

**Open consultations on the implementation of HRC Resolution 26/9
Elaboration of an international legally binding instrument
on TNCs, OBEs and human rights**

Guiding questions for thematic discussions during the third open consultation

Jurisdiction:

Clarifying jurisdiction is a cornerstone of a legally binding Instrument in order to guarantee the ability of victims to choose the forum where they seek to bring a case in response to violations committed by business enterprises. In order to attain access to remedy and justice, it is crucial to tackle barriers that victims face in accessing courts in jurisdictions linked to the transnational practice of business enterprises.

In this regard, several comments and proposals have been made to address those barriers and accountability gaps, and to clarify when courts could consider claims for abuses occurring abroad, including through clear references to basis for jurisdiction such as a reasonable link between the State and the conduct concerned, as well as a possible definition of what is understood as “under its jurisdiction”. Other views refer to the issue of enforcement of judgements, the possible use of prescriptive jurisdiction principles, as well as to the strong link between the provisions of jurisdiction and those of international cooperation.

Therefore, taking into account the importance of having a better understanding of the possible landing zone between the different views on the issue of jurisdiction of the future legally binding instrument, the following guiding questions are put forward to facilitate the thematic discussion within the third open informal consultation:

- a. Has your delegation considered circumstances in which courts could hear claims arising from conduct undertaken outside your territory? Which are the applicable principles of jurisdiction in such cases?
- b. Is your country party to any treaty or convention which clarifies jurisdiction of courts in cross-border or transnational cases? How has it been implemented?
- c. Does your delegation agree to an approach that would link jurisdiction over cases arising from transnational business conduct to place of incorporation/ domicile, place of headquarters, and place of substantial business interest of the business enterprise involved?

Legal Liability:

Discussion in the OEIWG have indicated the value of achieving a level of convergence among different jurisdictions on the issue of legal liability of business enterprises involved in human rights abuses or violations, in order to protect the right of victims. Different examples were raised with regards to the recognition of criminal, civil and administrative liability of legal persons under domestic and regional systems, apart from the liability of natural persons. Clarifying the section of legal liability in the legally binding instrument could contribute to achieving legal certainty in the application of standards for both, victims as well as business enterprises. In that regard, the following questions are put forward to facilitate the thematic discussions during the third open consultation:

- a. Does your delegation agree that a future Instrument should be comprehensive in establishing that domestic laws of State parties should cover civil, criminal and administrative liability? Or does your delegation consider that State parties should be provided with the flexibility of establishing grounds for liability of business enterprises in either civil, criminal or administrative law?

b. When it comes to addressing standards pertaining to legal liability, such as standards for attribution of criminal and civil liability, does your delegation consider that it would be preferable that the future Instrument includes a flexible approach (i.e. whereby standards could be defined under national laws on the basis of a list established by the Instrument), or a prescriptive approach (i.e. whereby the Instrument would establish minimum standards that States must adopt when establishing the different forms of legal liability in their jurisdictions, including rules for attribution)?

c. Does your delegation agree that the future Instrument should include the recognition of civil, criminal and administrative liability for corporations for human rights violations or abuses besides the recognition of liability of natural persons involved in such conduct?

Preventive Measures:

The OEIWG's discussions have also considered the need to prevent human rights violations or abuses by business enterprises. Preventive measures could serve as a cornerstone of the Instrument as such measures will avoid suffering of victims and incurring in litigations costs. Preventive measures could also assist States and business enterprises as analytical tools to prevent human rights violations by conducting human rights risk assessments.

Suggested questions for consideration by delegations:

d. Does your delegation consider that the inclusion of provisions concerning preventive measures on the future Instrument could be clarified by requiring effective and binding due diligence requirements for business enterprises considering human rights abuses that they could cause or contribute in their operations, including their own activities, as well as other business relationships linked to their operations at home or abroad?

e. When it comes to establishing the mechanisms of implementation of such requirements, does your delegation believe that the future Instrument should provide States flexibility on its application based on the size, sector, operational context, ownership and structure of such enterprises? Will such approach guarantee a clear regulatory framework that strengthens the domestic jurisdiction of States with regards to the prevention of human rights abuses or violations by business enterprises?

f. What mechanisms could the Instrument include to guarantee transparency and access to information of business enterprises' operations, including other business relationships linked to their operations at home or abroad? Should the Instrument include vigilance plans or other monitoring requirements for business enterprises?