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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

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

*Chair-Rapporteur:* María Fernanda Espinosa

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

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## **I. Introduction**

1. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights was established by the Human Rights Council in its resolution 26/9 of 26 June 2014, and mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises with respect to human rights. In the resolution, the Council decided that the first two sessions of the working group should be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument. Following its first session, held from 6 to 10 July 2015, the working group presented its first progress report to the Council at its thirty-first session (A/HRC/31/50).

2. The second session, which took place from 24 to 28 October 2016, opened with a video message by the United Nations High Commissioner for Human Rights. The High Commissioner congratulated the Chair-Rapporteur and stated that business entities had a vast and growing impact on peoples' lives, including on gender relations, the environment, neighbourhoods and access to land and other resources. When businesses paid insufficient attention, they often infringed on people's human rights. The High Commissioner underlined the importance of preventing and redressing business-related human rights abuses and of ensuring greater accountability and access to remedy for victims. He referred to the outcomes of the accountability and remedy project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) (see A/HRC/32/19), suggesting that the project could provide some guidance for the working group discussions. He welcomed the embrace of civil society voices and the constructive involvement of States and other stakeholders in the working group discussions, reiterating the full support of his Office and wishing the working group success in its deliberations.

3. The High Commissioner's message was reinforced by the remarks of the Director of the Thematic Engagement, Special Procedures and Right to Development Division, who emphasized the need for improved mechanisms of accountability with respect to corporate human rights abuses.

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

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

4. The working group elected María Fernanda Espinosa Garcés, Permanent Representative of Ecuador, as Chair-Rapporteur by acclamation following her nomination by the representative of Honduras on behalf of the Group of Latin American and Caribbean States.

### **B. Attendance**

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

### C. Documentation

6. The working group had before it the following documents:
  - (a) Human Rights Council resolution 26/9;
  - (b) The provisional agenda of the working group (A/HRC/WG.16/2/1);
  - (c) Other documents, including a concept note, a programme of work, a list of panellists and their curricula vitae, a list of participants, and contributions from States and other relevant stakeholders, which were made available to the working group through its website.<sup>1</sup>

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

7. In her opening statement, the Chair-Rapporteur expressed gratitude for the renewed trust placed in her as Chair-Rapporteur and pledged to maintain transparency and openness to dialogue. In a context of large-scale outsourcing of production and global value chains spanning different jurisdictions, international human rights must play a central role. The initiative of a binding instrument was based on respect for the principles of fairness, legality and justice, which should prevail for the benefit of all in the international context, and the objective of the process was to fill gaps in the international system of human rights and to provide better elements for access to justice and remedy for victims of human rights abuses related to transnational corporations. That objective was in no way aimed at undermining host States or the business sector, but was intended to level the playing field with regard to respect for human rights.

8. The Chair-Rapporteur presented the draft programme of work, which was adopted as proposed.

9. Jeffrey Sachs delivered a keynote message via videoconference, expressing support for an international legally binding instrument under which transnational corporations could be held accountable and their compliance with human rights standards could be promoted and enforced. Noting that the most important locations for the enforcement of human rights and access to remedy for victims were national judicial systems, he underlined the need to incorporate international human rights into national legislation and to facilitate access to justice. Citing weak enforcement of judgments as the biggest obstacle to achieving access to justice, he stressed the international responsibility to honour judgments rendered, including in developing countries, which were often hosts to transnational corporations. Transnational corporations were more powerful than many Governments; therefore they should be accountable and comply with human rights for the decent development of the world economy. An international treaty could strengthen the capacity of Governments to ensure remediation.

## III. General statements

10. State delegations acknowledged the work of the Chair-Rapporteur and the transparent and inclusive process of consultation, as well as the flexibility demonstrated by States and other relevant stakeholders in the preparation of the programme of work. They recalled that many actors had struggled for more than 40 years to develop effective global standards to hold companies accountable with respect to human rights.

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<sup>1</sup> [www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx](http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx).

11. One regional group emphasized that transnational corporations and other business enterprises, through the global reach of their operational activities, had social and political impacts disproportionate to their legal and social obligations, nationally and internationally. While recognizing that some positive measures had been implemented nationally and regionally, the group posited that in order to promote global compliance with a uniform standard, action must be initiated to develop an international legally binding instrument. That would be an effective response to many of the issues arising in the context of the widely perceived inequality in rights and obligations that existed between transnational corporations and other business enterprises and victims of business-related human rights abuses; the same point was subsequently reiterated by other delegations and non-governmental organizations (NGOs). Violations of human rights by such entities, for example in the areas of child labour, environmental degradation and decent work and wages, affected marginalized and impoverished groups disproportionately and exacerbated existing human rights concerns. The group stated that it remained committed to the letter and spirit of Council resolution 26/9 and encouraged the Chair-Rapporteur to prepare a draft negotiating text for the next session, based on the deliberations carried out to date and her own initiatives in that regard.

12. Some delegations asserted that a legally binding instrument was needed in order to redress the current imbalance between the progressive recognition of rights on the one hand, and the economic and political guarantees extended to transnational corporations on the other. Without corresponding obligations for corporations to respect human rights, rights were being undermined.

13. Many delegations stressed that business enterprises could support the economy and contribute to development while respecting human rights, such as the right to development, including access to public services. It was noted that constructive dialogue in the process towards an international legally binding instrument was essential. Some delegations expressed support for the Guiding Principles on Business and Human Rights and their implementation through national action plans. Many delegations recognized that the Guiding Principles and the mandate of the working group were mutually reinforcing, both representing positive steps towards the protection of human rights. Some delegations mentioned that the working group's mandate did not duplicate other efforts at the international level.

14. The European Union noted with appreciation that the programme of work, which was a result of compromise and flexibility, provided the reassurance that the process did not undermine the much needed continued implementation of the Guiding Principles. The programme of work widened the scope of the working group beyond transnational corporations so that the discussion could also cover all other enterprises. The European Union also noted with appreciation that agreement had been found on the programme of work for the second session, allowing it to participate. It stressed the importance of including civil society organizations, trade unions and the private sector in the deliberations. The representative reminded the international community that more remained to be done to prevent abuses in connection with activities by transnational corporations and other business enterprises and to enable access to remedy when abuses occurred, and referred to the mobilization carried out by civil society and human rights defenders worldwide on those issues. In line with the earlier concern expressed by the European Union that the working group had been established without other options, including the use of existing United Nations forums, having been considered, the representative emphasized that the international community needed to respond in a responsible and effective manner. In that connection, one State delegation called for the implementation of the guidelines for multinational enterprises published by the Organization for Economic Cooperation and Development (OECD).

