ISSN 2526-0774 | *Seção Cadernos de Pesquisa Homa*

HomaPublica REVISTA INTERNACIONAL DE DERECHOS HUMANOS Y EMPRESAS

Vol. V | Nº. 02 | Jul - Dic 2021

Recibido: 09.08.2021 | Aceptado: 09.08.2021 | Publicado: 10.08.2021

ANALYSIS OF THE SECOND REVISED DRAFT OF THE LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN RIGHTS

ANÁLISE DO SEGUNDO DRAFT REVISADO DO INSTRUMENTO JURIDICAMENTE VINCULANTE SOBRE EMPRESAS TRANSNACIONAIS E OUTRAS EMPRESAS COM RESPEITO AOS DIREITOS HUMANOS

ANÁLISIS DEL SEGUNDO BORRADOR REVISADO DEL INSTRUMENTO JURÍDICAMENTE VINCULANTE SOBRE LAS EMPRESAS TRANSNACIONALES Y OTRAS EMPRESAS EN MATERIA DE DERECHOS HUMANOS

Manoela Carneiro Roland
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0001-5168-2230
Andressa Oliveira Soares
Universidade de São Paulo | São Paulo - SP, Brasil | ORCID-ID 0000-0001-8063-6380
Maria Fernanda Campos Goretti de Carvalho
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0003-3296-9396
Aline Laís Lara Sena
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0001-6471-0966
João Pedro Brito Perillo
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0002-1963-4930
Luca Cezário Tostes Tito
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0002-4737-8153
Renata Paschoalim Rocha
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0002-2202-0438
Sofia Miranda de Oliveira
Universidade Federal de Juiz de Fora | Juiz de Fora - MG, Brasil | ORCID-ID 0000-0001-5182-5270

Abstract
This paper aims to provide an overview regarding the Draft Two, starting from a punctual analysis of each article and considering along with it, goals set by the Resolution 26/9, which concerns the regulation of Transnational Companies activities. Notwithstanding, we consider the position adopted by the Global Campaign to Dismantle Corporate Power and Stop Impunity to take on a critical perspective referring to the changes made in the Second Revised Draft, as well as to face problems not solved by the new wording and pointing out suggestions for a better buildout and specificity of the Instrument. In this sense, we apply qualitative methodology through document review, in order to provide a more punctual aspect with regard to the subject and also to demonstrate the need for addings in the current wording, aiming for an alignment with the Human Rights protection system.

Keywords
International treaty on business and human rights. Draft Two. Transnational Companies. Human Rights violations.

Resumo
O presente texto busca traçar um panorama acerca do texto do Draft Two, partindo de uma análise pontual de cada artigo do documento, em conjunto com o objetivo estabelecido pela Resolução 26/9 a respeito da regulação de atividades de Empresas Transnacionais, e ainda com a posição adotada pela Campanha Global para Reivindicar a Soberania dos Povos, Desmantelar o Poder Corporativo e por fim à Impunidade. Sob o ponto de vista adotado, o trabalho expõe uma visão crítica acerca das mudanças trazidas pelo Second Revised Draft, enfrentando as problemáticas que não foram solucionadas pela nova redação, bem como apontando sugestões para um melhor desenvolvimento e foco do Instrumento. Nesse sentido, emprega-se a metodologia qualitativa através de revisão documental, a fim de proporcionar um conhecimento mais pontual acerca da temática, demonstrando também a necessidade de complementações ao texto, com o objetivo de alinhamento aos preceitos de proteção de Direitos Humanos.
Palavras-chave
Tratado internacional sobre Empresas e Direitos Humanos. Draft 2. Empresas Transnacionais. Violações de Direitos Humanos.

Resumen
El presente texto pretende ofrecer una visión general del texto del Borrador Dos, comenzando con un análisis específico de cada artículo del documento, en relación con el objetivo establecido por la Resolución 26/9 sobre la regulación de las actividades de las Empresas Transnacionales, y también con la posición adoptada por la Campaña Global para Reivindicar la Soberanía de los Pueblos, Desmantelar el Poder Corporativo y Acabar con la Impunidad. Bajo el punto de vista adoptado, el trabajo expone una visión crítica sobre los cambios introducidos por el Segundo Borrador Revisado, afrontando los problemas que no fueron resueltos por la nueva redacción, así como señalando sugerencias para un mejor desarrollo y enfoque del Instrumento. En este sentido, se utiliza la metodología cualitativa a través de la revisión de documentos, con el fin de proporcionar un conocimiento más específico sobre el tema, demostrando también la necesidad de adiciones al texto, con el objetivo de alinearse con los preceptos de protección de los derechos humanos.
Palabras clave
Tratado Internacional sobre Empresas y Derechos Humanos. Borrador 2. Empresas transnacionales. Violaciones de los derechos humanos.

The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity[1], proceeding with its engagement on the protection of Human Rights against the violations caused by large enterprises, dedicates itself, in this document, to analyze the Second Revised Draft[2]. We present the continuity of the monitoring of the study on the theme of Human Rights and all the negotiation process of the Treaty, attempting to define its importance, mistakes and successes and, also, if there were any improvements regarding the accountability of Business by its violations of Human Rights.

United Nations' (UN) work on the subject of Human Rights is relatively recent. Although the discussions on the topic initiated in the 1970s, with the expansion of globalization and the power of transnational corporations, it was only in 2011, about forty years later, that the Guiding Principles on Business and Human Rights were presented in the sphere of the UN Human Rights Council. However,

[1] Created in 2012, the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, called in this article "Campaign", is a network that brings together more than 250 social movements, civil society organizations and communities affected by the activities of Transnational Corporations. The organization, created as a response to the frequent violations of Human Rights by business, allows a global structure in search of visibility of the resistance against the activities of major business enterprises. More information available at: https://www.stopcorporateimpunity.org.

[2] To the purpose of this analysis, the OEIGWG Second Revised Draft on the "Legally Binding Instrument to Regulate, in International Human Rights Law, the activities of transnational corporations and other business enterprises" will be called "Draft 2", and can be found here:
https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf .

due to the voluntarist character, the milestone had several gaps, such as the lack of extraterritorial mechanisms, direct obligations to corporations and the business-oriented logic, which culminated in several countries and civil society pressuring the approval of a Resolution - 26/9 - which happened three years later, resulting in the elaboration of the International Treaty on Human Rights and Business - a Historical step towards the protection of Human Rights against violations caused by business.

After two virtual informal consultations, held during May and June of 2020, the Working Group, through its President, published a new version of the legally binding document at the beginning of August.

This Draft is noted to have only punctual and worthless improvements, and structurally, it reproduces the logic present in the last Draft, which is the logic of the Guiding Principles. This means that the document does not have strength to innovate, regulate the transnational corporations and guarantee the protection of human rights, which should be its primary goal.

We can point out several problematic issues in this Draft. Firstly, the treaty maintains obligations to States only. Therefore, no direct responsibility is attributed to companies but the guidelines that reproduce the same flawed system that can be perceived in the Guiding Principles. In this sense, the text itself limits the efficacy of the Treaty by not imposing direct obligations for companies. Of course, these obligations should be different from the States, but in our view, it is indispensable that corporations respect the principles and standards of human rights ascribed by the United Nations.

On top of that, we are not suggesting a reinvention of the international law, since there are already international treaties and instruments that include obligations and make legal persons, such as TNC's, legally responsible, even in some investment treaties.[3]

The primacy of international human rights law over any other international legal instrument, in particular over trade and investment agreements, is essential to establish an effective treaty. Nevertheless, this concept was not addressed in the Draft. It is imperative that this principle is highlighted in the final document and that it is the subject of a specific article, in addition to being reaffirmed throughout the entire Treaty.

Another significant problem is the scope of the Treaty. The use of "all business" is a signal of OEIGWG's lack of commitment to effective protection of human rights. The broader scope avoids an instrument that would fill the gaps in international law, maintaining the status quo and represents a great risk to the effectiveness of the Treaty, since it dilutes the efforts of investigation and regulation of all the specificities of the transnational business activity, opting for more generic devices, and which must also be adapted to the branches of activity of any and all corporations, in the domestic sphere, of each State. The special nature of power held by Transnational Corporations and their legal and economic structure demands an international law instrument to regulate their impacts, since domestic law can be way too susceptible to economic and political power. In addition, it is a flagrant non-compliance of the mandate of Resolution 26/9 and of its spirit.

[3] Some of the international treaties: United Nations Convention against Corruption, United Nations Convention on the Law of the Sea; Stockholm Convention on Persistent Organic Pollutants; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and others.

