

*Written contribution by the Europe-Third World Centre (CETIM), the Institute for Policy Studies/Transnational Institute and the Friends of the Earth International to the consultations on the “Draft legally binding instrument”, presented to the 4<sup>th</sup> Session of the Intergovernmental Working Group on Transnational Corporations and other business enterprises with respect to human rights*

*This written contribution is made on behalf of the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity <sup>1</sup>*

*Geneva, February 2019*

**COMMENTS AND PROPOSALS ON THE DRAFT LEGALLY BINDING INSTRUMENT  
PRESENTED TO THE INTER-GOVERNMENTAL WORKING GROUP ON  
TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH  
RESPECT TO HUMAN RIGHTS**

The “Draft legally binding instrument” presented to the Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights during its fourth session (October 2018) is a step forward in the process to build an instrument that regulates the activities of these entities. The Draft contains interesting elements such as the rights of victims, the prevention of human rights violations committed in the context of business activities that have a transnational character, mechanisms of inter-state cooperation and mutual legal assistance.

However, contrary to the “Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights” (herein referred to as the Elements Document), this document does not reflect the debates held during the first two sessions of the Intergovernmental Working Group and presented in accordance with Resolution 26/9, nor does it include the advances and contributions made during the third session.

In fact, the way it has been structured, the draft binding instrument will not be effective, as it does not foresee any direct obligation for transnational corporations (TNCs), nor the establishment of an effective international implementation mechanism. The draft places the responsibility for controlling the activities of TNCs on the State, thereby adopting a traditional approach that has proven to be insufficient to regulate the current power relations between TNCs and State actors.

The draft binding instrument does not include provisions on social participation or a gender approach. It also does not contain articles on the role of international financial institutions or references to international trade and investment agreements that have a real impact on the influence of these agreements in the human rights violations committed by TNCs.

Furthermore, we do not believe the Draft Optional Protocol will be of use, nor do we agree with the reasons for presenting it as a separate document. It would be more appropriate to include some of its elements in the draft binding instrument and foresee the creation of an effective international enforcement mechanism.

Through the present document, the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) wishes to participate constructively and positively to the negotiating process and bring the voice of the movements and organisations of the

<sup>1</sup> <https://www.stopcorporateimpunity.org/call-to-international-action/>

Campaign to the process. This concept paper presents our main observations and proposals to the draft binding instrument. These proposals originate from and/or are inspired by the Treaty Proposal of the Global Campaign<sup>2</sup> and the Elements Documents presented by the Presidency in 2017<sup>3</sup>.

## General framework

### *Primacy of human rights law*

The primacy of human rights obligations over trade and investment agreements shall be reaffirmed in the preamble and be the subject of a separate article (see proposal in article 13).

### *The direct obligations of TNCs<sup>4</sup>*

The preamble has been elaborated based on the classical theory of the primary responsibility of the State in the area of human rights and does not consider the direct responsibility of TNCs. Thus, its content reveals, from the beginning, the clear desire to limit the purpose of the future treaty by making it rest on one pillar: the primary responsibility of the State to “promote, respect, protect and guarantee human rights *and fundamental freedoms*”.

It is essential for the draft Convention to include direct obligations for TNCs on human rights. This direct application shall be vertical for States Parties (obligation to take measures against third parties to protect human rights) and horizontal for TNCs (obligation to refrain from violating human rights in the course of their activities). TNCs must respect the generally recognised principles and norms set out in United Nations treaties and other international instruments. Excluding TNCs from this draft Convention on TNCs and human rights is, in our view, a fundamental error.

Indeed, it is of utmost importance that adequate measures be adopted to guarantee that the perpetrators of human rights violations are promptly and effectively held accountable for their actions and that the affected individuals and communities have access to justice and remedy. Without direct obligations for TNCs, it will not be possible to prosecute them.

It is important to underline that already exist international treaties and instruments that include obligations and make legal persons such as TNCs legally responsible<sup>5</sup>, even in some investment treaties, and also in the European community with regard to competition, for example.

### Proposals

- *The obligations of TNCs set out in this Convention (including due diligence) apply to all TNCs and their supply chains, because of the activities they carry out, whether in the State or States of origin, host States or States affected by the operation of the entity in question.*
- *TNCs (legal entities) and their managers (natural persons), whose activities, carried out directly or indirectly through the entities that make up their supply chains, violate human rights, incur criminal, civil and administrative liability, as appropriate. This responsibility shall have the content regulated in this Convention and established in the norms of domestic law.*

2 [https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty\\_draft-EN1.pdf](https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf)

3 [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf)

4 In this document, the term “TNC” includes all entities in the supply chain.

5 United Nations Convention on the Law of the Sea; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Stockholm Convention on Persistent Organic Pollutants (POPs); United Nations Convention against Corruption, and others.

