

**ELEMENTS FOR THE DRAFT LEGALLY BINDING INSTRUMENT
ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS
ENTERPRISES WITH RESPECT TO HUMAN RIGHTS**
Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9
(29/09/2017)

Introduction

The following document has been prepared in the framework of Resolution A/HRC/RES/26/9 (Resolution 26/9), “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, which established an open-ended intergovernmental working group (OEIGWG), with the mandate to elaborate such instrument. According to operative paragraph 3 of resolution 26/9 the Human Rights Council decided that “the Chairperson-Rapporteur of the open-ended intergovernmental working group should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions.”

In this regard, the aim of this proposal is to reflect the inputs provided by States and other relevant stakeholders in the framework of the referred sessions, dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, as well as during the intersessional period. This document should be considered as a basis for substantive negotiations to elaborate the instrument to regulate, in international human rights law, the activities of transnational corporations (TNCs) and other business enterprises (OBEs) during the third session of the OEIGWG, to be held from 23 to 27 October 2017.

In line with the spirit of transparency, inclusiveness and dynamism of the process, it is important to acknowledge the constructive participation of different actors in more than 200 bilateral and multilateral intersessional meetings in Geneva and in many different countries in the world, since the adoption of Resolution 26/9 on July 14, 2014.

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1. General framework

1.1 Preamble

The preamble will include a specific reference to the legal mandate that led to the presentation of this document of elements as a fundamental step towards the implementation of the overarching mandate for the open-ended intergovernmental working group, established in Resolution 26/9, which is clearly: “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”.

Additionally, a brief reference is introduced to the other circumstances that led to the

establishment of the mandate referred above and to the commencement of the negotiation of the future instrument, particularly in relation to impacts related to TNCs and OBEs and human rights, and their legal challenges, as discussed in the two first sessions of the OEIGWG.

The content of the instrument may include the following:

- *General references to existing relevant international legal instruments (including inter alia: UN Charter, Universal Declaration of Human Rights, ICESCR and ICCPR, Vienna Declaration and Programme of Action);*
- *Reaffirmation of - and relationship with - the other Conventions (i.e. ILO Core Conventions, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination against Women, the Universal Declaration on the Rights of Indigenous Peoples, the Convention on the Rights of People with Disabilities, the UN Convention against Corruption, the Declaration on the Right to Development, etc.);*
- *General background of the impacts of TNC and OBEs activities with respect to all human rights (including inter alia the right to development, the right to safe, clean, healthy and sustainable environment, the right to the highest attainable standard of health, the right to food, the right to water and sanitation, the right to work, the right to social security, the right to adequate housing, the right to non-discrimination, etc.), and its legal challenges;*
- *Reference to existing Norms on the responsibilities of transnational corporations and other business enterprises with regards to human rights. E/CN.4/Sub.2/2003/12/Rev.2 (2003);*
- *Reaffirmation of the UN Guiding Principles on Business and Human Rights and other such principles and frameworks;*
- *Reminder of all relevant Resolutions and decisions adopted at the UNGA, HRC, Treaty bodies, ILO and other relevant intergovernmental organizations, including inter alia:*
 - *Resolution 56/83 and Document A/56/49 (Vol. I) Corr. 4 on Responsibility of States for Internationally Wrongful Acts;*
 - *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, Document A/RES/60/147;*
 - *ILO Tripartite declaration of principles concerning multinational enterprises and social policy); and other relevant documents from other intergovernmental organizations;*
 - *Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1;*
 - *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UNGA Resolution 53/144;*
- *Reaffirmation of the Human Rights Council Resolution A/HRC/RES/26/9;*
- *Reaffirmation that State Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States, and that nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law;*
- *Reminder that International Organizations shall not adopt or promote any international*

norm or decision that could limit the achievement of the purpose and objectives of this legally binding instrument, as well as the capacity of the Parties to fulfill their obligations adopted herein. Such organizations include inter alia, the UN and their specialized agencies, funds and programs and other international and regional economic, finance and trade organizations.