15. Another political group referred to the recommendation on human rights and business recently adopted by its Committee of Ministers, which built on the Guiding Principles, incorporating access to remedy and including additional guidance in relation to particular vulnerable groups.

16. One delegation noted that any legally binding instrument on transnational corporations and human rights should address the challenges posed by conflict areas and areas under occupation. The delegation indicated that its members were looking forward to the results of the data-based project on businesses operating in the occupied territories (see Human Rights Council resolution 31/36).

17. Several delegations stressed the importance of a victim-centred approach and a focus on access to remedies and reparations. Even if there were positive measures at the national level to protect victims from human rights violations by transnational corporations, there must also be measures, standards and mechanisms in a binding instrument at the international level. Additionally, transnational corporations must fulfil existing binding obligations relating to human rights in accordance with international law.

18. One delegation noted that different national circumstances might need to be taken into account while respecting and protecting human rights.

19. Most NGOs concurred that any binding instrument must clearly establish the obligations of transnational corporations to comply with environmental, health and labour standards and international humanitarian law. It would need to outline the right of individuals and affected communities to access to justice and include provisions for the accountability of parent companies, protection of human rights defenders and the right to self-determination.

20. Several NGOs advocated that any treaty proposed should provide for international implementation mechanisms and possibly an international tribunal. Ultimately, such an instrument should allow States to regain policy space for the protection of human rights.

21. NGOs warned against corporate capture in the negotiation of a binding instrument, with States having the responsibility to act in the interests of their people and not in the interests of transnational corporations. As an instructive example, reference was made to the guidelines for the implementation of article 5 (3) of the WHO Framework Convention on Tobacco Control, on protecting against interference by transnational corporations.

22. Some NGOs called for gender perspectives to be mainstreamed in the instrument, since human rights violations by transnational corporations might exacerbate pre-existing inequalities and exert negative gender impacts. Gender perspectives also needed to be included in assessments of the human rights impact of projects and activities planned by transnational corporations, including with regard to problems faced by those who defended the human rights of women.

## **IV. Panel discussions**

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

23. The first panellist noted that many transnational corporations had committed human rights violations with impunity. Furthermore, international investment treaties had granted rights to such corporations to bring claims against States for regulating in the public interest. The situation could be remedied by a treaty that would hold transnational

corporations and other corporate actors accountable for human rights violations resulting from their operations, including in their global value chains, and that would allow for the individual liability of leaders involved in the decision-making process. Such a treaty would be tantamount to a right of appeal and should make that right accessible to individuals, groups, trade unions and communities free of charge, with costs covered by a tax to be paid by transnational corporations. In addition to recognizing the standards set by the International Labour Organization (ILO) and by the World Health Organization (WHO), those participating in the treaty process should recognize the need for an international court on climate issues.

24. The second panellist noted that the working group process was relevant to the implementation of the 2030 Agenda for Sustainable Development. Modern development had seen close collusion between financial and corporate actors, since investment for delivering the 2030 Agenda was not based on credit, but on the reinvestment of corporate profits. While large companies had great potential for delivering social progress, they often contributed to a race to the bottom with regard to taxes and labour costs. Similarly, free trade agreements carried downstream economic risks and might transfer control of some factors of the economy from the public sector to the private sector. A binding instrument would address those issues and provide an alternative to trade agreements negotiated behind closed doors.

25. The third panellist identified the need to address the structure of transnational corporations and their supply chains, acknowledging the failure of soft law and voluntary approaches and expressing support for the development of an instrument that would build on, and not undermine, the Guiding Principles. Such an instrument must cover workers' rights, particularly those set out in the ILO Declaration on Fundamental Principles and Rights at Work, and should be applicable to transnational corporations but not exclude other businesses, in order to avoid accountability gaps. A treaty should include an obligation on States to adopt measures on human rights due diligence and clarify the steps that companies should take in that regard, and should establish legal liability and extraterritorial jurisdiction for human rights abuses.

26. The fourth panellist stressed that corporate legal structures rendered it difficult to hold corporations accountable. She pointed to the problem of enhanced protection of investor rights, which often went further than national law and provided investors with a right to have their claims settled by international arbitration rather than in national courts. Investment treaties could clash with States' obligations to protect human rights, and the threat of international investor-State dispute settlement proceedings had a chilling effect on developing countries in terms of regulatory measures. Investor-State dispute settlement proceedings resulted in an imbalance of power because they provided a remedy only for business stakeholders. One solution would be to allow victims access to courts of the investors' home States, which was often where assets of transnational corporations were located. A binding instrument could provide guidance for the development of trade and investment instruments, including by stipulating the requirement of ex ante and ex post facto human rights impact assessments and setting out appropriate investor obligations. Such principles were reflected in the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD) and in South African and Indian law.

27. The fifth panellist noted that the corporate law principles of separate legal identity and limited responsibility were often applied together in relation to the acts of subsidiaries, allowing the mother company to escape responsibility. Certain legal doctrines, such as piercing the corporate veil, were designed to resolve such problems. A binding instrument could set out standards for operationalizing such principles, and the identification of those standards did not require a unique understanding of what a transnational corporation was.

The panellist suggested that the instrument should provide for mechanisms to facilitate the protection of human rights.

28. The sixth panellist criticized the practice of tax evasion by companies and suggested country-by-country tax reporting. The belief of States that they must sign bilateral investment treaties in order to attract foreign direct investment was seen as the source of the investor-State dispute settlement system. However, such bilateral treaties were a threat to democracy, removing the control of the judiciary, and could interfere with legislative processes.

29. Most delegations concurred that voluntary standards were insufficient and that a binding instrument should affirm that human rights obligations prevailed over commercial law. States had obligations to regulate in the public interest, defend the rights of people against privatization, strengthen mechanisms for due diligence and ensure that transnational corporations did not use their influence to avoid accountability and payment of reparations to victims. One delegation suggested that maximum deterrence could be achieved by imposing criminal liability.

30. Several delegations referred to the asymmetry between rights and obligations of transnational corporations in bilateral investment treaties and free trade agreements. Concern was expressed about the access by corporations to international arbitration against States, where there were no corresponding mechanisms to address the obligations of corporations to respect human rights.

31. A number of delegations referred to specific cases to demonstrate how transnational corporations had used bilateral and multilateral agreements to challenge measures taken by States to protect human rights. One delegation referred to a case where such a challenge had failed, highlighting the existence of tools for States to defend themselves properly before international arbitration tribunals.