- *TNCs have obligations derived from International Human Rights Law. These obligations exist regardless of the legal framework in effect in Host, Home or Affected States, directly or through their supply chains.*
- *TNCs shall not carry out activities that violate human rights, either directly or indirectly through the group of entities that make up their supply chain.*

### **Gender approach**

The draft Convention must recognise the specific negative effects of TNCs' activities on women and girls, as well as the fundamental role of women in the process of dealing with and remedying these impacts. It must reaffirm the existing obligations of States to protect women from TNCs and other human rights violations related to economic activity in accordance with the relevant norms. It shall also adopt a gender justice approach to overcome the historical prejudices and discrimination against women and girls and gender inequality. The draft Convention must include strong and clear wording on the protection of women defenders of human rights, women and girls affected by TNCs and all women who denounce the violations of TNCs. All measures that arise from this Convention must take into account the situations of double discrimination linked to gender, such as for indigenous women, refugees women, peasant women and internally displaced women.

### Proposal

*TNCs shall respect the rights of women as regulated by International Human Rights Law, and especially avoid exploiting them and perpetrating violence against them. TNCs shall take the measures needed to ensure the equality of rights, a safe and healthy work environment and a culture that is supportive of women's participation in the work force.*

### **Lifting the corporate veil**

The Convention must necessarily include provisions that oblige TNCs to lift the corporate veil, which prevents all entities along the supply chain of the TNC from having a legal existence, resulting in each of them being considered as an autonomous legal entity. This fact prevents the recognition of the legal responsibility of the parent company for the violations caused by the entities in its chain, in spite of the links that unite them. In this sense, this autonomy of legal personality constitutes a veil between the parent company and the other entities. TNCs must disclose the existence and links of all entities in the chain and the Convention must establish mechanisms to incur legal responsibility between the parent company and its supply chain.

### Proposals

- *Parent companies shall identify, prevent and remedy the risks of human rights violations caused by their activities or those of the entities along the supply chain. In the event of damage, it is the duty of the company to repair it and compensate the affected individuals and communities; their legal liability may be incurred.*
- *TNCs shall provide precise and detailed information to the public on: a. the purpose, nature, scale and terms of the leasing contracts for their operations and/or other contracts, as well as the terms of those contracts; b. the activities, structure, ownership and governance of the TNCs; c. the financial situation and performance of the TNCs; d. the availability of grievance and redress mechanisms and the procedures for their use.*
- *TNCs shall make public the identity of the partners with whom their investors carry out business and/or financial activities in order to prevent tax fraud and evasion, or intra-firm capital flows that violate human rights.*

- *TNCs shall make public their corporate management structures, the individuals who are responsible for making decisions and their respective responsibilities in the supply chain. By doing so, shareholders become liable and the corporate veil can be pierced whenever TNCs violate human rights.*
- *TNCs shall disseminate information through all appropriate means (print, electronic and social media, including newspapers, radio, television, mailings, local meetings etc.), taking into account the situation of remote or isolated, and ensure that notification and consultation are carried out in the language(s) of the affected individuals and communities.*

### ***International Economic and financial institutions (IFIs) and other financial entities***

In the draft Convention, the total absence of provisions in relation to economic and financial institutions and entities can be noted. It is crucial to fill this gap since these institutions are, in many cases, complicit in human rights violations perpetrated by TNCs. It is necessary to define and elaborate a specific article on this issue.

#### Proposals

- We propose that the definition includes the following entities: Inter-governmental organisations and specialised agencies of the UN (International Monetary Fund, World Bank), the World Trade Organization (WTO), development, trade and investment banks and other international financial institutions. There are other financial entities that can include TNCs that work as depository, contractual or investment institutes, such as banks, insurance companies, pension funds, hedge funds, investment companies and brokerage firms.
- *The conduct of IFI can provoke violations of human rights. The IFI's obligation to avoid such conduct gives rise to a variety of human rights related obligations. for these organizations. States parties agree that these obligations include the obligation of IFIs and their managers to abstain from supporting any activities of TNCs and their supply chains that violate human rights. IFIs shall respect all relevant norms and rules of international law in general. In addition, the World Bank and the International Monetary Found, as specialized UN agencies, are bound by the general objectives and principles of the United Nations Charter; which include the respect for human rights and fundamental freedoms.*
- *Any conduct of these organizations and its managers that contravenes these obligations stands to be corrected by suitable disciplinary, administrative or other measures including the possibility of affected people or communities to seek compensation and reparation against the concerned organization.*

### ***Undue interference by TNCs***

The Treaty must include concrete measures against undue interference by TNCs. This element must be included in the preamble and be the object of a separate article.

