

**Joint trade union
response to the request
for written inputs on the
proposal for a legally
binding instrument to
regulate, in international
human rights law, the
activities of transnational
corporations and other
business enterprises**



Further to the note verbale of 2 March 2023 issued by the Office of the United Nations High Commissioner for Human Rights, the following global trade union organisations (Global Unions) wish to provide written inputs on Article 1-14 of the draft legally binding instrument (LBI): ITUC, UNI, INDUSTRIALL, EI, ITF, IFJ, BWI, IUF, PSI.

The Global Unions note and appreciate the work of the OHCHR and the Chairperson-Rapporteur of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights during the inter-sessional period.

As we stated at the 8th session of the OEIGWG, while appreciating the Chairperson-Rapporteur's efforts to push the agenda forward with some textual proposals on Articles 6-12 together with a new set of definitions, the Global Unions believe that the third revised draft already offers conceptual clarity and a text that is politically viable for States and non-State actors alike. We carefully considered the Suggested Chair Proposals, which appear to streamline the provisions by making them less prescriptive. While this is aimed at achieving the broadest possible support for the draft, the Global Unions believe that there is a risk of losing much-needed detail to truly achieve accountability for corporate human rights harms. We believe that the third revised draft offers a text that is reasonably prescriptive while allowing for broad support of member States and civil society.

Fundamentally, we believe that the approach taken in the third revised draft of focusing the operational provisions of the LBI on cross-border activities of business enterprises while maintaining a broad scope, which includes transnational and other enterprises, responds to the mandate given by Human Rights Council Resolution 26/9 of 2014. We welcome this

hybrid approach, which ensures that the LBI is clearly geared towards addressing business activities of a transnational character, which is where the normative gaps in international human rights law lie. Any deviation from this approach would weaken the transnational coverage of the LBI and represent a major setback.

On that basis, we hereby present proposals for textual amendments to the third revised draft, which aim to, among other things:

- better articulate the scope of labour rights;
- ensure that the LBI has a strong social justice dimension;
- provide clarity on the internationally recognized labour rights applicable to States by virtue of ratification and those to which they are otherwise bound;
- ensure access to justice is solidified with legal principles such as forum non conveniens no longer being used by courts to deny remedy for human rights harms; and
- ensuring that the provisions on liability for corporate human rights abuse better reflect the types of liability applicable to the different supply chain business models relied on by corporations.

We hope that our written inputs will assist the Chairperson-Rapporteur and the Friends of the Chair in advancing the discussions to be had at the inter-sessional consultations.

Finally, we also believe that the Friends of the Chair group could benefit from civil society advisers to further add legitimacy and teeth to the process. The Global Unions stand ready to support group with perspectives from the world of work.

Textual amendments

PREAMBLE

PP3

Recalling also the Universal Declaration of Human Rights, as well as the Declaration on the Right to Development, the Vienna Declaration and Programme of Action, the Durban Declaration and Programme of Action, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples, **relevant ILO Declarations and Conventions**, and recalling further the 2030 Agenda for Sustainable Development, as well as all internationally agreed human rights Declarations;

We recommend a reference to *all* ILO Declarations and Conventions, in addition to the already-referenced fundamental Conventions of the ILO. ILO Declarations and International Labour Standards help States implement their obligations concerning human rights at work.

PROPOSED NEW PP5

***Recalling* that International Labour Standards provide States with the tools to implement their obligations concerning human rights at work and establish mechanisms for labour inspection and enforcement necessary to realize decent work for all.**

We strongly recommend the inclusion of this new paragraph to better articulate the scope of labour rights within the context of the Legally Binding Instrument.

PP8

***Recalling* the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction ~~of race, colour, sex, language or religion~~ OR based on the principles of equality and non-discrimination in international human rights law;**

A formulation based on the *principles of equality and non-discrimination* in international human rights law would ensure that no protected characteristics are left out of an otherwise exhaustive list in this paragraph.

PROPOSED NEW PP8

Recalling the State duty to exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

We recommend the inclusion of a new paragraph highlighting the State duty to protect human rights in situations where a commercial nexus exists between public actors and business, such as when government bodies purchase goods and services through public procurement, and in connection to privatisation.

PROPOSED NEW PP 10

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

Reaffirming the primacy of international human rights law over trade and investment agreements reflects the spirit of Article 103 of the Charter of the United Nations and helps set the context for Article 15.5(b).

PROPOSED NEW PP12

Recognizing that inclusive and concerted action is essential to realize human rights, achieve social justice, promote universal and lasting peace, and acknowledging that the failure to respect and fulfil human rights constitutes a threat to social progress;

We strongly recommend the inclusion of a new paragraph highlighting the importance of fulfilling and respecting human rights in a business context for the achievement of social justice.

PP13

Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, workers, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders; and the structural obstacles for obtaining remedies for these persons;

With the COVID-19 pandemic once again exposing the fragility of global supply chains and business models built on non-standard forms of employment and informality, the Legally Binding Instrument represents a unique opportunity to end the impunity for corporate human rights abuses. As such, we believe it is important to highlight the clear, distinctive and disproportionate impact of business-related human rights abuses on *workers*.

SECTION I

ARTICLE I

“Victim” shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm through acts or omissions in the context of business activities, that constitute human rights abuse. The term “victim” ~~may~~ **shall** also include the immediate family members or dependents of the direct victim, **and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.** A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted.

A comprehensive definition of *victim* should include *persons who have suffered harm in intervening to assist victims in distress or to prevent victimization* so that human rights defenders, including trade unionists, are implicitly covered by the term. In line with best practice under international human rights law, we recommend the categorical inclusion of immediate family members or dependents of the direct victim in the definition of *victim*.

