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

## Draft 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.

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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 (IGWG) 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 (TNCs and OBEs) with respect to human rights.

2. The IGWG'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 (RDLBI), which provides a solid basis on which to commence substantive negotiations. For her, a future treaty can help ensure effective prevention, protection and remedy for those subjected to business-related human rights abuses, just as it can help to open up more sustainable, equitable and inclusive development. She recalled that business-related human rights abuses impact different groups of people and rights-holders differently, and some even disproportionally. In that context, she mentioned that a business and human rights treaty is not a cure, but it can 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 fifth session. She reminded that the High Commissioner urges everyone to recall that the UN Guiding Principles on Business and Human rights (UNGPs) and the new treaty can and should be mutually reinforcing and complementary. In that sense, she recalled that the UNGPs themselves call for States to consider a smart mix of measures, including relevant and meaningful legal developments at the international, regional and national levels. She mentioned that the High Commissioner sees the potential of this treaty process to deliver an 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 UNGPs, at least until such time as a stronger normative framework is in place. She recalled the work of her office on the Accountability and Remedy Project, noting that the outcomes of the project can already be used to improve access to State-based remedial mechanisms, and she recommended that members of the IGWG use its outcomes as a helpful resource during negotiations. Additionally, she highlighted the record number of civil society representatives during this session and their key role in this process. She also commended the role of independent experts during the session. Finally, she stressed the urgency that the High Commissioner feels for this 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 by the delegation of Nicaragua on behalf of the Group of Latin American and Caribbean States.

## 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 IGWG had before it the following documents:

(a) Human Rights Council resolution 26/9;

(b) The provisional agenda of the IGWG (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 IGWG 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 its nomination, as well as all member States for their support and trust. He invited everyone to participate in the widest possible manner in the deliberations and beginning of the 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 RDLBI incorporated the views, thoughts and ideas expressed therein, as well as in the more than 40 written submissions received and the compilation of oral interventions made at the fourth session.[2] This revised draft aimed to protect and defend victims, and strived to prioritize the needs of human beings and eliminate any negative misperception of the process. The Chair-Rapporteur also highlighted efforts to align the text with other relevant initiatives, particularly the UNGPs, OECD Guidelines for Multinational Enterprises, ILO Conventions, and domestic regulatory measures. In that sense, he invited all to jointly determine a set of rules that are clear, coherent, and generally acceptable to govern the relationship between business and human rights on the basis of existing principles, frameworks and current developments. This is an unavoidable responsibility of States and business enterprises. He hoped that this 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 the Chair's leadership and his proposed programme of work for the fifth session.[3] Several delegations thanked the Chair for the work put into the process since the fourth session, particularly with respect to the development of an improved RDLBI.

9. Many delegations and non-governmental organizations (NGOs) recalled instances of business involvement in human rights abuses where there had been no accountability or remedy for those affected. These incidents – involving environmental and human rights defenders being killed or otherwise 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 – provided a powerful reminder of the need for increased action to prevent and address business-related human rights harms.

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

[2] A/HRC/40/48/Add.1.

[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/.

10. While several delegations shared developments taken at the domestic level (such as new or reformed legislation and national action plans on business and human rights), most others emphasized how international legal developments were needed to enhance the protection and respect of human rights in this space. Those pursuing an international agenda 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 amongst members of the international community. Some delegations and many NGOs emphasized that the focus of these efforts must be on the people who have been, or are at risk of being, harmed in the context of business activities, particularly those at heightened risk of vulnerability or marginalization.

11. Many delegations and NGOs welcomed the RDLBI as an improvement on the zero draft instrument.[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 NGOs thanked the Chair 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 RDLBI. There were many calls for more precise language and concrete measures throughout the draft. One delegation noted the large costs involved with the RDLBI as presented, and questioned the added value of the instrument over the existing UNGPs framework.