#### Proposals

- We propose that references inspired from the WHO Framework Convention on Tobacco Control (article 5.3) be included in the preamble and throughout the text: *In setting and implementing their public policies with respect to the regulation of TNCs, State Parties shall act to protect these policies from commercial and other vested interests, and from undue interference by TNCs.*
- The Convention shall also safeguard national and international policy space on human rights from undue interference by TNCs and States shall refuse to give them the means to influence relevant policies on human rights in their bilateral, regional, multilateral or another

types of trade and investment agreements. The Convention shall propose measures to protect these public policymaking processes and government bodies from this undue influence.

## **Concrete proposals on the Draft's content**

### ***Article 1: "Preamble"***

The preamble cannot appear as article 1. This error needs to be corrected.

In paragraph 6 of the preamble, reference is made to all companies, whereas the Working Group's mandate refers specifically to transnational corporations and other enterprises with transnational activities.

### Proposal

*Substitute "all business enterprises" with "all transnational corporations and other enterprises with transnational activities". After this sentence, we propose that the following be added: No element of this Convention can be used by a state to impose lower standards on its local businesses.*

The preamble shall mention human rights law, labour rights, the environment and corruption.

### Proposal

Add the following references to the preamble:

*Desiring to promote the observance of the principles set out in the Charter of the United Nations; the Universal Declaration of Human Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees; the Declaration on the Rights of Indigenous Peoples; the Declaration on the Right to Development; the Convention against Corruption, the Conventions and Recommendations of the International Labour Organization, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Slavery, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the four Geneva Conventions and their Optional Protocols, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; the Rome Statute of the International Criminal Court and other relevant international instruments approved at the international or regional level in the human rights framework; the customary international and the general principles of international law which constitute the basic pillars upon which to construct a new international judicial system.*

### ***Article 2: “Statement of purpose”***

Paragraph c) of article 2.1, as it is currently formulated, does not allow for the effective development of international human rights law; instead, it maintains a traditional vision of it. Adopting a broader vision of the subjects that are to be the addressees of the obligations established by the Convention is fundamental, as is recognising the international responsibility of TNCs to respect human rights. As such, international cooperation shall seek to ensure that the obligations of States and TNCs established under international human rights law are effectively enforced.

### ***Article 3: “Scope”***

With regards to the rights covered by the present Convention, article 3.2 shall include the core international human rights treaties and especially the ones pertaining to economic, social, cultural, civil, political and labour rights; the right to development, self-determination and a healthy environment; and all the collective rights of indigenous peoples and communities.

#### Proposal

*The rights concerned are all internationally recognized human rights, taking into account their universal, indivisible, interrelated and interdependent character, as reflected in all human rights treaties, international humanitarian law, as well as in other international instruments relating, in particular, to the right to work, the right to environment and the fight against corruption.*

### ***Article 4: “Definitions”***

For the article on the definitions, a longer or better description of the key concepts used in the draft Convention is required.

For the effective implementation of the future Convention, a clearer definition of TNCs is needed. A definition for the concept of a parent company’s control of the different entities in its value chain must be included. It is equally important to include responsible solidarity between parent companies and their subsidiaries and value chain. This is essential if we wish to fight against the impunity of these companies, which often evade their responsibility in the human rights violations committed thanks to the use of the corporate veil, decentralisation or outsourcing.

#### Proposals

- *The parent company's control over its value chain may be direct, indirect, financial, economic or otherwise.*
- *Parent companies of TNCs have joint and responsible solidarity with the entities in their supply chain, with respect to their obligations under this Convention. This responsibility shall be effective regardless of the legal framework in force in the home, host or affected States.*

The definition of the “supply chain” is essential for determining the scope of TNCs’ responsibility for the human rights violations committed all along their chain of activities and outside of the parent company’s Home State. This element is fundamental for ensuring the effectiveness of the future Treaty, which is why it was one of the issues debated the most in the different forums held during this process.

## Proposal

- *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.*
- It is also necessary to include the definitions of other important terms, such as: “responsible solidarity”, “Home State and Host State of a TNC”; “official international economic and financial institutions (IFIs)”; “TNC managers”; and “victims/affected communities”. The definitions of these concepts can be found in the Global Campaign’s Treaty Proposal.

## ***Article 5: “Jurisdiction”***

The text uses a broad definition of jurisdiction, which enables affected communities and individuals to access justice in the courts of the State where the harm occurred or where the TNCs in question are domiciled. Even so, certain elements should be highlighted.

