**Second Session of the Open-ended Intergovernmental Working Group in charge of the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, Human Rights Council Resolution A/HRC/RES/26/9**

**Concept note proposed by the Chairperson – Rapporteur, Ambassador María Fernanda Espinosa, Permanent Representative of Ecuador to the United Nations in Geneva**

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**Background**

1. The Open-ended Intergovernmental Working Group (OEIGWG) on Transnational Corporations (TNCs) and other Business Enterprises with respect to Human Rights was established pursuant to Human Rights Council Resolution A/HRC/RES/26/9 (resolution 26/9) on June 26th, 2014. The OEIWG is mandated to “elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” (para. 1 of Resolution 26/9).
2. According to paragraph 2 of Resolution 26/9, “the first two sessions of the Open-ended Intergovernmental Working Group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument” in order to allow the Chairperson-Rapporteur of the OEIGWG to “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” (para. 3 of Resolution 26/9).
3. The First Session of the OEIGWG was held from 6 to 10 July 2015, chaired by Ambassador María Fernanda Espinosa, Permanent Representative of Ecuador to the United Nations in Geneva. This session served its objective by receiving inputs from States and relevant stakeholders on “*the possible principles, scope and elements of such an international legally binding instrument*”, as indicated by paragraph 5 of Resolution 26/9.
4. The First Session was structured in eight different panels covering the possible principles for a legally binding instrument on transnational corporations and other business enterprises with respect to human rights, the implementation of the United Nations Guiding Principles on Business and Human Rights (Guiding Principles); the coverage of the international legally binding instrument with respect to the objective and subjective scope; the obligations of States, including extraterritorial obligations; and the responsibilities of TNCs and other business enterprises to respect human rights; the legal liability of TNCs and other business enterprises for human rights abuses; and the design of national and international mechanisms for access to remedy for victims of human rights abuses perpetrated by TNCs and other business enterprises, including through international judicial cooperation.

1. The Chairperson-Rapporteur presented the Report of the first session (document A/HRC/31/50) during the 33rd Regular Session of the Human Rights Council, in which it was recommended to “prepare a new program of work on the basis of the discussions held during the first session of the working group and the informal consultations to be held, and should share that program of work with the relevant stakeholders before the second session of the working group for consideration and further discussion thereat”.
2. Therefore, the program of work (PoW) for the Second Session was prepared taking into account the above-referred to recommendation as well as the results of more than a hundred constructive meetings, events, activities and consultations held by the Chairperson in different regions with States and other relevant stakeholders, and taking into account the more than 70 written contributions received.
3. A brief overview of the process can be found in the concept note of the First Session of the OIEGWG, link:

<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx>

**Objective of the Second Session of the OEIWG**

1. Based on the mandate provided by resolution 26/9, the main objective of the second session of the OEIGWG is to continue with constructive deliberations on the content, scope, nature and form of the future international legally binding instrument, taking into account the discussions held during the first session of the working group and the informal consultations held during the intersessional period, in order to allow the Chairperson-Rapporteur to prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the Third Session of the OEIGWG.

**The Second Session of the OEIGWG and its Program of Work**

1. The Second Session of the OEIGWG and its proposed PoW have been structured according to six main topics to be discussed in the same number of panels, taking into consideration the debate on the content, scope, nature and form of an international legally binding instrument, with the purpose of identifying further elements for the design of such an instrument in advance of the third session of the OEIGWG.

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

1. As reflected in the Report of the First Session of the OEIGWG, the activities of transnational corporations and other business enterprises can have an impact on the enjoyment of human rights in different areas, including, but not limited to, public health, environment, labour rights, education, competence rights, rule of law, poverty eradication and sustainable development. Likewise, the current international legal order contains gaps and imbalances with respect to the relationship between human rights and corporations, particularly when dealing with victims’ access to justice and effective remedy in cases of human rights abuses perpetrated by corporations. It was also emphasized in the Report that today’s complex legal structures and the economic power of corporations can reinforce an uneven playing field with respect to States’ capability to regulate the operations of corporations. Moreover, it was highlighted that corporate legal structures often facilitate the lack of accountability of corporations that commit human rights abuses, especially in cases concerning cross-border activities.
2. In this regard, Panel I will provide an opportunity for identification of the main areas of impact of the activities of transnational corporations and other business enterprises with respect to human rights, while focusing on the complex legal and economic structures from which corporations can benefit in the current international legal and economic order, and how these structures may create legal gaps for securing accountability in cases of corporate human rights abuses. Within this context, the following issues, among others, could be explored during Panel I of the second session of the OEIGWG:
* How does the legal and economic reality of corporate practice today impact on the fulfillment of human rights in different social, economic and environmental aspects?
* What essential elements could be included in an international legally binding instrument on business and human rights to help address any legal gaps?