12. Much discussion focused on the need for the LBI 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 SDGs, the OECD Guidelines for Multinational Enterprises, and, chiefly, the UNGPs. Many delegations and organizations emphasized their support for the UNGPs, and noted how the RDLBI was compatible with, and complementary to, the UNGPs. Several delegations noted welcome changes that indicated the draft's stronger alignment with the terminology and concepts of the UNGPs, such as the explicit reference to them in the preamble. However, other delegations considered that some parts of the draft diverged from the UNGPs and that there was still room for closer alignment.

13. Many delegations also discussed the relationship between the RDLBI and development. It was recognized that TNCs and OBEs play an important role in promoting development and attaining the SDGs. Some delegations highlighted that this process was not meant to vilify business; rather, it should be seen as an attempt to improve certainty and the conditions through which quality investments can be made. Despite some references to development in the preamble, some delegations called for an increased emphasis on the development agenda in the text.

14. Many provisions of the draft were addressed in this general session. 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 lie with the State, and that States must protect against human rights abuse by third parties, including business enterprises. Some delegations and NGOs also welcomed the references to international humanitarian law and situations of conflict in the preamble, though 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 "victim" could be refined and should be clearer regarding how it applies 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. Further, several delegations and NGOs took issue with the concept of "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 RDLBI as compared to the zero draft. Some were of the view that the application of the instrument to

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

all business activities exceeded the mandate of resolution 26/9, which refers to the regulation of "transnational corporations and other business enterprises," and specifies in a preambular footnote that "[o]ther business enterprises" denotes all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law. Other delegations suggested that the expanded scope was compatible with resolution 26/9, but called for a stronger focus in the LBI on transnational corporations. However, most delegations and organizations welcomed the RDLBI's expanded scope, believing it to close significant gaps in coverage of the LBI and enhance rights-holders' access to justice.

17. Most other provisions of the RDLBI were briefly commented on during the general statements. Some delegations asked for greater clarification on article 12(6) as regards the relationship of the LBI with trade and investment agreements. Many NGOs insisted that the provision should be expanded to clearly indicate the primacy of human rights over such agreements. Additionally, delegations emphasized the need for an effective mechanism to ensure implementation of the LBI, though there was disagreement as to whether the Committee referenced in article 13 was the best approach.

18. Beyond what was included in the text, some delegations and NGOs recommended potential additions, including provisions addressing non-judicial mechanisms, data protection, customary international law, and State-owned enterprises. Additionally, some NGOs 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 going forward. 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 RDLBI, noting that it needed to obtain a formal negotiating mandate before being able to fully engage with 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(s). After his introduction, experts provided 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 introduced the debate by noting that, in response to contributions received, the preamble now included more explicit reference to international instruments and standards (such as the UNGPs), international humanitarian law, 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 the five definitions of article 1 are crucial to understanding the rest of the text, and he highlighted the new definitions on "human rights violation or abuse" and "contractual relationship." Additionally, the Chair-Rapporteur introduced article 2 and noted that there had been no significant changes to this article.

22. It was noted that the preamble and articles 1 and 2 set a foundation for the whole LBI, and there were calls for more precision in the text. Some delegations called for a greater reliance on the language of resolution 26/9, suggesting that the RDLBI make greater use of

[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.

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

the formulation of "transnational corporations and other business enterprises" as defined in the resolution.

23. One delegation proposed replacing all instances of "business activities" in the preamble with "TNCs and OBEs." Another delegation generally 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 adopted by the United Nations, and the eight fundamental Conventions adopted by 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 Guiding Principle 12 be adopted. Another delegation suggested employing a general reference to "human rights instruments" throughout the preamble instead of trying to list all 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 the document.

25. Two delegations suggested merging the preambular paragraphs referencing UN Charter articles 55, 56 and 2. Regarding the paragraph citing UN Charter article 2, 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 Co-operation among States rather than listing a subset of the principles referenced in that document.

26. Regarding the paragraph underlining the responsibility of business, one delegation proposed referring to "abuses" rather than "adverse human rights impacts" to harmonize the text. A business organization noted a discrepancy between the paragraph and the UNGPs, as the former makes reference to "the responsibility to respect *all human rights*," whereas the latter refers to the responsibility to respect *internationally recognized* human rights.

