Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

Compilation of written inputs by stakeholders entitled to speak at the public sessions of the working group, in line with the note verbale of 2 March 2023

5 April 2023[*]

Contents

[*] The original version of this compilation was shared with all friends of the Chair on 5 April 2023 and included all submissions received by that date. The current version includes submissions received after that date.

Замечания и предложения Российской Федерации к статьям 1-14 пересмотренного проекта юридически обязывающего документа о ТНК и других предприятиях в контексте прав человека

1. Российская Федерация подтверждает замечания и предложения к проекту юридически обязывающего документа о ТНК и других предприятиях в контексте прав человека (далее – пересмотренный проект), сделанные ранее в ходе предыдущих сессий Межгосударственной рабочей группы по правам человека и транснациональным корпорациям и другим предприятиям (далее – МРГ). Они сохраняют актуальность.

2. В пересмотренном проекте фигурируют так называемые «экологические права» и отсылки к международным актам в области экологии (например, пункт 1.2 статьи 1, пункт 3.3 статьи 3, пункт 6.3 «a» статьи 6, пункт 6.8 «bis» статьи 6). Российская Федерация исходит из того, что обсуждение обозначенного многообразия защиты «экологических прав» при том понимании, что эта категория прав в настоящее время не имеет общепризнанного определения, не может входить в мандат МРГ.

3. Подтверждаем неоднократно озвученную в ходе заседаний МРГ принципиальную позицию о распространении действия пересмотренного проекта конвенции только на транснациональные компании и другие предприятия транснационального характера (transnational corporations and other business enterprises of transnational character). Поэтому обращаем внимание на важность приведения проекта к единообразию в этом контексте и замене понятия «предприятия» (business enterprises) на транснациональные компании и другие предприятия транснационального характера (например, пункт 2.1 «b» статьи 2, пункт 3.2 статьи 3, пункты 6.1-6.3 статьи 6).

В этом же русле стоит вести работу над определением «предпринимательской деятельности» (пункт 1.3 статьи 1). Российская Федерация поддерживает вариант формулировки этого термина, предложенный КНР. Если именно он будет закреплен в проекте, то станет

излишним использование такой уточняющей фразы как «particularly/including those of transnational character», например, в пункте 2.1 «a» и «e» статьи 2, пункте 3.1 статьи 3, пункте 8.4, 8.6 статьи 8, поскольку определение КНР само по себе подразумевает транснациональный характер предпринимательской деятельности.

6. Российская Федерация отмечает, что положения, подчеркивающие недискриминационный характер прав человека, не претерпели значительного изменения с субстантивной точки зрения. Пересмотренный проект до сих пор не в полном объеме отражает заявленный в пятом абзаце преамбулы принцип недискриминационного характера прав человека.

Не можем согласиться с использованием, при этом не вполне единообразным, в проекте (например, пункт 2.1 «d» статьи 2, пункт 4.2 «c» статьи 4, пункт 7.2 и пункт 7.3 «b» статьи 7, пункт 8.4 статьи 8, пункт 10.2 статьи 10) таких категорий как: «gender-responsive», «gender and age responsive», «gender-sensitive», «age-sensitive», «victim-centred», «child-sensitive», «child - friendly». Полагаем, что отсутствие четкого представления о содержании обозначенных юридических категорий создает риски неоднозначного толкования будущего документа, а также делает участие в нем Российской Федерации мало реализуемым.

7. Российская Федерация продолжает настаивать на исключении прямого упоминания международного гуманитарного права (пункт 3.3 статьи 3, пункт 7.5 статьи 7, пункт 8.8 статьи 8, пункт 14.5 статьи 14, как и любых других отраслей права, так как это, помимо прочего, влечет ослабление имеющегося режима защиты прав человека), отсылок к его положениям посредством закрепления обязательства государства по предотвращению нарушения прав человека на оккупированных территориях и в затронутых конфликтом районах, включая оккупацию (пункт 4.2 «a» статьи 4, пункт 6.4 «g» статьи 6) и причисления к лицам, которые подвержены повышенному риску нарушения их прав, тех, кто находится на

оккупированных территориях или в конфликтных районах (пункт 6.4 «c» статьи 6).

8. Российская Федерация продолжает выступать против формулировок, содержание которых неоднозначно или излишне размыто; неясность в определении круга источников, с учетом которых планируется реализовывать отдельные положения документа: «международно признанные права человека» (например, пункт 3.3 статьи 3, пункт 4.1 статьи 4, пункт 6.2 статьи 6); «соответствующие/применимые международные стандарты» (например, пункт 8.4 статьи 8); «международно согласованные стандарты свободного, первоочередного и информированного согласия» (пункт 6.4 «d» статьи 6); «международное обычное право» (пункт 3.3 статьи 3, пункт 8.8 статьи 8); «международные правовые стандарты прав человека и международные правовые требования» (пункт 12.5 статьи 12), «общее международное право» (пункт 14.4 статьи 14); «экологические стандарты и стандарты изменения климата» (пункт 6.4 «e» статьи 6) и т.д., а также против оценочных категорий в тексте проекта: «значительное влияние» в дефиниции «предпринимательская деятельность транснационального характера» (пункт 1.4 статьи 1); «обстоятельства делают исчерпание местных средств неразумным» (статья 8 «bis»); определение «эффективного форума, гарантирующего справедливый процесс» и «существенной активности ответчика» при определении юрисдикции судов (пункт 9.5 статьи 9); «самые широкие меры» (пункт 12.3 статьи 12); «насколько возможно самая большая степень» (пункт 12.6 «a» статьи 12).

9. В проекте дублируются уже существующие и широко признанные в международном праве права человека (статьи 4 и 5), налицо также их увеличившаяся детализация. Речь, в частности, идет о предложениях государств отдельно выделить в определении «нарушение прав человека» в пункте 1.2 статьи 1 права на «безопасную, чистую, здоровую и устойчивую окружающую среду», а также добавить отдельные подпункты пункта 6.4 «a»

статьи 6, касающиеся, например, «безопасности места работы», обеспечения «баланса между семьей и работой», «искоренения насилия на работе».

10. В пересмотренном проекте сохраняется упоминание запрета на использование доктрины *forum non conveniens* (суд, компетентный рассматривать спор с учетом правил о подсудности и при наличии юрисдикции, вправе по требованию ответчика отказать в принятии дела к производству, если имеется более «удобный» суд за границей, например, где находятся свидетели и доказательства; пункт 7.3 «d» статьи 7 и пункт 9.3 статьи 9) наравне с сохранением ранее включенных в документ юрисдикционных привязок. Российская Федерация не может поддержать такой подход.

11. Российская Федерация вновь хотела бы обратить внимание на то, что в пункте 7.5 статьи 7 присутствует конструкция «инверсия бремени доказывания» (reverse the burden of proof). Подтверждаем свою позицию о неприемлемости данной конструкции, прямо противоречащей презумпции невиновности и обязанности доказывания обстоятельств, на которые ссылается сторона гражданского процесса.

12. В нескольких фрагментах текста к слову «жертва» добавляется уточнение «нарушения прав человека» (например, пункт 8.4 статьи 8). Считаем его излишним, потому что непосредственно в самом определении понятия «жертва» уже указывается нарушение прав человека.

13. В пересмотренном проекте юрисдикция суда государства предусмотрена в том числе, если «жертва имеет (его) гражданство или домициль» (пункт 9.1 «d» статьи 9). Категория «домициль» в отношении физических лиц характерна в большей степени для государств общей правовой семьи. С учетом статьи 8 проекта статей Комиссии международного права о дипломатической защите («государство может осуществлять дипломатическую защиту в отношении лица без гражданства, которое <...> законно и обычно проживает в этом государстве»), Российская Федерация предлагает в отношении жертвы вместо категории «домициль»

использовать словосочетание «постоянное проживание» (habitual residence). Такое изменение потребует соответствующей корректировки термина жертва (пункт 1.1 статья 1).

14. По-прежнему требуется разъяснение используемой в пункте 12.1 статьи 12 формулировки «международное право»: что, по мнению разработчиков, может быть применимо в этой сфере помимо международных договоров?

15. Российская Федерация исходит из того, что включение пассажа о том, что государства могут задействовать механизм оказания правовой помощи, предусмотренный в документе, даже в том случае, когда одно из них не присоединилось к документу на основании *ad hoc* договоренности или ином соответствующем основании, в пункте 12.2 статьи 12 избыточно, поскольку соответствующее соглашение между государствами может быть достигнуто и без упоминания о такой «опции» в тексте документа. При этом следует учитывать, что в России признание и исполнение иностранных судебных решений по гражданским и торговым делам осуществляется только при наличии соответствующего международного договора. В этом же контексте примечательно, что пункт 7.6 статьи 7 и пункт 12.10 статьи 12 предусматривают категоричное признание и исполнение решение без возможности апелляции.

16. Российская Федерация считает необходимым и далее настаивать на расширении оснований для отказа в признании и приведении в исполнение решений судов, перечисленных в пункте 12.11 статьи 12, определяющихся не только общественным порядком, но и «существенными интересами государства - участника».

17. Российская Федерация считает неприемлемым сохранение в проекте далеко идущих обязательств государств относительно их международных договоров в торговой и инвестиционной сфере (как действующих, так и будущих; например, пункт 14.5 статьи 14).

Written Input: Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

The United States thanks the Office of the High Commissioner for Human Rights and the Chair-Rapporteur for the update and invitation for written inputs sent to the Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights on March 3. As specific input on the draft legally binding instrument, the United States refers to our general statement and interventions, including proposed edits to the Chair's Proposals and the 3rd Revised draft, made during the 8th session of the working group held in October 2022, and our general statement and interventions made during the 7th session in 2021. We are attaching the statement and interventions from October 2022 for ease of reference and ask that they be fully taken into account.

For an instrument to gain the broad acceptance needed to be truly impactful, it must incorporate the viewpoints of a diverse group of stakeholders, including civil society, businesses, and States, including States that domicile significant numbers of international businesses. We hope the intersessional meetings create opportunities to meaningfully discuss the complicated issues the text seeks to address. We continue to believe that a less prescriptive approach that builds upon the UN Guiding Principles on Business and Human Rights (UNGPs) and is developed in collaboration with diverse stakeholders provides the best way forward. More prescriptive elements could be addressed through optional protocols to such an instrument. The United States stands ready to continue to engage constructively to find ways to build on the UNGPs in a consensus-based manner.

Tab 1 – United States 8th Session Interventions

General Statement of the United States

The U.S. Government's Concerns with the Business and Human Rights Treaty Process and Interest in Exploring an Inclusive, Multistakeholder Approach

October 24, 2022

Thank you, Chair. To begin, we wish to thank the Government of Ecuador and the members of the business and human rights community for your tireless work to bring attention to the issues that this treaty seeks to address.

This year marks the second year that the United States is participating in these Working Group meetings. While our concerns with the draft text and process around its development remain, we affirm that we share the convictions of this Group that more must be done to build upon the UN Guiding Principles on Business and Human Rights (UNGPs), including in relation to critical areas such as climate change and increased support and protections for human rights defenders.

The UNGPs created a common understanding of the duties of governments and responsibilities of businesses through the three-pillar framework. They have led to over 50 States having developed or being in the process of developing National Action Plans, including our own, which we are currently updating, and many have adopted laws to strengthen accountability, including on due diligence and supply chain transparency. Meanwhile, businesses are increasingly integrating human rights considerations into their policies and practices. Governments and businesses have also made progress in strengthening access to remedy,

which is a key concern of the treaty process, for example, by developing operational-level grievance mechanisms and remediation processes.

Despite these achievements, serious issues remain. Just last month, international NGO Global Witness in its annual report recorded that in 2021 alone, 200 land and environmental defenders were killed; of these, a significant proportion were engaging on issues related to business activity. There is a need for a stronger international structure to protect individuals like these who do such important work and to hold those who harm them to account. We understand the motivation behind members of this Group to create a legally binding instrument that will address challenges such as these but continue to believe that a less prescriptive approach that obtains the buy-in of relevant governments and other key stakeholders is the better option. We want to work with the Group to identify a collaborative path forward to advance business and human rights.

We appreciate the Chair circulating new proposals to find constructive paths forward. As we are still studying them, we may not be in a position to engage on all aspects of the proposals in great depth. That said, we appreciate that they consider, more than prior drafts, the diversity of legal systems and appear to provide increased flexibility for implementation. This is a promising step in the right direction of developing a workable text. However, we note with concern that they remain prescriptive and retain elements such as overly broad jurisdictional provisions, unclear liability provisions, and potential criminalization of an ill-defined range of human rights abuses that will make it difficult for many States to sign on to or implement the treaty.

The United States has not been alone in our concerns regarding the draft treaty. Many stakeholders, including a considerable percentage of States that are home to the world's largest transnational corporations, have pursued only limited participation in these negotiations. Yet, we appreciate Ecuador's recent efforts to incorporate a broader range of viewpoints in the treaty process.

As underscored in a Joint Statement led by the United States and signed by 49 states in June 2021, "One key factor behind the wide acceptance of the UNGPs has been the multistakeholder dialogue that led to their development and that has characterized their implementation. The success of efforts to build upon them in the next decade will depend upon maintaining this approach." We are concerned that an important opportunity to advance business and human rights will be lost if the instrument produced by this Group does not follow such an approach.

For an instrument to gain the broad acceptance needed to be truly impactful, it must incorporate the viewpoints of a diverse group of States, including States that domicile significant numbers of transnational corporations, civil society, and businesses. For this reason, we continue to believe that a less prescriptive approach, more akin to a framework agreement, that builds upon the UNGPs and is developed in collaboration with, and ultimately reflect principles broadly supported by diverse stakeholders provides the best way forward. More prescriptive elements could be addressed through optional protocols to such an instrument.

We wish to reassure all parties present that we are here this week to engage constructively and to negotiate in good faith, with the shared aim of increasing corporate accountability and access to remedy for human rights abuses. We look forward to negotiations this week and engaging

across stakeholder groups to discuss a way forward on this effort, as an inclusive, multi-stakeholder approach is imperative to further advancing the UNGPs. Thank you.

United States' Interventions on the Suggested Chair's Proposals

Definitions

Remedy: We recognize the importance of access to remedy in this text as there is still much work to be done in implementing the UNGPs, particularly pilar three. Therefore, precise definitions are particularly important. The United States believes that there is tension between the proposed definitions of "remedy" and "effective remedy" that needs to be reconciled. According to the definition, any remedy provided is expected to return a victim to the position "they would have been [in] had the abuse not occurred, or as nearly as is possible in the circumstances." Yet, the definition of "effective remedy" includes a range of options that, while consistent with the forms of remedies contemplated under the UNGPs, may or may not "restore" a victim to their prior position. Moreover, the definition of "effective remedy" too narrowly characterizes remedy as "reparations," which suggests that all remedies must be monetary in nature. The United States proposes that the definition of remedy be aligned more closely with the commentary of UNGPs principle 25, and thus the first sentence would be replaced with: **"Remedy" shall mean redress to counteract or make good for any human rights abuses that have occurred.** The second sentence also should be revised, both to address the "reparations" concern and to eliminate redundancies. We suggest the following: **An "effective remedy" involves redress that is adequate and prompt; is gender and age responsive; and may draw from a range of remedies such as restitution, compensation, rehabilitation, cessation of abuse, apologies, sanctions, and guarantees of non-repetition."**

Relevant State Agencies: The definition of "relevant State agencies" seems overly broad to the United States, as at least under the U.S. system, judicial functions are generally independent, and not under the control of, the State and therefore are not agents of the state. We suggest instead that rather than using "relevant State agencies" as the operative term in, e.g., Article 7, the term "state-based judicial and non-judicial grievance mechanism" should be used and therefore defined, based on the UNGP definition. Thus, we would revise this definition by **replacing "relevant State agencies" with "state-based judicial and non-judicial grievance mechanisms."** This term could include, for example, a non-judiciary grievance mechanism at a bilateral development finance agency as well as a judiciary grievance mechanism through a court. If instead the definition is intended to focus on the functions within the administrative bodies of a State, the definition should be clarified to exclude judicial bodies and non-administrative courts.

Article 6 Prevention

The United States appreciates that the Chair's proposals on Article 6 are less prescriptive and more concise than the those in the 3rd revision of the text, and that they provide more flexibility for implementation, reflecting the diversity of legal systems. As noted yesterday, we believe these are a promising first step in the right direction of developing a workable text. In light of this, the United States will be focusing its comments on Articles 6-13 on the Chair's proposals.

While we believe that it is important for any BHR instrument to further purposes of the UNGPs by encouraging states to take steps within their domestic legal frameworks to help prevent

human rights abuses from occurring, in order for the provisions on prevention to be implementable and garner the necessary support, we propose that rather than mandating that measures be adopted in full immediately, the chapeau of 6.1 should be edited to say that **Consistent with domestic legal and judicial systems, each State party should take steps to adopt legislative, regulatory, and other measures, as appropriate, to:…**

With respect to Article 6.3 of the Chair's proposal, the United States appreciates the importance of addressing human rights due diligence as a means of furthering the goals of the UNGPs. We do think that language in the 3rd revised draft that drew from the UNGPs' recognition that due diligence will vary depending on the business was useful. To that end, in the Chair's text we suggest replacing 6.3 with the following language: **To achieve the ends identified in 6.1 (a)-(d), States Parties shall take steps to encourage business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse and the nature and context of their operations and their business activities and relationships.**

We recommend **deletion of the subparts under 6.3** in the Chair's proposal**,** as this level of detail may be better suited for an optional protocol to a Framework Agreement, guidance on best practices in conducting human rights due diligence, and/or framed as factors for businesses to consider. We would also note that the development of optional protocols could be pursued simultaneously with development of a framework agreement.

With regard to Article 6.4, the United States notes that the proposed text has shifted from a prescriptive approach to the content of due diligence requirements to a focus on the extent to which a business would be required to conduct due diligence. Because agency relationships can be complicated and addressed differently under domestic legal systems, the United States believes that this topic could also benefit from additional technical consultations, perhaps intersessionally, to determine how third-party actions could be most effectively and practically addressed in the context of an LBI.

Article 7 Access to Remedy

As noted in our intervention with respect to the definition of "relevant state agencies," it is unclear whether the scope of Article 7 is intended to cover administrative bodies only or all grievance mechanisms, including any potential judicial mechanisms.

If the intent is to cover all grievance mechanisms, consistent with the United States proposal to change the definition of "relevant state agencies" to instead be a definition of "state-based judicial and non-judicial grievance mechanisms," all references to "relevant state agencies" throughout the text would be replaced with "state-based judicial and non-judicial grievance mechanisms" as used in the UNGPs.

Otherwise, the United States notes with appreciation that the Chair's proposal for Article 7.1 appears to move away from a prescriptive approach and towards one that may allow for flexible implementation in accordance with domestic judicial and administrative systems. That said, it is not clear how the goals of Article 7, in particular the goal in 7.1(c) of ensuring delivery of effective remedy, could be achieved through the mandate of the LBI. At a minimum, in 7.1(c) we propose **changing "ensure" to "work towards ensuring"** and furthermore we believe there

could be a benefit to intersessional technical consultations to assess the scope and feasibility of Article 7.

Additionally, focus within Article 7 also seems to be only on "victims," or those who have been found as a matter of fact to have suffered from human rights abuses, and we wonder if language from the UNGPs might be useful here. To that end, we would suggest **replacing "victims" here, and throughout the text, with "right holders," and will offer a parallel suggestion when the definition of "victims" is presented on screen.**

The United States appreciates the efforts of the Chair to make Article 7.2 more general and less prescriptive, as well as the efforts to take into account important concerns such as mitigating the risk of reprisals. As with other aspects of Article 7, we believe paragraph 7.2 would benefit from intersessional technical consultations on the scope and feasibility of the proposal.

With respect to paragraph 7.3, we understand the sentiment behind this text of some of these concepts, for example reducing the risk of reprisals. Again, it is unclear in this paragraph whether the focus of the paragraph is intended to be only "victims," or instead anyone who has alleged that they have suffered human rights abuses. The scope of this provision is broad and at the same time very specific in a way that would be challenging for many States to implement. This is the type of detailed concept that could potentially be pursued in an optional protocol rather than in the main body of an agreement. In that context it could also be helpful to have intersessional technical consultations as to how these provisions would be implemented in practice.

While the United States understands the sentiment behind Article 7.4 in that enhancing access to remedy supports implementation of the UNGPs, there are concepts embedded in the subparagraphs that require clarification. For example, in subparagraph (a), what remedies are the relevant state agencies (or grievance mechanisms) expected to directly deliver or contribute to? Additionally, does (b) suggest that victims are to receive preferential treatment over, or the same treatment as, businesses during any grievance proceedings? And finally, the type of functions contemplated in (c) may or may not be appropriate or achievable within relevant state agency resource allotments. This is the type of detailed concept that could potentially be pursued in an optional protocol rather than in the main body of an agreement. In that context it could also be helpful to consider in intersessional technical consultations as to how these provisions would be implemented in practice.

Article 8. Legal Liability

While we acknowledge the new proposal recognizes the need for flexibility, the treatment of natural and legal persons may vary depending on domestic legal systems, and thus this proposed article warrants technical consultations on what limitations there might be on implementation. For our part, we have not yet had the time to fully analyze how this could be implemented within the United States and would be interested in any intersessional technical conversations that could address implementation.

Article 9. Jurisdiction

We see the Chair's proposal as an improvement to Article 9. We recognize the need to have greater access to remedy and accountability, which this text seeks to achieve. That being said, we would recommend exploration of these concepts for potential inclusion in an optional protocol in a less prescriptive approach. This would allow the international community and diverse stakeholders to dedicate time and attention with the right level of expertise to finding a mutually agreeable text.

Article 10. Limitation Periods

Regarding the Chair's proposal on Article 10, given that the definition of "human rights abuse" for purposes of the LBI is clearly circumscribed to focus on actions in connection to business activities, it is unclear what human rights abuse could constitute a war crime, a crime against humanity, or the crime of genocide since, generally, the United States only views natural persons as having the capacity to commit such crimes. While we have not yet had the time to fully evaluate this proposal, preliminary questions we have include: 1) who -- or what entity -- would the judicial proceeding be against, recognizing that many states only view natural persons as the subjects of international criminal law, and 2) how would "in relation to" be defined, as it could be interpreted so broadly as to be capture any attenuated relationship to a person engaged in one of these crimes.

Article 12. Mutual Legal Assistance

Regarding the inclusion of mutual legal assistance in the LBI, in general, we appreciate the Chair's efforts to streamline the text. The proposed LBI is geared towards effective remedy in a variety of contexts—administrative, civil, and criminal. Mutual legal assistance is used to support criminal investigations and prosecutions and is well covered in multilateral agreements as well as bilateral agreements between many countries. Even if the LBI were to impose an obligation on state parties to criminalize conduct, because the system of bilateral mutual legal assistance agreements is a sophisticated and well-functioning one, any attempt to bring mutual legal assistance into the LBI should be made only on the basis that it would address gaps that aren't otherwise addressed in existing agreements, for instance, the Hague Judgements Convention. Absent further information about the scope of the provision and what gaps we are seeking to address, absent further understanding of the scope and what gaps exist, we propose deletion of Article 12.

United States' Interventions on the 3rd Draft Rev. Text

Preamble

Starting with PP4. As PP4 does not directly track the Charter of the United Nations, the United States proposes **striking "as set out in the Charter of the United Nations" and inserting "the Charter of the United Nations" after "treaties,".**

On PP6, The United States recognizes the importance of access to remedy, as the third pillar of the UNGPs, in this process. We suggest revising PP6 to be consistent with the framing of human rights under international human rights law. Furthermore, we have questions about the reference to international humanitarian law as it is used here, where it is intermingled with references to international human rights law, and absent further clarity about how international humanitarian law fits within this provision and the scope of this agreement as a whole we would recommend replacing the reference to international humanitarian law with "including as applicable during armed conflict."

The United States proposes editing PP6 to read: **Reaffirming the rights of every person to be equal before the law, to equal protection of the law, and to have an effective remedy in case of violations of international human rights law, including as applicable during armed conflict, including rights related to non-discrimination, participation and inclusion.**

On PP9, The United States opposes adding the language proposed by Iran and proposes reverting to language that has been agreed in other UN contexts for this paragraph as follows: **Upholding the principles of sovereign equality among Members of the UN, peaceful settlements and territorial integrity as set out in Article 2 of the United Nations Charter**

On PP11, as has been noted, the United States understands the desire of the drafters to increase corporate accountability through this process. However, we would not be able to accept the suggestion that an agreement among states can itself directly impose legal obligations on businesses. PP 11 misstates international human rights law by asserting that business enterprises have "obligations" to respect internationally recognized human rights, when businesses do not have the capacity to take on obligations as a matter of international law. The United States proposes replacing PP11 with the following, which would be consistent with principle 13 of the UNGPs by replacing "obligation" with "responsibility," and replacing "human rights abuses" with "adverse human rights impacts," : **Underlining that business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the responsibility to respect internationally recognized human rights, including by avoiding causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and by seeking to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships.**

On PP14bis, while protection of the environment is an important global concept, the inclusion of these environmental treaties in PP14bis suggests that their key goals relate to the protection of

human rights; as that is not the case, we believe their inclusion is beyond the scope of the LBI, and we recommend **deletion of PP14bis**.

Lastly, on PP18, The United States again notes that business enterprises do not have obligations under international human rights law to be clarified through the LBI, and thus proposes that **"obligations" be replaced with "responsibilities,"** consistent with the UNGPs. I thank you.

Article 1 Definitions

The United States notes that the draft definition of victim is somewhat confusing in light of the use of the term throughout the draft treaty. Specifically, as a victim is defined as a person or group of persons that "have suffered harm that constitutes human rights abuse," a factual determination would need to be made that harm has been suffered in order for the term "victim" to apply. Thus, for example, it might not make sense to discuss in Article 7 reducing barriers to access to grievance mechanisms for "victims" as such provisions could only apply to individuals who have already been determined to be victims as part of the grievance process, and thus the protections the LBI is intended to put in place for individuals seeking remedy would not apply from the beginning of any grievance process. Therefore, while we take no issue with the term "victim" or its definition, we think it could lead to an unintended, narrow interpretation of Article 7. As per the UNGPs, we suggest that "rights holder" be used in place of "victims" throughout the LBI.

In 1.3, the definition of business activities, the phrase "other activity" presents vagueness issues. In order to improve predictability as to the scope to be covered, **we recommend deleting "and other activity"** in the beginning of the paragraph.

In 1.4, business activities of transnational character The United States would like to note a general concern that limiting application of provisions of the LBI to business activities of a transnational character would, in some cases, be unduly narrow and inconsistent with the UNGPs.

Article 2 Purpose

The US believes it is important to ensure that any additional instrument on BHR builds upon and is aligned with the UN Guiding Principles and international law. We would welcome input from experts on the UNGPs as to how best to ensure alignment of this provision with the UNGPs. As we stated before, only states, not businesses, have human rights "obligations" to fulfill, therefore we prefer the use of "responsibilities" in b) as proposed by Brazil and the EU.

Article 5 Protection of Victims

In Article 5, the United States understands the importance of including provisions on preventing reprisals in this article. Protecting and supporting human rights defenders is a key priority of U.S. foreign policy. Human rights defenders - including those engaging on worker rights and the environment - face increasing retaliation, threats, and violence for their work in holding their governments and private sector actors accountable to respect human rights. We have concerns about the ability of the United States to implement certain aspects of 5.1, 5.2, and 5.3 without these provisions being subject to or consistent with domestic legal and judicial systems. For

example, 5.1 may raise concerns under the confrontation clause of the Sixth Amendment of the US Constitution. We look forward to considering the issue further intersessionally before next year's negotiating session.

Article 14 Consistency with International Law principles and instruments

The United States opposes adding the proposed language, and instead recommends reverting to language that has been agreed in other UN contexts. Thus, **"the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States"** should be replaced with **"the principles of sovereignty and territorial integrity."**

Article 14.5 purports to obligate States to reinterpret all previously negotiated international agreements relevant to the LBI and implement them in a a manner consistent with the LBI, irrespective of the intent and interpretations of the negotiators at the time those prior agreements entered into force. Such a provision would be challenging for States to implement and potentially time- and resource-intensive. Moreover, to the extent that not all parties to the prior agreements may be party to the LBI, reinterpretation could be impossible to achieve. Any potential conflicts between the LBI and relevant provisions of other agreements, either existing or yet to be negotiated, would be addressed by interpreting the agreements in accordance with Article 30 of the Vienna Convention on the Law of Treaties, as stated in paragraph 14.4 above.

Article 15 Institutional Arrangements

The United States supports multilateral action to promote business respect for human rights, as it has through the UNGPs. However, any proposal to establish a new treaty body of 12 independent experts may entail significant additional outlays in the UN budget, and other implications and consequences would need to be considered carefully. Moreover, before deciding to establish a Committee, it would be important to identify more clearly its substantive duties and responsibilities. We could see the benefit of intersessional technical consultations with experts to explore potential synergies with existing mechanisms such as the UN BHR Working Group and the BHR Forum, to build on the UNGPs. We would also like to note that National Action Plans on Business and Human Rights serve as a useful tool to publicly communicate State progress on implementing the UNGPs, which relates to the objectives of this article.

Article 16. Implementation

In regard to Article 16, we question whether Article 16.5 as drafted might be overly broad, internally inconsistent, and inconsistent with other provisions in the proposed text. If the objective is to state that parties should interpret and apply the LBI in accordance with international law, such a provision is unnecessary. Furthermore, to say that "application and interpretation of these Articles . . . shall be without any discrimination of any kind or on any ground, without exception" is vague. Given its literal meaning, it could be at odds with Article 3, which allows States to differentiate how it applies measures taken to implement the LBI with respect to different sizes and types of businesses, or could require states to provide equal access to remedies to victims of abuses in other countries as to those within their countries. To be

clearer, **we propose that "without any discrimination of any kind or on any ground, without exception" be replaced with "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" to mirror the language of Common Article 2 of the ICESCR and ICCPR.** Furthermore, we propose **adding "applicable" before "international law, including international human rights law and international humanitarian law,** as the applicability of either body of law would depend on the circumstances. We look forward to studying Article 16 further intersessionally, especially considering the implementation of provisions that potentially do not allow for domestic court systems to discriminate between victims located within the United States and subject to its jurisdiction and those that are not.

Article 17. Relations with Protocols

As has been recommended previously by the United States, we would encourage the exploration of an approach that allows for more detailed issues to be addressed in protocols. Notably, this would involve having a core text with optional protocols in which issue or industry specific areas could be negotiated separately and signed onto by interested parties. Therefore, we appreciate that the text provides for the negotiation of protocols.

Article 18. Settlement of Disputes

The United States is still reviewing this provision, especially as it does not identify any rules that would be used even if a single organization and procedure were identified. Furthermore, the United States believes arbitration is an area that would benefit from an examination of best practices for dispute settlement in other treaties.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

DIRECTORATE GENERAL OF HUMAN RIGHTS AND RULE OF LAW

HUMAN RIGHTS DIRECTORATE

HUMAN RIGHTS INTERGOVERNMENTAL COOPERATION DIVISION

Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights:

Invitation for written inputs

Input from the Human Rights Intergovernmental Co-operation Division, Directorate General Human Rights and Rule of Law, Council of Europe

1. This written input is submitted by the Human Rights Intergovernmental Co-operation Division of the Directorate General Human Rights and Rule of Law, Council of Europe. It addresses in particular the "Suggested Chair Proposals" on Articles 6 and 7 of the draft Legally Binding Instrument, on the understanding that they represent the latest versions of these provisions.

2. This input is based on Recommendation CM/Rec(2016)3 of the Committee of Ministers of the Council of Europe to member States on human rights and business. Recommendation CM/Rec(2016)3 is intended to be complementary to the UN Guiding Principles on Business and Human Rights and uses the same "Protect, Respect and Remedy" framework. It was prepared by the Council of Europe Steering Committee for Human Rights (CDDH), the secretariat of which is assured by the Human Rights Intergovernmental Co-operation Division.

3. It should first be noted that the general approaches taken by Recommendation CM/Rec(2016)3 and the draft Legally Binding Instrument are complementary and essentially consistent. Whilst there may be some differences in scope, emphasis, detail and style, there do not seem to be any fundamental contradictions. This input will therefore seek to highlight certain issues that are addressed in greater detail by Recommendation CM/Rec(2016)3 than by the draft Legally Binding Instrument. The Working Group may wish to consider reflecting these aspects in the draft instrument.

Conseil de l'Europe
F-67075 Strasbourg Cedex
David Milner, Head of Division
David.milner@coe.int
Tél.: +33 (0)3 90 21 53 27
E-mail: DGI-CDDH@coe.int
http://www.coe.int/cddh

4. As compared to Article 6 (“Prevention”) in the “Suggested Chair Proposals”, Section III of Recommendation CM/Rec(2016)3 (“State action to enable corporate responsibility to respect human rights”) distinguishes between the measures that the States should take with respect to business enterprises domiciled within their jurisdiction and those domiciled elsewhere but conducting substantial activities within their jurisdiction (paragraph 20). (This does not seem to coincide with the way in which jurisdiction is dealt with in Article 9, which appears to relate to the issues of remedies and legal liability rather than “prevention”/ “respect”.)

5. Section III proposes additional measures for enterprises that have certain relationships with the State or perform certain functions on behalf of the State (paragraph 22).

6. Section III addresses in particular detail the human rights advisory responsibilities of States when, for example, business enterprises are represented in trade missions, or when they intend to operate or are operating in third countries, including in conflict-affected areas and other sectors or areas that involve a high risk of negative impact on human rights (paragraphs 25-27).

7. Section III contains a specific provision intended to prohibit trade in goods with no practical use other than for the purpose of capital punishment, torture, or other inhuman or degrading treatment or punishment (paragraph 24). In this connection, it is recalled that the Committee of Ministers of the Council of Europe has also adopted Recommendation CM/Rec(2021)2 to member States on measures against the trade in goods used for the death penalty, torture and other cruel, inhuman or degrading treatment or punishment.

8. Section III also contains a specific provision on enforcement measures (paragraph 30), which may go beyond what is covered by Article 6.1.

9. As compared to Article 7 (“Access to Remedy”), Section IV (“Access to remedy”) addresses the need to avoid certain potential obstacles to civil litigation, such as the doctrines of “the act of the State” or “the political question”, or (in the case of business enterprises owned or controlled by the State) domestic privileges or immunities (paragraphs 37-38).

10. Section IV contains detailed provisions on the circumstances in which criminal or equivalent liability should apply in relation to business-related human rights abuses (paragraphs 44-46).

11. Section IV also contains provisions on administrative remedies, reflecting the fact that an effective remedy under article 13 of the European Convention on Human Rights need not be judicial.

Subject: Open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (reference TESPRDD/DESIB/BHRU/NS): Written inputs submitted by the World Health Organization (WHO)

Key messages

- **The right to health is a fundamental human right and integral to the Constitution of the World Health Organization (WHO). The right to health is one of a set of internationally agreed human rights standards and is inseparable or 'indivisible' from these other rights.**
- **The right to the highest attainable standard of physical and mental health implies a clear set of legal obligations on states to ensure appropriate conditions for the enjoyment of health for all people without discrimination.**
- **Despite the inalienable recognition that health is a human right, and the potential for transnational corporations and other business enterprises to affect the legal obligations pertaining to the right to enjoy health without discrimination, the existing text of Articles 1-14 could be strengthened to further address the protection of the right to enjoying the highest attainable standard of health for all.**
- **In paragraphs 13-15 of this written input, WHO proposes a series of actions to strengthen the text with a view to ensuring adequate legal protection of the right to the enjoyment of the highest attainable standard of health of every human being, within the draft legally binding instrument.**

Full written inputs

1. **The right to health is a fundamental human right and of our understanding of a life in dignity.** The right to the enjoyment of the highest attainable standard of physical and mental health was first articulated in the 1946 Constitution of the World Health Organization (WHO), that *"the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition"*[1]. In the WHO Constitution, health is defined as *"a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"*.

2. **The right to the highest attainable standard of health implies a clear set of legal obligations on states to ensure appropriate conditions for the enjoyment of health for all people without discrimination. Core principles of human rights are accountability, equality and non-discrimination and participation.** Accountability means that States and other duty-bearers are primarily answerable for the respect, protection and fulfilment of human rights. However, there is also a growing movement recognising the importance of

[1] World Health Organization. Constitution of the World Health Organization, 1946, available at: https://www.who.int/about/governance/constitution [accessed 10 April 2023].

other non-state actors such as businesses in the respect and protection of human rights including the right to health. For example, the UN Guiding Principles on Business and Human Rights, endorsed by the Human Right Council in 2011, provide guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations. Non-discrimination is a key principle in human rights and crucial to the enjoyment of the right to the highest attainable standard of health. The right to health must be enjoyed without discrimination on the grounds of race, age, ethnicity, or any other factor. Non-discrimination and equality requires States to take steps to redress any discriminatory law, practice or policy. Acknowledging health as a human right recognizes a legal obligation on states to ensure access to timely, acceptable, and affordable health care. Participation is important to accountability as it provides checks and balances which prevent unitary leadership from exercising power in an arbitrary manner.

3. **The right to health has since been reaffirmed in supporting international declarations and covenants.** Article 25 of the 1948 Universal Declaration of Human Rights[2] mentions health as part of the right to an adequate standard of living. The right to health, enshrined in Article 12 of the Covenant on Economic, Social and Cultural Rights[3], was further defined in General Comment 14 of the Committee on Economic, Social and Cultural Rights[4] – a committee of Independent Experts, responsible for overseeing adherence to the Covenant. States are ultimately accountable for any violation of human rights, including the right to health.

4. **The right to health is one of a set of internationally agreed human rights standards and is inseparable or 'indivisible' from these other rights.** This means achieving the right to health is both central to, and dependent upon, the realisation of other human rights, to food, housing, work, education, information, and participation. The right to health, as with other rights, includes both freedoms and entitlements:
    a. Freedoms include the right to control one's health and body (for example, sexual and reproductive rights) and to be free from interference (for example, free from torture and non-consensual medical treatment and experimentation).
    b. Entitlements include the right to a system of health protection that gives everyone an equal opportunity to enjoy the highest attainable level of health.

5. **Two core elements of the right to health are progressive realization and non-retrogression**. The progressive realization of a right to health requires using maximum available resources. States should also not allow the existing protection of economic, social, and cultural rights to deteriorate unless there are strong justifications for a retrogressive measure.[5]

---

[2] United Nations General Assembly. The Universal Declaration of Human Rights (UDHR), 1948, New York: United Nations General Assembly.

[3] United Nations General Assembly. International Covenant on Economic, Social and Cultural Rights, 1966, available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [accessed 10 April 2023]

[4] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, available at: https://www.refworld.org/docid/4538838d0.html [accessed 10 April 2023]

[5] CESCR General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) Adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990

6. **The Office of the United Nations High Commissioner for Human Rights (OHCHR) has previously reiterated the importance of these health freedoms and entitlements**, including the right to health without discrimination, in its joint publication with WHO, *Fact Sheet No. 31, The Right to Health, June 2008*. In this fact sheet, the topic of accountability for monitoring for the right to health at the national level also states that *"Reviews of policy, budgets or public expenditure, and governmental monitoring mechanisms (for example, health and labour inspectors assigned to inspect health and safety regulations in businesses and in the public health system) are important administrative mechanisms to hold the Government to account in relation to its obligations towards the right to health"*[6].

7. **WHO has made a commitment to support Member States in their efforts to mainstream human rights into healthcare programmes and policies by looking at underlying determinants of health as part of a comprehensive approach to health and human rights**. Addressing the needs and rights of individuals at different stages across the life course requires taking a comprehensive approach within the broader context of promoting human rights, gender equality, and equity. As such, WHO and partners work with Member States to build on existing approaches in gender, equity, and human rights to generate more effective and robust solutions to health inequities. This work builds on the foundational strengths and complementarities among these approaches to create a cohesive and efficient approach to promoting health and well-being for all. In addition, WHO has been actively strengthening its role in providing technical, intellectual, and political leadership on the right to health including:
    a. strengthening the capacity of WHO and its Member States to integrate a human rights-based approach to health;
    b. advancing the right to health in international law and international development processes; and
    c. advocating for health-related human rights, including the right to health.

8. **Transnational corporations and other business enterprises can affect the right to health in several ways**. Commercial determinants of health are the private sector activities that affect people's health, directly or indirectly, positively or negatively. As examples of negative violations of the right to health:
    a. Company choices in the production, price-setting and targeted marketing of products, such as breast-milk substitutes, ultra-processed foods, tobacco, sugar-sweetened beverages and alcohol lead to diseases such as cardiovascular disease, type 2 diabetes and certain cancers, as well as hypertension and obesity.
    b. Young people are especially at risk of being influenced by advertisements and celebrity promotion of material. For example, fast-food advertising to youth activates highly sensitive and still-developing pathways in teens' brains.
    c. The mass removal of trees creates mosquito breeding sites, causing vector-borne disease outbreaks like malaria and chikungunya, with up to 20% of malaria risk in

(Contained in Document E/1991/23) available at: General comment No. 3: The nature of States parties' obligations (refworld.org)

[6] UN Office of the High Commissioner for Human Rights (OHCHR) and World Health Organization (WHO). Fact Sheet No. 31, The Right to Health, June 2008, No. 31, available at: https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health [accessed 10 April 2023]

deforestation hotspots attributable to international trade of deforestation-implicated export commodities such as timber, tobacco, cocoa, coffee and cotton.

d. Factories, which are disproportionately located in disadvantaged communities, pollute the air, causing and exacerbating respiratory diseases.
e. Unsafe or toxic work environments can impact employee mental health, for example for women working in the ready-made garment industry.
f. Commercial action in knowledge environments can foment groundless doubt and contribute to climate change denialism or vaccine hesitancy.
g. Intensive animal agriculture is a leading cause of climate change, deforestation, antimicrobial resistance, and air, soil and water pollution. The consumption of animal-derived food products is linked to higher rates of noncommunicable diseases, including some cancers and diabetes.
h. Workers in slaughterhouses and meat packaging facilities, which are often located in disadvantaged communities, suffered high rates of injury and experienced high rates of infection from COVID-19.
i. Harmful use of intellectual property law can prevent some communities to access affordable medicines.

9. **Transnational corporations and other business enterprises can support the realization of the right to health**, for example when companies implement the following health interventions:
    a. increasing the availability of essential medicines and health technologies, and supporting improved access to essential, high-quality, safe, effective and affordable medicines and medical products;
    b. reformulation of goods and products to reduce harm and injury, including the industry introduction of seat belts, efforts to reduce salt content in food production, and to eliminate trans fats from the global food supply;
    c. ensuring living wages, paid parental leave to improve child health outcomes, sick leave and access to health insurance; and
    d. financial decisions to divest from products and services harmful to health.

10. **Further, the workplace also functions as a setting of health promotion and protection against harm**, including allowing the following:
    a. principles to guard against modern slavery, exploitation or indentured servitude;
    b. occupational health and safety standards and hygiene practices that reduce the risk of disease or work-related disability;
    c. health promotion activities aimed at the workforce, including use of stairs, healthy canteens, walkathons or sports events; and
    d. health literacy events, including awareness building about deadly ailments, blood donation or vaccination.

11. **WHO recognizes the specific challenges faced by those communities facing disadvantage and marginalization**, welcomes the recalling of the UN Declaration on the Rights of Indigenous Peoples and the Rio Declaration on Environment and Development. Communities facing disadvantage and marginalization including Indigenous Peoples, are exposed to greater rates of ill-health and face significant obstacles to accessing quality and affordable healthcare. This is particularly important recognizing the distinctive and

disproportionate impact of business-related human rights abuses on women and girls, children, Indigenous Peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situations.

12. **Recalling the WHO Framework Convention on Tobacco Control, WHO reiterates its commitment to the importance of protecting the right to health from any undue influence from commercial and other vested interests**. The potential for commercial damage to undermine the right to health is catastrophic and preventable, as emblemized by the tobacco epidemic. The tobacco epidemic is one of the biggest public health threats the world has ever faced, killing more than 8 million people a year, including around 1.2 million deaths from exposure to second-hand smoke. Over 80% of the 1.3 billion tobacco users worldwide live in low- and middle-income countries, where the burden of tobacco-related illness and death is heaviest. Tobacco use contributes to poverty by diverting household spending from basic needs such as food and shelter to tobacco. The economic costs of tobacco use are substantial and include significant health care costs for treating the diseases caused by tobacco use as well as the lost human capital that results from tobacco-attributable morbidity and mortality.

13. **Despite the inalienable recognition that health is a human right, and the potential for transnational corporations and other business enterprises to undermine legal obligations pertaining to the right to enjoy health without discrimination, the existing text of Articles 1-14 of the draft legally binding instrument could be strengthened further to ensure adequate legal protection of the right to health**. Currently, the only explicit mention of the right to the highest attainable standard of health is the *"right to a safe, clean, healthy and sustainable environment"* (Article 1.2, definitions), with other references to health in the context of health and safety standards, occupational health, emergency and long-term health assistance for victims, and health as one of the areas for mandatory corporate reporting. We also note there is a proposal to delete recognition of the last reference in its entirety.

14. **Accordingly, the World Health Organization welcomes the inclusion in the draft text of the following: a *"right to a safe, clean, healthy and sustainable environment and the obligations on transnational corporations and other business enterprises to respect labour rights, health and safety standards, the environment and the climate"***. These are fundamental prerequisites for individuals and communities to realize their right to the highest standard of health. In order to support this, it is important that human rights due diligence measures undertaken by business enterprises shall include undertaking and publishing health impact assessments, in addition to mechanisms and instruments for human rights, labour rights, environmental and climate change.

15. **Additionally, the World Health Organization would propose for consideration the following text changes to the draft legally binding instrument**. Where existing language has been proposed by a Member State or the Chair, WHO's recommended amendments are listed in red.
    a) **In Preamble PP2**, WHO welcomes the recalling the nine core International Human Rights Instruments adopted by the United Nations, five of which (the International Covenant on Economic, Social and Cultural Rights, International Convention on the

Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities) expressly cover the right to health for particular populations.

b) **In Preamble PP3**, WHO welcomes the recalling of the UN Declaration on the Rights of Indigenous Peoples and the additions of also recalling *"the WHO Framework Convention on Tobacco Control"* as proposed by (Panama, Palestine), the "Rio Declaration on Environment and Development" (Panama, Palestine, Cuba, South Africa) and *"the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas"*.

c) **In Preamble PP9 quinquies**, WHO recognizes that protecting and improving the health of children is of fundamental importance, that children must also be given a stable environment in which to thrive, including good health and nutrition, protection from threats and access to opportunities to learn and grow, and that investing in children is one of the most important things a society can do to build a better future.

d) **In Preamble PP10**, WHO proposes for consideration the inclusion of the following change in text: *"Acknowledging that all business enterprises have the capacity to foster sustainable development through an increased productivity, inclusive economic growth and job creation that respect internationally recognized human rights, labour rights, health and safety standards, the environment and climate, in accordance with relevant international standards and agreements, including the enjoyment of the highest attainable standard of health as one of the fundamental rights of every human being"*;

e) **In Preamble PP11**, WHO proposes for consideration that that the following principles of the draft text (in **bold**) be retained and strengthened in future iterations: "Underlining that business enterprises, regardless of their size, sector, location, operational context, ownership and structure **have the obligation to respect internationally recognized human rights**, including by avoiding causing or contributing to human rights abuses **through their own activities and effectively remedying such abuses** when they occur, as well as by **preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships**. WHO also notes proposals by several States that are supportive of these principles.

f) **In Preamble PP18 ter**, WHO proposes for consideration a further amendment of language from the proposal: *"Stressing the growing economic might of some business entities, in particular transnational corporations, and their particular responsibility and impact on human, labour, health and environmental rights"* (Cameroon).

g) **In Article 4.2.c**, WHO welcomes the recognition of approaches that prioritize the rights of the child, and in prioritizing and protecting the provision of health assistance, within an overall recognition of the right to health as integral to the right of victims.

h) **In Article 5.3 bis**, WHO proposes for consideration a further amendment of language from the proposal by Cameroon to reflect that *"States parties shall ensure emergency response mechanisms in case of disasters including health emergencies, caused by the action of transnational corporations and other business enterprises of transnational character"*.

i) **In Article 6.3**, in line with the OHCHR and WHO's fact sheet subsection on accountability for monitoring for the right to health at the national level, which states

that *"Reviews of policy, budgets or public expenditure, and governmental monitoring mechanisms (for example, health and labour inspectors assigned to inspect health and safety regulations in businesses and in the public health system) are important administrative mechanisms to hold the Government to account in relation to its obligations towards the right to health"* [7], WHO proposes for consideration that surveillance, monitoring and reporting towards the impact of transnational corporations and other business enterprises on the right to health, including specific attention to the use of health impact assessments for this purpose, are captured within the text of the draft legally binding instrument.

j) **In Article 6.4**, WHO proposes for consideration the inclusion of health in the proposed text: *"Regular, publicly available and duly conducted social, environmental, health, economic and human rights impact assessments prior to and throughout their operations"* (Egypt).

k) **In Article 6.8**, WHO welcomes the protection of public policies and legislation from the influence of commercial and other vested interests of business enterprises, and encourages the recognition in language of the draft legally binding instrument that these interests pervade through more than policy alone, as is reflected in the text amendments suggested by several States.

l) **In Article 14.5,** WHO welcomes the reiteration that all existing bilateral or multilateral agreements on issues relevant to this Legally Binding Instrument and its protocols - internationally agreed human rights standards, including the right to health as inseparable or 'indivisible' from these other rights - shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this Legally Binding Instrument.

m) **Throughout,** WHO reiterates the need for not only 'recalling' human rights instruments in which health is considered, but on the explicit opportunity to strengthen the 'realization' of the right to health and to contribute to global health and health equity.

[7] UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 31, The Right to Health, June 2008, No. 31, available at: https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-31-right-health [accessed 10 April 2023]

Submission in response to the Call for inputs for the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights: Update and invitation for written inputs

JOINT NHRI STATEMENT

31 March 2023

The National Human Rights Institutions that form part of the GANHRI Working Group on Business and Human Rights (GANHRI WG) congratulate the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights for undertaking this public call to present written inputs by stakeholders (as regards substantive improvements to Articles 1-14 of the third revised draft legally binding instrument and the Suggested Chair Proposals).

Nine years after the UN Human Rights Council in Geneva adopted a resolution drafted by Ecuador and South Africa to create an open-ended intergovernmental working group (IGWG), and considering the third draft and comments developed during the eighth session we consider this call for submissions to be of utmost importance.

As state-mandated, independent, effective, and pluralist bodies with a broad human rights mandate, National Human Rights Institutions (NHRIs) are among the pillars of protection of and respect for human rights. NHRIs play vital roles in complementing, supporting, or drawing attention to States' actions or policies affecting human rights, as well as monitoring the activities and operations of businesses.