**Panel II.: Primary obligations of States, including extraterritorial obligations related to TNCs and other business enterprises with respect to protecting human rights:**

1. International human rights law recognizes the States’ obligation to respect, protect and fulfill human rights. This obligation also entails positive duties of States to exercise due diligence in order to prevent, investigate, punish and redress the harm caused by third parties, which also could include extraterritorial obligations with respect to corporations, domiciled in their jurisdiction, operating abroad. The discussions on Panel II will consider the following subthemes and elements:

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

1. The discussion on obligations of due diligence in international and domestic legal instruments could be helpful to overcome obstacles for effective regulation posed by complex corporate structures or trans-bord activities, as well as to analyze the possibility for States to exercise control, power, or authority over domestic corporations operating outside their sovereign territory in order to ensure that such conduct will not result in human rights abuses.
2. Therefore, the OEIWG, in its Second Session, could identify and address different examples of national legislation and international instruments applicable to TNCs and other business enterprises with respect to human rights in order to design a common approach to these issues, based on current State practice at national and international levels.

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

1. During the first session of the OEIGWG, it was pointed out that the current economic structure of transnational corporations requires international cooperation to protect and respect human rights, including through the effective articulation and application of extraterritorial obligations.
2. Under this framework, the discussions and decisions adopted by different UN Human Rights Treaty Bodies provide that States have the obligation to respect, protect and fulfill human rights from being violated by third parties, including business corporations, even if such corporations are not situated within the territory of a State Party, when they exert sufficient power or effective control to influence corporate operations by way of legal or political means, particularly if a reasonable link between the State and the conduct concerned is in place. The basis for this approach of extraterritorial obligation is the principle that a State should not allow the use of its territory, and the use of its jurisdiction, to cause damage in the territory or jurisdiction of another State. For these reasons a global partnership based on extraterritorial obligations could be a key building block of the binding instrument.
3. Within this context, the following issues, among others, could be explored during Panel II of the second session of the OEIGWG:
* How and to what extent the exercise of extraterritorial obligations by home-States of corporations may affect the sovereignty of host-States?
* What approaches could be adopted under an international legally binding instrument to clarify extraterritorial obligations of States?

**Panel III: Obligations and responsibilities of TNCs and other business enterprises with respect to human rights**

1. During the First Session of the OEIWG, it was noted that the duty of States to protect human rights should be complemented by a comprehensive and balanced manner of addressing the obligations or responsibilities of transnational corporations and other business enterprises with respect to human rights. Indeed, several States expressed the opinion that a legally binding instrument should include clear obligations or responsibilities of corporations and should set out their principal obligations when it comes to prevention, mitigation, and compensation for potential human rights violations that might be committed as a result of corporate operations.
2. Furthermore, it was argued that taking into account the second pillar of the UN Guiding Principles, which already refers to the responsibility of business enterprises to respect human rights, a legally binding instrument could go beyond, in order to clarify the mechanisms and measures required to implement such responsibilities, particularly by moving beyond the voluntary nature of those principles.

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

1. On this issue, a number of international instruments on human rights, labour, environment, among other fields, have already referred to the regulation of non-State actors either directly or indirectly in their legal texts. A few examples include the Universal Declaration of Human Rights, the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, the Convention on the Prevention and Punishment of the Crime of Genocide, the Rome Statute of the International Criminal Court, or the International Convention on Civil Liability for Oil Pollution of 1992. The OEIGWG could benefit from these and other examples in order to build its own approach to corporate obligations, therefore tackling some of the most common barriers and legal gaps found in the current international legal framework with respect to corporate human rights abuses.