27. Several delegations and NGOs appreciated the reference to human rights defenders in the preamble.

28. Delegations had various suggestions with respect to the preambular paragraph recognizing the distinctive and disproportionate impact of abuses on different groups. One delegation recommended that it would be more appropriate to refer to the groups' situations of vulnerability rather than the groups' vulnerabilities. Some delegations suggested adding protections for sexual orientation and gender identity and 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 is non-exhaustive.

29. Several delegations approved of the included reference to the UNGPs in the preamble.

30. Some delegations questioned whether it made sense to single out the ILO 190 Convention in its own paragraph, when there was an earlier paragraph referencing the eight fundamental ILO Conventions.

31. Additionally, one delegation questioned the rationale for including references to international humanitarian and human rights law in the final preambular paragraph when the paragraph can simply refer to international law generally. Some other delegations suggested removing the reference to international humanitarian law, considering it more appropriate to fixate on human rights law; however, this was challenged by two delegations, as well as two of the experts for the session.

32. Several delegations and organizations suggested including other references in the preamble, such as on 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 SDGs; the capacity of business to foster economic well-being, development, technological improvement and wealth; and climate change. Additionally, at least one delegation and some NGOs called for a greater focus on the gender dimension in the preamble.

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 LBI beyond transnational harm.

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

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 the provision was far too broad, as it covers "any harm" against "any person." Others questioned what level of harm must 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 RDLBI refer only to "abuses" throughout the document; another delegation and NGO suggested defining "abuse" and "violation" separately. Some delegations proposed removing the reference to the "State" since the instrument was to focus on TNCs and OBEs. There were calls to clarify or remove the reference to "emotional suffering," as well as "economic loss." Additionally, a number of delegations proposed removing the reference to "environmental rights," with two delegations asking for a clarification of what the phrase meant. However, some NGOs insisted on retaining the reference to "environmental rights" and recommended adding an explicit reference to economic, social and cultural rights (ESCR).

36. Although many delegations praised the expanded scope of the RDLBI, some delegations called for the definition of "business activities" in article 1(3) to be restricted to transnational corporations. One delegation suggested reverting back to the definition contained in the zero draft on "business activities of a transnational character." Another delegation proposed expanding the definition to include "economic *or other* activity."

37. Several delegations and NGOs urged careful consideration of the definition of "contractual relationship" contained 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 NGOs recommended replacing the phrase with "business relationship" (as contained in the UNGPs), while another proposed "economic relationship." Another delegation warned that this 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 NGO recommended that article 2 be removed from the operative part of the LBI and moved into the preamble. Other delegations welcomed the article, but thought the language could be brought more in line with resolution 26/9, or should specifically go beyond the UNGPs by creating positive, justiciable obligations on TNCs and OBEs.

## 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 (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 reaffirms and clarifies victims' minimal procedural rights and States' existing obligations with regard to access to justice. The Chair-Rapporteur