The NHRIs that form part of the GANHRI WG commend the Chair of the IGWG for his continuous work towards a Legally Binding Instrument (LBI) that closes protection gaps for rights holders by addressing the prevalence of human rights violations by businesses and challenges to access to remedy.

The GANHRI WG welcomes the Chair's initiative for a Group of Friends of the Chair to facilitate regional coordination and negotiations from now on. We call on States to acknowledge and seize the opportunity the newly established Group of Friends of the Chair provides for the successful advancement of the LBI negotiations. We therefore call on all States to support the work of the Friends of the Chair and actively engage in inter-sessional

regional meetings and negotiations. In order to strengthen the modus operandi and intergovernmental cooperation at the negotiations, States could further offer technical and financial support to the Friends of the Chair Group.

General comments

It is known that the purpose of the instrument is to establish, in a pragmatic and balanced way, clear and general binding rules on human rights in relation to business activities, as a way to protect victims or potential victims of corporate abuses and offer them better opportunities for access to justice and redress. At the same time, this proposal aims to fill a gap in international human rights law, as there are no binding rules in this area.

Having reviewed the third draft of the Legally Binding Instrument, the National Human Rights Institutions (NHRIs) associated with GANHRI, through their Working Group, urge governments to analyse the original objective of the instrument, ratifying the position of having an adequate instrument that recognises, promotes and protects the rights of individuals in relation to business activities, especially transnational corporations at the global level.

This includes, especially the analysis of the responsibility of companies to establish due diligence plans that allow for an adequate preliminary analysis of their activities to establish the possible impacts on human rights and establish plans to prevent such violations or abuses; as well as to assume direct responsibility in case of violations or abuses of human rights caused by their activities both before the national authorities of their jurisdiction and of the jurisdiction where such impacts are caused, as well as before international courts in case these actions are presumed as an international crime of serious human rights affectation.

In this context, NHRIs consider it important that the Legally Binding Instrument sustain the appropriate parameters to establish adequate mechanisms for the prevention of human rights violations, infringements and abuses, both as a responsibility of states through appropriate and mandatory public policies within their territories, as well as on the part of companies through the due diligence mechanisms mentioned above.

Another issue of concern is the establishment of adequate mechanisms so that, once the existence of a human rights violation, infringement or abuse has been established, adequate remediation is implemented for victims recognised directly or indirectly in accordance with national and international laws on the rights affected.

Finally, we consider that NHRIs can play a leading role in the aforementioned processes and that it is therefore necessary that the Legally Binding Instrument includes appropriate provisions so that NHRIs can participate in advising and accompanying states and companies in the design of their prevention and due diligence plans; as well as the possibility of becoming a mechanism for reaching agreements for the adequate remediation of human rights violations and warnings, their follow-up and demand for implementation.

We hope that the negotiations at the next meeting of the United Nations Open-ended Intergovernmental Working Group on Business and Human Rights will reach agreements to guarantee the full enjoyment of human rights through the achievement of a commonly agreed text for a legally binding instrument.

Written contribution from African Civil Society and Faith-Based Organisations to the Intergovernmental Working Group on Transnational Corporations and Human Rights, on the Third Revised Draft of the Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with regard to Human Rights

Following the Note Verbale of 2nd of March 2023 released by the Office of the United Nations High Commissioner for Human Rights.

This document is a joint submission from 17 African organisations and 8 Pan-African or regional networks, namely:

Akina Mama wa Afrika (Pan-African organisation with ECOSOC status); **Justiça Ambiental JA!** (Mozambique); **Centre for Human Rights**, University of Pretoria (South Africa); **African Coalition for Corporate Accountability** (ACCA); **Centre for Applied Legal Studies** (CALS), University of Witwatersrand (South Africa); **Environmental Rights Action / Friends of the Earth Nigeria** ERA/FoEN (Nigeria); **Jeunes Volontaires Pour L'environnement** (Côte d'Ivoire); **Human Rights Defense Club** (Cameroon); **Youth Initiative for Land in Africa** (YILAA); **Research and Support Center for Development Alternatives - Indian Ocean** - CRAAD-OI (Madagascar); **Friends of the Earth Ghana**; **Les Amis de la Terre Togo**; **FIDEP Foundatio**n (Ghana); **WoMin African Alliance**; **Africa Europe Faith Justice Network** (AEFJN); **Symposium of Episcopal Conferences of Africa and Madagascar** - SECAM-JPDC; **Mining Affected Communities United in Action** - MACUA (South Africa); **Women Affected by Mining United in Action** - WAMUA (South Africa); **Zimbabwe Environmental Law Association** - ZELA (Zimbabwe); **Legal Resources Foundation Trust** - LRF (Kenya); **Southern Africa Campaign to Dismantle Corporate Power** (Southern Africa); **ALTERNACTIVA** - Acção Pela Emancipação Social (Mozambique); **Friends of the Earth Africa** - FoEA; **Uganda Consortium on Corporate Accountability** - UCCA (Uganda); **Catholic Parliamentary Liaison Office** - CPLO (Zimbabwe).

INTRODUCTION AND GENERAL COMMENTS

We, as African civil society organisations and networks comprising several social movements and collectives would like to reinforce our deep support and commitment to the ongoing process of negotiations towards a United Nations legally binding instrument to regulate the activities of transnational corporations (TNCs) under Human Rights law. This important initiative shall ultimately help to close the legal loophole through which TNCs, across their powerful, complex and opaque global value chains, are able to avoid accountability when they commit or contribute to Human Rights violations.

We recognise that progress has been made since the beginning of the negotiations, especially with regard to the involvement of States and civil society organisations, and their important contributions to the current process of elaborating a legally binding

instrument to regulate the activities of transnational corporations. The dedication of many States and civil society organisations to this process are reflected in the text that is now the 3rd Revised Draft with comments from the 7th and 8th sessions of the OEIGWG. We would like to acknowledge and appreciate the commitment and proactive spirit of the African Group of states in these negotiations, and of several African states, who have been participating with a constructive approach and providing important contributions to strengthen the text of the LBI. We would also like to note that the 3rd Revised Draft with comments from States during the 7th and 8th sessions is the only legitimate basis for negotiation. Accordingly, our inputs refer only and exclusively to this text. We reiterate here our strong rejection of the Chair's informal proposals presented at the 8th session, in line with the statement delivered by the African Group during the 8th session and reiterated by Namibia during the 52nd session of the Human Rights Council. The Chair's informal proposals are in contradiction with the agreements and methodology of this OEIGWG until date and represent an attempt to undermine and derail the democratic character of the process.

Notwithstanding, we note that the 3rd revised draft still lacks robust mechanisms to ensure that Transnational Corporations (TNCs) respect Human Rights in their operations throughout their global production chains. In the current draft, the establishment of direct obligations and not mere responsibilities to companies continues to be avoided, assigning them solely to the States, even though it is well known that most States, national jurisdictions, lack the necessary legal-administrative capacity to adequately regulate TNCs, protect people, communities and the environment in the face of TNCs and their extensive global production chains. To put an end to this impunity, we need action at the international level and within the framework of International Human Rights Law.

We note with great concern the growing influence of powerful corporations and their representatives in the negotiation process of the Treaty, aimed at preventing or delaying the adoption of the Treaty and / or weakening its content. We condemn this influence, and demand that adequate measures are taken to prevent corporate pressure and or corporate capture of the process considering that this is a negotiation within the United Nations Human Rights Council. It is encumbered on the Council to ensure that the negotiation and associated processors are fair and place Human Rights above any other interests.

We call on States to defend the progress so far made and the positive elements that are currently included in the third revised draft, such as the prohibition of *forum non conveniens*, the inclusion of the principle of *forum necessitatis*, and important mechanisms of access to justice for the affected communities (applicability of the law of the domicile of the affected communities, collective complaint mechanisms, legal aid, release from the payment of legal costs, fund for support to the affected communities). We urge all States to support these progressive provisions and ensure that they be kept in the text, and to work constructively and collectively to develop these further.

To ensure a strong, effective and applicable LBI, we recommend the improvement of the current revised draft around the following aspects:

• The LBI text must clearly delimit its scope, including within it TNCs and all the entities across their global production chains, according to the mandate established by Resolution 26/9. It is important to ensure that all the entities across the global value chains of the TNCs are covered by this LBI, and clearly establish the responsibility of the parent companies for the violations committed along these chains;

• The LBI must establish direct obligations for TNCs, which must be different and separate from States' obligations. The need for the LBI to include direct obligations for TNCs has been defended in each negotiation session by some states and many legal experts;

• The LBI must use the word "violation" alongside the existing term "abuse" in a manner consistent with the rest of the Human Rights instruments. While it is true that TNCs can commit abuses, it is also true and incontestable that these entities often violate the human rights of people, communities and nature's rights;

• As it becomes more and more clear that international investment law can impact the protection of Human Rights and undermine States' ability to take bold and necessary actions to protect their peoples, the environment and the climate, it is crucial that this LBI clearly reaffirms the primacy of international human rights law over any other international legal instruments and, in particular, over trade and investment agreements;

• The LBI must provide strong mechanisms against corporate capture, by strengthening the provision about undue influence of the private sector in human rights policies.

Finally, we reaffirm that the centrality of affected peoples' voices must be guaranteed throughout the whole process of drafting, negotiating and implementing the future LBI, and not the perspective of the perpetrators of Human Rights abuses and violations, as already established in International Human Rights Law.

We are confident that our contributions and other contributions from States and civil society actors committed to putting an end to Transnational Corporations' impunity will support States, in particular African States, to shape their positions on the process of negotiations, and ultimately be incorporated in the 4th revised draft of the LBI.

PROPOSED AMENDMENTS FOR THE ARTICLES

Preamble

Paragraph 11: The liability of TNCs should apply regardless of whether the TNCs have committed the act directly or indirectly. Finally, a reference to the global production chain must be added. We support the amendment proposed by Cameroon and South Africa:

> PP11: Underlining that transnational corporations and other business enterprises of transnational character, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect all human rights, including by preventing or avoiding human rights violations that are committed all along its global production chains, directly and indirectly linked

to their operations, products or services by their business relationships. (Cameroon, South Africa)

Moreover, in order to strengthen the provisions of the preamble, we propose to add a paragraph that reaffirms the primacy of human rights over investment and trade agreements, and as such we support the new paragraph as proposed by Palestine:

> PP11 bis: To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements. (Palestine)

Paragraph 18: We also suggest the addition of a paragraph relating to the obligations of TNCs with regard to their economic might and their decisive influence on the respect of human, labour and environmental rights. We support the two proposals made by Cameroon:

> (PP18 ter): Stressing the growing economic might of some business entities, in particular transnational corporations, and their particular responsibility and impact on human, labour and environmental rights. (Cameroon)
>
> (PP18 quarter): Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations are different, exist independently and in addition of the legal framework in force in the host and home States. (Cameroon)

It is also necessary to include a reference on the issue of corporate capture, inspired by the WHO Framework Convention on Tobacco Control (article 5.3):

> Proposed new paragraph: Underlining that in setting and implementing their public policies related to the regulation of TNCs with regards to human rights, State Parties shall act to protect these policies from commercial and other vested interests, and from undue interference and influence by TNCs.

Article 1: Definitions

Paragraph 1.1: Definition of victims: We propose to use the term “affected communities and individuals” instead of or in parallel with the term “victims”. This term better underscores the protagonism of the people affected. Moreover, the term “abuses” should be replaced for violations.

Paragraph 1.2: The proposal to add the term ‘violation’ next to ‘abuse’ must be incorporated and standardised through the next draft, and as such we support the proposal made by Cameroon:

> 1.2: “Human rights violation” shall mean any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment. (Cameroon)

Paragraph 1.3: Regarding the definition of "business activities", it is important to maintain accordance with Resolution 26/9 which focuses on TNCs and other business enterprises (OBEs) of transnational character. In this regard, throughout the treaty, business activities are to be understood as activities carried out by "transnational corporations and other business enterprises of transnational character". We support the proposal made by Cameroon:

> 1.3: "Business activities" means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by **transnational corporations and other business enterprises of transnational character (natural or legal person), which can be private, public or mix**, ~~a natural or legal person, including State-owned enterprises,~~ including financial institutions and investment funds, joint ventures, ~~and any other business relationship undertaken by a natural or legal person~~. This includes activities undertaken by electronic means. (Cameroon)

Paragraph 1.5: Definition of business relationship: it is necessary to strengthen this definition by: 1) linking it to other mechanisms which extend legal liability (not just due diligence) along the entire global production or value chain in question, including instruments able to balance the asymmetry regarding the burden of proof; and 2) defining the global production or value chains which are the pillars of the transnational architecture and not conditioning its recognition to the provisions of domestic law. We support the proposal made by Palestine, with an additional sentence at the end:

> 1.5: "Business relationship" refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, entities in the value and supply chain, any non-State or State entity linked to a business operation, product, or service even if the relationship is not contractual, as well as including activities undertaken by electronic means. **The business relationship shall include financial entities as investors, shareholders, banks and pension funds that finance the activities of TNCs.**

Article 2: Statement of purpose

Paragraphs 2.1.b, c: In the paragraphs on prevention, it is necessary to reiterate the importance of regulating TNC's by establishing direct and binding obligations and responsibilities vis a vis human rights, accompanied by necessary implementation mechanisms.

> Amendment: b. To clarify and ensure respect and fulfilment of the human rights obligations of business enterprises, c. To prevent and avoid the occurrence of human rights violations in the context of business activities **by establishing specific, binding and concrete obligations to respect human rights for TNCs, in addition to States' obligations, and by creating effective and binding mechanisms of monitoring and enforceability.**

Article 3: Scope

Paragraph 3.1: With the formulation "This LBI shall apply to all business activities, including business activities of a transnational character", article 3 departs from the mandate of the Working group (Resolution 26/9). Therefore, as already said, it is necessary to harmonise throughout the future legally binding instrument the terms used when referring to TNCs and other enterprises of transnational character, and not to any type of enterprise. Otherwise, the coherence and efficiency of the Treaty will be compromised. As such, we propose to combine the amendments proposed by Egypt, Pakistan and Palestine, Namibia, as follows:

> Amendment: This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character along the value chain.

Article 4: Rights of victims

The title of this article is incomplete since the article does not just include rights of the victims but also rights that belong to all individuals and communities threatened or affected by corporate harm, even if they have not yet been declared as victims. Therefore, we support the proposal by Cameroon to change the title of this article to: **Rights of Affected Individuals and Communities/Right of victims**. The respective changes should be included throughout the article, changing the word victims or adding the term affected individuals and communities.

Paragraph 4.2. f: The right to access information should be further elaborated to include stronger requirements for the disclosure of information in order to facilitate legal proceedings. In particular, affected communities and individuals should have access to information regarding the different legal entities linked to the parent company so as to facilitate the determination of liability. The amendments proposed by Palestine and Cameroon, Namibia are both very important, and as such we propose to combine the two as follows:

> Amendment: be guaranteed access to legal aid and information held by businesses and others and legal aid relevant to pursue effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure;

To strengthen article 4, two additional paragraphs should be included:

Proposed new paragraph 4.2.h: be guaranteed with access to independent technical advisory mechanisms that facilitate access to impartial evidence regarding the harm or risk of harm caused by companies;

Proposed new paragraph 4.4: Affected individuals and communities shall have the right to request State parties adopt precautionary measures related to serious or urgent situations that present a risk of irreparable harm pending the resolution of a case **as, for instance, in cases of risks of environmental harm.**

Finally, all amendments proposed by the Plurinational State of Bolivia, and supported by several States, on the inclusion of peasants' rights throughout the articles, should be accepted and incorporated into the future Treaty.

Article 6: Prevention

The article on prevention is a pillar of the future LBI, and an article where direct obligations should be imposed on TNCs, in addition to and separated from the obligations listed for States. Furthermore, it should ensure that due diligence is an obligation of results and not only of means.

Paragraph 6.1: This article should explicitly include the obligation to repair human rights violations and should include the entities in the economic groups and production chains of the TNCs.

Amendment: States Parties shall regulate effectively the activities of transnational corporations and other business enterprises of transnational character within their territory, jurisdiction, or otherwise under their control. For this purpose States shall take all necessary legal and policy measures to ensure that transnational corporations and other business enterprises of transnational character respect all internationally recognized human rights and prevent, remedy and repair human rights violations throughout their operations, including through their business relationships and global production or value chains.

Furthermore, we also support the proposal made by Cameroon:

6.1.bis: In order to comply with their obligations to respect, protect and fulfil the rights of this instrument, States parties shall adapt their administrative law to prevent the authorization of business activities of transnational character that would not meet the standards of human rights protection provided in this Legally Binding Instrument. States shall adopt higher standards in their own business relationships, in particular but not limited to public contracts, public-private partnership services and not enter into any type of collaboration with transnational corporations and other business enterprises of transnational character condemned for human rights violations. (Cameroon)

Paragraph 6.2: This article could be reformulated to be imposed directly on TNCs, without the need of passing a national law. It should include an obligation to publish a mapping of the possible risks and gendered impacts, i.e. the companies should publish explicitly the list of activities, countries and individual projects that are identified as posing risks to human rights, women's rights and the environment. It should not only include the duty to "take appropriate legal and policy measures", but also the duty to

“implement effectively”, as many companies already have due diligence procedures, but only on paper. This obligation of effective implementation should fall on the parent or outsourcing companies and they should be responsible for this effective implementation throughout their whole global production chain and their business relationships. We therefore support the proposal from Cameroon:

> 6.2 bis: Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships. (Cameroon)

Paragraphs 6.4.c and 6.4.d: We support the proposal from Cameroon to move 6.4(c) and 6.4(d) to a new provision (6.3 bis.). In this article, it would also be necessary to establish the expression “consent”. In addition, the right to free, prior and informed consent must extend beyond indigenous communities and be understood as:

• the right to be previously informed about the risks related to the activity before the company is installed, in a timely manner and accessible language;
• the right to be protected from any pressure or harassment and to be able to freely express your concerns and demands about a project or company;
• the right to say no, that is, a veto right against the installation of a new company or project if they consider that it will not benefit the local population and represents a risk to their rights.

As such, we support the proposal from Palestine, South Africa:

> 6.4.c: Conducting meaningful consultations - in line with principles of free, prior and informed consent and throughout all phases of operations - with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas, such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests - where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless it is for the benefit of the oppressed population; (Palestine, South Africa)

Article 7: Access to remedy

We welcome the inclusion of article 7.3.d preventing the use of the doctrine of *forum non conveniens*. However, we propose deleting the term *“appropriate cases of human rights abuses”*, which is wrong (as we are talking about human rights violations) and is also vague and open for interpretation. We therefore support the proposal made by Palestine:

> 7.3.d: Removing legal obstacles, including the doctrine of forum non conveniens, to initiate proceedings in the courts of another State Party in all

appropriate cases of human rights abuses and violations resulting from business activities in particular those of a transnational character. (Palestine)

With regard to paragraph 7.5 on the reversal of the burden of proof, we consider that this investment should be considered a right of the affected individuals or communities to ensure both access to justice and due legal process. In addition, the term appropriate cases should be withdrawn, in addition to the express need in accordance with national jurisdictions. We recall that the reversal of the burden of proof is a way of ensuring equality of arms in the judicial process, eliminating the barriers that exist to access justice.

In order to strengthen the article, we propose to include an article with the principle of *in dubio pro persona*:

Proposed new paragraph 7.7: States shall guarantee that if there is any doubt about the implementation of the LBI, people and communities, particularly women and youth, that have been or are affected or threatened by the activities of transnational corporations and other business enterprises of transnational character will enjoy the widest protection of their rights.

We also propose to include an article of precautionary measures:

Proposed new paragraph 7.8: States shall make available mechanisms to allow affected communities and persons, particularly women and youth to demand precautionary measures to prevent harm.

Article 8: Legal liability

The whole of the article should be modified to include the violations committed by legal persons outside the territory through their global production chains. It is also necessary to list the obligations of the TNCs, which, in case of non-compliance, will entail their liability. This article should also explicitly state the need for administrative, civil and criminal regimes of liability. Criminal liability is necessary since civil convictions are not sufficient and do not act as a deterrent. We also support the following proposals made by Palestine:

8.1: States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability including joint and several liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses and violations that may arise from actions or omissions in the context of their own business activities, including those of transnational character, or from their business relationships. (Palestine)

8.3: States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions where legal or natural persons conducting business activities have caused or contributed to human rights abuses and violations - such as withdrawal of licenses, termination of contracts for company projects, or inclusion on a prohibited list of companies for business. (Palestine)

Paragraph 8.8: The expression 'Subject to their legal principles' should be deleted.

A key provision is missing in Article 8: one that establishes the joint responsibility of the different companies that participate in the violation of human rights. We therefore support the proposal made by Palestine:

> 8.10 bis: All companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibilities for human rights abuses in which they are involved. (Palestine)

A paragraph to establish TNCs obligations and responsibility should also be added:

> Proposed new paragraph 8.11: TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, whether home states, host States or States affected by the operation of TNCs.
>
> To this end: a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.
>
> b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities - as the case may be.
>
> c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.

Article 9: Adjudicative jurisdiction

It is crucial to strengthen provisions widening the jurisdiction of courts to judge human rights violations committed by TNCs. We therefore support several proposals made by Palestine and South Africa, namely:

> 9.1: Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses or violations covered under this (Legally Binding Instrument), shall upon the victims and their family's choice, vest in the courts of the State where: (Palestine, South Africa)
>
> 9.2: Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal or natural person conducting business activities of a transnational character, including through their business relationships, is considered domiciled including through their business relationships and global production chain at the place where it has its: (Palestine)
>
> 9.3: Courts vested with jurisdiction on the basis of Articles 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of forum non conveniens, to initiate proceedings in line with Article 7.5 of this (legally binding instrument). (South Africa)

Article 10: Statute of limitations

Paragraph 10.1: We propose to delete the reference to the most serious crimes and to add a reference to labour rights, women's rights, environmental norms and climate obligations.

Article 11: Applicable law

Article 11 does not allow for a clear resolution of conflicts between different national legislations or between international human rights law and trade and investment law for example. It should be explicitly stated that the choice of applicable law should be the choice of affected communities and persons and/or the law most protective of victims' rights. The article 11.2 allows the victims' choice but it limits their options.

Article 14: Consistency with international law and principles

Paragraph 14.5.a.: This paragraph should be modified to guarantee the primacy of this Treaty (when it guarantees greater protection of Human Rights) and Human Rights over any other trade or investment agreements.

> Amendment: any existing bilateral or multilateral agreements, private-public partnerships and contracts, […] shall be interpreted and implemented to ensure the primacy of human rights, in a manner that will not undermine or limit their capacity to fulfil their obligations under this LBI and its protocols, as well as other relevant human rights conventions and instruments.

WRITTEN CONTRIBUTION IN THE FRAMEWORK OF THE INTER-SESSIONAL PERIOD (8th - 9th SESSION) OF THE INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

Joint-contribution by American Association of Jurists (AAJ), Associação Brasileira Interdisciplinar de AIDS (ABIA), Centre Europe - Tiers Monde (CETIM), Corporate Accountability (CAI), FIAN International, Friends of the Earth International (FOEI), International Association of Democratic Lawyers (IADL) and Transnational Institute (TNI), all organizations with ECOSOC consultative status

On behalf of the Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and Stop Impunity[1]

March, 2023

Introduction

Within the context of the inter-sessional consultations leading up to the 9th session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), this document consolidates the written inputs from the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power, and Stop Impunity (the Global Campaign). Comprising over 250 social movements, trade unions, civil society organisations, and communities affected by the activities of Transnational Corporations (TNCs), the Global Campaign has been advocating for the regulation of TNCs under Human Rights International Law for over a decade. The process established by Resolution 26/9 is thus of great significance to our members who actively engage in the process, and work tirelessly to ensure it follows its mandate and intended purpose.

These written inputs are the result of the extensive work undertaken by affected communities, movements, lawyers, and activists from organisations that collectively represent over 260 million people. **They aim to both underline textual proposals that we consider indispensable and propose new language to consolidate or strengthen some provisions of the current and collectively developed revised draft**. These inputs are based on our historical claims, and on concrete proposals and amendments presented by the Global Campaign during the last negotiation sessions. They also take into account the sustained work and textual contributions of many States that, like us, are committed to the building of a Treaty that answers to the needs of those affected by violations committed by TNCs.

The diligence and dedication of these rightful parties has been tireless. The third revised draft, with the comments added by States during the 7th and 8th sessions, built upon over 8 years of negotiations, includes provisions and proposals that reflect the needs and proposals arising from those parties. Even if gaps still exist and although its content needs further consolidation, this text is the only legitimate basis for negotiation. Accordingly, our inputs are exclusively referring to its dispositions and comments. We therefore reiterate here our strong rejection of the Chair's

1 The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) is a network of over 250 social movements, civil society organisations (CSOs), trade unions and communities affected by the activities of Transnational Corporations (TNCs).

informal proposals, which are part of a manoeuvre and a diversionary strategy to undermine the process and the mandate of Resolution 26/9. At the outset, the Chair's proposals are in complete contrast with the agreements and the methodology adopted at the end of the 7th session. Moreover, they are straying from the mandate established by Resolution 26/9, introducing new content that reflects exclusively the Chair's positions and that represents a threat to the democratic character of the process.

We are confident that our contributions, alongside those of committed States, will shape the legal architecture that must ultimately protect the interest of affected communities and rights-holders and assure the responsibility and sanction of TNCs that violate human rights. Given our sustained commitment to the process, the strength of our arguments, and the continuing negative consequences of the activities of TNCs on the lives of billions of people all over the world, we are confident that our voices will be heard, and our suggestions incorporated into the inter-sessional consultations, the 9th session, and the final text.

Preamble

- PP13bis: New article proposed by Palestine
  →This proposal shall be incorporated into the next draft to guarantee the protection of the human right to a clean, healthy and sustainable environment, as recognized by UNGA Resolution A/76/L.75.

- PP11: Amendment by Cameroon and South Africa
  → This proposal shall be incorporated into the next draft to align this paragraph with the original scope and to recognize that TNCs have obligations to respect human rights along their value chains.

- PP11 bis: New article proposed by Palestine
  → This proposal shall be incorporated into the next draft to reaffirm the primacy of human rights, especially in regards to other trade and investment provisions.

- PP18 ter and PP18 quater: New paragraphs proposed by Cameroon
  → This proposal shall be incorporated into the next draft to recognize that TNCs have obligations in international human rights law.

Article 1

- Art.1.1: Amendment by Cameroon and Palestine
  → This amendment shall be integrated in the next draft to include the term "affected persons and communities" next to "victims". Furthermore, the Global Campaign suggests the incorporation of “holders of individual and collective rights” so trade unions are explicitly encompassed by this definition. This shall be standardised throughout the text.

- Art. 1.2: Amendment by Cameroon
  → The proposal to add the term "violation" next to "abuse" must be incorporated and standardised through the next draft. The exclusive use of the term "abuse" implies a fictional hierarchy between States that would violate human rights and TNCs that may only abuse them, as if TNCs did not have an explicit obligation to respect human rights.

- Art.1.3: Amendment by Cameroon
  → This amendment is important to comply with the original scope established by the mandate of the OEIGWG in Resolution 26/9. It shall therefore be incorporated into the next draft.

- Art.1.5: Amendment by Palestine
  → This amendment shall be modified to also include financial capital that finances TNCs. It follows the Palestinian proposal with new language in green:
  *1.5. "**Business relationship**" refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship~~**, or any other structure or relationship as provided under the domestic law of the State**~~, **entities in the value and supply chain, any non-State or State entity linked to a business operation, product, or service even if the relationship is not contractual, as well as** ~~**including**~~ activities undertaken by electronic means.* ***The business relationship shall include financial entities as investors, shareholders, banks and pension funds that finance the activities of TNCs***.

Article 2

As clearly stated by Resolution 26/9, it is necessary to make the regulation of the activities of TNCs, within the framework of the provisions of the Binding Treaty, the main purpose of this process. We propose that the first paragraph of this article reads as follows.

- The Global Campaign would like to propose the following new paragraph for Art.2.1.0 **:**
  To regulate the activities of transnational corporations and other business enterprises of transnational character within the framework of international human rights law.

- Art.2.1a: Amendment by Egypt, China, Cuba, Iran and Bolivia
  → This proposal shall be incorporated into the next draft to comply with the scope established by Resolution 26/9.

- Art.2.1c: Amendment by Egypt / Art.2.1e: Amendment by Brazil and Panama:
  → Proposals to delete the term "mitigation" when referring to human rights violations or abuse shall be incorporated into the next draft. On the one hand, due to the nature of the crime, human rights violations should not be mitigated, but always prevented and fully repaired. Risks, on the other hand, can and should be mitigated in some circumstances.

Article 3

In Art.3.1 we propose to combine the amendments of Egypt/Pakistan and Palestine/Namibia, as follows:

This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character along the value chain.

Article 4

The proposal by Cameroon to change the title of this article to "***Rights of Affected Individuals and Communities/Right of victims"*** shall be incorporated into the next draft. This change is

necessary to guarantee the rights of all individuals, communities and workers that are affected or might be affected by violations of human rights.
Throughout the article, States have proposed amendments and new language necessary for the effective protection of individuals, communities and workers against violations of human rights by TNCs. These proposals shall therefore be incorporated into the text:

- Art.4.2 c and 4.2 d: Amendment by Palestine

- Art.4.2f: The amendments by Palestine and Cameroon/Namibia are both very important, and should thus be merged as following:
  4.2f: be guaranteed access to legal aid and information held by businesses and others and legal aid relevant to pursue effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure;

- Art.4.2f ter and 4.2f quater: New paragraph proposals from Palestine and Cameroon

- Art.4.3 bis: New article proposed by Cameroon

Finally, all amendments proposed by the Plurinational State of Bolivia, and supported by several States, on the inclusion of peasants' rights throughout the articles, should be accepted and incorporated into the future Treaty.

Article 5

In order to strengthen the provisions of this article, it is key to support and incorporate the following amendments into the next draft:

- Art.5.1: Amendment by Cameroon, South Africa and Palestine

- Art.5.2: The amendments by Cameroon and Palestine could be merged. The paragraph would read as follows :
  States Parties shall take adequate and effective measures to guarantee ***all rights of ~~a safe and enabling environment for~~*** *persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity.* ***This obligation requires taking into account their international obligations in the field of human rights, and***

their constitutional principles. State Parties shall take adequate and effective measures including, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses and violations linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work.

- Art.5.3: Amendment by Palestine
  → This amendment is important to guarantee the international character the Treaty must have. As judicial systems in several countries may be flawed, deficient or partial, the implementation of the Treaty cannot be a national prerogative exclusively. References to domestic law of states, thus, should be limited to i) national law that is more protective of human rights, ii) dispositions that claim for international judicial cooperation in the prosecution of violations, and iii) provisions determining ways in which domestic law must adapt and comply with this draft Treaty.

- Art. 5.3bis: New article proposed by Cameroon

Article 6

The article on prevention is a pillar of the future Treaty. This is the article where obligations for TNCs[2] should be stipulated, in addition to and separated from the obligations listed for States. Furthermore, this article should ensure that due diligence mechanisms are obligations of results and not only of means.

- Art.6.1: Amendment by Egypt, Pakistan and Philippines
  → This amendment shall be incorporated into the next draft so the future treaty complies with the scope established in Resolution 26/9 and article 3.

- Art.6.1 bis: New article proposed by Cameroon
  → This proposal shall be incorporated into the next draft to ensure States adapt their laws and behaviour to prevent human rights violations in the context of business activities of transnational character.

- Art.6.2: Amendment by Egypt and Cuba
  → This amendment as well shall be integrated to comply with the original scope, to standardise the term “violations”, as well as to delete the term “mitigate” which weakens the provision.

- Art.6.2 bis: New article proposed by Cameroon
  → This proposal is key to recognise the obligations of TNCs to prevent human rights violations.

- Art.6.3b: Amendment by Panama, Mexico, Brazil and Palestine
  → This amendment seeks to establish that violations shall not be mitigated but rather

2 See here our document of arguments on the importance of recognizing and establishing clear and proper obligations for TNCs.

prevented, as stated before. The term “abuses” should be changed to “violations”, and it shall be incorporated into the next draft.

- Art. 6.4: Amendment by Cameroon
  → This amendment is important because it suggests another external entity to monitor business due diligence, but it should also include a public mechanism of control.

- Art.6.4c: Amendment by Palestine and South Africa
  → This amendment is very important to allow communities to be consulted, as a possibility to enshrine the “Right to say NO” to corporate projects in their territories. This amendment is also important because it states that consultations must be carried out by a public body and not by TNCs.
  → The obligation to carry out meaningful consultations is not enough to guarantee respect for the right to participate in decision-making of the interested populations. Therefore, it is necessary to add the term “*mandatory*”:
  6.4c: Conducting meaningful and mandatory consultations…

- Art. 6.4d bis: New proposed paragraph from Palestine
  → This important proposal adds to meaningful consultations The Right to Say No, guaranteeing communities on the ground have control over their territories and their ways of living.

- Art.6.4f bis: New proposed paragraph from Cameroon
  → This proposal shall be incorporated into the next draft as it will provide a mechanism for financial guarantees to already vulnerable affected communities.

- Art. 6.8: Amendment by Cameroon
  → This amendment is very important, and shall be incorporated into and integrated in the next draft, as it strengthens the provision on prevention of corporate capture.
  → We propose to add “philanthropic institutions” that also have to be identified as corporate capture actors.

- Art.6.8 bis and ter: New articles proposed by Cameroon
  → These proposals shall be incorporated into the next draft, as they rightly point out the role of International Financial Institutions in corporate violations. These proposals rightly aim at establishing obligations for these entities.

Article 7

- Art. 7.1bis: New article proposed by Palestine
  → This new article is very important to guarantee that those violating human rights are not determining how these same violations should be remediated. It shall therefore be incorporated into the next draft.

- Art.7.2: Amendment by Palestine
  → This amendment is very important to strengthen the right to information of those affected. It shall therefore be incorporated into the next draft.

- Art.7.3: It is important to keep the language *"States Parties shall provide adequate and effective legal assistance to victims throughout the legal process",* which is the most favourable for those affected.

- Art.7.3d: Amendment by Palestine
  → This amendment shall be incorporated into the next draft in order to remove legal obstacles as the *forum non conveniens* and to add the term "violations".

- Art.7.5: Amendment by Palestine
  → This amendment shall be incorporated into the next draft to enshrine the reverse of the burden of proof, needed to fulfil the right to access to remedy.

- Art. 7.2, 7.5, and 7.6: Amendments by Palestine
  → These amendments, just as 5.3, also guarantee that references to domestic law of States are there to expand the human and environmental rights of affected individuals or communities–and not to their detriment. As such, they shall be incorporated into the next draft.

Article 8

To safeguard the rights stipulated by the treaty, and to guarantee accountability in case of their violation by TNCs or other businesses along its value chain, the Treaty must explicitly establish **administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs**. Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

- Art. 8.1 and 8.2: Amendments and support by Palestine
  → These two articles shall be incorporated into the next draft; just as Art. 5.3, they reference domestic law of States to expand human and environmental rights of individuals and communities.

- Art.8.3 and 8.8: Amendments by Palestine
  → These two amendments shall be incorporated into the next draft. The first allows for the establishment of concrete liability provisions and a regime of sanctions in case of violations of human rights committed by TNCs. The second is key to guarantee that national legislations establish criminal liability to legal persons for human rights violations.

- Art. 8.7: Amendment by Palestine
  → This amendment shall be incorporated in this paragraph about due diligence. It is important to highlight that, due to the lack of effective monitoring and enforcement mechanisms, TNCs can use Due Diligence to evade responsibility. Liability of TNCs regarding human rights violations should not be determined by a list of precautions

eventual perpetrators must take, but by the actual harm caused to individuals, communities, and the environment.
Any reference to Due Diligence in the Binding Treaty should i) make clear its encompassing scope of application (the whole of global value chain, up and downstream); ii) include clear sanctions and administrative, civil and criminal liability regimes when transnational corporations do not comply with their obligation; iii) cover all human and environmental violations; iv) ensure the primacy of human rights over any trade and investment instruments; v) provide for specific obligations, separated and independent from those of States, for TNCs and international financial institutions involved in violations; vi) include provisions to improve access to justice and vii) establish a multi-party body (State, unions, human and social rights organisations) that monitors complaints and reparations. The amendment shall thus be incorporated into the text. Due diligence can not be a central concept, but rather an auxiliary obligation, linked to prevention and established as a direct obligation for transnational companies.

- Art.8.10 bis: New article proposed by Palestine
  → This amendment is important to establish the joint and several liability of parent companies along their value chains. It shall therefore be incorporated into the next draft.

- Art. 8.10 ter: New article proposed by Palestine -->
  → This amendment is also important for the establishment of criminal liability in the context of human rights violations committed by TNCs.

- In order to guarantee the effectiveness of the provisions of this article, the amendments made by Brazil and China in Art.8.5, 8.6 and 8.7 shall be rejected.

- **New proposals from the Global Campaign :**
  8.11: The parent company, the outsourcing companies it uses, their respective subsidiaries, and all persons with whom the parent and its outsourcing companies have business relationships and/or which are part of their global value chains, shall be jointly and severally liable for the obligations established in this (Legally Binding Instrument.)

  The obligation to assume this joint and several liability shall be directly applied by judges where the existing legal framework in force in the home and/or host states or in the states where the affected persons or communities are based or domiciled is not adequate for the implementation of this (Legally Binding Instrument).

  8.12 TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, whether \(weather) (home states, host States or States affected by the operation of TNCs. To this end :
  a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.
  b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities as the case may be. c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.

Finally, it is crucial to reject the proposal for an Article 8bis made by Brazil, as it will limit the capacity of the future Treaty to ensure access to justice and remedy for affected individuals, communities and holders of individual and collective rights.

Article 9

There are many important amendments that strengthen provisions widening the jurisdiction of courts to judge human rights violations committed by TNCs. They should therefore be incorporated into the next draft.

- Art. 9.1: Amendments by Palestine and South Africa
- Art.9.2: Amendment by Palestine
- Art. 9.1b, Art.9.1c, Art.9.2, Art.9.2d bis, Art.9.5: Amendments by Palestine
- Art. 9.3: Amendment by South Africa

Finally, to protect the provisions of this article, and thus the effectiveness of the future Treaty, it is key to reject the amendments that aim at weakening the text:

- Art. 9.3: Amendment by China
- Art. 9.4 and 9.5: Amendments by Brazil

Article 14

- Art. 14.3: Amendment by Palestine
  → This article, with the amendment, is very important to guarantee that only domestic law that is more protective of human and environmental rights than those stipulated by this Treaty prevail

- Art. 14.5a and 14.5b: Amendment by Palestine
  → In order to strengthen the provisions that aim at re-affirming the primacy of human rights over trade norms and agreements, it is important to incorporate these amendments
  → The Global Campaign would like to propose a slight change in Art.15.5b: instead of ***"be compatible",*** the paragraph should say ***"adjust and strictly comply"***

Article 15

One of the most serious limitations of the current draft is the design of the compliance monitoring mechanism. As currently established, the Committee is very weak and unable to guarantee the effectiveness of the provisions of the Treaty, even when they are as limited as those imposed on the States by this draft. Article 15 should, therefore, include the possibility for affected people and communities to file complaints against TNCs, and to make the Committee's recommendations binding.

Furthermore, the Global Campaign understands that it is essential to establish, in complementarity to the Committee, an International Tribunal[3] that receives individual and collective lawsuits in the event of human rights violations committed by TNCs directly or through their global production chains, even if this is done, during the Conference of States Parties, ex-post the adoption of the Treaty–as suggested in the Elements Paper published in 2017 by the Chair of the OEIGWG.

In this sense, we propose to add the following provisions:

New proposals from the Global Campaign:
15.4.a.bis: The Committee receives and considers complaints submitted by victims and affected communities concerning the activities of transnational corporations that act in contradiction to this legally binding instrument.15.4.a.2bis: States Parties recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Treaty.

15.4.b.bis: The decisions rendered by the Committee shall be binding and shall be followed by action by transnational corporations and other business enterprises of transnational character, States Parties and related organisations (such as a special fund for victims, administrative sanctions for the companies concerned by the decisions, etc.).

15.4.c.bis: The Committee may also make recommendations to States parties to guide them in their strategies to regulate transnational corporations' activities in order to prevent human rights violations. For this purpose, the latter may be assisted by independent experts and professionals in the fields in question.

The Global Campaign also proposes a new paragraph in art.15.8 (inspired from the language used in the Elements Document published by the Chair of the OEIGWG in 2017): ***State Parties shall decide for the establishment of an international judicial mechanism for the promotion, implementation and monitoring of the legally binding instrument, in the form for instance of an International Court on Transnational Corporations and Human Rights.***

3 See here our document of elements for an International Tribunal on TNCs and human rights.

UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

Centre for Human Rights
Faculty of Law

AFRICAN ACCA
COALITION FOR CORPORATE ACCOUNTABILITY

Centre for Human Rights, University of Pretoria (Special)
For more information, please contact; Arnold Kwesiga,
Mobile: +256 772 446 728. Email: arnold.kwesiga@up.ac.za.

30 March, 2021

Centre for Human Rights, University of Pretoria submission to the Chair-Rapporteur and UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

This submission is made by the Centre for the Human Rights, University of Pretoria and the African Coalition for Corporate Accountability (ACCA). The Centre for Human Rights is an internationally recognised university-based institution combining academic excellence and effective activism to advance human rights, particularly in Africa. It aims to contribute to advancing protection and respect for human rights, through education, research and advocacy. The ACCA is a coalition of over 136 organisations from 32 African countries which supports African communities and individuals whose human rights are adversely impacted by the activities of corporations, both multi-national and domestic. The Centre for Human Rights hosts the ACCA Secretariat.

A. General Comments

1. The Centre for Human Rights and ACCA have been involved in the process to elaborate a legally binding instrument on TNCs and other business enterprises (LBI) and reiterate our support to the working group towards a strong LBI, alive to the practical realities of communities—especially from the global south, affected by adverse human rights violations in the context of business activities. We emphasize that the third revised draft is the only legitimate draft to inform negotiations and call on States to continue meaningfully and effectively engaging in the process to ensure that we have a treaty that will address the increasing human rights abuses and violations arising out business and development projects. We reiterate our support for the process of developing a legally binding instrument on TNCs and other business enterprises and human rights, and

commit to ongoing participation in the process. We acknowledge that the current draft reflects changes and advancements made in previous versions. We assert that there remain critical areas that require reinforcement to ensure that the Treaty's language and text are effective enough to address the numerous corporate abuses and breaches seen globally, particularly in the Global South.

2. The Centre and ACCA applaud noteworthy developments in the third revised draft. The treaty process has made major strides, both in terms of draft negotiations and the overall remarkable levels of commitment of States. To achieve global sustainable development, states must remain committed and invested in bringing this process to a reasonable conclusion and establishing a new global order in which human rights are protected, respected, promoted, and guaranteed by business actors and business activities. The use of the term "obligations" rather than "responsibilities" of businesses to prevent and mitigate human rights violations and respect internationally recognized human rights, for example, is a commendable improvement to the text that strengthens the Treaty's purpose. Nonetheless, important issues raised in the second draft were not addressed in the third draft and there are new concepts introduced in the third draft that require careful consideration during negotiations in order to achieve a Treaty that meaningfully and effectively serves its purpose.

3. We continue to urge States, particularly those in the Global South, to participate meaningfully in the Treaty process, as well as to accommodate and consider previous and novel Civil Society comments strengthening the text of the draft treaty. This will help to create a Treaty that is alive and effective in addressing common global challenges like corporate abuses and violations, rising cases of corporate capture, environmental challenges, access to remedies, and rights of victim in the context of business activities.

4. We believe that the overall goal of the treaty should be to contribute significantly to the end of corporate impunity and the protection of human rights in the context of business activities. The treaty and its implementation mechanism must be strong and effective to prevent business abuses and violations of human rights, as well as a tool for prevention and effective remedial and grievance resolution, as well as guarantees of non-repetition. Specifically, the third revised needs to strengthen provision on human rights defenders as victims. It is critical that they are acknowledged as distinct victims of business-related human rights violations, and that any special protections granted to them are explicitly acknowledged. With regards to the provision on non-judicial mechanisms, we submit that this might be read as if excluding victims' rights to judicial mechanisms.

5. Throughout the treaty, we argue for a victim-centred approach.The third revised draft made some steps in improving access to remedies, but there are still a number of places where it needs further strengthening. In general, several of the sections are still ambiguous and might use additional detail in the subsequent draft. The provision in Article 4.2(f) on access to information warrants note in this context as one that requires explanation. It may use clearer language that is more targeted. For instance, it is important to elaborate on and explain precisely what information is covered by this provision.

6. We reiterate the importance of remedy in the LBI and applaud the draft treaty's emphasis on accountability and redress for corporate abuses and violations of human rights. We commend the third revised draft's significant advancement, identifying legal barriers to

redress and further makes suggestions on how these barriers can be removed. The concept of *forum non conveniens* remains problematic because it has prevented many victims of corporate abuses from accessing justice and redress due to technicalities associated with the concept. Victims of corporate abuses and violations should be availed opportunity to initiate proceedings in the courts of another State Party where the violations arise out activities of a transnational character.

7. We recommend that the provision be redrafted to require State Parties to "remove legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in the courts of another State Party in ALL (rather than 'appropriate') cases of human rights abuses resulting from business activities of a transnational character"

8. Regarding the informal proposals made by the Chair-Rapporteur on October 6, 2022, we align our voice with submissions made by states including South Africa, Namibia, Palestine and Egypt among others that those informal suggestions risk reversing the incremental progress made towards elaborating a LBI as captured in the third revised draft. As such only the third revised draft should be the document referenced in these negotiations.

9. We urge states not to promote or adopt language that weakens the treaty, blurs legal obligations on parties, and removes specificity for important standards of legal liability and accountability to the benefit of corporate organisations and lobbyists and several demands of some global north states related to their colonial legacies. As such our submissions are made only in respect of the third revised draft treaty and continue to reiterate that these should be the only legal basis for negotiations.

B. Third Revised Draft Textual Suggestions

Article 1: Definitions, language and core concepts

Article 1.1: Victim

10. The concept of "victims" is central to the treaty's overall objective, and its use must be preserved. As a result, we strongly oppose suggestions made during the 8th session to replace the word victim throughout the text with rights holder. The term victim is used in existing human rights treaties and jurisprudence. It is more specific than the term "rights holder," which under the Universal Declaration of Human Rights refers to every human being. A victim is a rights holder whose rights have been violated. We believe that keeping the word victim in this treaty focuses on the company's wrongdoing and has the potential to increase accountability.

11. Regarding the definition of the word victim itself, the suggestion by the State of Palestine in our opinion should be maintained with some additions. While this definition is a step in the right direction in terms of filling some major gaps, it has the effect of excluding those who have suffered harm while intervening to assist victims or prevent victimization, such as human rights defenders, civil society organizations, activists, lawyers, journalists, and trade unions.

12. We propose that the definition specifically refers to such groups so that the remedies in Articles 4 and 8 can be extended to them. In this regard, we propose that Article 1.1 on victims be amended to read:

    *"Victim" shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm that constitute human rights abuse, through acts or omissions in the context of business activities. The term "victim" may also include the immediate family members or dependents of the direct victim**, as well as any person or group of people who suffer harm as a result of intervening to help victims in distress or to prevent a person or group of people from being victimized**. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted*

Article 1.2 Human rights abuse

13. We propose that the term human rights abuse be used instead of human rights violation, as proposed by a number of States during the eighth session. We also welcome the expansion of the definition of human rights to include the right to a healthy, safe, clean, and sustainable environment in Art. 1.2, as proposed by some States during the 8th session negotiations, is a critical issue in the face of an imminent climate crisis.

14. Consequently, we most strongly support the definition endorsed by South Africa and Mexico, which uses the word 'abuse' instead of 'violation,' and includes the word 'omissions,' in contrast to the submission by the State of Brazil. We agree that the words "group of persons" in the definition must be preserved, aligning ourselves with the interventions of the States of Palestine and Namibia in this regard.

Article 1.3 Business Activities

15. Regarding the definition of business activities, we align ourselves with the definition offered by the State of Palestine, particularly the inclusion of **'particularly those of a transnational character**' as we understand TNCs to be the most prevalent regarding human rights abuses and violations in the context of business activities.

Article 1.4 Business activities of a transnational character

16. We submit no textual suggestion to 1.4 and confer that it should be left as is, as it adequately describes the characteristics of TNCs.

Article 1.5

17. We suggest keeping the inclusion of the text ***'including throughout their value chains'*** in the definition of business relationship as suggested Panama, Egypt and South Africa. The success of businesses relies on a very strong value chain and respect for human rights should therefore be imposed on everyone within the value chain. We believe the inclusion of Article 1.5 bis is unnecessary.

Article 2: Statement of Purpose

Article 2.1

18. **Regarding 2(1)(a)**, we recommend that the proposals by Mexico and Panama be accepted. We emphasize that the words ***'particularly those of a transnational character'*** should be retained, as opposed to removal suggestions made by Egypt, China, Cuba, and Iran. Retaining this phrase emphasizes that, while all business enterprises can abuse and violate human rights, TNCs are the most egregious offenders, and thus their role should be highlighted. By removing the words 'particularly those from this Article, it runs the risk of giving an incorrect impression that TNCs are the only offenders and thus the only type of business enterprise that this treaty seeks to regulate.

19. **Regarding 2(1)(b),** we strongly oppose the removal of the word ***"obligations"*** as proposed by the European Union, Brazil, and the United States of America. We support the State of Palestine's submission to keep the word 'obligations' in the text. This, we believe, reduces the notion of a recommendation to businesses to respect human rights. Keeping the word obligation creates a legally binding requirement for businesses to respect human rights, and in this context compels businesses to follow or avoid specific courses of action that may result in human rights abuses and violations whereas replacing it with the word responsibility creates a moral requirement. As this is a legal text, we suggest that the word obligation is therefore more appropriate. Using the word "responsibility" may ensure that businesses are held accountable after the fact, but it does not prevent human rights violations from occurring in the first place. If the word responsibility is to be added, we believe it should be used in conjunction with the word obligation. The Article to read; ***"To clarify and ensure respect and fulfilment of the human rights obligations and responsibilities of business enterprises"***

20. **Regarding Article 2.1(d)** we note that human rights violations encountered by women in the context of business activities combine pre-existing gender inequality with substantial power disparities between business actors and individual women. These factors, when combined, create significant barriers to justice for women workers at the bottom of the value chain, as well as women in communities where corporations operate. Furthermore, the specific impact of human rights violations on children should be considered. To this end, the textual suggestions made by Panama, Argentina, Peru, Palestine, South Africa, Namibia, Kenya, and Bolivia should be retained as they offer a more victim-centred approach.