Paragraph d) does not adequately cover the concept of the “supply chain”. For example, it does not mention the mechanisms at the States’ disposal on extraterritorial obligations<sup>6</sup>. Failure to take the concept of the supply chain into account means that there will be no provisions on responsibility for violations committed by subsidiaries, suppliers, subcontractors and licensees, nor on how to link TNCs to these entities. This type of provision is fundamental for piercing the corporate veil, holding TNCs responsible, regulating their activities and, finally, ending impunity. In addition, it is necessary to add clarifications on the liability links between parent companies and their supply chains, in order to be able to jointly attack the parent company and the entity in question before the same jurisdiction, as co-authors of the damage or violation.

In regard to the third paragraph, which concerns the possibility of submitting claims on the behalf of an individual or group of individuals without their consent, establishing parameters for this possibility is crucial. These parameters shall be based on the guarantee for the access of affected individuals or communities to justice and the prevalence of their rights, as well as the centrality of the suffering of the affected individuals and communities.

## Proposals

- We believe that it is essential to add a subparagraph that addresses the need to ensure that the criteria adopted on jurisdiction inhibits the use of the argument of *forum non conveniens*: *States - whether home or host - of an TNC cannot apply the doctrine of forum non conveniens when invoking a human rights violation committed by a TNC. A State party, whether of origin or host, to a TNC shall allow affected communities and persons to institute legal proceedings before its courts if they so wish. States parties shall ensure that civil society organizations have access to the courts on behalf of the affected individuals and communities in such cases.*

6 For the purpose of this instrument, extraterritorial obligations encompass: a. obligations relating to the acts and omissions of a State, within or beyond its territory, that affect the enjoyment of human rights outside of that State’s territory owing to the home states’ failure to regulate and control its TNCs; and b. obligations set out in the Charter of the United Nations and human rights instruments to take action, separately and jointly through international cooperation, to ensure compliance with the provisions of this Treaty.

- It is necessary to consider that in cases where national complaint mechanisms fail, affected communities must be able to bring their complaint before an international court. The Global Campaign's Treaty Proposal proposes the creation of an international court that guarantees the implementation of the obligations established in the agreement (the concept of the International Court will be presented in the discussion of article 14 below). It would also be important to consider the opportunity to include a *forum necessitatis* that could be used as an option in circumstances of denial of justice, allowing a court to declare itself capable of hearing a case when there is no forum available. This would help to avoid *forum non conveniens*, which is a major contribution to impunity for TNCs.

**Article 6: "Statute of limitations"**

In this article it would be necessary to strengthen and clarify the legal language necessary to ensure the capacity to impose effectively enforceable obligations on States parties in relation to the statute of limitations for human rights violations. In this regard, it is necessary to establish the link between statutes of limitation and the guarantee of access to the mechanisms of guarantees of non-repetition and reparation, in order to prevent such periods from allowing impunity for human rights violations.

Proposal of rewording :

*Statutes of limitations shall not apply to violations of international human rights law which constitute crimes under international law. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims, administrative sanctions and other procedures, shall allow an adequate period of time in order to guarantee reparation of the violation, particularly in cases where the violations occurred abroad.*

**Article 7: "Applicable law"**

Article 7.2 requires clarifications and a better articulation with article 5.

Proposal

It is essential that the following guiding principle be incorporated into the second paragraph: *In case of conflict of laws, the most beneficial shall always be applied to the victim/affected community.*

**Article 8: "The rights of the victims"**

The Convention must guarantee that TNCs respect human rights and the affected communities' right to access to justice and remedy. To meet this objective, the draft Convention has to be proposed as a way to establish mechanisms to enforce TNCs to fulfil their obligation to respect human rights.

The content adequately addresses the main fundamental issues such as the cost of legal proceedings and legal assistance. However, provisions on other important issues are lacking: there is no reference on the need to establish special guarantees for human rights defenders. Specific measures for groups who are specially affected by the human rights violations committed by corporations or have greater difficulty in accessing justice (indigenous communities, women, peasants, individuals with disabilities, etc.) are also absent. A specific reference on the possibility of social or trade union



organisations acting in the affected individuals and communities' name in proceedings against TNCs is missing. Furthermore, the following issues included in part 6 of the Elements Document have not been included: the obligation of States to adopt adequate measures to ensure that non-judicial mechanisms are not considered a substitute for judicial mechanisms; the introduction of the reversal of the burden of proof; the adoption of protective measures to avoid the use of "chilling-effect" strategies used to discourage individual or collective claims; and the limitation to the use of the doctrine of *forum non conveniens*.