**Subtheme 2 - Jurisprudential and other approaches to clarify standards of civil, administrative and criminal liability of TNCs and other business enterprises**

1. Another issue raised during the First Session of the OEIGWG refers to the liability of TNCs and other business enterprises in cases of abuses of human rights. In this respect, three main fields were mentioned: administrative, civil and criminal liability. However, there is still a need to deepen the discussion on how to address this issue, including *vis-à-vis* the challenge of identifying and reaching the TNC or business enterprises accountable for those liabilities, taking into account the complexity of the economic structure mentioned in previous panels. In that regard, national or regional jurisprudence may provide valuable criteria to address these challenges, and therefore could be considered as part of the elements for the draft legally binding instrument, and for substantive negotiations at the commencement of the Third Session of the OEIGWG.
2. Within this context, the following issues, among others, could be explored during Panel III of the second session of the OEIGWG:
* How could the legally binding instrument approach standards for corporate liability?
* What lessons could be learned from the experience of different domestic jurisdictions and regional legal systems, particularly with regard to the recognition of corporate criminal and civil liability under regional treaties and practice and domestic jurisdictions?
* How could the legally binding instrument approach jurisdictional issues, and what country practices could serve as examples in this regard?
* How could the legally binding instrument address issues pertaining to parent-subsidiary relations, and piercing of the so-called “corporate veil”?

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

1. Different questions on the subjective scope of the legally binding instrument have been raised before, during and after the first session of the OEIGWG, mainly with respect to the type of businesses that the instrument will cover. As reflected in the concept note of the First Session of the OEIGWG, the issue of the footnote of resolution 26/9, which provides an interpretation on how to understand the expression “other business enterprises” has triggered a lively debate. Some States and other stakeholders have requested a broad interpretation of the footnote, not limited to transnational corporations, but applied to all business enterprises. In order to address this concern, and without prejudging any position or opinion, and taking into account that the footnote is a part of resolution 26/9, States and other relevant stakeholders are invited to engage in a substantive and constructive discussion in order to address this concern. Therefore Member States and other stakeholders are invited to provide and elaborate their views and positions on this matter during the Second Session of the OEIGWG, so they can be duly reflected in the elements for the draft legally binding instrument to be presented at the commencement of the Third Session of the OEIGWG.
2. It is also expected that participants refer to other dimensions of the scope, such as what human rights should be covered, or other areas to be considered important for the legally binding instrument, such as labour rights, protection of the environment, health issues, corruption and transparency practices, among others which have been already mentioned during the First Session of the OEIGWG and during the inter-sessional period.
3. The OEIGWG will serve as a space for continuing a substantive and constructive discussion in order to comprehensively address these concerns and review different approaches with regards to all the elements of the scope of the legally binding instrument. Within this context, the following issues, among others, could be explored during Panel IV of the second session of the OEIGWG:
* Should the legally binding instrument include an explicit definition of transnational corporations and other business enterprises? Could the definition of the conduct of corporations subject to the legally binding instrument serve as an alternative?
* What lessons in this regard could be learned from existing international agreements and previous treaty design?

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

1. In the first session of the OEIGWG as well as in other fora, a repeated call has been made with regard to the need for collaboration, capacity-building and mutual assistance on due diligence investigations, administration of justice and enforcement of judgments, taking into account the economic, historic and cultural circumstances of each State. It is worth noting that recent studies undertaken under the auspices of the Office of the High Commissioner for Human Rights (Access to Remedy Project) have pointed out that the lack of cooperation and coordination between interested States with respect to the investigation, prosecution and enforcement of cross-border cases, contributes to undermine the ability of domestic legal regimes to effectively respond to cross-border cases concerning business involvement in human rights abuses.
2. In that regard, several States have established different mechanisms and legal instruments to implement such international and regional cooperation, including in particular in judicial, civil, commercial and criminal matters, with a view to facilitate investigation activities and enforcement of judicial decisions. The OEIGWG could learn from those experiences on issues pertaining to investigation, prosecution and enforcement in cross-border cases, understood as those in which different cross-border elements mingle into one single proceeding concerning different jurisdictions, for example when the violation occurs in one territory, but the offender is located outside such territory.