21. **Regarding 2.1(e)** it is generally accepted and well substantiated that the most severe forms of business-related human rights violations take place in conflict-affected areas. This is something that the UNGPs specifically mention. As a result, the provisions of the treaty in 2 1(e) must acknowledge corporations' role in victimizing people in conflict-affected areas and as such the text should be read as proposed by Palestine and Iran to include ***"including those affected by conflict'***

Article 3: Scope

22. The updated Draft Treaty must continue to place a significant emphasis on TNC accountability as a key goal, even if States elect to widen their purview. It must make sure that States establish domestic laws, procedures, and policies aimed at holding

corporations accountable for violations and/or abuses brought on by business activity, especially business activity with a transnational component.

Article 3.1

23. In light of the foregoing, we propose that States adopt the provisions proposed by the states of Palestine and Namibia for the text of 3.1 to read

This (Legally Binding Instrument) shall apply to all business activities with a particular focus on transnational corporations and other business enterprises in the value chain that undertake business activities of a transnational character.

Article 3.2

24. Article 3.2, as envisioned by the State of Palestine, better reflects the treaty's aspirations by replacing the word ***"or"*** with '***and'***. As a result, we propose that such a substitution be made.

Article 4: Rights of victims

25. The primary aim of the proposed treaty, to address the issue of remedies and reparations in the context of business-related human rights abuses, is strengthened by Article 4 on victims' rights. A few of Article 4's requirements remain unclear, despite the fact that it contains essential elements for securing justice for impacted communities and individuals.

In this regards we suggest the following:

Article 4.1

26. For the reasons given in Article 1, we strongly suggest that the term victim be maintained throughout the text of Article 4. Thus, we disagree with the submission by Cameroon to replace the word **'victims'** with '**affected individuals and communities**.

27. In light of the suggested modified definitions of both terms in Article 1, the text of a final negotiated Treaty must contain the protection of victims against both ***violations and abuses.*** This needs to be clarified throughout the entire text. The formulation of Article 4.1 as it was suggested by the State of Palestine and Ecuador is more thorough and must be upheld.

Article 4.2

28. In 4.2.a the inclusion of ***'taking into consideration factors that affect those in conflict areas'*** as suggested by the State of Palestine should be maintained. Similarly, the wording of 4.2 as suggested by Panama, South Africa and the State of Palestine during the 8th sessions of negotiations should be adopted.

29. In 4.2.c the text should read; be guaranteed the right to fair, appropriate adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, reparation, satisfaction, ***guarantees of non- repetition, injunction,***

environmental remediation, and ecological restoration; including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right for long-term monitoring of such remedies.

30. Article 4.2(f) allowing victims the right to access information, for example, is quite ambiguous and needs to be rewritten. To avoid any misunderstandings, the precise information that victims should have access to, must be made apparent in the provision. In some ways, this rule can draw attention to the ties that exist between a parent firm and its subsidiaries, thus paving the way for future implementation procedures. In this regard, we recommend using the provision as suggested by the State of Palestine during the 8th session in the text with only slight modifications to read;

be guaranteed access to information held by businesses and others and legal aid relevant to pursue an effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls, human rights defenders, and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents;

Article 5: Protection of victims
Article 5.2

31. A better iteration of Article 5.2 would read as follows:
States Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, harassment, violence or insecurity. Adequate and effective measures include, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work, including gender-based

Article 6: Prevention

32. Article 6 on Prevention, presents the backbone of the treaty. We reiterate our comments as submitted during the 8th session that, Articles 6.1 and 6.2 have gaps in that they fail to categorically require States to make changes in corporate laws that are necessary to render businesses accountable and liable for fundamental rights violations, as well as to create direct human rights violations.

33. As a result, we support the proposals and textual modifications made to Article 6.2 by South Africa, Mexico, Brazil, and Panama as well as Cameroon's addition of Article 6.2 ibis, which requires TNCs to NOT take any actions that present a real risk of undermining and violating human rights and to identify and prevent human rights violations and risks of violations throughout their business operations.

34. We maintain that there is a gap between identifying potential business abuses and implementing effective countermeasures. To remedy this, we endorse the proposal made by South Africa and Palestine to have State Parties require businesses and all other participants in the value chain to conduct ongoing, continuous, and frequently updated human rights due diligence. We endorse the State of Palestine's suggestion of the inclusion of environmental and workers' rights in the text of Article 6.3 (a).

35. Additionally, the third revised draft's Article 6.3 should impose a duty on businesses to continuously undertake human rights due diligence into their own procedures. States must take part in human rights impact assessments and due diligence procedures in order for the process to be successful. We also applaud the revised draft's Article 6.4(a), requiring firms to do human rights impact assessments on the environment and climate change.

36. We advise that the references to "those of African heritage" in Article 6.4(c) and the draft's Preamble be clarified/defined, if not removed entirely. From an African standpoint, we are unable to comprehend this term, and its use does not adequately convey the Treaty's worldwide nature. We advise using a term or terms that are precise, inclusive and adequately convey the Treaty's global scope.

Article 7: Access to remedy

37. We reiterate the importance of remedy in the LBI and applaud he draft treaty's emphasis on accountability and redress for business and human rights abuses and violations. The third revised draft takes a significant step forward by identifying legal obstacles to redress and requesting that these obstacles be removed. The concept of *forum non conveniens* remains problematic because it has prevented many victims of corporate abuses from accessing justice and redress due to technicalities associated with the concept.

Article 7.2:

38. We align ourselves with the comments made by Palestine during the 7th session and reiterated in the 8th session, to facilitate access to information in a gender sensitive manner and the deletion of the word 'appropriate' in the same provision, noting in this regard that the access to information should be facilitated in **ALL** cases, without distinction between what might be deemed appropriate or otherwise.

Article 7.3:

39. We endorse comments made by South Africa and Palestine on Article 7.3 to the effect that this provision should read '**State Parties shall provide adequate and effective assistance to victims throughout the legal process, including by…and on the contrary reject suggestions by some States to include clauses in 'national legislation'** as this has the potential to impose direct responsibility on the State and not on the companies and OBEs.

40. We reiterate our previous position that, as proposed by South Africa, Panama, Peru, Palestine, and Mexico, Article 7 should assure the non-prejudicial protection of victims'

rights to be heard at all stages of proceedings, adding the wording "avoiding gender and age stereotyping" to Article 7(3) (b).

Article 8: Legal liability

41. A progressive and welcome addition to the treaty is the proposed legislation in Article 8.1, which would require States to ensure that their domestic law provides for a thorough and sufficient system of legal liability for human rights violations resulting from the business activities or business relationships of legal and natural persons.

Article 9: Adjudicative jurisdiction
Article 9.1:

42. With respect to Article 9.1, we endorse the suggestions made by South Africa and the State of Palestine during the 7th session to include 'or violations' following the phrases human rights abuses, as well as 'upon the victims and their family's choice'. This, in our opinion, provides an approach to adjudicative jurisdiction that is victim-centred.

43. In Article 9.1 (c) we endorse the State of Palestine's addition of the words '**including in their business relationships and global production chain',** noting that this approach offers broader protection to victims.

Article 9.2:

44. In 9.2 we align ourselves with the State of Palestine's suggestion for the deletion of the words '**domestic law'** and inclusion of **including through their business relationship and global production chain'**

45. And 9.2 bis which adds **a place where substantial assets are held** to be considered as a place of domicile for a company.

Article 9.3:

46. Under Article 9.3 we support South Africa's submission during the 7th session for the text to read; **Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in line with Article 7.5 of this (legally binding instrument).**

Article 10: Statute of limitations

47. We support submissions that propose that domestic statutes of limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow for a reasonable and gender-responsive period of time for investigation and prosecution or other legal proceedings.

Article 11: Applicable law

48. We endorse that the "applicable laws" section of the LBI must be retained in the draft text of the treaty and it must recognize indigenous customary laws.

Conflicts between, for instance, various state laws or between international human rights law and trade and investment law cannot be satisfactorily resolved under Article 11. It should be made clear that the applicable legislation should be chosen by the affected groups and individuals and/or the law that protects victims' rights the best.

Article 12: Mutual Legal Assistance and International Judicial Cooperation

49. We suggest that Article 12.12 which states that ***Mutual legal assistance or international legal cooperation under this article may be refused by a State Party if it is contrary to the applicable laws of the requested State Party,*** be removed.

Article 13: International Cooperation

50. Submissions that call for Article 13 on international cooperation to maintain the standard of good faith for States to cooperate with one another to stop corporate abuse of human rights with the requirement that State Parties take 'all necessary steps' to do so, must be upheld. The good faith standard represents a concrete obligation that State Parties must comply with.

Article 14: Consistency with International Law principles and instruments implementation

Article 14.3

51. The text of this article should replace the word ***'affect'*** with the phrase '***shall be interpreted in consonance with, and without limiting'***

Article 14.5

52. In Article 14.5(a) we suggest deleting ***'interpreted and implemented in a manner that will not undermine or limit their capacity to fulfil'*** with ***'reviewed, adapted and implemented in compliance with and in a manner that does not undermine'***

53. In 14.5(b) the word ***'new'*** must be deleted

WRITTEN INPUT ON ARTICLES 1-14

Of the Third Revised Draft for a Legally Binding Instrument (LBI) to Regulate the Activities of Transnational Corporations and Other Business Enterprises in International Human Rights Law

REGIONAL CONSULTATION - MARCH 2023

CONTENTS

Introduction

The present contribution to the regional consultation of the United Nations' (UN) open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG) has been produced by CIDSE, the international family of Catholic social justice organisations, and its Corporate Power working group. In order to achieve a Legally Binding Instrument (LBI) that can truly make a difference for those in the Global South directly impacted by corporate activities, we have consulted with partner organisations in the Global South in order to mobilise their expertise and integrate their points of view.

Through our commentary and additions to the text of Articles 1 through 14 of the Third Revised Draft of the Legally Binding Instrument, we want to ensure the future Fourth Draft can effectively accomplish the double objectives of preventing human rights abuses, particularly by transnational corporations, and ensuring effective remedy and justice for those affected.

While rooted in our previous contributions to the Third Revised Draft[1], in the present text we have given prominence to proposals by States on the Third Revised Draft during the 8th and 7th sessions, while re-iterating the need for a victim-centred text through additional text when we considered States' amendments lacked important provisions. While the rest of the text examines in details changes proposed to the draft LBI, we would like to highlight here three general points that States should consider throughout the text:

1. Emphasise collective rights. While the notion of victims and affected stakeholders in the draft do include the collective aspects of the rights affected, it is important to detail and engrain in the text the role that collective rights play in non-Western legal systems. This is particularly important in the case of communities at large and peoples whose sovereignty and autonomy is recognised by international law, such as Indigenous Peoples or afro-descendant communities[2]. An emphasis on collective rights would strengthen the enjoyment of traditional and indigenous rights over land and the natural environments. Amendments in this sense are put forward on Articles 1, 4, 5, 6 and 7, but the text should generally be revised to allow for the multiplicity of collective rights enjoyed by peoples and communities.

2. Cover environmental and climate-related abuses and violations. The inclusion of environmental damage and climate-related impacts in the LBI has been an issue of discussion since the beginning of the OEIGWG work. As we have stated in previous contributions, a forward-looking LBI cannot overlook climate and the environment. The Fourth Draft should embrace the precautionary principle, and fully include the right to a clean, healthy and sustainable environment. Importantly, the European Commission's Corporate Sustainability Due Diligence Directive (CSDDD)[3] also covers environmental impacts – the LBI should follow suit and recognise that the protection of the environment and climate in the context of corporate activities are essential for the enjoyment of virtually all human rights.

3. A victim-centred text. While the prevention of human rights abuses by companies is essential, the real innovation of the LBI resides in its provisions relating to civil liability, access to justice, applicable law and choice of jurisdiction. These provisions would establish an international framework for legal accountability and allow to overcome many national and international barriers victims face when seeking justice transnationally. In the European context, it would strengthen regional frameworks like the CSDDD and complement national initiatives like the German and the French due diligence laws, providing a harmonised framework for access to justice[4].

Article 1 – Definitions

We suggest amending Art 1.1 to add "affected individuals, communities and peoples" after 'victims'. This would better reflect the collective nature of harm often experienced by rights-holders. Particularly human rights abuses in the context of corporate activities often impact groups of people, such as Indigenous People and Afro-descendant communities who enjoy collective rights under international and domestic laws. Additionally, victims of abuses in the context of business activities are often children, who may suffer specific developmental impacts – this should be reflected in the article. For this reason, we suggest amending Art 1.1 as follows:

[1] See CIDSE's contributions to the Seventh and Eight Sessions of the OEIGWG.
[2] See the International Labour Organisation's (ILO) Convention 169 on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples.
[3] European Commission, Proposal for a Corporate Sustainability Due Diligence Directive.
[4] Bernaz and others, The UN Legally Binding Instrument and the EU proposal for a Corporate Sustainability Due Diligence Directive, 2022.

> ***Art 1.1*** *– "Victims"* ***or "affected individuals, communities or peoples****" shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm that constitute human rights abuse, through acts or omissions in the context of business activities. The term "victim" may also include the immediate family members or dependents of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.* ***When the victim is a child, harm should contemplate the impacts on their development.***

With regard to the definition of human rights abuses in Art 1.2, we suggest keeping the original text as formulated in the Third Revised Draft. We strongly suggest keeping the reference to a clean, healthy and sustainable environment[5]. As recognised by the Human Rights Council and the UN General Assembly, a clean, healthy and sustainable environment is a crucial condition to enjoy most human rights. Additionally, in this formulation, the article reflects the principle recognised in the United Nations' Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines on Multinational Enterprises (OECD Guidelines) that corporate activities can affect virtually any human rights. We also suggest amending Art 1.2 in line with our comments on Art 1.1. Additionally, it is important to recognise that State actors can also violate human rights in the context of business activities. In line with the practice in international human rights law, we suggest refering the definitions to both breaches of companies' obligation to respect (abuses) and of States' obligation to protect and fulfil human rights (violations). For this reason, we suggest adding "violations" to the definition of human rights abuses.

The amended Art 1.2 would read as follows:

> ***Art 1.2*** *– "Human rights abuse* ***and violation****" shall mean any direct or indirect harm in the context of business activities, through acts or omissions, against any person****,*** ~~***or***~~ *group of persons* ***or people****, that impedes the full enjoyment of internationally recognised human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.* ***"When the "rights-holder" is a child, harm should contemplate the impacts on their development.***

Article 2 – Statement of Purpose

With regards to Article 2, setting out the Statement of Purpose of the LBI, we suggest enshrining in the text the need for person-centred, gender-sensitive access to remedy and justice – taking into account the differentiated impacts of human rights violations on different groups of at-risk persons. For this reason, and as suggested by numerous States during the 7th and 8th sessions, we suggest amending Art 2.1d as follows:

> *Art 2.1d – To ensure access to* ***gender-responsive, child-sensitive and victim-centered*** *justice and effective, adequate and timely remedy for victims of human rights abuses in the context of business activities;*

In Art 2.1e, we suggest replacing "prevent and mitigate human rights abuses" by "prevent and remedy human rights abuses and mitigate risks of abuse." While risks of human rights abuses in the context of business activities should be mitigated when prevention is not possible (because, for instance, a company is contributing to a human rights abuse but it is not directly causing it), when those risks concretise in abuses keeping individuals from enjoying their rights, the activities causing the abuse must be terminated. In accordance with the OECD Guidelines on Multinational Enterprises and the United Nations' Guiding Principles on Business and Human Rights (UNGPs), the text should also make it clear that when companies do cause harm, they have an obligation to remedy it.

[5] A position supported in the 7th and 8th session by South Africa, Mexico, Palestine, Costa Rica, Panama.

Both the obligation to cease harm and to remedy it are also principles established in the European Commission's CSDDD proposal.

Article 3 – Scope

All businesses must respect human rights, and the way in which they may do so should depend on their size, context of operation, turnover, governance structure[6]. We agree that the LBI should set out this principle, which is recognised in the UNGPs and OECD Guidelines, but that it should also set out specific provisions for preventing and addressing risks in the operations and value chains of companies operating transnationally, due to the larger risks that they pose to human rights and the environment globally and to the legal challenges they pose to victims when they try to access justice[7]. For these reasons, Art 3.1 should be reworded as suggested by Palestine and Namibia during the 7th session. This amendment would be aligned with Art 3.2, which calls on Member States to take account of the different types of business enterprises that exist domestically when implementing domestically the obligations set out in the LBI.

> ***Art 3.1*** *– This (LBI) shall apply to all business activities,* ***with particular focus on transnational corporations and businesses with a transnational character in their operations and their value chains.***

With regards to material scope, it is of crucial importance that businesses act responsibly in the context of occupation or conflict. For this reason, we support the specific mention of international humanitarian law, international criminal law and international environmental law in Art 3.3[8]. With regard to the last point, we wish to draw attention to proposed legislation in the European Union, the Corporate Sustainability Due Diligence directive, which covers environmental and climate standards as well. Activities of the extractive industries often put at risk vital ecosystems that are necessary for the enjoyment of the rights of local communities and population, and for the planet and humanity as a whole. Mining operations in protected areas, for example, contribute to climate change both through direct emissions and through deforestation, soil erosion and other environmental impacts. The resurgence in mining that is accompanying the transition to an economy centred on renewable energies in the Global North could exacerbate these impacts[9]. It would be a missed opportunity for the future LBI not to address such important risks.

> ***Art 3.3*** *– This (Legally Binding Instrument) shall cover all internationally recognised human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument), including those recognised in the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions to which a State is a Party, customary international law,* ***international humanitarian law, international criminal law and international environmental law****.*

Article 4 – Rights of Victims

It is important to recognise that States can violate human rights in the context of business activities and for these reasons Art 4.1 should refer to human rights abuses 'and violations', as suggested by Ecuador and Namibia during the 7th session.

We suggest strengthening Art 4.2c by adding that reparation must not only be gender-sensitive, but also child friendly, as raised by Panama and South Africa in past sessions.

---

[6] See UNGPs, Pillar II, 14.
[7] See for example the study commissioned by the European Parliament by Axel Max and others, Access to legal remedies for victims of corporate human rights abuses in third countries; the study by European Fundamental Rights Agency's (FRA) Business and Human Rights – Access to Remedy.
[8] As proposed by Palestine during the 7th and 8th sessions..
[9] See SOMO, The Big Battery Boom.

It is positive that Art 4.2d recognizes the rights of victims to seek reparation through both judicial and non-judicial mechanisms. However, the text must clarify that recourse to the latter should not deprive victims of the rights to seek remedy through the State's judicial system. Therefore, we suggest amending Art 4.2d as follows:

> ***Art 4.2d*** *– "be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties* ***and that the right to submit claims to non-judicial grievance mechanisms shall not infringe upon the right to access judicial mechanisms.****"*

Art 4.3f deals with the issue of legal aid and access to information, which are key in transnational cases in the context of business activities, yet the article is worryingly limited. The paragraph should clarify that when access to information necessary to pursue remedy is granted, and that this is done in a way that is accessible to particular at-risk groups such as Indigenous People or rural communities, in terms of format and language. Given the importance of access to information, we suggest limiting Art 4.3f to the issue of legal aid and dedicating a new Art 4.3g to the right to information. If States' suggestions[10] from the 7th and 8th sessions are combined, the two new paragraphs would read as follows:

> ***Art 4.3f*** *– "be guaranteed access to legal aid relevant to pursue effective remedy."*

> ***NEW Art 4.3g*** *– "be guaranteed access to information relevant to pursue effective remedy in their own language or other relevant languages and in a format accessible to children and adults, including women, peasants, Indigenous Peoples and other at-risk groups. This should include information relative to the businesses involved and their business relationships throughout the value chain, including but not limited to information and documents on business ownership and control, contractual relationships and communications."*

Article 5 – Protection of Victims

In Art 5.1, we suggest adding 'communities and peoples' to the list of those protected under the LBI.

In Art 5.2, it is crucial to address the particular risks faced by those defending human rights and the environment by ongoing or potential future corporate harm. The text of the Third Revised Draft does recognise the role of human rights and environmental defenders and their particular protection needs but should be further strengthened by highlighting the role that public and private security forces play in putting them at risk. It is also important to recognise the common tactics used to threaten the life and security of human rights and environmental defenders, including threats and harassment (including legal forms of harassment such as Strategic Lawsuits Against Public Participation (SLAPPs)). In this light, States should take proactive measures to prevent and investigate threats and harassment.

> ***Art 5.2*** *– "States Parties shall guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence, insecurity, harassment and reprisal."*

> ***NEW Art 5.3*** *– "States Parties shall take appropriate, effective and timely measures to prevent, investigate impartially and timely, and punish those* ***materially and intellectually*** *responsible for attacks, threats or intimidations of persons, groups and organisations that promote and defend human rights and the environment."*

[10] See contribution from Cameroon, Namibia, Ecuador, Palestine, South Africa and others to the 7th and 8th sessions.

Article 6 – Prevention

The inclusion of the precautionary principle is key to ensuring the right to a clean, healthy and sustainable environment. This is in line with Principle 15 of the Rio Declaration, and should be seen as conducting to fulfilling the right to a safe, clean, healthy and sustainable environment. This principle requires taking measures that reduce the possibility of suffering environmental damage even if the precise probability of it occurring is not known. The inclusion of this principle would give greater weight, in terms of the right to the environment, to the material content of the binding instrument.

The language of Art 6.3b underlines the importance of avoidance and prevention, aligned with a precautionary approach. We must restate here that when business activities are causing human rights abuses, companies should have an obligation to terminate them. Companies should only be required to mitigate human rights abuses when they are not materially able to terminate them – this is typically the case when they are contributing to abuses by another party in their supply chains. When a company is capable of ceasing abuse they should do so. We suggest restricting the preventative duty by clarifying that human rights abuses should always be ceased.

As per our comment under Article 2, we recommend that any reference in the LBI to "prevent and mitigate human rights abuses" should be replaced by "prevent, mitigate or cease human rights abuses and avoid risks of abuse."[11] We recommend that Art 6.2 should be rephrased as follows:

> ***Art 6.2*** *– "States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognised human rights,* ~~***and***~~ ***prevent human rights abuses and avoid human rights risks*** *throughout their business activities and relationships."*

Companies should also be responsible for ceasing and redressing adverse impacts when they have caused or contributed to them. We therefore recommend to rephrase Art 6.3.b as follows:

> ***Art 6.3.b*** *– "**Take appropriate measures to avoid, prevent and mitigate potential human rights abuses and to cease and redress effectively the identified actual human rights abuses**."*

We believe a more precise framework is needed under Art 6.4. Art 6.4a should be amended to include reference to conduct impact assessments "prior and throughout their operations, including the corresponding measures taken in response to any identified risks." Moreover, States shall ensure that when conducting human rights, labour rights, environmental and climate change impact assessments, this is done independently and in a way that is public and transparent. As affected stakeholders are often the ones who bear the information relevant to effective identification of risks, they should be consulted throughout the process.

> ***Art 6.4a*** *– "Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments* ***prior and*** *throughout their operations,* ***including the corresponding measures taken in response to any identified risks. States shall ensure that impact assessments are carried out by an independent party in a transparent and public manner and in consultation with affected stakeholders."***

We also support the amendments made by various States to ensure freedom of association, the right to strike, collective bargaining, non-discrimination and gender equality - elimination of workplace violence and harassment in the world of work -, occupational safety and health, prohibition of child and forced labour, and social protection, as specific issues.

[11] In line with suggestions by Panama and Mexico.

With reference to amendments made by Panama, Palestine and South Africa at the 8th session, Art 6.4c should be amended to:

> ***Art 6.4c*** *– "Conducting meaningful consultations -* ***in line with principles of free, prior and informed consent*** *- with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions* ***and civil society organisations****, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas."*

These amendments would enhance the likelihood of inclusive, transparent and meaningful stakeholder consultations, which are essential.

Art 6.4 remains overall vague on the issue of communities' consent to the presence of business activities that might affect them. While free, prior and informed consent (FPIC) is mentioned for indigenous communities, it is not clear whether a denial of consent from the same communities would be enough to actually prevent business activities from taking place or cease ongoing activities. And while FPIC is an internationally recognised right for indigenous communities, there is a lack of a similar requirement for communities impacted by business activities that do not fall under the 'indigenous' umbrella. We therefore recommend that Art 6.4d is amended to:

> ***Art 64.d*** *– "Ensuring that consultations with indigenous peoples and local communities are undertaken in accordance with the internationally agreed standards of free, prior and informed consent****, and that denial of such consent constitutes sufficient grounds for preventing or ceasing business activities****."*

We also recommend that all references to *"Free, prior and informed consent"* are followed by the sentence ***"and that denial of such consent constitutes sufficient grounds for preventing or ceasing business activities."***

Security forces, whether public or private, are often the ones materially responsible for abusing the rights of those impacted by business activities. Companies may act through private or public security forces to shield their responsibilities for human rights violations. This is often the case when communities oppose large industrial projects, and even more so in situations of occupation and conflict. For this reason, we recommend the addition of a new letter, Art 6.4x:

> *"Reporting on the provision of security for their operations, regardless or whether they are enforced by security forces directly employed by the company, hired, or through other arrangement."*

Art 6 of the LBI should be amended through an additional paragraph, building on amendments made by Uruguay, Panama, Palestine, Mexico and Brazil:

> ***Art 6.X*** *– "States Parties shall enact legislation, regulations and enable effective adjudication to ensure that business enterprises respect the rights of human rights defenders."*

Article 7 – Access to Remedy

On Art 7.3, we want to stress that differences in different jurisdictions would create inequality and gaps for those seeking remedy and justice. Addressing such differences and ensuring access to justice for all victims, regardless of what jurisdiction they reside in, should be a key objective of this instrument.

We support the formulation of Art 7.3a and Art 7.3b. We suggest rephrasing Art 7.3c so as to highlight the need for a gender and child-sensitive approach. We reiterate the need to explicitly mandate States to remove gender-specific barriers to justice, and we support suggestions by Peru, Panama, South Africa, Palestine and Mexico on Art 7.3.b to "avoid gender and age stereotyping". Egypt's suggestion on this point might provide for a better wording:

> ***Art 7.3b*** – "Guaranteeing the rights of victims to be heard in all stages of proceedings in a gender-sensitive, age-sensitive, and child-sensitive manner;"

On Art 7.4, the reference to "rules concerning allocation of costs" may be too narrow. In some cases, it may not be the rules themselves that become a barrier but their application or practice. We, therefore, suggest deleting the words "rules concerning". The article which would then read:

> ***Art 7.4*** *– "States Parties shall ensure that court fees and* ~~***rules concerning***~~ *allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings (…)."*

We welcome the explicit obligation for State Parties in Art 7.5 to enact legislation to enable a reversal of the burden of proof regarding the establishment of the liability of companies. Given the significant imbalance in power, resources, and access to information that right-holders experience when suing corporations, the LBI should explicitly mandate for reversing the burden of proof, moving away from judges' discretion. We therefore suggest removing the mention "allowing judges", so that the article reads as follows:

> ***Art 7.5*** *– "States Parties shall enact or amend laws to reverse the burden of proof in appropriate cases or enabling courts to reverse the burden of proof to fulfil the victims' right to access to remedy where consistent with international law and its domestic constitutional law."*

Article 8 – Civil Liability

The LBI lacks an explicit recognition of joint or several liability of the corporation causing or contributing to the human rights abuse (e.g., the local subsidiary) and the corporation controlling the former but not preventing it from causing or contributing to the violation (e.g., the parent company). The text of the LBI should explicitly recognise the possibility for joint and several liability, as this is crucial in court cases to determine responsibility for the damage caused, as follows:

> ***Art 8.1*** *– "States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability* ***including joint and several liability*** *of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses* ***and violations*** *that may arise from* ***actions or omissions in the context*** *of their own business activities, including those of transnational character, or from their business relationships."*

It is welcome that the draft reflects companies' liability for historical damages; however, the current language could confuse and lead to interpreting the provision as uniquely referring to past business relationships. The first part of Art 8.6 should be amended replacing 'have had' with "have or have had" as follows:

> ***Art 8.6*** *– "States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they* ***have or have had*** *a business relationship (…)."*

The notion of control in Art. 8.6 is also problematic. As the draft lacks provisions establishing a clear rebuttable presumption of control, it can be assumed that "***to establish legal liability, it***

must be proven in each individual case that a company effectively exercised control over their business relationships."

This can be difficult because corporate relations between different companies (percentage of shares, appointment of directors, voting rights such as "golden shares") are often not apparent to third parties. Similarly, if control is exercised through contractual relations (right to unilaterally determine price, quality and quantity of products), it may be challenging to prove control without access to these contracts.

In light of the variety of control situations and the differences between legal systems, the text should require States to ensure that their domestic systems provide for a presumption of control in the meaning of Art 8.6. A sentence should be added to Art 8.6, worded as follows:

> ***Art 8.6*** *– "States Parties shall determine in their domestic law that control over one legal person by another legal person* ***is presumed*** *with reference to corporate, contractual and other business relations between the former and the latter into account."*

Corporations should not be exempted from liability for harm in reason of their compliance with due diligence obligations. It is essential that this is as unambiguous as possible.
Art 8.7 establishes this clearly in the first part, except for the use of 'automatically', and the ambiguity in the second part. Art 8.7 should be strengthened and simplified by reformulating it as follows:

> ***Art 8.7*** *– "When determining the liability of a natural or legal person for causing or contributing to human rights abuses or failing to prevent such abuses as laid down in Article 8.6, the competent court or authority can take into account if the person undertook adequate human rights due diligence measures, but compliance with applicable human rights due diligence standards shall not absolve from liability ipso iure."*

Article 10 – Statute of Limitations

Any provisions on statutes of limitations should ensure that child victims are not in a situation where justice is denied. This is also crucial for those who, because of their age, physical, mental or psychological condition, need additional time and resources to seek redress. For this reason, we support the amendment from Palestine last year on Art 10.2.

Article 14 – Consistency with International Law Principles and Instruments

We welcome that Art 14 recognises the primacy of human rights over trade and investments. Yet, in its current wording the article remains too vague, insofar as it does not specify how States should practically ensure that existing agreements do not violate human rights. We suggest introducing a human rights-based approach in the whole article and outlining that human rights experts should have a central role in Investor-State Dispute Settlement Tribunals.

Civil society and people affected by corporate abuse have been denouncing for years the negative impact of some mechanisms of bilateral and multilateral agreements, such as Investor-State Dispute Settlement Tribunals, known as ISDS. ISDS are unfairly biased towards corporate actors and are used as a means by which corporations exercise undue influence on governments' policies. They have for too long provided avenues for powerful companies to undermine crucial measures to protect people and the planet.

Three changes to Article 14 may help address the problem:

- First, language should be added at the end of the article to ensure that all existing bilateral or multilateral agreements, including trade and investment agreements, shall be

interpreted and implemented in a manner that does not undermine or restrict States capacities to fulfill their obligations under this LBI and other existing obligations in international human rights law.

- Second, we advise the addition of an additional letter to Art 14.5 that would allow States to revise and amend trade and investment agreements that can negatively impact human rights.
- Third, prior to concluding any new trade or investment agreements by State Parties, States Parties should be required to carry out comprehensive environmental and human rights impact assessments.

The new Art 14.5 would read as follows:

14.5 State Parties shall ensure that:

a) All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be interpreted and implemented in a manner that does not undermine or restrict their capacity to fulfill their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, inter alia by ensuring that members of a dispute settlement entity charged with interpreting and implementing these agreements have specialised knowledge in human rights law and by referring to the obligations under this LBI as well as other relevant human rights conventions and instruments in their submissions to such a dispute settlement entity.

b) All new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments. To ensure the compatibility of these agreements with States Parties' human rights obligations, States Parties shall:

• Conduct impact assessments based on the UN Guiding Principles on Business and Human Rights' impact assessments of trade and investment agreements before and during the negotiations, before the ratification and periodically after the entry into force of such agreements;

• Include specific exception clauses in all new trade and investment agreements to allow States Parties to fulfil their obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments with measures which would otherwise violate their obligations under the respective trade and investment agreement;

c) All existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be revised in light of their impact on States Parties' obligations under this (Legally Binding Instrument) and its protocols, if any, as well as other relevant human rights conventions and instruments, and shall be revised if necessary.

Written Input on Art. 1 – 14 of the draft legally binding instrument according to the Note verbale of 2 March 2023 of the Chair Rapporteur

jointly submitted by:

Children are in constant interaction with companies throughout their lives. They may be consumers, children of workers, targets of advertising or be workers themselves, often subject to abusive labour practices. They sometimes suffer exploitation, including sexual exploitation and abuse in online and offline environments. Commercial activities can have both positive and negative impacts on the realisation of children's rights. As such, children are also stakeholders of businesses in the community.

The positive effects of business activities need to be enhanced and the negative impacts should be avoided, discouraged or remedied. Business conduct that amounts to human rights abuses needs to be redressed, and responsible companies held accountable. States have a crucial primary duty to protect children. But national structures and institutions for protection are constrained by advancing economic globalization and its impacts across borders. Increasingly, businesses have become part of and dependent on global value chains: they produce, market and sell goods and services using networks of economic units in multiple jurisdictions. Legal protection structures in one country or region may not apply or be effective in other countries where production units are located. Even within national borders, national frameworks often pay little attention to places and situations where children and other groups in vulnerable positions are at risk.

A LBI on business and human rights will be the first legally binding global instrument to address prevention, legal liability and redress in respect of human rights abuses by business and it is vital that it incorporates rights from the child perspective as part of a human rights approach. This means that the scope of application of the treaty provisions must be broad enough to address the main sources and situations at the root of actual or potential risks to children's rights. Children and their rights are at risk within national borders and in all jurisdictions. And children's rights can be affected by any enterprise, small, medium or large, national and transnational, including those in the informal sector.

This LBI should incorporate a child rights perspective that takes into account the special and dependent status of children. Childhood is a unique period of development, which means that any violation or abuse of children's rights can result in severe, irreversible, lasting or lifelong or even trans-generational impacts and harm. Children may also be more likely to be affected by human rights violations or abuses of their parents or caregivers. For all these reasons, children need a higher level of protection.

The LBI should take full account of the diverse circumstances and places where children's rights are at risk from business activity; provide States and businesses with adequate tools to prevent violations; protect and guarantee children's rights in the corporate value chain; be based on children's consultation and participation, children need to be heard; and also, it should protect and empower children to monitor and hold businesses accountable.

The organizations signing this commentary welcome all the efforts States have done so far to introduce a child's right perspective on the draft LBI. We encourage still other changes. Below, we indicate our support to specific language proposed by States as well as suggest additional improvements.

Please note:

In **red**: concrete wording suggestions

In black: Comments/draft text

In **black**: States proposals

Article 1. Definitions

1.1. We support the following language:

> "**Victim**" shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered, **or, where relevant, have alleged to have suffered** harm that constitute human rights abuse, through acts or omissions in the context of business activities. The term "victim" may also include the immediate family members or dependents of the direct victim **and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization, as well as any child under the care of the direct victim, whether provided by law or by the local custom**. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted. **When the victim is a child, harm should contemplate the impacts on their development.**

1.2. We propose to add after abuse, **"or violation"** (also supported by Palestine and South Africa) and support Panama's and Costa Rica's proposal to add **"the right to a safe, clean, healthy and sustainable environment",** and it read as such:

> "Human rights abuse **or violation**" shall mean any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including **the right to a safe, clean, healthy and sustainable environment**.

1.5. We support the proposal of Palestine on adding **"value and supply chain"** and Panama Egypt and South Africa to add after **"… or any other structure or relationship, including throughout their values chains,…"**

Article 2. Statement of Purpose

2.1.

d. We support the of the amendments made by Panama, Argentina, Peru, Palestine, South Africa in the seventh session and of Namibia, Kenya, Bolivia in the eighth session and to also add human rights violations (as proposed by Egypt) after abuses with the following text proposal:

> To ensure access to **gender-responsive, child-sensitive and victim-centred justice** and effective, adequate and timely remedy for victims of human rights abuses **and violations** in the context of business activities~~ of a transnational character;~~

e. To facilitate and strengthen mutual legal assistance and international cooperation to prevent and mitigate human rights abuses **and violations** in the context of business activities, particularly those of transnational character, and provide access to justice and effective, adequate and timely remedy **and reparations** to victims of such abuses **or violations**.

Article 3. Scope

3.3. We support the amendments proposed by Panama on Article 3.3.: … **and other relevant international and regional environmental agreements…**

Article 4. Rights of Victims

4.1. We support the proposal of Kenya made during the eighth session to change **"human rights abuses" to "human rights abuses and violations"** throughout the text and to also add the following text proposal at the end:

> Victims of **human rights abuses and violations** in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms **and due regard should be given to children while considering the best interest of the child**.

4.2.

c. We support the proposal made by Panama, South Africa and Palestine on adding **child-friendly** before gender sensitive**.**

d. be guaranteed the right to submit claims, including by a representative or through class action ~~**in appropriate cases**~~, to courts and non-judicial grievance mechanisms**, without prejudice to the right to judicial remedy** of the ~~State~~ States Parties;

We also support the proposal made by Palestine on Article 4.2.d.

4.2.d. …**and that the right to submit claims to non-judicial grievance mechanisms shall not infringe upon the right to access judicial mechanisms**; **(Palestine)**

e. We propose the following language on Article 4.2.e:

4.2.e. be protected from any unlawful interference against their privacy, and from intimidation, and reprisals, before, during and after any proceedings have been instituted, as well as from re-victimization in the course of proceedings for access to effective, prompt and adequate remedy, including through appropriate protective and support services that are gender and age responsive. **Child victims' identity shall not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned**; and,

f. We Propose the following amendment to the Article 4.2.f and support Panama's and Ecuador's (during eighth session) proposals:

4.2.f. be guaranteed access to information **in their own language or relevant languages and accessible formats to adults and children alike, including those with disabilities,** and legal aid relevant to pursue effective remedy.

Article 5. Protection of Victims

5.2. We propose to amend the first sentence of Article 5.2 as such:

States Parties shall take adequate and effective measures to guarantee a safe and enabling environment for persons, **including for children and young people…**and support proposals of Panama and South Africa on adding **harassment and reprisals.**

We support Cameroon's proposal on 5.3 bis:

5.3 bis. States parties shall ensure emergency response mechanisms in case of disasters caused by the action of transnational corporations and other business enterprises.

Article 6. Prevention

We propose to add Art 6.1 bis:

Art. 6.1.bis: States Parties shall also provide capacity-building and technical assistance opportunities to business enterprises on human rights to assist them with developing human rights statements of policies, while paying special attention to the rights of groups and individuals in situations of particular vulnerability. States Parties shall also ensure that information regarding business enterprises' obligations with regard to human rights is easily accessible in appropriate formats by all.

We support the following language proposed by States:

6.2. States Parties shall take **all** appropriate legal and policy measures to ensure **that their domestic legislation reflects their international human rights obligations and** that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights **abuses and violations (as proposed by Palestine, Egypt and Cuba)** throughout their business activities and relationships.

6.3. For that purpose, States Parties shall require business enterprises to undertake human rights due diligence **including a child right impact assessment across their supply and value chains when necessary due to imminent impact and at regular interval**, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows:

6.3.b We support Palestine's proposal to add at the end:

'**In cases where mitigation is impossible, businesses may be required to terminate their relationship and/or cease activities/operations to fulfill their obligations'**; **(Palestine)**

6.4. We support Cameroon's proposal:

States parties shall designate a competent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by business enterprises as well as their effective implementation. (Cameroon)

6.4.a. We propose the following amendments including the proposal made by Panama and Egypt (on adding prior) on the Article 6.4.a with the following wording:

Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments, **paying special attention to the rights of groups and individuals in situations of particular vulnerability, including children prior and** throughout their operations;

6.4.a. We also support the proposal of Argentina and Palestine on Article 6.4.a bis.

6.4.b We propose the following amendments including the proposal made by Panama on the Article 6.4.b. with the following wording:

Integrating a gender **and age** perspective, in consultation with potentially impacted women **and girls** and women´s **and girls'** organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls;

6.4.a ter. We support the proposal made by Namibia on Article 6.4.a. ter and 4.a quinquies and we propose the following amendments to Article 6.4.a.ter

" Strengthening the prevention and elimination of all forms of forced and compulsory labor, including modern slavery and trafficking in persons, and taking effective measures to prohibit and abolish child labor**, as well as the sexual exploitation of both boys and girls**[1]**.** (Namibia (part of package proposal for a bis - a quinquies))

6.4.c. We support the following amendment proposed by Panama, Palestine, South Africa, Egypt and Bolivia to the Article 6.4.c and it reads as follows:

Conducting meaningful consultations **- in line with principles of free, prior and informed consent and throughout all phases of operations** with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions **and civil society organizations,** while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas, **peasants and other people living in rural areas.**

6.4.d. We propose the following amendment to Article 6.4.d which is also partly based on Indonesia's proposal as such:

Ensuring that consultations with indigenous peoples **and local communities** are undertaken in accordance with the internationally agreed standards of free, prior and informed consent; **and that consultations with children are undertaken in accordance with the principle of the child's right to be heard.**

Article 7. Access to Remedy

We propose to add to the title of Article 7: Access to remedy **and Reparation**

7.1 We propose to add the term **reparation** after effective remedy in Article 7.1. and to add **"and children"** after the term "women" at the article reads as follows:

States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims´ access to adequate, timely and effective remedy **and reparation** and access to justice and to overcome the specific obstacles which women **and children**, vulnerable and marginalized people and groups face in accessing such mechanisms and remedies.

7.3.b We support the proposals made by Peru, Panama, South Africa, Palestine, Mexico and Egypt on promoting gender, age and child sensitive proceedings without stereotyping and it should be read as:

Guaranteeing the rights of victims to be heard in all stages of proceedings **avoiding gender and age stereotyping and child-sensitive manner**.

7.3.d. We support the wording proposal of the 3rd Draft on removing obstacles, including the doctrine of forum non conveniens.

7.4 We propose to amend Article 7.4 by including: **"and providing, where needed, free legal aid to child victims;"** or to add the following at the end of the current text and it reads as such:

States Parties shall ensure that court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings in accordance with this (Legally

[1] Global Boys Initiative - ECPAT

Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases, **such as cases concerning child victims**.

7.5. We propose to either delete **"in appropriate cases"** in Article 7.5 or to provide more legal certainty on the term **"in appropriate case"** and when they shall apply**:**

> States Parties shall enact or amend laws allowing judges to reverse the burden of proof ~~in appropriate cases~~ to fulfill the victims´ right to access to remedy, where consistent with international law and its domestic constitutional law.

7.6 As proposed by Egypt and Palestine and Ecuador, we support adding **"and violation"** after human rights abuse.

Article 8. Legal Liability

8.1. We support adding **"violation"** after human rights abuses in Article 8.1. as proposed by Egypt, Pakistan and Palestine.

We propose a New Art. 8.2.bis:

> **8.2.bis. Neither the use or availability of company operational grievance mechanisms and similar non-judicial mechanisms can forfeit the right to access to courts and the potential legal liability of business enterprises.**

8.3. We support adding **"violation"** after human rights abuses in Article 8.3. as proposed by Egypt and Palestine

8.4. We support adding **"violation"** after human rights abuses in Article 8.4. as proposed by Egypt and Palestine

8.5. We propose to add amend Article 8.5 as such:

> States Parties shall require legal or natural persons conducting business activities in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security **and availability of assets**, such as insurance bonds or other financial guarantees, to cover potential claims of compensation.

Article 9. Adjudicative Jurisdiction

9.1. We propose to amend to add **'or on behalf of'** and support Palestine, South Africa and Egypt's proposals, as follows:

> Jurisdiction with respect to claims brought by **or on behalf of** victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), shall **upon the victims and their family's choice,** vest in the courts of the State where:

9.1.b. We support Palestine's proposal.

9.3. We support keeping the doctrine of forum non conveniens in Article 9.3 as supported by South Africa, Palestine and Namibia.

Article 10. Statute of limitations

10.1. We propose the deletion of **"the most serious"** and **"of concern to the international community as a whole"** to the Article 10.1.

10.2. We propose the following amendments to the article 10.2 and Palestine's proposal, and it reads as such:

> The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute ~~**the most serious**~~ crimes ~~**of concern to the international community as a whole**~~ **under international law shall not run for such a period as no effective remedy is available: In all cases they must** allow a reasonable period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time, **or where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological condition and to support in particular justice for victims of sexual and gender-based violence as well as children and persons with disabilities**.

Article 11. Applicable Law

11.2.a. We propose to add to Article 11.2.a ter the following: **'a) *ter* the victim is domiciled;'.**

Article 12. Mutual Legal Assistance and International Judicial Cooperation

No comments on Article 12

Article 13. International Cooperation

13.1. We propose the amendment of Article 13.1 as such**:**

> States Parties shall cooperate in good faith to enable the implementation of their obligations recognized under this (Legally Binding Instrument) and the fulfillment of the purposes of this (Legally Binding Instrument) **including in the prevention and detection of any activity contrary thereto and in the rehabilitation, physical and psychological recovery, social reintegration and repatriation of victims, especially children.**

13.3. We propose Article 13.3 should read as:

> **New Art. 13.3. States Parties shall promote international cooperation and coordination between their authorities, national and international non-governmental organizations and international organizations.**

Article 14. Consistency with International Law principles and instruments

14.3. We support the following proposal from Palestine in adding **and remedy and reparations** and after human rights abuses **and violations** to the last part of Article 14.3.

> The present (Legally Binding Instrument) shall **be interpreted in consonance with, and without limiting,** any provisions in the domestic legislation of a State Party or in any regional or international treaty or agreement **or customary international law** that is more conducive to the respect, protection, fulfillment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedy **and reparations** to victims of human rights abuses **and violations** in the context of business activities, including those of a transnational character.

14.5.b. We propose the to add the following sentence at the end of Article 14.5.b:

> All new bilateral or multilateral trade and investment agreements shall be compatible with the States Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights conventions and instruments. **In order to ensure such compatibility, State Parties should carry out environmental and human rights impact assessments prior to concluding such agreements and whenever necessary during the time the agreement is in force. Such assessments should evaluate and address any foreseeable effects of such agreements on the enjoyment of human rights and be undertaken through full and public consultation with all stakeholders.**

14.5.b. We support the proposal of Palestine to delete new in Article 14.5.c:

c. All ~~**new**~~ bilateral or multilateral trade and investment agreements shall be compatible with the States Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights **and humanitarian law** conventions and instruments.

For questions or request for clarification of the content please contact:

DKA Austria:
Ingrid Pintaritsch
Ingrid.pintaritsch@dka.at

Clínica de Direitos Humanos PPGD/PUCPR
Danielle A. Pamplona
danielle.pamplona@pucpr.br

الشبكة العالمية
للحقوق الاقتصادية
والاجتماعية والثقافية

ESCR-Net
Red-DESC
Réseau-DESC

ESCR-Net - International Network for Economic, Social and Cultural Rights submission to the Chair-Rapporteur and UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

31 March 2023

General remarks

This submission was coordinated by ESCR-Net's Corporate Accountability Working Group, which coordinates collective action to confront corporate capture, challenge systemic corporate abuse, and advocate for new accountability and remedy structures. ESCR-Net - International Network for Economic, Social and Cultural Rights connects over 300 social movements, Indigenous Peoples' groups, NGOs and advocates across more than 80 countries to build a global movement to make human rights and social justice a reality for all.

ESCR-Net reaffirms its support to the UN process towards a legally binding instrument on TNCs and other business enterprises and human rights. At the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, we continued to call on all States to negotiate meaningfully and effectively for a legally binding instrument based on the third revised draft considering textual suggestions presented by States in 2021, which demands for stronger provisions to hold corporations accountable as articulated by people and communities affected by violations and abuses related to business activities. States must act urgently to advance and ultimately adopt the legally binding instrument in an effort to stop corporate capture, end corporate impunity and to create effective mechanisms to remedy and compensate communities and people particularly affected by transnational corporations including those operating in the extractive, financial, food, healthcare and tech industries, integrating comprehensive attention to the different and disproportionate impacts experienced by women in all their diversity, gender non-binary persons, rural communities, Indigenous Peoples, and other historically marginalized groups, as well as communities in contexts of conflict and occupation.

We call on States to reject textual proposals that embolden colonial legacies. We call on States to stop corporate capture and reject capitalist agendas in negotiations that prioritize profit over people. Several States, like the United States of America, have defended corporate participation in treaty negotiations and even echoed their demands to weaken the text of the treaty. **We strongly reject the right of corporations to participate in the treaty process because they have an irreconcilable conflict of interest when it comes to regulating and remediating their**

own human rights impacts. From another perspective, informal proposals provided by the Chair-Rapporteur on 6 October 2022 threaten to backtrack the incremental progress made in the creation of a third legally binding instrument. We urge States not to promote or adopt any language that weakens the treaty, blurs legal obligations on parties, and removes specificity for important standards of legal liability and accountability to the benefit of corporate lobbyists and several demands of the Global North that can be associated with their colonial legacies.

Countries in the Global South face particular challenges in securing remedy for harms to their communities and environment by large transnational corporations often headquartered in the Global North. Global South governments are consequently stuck with the costs and other long term consequences of such damages. We believe that there is an urgent need for all States to support the third revised draft of the legally binding instrument as a valuable starting point for negotiations and to push back against corporate capture of the process. Existing elements of legal liability in all contexts, extraterritoriality and a provision on conflicts of interest are essential to stopping corporate impunity. After more than eight years of this process, we ask the question - if we do not work to advance a meaningful legally binding instrument now, then when? Now is the time to act. Human rights, our planet and the environment cannot wait any longer, and we cannot allow corporate capture of our government decision-making processes to continue delaying the realization of our demands.

For textual suggestions on the legally binding instrument click here.

Article 1

Suggestions to add “adverse human rights impacts” in the text should not be accepted. The use of “adverse human rights impact” as a definition centers and favors business interests as it reduces the responsibility on corporations. An adverse human rights impact has been defined as “a harm which corresponds ***to a reduction*** in or removal of a ***person’s ability*** to enjoy an internationally recognized human right.” On a semantic level, the word “adverse” evokes less of a severity than “abuse” and the passive language of “a person’s ability to enjoy” takes away the power of a person’s entitlement to “full enjoyment” of their rights.
The Third Draft included “human rights ***abuses***,” defined as “any direct or indirect harm in the context of business activities, through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights ***and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.”*** **ESCR-Net members called for this text to be further strengthened to include a reference to workers rights as well. New proposals to remove or exclude** direct or indirect harm dangerously narrows the scope of subsequent liability for the commission of such abuse - therefore must be strongly rejected. Similarly, proposals to exclude “fundamental freedoms” after “internationally recognized human right,” eliminates the space to continue pushing for more internationally recognized rights that may not be currently supported or recognized nationally, regionally and within the international legal community. Finally, any exclusion of the specific rights (the right to a safe, clean, healthy and sustainable environment - or workers rights) takes away the important focus of the Legally Binding Treaty, which is the protection of these specific rights in light of corporate abuse. The Third Draft significantly added “including” before listing these rights, so as to ensure that those specific rights were highlighted but not limiting other rights that are under attack due to corporate abuse. This is crucial and must be retained in the text.