32. Another delegation reaffirmed the right of the State to regulate in the public interest and referred to its own act on the protection of investment, aimed at securing a balance between the rights and responsibilities of investors.

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

34. Many NGOs stated that a binding instrument should not be conceived of as an isolated human rights instrument, but should take into account international trade and investment agreements. Furthermore, it should include a hierarchical clause establishing the primacy of human rights over trade and investment agreements and address critical gaps in assessing and monitoring the impact of such agreements. Calls were made for the establishment of an international tribunal or mechanism to investigate and ensure the accountability of transnational corporations.

35. One delegation raised the issue of unilateral economic sanctions and asked whether States could compel corporations to enforce such sanctions in the light of negative impacts on human rights.

36. NGOs enumerated some of the adverse human rights impacts caused by transnational corporations and requested that the binding instrument guarantee indigenous peoples' rights, recognize the primacy of the human right to water over profit-seeking in the water sector and guarantee access to safe drinking water and other resources. Few countries had adopted national laws in accordance with the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).



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

### **Subtheme 1. Implementing international human rights obligations: examples of national legislation and international instruments applicable to transnational corporations and other business enterprises with respect to human rights**

37. The first panellist pointed to the paradox of some States claiming that human rights interfered with their sovereignty while remaining willing to sign investment treaties that protected the rights of transnational corporations and directly interfered with their sovereignty. A binding treaty must: address the regulatory shortfall with respect to the protection of human rights and codify and develop the responsibility of States to protect human rights; build capacity and help States to adopt effective legislative and administrative measures to establish the criminal and civil liability of corporations responsible for human rights abuses; and provide standards to protect public policy in bilateral investment treaties.

38. The second panellist drew attention to the well-developed international human rights regime and recalled the obligation of States to protect, respect and fulfil human rights, including in relation to the activities of third parties, such as businesses, while simultaneously noting the significant limitations to States' compliance with such a regime. Any binding instrument should be developed in a way that addresses the causes of current enforcement gaps.

39. The third panellist referred to relevant international standards that might be useful in developing the content of an international instrument, citing, for example, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, in particular principles 8, 9, 25, 26, 29, 36 and 37.

40. The fourth panellist noted that infringement of human rights by transnational corporations happened in the context of an overall architecture of impunity. A binding instrument could change that state of play, remedy the asymmetry between the rights and obligations of transnational corporations, allow for the monitoring of human rights compliance of transnational corporations by home and host States as well as by citizens, and extend the obligations of such corporations in relation to contracting with suppliers. There would be a need for an international court to enforce the treaty, as well as for extraterritorial obligations and universal jurisdictional mechanisms.

41. One delegation noted that States were expected to uphold human rights both at home and abroad and advocated for the implementation of the Guiding Principles.

42. Several delegations recalled the primary obligation of States to protect human rights, including in relation to transnational corporations. Regional courts had acknowledged that corporate abuses could lead to States violating their obligations to exercise due diligence. A binding instrument would allow both home and host States to protect human rights and redress violations committed by transnational corporations.

43. Examples were given of domestic law that required companies to accept monitoring by Government and members of the public, for example in the areas of labour, environmental law and consumer protection. It was recommended that countries should make human rights a key factor when considering international investment.

44. One delegation cited the need to agree on clear standards to prevent transnational corporations from avoiding extraterritorial obligations and turning to international arbitration to protect their interests. Another delegation observed that the extraterritorial dimension could be dealt with as per the practice of treaty bodies, which had stated that

home States had duties in relation to the extraterritorial operations of transnational corporations and that such duties did not infringe on host States' sovereignty.

45. Another delegation advocated for a binding instrument to address the issue of State complicity, pointing out that the corrupting influence of corporations might take many forms, including lobbies and unlimited resources. In the State represented by the delegation, human rights were an important pillar of domestic and foreign policies and enshrined in the Constitution, which had enabled the judicial system to hand down judgments finding corporations responsible for human rights violations. However there had been enforcement challenges following the closure or relocation of corporate operations. The delegation referred to its Government's guidelines on good practices for domestic companies operating abroad.

46. Some delegations challenged the value of investor-State dispute settlement proceedings, describing how unfair arbitration processes could lead to major economic costs for States. Victims of human rights violations generally did not have access to arbitration, even in local courts, and non-compliance with national rulings was frequent. Other questions raised included how to reconcile State sovereignty with the notion of extraterritorial and universal jurisdiction, and how to guarantee the implementation of decisions adopted by host States regarding violations of human rights by transnational corporations when the latter fled the jurisdiction.

47. NGOs conveyed experiences of assisting victims and highlighted the multiple procedural and legal obstacles, including when holding parent companies accountable for subsidiaries' abuses. A binding instrument should overcome such obstacles, with the Maastricht Principles providing key elements for defining extraterritorial scope.

48. Reference was made to national initiatives by which States sought to impose obligations of corporate human rights due diligence, including in relation to operations abroad, and the reversal of the burden of proof in investigating complaints of corporate abuse. However, it was reported that those initiatives faced strong resistance from the business community.

49. Calls were made for the creation of a body to receive and investigate complaints submitted by affected communities or their representatives.

50. It was proposed that the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters should form the basis for participation, access to justice and remedy provisions in a binding instrument. A reference was also made to the Committee on the Elimination of Discrimination against Women, which had set out extraterritorial obligations with regard to discrimination against women, extending to acts of national corporations operating extraterritorially.

51. One panellist highlighted the need to provide the most vulnerable groups with legal tools to claim their rights, including through capacity-building in host countries. Cooperation between States and judicial bodies was deemed as essential to ensure the implementation of decisions.

52. One panellist did not share the view that trade agreements could result in adverse human rights impacts and that all investment arbitration tribunals aligned with the interests of investors. A State could denounce and withdraw from an investment treaty at any time. On the question of how power could be rebalanced vis-à-vis corporations, there were many positive initiatives, for example, the G7 CONNEX Initiative, as well as work carried out by UNCTAD. Additionally, the panellist warned that the proposed reversal of the burden of proof would not be in line with due process.

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

53. The first panellist indicated that a binding instrument should clarify the home State's responsibility to impose an obligation on transnational corporations to comply with certain norms wherever they operated, for example, due diligence requirements for prevention of harm, disclosure and reporting requirements, as well as the courts' jurisdiction in that State for corporate human rights abuses committed anywhere the business concerned operated. The International Court of Justice had clarified that a State's obligations to respect human rights applied beyond the State's territory when there was a link between the State and the activity taking place abroad.