Due to the non-recognition of direct obligations attributed to companies, it is reproduced in Draft 2 the terminological / conceptual difference regarding the fields of activity developed by States and companies. That is, States would violate human rights, and corporations would only promote impacts or abuses. An essential aspect, which must be recognized, in order to guarantee a systematic adaptation of the international instrument to the logic of other international treaties of protection of human rights, is that the victim's perspective should prevail with respect to identification of the dimension of the violated rights. Thus, whenever referring to groups affected by "damages", the term "violation" of Rights should be used. The victims, or affected communities, were not abused, but had human rights and guarantees violated. In this way, this distinction must be deleted throughout the document.

Moreover, in order to guarantee greater uniformity in the interpretation and application of the future Treaty, it is necessary to exclude vague, imprecise and indeterminate concepts, or an excess of adjectives. As, for example, mainly documents; substantial relationships; more serious crimes. This type of terminology threatens good enforcement of the Treaty, since vague terms have no defined concept, for they could be invoked at any moment in an attempt to avoid responsibility.

We are also extremely concerned with the total absence of the supply chain discussion and the lack of liability provision of all entities involved in transnational business activity along the supply chain, including, also, the application of the solidarity obligation institute.

In addition, the Draft 2 fails to address the important issue of "lifting the corporate veil". The corporate veil prevents all entities in the supply chain from having a common legal existence, so each one is considered an independent legal entity. This fact presents itself as an obstacle to the recognition of the parent's company legal liability for violations caused by other companies in its supply chain despite the connection between them. It is essential that the parent company disclose all the information of the entities that are a part of their chain. In this sense, the Treaty must establish clear mechanisms to declare legal liability between the parent company and all parts of the supply chain. As a proposal for the Treaty, the Global Campaign suggests once more the following description:

> For the purposes of this Treaty, the TNC supply chain consists of companies outside the TNC that contribute to the operations of the TNC – from the provision of materials, services and funds to the delivery of products for the end user. The supply chain also includes contractors, subcontractors or suppliers with whom the parent company or the companies it controls carry on established business relations. The TNC may exercise influence over a supply chain company depending on the circumstances.

Even though the Draft 2 mentions the due diligence process in its Article 6, it is not sufficient to consider it as an advance. It is necessary to promote an independent monitoring due diligence with focus on human rights. It is proven that it is not possible to trust the companies to monitor their own actions and decisions.

Furthermore, the Draft fails to properly address the extremely important prohibition of the forum non-conveniens. Although it was mentioned in Article 7, it was vague and lacking any mechanisms to force or assist the States on the matter. Also, its crucial the inclusion of the doctrine of forum necessitatis whenever the link is established between the TNC's prosecutor and the violated community.

It is not observed in this new text any kind of enforcement provisions, which leaves the document without any mechanisms to provide and sustain its effectiveness. We insist that the possibility of a Court should be lifted, since even the former Ambassador of Ecuador, Luis Gallegos, along with Daniel Uribe, recognized that a Court is viable and needed in the context of the Treaty[4]

In brief, it is safe to say that the ability to regulate transnational business activity weakens with this Draft. Essential issues like the ones mentioned above have been left out, smoothed or relativized. We need a stronger language Treaty, focusing on effective protection and fair redress for violated communities and people.

PREAMBLE

Regarding the preamble, the Draft 2 maintains the same problems that obstruct the Treaty's effectiveness and its compliance with Resolution 26/9 principals. Beforehand, it is worth mentioning that the current Draft did not present a section of rights and principles to be protected and respected by the Treaty signatories. We consider, however, that it is essential to the elaboration of a Human Rights and Business Treaty, as well as a common practice, to have a section on that matter in this type of binding document.

Moreover, it is crucial to establish, already, the primacy of human rights over investment and trade agreements. This is the main core of the document, and should be clearly presented.

Nonetheless, the beginning of the document should mention the nine core International Human Rights Instruments adopted by the United Nations[5], and the eight fundamental Conventions adopted by the International Labour Organization[6]. Notwithstanding, the document restricts itself, determining only a few international instruments and pointing out "others internationally agreed human rights-relevant declarations".

However, to begin with, we understand that mentioning specific instruments can end up by limiting the possibilities for human rights instruments that could support the LBI. In that regard, article 3.3 mentions that the Treaty should cover all internationally recognized conventions and instruments of human rights, as well as customary law. Therefore, we understand that the limitation resulting from specific quotes in the preamble is contradictory with the Treaty provision.

[4] Luis Gallegos, Daniel Uribe. The Next Step against Corporate Impunity: A World Court on Business and Human Rights?, 2016 https://harvardilj.org/2016/07/the-next-step-against-corporate-impunity-a-world-court-on-business-and-human-rights/

[5] The nine instruments adopted by the UN are: International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); International Convention for the Protection of All Persons from Enforced Disappearance (2006); Convention on the Rights of Persons with Disabilities (2006). More information about the instruments can be found here: https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

[6] The main eight conventions adopted by the International Labor Organization are: Freedom of Association and Protection of the Right to Organize Convention n. 87 (1948); Right to Organize and Collective Bargaining Convention n. 98 (1949); Forced Labor Convention n.29 (1930); Abolition of Forced Labor Convention n.105 (1957); Minimum Age Convention n.138 (1973); Worst Forms of Child Labor Convention n.182 (1999); Equal Remuneration Convention n. 100 (1951) e Discrimination (Employment and Occupation) Convention n. 111 (1958). More information can be found here: https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm

Still, in case the instruments remain distinctive, we propose the appreciation of other international instruments, in addition to the ones previously mentioned, such as:

> The Convention relating to the Status of Refugees; the Convention against Corruption; the Convention the Prevention and Punishment of the Crime of Genocide; the Convention on the Slavery; the Declaration on the Right of Peoples to Peace; the four Geneva Conventions and their Optional Protocols; the International Convention against 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; the Convention on Biological Diversity; the Declaration on the rights of peasants and other working in rural areas, besides other Conventions and Recommendations of the International Labour Organization, specially The Indigenous and Tribal Peoples Convention n.169 (1989), marco internacional essencial na proteção de povos indígénas e comunidades tradicionais[7].

The Draft 2 also fails to reaffirm the fundamental rights of some groups and some agreements that should be considered, stating only the need to promote equality between men and women, when the text should also focus on instruments regarding economic, social, cultural, political and labour rights. It is necessary to enforce collective rights, such as self-determination, the right to development and to a healthy environment, including, still, indigenous people and native communities rights and the need to promote social progress and better standards of life in larger freedom while respecting the obligations arising from treaties and other sources of international law as set out in the Charter of the United Nations.

Another problem that has not been solved by this Draft's version is the mention of the term "all business enterprises", which suggests - primarily - United States and European Union's view, to include a wording that would broaden the reach of the LBI to all business. However, such prerogative goes in opposite ways of the Resolution 26/9, which is clear on the transnational character of those corporations (TNCs), as mentioned before.

Again, the LBI Draft presents vague terms, without definitions, that may impact its effectiveness. It is important that the preamble's tenth paragraph is changed in its final part to remove the word "directly": [...] as well as by preventing or mitigating human rights abuses that are **directly** linked to their operations, products or services by their business relationships [...].

This expression has the potential to narrow the reach of the document because there is no definition of what should be considered "directly linked", and the accountability of business for human rights violations should happen at any time, regardless of whether they have directly or indirectly perpetrated the offenses in their operations, products or services. In this sense, the company obtaining profits over the activity has to assume responsibility in all its supply chains.

The preamble also advocates the wish to "clarify and facilitate the effective implementation of State obligations regarding the human rights abuses related to the business activities, and the responsibilities of business in that sense". However, once again - and all over the document - the roles for acting on the problem are delegated to the States only, while there are no direct obligations

[7] GLOBAL CAMPAIGN TO RECLAIM PEOPLES SOVEREIGNTY, DISMANTLE CORPORATE POWER AND STOP IMPUNITY. Treaty on Transnational Corporations and their supply chains with regard to Human Rights. Outubro 2017. p.7. Disponível em: https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draftEN.pdf

imposed on companies. Therefore, this approach is not in agreement with Resolution 26/9, which increases the chances of a reduced effectiveness on the protection of human rights. [8]

The Draft also mentioned the compliance with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. Although we understand that the GP were an important step in the Human Rights and Business Agenda, the aim of the Treaty is to oppose to the logic of voluntarism of the GP and fill in their gaps by searching ways to directly bind business to the Human Rights, and hold them accountable for their activities.