1.2 Principles

- *Reaffirmation of general principles and obligations (including inter alia):*
- *The universality, indivisibility, interdependence and inter-relationship of all human rights which therefore must be treated in a fair and equal manner, on the same footing and with the same emphasis.*
- *General obligation to respect, promote and protect all human rights and fundamental freedoms at the national and international level and conducted without conditions attached.*
- *Primary responsibility of the State to protect against human rights violations or abuses within their territory and/or jurisdiction by third parties, including TNCs and OBEs.*
- *Responsibility of TNCs and OBEs to respect all human rights, regardless of their size, sector, operational context, ownership and structure.*
- *Recognition of the primacy of human rights obligations over trade and investment agreements.*
- *Respect of the principles of sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of other States.*
- *Observance of domestic laws, regulations and administrative practices.*
- *Recognition of the necessity of a special protection of the following human rights: inter alia, self-determination; access to justice; access to effective remedy, participation and inclusion and non-discrimination.*
- *Recognition of special protection to victims and particularly to indigenous peoples; women; girls and children; persons with disabilities; refugees, or any group considered vulnerable according to national, regional or international applicable regulations.*
- *Duty of the State Parties to prepare human rights impact assessments prior to the conclusion of trade and investment agreements, including to identify any potential inconsistency between preexisting human rights treaties and subsequent trade or investment agreements, and to refrain from entering into such agreements where such inconsistencies are found to exist.*
- *Recognition of the responsibility of State for private acts if they fail to act with due diligence to prevent violations or abuses of rights or to investigate and punish acts of violence, and for providing compensation.*
- *General obligation of international cooperation.*

1.3 Purpose

- *To create an international legally binding framework that aims to guarantee the respect, promotion and protection of human rights against violations or abuses resulting from the activities of TNCs and OBEs, in order to*
 - *ensure civil, administrative and criminal liability of TNCs and OBEs regarding human rights violations or abuses.*
 - *include mechanisms to guarantee the access to justice and effective remedy for such human rights violations or abuses committed by TNCs and OBEs, including*

adequate remediation and guarantees of non-repetition, as well as the strengthening of international cooperation between all relevant actors.

- *include obligations to prevent such adverse human rights impacts.*
- *reaffirm that State Parties' obligations regarding the protection of human rights do not stop at their territorial borders.*

1.4 Objectives

- *To facilitate the full implementation of the primary responsibility of the State, and to respect, promote and protect human rights and fundamental freedoms against human rights violations or abuses within their territory and/or jurisdiction, committed by TNCs and OBEs.*
- *To ensure that the activities of TNCs and OBEs fully respect human rights.*
- *To include preventive measures for tackling business human rights violations or abuses.*
- *To ensure adequate access to justice for victims of human rights violations or abuses resulting from the activities of TNCs and OBEs.*
- *To establish or strengthen effective remedy mechanisms, at all levels, for victims of human rights violations or abuses perpetrated directly or indirectly by TNCs and OBEs.*
- *To strengthen international cooperation, including mutual legal assistance to tackle business enterprises human rights related violations or abuses.*
- *To reaffirm the primacy of human rights law over trade and investments agreements and establish specific State obligations in this regard.*

2. Scope of application

The scope of the legally binding instrument on TNCs and OBEs with respect to human rights was one of the four topics mandated to be discussed during the first two sessions of the OEIGWG. From the constructive debate which took place, different interpretations of the relevant reference in Resolution 26/9 emerged and several proposals from States and other stakeholders were made with regard to both the objective and the subjective scope.

In this regard, based on the deliberations of the first two sessions, this proposal considers that the objective scope of the future legally binding instrument should cover all human rights violations or abuses resulting from the activities of TNCs and OBEs that have a transnational character, regardless of the mode of creation, control, ownership, size or structure.

With regard to the subjective scope, the present instrument does not require a legal definition of the TNCs and OBEs that are subject to its implementation, since the determinant factor is the *activity* undertaken by TNCs and OBEs, particularly if such activity has a transnational character.

The content of the instrument may include the following:

2.1 Protected rights

- *All internationally recognized human rights, taking into account their universal, indivisible, interrelated and interdependent nature, as reflected in all human rights treaties, as well as in other intergovernmental instruments related, inter alia, to labour*

rights, environment, corruption.

2.2 Acts subject to its application

- *Violations or abuses of human rights resulting from any business activity that has a transnational character, including by firms, partnerships, corporations, companies, other associations, natural or juridical persons, or any combination thereof, irrespective of the mode of creation or control or ownership, and includes their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.*

2.3 Actors subject to its application

- *States and organizations of regional economic integration.*
- *TNCs and OBEs.*
- *Natural persons.*

3. General Obligations

The principle of primary responsibility of States to protect against human rights violations or abuses within their territory and/or jurisdiction by third parties, including private parties, implies that States have to take all necessary measures to attain such objective.