54. The second panellist recalled that corporations had obligations under international law and asserted the need to close legal gaps. While States had obligations to protect citizens from corporate human rights violations, when they failed to meet those obligations or were too weak to do so, there was often no liability before international tribunals or domestic courts of other countries. Placing obligations on States to create national legal frameworks could also risk undermining human rights by resulting in differential standards. In the race to the bottom, corporations could relocate their operations to States with lesser protections.

55. The third panellist identified different levels for providing a reasonable opportunity for victims to obtain a remedy for human rights abuses committed by transnational corporations. Level 1 would comprise national and subnational legal systems. Level 2 would entail the engagement of an international or regional ombudsperson who could intervene on behalf of weaker plaintiffs against more powerful corporations or States. At level 3, which would be at the level of the home State or a country with a significant presence of assets held by transnational corporations, there would be a specific role for extraterritorial application of law. Level 4 — the international level — would include a role for an international court on transnational corporations and human rights. Level 5 would comprise a register of all pending cases concerning transnational corporations and human rights.

56. The fourth panellist suggested drawing lessons from the implementation of two international instruments designed to protect human rights from abuses by transnational corporations, namely, the International Code of Marketing of Breast-milk Substitutes and the WHO Framework Convention on Tobacco Control, both developed under the auspices of WHO. First, it was important to have the data to support the treaty provisions, especially data that demonstrated the ways Governments bore the costs of repairing the damage caused by human rights abuses committed by transnational corporations, for example, costs related to health care, water and sanitation, and the repair of environmental damage. Second, the panellist urged the use of the precedents set through the Framework Convention to protect the working group process from conflicts of interest and corporate interference (see art. 5 (3) of the Framework Convention) and to develop a civil and criminal liability regime (see art. 19).

57. The fifth panellist stressed the importance of holding transnational corporations accountable also for failure to prevent harm. The Rome Statute of the International Criminal Court excluded the consideration of crimes linked to the economy. However, the experience and rulings of the Permanent Peoples' Tribunal demonstrated that crimes committed by transnational corporations could be adjudicated, including when they constituted crimes against humanity.

58. Some delegations stressed the importance of States adopting measures to protect human rights at the domestic level and noted that many were already regulating corporate

behaviour in relation to issues such as workers' health and safety. Some countries already had provisions for extraterritorial jurisdiction in place for certain issues.

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

60. Another element raised by delegations was the establishment of a national mechanism, such as an ombudsman's office, that could receive complaints and produce reports.

61. Delegations again highlighted the issue of extraterritoriality, noting that several treaty bodies had recognized the obligation of States to prevent third parties from violating human rights. It was suggested that treaty bodies, for example the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, could also be instructive with regard to preventative measures. The need for States to take measures to ensure protection against human rights violations committed by companies abroad, as long as there was a reasonable link between a State and the company's activities, was stressed.

62. One participant drew attention to a number of successful cases brought against corporate actors worldwide. Corporate actors were found to bear the primary responsibility for violations in approximately half of those cases; in the other half, the State or its agents were found to be the primary actor, with the company being complicit in the State's action.

63. Parties to a future instrument should cooperate in the enforcement of judgments, thereby addressing some of the challenges faced in terms of access to remedy. One panellist referred to multiple models at the inter-American level and in the arbitration sphere where States had designed instruments for cooperation in that regard.

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

### **C. Panel III. Obligations and responsibilities of transnational corporations and other business enterprises with respect to human rights**

#### **Subtheme 1. Examples of international instruments addressing obligations and responsibilities of private actors**

65. The first panellist presented the example of the WHO Framework Convention on Tobacco Control, which provided a good opportunity to enhance public health and change business models, since it provided the possibility for mutual reinforcement among treaties, holding corporations accountable for products, policies and practices that were harmful, as well as for excluding corporations with conflicts of interest from policymaking at all levels.

66. The second panellist referred to several instruments adopted over the previous four decades that directly addressed the responsibility of business enterprises, such as the OECD Guidelines for Multinational Enterprises, the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of ILO, the United Nations Global Compact and the standard of the International Organization for Standardization providing guidelines for social responsibility (ISO 26000), which were, or were intended to be, in line with the Guiding Principles.

67. The third panellist presented the work and experience of ILO, focusing on three types of instruments, namely, international labour standards, fundamental principles and rights at work and the Tripartite Declaration.
68. The fourth panellist referred to the rapid growth of corporate social responsibility and sustainability and noted the still limited legislation regulating transnational corporations and the general opposition of corporations to such legislation.
69. The fifth panellist stated that there was no legal obstacle to international law imposing obligations and responsibilities on private non-State actors. He provided examples of several treaties and other instruments that did so, including the Guiding Principles. He agreed that States could impose direct obligations on non-State actors in a treaty, in addition to the obligations imposed on States themselves. That would make it easier for victims to seek remedy without the help of State agencies and to negotiate out-of-court settlements.
70. One delegation mentioned the existence of regional instruments, such as the Charter of the Organization of American States (art. 36), in which general principles on the responsibility of businesses were recognized.
71. Another delegation noted that there was no comprehensive international instrument addressing global corporate accountability, leaving the door open to a legal vacuum and potential violations. Moreover, voluntary mechanisms could not be compared to legally binding rules that recognized transnational corporations and other business enterprises as bearers of direct human rights obligations.
72. Another delegation described how the Universal Declaration of Human Rights imposed obligations to respect human rights on all actors of society, including transnational corporations. The legally binding instrument proposed must include provisions to protect public services of common interest, for example provisions relating to the right to water and respect for mother earth; provisions to protect individual and collective human rights, including the rights of peasants; and a monitoring mechanism.
73. According to another delegation, national systems of justice were experiencing challenges in preventing transnational corporations from committing human rights violations, as well as in the areas of prosecuting perpetrators and compensating victims.
74. Another delegation noted that the Tripartite Declaration was weak in human rights language and was currently under review.
75. Several delegations considered that a binding instrument should set out direct responsibilities and obligations for transnational corporations while making clear distinctions between obligations borne by companies and those borne by States. No loopholes should allow transnational corporations to escape their responsibilities, and a mechanism should be established to evaluate corporate due diligence.
76. Many NGOs expressed the view that voluntary principles were not effective in ensuring the regulation of transnational corporations, for example food corporations, with respect to their impact and responsibilities in terms of public health.
77. NGOs submitted that a binding instrument would also need to apply to international financial institutions and banks that provided corporate funding. One NGO drew attention to the so-called Panama Papers, which had revealed that corporations avoided taxes and obtained fiscal benefits to maximize profits, thereby contributing to tax fraud and exacerbating inequality and poverty.
78. It would be important for the working group to replicate article 5 (3) of the WHO Framework Convention on Tobacco Control to avoid undue influence from commercial and other vested interests.