highlighted that this article now includes 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 as to the scope covered in article 3. Several argued that the scope of companies covered by article 3(1) was much too broad since it covered more than just TNCs. In their view, the focus of the LBI should be limited to the express terms of HRC Resolution 26/9, which references TNCs and OBEs that have a transnational character in their operational activities. However, several other delegations and organizations welcomed the expanded scope, with some thanking the Chair for addressing one of their major concerns with the zero draft. In their view, a distinction between TNCs and OBEs would be difficult to maintain in practice, it would create gaps in the coverage of the LBI as corporate structures could be created so as to avoid falling within the scope of the instrument, and impacted persons do not care if they are harmed by a transnational or domestic company. One delegation suggested removing the reference in 3(1) to business activities of a transnational character and another proposed emphasizing that the scope applied to business activities "regardless of their size, sector, operational context, ownership and structure." However, some other delegations and at least one NGO argued it would be beneficial to retain a focus on TNCs even if the LBI 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 LBI, while others proposed moving the provision into article 1 on definitions. One delegation noted that the reference to "contractual relationship" in article 3(2)(b) was limiting; another found the reference in the same provision to "direction, control, [and] designing" to be problematic. Several delegations sought clarification as to the meaning of "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) that the LBI shall cover "all human rights." These delegations argued that the formulation was overly broad and vague. This 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 amongst States parties. 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 UNGPs, Universal Declaration of Human Rights, or HRC resolution 26/9. One delegation proposed deleting the provision, arguing that it had little added 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 with existing rights under international and domestic law; one delegation argued that a detailed article in this context could have the consequence of offering greater rights to victims harmed by TNCs over those harmed by States. However, some States and NGOs considered article 4 to be one of the most important articles in the instrument and critical to ensure that those harmed have 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 an NGO called on the IGWG to consider amending the title of the article. One delegation noted that the article covers both the rights of victims and obligations of States, thus the current title – "Rights of Victims" – could be more accurate, and the provisions could be more clearly categorized. Another delegation and an NGO thought it would be more appropriate for the title of the article to focus on "Access to Remedy" or "Access to Justice," since that is what the article focused on. It was suggested that, given the focus on access to remedy, it would be more logical for this article to be moved after articles 5 (on prevention) and 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: (1) substantive rights of victims, (2) procedural rights of victims, and (3) 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 vs. civil vs. non-judicial).

46. Several delegations and NGOs 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 of terminology within the article and with the rest of the RDLBI. One delegation recommended reformulating all instances of "victims shall [have rights]" to "States shall [guarantee or protect the rights of victims]." There were also several calls to add to the text, for instance in relation to victims of conflict situations, international humanitarian law, parts of the Basic Principles and Guidelines on the Right to Remedy, the State duty to protect, and global justice mechanisms.

47. One delegation suggested article 4(1) was unnecessary, though it did not oppose retaining the provision (the same comment was made in relation to 4(2) and 4(3)). A 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 an NGO 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 to refer to "all recognized human rights and fundamental freedoms."

49. Some delegations also proposed changes to article 4(3), to add references to interim measures or to the rights of children, and to use the word "reprisal" 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 provision's inclusion, considering it particularly important for enhanced protection based on gender.

51. With respect to article 5(a), one NGO proposed adding apologies and reinstatement of employment to the list of proposed remedies. Some delegations and a business organization sought more clarification regarding the appropriateness of referring to "environmental remediation and ecological restoration" under article 5(b). It was questioned whether this was within the mandate of the IGWG, and one delegation called for references to environmental remediation to be consistent with existing international law.

52. Several NGOs suggested that the right to access to information should be strengthened in article 4(6), with one emphasizing this should apply to information held by private enterprises.

53. Some 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 Conventions on Diplomatic and Consular Relations, and by clearly differentiating between diplomatic and consular assistance and legal assistance. However, some delegations considered the provision to be redundant and inappropriate to be included in the LBI.

54. Several delegations wanted clarification as to which circumstances would justify a person submitting a claim on behalf of another without the latter's consent, according to article 8(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 NGOs 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 4(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 timeframe 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). And many

delegations and business organizations voiced concern over article 4(12)(e) and its inflexibility with respect to cost shifting. In their view, nothing in the provision protected against entirely frivolous claims; thus, there was concern over the possibility of vexatious and unmeritorious claims causing 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 NGOs considered this to be a crucial provision, which should be strengthened and be made obligatory. However, some delegations and organizations called for clarification regarding the circumstances under which reversing the burden of proof would be considered appropriate. According to them, 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 began the session by introducing article 5 on prevention. Drawing on the text and spirit of the UNGPs, the provisions on human rights due diligence now focused on conduct rather than results. The Chair 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 article's inclusion of an open-ended list of measures States may adopt, as minimum standards, to facilitate and promote businesses to conduct human rights due diligence. Finally, he stressed that these measures should include an evaluation mechanism of such measures.