The reinforcement of the primary responsibility of States and the recognition of general obligations of TNCs and OBEs represents the core of an international legally binding instrument. In this regard, it is of utmost importance to promote adequate measures to ensure prompt and effective legal accountability and redress in cases involving human rights violations or abuses by TNCs and OBEs.

Similarly, throughout the overall process of Resolution 26/9, it has been highlighted that the negative impact on human rights resulting from transnational operations has transboundary outreach in all regions, as well as pre-existing loopholes that frustrate the effective guarantee of rights of victims. Therefore, the adoption of an international legally binding instrument which recognizes such general obligations could strengthen the international system, by establishing clear rules for States and other stakeholders involved in the prevention and protection of human rights, as well as in the redress of human rights violations or abuses.

The content of the instrument may include the following:

3.1 Obligations of States

- *States shall respect, promote and protect all human rights against violations or abuses within their territory and/or jurisdiction by third parties, particularly TNCs and OBEs, and guarantee access to remedy for victims of such violations or abuses.*
- *States shall take all necessary and appropriate measures to prevent, investigate, punish and redress such violations or abuses, including through legislative, administrative, adjudicative or judicial measures, to ensure TNCs and OBEs respect human rights throughout their activities.*
- *States shall take all necessary and appropriate measures to ensure access to justice and effective remedy for those affected by human rights violations or abuses of TNCs and OBEs.*
- *States shall adapt domestic legislation to the provisions of this instrument and*

enforcement measures to require business enterprises to respect human rights.

- *States shall take all necessary and appropriate measures to design, implement and follow up on national policies on human rights and TNCs and OBEs, taking into account the primacy of human rights over pecuniary or other interests of corporations.*
- *States shall take all necessary and appropriate measures to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses, and that fully comply with all requirements as established in this instrument.*
- *States shall take all necessary and appropriate measures to ensure that human rights are considered in their legal and contractual engagements with TNCs and OBEs, and their implementation.*
- *States should adopt measures to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent and avoid human rights violations or abuses throughout their supply chains.*
- *State Parties shall take all necessary and appropriate measures to ensure that TNC and OBEs design, adopt and undertake human rights and environmental impact assessments that cover all areas of their operations, and report periodically on the steps taken to assess and address human rights and environmental impacts resulting from such operations.*
- *States shall adopt all necessary measures to include disclosure requirements for all TNCs and OBEs before registering or granting a permit of operation for TNCs and OBEs.*

3.2 Obligations of Transnational Corporations and Other Business Enterprises

- *TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains.*
- *TNCs and OBEs shall prevent human rights impacts of their activities and provide redress when it has been so decided through legitimate judicial or non-judicial processes.*
- *TNCs and OBEs shall design, adopt and implement internal policies consistent with internationally recognized human rights standards (to allow risk identification and prevention of violations or abuses of human rights resulting directly or indirectly from their activity) and establish effective follow up and review mechanisms, to verify compliance throughout their operations.*
- *TNCs and OBEs shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights.*

3.3 Obligations of International Organizations

- *State Parties shall strive to ensure that international organizations, including international and regional economic, financial and trade institutions, in which they are Members, do not adopt or promote any international norm or decision that could harm the objectives of this legally binding instrument, or affect the capacity of the Parties to fulfill their obligations adopted herein.*

4. Preventive Measures

The prevention aspect has been long identified as an important pillar of the relationship between business and human rights, particularly in relation to the efforts undertaken at the national and international levels for a stronger engagement of the corporate sector in the identification and prevention of human rights violations or abuses. This concept, referred in some legal and non-legal frameworks as human rights due diligence comprises different policies, processes and measures that TNCs and OBEs need to undertake, as a minimum prudence, according to its capacities, to meet its responsibility to respect human rights. In this regard, the real added value of this section would be precisely to give a legally binding nature to the adoption of such measures or minimum standards by TNCs and OBEs.

