

Compilation of the comments, requests for clarification and concrete textual proposals made by non-State stakeholders during the seventh session

Note by the Secretariat

Summary

The present document contains a compilation of comments, requests for clarification and concrete textual proposals on the third revised draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises¹ made by non-State stakeholders during the seventh session². Only oral statements received by the Secretariat are part of this compilation and have been reproduced in the original language of submission.

¹ www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

² These statements have also been posted online at <https://owncloud.unog.ch/s/uimBIpxsyrMpm>

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A. Preamble

1. DKA Austria

Thank you chair, my name is Ute Mayrhofer. I am speaking on behalf of a group of civil society and children's rights organizations.

We would like to make the following amendment to Preamble 6 by including the following: Upholding the right of every person, **including children**, to have equal access to effective remedy and reparation.

At Preamble 12 including: Emphasizing that civil society actors, including human rights defenders have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and seeking effective remedy for business-related human rights abuses; **for the adverse human rights impacts of business enterprises, and that a safe and empowering context should be provided to them, including for children and young people;**

Preamble 13 to include: 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, **transboundary citizens**, 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 rightsholders, **including potential intersectional vulnerabilities**; and the structural obstacles for obtaining remedies for these persons

Preamble 13 to add: **Recognizing in particular that the best interests of the child should be a primary consideration in all decisions affecting children and that appropriate child-sensitive procedures to pursue remedies for violations and abuses of their rights should be available to them at all levels, in judicial and non-judicial processes alike.**

Thank you chair for taking our proposal into consideration.

2. Feminists for a Binding Treaty

I speak on behalf of the "Feminists for a Binding Treaty" coalition.

- We agree with proposals made to keep the reference to IHL in PP6 and to add it in PP7. In conflict-affected areas, including situations of occupation, the risk of businesses becoming involved in gross violations or abuses of human rights and of violations of IHL is particularly severe. We also recall that the UNGPs state that businesses should respect IHL.
- We support the proposal for a new PP9bis adding a reference to the right to self-determination, as well as the proposals about ensuring a child-rights sensitive and age-responsive perspective in the instrument.
- In addition, while PP10 of the draft Preamble underlines, and I quote, "business capacity to foster sustainable development", the Preamble should set out in a more balanced way the context for the development of the legally binding instrument. This can be done by noting the global concern for the continuing human rights abuses committed by businesses, including with regard to environmental damage. We, thus, propose a PP 12 bis to read as follows:
 - "Deeply concerned that individuals and communities continue to face business-related human rights abuses and violations in all parts of the world, including as arising in connection with business-related environmental damage and in conflict-affected areas, including situations of occupation, and in certain operating contexts which pose risks of severe human rights impacts."

- We support Mexico's comment to differentiate between "preventing abuses" and "mitigating risks" throughout the text, which is a key conceptual distinction to make.
- We also support Bolivia's comment on including the UN Declaration on the Rights of Peasants and other peoples living in rural areas (UNDROP) in PP3. In addition, peasants should also be recognized in PP14 as a group requiring special attention.
- We urge delegations to counter proposals to delete references to "human rights defenders" from the text. This is a term widely used, including in numerous General Assembly and Human Rights Council resolutions, as well as in regional texts and instruments, including the Escazú agreement. We also support the new suggested PP12 bis recognizing the specific vulnerabilities of certain groups of HRDs.

Finally, we recommend adding in PP14 after "international standards" the following and I quote: "including to consider underlying causes and risk factors, eliminate all forms of discrimination, redress historical and current disadvantage, address stereotypes and violence, transform biased institutional structures and practices, and facilitate social inclusion and political participation."

Thank you Mr Chair.

3. International Commission of Jurists

The International Commission of Jurists welcomes the Third Revised draft of a LBI. It calls all states and stakeholders to focus now on the negotiation of the text in front of us. This is not the time to look at alternative models, but at alternative language to each specific provisions.

The ICJ has provided the Chairmanship and its Secretariat with a copy of its commentaries to the Third revised draft with suggestions of alternative language. We will be referring to that document in our interventions.

The preamble of a legally binding instrument is important to offer guidance and context for the correct interpretation and application of the treaty provisions. It is therefore crucial that it contains the necessary elements in a proper language. The changes contained in the preamble are generally positive and strengthen the text, but references to international instruments should be limited to those of highest importance and relevance such as international treaties and declarations.

There should be a proper reference to all the principal core human rights treaties, including their substantive protocols, and relevant labour rights ILO Conventions in the preamble.

And conventions should be separate from declarations and other recommendatory instruments.

A reference to the "UN Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law, adopted by consensus at the UN General Assembly which is influential in the draft treaty's articles 4, 5 and 7, in PP3.

In PP4, there should be recognition of the "status of the child as a subject of rights with evolving capacities" after reference to men and women. This should not be controversial, given that almost all States are party to the UN Convention on the Rights of the Child.

Thank you!

4. International Organization of Employers

Thank you very much Chair for giving us the floor.

Let me start by expressing our deep concern around the prevailing divergent views and understanding of substantial elements in the preamble.

We regret to observe that various proposals tend to deviate from the UNGPs, and various countries have also expressed their concern in this respect.

We risk not only getting apart from a consensual outcome, but we risk also undermining the UNGPs.

Just to mention 3 substantial deviations.

1. language in PP11 referring to “... Obligation to respect” -for example- in fact UNGP’s refer to the “Responsibility to respect”, drawn from item 13 of the UNGP’s. This was also raised by various governments. If I remember well, Mexico also made this precision.

2. Also, language that reads “as well as by preventing” should read “**as well as to seek to prevent** or **mitigate adverse human rights impacts**”, we normally refer to “impacts” not to “abuses”.

3. proposals to change the reference to “abuses that are directly linked”, so to include indirect actions, are inappropriate. Actually, the UNGPs refer to “**human rights impacts that are directly linked to their operations**”.

On a second issue, in **PP2** there is a need to be clear about the so referred **relevant UN instruments**, where it would be inappropriate to insert the reference to “all” instruments.

Not all instruments are binding to member States. We have to acknowledge this fact, and if we are working on a binding instrument, it would be absolutely inappropriate to have references to another instruments that are not binding to all member states, this was also raised by various countries.

In the same lines, the reference to relevant ILO conventions could turn inappropriate.

First, because not all ILO instruments are Human Rights. Second, because these are only binding to those member states that have ratified such conventions.

5. United States Council for International Business (USCIB)

Thank you, Chairperson

USCIB supports the comments advanced by the international Organization of employers.

On Paragraph 8 and in the spirit of an inclusive approach advanced by the EU and Argentina, we would like to add “gender expression, LGBTQI+” following the word “sex.”

We all heard the many states, this year and in every previous year of this working group, clarifying that any legally binding instrument must align with the UNGPs. We agree. For this reason, on Paragraph 11, we propose deleting the word obligation and replacing it with the word “respect.” The UNGPs are clear that companies have the responsibility to respect.

We also cannot support any proposals made to insert specific references to “transnational corporations.” UNGP article 14 states, “The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure.”

All businesses means all businesses and questions about scope remain fundamental. If this text only references transnational corporations, this will remain a minimally supported exercise, void of the consensus enjoyed by the UNGPs.

Thank you.

6. Joint statement on behalf ABIA, CETIM and Friends of the Earth International, members of the Global Campaign

Gracias Sr. Presidente. Realizo esta intervención en nombre de Amigos de la Tierra Internacional, ABIA y CETIM, miembros de la Campaña Global.

Con relación al Preámbulo, lamentamos volver a señalar que el documento mantiene las cuestiones problemáticas ya resaltadas en los comentarios enviados por la Campaña en años anteriores, que obstruyen la eficacia del futuro Tratado y el cumplimiento de la Resolución 26/9.

Sugerimos que se agregue al Preámbulo en los párrafos 2,3 y 4 una lista de instrumentos internacionales necesarios para que el Tratado refleje los estándares internacionales de protección de Derechos Humanos. Ellos están en la propuesta escrita que será enviada.

Enmienda: *Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on Biological Diversity; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees; the Convention against Corruption, the Conventions and Recommendations of the International Labour Organization, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Slavery, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Right of Peoples to Peace, the Declaration on the rights of peasants and other people working in rural areas, the four Geneva Conventions and their Optional Protocols, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; the Rome Statute of the International Criminal Court and other relevant international instruments approved at the international level in the human rights framework.*

También sugerimos que se haga una enmienda al párrafo 11 para que las empresas transnacionales y otras empresas de carácter transnacional, que deben representar el alcance de ese instrumento, tengan obligaciones con respecto a los derechos humanos, obligaciones estas que deben ser previstas en un capítulo específico:

Enmienda §11: *... 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...*

Además, con el fin de fortalecer las disposiciones del preámbulo, proponemos agregar un párrafo que reafirme la primacía de los derechos humanos sobre los acuerdos comerciales y de inversión. Lo que también debe componer el artículo 14.

Propuesta de nuevo párrafo: *Reaffirming the primacy of International Human Rights Law over all other legal instruments, especially those related to trade and investment.*

También sugerimos la adición de un párrafo relativo a las obligaciones de las ETNs en cuanto a su poder económico y su obligación de respeto de los derechos humanos, laborales y ambientales:

Propuesta de nuevo párrafo: *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.*

Propuesta de nuevo párrafo: *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.*

Y, al final, defendemos que también es necesario incluir una referencia sobre el tema de la captura empresarial, inspirada en el Convenio de la OMS para el Control del Tabaco (artículo 5.3):

Propuesta de nuevo párrafo: *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.*

Muchas Gracias,

7. Joint statement on behalf of ESCR-Net, including Al-Haq, FIAN & Poder

Thank you Mr. Chairperson,

These comments are made on behalf of over 280 ESCR-Net members including Al-Haq, FIAN & PODER addressing PPs 3, 6, 7, 9, 11, 12 and 18.

On PP3, we would like to support the proposal of Bolivia to include the UN Declaration on Peasants Rights and other People Working in Rural Areas.

In PP6 and PP7, we support maintaining and including language on international humanitarian law in the preamble as supported by the State of Palestine, South African and Panama.

We also support the proposal by Palestine in PP9bis to include an explicit reference to the right to self-determination as articulated in Article 1 of the international covenants on economic, social and cultural rights as well as on civil and political rights.

I also think it is important to note that the organization I am most directly connected to, the Palestinian human rights organization with long-standing ECOSOC status, Al-Haq, has recently been designated as a “terrorist organization” by the Israeli occupying power as part of its historical colonial policies towards the Palestinian people in the denial of their right to self-determination.

In the context of the Fourth International Decade for the Eradication of Colonialism and the welcome return of colonialism to the human rights agenda, we cannot lose sight of the reality that the gaps, or loopholes, in international law regarding business activities of TNCs, especially their extraterritorial activities are inherently linked to the legacies of colonialism.

We cannot expect to eradicate colonialism and close this dark chapter in the history of humanity with closing these gaps that allow new means and methods of colonialism to emerge in the contemporary context, as we see in the Palestinian present.

In PP11, the language on obligations should be retained - and remind States that we are here to talk about obligations not responsibilities related to protecting and respecting human rights in the context of business activities, particularly those of a transnational character exactly because the current state of international law is not sufficiently able to address these challenges.

We further support adding the word “indirectly linked” in PP11 while we support the suggestion of a PP11bis that would ensure the primacy of human rights obligations over agreements on trade among others. We also strongly support the reference to obligations of states extraterritorially in accordance with the International covenant on economic, social and cultural rights.

We also want to reiterate that States must ensure the protection of HRDs who are largely impacted by business related abuses and violations - and must take into consideration at risk groups. Therefore, we would like the language suggested on HRDs in PP12 to be retained. We further support the inclusion of strengthened language on protection of environment and climate in this paragraph.

Finally, in PP18, we again reiterate the need to address obligations not responsibilities and support the additional paragraphs proposed by Cameroon.

We must not continue to be influenced by the illusory argument of separation between political actors and economic actors, especially given the history of the role of TNCs in undermining the exercise of the right to self-determination from the exploitation of natural resources to complete regime change, through the use bi-lateral investment agreements and political risk insurance.

TNCs have enjoyed the benefits of rights in the globalized social system of humanity without adequate correlative duties for too long. It's time to bridge these gaps and close these loopholes that continue to negatively impact humanity and mother nature.

Enough is enough!

Thank you Mr. Chairperson

8. Joint statement on behalf of Institute for Policy Studies and Corporate Accountability International

Gracias Señor Presidente

Mi nombre es Adoración Guamán del Centro de Derechos Económicos y Sociales del Ecuador. Hablo en nombre del Transnational Institute y Corporate Accountability, miembros de Campaña Global.

Desde la Campaña expresamos nuestra preocupación ante el posicionamiento de diversos Estados, como Estados Unidos, México, Brasil o Chile, que han expresado su voluntad de eliminar el término “obligaciones de las empresas” del texto.

Consideramos que estas posturas no están correctamente fundamentadas y que parecen olvidar que los derechos humanos tienen aplicación erga omnes.

Como explicó con claridad en sesiones anteriores el profesor De Schutter, NO existen distintos grados de obligaciones entre Estados y empresas en relación con el respeto de los derechos humanos. Se trata de obligaciones independientes y que en ningún caso deben ser sustitutivas unas de las otras. No se puede graduar la obligación de respetar los derechos humanos (son inviolables) y ello NO implica en absoluto desconocer las obligaciones generales de los Estados.

Así, la inclusión de obligaciones de actuación directas a las empresas que aseguren su pleno respeto de los derechos humanos y que anuden consecuencias a sus violaciones no constituye una ruptura del derecho internacional, al contrario, supone un paso más en la línea de lo que ha sido integrado en textos como las Líneas Directrices de la OCDE o la Declaración tripartita de la OIT. Ambos documentos integran numerosas líneas de actuación que las empresas “deberían” realizar pues bien, es el momento de dotar de obligatoriedad a aquello que se lleva afirmando durante años como un comportamiento óptimo.

De hecho, más allá de estos textos, la práctica del derecho internacional demuestra que la inclusión de obligaciones directas a las empresas se ha integrado en numerosos documentos de los órganos de tratados de derechos humanos y diversos instrumentos de derecho internacional. Así, por ejemplo, la doctrina del Comité DESC, ha remarcado que las empresas tienen responsabilidades de respeto de los derechos humanos, entre otros, de los siguientes derechos: salud, alimentación, agua o derecho al trabajo.

Además, como también recordó el profesor De Schutter, no podemos dejar de mencionar la asimetría que este tratado está llamado a solucionar: el derecho internacional (de inversiones) YA reconoce derechos específicos a las empresas. Si las empresas son sujetos activos, a los que el derecho internacional reconoce directamente derechos, no solo es posible sino necesario reconocerles obligaciones.

Por añadidura, debemos decir que la interpretación sostenida por los Estados Unidos respecto de una supuesta incompatibilidad entre la inclusión de obligaciones directas y los PRNU es equivocada. Los Principios no son en sí mismos vinculantes, pero en ningún momento rechazan la posibilidad de establecer obligaciones para las empresas, así, el establecimiento de las mismas no riñe con el texto de Ruggie, además, que viene a complementarlo.

Recuerden, por favor, que el principio de progresividad ha guiado, debe guiar, la construcción de la protección de los derechos humanos. Hoy se han expresado en la sala algunas opiniones que implican una regresión no sólo en las negociaciones de este grupo sino en el propio sistema de protección de los derechos humanos.

Para finalizar queremos recordar las palabras de Surya Deva, miembro del grupo de trabajo sobre derechos humanos y empresas: Ningún centro de poder en la sociedad debería ser inmune a las obligaciones que emanan de las normas de derechos humanos. A las víctimas les importa poco si el violador es un Estado o un actor privado.

Desde la campaña global exhortamos a los Estados a mantener la línea de progreso comenzada con la adopción de la resolución 26/9 y recordar que el deber que aquí les reúne

es lograr que el derecho internacional integre las herramientas necesarias para acabar con la impunidad de las transnacionales y con la indefensión de las personas y grupos afectados.

9. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the over 200 million members of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

We have several proposed amendments to the Preamble and suggestions for three new paragraphs. I will take them in order:

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. Therefore, we recommend that the word ‘relevant’ before *ILO Conventions* be deleted and instead we recommend the inclusion of a reference to *ILO Declarations and Conventions*.

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.

Then, we have a proposal for a new PP5. We strongly recommend the inclusion of a new paragraph to better articulate the scope of labour rights within the context of the Legally Binding Instrument. This paragraph would read as follows:

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;*

Regarding PP8, we strongly recommend that the exhaustive list of protected characteristics be deleted in favour of a reference to human rights and fundamental freedoms for all without distinction *based on the principles of equality and non-discrimination in international human rights law*.

Proposed new PP [10]

Reaffirming the primacy of international human rights law over any other international agreement, including those related to trade and investment;

We would then propose a new PP10, which would reaffirm the primacy of international human rights law over trade and investment agreements. This would reflect the spirit of Article 103 of the Charter of the United Nations and help set the context for Article 15.5(b) of the Legally Binding Instrument. The paragraph would read as follows:

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. This new PP12 would read as follows:

And finally, in relation to original PP12, we strongly recommend that the paragraph be strengthened by including examples of human rights defenders, including trade unionists, to emphasise the fundamental role these actors play in protecting human rights.

Thank you, Chairperson.

B. Article 1

1. Feminists for a Binding Treaty

Thank you, Mr. Chair. I speak on behalf of the “Feminists for a Binding Treaty” coalition.

First, in the definition of “victims”, we recommend removing the word “immediate” before “family members” and after “family members” adding “including civil partners”. After the term “suffered harm”, we recommend adding and I quote, “or are in imminent risk of irreparable harm, or substantial impairment”. Also, adding the term “or violation” in article 1.1 after the word “abuse” would also make clear that victims should also be protected from violations by the State or its agents.

Secondly and linked to the previous point, while recognising that the definition of “human rights abuse” seems somewhat broader with the deletion of the terms “committed by a business enterprise”, we suggest reintroducing the notion of human rights violation in the text, including in the Preamble where relevant (notably in PP13 and PP18). This is essential to make clear that the instrument applies to violations committed by the State or its agents in the context of business activities. This would also avoid creating confusion regarding the term “abuses” as it is normally understood under international human rights law to be committed by non-State actors, whereas violations are committed by States.

We are concerned with the proposals to remove the term “omissions” from the definition of “victim” and of “human rights abuse”. It is indeed now clear under international human rights law that State responsibility at the international level is engaged not only through acts, but also through omissions, and that failure to act to prevent, investigate or sanction certain human rights abuses committed by private actors can result in a finding that the State has failed in its international human rights obligations, particularly its obligation to protect human rights. We also recall that under the UNGPs, a business enterprise’s “activities” are understood to include both actions and omissions.

Finally, we support the reference to the right to a healthy environment in line with HRC Resolution 48/13, as well as because this right is recognised in many jurisdictions.

Thank you.

2. International Commission of Jurists

Mr Chairperson,

The definition of “victims” has been shortened, mostly in a sensible way. But it should be amended in two aspects. First, a victim is defined by reference to a human rights abuse, a term usually taken to refer attributable to the conduct of 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. That part of the definition should be restated.

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 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. Departure from that practice would create confusion and lead to inconsistencies in usages in the generally applied human rights lexicon. The revised Draft should avoid unduly conflating the 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. Like several state delegations in this room, the ICJ is concerned by the open ended broad definition of “business activities” in Article 1.3 that can potentially encompass also other persons and organizations as well as any of their activities under its purview. 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 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.

To remedy this, we agree with others to define “business activities” as “any activity of economic or commercial nature or associated activity”, ...undertaken “by a natural or legal person”.

The ICJ also supports the references to the right to a safe and healthy environment which has been recognised by the Human Rights Council early this year.

3. International Organization of Employers

Dear Chair

I would like to make 5 points.

- In the discussion on this article we have seen that Governments try to narrow down the scope of the treaty to transnational companies. As we have said before, this treaty needs to apply to all companies to be in line with the UN Guiding Principles. This is also what the human rights experts in their joint statement are asking for. Moreover, it would be against any notion of creating a level playing field, if the legally binding instrument would only apply to transnational companies.

- On the definition of 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 term “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 “**plaintiff**” or “**complainant**”.

- It was already said before, “**Business activities**” is a very vague definition. Of particular concern is the use of the term “undertaken by electronic means”. The vagueness of this 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. The phrase “undertaken by electronic means” should be **omitted**.

- On the definition of “**Business relationship**” we would like to reiterate that the definition of 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” is unworkable, as it is indefinite, vague, and overly broad. This will have grave consequences later in the articles on liability. Instead, the text should use the definitions of the UN Guiding Principles or OECD Guidelines.

- We support what the government representative of Panama said, that adverse human rights impacts can also come from non-commercial organisations. For a victim it does not matter whether the impact came from a private sector MNE, from a state owned-enterprise or from a non-commercial entity. The impact needs to be addressed.

4. United States Council for International Business (USCIB)

Thank you, Chair.

We wish to align ourselves with the comments made earlier on this section by the United States Government.

Further, and to our dismay, several of the issues that have been raised over the years of negotiation remain in place in this Third Revised Draft.

With respect to the definitions laid out in Article 1, this LBI does not reflect generally accepted legal norms and is too general to ensure consistent application.

The term ‘Victim’ in 1.1 is misused and should be replaced by the word ‘plaintiff’ or ‘complainant.’

Victims are those who have been found by a court of law to have suffered a harm. Therefore, use of term victim throughout the text presupposes guilt by a third-party, rather than more precisely capturing the rights of an individual who alleges harm has been done.

Extension of the definition of victim to immediate family members and dependents of the direct victim is yet another example of the misuse of the word victim.

Determination of harms affecting dependents of direct victims are matters to be decided by courts based on the facts of individual cases.

This additional language should be deleted

Article 1.2 seeks to redefine internationally recognized human rights as including the right to a safe, clean, healthy and sustainable environment. Not only does no such right exist in international human rights law, but its insertion will ultimately lead to interpretive inconsistency. This phrase should be deleted.

Concerning Article 1.3, defining “business activities” as including “any other activity” is overly vague. Business activities must be linked to trade, commerce or other economic action. The definition should be made more precise.

We have serious concerns about the inclusion of business “conducted by electronic means.” Given the pace of digitization, the complexity of digital networks and transactions, and the potential negative consequences of this type of liability on SMEs, the imprecision of this definition needs to be clarified or the clause should be deleted.

Similar issues arise with the definition of business relationships in Article 1.5 as capturing “any other structure or relationship...including activities taken by electronic means.” This ambiguous language would extend due diligence duties and liability beyond the scope of a business’ contractual relationships, where they have little to no leverage or control.

The UNGPs and the OECD MNE Guidelines provide a clear definition of “business relationships” that should be mirrored here. Those instruments define business relationships as 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.

5. Verein Sudwind Entwicklungspolitik

As declared in our opening statements we, Südwind and the other members of the Treaty Alliance Austria, a coalition of 15 Austrian NGOs and trade unions, highly welcome the “Third revised draft”.

Specifically we want to contribute with this statement to Article 1.1: and 1.2:

In Article 1.1 the terms “affected individuals and communities” and “right-holders” should be used instead of the term victim. Furthermore the article. should consider the circumstance, that persons have suffered harm because of supporting victims. Therefore it should use a broader definition of victim, a wording which already existed in Article 1.1 of the “Second Revised Draft”.

- The following definition was used in the 2nd Draft: “ persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

We welcome the inclusion of the right to a healthy, safe, clean and sustainable environment in Article 1.2 . The latest Global Witness report underlines the importance of this inclusion. It shows that 227 people were murdered in the previous year because they were engaged in environmental activism. So it was, again, the most dangerous year on record for people defending their rights, their lands and protecting the environment. This clearly underlines the urgent need for a Binding Treaty .