60. Several delegations and NGOs emphasized the importance of including an article on prevention, believing this to be one of the key components of the LBI. It was noted that preventing harm in the first place was preferable to attempting to remedy it after the fact. However, some delegations voiced concerns with how article 5 was currently drafted. In their view, the article was too prescriptive, creating too many State obligations while restricting States' flexibility with regards to the best means of implementing those obligations. At the same time, other delegations and organizations contended 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 NGOs stressed the need for there to be adequate sanctions for those companies that fail to conduct human rights due diligence in accordance with article 5. However, at least one delegation and business organization argued that the RDLBI's current standard of establishing liability for the failure to prevent another entity's harm could be unfair to companies, who could potentially be subject to liability despite doing everything in their power to comply with article 5. It was argued that the IGWG should fine-tune articles 5 and 6 to create the proper incentives so as to prevent harm.

62. There were several suggestions put forward as to how article 5 could be improved. Several delegations and organizations called for the article to use the phrase "business relationships" instead of "contractual relationships." It was argued that such a change would increase the scope of protection and would bring the RDLBI into more alignment with the UNGPs. Some delegations called for a greater alignment of this article with the language of HRC resolution 26/9. One delegation recommended removing all references to "violations" in the text and replacing them with "abuses." Additionally, there were calls to make 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 regulate the activities of companies within their territory and jurisdiction. Some other delegations argued for strengthening the provision, making it clear that States have an obligation to regulate companies both in home and host States.

64. In the context of article 5(2), it was noted that there was room for greater alignment with the UNGPs; 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 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 the removal of the reference to environmental impact assessments. However, other delegations and organizations argued that such assessments are 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 the provision's divergence from the accepted language found in the ILO Indigenous and Tribal Peoples Convention, and that delegation stated it was not in a position to endorse non-consensual language regarding consultations with indigenous communities. Several delegations and many NGOs argued that the provision's 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 for 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), specifically so as to protect against sexual harassment and gender-based violence, as well as to protect peasants and farmers; on the other hand, one delegation proposed referring generally to the protection of groups in situations of vulnerability in lieu of listing out specific groups.

67. At least one delegation and NGO welcomed the reference in article 5(3)(e) to the need for enhanced human rights due diligence in occupied or conflict-affected areas, though they called for there to be stronger language.

68. At least one delegation and several NGOs 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 RDLBI on legal liability underwent significant changes since the previous draft, and now explicitly included the obligation of States to ensure that their domestic laws provide for a comprehensive and adequate system of legal liability. In the RDLBI, liability is now more clearly based on the notion of control or supervision over business activities which cause foreseeable harm, and there is an obligation to adopt sanctions and reparations in cases of abuse. He highlighted some new elements in the article, such as article 6(5) on financial guarantees, and article 6(7), which requires States to ensure their law provides for criminal, civil, or administrative liability for a non-exhaustive list of offenses.

70. Many delegations and NGOs considered the article on legal liability to be a core element of the LBI, and it was noted that article 6 was an improvement over the article on legal liability found in the zero draft LBI. However, some considered the current article to be overly prescriptive and inflexible, limiting States' freedom to determine how best to implement the LBI. This was particularly problematic for areas that suggested a need for establishing criminal liability of legal entities, which was not possible in several States' legal systems. One delegation called for the development of an approach to the article that would be sufficiently robust, yet provide flexibility to States in terms of implementation. Several delegations and organizations considered the article to be too ambiguous and broad, counselling for greater clarity conceptually and terminologically. Additionally, a few delegations called for the article to be more aligned with resolution 26/9 and for there to be a greater focus on TNCs.

71. There were many additions suggested for the article. As with the discussion on article 5, some delegations and NGOs requested an explicit link be made between articles 5 and 6. A business organization requested a provision recognizing those companies that take meaningful steps to prevent abuse within their supply chains. Additionally, there were calls for an increased gender perspective and child-specific approach, and provisions covering,

among other things, ESCR, compensation levels, legal barriers, and the direct obligations of TNCs.