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

1. In the first session of the OEIGWG, the Chair of the Working Group on Business and Human Rights and particularly in other spaces, including the Annual UN Forum on Business and Human Rights, some actors have presented their experiences and lessons learned with regard to the implementation of the UNGPs on Business and Human Rights, stressing inter alia, the challenges faced at the national and international level.
2. The information of those experiences and challenges, needs to be updated, including by taking into account the recent remedy and accountability project prepared by the Office of the High-Commissioner for Human Rights, and the growing need for a stronger inter-State cooperation and other alternative legal mechanisms to ensure such access to remedy and accountability.
3. The real experiences of implementation of the UNGPs may well be a reference on how to address practical issues

**Subtheme 2 – The relation between the United Nations Guiding Principles on Business and Human Rights and the elaboration of an international legally binding Instrument on TNCs and other business enterprises**

1. Also during the First Session of the OEIGWG and in other processes, several actors have stated that the United Nations Guiding Principles on Business and Human Rights pursue the same objective of ensuring that enterprises, including in particular transnational corporations, respect human rights and provide remedy to the victims of human rights violations resulting from their business operations. In this regard, the Chair of the Working Group on Business and Human Rights noted that their work could contribute to the discussions of the OEIGWG when addressing mechanisms to guarantee access to remedies for victims of corporate human rights abuses.
2. On the basis of the above, the UNGPs could assist the work of the OEIGWG towards the elaboration of an international legally binding instrument, building upon the mutually reinforcing link between the process of implementation of the UNGPs and the elaboration of such an international instrument, and the common practice in treaty law, which usually starts the design of an international instrument on the basis of previously existing principles in international law.
3. Within this context, the following issues, among others, could be explored during Panel V of the second session of the OEIWG:
* How could an international legally binding instrument approach issues pertaining to investigation, prosecution and enforcement of cross-border cases, based on the examples of regional and international instruments addressing international cooperation?
* How could an international legally binding instrument address issues pertaining to access to funding, lawyers and experts and availability of legal aid?
* How could the lessons learned, best practices and challenges in the implementation of the UNGPs feed into the process of elaboration of an international legally binding instrument?

**Panel VI: Lessons learned and challenges to access to remedy (selected cases from different sectors and regions).**

1. The historical basis of more than four decades of struggle of the international community, particularly civil society organizations to protect human rights and prevent against corporate human rights abuses, is marked by the concrete experience of different human rights violations resulting from the activities of transnational corporations and other business enterprises. These experiences have challenged and continue to challenge the fulfillment of the State obligation to protect against any violation of human rights occurring within its territory or jurisdiction by third parties, including business enterprises. Despite this fact, a generalization of the corporate sector as being responsible for wrong actions must be avoided. On the contrary, a legally binding instrument will level the playing field and will encourage fair competition, and clear rules, based on the respect for human, and other related, rights.
2. Likewise, the current lack of international cooperation and coordination between States and the increasingly globalized structure of the supply chain in corporate operations, hampers, inter alia, the ability of victims´ representatives, lawyers, prosecutors and judges to operationalize complaints and even to enforce judicial decisions, introducing new costs, delays and other challenges to the already complex procedure when dealing with cross-border cases.
3. Notwithstanding these limitations, a deep knowledge of the experiences from the actors on the ground can provide important lessons to clarify ways to overcome these challenges, in order to establish mechanisms and instruments to facilitate and ensure the access to remedy and reparation for the victims of business-related human rights violations.
4. Within this context, the following issues, among others, could be explored during Panel VI of the second session of the OEIWG:
* What have been the most relevant and concrete limitations and legal barriers which victims have faced when dealing with cases of human rights violations resulting from the activity of transnational corporations or other business enterprises in cross-border cases?
* How can the experiences and mechanisms explored or used to overcome these limitations during a particular process on the ground, be implemented in an international legally binding instrument to be applicable to other similar cross-border cases?