“Business activities of a transnational character” means any business activity described in Article 1.3 above, when:

- a. It is undertaken in more than one jurisdiction or State; or
- b. It is undertaken in one State but a **significant** part of its preparation, planning, direction, control, design, processing, manufacturing, storage or distribution, takes place through any business relationship in another State or jurisdiction; or
- c. It is undertaken in one State but has a **significant** effect in another State. or jurisdiction.

We strongly recommend the deletion of the undefined and vague qualifying term *significant* which could lead to unnecessary debates about what constitutes a business activity of a transnational character.

ARTICLE 3.3 [RE-ORDER]

This Legally Binding Instrument shall cover all internationally recognized human rights and fundamental freedoms which the State Parties of this (Legally Binding Instrument) have ratified, including:

- a. those recognized in the Universal Declaration of Human Rights
- b. all core international human rights treaties
- c. ILO Conventions as well as those to which they are otherwise bound, including,
- d. the ILO Declaration on Fundamental Principles and Rights at Work
- e. customary international law

We strongly recommend a re-ordering of Article 3.3 to cover more clearly the internationally recognized human rights applicable to States by virtue of ratification and those to which they are otherwise bound.

SECTION II

ARTICLE 4.2(C)

c. be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, **reinstatement in employment, apology, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;**

We believe that this non-exhaustive list of remedies should include apologies (both public and private) and, most importantly, reinstatement in employment. A significant challenge for workers exercising their right to freedom of association is the fear of discriminatory dismissal. In such cases, the remedy must be reinstatement given that compensation alone may continue to contribute to an atmosphere of intimidation in the workplace.

ARTICLE 6.2

States Parties shall take appropriate legal and policy measures to ensure that business enterprises, including transnational corporations and other business enterprises that undertake activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their operations. **business activities and relationships. Such measures may include injunctive relief, precautionary or protective measures, and strict liability for human rights abuses, as appropriate.**

We strongly recommend including a non-exhaustive list of legal and policy measures that States can take to ensure that business enterprises respect all internationally recognised human rights and prevent and mitigate human rights abuses. This would help re-emphasise the scope of this Article, which is intended to cover an array of preventive measures above and beyond human rights due diligence.

ARTICLE 6.3(B)

b. Take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses, which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take **reasonable and** appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;

While the UNGPs set out a greater number of factors to be considered where there is a business relationship in order to determine what *appropriate* action may be required, there is no suggestion that the action to be decided on as appropriate is lesser or limited to only what is *reasonable*. For this reason, we would recommend the deletion of the term *reasonable* here.

ARTICLE 6.4.

States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:

c. Conducting meaningful consultations **with individuals, communities, workers, and workers' representatives** whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas;

It would be important to highlight the specific need to consult workers' and their representatives as rights-holders themselves.

g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in **situations of instability and national stress or in occupied or conflict-affected areas, including situations of occupation.**

This formulation would meet the recommendations of the UN Working Group on Business and Human Rights' guidance on human rights due diligence in conflict situations.

ARTICLE 7.2

States Parties shall ensure that their domestic laws facilitate **disclosure OR discovery** and access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.

A reference to the judicial process of disclosure or discovery would help further clarify the intent of this Article.

ARTICLE 7.5

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

We recommend that this important provision allowing for the reversal of the burden of proof in favour of victims is not left up to the discretion of judges and/or domestic constitutional law.

ARTICLE 8.6 [RE-ORDER]

States Parties shall ensure that their domestic law provides for the liability of business enterprises for human rights abuses caused or contributed to by another legal or natural person, where a business enterprise:

- a. that controls, manages, supervises or otherwise assumes responsibility of another legal or natural person with whom they have a business relationship fails to prevent that person's activity which caused or contributed to human rights abuse; or
- b. effectively controls another legal or natural person that caused or contributed to human rights abuse; or
- c. should have reasonably foreseen the risk of human rights abuses in its business activities or business relationships but failed to prevent the human rights abuse.

Breaking down Article 8.6 in this way helps clarify the type of liability applicable to the three listed scenarios, namely negligence, strict liability, and strict liability for risk.

ARTICLE 8.7

The burden of proof rests with the business enterprise to prove that it has taken all reasonable steps to conduct human rights due diligence as laid down in Articles 6.3 and 6.4. Human rights due diligence shall not automatically necessarily absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. ~~The court or other competent authority will decide the liability of such legal or natural persons after an examination of compliance with applicable human rights due diligence standards.~~

We believe that our suggested formulation better articulates the intention behind this Article. It is our firm view that while the requirement to implement human rights due diligence is critical in ensuring that companies take a proactive and hands-on approach to ensure human rights are fully complied with in the supply chain or the corporate group, it cannot become a substitute for ensuring a right to remedy for victims of corporate negligence. While this important distinction seems to be reflected in the text, the second part of this Article indicates that “the court or other competent authority will decide the liability of such entities after an examination of compliance with applicable human rights due diligence standards.” This sentence seems to suggest that the implementation of human rights due diligence standards does determine the liability of business entity, which seems to be in conflict with Article 6 and the first part of the present Article. This text should therefore be deleted.

ARTICLE 9.1

9.1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:

- a. the human rights abuse occurred and/or produced effects; or
- b. an act or omission **causing or** contributing to the human rights abuse occurred;
- c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or
- d. the victim is a national of or is domiciled.

This amendment aims to address a potential inconsistency with Article 9.1(c).

ARTICLE 11.2

All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where:

- a. the acts or omissions have occurred or produced effects; or
- b. the natural or legal person alleged to have committed the acts or omissions is domiciled; **or**
- c. **the victim is domiciled.**

The law of the domicile of the victim should be included as an option in order to, among other things, balance the ability of transnational companies to choose host countries with weak legal and governance frameworks.