72. Two delegations requested elaboration of the phrase "comprehensive and adequate system of legal liability" in article 6(1) with one noting it could agree with the provision so long as it did not imply that States would be required to adopt new, specialized legislation. Other delegations requested that this, and other provisions of article 6, refer to TNCs and OBEs in accordance with resolution 26/9; a similar comment was made with respect to the use of the word "abuse" instead of "violation" throughout 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 6(3). Additionally, one delegation proposed merging articles 6(3) and 6(4). While one delegation welcomed article 6(5), another delegation and a business organization suggested that it be removed 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 this regard. However, some delegations and business organizations voiced concerns with the article as written, arguing it could unfairly establish liability on companies for failing to prevent harms committed by distant third parties.

75. Most of the debate centred on article 6(7) and its many sub-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 there were likely important offenses omitted and flexibility in the article could ensure it captures future developments of law. Several delegations supported a proposal that the words "*inter alia*" be added before the phrase "for the following criminal offences." Additionally, there were several proposals for other crimes to be included, such as environmental crimes, which received relatively broad support, and crimes relating to ESCR, corruption, privacy, and terrorism financing.

76. However, several delegations voiced serious concerns with the article as drafted. Some questioned whether several of the article's sub-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. This 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 a worry that the inclusion of these references would make it politically difficult to join the future LBI. Several delegations also considered articles 6(7)(h) – 6(7)(k) to be too vague, requesting them to be properly defined.

77. Two delegations voiced concern over the wording of article 6(9), as it could be read to require 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 provision's meaning.

## E. Articles 7 – 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 deals with the key role of courts in achieving justice for victims. With regard to article 8 on statutes of limitation, he mentioned that the text had been bolstered and expanded States' leeway with respect to determining the best means of implementation. The new text calls for a "reasonable" period of time for the investigation and prosecution of violations, particularly for cases involving another State, where processes take longer due to the need of mutual legal assistance and cooperation. Additionally, the Chair-Rapporteur explained that article 9 was revised to ensure consistency with article 7 and to give courts a

broader range of options when determining the appropriate law. Now, there is the possibility for matters of substance to be governed by the law of the State where the violations have occurred or where the victim is domiciled, so long as it is in the best interest of the victims and their rights to access to justice and effective remedy.

79. It was appreciated that article 7 on "Adjudicative Jurisdiction" was included as rights-holders' claims are often rejected on jurisdictional grounds. Two delegations and at least one NGO welcomed the greater precision in the title of the article over that of the previous draft ("Jurisdiction"). It was broadly agreed that article 7 could lead to courts asserting jurisdiction over actions taking place extraterritorially, though there was large disagreement over the desirability of this. Several delegations and NGOs welcomed the greater choice of fora for potential claimants, and argued that victims should have greater agency over where their claims should be adjudicated. However, some delegations noted that this could lead to conflicts of jurisdiction and suggested that the LBI clarify how to address competing claims of jurisdiction. Other delegations and business organizations voiced concern over an expansive view of jurisdiction and argued it would be inappropriate to allow claimants to forum shop. In their view, permitting extraterritorial jurisdiction in an expansive way could violate principles of sovereign equality and territorial integrity.

80. Many delegations and NGOs 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 NGOs requested clearer language regarding jurisdiction with respect to harms in supply chains. Furthermore, some delegations and NGOs proposed adding references to universal jurisdiction, competent regional courts, and the creation of an international court.

81. With respect to article 7(2), it was queried 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 LBI. Several delegations called for clarification over what constituted "substantial business interests" in article 7(2)(d).

82. While some delegations appreciated an article on statutes of limitation and called for it to be strengthened, others considered the wording of article 8 to be problematic. Many delegations sought clarification as to 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" in article 8(1); they argued that the provision would be difficult to apply without more guidance. One delegation argued that statutes of limitation are already not applicable to a wider range of offenses, and they were worried this provision could restrict the current state of the law. It was queried whether the article applied only to criminal cases. Additionally, 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 limitation should be removed for offenses less than the most serious crimes. Some delegations proposed ways to ensure a fairer conception or application of statutes of limitation; for instance, by making statutes of limitation longer for graver abuses, taking into account the continuous nature of some offenses, and tolling statutes of limitation for children, those who were unable to know of the harm earlier, and some persons with disabilities.