Another important point of attention is the Intergovernmental Group choice to use the expression "human rights abuses" rather than "human rights violations". This linguistic resource was used throughout the document, starting from the preamble. However, it consists in a wrongful of the violations' view because even though the actions are internationally recognized as "abuses", we emphasize that whenever the scenario concerns damaging business activities and the people affected by the problem, what is at stake is the integrity of human rights, therefore, its violations - not abuses.

Even though the term used when talking about the actions of a business is abuse, by the argument of it being internationally recognized that way, we emphasize that whenever we are talking about people in the context of damaging business activities, what is happening is the violation of their rights, not abuse. By applying the term "violations" we imply an understanding of more severe consequences of whom should prevent illegal activities, after all, the violation suffered by the person affected is overruled. We reaffirm that the victim's perspective should be the prevailing one, and not the perpetrator's. This, however, is already an established consensus in International Human Rights Law, for example with the Centrality of the Victims' doctrine, largely developed in the Inter-American Human Rights System.

At last, a final and necessary amendment would be to change the existing expression "to clarify and facilitate" to the most applicable one "effectively implement", and also replace the term "responsibilities" of the TNCs for "obligations". To sum up, these modifications are important to maintain the victim's perspective through the Treaty and to facilitate their access to remedy.

SECTION I

ARTICLE 1. DEFINITIONS

The purpose of this article is to make definitions on the concepts of: victims, human rights abuses, commercial activities, commercial activities of transnational character, commercial relations and regional integration organization.

First of all, we reject a definition of victims, because this term can withdraw the protagonism of individuals and expresses an idea of incapability, which does not reflect the reality. Therefore, we suggest the use of affected people and communities[9].

[8] GLOBAL CAMPAIGN COMMENTS AND AMENDMENTS TO THE UN BINDING TREATY REVISED DRAFT (DRAFT 1). February 2020. P. 4 Available at: https://www.stopcorporateimpunity.org/global-campaign-comments-and-amendments-to-the-un-binding-treaty-revised-draft-draft-1/.

[9] GLOBAL CAMPAIGN COMMENTS AND AMENDMENTS TO THE UN BINDING TREATY REVISED DRAFT (DRAFT 1). February 2020. p. 5. Available at: https://www.stopcorporateimpunity.org/global-campaign-comments-and-amendments-to-the-un-binding-treaty-revised-draft-draft-1/.

The Second Draft added to the term ‘‘victims’’ (1.1) matters of physical or mental injury, emotional suffering, economic loss, or substantial impairment of their human rights, through acts or omissions in the context of transnational activities, which were part of the term ‘‘Human rights violation or abuse’’ in Draft One. The newest document also removed the condition of adequacy to the internal law, present in the previous draft and included the immediate family members or dependents of the primary victim, and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization in the concept of victims, by that making a more extensive concept.

The term "Human rights violations or abuse" present in Draft One was replaced with ‘‘Human rights abuse’’ in Draft 2[10]. The removal of the term violation can be understood as a restriction and a contradiction to the document itself, after all, in this newer draft, State-owned enterprises were specifically regarded, and in this case, the State ended up being the direct perpetrator. Therefore, there is no reason for the replacement.

Regarding the ‘‘business activities”, article 1.3 keeps the reach of all business covering all types of economic activities. Thus, due to the huge amount of business and their differences, that vary according to the supply chain size, the segment of its activities, its international reach, among others, the writing of the article contributes to the loss of effectiveness of the Treaty that should be aiming at the TNCs actions. The issue once again affects what was established by Resolution 26/9 and has been widely advocated by the Global Campaign, which focus on the accountability of transnational corporations. Also, the article composition did not list the commission or omission acts, prerogative advocated by the Campaign[11].

It was incorporated into article 1.4 the definition of ‘‘business activities of a transnational character’’. In the subitem b, the term “substantial” must be removed, since any activity within another State other than the one where the corporation started is considered transnational activity. Using that term reduces the responsibility of business by possibly violating activities in different States other than the source ones. Again, the use of terms that the concept is not explicitly defined can lead to a loss of effectiveness of the instrument.

Draft 2 resumes the elements of the Draft 0 in article 1.5 by changing its terminology ‘‘contractual relationship’’ to ‘‘business relationship’’, requested by the Global Campaign, to prevent restrictive interpretations of the article that previously did not include the non-binding labour relationships. Although the nomenclature changes, the content was kept almost unchanged, with only the addition of activities performed by electronic means. In this context, it is worth mentioning that problems like the lack of definitions regarding the supply chain were kept. Besides this, we propose an amendment in article 1.5, as it follows:

> The term business relationship shall not be restricted to the signing parts of specific contracts or other formal proof and should be interpreted in the most protective manner for the alleged victims under this treaty. This “business relationship” is built upon the joint and several liability between the parent company of a TNC and all entities along their global value chain (as defined in this article), including private and public investors, International

[10] Ibidem.
[11] Ibidem. p. 6.

> Economic and Financial Institutions (as defined below) and banks participating by investing in the production processes, for all of their activities.

For the "joint and several liability" recommended to integrate the article 1.5, the Campaign would also like to propose clarification of this term, which should be explicit in a new paragraph, 1.5bis1:

> For the purposes of this Treaty, "Joint and several liability" refers to the responsibility that exists between TNCs, all its subsidiaries and their global value chain, including the parent company and private and public investor, the International Economic and Financial Institutions (as defined below) and banks participating by investing in the production processes, for all of their activities.

Regarding the cited "global value chain", the Campaign suggests the inclusion of a new paragraph, 1.5.bis2, that should make this concept crystal clear for future interpretation:

> The "global value chain" consists of a group of companies coordinated by a transnational corporation that contribute to the operations of the transnational corporation - from the provision of material, services and funds to the delivery of products for the end user. The global value chain includes affiliates, contractors, subcontractors or suppliers with whom the transnational corporation carries on established business relations. The TNC may exercise influence over a global value chain company depending on the circumstances.

On the subject of ''regional integration organization'' article 1.6 of the Draft 2 brings as an innovation the burden of these organizations to represent, through the formal instrument of confirmation or accession, their level of competence concerning the subjects ruled by the Treaty and also report the depository of any significant change of competence.

At last, we provide clarification of the "International Economic and Financial Institutions", henceforth IFIs, a definition that should be added in a new paragraph, 1.7, as proposed:

> IFIs include Inter-governmental organizations, the United Nations and its specialized agencies (International Monetary Fund, World Bank), the World Trade Organization (WTO), development, trade and investment banks, regional banks and other international financial institutions.

ARTICLE 2. STATEMENT OF PURPOSE

The Draft 2 explicitly added, through article 2.1.a, that the goal of the Treaty is to regulate ''responsibilities of business enterprises in this regard'', which is characterized as a small improvement over its previous wording. However, it still does not comply with the statute of the Resolution 26/9, which aims to establish objective and factual responsibilities to transnational corporations. By mentioning only that ''business enterprises'' are responsible, without the proper listing or establishing obligations - and including other business enterprises of transnational character - the document reinforces a soft law feature regarding the obligations of private agents.

Moreover, the current writing of the Draft still perpetuates the logic of the Guiding Principles in article 2.1.a by establishing the broad responsibility of ''respect, protect and promote human rights in the context of business activities'' delegated to States. As a way of enhancing the direct obligations pursued by this LBI, article 2.1.b should be amended adding "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." to it.

At last, with the concern of ensuring better results, the expression ''strengthen", present in article 2.1.d, should be replaced by one with stronger semantics, like "guarantee", thus representing a more forceful character for the prevention of human rights violations perpetrated by transnational corporations.

ARTICLE 3. SCOPE

Resuming the analysis, the scope of Draft 2 still maintains its scope to ''all business enterprises'' and ''other business enterprises that undertake business activities of transnational character'' through article 3.1, thus lowering the effectiveness of the Treaty by comparing in a theoretical aspect subjects that are different in practice - like transnational corporations and other business, thus establishing a task almost impossible to achieve and control.

The new Draft's writing throughout article 3.2 establishes that States are responsible for determining the obligations of ''business enterprises'' in accordance with their internal law. Therefore, the text of the document includes provisions that once more are responsible for reducing its effectiveness and hindering the victims' adequate protection and access to justice. The fact that States, and not an International Council, are responsible for those determinations completely disregards the huge difference in the handling of the protection of human rights and access to justice of different States. That way, as it was already stated by the Global Campaign, TNCs cannot take advantage of fragile international frameworks in the protection of human rights to avoid their obligations and responsibilities, therefore showing the need for implementing the modifications suggested in this article.