**Subtheme 2. Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of transnational corporations and other business enterprises**

79. The first panellist stated that a binding instrument would not have to specify each individual human rights obligation of corporations, but should provide an analytical framework for how treaty bodies or domestic courts could further develop those obligations in a particular context. The approach of the Constitutional Court of South Africa, which provided for the direct application of constitutional rights obligations on private actors, could be instructive in that regard.

80. The second panellist outlined standards of civil liability for human rights abuses applicable to multinational parent companies in English tort law and their potential implications. The common law requirement of reasonable steps to avoid harm to those to whom a duty of care was owed overlapped largely with the human rights due diligence obligation. Therefore, he suggested a tort law approach for achieving corporate accountability, particularly in respect of parent companies and their potential negligence, but with some modifications to make it more universally applicable.

81. The third panellist noted that the global economy and corporations continued to operate in a system of segregation, racism, exploitation and inequality, in which human rights were violated without any actor being held accountable. Therefore, the philosophies of decolonization, feminism, rights of the child and the elderly, fairness, equality and security should be part of the framework of principles used in the treaty. The panellist identified evidence of corporate civil and criminal liability in domestic and international law, such as in the constitutions of the Gambia, Ghana, Kenya, Malawi and South Africa, which provided for the horizontal application of human rights, including with regard to the activities of corporations. Further guidance could be found in the criminal codes of Australia, South Africa and the United Kingdom of Great Britain and Northern Ireland, which included provisions on corporate criminal liabilities, and in the African Union draft protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

82. The fourth panellist stressed that any discussion of a treaty should include the issue of its ratification by certain countries, and the ability to effectively enforce any corporate liability under that treaty. The treaty should be focused on clarifying liability standards to judge corporate conduct with respect to human rights. In that connection, he recalled the importance of the application of the standards of knowledge and purpose as components of *mens rea* in order to determine corporate liability or negligence.

83. The fifth panellist proposed basic principles that should inform the treaty: corporations should be subject to private civil liability as well as to administrative or criminal enforcement sanctions by the State, in the same way as a natural person; certain principles, such as the legal liability of corporations for abuses within their sphere of influence, when they have caused, profited from, contributed to or failed to prevent the harm, were common to all legal systems and therefore should be used in a treaty; victims should have the right to hold transnational corporations liable either in the place where the subsidiaries operated and where the harm occurred, or in other places where the company was present; the treaty should provide for the elimination of the doctrine of *forum non conveniens* and the concept of the corporate veil in human rights cases; and the treaty should provide for the liberalization of the rule of discovery and the enhancement of international cooperation. The relevant European Union regulations and the United Nations Convention against Corruption were good models for, among other things, the exchange of technical expertise and information among States and the shifting of the burden of proof.

84. The sixth panellist presented the health and environmental impacts of shipbreaking in Bangladesh to demonstrate issues related to liability and how corporations escaped accountability as a result of the lack of a binding standard.

85. Delegations stressed the need for clear regulations to prevent corporations from committing abuse and to hold corporations accountable for any abuse, since administrative liability and sanctions did not provide victims with redress. While civil liability could be a possible avenue to secure accountability, it often involved complex, lengthy and costly procedures, particularly when transnational corporations were domiciled in third countries. Regarding criminal liability, a binding instrument could correct a historical failure by making legal persons liable, as was expected for article 25 of the Rome Statute, and by attributing criminal responsibility to corporations.

86. Questions were raised in relation to the identification of the competent court; the definition of liability standards, including the criteria for establishing liability; and the implications for the principles of universality, interdependence and interrelatedness of all human rights. Also raised were questions on how to address damage that affected an entire population or several generations and on the elements of criminal liability that would apply to the company itself and possibly its managers.

87. One delegation mentioned the 2016 report of the International Law Commission, which included a section in which the Commission's Special Rapporteur on crimes against humanity outlined arguments to support the international criminal liability of legal entities.

88. Given that corporations operated increasingly in conflict-affected areas, another delegation raised the issue of corporate liability for breaches of international humanitarian law and the need to incorporate into the legally binding instrument references to international humanitarian law as part of the corporate due diligence in such areas.

89. Some delegations were of the view that transnational corporations also had positive obligations to take active steps to realize human rights for all, including by contributing to the mobilization of resources for the realization of the right to development and economic, social and cultural rights globally, with a view to ending poverty.

90. One delegation reiterated that, in addition to liability standards, the treaty should include references to international cooperation for investigations and enforcement, as was the case in the Convention against Corruption.

91. Some NGOs recalled the legal obstacles to establishing the civil liability of transnational corporations at the national level. Self-regulation and regulation without monitoring by a third party did not work, thus there had to be a binding instrument and a court to enforce it. Other proposals for elements to be covered by a treaty included the compulsory disclosure of, inter alia, the compositions, subsidiaries and supply chains of companies.

92. One participant noted that the OECD guidelines and national contact points had been essential in establishing what expectations States have of companies, and had helped to change behaviour regarding human rights, facilitating faster access to justice through mediation, as opposed to litigation. It was also asserted that there had been progress by companies in integrating the Guiding Principles throughout their activities and operations; the principles should be the basis of the working group's work.

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

93. The first panellist argued that the changing character of transnational corporations made it difficult to define them. While he cited the pragmatic approach of the OECD guidelines, he considered that a precise definition of transnational corporations or other business enterprises was not required. According to UNCTAD, from a universe of 200 million enterprises registered worldwide, only 3,200 had operations of a transnational character, accounting for less than 1 per cent of all enterprises. According to OECD, the remaining 99 per cent were domestic small and medium-sized enterprises. Thus transnational corporations were clearly a distinct group within the universe of business enterprises. The treaty should be complementary to the Guiding Principles, committing States, transnational corporations and other business enterprises to put the principles into practice, with a view to, among other things, supporting the implementation of the Sustainable Development Goals and creating new models of business and investment.