Especially against the background that Austria is a member of the UN Human Rights Council, Austria should take up its responsibility and constructively engage in this and upcoming sessions of the intergovernmental Working Group.

6. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan

On behalf of: CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan

Art 1.1: Throughout the text, we strongly recommend replacing the term **victims** with **right holders**, to ensure that the definition is inclusive not only of ‘groups of people’ but of people with a specific cultural and spiritual identity, such as indigenous people. We also suggest integrating the particular impact that harm has on the development of children, as well as the reference to person who have suffered harm in attempt to avoid victimization.

The rephrased article would read as follows:

Art 1.1. – "Rights-holder" shall mean any person, group of persons, community, tribal or indigenous people, irrespective of nationality or place of domicile, who individually or collectively have suffered harm that constitutes human rights abuse through acts or omissions in the context of business activities. When the victim is a child, harm should contemplate the impacts on their development. The term “rights-holder” 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 victimisation.

7. Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR

We emphasize the need to keep the following in article 1.1:

“Victim” shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered, or, *the term victim may also include;* **to add: where relevant, have alleged to have suffered** harm, that constitute human rights abuse. The term “victim” may also include the immediate family members or dependents of the direct victim, **to add 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. *Add the last sentence When the victim is a child, harm should contemplate the impacts on their development.*

At article 1.2. including “Human rights abuse *and to add* or violation”

We support the proposal of Panama to keep the right to a safe clean and sustainable environment at the end of article 1.2

Thank you chair for taking our proposal into consideration.

8. **Joint statement on behalf of Franciscans International, FIAN, WILPF, CIDSE, CCFD, LHR, and FIDH**

We reject Brazil's proposal to delete the references to "collectively" or "group of persons" in article 1.1 and 1.2 respectively. This proposal would go against the vast jurisprudence and international human rights law recognizing the collective exercise of human rights. Among others, it would go against the many precedents that we can find in international agreements such as the Optional protocols to the ICESCR, to CEDAW, and to the CRC. Collective rights are also enshrined in the UN declarations on the rights of Indigenous Peoples and on the rights of peasants and other people working in rural areas (UNDRIP and UNDROP).

In sub paragraph 1, in the definition of victims, we suggest adding “human rights violation” to the text, so that victims include those that “have suffered harm that constitute human rights abuse *or violation.*”

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. In that sense we would like to propose that the definition of Victims in Article 1

- recognise not only people who have suffered harm but also those who are under impending threat of harm
- 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 instances of 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. The suggested language will be sent to the Secretariat in our statement.

In relation to the definition of “human rights abuse” in sub paragraph 2, we support the addition of language, in line with HRC Resolution 48/13, on the right to a healthy environment. This right is recognized in a number of constitutions worldwide and has been recognized in the jurisprudence of regional human rights bodies, such as the InterAmerican Human Rights Court. Furthermore, the Special Rapporteur on Human Rights and the Environment has also developed standards in this regard.

In relation to the definition of “business activity” (art 1.3), “business activities of transnational character” (art. 1.4) and “business relationship” (art 1.5) the exclusion of the references to “for-profit” activities only in art. 1.3. and explicit reference to “state entities” in art. 1.5 are welcomed, as it goes in the direction of avoiding any gap that would allow State-owned enterprises and the State to escape from the application of the treaty.

We disagree with Iran's proposal (1.5 bis) because even businesses with activities of a transnational character need to be registered under domestic law.

9. Joint statement on behalf of Homa, Asociación Brasileña Interdisciplinaria de Sida, FoEI and CETIM, Members of the Global Campaign

Gracias, Sr. Presidente,

Mi nombre es Andressa y hablo en nombre de Homa, Asociación Brasileña Interdisciplinaria de Sida, FoEI y CETIM, miembros de la Campaña Global. El artículo 1 y las definiciones son clave para la eficacia del documento, pues dicta el alcance y el tono del futuro tratado.

La primera definición a la que sugerimos cambio es en el término "víctimas" en el 1.1. Proponemos utilizar el término "*affected communities and individuals*" en lugar o en conjunto con el término "victims", como propuso Camerún. Este término subraya mejor el protagonismo de las personas afectadas y es una demanda de larga data de los movimientos de la sociedad civil organizada. Asimismo, rechazamos la propuesta de Brasil de sacar a grupos de personas como víctimas. El carácter colectivo de esos derechos son reconocidos en el derecho internacional de los derechos humanos desde el Pacto DESC de 1966. Así lo entiende, el sistema interamericano y su relatoría REDESCA e incluso en la legislación interna de Brasil. Esta propuesta deja aún más vulnerables a las comunidades afectadas.

También nos parece importante mantener la mención a las víctimas indirectas, que son reconocidas en los instrumentos de derechos humanos y esta definición es esencial para garantizar el acceso a reparación por parte de los afectados y las afectadas.

El término abuso, aunque utilizado comúnmente en los instrumentos referentes a actividades empresariales, no corresponde a la gramática internacional de los derechos humanos. Además, la eliminación del término *violation*, de este documento, puede entenderse como una subestimación o minoración del impacto de los actos de las ETNs. Por lo tanto, *abuses* debe reemplazarse por *violation* o ser acompañado por él en todo el texto como propusieron Palestina y Camerún, especialmente en la definición del 1.2. La propuesta de Brasil de agregar serious and substantive damages es preocupante, porque deja margen para que algún daño o violación de derechos humanos sea tolerada, lo que es imposible visto que son innegociables.

Es importante resaltar que las empresas tienen obligaciones internacionales en materia de derechos humanos y son capaces de violar esos derechos debido a su carácter erga omnes, algo ya firmado en el derecho internacional de los derechos humanos y por los sistemas regionales de protección, en especial la Corte Interamericana, de la cual hacen parte México, Chile y Brasil, de forma que no entendemos por que proponen tal distinción.

Por fin, es necesario resaltar que las Instituciones Financieras Internacionales tienen un impacto innegable en el disfrute de los derechos humanos. Por tal, la Campaña Global reitera la necesidad de que el futuro tratado incluya a actores clave como las instituciones financieras en las definiciones, como propuso Camerún.

Muchas gracias

10. Joint statement on behalf of Indigenous Peoples International Centre for Policy Research and Education-Tebtebba Foundation, Indigenous Peoples Rights International and the Narasha Community Development Group

Mr. Chair,

We would want to intervene on three points:

1. On the proposal to delete the word "collective" in the definitions specifically Articles 1.1 and 1.2.

Indigenous Peoples have the collective rights to land, territories and resources, collective rights to their culture, to their identify, to right to self-determination, among others. These are all recognized under international law, and contained in the UN Declaration on the Rights of Indigenous Peoples that already has the support of 144 States when it was passed in 2017, and gained more State support throughout the years.

We are therefore extremely concerned with the proposal of the esteemed delegate from Brazil, to remove the word “collective” from the Definitions especially Article 1.1 and 1.2, for the reason that, as peoples having collective rights, the violation of such rights likewise impact on the Indigenous Peoples, as a collective.

2. On the proposal to remove the word “omissions” in Article 1.2, in relation to commission of human rights abuses.

Human rights abuses are committed, not only by direct actions, but also by omission. We have repeatedly raised the problem of impunity that allows unimpeded human rights abuses without fear of prosecution. Removing the word “omission” will allow the perpetuation of an environment of impunity for human rights abuses, where States can sit on the fences while human rights abuses are committed, and have no accountability for it.

3. On the proposal of the United States to delete “safe, clean, healthy and sustainable environment”.

A safe, clean, healthy and sustainable environment is integral to the full realization of the right to life and the right to health, among others. For Indigenous Peoples, we believe in the inter-generational responsibility to protect the land, environment and natural resources, not just for the perpetuation of life of the current generation, but also of generations to come.

We would also like to point out, the UN Human Rights Council, passed Resolution A/HRC/48/L.23/Rev.1 on October 5, 2021, recognizing access and having safe, clean, healthy and sustainable environment as a universal right. In this Resolution, States are implored to continue to take into account, human rights obligations and commitments relating to the enjoyment of a safe, clean, healthy and sustainable environment in the implementation of and follow up to the Sustainable Development Goals, and adopt policies to ensure full enjoyment of this right.

We therefore strongly support the positions of Namibia, Palestine, and South Africa to retain the word “collective” in Article 1.1 and 1.2, and the word “omission” in Article 1.2. We also call for the retention of the words “safe, clean and sustainable environment” as supported by Panama and as already provided in the definitions.

Thank you Mr. Chair.

11. **Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI**

Mr. Chair,

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

“**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 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.

In relation to the definition of ‘victim’, we believe that a comprehensive definition 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. Therefore, we would recommend that the language from the second revised draft be re-inserted into the body of the definition.

Regarding the definition of “Business activities of a transnational character”, We strongly recommend the deletion of the undefined and vague qualifying term *significant* (in Article 1.3 (b) and (c)), which could lead to the application arbitrary tests on what constitutes a business activity of a transnational character.

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.

“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.

C. Article 2

1. International Commission of Jurists

Mr Chairperson,

The statement of purposes of the treaty in article 2 has been slightly amended, including with new language in 2.1(b) that one purpose is to “clarify and ensure respect and fulfilment of the human rights obligations of business enterprises.” This is something new.

Consistent with language in the Preamble, this new purpose refers to “obligations” rather than “responsibilities” of business enterprises. “responsibilities” is the term normally applied to business enterprises. Also, there is no visible section or provision in the draft treaty that develops this purpose and, and therefore, no clear impact of this change of terms. If this treaty goes in the direction of recognising obligations of business, some changes are necessary. For instance, a provision that restates, in the main body of the treaty, the language of current PP11 could be added just before article 6 (prevention):

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 the word “implementation”.

The ICJ disagrees with the proposals to refer only to transnational enterprises.

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 directed toward a reparative outcome and is not just a procedural device.

The ICJ also supports the reference to “gender-responsive, child-sensitive and victim-centred” justice, in 2.d.

2. International Organization of Employers

Chair

This treaty needs to focus on all companies. Again, in the negotiation on this article we see a lot of efforts to focus this Treaty only on transnational companies. This would be the end of this treaty, as many countries will not support the process and content, it would result in the fact that the treaty is not in line with the UN Guiding Principles and it would not create a level playing field.

On article 2.1b: I would like to stress that under international law companies do not have obligations. Companies only have obligations, if the country has ratified and implemented them into national law. Here we have two possibilities: We can add a sentence at the end of 2.1b which says “where required by national law”, or we go to the formulation of the UN Guiding Principles and use the term “responsibility to respect human rights”.

3. United States Council for International Business (USCIB)

Thank you, Chair.

- We align ourselves with the many states in the room who continue to call for alignment of this text with international law and the UNGPs. Ignoring those calls is causing this exercise to continue to be characterized by a fundamental lack of consensus.
- For reasons stated earlier and in line with the UNGPs, we cannot support language proposed that restricts the scope of this LBI to only transnational corporations, in particular in Subparagraph a.
- We stress that the obligations enumerated in this LBI are only applicable to States that have signed and ratified this Treaty. Businesses are bound by obligations arising from national laws. We therefore support the proposal by the EU and Brazil to replace the word ‘obligations’ with ‘responsibilities’ in Subparagraph b.
- On Subparagraph c, we would like to propose alternative language as follows:
 - o “to clarify the role of the state in preventing and mitigating the occurrence of human rights abuses in the context of business activities by effective mechanisms of monitoring and enforceability;”
- In order to align with the UNGPs, 2.1.d should highlight the need for access to judicial and non-judicial remedy as an essential prerequisite for access to justice.
- Thank you.

4. Joint statement on behalf of FIDH, Organisation Guinéenne de défense des droits de l’homme (OGDH), EQUIDAD (peru), Observatorio Ciudadano (Chile), Organisation Marocaine des Droits Humains (OMDH), Lawyers for Human Rights (South Africa), Franciscans International, the “Feminists for a Binding Treaty”, ESCR-Net

Thank you Chairman,

We have 2 suggestions regarding this article

First, we suggest deleting the words “and mitigate” both in 2.1.c and in 2.1.e.

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 due diligence obligations seek to “prevent and mitigate risks” on the one hand, and “prevent abuses” on the other, not “mitigate abuses”.

Following the UNGPs, the term “mitigation abuses” may have a place in article 6, but it should be in the very specific cases where a company has limited or no leverage on a business relationship that is linked to abuses.

However, article 2 sets out the general purpose of the instrument and it simply would not be acceptable to develop an international human rights instrument whose aim is to “limit” abuses rather than to prevent and remedy them.

To clarify the use of mitigation and prevention throughout the text, we suggest that the drafters seek inspiration in the wording of General Comment 24 of the Committee on Economic, Social and Cultural Rights.

We note the proposal made by China in regards to Art. 2.1 is unclear

Second, the reference to mechanism of monitoring and enforceability in Art 2.1(c) is welcome to reinforce the (usually weak) implementation by States of their obligations in the context of business activities. However this purpose should be operationalized by adding a specific article on ‘Monitoring and Enforcement’ with an aim to reaffirm the role of the State as a guarantor and enforcer of rights, rather than leaving enforcement almost fully to victims through private complaint procedures.

We welcome suggestions by South Africa and Panama to add, under section d, references to “gender responsive, age-responsive and victim-centered” access to justice.

As stated previously, we recommend that throughout this article as well as the entire treaty, adding “and violations” after the word abuses, including in article 2.1.c. Reintroducing the notion of human rights violation in the text is essential with regard to the accountability of States when implementing their obligations under the treaty.

This change would be in line with article 2(1)(a), which makes clear that the LBI will address both the State’s obligations in the context of business activities and the responsibilities of business enterprises.

5. Joint statement on behalf of Friends of the Earth International and CETIM

Gracias Sr. Presidente. Hablaré en nombre de Amigos de la Tierra Internacional y CETIM como miembros de la Campaña Global.

Para enfrentar la impunidad que aún disfrutan las empresas transnacionales y cumplir plenamente con el contenido de la Resolución 26/9, que tiene como objetivo "*regulating the activities of TNCs and other business enterprises in international human rights law*", es necesario que el artículo 2 refleje este objetivo.

En ese sentido, apoyamos la propuesta consensuada por varios estados de enmienda al artículo 2.1a y apoyamos igualmente la propuesta de Egipto de incluir un nuevo párrafo 2.1a.bis sobre el objetivo de regular las actividades de las transnacionales.

Ya, En el artículo 2.1.b rechazamos, al igual que Palestina, la propuesta de la Unión Europea y Brasil que persiste en su empeño de devaluar las obligaciones de las empresas de respetar los derechos humanos. En este mismo párrafo es importante unificar los términos y referirse siempre a empresas transnacionales y aquellas con actividad transnacional.

Por otro lado, el establecimiento de obligaciones directas, tal y como se reconoce en el párrafo 11 del preámbulo, tiene como objetivo obligar a las empresas a establecer medidas preventivas pero también, y entendemos que sobre todo, establecer obligaciones y responsabilidades directas y concretas respecto de los derechos humanos, acompañadas de los necesarios mecanismos de implementación.

Apoyamos la propuesta de Egipto de eliminar “*mitigate*” y la propuesta de Egipto y Palestina de añadir violaciones. Además proponemos agregar el establecimiento de obligaciones para las empresas transnacionales. El artículo 2.1.c quedaría de la siguiente forma:

c. To prevent and avoid (instead of mitigate) the occurrence of human rights violations (instead of abuses) in the context of business activities by establishing concrete obligations to respect human rights for TNCs, in addition to States’ obligations, and by creating effective and binding mechanisms of monitoring and enforceability.

También apoyamos la propuesta de Egipto para 2.1d, y rechazamos la de China. Además, con la preocupación de asegurar mejores resultados, la expresión “*strengthen*”, presente en el artículo 2.1.d, debe ser reemplazada por una semánticamente más fuerte como “*guarantee*”, que representaría un carácter más contundente para la prevención de las violaciones de derechos humanos perpetradas por las ETNs. En este mismo párrafo es importante unificar los términos y referirse siempre a empresas transnacionales y aquellas con actividad transnacional.

Por fin, apoyamos la propuesta de Cuba e Irán para el 2.1.e y tenemos acuerdo igualmente con las propuestas de Palestina e Irán en el mismo punto.

Muchas gracias.-

D. Article 3

1. International Organization of Employers

Thank you, Chairperson-Rapporteur. This intervention is a response to Article 3 of the Third Revised Draft Treaty, which deals with the “scope” of the draft treaty.

The text of this article is very short, but its impact is extremely consequential.

Ever since the start of this treaty process, the “scope” of this draft treaty has been particularly controversial. Indeed, earlier drafts sought to cover only multinational companies, leading to great disagreement.

This Third Revised draft, *on its face*, appears to broaden the scope to “all business activities, including business activities of a transnational character.”

However, *in practice*, this apparent broader scope would be undermined and severely narrowed by the very next sub-section in Article 3, which allows for States Parties to determine, via national law, which enterprises are actually covered under the scope of this treaty. Indeed, the States Parties can carve out these exemptions based on vague factors such as the enterprise’s “size, sector, [or] operational context.” Some of the proposals we heard from States Parties appear to intend to formalize these exemptions within the text of the draft Treaty.

The bottom-line is that the States Parties have a wide berth in picking and choosing which enterprises will be subjected to the onerous provisions of this draft treaty, including the almost impractical due diligence obligations, the wide-ranging criminal, civil, and administrative liability, and the broad extraterritorial jurisdictional provisions.

This is a recipe for States Parties to engage in calculated protectionist measures to protect their State-owned enterprises, as well as their local small-and-medium scale enterprises.

Some of the most egregious human rights abuses that the Draft Treaty seeks to address are committed by exactly these types of organizations. Indeed, in 2016, a UN Working Group published a seminal report³ to the HRs Council on the often-ignored role of State-Owned-Enterprises in human rights abuses, and how such abuses constitute a grave derogation of the States’ duty to protect against human rights abuses.⁴

Allowing States Parties to carve out such protectionist exemptions is in stark contrast to the UN Guiding Principles which applies to “*all* business enterprises, both transnational and others.”

Human rights victims have no preference as to whether their perpetrators’ operations are State-owned or private, domestic or global, and the proposed language would lead to absurd results. For example, where a State-owned-enterprise is in a joint venture with a private company, and the joint venture results in human rights abuses, only the private company would be held accountable.

Given that my time is up, I thank the Chairperson and the Intergovernmental Working Group for their kind attention to these serious concerns of the international employer community.

Thank you.

2. United States Council for International Business (USCIB)

- Thank you, Chair.

³ U.N. Human Rights Council, Rep. on the First Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an International Legally Binding Instrument, U.N. Doc. A/HRC/31/50 (Feb. 5, 2016).

⁴ Indeed, UN Guiding Principle 4 requires that “States should take *additional* steps to protect against human rights abuses by business enterprises that are owned or controlled by the State”

- While we agree that a State is responsible for determining how treaty obligations are fulfilled at the national level, we fear that the ability for governments to differentiate how and if certain businesses are subject to these laws will result in an uneven application of human rights protections
- All businesses, MNCs, micro and SMEs, State-owned enterprises, and so on may contribute to harms and all are bound by the UNGPs to respect human rights.
- Enhanced clarity is needed on what exactly constitutes a non-discriminatory basis on which to differentiate the obligations of business enterprises.
- Article 3.3 should reflect the language of the UNGPs item 12.

3. Women’s International League for Peace and Freedom

Thank you, Mr. Chair.

I speak on behalf of the Women’s International League for Peace and Freedom.

We have listened carefully to the proposals made by several delegations to limit art. 3.1 to transnational corporations and other business enterprises of a transnational character. In our view, doing so would be a major step back to ensure accountability of all businesses. While many provisions apply both to domestic and business activities of a transnational character, it is in relation to the latter that they have the most impact and added value. We hence concur with the comments made by our colleague from the ICJ and the ECCHR on keeping the approach taken in relation to the material scope of the draft in article 3.1.

The draft also importantly seeks to strike a balance by acknowledging in art. 3.2, 6.3 and 6.6 the possibility for States to exempt certain companies, including SMEs from certain obligations. These provisions could be further developed to alleviate the concerns of certain States regarding overburdening smaller companies. We reiterate however that all businesses regardless of size, sector or whether it is a public company must be held accountable for abuses under the LBI.

Thank you.

4. Joint statement on behalf of Centre Europe – Tiers monde, Friends of the Earth International and Asociacion Internacional de Juristas Democratas

Gracias, Sr. Presidente,

Mi nombre es Raffaele y hablo en nombre de CETIM, Asociacion internacional de juristas democratistas y Friends of The Earth International, y de la Campaña Global.

Antes de proceder al análisis específico sobre el artículo del ámbito de aplicación, es imprescindible recordar, una vez más, con el riesgo de ser repetitivos, que estamos hablando aquí del mandato de este grupo de trabajo, establecido por la Resolución 26/9. Un mandato que fue discutido y debatido a lo largo y a lo ancho, y al final aprobado por la instancia que es el Consejo de DH.

En el 3.1, es innegable que con la formulación del art. 3.1 *“This LBI shall apply to all business activities, including business activities of a transnational character”*, sumado al art.1.3, el texto se aparta del mandato original, como recordaron muchas delegaciones. Por tanto, como ya se ha dicho, es necesario armonizar a lo largo del futuro instrumento jurídicamente vinculante los términos utilizados al referirse a las ETNs y otras empresas de carácter transnacional, y no a todo tipo de empresa. Por todo esto, creemos y coincidimos plenamente con cuanto dicho por la delegada de Egipto hace poco y apoyaríamos la propuesta de este mismo país para el art. 3.1 que nos parece la más adecuada.

Aun así, y dado que una mayoría de estados presentes se han pronunciado de manera coincidente respecto de la necesidad de mantener el enfoque de este tratado en las empresas transnacionales y otras empresas con actividad transnacional, exhortamos a los Estados a buscar una propuesta coincidente en el sentido mencionado, que permita delimitar adecuadamente el ámbito de aplicación de acuerdo al mandato del Grupo de trabajo.

En el art 3.2, proponemos de uniformar el texto, sustituyendo “business enterprises” por “transnational corporations and other business enterprises of transnational character”. En este mismo artículo 3.2, apoyamos la propuesta de Palestina de sustituir la palabra “or” por “and”, lo que nos parece fundamental para reforzar la disposición.

En el párrafo 3.3, hay otra cuestión que nos parece muy importante. La frase “*binding on the State Parties of this (Legally Binding Instrument) to which a state is party*” crea una protección desigual de los derechos humanos de un Estado u otro según las normas internacionales que haya ratificado. Más aún, la expresión creará un problema jurídico importante porque ignora la realidad de determinadas normas internacionales que son obligatorias para la totalidad de los estados miembros de Naciones Unidas. Esto ocurre, por ejemplo, con determinados convenios de la Organización Internacional del Trabajo. Aquí podemos usar el ejemplo del Convenio 98 de la OIT que es aplicable a todos los Estados miembros de la organización incluso si aún no lo han ratificado.

Por último, el artículo 3.3 enumera los instrumentos internacionales de Derechos Humanos para definir los derechos cubiertos por el Tratado, consideramos que este listado es insuficiente y no recoge el acervo normativo necesario para garantizar la cobertura adecuada de los derechos humanos. Enviaremos una propuesta concreta por escrita.

5. Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR

3.1 [This](#) (Legally Binding Instrument) shall apply to all business [activities](#), including business activities of a transnational character.

3.2 Notwithstanding [Article](#) 3.1. above, when imposing prevention obligations on business enterprises under this (Legally Binding Instrument), [States](#) Parties may establish in their law, a [non-discriminatory](#) basis to differentiate how business enterprises discharge these obligations commensurate with their size, sector, operational context [or](#) the severity of impacts on human rights.