84. Delegations requested clarifications and more precise language with respect to 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 NGOs suggested that victims should have the ability to choose the appropriate law. One delegation considered article 9(2)(b) to be problematic; in their view, this provision enabled 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 – 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 WHO Framework Convention on Tobacco Control. Article 12(6) had been made less prescriptive without undermining the goal of ensuring compatibility between the LBI and other instruments, both with respect to interpretation and implementation.

86. Several delegations and NGOs recognized the importance of articles 10 – 12 (in particular articles 10 and 11) for the effective implementation of the future LBI; however, there were some calls for the text to be made more concise and precise.

87. With respect to article 10, several delegations requested there be a clearer distinction 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 differ (sometimes substantially) depending on the type of proceeding; thus, it would aid implementation if the LBI 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 as to how the LBI should be interpreted and implemented in relation to other mutual legal assistance treaties, particularly in cases involving States not party to the LBI. Some delegations recalled the breadth of instruments and mechanisms already available to aid mutual legal assistance, and there were calls to avoid duplication and to ensure coherence with other processes. Specifically regarding the recognition and enforcement of judgments (articles 10(9) and 10(10)), it was proposed that the IGWG seek guidance from the recently-adopted text found in the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, as well as the Singapore Convention on Mediation.

88. There were several textual suggestions made to the many provisions of 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. With respect to article 10(3), a delegation proposed removing article 10(3)(j) since, in their view, it went beyond traditional mutual legal assistance principles, though another delegation argued for the provision to remain and be strengthened (potentially by borrowing language from the Convention against Torture). Some delegations proposed more flexibility in article 10(5), requesting the word "shall" to be changed to "may." One delegation requested clarification as to the meaning and reach of article 10(8), and another suggested removing the provision. Some NGOs argued that article 10(10) should be strengthened by removing potential grounds for refusing recognition and enforcement of foreign judgments (such as those found in 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 10(10)(c) in addition to defendants).

89. Several delegations and NGOs highlighted the importance of article 11 on international cooperation and called for it to be strengthened. There was a suggestion for the article to 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 who will not be party to the LBI (this was specifically raised in relation to 12(3)(a) and 12(6)). One delegation questioned why article 12(1) referenced only some of the principles of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and it requested that all principles be included. Another delegation proposed removing the phrase "by its domestic law" in article 12(2) since international law was also relevant in this context

(and proposed simply ending the sentence after the word “jurisdiction”). Many NGOs called for article 12(6) to be strengthened and more clearly assert 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 LBI, arguing that they were clearer about the relationship between the LBI and trade and investment agreements.

## G. Article 13

91. The Chair-Rapporteur introduced article 13 on institutional arrangements, noting 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 noted that the recommendations mentioned in article 13(4) should be interpreted as having the same status as those of other treaty bodies. Additionally, he noted that the provision on the International Fund for Victims had been moved into 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 to ensure proper implementation of the LBI, some delegations considered it premature to debate the specifics of the article until after there had been more progress made on the substantive sections of the instrument. These 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 a concern that creating a new treaty body could be costly and duplicative of other mechanisms; thus, some delegations urged the IGWG to think outside of the box to determine an efficient way of leveraging systems already in place.

93. With respect to the composition of the Committee, it was welcomed 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 NGOs expressed appreciation for the inclusion of language in article 13(1)(b) ensuring that elected experts do not have any conflict of interest, though they sought clarity regarding how this could be ensured (one NGO proposed a ban on those holding government or business positions). At least one delegation and several NGOs recommended that the Committee include members from minority groups (such as indigenous peoples) or civil society organizations. Some NGOs 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 their recommendations, and another delegation voiced concern over the risk that consideration of State reports could be politicized. There were several calls, mostly from NGOs, for strengthening 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 NGOs called for the establishment of an international tribunal to investigate and adjudicate claims against TNCs and OBEs, as well as the establishment of an international mechanism to monitor the activities of TNCs and OBEs.

95. Some delegations welcomed the creation of a Conference of States Parties in articles 13(5) and 13(6), though it was noted that the provisions were vague, and one delegation asked for clarification as to its role.