The reference to domestic law in paragraph 4 could dilute the obligations arising from the future Convention.

### Proposals

- We propose that the title be changed to "Access to justice and remedy", given that this is the main challenge at the international level. Furthermore, because of our preference for the term "affected individuals and communities", we propose to use it instead of, or in parallel, to "victims".
- *Affected individuals and communities have the right to be exempted from the legal costs of the process and to a quick, preferential and simplified procedure.*
- *Affected individuals and communities have the right to a fair and impartial system of assessment and quantification of damages, independent of the TNCs that cause them.*
- *Affected individuals and communities have the right to lodge a complaint against the entity that directly committed the violation of their rights or the entity that controls the one that directly committed the violation in the country where either one is domiciled.*
- Paragraph 4: We propose that "and in line with confidentiality rules under domestic law" be deleted and that the following sentence be added: *Affected individuals and communities have the right to demand all information showing which companies in the supply chain alleged to have violated their rights and that in the absence of reliable evidence of the links between the entities alleged to have committed the abuse, it is the relevant companies that have the burden of proof, as a result of a rebuttable presumption of link between those entities.*
- Paragraph 5: We propose that the following two points be added: *e. Adopting legislative, administrative and judicial measures that make it possible for human rights lawyers and defenders to act in lawsuits against TNCs, granting them technical and financial assistance.* *f. Recognizing that lawyers and human rights defenders, who have recognized actions within the framework of the activities of TNCs, have the right to respond with total freedom against any accusation or attempt of criminalization and persecution they may suffer. These attacks shall not be used as a way to dismantle ties between groups and individuals whose actions oppose TNCs involved in operations that result in human rights violations.*
- Paragraph 12: A series of rights that States must guarantee are listed. In this list, civil and political rights have been enumerated, and social, economic, cultural and other relevant rights have been set aside. We propose to add economic, social, cultural, and labour rights; the right to development, to self-determination of peoples, and all collective rights and indigenous peoples rights.
- Finally, it is essential to guarantee that all procedures regarding access to justice are sensitive to gender issues, which requires addressing unequal gender relations that dominate the context of the violations committed by TNCs and the complicity of the State. Therefore, this article must recognise and address the multiple and interrelated forms of discrimination, burden and abuses that women experience, especially women from marginalised groups.

### ***Article 9: “Prevention”***

This article establishes that the main obligation of States, in relation to the Treaty, is to ensure that TNCs within their territory or otherwise under their jurisdiction or control shall undertake due diligence obligations throughout their business activities, while taking into consideration their “impact on human rights”. It is essential that the article also includes obligations for TNCs.

The issue of prevention must be addressed together with the concept of the supply chain. The assessment of the exercise of due diligence must take the parent TNCs’ and the outsourcing company entire production system into account. Paragraph c) brings to light the omission of the supply chain here, as it deals only with direct linkages and does not cover subcontractors and other entities.

The elaboration of vigilance plans shall be a transparent and participatory process that includes the participation of interested communities and social organisations throughout the entire impact assessment process. In addition, it is essential that the monitoring of the level of requirements and the application of these vigilance plans be carried out by an independent body, protected from the undue influence of TNCs.

### **Proposals**

- With regard to prevention and reparation, direct obligations must be added for TNCs, thus moving from simple due diligence to a real legal obligation of vigilance: *1) the obligation to prepare, publish and effectively implement vigilance plans, and to evaluate their efficiency. 2) The obligation to repair damages or violations, within the framework of mechanisms to incur TNCs' legal liability.*
- Furthermore, the “meaningful consultations” concept is vague. Thus, the Convention shall include the States’ obligation to obtain the communities’ free, prior and informed consent (FPIC) on all investment projects that could affect them.
- Finally, the article shall explicitly require gender impact assessments to be conducted and guarantee the full and meaningful participation of the women of all affected communities. Gender impact assessments must cover and address the impacts of TNCs’ activities on gender roles and gender-based discrimination and violence; sexual violence; the trafficking of women and children; women’s health, including prenatal and maternal health; the gender division of labour at the family and community level; access to and control of social and economic rights, especially for rural women; and the rights of indigenous peoples in their territories.

### ***Article 10: “Legal liability”***

The criminal liability of legal persons does not exist in all States. Therefore, the creation of a uniform international rule on the civil and criminal liability of TNCs by the draft Convention would be a positive step. Nonetheless, certain problems and absences need to be highlighted.