Further, any suggestions to change the definition of human rights abuse to “any acts or omissions that take place in connection with business activities and ***result in an adverse human rights impact***” is vague and narrows the scope of potential human rights abuses and violations.

Narrowing the definition of human rights abuses in the Third Draft, quoted above, eliminates important qualifying concepts, such as “direct and indirect harm” as well as “acts or omissions.” It also eliminates the subject of the harm– namely “any person or group of persons.”

Finally, it is significant that Article 1 maintains mentions of the following definitions: (a) business activities; (b) regional integration organization; (c) victim; and (d) business relationship.

For further textual suggestions on this article click here.

Article 6

Article 6.1

We support textual suggestions made by the State of Palestine in the 7th session of the IGWG last year to strengthen Article 6 by adding a provision highlighting that *“State Parties shall take precautionary measures, including the halt of business activities, when such activities can cause imminent human rights abuses or violations causing irreparable harm, independently from the existence or outcome of a legal proceeding relative to the situation.”*

We also urge states to **enforce respect by corporate entities** of internationally recognized human rights standards through legislative approaches as a preventative measure. It would be important to avoid language that promotes voluntary approaches such as “enhancing respect” or “strengthening the practice of human rights due diligence”. **States must require corporations under this article to actively “prevent and mitigate human rights abuses and violations or else face punitive measures and accountability.”**

Article 6.2

This provision must remain unchanged as per the text in the Third Draft treaty - with the addition of the word violations in addition to abuses. We agree with the proposal of Cameroon (in 2021) to strengthen this Article by adding a provision that articulates the following: “Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships.” We support the proposals by Mexico and Panama to delete the word “and mitigate” from this provision.

Article 6.3

This provision is key and must not be further weakened or watered down in a revised draft treaty text. We support textual suggestions made last year by Palestine to further strengthen this text particularly by adding language on:

- **Accountability across the value chain:** States Parties shall require business enterprises and associated actors across the full value chain, to undertake ongoing and frequently updated human rights due diligence…. across all operations
- **Terminating activities where mitigation is impossible:** In cases where effective human rights due diligence is impossible, businesses may be required to terminate their relationship and/or cease activities/operations to fulfill their obligations

Of note, we strongly encourage States to also include in a revised draft that where States and financial institutions are involved in business, they too are required to conduct both human rights and environmental due diligence, in addition to the corporate entity involved. The due diligence obligation should further be an ongoing process across the full value chain, rather than just a single checklist activity.

For that purpose, States Parties shall require business enterprises to undertake human rights due diligence based on national laws and international obligations, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows. -Proposal made by Ethiopia, but Mexico opposes.

Article 6.4

We support the proposal by Cameroon for a provision stipulating that "State Parties shall designate a competent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by business enterprises as well as their effective implementation." We also support Panama's proposal to undertake and publish regular impacts assessments ***prior*** and throughout their operations.

We also support Argentina's suggestion to add a provision that would ensure "freedom of association, the right to strike, collective bargaining, nondiscrimination and gender equality - elimination of workplace violence and harassment in the world of work -, occupational safety and health, prohibition of child and forced labor, and social protection, as specific issues."

We also support suggestions to strengthen this provision in line with the following:

- Consultations with Indigenous Peoples must be in line with in line with principles of free, prior and informed consent and must be carried out throughout all phases of operations (text supported by Palestine and South Africa)
- Consultations on business activities shall be undertaken by an independent public body and protected from any influence from commercial and other vested interests (text supported by Palestine and South Africa)
- Where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless it is for the benefit of the oppressed population (text supported by Palestine, South Africa)
- Inclusion of civil society organizations in consultations on business activities (text supported by Panama, Palestine and South Africa)
- Respecting that Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land without threats of retaliation. (text proposed by Palestine).
- States parties shall provide mechanism for financial guarantees to communities for activities with a high potential of damage to human rights, to be made immediately available in case of harm (text proposed by Cameroon)
- Adopting and implementing enhanced and ongoing human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation – the enhanced due diligence must take place prior to the commencement of business activities and throughout all phases of operations, corporations and/or State entities already engaged in business activity in conflict-affected areas, including situations of occupation, shall also adopt and implement urgent and immediate measures, such as divestment and disengagement policies, to avoid corporate involvement in, or contribution to human rights abuses and violations in their activities and relationships. (text proposed by Palestine)

Of note, in order to properly safeguard Peoples' right to self-determination, the Legally Binding Treaty must also include explicit language recognizing Indigenous Peoples "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" as well as the right to "own, use, develop, access and control the lands, territories, and resources that they traditionally possess or own.

Further, we also propose adding language under Article 6 highlighting the protection of human rights defenders as an essential element of the prevention of corporate-related abuses or violations. **Human rights defenders**, including journalists, lawyers, activists, members of indigenous communities and others, are crucial actors in the context of human rights and business activities as they fulfill the task of ensuring corporate accountability and responsibility. However, their work is subject to danger and restrictions in many countries of the world. Attacks such as killings, beatings, threats, strategic lawsuits against public participation (SLAPPs), and others intended to silence or intimidate defenders focused on business-related activities are evident and increasing with each passing year.

On Article 6.8

With corporate capture being a major obstacle to advancing a strong legally binding instrument, we call on the UN and States to restrict the participation of the International Organization of Employers (IOE), International Chamber of Commerce (ICC), the United States Council for International Business (USCIB) and any other representatives of corporate power in the negotiations for an LBI by adopting lessons from the Framework Convention on Tobacco Control which explicitly recognized the tobacco industry's irreconcilable conflict of interest with public health policymaking and put measures in place to protect treaty processes and implementation from industry interference.

We call on States not to encourage the classification of the IOE, ICC, USCIB and other representatives for corporate power as "civil society organizations". Such corporate-backed entities represent some of the most abusive corporations in the world—including Dow, Chevron, and Shell—which have been implicated in serious human rights violations affecting communities, human rights defenders, and civil society. States must also maintain and strengthen the text of the LBI to (a) stop corporate capture, and (b) develop an independent and international court to hold corporations, particularly those that operate transnationally, accountable for committing or contributing to human rights abuses and violations.

In concrete textual suggestion we call on States to retain Article 6.8 and to further strengthen with the words highlighted in bold: "In setting and implementing their **legislation** and public policies with respect to the implementation of this (Legally Binding Instrument), State Parties shall act to protect these legislation and policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of a transnational character. **In efforts to limit corruption, States shall also review and adopt laws that will enhance transparency regarding business donations to political parties, corporate lobbying, awarding of licenses, public procurement, and revolving doors practices.**"

At the core of preventing human rights abuses and violations related to business activity is ensuring that corporations are not making decisions through government and multilateral platforms, including the UN, that affect our basic rights in the interest of profit-making. We elect governments, not corporate actors. We advocate for democracies, not corporatocracies. States who are echoing corporate language, such as the US, must consider that their duty is public service, it is to serve our rights and our interests as people and to protect the planet - and not the

interest of profit making for the 1 percent. As such we recommend that Article 6 maintain strong language to stop corporate capture in an effort to prevent abuses and violations in the context of business activity. We support proposals by the State of Palestine in this regard.

For further textual suggestions on this article click here.

Article 7

Language in Article 7.1 must be retained as was proposed in the third revised treaty. In particular, language on ensuring that State Parties shall provide competence in judiciary for overcoming obstacles for specific marginalized groups in seeking remedy.

This article must articulate clearly that an international legal forum can be used - in addition to a domestic one - for access to remedy by those affected by abuses or violations related to business activities. In this vein, we support the inclusion of a provision on ensuring that "State Parties shall provide adequate and effective legal assistance to victims throughout the legal process" - in accordance with international law as suggested by Panama.

We also strongly support Palestine's textual suggestion for a provision in 7.1 *bis* stipulating that "State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented, in consultation with, and with the full participation of affected communities, are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected. (Palestine)" - we could see this Article being placed under legal liability as well.

In Article 7(2), States party to the Treaty should ensure that their domestic laws facilitate access to information both through assisting with the provision of information when corporations fail to provide meaningful access to information, and by taking into due consideration and recognising the validity of different forms of data and information gathered by communities.

Article 7 must articulate specific avenues for redress. Notably, the article must keep reference to two central components of the right to an effective remedy: (1) the right to due process (notice and right to be heard); and (2) the right to access justice systems in an "adequate, timely, and effective manner."

This article must also keep reference to specific remedies, including:

- Facilitating requests for disclosure of State or corporate finances or relations and other relevant information (as suggested by Palestine in Article 7.2)
- Expanding admissible evidence to include different types of evidence, such as oral and visual, in efforts to prioritize which is more suitable for communities to remove barriers for community-led data
- Provide adequate and effective legal assistance to victims throughout legal process
- Guarantee due process right to be heard in all stages of proceedings,
- Avoiding gender and age stereotyping
- Avoiding unnecessary delays and costs on those affected by abuses and violations related to business entities
- Removing legal obstacles, including *forum non conveniens*, to initiate proceedings in the courts of another State Party in all cases of human rights abuses and violations resulting from business activities in particular those of a transnational character.

- Ensuring that burden of proof is on corporate entities or entities involved in business activities that may have caused or contributed to human rights abuses and / or violations (as suggested by Palestine in Article 7.5)

For further textual suggestions on this article click here.

Article 8

In Article 8.1, the liability should be clearly attributed to "legal or natural persons *conducting business activities* that may have caused or contributed to human rights abuses and / or violations - particularly of a transnational character". The explicit mention of these phrases, while simple, makes the section much more powerful. This article must not eliminate mention of the transnational nature of business activities as it may signal an intention to protect or shield multinational corporations from the effects of this treaty by blurring their explicit accountability to this binding document.

This Article must retain mention of "comprehensive and adequate systems of liability" as well as the broad jurisdictional approach of the Third Draft ("conducting business activities within their territory, jurisdiction or otherwise under their control").

In Article 8, criminal, civil and administrative legal liability for abuses and violations related to business activities must be clearly articulated. There should be a clear legal standard classifying how business activities will be prosecuted by State Parties through this legally binding instrument. This Article must further be enshrined in rights - rather than needs. Any reference to victims "needs" instead of "rights" is very concerning because it frames this concept as a weaker mechanism through which victims of corporate abuse and violations can access the justice system. Further, the gravity of violations and abuses may differ but endeavors for legal liability and subsequent avenues must be at the disposal of those affected or impacted by human rights abuses or violations.

Liability of legal and natural persons under Article 8 must not be limited to crimes accessory to the commission by the main perpetrator such as conspiracy as well as aiding and abetting - it must also refer to situations where legal or natural persons may be directly involved in violations and abuses of human rights - whether separately or jointly with other actors. Categories of accessory liability such as conspiracy are not standards adopted in international law (i.e. the Statute of the ICC).

In Article 8.3, the notion of criminal liability could be further strengthened by the mentioning of specific examples of sanctions or penalties that companies could face should they be prosecuted such as withdrawal of licenses or termination of contracts for company projects and so on.

It would be crucial to ensure that criminal liability under Article 8 is triggered also by a business activity that violates war crimes, crimes against humanity, and other grave breaches of international human rights and humanitarian law. This would ensure that the gravity of the abuse, the public interest and justice is reflected in the kind of legal liability attributed to the perpetrator and the sanctions applied.

Article 8 should also include a provision reaffirming the joint and several responsibilities between all companies involved in an abuse or a violation, be it along the global value chain or in the time of armed conflict. In particular - in Article 8.10, we agree with the proposal by Palestine to include the following provision: *"All companies involved in human rights abuse or violation, whether a*

subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibility for human rights abuses in which they are involved."

For further textual suggestions on this article click here.

Article 9

This article must absolutely retain the language in the Third Draft which includes, "victims, irrespective of their nationality or place of domicile," can bring a claim for human rights violations and abuses. This sentence must not be eliminated in the treaty text. Victims and their families should be able to decide where to adjudicate a case.

It is also important for the treaty text to articulate what is meant by domicile - this should include both where the company is headquartered but also the place where its substantial assets are held to ensure remedy for affected communities. We agree with the proposal of Palestine (in 2021) to include a provision to this effect in Article 9(2)d *bis*.

Article 9 should also not restrict the advancement in applicability of international law based on applicable domestic or State laws. This defies the very purpose of this treaty which would be to expand avenues for remedy and corporate accountability by setting legal standards that would enhance the ability to adjudicate cases of abuses and violation related to business activity extraterritorially across different jurisdictions. The aim of this treaty is not to limit liability but to expand it.

States should incorporate or otherwise implement within their domestic law appropriate measures for universal jurisdiction for human rights violations and internationally recognized crimes mentioned in the preceding. This was mentioned in the zero Draft under Article 6 and should be reintroduced. As such, we support the textual suggestion by the State of Palestine to add the following provision: ***"Where applicable under international law, State Parties shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes."***

Article 10

In line with feminist analysis, we recommend adding that domestic statute of limitations applicable to civil claims or to violations that do not constitute the most serious crimes of concern to the international community as a whole shall allow a reasonable and gender-responsive period of time for the investigation and commencement of prosecution or other legal proceedings. This should also apply where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological state (to support, in particular, justice for victims of sexual and gender-based violence, as well as children and persons with disability): "10.2. The States Parties to the present (Legally Binding Instrument) shall adopt any legislative or other measures necessary to ensure that statutory or other limitations applicable to civil claims or violations that do not constitute the most serious crimes of concern to the international community as a whole allow a reasonable gender-responsive period of time for the commencement of legal proceedings in relation to human rights abuses, particularly in cases where the abuses occurred in another State or when the harm may be identifiable only after a long period of time, or where the victim is delayed in commencing a proceeding in respect of the claim because of their age, physical, mental or psychological condition."

Article 11

The “applicable laws” section of the LBI must be retained in the draft text of the treaty - and it must recognize Indigenous customary laws. If taken away, this would eliminate one solid avenue for Indigenous Peoples and nations under occupation to assert their right to self-determination.

Article 13

Article 13 must maintain the good faith standard for State Parties to cooperate with one another to stop corporate abuse of human rights - with the requirement that State Parties take “all necessary steps" to do so. The good faith standard represents a concrete obligation that State Parties must comply with.

Written Input by FIAN International on the Third Revised Draft of the Legally Binding Instrument (LBI) on transnational corporations and other business enterprises with respect to human rights

This written input: i) explains aspects that constitute positive advancements in the current third draft and must be maintained in the fourth draft, and ii) provides specific text proposals for other aspects that can be further improved.

In line with our position during the 8th session of the OEIGWG, FIAN would like to highlight that we **consider the third revised draft of the Legally Binding Instrument (hereafter, LBI) as the only legitimate basis for negotiations** and base our inputs on the same. The third draft is the result of a democratic process of consultations and negotiations and cannot be put at the same footing as the Chair's informal proposals. We would also like to reiterate that lessons learned from our case work[1] and ground realities have shown us the urgent need for a robust LBI that effectively tackles corporate impunity.

In general, FIAN considers positive and welcomes changes that ensure a strong gender perspective in key provisions of the instrument. Regarding the listed instruments in § 3 of the preamble, States should **include the UN Declaration on the Rights of Peasants and other peoples living in rural areas (UNDROP) and international humanitarian law standards,** to ensure that the LBI is updated with the latest relevant standards in international human rights law, democratically adopted by the Human Rights Council and the UN General Assembly. Similarly, **Peasants should be recognized in paragraph 13 of the preamble as well as throughout the LBI,** as a group requiring special attention.

We also suggest that the LBI should not refer to businesses in general, but highlight after each mention of businesses: '**in particular, activities of a transnational character'** and '**along the value chain**', given the systematic and serious impact of transnational corporations on human rights and the environment. States shall recall that this OEIGWG was established to focus particularly on the gaps in international human rights law regarding the business activities of transnational character, which pose different and particular regulatory and accountability challenges given their power and size.

Additionally, the 4th revised draft should eliminate legal ambiguities caused by the use of broad, general terms such as "adequate", "appropriate" and "where suitable". These terms lack legal precision, are open to interpretation and can be restricted in their scope to the detriment of affected people and communities.

In addition, the prevalence of international law agreed in the treaty over national law should be the rule, to ensure the effectiveness of the LBI.

Article 1 – Definitions

[1] https://www.fian.org/en/news/article/how-could-a-un-treaty-make-transnational-corporations-accountable-2660; https://www.fian.org/en/publication/article/the-case-of-the-posco-india-project-2786; https://fian.org/en/press-release/article/ugandans-face-serious-human-rights-violations-amid-total-project-2873

The broader definition provided to "business activities" is welcomed and States should retain this change. The scope of the definition of 'harm' in Art 1.1 was considerably reduced in the third draft. Therefore, the re-insertion in Art 1.1 as follows would be appropriate:

> *"1.1 "Victim" shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively has suffered harm,* ***including physical or mental injury, emotional suffering, or economic loss, or substantial impairment of their human rights*** *that constitute human rights abuse, through acts or omissions in the context of business activities.".*

Also, of relevance would be the explicit mention of the term "global production chain" in the definition of "business relationship" under article 1.5, as follows:

> "5. "*…or contractual relationship,* ***including throughout their value chains,*** *as provided under the domestic law of the States, including activities undertaken by electronic means".*

Article 2 – Statement of purpose

The inclusion of, "particularly those of transitional character" (same as in Art 2.1.a) in Art 2.1.b is critical, since it tackles the particular regulatory and accountability challenges arising from *transnational* business activities. Therefore, States should include "*in particular of a transnational character*" in the art. 2.1, b as well as to include a paragraph e. that reads:

> ***e. To close gaps in the regulation and accountability of legal persons carrying out business activities of a transnational character, including particularly transnational corporations and other business enterprises that undertake business activities of a transnational character***

Article 3 – Scope

In **article 3.3, States should delete the word "core"** when referring to international human rights treaties. It is also critical to add international humanitarian law and international criminal law treaties in Art 3.3.

Article 4 – Rights of victims

Important elements of this article addressing the many different types of barriers, which affected individuals and communities face when attempting to access justice have been maintained in this revised draft (art. 4.2.a-f) and we emphasize on their retention. Nonetheless, the rights included in this article are not just right of victims already defined as such but are rights of all affected communities and individuals. Therefore, states should **change the title of the article to "Rights of affected communities and individuals"** (as also proposed by Cameroon).

Art. 4.2.f on the right to access information should be further elaborated to include stronger requirements for the disclosure of information in order to facilitate legal proceedings.

The text proposal for article 4.2.f is as follows:

> *" 4.2.f. be guaranteed legal aid and access to information* ***concerning relationships covered under article 1.5 [businesses relationships] and relevant to pursue legal proceedings and effective remedy, including through enactment of necessary laws. In the absence of such***

information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure.”

The right to access such information and its corresponding obligation for business enterprises and States to disclose such information should also be reflected in article 7 on access to remedy and article 6 on prevention. Relevant sources to justify this improvement are the case of *Bámaca Velásquez vs Guatemala* and the Joinet Principles to combat impunity.

We propose to include additional components of reparation for victims under current article 4.2c, which better reflect the immediate and long-term measures which should be taken, and the importance for long-term monitoring of such remedies:

“4.2.c…. environmental remediation, ecological restoration, ***including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right to long-term monitoring of such remedies.”***

Our analysis of the cases of Brumadinho Dam Disaster and POSCO land grabbing have concretely shown the need to have such key components specifically added to reparations.

Effective remedies and reparation measures should take into account the differentiated impacts of human rights abuses on specific groups in order to respond adequately to these impacts and their particular needs. In order to guarantee this, it is important for the remedy process to be transparent, independent and count with the full participation of those affected. In addition, such processes should also consider harm that could appear in the future. To this end, we propose the inclusion of an additional paragraph to this article:

“4.2.c bis be guaranteed full participation, transparency and independence in remedy processes, which take into account the differentiated impacts of human rights abuses on specific groups of people and respond adequately to these impacts and their particular needs, including for future harm.”

On article 4.2.d, the insertion of the word “effective” to the reference on non-judicial grievance mechanisms is crucial. The revised article should read as follows:

“4.2.d *[…] to courts and* ***effective*** *non-judicial grievance mechanisms of the State parties”.*

States should also include an **additional paragraph** in this article regarding the right for affected individuals and communities to request the State party to adopt precautionary measures where human rights abuses are imminent and could lead to irreparable harm, regardless of the existence or not of a legal proceeding or of a pending legal decision on the case.

“4.4. Affected individuals and communities shall have the right to request in court the adoption of precautionary measures, regarding situations that present a risk of irreparable

harm. Such measures shall be taken regardless of the existence and outcome of a legal proceeding relative to the situation."

We would like to defend the inclusion of collective actions - in some countries known as class actions -, as an appropriate legal measure to defend the rights of affected communities and individuals when these are affected collective by one action, decision or omission of the perpetrator. This mechanism is already established in many legal orders around the world and could be included in this article.

Article 6 – Prevention

The obligation for States to take precautionary measures in the case of serious or urgent risks of human rights abuses leading to irreparable harm, established in the proposed article 4.4, should also be reflected in this article on prevention (as proposed by Cameroon and Palestine). We therefore propose an additional paragraph after article 6.1, which would read as follows:

"6.1 bis. ***States parties shall take precautionary measures by request of affected individuals or communities, including the suspension and complete cessation of business activities of transnational character, regarding situations that present a risk of irreparable harm, independently from the existence or outcome of a legal proceeding relative to the situation."***

Prevention and not mitigation should be at the core of human rights due diligence. As mitigation can result more cost-effective than prevention for certain transnational corporations and other business enterprises, they might prefer to mitigate instead of mainly and effectively invest in prevention. Mitigation should be understood as a component of the precautionary measures, which we propose of the remedy and liability processes under articles 4 and 8. It is, therefore, proposed **that references to "mitigation" in articles 6.2, 6.3b and 6.3c be deleted.**

Article 6.4 currently fails to set clear standards on how assessments should be undertaken and who should undertake them. It is also important for article 6.3 to clarify that this list of human rights due diligence measures is non-exhaustive. We therefore propose the following amendments for articles 6.4 and 6.4a:

*"6.4 States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include****, but shall not be limited to:***
6.4.a *Undertaking and publishing regular* ***ex ante and ex post*** *human rights, labour rights, environmental,* ***socio-economic*** *and climate change impact assessments throughout their operations;*
Such impact assessments shall be undertaken by independent third parties with no conflicts of interests and must be conducted in consultation with, and drawing from input and knowledge of those likely to be impacted*."*

On article 6.4.c. regarding meaningful consultations, these should be conducted in a continuous manner, both prior as well as during the business activities (similar to assessments). The treaty should also set standards for **meaningful consultations**. This shall respect the principles of

transparency, independency and participation, meaning that these shall be undertaken by an independent third party. We therefore propose the following amendment to article 6.3.c:

> "6.3c. *Conducting* ***ex-ante and ex-post*** *meaningful consultations […] such as women, children, persons with disabilities, indigenous peoples,* ***peasants,*** *[…] or conflict areas.* ***Such consultations shall be undertaken by an independent third party, be conducted in a transparent and participatory manner and protected from any undue influence from commercial and other vested interests.***

The correlative obligation for business enterprises to disclose information from our proposed article 4.2.f. on the rights of victims to access information should be included in this article on prevention. Article 6.4e. should therefore be modified as follows:

> **"6.4e.** *Reporting publicly and periodically on non-financial matters, including information about group structures, suppliers* ***and all other legal entities it has business relationships with,*** *as well as policies […]*

Concerning human rights due diligence requirements in occupied or conflict-affected areas, it is recommended that article 6.4g is strengthened as follows:

> *"6.4g Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses* ***and humanitarian law violations or abuses*** *in occupied or conflict-affected areas, including situations of occupation.* ***Such prevention includes disengaging from business operations and relationships to prevent human rights abuses in these areas"***

The revised text of article 6.7, where it's made clear that adequate penalties and corrective action for failing to comply with Art 6.3 and Art 6.4 will be without prejudice to the provisions on criminal, civil and administrative liability under Art 8 **is very welcomed and we strongly support its remainder in the legally binding instrument**. Due diligence cannot simply be a 'check-list' procedure with the potential safeguarding legal and natural persons from legal liability. In addition to being an 'obligation of conduct', due diligence should also be an 'obligation of result'.

The undue influence of commercial and other vested interests of transnational corporations and other business enterprises goes far beyond policy spaces. This for example has been one of the hurdles faced in processes aiming to regulate the marketing of ultra processed edible products, especially when trying to protect the right to food of children and to prevent non communicable diseases such as diabetes and obesity. We therefore propose the following additions in article 6.8.:

> **"***6.8. In setting and implementing their public policies and legislation with respect to the implementation of this (Legally Binding Instrument), State parties shall act in a transparent manner and protect these* ***policy-making processes,*** *policies,* ***laws, government and other regulatory bodies, and judicial institutions*** *from the* ***undue*** *influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character."*

As it currently stands, this article on prevention only focuses on the due diligence obligations for transnational corporations and other business enterprises and leaves out the prevention for States, for instance regarding concessions, policies on public procurement, development cooperation,

energy or different international agreements they adhere to. The preventive measures that States take should be undertaken in a transparent manner, with the participation of those potentially impacted, which also requires disclosing information.

We therefore propose the inclusion of **two additional paragraphs** under this article regarding the specific prevention obligations of States:

> ***"6.9. For the purposes or article 6.1, State parties shall conduct human rights, environment and gender impact assessments of all their policies, projects, activities and decisions involving business activities of a transnational character likely to impact public interest. This obligation shall apply to all branches and bodies of the State. Such assessments shall be conducted in consultation with, and drawing from input and knowledge of those likely to be impacted.***
>
> ***6.9 bis. States Parties shall provide, or ensure the provision of all relevant information, including investment agreements, to individuals and communities concerning business activities and projects likely to impact their human rights in a timely, objective and accessible manner.***
>
> ***6.10. When participating in decision-making processes or actions as Members States of international organisations, State parties shall do so in accordance with their human rights obligations and obligations under the present (legally binding instrument), and shall take all necessary steps to ensure that such decisions and actions by the international organisations do not contribute to human rights abuses and violations in the context of business activities of a transnational character."***

6

Article 7 – Access to remedy

We welcome article **7.3 d) which requires States to remove legal barriers including the doctrine of *forum non conveniens* and would strongly recommend retaining Art 7.4** which ensures that court fees, and other legal costs do not place an unfair and unreasonable burden to victims.

We welcome Art. 7.5 to the extent that it incorporates our recommendation to give courts the power to order the reversal of the burden of proof in appropriate cases to fulfil the victim' right to access to remedy and balance power of the litigating parties in the judicial procedure. In legal regimes where the reversal of the burden of proof is not provided for, the LBI should strongly encourage the adoption of all needed measures to allow for this provision in order to fulfil victims' right to access remedies. The addition of consistency with both international law and domestic constitutional law has, however, narrowed the scope of this provision and made it ambiguous in application. **We would therefore suggest deletion of "and its domestic constitutional law".** Paragraph 7.5 should therefore be amended as follows:

> *"7.5 States Parties shall enable the reversal of the burden of proof in appropriate cases to fulfill the victims´ right to access to remedy,* ***where consistent with international law. Where the reversal of the burden of proof is not allowed for in certain legal regimes, State parties shall, , adopt all necessary measures to provide for reversal of burden of proof and ensure that it lies with the defendant".***

Article 8 – Legal liability

We agree with additions by Palestine on 8.3 since this clarifies the kind of measures to be taken. Withdrawal or licenses, suspension and termination of contracts are foreseen in administrative law in some national legal frameworks and are effective to stop or mitigate harm.

States should explicitly insert *victim participation* in the definition of responsive reparations, also in line with the provisions under Article 4.2.c and our corresponding suggestions above. In this sense, Article 8.4 should read:

> *"8.4 States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective,* ***participatory****, and gender and age responsive reparations to the ~~victims of~~* ***communities and individuals affected by*** *human rights abuses in the context of business activities, including those of a transnational character, in line with applicable international standards for reparations to the victims of human rights violations.* ***When defining the remedies, States Parties should apply the standards set under Article 4.2.c bis****."*

Article 8.6 as it stands now, is very text heavy and not very precise. Additionally, in order to further clarify the principles of parent company liability (including due to the corporate culture, standards or products), and joint and several liability, for human rights abuses that occur throughout their business relationships, including through their value chains, we propose to amend article 8.6 as below.

> ***"8.6.*** **States Parties shall ensure that their domestic law provides for the joint and several liability of one business enterprise, for harm to a third person caused or contributed to by another legal or natural person, when:**
>
> **a. the business enterprise has controlled, taken over, supervised, advised, intervened with or otherwise sufficiently influenced the other person's activity that caused the harm and failed to prevent this person from causing or contributing to the harm; or**
> **b. the business enterprise (legally or factually) controls such other person, unless the business enterprise demonstrates that the harm was caused notwithstanding the reasonable and necessary measures it had taken to prevent it; or**
> **c. the business enterprise should have reasonably foreseen the risk of harm in the activity (within its business relationships) that caused the human rights abuse and that is linked to its operations, products or services, unless the business enterprise demonstrates that the harm resulted notwithstanding the reasonable and necessary measures it had taken to prevent it.**

This proposed revision in Art 8.6 clearly demarcates liability for harm to others in situations where there exists: a. control over the specific activity; b. a presumption of liability in case of control over others and; c. presumption in case of foreseeability. It also embodies rebuttable presumptions of control in these three cases.

Article 8.7 is the corollary to article 6.7 regarding the link between human rights due diligence obligations and the determination of liability. These two articles are very important in order to avoid due diligence requirements becoming procedural 'check-list' exercise and a tool for transnational

corporations and other business enterprises to escape liability. Liability should never be only defined by compliance with due diligence. Under a mere due diligence regime, the risks and mitigation measures determined by corporations are the only rule the judge applies. This is very restrictive to ensure access to justice and displaces the judgement of the care taken, from the adjudicator to the company.

We therefore recommend the deletion of the second phrase in this paragraph, which may result in contradicting the purpose of the paragraph and suggest that liability depends on the compliance with human rights due diligence standards. The aim of this deletion is to ensure that the adjudicator does not focus on the implementation or not of a due diligence procedure, but on the harm caused, according to the principles as the duty of care or the principles of extra contractual civil liability, in line with article 8.6.

We therefore propose the deletion in article 8.7 of the following sentence:

"Ar. 8.7 Human rights due diligence shall not automatically….~~The court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.~~"

Liability standards should be different and stricter for business activities, which are inherently dangerous and where risk is foreseeable. In such cases, transnational corporations and other business enterprises should be held liable even when they have not acted negligently. Strict liability is appropriate in cases where business enterprises are engaged in hazardous or inherently dangerous industries. We therefore propose to include a clause on strict liability, which is a form of liability that already exists in different domestic legal systems:

"8.11. In business activities that are hazardous or inherently dangerous, States Parties shall provide measures under domestic law to establish strict liability, without regard to the negligence of the business enterprise. This shall apply without prejudice to already existing provisions on strict liability in domestic law."

Article 9 – Adjudicative jurisdiction

We welcome the inclusion of domicile of the affected individual and communities under article 9.1 in the definition of jurisdiction. This is particularly important, for instance for migrant workers, who face barriers related to resources, mobility and language in access to justice and would now have the option to file a complaint where they are domiciled or are a national of. In order to ensure consistency in language used in article 9.1.c, we propose the inclusion of the word "natural persons" under article 9.2, as follows:

"9.2 *Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, the legal* ***or natural person*** *conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its: […].*"

8

In article 9.3, the referred article on *forum non conveniens* should be article **7.3.d and not article 7.5** which was the reference in the second draft, but now changed to include the reversal of the burden of proof.

We also see positively the elaboration of article 9.5 as it attempts to establish the principle of *forum necessitatis*, which provides affected individuals and communities with a forum when no other forum is available nor guarantees them a fair judicial process. The revised Art 9.5 uses 'judicial process' instead of 'trial' which is a broader term incorporating other aspects of a remedial process and not just the trial. The new grounds laid down in Art 9.5 defining 'connection to the State Party' also offer more clarity.

We recommend the inclusion of an additional paragraph in article 9, which provides for universal jurisdiction in cases of human rights abuses and violations, which amount to international crimes, as defined under article 8.9, given that such crimes are of concern to the international community as a whole.

"9.6. All courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State for human rights abuses and violations which constitute the most serious crimes of concern to the international community as a whole."

Article 11- Applicable Law

It is recommended that applicable law must also be the law of the State where the victim is domiciled. It can be added as a new ground as Art 11.2.c.

Additionally, in the event of conflict of laws regarding State obligations under this LBI and other bilateral or multilateral trade or investment agreements, **the applicable law should be in accordance with Art 14.5 of this LBI. This understanding is also in line with the pro persona principle.** This can be added as a new article 11.3 and read as follows**:**

"11.3 In the event of conflict of laws resulting from obligations of States under bilateral or multilateral trade and investment agreements and their obligations under this (Legally Binding Instrument, the choice of applicable law shall be in accordance with article 14.5 of this (Legally Binding Instrument)."

Although, some stakeholders participating in the negotiations have highlighted a risk of forum shopping, this is not a real risk, since usually victims do not have the capacity to make a claim in multiple forums and have very scarce resources that barely allow reaching out to a single forum.

Article 12- Mutual Legal Assistance and International Judicial Cooperation

We recommend the deletion of Art 12.12, which reads contrary to the very aim of this Article. The provision offers no clarity on what constitutes "applicable laws" of the State Party and the grounds that may exist to assess the claim of the requested State party for refusing such mutual legal assistance or international legal cooperation. Given the nature and impact of business activities of a transnational character, legal assistance and judicial cooperation between States is crucial for affected communities to fully realise their rights under this LBI.

It is also imperative that Art 12.1 be read in conjunction with Art 14.3, so the highest standard for the respect, protection and fulfilment of human rights that is provided for (either in domestic law or international, regional law) is followed for the provision of mutual legal assistance and international judicial cooperation. The revised article should read as follows:

> ***"12.1 States Parties shall carry out their obligations under this Article in conformity with any treaties or other arrangements on mutual legal assistance or international judicial cooperation that may exist between them. In the absence of such treaties or arrangements, States Parties shall make available to one another, mutual legal assistance and international judicial cooperation to the fullest extent possible under international law and in conjunction with Art 14.3 of this instrument.***

Article 14 – Consistency with International Law principles and instruments

We strongly suggest the retention of provisions included in this article that enable for the maximum protection of the rights of affected individuals and communities and strengthen their access to justice and remedies. **In this sense, we reiterate the importance of article 14.3.**

We also strongly support the inclusion of article 14.5 a and b that will ensure that the human rights obligations of States arising from this legally binding instrument shall not be trumped by other international agreements, most notably trade and investment agreements. We propose for this article to also refer to **"contracts"** in addition to "international agreements". We additionally propose for the legally binding instrument to require States to review and, where necessary, amend such agreements which contradict States Parties human rights obligations or obligations under the present. Article 14.5.a would therefore read:

> *"14.5a. any existing bilateral or multilateral agreements* ***and contracts,*** *[…] shall be interpreted, implemented* ***and, where necessary reviewed and amended,*** *in a manner that will not undermine or limit their capacity to fulfil their obligations under this […]."*

10

Franciscans International
A voice at the United Nations

Submission to:

Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights

March 2023

Franciscans International welcomes the opportunity to submit comments to the working group in regard to Articles 1-14 of the draft legally binding instrument. We reiterate our commitment to constructively engage in this process, and underscore the urgent need for binding rules on the regulation of businesses under international human rights law. Our partners throughout the world continue to relay the various adverse impacts that business activities and operations have on them, their communities, and the environment. The most severe effects are often linked with extractive industries who reap profits from the long-term damage they inflict on communities and nature; too often, this occurs in total impunity.

Accordingly, we urge all States to participate in the regional consultations and IGWG sessions, in an active and constructive manner, and in good faith. In the absence of an updated draft, as expected following the recommendations of the Chairperson-Rapporteur in the report of the 2021 session, the 3rd revised draft of the legally binding instrument and the textual proposals by States made at the 7th and 8th sessions continue to be the basis for negotiations and any revised draft.

Preamble

PP6: We support keeping the text as is, and we reject the edits suggested by the United States. We underscore the importance of including reference to "international humanitarian law" throughout the LBI, and the need for accountability in cases where businesses violate both international human rights law and international humanitarian law.

PP8: We support the proposal made by Palestine, Panama, et. al to change the text to read "and stressing that there should be no discrimination on grounds that are prohibited by international human rights law."

PP14 bis: We think that Panama's proposal is in general positive and would provide an important link between the future LBI and international environmental agreements. However, we like to propose the following rewording to better correspond to the realities faced globally, and in order to ensure policy coherence in line with international human rights law. The suggested change is in red:

> *Recognizing that regulating business activities in international human rights law is key to achieving the goals of key environmental treaties including, but not limited to, the UN Framework Convention on Climate Change, the Convention on Biological Diversity, the*

Convention to Combat Desertification, the Basel, Rotterdam and Stockholm Conventions and the Minamata Convention on Mercury;

Article 1

Article 1(1) – Definition of Victim: We suggest adding "human rights violations" in addition to "abuses" throughout the text. Accordingly, we suggest editing the first sentence of Article 1, so that it reads, in part:

> "*Victim" shall mean […] suffered harm that constitutes an abuse or violation of human rights through acts or omissions in the context of business activities*."

We reject Brazil's proposal to delete "group of persons" and "collectively" in the first sentence, as it would go against vast jurisprudence and international human rights law that recognizes the collective exercise of human rights.

We also note that we, alongside our partners, have documented and advocated on cases of environmental damage and toxic waste, where the impacts have taken years to manifest, and/or continue to impact local populations for generations. We would like to propose that the definition of *Victims* in Article 1:

- Recognizes not only people who have suffered harm but also those who are under impending threat of harm; and
- includes those impacted by transgenerational harm.

We also note that relatives of victims should not be narrowed. In line with international and regional jurisprudence, this definition should include all family members and relatives including caregivers' and others in familial relationships.

The definition should also make explicit reference to human rights defenders as potential victims

The definition would state in part:

> "*The term "victim" shall also include all family members or dependents of the direct victim, including when impacted by latent, enduring, or trans-generational harm*."

This language had been supported by judgements from the International Criminal Court, which has recognized the "phenomenon" of harm from transgenerational trauma. The Committee on the Rights of the Child has also underscored "transgenerational consequences" in the context of business activities and operations, and the need for States to provide remedies in cases of business violations.

Article 1(2): In line with the aforementioned suggested change, we propose that Article 1(2) defines "Human rights abuse or violation." We underscore the need to maintain both phrases,

and make clear that the instrument applies to violations committed by the State or its agents in the context of business activities.

We support the specific inclusion of the right to a clean, healthy and sustainable environment in the draft.

Article 2

Article 2(1)(c): We support Panama's proposal to delete the phrase "and mitigate" and again suggest the inclusion of "human rights violations", so that the text reads:

> *To prevent the occurrence of human rights abuses and violations in the context of business activities by effective mechanisms of monitoring and enforceability*

Article 2(1)(e): In line with the above, we again suggest editing the text to:

> *"[…] human rights abuses and violations in the context of […]"*

Article 3

Article 3(3): We support Palestine's addition to the text.

Article 4

Article 4(1): In line with our above suggestions, we support Palestine's amendment so that it reads:

> *"Victims of human rights abuses and violations […]"*

Article 4(2)(f): The inclusion of a provision on access to information is critical. We therefore support the various suggestions to include and bolster the text regarding access to information, including those made by Panama and Ecuador. While recognizing the important suggestions made by Cameroon, we would propose placing some of the suggestions in other articles as relevant and useful, such as in Article 6.

Article 5

Article 5(2): We support the amendments made by Panama and South Africa, to include the terms "harassment and reprisals" at the end of the text.

Article 5(3): We support Palestine's changes to the text.

Article 6

Article 6(1)ter: We support Palestine's inclusion of precautionary measures.

Article 6(2): We support the suggestion by Panama, Mexico and others to delete "and mitigate" in the article, and also suggest adding "avoid." In line with previous comments, we also suggest adding "human rights violations" to the text. It would then read in part:

> "*respect internationally recognized human rights, avoid and prevent human rights abuses and violations throughout their business activities and relationships."*

Article 6(3): We support Palestine's additional phrasing of "other actors across the full value chain including State entities," and also that human rights due diligence must be "ongoing." In line with this proposal, the State, as an economic actor, needs to be addressed throughout the text. The proposed text would read:

> *"For that purpose, States parties shall require business enterprises and other actors across the full value chain, including State entities, to undertake ongoing human rights due diligence, proportionate to their size, risk of severe human rights abuses and violations and the nature and context of their business activities and relationships, as follows […]"*

Article 6(3)(a): We suggest editing the text to read:

> *"Identify, assess and publish any actual or potential adverse human rights and environmental impacts that may arise from their own business activities, or from their business relationships:"*

Article 6(3)(b): We suggest retaining "avoid," so that it reads

> "*Take appropriate measures to avoid and prevent human rights abuses and violations. […]"*

In that regard, we also support Palestine's suggestion to add a sentence in 6.3 (b) on situations where mitigation of risks is impossible, such as in certain contexts of conflict.[1] We suggest the following:

> "*In cases where mitigation is impossible, businesses should avoid entering into activities or relationships, and/or cease the activity and use its leverage to mitigate any remaining impacts to the greatest extent possible*."[2]

Article 6(3)(c): We suggest amending the text in line with the aforementioned comments to:

> "*Monitor the effectiveness of their measures to avoid, prevent, and mitigate human rights abuses and violations, including in their business relationships*"

---

[1] Report of the United Nations High Commissioner for Human Rights,26 January 2018, A/HRC/37/39, para. 40-41

[2] *See*: Statement on the implications of the Guiding Principles on Business and Human Rights in the context of Israeli settlements in the Occupied Palestinian Territory, Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises, p.8

Article 6(3)(d): We suggest amending to:

"*Communicate regularly and in a public, appropriate, and accessible manner to the public and stakeholders, including through gender-responsive consultation with local and Indigenous communities, to account for […]"*

Article 6(4)(a) and Article 6(4)(e): We note our support for language in these articles on "environmental and climate change impact assessments" and "environmental and climate change standards" in the respective articles.

Article 6(4)(b): We underscore the importance of this article, and also support Panama's suggestion to add "*and age*" to the text.

Article 6(4)(c): We suggest editing the last sentence so that it reads:

"[…] *and protected persons in armed conflict, including situations of occupation."*

Article 6(4)(d): In line with the aforementioned comments, we suggest:

"Adopting and implementing enhanced and ongoing human rights due diligence measures to avoid and prevent human rights abuses in conflict-affected areas, including situations of occupation, and ensure that businesses respect international humanitarian law standards. Given the risk of gross human rights abuses in conflict-affected areas, certain situations may require that businesses refrain from entering into activities and/or relationships or cease them depending on the phase of operation."

Article 6(5)bis: We propose this as an addition that reads:

"*States Parties shall take all necessary additional steps, including through human rights impact assessments and other measures, to respect and protect human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes but is not limited to, State ownership or control in business activities, State engagement in business activities with companies or other States, including trade and investment agreements, State regulatory oversight, or political or financial support. State Parties shall refrain from adopting laws and policies that directly or indirectly result in violations of human rights protected under this (Legally Binding Instrument)."*

Article 6(8): We support maintaining Article 6(8), and would suggest adding "standards'

"*In setting and implementing their public policies, legislation, and relevant practices with respect to the implementation of this […]"*

Article 7

Article 7(1): We welcome the recognition of the specific obstacles that some individuals and groups who are disadvantaged and marginalized face. This is important language and should be kept.

Article 7(1)bis: This proposed article by Palestine is interesting and relevant. Such an article would be valuable given the realities lived by communities in cases of mining disasters, among others, and how processes of reparations have been typically carried out (i.e. without the participation of affected individuals and communities, through non-public, non-transparent processes, and negotiations that bar any judicial civil proceedings for individual reparation).

Article 7(3): We support the original language of the article, and would like to note our concern with the proposal by Brazil, Pakistan, and Egypt to limit legal assistance "according to national legislation."

Article 7(3)(a): We suggest amending the article to ensure that States make information available regarding environmental disasters, including information regarding negotiations between businesses and States, such as:

> "*Making information available and accessible to victims of their rights, the status of their claims, and where appropriate, any information regarding environmental impact assessments, as well as information on negotiations, including reparation agreements, between businesses and States, in relevant languages and accessible formats to adults and children alike, including those with disabilities*"

Article 7(3)(b): We support Egypt's addition of "in a gender-sensitive, age-sensitive, and child-sensitive manner."

Article 7(4): We are concerned that limiting cases to where there is an "unreasonable burden" is too broad, and can be potentially challenged by businesses. We are similarly concerned with so-called "loser-pay" systems which may also deter victims from bringing claims, and may effectively allow businesses to re-harm communities.

Article 7.5: We would like to reaffirm the importance of the provision allowing the reversal of the burden of proof in cases of abuses of human rights by businesses. Such a provision is fundamental to avoid denial of justice, to protect general principles of law, the interest of justice and equality of arms. The possibility of the reversal of the burden of proof has been handled by many national, regional and international judicial bodies. They have found ways to ensure compatibility with the presumption of innocence. Notably by establishing criteria and safeguards among which such reversal should be "reasonable, necessary and proportionate in pursuit of a legitimate objective." Such balancing between rights and limiting procedural and other rights is nothing new to courts. We recall the precedent of the Escazu agreement article 8.3 (e) that stipulates that: States parties shall have "measures to facilitate the production of evidence of

environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof."

Article 7(6): We support Palestine's proposed changes to the text (to add "and violations" and delete reference to domestic law).

Article 8

Article 8(1): We suggest amending the text, in part to be in line with 8.3 and aforementioned comments in regard to adding "human rights violations", so that the text reads:

> *"[…] or otherwise under their control, for causing or contributing to human rights abuses and violations that may arise from their own business activities […]"*

Article 8(3): We suggest adding to the text as follows:

> *"[…] where legal or natural persons conducting business activities have caused or contributed to human rights abuses or violations, and violations of international humanitarian law."*

Article 8(4): We reiterate aforementioned comments on ensuring that the text says "human rights abuses and violations. After the first paragraph, we would also add the following:

> *"Particular attention should be given to cases of environmental damage or contamination in order to limit ongoing and future human rights abuses or violations, including to ensure that all necessary measures are undertaken in close consultation with impacted communities."*

Article 8(6)bis: We suggest the addition of an article that reads:

> *"State Parties shall also ensure that their domestic law provides for liability of State authorities who fail to adopt and adequately enforce environmental and other related legislation, which may unduly permit and prolong human rights abuses from business activities."*

Article 8(7): We support Palestine's amendments to the article, including the deletion of the last sentence and to add "human rights violations." This article is particularly important as more States are negotiating and implementing due diligence laws; given the varying standards and rigor in application of human rights due diligence, businesses must continue to be held accountable for any adverse human rights impacts that they have caused or contributed to.

Article 8(8): We support Palestine's amendments to the text.

Article 8bis: We note our support for Namibia's proposal if 8bis is retained.

Franciscans International
A voice at the United Nations

Article 9

We generally support the article as has been proposed in the third revised draft, and note our aforementioned comment to update with "human rights abuses and violations" throughout the article.

Article 9(3): We support keeping the article as is, and as supported by South Africa and other States. We think it is important to explicitly note "the doctrine of *forum non conveniens*", since in our experience, this doctrine is a very real obstacle to legitimate attempts by victims to access remedies in an appropriate jurisdiction and de facto leading to denial of justice.

Article 9(5): We suggest aligning wording regarding activity to be more in line with Article 9(2)(d) which notes "activity on a regular basis," and noting that "substantial activity" as currently in the article is too restrictive, so that Article 9(5)(c) is edited to:

"*some activity of the defendant*"

Article 10

Article 10(1) and 10(2): We underscore the importance of Article 10 generally. In line with the proposal we made in Article 1(1) in defining victims to include those that have been impacted by latent or trans-generational harm, we urge that Article 10(1) is broadened to include abuses and violations whose effects and impacts may only appear after or continue for long periods. This is especially relevant in cases of environmental harm. Article 10(2) should then be amended accordingly as well.

Article 10(2): We support Palestine's proposed amendments but suggest that it reads:

"*a reasonable and gender-responsive period of time*"

Article 12

Article 12(12): We support Palestine's proposal to delete this article. We more generally suggest removing any language referencing domestic laws that may limit the application of the LBI.

Article 14

Article 14(1): We support keeping the article as is, and reject proposals by China, Brazil and the US.

Article 14(3): We suggest adding "human rights violations" as relevant (and aforementioned) in the text, i.e. "[…] victims of human rights abuses and violations in the context of […]"

International Commission of Jurists' Written inputs on Articles 1- 14 of the Third Revised Draft Legally Binding Instrument on Business and Human Rights and the Chair Suggestions

March 2023

The International Commission of Jurists thanks the Chairperson-Rapporteur of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights for the additional opportunity to provide comments on the Third Revised draft of the legally binding instrument on business and human rights.[1] The ICJ has provided written and oral comments and suggestions on the same draft and in response to States' suggestions during the 7th and 8th sessions of the Open Ended Intergovernmental Working Group. The present document provides a summary of most of those comments and provides additional observations in relation to the in input of States and other stakeholders as well as conference room papers circulated during the 8th session. Extended versions of ICJ comments are available in a document published on the occasion of the publication of the Third Draft.[2]

The Third revised draft reflects mostly positive changes that supplement, clarify and strengthen some of the provisions of the instrument and increase the overall coherence of the draft and add some precision in certain cases. But the draft fails to adequately address certain outstanding issues concerning access to an effective remedy and legal liability for businesses' human rights abuses, which are central to an effective instrument.

The ICJ considers that the generally vague and ambiguous language contained in some of the Chair's informal suggestions,[3] does not provide the clarity, precision and robustness that is required in this legally binding instrument to effectively accomplish its purpose to improve protection of human rights in the context of global business activity.

For the same reason, the ICJ strongly disagrees with the commentary by some State delegations that criticized many provisions in the Third draft as being overly prescriptive in character.[4] These delegations advocated the inclusion of more general and flexible

[1] Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 23 January 2023, A/HRC/52/41/add.1

[2] https://www.icj.org/wp-content/uploads/2021/10/ICJ-Comments-Third-Revised-LBI-2021final.pdf

[3] Suggested Chair proposals for select articles of the legally binding instrument with the concrete textual proposals submitted by States during the eighth session, 28 October 2022, A/HRC/WG.16/8/CR

[4] See interventions by the United States of America and the European Union, in: Compilation of general statements from States and non-State stakeholders made during the eighth session,

language that they said would take into account the differences of the legal systems and policies of various States with a view to building consensus.

The ICJ considers that while this suggested approach may be warranted in a few circumstances, if adopted across the board it could serve to undercut the object and purpose of this treaty. It would also lead to treaty obligations drafted in ambiguous, general and abstract manner that will not provide a clear answer to the problems the IGWG is discussing, fail to provide adequate guidance for States and facilitate lack of compliance. Although the objective of building broad consensus is valuable, general, abstract or ambiguous provisions may only generate more confusion and lead to an ineffective treaty that will fail to provide protection to people and legal security and level playing field to business.