The content of the instrument may include the following:

- *States must take any necessary action, including the adoption of legislative and other necessary measures to prevent human rights violations committed by TNCs and OBEs.*
- *State Parties shall adopt legislative and other measures to require TNCs and OBEs to design, adopt and implement effective due diligence policies and processes, including codes of conduct, and to identify and address human rights impacts resulting from their activities. Such measures shall apply to all the TNCs and OBEs in their territory or jurisdiction, including subsidiaries and all other related enterprises throughout the supply chain. All concerned TNCs and OBEs shall adopt a “vigilance plan” consisting of due diligence procedures to prevent human rights violations or abuses, which shall include inter alia, the risk assessment of human rights violations or abuses in order to facilitate their identification and analysis; a procedure of periodic evaluation of subsidiary enterprises throughout the supply chain in relation to their respect of human rights; actions aimed at risk reduction; an early warning system; a set of specific actions to immediately redress such violations or abuses; and a follow up mechanism of its implementation, notwithstanding other legal procedures, liabilities and remedies recognized in the present instrument.*
- *States shall promote adequate consultation processes with the participation of all relevant actors.*
- *States shall promote that everyone within their jurisdiction has access to information about this treaty in a language they can understand.*
- *State Parties shall adopt adequate measures to provide TNCs and OBEs with relevant information about the obligations contained in this instrument.*
- *States shall adopt adequate measures to ensure that TNCs and OBEs in their jurisdiction report periodically on the measures they have adopted to prevent the violations and abuses of human rights.*
- *States shall take all necessary and appropriate measures to ensure that their agreements with TNCs and OBEs encompass internationally recognized human rights standards.*

5. Legal liability

One of the core objectives in the process of elaboration of an international legally binding instrument is to put an end to impunity in cases of violations or abuses of human rights that occur in the activities performed by TNCs and OBEs. In this regard, States must take all necessary action, including the adoption of legislative and other necessary measures to regulate the legal liability of TNCs and OBEs in administrative, civil and criminal fields.

In this regard, States should strengthen administrative and civil penalties in cases of human rights violations or abuses carried out by TNCs and OBEs.

States which do not yet have regulations on criminal legal liability on legal persons are invited to adopt them in order to fight impunity and protect the rights of victims of violations of human rights perpetrated by TNCs and OBEs. Criminal legal liability must cover the acts of those responsible for the management and control of TNCs and OBEs.

Additionally, legal liability must also cover those natural persons who are or were in charge of the decision-making process in the business enterprise at the moment of the violation or abuse of human rights by such entity.

The content of the instrument may include the following:

- *State Parties shall adopt legislative and other measures in accordance with their national legal systems and principles, to establish and apply the legal liability of TNCs and OBEs under their territory or jurisdiction, for violations or abuses of human rights, resulting from their activities throughout their operations. Such liability may be criminal, civil and administrative, whether committed individually or collectively.*
- *State Parties shall adopt legislative and other measures to establish the criminal liability or its equivalent of TNCs and OBEs subject to their jurisdiction, for criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments.*
- *State Parties shall adopt legislative and other measures to establish the criminal liability or its equivalent of TNCs and OBEs to attempt to commit any of the criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments; and to be complicit or participate in any of the said acts.*
- *State Parties shall adopt legislative and other measures to establish that criminal and civil liability of TNCs and OBEs for human rights violations or abuses from their activities and throughout their operations do not exclude criminal and civil liability of company members, regardless of their position, and shall be independent from the finding of individual or collective civil and criminal liability.*
- *State Parties shall adopt legislative and other measures to establish the direct civil liability of TNCs and OBEs under their jurisdiction, for human rights violations or abuses that occur throughout the activities of such TNCs and OBEs.*
- *States shall adopt legislative and other measures to establish civil liability of TNCs and OBEs based in their territory or jurisdiction, for participating in the planning, preparation, direction of or benefit from human rights violations or abuses caused by other TNCs and OBEs.*
- *State Parties shall adopt legislative and other adequate measures to ensure the applicability of effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions, to TNCs and OBEs found liable of criminal offences recognized under their jurisdiction.*
- *State Parties shall ensure that civil liability of TNCs and OBEs shall not be made contingent upon the finding of criminal liability or its equivalent from the same actor.*
- *States shall ensure that TNCs and OBEs with whom they have commercial contracts do not use immunities or privileges as shields against civil legal liability.*
- *State Parties shall adopt legislative and other adequate measures, including procedures and sanctions, to ensure administrative liability as additional measures for cases of violations or abuses of human rights perpetrated by TNCs and OBEs. Administrative*

remedies will be adequate, accessible, affordable, timely and effective. Under public procurement regimes, administrative sanctions may include the denial of awarding of public contracts to companies that have engaged in a conduct leading to a violation of a human right.