3.3 This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms [binding on the State Parties of this \(Legally Binding Instrument\), including those recognized 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 \(Panamas proposal\)](#) to which a [State](#) is a [Party](#), and customary international law. **This (Legally Binding Instrument) shall also cover all applicable obligations for businesses.**

We also support Panamas proposal on adding: and other international and regional environmental agreements after Fundamental ILO Convention.

Note 3.3:

In relation to scope, **Article 3**, the new draft means progress in clarifying that it covers all “binding” obligations for States, but it should also cover all applicable obligations for businesses by referring to “internationally recognized human rights that are applicable to business enterprises.” This would be consistent with the new item of purposes defined under the treaty: to ensure businesses respect their human rights obligations.

6. Joint statement on behalf of Friends of the Earth International and Institute for Policy Studies

Thank you very much Mr. Chair. My name is Juliette Renaud, I am speaking on behalf of Friends of the Earth International and the Transnational Institute, members of the Global Campaign.

The definition of Article 3 allows us to define the scope of the treaty, which is one of the most important components of the negotiations for a binding international instrument on transnational corporations and human rights. It is also indispensable to remember that the purpose of the treaty is to fill the gaps in international law and to regulate transnational

corporations. It therefore seems important to us to reach a consensus between the proposals made by the different countries in article 3.1.

However, the issue is complex as the term "transnational corporations" lacks a legal definition. Article 1, which was discussed yesterday, did not include this definition, but instead integrated the definition of "business activities with transnational character", with explicit mention of global value chains.

It is good that the treaty does not propose a definition of "transnational corporation", as it would be difficult or even impossible to group the myriad complex business relations that transnational corporations engage in under just one definition, creating the risk that many situations and companies would slip through the gaps, thus evading the treaty's obligations.

It should be recalled that there is no legal definition of Transnational Corporations; most institutional texts dealing with the relationship between these structures and human rights choose not to incorporate an exact definition. Thus, the OECD Guidelines for Multinational Enterprises recognise that "a precise definition of multinational enterprises is not necessary for the purposes of the Guidelines", a similar approach is found in the ILO Tripartite Declaration of Principles.

With regard to the first national legislations, such as the French law on duty of vigilance, we also note that the scope is defined by the number of employees or by their transnational activity, always oriented towards companies of a considerable size. Under this law, responsibility lies on parent and subcontracting companies (what we would generally call 'transnational corporations'), as this is where the main power lies and where decisions are made, but it includes the activities of all the company's entities (subsidiaries and controlled companies) and their value chain (subcontractors and suppliers) in the entire world, so in the end it covers all businesses with activities of transnational character.

We therefore consider it legally more appropriate to revert in Article 3.1 to the term "activities with a transnational character", which was defined in Article 1.

On the other hand, we would like to stress that the express exclusion of local businesses registered under domestic law, as proposed by several countries, can be very problematic. As you are well aware, global value chains are composed of a set of companies, transnational in character and, in the lower ranks especially, exclusively local in character.

Thus, the value chains of transnational companies are composed of subsidiaries, subcontractors and suppliers, which, legally speaking, are local companies registered under domestic law. In fact, this is one of the pillars of corporate impunity today: transnational corporations take advantage of the fact that the different legal entities that compose them or that are part of their global production chains are registered in different countries, with very uneven levels of legal protection of human rights and the environment, or with institutional weaknesses that allow transnational corporations to escape their responsibilities.

In this sense, we propose to permanently include an explicit mention of the value chain, to avoid that violations committed by national entities that are part of the chain of a transnational corporation fall outside the scope of the treaty.

Our concrete proposal for amendment is as follows:

This (Legally Binding Instrument) shall apply to all business activities, including business activities of a transnational character, **including the global value chains**.

Thank you very much.

7. Joint statement on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

I have a comment regarding Article 3.3.

As with the second revised draft, we cautiously welcome the extension of the scope of rights now covered in the LBI – which include fundamental freedoms emanating from the UDHR,

customary international law, and core international human rights treaties and fundamental ILO conventions to which a state is a party. Taken together, these instruments embody numerous labour rights, such as freedom of association and collective bargaining, equality and non-discrimination, forced labour, and child labour, wages, health and safety, social security and the limitation of working hours.

We had commented last year that any formulation that limits the coverage of *fundamental ILO Core Conventions* to those which a State has ratified would breach the principle of non-regression under international law due to the fact that the Declaration on Fundamental Principles and Rights at Work of 1998 requires ILO Member States to respect and promote the principles and rights contained in the ILO's Core Conventions by virtue of its membership in the Organization, regardless of ratification. While the third revised draft now makes a reference to the Declaration on Fundamental Principles and Rights, the language around Core ILO Conventions *to which a State is a party* remains. As this formulation still causes some confusion, we would recommend re-ordering Article 3.3. We have some language for this and our proposal would read as follows:

Article 3.3

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; and
 - e. customary international law.

Thank you, Chairperson.

E. Article 4

1. ESCR-Net

This statement is on behalf of over 280 ESCR-Net members.

In Article 4, we support the suggestion by the state of Palestine to add the word violations. We emphasize here that both State and non-State actors may be involved in business activities that undermine human rights - particularly in the context of transnational corporations. As such the inclusion of both abuses and violations in this Article is paramount and could offer further protection to victims and potential victims at a time when harmful business activities are on the rise to maximize profit making following the COVID-19 pandemic, particularly impacting Indigenous Peoples' rights and threatening our planet, land and mother nature.

As I address you today - our brothers and sisters in Guatemala are facing violence and threats of harm in a Mayan village located 315 kilometers from the capital, Guatemala City. Its inhabitants have been fighting for years against a local mining company, Compañía Guatemalteca de Níquel, a subsidiary of the Swiss company Solway Investment Group, which exploits minerals in their territory. Now the situation escalated in violence and the state is under siege. Similarly, in Kedong valley, the Maasai community is facing threats of evictions and human defenders arrested as they defend their indigenous land where they have lived for centuries as a result of transnational and national corporations; Akira 1, Standard gauge Railway and Kengen co. Ltd.

We want to emphasize that this Article is at the heart of the treaty process - we are here to bridge the gap that exists in the protection of Indigenous Peoples and other communities and individuals affected by business activities, particularly of a transnational character. We support suggestions by other members of our Network today to strengthen this draft Article.

Thank you.

2. FIAN International

Thank you Mr. President, I speak in name of FIAN International, and I would like to share the following considerations and suggestions:

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”**.

Regarding *Art. 4.2.f* we support the proposal made by the Delegation of Cameroon. It is particularly relevant for affected communities and individual to have access to information regarding the different legal entities linked to the parent company as to facilitate the determination of liability.

We also support Palestine’s proposal *4.2.f.ter*, since we have also realized the need to guarantee full participation, transparency and independence of affected communities in reparation processes such as in the cases of Brumadinho Dam Disaster in Brazil and POSCO land grabbing in India.

Moreover, we explicitly support Cameroon’s suggestion on 4.3 bis on precautionary measures because in many cases damages are irreparable and just through such measures the rights of affected communities can be fully protected, particularly on the case of environmental rights. Precautionary measures are already incorporated in many legal systems around the world, including regional mechanisms, such as the Inter-American one, and in the Individual complaint mechanisms of the UN Treaty Bodies.

3. Franciscans International

Thank you Mister Chairperson,

I will be very brief since many of the points we wanted to make have already been made by colleagues and by coalitions and networks we are part of.

I would like to first make a general comment. We note that some States and business representatives talk about a too prescriptive paragraph while others, to which we belong, think that this article is a reaffirmation of existing standards, well covered by international law. Some parts could even seem tautological, to say that victims shall enjoy all human rights. Of course they do as all rights-holders.

Having said all of that, each paragraph and subparagraph is adding useful details or elements applied to the specific context of our negotiation here. In that regard, we would agree with the proposal made by our colleague from ECCHR to consider changing the title to reflect better the content and include access to justice.

It is surely important to recall the guarantee of all human rights to victims at the beginning of the article. But we would agree with our colleague from the ICJ that opening a list of some rights in article 4.2 b may not be very useful as it is redundant and may give the impression that some rights are more important than others.

Let me go now to and finish with my more specific point on article 4.2.f concerning the right to access information. This is undoubtedly a crucial point in here and needs to be maintained and even strengthened.

The right to access information is enshrined in various international instruments, at the global and regional levels, and jurisprudence. In particular, article 19 of the ICCPR requires to guarantee the right to access information held by public bodies. Which, in turn, should mean that these bodies should have themselves necessary information and control over key documents through their duty to protect human rights and to regulate the activities of companies that impact human rights and the public interest. We could propose some wording in line with this but we note that States have made several proposals in that respect.

We thus support all proposals made by distinguished delegates that aim at increasing accessibility of information, including through adding gender and age responsive and sensitive approaches, as well as in different languages.

We also welcome the proposals made by the distinguished delegate of Cameroon to strengthen the article 4.2f. We note that the text is a bit heavy now with all the details. So we would propose that while not losing any of the important elements of Cameroon's proposal, some of them could be placed in other relevant articles such as article 6, if that might be useful.

I thank you

4. International Commission of Jurists

Article 4: Rights of victims

Article 4 sets out a list of rights of victims of human rights abuse which need to be protected. This list reflects and builds on 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.

This article is to be read in conjunction with the current article 5 and 7, which restate in a modified way parts of the standards originating from those existing UN instruments, which should also be recognized in the Preamble. Although already existing, the 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 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 require amendment. 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:

"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)"

Support Panama's and other states' proposals to ensure 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."

5. International Organization of Employers

The third revised draft treaty continues to focus on the rights of those making claim but ignores the rights of those who may have claims lodged against them, such as fundamental due process and confidentiality rights.

With regards to d): This text foresees the possibility of collective redress/class actions. However, the introduction of group lawsuits against companies is not a concept that is recognized in many legal systems.

With regards to f): The rules on legal aid must, on the one hand, ensure that the 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 not to include. Furthermore, “access to information” should be tempered with an effective recognition of the vital importance of the confidential nature of certain information.

6. United States Council for International Business (USCIB)

- Thank you Chair
- Many states have called for alignment with the UNGPs, and business has made this urgent call as well.
- States in the room have also pointed out that this unclear text contains concepts which are not universally recognized, risking further confusion and lack of consensus.
- As was explained earlier, paragraph 4.2.c inappropriately seeks to guarantee access to justice, while the UNGPs position access to judicial and/or non-judicial remedy as foremost. Justice encompasses specific national-level legal mechanisms. Therefore, this LBI should seek to provide access to remedy first.
- Moreover, the list of potential remedies should be explicitly described as examples.
- The right to legal aid is very important in ensuring alleged victims of human rights abuses have access to remedy and justice. However, there must be clearly defined pre-conditions that must be met in order to receive legal aid. Without such necessary factors, this LBI may actually facilitate frivolous or bad faith claims, further delaying remedy and justice for actual victims.
- Additionally, Article 4.2.f should recognize that certain information is confidential and must be protected from public disclosure.
- We propose an additional provision within this article that articulates the rights of a business or person, should a claim be brought against them. Defendants are themselves entitled to due process, the presumption of innocence, equality, etc.
- Finally, and most importantly, this Article and the LBI as a whole, provides no guidance on instances in which the state cannot fulfill its duty to protect victims from human rights abuses, nor when the state is itself a perpetrator of harm.

7. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Broedelijk Delen, CAFOD, Entraide et Fraternité, Fatenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll, Trocaire, Alboan and Justice and Peace Belgium

Thank you Mr. Chair,

I would like to make this statement on behalf of CIDSE, CCFD-Terre Solidaire, Broedelijk Delen, CAFOD, Entraide et Fraternité, Fatenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll, Trocaire, Alboan and Justice and Peace Belgium.

First of all, we would like to support the proposal by Palestine on article 4.1., which would read as follows:

Art 4.1 - Victims of human rights abuses **and violations** in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms

Then, we want to stress that we strongly reject the proposal by the delegations of China and Brazil with regards to the rights enjoyed by victims. We would like to recall the principle of universality, indivisibility and inalienability of human rights.

Lastly, we support Palestine's proposal for an additional sentence at the end of Art 4.2.d. Indeed, while access to non-judicial remedy should be available, we believe Art 4.2.d should be strengthened by specifying that right-holders' right to access non-judicial grievance mechanisms should not infringe upon their right to seek remedy through the judicial System. Article 4.2.D should thus **end** as follows:

“and that their right to submit claims to non-judicial grievance mechanisms shall not infringe upon their right to access judicial mechanisms.”

Thank you Mr. Chair

8. **Joint statement on behalf of Corporate Accountability International and Friends of the Earth International**

Gracias, sr. Presidente. **Me llamo José Luis Gutiérrez Aranda y hablando en nombre de Corporate Accountability, Amigos de la tierra y de la Campaña Global, presentamos las siguientes consideraciones:**

Desde la campaña global queremos remarcar la necesidad de superar la vieja visión liberal, en la que prevalece la persona considerada de forma individual como sujeto de derecho y adoptar un enfoque que integre a los sujetos colectivos, fundamentado entre otras razones jurídicas en el Pacto de Derechos Económicos, Sociales y Culturales.

Así, es ya imprescindible hablar de violaciones de derechos de comunidades, que son un conjunto determinado de personas que tienen algún rasgo o interés común que las distingue de las demás.

De igual manera es necesario evitar circunscribir esta protección a las personas o comunidades declaradas jurídicamente como víctimas, sino ampliar la redacción para asegurar la garantía de los derechos a individuos y comunidades amenazadas o afectadas por daños corporativos, incluso cuando no hayan sido declaradas víctimas.

Por este motivo, consideramos que el título de este artículo está incompleto y proponemos cambiarlo por el siguiente: *Rights of Affected Individuals and Communities/Right of victims*. Los cambios respectivos deben incluirse a lo largo del artículo, cambiando la palabra víctimas o agregando el término personas y comunidades afectadas.

Ya respecto del contenido del artículo, manifestamos en primer lugar nuestro **apoyo a la propuesta de Palestina de añadir el término de “violaciones”, así como sus diferentes propuestas de enmienda del 4.2a, 4.2c, 4.2d.**

Rechazamos la propuesta de enmienda al artículo 4.1 de algunos países, como Brasil y China, que pretenden limitar la protección de los derechos de las víctimas o comunidades afectadas a aquellos derechos reconocidos por los tratados internacionales ratificados por los países firmantes del instrumento. Esta propuesta desconoce el alcance universal de los Derechos humanos que, de acuerdo con la Convención de Viena debe superar el particularismo nacional o regional para alcanzar una aceptación universal. Aquí, vale la pena recordar a los Estados, el carácter erga omnes de estos derechos, cuya obligatoriedad no depende de la ratificación o incorporación en el derecho nacional.

En cuanto al artículo 4.2, desde la Campaña Global entendemos que el derecho al acceso a la información debe ser elaborado más a fondo para incluir requisitos más estrictos para la divulgación de información a fin de facilitar los procedimientos legales. En particular, las comunidades e individuos afectados deben tener acceso a la información sobre las diferentes entidades legales vinculadas a la empresa matriz para facilitar la determinación de la responsabilidad. **En este sentido, apoyamos la propuesta hecha por Camerún en 4.2.f.**

Apoyamos igualmente la propuesta de Camerún de párrafos adicionales 4.2f ter para garantizar el acceso a mecanismos independientes imparciales para enfrentar situaciones de violaciones de derechos humanos, y **el 4.3bis sobre el derecho de las comunidades afectadas a exigir de los Estados medidas de precaución.**

Por otro lado, la propuesta de Palestina 42f.ter de diferenciar las víctimas por el nivel de abusos, puede dejar una brecha para criterios aleatorios y en disconformidad con los instrumentos internacionales de protección de los Derechos Humanos

Muchas gracias Señor Presidente.

9. Joint Statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR

4.1.: Victims of human rights abuses 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 taking in to account the best interest of the child.**

4.2: Without prejudice to [Article 4.1.](#) above, victims shall:

- a. be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured;
- ~~b. be guaranteed the right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement;~~
- c. be guaranteed the right to **accessible**, fair, adequate, effective, prompt ~~and~~, non-discriminatory, [appropriate and gender- and age-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 **and the right to the truth.**
c. bis be generally guaranteed the right to a judicial remedy, which must be available without exception in case of gross human rights violations or abuses and serious violations of international humanitarian law;
- d. 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 StateStates Parties;
- 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. be guaranteed access to information **in relevant languages and accessible formats to adults and children alike, including those with disabilities**, and legal aid relevant to pursue effective remedy

Thank you Chair for taking our proposals into consideration!

10. Joint statement behalf of FIDH, Feminist for a Binding Treaty Coalition, ESCR-Net , Manushya Foundation, FI

Thank you M. Chairperson,

I am delivering this statement on behalf of FIDH, Feminist for a Binding Treaty Coalition, ESCR-Net , Manushya Foundation, FI

Mister Chairperson,

This article refers to a broad range of rights and protections which already exist in international law and should be guaranteed not only to victims of corporate abuses but to all individuals. A change in title to Article 4 from “Rights of Victims” to “Right to Effective Remedy” and use of the term “rights-holders” instead of “victims” would clarify this point.

We also recommend adding in article 4.1 after the word “abuses”, “and violations.” This is essential with regard to the accountability of the State or its agents in the context of business activities. We would also like to oppose changes to the Article suggested by Brazil as it may limit the international standard of protection under this Article.

In Article 2.4. (b) we suggest to add “including” after be guaranteed, and add a reference to the right to a healthy, clean and sustainable environment.

We welcome the changes in Article 4.2. (c) in line with a broad understanding of the right to access to justice and to reparation, as outlined by the Inter-American Human Rights system, underlining that the listed forms of remedy are not limited. To fully align with this wording article 4.2 should also include that rights-holders shall “be covered of expenses for relocation of victims, replacement of community facilities, comprehensive emergency assistance and long-term health monitoring”. We also welcome the addition in Article 4.2. (c) the concept “gender-sensitive” access to justice.

Article 4.2.b

As such, to overcome specific barriers to access to justice, article 4 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. In particular, regarding the different legal entities linked to the parent company as to facilitate the determination of liability. along the lines of [rights holders shall]:

“be guaranteed, through mandatory disclosure laws, procedural rules on evidence and other appropriate measures, access to information necessary for the pursuit of truth and remedies. This shall include but not be limited to information on corporate structures and networks, including legal relationships and allocation of responsibilities among different entities within these structures and networks, key corporate decisions concerning or with an effect on human rights and their supporting documentation such as internal and external inspection reports, risk assessments and expert or scientific reports and advice and information relating to the nature, extent and scope of harm held by the accused or defendant business enterprise [...] . This information shall also include proposed reparations measures when these are being pursued or negotiated on victims’ behalf”

Furthermore, specific references included in article 6, to the obligation to publish human rights, labour rights, environmental and climate change impact assessments Art. 6.4 (a)), and the obligation to report publicly and periodically on environmental and climate change standards (Art 6.4 (e)) would be better placed under article 4 instead of article 6, to complete clarifying these are primary obligations of the States as established by other international human rights instruments.

Thank you

11. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

I have a comment on Article 4.2(c).

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 the non-exhaustive list of remedies contained in this Article should include **apologies (both public and private)** and, most importantly for us, **reinstatement in employment**.

Chair,

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.

Therefore, our recommendation is to include the terms *reinstatement in employment and apology* after the term *compensation* in the list as it stands now.

I would like to deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Broedelijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll, Trocaire, Alboan, Justice and Peace Belgium,

We suggest specific amendments to Article 5 to clarify that human rights and environmental defenders need to be explicitly protected in the LBI, and we need to further concretise the respective state obligation.

First, the title of Article 5 should not only refer to the protection of victims, but also include human rights and environmental defenders, because it seems human rights and environmental defenders are not victims in the meaning of Article 1.1. of the LBI.

It is therefore suggested to change the title into

“Protection of victims and human rights and environmental defenders”

and to **include the term “human rights and environmental defenders” in Article 5.2.** of the LBI to make the reference explicit.

In addition, the LBI should better clarify the obligations of states to protect human rights and environmental defenders.

In drafting such a provision, inspiration could be taken from the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the so-called Escazú Convention) which entered into force in April 2021. Based on Article 9 of the Escazú Convention,

Article 5 of the LBI could be amended with a special article on human rights and environmental defenders in a business context. Such a provision could be worded as follows:

“5.3. States Parties shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights and environmental defenders may suffer while exercising their human rights.”

Thank you Mr chair.

F. Article 5

1. Asia Task Force, and members of the Global Campaign

I speak on behalf of the Asia Task Force, and members of the Global Campaign.

Articles 4 and 5 in the proposed text for a legally binding instrument (LBI) on the Rights of Victims and Protection of Victims are of crucial importance to communities that have been severely impacted by corporate abuses and violations, and who for many years have continued the struggle for accountability and justice.

We reiterate the proposal of the Global Campaign and other networks to reflect on these Articles Victims and affected communities. We underscore the demand for the future treaty to recognize that when we speak of victims of corporate abuses and rights violations, that we should consider all individuals and communities threatened or affected by corporate harm, even if they have not yet been declared as victims.

We reject the view advanced by big business that a person or a community only becomes a victim after the alleged harm is proven in court. This view is a clear obstacle to affected communities seeking to access remedy and justice. We believe that the treaty should, and this is the spirit of both Articles 4 and 5, make it easier for affected communities to gain access to adequate, timely and effective remedy, and access to justice. The burden should be on

corporations who have inflicted the harm, and not on the victims of these abuses and violations.

We advance again the proposal of the Global Campaign for an Amendment to Article 5.2:

States Parties shall take adequate and effective measures to guarantee all rights, including 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.

In the context of affected communities in Asia, re-victimization has become the norm, where access to remedy and justice has become a generational struggle rife with obstacles.

The protection of victims and affected communities as defined in Article 5 is vital in order to ensure that victims and affected communities are able to secure access to remedy and justice for abuses and violations committed against them in light of the re-victimization, and the intensifying attacks against victims and affected communities seeking accountability and justice.

2. European Center for Constitutional Rights

Thanks Mr. Chair for providing the floor.

On Art. 5.2. it contains protections for different groups and could 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 as proposed by the honorable delegates of Panama / South Africa. Article 5.3 propose to move under article 7 due to its procedural nature.

Finally, Art. 5.3., due to its procedural nature could be considered under Art. 7.

Thank you very much,

3. Feminists for a Binding Treaty

Thank you Mister Chairperson. I speak on behalf of the Feminists for a Binding Treaty.

In Article 5(2): We recommend this be amended to provide explicitly that States Parties’ measures to guarantee a safe and enabling environment for human rights defenders be ‘gender-responsive’ in addition to being adequate and effective. While women human rights defenders are exposed to similar risks as other defenders, they also face additional gender-specific threats and violence and a higher risk of being subject to prejudice, exclusion, and stigma than their male counterparts.

Finally, in line with our general position on the text, we recommend adding after “abuses”, “the term “violations” in 5.3 as States should investigate both abuses committed by business and violations committed by the State itself or its agents.

4. FIAN International

Thank you Mr. Chair. I speak on behalf of FIAN International and I would like to share the following suggestions for your consideration.

In order to ensure consistency in language with our comments on article 4 regarding the use of the word “victim”, it is proposed that article 5 be amended as follows:

“Article 5 – Protection **of affected individuals and communities**

*1. State Parties shall protect victims, **affected individuals and communities**, ...*

*2. State 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 States Parties’ international obligations in the field of human rights, their constitutional principles and the basic concepts of their legal systems.***

We apologize for not reacting in time regarding a proposal concerning article 4, but due to its relation to the current article, we would like to address it at this moment. In this sense, we 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. This mechanism is already established in many legal orders around the world and could be included in this article, if not maintained in *article 4-2.d*. As known, many of the violations are collective and such measures might facilitate judicial procedures and the rights of affected communities.