The ICJ reiterates its call to all delegations to work for a strong, legally-sound and enforceable treaty. The treaty should build on existing instruments and draw from good national developments. These instruments comprise the UN Guiding Principles on Business and Human Rights but must be anchored in existing international human rights treaty instruments, as interpreted by their authoritative monitoring bodies, which have extensively addressed the duties of States under those instruments and in relation to the activities of business enterprises. Indeed, the UNGPs themselves are also anchored in general human rights treaties. Further, national and regional good practices are positive, but they are not enough. We need global collective action and level-playing field for all actors.

Preamble

In relation to the Preamble, the ICJ would respectfully refer States and stakeholders to its extensive commentary on the Third Draft, available at the website of the OEIGWG.

Article 1: Definitions

The definition of "victims" in Article 1 of the 3rd Revised draft, largely corresponds to accepted definitions in UN instruments, such as the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. But it should be further refined in two respects. First, a victim is defined by reference to a human rights abuse, a term usually taken to refer to the conduct attributable to a non state actor, such a business enterprise. Because in many cases of abuses by companies there is participation (in the modality of complicity or otherwise) by a state agent, it is important that the term "violation" is added here to account for situations of State involvement in the causing harm to the victim. Secondly, the deletion of "persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" from the definition of "victims" weakens this definition in a manner inconsistent with international human rights standards set in art 2 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The ICJ joins other groups and States to ask for this part of the definition to be restated.

Human rights abuse.- The definition of "human rights abuse" in the Draft is now detached from any conduct by a business enterprise. As it stands, an "abuse" may be committed by business enterprises and States alike. While "abuse" can theoretically refer to a wrong by any kind of actor, in international human rights law the term "violations" is used to refer to conduct attributable to States. The revised Draft should avoid unduly conflating the

https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/igwg-8th-compilation-general-statements.pdf and Compilation of Statements delivered by States during the State-led negotiations of the eighth session, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/wgtranscorp/session8/igwg-8th-compilation-state-statements.pdf

usages of both "abuse" and "violation". The ICJ is of the view that the term "abuse" should be reserved for business' conduct and the term "violations" to state conduct to reflect the different position of each actor under international law.

Business activities.- The ICJ is concerned by the open ended broad definition of "business activities" in Article 1.3. The provision defines "business activities" that covers "any economic or other activity", …undertaken "by a natural or legal person", including a number of actors. As such, this definition risks to encompass also activities carried by NGOs, trade unions, churches that are proper to their function and purpose and have nothing to do with commercial or economic activities. If adopted, this definition would take the scope of this treaty far beyond its original mandate and could pose undue impediments to the legitimate activities of other actors. The ICJ proposes to define "business activities" as follows: "any activity of economic or commercial nature or associated activity", …undertaken "by a natural or legal person". This definition more clearly circumscribes the world of "business".

Article 2: Statement of Purpose

Purpose 2.1(b) to "clarify and ensure respect and fulfilment of the human rights obligations of business enterprises", should be matched by specific provisions in the draft treaty that fleshes it out. The ICJ proposes to do this by including at the start of article 6 (prevention), a provision that recalls business' responsibilities in respect to human rights (see below comment on article 6).

In this same paragraph, while ensuring fulfilment makes sense it is not clear at all how the proposed treaty can "ensure respect" of business obligations. It probably means "to ensure the respect of human rights obligations by business enterprises". An alternative would be to replace "respect and fulfilment" with "implementation".

The ICJ reiterates its remark that both subparagraphs 1(d) and 1(e) are missing a crucial element of redress, namely reparation. They need to be improved by reference to "effective access to justice remedy and reparation". This is to ensure that "remedy" is geared toward a reparative outcome and is not just a procedural device.

Article 3: Scope

The ICJ welcomes that Article 3 maintains a broad scope for the proposed treaty, potentially comprising all business activities while having a special focus on the activities of businesses with activities of transnational nature and scaling obligations in consideration of size, context and sector of activity.

Article 4: Rights of Victims

Article 4 sets out a list of rights of victims of human rights abuse which need to be protected and is reflective of existing and well-established standards of international human rights law, including the UN Basic Principles on the right to a remedy a reparation, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the UN Updated Set of Principles to combat impunity.[5] Although already existing, the

[5] 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. Available at: https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx; Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005

respect and compliance with these standards for victims' protection could significantly be reinforced by their incorporation in a legally binding instrument.

The Article needs to be drafted as an obligation for States Parties to the treaty to take measures to recognize and guarantee the rights of victims enumerated in it without prejudice to other rights recognized under international law or to a greater extent.

The ICJ recognizes the efforts to align article with adopted language in existing UN instruments, but it also stresses that the draft needs much more alignment, always acknowledging the need to adapt and update them to the context of protecting rights in the context of business human rights abuse may entail some language modifications. In this regard, the ICJ welcomes the recent changes operated in this article incorporating more clearly a gender perspective, collective reparations and age-sensitive approaches.

Paragraph (b) of 4.2 should be deleted as it overlaps with and effectively contradicts 4.1., which already guarantees all human rights for victims, whereas paragraph (b) unnecessarily only recognizes a few. This would signal an inappropriate expression of hierarchy among human rights, where certain rights are accorded or perceived to be accorded enhanced protected status, contrary to the principle of indivisibility and interrelatedness of human rights, affirmed by all States in the Vienna Declaration and Programme of action.

The ICJ reiterates its recommendation to include a reference to the "right to truth" as stated in the UN Updated Principles on impunity (Principle 2 and 4)

> "Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. (Principle 2, first part)
>
> Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate. (Principle 4)"

This and other provisions should also explicitly capture some child-specific elements to ensure that critical child protections do not go unaddressed. For instance, in article 4 (2) (e), although "age responsive" protective and support services have been added, a stronger emphasis on child rights should be considered by adding the words "**and child sensitive"** together with further reference to the requirement that "a child victim's identity not be revealed publicly without their express consent or, where this is not possible, without the consent of their legal representatives who shall be guided by the principle of the best interests of the child concerned."

Article 5: Protection of victims

Article 5.1 provides for an obligation to the protect victims and their representatives, families and witnesses against "unlawful interference" with their rights and "re-victimization in the course of these proceedings". It constitutes a repetition of what article 4.2 (e) provides for and could therefore be deleted, provided also that the definition of "victims" there also refers to representatives, families and witnesses, as proposed by the ICJ.

Article 5.2. provides for protections for human rights defenders, which still should be further strengthened by adding a specific reference to trade unionists as human rights

defenders, which seems necessary on the face of persistent and growing risk of threats and attacks to unions and workers.

In addition, Art. 5.2 should integrate "harassment and retaliation" at the end of the provision to protect victims, human rights and workers' rights defenders against such conduct by businesses and States. The ICJ supports amendments in this regard proposed by Panama and South Africa.

In many respects, this article is a continuation of and closely connected to article 4, and it may be sensible for the two articles to be merged in a single one. In fact, the standards in the original instruments from which articles 4 and 5 are taken were originally formulated largely together. This article also includes under its purview the representatives, families and witnesses of the victims, as well as their defenders (legal or non-legal), which is an additional argument for the inclusion of those persons and groups in the definition of "victims" in article 1.

While Article 5.3. is also critical for the protection of the rights of victims, it is a State's procedural obligation more intrinsically linked to access to remedy and to justice for the victim and would therefore be better placed under article 7 (Right to an effective remedy).

Article 6: Prevention

As stated above (in relation to "purposes"), the ICJ believes there should be substantive provisions to match and operationalize each of the stated purposes. In relation responsibilities or obligations of business enterprises, article 6 should be opened by a provision that restates business responsibilities, as follows:

"Business enterprises, regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses through their own activities and addressing such abuses when they occur, as well as by preventing or mitigating human rights abuses that are directly linked to their operations, products or services by their business relationships;"

The International Commission of Jurists reiterates its support for the adoption of strong and clear provisions on the prevention of human rights abuses and violations by companies. But the obligation of due diligence for companies is not the only preventive measure to be considered in the treaty. States must also take preventive measures in relation to their own commercial activities.

In this context, the ICJ supports the proposals made by Cameroon in relation to Article 6.1 for States to adopt higher standards aimed at guaranteeing respect for human rights in their own commercial relations, particularly in the context of public procurement.

Regarding due diligence for companies, the ICJ is of the opinion that paragraph 3 should be worded as closely as possible to the wording in the Guiding Principles. Any additional elements to be included in the due diligence process and which would arise from the experience of its implementation at the national level should in turn be stipulated in paragraph 4 of the draft.

In our opinion, these new elements are already present in Article 6 but they would need a more coherent approach: emphasis must be placed on the participation and consultation of workers and other stakeholders; increase the transparency and publication of information on the structure and organization of the multinational company, and increase the visibility of the mechanisms of vigilance, enforceability and sanctions for lack of compliance.

The ICJ recommends specific attention to the rights of individuals from groups in situations of vulnerability, including children, in impact assessments. Article 6.4 (a) requires attention to various groups and situations in carrying out human rights impact assessment. A reference to "children's rights" should be added in that paragraph, and "and girls" should be added after "impacted women" in 6.4 (b).

In 6.4 (c) or (d) it should be added that "consultations with children should be undertaken in accordance with the principle of the child's right to be heard." This is a set of standards on consultation and participation of children that cannot be left aside.

Article 6.8. should be strengthened to require States to enact laws enhancing transparency regarding business donations to political parties, corporate lobbying, awarding of licenses, public procurement, and the "revolving door" practice.

Finally, in relation to Article 6.6, the ICJ is of the opinion that it could be strengthened by taking up some of the Suggestions made by the Chairperson-Rapporteur of the IGWG, in particular the one calling for the establishment of a competent and independent national authority to monitor the implementation of treaty obligations.

Article 7: Access to Remedy

The ICJ supports article 7.1. in the Third Revised Draft. The ICJ reiterates that access to effective remedy is a universal right already recognized in international instruments. The inclusion of provisions to address some of the specific problems in the implementation of this right in the context of business activities and abuses, and the existing obstacles that victims face to find justice and reparation, are a central contribution of the proposed treaty to international law. However, an improved Article 7.1 in the Third Draft should be amended as follows:

> "7.1. States Parties shall ~~provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable~~ guarantee victims access to adequate, timely and effective remedy, including judicial remedy. **They shall take measures** ~~and~~ to overcome the specific obstacles which **individuals and groups in** vulnerable and marginalized **situations** ~~people and groups~~ face in accessing such ~~mechanisms and~~ remedies."

In addition, ICJ considers that the Chairperson's informal suggestions on Article 7 present a more systematic and clear way to address some of the problems in this article. Therefore, it is suggested that these proposals under Article 7 are merged into the current text in the Third Draft, but eliminating or replacing the ambiguous or vague terms as follows:

> In 7.1. the phrase "consistent with its domestic legal and domestic systems", by subjecting compliance with the treaty obligations to national law undermines the substance of the obligation. As such it should be deleted wherever it appears.
>
> The reference to "relevant State agencies" in 7.1.a and other paragraphs should be replaced by "courts or tribunals" to be consistent with existing international standards on the rights of victims. The expression "relevant State agencies" is also vague as it makes reference to a large plurality of agencies, adding unclarity to the obligations under the treaty.
>
> In 7.1.b. the word "progressively" should be removed because it unjustifiably reduces the value and reach of the obligation

In 7.3.f. the word "collective or" should be added before "possibility of group actions".

The ICJ stresses that the need for consensus and flexibility for national implementation of obligations cannot be obtained by sacrificing needed clarity and strength of the obligation, especially in this crucial subject.

Article 8: Legal liability

Article 8 on legal liability is fundamental to ensuring the fair administration of justice around business human rights abuses, the appropriate allocation of responsibility and the access to reparation for victims of abuse.

Article 8.6 in its current form mixes in a single provision different modalities of civil liability and it is not clear about the cases in which a discharge or rebuttal of presumption of responsibility by the defendant company would be allowed. This provision outlines three situations or modalities of civil responsibility in a triangular relationship: a) when the parent/lead company controls, manages or supervises another company; b) when the parent/lead company controls, manages or supervises another enterprise's activity or conduct that causes harm; and c) when the parent/lead company should have foreseen the risks of human rights abuse. The responsibility arises in these three cases when the company fails to take adequate measures to prevent the abuse from materializing.

The same provision could be drafted in a more coherent way, differentiating each of these three modalities of responsibility.

The ICJ generally agrees with the Article 8.7 but needs some refinement. ICJ agrees with the global trade unions in their comments to this article.

Article 8.8 is meant to address the legal liability of a business enterprise for the commission of serious human rights violations akin to crimes defined under international law. This article had already been amended and greatly reduced in length, resulting in diminished clarity, in the 2020 Second revised draft. But it still needs to be further developed in its scope and content. The current Third draft obscures the fact that this provision is about legal liability for abuses that amount to crimes as defined under international law, which carry particular consequences in international law. To provide better guidance, the paragraph should include an illustrative list of widely accepted offences under international law. While the special gravity of these acts is adequately reflected in the criminal liability it attracts, there should also be some space for civil liability in these cases without prejudice to the corresponding criminal responsibility or its equivalent in certain jurisdictions.

On the additional 8.bis proposed by Brazil, ICJ notes that exhaustion of domestic remedies applies in relation to international jurisdictions- to the effect of giving first preference to the domestic system to provide remedy before the involvement of an international jurisdiction. Therefore, such proposal is not pertinent in relation to article 8.

Article 9: Adjudicative Jurisdiction

The ICJ considers that many of the provisions of this article do nothing more than reflect a widespread practice in the exercise of their jurisdiction by States in commercial and civil matters, as well as the progressive development of international law. For example, the provision on jurisdiction by connection and by necessity (paragraph 9.4 and 9.5 respectively of the 3rd revised project) that seem to be questioned by some delegations, correspond to recommendations contained in Recommendation 16/3 (2016) on Businesses and Human Rights approved by the Committee of Ministers of the Council of Europe and also to developments in the inter-American sphere.

The ICJ recommends restating a well-accepted definition of *forum necessitatis* as an extraordinary ground for jurisdiction that can be invoked when the business enterprise is not domiciled in the forum State but the other conditions are present:

> Where business enterprises are not domiciled within their jurisdiction, States should empower their domestic courts to exercise jurisdiction over civil claims concerning business- related human rights abuses against such a business enterprise, if no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.[6]

The ICJ also notes that Article 9 continues to be essentially focused on civil jurisdiction, leaving criminal proceedings that could possibly arise out of provisions such as art 8.8 outside its purview. The ICJ considers that this provision needs to also address the issue of jurisdiction in criminal cases,[7] to be consistent with the provision on crimes under international law which are seemingly foreseen in Article 8.8 and the provisions on statute of limitations in article 10. In that regard, the ICJ reiterates its recommendation on the introduction of a new Article 9.6 provision regarding jurisdiction with respect to criminal offences.

There should be a provision requiring States to exercise universal jurisdiction in respect of crimes that need to be prosecuted on that basis under international law, while allowing States discretion to exercise such jurisdiction in respect to other crimes. In respect to certain crimes such as torture or enforced disappearance, States are required to exercise universal jurisdiction when the alleged offender is in its territory.[8]

The treaty should also clearly state that its provisions on jurisdiction are without prejudice to principles of general international law, and that it does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 10: Statute of Limitations

Article 10.1 has been amended to insert "legal proceedings," instead of "prosecution and penalty," so that prescriptions and other statutory limitations do not apply to all kinds of legal proceedings, including criminal, civil or administrative proceedings, in cases concerning crimes under international law. This is an expansive and progressive formulation of a norm that traditionally limited the effect of statutory time limitations only to criminal prosecution and penalties in cases concerning crimes under international law.

Article 10 maintains some of the text from the Second draft that do not accurately reflect international law well. For instance, it includes a reference to "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," which is not an appropriate formulation. All human rights by definition are "of concern to the international community as a whole" by virtue of their *erga omnes* legal character and numerous treaties and other standards, including the UN Charter itself. The term is misplaced in this context. The ICJ

---

[6] Formulation based on article 36 of Council of Europe's Recommendation 2016 on Business and Human Rights

[7] See ICJ comments to the 2019 revised Draft: ICJ, Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights, February, 2020, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/ICJcommentsReviseddrafttreaty2019.pdf

[8] Suleymane Guengueng et al v Senegal, Committee against Torture Communication 181/2011, UN Doc CAT/C/36/D/181/2001 (2006), para 9.3-9.5; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), ICJ Judgment of 20 July 2012, para 74.

recommends that the zero draft's formula "violations of international human rights law which constitute crimes under international law" be restated in both 10.1 and 10.2 because it is simpler and reflects better existing international law and standards.

The term "civil claims" should be deleted in 10.2 because there is no reason to single out only civil claims when 10.1 encompasses all kinds of legal proceedings. The rule that prescriptions "shall not run for such period as no effective remedy is available" from the UN Updated Principles on the fight against impunity (principle 23) should also be included at the end of 10.2.

This article is supported by provisions contained in the International Convention on Enforced Disappearances (article 8),[9] the UN Principles and Basic Guidelines on the right of victims of gross violations of international human rights and serious violations of international humanitarian law to remedy and reparations (especially principles 6 and 7), and also the UN Updated Principles for the protection and promotion of human rights through the fight against impunity (Impunity Principles 23 and 32).[10] It should be noted that the Impunity Principles adopts the term "prescription" to refer to statutes of limitation, and it therefore may be appropriate to amend the text to read "...other measures necessary to ensure that prescription, including statutory or similar limitations...". This would make clear that it covers the full range of prescription measures, particular in systems that apply different legal terminology to cover this concept.

The ICJ would like to express its support to article 10.1 as proposed by Brazil and Mexico, and supported by Panama, which in our view reflects in a better way the state of international law and practice. ICJ also expresses its support to the amendments by Palestine to art 10.2.

Article 12: Mutual Legal Assistance

Article 12 addresses mutual legal assistance, still largely focused on criminal investigations and proceedings resembling those contemplated in such treaties as the Convention on transnational organized crime or against corruption. However, the Draft, as well as the Second and First Revised drafts are mainly concerned with civil liability, with a too limited role for criminal liability for business enterprises. To improve the internal consistency of the proposed treaty, it would be important to amend and adapt the provisions on mutual legal assistance also to civil cases, which requires detained and informed consideration of each article. The fact that there are only minor changes to this article, reflecting the scant attention paid by States and stakeholders to it, and the complex nature of this issue (in particular recognition of judgements), suggests that it might be more feasible to discuss this issue later on, possibly in an additional protocol.

Article 12.11 (c) on Mutual Legal assistance and recognition of foreign judgements, is the only place that addresses the issue of parallel judgements, refusing recognition to one judgement when it is "irreconcilable with an earlier judgment…with regard to the same cause of action and the same parties" given by a court in the State in which recognition is

[9] With the exclusion of enforced disappearance as a crime against humanity where prescriptions do not apply: "8.1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
(*a*) Is of long duration and is proportionate to the extreme seriousness of this offence;
(*b*) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.
8.2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation."

[10] Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 2005.

sought. The ICJ recalls that it is necessary that the treaty addresses the consequences of possible parallel proceedings in a more consistent way.[11] It would be important that the treaty addresses this situation by including a rule on *litis pendens* (when a suit is pending in another jurisdiction) as a possible basis for courts to refuse jurisdiction.

Article 13: International Cooperation

The ICJ reiterates its support to this article in the 3rd revised draft. There are several reasons why the current provisions are more appropriate for this LBI than other alternatives, including its specific provisions for cooperation between parliaments and NHRIs.

However, the ICJ acknowledges that some elements from the Chair's informal suggestions appear to be better drafted and should be taken into consideration. Notably, article 13.1 of the chair's draft could replace the current 13.1 in the 3rd Draft, and 13.2.b from the chair's draft could be added to the list in 13.2 of the 3rd draft.

Article 14: Consistency with International Law principles and instruments

The Draft addresses the relationship of the proposed treaty with international law at large and with other treaties, particularly including in the trade and investment realm, under the perspective of consistency between those instruments under Article 14.

In Article 14.5 (b), it would be sensible to clarify that the impact assessments to be carried out in order to ensure the compatibility of other agreements with the treaty:

> "should be conducted prior to concluding such agreements and whenever necessary during the time the agreement is in force. Such assessments should evaluate and address any foreseeable effects of such agreements on the enjoyment of human rights and be undertaken through full and public consultation with all stakeholders."

The ICJ reiterates that the OEWG should seriously consider the option of including a new sub-paragraph Article 14.5 (c) regarding the obligation of States to integrate binding and enforceable human rights, environment and labour clauses in their trade and investment agreements. Moreover, Art. 14 (5) should require the inclusion of investors' human rights obligations in trade and investment agreements, f prescribing specific tools as an *ex-ante* impact assessment of trade and investment agreements to achieve compatibility. [12]

[11] Joseph, S. & Keyes, M. The Business and Human Rights Treaty and Private International Law, Blog Symposium, 09, September 2020 at: http://opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law/

[12] See, Report by the Working Group on Business and Human Rights, International Investment Agreements (IIAs) and Human Rights: Report on human rights-compatible international investment agreements, A/76/238, 2021. See also, Deva, S. The Business and Human Rights Treaty in 2020–The Draft is "Negotiation-Ready", but are States Ready? Blog Symposium, 09, September 2020 at: http://opiniojuris.org/2020/09/08/bhr-symposium-the-business-and-human-rights-treaty-in-2020-the-draft-is-negotiation-ready-but-are-states-ready/

Written input on the textual proposals in preparation for the inter-sessional consultations of the IGWG before the Ninth Session

Articles 1 to 12 of the Third Revised Draft of the Legally Binding Instrument

Introduction

During these last 9 years of negotiations, the draft text elaborated by the Chair of the Working Group has been enriched both by the proposals of some states and by the contributions made by civil society organisations. FIDH believes it is essential that the draft LBI negotiations continue meaningfully at the ninth session this year, allowing the existing text to be improved and consolidated.

As a number of governments, including the European Union, advance towards the adoption of national legislations aimed at strengthening corporate accountability by imposing a mandatory due diligence duty, the ninth session will represent a significant opportunity for States to contribute to the building of a global set of rules regulating corporate behaviour when it comes to human rights and access to justice for rights holders.

This year, the group of friends of the Chair has been requested to convene and lead inter-sessional consultations among States to advance work on the draft legally binding instrument within their respective regional groups. As a result of those consultations and the concrete textual proposals and comments from the 8th session, the Chair will submit an updated draft of the legally binding instrument for the next round of negotiations. To enrich the dialogue among states, inter-sessional consultations will also include written inputs from stakeholders. In light of the broad participation of civil society organisations and the rigorous contributions they have made over the past year, FIDH regrets that those consultations are not open to civil society participation or observation and hopes that the group of friends of the Chair will effectively carry out the mandated inter-sessional consultation mission by taking stock of all the contributions civil society organisations and social movements made on the text to address the remaining gaps.

In this regard, we submit below a summary of FIDH's main reflections on the Third Revised Draft. Additionally, FIDH's written and oral statements and publications will be available on a dedicated web page.

Art. 1. Definitions

In Article 1.1 of the Third Revised Draft LBI and throughout the text, we suggest adding "human rights violation", so as not to exclude state-led violations. We also suggest the following amendments to cover more broadly the types of harm.

> *1.1. "Victim" shall mean any person or group of persons or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm* ***or threats of harm****, that constitute human rights abuse* ***or violations****, through acts or omissions in the context of business activities. The term "victim"* ~~***may***~~ ***shall*** *also include* ~~***the immediate***~~ *family members or dependents of the direct victim as well as caregivers, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization,* ***including instances of latent, enduring, or trans-generational harm****.*

Article 2. Statement of Purpose

In article 2.1 c of the Third Revised Draft LBI, we strongly support the proposal made by Panama and others to delete mitigate and stick to a purpose of the future LBI to prevent "the occurrence of human rights abuses in the context of business activities by effective mechanisms of monitoring and enforceability;" but we also agree with the suggestion of Egypt and others to add 'violations' so that it includes 'human rights abuses and violations'.

> 2.1. The purpose of this (Legally Binding Instrument) is:
>
> c. To prevent ~~and mitigate~~ the occurrence of human rights abuses and violations in the context of business activities by effective mechanisms of monitoring and enforceability

In general, and for the definitions, we think that it is fundamental to still use both terms of abuses and violations as it is essential to make clear that the instrument also applies to violations committed by the State or its agents in the context of business activities, in the future LBI.

Article 6. Prevention

Article 6 of the Third Revised Draft Treaty still needs some improvements.

- Despite the explicit mention of State-owned enterprises, the text still falls short of addressing the role of the State as an economic actor with a heightened duty to respect human rights. It is key that the LBI better addresses the obligation for a State to conduct due diligence when it engages in economic activities or when it offers financial or other support to businesses, such as granting export licences or conducting commercial transactions with businesses.

- Articles 6.1 and 6.2 contain significant overlap and could be merged.

- We support Mexico, Palestine, South Africa, Brazil and Panama's suggestion to delete references to mitigation of abuses in articles 6.2, 6.3.b, and 6.3c. Due diligence obligations should not seek to "mitigate abuses", which could imply accepting a certain level of abuse, contrary to the objectives of this treaty. However, states should consider slightly modifying their amendment to 6.3.b by adding the words "prevent and" before "mitigate effectively", so that the provision aims to prevent risks as well as mitigate them.

- Another strength of Panama, Mexico, Brazil and Palestine's amendment at 6.3.b is that it no longer limits the obligation to take appropriate measures in 6.3 to abuses that were *identified*, which could significantly limit the due diligence duty.

- Drafters must align the language used in Article 6 with the steps of human rights due diligence 'codified' by existing international standards such as the UNGPs and OECD Guidelines. It is essential for the future legally binding instrument to take stock of the existing standards when they are more protective of human rights and to improve them when they are not sufficient. This includes:

    - A reference to the ongoing nature of due diligence, as per UNGP 17

    - A reference to the **ceasing** of actual impacts when they are identified, as in the OECD guidelines

    - Add the 2 missing steps of due diligence found in OECD standards:

        - 1st: embedding responsible business conduct into policies & management systems

        - 6th: provide for or cooperate in remediation when appropriate

- Article 6.3b introduces the word "manages". In our view, this term requires a clear definition which should be added to article 1.

- We suggest adding "*independent*" before "assessment" in article 6.4a, and to further clarify the requirements for an independent assessment.

- The word “**meaningful**” in article 6.4c - concerning **consultations** - also requires further precision, in terms of requirements. It should be made clear that business enterprises should take into account all potential barriers to effective engagements, and that consultations should take place regularly at all stages of the due diligence process. To this end, we suggest adding the following language to article 6.4c:

  > "*For a consultation to be meaningful, business enterprises should take into account all potential barriers to effective engagements, including language, gender, physical ability and accessibility, literacy, and risks of reprisals. States parties shall ensure that human rights defenders and affected community members, including members of the LGBTIQ+ community, peasants and other rural people and ethnic and linguistic minorities are consulted throughout the planning, implementation and follow-up of a given business activity. Consultations should take place regularly at all stages of the due diligence process and be carried out in a free, informed and timely manner. The business enterprise should take into account the interests of affected individuals and communities in decision making and ensure that consultations are conducted with, and drawing from input and knowledge of those likely to be impacted.”*

  This would bring the article closer in line with article 6 of ILO convention 169.

- The language used in Article 6 still must be aligned with the steps of human rights due diligence ‘codified’ by existing international standards such as the UNGPs and OECD Guidelines. It is essential for the future legally binding instrument to take stock of the existing standards when they are more protective of human rights and to improve them when they are not sufficient.

- Article 6.8 does not deal with ‘prevention’ as such but rather with the obligation of States Parties to implement the provision in a transparent manner and safeguarded against corporate capture. We suggest moving that provision to article 16.

Article 7. Access to remedy

- FIDH insists that access to information remains very weak in Art 7.2 and does not address discovery. The wording should be strengthened in line with international human rights law, ensuring access of right-holders to adequate and complete information on business enterprises’ activities. In this respect, the proposal to strengthen article 7.2 submitted by Palestine

isinteresting.

- Article 7.3 deals with adequate and effective legal assistance to victims. For the sake of clarity, we suggest that 7.3c and 7.3d be separated into different paragraphs as these do not relate to legal assistance.

- We support Palestine's proposal in the 7th session to remove the word "appropriate" from Article 7.3 d.

- On the right of victims to be guaranteed legal aid, we suggest introducing a literal subparagraph under art. 7.3 reading:

> *"Guaranteeing legal aid relevant to pursue an effective remedy by ensuring legal representation and access to the court system for victims unable to afford these costs."*

- In Article 7.5 regarding the reversal of the burden of proof, there is still some clarification needed. Indeed, we believe the use of "shall" instead of "may" would remain a stronger and clearer formulation that no longer leaves its application to the discretion of State authorities. However, the option of reversing would still be left to judges' discretion and subject to states' constitutional laws. Similarly, the references to consistency with international law and domestic constitutional law risk unnecessarily weakening the provision and thus should be removed.

> *7.5. States Parties shall enact or amend laws* ***~~allowing judges~~*** *to reverse the burden of proof in appropriate cases to fulfil the victims´ right to access to remedy****~~, where consistent with international law and its domestic constitutional law~~****.*

- We believe states should consider integrating the principle of dynamic burden of proof in line with the following wording:

> *"State Parties shall include the power for judges, ex officio or at the request of a party, to require proof of a certain fact to the party that is in a more favourable position to provide evidence or clarify the disputed facts. The party will be considered in a better position to prove by virtue of its proximity to or possession of the evidentiary material, of its technical knowledge of the circumstances, because it has directly intervened in the facts that gave rise to the litigation, or due to the state of defenselessness or incapacity in which the opposing party finds itself, among other similar circumstances."*

Article 8. Legal liability

- Article 8 on legal liability should better distinguish between provisions addressing:

- ❖ liability in cases of harm a company caused or contributed to through its own activities or operations (8.1), and
- ❖ liability in cases of harm caused or contributed to by the activities or operations of a company that it controls, or for failure to prevent harm linked to its business activities (8.6).

- In Article 8.3 we suggest that the reference to “other regulatory breaches” be reincorporated in the draft as these are breaches that often lead to abuses and should be dealt with specifically as part of effective prevention.

- Besides, we insist that Article 8.3 should explicitly include criminal sanctions. Therefore, we suggest the word “criminal” be followed by “as well as”.

- We recall that Article 8.6 should clearly distinguish the 3 following scenarios to clarify the conditions for liability:
  1. Liability of business enterprises for the human rights abuses caused or contributed to by the entities that they control, manage or supervise.
  2. Liability of business enterprises for failing to take adequate measures to prevent foreseeable human rights abuses to which they are linked through a direct or indirect business relationship.

  It could be then drafted as follows:

  “*8.6 States Parties shall ensure that their domestic law provides for the civil liability of a business enterprise for harm to a third person caused or contributed to by another legal or natural person in the context of business activities, when:*

  1. *the business enterprise factually or legally controls, manages or supervises such other person, or*

  2. *the business enterprise foresaw or could have foreseen the risk of harm to which they are linked through a business relationship or services not covered under 8.6.a, unless they can prove that they took necessary measures to effectively prevent it.*

     Where two or more business enterprises fall under sub-paragraphs 8.6.a and 8.6.b, States Parties should ensure their domestic laws provide for their joint and several liability.”

- We insist on the fact that Due diligence shall never act as a shield from liability. In this regard, we suggest clarifying Article 8.7 by making clear that:

“States shall ensure through legislative measures that due diligence does not automatically absolve from liability for human rights abuses.”

- At the same time, it is crucial to make clear that this defence is not available when companies cause or contribute to human rights abuses through their own operations. We thus insist on removing the last sentence of Article 8.7 as it could undermine the effectiveness of the provision itself.

- We believe that the proposal Brazil made in the 7th session to add an Article 8bis will defeat the objective of article 8 which is to facilitate access to justice by victims and accountability of mother companies, including in jurisdictions of domicile.

In Article 8.8 we continue to regret the elimination of the reference to the duty of states to continue working towards recognising crimes under international law in their national legal systems and to making legal persons criminally liable for them.

Article 9. Adjudicative jurisdiction

Article 9.1 (b) makes a reference to “contributing” which can be potentially limiting, in that it would leave out instances of direct causation. “*Causing*” should be added, to use the same language as Article 9.1(c) which correctly uses “*causing or contributing*”. For this session, we also support Palestine and Egypt’s suggestion to add the term *“violation”* in the text.

Art. 9.3 which seeks to avoid dismissal of cases on the basis of the *forum non conveniens* doctrine is important. However, we remind drafters that the Second Revised Draft proposed a somewhat more straightforward and simple formulation and could be reintegrated:

State Parties shall/ensure that the doctrine of forum non conveniens is not used by their courts to dismiss legitimate judicial proceedings brought by victims.

Regarding 9.5, on the one hand, the express enumeration of grounds makes sure that claimants found in any of those situations will not have to argue and litigate that their situation amounts to a “connection”. For jurisdictions that use a very narrow interpretation of “sufficiently close”, this could be advantageous. On the other hand, the closed list of grounds risks excluding other grounds that could, in a given jurisdiction or case, be interpreted as amounting to a “connection”. By maintaining the reference to “connection to the State Party concerned”, followed by a non-exhaustive list of grounds, the LBI would retain a general basis that could capture new or unanticipated situations, while making sure that the three listed grounds are always interpreted as amounting to a sufficient connection.

Moreover, the reference to a “substantial” activity under 9.5.c is too restrictive. We suggest the following amendments:

> *Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial judicial process is available and there is a connection to the State Party concerned, **~~as follows~~ such as:***
>
> *a. the presence of the claimant on the territory of the forum;*
> *b. the presence of assets of the defendant; or*
> *c. **some ~~a substantial~~** activity of the defendant*

Article 11. Applicable law

Article 11 of the Third Revised Draft contains a critical provision allowing the possibility for victims to choose the applicable law in the cases that they bring before courts, in line with the pro personae principle: it would concretely give to the victims the possibility to choose the most protective legislative framework in case of a dispute while keeping the case in the judicial system that they are more familiar with. This is also particularly important given that domestic law in certain places where harm arises often features inadequate protection of human rights or disproportionately restrictive procedural standards (e.g., very short statutes of limitation).

This possibility or similar possibilities already exist in certain legal systems:

- For example, it exists in the European Union’s Rome II regulation with respect to environmental damage. As a matter of fact, several EU institutions, including the EU Agency for Fundamental Rights and the European Economic and Social Committee suggested expanding this principle to all business and human rights cases.
- The pro personae principle, which implies that legal interpretation should always seek the greatest benefit for the human being is also well established in the Inter-American System, namely in the case law of the Inter-American Court of Human Rights that derived it from Article 29 of the American Convention on Human Rights.

As cases are often decided on the basis of provisions contained in the law applicable to the case, which might not be the law of the forum in which the case is filed, it is crucial that the LBI contains provisions that set general rules on this issue.

For all these reasons, we strongly support Palestine and Mexico’s proposal and recommend keeping article 11 in the LBI.

Transversal concerns:

Throughout the text, the LBI continues to carry an important level of confusion when referring to the objective of “mitigation” (not just prevention). It is paramount to clarify that companies should “prevent and mitigate risks” and “prevent abuses”, not “mitigate abuses”.

Close attention to the alternate use of mitigation and prevention is key. Not only have the issues pointed out in the past regarding articles 6.2 and 6.3(b) not been addressed, but the addition of “mitigation” in articles 2.1(c) and (e) deepens this confusion, as these articles refer to the objective to mitigate abuses which an enterprise causes or contributes to through its own activities (when prevention should be used in this context).

The use of the term “mitigation” is also particularly misplaced in Art 6.3(b) as it specifically refers to the objective to mitigate abuses that an enterprise causes or contributes to through its own activities. Only “prevention” should be used in this context. As some states such as Panama and Mexico have already proposed during the last session, negotiators should clarify the use of the terms prevention and mitigation throughout the text ensuring that prevention is always used with regard to an entity’s own activities and business relations where a considerable control or influence exists, while mitigation is used in cases where the entity has a very limited to no leverage.

While mitigation has a place, it should be clear that it concerns abuses by business relationships (where a business may have no or limited leverage). In relation to their own activities or the activities of businesses under their control, abuses should be prevented. The use of mitigation in these contexts detracts from the language in the first revised draft that had made clear that prevention was the main goal of legislation on human rights due diligence, and contradicts current UNGPs Principle 11 which adopts a more appropriate formulation: prevent abuses in the context of own activities and prevent/mitigate abuses by business relationships.

Final remarks

Further details on the suggested wording to address these concerns can be provided upon request. We strongly call once again all negotiating parties that have been part of this process for the past 9 years to advocate for the continuity of the process, to engage in consensus-building on the textual propositions, to reinforce them with strong contributions and to aim for the most effective protection of human rights in cases of corporate abuse.

Business Joint Position

Binding Treaty Process – OEIGWG Call for written comments

Joint IOE-Business at OECD (BIAC)-BusinessEurope position on the third revised draft of the legally binding instrument with the textual proposals submitted by States during the eighth session

31 March 2023

I. Introduction and context

The International Organisation of Employers (IOE), Business at OECD (BIAC) and BusinessEurope welcome the opportunity to answer the call for submission of written inputs from the Chair-rapporteur of the Intergovernmental Working Group (OEIGWG) on this further elaboration of a draft Treaty on Business and Human Rights. **These comments are a joint business position which includes stakeholders entitled to speak such as IOE and the United States Council for International Business (USCIB).**

This joint business position should also be taken into account in the run-up to the **ninth session to be held in October 2023**. The business community remains committed to taking actions that respect human rights and engaging in a balanced way in the policy debates on this topic.

Business, the intended target of this text, reminds the OEIGWG of its earlier submissions to the various drafts[1][2] that have emerged from this process. All comments remain relevant to the consideration of the draft as it stands for the upcoming ninth session.

Ahead of the ninth session, we revisit those outstanding comments and concerns in this document with a particular focus on the **two documents that will serve as the basis of the negotiation**:

1) The wording proposals submitted by States that came out of the eighth session of the OEIGWG on the third revised draft Legally Binding Instrument (LBI).

2) The informal proposals made by the Chair-rapporteur, the Ambassador of Ecuador Mr Emilio Rafael Izquierdo, on articles 6 to 13, as well as the changes and additions to article 1. Please note that IOE-BIAC-BusinessEurope prepared a **separate document** with dedicated comments regarding the Chair's proposals.

The below comments from IOE, BIAC and BusinessEurope include a comprehensive review and

[1] https://www.ioe-emp.org/news/details/final-position-paper-on-the-second-revised-treaty-on-business-and- human-rights
[2] IOE-BIAC-BusinessEurope position to the Third Revised Draft of the Legally Binding Instrument

position on the wording proposals from States that came out of the eighth session. Unfortunately, **when it comes to the wording proposals that came out of the eighth session**, the minimal revisions introduced do not address the concerns consistently articulated by business and many governments to date.

As it stands now, the third revised draft treaty with the wording proposals from the seventh and eighth sessions continues to fail to address the actual challenges and diverges from core concepts of the UN Guiding Principles. It ignores that multiple jurisdictions have already developed or are developing local regulatory solutions, jointly with business. **Despite the new Chair's proposals, key areas of concern in the draft treaty persist which would prevent reaching a consensus-based outcome.** More importantly, as it stands now, the text carries important risks of going against the very aim of this process which is to create a "global level playing field" and would lead to the fragmentation of the internationally recognised "protect, respect and remedy" framework of the UNGPs. For use of reference, please find below a concise overview of the main ones:

- The text proposals which were made during the seventh and eighth sessions of the IGWG distance the draft treaty even more from the process-based approach of the UN Guiding Principles, making it less implementable and potentially jeopardizing any possible consensus-building even more.

- The draft treaty would continue to define "**business relationships**" as "any relationship". This language expands the potential scope of diligence duties and liability to companies' relationships to entities – including third parties – with whom they have no contractual relationship and into whose operations the companies have no insight nor control. The draft also defines "**business activities**" to include activities "undertaken by electronic means", which remains unclear and vague language, vastly expanding the regulatory scope of the draft, including activities that go beyond any possible degree of control by a private company.

- The proposed changes would make the treaty only applicable to transnational companies and would explicitly exempt domestic companies. As it stands, the proposals from different States that came out of the seventh session would make the scope in the Article 3 provision only focus on **multinational enterprises/transnational** companies (TNCs), with a loophole to exclude State-owned and local enterprises. If so, the draft would apply only to a small minority of business activity, as approximately 95 per cent of the world's workers are employed by purely domestic entities and most human rights deficits arise in the domestic economy, which is often part of the "informal" economy, and thus beyond regulatory enforcement. However, regarding prevention (article 6), a specific clause would be needed to give State Parties the possibility to exclude **micro, small and medium-sized enterprises (MSMEs)** from legally binding due diligence obligations with the aim of not causing undue additional administrative burdens and respecting their constraints.

- **On legal liability**, the proposals would impose **liability** for failing to "prevent" human rights harms, thus up-ending the "process-based" human rights due diligence duties of the UNGPs, and without requiring a causal connection between the business and alleged harm. The proposals also extend liability to natural persons, overriding settled local law principles on "piercing the corporate veil." As it stands, the proposals could introduce liability for a company based on a violation occurring anywhere in its entire supply chain, creating great legal uncertainty.

- On **jurisdiction**, the proposals continue to promote extremely broad extraterritorial jurisdiction, encouraging plaintiffs to forum shop, again creating great legal uncertainty as to where a business maybe hauled into court. Indeed, the proposals take even a novel step further to again broaden jurisdiction to where a company's assets are held which expands extraterritoriality in an unreasonable fashion.

- **On international cooperation,** the proposal would not promote effective and meaningful consultation and cooperation with the most representative Employer Organisations, as well as with companies and small and medium-sized enterprises as encouraged in the UNGPs, despite these being the main subject of this draft.

- The Proposals also seek to delete the provision that mutual legal assistance or international legal cooperation may be refused by a State Party if it is contrary to the applicable laws of the requested State Party. Such deletion would undermine that State Party's legitimate exercise of sovereignty.

CONTEXTUAL ISSUES

The value of business involvement

While acknowledging that this is an inter-governmental process, we again insist that ***representative business should be at the table*** in the actual drafting of any such text. ILO standard-setting processes, as well as UN processes, in particular the Guiding Principles on Business and Human Rights, have over time shown the value of an inclusive, tripartite approach, not only in the drafting process but also in creating the consensus needed to give effect to a standard-setting instrument, in this instance, the treaty.

Distinguishing between the role of States and business

It should not be forgotten that ***such a treaty requires ratification by an individual State for its content to become an obligation*** that the State then must fulfil. Then a transposition by the State into national laws, triggers compliance by business. It would not be possible to apply this binding instrument directly to the private sector. It is necessary that each State firstly ratifies it before it shows any effect at the national level. Only after that, these norms could be applied in concrete cases involving private business.

The State has the primary and foundational obligation to protect human rights. This obligation can be expressed through the creation and sound enforcement of applicable law but is not self-executing. The UN Declaration on Human Rights, for example, does not of itself create obligations on States **but rather the transposition into national law of the principle enshrined into it**. Also, no private body or person is required legally to carry out obligations that are not imposed by law or by agreement, even if there is clearly a moral obligation when it comes to respecting human rights. Business is committed to the principles of legal compliance and moral and ethical behaviour, and states should reflect on whether they can effectively transpose and then enforce any law that would come from the treaty as they seek to negotiate or support any draft text.

The importance of even ratification and implementation

Unfortunately, the draft text is still based on the misguided premise that all States are legally bound to the same human rights framework. This is not accurate because of the vast disparities in ratification of Human Rights instruments amongst States https://indicators.ohchr.org/

It also ***assumes that every State has the same capacity to give effect to such a treaty following ratification, which is also unfortunately not the reality***. This is one of the key root causes of human

rights abuses across the globe. Reports to the ILO`s Committee of Experts on the ratification by States of ILO standards clearly shows, often year after year, a lack of capacity or will to implement an international labour standard in national law. This lack of capacity is also present in many national legal systems. Remedy is only possible where the judiciary is well-resourced, free from political influence and corruption.
These aspects can lead to uneven ratification and subsequent implementation, thus undermining any common global approach, and creating uncertainty for business and for those who might be adversely affected by their actions.

Focus must be on all third parties

Whilst States must further protect against human rights abuse within their territory and/or jurisdiction, all third parties should respect human rights. The idea of a silo approach to human rights protection by just addressing business is flawed. Business is not the only actor that can infringe on human rights within a country. This requires taking appropriate steps to prevent, investigate, punish, and redress such abuse by all actors through effective policies, legislation, regulations, and adjudication.

States in this process need to look beyond the role of business and to ensure that all third parties are protected by the State and that where there are related laws, everyone fully respects them.

The fact that 61,2 per cent of the global workforce and commercial activity take place in the ***informal economy*** limits the rule of law which is fundamental for effective human rights protection. In addition, when not addressed by States, informality also leads to a lack of human rights protection for those who are most often at risk of serious harm. This creates a human rights imbalance and States must find ways to address this to avoid creating double standards for human rights on the ground, where some are protected and others are not, which is an unacceptable situation for all.

Rule of law is where the focus should be. States should ensure that existing political, legal, and judicial infrastructures are competent to ensure effective enforcement of extant legal protections. This should be a state-specific exercise.
People also need to be protected from the actions of a State, which are contrary to its assumed obligations.

It needs to also be clear that where a State operates as a business, it is required to meet the same human rights standards as any other business and cannot take steps to exempt, transfer or otherwise dilute those responsibilities as set out in Article 30 of the Universal Declaration on Human Rights or the applicable UNGPs.

II. The UN Guiding Principles on Business and Human Rights

More than ten years on from the adoption of the UN Guiding Principles on Business and Human Rights by member States, a lot of lessons can be drawn from both actions by States but also from actions of business. There is a strong argument that States are already equipped with the tools they need under Pillar one to give effect to the human rights obligations they have assumed, whilst also emphasising that more focus needs to be put on States' implementation of Pillar one of the UNGPs rather than the

current trend to focus on business. If the treaty is to go forward, the IGWG needs to fully consider the assessments of the work done within the framework of the UNGPs and ensure that if it is to continue, that it is fully aligned.

The OEIGWG should refer to the following texts, which outlines the positive steps companies have taken since 2011 but also that States are not waiting for a treaty to act, in consultation with local business and other actors, to implement human rights requirements. Any treaty must avoid diluting those collective efforts or create confusion and conflict between steps already taken. *Link UNGPs Plus 10 IOE document*

III. Comments on the third revised draft treaty including the textual proposals submitted by states during the eighth session

This document emphasizes the views of the business community, as represented by IOE, BIAC and BusinessEurope, on some of the critical issues that continue to pose serious obstacles to the business community's endorsement of the Treaty process.

As a general comment and to avoid repetition, it is important for all language used to be clear and free from ambiguity or subjectiveness. Language must also clearly distinguish between State "obligations" as opposed to businesses responsibilities to comply with law and "respect" human rights – in line with the widely used and broadly implemented three pillar-approach promoted by the UNGPs.

Business is extremely concerned about the following aspects of the revised draft treaty:

PREAMBLE

All words are important as they determine the way in which a treaty may be interpreted should it be ratified. The Preamble is no exception. As a general remark, the Preamble as it stands now is not balanced and has lost its purpose which is to define, in general terms and concisely, the purposes and considerations that would lead the parties to conclude the treaty without entering into a listing or repetition exercise. Unfortunately, too vague, repetitive and subjective language still persists which provides important legal uncertainty. Similarly, in various instances, the preamble misses the point to focus on Business and Human Rights issues and tends to include wording that goes beyond the mandate given to the OEWGWG "to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" (A/HRC/RES/26/9).

PP1. The original proposal of the third revision was clear enough by focusing on reaffirming the principles and purposes of the Charter of the United Nations only, knowing that PP9 already cover the UN principle of Article 2 of the UN Charter. There is no need to refer to specific principles such as "sovereign equality" or "maintenance of territorial integrity" as these have no link whatsoever with the purpose of this draft treaty on Business and Human Rights. In addition, overfocusing on specific principles would create both an unnecessary repetition as these principles are already embedded in the UN Charter but also divert from the concept of unity and equality of importance of all the principles of the Charter.

PP2. The adoption of instruments by the UN is not the same as the obligations that come from their ratification by States. The Preamble should not leave the distinction in doubt. In addition, there are now ten ILO fundamental Conventions with the inclusion of Conventions No. 155 and No.187.

PP3. What is meant by relevant ILO Conventions? Any reference here should only be to those that a State has ratified and if not, then the reference should be to the ILO 1998 Declaration on Fundamental Principles and Rights at Work. What applies to a country should not be left open to interpretation. Again here, "all internationally agreed human rights declarations" by the UN as a body do not carry with them human rights "obligations" on individual States. In addition, the new proposal to start listing all existing Conventions or Declarations under this point would lead to missing the point of focusing on the most authoritative texts. The proposal from Panama to add the "WHO Framework Convention on Tobacco Control" falls entirely outside the scope of this draft treaty on Business and Human Rights and should be omitted.

PP4 bis. This new point proposed on "the right of every person to be entitled to a social and international order in which their rights and freedoms can be fully realised" is repetitive, as already embedded in all authoritative texts on human rights. It does not bring any added value to the already lengthy preamble.

PP6. Reference to "access to justice" should be omitted. We welcome the proposals from the United States to bring the text closer to the universally accepted language present in articles 7 and 8 of the Universal Declaration of Human Rights (UDHR). However, to ensure full alignment, the text should be replaced as follows: "*Upholding* the right of every person to be equal before the law, to be entitled without any discrimination to equal protection of the law and to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

PP7. The new addition to ensure respect for and implementation of international human rights law "and humanitarian law" regarding the State's duty to protect is not a problem by itself as long as this concern the obligations of States only. Yet, the reference to "humanitarian law" should be omitted. States are the main subject of international humanitarian law and signatories of the Geneva Conventions and associated additional Protocols, not business. In addition, business like individuals must be protected by States in conflict situations as subject under international humanitarian law. Equally, humanitarian law applies in conflict situations which is not the purpose of this treaty. Last but not least, it is an important part of the State duty to protect to help ensure that business enterprises operating in conflict-affected areas are provided with the adequate assistance in line with UNGP 7.

PP8. As it stood from the third draft treaty, the version was referring to the wording of articles 55 and 56 of the UN Charter, therefore it would be more convenient to stick to the original wording as the changes brought by various States do not seem to bring any added value but rather extend unnecessarily the text. This comment also applies for the new listing suggested by few States.

PP9. Overall, this point has no direct relation with matters of Business and Human Rights. The suggestion to merge PP9 with PP1 could represent a compromise. However, the addition of the "principle of non-intervention in the internal affairs of other States" is repetitive and extends unnecessarily the text as this international principle are already included in the referred article 2 of the UN Charter. The proposed changes provided by the United States are welcome are they aim to streamline the text.

PP9 bis, ter, quarter, quinquies. These new points in the preamble are repetitive and extend unnecessarily the Preamble. They refer to important texts that have been already mentioned in the previous points such as the UN Charter. Specific human rights such as the respect and protection of "children's rights" are already part of the internationally recognised human rights and are also covered in the Durban Declaration and Programme of Action referred to in PP3.