Supply chains are mentioned for the first time in the Convention in paragraph 6. However, the term “a sufficiently close relation” (between the supply chain and parent company) is not sufficient to establish the relation between the parent company and its subsidiaries, subcontractors, etc. Thus, the article shall clearly contain the obligation to lift the corporate veil to facilitate the determination of

responsibility of all entities violating human rights individually or collectively and the reference to the definition of the supply chain, which shall be inserted in article 4. Furthermore, the States Parties shall establish sanctions such as the cancellation of contracts and operating licenses.

#### Proposal

- In article 10.6.b, we propose that *“it exhibits a sufficiently close relation with”* be replaced with *“of”*.

It shall be emphasized that the objective of this Convention and this article in particular is to regulate the international obligations of TNCs on human rights, as explicitly stated in Resolution 26/9. Therefore, it is necessary to establish separate sections for the obligations of States and those of TNCs. Moreover, the criminal, civil and administrative liability of TNC managers, as both perpetrators of violations and accomplices, must be clearly established.

#### Proposals

- *TNCs are liable civilly, administratively and criminally for all obligations listed in this Convention that are breached.*
- *States Parties shall simultaneously establish administrative, civil and criminal liability for TNCs and their managers. Such responsibility is independent of whether they operate as perpetrators or accomplices of human rights violations, and extends to all links in the supply chain of the TNC in question. In addition, States parties must provide for sanctions, including the dissolution of the TNC, and oblige the TNC to pay the fees.*

The absence of provisions that hold the State directly responsible for actions and omissions committed by TNCs under the State’s control, instruction or guidance or while exercising government authority delegated to them, explicitly or tacitly, need also to be highlighted. This absence generates a serious void and a room for impunity for both TNCs and corrupt behaviour and corporate capture.

Finally, in order not to limit the scope of the Convention, it is imperative to eliminate all references to domestic legislation throughout this article and not to limit criminal liability to intentional cases.

#### Proposals

- Delete references to “domestic law” in the article.
- Delete the word “intentional” in article 10.8.

#### ***Article 11: “Mutual legal assistance”***

The reference to domestic law reduces the scope of article 11. Leaving legal assistance in the hands of future inter-state agreements is equally problematic, as it is a threat to the concrete implementation of the future Convention.

#### Proposals

- Eliminate the reference to domestic law in articles 11.4, 11.6 and 11.7.
- Delete paragraph 5 of article 11.
- In order to ensure the effective protection of human rights and the enforcement of the sentences, it is important to mention in art. 11 the right of affected communities and

individuals to claim the removal of the *forum non conveniens* argument, whenever the link between the defendant TNCs and the committed violations is established.

### ***Article 12: “International cooperation”***

This issue is fundamental for the development of a robust and efficient Treaty. We have proposals on how to improve the content of this article.

It is necessary to add that in the legal field, international cooperation shall extend from information sharing and assistance with investigations and proceedings to the enforcement of rulings, including the recognition of verdicts handed down in other jurisdictions and even the possibility of extraditing the convicted.

It is also necessary to establish the State’s obligation to facilitate the homologation and enforcement of sentences passed by foreign courts.

### ***Article 13: “Consistency with international law”***

Article 13 contains a series of principles intended for various purposes, which sometimes contradict the general principles of international law or reiterate elements already mentioned in the text. In its present form, this article is not only unhelpful, but may also be an obstacle to the implementation of the Convention. Some paragraphs of this article should be moved to other parts of the Convention, others should be deleted and others should be reworded in a separate article.

#### Proposals

- Paragraphs 1, 2 and 5 should be moved to the Preamble, since they affirm very general principles of international law such as sovereign equality among States, the absence of judicial jurisdiction of one State over another territory, etc.
- As drafted, paragraph 3 could allow States to avoid their obligations under this Convention in the event that they violate their national laws. The latter cannot be used by States to justify a violation of their international obligations, under penalty of violating the Vienna Convention on the Law of Treaties (cf. art. 27). Therefore, paragraph 3 has no place in this Convention and should be deleted.
- Paragraph 4 should be included in Article 12 as 12.2.
- Paragraphs 6 and 7 provide for regulation of the link between existing international standards, particularly between trade and investment treaties and this Convention. We consider this to be a fundamental point. Therefore, it is necessary to make a specific and clearly stated article on the question of the primacy of human rights, with the relevant development provisions, and also to include a provision in the Preamble. Regarding the latter, we propose the following wording: *Recognising that the content of many international trade and investment instruments are inconsistent with human rights and that this is one of the elements that makes it difficult for States, acting separately or jointly, to comply with their human rights obligations.* For the article, we propose the following :

#### **Article “Primacy of human rights”**

##### General obligations

- *The States Parties recognise the primacy of International Human Rights Law over all other legal instruments, especially those related to trade and investment.*