- *State Parties shall be responsible for actions or omissions of TNCs and OBEs when the latter:*
 - *Act under the instruction or control or direction of a State Party and violate or abuse human rights in this process.*
 - *Perform activities entrusted to them under the State Party's legislation to exercise elements of governmental authority or delegation of political power or government authority, either by legal delegation or due to the absence or default of the official authorities, and in circumstances such as to call for the exercise of those elements of authority.*
 - *Perform activities that the State Party acknowledges and adopts as its own.*
- *State Parties shall be internationally responsible if they act in complicity with the harmful activities of TNCs and OBEs or the State does not apply due diligence to avoid the impacts of such actions.*
- *State Parties shall adopt legislative and other measures to implement due diligence procedures and promote decent work in all the operations and the supply chains of TNCs and OBEs under their ownership or control.*

6. Access to justice, effective remedy and guarantees of non-repetition

According to the Universal Declaration of Human Rights (articles 7, 8 and 10) “all are equal before the law and are entitled without any discrimination to equal protection of the law”; “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”, and “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. In real situations, however, inequality of arms is present and the big economic power of TNCs and OBEs and their influence on political and judicial officers, among other circumstances, may play a crucial role to limit the actions or to persuade the victims not to seek justice.

The barriers to access justice, as enumerated by the United Nations Development Program, UNDP (“Access to Justice, Practice note” 9 March 2004), include prohibitive costs of using the judicial system; abuse of authority and powers; weak enforcement of laws and implementation of orders and decrees; lack of de facto protection, especially for vulnerable group members; lack of adequate legal aid systems; formalistic and expensive legal procedures; avoidance of the legal system for economic reasons, fear, or a sense of futility of purpose.

Access to justice must include the existence of clear procedures and institutions which have the duty to provide effective remedy to the victims of TNCs and OBEs’ violation or abuse of human rights, as a way to redress moral and material damages. In addition, these measures are called to deter TNCs and OBEs to repeat violations of human rights.

The proposed elements on this issue are the following:

- *State Parties shall adopt adequate measures to provide prompt, accessible and effective remedies, including judicial and non-judicial remedies, when a TNC or OBE is acting under their instructions, direction or control; or when a TNC or OBE is empowered to*

exercise elements of governmental authority and has acted in such capacity while committing the violation or abuse of human rights.

- *State Parties shall guarantee access to justice and to effective remedies to every person and specially to indigenous peoples; women; girls and children; persons with disabilities; refugees; or any group considered vulnerable according to nationally, regionally or internationally applicable regulations, taking into account their specific reality, circumstances and culture.*
- *State Parties shall adopt adequate measures to ensure that prompt, accessible and effective judicial remedies are provided when the harm resulting from violations or abuses of TNCs or OBEs under their jurisdiction implies criminal liability, notwithstanding the provision of judicial and/or non-judicial remedies for the harm related to other types of liability.*
- *State Parties shall adopt adequate measures to ensure that non-judicial mechanisms are not considered a substitute for judicial mechanisms in order to provide effective remedy to victims of violations or abuses of human rights committed by TNCs and OBEs.*
- *State Parties shall adopt adequate measures to ensure that any violation or abuse of human rights, irrespective of who may ultimately be the bearer of responsibility for the violation, gives rise to legal actions and opens the way for victims' claims for damages and remediation.*
- *State Parties shall adopt adequate mechanisms to reduce regulatory, procedural and financial obstacles which prevent victims from having access to effective remedy, including the enabling of human rights-related class actions and public interest litigation; the facilitation of access to relevant information and the collection of evidence abroad; the reversal of the burden of proof; the adoption of protective measures to avoid the use of "chilling-effect" strategies by TNCs and OBEs to discourage individual or collective claims against them and the limitation to the use of the doctrine of forum non conveniens.*
- *State Parties shall adopt adequate measures to guarantee the access to information about existing remedies, including judicial and non-judicial, for all relevant actors, in a language which they can understand.*
- *State Parties shall adopt adequate and effective remedy measures to guarantee, inter alia, a prompt, comprehensive and impartial investigation of the violation, as well as to guarantee compensation, reparation, restitution, rehabilitation, measures of satisfaction, and non-repetition.*
- *State Parties shall adopt adequate measures to guarantee that all victims of human rights violations or abuses committed by TNCs and OBEs have access to an independent and impartial judge to decide on their claim.*
- *State Parties shall adopt adequate measures to guarantee the life, security and integrity of victims, their representatives, witnesses, human rights defenders or whistle blowers, as well as proper assistance, including inter alia, legal, material and medical assistance, in the context of human rights violations or abuses resulting from the activities of TNCs and OBEs throughout their activities.*
- *State Parties shall ensure that their legal systems guarantee the right to a fair trial, including the principle of equality of arms or its equivalent and the provision of legal aid, in proceedings concerning civil claims over which their domestic courts have jurisdiction, regarding human rights violations or abuses resulting from the activities of TNCs and OBEs.*
- *State Parties shall guarantee the avoidance of unnecessary delay in the disposition of cases.*
- *State Parties shall adopt adequate legal mechanisms to guarantee the access to*