PP10. The inclusion of the recognition of the critical role and capacity all business enterprises have to not only respect but also "promote" internationally recognised human rights is welcomed as many companies do not only respect human rights but have been also going beyond what is expected from them in the UNGPs by actively promoting human rights worldwide. We positively welcome the more direct and concise recognition provided by the proposal made by Brazil, updating its position from the seventh session.

PP11. Treaties that incorporate internationally recognised human rights are addressed to States, creating no obligations for companies. Companies should however, in the words of the UNGPs, respect human rights. This means that they should avoid infringing on the human rights of others and provide for remedy in case of an actual infringement, just like any actor in a society. Consequently, the wording "obligation" instead of "responsibility" is not in line with the UNGPs and should be modified. In this regard, the modifications brought by the US are positively welcome.

Overall, apart from the US proposals during the eighth session, the proposals made during the seventh and eighth session for PP11, unfortunately, distance themselves even further from the UNGPs:

- Firstly, the focus on "transnational corporations" is not acceptable as PP11 is aimed to reaffirm the general principle of corporate responsibility to respect based on the UNGPs which apply to all enterprises.
- Secondly, the responsibility to respect concerns internationally recognised human rights part of the International Bill of human rights and the ILO FPRW as laid down in UNGP 12 and not all human rights.
- Thirdly, the inclusion of the wording "violations" cannot be accepted as violations can only be applied to human rights impacts committed by States, in violation of their obligation to protect, respect and fulfil human rights. Because non-state actors such as companies do not have the same obligations under international human rights law, "adverse human rights impacts" should be used instead of violations[3].
- Fourthly, as it stands in the proposals made, enterprises would have a responsibility to "prevent or avoid human rights violations that are committed all along its global production chain directly or indirectly linked to their operations, product or services by their business relationship". This cannot be accepted as it extends the scope of the corporate responsibility to respect and go entirely against the UNGPs by mixing the corporate responsibility to avoid causing or contributing to adverse human rights impacts with the prevention and mitigation efforts. UNGP 13 is clear in this regard:

  "The responsibility to respect human rights requires that business enterprises:

  (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

  (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their

[3] See Frequently asked questions about the UNGPs, p.43.

operations, products or services by their business relationships, even if they have not contributed to those impacts."

In addition, according to UNGP 22, where adverse impact have occurred that the business enterprises has not caused or contributed to, which are directly linked to its operations, product or services by a business relationship (e.g. entities in its value chain), the responsibility to respect human rights does not require that the enterprises itself provide for remediation, though it may take a role in doing so.

In this regard, we welcome the proposals made by few States to bring to text closer to the UNGPs wording.

PP11 bis. The new point on the "primacy of human rights obligation in relation to any conflicting provision contained" in various agreements is unclear and creates ambiguity as we do not know to whom it is directed. Human rights obligations can only be directed to States and not companies. Equally, for States, human rights obligations derive from States' existing obligations under international law, some of which are legally binding on States. There is no existing general primacy of human rights obligations in relation to conflicting provisions in other international agreements. Any changes in the provision of a treaty, including the reference to human rights obligations, require the explicit acceptance of Member States.

PP11 ter. This new point omits mentioning that the State's duty to protect human rights not only applies to business activities but includes all third parties. However, this is an obligation for States, not companies. Additional wording from UNGP 1 could be added so that to express the obligations from States to take all appropriate steps to fulfil this principle through effective policies, legislation, regulation and adjudication. Additionally, a major problem with this point is the broadening of the scope of jurisdiction which goes against the UNGPs. At present, States are not required under international human rights law to regulate the extraterritorial activities of companies domiciled in their territories and/or jurisdiction.

PP12. Some countries want to remove the reference to human rights defenders although they are important players as part of the meaningful consultations of the corporate responsibility to respect as well as their key role to ensure effective access to state-based judicial mechanisms. We welcome few State's support to keep it in the text. However, it should be added that these groups cannot only play an important role with regard to the corporate responsibility to respect but they are also important actors in the framework of the State duty to protect and provide effective remedy.

PP12 bis. We welcome this new addition focusing on the heightened risks faced by human rights defenders and the obligation of States to protect them however, the reference to this particular group could be added in the listing provided in PP13 to avoid creating an additional point in the preamble.

PP13. The proposal made to add "those affected by illegal unilateral coercive measures" seems to be out of context as the aim of this listing is to referent to particular groups of people. People affected by illegal unilateral coercive measures can be everybody and this concept is not clear enough. In addition, the idea behind the characterisation of "effective legal and equitable" could be useful if complemented with the seven elements needed to have effective access to remedy from UNGP 31 and also the eighth for operational-level mechanisms.

PP13bis. The reference to the climate emergency falls outside the scope of this draft treaty which must focus on BHR.

PP14. As it stood from the third revised treaty, this point was balanced. However, with the new changes provided by different States, this point loses all its substance which is to integrate a gender perspective in all its measures.

PP14bis. States are signatories of treaties and bound by them, not companies. In addition, according to the UNGPs, businesses have a responsibility to respect human rights. The promotion, fulfilment and protection of human rights is a prerogative of States, not companies. The extensive promotion of human rights undertaken by the private sector has been mainly done on a voluntary basis as the UNGP only requests companies to respect them. The role of companies is to observe national regulations and policies that could eventually derive from such instruments but not be directly bound by this set of international instruments. Therefore, we oppose the reference to the fact that "businesses have a key role to play" which should be omitted. At best, business can positively contribute to achieving environmental goals but by no means a State's obligation arises from environmental treaties can be applied to business. We welcome the US proposal to oppose to the inclusion of this point.

PP18. We welcome positively the proposal to change "obligations" by responsibilities as it reflects the UNGPs.

PP18 bis. Please refer to PP11 bis.

PP18 ter and quarter. These new proposals are not acceptable. Transnational corporations are negatively depicted which does not reflect their important contribution to growth, wealth and development. The reference to "growing economic might" is an ambiguous and biased open-ended concept which does not belong to such a treaty. Equally, as stated in the UNGPs, the term "responsibility" to respect, rather than "duty" indicates that respecting human rights is not an obligation that current international human rights law generally imposes directly on companies. Any legal duties on companies relating to the corporate responsibility to respect HR is generally imposed by States at the national level and in some cases as a result of States' human rights obligation.

Article 1. Definitions

1.1 Victim. "Victim" is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. Until then, they are a person alleging an abuse. The misuse of the term here gives a pejorative status to a person as a victim before the harm itself has been proven. Victim is not used in the UNGPs and should not be used here. The text needs to include the fact that until harm is proven it is an alleged harm and the better term to describe what is meant here would be to use the word "**rights holder". We welcome the United States' proposal to modify it throughout the text.**

This definition continues to extend the term "victim" to apply to "immediate family members or dependents of the direct victim". A victim is that person or persons who suffered the proven harm of the act of abuse. That is the case in most legal constructs. Extending the label of victim to those who may not have suffered harm is a misuse of the term victim and diminishes the person or person who was harmed. The issue of who a victim is, is a matter for the law to determine on the facts of a particular case and should not create a preferential category of rights holders by the inclusion of immediate family members or dependents. **This additional language should therefore be deleted.**

The proposal coming out of the seventh session do not bring any better wording to the text.

1.2 Human rights abuse. Here the treaty looks to expand what a human rights abuse is from the framework it articulates as being the internationally recognised human rights law in the preamble to now include a "safe, clean, healthy and sustainable environment". Despite the recent adoption by the UNGA of a non-binding resolution declaring recognising the right "to access to a clean, healthy and sustainable environment" as a universal human right, the meaning of these words is nowhere defined in the text, nor at the international level and open to interpretative inconsistency. This overreach by the text lacks any legal basis as again obligations on social actors including business are only those articulated by a State in its own laws. **This additional language should be deleted and we welcome the proposal of deletion.** Additionally, the UNGPs define human rights abuses to refer to adverse human rights impact, understood as an action removing or reducing the ability of an individual to enjoy his or her human rights, that is caused by non-State actors, in this context of business enterprises. Again, the proposal by few States to replace "abuses" by violations" or keep both in is not acceptable.

1.3 Business activities. What is meant by "other activity"? The examples that follow are all economic in nature, which is at the core of any business activity, so what is the draft trying to capture here? Those "other activities" need to be elaborated and explained or the **language deleted.** We appreciate the US proposal of deletion in this regard.

What do the words "undertaken by electronic means" actually mean? The vagueness here is concerning. As well as being unclear, these words vastly expand the regulatory scope of the draft. For example, internet transactions may involve both known or unknown intermediaries such as banks or bank vendors that are beyond any degree of control by a company. This issue is compounded when considering smaller enterprises, which are using telephone technology for financial transactions, particularly in developing markets. Either the text should be clarified so that a proper understanding can be discussed, or it should be **omitted.**

The new proposals aim to focus the draft treaty on translational corporations and removing the reference to state-owned enterprises is concerning. The UNGP provided a clear and robust definition that should be the basis of negotiations: "Business relationships refer to those relationships a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services. They include indirect business relationships in its value chain, beyond the first tier, and minority as well as majority shareholding positions in joint ventures."[4].

1.5 Business relationship. The draft continues to define a business relationship as "any relationship between natural or legal persons to conduct business activities, … or "any other structure or relationship" (…) including activities undertaken by electronic means". Defining business relationships as "any relationship" or "any other structure" is unworkable, as it is indefinite, vague, and overly broad. The new proposal to add "including throughout their value chains" is also worrisome as it is trying to target multinational companies. This language expands the potential scope of diligence duties and liability to companies' relationships to entities – including third parties – with whom they have no contractual relationship and into whose operations the companies have no insight nor control. This could have negative unintended consequences, in particular for MSMEs.

[4] Frequently asked questions about the Guiding Principles, p.41.

The UNGPs, as well as OECD MNE Guidelines, which constitute another important internationally recognised standard for responsible business conduct, by contrast clearly underline that "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

This blanket language blurs the line between the States obligations under ratified human rights instruments and the role of business and that of other actors. The fact that business should respect human rights is clear – business accepts that they should act responsibly towards its employees, customers, consumers, and communities. However, other actors should also do that. As referenced in the Universal Declaration on Human Rights, businesses are part of society, but they are not the only group that the State needs to consider when looking to create obligations at the national level. As Article 29 of the Universal Declaration states, "everyone has duties to the community". The draft should not seek to avoid addressing the exact concerns that the language "any relationship" or "any other structure" create. Courts should not be left to try and infer a meaning from these vague expressions. The draft should be clear, or **those terms omitted.**

1.5bis. The inclusion of a new point 1.5 bis to define "other business enterprises" is concerning as it includes only transnational character and do not apply to national businesses. This goes against the very aim of this treaty to be a text aimed at all businesses. We welcome the concerned expressed by few States on this provision.

Article 2. Statement of Purpose

2.1 b As mentioned above, obligations only fall on companies where the law requires it or they themselves have agreed to be bound. The draft cannot therefore impose those obligations without individual State ratification and legislation. This needs additional language clarifying that this applies "**where required by national law".**

The new proposal made during the seventh and eighth session would make the treaty only applicable to transnational companies and not anymore to all business activities and would explicitly take out domestic companies linked to the inclusion of 1.5bis above. The draft treaty cannot have a differentiated approach towards transnational companies and national ones, as this could create negative unintended consequences such as unfair competition.

2.1.bis. The new proposed point a bis. is not acceptable as it stands. The draft cannot aim "to regulate the activities of transnational corporations and other business enterprises within the framework of international human rights law" as this framework does not exist and has no legal basis. Current obligations only fall on companies where the law requires it or they themselves have agreed to be bound.

2.1.b. We welcome the proposal to replace the term "obligations" by responsibilities to be in line the with the UNGPs. The suggested subsequent changes do not seem to be relevant in this context as the respect of these principles are in any case already referred to by the mention of article to of the UN Charter in the preamble.

2.1.c. Although the idea behind this point is clear, it remains ambiguous and vague what are the "effective mechanisms of monitoring and enforceability" and how will these work? Additionally, the inclusion of "violations" go again against the UNGPs. The suggested additions of "environmental harm from business activities in both conflict and non-conflict affected areas by creating and enacting effective and binding mechanisms of monitoring, enforceability and accountability" are extremely vague. These additions are calling for new mechanisms while it is precisely the current failure of States at the national level to enforce existing laws that directly or indirectly regulate business respect for human rights that are responsible for the major human rights abuses. In addition, the UNGPs themselves do not provide a grievance mechanism as this is something States and companies must implement, nor do they provide a dedicated accountability mechanism. This should be removed.

2.1 d Here the reference is to "justice" whereas the focus should be on remediating the harm caused and that includes through judicial and non-judicial means. Justice without remediation is not in line with the UNGP approach of trying to restore a harmed individual as close as possible to the state they enjoyed before the harm occurred. The wording here should be **"To ensure access to remediation process both judicial and non-judicial and effective…".** New suggested proposals include the characterisation of "gender-responsive, child-sensitive and victim-centred" justice which brings unnecessary complexity to the term justice which should not be used in the first place. In addition, the reference to transnational companies only is problematic. We welcome the proposal to be concise but the reference to justice should be removed.

2.1. e. As for point 2.1.d, the new proposals want to include "violations" and focus the scope of the draft to be applicable to transnational companies only and not anymore to all business activities which would de facto explicitly take out domestic companies

Article 3. Scope

3.1 This, for clarity should specifically refer to the final language of these terms as found in the definitions section. The new proposals from the seventh and eight sessions would divert the intended scope of the treaty to be now applicable only to translational companies and keep "local business registered in terms of relevant domestic law" out of it. **Approximately 95% of the world's workers are not employed by exporters and most of human rights deficits arise in the domestic economy, not in global supply chains**. As it stands, the draft would apply only to a large minority of business activity. As previously said, this could also create **unintended negative consequences** and unfair competition among national enterprises and ones with a transactional character.

3.2 It is not unreasonable to allow a State to determine, at least in part, how to operationalise a treaty at the national level. However, this should not be an absolute power. Governments need to continue to improve the realisation of human rights in their territories and not act in a way that results in the infringement of human rights or the exclusion of human rights protections. These exceptions should be explained, be truly exceptional and time-bound and be subject to regular domestic review with stakeholders. Businesses of all sizes can create human rights risks and therefore share the responsibility to respect human rights and provide remedy where harm occurs. In addition, the differentiating factors should also include "the ownership" and "the structure" as these two elements are included in UNGP 14 and do have an important impact on the scale and complexity of the means through which enterprises meet their corporate

responsibility to respect.

3.3 We welcome the draft clarifying that it shall cover all internationally recognised human rights "**binding on States"** as a prerequisite to the creation of State obligations.
However, the attempt to give the same status to the Universal Declaration of Human Rights and the ILO 1998 Declaration is a confusion. Declarations are not binding per se unless a State has incorporated those provisions into law. Even the ILO, in creating the Declaration, recognised this, as well as calling on States who had not ratified the conventions from which the principles were drawn to work towards their realisation. The draft should not require States to do something they have decided not to do or to elevate those non accepted requirements into an obligation. Furthermore, the introduction of "fundamental freedoms" are an issue of major concern. This concept is not recognised in the majority of jurisdictions around the world and would create conflicting legal requirements.

Instead, the draft should refer to the authoritative list of the core internationally recognised human rights as defined in UNGP 12, viz. the International Bill of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the principles as set out in the Declaration on Fundamental Principles and Rights at Work.

This language also raises the question about the content of this draft instrument when a State has ratified few of these instruments.

Article 4. Rights of Victims

Please refer to our earlier comments in clause 1.1 on the use of the word "victims". We appreciate the attempt to nuance this term with the proposal of replacing "victims" by "affected individuals" from Cameroon but the inclusion of "communities" would extensively extend the scope and create high legal uncertainty as it could include anyone without the need to have a direct link with the harm caused. Most importantly, however, is the fact that the **text needs to include the fact that until harm is proven it is an alleged harm and the better term to describe what is meant here would be to use the word "rights holder"**. "Affected individuals and communities" also gives a pejorative status to a person as "affected" before the harm itself has been proven.

Who is responsible for the obligations to "ensure", "guarantee", "protect" etc? **These are rights for a State to guarantee and should not be transferred to a business**. What about in States where any number of these rights are not protected? These may be well-intentioned, but they are of no use to a person who has a genuine allegation to bring up but cannot do so due to a State's failure to protect. It is impossible for businesses to guarantee access to justice, the right to submit claims to courts, or other rights brought by this article. The draft should be clearer about who should be responsible for taking these provisions – the States. Otherwise, article 4.2 shall be removed from the draft.

Despite the recognition that human rights conventions can only apply where a nation-state has agreed to be bound by them and have reflected that in national law and regulation, "victims" cannot enjoy a convention, States do, but rather the rights embedded in these conventions. The wording should be improved.

4.2 a. "Psychological wellbeing" is a matter for a trained medical professional to determine rather than parties to the draft and it is impossible to ensure as it is not necessarily a static condition.

c. How a complainant accesses remedy (the word "justice "is inappropriate as explained in **2.1** should be a matter for domestic law to determine. The words "individual or collective reparation" should therefore be omitted. Similarly, the list of remedy should be described as examples rather than using the words "such as" as again, it is for individual States to determine how they want to provide remedy. The new additions include a listing of measures which are up to the States to decide domestically in accordance to its laws and system of remedy. These are also already included in the list of remedy. In addition, providing "victims" with "long-term health assistance" and "long-term monitoring of such remedies" are ambiguous terms and are decision to be taken by States, not by parties. Besides, what does long-term means?

d. This should be reworded. "**Be guaranteed the right to choose to submit claims including through a duly instructed and authorised representative to courts and non-judicial grievance mechanisms of the States Parties**"

This rewording addresses the removal of class actions (unless provided for in accordance with national laws). There is no reason for specifically introducing collective redress instruments as claims can be filed by individuals. Class actions bear the danger of abuse and an effective arrangement that prevents abuse is hardly possible. This is particularly valid where not only government agencies have standing to execute collective redress procedures, but also NGOs and private organisations. In fact, class actions entail a transfer of law enforcement to private entities. Furthermore, the possibility to file class actions bears potential for exerting undue pressure on a company in pre-trial negotiations (via settlement) which has to be rejected. Class actions are particularly dangerous if they are designed with a so-called opt-out procedure: The group of claimants will then include persons who do not expressly object; it may grow up to several thousands of persons. This is contrary to the right of self-determination of the victims (linked to the principle of access to justice) who can no longer decide for themselves whether they want to participate in a lawsuit. If they do not even know that the case concerns them, it will also violate the right to be heard. Together with a booming third-party litigation industry who have nothing but a financial interest in judicial claims, all the ingredients are there to create a massive litigation culture which will help no one.

f. The rules on legal aid must, on the one hand, ensure that the individuals who claim to be victims of human rights violations have access to justice, and, on the other hand, they must not facilitate frivolous or bad faith claims. To achieve this balance of interests, certain conditions for a right to legal aid are needed, which the text continues to omit. Furthermore, "access to information" should be tempered with an effective recognition of the vital importance of the confidential nature of certain information.

The Article 4 provision does not recognise fairness or balance as it addresses none of the rights that a business or person should be given during a complaint against them. The presumption of innocence is a basis of law that should not be interfered with by a treaty body. They too are entitled to due process equity, confidentiality, and privacy etc. **Such a provision should be included here.**

The new proposals from the seventh and eighth session are calling for the entire disclosure of an enterprise's information, in addition to focusing only on TNCs and excluding de facto national companies from the scope. The disclosure clause is strictly regulated by the Securities and Exchange regulation bodies of each country and should be omitted here as the commercial and other property rights of the respondent must be protected.

Going even further, few States' proposals call for a "presumption of control of the controlling or parent companies" should the information be not available. This is not acceptable as it goes against the presumption of innocence and must be entirely removed.

f bis. A new proposal calls on "guaranteeing access to appropriate diplomatic and consular means to facilitate access to effective remedy". This should be omitted as it refers to the diplomatic and consular relations between States only which are regulated by the Vienna Convention on Diplomatic Relations. This falls outside the scope of this treaty.

f tier and quarter. These new proposals are for States to decide at national level.

4.3 This can only apply where a nation state has agreed to be bound by them and have reflected that in national law and regulation. This applies to new proposal 4.3. bis.

Article 5. Protection of victims

The same concern exists here as in Article 4. Not all States unfortunately give such protections, and the draft Treaty is silent on any consequences on States that fail to do so. This means that these ideals are not likely to be implemented, as such States would probably not ratify a treaty such as this.

A two-speed human rights framework would therefore be brought into existence by such a treaty and undermine the proven universal and inclusiveness of States, business and others working within the framework of the UNGPs.

5.2. Proposal brought during the seventh session tends again to extend the scope of this draft to "rights", which goes even beyond "human rights". This must be omitted. The scope of the present draft should be of the international recognised human rights as laid down in UNGP 12. Article 5.2 should also recognise the fact that business is an essential element of the promotion of human rights and therefore States Parties should take adequate and effective measures to guarantee a safe and enabling environment for business to respect human rights. This is an essential part of Pilar I as laid down in UNPG 3.

5.3 This again raises the issue of State capacity. Even the most advanced State would probably struggle to investigate all human rights abuses. It also negates the responsibility under the UNGPs for business to act through due diligence to identify and remediate abuses they find as well as preventing, as far as possible, a recurrence. We welcome positively the proposal of deletion from China. Please see the previous comment on PP11 for the removal of the term "violations"

5.3 bis. This new proposal presumes without any evidence the direct responsibility of companies for "disasters caused by the action of transnational corporations and other business enterprises of transnational character". This should be omitted. While the idea of States' "emergency

response mechanisms" can be proven to be relevant, these mechanisms should include "potential adverse human rights impacts caused" by all actors, including the State and state-enterprises.

Article 6. Prevention

As a general comment, the intended draft provision follows an important and relevant ideal but seems to be **far from reality and almost impossible to implement.** As it stands, the draft expects States to "regulate effectively the activities of all business enterprises…". This disregards the current unfortunate reality that the majority of states are currently lacking strong governance and institutions as well as a lack of effective implementation and enforcement of regulation at the national level, including international conventions they decided themselves to be bound with. This goes also against the UNGPs that are based on a voluntary nature. It seems unrealistic to ask States to do so and should be reformulated.

6.1. As for the scope, new proposals from the seventh and eighth sessions from various States want to divert the intended scope of the treaty to be now applicable only to translational companies and keep "local business registered in terms of relevant domestic law" out of it.

6.1 bis. The new proposal does not include national companies.

6.1. ter. This new provision on "precautionary measures" goes against the presumption of innocence as it could impact business activities without any existence of an outcome of a legal proceeding or evidence of an alleged impact. In addition, this would give States an "absolute" power of decision over business activity, simply based on the "precautionary principle". This provision must be omitted in full.

6.2. Please refer to same comment as 6.1. We welcome the changes brought forward by Brazil during the eighth session.

6.2 bis. Please refer to comment for 6.3 and 6.1. This new proposal should be omitted.

6.3 The new proposition by South Africa during the eighth session to extend the scope of due diligence obligations to the entire "value chains" as chapeau and so with related sub-points and obligations should not be "required" as it would not be realistically implementable in practice. The scope of the few due diligence legislations are limited to the supply chains precisely because it would be impossible for a company to undertake due diligence beyond Tier 1 suppliers. Similarly, the new additions from Palestine in 6.3 (a) to include "environment" should be removed. **"Environmental" rights are beyond the mandate of the IWG.** Moreover, there is no international consensus as to the definition of "environmental rights," and therefore, the use of such a term will lead to great uncertainty on the rights at issue.

The provision 6.3 should be replaced in full by the wording from the UNGPs namely:

"To meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) ***A policy commitment to meet their responsibility to respect human rights;***
(b) ***A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;***
(c) ***Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute".***

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Human rights due diligence:

(a) ***Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships;***
(b) ***Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;***
(c) ***Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve***

To gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.

This wording is known and understandable to business, States and other stakeholders.

Furthermore, **a specific clause is needed to give State Parties the possibility to exclude micro-companies and small and medium enterprises (SMEs) from legally binding due diligence obligations with the aim of not causing undue additional administrative burdens and respecting their constraints**. SMEs are the backbone of all economies and in all existing national due diligence laws there are specific thresholds to exclude smaller companies from legally binding obligations. According to UNGP 14, the scale and complexity of the means through which enterprises meet their responsibility may vary according to their size. SMEs have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.

6.4. As a starting point, this clause should be deleted in its entirety and replaced with the language of the UNGPs:

In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;
(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;
(c) In turn, not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

a. However, if this clause is retained, **the wording used is problematic.** We will comment on the reporting issue later in these comments, but this new provision introduces the term "assessments". This is beyond other provisions in this draft and adds cost and complexity without highlighting the rationale for this addition. Who is the audience and what is its purpose? It also broadens the scope to other topics, e.g. environmental, climate change, without highlighting a clear link to human rights. This sort of blanket provision broadens the obligations on business, creating more burdens, without a clear justification. It should therefore be **omitted.** The new proposals that either extend the text or extend the scope of the draft should be readapted as they includes areas that are not considered international agreed human rights and should be omitted.

The draft includes the publishing, by the company, of "actual or potential human rights abuses that may arise from their own business activities or from business relationships". The reference to "potential" abuses makes this too broad. Whilst business attempts to make all efforts to avoid possible human rights abuses, this requires supposition/prediction by a business as to future events, which is very difficult to assess. This risk is heightened when factoring in the responsibilities regarding business relationships. Given the penalties provided in 6.7, a company could be found to have not reported on something which it did not predict, which would open it up to legal liability, in particular given the removal of the safe harbour provision.

a bis. Article 6.4 a bis should be redrafted and streamlined. Under our understanding, the proposals made for article 6.4. a bis are aimed to reaffirm the necessity to include the ILO Fundamental Principles and Rights at Work (FPRW) as part of the scope of due diligence requirements. These requirements are already included in the Treaty as part of article 1 under the definition of "Human rights abuses" which include all internationally recognised human rights in line with UNGP 12 and so we should avoid unnecessary repetition. The basis of this point should be UNGP 17 which provides clear wording understandable by all actors on what is requested from companies when it comes to human rights due diligence. Therefore, there is no need to enumerate those rights, as doing so runs the risk of mischaracterizing those rights. Equally, the right to strike or concepts such as "work and family-work balance" are not recognised human rights and so fall outside the scope of any due diligence requirement. Beyond due diligence, these matters are industrial matters and do for the national legislation to decide and have no place in an international treaty on business and human rights. Moreover, under the ILO system, member states are allowed the sovereign right to consider and ratify all ILO conventions according to their own timetables – 6.4 a bis appears to be an attempt at circumventing that democratic process, by foisting each of those conventions upon all member states via the treaty process. This should be redrafted in full.

b. The integration here should be "as appropriate" rather than "at all stages", as it may not be an issue at the start but becomes more so as due diligence progresses. In addition, new proposal made regarding the "termination of a relationship" in the case where mitigation is impossible, goes against the UNGPs and would prevent any company to use its "leverage" to encourage the entity that caused or contributed to the impact to prevent or mitigate the recurrence. It is worth reminding that mitigation efforts for a company arise when it is at risk of involvement in an adverse impact solely because the impact is linked to its operations,

product or service by a business relationship. In this case, the company does not have a responsibility for the impact itself, this responsibility lies with the entity that caused or contributed to it. Therefore, according to the UNGPs, it is up to the company to decide to terminate the relationship, based on various factors, notably if the relationship is deemed crucial for its operations.

c. Subjective language should always be avoided. What is meant here by the word "meaningful"? Who will determine what is meaningful? What is meaningful to one side may not be meaningful to the other. This word should be **omitted** or replaced by the wording of UNGP 18 "Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation." In addition, the inclusion of the biased and negatively connoted term "**undue influence from commercial**" is not acceptable in such text. This assumes that it is only a business that looks to exert undue political influence. That is untrue and misleading. Any group could be accused of that and to focus just on business paints them as a pariah which is undeserved. The UNGPs call for the involvement of all stakeholders in the policy-debate, - even more so if their operations include some areas where human rights are potentially at risk and this is critical to ensuring that regulation is effective, proportionate, workable, and supported by credible evidence. Regarding the inclusion of conducting meaningful consultations "in line with principles of **free, prior and informed consent** and throughout all phases of operations." (FPIC). There is no doubt that consulting with the indigenous population is important in particular when reasonable risks might exist. However, the principle of FPIC derives from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which has a non-legally binding nature and are for States to voluntarily commit to it. ILO Convention 169 represent an important instrument in that regard with obligations for ratifying States. However, the requirement for consultation with indigenous groups falls upon the government of the state and not on private persons or companies and may be delegated, but the ultimate responsibility rests on the government. Ultimately, it is up to national authorities to decide and should therefore not be included in the treaty, therefore this should be omitted or replaced by "free, prior, informed, consent, *to the extent that it is required under local law."*

d. This assumes international agreement around free, prior, and informed consent which stretches the amount of agreement that may exist. **Omit** "with the internationally agreed standards".

d bis. This new proposal on "respecting that Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land without threats of retaliation" is unclear and ambiguous. What is it meant by Peoples? This also includes companies? This proposal should be omitted in full.

e. This needs to be subsequently amended due to the inclusion of environment and climate. Also, standards do not necessarily exist in each State on these topics and the compliance cost on business to meet what is in effect an exercise of predicting event is inappropriate and should be **omitted.** We welcome the deletion's proposal.

f. This wording does not take into consideration the way commercial contracts are created.

Such inclusion should be encouraged, not mandated, and it should recognise that the use of such inclusions would take time as existing contracts are most likely to be silent on such language. It is also unclear why such inclusion should "make provision for capacity building or financial contributions, as appropriate". Who are these additional words aimed at and what are they for? Those words should be **omitted.** We welcome the deletion's proposal.

g. UNGP 7 calls for States to support business for human rights in conflict-affected areas and should replace this point in full. The new additions to this point would create unbearable burdens on enterprises with respect to their due diligence obligations, this in conflict-affected areas where even States are facing difficulties to fulfil their duty to protect. Although the corporate responsibility to respect exists independently of State's duty to protect, it is part of the state's duty to protect to support companies in these difficult situations, not create additional challenges for them.

Please see our previous comment for 6.4 regarding the proposal to Article 6.4 in full

6.4. bis. Parent and outsourcing enterprises cannot have obligations whatsoever to give "all the necessary technical and financial means" to their business relationships in their global value chair for them to be able to implement their due diligence. The corporate responsibility to respect and its operationalisation via an ongoing due diligence process is conduct expected from all enterprises independently, including from all the enterprises part of the global value chain. According to UNGP 17, the due diligence of the parent company should cover adverse human rights impacts which may be directly linked to its operations, products or services by its business relationship. In the absence of a direct link regarding its own operations, a parent company has no obligation toward its business relationships.

6.5. Please refer to the comment on 6.1 with regard to the new proposals made from the seventh session.

6.6 How are the requirements here to be implemented and do all States have the resources and capacity to do this "effectively"?

6.7 Given the provision of penalties envisaged by this paragraph, it is important that the uncertainty and vagueness here and in the preceding paragraphs is adequately addressed. What are "adequate penalties" and what are they deemed to be adequate for? The complainant? To dissuade? To Punish? People, including companies, need clarity of the obligations expected of them under the law. In any case, penalties should be set in line with national judicial systems. In addition, the same comment from 6.5 applies here.

6.7. bis. This proposal is calling for the incorporation or implementation of "universal jurisdiction over human rights violations that amount to international crimes". Universal jurisdiction enforcement is up to States to decide and should not be included in the draft as we are diverting the discussion from Business and Human Rights to international criminal law. We welcome Namibia's updated position to remove it from the text.

6.8 This provision is exclusionary and restricts freedom of speech and expression enshrined in Article 19 of the Universal Declaration. Business has a key and legitimate role to play in speaking to the development and implementation of business and human rights policies. Indeed, this

article questions and undermines the legitimate right of business to be involved in expressing its views in such dialogues at national level and impacts on the tri-partite discussions that are embraced by the ILO and other UN agency approaches to consultation and dialogue. This paragraph must be **omitted.** Please also consider comment for 6.4.c. with regard to the proposal from Cameroun.

6.8. bis and ter. The proposals regarding "international financial institutions" disregard and loses sight of the fact that this draft is aimed at States and non-state actors such as companies. It is by no means directed to international organisations. In addition, this draft cannot dictate the conduct of international organisations as it is up its ratifying members states to decide. In addition, as it stands, this draft would create obligations on member states part of these organisations even if they have not ratified this treaty. This goes against customary international law such as the Vienna Convention on the Law of Treaties.

6.8. quarter. Business cannot substitute States in their duty to protect. States should first ensure that at national level, human rights defenders are duly protected in law and in practice. In addition, the very concept of "human rights defenders" has no international recognized definition. The UN General Assembly Resolution 53/144 called "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" do not resort to the concept of "human rights defender". In addition, this resolution is applicable to everyone "individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels" (art. 1) without providing a specific category of individual. Art. 2 recall the State's duty to protect human rights. Thus, a more granular definition on "human rights defenders" would therefore be needed and consequently, this should be omitted.

Article 7 Access to Remedy

7.1. Please refer to the previous comment on the use of the term "victims". UNGP 25 and 26 in full should be the foundational principle of this part on access to remedy as it is a wording known and understood by all businesses and States. **It is of central importance that this draft includes a reference to the recognition that effective judicial mechanisms provided by States are at the core of ensuring access to remedy as States are the first duty bearer under international human rights law.** Unless they do so, the State's duty to protect can be rendered weak or even meaningless. Additionally, as part of the State's duty to protect, access to remedy also includes States facilitating public awareness and understanding of these mechanisms, how they can be accessed and any support (financial or expert) for doing so. This should be better reflected in the draft. As it stands the text would open the door for extraterritorial jurisdiction and would also allow plaintiff to forum shop therefore carrying the important risk to erode national sovereignty and the sustainability of national judicial systems. Article 7 should be entirely redrafted so that it aligns with the UNGPs and existing international human rights law.

7.1. bis. The new proposal refers to vague and biased wording such as "large-scale industrial disasters". It should be omitted.

7.2. This "access to information" disregards existing international obligations of various States

regarding this subject matter, these existing obligations must be complied with. Moreover, where such facilitation is introduced, it must comply with laws such as the requirements of Privacy laws. The information to be accessed should be strictly/narrowly defined, to ensure that it is directly relevant to the matter before a court and to protect the commercial and other property rights of the respondent. New wording proposals are calling for the access of information for "all cases". These new changes should be omitted in full.

7.3. The clause starts from a false assumption that legal requirements are obstacles to deciding on the location or forum for a specific matter. This denigrates the legal rights of all parties in a matter. Those protections are there for a purpose and cannot be so simply dismissed. This clause should be replaced by UNGP 26 in full. We do however welcome positively the proposal to add "according to national legislation"

The doctrine of **forum non conveniens** is largely a common law legal doctrine and as such should be respected by non-common law jurisdictions. We welcome positively some reserved positions on this matter. Moreover, this clause 7.3 disregards the fact that various national, international and/or European law instruments exist that provide for rules of jurisdiction. These cannot and should not be qualified as "legal obstacles". The State should protect its own laws and allow its courts to ensure that the details of any proceedings are properly founded, including the location or forum to be used. A complainant's request for where a matter should be heard is itself a matter of law. Therefore, this is for the Courts to decide in line with their independence. Rejecting this doctrine creates enormous legal uncertainty as to where a company may face a complainant and leave them with no ability to challenge that request. This is particularly true given the vague definition of "business relationship" in Art 1.5. New proposals also would request a guarantee from States of the victim "of victim to be heard in all stages of proceedings avoiding gender and age stereotyping". This is rather vague language and raise the question of how States could control one's people perceptions or stereotypes as there are entirely subjective. Similarly, the proposal on initiation of "proceedings in all cases of human rights" is unrealistic and would lead to the collapse of any judiciary system.
This entire clause should be **omitted.**

7.5 This clause contravenes a fundamental and well-settled legal principle of "innocent until proven guilty" and the notion that "he who asserts must prove." Indeed, requiring that the accused party prove its innocence, violates due process principles and fundamental notions of fairness in most jurisdictions. It is not acceptable to suggest that putting complainants in the position of proving a human rights breach is unfair, as they are the ones with the evidence of the harm claimed. An argument of complainants being in a weaker position than a company is already addressed in the earlier provisions of this clause. We welcome positively States' reserves in this regard. This clause must be **omitted.**

7.6. The new proposals could be interpreted as in favour of the acceptance of universal jurisdiction enforcement which is up to States to decide and should not be included in the draft.

Article 8. Legal Liability

As a general observation on the proposals arising from the seventh session, we positively welcome the fact that few States have **reservations regarding the criminal liability of legal persons**. Allowing criminal liability would pierce the corporate veil and opens the door for States to hold liable even human rights managers, directors, and shareholders in companies. This would have a direct impact on a company's decision to enter, stay or exist in a given market. Important legal uncertainty and fear of criminal liability would lead to negative unintended consequences such as de-investment in countries which need economic development but also companies would need to cut their Tier 1 suppliers to ensure that risks are minimised. Lastly, who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability which may or may not include natural persons.

8.1-8.3. Please refer to our comment on 6.1. Equally, the proposal on 8.3 should be omitted as according to the UNGPs, it is up to the company, not the State to decide to terminate the relationship.

8.4. refer to comment 8.6. UNGP 22 should replace the existing proposals. We welcome States' reserves and proposals of deletion.

8.5 This provision is unreasonable, has no place in national legal frameworks and is in breach of rights that are afforded to natural and legal persons under national laws. Moreover, from a practical perspective, the amounts of required funding would be completely disproportionate and beyond the financial means of many companies. This could also act as a deterrent to trade and investment in countries, whereas this generally has a positive impact on economic and social development and human rights. Also, companies cannot afford to lock up capital, simply in case of a future event, as this capital would be much better channelled into sound business investments and practical measures to ensure respect of human rights. Therefore, the clause must be **omitted.**

8.6 In a significant departure from the UNGPs, the draft's due diligence process requires that companies prevent human rights violations from happening, or face liability. The UNGPs, on the other hand, more appropriately present human rights due diligence as a process in which companies take adequate measures to seek to prevent, mitigate and remediate for human rights impacts. This draft continues to seek to transform due diligence from a process-based standard to an outcome-based standard.

Any liability arising from a failure to prevent a human rights harm should be subject to the foreseeability and avoidability of the event and be mitigated by a company's efforts through its due diligence. The language used in the draft is contrary to the UNGPs which requires remedy only where the business caused or contributed to the human rights violation. Liability requires a negligent violation of an individual's human rights caused by the respondent and which causes an impact requiring remedy. The draft foresees civil liability without sufficient causality. It introduces a parent company liability and a liability for the whole supply chain aka vicarious liability). This is not in conformity with UNGP No. 15 and 22. Furthermore, this is an unproportionate burden for business and contradicts basic legal traditions in many national legal jurisdictions which are based on the principle of legal autonomy. Furthermore,

remediation and restoration of environmental damages is a complex issue. Most of the national legal systems decide not to opt for a general right of legal standing in these matters.
When it comes to the question of liability rules, we call for a "stay and behave" instead of a "cut and run" approach and mindset. Companies are ready and willing to positively improve situations in global supply chains. A far-reaching regulation on supply chain liability, however, could lead to counterproductive consequences. Companies would have to withdraw from countries with a difficult human rights situation if they would be held liable for adverse effects on the ground.

Since liability is extended to natural persons, this opens the door for States to hold liable even human rights managers in companies. Thus, the draft seeks to "pierce the corporate veil" in imposing broad liability on a broad swath of entities and individuals. Who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability which may or may not include natural persons. We welcome States' tentatives, as starting point, to improve the text but remain extremely concerning parts which should be omitted.

8.7 As it is currently worded, this clause denies a company an important mitigation in defence of a claim made against it, i.e., good faith due diligence. This exclusion is contrary to the rules of natural justice. A Court should not be prevented from considering these mitigating factors in determining liability. Such a requirement is omitted from the second sentence of the draft and should be included. "Competent authority" is included here without defining what that is and how it will function in such a process. If that is to be retained, it needs to be defined.

Such language also acts as a deterrent for companies investing in what would be seen as high-risk countries, whereas this generally has a positive impact on economic and social development and promoting human rights. This could lead to many companies' disengagement from countries where the risk to operate is too high, which would ultimately disfavour workers in these countries.

8.8. Changes to the third draft text which are calling for universal criminal liability should be omitted.

8.10 bis and ter. New proposal arising from the seventh sessions should be omitted in full as targeting TNCs. We welcome State's opposition.

Article 8 bis.

We welcome positively the new proposal made regarding the rule of prior exhaustion of domestic remedies. The rule is well established in international law and is aimed to maintain the international juridical system sustainable. Equally, to the extent they are provided by businesses, claimants should first seek a remedy via the business' internal complaints resolution mechanism.

Article 9. Adjudicative Jurisdiction

The proposed scope of article 9 continues to promote extraterritorial jurisdiction. This entire part must be redrafted or omitted. We positively welcome States' reservation regarding the entire article as

it stands. In particular, in describing where the harm occurred, we strongly recommend to resort to language like "**redressable injury-in-fact**" to avoid any speculative and vague harms. This would bring the language more in line with "standing" principles recognized in different national courts.

Indeed, the new draft defines that a company is considered domiciled where it has "activity on a regular basis". This is not only very vague language but would mean universal jurisdiction for many multinational companies that are active in most economies around the world.

The extensive jurisdictional scope of the draft is further exacerbated when considering the breadth of the "activities" to be regulated, which include electronic transactions. (See above).

The new draft also appears to allow for concurrent jurisdiction in the company's host country where the harm occurred, the home country where the company is located, or even in a third country. Adding to this jurisdictional uncertainty, **the draft continues to explicitly reject the doctrine of the forum non conveniens, the retention of which has been called for above in our comments on 7.3.**

Additionally, the text fails to provide for practical and effective pathways to remedy at a local level, allowing States to sidestep any responsibility for maintaining their fundamental obligations regarding remedy under Pillar III. Since access to remedy in the vast majority of cases is most likely to come through better and more effective judicial systems at a national level where violations occur, efforts and resources should be focused on improving national judicial systems in host countries and where violations occur, instead of focusing on expanding the availability of extraterritorial jurisdiction and on building new international legal structures.

The use of poorly defined terms such as "activity on a regular basis", "the presence of assets" and "substantial activity of the defendant" all add to the uncertainty a business will face and can actually restrict their legal rights in mounting a defence.

Lastly, all references of "nationality" as a possible element to define jurisdiction should be removed, since it doesn't improve the chances of repair for the alleged victims. This would only promote forum shopping, as there is already an extensive role of possible jurisdiction to be chosen by the alleged victim's choice, favouring the victim's discretionary power.

9.1. New proposals from would allow the "plaintiffs" and their "family" to decide instead of States where to the claims can be brought upon their discretionary power. **This goes against the principle that complaints must be brought to courts in the country where the alleged harm has been caused. This undermines the general principle that the applicable law is that of the forum State**.

9.2.d. The new inclusion under new point 9.2.d. would create liability for companies where substantial assets are held. Again, this new proposal seeks to "pierce the corporate veil" in imposing broad liability on a broad swath of entities and individuals, including where assets are held. Who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability which may or may not include natural persons. This should be omitted in full.

9.3. We welcome States' proposal to retain the reference of **the *doctrine of forum conveniens i*n 9.3.**

Article 10. Statute of limitations

As a general comment, **the term "most serious crimes of concern …"** has no legal meaning and can lead to wildly inconsistent interpretations. "*Jus cogens*" should be preferred in this context.

Equally, we note with serious concerns the following elements and we call for redrafting of the entire article 10 and sub-articles considering the below points:

- **Unlimited Limitations Period**: the draft text currently provides for "no limitation period" to apply when the human rights abuse is a "war crime, a crime against humanity, or the crime of genocide.". We already explained under PP7 the reasons why "humanitarian law" should be omitted in the treaty. As it stands now, a complete lack of a limitations period, combined with the current definition of "victim" including any family member, means an unreasonable and potentially limitless time period for claims to be brought. Equally, to date, limitless limitations periods are applicable for criminal violations only, not civil (damages) claims. Even during times of war, countries have recognized that civil claims might arise from the war, and have tolled the civil limitations periods for those war-related claims. Additionally, civil limitations periods normally take into account whether the primary actors on both sides will be alive/available to substantively contribute.
- **Unlimited Subject Matter: as stated under PP7,** States are the main subject of international humanitarian law and signatories of the Geneva Conventions and associated additional Protocols, not business. In addition, business like individuals must be protected by States in conflict situations as subject of international humanitarian law. Greater emphasis should be placed on the duties of the State to support businesses when operating in conflict-affected areas, as in most cases businesses are essential in helping people survive and overcome difficulties.

10.1 The determination of statutory limits for the receiving of complaints also needs to recognise a State's existing law in this regard. States should certainly consider any limitations that exist, but they should retain the competency to alter, amend or affirm their own statutes in this regard. The language used here is too absolute. The reference to "humanitarian law" should be excluded and this sub-point omitted in full.

10.2. The proposals made are vague and ambiguous making it difficult for any reader to understand what the obligations arising from the draft could be. For example, what would "a reasonable gender-responsive period of time" mean in concrete terms? This wording should be omitted in full throughout the entire draft as it diverts the text from being understandable by all and effectively implementable. The entire article should be redrafted.

Article 11. Applicable law

The draft continues to grant the plaintiff wide discretion to select the applicable law and will encourage plaintiffs to forum shopping. Any such request would need to be subject to a legal enquiry and ruling by a court. As it is written now, this undermines **the general principle that the applicable law is that of the forum State**. Not only does this create uncertainties as to which laws will apply, it

also creates issues of competence in that jurists in one country may not be equipped to interpret the laws of another State Party. Furthermore, this regulation contradicts the internationally recognised principle of the Rome II-Regulation, according to which the law of the jurisdiction where the tort occurred shall apply in general.

This has proven to be effective also to avoid conflicts regarding the applicable law, as allowing a company complying with national laws to be prosecuted in that same country by a plaintiff seeking redress under the laws of another State would create in effect a double standard within the one State. We positively welcome State's reservations particularly regarding the reference to "upon the request of the victim".

11.1. Vague language such as "indigenous customary laws" should be omitted in full.

11.2. As previously said, this article should be omitted in full. Nevertheless, we welcome Brazil's reserve to include "upon the request of the victim" which would provide the plaintiff with a discretionary power to forum shop.

Article 12. Mutual legal assistance and international judicial cooperation

International assistance and cooperation are important to promote human rights and access to remedy. Countries must undertake more efforts to support each other through technical cooperation, peer learning and the exchange of experience to strengthen judicial systems.

That being said, we welcome the United States' proposal to delete article 12 in full as the article does not provide enough legal clarity and remains vague as to its purpose. This article could undermine State's sovereignty therefore it should be redrafted or omitted in full.

12.2, 12.3 and 12.4 The proposed actions could lead to undermining State's sovereignty. It is up to each national state and its national legislation to decide what is allowed to share or not. Similarly, the measures included in these provisions should not lead whatsoever to unlawful targeting and theft of critical economic/trade secrets and intellectual property.

12.5 The list of proposed actions here to promote cooperation between States such as: "executing searches and seizures"; "examining objects and sites"; and "facilitating the freezing and recovery of assets" are not appropriate as they are not subject to legal due process. These wide-ranging examples could enable politically motivated abuse and frivolous prosecutions against business, as well as compound existing problems in a number of States in relation to other bad-faith or harassing actions against companies.

12.10 Under international law, an important check on a foreign court's adjudicative jurisdiction has always been the power of a national court to refuse to recognise the enforcement of that foreign court's decision. This is an important safeguard that allows a national court to reject a foreign court's decision to exercise jurisdiction over a defendant located in the country of the national court. However, this important safeguard continues to be removed by this draft as it still mandates that all State Parties recognise and enforce another State Party's court order – with very limited exceptions. This could result in the State creating a breach of their obligation to protect their own citizens human rights.

The new proposals from the seventh session do not unfortunately improve the draft. Even worse, the point 12.11 which grants the refusal of recognition and enforcement of general principle accepted in international law would be deleted.

Article 13. International cooperation

13.1 This wording contradicts the wording of **12.12** and other provisions in the draft that give States direct powers. This needs to be aligned considering the concept of the sovereignty of the State.

13.2. The draft does not mention the need to include EBMOs in international cooperation as well as the private sector at large despite the recognised key role social actors are playing to advance human rights. Equally, the draft does not promote effective and meaningful consultation and cooperation with EBMOs, companies and SMEs as encouraged in the UNGPs. The draft would create extensive burdens on enterprises, yet these are not even envisioned to be included in any kind of international cooperation or consultations whatsoever.

Article 14. Consistency with International Law principles and instruments

The absolute language used in the article fails to recognise the right of freedom on negotiations and the balancing role that States need to take in terms of possible competing issues and priorities. States can always be encouraged to consider such expectations, but the draft cannot require that outcome. It is also unclear what, if any, consequences there would be, if a State did not comply with the requirements stemming from this wording.

The new proposal from few States are inconsistent with the very aim and essence of this draft. This binding treaty should impose obligations on ratifying States and enterprises irrespective of whether they are domestic or transnational. The various proposals of extraterritorial jurisdictions, removal of *forum non-conveniens* or universal jurisdiction brought by the different States would render the principle of non-intervention in the domestic affairs of other states invalid as for instance States' courts should be forced to hear complaints based on the "victims" discretionary power, undermining the general principle that the applicable law is that of the forum State.

We welcome positively the fact that few States have reservations regarding the whole provision. As it stands, the article should be either redrafted in full or omitted.

Article 15. Institutional Arrangements

No comments as of now.

Article 16. Implementation

News proposals from the seventh session from various States are concerning as they want to divert the intended scope of the treaty to be now applicable only to translational companies and keep "local business registered in terms of relevant domestic law" out of it. These should also be omitted in this

part.

16.5.bis. Please refer to the comment under 6.4.c.

Article 17. Relations with Protocols

No comments as of now.

Article 18. Settlement of Disputes

No comments as of now.

Article 19. Signature, Ratification, Acceptance, Approval and Accession

No comments as of now.

Article 20. Entry into Force

What is the threshold for such a treaty to come into force? Given that the treaty would be between multiple States to become operative, this would require a large number of ratifications before coming into force and being effective.

IV. Concluding Remarks

From the outset, business has expressed valid concerns about the feasibility and application of this draft Treaty, as it diverges and distracts from the successful approach of the UNGPs and their ongoing implementation by business. Moreover, the content of the draft Treaty continues to not reflect the critical comments made by business and many governments. We have actively and persistently engaged in the Treaty process in informing the OEIGWG of our concerns as well as highlighting the success of the UNGPs on the development of respect of human rights by business. That success is well documented and clearly highlighted in the current context of the 10th anniversary of their adoption by States, who are also part of this process.