Besides, we would like to reemphasize that assuming the U.S.’ proposal would imply discarding all contributions that affected communities and their representatives have made during this process to overcome all the barriers regarding prevention, justice and effective remedy. Public International Law is prescriptive, and as stated by the Mr. Chair President on the first day, the objective of International Law is to implement and/or correct insufficient national law.

We would also like to oppose China’s proposal to delete “prior” from *Art. 5.1*. It is important that affected communities and individuals are also protected *before* the proceedings, when they are most vulnerable to access justice. If they are not protected before, their access to seek access to effective, prompt and adequate remedy might be impeded.

Finally, we would also like to support Panama’s comment on including ‘harassment’ and ‘reprisal’ in *Art 5.2*.

Thank you, Mr. President.

5. International Commission of Jurists

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). If the definition of “victims” includes also reference to representatives, families and witnesses, this art 5.1 becomes superfluous.

It also contains in 5.2. 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 Art. 5 (2) we support the proposal by Panama and South Africa to integrate “harassment and reprisals” at the end of the provision to protect victims, human rights and workers’ rights defenders against such conduct by businesses and States.

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. 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 clearly linked to access to remedy and to justice for the victim and consideration should be given placed under article 7 (Right to an effective remedy).

6. Joint statement behalf of CIDSE, CCFD-Terre Solidaire, Broedelijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll, Trocaire, Alboan, Justice and Peace Belgium

I would like to deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Broedelijk Delen, CAFOD, Entraide et Fraternité, Fastenopfer, Focsiv, KOO, DKA Austria, Misereor, Maryknoll, Trocaire, Alboan, Justice and Peace Belgium,

We suggest specific amendments to Article 5 to clarify that human rights and environmental defenders need to be explicitly protected in the LBI, and we need to further concretise the respective state obligation.

First, the title of Article 5 should not only refer to the protection of victims, but also include human rights and environmental defenders, because it seems human rights and environmental defenders are not victims in the meaning of Article 1.1. of the LBI.

It is therefore suggested to change the title into

“Protection of victims and human rights and environmental defenders”

and to **include the term “human rights and environmental defenders” in Article 5.2.** of the LBI to make the reference explicit.

In addition, the LBI should better clarify the obligations of states to protect human rights and environmental defenders.

In drafting such a provision, inspiration could be taken from the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the so-called Escazú Convention) which entered into force in April 2021. Based on Article 9 of the Escazú Convention,

Article 5 of the LBI could be amended with a special article on human rights and environmental defenders in a business context. Such a provision could be worded as follows:

“5.3. States Parties shall take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights and environmental defenders may suffer while exercising their human rights.”

Thank you Mr chair.

G. Article 6

1. Centre for Constitutional Rights

We strongly support the recommendation by Palestine for paragraph 6.4 d bis.

On paragraph 6.8, we also support the position of Palestine, particularly the evolution for this third draft of the text through the insertion of the word ‘any’ to this provision.

In doing so we note the strong connection between human rights violations and undermining of the independent authority of nation states to make law and policy decisions by corporations. As one strong example of this we recall the many mentions by states and civil society organizations in many of this Working Group’s sessions of the serious violation of the right to health arising from tobacco corporations’ interference in state policy and law making. Another present example is the undermining of passing into the law the US Biden Administration’s climate agenda in part due to the earnings being made by the family members of a key US Senator from stocks held in coal corporations.

Finally, a general concern we would like to convey to the Chair and this Working Group is the threat to the process itself from corporate influence, as we have already seen some years ago when some corporate representatives still involved in this process threatened states in this room with divestment if they stayed active in the Working Group. For this reason we would welcome the Chair elaborating a set of safeguards for the process from corporate influence in the intersessional period.

2. Corporate Accountability International

Mr Chairperson,

Thank you for the opportunity to speak.

Throughout this process, members of civil society representing a broad consensus across the coalitions supporting this process, have repeatedly emphasized the danger of corporate influence to this process and the implementation of a future treaty.

Corporate opposition to this treaty is to be expected, because the aim of the treaty is to hold transnational corporations accountable to systemic and widespread human rights abuses that are the result of huge gaps in current legal standards, implementation and political will—as well as widespread corporate capture. **As such, corporate interference in this process is perhaps the single largest threat to the success of this treaty.**

It is pure fantasy to suggest, as industry and some states – notably the US have -- that we need consensus or agreement WITH industry in order to implement this treaty. First, in terms of the different obligations of States vs. corporations, States hold the responsibility to regulate in the public interest, and that this does not require consent from all parties – especially those involved in perpetuating crimes or injustices. Secondly, history has shown that attempts to persuade or convince industry to improve their record on human rights, have fallen dramatically short of the goal. **Voluntary standards have not worked.** Thirdly, because of the tremendous power and influence of corporations, the best model we have for effectively regulating industries is, in fact, to exclude the industry from the development of relevant policymaking processes – as was done in the Framework Convention on Tobacco Control.

For this reason, I commend the inclusion of language modeled on that treaty in article 6.8. As a member of the Global Campaign, I support the proposal of the Global Campaign on how to improve the text, and my main recommendation would be to make this concept a free standing article so that it applies to the whole of the treaty, since it is not only related to prevention, but also to implementation and many other aspects of the treaty.

Thank you Chair.

3. ESCR-Net

Thank you Mr Chairperson,

This statement is on behalf of over 280 ESCR-Net members.

In the spirit of Article 6 on prevention, we wish to highlight that 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.

Thank you.

4. International Commission of Jurists

Monsieur le Président,

La prévention est l'une des composantes les plus critiques de tout système de protection des droits de l'homme et est devenue, à juste titre, un élément proéminent du traité proposé.

Le paragraphe 2 prévoit ici l'inclusion du processus de diligence raisonnable, élément central du 2ème Pilier des Principes Directeurs, ainsi qu'aux intérêts de certains gouvernements et parties prenantes. Cependant, ce processus ne devrait pas être limité à la diligence raisonnable

seule, puisqu'il implique des actions plus extensives que celles prévues par les Principes Directeurs.

Concernant le paragraphe 3, la CIJ relève qu'il serait préférable que sa formulation se rapproche de celle des principes directeurs 17, 18, et 19, tels qu'approuvés par le Conseil des Droits de l'Homme, et recommande que toute proposition d'élément supplémentaire soit contenu dans le paragraphe 4. Les éléments récemment ajoutés à ce paragraphe apparaissent comme étant déjà inclus dans l'article 6, mais auraient, selon nous, besoin d'une approche plus cohérente. En effet, certaines lacunes persistent quant au degré de participation et de consultation des travailleurs et autres parties prenantes avec les entreprises multinationales, mais également sur le degré de transparence concernant l'organisation et la structure de celles-ci. À titre d'exemple, nous manquons toujours de visibilité quant aux pratiques lobbyistes, l'attribution des licences, phénomènes de « porte tournante », ainsi qu'aux dons octroyés aux partis politiques. Nous demandons également plus de visibilité quant aux mécanismes de vigilance, d'exigibilité, et de sanctions pour manque de conformité.

La CIJ réitère sa recommandation d'ajouter une attention spécifique aux droits des individus issus de groupes en situation de vulnérabilité, y compris les enfants, quant à l'évaluation d'impact dans le nouveau paragraphe 4 (a). Une référence aux "droits de l'enfant" devrait y être ajoutée, et, je cite, "et les filles" devrait être ajouté après la mention de "femmes impactées" au sein du paragraphe 4 (b).

Pour finir, il conviendrait également d'ajouter au sous-paragraphe 6 (c) ou (d) que, je cite, "les consultations avec les enfants doivent être menées conformément au principe du droit de l'enfant d'être entendu."

Merci Monsieur le Président.

5. International Organization of Employers

Chair

I would like to make 5 points

1) We see again efforts to focus only on transnational companies. As said numerous times before, it would mean that the legally binding instrument is not in line with the UN Guiding Principles and would not create a level playing field. Let me give you a very practical example. Just imagine two mines, which are 10 kilometres away from each other. One mine is operated by a purely domestic company and the other mine by a transnational company. The text as it stands at the moment would mean that the latter mine is in the scope of the treaty, but not the first one. Thus, workers and communities of the mine which is operated by the transnational company would benefit from all the due diligence requirements and access to remedy, but not the stakeholders of the purely domestic mine. In effect the treaty would establish a two-tier system, where one group of workers and communities is better protected than the other one. This cannot be in the interest of anyone.

2) On Due Diligence: Through the many amendments we moving further away from anything which is implementable, which is in line with the UN Guiding Principles, and which is consensual. For that reason we need to step back and see what is in the UNGPs.

3) On 6.3 what we should do is to focus on UNGP 15, which outlines what is needed for prevention: policy commitment, due diligence and remediation. We should then include UNGP 17, which clearly outlines what due diligence means. This due diligence concept of the UNGPs were incorporated into the OECD MNE Guidelines and other instruments. Thus, focusing on the wording of UNGP 17 creates policy coherence, which is of utmost importance.

4) On Art. 6.4, we need to incorporate the wording of UNGP 21, which clearly outlines what are the requirements for being transparent. The aim of all this proposal is to create policy coherence on all these issues.

5) On Art. 6.8. This Article 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 tripartite discussions that are embraced by the ILO and other UN agency approaches to consultation and dialogue. This paragraph must be **omitted**.

6. United States Council for International Business (USCIB)

- Thank you Chair
- With respect to Article 6.3 we support the comments made by the distinguished delegate from the United States
- We too question whether this instrument and its provisions mandating that and how due diligence is conducted constitutes progress and advances our shared goal of promoting human rights in the context of business activities
- So while we agree that due diligence is an essential component of responsible business conduct, we also believe that the nature of respecting human rights through due diligence exercises requires a degree of flexibility to innovate impactful solutions
- Furthermore, we do not agree with delegations that would prescribe a “cut and run” approach where the possibility for capacity building to respect human rights is possible
- On article 6.4, we recommend replacing 6.4 with the text from UNGPs principle 21 regarding accounting for how a business addresses their human rights impacts through external communication.
- We agree with the states who commented on the overly broad text in Article 5, and Article 6.4 is regrettably ambiguous as well. Terms like “potential” and “meaningful” are overly subjective and legally imprecise. They should be clarified or deleted.
- Where States do not have standards on environment and climate change, is it the expectation that any actor – including business - will be able to predict what a State may or will enact at some future date?
- Given the impracticality of such a scenario, given the fact that states are at varying stages of adopting their own national-level standards, and given the fact that the terms “environmental” and “climate change” are not defined in international human rights law,
- they should be deleted because they add uncertainty as to the scope of rights subject to the treaty, and increase the likelihood even further that the text will not secure the broad and cross-regional consensus that so many governments have called for at this meeting.
- Finally, paragraph 6.8 should be deleted. States parties should always act in a transparent manner, but this is not mutually exclusive from entering into constructive and meaningful dialogue with the business community.
- Businesses are recognized as legitimate actors with an important role to play in the development and implementation of human rights policies. This is a fact illustrated by employers being designated as a formal constituents at the ILO since its founding over 100-years ago in 1919.
- Business is a recognized and valuable participant which is welcomed in an inclusive manner in other UN and multilateral organizations as well.

Thank you.

7. Joint statement on behalf of ActionAid Netherlands, Afrewatch, Al-Haq, ECCJ, FIDH, IUCN Netherlands, Lawyers for Human Rights (South Africa), Manushya Foundation, SOMO, WILPF, and WO=MEN

Thank you, Mister Chair. I make this contribution on behalf of ActionAid Netherlands, Afrewatch, Al-Haq, ECCJ, FIDH, IUCN Netherlands, Lawyers for Human Rights (South Africa), Manushya Foundation, SOMO, WILPF, and WO=MEN.

We welcome the general direction in which the draft text has evolved.

With the aim of further clarification of the text, and to prevent misinterpretations and inconsistencies in the implementation of the instrument by the States Parties, we would like to suggest the following changes to article 6 on prevention:

- Articles 6.1 and 6.2 contain significant overlap and we would suggest merging those provisions.
- We strongly support Mexico, Palestine, and Panama’s suggestion to delete references to mitigation of abuses in articles 6.2, 6.3.b, and 6.3.c. 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, we ask Panama, Mexico and Palestine to 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.
- 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 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, 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.
- 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.

Overall, the text of Article 6 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 address 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 licenses or conducting commercial transactions with businesses.

Finally, the word “severe” was removed from art. 6.3 so that all human rights abuses now fall within the scope of the treaty. We welcome this change.

Thank you, Mister Chair.

8. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, Maryknoll

Mr Chair,

Yesterday, the Financial Times reported that Apple is opposing a petition by its shareholders to ask for more transparency on forced labour in its supply chain. This goes to show that we’ve run out of carrots, Mr Chair. It is now time for sticks.

Article 6 on prevention is one of the crucial articles in this text. We believe the current formulation is a slight advancement compared to the previous draft. We do not share the comment of the Brazil delegation and others who are concerned about the level of details. **Where others lament prescription, we welcome clarity, guidance and precision.**

We are surprised by the United States' comments regarding voluntary approaches, which the article is in line with. Voluntary due diligence guidelines are not new, yet they have bluntly failed. **We are way passed companies needing encouragement and are now at the point where they need clear obligations.**

We would like to suggest a few improvements to go beyond the prevention element, and to effectively **recognize the primacy of human rights over economic interests.**

Mr Chair,

Companies should not only have a responsibility to prevent, but also to **cease and redressing** adverse impacts when they have caused or contributed to them.

Adverse human rights impacts should only be **mitigated** when it is not in the capacity of a business, but of another over which it has not control, to cease them **entirely**.

In order to operationalise this principle, Article 6.3.b on due diligence should be rephrased as suggested

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

In its current form, Art 6.4 remains overall vague on the issue of communities' consent to the presence of business activities that might negatively affect them or their territories.

Free, prior and informed consent (FPIC) is mentioned for indigenous communities, but 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.

Additionally, 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.

The **beginning** of Article 6.4 should therefore be amended as follows:

Art 6.4. - Ensuring that consultations with indigenous peoples 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.

To ensure that the consent of all affected communities is always a requirement, a new letter should be added following Art 6.4.d:

Art 6.4.e - Ensuring that right-holders who may be affected by the negative human rights impacts of business activities have a right to express their consent or lack of thereof, and that denial of consent constitutes a sufficient basis for preventing or ceasing the business activities.

Moreover, a new letter in Art 6.4 should explicitly mandate States to require companies to include, in their due diligence assessments, the risks of abuse arising from their own **security forces** or from the security forces they may hire. Thus, a new letter in Art 6.4 should read:

Art 6.4.x – Reporting on the provision of security for their operations, regardless or whether they are directly employed by the company, hired, or through other arrangement.

Thank you Mister Chair.

9. **Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR**

We propose to reinstate the word all before appropriate and a new Art. 6.2 bis: It would mean that the system is not relying overly on a liability regime but establish additional measures such as robust legislative and administrative frameworks to enforce children's rights at the outset.

Therefore we propose to include: 6.2. States Parties shall take **to include all** appropriate legal and policy measures to ensure **to include here that their domestic legislation reflects their international human rights obligations and** that business enterprises

Our proposal for a new Art 6.2 would be: **New Art. 6.2.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.**

At 6.4 we propose to pay special attention to individual in vulnerable situations such as children – therefore we propose to include at 6.4

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

at b. to include Integrating a gender perspective, in consultation with potentially impacted women **add and children** and women's **and children's** organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts **experienced** by women and add **children**;

d. **add at the end of the sentence and that consultations with children are undertaken in accordance with the principle of the child's right to be heard.**

e. **add after human rights, including children's rights,**

Thank you chair for taking our proposal into consideration.

10. **Joint statement on behalf of Feminists for a Binding Treaty and ESCR-NET**

First, In regard to 6.1, "We look favorably to the proposal by Palestine for a 6.1 ter on precautionary measures."

In regard to Article 6.2, we would like to suggest editing the text so that it reads in part "respect internationally recognized human rights, **avoid and** prevent human rights abuses and **violations** throughout their business activities and relationships." The term "mitigate" would be deleted as abuses should be prevented, not mitigated. The word "avoid" is added in line with 6.3(b), as well as the term "violations" of human rights.

In 6.3(a), We recommend adding, at the beginning, "**In partnership with potentially affected communities and individuals, identify, assess and publish in an accessible manner**"

We agree with Mexico regarding 6.3(b) that abuses should not be mitigated but prevented. We however suggest retaining "avoid" (so that it reads "take appropriate measures to avoid and prevent abuses." In that regard, we also support Palestine's remark on adding a sentence in 6.3 b on situations where mitigation of risks is impossible such as in certain contexts of conflict.

In Art. 6.3(d), we suggest adding to the text so that it reads, "Communicate regularly and in **a public, appropriate, and accessible manner to the public and stakeholders, including gender-responsive consultation with local and indigenous communities**"

With regard to Egypt's proposal, we would like to ask, through you Mr. Chairperson-Rapporteur, for a clarification as to whether it seeks to replace the whole 6.4 with Egypt's

proposed text. If that's indeed the case, this would effectively delete the important subparagraph 6.4 b) about integrating a gender perspective. We urge all delegations to keep the text of 6.4 b) as drafted and with Panama's addition of the word "age".

The issue of immitigability should be reasserted in Article 6(4)(g), with an additional emphasis in relation to compliance with international humanitarian law, so that it reads:

"Adopting and implementing enhanced **and ongoing** human rights due diligence measures to prevent human rights abuses in eonflict-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.**"

We regret that the role of the State as an economic actor is still not addressed in the text including under article 6. We suggest adding a new Art. 6(5)bis, which would read: "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)."

11. **Joint statement on behalf of FIAN International, Franciscans International, Indigenous Peoples Rights International, and Tebtebba Foundation**

Thank you Mr. Chair. I speak on behalf of **FIAN International, Franciscans International, Indigenous Peoples Rights International, and Tebtebba Foundation**

We support the proposal of Palestine including States obligation to adopt precautionary measures in line with the proposal of Cameroon on article 4.4

In line with the proposals from Mexico and Panama, we suggest deleting reference to 'mitigation' in articles 6.2 and 6.3b and 6.3c. Prevention and not mitigation should be at the core of human rights due diligence. As mitigation can be more convenient than prevention for certain transnational corporations and other business enterprises, there might be preference 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.

As has already been stated by other delegations with regard to article 6.4, we propose that both impact assessments and consultations in Art 6.4.a and Art 6.4.b **are carried out both ex ante and ex post and 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.**"

We also support Egypt's proposal to include peasants and other people working in rural areas as a group requiring special attention in Art 6.4.c and add that article 6.3 clarifies that this list of human rights diligence measures is non-exhaustive.

Concerning human rights due diligence requirements in occupied or conflict-affected areas, we support the proposal of Palestine, to ensure stronger protection of communities in such areas.

We also support the additions proposed by Cameroon in article 6.8 on corporate capture. Over the sessions, civil society has brought forward numerous cases demonstrating the negative impact of undue influence and corporate capture by business actors, in standard-setting, monitoring and accountability processes. This for example has been one of the hurdles faced in processes aiming to regulate the marketing of ultra processed edible product, especially when trying to protect the right to food of children and to prevent non communicable diseases as diabetes and obesity.

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. We therefore consider that the proposals by the delegation of Cameroon in Art 6.1 would be a relevant addition to the treaty text.

I thank you Mr. Chair.

12. Joint statement on behalf of FIDH, ActionAid Netherlands, Afreewatch, Al-Haq, ECCJ, IUCN Netherlands, SOMO, and WO=MEN

Thank you, Mister Chair. I make this contribution on behalf of ActionAid Netherlands, Afreewatch, Al-Haq, ECCJ, FIAN International, FIDH, IUCN Netherlands, SOMO, and WO=MEN.

We welcome the general direction in which the draft text has evolved.

With the aim of further clarification of the text, and to prevent misinterpretations and inconsistencies in the implementation of the instrument by the States Parties, we would like to suggest the following changes to article 6 on prevention:

- Articles 6.1 and 6.2 contain significant overlap and we would suggest merging those provisions.
- Articles 6.2 and 6.3b lack an adequate distinction between the degree of control a business enterprise can have over business activities and commensurate responsibilities to “avoid” and “prevent” abuses on the one hand, and “mitigate” abuses only in specific cases where a company has limited or no leverage on the entity causing abuse on the other.
- 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 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, physical ability and accessibility, literacy, risks of reprisals. 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 affected 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.
- Furthermore, we recommend for Article 6 to better include **protection of human rights defenders** as a key element for an effective prevention of human rights abuses and violations in the context of business activities. In this sense, in **Article 6.4.c** we propose to add: *"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."*
- 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.

Overall, the text of Article 6 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 address 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 licenses or conducting commercial transactions with businesses.

Finally, the word “severe” was removed from art. 6.3 so that all human rights abuses now fall within the scope of the treaty. We welcome this change.

Thank you, Mister Chair.

13. Joint statement on behalf of Friends of the Earth International, Homa - Centro de Derechos Humanos y Empresas, CETIM and the Global Campaign

Gracias, sr. Presidente. Mi nombre es Marina, y hablo en nombre de Homa - Centro de Derechos Humanos y Empresas, CETIM y Friends of The Earth International y de la Campaña Global, dando seguimiento a lo que dice mi compañera, seguimos presentando las siguientes consideraciones a lo artículo 6:

Reforzamos que el artículo sobre prevención es un artículo en el que se deben imponer obligaciones directas a las ETNs con respecto a los derechos humanos visto que ya quedó claro por las intervenciones en estos días que sí tienen obligaciones internacionalmente reconocidas.

También, como bien ha mencionado Cuba, la convención de la ONU contra la corrupción ya prevé una sección que define obligaciones para entes privados, de forma que no sería algo inédito en el derecho internacional. Estas obligaciones, claro, serían diferentes de las de los Estados, por eso hay que dejar claro lo que es obligación estatal y lo que es obligación de la empresa, para también evitar el automonitoreo, de acuerdo con lo que propone Camerún en el artículo 6.4.

Asimismo, las políticas de diligencia debida trabajan con la idea de mitigación de violaciones y algún nivel de daño o riesgo inherente a la actividad empresarial, lo que está en contra de la lógica de la primacía de los derechos humanos y de las comunidades, como señalaron Cuba, Panamá, Egipto y México.

Específicamente, en el artículo 6.4.c, consideramos que cuando se mencionan las consultas debe evitarse el término “significativas” para incluir “obligatorias”. Incluso, de acuerdo con lo que prevé la Convención 169 de la OIT. Apoyamos la propuesta de Palestina y Sudafrica para este literal.

Además, en este artículo también sería necesario rescatar la expresión "*consent*". Además, el derecho al consentimiento libre, previo e informado debe extenderse más allá de las comunidades indígenas, en este sentido, apoyamos la propuesta de Egipto e Indonesia de incluir los campesinos y otras personas que trabajan en la área rural. También apoyamos a la propuesta de Palestina para el artículo 6.4.d bis, sobre el derecho de decir veto a la instalación del proyecto sin retaliación. Asimismo debe entenderse como:

- el derecho a ser informado previamente sobre los riesgos relacionados con la actividad antes de que la empresa se instale y al largo de todo su actuación en el territorio;
- el derecho a estar protegido de cualquier presión o acoso y poder expresar libremente sus inquietudes y demandas sobre un proyecto o empresa;

Apoyamos la propuesta de Camerún para el artículo 6.4.f bis sobre la necesidad de que los Estados parte proporcionen mecanismos de garantías financieras a las comunidades para las actividades con un alto potencial de daño a los derechos humanos.

Además, apoyamos a la propuesta de Camarún de un nuevo párrafo 6.9 con el fin de imponer obligaciones a las instituciones financieras internacionales.