Furthermore, the composition of the previously mentioned article does not include obstacles to the accountability of private entities, as the logic of ''race to the bottom'' and corporate capture. In that context, an International Treaty on Business and Human Rights should strongly restrain any mechanisms that allow transnational corporations to escape their responsibilities in order to end impunity. That way, with the current text of article 3.2, each State will be responsible for establishing obligations to the companies, and that is inadequate, since the nations that have inefficient standards on human rights, or that have their economies strongly dependent on business activities, can be vulnerable to those corporations and susceptible to continuous human rights violations. Notwithstanding, if approved as currently stated, besides the inefficiency, the Treaty would contribute to the maintenance of that perspective, since it would already be of internationally recognized legitimacy.

Lastly, article 3.3 brings a wide expansion of the international documents of Human Rights that the treaty must include, which denotes the inconsistency with the nomination of certain documents in the preamble, as already mentioned.

SECTION II

ARTICLE 4. RIGHTS OF VICTIMS

Article 4 starts the second section of the Treaty delimiting the victims' rights. The content in the article suffered some changes, some of which were transferred from their old provisions to the following article, added to the document as "Protection of the Victims", hence reducing the amount of content present in this article and creating a more articulated division, as the separation provides a greater focus on Article 4, effectively on the guarantees of those affected, and less on the direct obligations of the State.

These changes, however, do not solve all the problems previously presented. In this sense, with regard to the rights of those affected, they have greater coverage than what is presented in the text. That situation, which before was already considered as a potential restriction of rights, when listed in a legal document, as if it were a list of situations to be guaranteed, may open precedents for an exhaustive interpretation of the article, that is, only what is effectively provided should be safeguarded.

In addition, it is clear that two points previously criticized have not undergone any kind of change, namely: in the 2nd article, subitem "c", is mentioned "environmental remediation, and ecological restoration;". Here, it is clear the presupposition that the right to environmental remediation and ecological restoration is liable after the perpetration of violations. But such provision was already an object of criticism since, nowadays, the fallacy of this argument is already recognized. However, even with such remarks about it in the Draft One, the possibilities were kept.

Yet, another widely debated issue related to the previous Draft was the absence of a thematic approach that considers corporate capture. Even with the removal of the State obligations from the article, there is nothing in it that implicate the attribution of direct responsibilities to the companies, even if this precedent can already be found and inferred from other spheres of the international law, such as the treaties mentioned in the introduction, as in the CIDH[12] and its REDESCA[13] report, within the scope of the OAS.

Regarding the criticism also remarked by the Campaign, previously related to paragraph 4.6, which now comes in paragraph 4.2, subitem f, referring to the vagueness of the provision that guarantees the access to relevant information. Thus, it is necessary the inclusion of prerogatives that expand the effectiveness of the scope of such guarantee, for example, imposing that victims can have legal information about transnational corporations, with the purpose of facilitating the access to effective remedies.

It is also worth mentioning that it was not provided the right to full reparation of the affected, concept already consolidated in the international jurisdiction of human rights, for example at the

[12]Empresas y Derechos Humanos: Estándares Interamericanos http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf
[13] Special Rapporteur for Economic, Social, Cultural and Environmental Rights

Inter-American Court, through the restitutio in integrum[14] that besides restitution and compensation measures, prescribes rehabilitation, satisfaction and non-repetition measures.

Proposals

With the restructuring of the article, what is sought now is the reformulation of the idea that the right to the environment can be "restored". Furthermore, support the proposal made by the Campaign of changing, what now is paragraph 4, f, to: "victims shall be guaranteed access to information relevant to the pursuit of remedies. **This shall include information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, board members, communications and other relevant documents."**[15]

Additionally, the article 4.2.c should be amended, considering the erasure of "such as", that could be viewed as an obstacle to indeed guarantee a proper access to justice and effective remedy. That said, the expression "including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right for long-term monitoring of such remedies." shall be included at the end of the article.

At last, the Campaign proposes a new paragraph 4.2, subitem h, guaranteeing that victims shall "have access to independent technical advisory mechanisms that facilitate access to impartial evidence regarding the harm or risk of harm caused by companies". Yet, the inclusion of a fourth paragraph, 4.4, is proposed, assuring that "affected individuals and communities have the right to request States parties to adopt precautionary measures related to serious or urgent situations that present a risk of irreparable harm pending resolution, for instance in cases of risks of environmental harm.".

Article 5. Protection of the Victims

The addition of the topic "protection of victims" in an exclusive article represents a structural change in relation to the previous document, and it shows that only the recognition of the rights of the affected by violations (described in article 4) is not enough for it to be guaranteed, being necessary the creation of legal and structural mechanisms to enforce these rights. The article, which maintains the issue of the term "victims", already debated, comes in three paragraphs that deal with the necessity of ensuring to affected persons and communities the protection toward the realization of their rights, especially when talking about their access to justice. That protection, however, is expressed in a vague, general and imprecise way, according to what we can realize in the first two paragraphs, not demonstrating how it will be done, nor anticipating means for its enforcement.

Regarding the scope of the article, there is a lack of differentiated treatment of the vulnerabilities of each group that suffers violations of Human Rights by Business in an intersectional approach. That absence shows how important it is for an improvement on the individuality of the

[14] Velásquez Rodriguez paragraph. 26
[15] Global Campaign Comments and Amendments to the unbinding treaty revised Draft (draft 1), p.8

affected and their representativeness in the Treaty in order to implement actions aimed at ensuring the specific necessities of each group, as the protection to victims require.

There is also the necessity of specific protection mechanisms for human rights defenders and trade union officials, protecting their physical and psychological integrity through legal obligations of States and Business Enterprises, since the reality in the global south of systematic murders and attacks to these essential actors makes it necessary special protection for that group. Furthermore, there could be a conduct parameter for cases of Environmental Rights violations in which the affected need to be allocated to another region, ensuring their safety and their medical and psychological treatment.

At last, it is important to notice that the provision only regards the accountability of States toward the affected, and does not establish obligations to companies in relation to people that suffered the consequences of their violations. The withholding to provide measures that make it possible to hold companies accountable is conditioned to the political and legal challenges in overcoming the lobby, the corporate capture and the power that they have in the global scenario. However, the bases that structure the "architecture of impunity" cannot justify the omission of the direct accountability of business in a regulatory instrument that deals with Human Rights violations.

It is necessary that the protection and the rights of the people and their communities be the central focus in all the defense spheres of those rights, be it on prevention, mitigation, or reparation for the damage caused by business activities, always aiming at the Victim-Centered approach. That way, it is expected that the establishment of clear and objective obligations, with the imposition of penalties well defined for States and Business, will ensure full protection to victims.

PROPOSALS

Regarding the vagueness of the provision, the imposition of express obligations to the preservation of the individual guarantees provided by the States and companies should always come through the creation of public policies that implement them, ensuring the civil, administrative, labor and criminal responsibility of these entities, always aiming at the assurance of the principle of Human Rights primacy, as well as the already established norms of International Law. These policies should safeguard, in all spheres, social, cultural, civil, economic, political, labor rights, the right to development, decent work, self-determination and a balanced environment, as well as recognizing the need for protection mechanisms specific to human rights defenders, as proposed by the Campaign:

> States parties shall take adequate and effective measures to (atualizado: guarantee all rights of 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 internacional obligations in the field of human rights, and their constitutional principles.) recognize, protect and promote the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.[16]

[16] Global Campaign Comments and Amendments to the unbinding treaty revised Draft (draft 1), p.9

The protection of the affected by Human Rights violations must include the recognition of their individualities and vulnerabilities. Therefore, it is necessary to differentiate gender, race and social class. Quilombola, traditional communities and indigenous peoples must have their culture, way of life, social organization, uses and customs recognized and preserved. The beliefs and traditions of the entire group must be protected.

Furthermore, the Campaign suggests the inclusion of a new paragraph, 5.4, focusing on the emergency response mechanism, as proposed:

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

It is also proposed, in article 5.3, the addition to the obligations of the State to guarantee the full reparation, according to what was already debated in the previous article. Thus, the writing could be as follows:

> State Parties shall investigate all human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly and impartially, and where appropriate, take action against those natural or legal persons found responsible, and guarantee access to restitutio in integrum, in accordance with domestic and international law.