94. The second panellist, referring to a call for the treaty to cover all businesses, recalled that the scope used for certain national and regional laws was much more narrowly defined, citing, for example, the draft law on duty of care in France and the non-financial reporting initiative of the European Union, which covered only companies with over 500 employees. Nevertheless, the priority focus of the treaty should be on transnational corporations, applying to all their subsidiaries and business relationships, as well as to all the companies in their global supply chains, including subcontractors and financiers, and eventually to all companies that perpetrated, or were complicit in, human rights violations. Many transnational corporations were more wealthy and powerful than the States trying to regulate them. They could influence judicial institutions or block binding regulation through heavy lobbying, or simply relocate to other countries, leaving victims without redress. The panellist defended the need to address the role of public finance and foreign investment, as well as investor-State dispute settlement proceedings.

95. The third panellist made reference to the Guiding Principles as a step in the right direction. However, he deplored the fact that they were voluntary, including with respect to issues such as the obligation of transnational corporations to pay their fair share of taxes, which could be interpreted as part of due diligence, but nevertheless was not included in the Guiding Principles. With respect to promoting the right of access to information, the panellist recalled his recommendation to the General Assembly for States to provide protection for whistle-blowers. He also invited States to put teeth in the Guiding Principles, to develop monitoring mechanisms and to prohibit aggressive tax avoidance and tax havens, in order to ensure transparency and accountability.

96. The fourth panellist recalled OECD and ILO efforts to define transnational corporations; the subjective scope of the treaty was clearly defined in the footnote in resolution 26/9. He criticized the arguments against such a footnote, quoting the common practice in the jurisprudence of the World Trade Organization and other frameworks that assigned footnotes the same legal weight as the paragraphs of an instrument, resolution or decision. He posited that focusing the treaty on transnational corporations would not entail any discrimination, as local companies were already subject to regulation and did not have the possibility to evade their responsibilities in the same way as transnational corporations. In terms of which human rights should be included, he had observed an emerging consensus around the core human rights covenants and the need to ensure broad coverage.

97. The fifth panellist claimed that the Guiding Principles did not provide robust remedies in cases of human rights abuses by transnational corporations, and mentioned the plurilateral agreements of the World Trade Organization as an example of relevant



instruments for remedy. The Montreal Protocol on Substances that Deplete the Ozone Layer set out general principles followed by articles on procedural aspects and included an annex that could be expanded and modified at the meeting of the parties to ensure precision and flexibility. The treaty could include a section on enhanced compliance, a section on due diligence and a functional legal platform to provide support for national legal systems.

98. The sixth panellist focused on the potential form of the treaty, suggesting several possibilities: a detailed treaty setting out substantive and procedural matters, similar to the Rome Statute; a framework treaty setting out key principles and approaches, such as the United Nations Framework Convention on Climate Change; a core treaty with a series of annexes to deal with supervisory mechanisms and developments, such as the Vienna Convention for the Protection of the Ozone Layer; or an optional protocol to existing human rights treaties. The treaty should expressly cover enterprises owned or controlled by the State; it should also define the responsibilities of international organizations.

99. One delegation expressed the need to agree on a definition of transnational corporations before drafting a treaty and suggested using ILO or OECD definitions. Another delegation objected, referring to concepts such as terrorism or violent extremism that were not universally defined but were addressed in binding instruments.

100. Another delegation advocated for a clear reference to existing principles, including the Guiding Principles, but also to instruments relating to the environment, social security and transparency, among others.

101. Regarding the scope of the instrument, some delegations noted that the binding instrument would need to be adaptive to ensure that transnational corporations were prevented from evading their responsibilities. Some delegations pointed out that companies with domestic dimensions that were subject to national regulations did not have the same possibility to evade their responsibilities and could not be treated equally as compared to transnational corporations, thus an instrument regulating transnational corporations, including their subsidiaries, decision-making bodies and supply chain, would place transnational corporations and domestic business enterprises on a more equal footing.

102. It was observed that there appeared to be a consensus that the treaty should cover all human rights, including the right to development, as well as principles of universality, indivisibility, interdependence, equality and non-discrimination. One NGO noted that the experience of national truth commissions should also be considered in that context.

#### **E. Panel V. Strengthening cooperation with regard to prevention, remedy and accountability and access to justice at the national and international levels**

103. The panel discussion opened with a video message by Nils Muižnieks, Council of Europe Commissioner for Human Rights. Mr. Muižnieks recognized that business practices could have a negative impact on a variety of human rights, citing several examples of concern in that regard and expressing support for the Guiding Principles, which had formed the basis for a recommendation on human rights and business adopted recently by the Committee of Ministers of the Council of Europe. He recalled that the European Union had also recognized the Guiding Principles as the authoritative policy framework in promoting corporate social responsibility, and the European Commission had encouraged the development of national action plans for the implementation of the Guiding Principles. However, much remained to be done, including ensuring broad and inclusive participation in the process of implementation, all of which would feed into the work of the working group in elaborating an international legally binding instrument.

**Subtheme 1. Moving forward in the implementation of the United Nations Guiding Principles**

104. The first panellist noted that the Guiding Principles had led to some progress with regard to business and human rights but also recognized that the extent of their influence in national legislation was limited. She stressed the need to reflect and act, in order to offer genuine remedy and accountability. In France, the first initiative built on the Guiding Principles, which would have imposed civil and commercial, as well as criminal, liability on companies with over 500 salaried employees for human rights abuse, had been rejected in 2015. A less ambitious draft legislation was subsequently presented to the parliament, aimed at ensuring that no human rights were violated and no serious environmental damage or health risks resulted from corporate activities. It also contained specific provisions to prevent active or passive corruption; non-compliance would result in accountability for the company, including sanctions. The panellist expressed the hope that the draft proposal would be adopted soon, and also expressed hope for the “green card” initiative, through which national parliaments could jointly propose to the European Commission new legislative or non-legislative actions, or changes to existing legislation, in the interest of sustainability.

105. The second panellist presented the OHCHR accountability and remedy project, describing how it might be relevant to the discussion of the working group. The project had been initiated in May 2013 to support a more effective implementation of the third pillar of the Guiding Principles and ensure effective accountability and remedy for business-related human rights abuses. The project was aimed at identifying solutions to the legal, practical and financial barriers victims faced, and was based on an extensive multi-stakeholder process and on data and information from more than 60 jurisdictions. The outcome of the project was presented to the Human Rights Council, which had taken note of the work in its resolution 32/10. The guidance that emerged from the project covered public and private law, included provisions for addressing challenges appearing in cross-border contexts, and could be implemented through national processes, for example, national action plans or legal review processes, or through subregional, regional or international processes, such as the working group. Civil society and national human rights institutions could also draw on the guidance in terms of their advocacy at the national level and in forums such as the one provided by the working group.