Por fin, proponemos un nuevo párrafo 6.10 para que los Estados, cuando en procesos de toma de decisiones o cualquier otra acción como miembro de Instituciones Financieras Internacionales, lo harán de acuerdo con las obligaciones de los Estados Parte establecidas en este instrumento vinculante a fin de garantizar que las empresas en cuestión no

contribuyan con las violaciones de los derechos humanos causadas por las empresas transnacionales. El texto será enviado a la Secretaría.

Gracias Sr. Presidente.

14. Joint statement on behalf of Indigenous Peoples Rights International (IPRI), Narasha Community Development Group, Movement for the Survival of the Ogoni People, ESCR-Net, Manushya Foundation, Asia Task Force on the Legally Binding Instrument, Legal Rights and Natural Resources Center, Friends of the Earth Philippines

Mr. Chairperson,

I deliver this intervention on behalf of Indigenous Peoples organizations in the room including Indigenous Peoples Rights International, Narasha Community Development Group, Movement for the Survival of the Ogoni People, and Tebtebba Foundation, along with support groups including ESCR-Net, Manushya Foundation, Legal Rights and Resource Center-Friends of the Earth Philippines, and the Asia task force on the Legally Binding Instrument.

We acknowledge the positive developments in the text of the treaty, especially in Article 6.4.d, in relation to the recognition of Free, Prior and Informed Consent for Indigenous Peoples.

The international standard of Free, Prior and Informed Consent is integral to the right to self-determination, and intricately connected to their right to control, manage and own their lands, territories and resources. It is not just about getting their consent, but also respecting right to say no to business activities, and the right to stop any activity that destroys the environment, and that violate their rights, and the right to participate in decision making processes at all stages, on matters affecting them.

We would therefore like to propose that this specific provision be further developed, as follows:

“Respecting Indigenous Peoples rights to their lands, territories and resources, and their right to self-determination, including ensuring Free Prior and Informed Consent and involving them in decision-making processes on all matters affecting them”

This textual suggestion finds basis in international law that fully recognizes the collective rights of Indigenous Peoples to self-determination, and to their lands, territories, and resources.

Article 6 in general, also lacks measures to prevent the criminalization of human rights defenders, including Indigenous Peoples and preventing impunity. We therefore propose that and article be added as follows:

“State parties shall take legal and policy measures to prevent criminalization of human rights defenders and imposing stringent punitive measures to persons acting with impunity in the commission of human rights violations. In relation to this, States shall ensure to prevent strategic litigation against public participation and similar actions that use the law and judicial measures that tend to suppress the exercise and defense of human rights.”

Thank you Mr. Chair.

15. Joint statement on behalf of Institute for Policy Studies/Transnational Institute and Friends of the Earth International

Dada la extensión de este artículo, los comentarios de la Campaña van a dividirse en dos intervenciones.

Consideramos que el artículo 6 debe incluir dos elementos diferenciados, complementarios e imprescindibles, por un lado las obligaciones de los Estados y por otro, las obligaciones dirigidas directamente a las empresas transnacionales y otras empresas de carácter transnacional.

El lenguaje del artículo debe adaptarse a lo propuesto en los párrafos anteriores y referirse a empresas transnacionales y otras empresas con carácter transnacional, tal y como han señalado Camerún y Cuba. Además, debe eliminarse del conjunto del texto la referencia a la obligación de “mitigar”, como ha señalado Egipto. Recordamos que desde la óptica de derechos humanos no es posible considerar la “mitigación” de una violación como una política aceptable, ni para Estados ni para empresas. Igualmente, toda obligación debe entenderse aplicable al conjunto de la cadena global de valor, según ha remarcado Palestina y debe evitarse la referencia a “*severe*” *human rights violations* ya que el término “severe” es sujeto a interpretación y en todo caso demasiado restrictivo. Al contrario, se tiene que abarcar todas las violaciones en las obligaciones de prevención.

El 6.1 debe contener un listado claro de las obligaciones que, como mínimo, los Estados deben asumir respecto de las empresas concernidas por el Tratado, tal y como ha remarcado Cuba. Así, proponemos una enmienda de adición, un artículo 6.1. bis, coincidente con la enmienda de Camerún sobre las obligaciones de los Estados de no autorizar ni contratar con empresas que incumplan las obligaciones establecidas en este tratado o hayan sido condenadas por violaciones de derechos humanos. En este artículo también incluiríamos la extensión de toda obligación derivada de este tratado a las empresas de carácter estatal. También apoyamos la enmienda propuesta por Palestina, sobre la obligación de cesar actividades, pero proponemos incluirla como una obligación directa de las empresas, supervisada por los Estados.

Los artículos 6.2, 6.3 y una parte del 6.4, dedicados a la diligencia debida, deben integrarse también como una obligación directa de las empresas que no necesita trasposición por una norma estatal, tal y como también ha señalado Camerún. Este artículo también debe incluir por separado las obligaciones de los Estados de controlar el cumplimiento de la diligencia y sancionar su incumplimiento.

Por lo tanto, proponemos incluir:

- La obligación de las empresas de publicar el listado de todos los posibles riesgos, incluyendo la lista de actividades, países y proyectos que se identifiquen como potencialmente peligrosos para los derechos humanos y el medio ambiente.
- la obligación de las empresas de implementar efectivamente las medidas adecuadas y asegurarse de su efectividad para prevenir dichos riesgos;
- la obligación de seguimiento de la ejecución, de rendición de cuentas, de transparencia de las acciones de debida diligencia.
- La obligación de las empresas de extender todas las medidas de diligencia debida a sus relaciones comerciales y al conjunto de la cadena de valor, incluyendo por igual a las distintas entidades que componen la misma, desde las que se ocupan del suministro de las materias primas hasta las que hacen llegar el producto al consumidor final.
- La obligación de los estados de controlar la eficacia y efectivo cumplimiento del conjunto de obligaciones de debida diligencia emprendidas por las empresas transnacionales. Coincidimos con Cuba en este aspecto, la evaluación en ningún caso puede quedar en manos de las empresas.
- La obligación de los estados de designar una autoridad competente para realizar este control y con capacidad de sanción administrativa por el incumplimiento. En ningún caso la actuación de esta autoridad debe llevar a una interpretación reducida de las obligaciones de debida diligencia a simple procesos, y no podrá obstaculizar el acceso a la justicia para sancionar los incumplimientos. De acuerdo con la propuesta de Camerún.
- En este sentido, debe incluirse la obligación de los estados de asegurar el acceso de individuos y comunidades afectadas a la justicia penal, civil y administrativa para exigir el cumplimiento por parte de las empresas de las medidas de diligencia debida.
- La obligación de los estados de garantizar la existencia de un mecanismo de garantía económica para comunidades afectadas por actividades de alto riesgo.

Enviaremos la enmienda concreta para facilitar la labor de la Presidencia.

Para finalizar esta intervención la Campaña quiere realizar una valoración de conjunto del mecanismo de diligencia debida en derechos humanos.

La diligencia debida es fundamentalmente una obligación de medios. Es un mecanismo preventivo que, como la misma Agencia de Derechos Fundamentales de la Unión Europea ha señalado, sólo puede colaborar en la remediación de manera muy tangencial y, en ningún caso, debe sustituir al establecimiento de las obligaciones de las empresas de respeto de los derechos humanos y a la inclusión de mecanismos de acceso a la justicia para permitir las sanciones a las empresas por las violaciones de derechos humanos cometidas de manera directa o a través de su cadena de valor.

Es fundamental evitar que el mecanismo de diligencia debida pueda servir como vía para exonerar la responsabilidad de las empresas por el mero cumplimiento de las medidas de prevención. La empresa NO puede ser absuelta de responsabilidad por cumplir las medidas de diligencia, la violación debe ser siempre reparada y en su caso las entidades culpables deben ser condenadas. Volveremos sobre esta cuestión en nuestro comentario sobre el artículo 8.

16. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

Chairperson,

Article 6.2

We note that Article 6.2 firmly embeds the requirement of States Parties to take *all* necessary legal and policy measures to ensure that business enterprises respect all internationally recognized human rights and prevent and mitigate rights abuses throughout their operations. While articles 6(3) and (4) bring the focus of prevention back to mandatory human rights due diligence legislation, it is clear that art. 6(2) sets expectations of States to go *beyond* this measure in line with the UNGPs. Therefore, we strongly recommend including a non-exhaustive list of *other* legal and policy measures. Our proposal is to include the following text at the end of Article 6.2:

Such measures may include injunctive relief, precautionary or protective measures, and strict liability for human rights abuses, as appropriate.

Regarding Article 6.3(b), we would request that the word ‘reasonable’ be struck from the second part of this sub-article concerning human rights abuses to which an enterprise is *directly linked*. If we look at the HRDD framework of the UNGPs from which this Article takes inspiration, although they set out a greater number of factors to be considered where an enterprise has 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.

So, the text after the final comma would read

*, and take **reasonable and** appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;*

In relation to Article 6.4, we think that it would be important to highlight the specific need to consult workers and their representatives – as rights-holders themselves. Our suggestion is to amend the first line of Article 6.4(c) so that it reads as follows:

c. Conducting meaningful consultations **with individuals, communities, workers, and workers’ representatives** whose human rights can potentially be affected by business activities...

And finally, regarding the extremely important provision on enhanced HRDD in Article 6.3(g), we think that it would be important to also cover *other situations* that can put a State under a level of stress similar to those in conflict situations. As the UN Working Group on Business and Human Rights’ stated in their Guidance on human rights due diligence in

conflict situations, genocide and crimes against humanity can occur during peacetime. And instability leading to rights abuses can emanate from serious levels of political volatility.

Therefore, we would recommend an amendment to Article 6.4(g) so that it covers human rights abuses in **situations of instability and national stress**.

Thank you, Chair

17. Joint statement on behalf of Südwind and the Austrian Treaty Alliance

Südwind supported by Austrian Treaty Alliance a coalition of 15 NGOs and trade unions specifically wants to contribute with this statement to Article 6

- Article 6 should explicitly mention that corporations are liable if they fail to comply with their due diligence obligations, in particular with their environmental due diligence obligations.
- Prevention should be highlighted instead of mitigation, so that harm doesn't occur

Article 6 should clearly define standards for consultations, which should ensure that these consultations are effective. Furthermore these consultations should be designed as an ongoing process, so they should take place prior as well as during the business activities.

H. Article 7

1. Franciscans International

In general we want to come in support of this article which we think contain key elements that correspond to the objective and purpose of this LBI which is to improve access to justice and fill gaps that prevent victims to enjoy their right to an effective remedy including reparations.

On article 7.1, we welcome the inclusion of the mention taking into account the specific obstacles that some individuals and groups who are disadvantaged and marginalized. This is welcome and should be kept.

We find the proposed article 7.1 bis by Palestine interesting and relevant, as we know the realities lived by communities in cases of mining disasters among others. And how processes of reparations have been carried out without the participation of affected individuals and communities, through non public, non transparent processes and negotiations and bar any judicial civil proceedings for individual reparation.

As to article 7.2, we would like to refer to our comments of yesterday, based notably on the many instruments and jurisprudence among which article 19 ICCPR, and its General Comment 34, on article 4 and the right to information including the right to access information. Some of the important elements suggested by the delegation of Cameroon under article 4 and that pertain to access to justice could be possibly included here.

On article 7.3: We are concerned about the proposal by the distinguished delegate of Brazil, as supported by others, to make the provision dependent on national legislation as we know in particular legal aid within the broader legal assistance schemes, is extremely unequal among States and weak especially outside of the restricted criminal justice. The proposal would largely reduce the relevance of this sub-para. Emptying the sub para of its aimed incentive for all States to provide legal assistance would deprive the LBI of one important advance. And so, we very much welcome the delegations who expressed their reservation about the proposal by Brazil and supported the original language.

On article 7.5, we would like to reaffirm the importance of the provision allowing the reversal of the burden of proof in cases of business abuses of human rights. Such a provision is fundamental to avoid denial of justice, to protect general principles of law, the interest of justice and equality of arms. We thus consider the suggestion by Palestine interesting but would at a minimum be in favour of keeping the para as is in the third draft (against Russia and Brazil).

In that regard, I would like to recall that 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 the 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.

Last but not least, I would like to recall 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”.

Thank you

2. International Association of Democratic Lawyers

Regarding art. 7, we suggest reformulating art. 7.4 as follow:

“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 **and continuing** proceedings in accordance with this (Legally Binding Instrument) **by placing an unfair and unreasonable burden on victims** and that there is a provision for possible waiving of certain costs in suitable cases”.

To fulfill the victims’ right to access to legal remedy, it would be important to include a paragraph on the taking of evidence. As we know, very often, in proceedings relating to action for damages for business related violations, strict discovery rules can jeopardize access to justice and the right to a fair trial.

The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to legal remedy.

For this reason, after art. 7.5 addressing the burden of proof, it would be very useful to include a new paragraph ensuring that “claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individuals items of evidence”. Moreover, national courts should also be able to order third parties – including public authorities – to disclose relevant evidence which lies in their control”.

To ensure effective judicial protection for TNCs violations, the treaty should also ensure that state parties adopt appropriate measures to enable associations and other recognized organizations that defend human rights, the environment and the consumers to promote collective redress actions, including collective injunctions.

3. International Commission of Jurists

Access to effective remedy is a universal right already recognized in international instruments, including the main human rights treaties. 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.

Article 7.1 however seems to deal with the jurisdiction of courts, which is most properly addressed under article 9. To avoid repetition and overlapping, 7.1 could be redrafted to focus on the duty to guarantee access to remedy in the context of business human rights abuse.

Article 7.2 relating to access to information is currently drafted in a too general and ambiguous way. It should more clearly identify which kind of information and from whom is to be obtained. In this regard, victims should be entitled to “Access to relevant information concerning violations and reparation mechanisms both from businesses and state agencies.” We agree in this regard with the delegation from Palestine.

Article 7.3 addresses some of the most important obstacles to access justice faced by victims of human rights abuse by requiring the provision of access to legal assistance in legal proceedings. In fact, it would be better to modify the chapeau of this article by referring more generally to “measures” since the issues addressed under this heading go beyond legal assistance.

7.3 (a) adds an important and welcome precision by incorporating children as one of the groups to provide information. To keep consistency, 7.3.(b) should also refer to the rights of children to be heard in an appropriate time and manner:

“b. Guaranteeing the rights of victims to be heard in all stages of proceedings, according to their special needs and rights keeping in mind that child victims may only be heard and participate voluntarily in a child-friendly setting and manner.”

7.3 (d) addresses judicial doctrines such as *forum non conveniens* used in certain countries by judges to relinquish jurisdiction that they would otherwise have over a case when they judge another more appropriate forum exists. As such, this issue is more clearly already addressed and drafted under article 9 and should be deleted from article 7.

Article 7.5 addresses obstacles presented by the inability of complainants to access relevant information of evidentiary value in legal proceedings to substantiate their claim before a court of law. Such inability may be determined by lack of means or simply legal and physical impediments to access the relevant information because it is legally in the possession or control of the defendant (a business enterprise in this case) or a third party. This problem has an impact on the fairness of the legal proceedings and its outcome and could breach the due process principle of equality of arms, but addressing the problem in an inappropriate manner may also breach due process rights of the defendant. For these reasons, it is recommended to slightly reformulate this provision to enable judges to order reversal of the burden of proof when necessary and taking into account whom is in a better position to provide the needed evidence. This has already been provided for in the Escazú Agreement and the CoE Recommendation on Business and Human Rights.

The ICJ has provided alternative language in its comments forwarded to the secretariat.

The ICJ also recalls that Article 7 should also include provisions on non-State-based grievance mechanisms, which under certain strict conditions of transparency and social participation, can play a role in providing rapid redress to harms caused. However, it should be made explicitly clear that in no circumstance should these grievance mechanisms be considered as a waiver of the right to a judicial remedy.

4. International Organization of Employers

Thank you, Chairperson-Rapporteur.

This intervention is a response to Article 7 of the Third Revised Draft Treaty, which deals with “Access to Remedy”. It is my pleasure to provide my thoughts on behalf of the IOE.

I have several specific comments that reflect much broader concerns.

First, Article 7.2’s “access to information” provision does not contemplate existing legal obligations that already exist between states under well-established notions of legal comity and other associated doctrines. There is simply no need for this provision, and it would appear to unjustifiably upset the existing balance between state sovereignty and the free flow of information.

Perhaps worse, this provision fails to even consider any privacy protections. If this provision is to remain in some form, it should very specifically narrow the categories of information that can be sought, state the reasons why this information can be sought, and at least provide some affirmative requirement that an applicable state should take steps to protect applicable privacy and other property rights.

Second, Article 7.5 seeks to eschew the well-established doctrine of *forum non conveniens*, on the continued and false assumption that this doctrine creates a “legal obstacle”. This doctrine is not a legal obstacle, but instead forms a foundational basis for a state’s sovereign duty to adjudicate disputes that concern matters and parties within its borders, while also

ensuring that due consideration is made to the location of witnesses and evidence so that disputes can be meaningfully adjudicated consistent with well-understand notions of due process. This provision should be removed, and eschewing this doctrine would seem to prioritize a rights-holder's attorney's decision about where a dispute should be decided over a state's solemn obligation to build and maintain judicial and associated infrastructure to adjudicate disputes.

Third, and finally, Article 7.6's contemplated reversal of the burden of proof should also be removed. Much has already been said about this unfortunate provision that need not be repeated here. It suffices to restate that this clause contravenes fundamental and well-settled principles of "innocent until proven guilty" and that requiring an accused party to prove its innocence violates due process principles and fundamental notions of fairness in most jurisdictions. This revised draft treaty seems to continue to confuse "legal obstacles" with ensuring that parties have free and fair process to adjudicate any associated disputes.

I thank the Chairperson and the Intergovernmental Working Group for their kind attention to these serious concerns of the international employer community.

Thank you.

5. United States Council for International Business (USCIB)

- Thank you Chair
- We refer you again to and align with the substantive analysis and text proposals on Article 7 and on the full draft LBI, put forward jointly by the International Organization of Employers, Business at OECD and BusinessEurope in their joint submission.
- We join with the many states who have raised overarching and substantive concerns with article 7 today.
- In particular, regarding Article 7.2, which provides for "access to information," we urge that the text comport with existing international obligations of various states. Any provision regarding access to remedy must also comply with privacy laws. Information subject to this clause must be narrowly defined and strictly applied to ensure that the data collected are directly relevant to proceedings and do not jeopardize commercial or other rights of the respondent.
- Regarding the doctrine of forum non conveniens, it is a common law legal doctrine and should be respected here. Rejecting this principle confusingly disregards the importance of an independent and competent judiciary, while creating enormous legal uncertainty, especially when considered in light of the ambiguous definition of "business relationships" that is currently proposed in this draft LBI. We recommend this provision be removed.
- As has been strongly argued by states in the room today and in previous years, we join them in raising strong concerns over the provisions laid out in Article 7.5. As written, Article 7.5 presents a violation of due process and subverts fundamental notions of fairness, thereby eroding trust in legal systems. Reversal of the burden of proof violates the fundamental principles of innocent until proven guilty. Therefore, Article 7.5 should thus be revised or it should be deleted.
- As we have emphasized in previous years, we again emphasize that we believe that the most effective and sustainable approach for advancing our shared goal for the meaningful realization of human rights around the world would be to especially focus our efforts on increasing State capacity, so that a rights holder in a country may bring a suit in the country where a harm occurred and have faith in their ability to obtain a fair and speedy trial and access to remedy.
- We simply cannot afford to ignore the State Duty under international human rights law to protect the human rights of individuals within their territory and/or jurisdiction.
- We note, for example and with regret that despite many States acceding to and ratifying human rights and ILO conventions, actual implementation remains a challenge.
- Meaningfully addressing this well documented challenge – together – must be our shared goal.

- Rule of law and good governance are foundational elements of this goal.
- The promulgation by governments of sound national laws that meet international standards, effective enforcement of those national laws, and standing up sufficiently-resourced adjudicative and investigative bodies, coupled with strong anti-corruption programs, are the best means for the protection of human rights and for achieving meaningful access to remedy.

Thank you.

6. Joint statement on behalf of the Centre for Human Rights, Centre for Applied Legal Studies, Lawyers for Human Rights, the African Coalition for Corporate Accountability, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), and the Uganda Consortium on Corporate Accountability

This statement is made on behalf of the on behalf of the Centre for Applied Legal Studies, Lawyers for Human Rights, the African Coalition for Corporate Accountability, the Centre for Human Rights, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (SAIFAC), and the Uganda Consortium on Corporate Accountability.

Access to remedies is one of the focal areas which necessitated a legally binding instrument to regulate transnational corporations. It is therefore crucial that this provision is strengthened and made effective for victims and potential victims of human rights violations.

We welcome the improvements made to article 7 from the previous draft, however we continue to call for a stronger provision. This can be done by making the following amendments:

In Article 7.2, the inclusion of ‘discovery’ after access to information.

For Article 7.3 Access to information should also be extended to human rights defenders. Human rights defenders are integral to affected communities’ struggle for justice and accountability and they play a pivotal role in assisting victims to access courts and other non-judicial legal mechanisms.

Furthermore, access to information for victims should also include any other information necessary for a victim to assert their right to access just and equitable remedies.

In article 7.6, we recommend the addition of ‘human rights abuses’ after ‘human rights violations.’

These amendments could go a long way in overcoming existing barriers to achieving effective remedies for victims of human rights violations and abuses.

Thank you

7. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, Maryknoll

Mr. Chair,

We would like to make this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, Maryknoll

Mr Chair,

The mark of good law is justice. Affected people and communities across the world, confronted with grave human rights and environmental abuses and violations from businesses need access to justice and remedy.

First, we support the proposal from Palestine to add a 7.1bis.

Then, we reiterate the need to explicitly mandate States to remove gender-specific barriers to justice, and we support Peru, Panama, South Africa, Palestine and Mexico on 7.3.b to “avoid

gender and age stereotyping". In that regard, we suggest the following amendment to article 7.2:

Art 7.2 – *State Parties must review and repeal domestic legislation that is a barrier to eliminating gender discrimination and providing training and education programmes to prevent recurrences of abuses and changes in patriarchal attitudes.*

On article 7.3, we support the reservation of Mexico and express our concern at the amendments suggested by the honorable delegations of Brazil, Pakistan and Egypt to undertake legal assistance "according to national legislation". 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

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. Contrary to what the distinguished delegate from Russia stated, the reversal of the burden of proof has no bearing on the presumption of innocence, and is an established principle, in appropriate cases, in many jurisdictions.

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"

Art 7.5 – *States Parties shall enact or amend laws ~~allowing judge~~ 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*

Thank you Mr. Chair.

8. **Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR**

Thank you chair,

On behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR.

At Article 7 we propose to add in the title and reparation, which then would be:

Article 7. Access to Remedy and Reparation

At 7.1. **we propose to add:** -access to adequate, timely and effective remedy **and reparation** and access to justice, and to overcome the specific obstacles which women, **to include here, children, people in vulnerable situations or marginalized** and groups face in accessing such mechanisms and remedies.

7.2.-**to include** States Parties shall ensure that their domestic laws facilitate **to add to victim** access to **relevant** information **concerning violations and reparation mechanisms both from businesses and State agencies**, including through international cooperation, as set out in this Legally Binding Instrument

7.3. **to include**-States Parties shall provide adequate and effective **measures** **instead of legal assistance**-to victims throughout the legal process, including by:

a. Making information available and accessible to victims of their rights and the status of their claims; **to add and the timing of the proceedings**, in relevant languages and accessible formats to adults and children alike, including those with disabilities **and providing where needed free legal aid to child victims**;

b. Guaranteeing the rights of victims to be heard in all stages of proceedings **to add: according to their special needs and rights, keeping in mind that child victims may only be heard and participate voluntarily, within a child friendly environment and through the use of child-sensitive methods**;

We propose to remove e, as This issue is more clearly already addressed and drafted under article 9 and should probably be deleted from article 7.