ARTICLE 6. PREVENTION

We can notice that, in the first paragraph of article 6, the maintenance of the scope of the Treaty, already criticized in the draft one analysis and in this text, which covers "all the commercial activities" without any differentiation, is a topic that we consider a setback in relation to the draft 0. The express mention to “all business enterprises domiciled within their territory or jurisdiction, including those of a transnational character” may still put the business that operates inside the national territory in foreground. That measure contradicts Resolution 26/9, which, in a footnote, states the reference to business of transnational character by “other business enterprises”, and the expectations of the participating States, civil society and organizations ahead of the Treaty elaboration process.

Such contradiction provokes a normative abstraction as the expansion of the scope of the Treaty corroborates to the generalization of its provisions, opening a certain vacuum on the discussion. However, the expansion of the scope, included in the European Union proposal (the origin country of most of the TNCs participant in the Treaty) and private actors, still indicates a corporate capture of the agenda, insofar as it removes from the priorities the mechanisms of accountability of these specific businesses, withdrawing the effectiveness of the Treaty.

It is evident that not even in relation to the prevention, the obligations are directed to companies. Nonetheless, the prevention against violations is voluntary to the agents. To the State is given the responsibility of creating binding regulations of human rights due diligence, verifying, regulating and inspecting the harmful potential of business activities, and to business is given the responsibility of following the regulations and inspecting their own production process, which has to be guided based on the perspective of protection of Human Rights. It is necessary to create different sections that deal with the States and business obligations.

We can also see that, in relation to Draft 1, in the first paragraph of this document, there is an addition to the concept of supply chain. However, there is a lack of provisions for the implementation of effective mechanisms that consider the unfold of this phenomenon, where we can see difficulties on the accountability, such as obstacles in the identification of the link between the head office, the branch and the activities of the chain; the market control; the ability to reduce costs of what is produced in the other parts of its structure and the resulting precarious work.

In paragraph 2, other types of violations, as labour, for example, lack more effective treatment, considering the flexibilization of labour regulations in developing countries to attract investment of transnational corporations, favoring the economic exploration and the precarious work conditions to which workers are subjected to, initiating the "race to the bottom".

In 6.3 c) again, there is the use of human rights abuses when it should be violations. In this provision, the victims are directly mentioned as the ones who suffer violations, not abuses. There is an attempt to mischaracterize the phenomenon of violation of rights of these groups.

At last, we can identify, in paragraph 4, the incentive to compliance. However, there are no parameters for the instrument to be used and developed, making it necessary for the existence of direct obligations to be followed. The decision of making the compliance is still dependent on the State, which most of the time suffers from the corporate capture, and that generates legal insecurity for the affected. The usage of the terms "small" and "medium sized" was kept, and its imprecision has already been criticized in the Homa analyzes of Draft One, characterized as an open concept in relation to the standing of the parties and who are the holders of the obligations.

Proposal

The Treaty must be restricted to States and Transnational Corporations, and these must adopt mechanisms of control, prevention, and reparation that are capable of identifying and preventing Human Rights violations, without prejudice to its responsibilities in case such violations occur. The obligations of prevention must be expressed for both entities and must involve the creation of means for the extraterritorial accountability to exist, besides provisions that ensure the coherence of the States in relation to commercial and investment agreements, as well as the establishment of mechanisms to control compliance with the obligations assumed at international level. The corporations' responsibilities must be extended throughout the entire supply chain, and the affected being taken into consideration through the entire production chain.

There could also be a specific topic on the rights of the community where the business is being placed, such as the right to be previously informed about the risks related to the activity before the business installs itself. And also that they are consulted and can give their thoughts on the activity, **and have the right to say no**, especially in the case of traditional communities.

Article 7. Access to Remedy

Article number 7, also part of section II, is an addition in relation to Draft One, which did not have such construction. This article comes in seven paragraphs, three of which have five sub-items, all of them regarding the necessity of the victims to have access to remedy. It also aims to ensure that

national laws are not obstacles to the access to justice, doing the exact opposite, by acting as mechanisms to guarantee such access, with facilitated access to information and low costs.

It is also possible to notice that with the creation of this new article a certain recognition that victims, besides the violations perpetrated by business, are also affected by actions of the national States that, when they hinder access to the means for claiming the rights of those affected, they perpetuate a process of curtailing these rights, to which state bureaucracy and corporate capture contribute largely. In that sense, in article 7, when looking for a more efficient regulation, assigning responsibilities to States to facilitate access, by the victims, to remedies for the violations, there is an implicit recognition that the lack of mechanisms or efficient mechanisms is a big barrier to the articulation of the victims.

However, the article is not immune to criticism, since it emphasizes, in the first paragraph, the incentive to non-judicial measures. In that case, the issue lies in the fact that the differences between victims and transnational corporations are huge, since the latter have much more economic-financial and even political power. To exemplify a situation of non-judicial measures that represent their inefficiency, the case of the agreements established in the Fundão dam collapse in Mariana, in 2015, can be used as an example, since it resumed in a situation where the affected until today did not receive the reparations deserved, but the corporations made use of the existing out of court settlements to get an effective non-accountability. Thereby, end by emphasizing a revictimization.

Another question that is not commented in this Draft, and consequently in the article in question, is the inclusion of the principle of centrality of the victims, which constitutes an important base for the human rights theme, and that has already been covered in several other opportunities, including in this text, and by the Campaign in an attempt to draw attention to the importance of putting the subject who suffered from the violations in focus in the debates of international law. It is important to highlight that the basis of that right must be the protection of individuals, be it against State or corporate violations, that are, as a rule, subjects in a relation of much bigger powers. In this way, in the sphere of the OAS, I/A Court H.R has been acting toward the recognition of that principle, showing that the international scene is becoming aware of the need to prioritize victims.

In article 7, however, it is made a short mention, but an important one, to the override of the forum non conveniens theme which has been tirelessly discussed, as the National Courts often reject actions under this doctrine. There is no mention, however, to the forum necessitatis in this document, which can make the discussion about the extraterritoriality issue quite incomplete.

There is also no provision in this article for a mechanism that can mitigate the corporate capture of the domestic structures of the State and avoid the non-accountability and non-reparation. Such reference would be essential.

Here, it is given that the article raises the question of creating non-judicial mechanisms in a more developed way, the proposal of the Campaign is appropriated and was previously addressed to article four, which seeks to create a security clause aiming to ensure that, in the event of continuing with these mechanisms, they do not constitute obstacles to the access of right-holders to the judicial sphere. As well as to ensure that other parties can submit complaints in the name of the victims, with their consent, unless their absence can be justified, in a way that the integrity of the text would be something like the following:

PROPOSAL

> Victims shall be guaranteed the right to submit claims to the courts and State-based non-judicial grievance mechanisms of the State Parties. Where a claim is submitted by a person on behalf of victims this shall be with their consent, unless that person can justify acting on their behalf **without a written/formal consent.** State Parties shall provide their jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies, ensuring a fair and impartial system of assessment and quantification of damages, independent from the influence of the entities that caused them [17]

Furthermore, the Campaign suggests the inclusion of a new paragraph, 7.8, ensuring the principle of in dubio pro persona:

> 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.

ARTICLE 8. LEGAL LIABILITY

In the first topic it is stated that the States have to structure the legal responsibilities of individual and legal persons. This is the logic that has been repeating since Draft Zero[18] and throughout the following provisions of the new Draft and also has some issues by contradicting the central purpose of the Treaty: to create an international binding mechanism that allows the accountability of transnational corporations.

Regarding the changes brought by the new version, the more expressive ones concern the parameters to be taken into account by national legislations, mostly because they also have to deal with the relations derived from the supply chains that, although they are not explicit, the text allows them to be achieved. Notwithstanding, it is strongly recommended that this mention of the accountability of the entire chain be expressed in article 8.7.

Previously, the State should choose which business would be covered by their national laws, but the way it is now, it is understood that the laws should hold not only the domiciled corporations accountable or the ones that actuate within the territory or jurisdiction, but also those included in its "business relations". That idea is covered by items **8.1** and **8.7**, the latter mentions that there shall be accountability of these entities even in cases where the damage was foreseen and the company did take the necessary measures to avoid it, that way creating a duty to act under due diligence. However, the extension to all business is repeated, when it should be restricted to transnationals, as already stated.