information in the possession of the defendant or a third party, if such information is relevant to substantiating claims of human rights violations or abuses resulting from - and throughout - the activities of TNCs and OBEs under their jurisdiction, with due regard for confidentiality considerations.

- *State Parties shall guarantee the prompt, fair and adequate restitution for violations or abuses of human rights caused by TNCs and OBEs as well as the environmental restoration of affected areas, including the respective expenses.*
- *State Parties shall adopt adequate measures to guarantee the right to truth and non-repetition, in relation to human rights violations or abuses resulting from – and throughout – the activities of TNCs and OBEs.*

7. Jurisdiction

During the first and second session of the OEIGWG, there was a strong call to include elements regarding the need to have effective administration of justice and enforcement of judgments, considering the economic, historic and cultural circumstances of each State.

TNCs and OBEs “under the jurisdiction” of the State Party could be understood as any TNC and OBE which has its center of activity, is registered or domiciled, or is headquartered or has substantial activities in the State concerned, or whose parent or controlling company presents such a connection to the State concerned.

Particularly, it has been considered that the legally binding instrument has an enormous potential to avoid TNCs and other OBEs from making use of limitations established by territorial jurisdiction in order to escape from potential prosecution in the host States where they operate.

The inclusion of a broad concept of jurisdiction will also allow victims of such abuse by transnational corporations to have access to justice and obtain remediation through either the forum where the harm was caused, or the forum where the parent company is incorporated or where it has a substantial presence. Similarly, an instrument of this nature could allow the standardization of jurisdictional rules and human rights obligations, allowing victims to access prompt and effective access to justice.

Some elements that could be considered are:

- *State Parties shall adopt legislative and other adequate measures to facilitate that their judiciaries are allowed to consider claims concerning human rights violations or abuses alleged to have been committed by TNCs and OBEs throughout their activities, including by firms, partnerships, corporations, companies, other associations, natural or legal persons, or any combination thereof, irrespective of the mode of creation or control or ownership, including their branches, subsidiaries, affiliates, or other entities directly or indirectly controlled by them.*
- *Adopt legislative measures to facilitate their judiciaries to consider claims concerning violations or abuses committed by TNCs and OBEs under their jurisdiction or concerning victims within their jurisdiction.*
- *Adopt legislative measures so that their judiciaries consider claims concerning violations or abuses committed by TNCs and OBEs and their subsidiaries throughout the supply chain domiciled outside their jurisdiction.*

8. International Cooperation

Establishing mechanisms of international cooperation is a common issue in international law. On the matter of business and human rights, these mechanisms could promote and clarify rules on judicial cooperation, for example by including a list of actions which could encompass such elements as taking evidence, access to information and access and protection to witnesses.

International cooperation could also assist the courts and tribunals hearing a case with transnational elements to secure the enforcement of a judgement through preventive measures, such as the seizure and freezing of assets located in the jurisdiction of another State different to the one hearing the claim, or by avoiding the relocation of a company immersed in such procedures. It could also complement States' efforts to comply with their international human rights obligations by overcoming the challenges in such cases.