In light of the above, the Treaty in its current form remains an inappropriate and distracting effort to the ongoing challenges on protection and respect of human rights and access to remedy. Many States have already developed, and many others are actively developing their own local laws to meet this challenge, and we are convinced that it would be more efficient and impactful for States to continue developing such local solutions, jointly with business and within the framework of the UNGPs. The treaty drafting process needs to recognise that progress should not hinder, contradict, confuse, distract from or otherwise delay these local efforts, which are legitimate exercises of those local jurisdictions' sovereignty. Should the work on the draft treaty be continued, these developments and concerns should be accurately reflected.

We continue to believe that this treaty as currently planned would generate very little to no added value, but instead contributes to uncertainty among global business and individual States, and that States could achieve more by continuing to work within the framework of the UNGPs and advancing their own domestic laws.

More specifically, we question the lack of alignment with fundamental principles and approaches championed by the UNGPs, including a confusion of the roles of government and business in relation to human rights, and a deviation from the balanced considerations for risk-based, process-oriented due diligence. We further stress that the Treaty's lack of clarity and its vague provisions would likely constitute a source of considerable legal uncertainty and may well lead to interpretative disputes and unintended consequences. Finally, we remain highly concerned about the potential implications of the treaty's deviations from fundamental and well-settled legal principles, including, for example, respect for State sovereignty, as well as the absence of appropriate safeguards to ensure that such deviations are not abused.

As outlined in our joint contribution to the roadmap for the next decade of implementation of the UNGPs, we believe in the importance of pursuing alternative/additional lines of actions, including improvements to sound governance and rule of law in high-risk areas, improvements in the access to remedy for rights holders and reinforced efforts to address the root causes of human rights violations, while also working to address the challenges of the informal economy.

In response to the recent and sad passing away of Professor John Ruggie, the principal author of the UNGPs, a spokesperson for the UN High Commissioner for Human Rights stated:

"…The Guiding Principles are firmly anchored in international human rights norms and standards and guided by an approach Ruggie famously termed "Principled Pragmatism". They provide a clear and common framework for addressing risks to human rights and contributing to a more equitable and sustainable global economy.

All of us engaged in human rights work can honour his memory by helping to make his vision reality and continuing to work for the effective implementation of the Guiding Principles everywhere."

* * * * *

JOINT IOE-BUSINESS AT OECD (BIAC)-BUSINESSEUROPE POSITION ON THE SUGGESTED CHAIR PROPOSALS FOR SELECT ARTICLES OF THE LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

31 March 2023

INTRODUCTION

The International Organisation of Employers (IOE), Business at OECD (BIAC) and BusinessEurope welcome the opportunity to answer the call for submission of written inputs from the Chair-rapporteur of the Intergovernmental Working Group (OEIGWG) on this further elaboration of a draft Treaty on Business and Human Rights. **These comments are a joint business position which includes stakeholders entitled to speak such as IOE and the United States Council for International Business (USCIB).**

This joint business position should also be taken into account in the **run-up to the ninth session to be held in October 2023.** The business community remains committed to taking actions that respect human rights and engaging in a balanced way in the policy debates on this topic.

For ease of reference and understanding, business believes it is important to recall the context of the Chair's proposals.

The eighth session of the open-ended intergovernmental working group (OEIGWG) on transitional corporations and other business enterprises with respect to human rights took place on 24-28 October 2022. Ahead of this meeting, the Chair-rapporteur, former Ambassador of Ecuador Mr Emilio Rafael Izquierdo Miño, sent for consultations the below informal proposals to States, civil society organisations and other relevant stakeholders as tentative to move the negotiation process forward.

The below informal proposals focus on the following provision of the draft treaty: **article 6** - prevention; **article 7** - access to remedy, **article 8** - legal liability, **article 9** – jurisdiction (previously named adjudicative jurisdiction), **article 10** – limitation periods (previously named the statute of limitation), **article 12** - mutual legal assistance (previously named mutual legal assistance and international judicial cooperation) and **article 13** – international cooperation. Please note that the below informal proposals also include the removal of **article 11** - applicable law as well as certain changes and additions proposed to the definitions found in **article 1**.

By ***Note Verbale*** sent on 2 March 2023, the new appointed Ambassador of Ecuador, Mr. Cristian Espinosa Cañizares, in line with the recommendation in paragraph 25(f) of the report on the eighth session, invited all stakeholders entitled to speak at the public sessions of the working group to submit written inputs. These inputs will be particularly helpful in advancing the discussions to be had at the intersessional consultations, and which will be shared on the working group website. The outcomes of the intersessional consultations, along with the concrete textual proposals and comments submitted by States during the

eighth session, will be used by the Chair to update and consolidate in a single text the draft legally binding instrument, and circulate it by the end of July 2023.

IOE, Business at OECD (BIAC) and BusinessEurope welcome the Chair's proposals as an attempt to move the negotiations constructively forward. We also welcome the call for written input ahead of the ninth session.

Yet, unfortunately, both the third draft treaty and the Chair's proposals continue to raise serious concerns for the business community as they are not yet a suitable basis to reach a balanced outcome based on consensus. Critical issues continue to be extremely problematic for business, such as the proposed scope for jurisdiction (article 9), the use of the term "victim", instead of the expression "alleged victim", statements involving mandatory prevention for business activities, or the article 4, which is maintained in full in the draft text.

To this end, it remains of paramount importance to increase the level of States' and relevant stakeholders' participation in the overall process. IOE and the business community remain committed to constructively and critically engaging in the upcoming ninth session.

In this regard, comments from the business community are provided below. These comments, which sometimes include suggestions for direct language**, should always be read in conjunction with the general comments provided for each article, but also with the business position as a whole presented both in this document but also in the document on the third revised draft treaty also submitted to the Chair.**

These comments reflect the **ongoing commitment** of business to respect and uphold human rights and responsible business conduct worldwide. However, we reiterate that any future legal instrument regulating business should follow a constructive approach, considering the legitimate challenges and concerns of business, and be guided by realistic and pragmatic requirements for effective implementation on the ground to achieve its objective.

To have a complete position of the business community regarding the entire draft treaty and proposals that came out of the eighth session, please refer to the separate document which contains the joint business position.

BUSINESS POSITION AND COMMENTS

Article 1. Definitions (additions and changes)

"Adverse human rights impact" *shall mean a harm which corresponds to a reduction in or removal of a person's ability to enjoy an internationally recognized human right.*

- **Comment**: This new suggested addition to the draft treaty would improve the coherence of the draft as it is in line with the UNGPs and referred to "internationally recognized human rights". This wording is known and understandable to businesses, States and other stakeholders.
- We strongly recommend using the language below, providing with a definition on the harm to avoid any speculative and vague harms that would harm any standing of the claimant:

*"**Adverse human rights impact**" shall mean a harm which corresponds to a reduction in or removal of a person's ability to enjoy an internationally recognized human right, and which is a redressable injury-in-fact that is recognized under the applicable local law.*

*"**Human rights abuse**" shall mean any acts or omissions that take place in connection with business activities and results in an adverse human rights impact.*

- **Comment:** This suggested change of the previous definition would improve the draft as it is in line with the UNGPs.

- We strongly recommend using the more balanced language below to be fully aligned with the "cause or contribute" framework of the UNGPs, and therefore more precise. "In connection with" is vague and overbroad:

*"**Human rights abuse**" shall mean any adverse human rights impacts ~~acts or omissions~~ that are caused by or contributed to by ~~take place in connection with~~ business activities and that seriously infringe upon an internationally recognized human rights ~~results in an adverse human rights impact.~~*

***"Human rights due diligence"** shall mean the processes by which business enterprises identify, prevent, mitigate and account for how they address their adverse human rights impacts. While these processes will vary in complexity with the size of a business enterprise, the risk of severe adverse human rights impacts, and the nature and context of the operations of that business enterprise, these processes will in every case comprise the following elements:*

(a) *identifying and assessing any adverse human rights impacts with which the business enterprise may be involved through its own activities or as a result of its business relationships;*

(b) *taking appropriate measures to prevent and mitigate such adverse human rights impacts*

(c) *monitoring the effectiveness of its measures to address such adverse human rights impacts; and*

(d) *communicating how the relevant business enterprise addresses such adverse human rights impacts regularly and in an accessible manner to stakeholders, particularly to affected and potentially affected persons.*

- **Comment:**

The draft should take the text from the UNGPs 17 to 22 in full. Human rights due diligence is a complex process, and the definition of this draft should be as clear and understandable as the UNGP for companies. As it stands, the draft definition is far too concise trying to resume in one short definition the content of seven guiding principles devoted to HRDD. This does not allow to capture well enough the different scenarios and associated responsibilities companies can face in their due diligence process. Also, the responsibility of remediation in cases where businesses have caused or contributed to harm is also not reflected in this definition although being a key component of the corporate responsibility to respect.

When it comes to the draft text, although close to the wording of the UNGPs, this proposal diverts itself from them by requesting "in every case" a complete due diligence process for companies. This could create important financial burdens on companies, notably MSMEs. This wording is too prescriptive, in cases where a full process is not needed. It should be replaced by "should" or, better yet, simply refer to the UNGP's guidance that due diligence be guided by the relevant context of a relevant business, its size and resources, and its operations and their attendant risks.

On point (b), it should be added "in cases where the business enterprise causes or may cause as well as contributes or may contribute to an adverse impact" to be in line with the sense of UNGP 19. Appropriate measures to prevent and mitigate are requested as part of the corporate responsibility to respect (R2R) from companies when there is a direct link between a business's operations and human rights harm. As it stands, the proposal is too vague and could be interpreted as an obligation

of prevention and mitigation measures for a company's entire supply chain. This goes against UNGP 19.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products, or services by its business relationship with another entity, the situation is more complex but, in such case, the company is not responsible to prevent or mitigate, although it can decide to do so by using its leverage. In terms of remediation, the company should not provide a remedy as it has no responsibility.

On (d), according to UNGP 21, the only requirement of formal reporting is for business enterprises whose operations or operating contexts pose risks of severe human rights impacts. The draft seeks to create an automatic reporting obligation for companies regardless of the context and potential gravity of human rights harms. This could create important additional burdens for companies, especially SMEs.

*"**Remedy**" shall mean the restoration of a victim of a human rights abuse to the position they would have been had the abuse not occurred, or as nearly as is possible in the circumstances. An "**effective remedy**" involves reparations that are adequate, effective and prompt; are gender and age responsive; and may draw from a range of forms of remedy such as restitution, compensation, rehabilitation, satisfaction (such as cessation of abuse, apologies, and sanctions), and guarantees of non-repetition.*

Comment:

Remediation and remedy refer to both the processes of providing remedy for an adverse human rights impact and the substantive outcomes that can ameliorate the adverse impact. These outcomes may take a range of forms, but these measures **are up to the States to decide domestically in accordance to its laws and system of remedy. For this reason, the UNGPs remain silence on defining "effective remedy" as this is a matter of national law to decide.**

Per UNGP 25 et. seq., these definitions should specify that ensuring access to effective remedy are a legal requirement of State. It is a fundamental principle of international human rights law that when human rights are violated, there must be effective remedy. Several international and regional human rights treaties explicitly provide for **the State obligation** to provide access to effective remedy to victims. It is of central importance that this draft includes a reference to the recognition that effective judicial mechanisms provided by States are at the core of ensuring access to remedy as States are the first duty bearer under international human rights law.

"Victim" is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. Until then, they are a person alleging an abuse. The misuse of the term here gives a pejorative and adjudicative status to a person as a victim before the harm itself has been proven. Victim is not used in the UNGPs and should not be used here. The text needs to include the fact that until harm is proven it is an alleged harm and the better term to describe what is meant here would be to use the word "rights holder" or "complainant".

*"**Relevant State agencies**" means judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred to in this LBI to address human rights abuse, and may include courts, law enforcement bodies, regulatory authorities, administrative supervision bodies, and other State-based non-judicial mechanisms.*

Comment:

We welcome the proposals from the United States arising from the eight session to replace the existing text with "State-based judicial and non-judicial grievance mechanisms" as this is wording coming from the UNGPs which is known and understandable by all actors.

Article 6. Prevention

6.1 *Each State Party shall adopt appropriate legislative, regulatory, and other measures to:*

- **(a)** *prevent the involvement of business enterprises in human rights abuse;*
- **(b)** *enhance respect by business enterprises for internationally recognized human rights;*
- **(c)** *strengthen the practice of human rights due diligence by business enterprises; and*
- **(d)** *promote the active and meaningful participation of individuals and groups, such as trade unions, civil society, non-governmental organizations and community-based organizations, in the development and implementation of laws, policies and other measures to prevent the involvement of business enterprises in human rights abuse.*

Comment:

This proposal should refer explicitly to the obligations of States included in the respective UNGPs on the State duty to protect human rights and associated obligations to support businesses in their responsibility to respect. Prevention is a shared responsibility between States and businesses. Also, it is worth reminding that the UNGPs themselves state that "the failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights.". Adopting laws and other measures would not make an effective difference if they are not properly implemented, enforced and reviewed at national level where and when needed.

Subjective language should always be avoided. What is meant here by the word "meaningful"? Who will determine what is meaningful? What is meaningful to one side may not be meaningful to the other. This word should be omitted. In addition, as the main subject of this draft, active participation from businesses, in particular, SMEs, as well as Employer Organisations should be explicitly included.

The proposals from the US throughout the article are welcome as they aimed to reduce the extensive prescriptiveness of the text by allowing flexible measures for States, as appropriate, that would be tailored to the national and local context and consistent with domestic legal and judicial systems.

The proposed changes by Mexico and Panama in article 6.1.(b) and (c) to replace "enhance" and "strengthen" by "ensure" are far too prescriptive. According to the UNGPs, States have a duty to support and strengthen the practice of human rights due diligence by business, this follows a constructive approach built on raising awareness and provide capacity-building which is a central element of Pilar I.

Article 6.1. (d) calls for the promotion of active and meaningful participation of many stakeholder groups in the development and implementation of laws. How to legislate is a question of national sovereignty and who should be consulted in each law also. This is for the national legislature to decide and should not be included in this instrument as this would go against State's sovereignty. In addition, in line with UNGP 18, due diligence already required business to "involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business

enterprise and the nature and context of the operation". Therefore, this point should redrafted or omitted.

- We strongly recommend using the more balanced language below to be fully aligned with the objectives of the UNGPs, and therefore more precise. By essence, prevention measures – as well as all HRDD – is a process through which prevention cannot be guaranteed – regardless of the legislative etc. measures in place:

6.1. Where applicable and in accordance with its national legal system, each State Party shall adopt appropriate legislative, regulatory, judicial, and other measures to:

(a) *Seek to prevent ~~the involvement of~~ business enterprises causing or contributing to ~~in~~ human rights abuse;*

(b) *enhance respect by business enterprises for internationally recognized human rights;*

(c) *strengthen and further incentivize the practice of human rights due diligence by business enterprises, including by creating legal protections for business enterprises that engage in good faith human rights due diligence, and by providing support, advice and guidance to business enterprises on respecting human rights, in particular through capacity-building and awareness-raising; and*

(d) *promote the active and meaningful participation of potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation, ~~of individuals and groups, such as trade unions, civil society, non-governmental organizations and community based organizations in the development and implementation of laws, policies and other measures~~ to seek to prevent ~~the involvement of~~ business enterprises ~~in~~ from causing or contributing to human rights abuse.*

6.2 *Each State Party shall ensure that competent authorities relevant to the implementation of Article 6.1 have the necessary independence, in accordance with the fundamental principles of its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.*

Comment: "Necessary independence and resources" should be added to this proposal. Also, to avoid any subjective language, the term "undue influence" should be omitted. What is "undue" and who is to determine that? Subjective language should always be avoided.

We strongly recommend using the more balanced language below:

6.2. Each State Party shall ensure that competent authorities relevant to the implementation of Article 6.1 have the necessary independence and resources, in accordance with the fundamental principles of its legal system, to enable such authorities to carry out their functions effectively ~~and free from any undue influence.~~

6.3 Measures to achieve the ends referred to in Article 6.1 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that such human rights due diligence:

(a) takes full and proper account of the differentiated human rights- related risks and adverse human rights impacts experienced by women and girls;

(b) takes particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;

(c) has been informed by meaningful consultation with potentially affected groups and other relevant stakeholders;

(d) ensures the safety of those who may be at risk of retaliation; and

(e) insofar as engagement with indigenous peoples takes place, is undertaken in accordance with the internationally recognized standards of free, prior and informed consent.

Comment:

This proposal does not consider the obligations arising from the State's duty to protect human rights which should provide guidance and support to companies when undertaking their HRDD.

Additionally, these legally new enforceable requirements would be extremely burdensome for business enterprises. For example, how could a company, as part of its HRDD, **ensure** "the safety of those who may be at risk of retaliation"? Public security is a prerogative of States. Also, how would this obligation apply in countries in a situation of conflict where even States are unable to defend their own population and ensure the respect of fundamental human rights? **This is unrealistic and should be omitted.**

The reference to women and girls in point (a) and subsequently groups of vulnerability in point (b) is repetitive as the former is included in the latter. In addition, a focus on one single group of vulnerable people would divert the attention to all the others, such as children, indigenous people and others, which should not be the aim of this draft.

Here, a **specific clause** would be needed to give State Parties the possibility to exclude micro-companies and small and medium enterprises (SMEs) from legally binding due diligence obligations with the aim of not causing undue additional administrative burdens and respecting their constraints.

As per the changes provided by States during the eighth session, we welcome the US proposals to streamline the text and delete all sub-provisions which are fully aligned with the UNGPs and so understandable by business.

The changes proposed by Mexico in (d) run counter to Pillar I of the UNGPs and contravene a fundamental principle that it is the duty of the state to protect individuals, not companies. Furthermore, it would run counter to most national laws in which law enforcement authorities are responsible for the protection of individuals.

Lastly, regarding the inclusion of the principles of free, prior and informed consent in (e), there is no doubt that consulting with the indigenous population is important in particular when reasonable risks might exist. However, the principle of FPIC derives from the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which has a non-legally binding nature and are for States to voluntarily commit to it. ILO Convention 169 on the other hand, represents an important instrument in that regard with obligations for ratifying States. However, the requirement for consultation with indigenous groups falls upon the government of the state and not on private persons or companies and may be delegated, but the ultimate responsibility rests on the government. Ultimately, it is up to national authorities to decide and should therefore not be included in the treaty, therefore this should be omitted.

We strongly recommend using the more balanced language below:

6.3 Measures to achieve the ends referred to in Article 6.1 may ~~shall~~ include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that such human rights due diligence:

(a) takes full and proper account of the differentiated human rights-related risks and potential

adverse human rights impacts experienced by vulnerable groups ~~women and girls~~;

(b) takes particular account of the needs of those who may be at heightened risks of vulnerability or marginalization; and

(c) has been informed by meaningful consultation with potentially affected groups and other relevant stakeholders;

~~(d) ensures the safety of those who may be at risk of retaliation; and~~

~~(e) insofar as engagement with indigenous peoples takes place, is undertaken in accordance with the internationally recognized standards of free, prior and informed consent.~~

6.4 Each Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases.

IOE Comment:

What does "third party" means in this context? Are we referring to suppliers? This language should be clarified. Each enterprise individually has a responsibility to respect human rights. This proposal is subjective and seems intended to focus the scope of the draft on transnational companies and shift the responsibility from enterprises in the value chain to the parent company.

In addition, what the distinction is between "legal" and "administrative" system in this context?

According to the UNGP 13, if an enterprise is at risk of involvement in an adverse impact solely because the impact is linked to its operations, products or services by a business relationship, it does not have responsibility for the impact itself: that responsibility lies with the entity that caused or contributed to it. The enterprise, therefore, does not have to provide remediation (although it may choose to do so). However, it has a responsibility to use its leverage to encourage the entity that caused or contributed to the impact to prevent or mitigate its recurrence. This may involve working with the entity and/or with others who can help.

As it stands, this article 6.4. carries an important risk to lead to a "cut and run approach" where companies will exit markets by fear of non-compliance. This goes against the very essence of the constructive approach of the UNGPs where business and the State work collaboratively with their distinctive clear role and responsibilities to advance human rights on the ground.

We strongly recommend using the more balanced language below:

6.4 Each Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that business enterprises take appropriate steps to seek to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to seek to prevent such abuse in appropriate cases.

6.5 State Parties shall periodically evaluate the legislative, regulatory, and other measures referred to in Article 6.1 and with a view to determining their adequacy for meeting the aims set out in that Article and shall revise and extend such measures as appropriate.

IOE Comment:

Vague and subjective language as proposed by Panama in new 6.5. bis should be avoided in a treaty of this standing. What does "protect these policies from the influence of commercial and other vested interests of business enterprises" mean if not ideological language? The reference to "influence" is biased and negatively depicts a business's legitimate right to express its opinion in line with Art.19 of the UDHR. This new proposal should be omitted in full.

We strongly recommend using the more balanced language below:

6.5 State Parties shall periodically evaluate the legislative, judicial, regulatory, and other measures referred to in Article 6.1 and with a view to determining their adequacy for meeting the aims set out in that Article and shall revise and extend such measures as appropriate.

Article 7. Access to Remedy

7.1 *Each State Party shall, consistent with its domestic legal and administrative systems:*

(a) *develop and implement effective policies to promote the accessibility of its relevant State agencies to victims and their representatives, taking into account the particular needs and interests of those victims who may be at risk of vulnerability or marginalization;*

(b) *progressively reduce the legal, practical and other relevant obstacles that, individually or in combination, hinder the ability of a victim from accessing such State agencies for the purposes of seeking an effective remedy; and*

(c) *ensure that relevant State agencies can either deliver, or contribute to the delivery of, effective remedies.*

7.2 *The policies referred to in Article 7.1(a) shall address, to the extent applicable to the State agency in question:*

(a) *the need to ensure that procedures and facilities for accessing and interacting with such agencies are responsive to the needs of the people for whose use they are intended;*

(b) *the need to ensure that victims have ready access to reliable sources of information about their human rights, the role and capacity of relevant State agencies in relation to helping victims obtain an effective remedy, and appropriate support to enable them to participate effectively in all relevant processes;*

(c) *the implications in terms of access to remedy of imbalances of power as between victims and business enterprises; and*

(d) *risks of reprisals against victims and others.*

Comment:

"Victim" is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. Until then, they are a person alleging an abuse. Please refer to our previous comment on definition of remedy.

U**NGP 25 and 26 in full should be the foundational principle of this part on access to remedy** as it is a wording known and understood by all businesses and States. It is of central importance that this draft includes a reference to the recognition that effective judicial mechanisms provided by States are at the core of ensuring access to remedy as States are the first duty bearer under international human rights law. Unless they do so, the State's duty to protect can be rendered weak or even meaningless. Additionally, as part of the State's duty to protect, access to remedy also includes States facilitating public awareness and understanding of these mechanisms, how they can be accessed and any support (financial or expert) for doing so. This should be better reflected in the draft.

The term "**imbalances of power**" should be replaced or omitted is an ambiguous open-ended concept which does not bring enough legal clarity or certainty. The concept of "leverage" would be a welcome addition if something like the referenced language persists.

We welcome the proposals made by the US during the eighth session.

7.3 *The measures to achieve the aims set out in Article 7.1(b) shall include, to the extent applicable to the State agency in question and necessary to address the obstacle in question:*

(a) reducing the financial burden on victims associated with seeking a remedy, for instance through the provision of financial assistance, waiving court fees in appropriate cases, and/or granting exceptions to claimants in civil litigation from obligations to pay the costs of other parties at the conclusion of proceedings in recognition of the public interest involved;

(b) providing support to relevant State agencies responsible for the enforcement of the measures referred to in Article 6;

(c) ensuring that there is effective deterrence from conduct that may amount to reprisals against victims and others;

(d) reversing or reducing evidential burdens of proof for establishing liability, such as through the application of presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases;

(e) ensuring fair and timely disclosure of evidence relevant to litigation or enforcement proceedings; and

(f) ensuring that rules of civil procedure provide for the possibility of group actions in cases arising from allegations of human rights abuse.

Comment:

It is for the national legislature to decide their national law regarding the burden of proof. In some cases, the reversal of the burden of proof could be admissible, especially for serious violations. However, the reversal of the burden of proof is not always justifiable and hinders the principle of presumption of innocence but also would make any judicial system unsustainable. This contravenes a fundamental and well-settled legal principle of "innocent until proven guilt" and the notion that "who asserts must prove"" Indeed, requiring that the accused party prove its innocence, violates due process principles and fundamental notions of fairness in most jurisdictions. It is not acceptable to suggest that putting complainants in the position of proving a human rights breach is unfair, as they are the ones with the evidence of the harm. Point (d) should be omitted in full.

The "imposition of strict or absolute liability in appropriate cases" as well as "ensuring fair disclosure" does not provide wording with enough legal clarity. What would be the "appropriate cases" and what does "fair" mean in this context? Subjective language should always be avoided.

Any liability arising from a failure to prevent a human rights harm should be subject to the foreseeability and avoidability of the event and be mitigated by a company's efforts through its due diligence. The language used in the draft is contrary to the UNGPs which requires remedy only where the business caused or contributed to the human rights violation.

7.4 *For the purposes of achieving the aims set out in Article 7. 1 (c), States shall adopt such legislative and other measures as may be necessary:*

(a) to enhance the ability of relevant State agencies to deliver, or to contribute to the delivery of, effective remedies;

(b) to ensure that victims are meaningfully consulted by relevant State agencies with respect to the design and delivery of remedies; and

(c) to enable relevant State agencies to monitor a company's implementation of remedies in cases of human rights abuse and to take appropriate steps to rectify any non-compliance.

Comment:

For States to deliver effective remedies, along with State-based judicial, explicit reference to non-judicial grievances should be included. State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy.

The chapeau of 7.4 should include "**judicial and non-judicial**" measures.

As said by the UNGPs, administrative, legislative and other non-judicial mechanisms play an essential role in complementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; a judicial remedy is not always required; nor is it always the favoured approach for all claimants.

In the wider system of ensuring access to effective remedy, reference to collaboration between States and businesses should also be included as, within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. For this reason, in point (b) companies and EBMOs along with affected individuals should be part of consultations with the State with respect to the design and delivery of remedies

Delivering effective remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so. This should be better reflected in the draft.

At 7.4.c., it seems unrealistic to ask relevant State agencies to monitor a company's implementation of remedies in cases of human rights abuse as this would require significant human resources and financial means that most states do not have.

Article 8. Legal Liability

8.1 *Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to establish the liability of legal and natural persons for non-compliance with its legally enforceable measures established pursuant to Article 6.*

Comment:

When it comes to the question of liability rules, we remain committed to seeking a "stay and behave" instead of a "cut and run" approach and mindset. Companies are ready and willing to positively improve situations in global supply chains. A far-reaching regulation on supply chain liability, that imposes penalties on companies for violative suppliers that are beyond the companies' contractual or other control, however, could lead to counterproductive consequences. Companies would have to withdraw from countries with a difficult human rights situation if they might be held liable for adverse effects on the ground.

This draft text is extremely vague for what companies would be liable and does not create legal certainty. Particularly since the definition on human rights due diligence in Art. 1 is not properly reflecting the due diligence concept in the UN Guiding Principles, there is a danger that the treaty could introduce a liability for the entire supply chain, what would not be in line with the UN Guiding Principles and would create great legal uncertainty.

Since liability is extended to natural persons, this opens the door for States to hold liable even human rights managers in companies. Thus, the draft seeks to "pierce the corporate veil" in imposing broad liability on a broad swath of entities and individuals. Who is to be subject to liability needs to be determined by national law and be subject to broader issues of commercial liability which may or may not include natural persons

8.2 *Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in this Article shall be criminal, civil or administrative, as appropriate to the circumstances. Each State Party shall ensure, consistent with its domestic legal and administrative systems, that the type of liability established under this article shall be:*

(a) responsive to the needs of victims as regards remedy; and
(b) commensurate to the gravity of the human rights abuse.

8.3 *Subject to the legal principles of the State Party, the liability of legal and natural persons shall be established for:*

(a) conspiring to commit human rights abuse; and
(b) aiding, abetting, facilitating and counselling the commission of human rights abuse.

Comment:

The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. As it stands, the proposal would go far beyond what is included in the jurisprudence as there is no reference whatsoever to the level of implication needed for a business to be established as complicit. This opens the room for extensive wider interpretation to any national court to decide by itself to hold companies and a broad range of individual actors liable. This broad language also appears to violate the attorney-client privilege recognized in many jurisdictions.

This proposal goes against the essence of the UNGPs. Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid causing or contributing to an alleged human rights abuse.

8.4 *Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that, in cases concerning the liability of legal or natural persons in accordance with this article:*

(a) the liability of a legal person is not contingent upon the establishment of liability of a natural person;

(b) the criminal liability (or its functional equivalent) of a legal or natural person is not contingent upon the establishment of the civil liability of that person, and vice versa; and

(c) the liability of a legal or natural person on the basis of Article 8.3 is not contingent upon the establishment of the liability of the main perpetrator for that unlawful act.

8.5 *Each State Party shall ensure, consistent with its domestic legal and administrative systems, an appropriate allocation of evidential burdens of proof in judicial and administrative proceedings that takes account of differences between parties in terms of access to information and resources, including through the measures referred to in Article 7.3(d), as appropriate to the circumstances.*

8.6 *Each State Party shall ensure that legal and natural persons held liable in accordance with this Article shall be subject to effective, proportionate and dissuasive penalties or other sanctions*

Article 9. Jurisdiction

9.1 *Each State Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to establish its jurisdiction in respect of human rights abuse in cases where:*

(a) *the human rights abuse took place, in whole or in part, within the territory or jurisdiction of that State Party;*

(b) *the relevant harm was sustained, in whole or in part, within the territory or jurisdiction of that State Party;*

(c) *the human rights abuse was carried out by either*

i. *a legal person domiciled in the territory or jurisdiction of that State party; or*

ii. *a natural person who is a national of, or who has his or her habitual residence in the territory or jurisdiction of, that State Party; and*

(d) *a victim seeking remedy through civil law proceedings is a national of, or has his or her habitual residence in the territory or jurisdiction of, that State Party.*

Comment:

The proposed scope of article 9 continues to promote extremely broad extraterritorial jurisdiction which encourages plaintiffs for forum shopping and create legal uncertainty. This is even furthered by the very vague language.

In 9.1. (b), the term “redressable injury-in-fact” should replace “harm”.

9.2 *For the purposes of Article 9.1, a legal person is considered domiciled in any territory or jurisdiction in which it has its:*

(a) *place of incorporation or registration;*

(b) *principal assets or operations;*

(c) *central administration or management; or*

(d) *principal place of business or activity.*

Comment:

The proposed language is overbroad in that it allows for reaching multinationals in multiple countries, thus leading to great uncertainty. This would create extensive unintended negative consequences such as de-investment in many countries mainly in the Global South and companies exiting markets by fear of non-compliance, ultimately promoting a "cut and run" approach in markets where most deficit work deficits arise. This would go against the very aim of the instrument which is to advance human rights worldwide.

- **Point (b) should therefore be omitted in full.**

9.3 Each State Party shall take such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1 shall respect the rights of victims in accordance with Article 4, including with respect to:

(a) the discontinuation of legal proceedings on the grounds that there is another, more convenient or more appropriate forum with jurisdiction over the matter; or

(b) the coordination of actions as contemplated in Article 9.4.

Comment:

The proposed language in (a) would go against the well-established principle of *forum non-conveniens* and should be deleted. As it stands, this would undermine the sovereignty of each state.

9.4 *If a State Party exercising its jurisdiction under this Article has been notified, or has otherwise learned, of judicial proceedings taking place in another State Party relating to the same human rights abuse (or any aspect of such human rights abuse), the relevant State agencies of each State shall consult one another with a view to coordinating their actions.*

Article 10. Limitation Periods

10.1. *Each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that no limitation period shall apply in judicial proceedings in relation to human rights abuse constituting a war crime, a crime against humanity or the crime of genocide.*

Comment:

The reference to "humanitarian law" should be omitted. States are the main subject of international humanitarian law and signatories of the Geneva Conventions and associated additional Protocols, not business. In addition, business like individuals must be protected by States in conflict situations as subject under international humanitarian law. Equally, humanitarian law applies in conflict situations which is not the purpose of this treaty. Last but not least, it is an important part of the State duty to protect to help ensure that business enterprises operating in conflict-affected areas are provided with the adequate assistance in line with UNGP 7.

Equally, we note with serious concerns the following elements and we call for redrafting of the entire article 10 and sub-articles considering the below points:

- **Unlimited Limitations Period**: the draft text currently provides for "no limitation period" to apply when the human rights abuse is a "war crime, a crime against humanity, or the crime of

genocide.". We already explained under PP7 in the draft binding treaty the reasons why "humanitarian law" should be omitted in the treaty. As it stands now, a complete lack of a limitations period, combined with the current definition of "victim" including any family member, means an unreasonable and potentially limitless time period for claims to be brought. Equally, to date, limitless limitations periods are applicable for criminal violations only, not civil (damages) claims. Even during times of war, countries have recognized that civil claims might arise from the war, and have tolled the civil limitations periods for those war-related claims. Additionally, civil limitations periods normally take into account whether the primary actors on both sides will be alive/available to substantively contribute.

- **Unlimited Subject Matter:** as stated under PP7 in the third revised draft treaty, States are the main subject of international humanitarian law and signatories of the Geneva Conventions and associated additional Protocols, not business. In addition, business like individuals must be protected by States in conflict situations as subject of international humanitarian law. Greater emphasis should be placed on the duties of the State to support businesses when operating in conflict-affected areas, as in most cases businesses are essential in helping people survive and overcome difficulties.

10.2. *In judicial proceedings regarding human rights abuse not falling within the scope of Article 10.1, each State Party shall adopt such measures as may be necessary, and consistent with its domestic legal and administrative systems, to ensure that limitation periods for such proceedings:*

(a) are of a duration that is appropriate in light of the gravity of the human rights abuse;

(b) are not unduly restrictive in light of the context and circumstances, including the location where the relevant human rights abuse took place or where the relevant harm was sustained, and the length of time needed for relevant harms to be identified; and

(c) are determined in a way that respects the rights of victims in accordance with Article 4.

Comment

Under (c), "victim", in the reference to article 4, is a term used to describe a person who has suffered harm and been found to have so suffered by a court of law. Until then, they are a person alleging an abuse. The misuse of the term here gives a pejorative status to a person as a victim before the harm itself has been proven. Victim is not used in the UNGPs and should not be used here. The text needs to include the fact that until harm is proven it is an alleged harm and the better term to describe what is meant here would be to use the word "rights holder".

With regard to the reference to article 4 on "rights of victims", who is responsible for the obligations to "ensure", "guarantee", "protect" etc? These are rights for a State to guarantee and should not be transferred to a business. What about in States where any number of these rights are not protected? These may be well-intentioned, but they are of no use to a person who has a genuine allegation to bring up but cannot do so due to a State failure to protect.

The Article 4 provision does not recognise fairness or balance as it addresses none of the rights that a business or person should be given during a complaint against them – including, for example, due process and confidentiality. The presumption of innocence is a basis of law that should not be interfered with by a treaty body. They too are entitled to due process equity, confidentiality, and privacy etc. Such a provision should be included under article 4.

- **Under article 4.2 a.** "Psychological wellbeing" is a matter for a trained medical professional to determine rather than parties to the draft and it is impossible to ensure as it is not necessarily a static condition.
- **On article 4.2 c.** How a complainant accesses remedy (the word "justice "is inappropriate as

explained in 2.1 should be a matter for domestic law to determine. The words "individual or collective reparation" should therefore be omitted. Similarly, the list of remedy should be described as examples rather than using the words "such as" as again, it is for individual States to determine how they want to provide remedy. The new additions from Palestine include a listing of measures which are up to the States to decide domestically in accordance to its laws and system of remedy. These are also already included in the list of remedy. In addition, providing "victims" with "long-term health assistance" and "long-term monitoring of such remedies" are ambiguous terms and are decision to be taken by States, not by parties. Besides, what does long-term means?

- **On article 4.2 d**. This point should be reworded. "Be guaranteed the right to choose to submit claims including through a duly instructed and authorised representative to courts and non-judicial grievance mechanisms of the States Parties"

  This rewording addresses the removal of class actions (unless provided for in accordance with national laws). There is no reason for specifically introducing collective redress instruments as claims can be filed by individuals. Class actions bear the danger of abuse and an effective arrangement that prevents abuse is hardly possible. This is particularly valid where not only government agencies have standing to execute collective redress procedures, but also NGOs and private organisations. In fact, class actions entail a transfer of law enforcement to private entities. Furthermore, the possibility to file class actions bears potential for exerting undue pressure on a company in pre-trial negotiations (via settlement) which has to be rejected. Class actions are particularly dangerous if they are designed with a so-called opt-out procedure: The group of claimants will then include persons who do not expressly object; it may grow up to several thousands of persons. This is contrary to the right of self-determination of the victims (linked to the principle of access to justice) who can no longer decide for themselves whether they want to participate in a lawsuit. If they do not even know that the case concerns them, it will also violate the right to be heard. Together with a booming third-party litigation industry who have nothing but a financial interest in judicial claims, all the ingredients are there to create a massive litigation culture which will help no one.
- **On article 4.2 f.** The rules on legal aid must, on the one hand, ensure that the individuals who claim to be victims of human rights violations have access to justice, and, on the other hand, they must not facilitate frivolous or bad faith claims. To achieve this balance of interests, certain conditions for a right to legal aid are needed, which the text continues to omit. Furthermore, "access to information" should be tempered with an effective recognition of the vital importance of the confidential nature of certain information.

Article 11. Applicable Law (removed)

Article 12. Mutual Legal Assistance

12.1 *States parties shall afford one another the greatest measure of assistance in connection with criminal, civil and administrative proceedings relevant to the enforcement of the measures referred to in Articles 6-8, including assistance to expedite requests from private parties for the transmission and service of documents and for the taking of evidence in civil proceedings.*

12.2 *States Parties shall carry out their obligations under Article 12.1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them.*

12.3 *States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the enforcement of the measures referred to in*

Articles 6-8. States Parties shall, in particular, take the necessary steps:

(a) *To establish, maintain and enhance channels of communication between their relevant State agencies and their counterparts in other States Parties in order to*

i. *facilitate the secure and rapid exchange of information concerning all aspects of the enforcement of the measures referred to in Articles 6-8, including for the purposes of the early identification of breaches of such measures; and*

ii. *share information concerning issues, challenges, and lessons learned in the prevention of business involvement in human rights abuse, including with a view to enhancing the effectiveness of competent authorities, agencies and services; and*

(b) *To facilitate effective coordination between their relevant State agencies and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers.*

12.4 *For the purposes of meeting their obligations under this article, each State Party shall:*

(a) *ensure that its relevant State agencies have access to the necessary information, support, training and resources to enable personnel to make effective use of the treaties and arrangements referred to in Article 12.2; and*

(b) *consider entering into or enhancing bilateral or multilateral agreements or arrangements aimed at improving the ease with which and speed at which*

i. *requests for mutual legal assistance can be made and responded to; and*

ii. *information can be exchanged between relevant State Agencies for the purposes of enforcement of the measures referred to in Articles 6-8, including through information repositories that provide clarity on points of contact, core process requirements and systems for updates on outstanding requests.*

Comment

Any draft should take greater care to ensure the confidentiality and private nature of certain information, as applicable, as balanced against the relevant policy interests that may exist in contrast.

At article 12.3(a)(i), we note that any draft would do better to include greater specificity around certain processes. For example, with respect to "facilitat[ing] the secure and rapid exchange of information concerning all aspects of the enforcement of the measures referred to in Articles 6-8, including for the purposes of the early identification of breaches of such measures[,]" what does "early identification" mean and what policy goal or goals does this serve?

With respect to "concerning issues, challenges, and lessons learned in the prevention of business involvement in human rights abuse[,]" what lessons are contemplated here and how would these "lessons" within an applicable legal or other context?

The proposed actions could lead to undermining State's sovereignty. It is up to each national state and its national legislation to decide what is allowed to share or not. Similarly, the measures included in these provisions should not lead whatsoever to unlawful targeting and theft of critical economic/trade secrets and intellectual property.

Article 13. International cooperation

13.1 *States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention of business involvement in human*

rights abuse and for the remedy of harms arising from such abuse. States Parties shall also promote international cooperation and coordination between their relevant State agencies, national and international non- governmental organizations and international organizations.

Comment

The draft does not mention the need to include EBMOs in international cooperation as well as the private sector at large despite the recognised key role social actors are playing to advance human rights. Equally, the draft does not promote effective and meaningful consultation and cooperation with EBMOs, companies and SMEs as encouraged in the UNGPs. The draft would create extensive burdens on enterprises, yet these are not even envisioned to be included in any kind of international cooperation or consultations whatsoever.

13.2 *States Parties shall promote international cooperation to:*

(a) *raise public awareness about*

i. *human rights in the context of business activities and how they are protected;*

ii. *the different ways in which business enterprises can become involved in adverse human rights impacts and their obligations under international and domestic law in such contexts and circumstances;*

iii. *best practices for identifying, preventing and mitigating adverse human rights impacts;*

iv. *how victims and potential victims can defend their rights and seek remedies for adverse human rights impacts; and*

(b) *assist and support victims and potential victims to defend their human rights and obtain an effective remedy.*

- **Comment**

Raising awareness without effective follow-up action from States such as via capacity-building will not make an impactful difference on the ground. Capacity-building and awareness-raising through both national and international institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.
Increased policy coherence is another area where further State's action is needed. Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

Lastly, international cooperation is also needed to address the root causes of governance deficit and weak governance as weak institutions, poor rule of law are breeding ground for human rights deficit.

13.3 *States Parties in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes for the purposes of realising the aims of this LBI.*

* * * * *

Joint trade union response to the request for written inputs on the proposal for a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

ITUC CSI IGB

UNI global union

industri all global union

Education International
Internationale de l'Education
Internacional de la Educación
Bildungsinternationale

itf

IFJ FIJ

BWI

IUF UITA IUL

PSI

Further to the note verbale of 2 March 2023 issued by the Office of the United Nations High Commissioner for Human Rights, the following global trade union organisations (Global Unions) wish to provide written inputs on Article 1-14 of the draft legally binding instrument (LBI): ITUC, UNI, INDUSTRIALL, EI, ITF, IFJ, BWI, IUF, PSI.

The Global Unions note and appreciate the work of the OHCHR and the Chairperson-Rapporteur of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights during the inter-sessional period.

As we stated at the 8th session of the OEIGWG, while appreciating the Chairperson-Rapporteur's efforts to push the agenda forward with some textual proposals on Articles 6-12 together with a new set of definitions, the Global Unions believe that the third revised draft already offers conceptual clarity and a text that is politically viable for States and non-State actors alike. We carefully considered the Suggested Chair Proposals, which appear to streamline the provisions by making them less prescriptive. While this is aimed at achieving the broadest possible support for the draft, the Global Unions believe that there is a risk of losing much-needed detail to truly achieve accountability for corporate human rights harms. We believe that the third revised draft offers a text that is reasonably prescriptive while allowing for broad support of member States and civil society.

Fundamentally, we believe that the approach taken in the third revised draft of focusing the operational provisions of the LBI on cross-border activities of business enterprises while maintaining a broad scope, which includes transnational and other enterprises, responds to the mandate given by Human Rights Council Resolution 26/9 of 2014. We welcome this hybrid approach, which ensures that the LBI is clearly geared towards addressing business activities of a transnational character, which is where the normative gaps in international human rights law lie. Any deviation from this approach would weaken the transnational coverage of the LBI and represent a major setback.

On that basis, we hereby present proposals for textual amendments to the third revised draft, which aim to, among other things:

- better articulate the scope of labour rights;
- ensure that the LBI has a strong social justice dimension;
- provide clarity on the internationally recognized labour rights applicable to States by virtue of ratification and those to which they are otherwise bound;
- ensure access to justice is solidified with legal principles such as forum non conveniens no longer being used by courts to deny remedy for human rights harms; and
- ensuring that the provisions on liability for corporate human rights abuse better reflect the types of liability applicable to the different supply chain business models relied on by corporations.

We hope that our written inputs will assist the Chairperson-Rapporteur and the Friends of the Chair in advancing the discussions to be had at the inter-sessional consultations.

Finally, we also believe that the Friends of the Chair group could benefit from civil society advisers to further add legitimacy and teeth to the process. The Global Unions stand ready to support group with perspectives from the world of work.

Textual amendments

PREAMBLE

PP3

Recalling **also the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples, ~~relevant~~ ILO Declarations and Conventions, and recalling further the 2030 Agenda for Sustainable Development, as well as all internationally agreed human rights Declarations;**

We recommend a reference to *all* ILO Declarations and Conventions, in addition to the already-referenced fundamental Conventions of the ILO. ILO Declarations and International Labour Standards help States implement their obligations concerning human rights at work.

PROPOSED NEW PP5

Recalling **that International Labour Standards provide States with the tools to implement their obligations concerning human rights at work and establish mechanisms for labour inspection and enforcement necessary to realize decent work for all.**

We strongly recommend the inclusion of this new paragraph to better articulate the scope of labour rights within the context of the Legally Binding Instrument.

PP8

Recalling **the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction ~~of race, colour, sex, language or religion~~ OR based on the principles of equality and non-discrimination in international human rights law;**

A formulation based on the *principles of equality and non-discrimination* in international human rights law would ensure that no protected characteristics are left out of an otherwise exhaustive list in this paragraph.

PROPOSED NEW PP8

> ***Recalling*** **the State duty to exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.**

We recommend the inclusion of a new paragraph highlighting the State duty to protect human rights in situations where a commercial nexus exists between public actors and business, such as when government bodies purchase goods and services through public procurement, and in connection to privatisation.

PROPOSED NEW PP 10

> ***Reaffirming*** **the primacy of international human rights law over any other international agreement, including those related to trade and investment;**

Reaffirming the primacy of international human rights law over trade and investment agreements reflects the spirit of Article 103 of the Charter of the United Nations and helps set the context for Article 15.5(b).

PROPOSED NEW PP12

> **Recognizing that inclusive and concerted action is essential to realize human rights, achieve social justice, promote universal and lasting peace, and acknowledging that the failure to respect and fulfil human rights constitutes a threat to social progress;**

We strongly recommend the inclusion of a new paragraph highlighting the importance of fulfilling and respecting human rights in a business context for the achievement of social justice.

PP13

> **Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, workers, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders; and the structural obstacles for obtaining remedies for these persons;**

With the COVID-19 pandemic once again exposing the fragility of global supply chains and business models built on non-standard forms of employment and informality, the Legally Binding Instrument represents a unique opportunity to end the impunity for corporate human rights abuses. As such, we believe it is important to highlight the clear, distinctive and disproportionate impact of business-related human rights abuses on *workers*.

SECTION I

ARTICLE I

"Victim" shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm through acts or omissions in the context of business activities, that constitute human rights abuse. The term "victim" ~~may~~ shall also include the immediate family members or dependents of the direct victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

A comprehensive definition of *victim* should include *persons who have suffered harm in intervening to assist victims in distress or to prevent victimization* so that human rights defenders, including trade unionists, are implicitly covered by the term. In line with best practice under international human rights law, we recommend the categorical inclusion of immediate family members or dependents of the direct victim in the definition of *victim.*

"Business activities of a transnational character" means any business activity described in Article 1.3 above, when:

a. It is undertaken in more than one jurisdiction or State; or

b. It is undertaken in one State but a ~~significant~~ part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or

c. It is undertaken in one State but has a ~~significant~~ effect in another State. or jurisdiction.

We strongly recommend the deletion of the undefined and vague qualifying term *significant* which could lead to unnecessary debates about what constitutes a business activity of a transnational character.

ARTICLE 3.3 [RE-ORDER]

This Legally Binding Instrument shall cover all internationally recognized human rights and fundamental freedoms which the State Parties of this (Legally Binding Instrument) have ratified, including:

a. those recognized in the Universal Declaration of Human Rights
b. all core international human rights treaties
c. ILO Conventions as well as those to which they are otherwise bound, including,
d. the ILO Declaration on Fundamental Principles and Rights at Work
e. customary international law

We strongly recommend a re-ordering of Article 3.3 to cover more clearly the internationally recognized human rights applicable to States by virtue of ratification and those to which they are otherwise bound.

SECTION II

ARTICLE 4.2(C)

c. be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, reinstatement in employment, apology, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;

We believe that this non-exhaustive list of remedies should include apologies (both public and private) and, most importantly, reinstatement in employment. A significant challenge for workers exercising their right to freedom of association is the fear of discriminatory dismissal. In such cases, the remedy must be reinstatement given that compensation alone may continue to contribute to an atmosphere of intimidation in the workplace.

ARTICLE 6.2

States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations. business activities and relationships. Such measures may include injunctive relief, precautionary or protective measures, and strict liability for human rights abuses, as appropriate.

We strongly recommend including a non-exhaustive list of legal and policy measures that States can take to ensure that business enterprises respect all internationally recognised human rights and prevent and mitigate human rights abuses. This would help re-emphasise the scope of this Article, which is intended to cover an array of preventive measures above and beyond human rights due diligence.

ARTICLE 6.3(B)

b. Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses, which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take ~~reasonable and~~ appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;

While the UNGPs set out a greater number of factors to be considered where there is a business relationship in order to determine what *appropriate* action may be required, there is no suggestion that the action to be decided on as appropriate is lesser or limited to only what is *reasonable*. For this reason, we would recommend the deletion of the term *reasonable* here.

ARTICLE 6.4.

States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:

c. Conducting meaningful consultations with individuals, communities, workers, and workers' representatives whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

It would be important to highlight the specific need to consult workers' and their representatives as rights-holders themselves.

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in situations of instability and national stress or in occupied or conflict-affected areas, including situations of occupation.

This formulation would meet the recommendations of the UN Working Group on Business and Human Rights' guidance on human rights due diligence in conflict situations.

ARTICLE 7.2

States Parties shall ensure that their domestic laws facilitate disclosure OR discovery and access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.

A reference to the judicial process of disclosure or discovery would help further clarify the intent of this Article.

ARTICLE 7.5

States Parties shall enact or amend laws ~~allowing judges~~ to reverse the burden of proof in appropriate cases to fulfill the victims´ right to access to remedy ~~where consistent with international law and its domestic constitutional law.~~

We recommend that this important provision allowing for the reversal of the burden of proof in favour of victims is not left up to the discretion of judges and/or domestic constitutional law.

ARTICLE 8.6 [RE-ORDER]

States Parties shall ensure that their domestic law provides for the liability of business enterprises for human rights abuses caused or contributed to by another legal or natural person, where a business enterprise:

a. **that controls, manages, supervises or otherwise assumes responsibility of another legal or natural person with whom they have a business relationship fails to prevent that person's activity which caused or contributed to human rights abuse; or**

b. **effectively controls another legal or natural person that caused or contributed to human rights abuse; or**

c. **should have reasonably foreseen the risk of human rights abuses in its business activities or business relationships but failed to prevent the human rights abuse.**

Breaking down Article 8.6 in this way helps clarify the type of liability applicable to the three listed scenarios, namely negligence, strict liability, and strict liability for risk.