106. Another panellist underlined that national action plans were one of the most important tools for implementing the Guiding Principles and that States needed to develop them as a matter of urgency. The Working Group on the issue of human rights and transnational corporations and other business enterprises (Working Group on business and human rights) had produced guidance on how to develop such plans. The binding instrument should strengthen the state of play in four areas: States’ enactment of laws and policies for mandatory human rights due diligence in connection with business in their territory and jurisdiction; the inclusion of human rights provisions in bilateral investment treaties; the conduct of human rights evaluations; and efforts to ensure investor compliance with human rights norms. In drafting the binding instrument, attention should be paid to those most at risk of vulnerability or marginalization, including women, persons with disabilities and migrant workers. Consideration should be given to including in the instrument references to other human rights instruments, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the United Nations Declaration on the Rights of Indigenous Peoples.

107. The European Union expressed support for the recommendation on human rights and business adopted by the Committee of Ministers of the Council of Europe, as well as for the accountability and remedy project and the recommendations emerging therefrom, including on improved cooperation between States on cross-border cases, and for the

activities carried out by the Working Group on business and human rights, including its annual forum. The European Union shared its latest policy developments relating to the Guiding Principles, aimed at implementing the principles through a smart mix of voluntary and regulatory measures. The representative expressed the European Union's commitment to developing peer learning, including across different geographic regions. The representative referred to the High Commissioner's report (A/HRC/32/19) and guidance, in which the High Commissioner indicated that business enterprises needed to have clear frameworks that could act as an effective deterrent. Some leading enterprises had shown remarkable progress, while others still needed to see the full benefit of ensuring respect for human rights.

108. Other delegations also expressed support for the Guiding Principles and referred to action taken at the national level to support their implementation. The need for complementarity between the Guiding Principles and a binding instrument was reiterated.

### **Subtheme 2. Relation between the United Nations Guiding Principles and the elaboration of an international legally binding instrument on transnational corporations and other business enterprises**

109. The first panellist stressed that for any binding treaty to be meaningful, it needed to improve victims' access to both a court and effective legal representation. Legal remedies and procedures must be effective in practice, particularly to address all of the interrelated financial, legal, procedural and practical barriers that existed, including issues of jurisdiction in home courts, the corporate veil, reversal of the burden of proof, access to documents and information, the absence of class action mechanisms, legal representation and funding, costs and levels of damages.

110. The second panellist referred to existing general obligations for international cooperation under international law, as contained in Articles 55 and 56 of the Charter of the United Nations, and the opportunity that a treaty would offer for international legal and judicial cooperation. In relation to access to justice in cross-border cases, the panellist noted that effective investigation of complaints of human rights violations in another country required cooperation by police and judicial authorities of the host country and the collection of evidence. In that connection, he suggested that the following be considered: State obligations to enter into bilateral and multilateral agreements to facilitate requests for legal assistance and to ensure cross-border investigations; the establishment of mechanisms for exchange of information; and the provision of adequate training, information and support for law enforcement.

111. Some delegations noted that a binding instrument would be complementary to the Guiding Principles with regard to both fundamental and operational principles. Such an instrument would strengthen the State duty to protect, in particular with regard to effective compensation, while reaffirming States' regulatory capacity and accountability. One delegation observed that the Guiding Principles had not been negotiated through an intergovernmental process and therefore did not constitute codified international law.

112. The European Union and other delegations insisted that any further steps must be inclusive, rooted in the Guiding Principles and applicable to all types of companies. The European Union insisted that the motto should remain to implement existing obligations. Efforts should also be made to achieve broad international consensus and awareness among transnational corporations about a new instrument, to ensure impact and implementation. Civil society organizations and human rights defenders must also be involved in the process. In the intergovernmental process, as many Governments as possible must be on board in order to ensure a strong treaty.

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

114. Some NGOs noted that national action plans needed to meet certain requirements, needed to ensure dialogue and transparency and needed to be based on the Guiding Principles, adapted to the national context and revised periodically. Some processes related to national action plans had revealed serious faults and were not necessarily delivering the required results. A legally binding treaty might be the best way to ensure appropriate access to justice and to create a common standard.

115. Other NGOs raised the issue of human rights defenders who, when opposing activities of transnational corporations, could face harassment, discrimination and even racism. Indigenous communities faced particular barriers in terms of access to justice. Some NGOs noted that efforts to strengthen the international normative framework were interdependent with efforts to strengthen national and regional frameworks.

#### **F. Panel VI. Lessons learned and challenges to access to remedy (selected cases from different sections and regions)**

116. The first panellist discussed practical challenges and opportunities that a binding instrument could address. A case study from a State emerging from conflict provided some specificities for addressing the need for effective remedies and redress in a post-conflict country. A binding instrument should codify and develop provisions for access to an effective remedy for wrongful conduct by both States and business enterprises, and would help to redress the inequality between corporate rights and obligations.

117. The second panellist exposed barriers to access to justice. She referred to her experience in supporting communities affected by large-scale projects for natural resource extraction, including challenges related to the lack of the following: transparency on the part of the entities and companies that had interests in the territories; access to information; spaces for participation; and the free prior informed consent of the affected population. She described other challenges related to the licensing and operational stages. A binding instrument would need to prevent violations and provide for mitigation of and remedy for negative impacts, addressing the multidimensional nature and effects of large-scale extractive projects.

118. A third panellist noted the importance of access to remedy, particularly for the most vulnerable and marginalized. She put forward several examples of cases to illustrate the lack of legal standing in the requested courts and the need for a broader definition of legal standing based on contextualized understanding of human rights violations and the possibility for representative, class and group actions. The panellist emphasized the need for a shift in the burden of proof, taking into account that even public prosecution authorities were at times reluctant to investigate cases involving corporate human rights violations. In situations of foreseeable risk, due diligence served as an analytical tool for managing risks relating to human rights, but liability standards should include strict liability and precautionary principles and be secured, for example through the reversal of the burden of proof and rebuttable presumptions. Jurisdictions should be allowed to consider the complementary responsibility of various corporate actors, even when the places of domicile of the actors were different.

119. A fourth panellist gave an overview of the Alien Tort Statute, by which courts in the United States of America were granted jurisdiction over claims made by a non-citizen of the United States physically present in the United States for violation of international law.

The overview included examples of how corporate defendant litigation under the Statute had held corporations accountable and provided remedies to survivors who had no other means of redress. However, over the previous few years the Supreme Court of the United States had severely limited such litigation, particularly in corporate defendant cases, restricting the extraterritorial scope of the Statute. Nonetheless, the Statute demonstrated that a robust system of litigation could lead corporations to pay closer attention to the adverse impacts of their operations and provide an opportunity for victims to expose abusive corporate behaviour and obtain meaningful monetary compensation.