The proposed elements are:

- *State Parties shall mutually cooperate to prevent, investigate, punish and redress violations or abuses of human rights, and to ensure access to justice and effective remedy for those affected by adverse human rights impacts of TNCs and OBEs under their jurisdiction.*
- *To achieve this, State Parties shall, inter alia:*
 - *Adopt adequate measures to facilitate the necessary mutual legal assistance and exchange of information for the prompt identification, prosecution and enforcement of relevant judicial orders in cases of human rights violations or abuses committed by - or with the participation of - TNCs or OBEs under their jurisdiction, including to guarantee the speedy and proper treatment of the received request for the mutual legal assistance.*
 - *Adopt adequate measures for the coordination of judicial actions, including transfer of proceedings, when necessary, to avoid repetition.*
 - *Adopt adequate measures to enable and facilitate the request and lending of mutual assistance to carry out joint or coordinated cross-border investigations, when necessary, or the collection of evidence of use in claims proceedings, access to witnesses, experts, and all other documents or objects necessary for the prosecution or investigation of the case.*
 - *Adopt all necessary measures to allow and safeguard the participation of victims and witnesses in all stages of the investigation and adjudication of the case, as well as their representatives and defenders.*
 - *Adopt adequate measures to ensure the recognition of foreign judgments that are enforceable in the State of origin and are no longer subject to review processes, except when the judgment was obtained by fraud or when the defendant was not given reasonable notice and a fair opportunity to present his case.*
 - *Adopt adequate measures to ensure that foreign judgments are recognized and enforceable in each State Party as soon as the formalities required in that State have been complied with.*
- *State Parties shall strive to negotiate and adopt bilateral or multilateral cooperation agreements to enable their judicial bodies and other relevant State agencies to request legal assistance from relevant counterparts in other States with regards to judicial proceedings arising from business-related human rights violations.*

9. Mechanisms for promotion, implementation and monitoring

Throughout the process of Res. 26/9, there has been much emphasis on the need to have adequate mechanisms at the national and international levels. Therefore, this binding instrument should take into consideration the role of national institutions in charge of the promotion and protection of human rights, as well as international judicial and/or non-judicial mechanisms, including treaty bodies and their experience from monitoring other international instruments on human rights.

Moreover, the existence of national and international mechanisms can strengthen the joint efforts of stakeholders to ensure prompt and effective accountability and redress as well as achieve good practices and tackle the challenges in the framework of the instrument.

Some elements that could be considered are:

- *a) National Level:*
 - *State Parties shall adopt adequate measures to establish national mechanisms for the promotion, implementation and monitoring of this instrument, or to entrust these functions to human rights institutions or mechanisms.*
 - *To this end State Parties should also consider, inter alia, Ombudsperson institutions or National Human Rights Institutions.*

- *b) International level:*
 - *State Parties shall decide what international judicial and non-judicial mechanisms should be established for the promotion, implementation and monitoring of the instrument, and the following options could be considered:*
 - *b.1. Judicial mechanisms*
 - *State Parties may decide that international judicial mechanisms should be established, for instance, an International Court on Transnational Corporations and Human Rights.*
 - *State Parties may also decide to strengthen existing international judicial mechanisms and propose, for instance, special chambers on Transnational Corporations and Human Rights in existing international or regional Courts.*
 - *b.2. Non-judicial mechanisms:*
 - *State Parties may decide to establish a Committee on the issue of Business and Human Rights, which will have, among others, the following duties:*
 - *Examining the progress made by State Parties in achieving the realization of the obligations undertaken in the present instrument.*
 - *Assess, investigate and monitor the conduct and operations of TNCs.*
 - *Conduct country visits in accordance to its mandate.*
 - *Examine the periodical reports according to its mandate.*
 - *Receive and examine communications according to its mandate.*

The Committee shall consist of eighteen experts of high moral standing and recognized trajectory in the field covered by this Instrument. The members of the

Committee shall be elected by State Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, gender balance as well as to the main different legal systems.

10. General provisions

Some elements that could be considered are:

- *Signature and ratification, acceptance, approval or accession*
- *Entry into force*
- *Follow-up*
- *Clause establishing the primacy of this instrument over other obligations from the trade and investment legal regimes*
- *Clause on dispute settlement mechanism(s) on the interpretation and implementation of this instrument*
- *Denunciation*
- *Depositary and languages*