ARTICLE 8.7

The burden of proof rests with the business enterprise to prove that it has taken all reasonable steps to conduct human rights due diligence as laid down in Articles 6.3 and 6.4. Human rights due diligence shall not ~~automatically~~ necessarily absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. ~~The court or other competent authority will decide the liability of such legal or natural persons after an examination of compliance with applicable human rights due diligence standards.~~

We believe that our suggested formulation better articulates the intention behind this Article. It is our firm view that while the requirement to implement human rights due diligence is critical in ensuring that companies take a proactive and hands-on approach to ensure human rights are fully complied with in the supply chain or the corporate group, it cannot become a substitute for ensuring a right to remedy for victims of corporate negligence. While this important distinction seems to be reflected in the text, the second part of this Article indicates that "the court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards." This sentence seems to suggest that the implementation of human rights due diligence standards does determine the liability of business entity, which seems to be in conflict with Article 6 and the first part of the present Article. This text should therefore be deleted.

ARTICLE 9.1

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

a. the human rights abuse occurred and/or produced effects; or

b. an act or omission causing or contributing to the human rights abuse occurred;

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or

d. the victim is a national of or is domiciled.

This amendment aims to address a potential inconsistency with Article 9.1(c).

ARTICLE 11.2

All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where:

a. the acts or omissions have occurred or produced effects; or

b. the natural or legal person alleged to have committed the acts or omissions is domiciled; or

c. the victim is domiciled.

The law of the domicile of the victim should be included as an option in order to, among other things, balance the ability of transnational companies to choose host countries with weak legal and governance frameworks.

ONG "LA GRANDE PUISSANCE DE DIEU"
ASSSOCIATION POUR LE DEVELOPPEMENT DURABLE DE LA VIE
SIEGE : MIDOMBO (Adjracomey) Akpakpa Maison KOUTON Télesphore 06 BP 3335
Tel : +(229) 94 54 25 67/ 66 74 93 56 Email : onglagrandepuissancededieu@gmail.com COTONOU
(REPUBLIQUE DU BENIN) IFU : 6 2021 1234 0294 du 02/02/2021
Enregistrement : N°2008/0427/DEP-ATL-LIT/SG/SAG-ASSOC DU 09 SEPTEMBRE 2008
Journal Officiel N°11 du 1er juin 2014
Organisation dotée d'un statut consultatif spécial auprès de l'ECOSOC depuis le 21 juillet 2022

Notre commentaire

Notre ONG se réjouit de la publication par la présidence de Groupe de travail intergouvernemental (GTI) à composition non limitée, du deuxième projet révisé de Traité contraignant. La pandémie de COVID-19 ayant mis une fois de plus au grand jour la fragilité des chaînes mondiales d'approvisionnement et des modèles commerciaux fondés sur les formes atypiques d'emploi et sur l'informalité, le Traité contraignant représenteune occasion unique de mettre un terme à l'impunité des atteintes aux droits humains liées aux activités desentreprises. Suite à la chute mondiale de la demande entraînée par la pandémie, de nombreuses entreprisesont décidé abruptement de ne plus procéder à des achats de biens et services, voire de revenir sur leurs engagements préalables, plongeant de la sorte les travailleurs des chaînes mondiales d'approvisionnement dans une situation catastrophique. En même temps, d'autres travailleurs, désignés comme indispensables, y compris les marins et les travailleurs des centres d'emballage et de distribution, continuent de travailler inlassablement en vue d'alimenter les chaînes mondiales d'approvisionnement, ce qui leur fait courir un risque immense d'exposition d'autant qu'on ne leur fournit souvent pas d'équipement de protection individuelle adéquat. Pour faire en sorte que l'économie mondiale soit non seulement résiliente mais aussi porteuse de progrès social, il convient que les gouvernements intensifient leur participation au processus d'élaboration duTraité contraignant.

Le deuxième projet révisé a introduit une plus grande clarté dans les concepts utilisés, il est aligné sur les Principes directeurs de l'ONU relatifs aux entreprises et aux droits de l'homme (ci-après les Principes directeurs),il est structuré de manière plus cohérente et son libellé est acceptable politiquement tant par les États que parles acteurs non-étatiques. Nous apprécions particulièrement, parmi d'autres évolutions, le renforcement de la dimension relative au genre dans l'ensemble du texte, y compris l'exigence pour les entreprises *d'intégrer une perspective des genres, en consultation des femmes et des organisations de femmes susceptibles d'enressentir l'impact*, tout au long du processus relevant du devoir de diligence pour les droits humains. Cette approche tenant compte des questions de genre aidera à garantir que les États s'acquittent effectivement deleurs obligations de protéger et de mettre en œuvre les droits humains des femmes, y compris en tant que travailleuses, dans le contexte des activités des entreprises.

Nous estimons également que le deuxième projet révisé constitue une base solide permettant de traiterde manière effective les lacunes existantes en matière de reddition de comptes et de responsabilité, qui découlent de la complexité structurelle des entreprises transnationales qui dominent l'économie mondiale etde leurs chaînes d'approvisionnement. Une des principales priorités pour les syndicats est d'avoir un instrument juridiquement contraignant qui rende possible de tenir les entreprises transnationales pour responsables desviolations des droits humains survenant à tout niveau dans leurs activités, y compris celles réalisées par lesentités de leur chaîne d'approvisionnement, indépendamment de leur mode de création, de leur structure depropriété ou de contrôle.

Une autre amélioration significative de ce deuxième projet révisé réside dans la disposition de l'instrument juridiquement contraignant qui exige *explicitement* des États de s'assurer de la compatibilité de tout accord de commerce et d'investissement, existant ou nouveau, avec les obligations en matière de droits humains découlant de l'instrument. Nous pensons, cependant qu'un article additionnel portant obligation aux États d'intégrer une clause contraignante et exécutoire sur les droits humains et du travail dans les accords de commerce et d'investissement permettrait de stimuler véritablement l'avancée vers le commerce et le développement durables.

Parmi les autres changements que nous aimerions voir dans le prochain projet de document figure la reconnaissance explicite des impacts différenciés des atteintes aux droits humains à l'encontre des *travailleurs*. Par ailleurs, il est important que les syndicalistes soient explicitement identifiés en tant que défenseurs des droits humains et que les syndicats soient reconnus comme faisant partie intégrante, entre autres, des processus de diligence raisonnable portant sur les droits humains.

Si nous saluons la portée étendue des droits humains protégés en vertu de l'instrument juridiquement contraignant, il est toutefois essentiel de ne pas rattacher le respect des *droits et principes fondamentaux autravail* à l'obligation de ratifier les Conventions fondamentales de l'OIT.

Le deuxième projet révisé limite en outre les voies de recours dans le pays d'origine de la victime, ce qui restreindrait inévitablement les options à la disposition des travailleurs migrants de retour dans leur pays. Enfin, les mécanismes internationaux d'exécution de l'instrument juridiquement contraignant demeurent en deçà de nos attentes. Nous réitérons notre appel en faveur d'un mécanisme international complémentaire chargé de surveiller la conformité au Traité.

Nous attendons des gouvernements qu'ils apportent des contributions substantielles aux débats durant la 6esession du GTI afin d'accomplir le mandat conféré par la résolution 26/9 du Conseil des droits de l'homme etde conclure les travaux sur un instrument juridiquement contraignant.

Nous rappelons que tout au long du processus, nous avons plaidé en faveur de l'inclusion des principales priorités suivantes.

- Une ample portée sur le fond couvrant tous les droits humains reconnus au niveau international, y compris les droits fondamentaux des travailleurs et les droits syndicaux, tels que définis par les normes internationales du travail pertinentes.
- La couverture de toutes les entreprises commerciales, indépendamment de leur taille, secteur, domaine d'activité, propriété et structure.
- Une réglementation extraterritoriale fondée sur la société-mère, et l'accès à la justice, pour les victimes de violations des droits humains par les entreprises transnationales, dans l'État du siège de la sociététransnationale.
- Des mesures de réglementation qui exigent des entreprises qu'elles adoptent et mettent en œuvre des politiques et procédures de diligence raisonnable en matière de droits humains.
- Une réaffirmation de l'applicabilité des obligations en matière de droits humains aux activités des entreprises ainsi que de leur obligation de respecter les droits humains.
- Un mécanisme international robuste de suivi et de contrôle de l'application.

À partir de ces attentes, nous présentons les observations suivantes sur le deuxième projet révisé.

Le ***Préambule*** a été amélioré grâce à des amendements ciblés visant à définir la finalité et la logique de del'instrument juridiquement contraignant. Nous saluons en particulier la réaffirmation que les droits humains sont *inaliénables, égaux et non-discriminatoires*, conformément à la Déclaration universelle des droits de l'homme (DUDH). En outre, les références à la Déclaration de principe tripartite de l'OIT sur les entreprises multinationales et la politique sociale et aux Objectifs de développement durable (ODD) renforcent le texte et assurent sa cohérence politique. Les nouveaux paragraphes qui mettent en exergue la nécessité pour lesÉtats comme pour les entreprises d'intégrer une perspective de genre dans toutes leurs mesures, et incluantcomme référence la Déclaration des Nations Unies sur les défenseurs des droits de l'homme, sont des ajoutsbienvenus.

- Réaffirmer la primauté des droits humains par rapport aux entreprises et au commerce en rappelantl'article 103 de la Charte des Nations Unies qui stipule que les obligations en vertu de la Charte prévalent. Cette reconnaissance serait importante aussi à la lumière du nouvel article 14.5.

L'article 1. Définitions comporte maintenant une définition complète de *victime* compatible avec les normes prévalentes du droit international, incluant *les personnes ayant subi un dommage pour être intervenuesafin d'aider des victimes en détresse ou d'empêcher la victimisation.* Par conséquent, les défenseurs des droits de l'homme, y compris les syndicalistes, sont implicitement couverts par cette définition. Ce qui, pris enconjonction avec l'article 4 (*Droits des victimes)*, veille à ce que les droits des victimes potentielles d'atteintesaux droits humains soient également couverts de manière adéquate, conformément à l'approche centrée surla *prévention* des répercussions pernicieuses sur les droits humains qui est celle de l'instrument juridiquement contraignant. Néanmoins, nous estimons qu'il conviendrait d'utiliser le terme « *titulaire de droits* » plutôt quede parler de *victime*, de manière à garantir aussi la protection des droits des individus ou groupes d'individusdont les droits sont *mis en péril*.

La définition des *atteintes aux droits humains* est désormais utilement centrée sur les dommages provoquéspar les entreprises commerciales dans le contexte de leurs activités. Cependant, alors qu'ils sont en rapportavec l'expression définie de « droits humains et libertés fondamentales internationalement reconnus », le champ d'application des *droits environnementaux* couverts demeure vague. Cette définition semble encore se limiter aux atteintes *à l'encontre* d'individus, alors qu'elle devrait être étendue en vue de couvrir toutes lesatteintes aux droits humains *résultant* des activités des entreprises, conformément à la thématique centrale de l'instrument juridiquement contraignant.

Si l'inclusion explicite des entreprises d'État dans la définition des *activités d'entreprises* constituent une évolution positive, nous remarquons que la mention *à but lucratif* exclut dans les faits le secteur public, alorsque celui passe des marchés de biens et de services à hauteur de 11 000 milliards de dollars tous les ans.

Nous saluons le remplacement, dans les définitions comme dans l'ensemble du texte, du terme « contractuelles »par « commerciales » en vue d'intégrer toutes les relations pertinentes au regard des Principes directeurs.

L'article 2. Exposé des motifs a été amendé, mais il reflète nos attentes générales concernant l'instrument juridiquement contraignant. Cependant, nous regrettons l'abandon de la référence à la *pleine réalisation* desdroits humains, qui aurait mis l'instrument juridiquement contraignant en conformité avec les autres traités relatifs aux droits humains. Par ailleurs, l'exposé des motifs devrait mentionner explicitement la protection des droits environnementaux, ou au moins des droits humains qui comportent nécessairement des aspects environnementaux. Enfin, nous nous réjouissons que la facilitation et le renforcement de l'entraide judiciairesoient reconnus comme étant l'une des finalités principales de l'instrument juridiquement contraignant.

L'article 3. Champ d'application intègre pleinement l'approche prise dans la version révisée, consistant à se centrer sur les dispositions opérationnelles de l'instrument juridiquement contraignant concernant les activités transfrontières des entreprises commerciales tout en maintenant un ample champ d'application, lequel inclut les entreprises *transnationales* et *autres entreprises*. Nous saluons cette approche hybride, dont nouspensons qu'elle permettra d'éviter que l'on ne tente de recourir à la forme d'une entreprise pour contourner les obligations concernant la mise en œuvre de l'instrument juridiquement contraignant. En même temps, cette approche garantit que l'instrument juridiquement contraignant soit clairement tourné vers l'examen des*activités de nature transnationale des entreprises*, qui sont justement celles où résident les lacunes normatives en matière de droit international des droits de l'homme.

S'il est vrai que l'article 3.2 donne aux États le pouvoir discrétionnaire d'opérer une distinction, sur une basenon-discriminatoire, dans la manière dont les entreprises vont s'acquitter de leurs obligations en fonction deleur taille, de leur secteur, de leur domaine d'activité et de la gravité des impacts sur les droits humains, nousestimons que ceci ne porte que sur les modalités de mise en œuvre et non sur l'obligation en tant que telle.

Une telle approche est avantageuse dans le but de réglementer de manière effective les petites et moyennesentreprises ainsi que les micro-entreprises.

Nous saluons, mais avec prudence, l'extension de la portée des droits couverts au-delà des droits humains reconnus internationalement, en vue d'inclure *les libertés fondamentales émanant de la DUDH,*

le *droit international coutumier* et *tout traité fondamental de droits de l'homme et convention fondamentale de l'OITauxquels un État serait partie*. Pris globalement, ces instruments regroupent bon nombre de droits du travail,tels que la liberté syndicale et le droit à la négociation collective, l'égalité et la non-discrimination, la lutte contre le travail forcé et le travail des enfants, les questions salariales, de santé et de sécurité au travail, la sécurité sociale et la restriction au temps de travail. Si nous pouvons comprendre que des considérations politiques aient joué un rôle pour que les définitions restreignent les obligations aux traités fondamentaux etaux Conventions fondamentales de l'OIT *auxquels un État serait partie*, nous ne pouvons pas accepter ces restrictions concernant les Conventions fondamentales de l'OIT. En effet, un tel libellé serait une infraction auprincipe de non-régression en droit international, étant donné que la Déclaration de 1998 de l'OIT relative auxprincipes et droits fondamentaux au travail exige des États membres de l'OIT qu'ils respectent et promeuvent les principes et les droits figurant dans les Conventions fondamentales de l'OIT indépendamment de leur ratification, du simple fait d'être membres de l'Organisation. Il est impératif que cet article ne mentionne pasd'exigence de ratification concernant les Conventions fondamentales de l'OIT.

L'article 4 sur les droits des victimes a subi une réorganisation utile, de sorte que les obligations de l'Étatne sont plus abordées dans le même article. Nous saluons l'accent marqué sur l'application aux victimes detous les droits humains et libertés fondamentales internationalement reconnus, tout en veillant à ce que cesdernières jouissent de protections plus favorables, pour les victimes comme pour les non-victimes, en vertudu droit international comme du droit interne (article 4.3).

Cependant, cet article devrait parler de « titulaire de droits », terme qui est plus vaste que « victime ». L'exercice des droits du travail, protégé dans le cadre des droits humains internationalement reconnus et par les normes internationales du travail, ne commence pas lorsque ceux-ci sont bafoués. En outre, dans l'article 6 sur la prévention, l'instrument juridiquement contraignant fait référence aux droits etobligations pour prévenir les violations. Il conviendrait mieux de remplacer le mot « victime » par « titulaire de droits » partout dans le texte.

Nous estimons que la liste non exhaustive de réparations figurant à l'article 4.2 c) devrait inclure les *excusesprivées et publiques* ainsi que, plus important encore, la *réintégration dans l'emploi*. Un des principauxdéfis entravant le libre exercice par les travailleurs de leur liberté syndicale est la peur d'un licenciement discriminatoire. Dans ce type de situations, la réparation doit être la réintégration dans l'emploi, car la simpleindemnisation financière pourrait contribuer à une atmosphère d'intimidation sur le lieu de travail.

Parmi d'autres aspects, nous saluons également la reconnaissance des droits à entamer un recours collectif(article 4.2 d)) et à une assistance juridique (article 4.2 d)) respectivement.

L'article 5 sur la protection des victimes est un nouvel article qui intègre des éléments qui figuraient auparavant à l'article 4 et qui concernaient les obligations incombant à l'État de protéger les droits des victimes. Si nous apprécions que figure l'obligation des États de garantir un environnement sûr et habilitant pour les défenseurs des droits humains et environnementaux, il demeure important de faire spécifiquementréférence aux syndicalistes en tant que défenseurs des droits humains, compte tenu de l'immense risque couru dans la pratique par ces derniers de subir des menaces et des représailles.

L'article 6 sur la prévention incorpore fermement l'exigence pour les États Parties de prendre *toutes mesures juridiques et politiques nécessaires* pour faire en sorte que les entreprises commerciales respectent*l'ensemble des droits humains internationalement reconnus et qu'elles préviennent et atténuent les atteintesaux droits de l'homme survenant dans* le cadre de leurs activités (article 6.1). S'il est vrai que l'article 6.2 ramène l'attention de la prévention sur la législation relative au devoir de diligence en matière de droits humains obligatoires, il apparaît clairement que l'article 6.1 établit les attentes que les États aillent au-delà de cette mesure, conformément aux Principes directeurs.

Les amendements à la note incluent l'exigence que la législation nationale sur le devoir de diligence en matière de droits humains oblige les entreprises commerciales à *intégrer une perspective de genre*, en consultationavec les femmes et les organisations de femmes susceptibles d'être affectées, à toutes les étapes du devoir de

diligence en matière de droits humains. Nous saluons également la référence à la nécessité de faire en sorteque les consultations des populations autochtones soient entreprises conformément aux normes convenuesinternationalement pour un consentement préalable libre et éclairé.

Pour ce qui a trait à l'article 6.3 c) sur la nécessité de consulter les parties prenantes pertinentes, nous estimons qu'une disposition devrait expressément stipuler que le devoir de diligence en matière de droits humains devrait s'appuyer sur des informations obtenues par une interaction significative avec les syndicats. Il convientde reconnaître que le droit à la consultation existe à part entière dans bon nombre d'instruments relatifs au travail. Le Guide OCDE sur le devoir de diligence pour une conduite responsable des entreprises en fait étattrès clairement, et cela doit aussi être reflété dans l'instrument juridiquement contraignant.

Nous saluons le nouveau texte de l'article 6.6 apportant davantage de clarté sur le fait que les entreprises commerciales peuvent être tenues pour responsables lorsqu'elles n'effectuent pas leur devoir de diligence concernant les droits humains obligatoires conformément à l'article. Il conviendrait cependant d'apporter encore davantage de clarté sur la relation entre cet article et l'article 8 sur la responsabilité (voir plus bas).

L'article 7 sur l'accès à un recours renforce dans le projet révisé les dispositions correspondantes antérieures,entre autres aspects en stipulant expressément que la doctrine du *forum non conveniens* ne doit pas être utilisée par les tribunaux pour se dessaisir de procédures judiciaires légitimes entamées par les victimes.Le projet actuel garantit aussi que le « renversement de la charge de la preuve » en faveur des victimes soitréalisé en conformité avec les exigences de l'état de droit, et ne soit plus laissé à la discrétion des tribunaux.Nous apprécions avec prudence l'évocation de mécanismes non judiciaires relevant de l'État dans l'article 7.1.

L'article 8 sur la responsabilité juridique est un élément fondamental de l'instrument juridiquement contraignant, qui doit constituer une base solide permettant de traiter de manière effective les lacunes existantes en matière de reddition de comptes et de responsabilité découlant de la complexité structurelle des entreprises transnationales qui dominent l'économie mondiale et de leurs chaînes d'approvisionnement.Une des principales priorités pour les syndicats est d'avoir un instrument juridiquement contraignant qui fasseen sorte que les entreprises transnationales puissent être tenues pour responsables des atteintes aux droitshumains survenant à tout niveau dans leurs activités, y compris celles réalisées par les entités de leur chaîned'approvisionnement, indépendamment de leur mode de création, de propriété ou de contrôle. L'article 8.1 constitue un fondement solide à cet égard puisqu'il exige des États qu'ils mettent en place « un système complet et adéquat » de responsabilité juridique pour les « atteintes aux droits de l'homme ».

Nous nous réjouissons que l'article 8.8 déclare explicitement que « le devoir de diligence en matière de droits de l'homme ne devra pas automatiquement dispenser une personne morale ou physique effectuant des activités commerciales de la responsabilité d'avoir provoqué ou contribué à des atteintes aux droits de l'homme ou de ne pas avoir empêché de telles atteintes commises par une personne physique ou morale, tel que stipulé à l'article 8.7. » L'obligation d'exercer un devoir de diligence en matière de droits humains estfondamentale pour garantir que les entreprises adoptent une approche proactive et concrète visant à veillerau plein respect des droits humains dans leur chaîne d'approvisionnement ou au sein de leur groupe. Ce devoir ne saurait toutefois se substituer à la nécessité de garantir une voie de recours aux victimes de la négligence des entreprises.

Si cette importante distinction semble être intégrée dans le texte, certaines parties du libellé créent une certaineconfusion. Par exemple, l'article 8.8 indique que « le tribunal ou une autre autorité compétente statuera sur la responsabilité de telles entités après avoir examiné la conformité avec les normes applicables au devoir de diligence en matière de droits de l'homme ». Cette phrase semble suggérer que la mise en œuvre des normes relatives au devoir de diligence en matière de droits humains permet effectivement de déterminerla responsabilité d'une entité commerciale, ce qui semble en contradiction avec l'article 6.6 ainsi qu'avec la phrase précédente à l'article 8.8. Il convient par conséquent d'apporter une plus grande clarté au texte à cetégard.

L'inclusion d'une obligation de garantir « des réparations aux victimes des atteintes aux droits de l'homme quitiennent compte du genre » à l'article 8.5 est bienvenue. Compte tenu des faiblesses existantes en matière degenre dans les Principes directeurs, l'instrument juridiquement contraignant pourrait apporter une contribution importante en comblant cette lacune normative.

L'article 8.6 maintient l'exigence qui figurait déjà en 2019 pour les entreprises de constituer et de maintenir une sécurité financière, par le biais de cautionnements par assurance ou d'une autre garantie financière, visant àcouvrir toute demande d'indemnisation éventuelle. Le comportement des entreprises transnationales durant la récente pandémie a une fois de plus démontré à quel point cette disposition est essentielle. Même les plusgrandes entreprises sont sous-capitalisées et sont revenues sur leurs engagements envers leurs fournisseursdu jour au lendemain, ce qui signifie que des travailleurs ont

perdu leur emploi et leur salaire sans préavis.

L'article 9. Compétence juridictionnelle prévoit une vaste gamme de juridictions compétentes, ce qui estbienvenu puisque le but principal de l'instrument juridiquement contraignant devrait être de garantir que les titulaires de droits aient un accès effectif à des voies de recours. L'article 9.3 énonce clairement que la juridiction établie en vertu de l'article sera « obligatoire » et que les tribunaux *ne devraient pas décliner leur compétence*sur la base du principe *forum non conveniens*. C'est là une disposition fondamentale, qui se révélera tout à fait précieuse pour élargir l'accès à la justice des titulaires de droits. Les entreprises transnationales n'auront plusla possibilité d'évoquer ce principe pour échapper à leur responsabilité, ce qui jusqu'à présent avait constituéun grave obstacle lors des demandes de réparation. L'article 9.4 stipule utilement que les tribunaux sont compétents dans le cas de personnes morales ou physiques non domiciliées « si la plainte est étroitement liéeà une plainte contre » une entité domiciliée. Cette disposition facilitera les poursuites dirigées conjointementcontre la société mère et des filiales. L'article 9.5 consacre le principe de *forum necessitas*, prévoyant qu'untribunal sera compétent pour des entités non domiciliées « si aucun autre for garantissant un procès équitablen'est disponible et qu'il existe des connexions suffisamment proches » avec cette juridiction.

Cependant, le texte révisé a retiré le domicile de la victime comme base pour établir la compétence (article 9.1). En outre, le critère « des intérêts commerciaux substantiels » permettant de déterminer le domicile de l'entitécommerciale a été retiré et remplacé par le terme plus restrictif de « lieu d'exercice principal de l'activité ».

Nous regrettons ces nouvelles restrictions en matière de compétence juridictionnelle. Dans certains cas, untitulaire de droits pourrait en pas être en mesure de quitter son domicile pour saisir un tribunal. Par exemplelorsqu'il s'agit de travailleurs migrants qui sont retournés dans leur pays d'origine mais qui ont toujours des griefs à l'encontre d'entreprises domiciliées ailleurs.

Le fait de ne plus tenir compte de l'endroit où l'entité commerciale a « des intérêts commerciaux substantiels »et de s'appuyer plutôt sur le lieu de constitution ou le lieu de l'exercice principal de l'activité pourrait également avoir des implications pratiques qui sont en contradiction avec la finalité de l'instrument juridiquement contraignant, étant donné que cela encouragerait les entreprises à se constituer dans des pays dotés de structures de gouvernance faibles.

L'article 10. Délai de prescription est une disposition essentielle pour faire en sorte dans la pratique que certaines entraves à l'accès à la justice puissent être surmontées. Le projet révisé est renforcé car le libellélimitant la portée de cet article au droit interne est retiré et parce qu'une disposition est insérée qui reconnaîtque dans certains cas les dommages ne sont pas reconnaissables ou ne sont pas en mesure d'être discutésavant longtemps. Ceci est particulièrement important pour ce qui a trait aux affaires de discrimination ou demaladie professionnelle.

L'article 11. Droit applicable du projet révisé retire à juste titre la disposition qui soumettait le choix du droit applicable à la législation nationale, et permet en revanche que le titulaire des droits fasse la demande du droit devant être appliqué. Cependant, le droit du lieu où le titulaire de droits est domicilié a été retiré comme droitpouvant être appliqué. Le texte devrait être révisé en vue d'inclure cette option, comme c'était le cas dansla version précédente. C'est important en vue de compenser la capacité des entreprises transnationales dechoisir des pays d'accueil ayant des cadres juridiques et de gouvernance faibles.

L'article 12. Entraide judiciaire et coopération judiciaire internationale est crucial pour la mise en œuvre effective de l'instrument juridiquement contraignant. Nous estimons que le texte devrait comporter une disposition ne permettant à un État Partie de refuser une entraide judiciaire qu'en toute bonne foi. Le projet révisé a été amélioré en limitant les possibilités de refuser la reconnaissance et l'exécution des décisions judiciaires (article 12.9) puisque la « souveraineté » et « les intérêts essentiels » ont été retirés comme motifsvalables de refus. Ces termes étaient par trop vastes et susceptibles d'être utilisés abusivement. Enfin, nousréaffirmons la nécessité de mesures supplémentaires pour assurer la mise en œuvre de cet article, telles que des procédures de conciliation lorsqu'un État Partie se plaint qu'un autre État n'apporte pas l'entraide judiciaire demandée.

L'article 13. Coopération internationale renforce une obligation générale d'aider les États à mieux promouvoir et protéger les droits humains, qui est une constante dans le droit international des droits humains. Nous réaffirmons que nous soutenons fermement cet article. Pour ce qui a trait aux partenariats avec les organisationsinternationales et régionales pertinentes et la société civile, nous souhaiterions voir une référence spécifiqueaux syndicats. Étant donné que nous représentons des membres de la société civile au niveau national, régional et international, nous avons l'engagement de contribuer à la réalisation de la finalité de l'instrument juridiquement contraignant.

L'article 14. Cohérence avec les principes et instruments du droit international oblige les États à garantir que tout accord bilatéral ou multilatéral nouveau ou existant, « y compris les accords de commerce et d'investissement », soit compatible avec les obligations des États en matière de droits humains en vertu del'instrument juridiquement contraignant ainsi que d'autres conventions et instruments sur les droits humains.Contrairement à l'article 12.6 du précédent avant-projet, cette disposition fait une référence explicite aux accords de commerce et d'investissement. Elle distingue également la manière différente dont cette compatibilité peut être obtenue pour les nouveaux accords et pour les accords existants. Nous nous réjouissons que le texte ait été renforcé pour ce qui a trait à cet aspect important permettant de conférer reconnaissance au principe selon lequel les obligations en matière de droits humains ont la primauté par rapport aux accords decommerce et d'investissement. Nous reformulons notre proposition d'inclure un nouvel alinéa sous l'article
14.5 c) prévoyant l'obligation d'intégrer des clauses contraignants et exécutoires en matière de droits humains, d'environnement et de travail dans les accords de commerce et d'investissement. En outre, l'article 14.5 devrait exiger l'inclusion, dans les accords de commerce et d'investissement, des obligations des investisseurs en matière de droits de l'homme.

L'article 15. Dispositions institutionnelles est une fois encore extrêmement décevant. Nous réitérons notre appel en faveur d'un mécanisme international complémentaire chargé de surveiller la conformité avec l'instrument contraignant. Nous sommes un peu déçu par le fait que le projet ne contienne aucune proposition concernant un Tribunal international. Il conviendrait donc de prendre en considération, au strict minimum,les amendements suivants :

Comité

- Les fonctions et pouvoirs d'un comité doivent être renforcés, entre autres en le rendant compétent pour entendre les plaintes individuelles. Certaines des dispositions du projet de Protocole facultatif devraient figurer directement dans l'instrument juridiquement contraignant.

- Il est essentiel également que les organisations de la société civile et les organisations syndicales soient pleinement impliquées dans la proposition et la désignation des experts du Comité.

Inputs on selected articles of the third revised draft legally binding instrument and the suggested Chair's proposals

Presented by the Third World Network

Table of Contents:

I. Regarding the section on prevention

1. This section contributes a clarification of the existing obligations of States under international human rights law and could aid States in fulfilling their obligations;
    - One important clarification in the draft text as it stands is that States have the obligation to regulate the activities of business enterprises '*within their territory, jurisdiction, or otherwise under their control*'.
    - In comparison, the Chair's proposals do not clarify to which business enterprises will the state obligation extend to. This omission seems to undermine the added value that this article might bring in regard to clarifying State's obligation under this article.

2. It is clearer today that there is growing convergence over mandatory human rights due diligence. The approach under the draft LBI seeks to capture that mandatory human rights due diligence is core to and necessary for prevention purposes;
    - The Chair's proposals under the proposed Article 6.3 and its chapeau combine references to legally enforceable requirements and other supporting and ancillary measures (potentially non-mandatory measures). This combination of references to mandatory and potentially non-mandatory measures might undermine the clarity of the provision on prevention, which is supposed to revolve around mandatory human rights due diligence and other mandatory measures.
    - For more clarity, the chapeau could clearly refer to legally enforceable requirements. Supporting and ancillary measures could be addressed in a separate provision.

3. The generally accepted approach pertaining to human rights due diligence is that it ought to extend across corporate groups and value chains. The draft LBI currently refers to an obligation that extends to business's 'business activities and relationships'.
    - Article 6.4 of the Chair's proposals includes propositions for qualifiers/limit on the extent of the obligation that will be imposed on business enterprises in the area of prevention and human rights due diligence;
    - The qualifiers proposed by the Chair under Article 6.4 (i.e. where an enterprise controls, manages or supervises the third party) captures direct relationships of control, supervision and management. This seems to be too narrow and does not capture the kind of influences that exist in value chains and that should inform the extent of the obligation. Furthermore, this approach seems to be more restrictive than the one proposed under the Guiding Principles (GPs) or adopted under recent practices.
    - Under the approach proposed by the GPs, human rights due diligence ought to extend to cover business's own activities and those directly linked to its operations, products or services by its business relationships.
    - Under recent practices, such as the French Duty of Vigilance law, the scope of the due diligence obligations extends to company's business relationships, defined as including relationships of companies among which there is direct or indirect control as well as relationships with subcontractors and suppliers with whom there is 'established business relationship'.[1]
    - It is important that any qualifiers to clarify the extent to which business's human rights due diligence obligations extend down the value chain should be designed in a way that dynamically covers the relationships of influence within a value chain and should be built on a good understanding of how influences in value chains are exercised.
    - In this regard, it is important to consider: the different situations that give rise to leverage in the relationship (the notion of leverage is recognized under the GPs, for example see principle 19), which could be through direct or indirect control; situations where a business enterprise exercises sufficient influence by virtue of different forms of intervention (beyond control and beyond the acts of supervision, management); situations where there is a level of dependence between the concerned entities and a reasonable expectation that such relationship will last. It is also important not to exclude situations where there is one-time relationships (such as in transport of toxics) but where it is clear that the company should have known the risks with the activities concerned.

4. In regard to clarifying the content of the human rights due diligence obligations: It has been stressed by various stakeholders, including several States, during the open-ended intergovernmental working group sessions

[1] Under French law, the concept of established business relationship covers all types of relations between professionals, defined as stable, regular relationships, with or without contract, with a certain volume of business, creating a reasonable expectation that such relation will last. Article L. 442-6, I, 5 ° of the French Commercial Code applies equally to the purchase and sale of products and to the performance of services.

that the notion of prevention and mitigation of human rights impacts should be separated: while businesses ought to be obliged to prevent adverse human rights impacts or harm, yet where harm arises then remedy and reparation should take place. Thus, the importance of clarifying that mitigation by business is related to risk of harm or potential harm and not actual harm.

- In the same approach, the GPs provide in the commentary on principle 17 that '*Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation* (Principle 22)'.
- This differentiation between the ability of business to prevent and mitigate risks of human rights abuse versus mitigating the harm itself is complementary to two other central ideas of importance under the draft LBI: (1) that where harm results, liability should ensue and victims should be able to access remedy and reparations and (2) that fulfilling the human rights due diligence obligations does not fully shield a company from liability if harm still emerges in its conduct.

5. Access to information: It is crucial that the LBI guard the content pertaining to access to information under the prevention section. The importance of ensuring timely disclosure of information to people at risk of harm is crucial. Effective access to relevant information, or lack thereof is a determining factor when it comes to access to justice for victims.
    - Currently the draft LBI text attempts to clarify what ought to be communicated and published by the business as part of its human rights due diligence. The draft LBI (under Articles 6.3 and 6.4) refers to: regular communication, which should be accessible to affected stakeholders, undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations, integrating a gender perspective, reporting publicly and periodically on non-financial matters (among other elements). This is in line with, and builds on, what the GPs advocate under principle 21 in regard to what the enterprise ought to communicate and how.
    - The more clarity the LBI provides in this regard, the better that will serve business in fulfillment of their obligations under human rights due diligence. Lack of clarity could lead to higher risks for businesses from being challenged as falling short of fulfilling their due diligence obligations in a meaningful way.
    - While the LBI should be aligned with the GPs, that does not require copying the GPs but rather designing the LBI in a way that is coherent with and builds on the GPs.

6. Missing element under the draft LBI: It is important to incorporate a requirement to ensure that risk assessments related to specific high-risk project/activities/products are done or verified by qualified and independent third parties with no conflicts of interest, rather than by the company itself.

II. Regarding the section on access to remedy

1. While the LBI recognizes the role of different State agencies in enhancing access to remedy and justice, it is important to guard the differentiation between the fundamental role of the judicial system versus non-judicial mechanisms. Such distinction is important in order to enhance the clarity of the provisions and the effectiveness of implementation.
    - For these reasons, it would be useful to review the approach in the Chair's proposed text in order to add more clarity. As it stands, the article proposed by the Chair refers to what is expected from 'State agencies' or 'relevant State agency' (See 7.1.a, b, and c, 7.2, 7.3 and 7.4). This means that who bears the responsibility of implementation will not be clear. This also makes the Article less targeted towards enhancing the access of victims to judicial systems that is crucial for access to remedy and justice. From how it reads, obligations listed under this article could be applied to only a subset of the agencies mentioned in the definition of 'relevant states agency'. For example, it could be read that all what is covered under the Article can be addressed through non-judicial mechanisms.
    - Generally, the Chair's proposal covers important elements addressed under the draft LBI text, and may help to inspire restructuring of Article 7 of revised text (including in regard to legal assistance to victims, burden of proof, disclosure of evidence, group actions, and consultations with victims).

III. Regarding the section on legal liability

1. The draft LBI text refers to 'comprehensive systems of legal liability' and is designed to ensure that liability extends beyond liability for non-fulfillment of human rights due diligence.

2. One crucial element under the draft LBI, on which there was no contestation in the open-ended intergovernmental working group, is that fulfillment of human rights due diligence shall not automatically absolve an entity from liability for causing or contributing to harm (See Article 8.7 of the draft text of the LBI).

    - That still leaves discretion to the adjudicator to consider how fulfillment of human rights due diligence is to be considered in a decision on liability, yet does not provide a complete shield from liability by mere formalistic fulfillment of human rights due diligence.

3. Unlike that approach, Article 8.1 of the Chair's proposals seems to revolve around liability for non-implementation of the elements under the Article on prevention, and does not extend beyond that.
    - It is important to clarify if this means that the liability foreseen in the Chair's proposal cover the extent of fulfillment of prevention measures only (such as human rights due diligence).

4. The objective of Article 8.6 is to clarify and specify the liability standards applied to legal entities in circumstances in which they *indirectly* contribute to a human rights abuse through a business relationship with a separate

legal entity that is *directly* responsible for the harm. For the reasons listed below, this article is of central importance to the practical effectiveness and utility of the LBI:

- This Article will help in complex cases with cross-border elements involving multiple business entities, such as those that could emerge in corporate groups where parent and subsidiary entities are involved in the harm or those that might emerge in the context of supply chains where lead and supplier companies may be involved in the harm.
- This Article could contribute to rebalancing the relationships between individuals and communities and companies within the context of global value chains.[2] Indeed, currently the failure to provide adequate liability within global value chains may lead to a 'situation where companies are able to draw the benefits from the use of global value chains while not assuming the responsibility for the human and social costs incurred in the operation of that chain'.[3]
- Although the laws of many States offer civil liability regimes somewhat analogous to those described in Article 8.6, the specific standards, and judicial opinion thereof, is still developing and differs between jurisdictions. Therefore, to ensure the effective operation of the LBI, and to guarantee a level of consistency among jurisdictions, as well as clarity for different affected stakeholders including communities and their lawyers as well as businesses, it is important that Article 8.6 be as detailed and clear as possible.

5. While the approach currently adopted under Article 8.6 of the draft LBI (focused on 'control' and foreseeability') is generally in line with the latest leading developments within international jurisprudence concerning such complex liability cases, it does fall short of the latest developments in the jurisprudence and can be further clarified and made more precise.
    - For example, rather than focusing on instances of 'control, management or supervisions', the focus should extend to cover instances of 'intervention and sufficient influence on another person's activity that caused the harm. This would be more aligned with the latest developments in the international jurisprudence[4].

---

[2] Advocates for Justice and Human Rights, *Comments and recommendations on the Revised draft of an International Legally Binding Instrument on Business and Human Rights:* https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session5/NGOs/ICJcommentsReviseddrafttreaty2019.pdf

[3] Ibid.

[4] See *Vedanta PLC and Another v. Lungowe and Others* (2019) (United Kingdom Supreme Court) *('Vedanta')[4] where the test formulated by the Supreme Court focused on the case where the entity* 'exercised a sufficiently high level of supervision and control of activities at the Mines [owned and operated by the subsidiary], with sufficient knowledge of the propensity of those activities to cause toxic escapes into surrounding watercourses, as to incur duty of care to the claimants' (at [54]), and stated that '*Everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary…" (*at [49]). Full judgement here: https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf. This approach was also followed in later decisions such as the UK Supreme Court decision in Okpabi & Others v Royal Dutch Shell Plc & Another [2021] UKSC, and outside the UK such as in *Oguru v Royal Dutch Shell* (2021) (Hague Court of Appeal). The Hague Court of appeal (HCA) followed the legal test prescribed in *Vedanta*, and developed upon the element of 'knowledge' within the *Vedanta* test as follows: '*Including the knowledge requirement, the Vedanta rule may be represented as follows: if*

- Instead of the current approach, the wording of Article 8.6 could focus on liability in the three circumstances where:

    c. the business enterprise has controlled, taken over, supervised, advised, intervened with or otherwise sufficiently influenced the other person's activity that caused the harm and failed to prevent this person from causing or contributing to the harm; or

b.the business enterprise (legally or factually) controls such other person, unless the business enterprise demonstrates that the harm was caused notwithstanding the reasonable and necessary measures it had taken to prevent it; or

c. the business enterprise should have reasonably foreseen the risk of harm in the activity within its business relationships that caused the human rights abuse and that is linked to its operations, products or services, unless the business enterprise demonstrates that the harm resulted notwithstanding the reasonable and necessary measures it had taken to prevent it.

IV. Regarding the section on adjudicative jurisdiction

1. The main added value of this article is to clarify the connecting factors that will give rise to jurisdiction of a certain court in relation to the concerned case. While Article 9.1 of the Chair's proposals generally keeps the same connecting factors covered under the draft LBI text, however, the chapeau of Article 9.1 of the Chair's proposal includes vague areas such as:
    - Lack of specification that this Article is addressing the jurisdiction of courts. The wording of the Article could be read to include the mandates of State-based non-judicial mechanisms given they are covered by the definition of 'relevant State agencies' and the latter are referred to under Article 9.3 of the Chair's text that reads 'decisions by relevant State agencies relating to the exercise of jurisdiction in the cases referred to in Article 9.1'.
    - The discretionary language in the chapeau 'as may be necessary and consistent with its domestic legal and administrative systems', makes the extent of the obligation unclear and may affect the effectiveness of implementation.

---

the parent company knows or should know that its subsidiary unlawfully inflicts damage on third parties in an area where the parent company involves itself in the subsidiary, the starting point is that the parent company has a duty of care in respect of the third parties to intervene.' (at [3.30]). The HCA focused on internal management and knowledge within the company and relied heavily on internal communications and policies passed from Royal Dutch Shell (RDS) down to its subsidiaries. In *Oguru,* the facts established that RDS was aware of oil spills in the Niger Delta and their associated impacts and was actively requesting its subsidiaries to adopt measures to mitigate these impacts. This represented a sufficient level of 'control' and 'knowledge' to justify liability. Full judgment: https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2021:1825.

- Such vagueness in the drafting may create ambiguity and undermine the main objectives of this Article, which is to ensure access to a court, and which is central to ensuring access to justice and remedy. More clarity and precision in drafting this article will help in providing more on the legal avenues available to victims as well as clarity to businesses, and would help prevent an accountability vacuum.

2. It has been repeatedly pointed out by experts participating in the open-ended intergovernmental working group that the application of forum non-conveniens (FNC) ought to be explicitly prohibited in cases falling under the scope of the LBI given the challenges it causes to access remedy and justice. This doctrine allows a court that has jurisdiction in a case to dismiss the case on the grounds that another court is more appropriate to proceed with the case and that its decision is in the interest of claimants.
    - Under Article 9.3 of the Chair's proposals, the wording is ambiguous and can be read as normalizing the application of forum non-conveniens (FNC) rather than removing the challenge that this doctrine imposes, because it can be read as providing that: the discontinuation of legal proceedings based on 9.3.a (which reflects the forum non-conveniens doctrine) could be considered as an act that is taken in respect of the rights of victims.
    - What is to be considered 'respect of rights of victims' will be left to the discretion of the judge who could decide whether to apply or not this doctrine.
    - The reference to 'respect the rights of victims in accordance with Article 4' does not mean that forum non-conveniens will not be applied given that Article 4 does not prohibit FNC.
    - If the intention is to prohibit forum-non conveniens in the cases of human rights abuse to be covered by the LBI, then a direct and explicit prohibition as proposed under the draft text of the LBI seems to be more effective.

3. Further work on procedural rules to avoid conflict of jurisdictions would help bring further clarity to this article under the draft LBI: The proposition of the Chair under Article 9.4 of the Chair's text seeks to address the possibility of parallel claims, although further clarity would help in the effectiveness of implementing such rules. For example:
    - It is not clear what proceedings are being addressed under Article 9.4 of the Chair's text, given that the paragraph refers to judicial proceedings but also covers 'relevant State agencies' that could be responsible for non-judicial proceedings
    - If a case has been brought to the courts of one jurisdiction, while there are other processes 'related' to the same human rights abuse under non-judicial mechanisms of another State, it is not clear whether the latter processes are to be set on hold while the court proceeds with the case in the former jurisdiction.
    - What does 'relating to the same human rights abuse (or any aspect of the such human rights abuse)' mean? Does it cover indirectly related issues or cases that are brought on different legal basis but concern one incident of abuse?
    - The consultations among relevant State agencies of each State referred to could take months if not years. It is not clear whether

victims are supposed to wait on the proceedings while the concerned state agencies consult and decide?

4. If to be addressed, parallel proceedings require simple and clear procedural rules, such as adapted fork-in-the-road provisions. The drafting should guard an approach empowering victims and should be clear on which claims are to be captured under these procedural rules.

5. It is important that the LBI continues to address the basis to join claims that are connected and 'forum 8ecessitates' (addressed under 9.4 and 9.5 of the draft text of the LBI) which are crucial to facilitating jurisdiction in cases that would fall under the scope of the LBI. These are not currently addressed under the Chair's text.

V. Regarding the section on applicable law

1. Various studies have shown that the issue of applicable law can constitute a significant barrier to accessing remedy for victims of human rights abuses[5]. Experts in private international law rules critiqued the status quo of the the rules that are seen as reluctant to become involved in regulating cross border activities and inefficient in addressing corporate accountability issues.[6]
    - Usually in corporate liability cases with transnational or cross-border elements, rules of private international law direct the choice of applicable law towards the legal regime where the harm occurred, which could often work against victims and could be significantly more lenient to the corporate defendant.
    - This approach is not an efficient rule in the context of corporate liability cases involving multiple instances of decision making, in which multiple entities are embroiled, and the source of the harm spreads across multiple jurisdictions. This approach also does not help in moving the practice towards the higher human rights standard.
    - Lack of certainty in regard to applicable law works against victims because it will also complicate the considerations that victims' lawyer face when deciding where to bring the case and how to articulate or focus the case.

2. Addressing applicable law in the LBI can be seen as the complementary part to addressing adjudicative jurisdiction. A choice of law provision in favor of victims, as the one proposed under the draft LBI, would help to elevate the applicable law to the higher standards from a human rights perspective, rather than allowing traditional concepts of conflict of laws to trump

[5] See for example: A. Marx, C. Bright and J. Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the DROI Committee, European Parliament (February 2019), at 112, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf

[6] See: Muir Watt, H. (2014). The relevance of private international law to the global governance debate. Private international law and global governance, 1-19. See also: Juenger, F. K. (1994). Private International Law or International Private Law. KCLJ, 5, 45.

meaningful access to justice. This will also help attend to the specific nature of the business-related human rights claims and help redress the power imbalance between the parties. In business and human rights cases as the ones that the LBI would cover, as long as minimum connecting factors are to be found, the law that favours the substantive fulfilment of human rights should apply.

3. Choice-of-law provisions as the one proposed under the LBI have not been uncommon. They are often used in relation to cases involving discrepancy between the parties, such as consumers or employees. Several jurisdictions, while they follow the law of place of conduct or injury, had incorporated such victim-empowering approaches, thus allowing tort victims to choose between the laws of the state of conduct and the state of injury, or authorizing the court to choose the law most favorable to the plaintiff or victim.[7] These approaches have been justified on the basis of the principle of favoring the injured party.

    - The Rome II Regulation does so in environmental torts, which allows the claimant to choose between the law of the place where the injury occurs and the law of the place where the tort was committed.
    - This approach had been also adopted by multiple European jurisdictions. For example, the German private international law codification provided that 'Claims arising from tort are governed by the law of the state in which the person liable to provide compensation acted. The injured person may demand, however, that the law of the state where the result took effect be applied instead'.[8] The Italian codification provided that torts are to be governed by the law of the state of injury, but 'the person suffering damage may request the application of the law of the State in which the event causing the damage took place'.[9] The Portuguese codification gave this choice to the court coupled with a foreseeability proviso by providing that '[i]f the law of the state of injury holds the actor liable but the law of the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission'[10].

[7] Symeon C. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 Hastings L.J. 337 (2009). Available at: https://repository.uchastings.edu/hastings_law_journal/vol61/iss2/2

[8] Einführungsgesetz zum Bürgerlichen Gesetzbuch [Introductory Act to the Civil Code], May 21, 1999, BGBI.I at 1026, art. 40(I) (F.R.G.), amended by Federal Act of 1999 for the Revision of Private International Law, translated in Peter Hay, From Rule-Orientation to "Approach" in German Conflicts Law: The Effect of s986 and 1999 Codifications, 47 AM. J. COMP. L. 633, 65o (1999), referenced in supra. Symeon C. Symeonides (2009)

[9] Law No. 218 of 31 May 1995, Article 62, Gazz. Uff., Supp. Ord. No. 128, June 3, 1995, translated in Andrea Giardina, Italy: Law Reforming the ItalianSystem of PrivateInternationalLaw, 35 INT'LMATERIALS LEGIS. & PERSP. 760,779 (1996), referenced in supra. Symeon C. Symeonides (2009)

[10] C6DIGO CIVIL PORTUGuts as amended in 1966, art. 45(2), referenced in supra. Symeon C. Symeonides (2009). Some jurisdictions condition the application of the law chosen to an express foreseeability proviso requiring that the actor could foresee the occurrence of damage as a consequence of his act or omission in the country whose law will be applied.

4. It is worth noting that in its 2020 draft report on the due diligence directive,[11] the European Parliament's Committee on Legal Affairs proposed amending the Rome II Regulation. It suggested 'to include a specific choice of law provision for civil claims relating to alleged business-related human rights abuses committed by EU companies in third countries, which would allow claimants who are victims of human rights abuses allegedly committed by undertakings operating in the Union to choose a law with high human rights standards'. A new Article 6a, entitled 'Business-related human rights claims', would have been modelled after Article 7 of the Rome II Regulation on environmental damage. The proposal would have given victims of human rights violations the option of choosing between potentially four different laws: (1) the law of the country where the damage occurred (i.e. the law of the place of injury), (2) the law of the country where the event giving rise to damage occurred (i.e. the law of the place of action), (3) the law of the country where the parent company has its domicile or, where the parent company does not have a domicile in a Member State, (4) the law of the country where the parent company operates. However, this suggestion was not included in the final resolution on the due diligence directive adopted by the European Parliament in March 2021.[12]

(Points 3 and 4 above are based on the report available here: https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf, section on applicable law)

5. Since there was no rejection of this article in the open-ended intergovernmental working group, it is important to focus the attention on clarifying the article and strengthening it. The provision could be divided into two sections: one to set a choice-of-law provisions in civil liability cases falling under the LBI and another that addresses applicable law in other cases such as criminal cases.

****

[11] DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 11 September 2020.
[12] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).