96. Several delegations requested much more detailed information with respect to the proposed International Fund for Victims 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 it would be difficult to form an official position on the provision until more was known. NGOs urged States to establish the fund since the lack of legal and financial aid is a major obstacle for those seeking access to remedy.

## H. Articles 14 – 22

97. Introducing articles 14 – 22, the Chair-Rapporteur reminded that those provisions were not significantly discussed during the fourth session, and therefore noted that no major changes had been made in the RDLBI. 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 LBI). He highlighted two new articles in the text. Article 15 was introduced to clarify the LBI's relationship with additional protocols. Secondly, article 16 was added to cover the settlement of any disputes. The Chair-Rapporteur noted that both of the new articles used the same models found in other relevant treaties.

98. Although one delegation argued it was premature to discuss articles 14 – 22 before more agreement had been reached on the content of the rest of the LBI, several delegations and NGOs raised comments and suggestions on article 14 (on implementation), and to a lesser extent the remaining articles.

99. With respect 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 an NGO welcomed the reference in article 14(3) to situations of conflict, though they suggested altering the text to refer to "conflict-affected areas and occupied territories." One NGO noted its appreciation of the focus on gender in the provision and recommended reference be made to gender-responsive human rights impact assessments. Appreciation was also expressed regarding the recognition of groups facing heightened risks of harm in article 14(4). One delegation and some NGOs recommended that the list of groups be non-exhaustive, and there were calls to include peasants in the list and note intersectionality; 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 NGOs suggested adding in a provision in article 14 on corporate capture.

100. One delegation and some NGOs 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 IGWG, 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 IGWG 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 this report. Additionally, the Secretariat will prepare a compilation of the written statements from States delivered during the fifth session of the IGWG, and to be made available no later than the end of December 2019, and to be included as an additional annex to this 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 exchange 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 advise 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) When presenting the second revised draft legally binding instrument, the Chair-Rapporteur should also prepare a document that contains an outline of the key issues and a structure of the revised draft which can serve as a tool to assist direct negotiations;**

**(h) That the Chair-Rapporteur promotes 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 shall 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 resolution 26/9:**

**(a) The working group welcomed the opening message of the United Nations Deputy High Commissioner for Human Rights, Kate Gilmore, and thanked the independent 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 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 contents, 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, Cote d'Ivoire, Cuba, Czech Republic, Denmark, Djibouti, Ecuador, Egypt, El Salvador, Ethiopia, Finland, France, Gabon, Gambia (The), 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 (ICC), Permanent Court of Arbitration, Office of the 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 (15:00-18:00)**

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

### Tuesday, 15 October 2019

**Articles 3 and 4 (10:00-13:00)**

- Surya Deva, UN 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 (15:00-18:00)**

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

### Wednesday, 16 October 2019

**Article 6 (10:00-13:00)**

- Jelena Aparac, UN 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 (15:00-18:00)**

- 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 (10:00-13:00)**

- Surya Deva, UN 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 (15:00-18:00)**

- Carlos Correa, Executive Director – South Center
- Jelena Aparac, UN 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 IGWG to consider moving the contents of article 2 to the preamble.

2. Recognizing the enhanced alignment of the RDLBI with the UNGPs, 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 LBI. 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 UNGPs.

### 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 UNGPs, 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 LBI). 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 IGWG 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 LBI 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 RDLBI's closer alignment with the UNGPs 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 IGWG to consider a limited defence for companies based upon a showing of human rights due diligence.

## D. Article 6

10. The first expert 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 RDLBI. 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 LBI 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 only succeed 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 – 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 RDLBI, 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 LBI.

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 LBI 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 – 12

17. The first expert 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

judgements 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 RDLBI was not in accordance with international law. He illustrated this by highlighting the expansive extraterritorial jurisdiction permitted by the terms of the LBI, 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 RDLBI 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 UN 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 LBI. 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 IGWG 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 State Parties.

21. The second expert 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 IGWG to consider requiring companies to report to the Committee. Furthermore, she suggested that the Committee be able to consider complaints submitted by victims and NGOs.