We propose at the end of 7.4: **such as cases concerning child victims**.

At 7.5 we propose to change to wording to

States Parties shall **adopt measures to empower judges in civil proceedings concerning human rights abuses, when appropriate and as applicable, to order the reversal of the burden of proof or the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts**.

Thank you chair for taking our proposal into consideration.

9. **Joint statement on behalf of ESCR-Net and FIAN International**

We support Palestine's proposal on 7.1 which responds well to the lessons learnt according to our analysis of the draft in the light of the Brumadinho and Posco cases. Full participation of affected communities is key in the definition of remedies, especially in the case of large scale disasters.

We also support the proposal of Palestine on par. 7.2 on information for the reasons explained under article 4, just with adequate access to information affected communities will have effective access to justice and remedy, as recognized in a number of international standards, including in environmental international law.

We also support Peru's proposal on 7.3 b to include gender and age stereotyping, which contributes to intersectional discrimination and constitutes one of the main causes of non-compliance with the vast body of international human rights standards against discrimination.

The contribution of Palestine on the burden of proof makes the article clearer. This provision is one of the key elements required to ensure the equality of arms in the judicial process, in contexts in which frequently the power of the defendants, together with the lack of information of the affected communities fully hinders the effective defense of their rights. Russia's interpretation on **Article 7.5** does not merit acceptance. As already foreseen in different national legal systems, the reversal of the burden of proof is *part* of a fair trial, guaranteeing particularly the above-mentioned equality of arms in the judicial process and does not contradict the principle of presumption of innocence.

We welcome the inclusion of specific obstacles that women, vulnerable and marginalised people and groups face in accessing remedy in Art 7.1. We also 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.

I thank you Mr. Chair.

10. **Joint statement on behalf of Feminists for a Binding Treaty and Women's International League for Peace and Freedom**

Thank you Mister Chairperson. I speak on behalf of the Feminists for a Binding Treaty.

- In Article 7.1: We recommend adding the qualifier "if appropriate" after "and". While state-based non-judicial mechanisms can play an important role in access to remedy, they are not appropriate in all cases. For example, where they do not meet sufficient standards

of independence. We also recommend, after “women,” adding “and other individuals and groups in vulnerable and marginalized situations”

- In Article 7.2: we recommend adding after “domestic law and”, the terms “court proceedings”. After “information”, we suggest adding “in a gender-sensitive manner” and to delete the final phrase “and enable courts to allow proceedings in appropriate cases.”
- In article 7.3, we recommend adding after “adequate”, “gender-responsive”.
- At the end of article 7.3(b) we recommend adding “including prior to irreparable harm for purposes of injunctive relief”. We welcome Peru’s proposal to add “avoiding gender and age stereotyping” at the end of this paragraph. We think that it should be complemented with the addition of a reference to “discrimination”, which is broader than “stereotyping”.
- We recommend adding a new 7.3(e): “Providing assistance to initiate proceedings in the courts of another State Party in appropriate cases of human rights abuses and violations resulting from business activities of a transnational character.”
- At the end of article 7.4, we recommend adding “particularly for those facing heightened barriers in accessing remedy, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations in conflict- affected areas, among other groups, paying particular attention to the multiple or intersectional forms of discrimination faced by persons belonging to more than one of these groups.”
- In Article 7.5, we suggest removing the phrase “where consistent with international law and its domestic constitutional law” and substituting it with the following sentence: “Where the reversal of the burden of proof is not provided for in certain legal regimes, State parties shall, to the extent possible, enact and amend laws to reverse the burden of proof and ensure that it lies with the defendant.”
- Finally, we support adding the term “violations” in 7.3 d).

At a time when there is growing violence against affected communities and continued rights violations including of Free, Prior and Informed Consent and while access to justice and to remedy is still weak, this session is a key moment to contribute to the global effort for a legally binding instrument. We will remain vigilant that the content really makes a difference for affected communities. As feminists we won’t let go of our demands and will continue working to contribute substantively to this process.

Thank you Mr. Chair.

11. Joint statement on behalf of FIDH, ActionAid Netherlands, Al-Haq, ECCJ, SOMO, and WO=MEN

Thank you, Mister Chair. I make this contribution on behalf of ActionAid Netherlands, Al-Haq, ECCJ, FIDH, SOMO, and WO=MEN.

We welcome the general direction in which the draft text has evolved.

With the aim of further clarification of the text, and to prevent misinterpretations and inconsistencies in the implementation of the instrument by the State Parties, we would like to suggest the following changes to article 7 on access to remedy:

- The wording in article 7.2 related to access to information should be strengthened in line with international human rights law, ensuring access of right-holders to adequate and complete information of business enterprises activities.
- 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 to remove the word “appropriate” from art. 7.3d.
- The right of victims to be guaranteed legal aid (as per article. 4.2f) implies an obligation to provide legal aid under article. 7. We suggest introducing a literal subparagraph

under art. 7.3 reading ‘guaranteeing legal aid relevant to pursue effective remedy by ensuring legal representation and access to the court system for victims unable to afford these costs.’

- Article 7.5 on the reversal of the burden requires further clarification. We propose deleting the reference “allowing judges” and “where consistent with international law and its domestic constitutional law”.

- Additionally, we suggest to integrate the principle of 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 favorable 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.”

Thank you, Mister Chair.

12. Joint statement on behalf of Friends of the Earth International and CETIM

Thank you Mr. Chair, my name is Erika Mendes from Justiça Ambiental in Mozambique, speaking on behalf of Friends of the Earth International and CETIM, members of the Global Campaign. We would like to present some considerations to Article 7, access to remedies, based on our work on the ground and in the territories for many years.

We gladly note an addition, on Article 7.1, recognizing the obstacles faced by affected communities, women and marginalized groups in accessing remedies. However we propose a few changes:

Amendment 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 victims affected individuals and communities’ access to **due process**, adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women, vulnerable and marginalized people and groups face in accessing such mechanisms and remedies. **The use and access to non-judicial mechanisms shall not compromise the rights-holders’ access to judicial mechanisms.***

We support Palestines’ proposal to add a new paragraph 7.1.bis to ensure reparation mechanisms that States should implement in consultation with affected communities, mechanisms that must be transparent and free from the influence of the entities that caused the violation.

We also 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 as stated by Palestine. The chapeau of this same paragraph should be drafted as *according to the national and the international law, prevailing the more beneficial for the affected.*

We also support Palestine’s proposal for 7.3.d, but would just propose at the end to speak about “business activities of transnational character” to be in accordance with the mandate.

We recommend maintaining Article 7.4, which guarantees that court fees and other legal costs do not place an unfair and unreasonable burden on affected peoples.

With regard to paragraph 7.5 on the reversal of the burden of proof, we consider that this 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, as well as the expression "and its domestic constitutional law", as proposed by Palestine. 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. We would like to remind

Brazil and Russia that the reversal of the burden of proof is already recognized in Brazilian and Russian legislations and case law.

Regarding 7.6, we support Palestine's proposal to add "violations" and delete "domestic law". As stated by Mexico, this kind of reference to domestic legislation could jeopardize the effectiveness of the instrument.

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

Proposed new paragraph 7.7:

States shall guarantee that if there is any doubt about the implementation of the LBI, people and communities 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 on precautionary measures:

Proposed new paragraph 7.8:

States shall make available mechanisms to allow affected communities and persons to demand precautionary measures to prevent harm.

All our text proposals and amendments have been sent to the secretariat.

Thank you

13. Joint statement on behalf of Indigenous Peoples Rights International (IPRI), Narasha Community Development Group, Movement for the Survival of the Ogoni People, ESCR-Net

Mr. Chair,

One of the primary concerns of Indigenous Peoples worldwide in relation to access to remedy, is the lack of effective recognition of their systems of justice by local, regional and national authorities, or the existence of discriminatory attitudes against these systems. We quote the UN Special Rapporteur on the rights of Indigenous Peoples, who said that:

“Without accessible courts or other legal mechanisms through which they can protect their rights recognized under national and international normative instruments, indigenous peoples become vulnerable to actions that threaten their lands, natural resources, cultures, sacred sites and livelihoods. At the same time, recognition of their own justice systems is important to respond to their rights and needs with respect to justice, self-governance and culture. Effective access to justice implies access to both the State legal system and their own systems of justice.

xxx

The ability of indigenous peoples to continue and strengthen their own systems of administration of justice is an integral component of their rights to self-governance, self-determination and access to justice under international human rights instruments.”⁵

Therefore, we would like to propose the inclusion of an additional provision after Article 7.1, that would read:

State parties shall respect and recognize indigenous customary laws and justice systems, including, by recognizing this as legal venue for redress, grievances and remedies and ensuring enforcement of their decisions.

To support this proposal, we make reference to the following international and regional instruments and documents:

1. The UN Declaration on the Rights of Indigenous Peoples, specifically Article 4 in relation to right to autonomy or self-government, Article 5 that asserts the right of indigenous peoples

⁵ A/HRC/42/37, August 2, 2019 – Report of the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council.

to maintain and strengthen their political, legal, economic, social and cultural institutions and Article 34 the right to promote, develop and maintain their institutional structures, including their juridical systems or customs in accordance with international human rights standards.

2. ILO Convention 169 also provides for the recognition of indigenous justice systems, customary laws and traditional institutions. Specific reference is made to Article 8 and 9 of ILO 169.

3. At the regional level, the American Declaration on the Rights of Indigenous Peoples contains relevant provisions on the law and jurisdiction of indigenous peoples. It provides for the right of indigenous peoples to promote, develop and maintain their institutional structures, distinctive customs, procedures and practices and juridical systems or customs, in accordance with international human rights standards (art. XXII (1)). It also provides that “indigenous law and legal systems shall be recognized and respected by the national, regional and international legal systems” and that indigenous individuals are “entitled, without discrimination, to equal protection and benefit of the law, including the use of linguistic and cultural interpreters” in matters before State jurisdictions (art. XXII (2) and (3)).

4. A/HRC/42/37, August 2, 2019 – Report of the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council on Access to Justice, that elaborates on the right to Indigenous Peoples to their traditional justice systems and institutions.

Finally, we support the proposals of Palestine in Article 7.1 bis and 7.2 to increase transparency in processes of access to remedies.

Thank you Mr. Chair.

14. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

I have two proposed textual amendments.

Regarding Article 7.2, we think that it would be useful to explicitly refer to the judicial process of disclosure or discovery. With our proposed amendment, Article 7.2 would read

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.

Finally, Chairperson, in relation to Article 7.5,

it refers to *allowing judges* to “reverse of the burden of proof”. This is usually not a matter that should be left to individual judges but one that is regulated in national legislation. The article should be strengthened and clearly require ratifying States Parties to provide for the “shifting of the burden of proof”. This is an important provision with respect to labour rights given that there is a significant imbalance between companies and their workers with regard to access to relevant information. This is also why we requested an amendment to Article 7.2.

So, with our amendment, Article 7.5 would read:

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.

Thank you, Chairperson.

I. Article 8

1. Feminists for a Binding Treaty

This statement is on behalf of Feminists for a Binding Treaty.

In regard to 8.1 (and in line with 8.3), we suggest adding, “causing or contributing to” before human rights abuses.

In 8.3, we suggest adding so that it reads “where legal or natural persons conducting business activities have caused or contributed to human rights abuses **or violations of international humanitarian law.**”

For consistency, we suggest adding “abuses” in 8.4, so that the first sentence reads in part, “reparations to the victims of human rights violations or **abuses.** We suggest then adding, “**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.**”

We also suggest adding 8.6 bis, which would read “**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.**”

We support Palestine’s proposal to delete the last line of 8.7.

In 8.8, we disagree with China’s proposal and find that it weakens the provision. Also in 8.8, we suggest deleting the first phrase, “Subject to their legal principles.” We would also like to add “international humanitarian law” to that sentence, so that it reads in part “amount to criminal offenses under international human rights law binding on the State Party, **international humanitarian law,** or customary international law, or their domestic law.”

We regret the reference in art. 8.8 that States should advance their criminal law to include international crimes and to ensure that legal persons are held criminally liable has been deleted. States should take measures to ensure that grave and serious violations of economic, social and cultural rights and environmental crimes committed in the context of business activities are subject to criminal liability including of legal persons. Such a dynamic approach would ensure a response to urgent needs and realities- we have seen the need for this in the recent case of Mayan communities in El Estor, Guatemala protesting against illegal mining operations.

Thank you Mr. Chair,

2. International Association of Democratic Lawyers, on behalf of the Global Campaign

Gracias Señor Presidente, me llamo Tchenna Maso y hablando en nombre de la Campaña Global hacemos las siguientes consideraciones:

El cumplimiento de las normas de seguridad en los lugares de trabajo, la adopción de medidas para proteger los derechos humanos y el medio ambiente representan por lo general un gasto bastante relevante para las empresas. Tratándose de entidades cuyo principal objetivo es el de maximizar las ganancias y ganar a la competencia, estas tienden naturalmente a reducir y recortar sus gastos. Las empresas más cínicas y sin escrúpulos cortan así aquellos gastos que son fundamentales para la protección de los derechos más básicos de la colectividad, provocando las catástrofes que nos traen a todos aquí para discutir medidas que pongan fin a sus conductas irresponsables.

Para las grandes empresas transnacionales, cuyo patrimonio es a veces igual al PIB de muchos países, compensar unos cientos, doscientos, trescientos muertos no es nada. Como en el caso de Brumadinho, Brasil, salió más barato a la empresa pagar por las 272 vidas que hacer la seguridad de la presa. Las empresas hacen sus cínicos cálculos, consideran la posibilidad de que se produzcan accidentes y asumen el riesgo, apostando con las vidas humanas. Sí, es verdad, cuando la Justicia les obliga a reparar los daños que provocan, las empresas eventualmente pagan las indemnizaciones, pero por desgracia muchas veces les sale más barato compensar los daños que prevenirlos.

Si queremos que el Tratado pueda efectivamente perseguir las finalidades que se propone y en particular fortalecer el respeto, la promoción, la protección de los derechos humanos en el contexto de las actividades transnacionales y prevenir las violaciones, hay que tomar medidas para evitar que las empresas puedan beneficiarse de sus conductas ilícitas. A tal fin invitamos

a los estados a considerar la posibilidad de incorporar en el artículo 8, después del párrafo 3, un nuevo párrafo que diga:

“Cuando las violaciones cometidas por las empresas transnacionales impliquen responsabilidad penal, los Estados Partes deben adoptar las medidas legislativas necesarias para garantizar que el daño sea indemnizado en medida no inferior al beneficio patrimonial obtenido por la empresa con la comisión del delito”.

"When human rights violations committed by transnational corporation imply criminal liability, States Parties must adopt the necessary legislative measures to guarantee that the damage is compensated is an amount not less than the profit obtained by the company through the commission of the crime."

Sólo de esta forma la responsabilidad civil podrá desempeñar su importante función preventiva y disuasiva.

gracias

3. International Organization of Employers

Chair

On article 8.4: The article says that “States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, gender and age responsive reparations to the victims of human rights abuses”. We take note that there are proposals made during this negotiation to link this exclusively to business activities of a transnational character. What does this mean? Should victims of domestic companies should not have access to “adequate, prompt, effective, gender and age responsive reparations”? Again, what is happening here is that we create a two-tier system in which certain workers and communities better protected than others. This is not only not in line with the UN Guiding Principles, but also again against any idea of fairness.

On article 8.5: The request for financial securities for any business activity to cover potential claims is not feasible, will be a major obstacle for any trade or investment and will have huge negative impacts on the employment prospects in and development chances of the weakest economies.

On article 8.6: In a significant departure from the UNGPs, the draft’s due diligence process requires that companies actually prevent human rights violations, 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 account for human rights impacts. The third revised draft treaty continues to seek to transform due diligence from a process-based standard to an outcome-based standard. Moreover, UNGP 15 and 22 require remedies only where the enterprise caused or contributed to the human rights violation. Furthermore, this contradicts basic legal traditions from all over the world. Liability should only take place where a clear and foreseeable link between the victim’s harm and the business held responsible is given.

4. United States Council for International Business (USCIB)

- Thank you, Chair.
- We refer you again to and align with the substantive analysis and text proposals on Article 8 as well as on the full draft LBI, put forward by the International Organization of Employers, Business at OECD and BusinessEurope in their joint submission.
- We join with the states who have raised concerns about the over-prescriptive nature of Article 8.
- We urge reconsideration of a number of its aspects if the goal remains to develop a draft text that enjoys the broad and cross-regional consensus called for by so many states and stakeholders.

- Most especially, we join with the many states and stakeholders who continue to strongly advocate that any proposed LBI must align clearly with the UN Guiding Principles on Business & Human Rights.
- For example, under the UN Guiding Principles articles numbers 15 and 22, remedies are required in cases where a business enterprise has caused or contributed to the human rights violation.
- However, the revised draft LBI contradicts the UNGPs yet again...this time by extending liability onto companies for their “failure to prevent” human rights harms which have not yet occurred.
- Human rights due diligence is a process-based standard but the LBI text incorrectly seeks to recharacterize it as an outcome based exercise. This contradicts the UNGPs and needs to be corrected in the text.
- We also regret that this draft instrument continues to reject the concept of a safe harbor provisions for good faith efforts made by the business community in conducting due diligence.
- We again call on this working group to add in such a provision and stress that a safe harbor clause would not immediately absolve a company from legal liability.
- However, its explicit exclusion here – coupled with the persistent weak rule of law and governance gaps on the part of states which we previously noted, will discourage good faith efforts on human rights and further reduce confidence in weakly governed economies.
- Thank you.

5. Joint statement on behalf of Al-Haq, FIDH, IUCN Netherlands, and SOMO

Thank you, Mister Chair.

I make this contribution on behalf of Al-Haq, FIDH, IUCN Netherlands, and SOMO.

We welcome the general direction in which the draft text has evolved.

With the aim of further clarification of the text, and to prevent misinterpretations and inconsistencies in the implementation of the instrument by the State Parties, we would like to suggest the following changes to article 8 on liability:

1. Article 8.3 should explicitly include criminal sanctions. Therefore, we suggest the word “criminal” is followed by “as well as”.
2. Article 8 tries to deal with the different forms of liability (civil, criminal and also administrative) resulting in complex wording and long paragraphs. For the sake of legal clarity, we recommend separating civil liability and criminal liability into separate articles.
3. We recommend re-integrating the reference to “other regulatory breaches that amount to or lead to” in art. 8.3 as these are breaches that lead often to abuses and should be dealt with specifically as part of effective prevention.
4. To clarify the conditions for liability under **Art 8.6** could be 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, 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 unless they can prove 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.

5. Additionally, we suggest adding a paragraph including strict liability in activities which are inherently dangerous:

“In business activities that are hazardous or inherently dangerous, States Parties shall provide measures under domestic law to establish strict liability.”

6. Furthermore, **Due diligence shall never act as a shield** from liability. In this regard, art. 8.7 does not contain a clear obligation. We suggest clarifying this provision by making clear that “States shall ensure through legislative measures that due diligence does not automatically absolve from liability for human rights abuses.”

7. Similarly, clarifying that this defence is not available when companies cause or contribute to human rights abuses through their own operations is paramount. We thus suggest removing the last sentence of article 8.7 as, in our view, it could undermine the effectiveness of the provision itself.

Thank you, mister Chair.

This oral statement was in part informed by an expert consultation participated in by academics, litigators, and civil society experts, held on 7 October 2021 at the Asser Institute in The Hague (The Netherlands).

6. Joint statement CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, Maryknoll

Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, Maryknoll

When establishing the liability of companies and their business relationships for causing or contributing to harm, the third draft changes the tense used in the **Art 8.6.** to the past, referring to persons with whom companies **'have had'** a business relationship. It is positive that the draft reflects 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.*

The LBI also lacks an explicit recognition of **joint or several liability**, with one or more businesses directly causing abuses and the other(s) (or several) controlling it but failing to prevent it from causing or contributing to harm. The text should explicitly recognise the possibility for joint and several liability. Such provision could be added at the end of **Art 8.6** which should read as follows:

“States parties shall ensure that their domestic law includes the possibility of joint and several liability in addition to liability for own business activities and liability activities for other persons”

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 second part is ambiguous. 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.*

Finally, we join Namibia and Palestine in opposing the new art. 8.bis proposed by Brazil, which defeats the purpose of this article and this Treaty. Right-holders who face high domestic obstacles to justice, or who deal with corporate capture of the state, must be able to seek redress through this treaty.

Thank you Mr. Chair.

7. Joint statement on behalf of Corporate Accountability and Transnational Institute

Gracias Sr. Presidente, mi nombre es Cristina Faciabén, soy la Secretaria de Internacional del sindicato CCOO de España y hablo en nombre de Corporate Accountability y el Transnational Institute.

En primer lugar, quiero enfatizar que las Cadenas Globales de producción o valor deben estar presentes en el conjunto del texto, tanto en las definiciones como en el ámbito de aplicación y por supuesto de responsabilidad.

Debemos repetir que las violaciones de derechos humanos, y muy en particular las situaciones de trabajo no decente, incluyendo la esclavitud moderna, se sitúan en los eslabones más bajos de las cadenas, como lugares *deliberadamente* elegidos y construidos para eludir y evadir los controles sindicales, normativos y administrativos y así maximizar la explotación.

Es fundamental por tanto establecer de manera clara la responsabilidad de las matrices sobre el conjunto de la cadena.

Por todo lo anterior, consideramos que es necesario mantener el párrafo segundo del art. 8.4, rechazamos la propuesta de Brasil y China y apoyamos la de Palestina.

Como representantes de los y las trabajadoras, nos preocupa en gran manera el contenido del art. 8.7, ya que puede permitir una exoneración de responsabilidad por parte de las empresas en las violaciones de derechos humanos cometidas a lo largo de sus cadenas, por el mero hecho de haber cumplido con las obligaciones de diligencia. Apoyamos en este sentido la propuesta de Palestina.

Diligencia y responsabilidad por las violaciones son dos cuestiones distintas.

La Diligencia Debida es un mecanismo sobre todo preventivo, útil, pero NO suficiente para garantizar el respeto a los derechos humanos a lo largo de toda la cadena.

También apoyamos la propuesta de Palestina para el artículo 8.8, aunque consideramos que la expresión “or functionally equivalent” debe mantenerse a efectos de facilitar la ratificación.

Consideramos que falta una disposición clave en el artículo 8: una disposición que establezca la responsabilidad conjunta de las distintas empresas cuya acción vulnera los derechos humanos.

En este sentido, la Campaña Global ha propuesto la adición de un párrafo 8.11, que establecería la responsabilidad solidaria de la matriz con las entidades que conformen sus relaciones comerciales y el conjunto de su cadena global de valor, en el cumplimiento de las disposiciones del presente tratado. Esto coincide con la propuesta de Palestina de artículo 8.10 bis.

Esta responsabilidad debería ser directamente aplicable por la jurisdicción del estado donde la matriz está domiciliada (en sentido amplio) o donde residan las personas o comunidades afectadas por el crimen corporativo, siempre a elección de estas últimas.

Así mismo, debería añadirse un último párrafo orientado a evitar las actuaciones empresariales que obstaculicen la aplicación efectiva de las obligaciones que se establecen en este tratado, en cualquiera de las jurisdicciones involucradas.

Queremos igualmente apoyar la propuesta de Palestina de 8.ter y rechazar enérgicamente el 8.bis propuesto por Brasil.

Como sindicato consideramos que se requiere un grado de responsabilidad de la empresa “principal” de tipo objetivo y solidario, que garantice la prevención y, eventualmente, la reparación de los daños que puedan provocar a los derechos de las personas trabajadoras, a lo largo de toda la cadena de producción.

