger language to address the power asymmetry created by trade and investment agreements.

18. The second expert suggested that the title of article 12 ("Consistency with international law") was unusual because, in his view, the revised draft legally binding instrument was not in accordance with international law. He illustrated this by highlighting the expansive extraterritorial jurisdiction permitted by the terms of the legally binding instrument, arguing that such an excessively broad conception of jurisdiction raised serious concerns with respect to State sovereignty and territorial integrity. Additionally, the expert noted that article 10 (10) neglected to include "lack of jurisdiction of the foreign court" as a ground for rejecting the recognition or enforcement of foreign judgments despite this being a common basis for non-recognition.

19. Focusing on article 12, the third expert suggested renaming the title of the article to "Relationship with other international agreements". He supported the change in article 12 (6) of the revised draft legally binding instrument to cover "any bilateral or multilateral agreements", which broadened the scope from the zero draft's reference to only trade and investment agreements. He noted this approach was in line with recent discussions at the United Nations Commission on International Trade Law, and the expert considered this change would encourage a more inclusive, mutually supportive and less fragmented application of international law. Additionally, he proposed adding a provision requiring human rights impact assessments with a view to ensuring future agreements' compatibility with the treaty.

G. Article 13

20. Recalling that the effectiveness of international instruments depends on their implementation mechanisms, the first expert recognized the critical importance of providing clarity on how to operationalize the obligations found in the legally binding instrument. In this regard, he noted that such mechanisms needed to be flexible enough to take into consideration the various compliance strategies of States in different legal regimes. The expert called on the working group to consider the lessons learned and challenges discussed in the Secretary-General's reports on the treaty body system. Additionally, he proposed expanding the Committee's powers such that it could aid capacity-building, be consulted on draft legislation, and participate in dispute settlement between States parties.

21. The second expert, speaking in her personal capacity, called for more clarity in article 13, particularly with respect to who will form the Committee, who will be monitored by the Committee, and what the functions of the Committee will be. With regard to the composition of the Committee, she suggested limiting members to one expert per region. The expert urged the working group to consider requiring companies to report to the Committee. Furthermore, she suggested that the Committee be able to consider complaints submitted by victims and non-governmental organizations.