Proposal by Campaign

> **8.1.** State Parties shall hold liable, even for the complicity, collaboration, instigation, incitement or concealment, the International Financial Institutions that have provided any kind of financial support to transnational corporations and other business enterprises of

[17] Global Campaign Comments and Amendments to the unbinding treaty revised Draft (draft 1), p. 9.
[18] For the purpose of this work, the EIGWG Draft on the "Legally Binding Instrument to Regulate, in Internacional Human Rights Law, the activities of transnational corporations and other business enterprises" will be referred to as "Draft Zero" and is available here: https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf.

transnational character responsible for human rights violations, including through their business relationships and global value chain.

Proposal

8.7. States Parties shall ensure that their domestic law provides for the liability of legal or natural or legal persons conducting **transnational** business activities **along the supply chain**, for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their **transnational** business activities, character, or in their business relationships, but failed to put adequate measures to prevent the abuse.

Another change is the addition of gender perspective in item **8.5** that should also mention other vulnerable groups that, given their peculiarities, lack the proper protection.

The same article establishes that natural and legal persons are declared as responsible for a violation and must repair the victim, the person in question must compensate the affected or the State, in case the latter has already repaired the affected. Such provision is inadequate. The primary duty to repair the victims is of the violator's responsibility, thus, in the case of this Treaty, the transnational corporations.

Furthermore, if the State bears the burden involved in emergency measures, for example, in this case, it should definitely be compensated, but that does not exclude the victim's access to adequate, timely and effective remedies.

Proposal

8.5. States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, and **adequate to the victims needs and vulnerabilities, such as gender, race, sexual orientation and if they had substantial life changes** reparations to the victims of human rights abuses in the context of **transnational business** character, in line with applicable international standards for reparations to the victims of human rights violations. Where a legal or natural person conducting business activities is found liable for reparation to a victim of a human rights abuse, such person shall provide reparation to the victim and compensate the State, if that State has already provided reparation to the victim for the human rights abuse resulting from acts or omissions for which that legal or natural person conducting business activities is responsible.

Topic 8.6, in turn, could be a good source of obligations to business, but has to adequate the language and the focus: it is necessary to specify that transnational corporations must keep funds in case there is the necessity of compensation. That is a way of guaranteeing that the business will possibly be accountable and works as an imposition because they must adopt a certain behaviour to operate. However, the draft states that "The States **shall**", which take away the obligation of the government to fulfill the measure in its territory and disregard that countries that are dependent of the business, precisely the ones that need the international binding Treaties the most, are going to have difficulties to enforce a provision like this.

Proposal

8.6. TNC shall establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation **and judicial costs.**

Topic **8.8** also excludes the possibility that the existence of due diligence be used as a factor for acquittal of the perpetrator, be it a natural or legal person, making the trier assess the whole along with other evidence. It could, however, exclude that the program of compliance can be used to determine the responsibility that has to be objectively measured.

> **Proposal by the Campaign**
>
> **8.8.** The parent and outsourcing companies assume several and joint liability with their subsidiaries and the legal persons with whom they have business relationships and/or which are part of their global value chain regarding the obligations established in this (Legally Binding Instrument). The obligation to assume this liability shall be directly applied by judges in cases in which the existing legal framework in force in the home and/or host states in which the affected persons or communities are based is not adequate for the implementation of this (Legally Binding Instrument).

Although there were changes in relation to the previous version, there is still room for improvement. The supply chains could have received a direct mention covering its specificities that lead to impunity, and the natural persons deserve a more adequate treatment because they must consider if the element of voluntarism is present from the distinctive human actions and actions that were taken by legal persons.

Moreover, this is another article that does not contribute to the protection of more economically vulnerable countries that depend on external agents to boost their economies.

ARTICLE 9. ADJUDICATIVE JURISDICTION

The first provision addresses the victims' legal demands and became broader by allowing that actions can be taken against acts or omissions that have caused or that may cause violations of Human Rights. However, in the subitems, the possibility of the demand being submitted at the victim's domicile (old 7.1.a) **was replaced by "place where the Human Rights abuse occurred"** (9.1.a), in practice, that change can hinder the access to justice, insofar as the affected may encounter difficulties to move from one place to another and in this case, what highlights the importance that the fund implemented in the previous article become an obligation.

Furthermore, the use of the term "human rights abuse" in article 9.1 does not make sense, since here the subject is the victim, and the victims suffer violations of their rights, not abuses. As it was already discussed in this text, that can cause a de-characterization of the human rights violation phenomenon, besides the fact that the treaty now makes reference to State-owned enterprise, and in this case, the State is the perpetrator. Hence, it is suggested the change of abuse for violation.

The Campaign proposes the inclusion of articles 9.1.d and 9.1.e:

> d. "The legal or natural persons conducting business activities of transnational corporation alleged to have committed, including through their business relationships and global value chain, such acts or omissions in the context of business activities are domiciled; or
> e. "The Companies that have business relationships with the transnational corporation alleged to have committed such acts or omissions in the context of business activities, are domiciled."

In the following provision, **9.2**, in which are displayed the criteria for the determination of the business domicile, it should also have been included the place where the TNCs assets are set, thus, in case of an execution, the process shall be swiftly solved.

> 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 or global value chain, is considered domiciled at the place where it has its:
>
> **a. patrimony** (no longer in the new version of the template)
> b. place of incorporation; or
> c. statutory seat; or
> d. central administration; or
> e. principal place of business; (replace with "or substantial business interests)

This article makes another explicit reference to the use of "forum non conveniens", in item **9.3**, as an argument saying that the Court cannot refuse a case submitted by victims, however, it suggests a mention to a more explicit prohibition, even though it can be inferred, it is important to not leave gaps in this context. Moreover, there could be an express mention to "forum necessitatis".

According to this doctrine, a Court is able to determine itself as competent to judge a case even without a direct relation to the cause, [19]thus, it is the most adjusted to Human Rights. The logic resulting from it would be the opposite: the judge shall primarily consider the interests of the affected when determining the jurisdiction of the case, which would imply in the efficiency of the normative framework and in which the access to justice would be addressed.

> **Proposal**
>
> **9.3.** A court **cannot** decline its jurisdiction to hear a case on the basis that there is another court that also has jurisdiction (forum non conveniens), especially when the alleged perpetrator has assets or substantial interests under the jurisdiction of the state of the court receiving the specific complaint (forum necessitatis).

The determination of jurisdiction in cases of Human Rights violations by business shall take into account the access to justice and all the factors associated with the context of the jurisdiction. It is worth mentioning that it is understood that not only the legal and judicial provisions are vital in this process, but they also go through the institutions capacity, which must be sturdy enough to conduct investigations, to order the necessary protection to victims even during the process and also the possibility of execution of the judgment.

All of these factors are not present in their greatest potential in all jurisdictions, hence the need for extraterritoriality in the Treaty and that this be adequate to Human Rights.

ARTICLE 10. STATUTE OF LIMITATIONS

The article had few changes in comparison to the previous version, thus, it is reiterated the same criticism already expressed: the Human Rights violations perpetrated by transnational corporations should not be time-barred since they reflect damages to the international community's

[19] ROLAND Manoela C., SOARES, Andressa O., **A Essencialidade do instituto da jurisdição extraterritorial no tratado internacional sobre Direitos Humanos e Empresas.**

most valuable resources. The term "most serious crimes" must be removed, by its lack in definition and different possibilities of interpretations that weaken the document's effectiveness. Besides that, the reasonable period of time must be a general rule applicable to all cases and it is necessary to remove the mention to domestic statutes.

One aspect that could be used to improve the capacity of the future treaty to conciliate with the widest possible range of international Human Rights treaties would be the reproduction of the provision referring to the criminal liability of business, when the instrument encourages States to improve their domestic laws to address such type of liability. Such provision should be applied to set forth an effort of internalization of regulations on Human Rights protection in general. It would follow the same logic.

By the way it was expressed, there is a loophole for impunity, and it is necessary the existence of guarantees that the demands will be truly dealt with, mainly considering that there is a disparity of power between affected and TNCs.

Proposal

10.1. The States 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 prosecution and punishment of all violations of international human rights law, Labor rights, Environmental norms, and humanitarian law.

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 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.

ARTICLE 11. APPLICABLE LAW

The biggest change in this article was the removal of the victims' domicile location, topic already discussed above. Moreover, the biggest problems have not been solved in relation to the previous document.

The Treaty must be an instrument that contributes to the primacy of Human Rights over investment treaties, thus, in cases where there are conflicts between legislations and competent jurisdiction, what should be used primarily is the most appropriate legislation and the one that most serves Human Rights, and consequently, the interests of the victim.

Proposal

11.1. The choice of applicable law shall always be in accordance with the provisions regarding the primacy of human rights over trade and investment agreements and the ones that better protect the affected people rights.