- *States' obligations under trade and investment agreements and treaties are subordinated to the obligations established in this Treaty.*
- *Under no circumstances States Parties accept lawsuits filed by TNCs under international trade and investment treaties that affect States' obligations to respect, protect and fulfil human rights.*
- *The States Parties reaffirm their sovereign right to regulate the activities of foreign investors in their jurisdiction and, collectively at the international level, to adopt norms that regulate the activities of TNCs.*

#### Obligations of States' parties

- *The States Parties shall recognize that International Human Rights Law – including International Labour Law – is hierarchically superior to national and international trade and investment rules, because of their imperative character and erga omnes obligations (from and for the whole international community).*
- *States parties shall take all necessary measures to adapt their national legislation in accordance with their obligations under international law to ensure the enjoyment of human rights and to protect these rights against TNCs' activities that constitute a threat.*
- *The States Parties shall elaborate, interpret and apply trade and investment agreements and economic, environmental or labour agreements with other States or entities, while respecting the juridical supremacy of their national and international human rights obligations and those arising from the present Treaty.*

#### Obligations of transnational corporations

- *TNCs shall refrain from any act or activity that undermines or risks undermining the State's obligations to respect, protect and fulfil human rights. In particular, TNCs shall not under any circumstances sue States under international trade and investment treaties where such claims may affect States' obligations to respect, protect and fulfil human rights.*
- *TNCs shall conduct their activities in accordance with the laws, regulations, administrative practices and national policies on environmental protection, while complying with international agreements, principles, norms, commitments and objectives regarding the environment and human rights, public health and safety, as well as bioethics and the precautionary principle. In addition, they shall not produce, market or promote products that are hazardous or potentially hazardous to people and nature.*

#### **Article 14: “Institutional arrangements”**

This article is supposed to establish the mechanisms for overseeing and implementing the Treaty. On this aspect, it is worth highlighting the absence of a binding mechanism of judicial control to address cases of breaches of the Treaty. Instead of proposing this kind a mechanism, the Convention proposes the creation of a Committee.

In addition to the Committee's composition, which follows the scheme typical of other UN Treaty Bodies, we can affirm that the functions attributed to the Committee will render it ineffective and are far from what was foreseen in the Elements Document. The Committee's mandate is considerably weaker than the mandates usually established for other UN Treaty Bodies. The Committee lacks the power to investigate or directly summons TNCs that commit human rights violations. It is not open to receiving individual and collective complaints from communities, affected persons or organisations. It is definitely far from becoming an effective body to monitor the implementation of the Convention.

On the contrary, to oppose the asymmetry of power with TNCs, rulings on individual or collective complaints shall be binding and enforceable. Ultimately, the Convention shall provide for the recognition of the legally binding nature of the decisions of the Committee and/or other mechanisms to guarantee their implementation. Failing that, the Global Campaign proposes the creation of other types of mechanism (see below).

It is our understanding that without the adoption of a binding and independent international implementation mechanism, it will not be possible to end corporate impunity and guarantee access to justice for affected communities. This mechanism can be established in parallel and in a complementary manner to the Committee proposed in this article. The Global Campaign Treaty Proposal proposes the following bodies that are to make up this international implementation mechanism:

#### Proposals

- ***International Monitoring Centre on Transnational Corporations***, responsible for evaluating, investigating and inspecting TNCs' activities and practices (managed collectively by States, social movements, affected communities and other civil society organizations).
- ***International Court on Transnational Corporations***, to guarantee the efficiency of the obligations established by this Convention. The Court has the competence to receive, investigate and judge complaints against TNCs for violations of the rights mentioned in this Convention. The Court protects the interests of the individuals and communities who are affected by the operations of TNCs, which includes ensuring full reparation for them and imposing sanctions on TNCs and their managers. The Court's rulings and sanctions are enforceable and legally binding.
- All mechanisms shall ensure gender equality in accordance with the CEDAW. Experience in gender issues shall be used as a criterion for the selection of experts that are to participate in the mechanism.

The function assigned to the Conference of States Parties is also problematic, as it could paralyse the effective implementation of future Convention. As currently drafted, articles 14.5 and 14.6 foresee continual negotiations on the future Convention. The mandate of the Conference of States Parties shall consist of making amendments to the instrument upon the request of one third of States Parties, just as other human rights instruments do (for example, article 29 of the International Covenant on Economic, Social and Cultural Rights and article 51 of the International Covenant on Civil and Political Rights).

