Check against delivery!

Thank you Mr Chairperson-Rapporteur,

I am an attorney at Littler Mendelson, an international law firm based in the US, and member of the IOE.

This intervention responds to the points in the "Access to Justice, Effective Remedy, and Guarantees of Non-Repetition" part of the "elements" paper.

As a general matter, we are committed to discussing how to improve access to justice and remedies. We consider that the greatest barrier to achieve this goal is the weak rule of law in countries where human rights abuses are most prevalent. The lack of enforcement of existing laws, lack of independent judiciaries, and corruption, have all led to this regrettable situation in these countries.

Therefore, we ask the Chairperson and the Panel experts as to how the Intergovernmental Working Group may seek to incentivize State Parties to enforce their existing laws consistently and fairly.

We believe that the work of the OHCHR's Accountability and Remedy Project, which seeks to improve access to remedies under domestic laws – both in judicial and non-judicial fora – is a good starting point to answer this question.

The elimination of barriers to justice must be done with well-settled norms of fundamental fairness in mind. However, we note with concern that some of the elements that have been proposed under this section ignores this proposition. For example, one of the proposed elements is that States adopt mechanisms that reverse the burden of proof, whereby in situations when a TNC or OBE is accused of a human rights harm, the ultimate burden of proof lies with the accused party, and not the accusing party. This proposal contravenes the principle that "ultimately … it is the litigant seeking to establish a fact who bears the burden of proving it."[1] Any requirement that the accused party prove its innocence violates due process principles and fundamental notions of fairness in numerous jurisdictions.

We also note that this proposed Treaty seeks to discard existing international law norms, including the doctrine of *forum non conveniens*. This doctrine, in particular, takes into account that it is impractical and costly to entertain a suit that is removed from the situs of the harm, where the witnesses and other evidence are found. How, then, does the instrument contemplate addressing such concerns?

These are just some of the aspects of this particular section of the "elements" paper that raise concerns for the business community.

We look forward to the responses from the Chairperson-Rapporteur and the Panel.

I thank you for your attention.

[1] Nicaragua v. United States of America. ICJ, Reports, 1984, p. 437 §