Article 12. Mutual Legal Assistance and International Judicial Cooperation

Article 12 of Draft 2 deals with mutual legal assistance and international judicial cooperation, that is, about the possibility of exchanging information between States and the extraterritorial scope of judgments. From reading the article, it appears that its content has suffered only a few changes, and the structural problems present in the previous Drafts were maintained and go against the Treaty model elaborated by the Global Campaign.

The condition of adequacy to the national law and without prejudice to the domestic law - issue responsible for reducing the scope of the article - were kept unchanged in articles 12.3.xi and 12.4. In this regard, all the references to "consistent with domestic law", such as the structure "any other type of assistance that is not contrary to the domestic law of the requested State Party" shall be deleted. Moreover, article 12.9.c, by mentioning about the cases of denial to mutual legal assistance, preserve the use of ''ordre public" as possibility of denial of a trial. Therefore, this paragraph should be withdrawn, since it devalues the primacy of human rights over the interests of a public policy, when, in fact, a Treaty on Human Rights and Business should affirm the superiority of these rights over any other norm and establish its commitment to the fight against the impunity of TNCs.

Besides, article 12.3 orders that the grant of mutual legal assistance will be ordered by the States involved, case by case. In that context, the article misses the point of being part of the Treaty, which is the elaboration of binding and obligatory compliance norms of Human Rights and Business. Thus, norms based on the criteria of voluntariness or any other that allow the perpetuation of the TNCs impunities must be disregarded. Finally, once again, the text of the Treaty remains silent as to the possible problems faced by States that present more fragile institutions, such as corporate capture. Therefore, that challenge, already known by the Global Campaign as the main source of violations of human rights, must be legislated in the Treaty with the intent of being restrained.[20]

Article 13. International Cooperation

Article 13 of Draft 2 regards international cooperation and, although it does not have substantial changes related to the Draft One, it brings new issues to be discussed. It is unchanged the maintenance of the logic of delegation of obligations only to States under the article 13.1, without any mention to the role of corporations in the process, which contributes to these agents to escape the responsibility, and go against the guidelines of the Elements document and the Campaign discussions.

It should be noted, still in article 13.1, the change in terminology, from ''commitments'' to ''obligations'', which establishes a less voluntaristic logic. Nevertheless, the change is of no use if they are kept - as they are - the delegation of responsibilities only to the States, and not to the real perpetrators of human rights violations, which are the transnational corporations.

[20] GLOBAL CAMPAIGN COMMENTS AND AMENDMENTS TO THE UN BINDING TREATY REVISED DRAFT (DRAFT 1). February 2020. p. 10

Furthermore, there has been, through article 13.2.c, the inclusion of "raising awareness about the rights of victims of business-related human rights abuses and the obligation of States". Such a measure is positive, however, there are not enough elements to really understand how this proposal will be developed. In this sense, it would be essential, in order to increase the efficiency of the text, that, in addition to raising awareness, objective projects were implemented to demonstrate the accountability of corporations that violate human rights.

In conclusion, article 13.2.e prescribes the contribution of States to the creation of an International Fund for victims of human rights violations. It is worth mentioning that the planning for that Fund is an improvement in the access to reparation for the victims and must be kept in the text. However, by giving the State the obligation of financial contribution, and not to companies, the instrument changes its project of accountability of transnational corporations by allowing that the real perpetrators of human rights violations remain unpunished.

Article 14. Consistency with International Law principles and instruments

Article 14 of Draft 2 discusses the consistency with principles and instruments of International Law. In this point, the current text of the Draft maintains the logic of the unconditional preservation of the sovereignty of States and their jurisdiction, a prerogative that differs from that proposed by the Campaign and the document Elements for the International Treaty on Transnational Corporations and other business and Human Rights.

Thus, Article 14.1 states that States Parties must fulfill their obligations under the Treaty in a manner of fully respecting the sovereignty, equality and non-intervention in the domestic affairs of other States. In this sense, such a topic is burdensome in a Treaty whose intention is to end impunity for human rights violations perpetrated by transnational corporations, since it subjects cooperation and extraterritoriality to the sovereignty of a State and thus limits the effectiveness of the document. It is worth [21]mentioning that the Campaign is against the State unlimited sovereignty, defending the peoples' sovereignty.

Draft 2, through article 14.2, excludes the possibility of the application of extraterritorial jurisdiction mechanisms, which is responsible for restricting the access to justice by the victims. Such restrictions go against the incentive presented by the Treaty in facilitating the cooperation between States, since it worsens the international provisions of Human Rights by giving the countries the responsibility of establishing -according to their domestic law - how this cooperation is going to work. In that sense, once again, it is important to highlight the concern with countries whose normative milestones are non-exhaustive in the protection of human rights, leaving a gap open to the lack of accountability for human rights violations committed by TNCs.

At last, article 14.5.a establishes that the States cannot make use of other instruments that limit their capacity to fulfill the obligations established by the Treaty. The aforementioned resolution is positive; however, it makes few concrete contributions if the extension of this logic does not occur

[21] More information available at: http://homacdhe.com/wp-content/uploads/2020/01/Cadernos-de-Pesquisa-An%C3%A1lise-do-Draft-One-Retificado.pdf, p.24

to business such as private-public partnerships and contracts through the affirmation of the hierarchical primacy of human rights.

SECTION III

ARTICLE 15. INSTITUTIONAL ARRANGEMENTS

COMMITTEE

Again, the document brings the Committee expectations, but it remains a fragile mechanism if analyzed the structural impunity of which corporations enjoy, especially the ones of transnational character, despite all international and national norms already implemented.

It is essential to have a clear definition of the criteria for the choice of possible candidates appointed by the States to compose the Committee, which, for example, could not be linked to the business sector. It is necessary, in the same way, the provision of at least one Optional Protocol to receive individual and collective complaints, and to open the debate, even with a future negotiation clause, under an International Court, whose historical viability was so well portrayed in the 2016 article already mentioned in this text, besides being presented as a proposal by several actors during the negotiation sessions.

CONCLUSION

It is possible to conclude, from reading the document, that the primary responsibility of ''respect, protect, fulfil and promote human rights'' are still delegated to the States. In this sense, Draft 2 maintains the gap on the allocation of responsibilities and direct obligations to private agents, which would be fundamental to a Treaty on Human Rights and Business given the capacity already recognized by international doctrine and by numerous instruments of international law of human rights violations perpetrated by corporate entities. Besides, it would be necessary to highlight in the document that there are no different gradations of responsibilities between States and business, but a sum of responsibilities, and therefore, the corporations are also subject to obligations. Moreover, the transnational corporations don't need to be recognized as subjects of the International Law in order to be accountable for their activities.

The additions related to the inclusion of a gender perspective can be considered an achievement of the Draft 2 text. In that sense, it was added the emphasis centered in the attention to the gender perspective along with the Convention on the Elimination of All Forms of Discrimination against Women, Beijing Declaration, The Beijing Platform for Action, and other international flags relevant on that matter. Despite this increase, it was not outlined an overview of how that would be implemented, lacking a more emphatic standardization to ensure that the provision is actually fulfilled and not just become an object of rhetoric. Furthermore, other vulnerable groups, such as ''children, indigenous peoples, persons with disabilities, migrants refugees, and other persons in vulnerable situation'' were only mentioned, which does not guarantee the full protection of their rights. Thus, it is recommended that more specific measures regarding each vulnerable group are presented to ensure the safety of all the different rights-holders' necessities.

Other expressive omissions are also identified in the Draft 2 text. In that perspective, the current document maintains the absence of mentions to the principle of centrality of the victim, an essential topic in the Treaty since it is necessary to aim for the full satisfaction of the interests of the affected and the access to remedy. And yet, it suppresses the affirmation of human rights supremacy regarding trade and inversion agreements - which is also a central issue to prevent economic and corporate interests from overlapping with the human rights of the people - which would be essential to prevent the admission of the possibility of human rights violations to justify economic benefits. Thus, it becomes essential to incorporate to the Treaty the hierarchical superiority of the human rights norms on trade and inversion agreements.

It is worth mentioning that the issue related to the escape of business from responsibilities of human rights violations and corporate capture are essential aspects and were also not considered in the elaboration of the document. Therefore, there must be implemented prepositions to the text regarding the independent responsibilities of States and business, and the latter cannot make use of weak national policies regarding the protection of human rights to remain unpunished. When it comes to the corporate capture, through the economic, legal, political and institutional asymmetry of some States and TNCs, measures must be presented to restrain that agendas from private entities penetrate in the public sphere to inhibit the enjoyment of human rights.