Para finalizar: nuestra posición se basa en la premisa de que todo sistema productivo debe tener a la persona que trabaja en su centro, y por ello, la deseable regulación internacional de la conducta responsable y cumplidora de los derechos humanos por parte de las empresas debe basarse en:

- a) el reconocimiento amplio de Derechos Fundamentales de los trabajadores;
- b) cumplimiento estricto de esos derechos no limitado a la debida diligencia, y
- c) responsabilidad plena y objetiva de la empresa transnacional respecto de las empresas vinculadas e integrantes de la cadena

8. Joint statement on behalf of Friends of the Earth International and Transnational Institute, members of the Global Campaign

My name is Jill McArdle, from Friends of the Earth Europe, speaking on behalf of Friends of the Earth International and Transnational Institute, members of the Global Campaign.

This time last year I spoke on this article and noted that we were in the midst of court cases against Shell for human rights violations.

This year we have seen a major outcome in one case - after a 13 year struggle, a court ruling ordered Shell to compensate Nigerian farmers whose environment was devastated by its oil activities. And we saw another court rule that Shell must reduce its climate impact throughout its global value chains.

Those cases succeeded because of **unique rules** in the Dutch legal system - we cannot rely on that to solve the global problem of impunity - we need this treaty to set **global rules** on liability.

With that in mind:

We support Egypt's proposals throughout the article 8 to add the terms “violations” and “of transnational character”.

8.1: *should explicitly state the need for **administrative, civil and criminal regimes** of liability. Criminal liability is necessary since civil convictions do not always act as a sufficient deterrent.*

8.3 *We support Palestine's proposal. Besides, the text should be revised to make it explicit that States should provide for the liability of TNCs established in their territory **regardless***

of the place where they have caused or contributed to the violations through their global production chains.

8.6 and 8.7: *These provisions remain difficult to interpret. A provision in article 8.6 should be added to cover the liability of TNCs for their failure to prevent violations arising from their own activities.*

*Furthermore, it is very difficult to prove the links of control or supervision between different companies or entities; so a **provision on the presumption of control of parent companies and on the reversal of the burden of proof** should be added.*

*Further in 8.6 - with regard to liability for violations when the corporations **legally or factually** controls or supervises another person or the relevant activity - the addition of the words “but failed to put adequate measures to prevent the abuse” is problematic as it could be used by corporations to escape from their liability. In the same sense, we reject the restricting changes proposed by Mexico’s in 8.6. And we support Namibia’s proposal not to limit this provision to civil liability.*

*Moreover, it creates confusion as it contradicts the welcomed first sentence of article 8.7 “Human rights due diligence **shall not** automatically absolve a legal or natural person conducting business activities from liability...”. However, in that sentence, **the word “automatically” should be suppressed.***

We support Palestine’s proposal to suppress the last sentence of article 8.7

8.8 on criminal liability -

We agree with Palestine’s suggestion to delete ‘Subject to their legal principles’ and “binding on a State party”, as well as the addition of a reference to humanitarian law. A reference to international criminal law should also be included.

*But we disagree with the suppression of “**or functionally equivalent liability**” that allows for an easier adoption by countries that have different regimes of criminal liability.*

*However it is a step backward that the new revised draft has deleted **the incentive for States Parties to “individually or jointly advance their criminal law”**. we think the Treaty should go even further by setting an ambitious criminal liability regime applicable to all States.*

Finally we agree with the new article 8.10 bis proposed by Palestine on joint and several liability and fully disagree with Brazil’s proposal about exhausting all legal instances at national level.

*[As our esteemed chair noted in his opening - we should avoid a mere repetition of what exists in international law – but move forward in protection of human rights and be ready to adapt domestic law -**for clarity we will send our concrete proposal of amendments to the Secretariat.***

9. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

Chairperson,

Article 8 goes to the very heart of what we’re here to achieve. Two of the global trade unions’ five priorities are (1) that this Treaty covers business enterprises regardless of size, sector, operational context, ownership and structure and (2) Parent company-based extraterritorial regulation and access to justice for victims of transnational corporate human rights violations. So, a comprehensive and clear liability regime is essential.

Therefore, we commend the drafters’ efforts in putting together Article 8.6. However, we think that a slight re-ordering the Article will help *differentiate* the forms of liability – namely tortious negligence and strict liability - applicable to the various way in which lead firms - or economic employers as we call them – organise their supply chains.

So, a revised Article 8.6 would read as follows:

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.

Regarding Article 8.7, we welcome the inclusion of a provision stating that HRDD shall not automatically absolve an enterprise from liability for rights abuses. It is our firm view that the requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations. While the language used in the present text partly reflects that used in the UNGPs in relation to this issue – that is – HRDD should not ‘automatically and fully absolve’ – we believe that the word ‘necessarily’ may be more appropriate than ‘automatically’ as this would make it appear less an assumption that hrdd would otherwise provide a shield *but for* this language.

Chairperson,

We also strongly recommend that the final sentence of Article 8.7 be deleted in its entirety. This sentence seems to suggest that the implementation of human rights due diligence standards *does* determine the liability of a business entity, which seems to be in conflict with Article 6 and the first part of the present Article. Again, we would emphasise that the requirement to practice human rights due diligence and the requirement to remedy any harm resulting from human rights violations should be treated as separate and complementary obligations. For these reasons, we would strongly recommend the deletion of the final sentence in this Article.

J. Article 9

1. FIAN International

Thank you Mr. Chair!

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 support Palestine's proposal to include the word “natural persons” under article 9.2.

Furthermore, we oppose China's proposal to delete “including the doctrine of *forum non convenience*” in Article 9.3.

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.

Concerning the concerns expressed by the USA on extraterritorial obligations and jurisdiction in the present third draft that, according to the USA, might not find much support amongst stakeholders: we want to remind that at domestic level, the US Alien Tort Claims Act provides for efficient extraterritorial obligations.

As the Secretariat of the ETO Consortium – gathering some 170 academic and CSO members worldwide advocating for the implementation of extraterritorial obligations (ETOs) of States –, FIAN has documented the increasing number of human rights standards recognizing ETOs and its justiciability, as for example the General Comment 24 of the CESCR, and the General Comment 16 of CRC. Furthermore, several special procedures have developed on ETOs, including with regard to the activities of corporations. In total, there are some 200 UN pronouncements on ETOs by diverse UN Treaty Bodies and special procedures – indicating the strong anchorage of ETOs in the universal human rights system and international human rights law.

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. This new article would read:

“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.”

I thank you Mr. Chair.

2. International Commission of Jurists

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, 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.

3. International Organization of Employers

Chair

Article 9 continues to create huge legal uncertainties and continues to be not implementable.

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.

The extensive jurisdictional scope of the draft is further exacerbated when considering the breadth of the “activities” to be regulated, which include electronic transactions.

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 of the UN Guiding Principles. Since access to

⁶ Formulation based on article 36 of Council of Europe’s Recommendation 2016 on Business and Human Rights.

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.

Finally, 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 legal uncertainty this article brings.

Thank you.

4. United States Council for International Business (USCIB)

- Thank you Chair
- The business community continues to believe that the most appropriate forum for remedy is the place where the harm occurred.
- Therefore, investments should be made in increasing State capacity to pass, implement and monitor effective, human rights-based laws, as well as in independent and competent national judiciaries.
- Such investments would go further in lowering barriers to accessing remedy and provide for clear, consistent and predictable proceedings.
- Considering Article 9’s proposed scope of adjudicative and extraterritorial jurisdiction that is so vast and ambiguous, coupled with the incorporation of vague concepts like “activity on a regular basis” and “substantial activity of defendants,” we join with the many states who have clearly stated that they cannot support the text.
- As drafted, Article 9 and the entire LBI does not enjoy broad, cross-regional support. We urge that Article 9 and the entire draft LBI be redrafted to align with the UN Guiding Principles on Business & Human Rights.
- Thank you.

5. Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR

Thank you chair,

On behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR.

Art 9.1 only refers to claim brought by “victims”. While it could be understood as implicitly including their representatives, an explicit reference to them could be more child sensitive. We therefore propose

9.1. Jurisdiction with respect to claims brought by **to add or on behalf of** victims

Although it does not specify it explicitly, Art 9 only addresses the issue of jurisdiction over civil complaints, leaving aside criminal complaints, despite Art. 8’s provision allowing for possible criminal liability for business enterprises, and administrative complaints

We therefore propose:

New Art. 9.3. Provision regarding jurisdiction with respect to criminal claims, including the provision for universal jurisdiction for certain crimes.

We also propose to add

New Art. 9.4. Provision regarding jurisdiction with respect to administrative claims

The new draft replaces fair trial with fair judicial process, which does not convey the full meaning of the rights to a fair trial as recognized in international human rights law. We would suggest restoring “fair trial” or (“fair judicial hearing”) to this language at Art 9.5

Thank you chair for taking our proposal into consideration.

6. Joint statement on behalf of FIDH and Franciscans International

Thank you, Mister Chair. I make this contribution on behalf of FIDH and Franciscans International, two organisations with ECOSOC status

The changes incorporated on article 9 are welcomed as they clarify the grounds for jurisdiction and definition of domicile. Yet some changes are still necessary to ensure that accountability gaps are properly closed.

Article 9.1.(a) positively adds the place where the human rights abuse “produced effects” which can be equated with the place where the harm/damage occurred, an obvious ground for the jurisdiction that had so far been missed.

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”. We also support Palestine and Egypt’s suggestion to add ‘violation’.

In Article 9.5. the elimination in the new draft of the phrase “sufficiently close connection” and use, instead, of a close list of grounds for proceeding with a forum necessitatis claim, can have both advantages and disadvantages. 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” that is “sufficiently close”. On the other hand, the close list of grounds risks excluding other grounds that could, in a given jurisdiction or case, be interpreted as amounting to a “connection”.

We suggest to maintain the reference to a “connection to the State Party concerned”, but to replace “as follows” by “such as [adding a non-limitative list of three grounds].” The LBI would thus retain a general basis that can 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, especially given that having an “activity on a regular basis” already constitutes a regular ground for jurisdiction under art 9.2.b. We thus suggest to change “a substantial activity” with “some activity”.

As such, we propose that article 9.5 could be drafted as follows

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, 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 activity of the defendant*

7. Joint statement on behalf of Friends of the Earth International and XX, members of the Global Campaign

My name is Juliette Renaud, from Friends of the Earth France, speaking on behalf of Friends of the Earth International and XX, members of the Global Campaign.

I coordinate the legal action against the oil giant Total, based on the French law on duty of vigilance. This law gives hope to affected communities in Uganda and Tanzania, as it makes it possible to sue transnational companies in their home countries, where decisions are made.

We filed this case exactly two years ago, yet there has been no ruling on the content yet. Indeed, while violations of human rights and unlawful arrests and harassment of human rights defenders are continuing and multiplying in Uganda, we are still stuck on procedural issues related to the competent jurisdiction to hear the case. Total and other companies sued under this law would like the cases to be heard by commercial courts, composed by non professional judges coming from the business sector. This judicial controversy arose because the French law on duty of vigilance did not clearly state that civil courts should be competent. Hopefully

this has been clarified last week with a new article of the judicial code adopted by the Parliament, that will apply for future cases.

This example shows that the wording of the provisions in article 9 must be very carefully chosen as these provisions can either guarantee effective access to justice, or, on the contrary, create more obstacles in the difficult quest for justice and remedies of affected people. We therefore have various comments and proposals to strengthen this article and ensure its effectiveness.

First of all, we agree with Palestine's proposal on 9.1 and 9.1.c. Indeed, as already commented on the previous draft, to avoid loopholes, we consider that article 9.1 should include an explicit reference to the business relationships and global value chains of transnational corporations, to be sure that it will be possible to bring legal claims in the home country of the parent or outsourcing company. In that sense, we also agree with Palestine's proposal on article 9.2. Besides, we welcome the reintroduction of 9.1.d stating that the country where the victim is a national or is domiciled also has jurisdiction.

Moreover, in 9.2, the inclusion of the definition of domicile that encompasses the assets of the companies is positive, but 9.2.b should be reformulated. The criterion must be the existence of sufficient resources for the reparation of those affected, and according to the demands of the claimants. Also, "activity on a regular basis" in 9.2.d should be removed as it can be difficult to interpret and seems to be redundant with "where operations are located" in 9.2.b. In addition, "principal place of business" should be in plural; and we agree with Palestine's addition of 9.2.d bis "substantial business interests", which is a well known expression in European law for instance. Besides, the article 9.2 should be better coordinated with 9.5 on *forum necessitatis*.

We reject China's proposal to delete "including the forum non conveniens" in article 9.3.

We welcome the provision 9.4 about connected claims, which will allow, for instance, the possibility of judging a parent company and its subsidiary operating abroad before the same court. This is a first important step in establishing their joint and several liability. However, this provision should be improved by adding paragraphs defining how the term "connected" should be interpreted.

Finally, we welcome the provision about *forum necessitatis*, as it can help to avoid the denial of justice, but the list that has been added makes its implementation more restricted. Indeed, the last words "as follows" announce a closed list when the list should be open. The three items that follow should only be examples to guide the judges without tying their hands. It is therefore appropriate to end the paragraph with "such as" instead of "as follows", and to suppress the last item 9.5.c. Indeed, 9.5.c. is already a criteria of jurisdiction in 9.2 and including this criteria in 9.5 will encourage judges to require more connections than the *forum necessitatis* requires.

We will send our concrete text amendments for these different proposals.

Thank you very much M. Chair.

Proposed amendments

Amendment 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~~ violations covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

- a. the human rights ~~abuse~~ violation occurred and/or produced effects **or risks to occur**;*
or
- b. an act or omission contributing to the human rights ~~abuse~~ violation **or risk of violation** occurred; or*
- c. the legal or natural persons alleged to have committed, **including through their business relationships and global production chain**, an act or omission causing or*

contributing to such human right ~~abuse~~ **violation** in the context of business activities, ~~including those~~ of a transnational character, are domiciled; or

d. the victim is a national or is domiciled; or

e. the legal or natural persons that have business relationships or are part of a global production chain with the legal or natural persons alleged to have committed such acts or omissions in the context of business activities, are domiciled.

Amendment 9.2.:

Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, ~~including through their business relationships~~, is considered domiciled, **including through their business relationships or global production chain**, at the place where it has its:

a. place of incorporation or registration; or

b. place where it has the principal **sufficient** assets or **where its** operations are located; or

c. central administration or management is located; or

d. principal **places** of business or activity **or substantial business interests**. ~~on a regular basis~~

Proposed new paragraph 9.4.b and 9.4c:

9.4.b. Claims are connected in the sense of paragraph 9.4.a if:

- i. it is efficient to hear and determine them together; and
- ii. the defendants are related

9.4.c. Defendants are related in the sense of paragraph 9.4.b, in particular if at the time the cause of action arose:

- i. they formed part of the same corporate group;
- ii. one defendant had business relationships with another defendant or controlled it directly or indirectly;
- iii. one defendant directed the litigious acts of another defendant; or
- iv. they took part in a concerted manner in the activity giving rise to the cause of action.

Amendment 9.5

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 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

~~e. a substantial activity of the defendant~~

K. Article 10

1. Feminists for a Binding Treaty

Thank you Mister Chairperson. I speak on behalf of the Feminists for a Binding Treaty.

In Art. 10.1, we suggest changing ‘any’ to ‘all’ so that it reads that States... “shall adopt all legislative or other measures.” We also suggest changing the sentence so that it reads “which constitute international crimes, including gross human rights violations and serious violations of international humanitarian law”.

We support Palestine's proposals on article 10.2. We also suggest adding at the end of article 10.2 the following sentence: "This may include cases where harms arise from environmental or other causes of latent diseases."

Thank you.

2. **Joint statement on behalf of CETIM and Transnational Institute, as members of the Global Campaign**

I speak on behalf of CETIM and Transnational Institute, as a members of the Global Campaign

We have just two small suggestions for this article.

10.1: We propose to delete the reference to the most serious crimes, we cannot differentiate and graduate crimes. Crimes are crimes. Moreover, we think it's important to add a reference to labour rights and environmental norms.

***Amendment 10.1:** The State Parties to the present (Legally Binding Instrument) undertake to adopt any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the ~~commencement of legal proceedings in relation to human rights abuses resulting in prosecution and punishment of all violations which constitute the most serious crime of concern to the international community as a whole~~ of international human rights law, Labour rights, Environmental norms and international humanitarian law.*

10.2: The notion of reasonable time remains far too vague to guarantee adequate protection for affected communities and individuals. We propose to change for a fair and adequate period of time for the investigation and commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.

***Amendment 10.2:** Domestic statutes 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~~ a fair and adequate period of time for the investigation and commencement of prosecution or other legal proceedings, particularly in cases where the violations occurred in another State or when the harm may be identifiable only after a long period of time.*

3. **Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misreor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, and Maryknoll**

Mr. Chair,

I deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misreor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, and Maryknoll

We welcome the fact that article 10 gives essential clarifications regarding the statute of limitations on human rights violations that do not constitute grave human rights abuses. Yet, this article still lacks clear indications of how long such a period should be. Especially, this article does not contain any specifications when the victim is a child. This should be addressed in an additional article:

article 10.2bis – In the case of child victims, States Parties shall take all legislative or other measures necessary to ensure that statutory or other limitations will not deprive them from their right to access justice, remedy and reparation.

The article should also clarify that statutes of limitations do not apply to crimes against humanity. Based on this, Art. 10.2. should add the following sentence at the end

Art. 10.2. State Parties shall ensure that the responsibilities resulting from the commission of crimes against humanity, war crimes and the crime of genocide, will never be subject to statutes of limitation.

Finally, the reference to "legal proceedings" could be clarified in the sense that it refers to civil, criminal and administrative proceedings.

Thank you Mr. Chair.

4. Joint statement on behalf of DKA Austria, Child Rights Connect, ECPAT International, Clínica de Direitos Humanos UFMG and Clínica de Direitos Humanos PPGD/PUCPR

Article 10 is crucial out of a child rights perspective.

In article 10 (statute of limitations) "prosecution and punishment" was changed for "legal proceedings", a concept that encompasses also civil and administrative actions and proceedings, which is positive in principle. But in both 10.1 and 10.2 paragraphs, the draft continues using the ill-grounded concept of "most serious crimes of concern to the international community as a whole", instead of the proposed term: "crimes under international law," which is fairly well defined in international law This is an important proposal that should be restated.

We therefore propose to change article 10.2 like that:

- 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 under international law shall not run for such a period as no effective remedy is available and shall not apply to civil or administrative actions sought by victims seeking reparation for their injuries. 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

We support Namibia's statement during the 5th session: "Time should not run against children during the investigation and prosecution of the violation".

We would recommend that domestic statutes of limitations do not start before the alleged victim reaches the age of 18. And recommend to add new

10.2bis. In the case of child victims, States Parties shall take all legislative or other measures necessary to ensure that statutory or other limitations will not deprive them from their right to access justice, remedy and reparation.

Thank you chair for taking our proposal into consideration.

L. Article 11

1. Friends of the Earth International

Thank you Mr. Chair,

My name is Bertrand Sansonnens and I speak on behalf of Friends of the Earth International and as a member of the Global Campaign. The pandemia has shown that human rights mechanisms to accomplishment cannot be dependent on business and especially on transnational corporations' interests. So we have to control their activities and reorient it (them?) towards the Human Rights principles.

Generally speaking, the Third Revised Draft still lacks strong mechanisms to guarantee the enforcement and effectiveness of the Treaty. In the current draft, all the responsibilities are based on the States, or based on national provisions, which we know is insufficient. Indeed, through their complex legal and administrative structures and outsized economic and political power, TNCs find ways to bypass accountability in national jurisdictions. This is why the objective of this process should be to establish an international framework for TNCs and other businesses with transnational character, beyond States' obligations.

It is also important to consider that through their undue influence, private sector lobbies do everything in their power to prevent or delay the adoption and/or weaken the content of any

new national/regional/international laws that seek to regulate the activities of TNCs and that could hinder the profits of these entities. Furthermore, today TNCs are able to sue States before international arbitration courts through ISDS controversial mechanisms included in more than 3400 investment treaties. This is why we need an international binding instrument in the first place.

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 them. The article 11.2 allows the affected peoples' choice but it limits their options.

To strengthen the provision of this article, we propose the following amendment:

***Amendment 11.2:** All matters of substance which are not specifically regulated under this [international legally binding instrument] ~~may~~ **shall**, upon the request of the victim **and/or if another law better protects the victims' rights**, 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 **conducting business activities of transnational character** alleged to have committed the acts or omissions is domiciled, **including through its business relationships and global production chain.***

2. International Organization of Employers

Chair

The third revised draft treaty continues to grant the victim wide discretion to select the applicable law. 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 recognized 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.

Thank you

3. United States Council for International Business (USCIB)

- Thank you, Chair
- We join with the many states and delegates today objecting to Article 11.
- It is widely accepted that applicable law is that of the Forum State. In contradicting this principle, this LBI creates exposes rights holders, enterprises and States to undue risk. Jurists in one State should not be expected to interpret and apply the laws of another State. Businesses should expect to be held accountable to the laws of the State in which they are operating and where the harm occurred.

4. Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

We have a proposal for a small but significant amendment to Article 11.2. We would recommend the insertion of a little c, which would include the *law of the domicile of the victim*. We believe that, among other things, this would help balance out the ability of transnational corporations to choose host countries with weak or under-developed legal and governance frameworks.

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.**

Thank you, Chairperson.

M. Article 12

1. FIAN International

Gracias, Sr. Presidente. Hablo en nombre de FIAN Internacional.

Apoyamos a Palestina en relación a la supresión del art. 12.12, que es contrario al objetivo mismo de este artículo. La disposición no ofrece ninguna claridad sobre lo que constituye la "legislación aplicable" del Estado Parte y los motivos que pueden existir para evaluar la pretensión del Estado Parte requerido de denegar dicha asistencia jurídica mutua o cooperación jurídica internacional. Dada la naturaleza y el impacto de las actividades empresariales de carácter transnacional, la asistencia jurídica y la cooperación judicial entre Estados son cruciales para que las comunidades afectadas puedan ejercer plenamente sus derechos en virtud de este instrumento jurídicamente vinculante. Tampoco podemos apoyar la sugerencia de Brasil en añadir el concepto de *ordre public*, ya que abre un margen muy amplio de objeción por parte de los Estados y genera aún más vulnerabilidad a las comunidades afectadas.

También es imperativo que el art. 12.1 se lea conjuntamente con el art. 14.3, de modo que se siga el estándar más alto de respeto, protección y cumplimiento de los derechos humanos que se prevea (ya sea en el derecho interno o en el derecho internacional y regional) para la prestación de asistencia jurídica mutua y cooperación judicial internacional. El artículo revisado debería decir lo siguiente:

***“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.*”**

Muchas gracias, señor Presidente.

2. International Organization of Employers

Chair

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.

With regards to article 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.

With regards to article 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.

Thank you

3. United States Council for International Business (USCIB)

- Thank you Chair
- International assistance and cooperation are essential in promoting human rights and access to remedy. We call on States to increase their efforts to strengthen capacity through technical cooperation and peer learning.
- Article 12.5 includes a list of proposed actions for cooperation between States that is inappropriate and circumvents legal rights to due process. Mandating that States “execute searches and seizures”; “Examine objects and sites”; and “facilitate the freezing and recovery of assets” could also enable politically motivated and frivolous proceedings against businesses.
- We join with the many states objecting to Article 12 due to its overly prescriptive wording and infringement of state sovereignty.
- Thank you.