120. One delegation asked whether it would be relevant for a treaty to mention not only legal, but also non-legal, complaint mechanisms, such as those of national human rights institutions, and enquired about the added value of such a wide range of formal and informal redress avenues.

121. Another delegation acknowledged that there had not been much progress in the implementation of the third pillar of the Guiding Principles. It offered to share information about an in-depth study that had been conducted on how to hold the national corporations of the delegation's country accountable even when they operated abroad, which had revealed ample opportunities in terms of access to justice, including through criminal laws.

122. In response to one delegation's question about different levels of access across nations to scientific evidence and the use of specific technologies to prove human rights violations, one panellist recalled the international obligation of scientific cooperation in environmental law and the need for a binding instrument to shift the burden of proof, while pointing to the need to increase education for judiciary and legal professionals on international human rights law.

123. One member of the Working Group on business and human rights stated that the Working Group would focus on the third pillar of the Guiding Principles in its upcoming reports and at its forum in 2017. He encouraged all stakeholders to use the Working Group's communication procedures.

124. In response to questions raised by several delegations on types of remedies, one panellist indicated that a wide range of options could be established through a treaty, but that all would need to fulfil the requirements of accessibility, independence, effectiveness and affordability. Local non-judicial bodies, such as corporate grievance mechanisms, national human rights institutions, ombudspersons and national contact points, were important since they were often more accessible. They could not, however, replace judicial mechanisms and thus were only complementary. They also required a lesser burden of proof and might allow for more creativity in the types of remedies granted, but procedural guarantees should be put in place for establishing such agreements.

125. In response to a question posed by some delegations on the type of international mechanism that could be established, one panellist indicated that he would prefer to use the monitoring system set up by human rights treaty bodies, which could receive complaints and authoritatively interpret the standards in the treaty through general recommendations.

126. Several NGOs reiterated the need to include the right to development as a founding and enforceable right in the treaty, as well as the rights to access to land, water and other resources, and the rights of migrant workers.

127. One organization reiterated that the utmost priority should be given to access to remedy on a domestic level through promotion of the rule of law, as such remedy was the most efficient in terms of cost and time.

128. Some NGOs noted that the binding instrument must remove obstacles blocking access to remedy in host and home States and should require States to abolish the corporate veil. The treaty should further oblige States to provide for civil and criminal liability and for appropriate redress in cases of corporate abuse of human rights. In such cases, the treaty should require a comprehensive approach to redress, and remedies should be culturally appropriate and gender sensitive. Some NGOs suggested drawing on existing sources of analysis of regional and international mechanisms, including the Special Rapporteur on violence against women, its causes and consequences and the Special Rapporteur on the rights of indigenous peoples. Finally, the binding instrument should also include an explicit guarantee that the application of any agreement or non-judicial mechanism did not interfere with the right to judicial remedies.

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

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

129. **Following the discussions held during the session, and acknowledging the different views and suggestions on the way forward, the Chair-Rapporteur makes the following recommendations:**

(a) **A third session of the working group should be held in 2017, in accordance with resolution 26/9, in particular operative paragraph 3;**

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

(c) **The Chair-Rapporteur should prepare a new programme of work on the basis of the discussions held during the first and second sessions of the working group and the informal consultations to be held, and present that text before the third session of the working group for consideration and further discussion thereat.**

### **B. Conclusions of the working group**

130. **At the final meeting of its second session, on 28 October 2016, the working group adopted the following conclusions, in accordance with its mandate established by resolution 26/9:**

(a) **The working group welcomed the opening message of the United Nations High Commissioner for Human Rights and thanked Mr. Sachs for serving as keynote speaker. It also thanked a number of independent experts and representatives who took part in panel discussions, and took note of the inputs received from Governments, regional and political groups, intergovernmental organizations, civil society, NGOs and all other relevant stakeholders;**

(b) **The working group welcomed the recommendations of the Chair-Rapporteur and looked forward to the informal consultations ahead of, and the new programme of work for, its third session.**

## **VI. Adoption of the report**

131. At its 10th meeting, on 28 October 2016, the working group adopted *ad referendum* the draft report on its second session and decided to entrust the Chair-Rapporteur with its finalization and submission to the Human Rights Council for consideration at its thirty-fourth session.

## **Annex I**

### **List of participants**

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

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

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

Holy See; State of Palestine.

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

International Labour Organization, United Nations Conference on Trade and Development, United Nations Environment.

#### **Intergovernmental organizations**

Council of Europe, European Union.

#### **Other entities**

International Committee of the Red Cross.

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

Working Group on Business and Human Rights.

#### **National human rights institutions**

The National Human Rights Council of Morocco.



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

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

## Annex II

### List of panellists and moderators

**Monday, 24 October 2016**

**Keynote speaker**

- Mr. Jeffrey Sachs, Columbia University (videoconference)

**Panel I (15:00-18:00)**

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

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

**Tuesday, 25 October 2016**

**Panel II (10h00-13h00)**

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

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

*Moderator: Ambassador Negash Kebret Batora, Permanent Representative of Ethiopia to the United Nations*

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

**Panel II — cont'd (15h00-18h00)****Subtheme 2: Jurisprudential and practical approaches to elements of extraterritoriality and national sovereignty**

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

**Wednesday, 26 October 2016**

**Panel III (10h00-13h00)**

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

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

*Moderator: Archbishop Ivan Jurkovic, Apostolic Nuncio, Permanent Representative of the Holy See to the United Nations*

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

**Panel III — cont'd (15h00-18h00)****Subtheme 2: Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of transnational corporations and other business enterprises**

*Moderator: Ambassador Nozipho Joyce Mxakato-Diseko, Permanent Representative of South Africa to the United Nations*

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

- Michelle Harrison, Earth Rights International
- Rizwana Hassan, Friends of the Earth, Bangladesh

**Thursday, 27 October 2016**

**Panel IV (10h00-13h00)**

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

*Moderator: Ambassador Robert Matheus Michael Tene, Deputy Permanent Representative of Indonesia to the United Nations*

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

**Panel V (15h00-18h00)**

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

*Moderator: Ambassador Beatriz Londoño Soto, Permanent Representative of Colombia to the United Nations*

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

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

**Friday, 28 October 2016**

**Panel VI (10h00-13h00)**

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

*Moderator: Ambassador Hernán Estrada Roman, Permanent Representative of Nicaragua to the United Nations*

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