The scope remained in "all business", which ends up by significantly reducing the document effectiveness, as discussed throughout the text. Also, an expressive gap is seen in the absence of enforcement mechanisms. There are no mentions of the possibility to constitute a Court, and the Committee that was presented seems to be very fragile and without any mechanism to prevent conflict of interest and keep the fairness of members. There is not even provision for receiving complaints.

Considering the topics addressed throughout the analysis and summarized in these last paragraphs, we can conclude that Draft 2 incorporated a few suggestions from States and civil society, however, it is still lacking in the main elements. With the new text, the Treaty seems to regulate much more other businesses, and loses its capacity to regulate transnational corporations. Therefore, it appears not being capable of changing the established agenda and provide real protection of Human Rights, and thus not fulfill its purpose prescribed in Resolution 26/9.

REFERÊNCIAS BIBLIOGRÁFICAS | REFERENCES | REFERENCIAS

Angelucci, P. D. & Roland, M. C. (2016). *O Processo de elaboração do Tratado de Direitos Humanos e Empresas: uma oportunidade de superação da perspectiva estadocêntrica adotada pelo Direito Internacional Público.* XXV Congresso Nacional de Pesquisa e Pós-graduação em Direito (CONPEDI). Curitiba - PR. Avaliable at: http://homacdhe.com/wp-content/uploads/2017/03/O-PROCESSO-DE-ELABORA%C3%87%C3%83O-DO-TRATADO-DE-DIREITOS-HUMANOS-E-EMPRESAS-1.pdf. Accessed July, 05, 2021.

Aragão, D. M. & Roland, M. C. (2017). The Need for a Treaty: expectations on counter hegemony and the role of civil society. In *Building a Treaty on Human Rights: context and contours.* Cambridge University Press.

Correa, C. M. (2016). *Scope of the Proposed International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights*. South Centre, Police Brief.

Deva, S. (2004). Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should 'Bell the Cat'?". *Melbourne Journal of International Law, 37*. Available at: http://classic.austlii.edu.au/au/journals/MelbJIL/2004/2.html. Accessed July, 05, 2021.

Gallegos, L. & Uribe, D. (2016). *The Next Step against Corporate Impunity: A World Court on Business and Human Rights?*. Harvard International Law Journal. Vol. 57 Online Symposium. Available at: https://harvardilj.org/2016/07/the-next-step-against-corporate-impunity-a-world-court-on-business-and-human-rights/. Accessed July, 05, 2021.

Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity. (2017). *Global Campaign Comments and amendments to the UN Binding Treaty Revised Draft (Draft 1).* Available at: https://www.stopcorporateimpunity.org/global-campaign-comments-and-amendments-to-the-un-binding-treaty-revised-draft-draft-1/. Accessed July, 05, 2021.

Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity. (2017). *Treaty on Transnational Corporations and their supply chains with regard to Human Rights.* Available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf. Accessed July, 05, 2021.

Guamán, A. (2018). *El Draft 0 del Binding Treaty: crítica jurídica y propuestas en el camino a la cuarta sesión del grupo de trabajo intergubernamental de composición abierta sobre las empresas transnacionales ETN y otras empresas con respecto a los derechos humanos.* In. Cadernos de Pesquisa Homa. vol. 1, n. 6. Available at: http://homacdhe.com/wp-content/uploads/2020/01/An%C3%A1lise-do-Draft-One-EN.pdf. Accessed July, 05, 2021.

United Nations Human Rights Council. (2014). *A/HRC/RES/26/9 Resolution*: Available at: https://www.ihrb.org/pdf/G1408252.pdf. Accessed July, 05, 2021.

United Nations Human Rights Council. (2018). *Zero Draft*. Available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf. Accessed July, 05, 2021.

United Nations Human Rights Council. (2020). *Report on Sixth Session*. Available at: https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx. Accessed July, 05, 2021.

United Nations Human Rights Council. (2020). *Second Revised Draft* Available at: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session6/Pages/Session6.aspx. Accessed July, 05, 2021.

Roland, M. C. & Soares, A. O. (2020). A Essencialidade do instituto da jurisdição extraterritorial no tratado internacional sobre Direitos Humanos e Empresas. In: *Direitos Humanos e Empresas: responsabilidade e jurisdição*. Belo Horizonte: Editora D'Plácido.

Roland, M. C. & Soares, A. O. (2020). Retos para la aprobación de un tratado sobre Derechos Humanos y empresas en el Consejo de Derechos Humanos de las Naciones Unidas. In: *Desafíos para la regulación de los Derechos Humanos y las empresas: ¿Cómo lograr proteger, respetar, y remediar?*. Bogotá: Universidad Externado de Colombia.

Roland, M. C., Soares, A. O., Brega, G. R., Oliveira, L. de S., Carvalho, M. F. C. G. & Rocha, R. P. (2018). Cadeias de Valor e os impactos na responsabilização das empresas por violações de Direitos Humanos. *Cadernos de Pesquisa Homa, 1 (5).* Available at: http://homacdhe.com/wpcontent/uploads/2018/08/Cadernos-de-Pesquisa-Homa-Cadeias-de-Valor.pdf. Accessed July, 04, 2021.

Roland, M. C., Soares, A. O., Brega, G. R., Braga, L. D., Carvalho, M. F. C. G. & Rocha, R. P. Draft One Analysis. (2019). *Cadernos de Pesquisa Homa, 2 (8)*. Available at: http://homacdhe.com/wp-content/uploads/2020/01/An%C3%A1lise-do-Draft-One-EN.pdf. Accessed July, 04, 2021.

Roland, M. C., Aragão, D. M., Angelucci, P. D., Neto, A. A., Galil, G. C. & Lelis, R. C. (2018). Desafios e perspectivas para a construção de um instrumento jurídico vinculante em direitos humanos

e empresas. *REVISTA DIREITO GV | SÃO PAULO, 14 (2),* p. 393-417. Available at: http://www.scielo.br/pdf/rdgv/v14n2/1808-2432-rdgv-14-02-0393.pdf. Accessed July, 05, 2021.

Zubizarreta, J. H. & Ramiro, P. (2016). *Against the "Lex Mercatoria": proposals and alternatives for controlling transnational corporations.* Madrid: OMAL. Available at: http://omal.info/IMG/pdf/against_lex_mercatoria.pdf. Accessed July, 04, 2021.

Zubizarreta, J. H. & Ramiro, P. (2008). La responsabilidad social corporativa y las empresas transnacionales: de la ética de la empresa a las relaciones de poder. *Revista de Relaciones Laborales, Lejona, 2 (19),* p. 17-49. Available at: https://www.ehu.eus/ojs/index.php/Lan_Harremanak/article/view/2648. Accessed July, 05, 2021.

Zubizarreta, J. H. (2017). *El Tratado Internacional de los Pueblos para el Control de las Empresas Transnacionales: Un análisis desde la sociología jurídica.* Available at: http://www.relats.org/documentos/GLOB.Zubizarreta3.pdf. Accessed July, 03, 2021.

Zubizarreta, J. H. (2016). El Tribunal Internacional para el control de las empresas transnacionales y los derechos humanos. *Transnacionales y Derechos Humanos Alai no 520.*

Document produced by
Homa – Human Rights and Business Centre
projeto.homa@ufjf.edu.br

Funding Agency
Ford Foundation Brazil

Coordination
Manoela Carneiro Roland
PhD, General Coordinator of Homa, Professor of International Law at University of Juiz de Fora

Supervision
Andressa Oliveira Soares
Master, research coordinator at Homa, University of São Paulo

Maria Fernanda Campos Goretti de Carvalho
Graduated in Law, reasearcher at Homa, Federal University of Juiz de Fora

Aline Laís Lara Sena
Undergraduate, reasearcher at Homa, Federal University of Juiz de Fora

João Pedro Brito Perillo
Undergraduate, reasearcher at Homa, Federal University of Juiz de Fora

Luca Cezário Tostes Tito
Undergraduate, reasearcher at Homa, Federal University of Juiz de Fora

Renata Paschoalim Rocha
Undergraduate, reasearcher at Homa, Federal University of Juiz de Fora

Sofia Miranda de Oliveira
Undergraduate, reasearcher at Homa, Federal University of Juiz de Fora

---

Instagram & Twitter | @HomaPublicaDHE
periodicos.ufjf.br/index.php/homa/