4. Joint statement on behalf of Transnational Institute and CETIM

Gracias señor presidente

Mi nombre es Adoración Guamán, profesora de Derecho de la Universidad de Valencia y hablo en nombre del Transnational Institute y de CETIM, miembros de la Campaña Global.

Desde la campaña global queremos subrayar que este artículo es clave para garantizar la eficacia del futuro tratado, se trata de la disposición que debe asegurar que el acceso de las personas y comunidades a la justicia no se frustra por el elemento de transnacionalidad.

El ejemplo de los obstáculos que deben enfrentar las víctimas para conseguir justicia cuando se enfrentan a una transnacional se evidencia claramente en el caso Chevron-Texaco en Ecuador. Este crimen ambiental demuestra cómo, aún cuando el acceso a la justicia esté garantizado en el ámbito estatal, la reparación efectiva puede frustrarse cuando se trata de un crimen cometido por una empresa transnacional.

Desde hace 25 años, más de centenares de habitantes de la Amazonía ecuatoriana mantienen una batalla jurídica en contra de Chevron, e intentan superar una trama de obstáculos al acceso a la justicia. En concreto, la utilización del velo corporativo y del entramado societario ha sido una vía reiteradamente utilizada por Chevron para mantener su capital al abrigo de los intentos de ejecución de una sentencia firme.

El 14 de febrero de 2011, se dictó la sentencia de primera instancia en la que se condenó a Chevron al pago de 18 mil millones de dólares. El 12 de noviembre de 2013, la Corte Nacional de Justicia resolvió el recurso de casación planteado por Chevron y redujo el monto de la sentencia a 9.500 millones de dólares.

Aunque la sentencia era firme desde entonces aun no ha sido ejecutada. Chevron salió del Ecuador en 1992 dejando en sus cuentas bancarias vacías. Por este motivo, y a efectos de obligarla al pago de la indemnización, las y los demandantes se han visto obligados a instar la ejecución de la sentencia en los países donde se identificaron activos de Chevron. Se iniciaron por tanto acciones para el reconocimiento y ejecución de la sentencia en **Brasil, Argentina y Canadá**, pero no se ha podido conseguir la ejecución y por tanto la reparación: la interposición de diversas estructuras societarias, de filiales y subsidiarias ficticias en

distintos países, la permanente acción de Chevron interfiriendo en el proceso, el lobby político y la captura corporativa, siguen impidiendo la remediación efectiva.

En cuanto al contenido del artículo 12, proponemos eliminar las referencias a la legislación nacional en algunos párrafos, ya que este tipo de remisión puede reducir el alcance de este artículo.

También proponemos eliminar la mención al "orden público" en 12.11.c. La consideramos extremadamente problemática ya que abre la posibilidad de rechazar un juicio basado en un término vago y puede poner en peligro la primacía de los derechos humanos.

El concepto de orden público ya no puede utilizarse de manera amplia en el derecho internacional, una vez que se ha convertido en una carta blanca para que las autoridades violen los derechos humanos y criminalicen a los defensores y activistas de los derechos humanos.

Por último, queremos apoyar a Palestina en la exclusión del párrafo 12.12, por los mismos motivos ya presentados.

N. Article 13

1. Centre for Health Science and Law

The Centre for Health Science and Law supports the proposal by Panama to include a reference to the best interests of the child in the preamble.

The Centre for Health Science and Law (CHSL) proposes that the Working Group:

III (part one). Amend Articles 13(2(e) and 15(7) as follows (Victim Fund) as follows:

International Advocacy Fund for Victims of Human Rights Abuses or Violations Concerning Businesses (also referenced in article 13.2(e))

Rationale: The longer name more accurately characterizes the fund's purpose—especially to a general audience—and distinguishes it from a compensation fund.

2. United States Council for International Business (USCIB)

- Thank you, Chair.
- Article 13.1 directly contradicts other provisions in this LBI, including Article 12.12, giving States direct powers. Considering the Sovereignty of the State, this provision should be edited to recognize the power of the State to pass and implement its own national laws.
- Thank you.

O. Article 14

1. FIAN International

Thank you Mr. Chairperson.

Concerning Article 14, 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 that protects any national, regional or international instruments that may provide for stronger protection of affected individuals and communities and their access to justice and remedy in the context of human rights abuses by transnational corporations and other business enterprises. Therefore, we support the pertinent proposals made by Palestine, which strengthen the content of this third paragraph, although we defend the maintenance of “or restrict their capacity to fulfill their obligations” after “that does not undermine”, as also defended by other organizations.

We express disappointment to States reserving their position to this key Article 14.5. Article 14.5 a and b 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. In addition to the current language, we propose for this article to also refer to “contracts” in addition to “international agreements”. We additionally support Palestine’s proposal for this Article 14.5.a to require States to review, adapt and implement such trade and investment agreements in compliance with the obligations under the present instrument. We again remind and reiterate to the states presenting reservations to this article, such as Brazil, Panama, Egypt and Pakistan of the primacy of human rights under international law.

Thank you Mr Chair.

2. International Commission of Jurists

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 this context, the ICJ would reiterate its comments and proposals made to the Second draft which are still relevant.

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, as of prescribing specific tools as an *ex-ante* impact assessment of trade and investment agreements to achieve compatibility.

I refer to the ICJ’s full comments and recommendations to the Third Revised draft for further details <https://www.icj.org/wp-content/uploads/2021/10/ICJ-Comments-Third-Revised-LBI-2021final.pdf>

3. International Organization of Employers

Chair

The IOE agrees with the many countries which have expressed great concerns, particularly with regards to article 14.4. and 14.5. 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.

Of course, States can always be encouraged to consider such expectations and of course they need to ensure that they have enough bargaining space to do so, 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.

Thank you

4. United States Council for International Business (USCIB)

- Thank you Chair
- The language of this article mandates that States establish a regulatory regime consistent with the proposed LBI. However, this Article neglects the competing priorities that States must consider when reaching agreements, including the right to development.

- We take note of the States who have raised questions and reservations on Article 14, and point out that it is another regrettable example of lack of broad and cross-regional consensus on the draft instrument.
- Finally, Chair, I would like to take a moment to address some of the comments made regarding international trade and investment dispute settlement.
- Trade has been a major driver of development for decades – stimulating inclusive economic growth and creating millions of jobs for men and women often with better working conditions, higher wages and better opportunities for women than in domestic markets. It enhances skills development, knowledge flows, productivity and competitiveness. In the context of our shared recovery from the COVID-19 pandemic – this is even more urgent.
- An open trade and investment environment leads to growth and development of economies, which will be vital in the rebuilding efforts post pandemic.
- One important aspect in this context is investment protection, which will be vital to encourage as much investment as possible. Markets that provide protections to foreign investors will increase investor confidence and be more attractive as investors are making investment decisions.
- This is important now more than ever as countries and our global economy work to recover.
- Thank you.

5. Joint statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, and Maryknoll

Mr. Chair,

We deliver this statement on behalf of CIDSE, CCFD-Terre Solidaire, Misereor, KOO, DKA, Fastenopfer, Focsiv, Broederlijk Delen, Entraide & Fraternité, CAFOD, Trocaire, Commission Justice & Paix Belgium, Alboan, and Maryknoll.

We welcome the general principles underlined in Art 14.5 regarding trade and investment agreements. Provisions in this article are crucial to ensure that human rights and our planet are not sacrificed in the name of profit, and that companies cannot exercise undue influence on states' capacity to protect and fulfil human rights. However, we still consider that the article is too vague insofar as it does not specify how States should practically ensure that existing agreements do not violate human rights.

In particular, the question of how a human rights approach might apply in the context of Investor-State Dispute Settlement Tribunals remains unaddressed. Such Tribunals are unfairly biased towards corporate actors and a means for corporations to exercise undue influence on governments' policies and undermine workers' rights and environmental protection.

While independent international agreements establish ISDS, the LBI should ensure that such tribunals safeguard the primacy of human rights and the environment over trade and investment concerns.

To specify better how States Parties shall ensure the primacy of human rights over trade and investment agreements, a few lines should be added at the end of art 14.5.a. reading as follows:

14.5.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

We also notice the same vagueness is reflected in Art 14.5.b, referring to new trade and investment agreements. While the article mandates States Parties to ensure that new agreements are "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", it does not specify how such compatibility should be ensured. We therefore reiterate the need for comprehensive environmental and human rights impact assessment before the negotiation and signature of any new trade or investment agreements by State Parties.

This is why we suggest adding at the end of 14.5.b:

"14.5.b. To ensure the compatibility of these agreements with States Parties' human rights obligations, States Parties shall:

1. conduct impact assessments based on the UN Guiding Principles on 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.

2. include specific exception clauses in all new trade and investment agreement 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."

Moreover, the LBI should require States to revise trade and investment agreements that can negatively impact human rights. To do so, we suggest adding a new lit, c), that would read as follows:

"14.5.c. All existing bilateral or multilateral agreements, including regional and sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, to be reviewed 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

6. Joint statement on behalf of Friends of the Earth International and CETIM

Muchas gracias,

hablaré en nombre de amigos de la tierra internacional y CETIM, somos miembros de la campaña global.

Nos gustaría, inicialmente, recordar que uno de los retos más importantes del derecho internacional es la "fragmentación". Existe un sin número de instrumentos y foros de solución de controversias que se traslapan y colisionan entre sí, lo que ha generado inseguridad jurídica para la efectiva garantía de los Derechos humanos.

Así, se puede comprobar en el aumento de demandas de inversión contra países del sur global, que generalmente surgen por la protección de los Estados receptores de los derechos humanos.

Este instrumento vinculante es de vital importancia para la armonización del derecho internacional desde del Derecho internacional de los Derechos humanos.

Bajo el mandato de la Resolución 26/9 se debe tener una interpretación coherente con las normas del derecho internacional, que establecen la obligación ineludible de los Estados miembros de Naciones Unidas de negociar cualquier instrumento en el marco del respeto de los derechos humanos, pues son normas imperativas de jus cogens de acuerdo con el artículo 53 de la Convención de Viena sobre el Derecho de los Tratados. En consecuencia, el artículo 14 que se negocia en esta sesión, debe tener en cuenta el carácter universal e inderogable de los derechos humanos, que exige la coherencia con los principios e instrumentos del derecho internacional, es decir, que las violaciones de estos derechos generan la nulidad de todo

tratado que esté en oposición con una norma imperativa de derecho internacional general, sin importar la naturaleza del instrumento internacional, ya sea un tratado de empresas y derechos humanos, un tratado comercial, o un tratado de inversiones, todos debe respetar los intereses o valores superiores de la comunidad internacional, conforme los derechos humanos. Así defendemos la recuperación de la previsión de los Elementos presentados en 2017, se Presidente, por Ecuador para que sea garantizada la Primacía de los derechos humanos sobre todos los acuerdos de comercio y o inversiones.

Así proponemos la siguiente redacción:

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 14.5a: *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.*

Apoyamos la propuesta de Palestina para el artículo 14.3 y por último, nos gustaría rechazar la posición de Brasil, Panamá y Egipto sobre el artículo 14.5. Apoyamos la propuesta de Palestina en el 14.5a, excepto que nos parece muy importante NO suprimir "or restrict their capacity to fulfill".

Es importante recordar la asimetría provocada por las normas de protección de inversiones que establecen una serie de derechos para los inversores extranjeros. Los centenares de casos resueltos por tribunales de arbitraje de inversiones en favor de las empresas, que condenan a Estados a pagar indemnizaciones millonarias a estos actores corporativos por adoptar decisiones totalmente legítimas en defensa de los derechos de sus pueblos, son la prueba de esta asimetría.

muchas gracias

P. Article 15

1. Centre for Health Science and Law

The Centre for Health Science and Law supports the proposal by Panama to include a reference to the best interests of the child in a preamble.

The Centre for Health Science and Law (CHSL) proposes that the Working Group:

I. Add the following to the end of Article 15(1)(a):

Committee expert members shall provide declarations of conflicts of interest to the Conference of State Parties or its designate in a prescribed manner and remain free of non-trivial conflicts of interest during their tenure on the Committee.

Rationale: Declaring conflicts of interest is consistent with the spirit of the Legally Binding Instrument and, specifically, Article 6.8. It is appropriate for experts to self-identify as representing public interest, academic, or human rights interests on one hand, or business interests on the other, based on how those entities are financed and governed and to be characterized as such in meetings and reports. These distinctions are not always obvious. Disclosing sources of conflicts of interest was advocated by one of the Working Group's experts as a precondition for appointing experts to the Treaty's Article 15 Committee. Also, disclosing conflicts of interest is typically required by authors before publishing in scientific journals.

II. Amend Article 15(2) (comprehensiveness of reports) as follows:

Article 15 2. [States](#) Parties shall submit to the Committee, through the Secretary-General of the United Nations, [comprehensive](#) reports [following a prescribed format](#) on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State

Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken, time-delimited plans to achieve full implementation and such other reports as the Committee may request.

Rationale: If given the flexibility, national government reports can often be weakly indicative of progress by reporting on metrics selectively, rather than comprehensively which can mask implementation failures. In addition, full domestic legal implementation of political commitments to treaties can be slow-going without concrete plans, clear accountability mechanisms, and targeted technical assistance. Arguably this amendment would promote an important change to member state reporting and a recurring incentive to implement LBI provisions in domestic law.

III. Amend Articles 13(2)(e) and 15(7) as follows (Victim Fund) as follows:

***International Advocacy Fund for Victims of Human Rights Abuses or Violations Concerning Businesses"* (also referenced in article 13.2(e))**

Rationale: The longer name more accurately characterizes the fund's purpose--especially to a general audience--and distinguishes it from a compensation fund.

Amend to Article 15(7) re "International Fund for Victims" and establish a corporate-abuser-pay principle as follows:

States Parties shall establish an International Advocacy Fund for Victims of Human Rights Abuses by Businesses covered under this (Legally Binding Instrument), to provide legal and financial aid to victims, taking into account the additional barriers faced by women, children, persons with disabilities, Indigenous peoples, migrants, refugees, internally displaced persons, and other vulnerable or marginalized persons or groups in seeking access to remedies. This Fund shall be established at most after **one year** [DELETE: (X) years] of the entry into force of this (Legally Binding Instrument). The Conference of Parties shall define and establish the relevant provisions for the functioning of the Fund. The fund shall be replenished by the States Parties annually and supplemented by a 2% levy from the proceeds of any fine, court-approved settlement, or tribunal-imposed financial award in any proceeding in which this (Legally Binding Instrument) if so ordered in any oral or written judgement, following a Corporate-Abuser-Pay-Principle.

Rationale: State parties should begin to finance the International Fund for Victims on a priority basis soon after the entry into force of the Legally Binding Instrument. The fund could be supplemented by a small (e.g., 2%) levy on court- or tribunal-ordered financial penalties imposed on business enterprises where the LBI is relied upon to secure claims. This funding mechanism can be understood as the "Corporate-Abuser-Pay-Principle" and brought to the attention of national judiciaries, legal professions, and human rights organizations to facilitate its use. The bulk of payments would foreseeably derive from large corporations (often headquartered in high-come countries) whose global national revenues often exceed entire gross domestic products of low- and middle-income economies, posing severely unequal access to human rights advocacy resources. This would help establish a Corporate-Abuser-Pay-Principle to financially support efforts to investigate, prosecute and litigate human rights claims against corporations in low- and middle-income countries and elsewhere when doing so is in the interests of justice.

Funds could also be used to support public interest litigation and law reform technical assistance in low- and middle-income countries where corporate accountability laws and regulations could better implement the Legally Binding Instrument, such as national regulations governing child, health and environmental rights impact assessments, class action rules of procedure, and transparency mechanisms.

2. FIAN International

Thank you Mr. Chairperson.

Regarding article 15, given the existing weak enforcement of international human rights law, we strongly call for the strengthening of the functions, purposes and competencies of the Committee. For the same reason, we are highly concerned by Brazil's suggestion of deleting

this article, which does not, in any way, contribute to the protection of affected communities and individuals.

Besides, this draft legally binding instrument was accompanied in previous sessions by a draft Optional Protocol providing for an individual complaint mechanism, similar to other existing Optional Protocols. We, therefore, recommend for an Optional Protocol to be part of these negotiations and be adopted jointly with this LBI.

Thank you Mr Chair.

3. International Commission of Jurists

The system of treaty monitoring at the UN is already insufficient in examining State compliance with classic human rights treaties and may be even less effective in relation to practices and policies of business enterprises. The ICJ suggests that, rather than entirely replicating the existing system, the new treaty on business and human rights could build on the best elements of that system but move beyond them and establish mechanisms with strengthened functions and enhanced the effectiveness of the international system of treaty monitoring and supervision.

A Committee of independent experts with a strengthened mandate to review reports of States and business performance of this treaty remains critical. However, beyond that, the OEWG should also include provisions to reinforce the mandate of the Conference of States Parties (COP) by expanding their powers to address issues relating to business human rights responsibilities that are not addressed or are addressed in an insufficient way in the present general treaty, and elaborate and adopt further commitments and protocols with binding force to the States party at regular periods of time. This arrangement would spare the need to establish an *ad hoc* procedure each time within the Human Rights Council.

The participation of the widest range of stakeholders is the most essential in new institutional arrangements if they are going to be effective and transparent, marking a difference with institutions of the past. Such participation must include labour unions, NGOs, and other less formal associations that have a mission relative to the economic life and the operations of companies. Such participation is essential in the selection and functioning of the expert committee, but also in the COP meetings and the discharge of its functions. The ICJ finally recalls that the draft treaty should make explicit provision for a strengthened role for civil society and other stakeholders in the monitoring of compliance with its provisions by states and business enterprises.

I refer to the ICJ's full comments and recommendations to the Third Revised draft for further details <https://www.icj.org/wp-content/uploads/2021/10/ICJ-Comments-Third-Revised-LBI-2021final.pdf>

4. Sikh Human Rights Group

As I stated in my opening remarks on Monday, the Sikh Human Rights Group whole heartedly welcomes and supports the formulation and enactment of a binding legal instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. However, we are concerned with issues of accountability and the enforcement of appropriate remedies by States and/or judicial bodies.

Therefore, we strongly believe along with a myriad of other civil society organisations and large and small businesses, with whom we have personally consulted, that these shared concerns could be mitigated against by this Working Group providing for the following adaptation to the latter text of **Article 15 Subsection (2)** – so that it reads as follows:

*[...] Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request **particularly on issues of accountability and remedies.***

For not only would this amendment lead to enhanced transparency and accountability between States and between States and the Committee but also civil society to whom they both serve.

Thank you very much that concludes my submission.

5. **Joint statement on behalf of ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI**

Thank you, Chairperson. I speak on behalf of the global trade union organisations: ITUC, BWI, EI, IndustriAll, ITF, IUF, PSI, and UNI.

While we appreciate that this session is very much focused on building consensus around the draft text based on broadly agreed principles and concepts, we do not think that – over the past six years - we’ve had a satisfactory discussion on institutional arrangements. For the global labour movement, Article 15 falls below our expectations. Indeed, since the outset, we’ve been calling for a complementary international mechanism to oversee compliance with the Legally Binding Instrument. However, we think that, as a minimum, the functions and powers of the Committee should be strengthened by, among other things, having the ability to hear individual complaints. Therefore, we have two formulations for a possible new Article 15.4.

The first formulation is:

States Parties recognise the competence of the Committee to receive and consider communications and complaints from individuals, communities, or their representatives concerning human rights abuses by business enterprises contrary to the provisions of the LBI and violations by a State Party of any of the rights set forth in the LBI.

And the second option:

State Parties recognise the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals or their representatives who claim to be victims of a violation by a State Party of the provisions of the LBI or victims of human rights abuses by business enterprises contrary to the provisions of the LBI.

Thank you, Chairperson.

Q. **Article 16**

1. **FIAN International**

Thank you Mr. Chair.

Article 6.8 relative to the protection of preventive measures from undue influence from commercial and other vested is a crucial provision and should actually be mainstreamed throughout the legally binding instrument. The corporate capture of policy and decision-making spaces is one of the main obstacles for implementation, explaining the weakness of corporate accountability. We therefore strongly support Palestine’s proposal (16.5 bis) for this provision to be included in article 16 on implementation.

We additionally require for an additional paragraph under this article that provides for the direct applicability of the present (Legally binding instrument) in cases of legislative negligence for its implementation. The direct applicability of human rights treaties already exists under some legal systems and should be made available for other legal systems (for example in the case of the constitutional block in a number of Latin American Countries) in the case mentioned above of negligence by competent authorities to take the necessary legislative measures for its implementation.

I thank you Mr. Chair.

2. **International Commission of Jurists**

The changes to article 16.3 are welcome to mention: “the use of child soldiers and the worst forms of child labour, including forced and hazardous child labour.” However, this whole provision seems to address business enterprises human rights due diligence processes (identify, prevent and mitigate risks) and as such it would be better located under article 6 (prevention), which focuses on business’s management of human rights risks.

Article 16.5 calls for the application and interpretation of the proposed treaty in a manner consistent with international human rights and humanitarian law. This is important, but since Article 14 already addresses consistency with international law and interpretation issues, it would make more sense to move this part of the provision to that article and leave the rest, on non-discrimination, in article 16.

Likewise, it is important that the treaty contains a general provision providing for the application and interpretation of the treaty in a manner that does not derogate from higher levels of protection recognized in international law or domestic law. This provision will expand the scope or replace current Article 4.3:

“Nothing in the present [LBI] shall affect any provisions which are more conducive to the realization and protection of human rights in the context of business activities, and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.”

I refer to the ICJ’s full comments and recommendations to the Third Revised draft for further details <https://www.icj.org/wp-content/uploads/2021/10/ICJ-Comments-Third-Revised-LBI-2021final.pdf>

R. Article 18

1. Centre for Health Science and Law

The Centre for Health Science and Law (CHSL) proposes that the Working Group:

Add a new paragraph to Article 18 (re standing of victims and human rights defenders in the settlement of state disputes) as follows:

18(4) If a dispute arises between two state parties, the parties shall offer unrestricted access to rights holders directly affected by the dispute and large and liberal access to experts and non-governmental organizations to participate in written and oral arguments, with leave of the court or tribunal where applicable, in all negotiations, including arbitrations and proceedings of the International Court of Justice. All proceedings should be as public and transparent as possible with no more secrecy than is necessary to protect the privacy and security of victims.

Rationale: The entitlements of natural persons to be free from physical harm are at the heart of this Legally Binding Instrument. Victims and champions of human rights must be able to effectively participate in all relevant disputes to ensure that victims’ interests are protected and not subverted to geopolitical brinkmanship. While state parties to a dispute may often facilitate participation of affected parties, there should be opportunities for civil society organizations with ECOSOC consultative status, human rights agencies, and other organizations to intervene directly, with the with leave of the court or other intermediaries. Currently, generally, only state parties and specialized institutes of the United Nations (i.e., named intergovernmental organizations) have standing to participate in proceedings of the International Court of Justice. The Binding Legal Instrument could facilitate such standing.

S. Article 21

1. Centre for Health Science and Law

The Centre for Health Science and Law (CHSL) proposes that the Working Group:

Amend Article 21(2.) be amended as follows:

An amendment adopted and approved in accordance with this Article shall enter into force on the thirtieth day after the number of instruments of acceptance deposited reaches two-thirds of the number of State Parties at the date of adoption of the amendment. Thereafter,

the amendment shall enter into force for any State Party on the thirtieth day following the deposit of its own instrument of acceptance. ~~An amendment shall be binding only on those State Parties which have accepted it.~~ **Thereafter, an amendment shall bind State Parties that have not registered a reservation within two years of the entry into force of the amendment.**

Rationale: Adherence to a change in the approach that enjoys the support of a super-majority of the global community should not be delayed by the inattention of some State Parties, especially considering human rights abuses often involve actions in many member states.