#### Proposal

Delete §§ 14.5 and 14.6, and substitute them with:

*Any State Party may propose an amendment and file it to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties, requesting them to inform him whether they favour convening a conference of States Parties for the purpose of considering and voting on the proposal. If, within four months from the date of such communication, at least one third of the States Parties favour the convening of such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.*

*All amendments adopted in accordance with the present article will come into effect once approved by the United Nations General Assembly and accepted by a majority of two thirds of the States Parties.*

*Once an amendment comes into effect, it will be binding for the States Parties that have accepted it; all other States Parties will continue to be bound by the provisions of the present Treaty and any other amendment that they had accepted beforehand.*

### **Article 15: “Final provisions”**

Paragraph 3 contains a clause on the protection of existing rights, which could be used to protect the commercial rights of TNCs. This clause shall be eliminated. A clause shall be included to establish that in cases where a ruling from a tribunal of an investor-state dispute settlement system (ISDS) or other arbitration tribunals could prevent the Home State of the affected communities or individuals from fulfilling its human rights obligations to them, a safeguard measure will be applied to prevent this case from being brought before the ISDS or a similar arbitration tribunal. The same clause shall establish that the case will be tried by the judicial system of the state involved, as defined by the affected communities.

In addition, the article grants disproportionate power to “regional integration organizations” as they would be able to vote in their members states’ place in the Conference of States Parties. With the votes of their members, these organizations would have a disproportionate number of votes, disqualifying States. Yet it is the latter who must assume their responsibilities towards their citizens in terms of human rights.

### **Proposals**

- Eliminate paragraph 3.
- Add the following clauses on ISDS : 1) *States Parties shall reject the inclusion of arbitration clauses that give international arbitration bodies jurisdiction over state-investor dispute resolution processes (ISDS).* 2) *Conflicts between TNCs and States involving human rights issues shall not be appealed to international arbitration tribunals on trade and investment. The instances that have jurisdiction to solve these conflicts are: international, national and regional jurisdictions, and mechanisms for monitoring and enforcement acting in a complementary manner.*
- Eliminate paragraphs 10 and 11 which allow regional integration organisations to adhere to the Convention and vote as a block in the Conference of States Parties. These organisations shall be granted observer status.

### **Optional Protocol**

First of all, we would like to point out that it is unusual to provide for a national implementation mechanism in an international treaty, since the States that ratify this type of treaty have the obligation to transpose it into their domestic law. What is important is to establish an effective treaty that can be implemented at both the national and international level. For the Convention to be effective and enforceable, as expert Alfred de Zayas would say, it must “be able to bear its teeth” – that is, it must have efficient justiciability mechanisms. However, the draft Protocol does not allow for this. In fact, this Protocol is very similar to the systems established by the voluntary codes of conduct, such as the OECD Guidelines for Multinational Enterprises, which have no real power and have proven to be inefficient.

Furthermore, the nearly judicial and mediation role assigned to the National Implementation Mechanism (NIM) is motive for concern, as there is a risk that the work of existing judicial and administrative bodies being duplicated and affected individuals and communities being diverted away from effective access to justice before national courts. What is more, this mechanism does not have the authority to forward complaints to the courts, which is another important shortcoming.

However, the proposal on the NIM contains interesting elements that shall be included in the international implementation mechanism (art. 14 “Institutional Arrangement”). The inclusion of these elements in this type of draft protocol is not only inadequate, but also insufficient for the implementation of the Convention being discussed.

The interesting elements include: the effective implementation of the Convention through the harmonisation of domestic law, the recognition that the Committee (or other international mechanisms) has the jurisdiction to receive individual and collective complaints and the investigation of violations committed by TNCs.

For us, it is clear that without an independent international mechanism to oversee the implementation of the binding Convention, as we stated earlier, it will not be possible to put an end to the impunity of TNCs and guarantee the access of affected communities and individuals to justice.

#### Proposals

Include in the Draft Convention:

- *States Parties will harmonise their legalisation with this Convention;*
- *States Parties must recognise the power of the Committee (or other international mechanisms) to receive individual and collective complaints and investigate the violations committed by TNCs.*

To conclude, we believe it is important to highlight a general issue that needs to be taken into account when analysing the Convention and the Protocol: the issue of asymmetry. That is, the incommensurable economic and political power of TNCs, in many cases greater than the one of States, their influence on public policies, as well as the power of coercion of private arbitration tribunals used by TNCs to defend their rights. The Convention and this Protocol do not question this asymmetry, which calls into question the Peoples’ and States’ sovereignty.

It is our understanding that without the elaboration of human rights obligations for TNCs, without the institution of a binding and independent international enforcement mechanism, as explained in the preceding pages, it will not be possible to end corporate impunity or ensure access to justice for affected communities and individuals.