COMMENTS AND AMENDMENTS ON THE REVISED DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS
(January 2020 version)

This document was developed by the Global Campaign to reclaim peoples sovereignty, dismantle corporate power and stop impunity

I. INTRODUCTION

The revised draft of a legally binding instrument on Transnational Corporations (TNCs) and human rights, which is presented to the 5th session of the Intergovernmental Working Group (Working Group) on this issue is an important sign of continuity in the negotiation process. As we have pointed out many times, the formulation of successive drafts implies a willingness to continue promoting the development of the Binding Treaty which is undeniably positive. However, following its analysis, we are deeply concerned about some elements of the revised draft.

The latest draft-text's weaknesses reflect that the fact that multiple comments and proposals made emphatically in the fourth and previous sessions to strengthen the text were not incorporated. In particular, most of the proposals which were made during the fourth session by the Global Campaign to reclaim peoples′ sovereignty, dismantle corporate power and end impunity (Global Campaign) - which are based on the proposals of affected communities and social movements - were not taken into account. In fact, most of the changes effectively remove positive elements that the Global Campaign had welcomed in the previous draft. It should also be noted that social movements and communities which have been affected by Transnational Corporations' (TNCs) activities have dedicated considerable efforts and resources to participate in the negotiations over past five years.

The revised draft does not effectively address the fundamental challenges of globalization, and as such cannot serve as the basis for an international instrument that seeks to serve as the global framework for regulating the activities of TNCs in relation to human rights. In order to tackle these challenges, we call upon the Working Group to respect the mandate set out in Resolution 26/9, as pointed out by many delegations at the fifth session, and to take into account the elements presented by the Global Campaign in this document.

The following are our main comments and proposals that were orally presented at the 5th session of the Working Group, and that we hope will be taken into account in the elaboration of the next version of the draft treaty.

With these comments and amendments, the Global Campaign is engaging, as it has been since the beginning, in a constructive and positive way in the process of negotiation. This document is based directly on the demands of our organizations and movements, as well as drawn from the Treaty proposal of the Global Campaign[1].

[1] https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf

II. GENERAL COMMENTS

Primacy of human rights

The primacy of international human rights law over any other international legal instruments, and in particular over trade and investment agreements, is the established principle which has been an integral part of the goal of the Working Group. However, that was removed from the revised draft. This principle must be explicitly reaffirmed in a separate article, in the preamble and reinforced in various articles of the text, including articles 5 (Prevention), 9 (Applicable law) and 12 (Compliance with international law).

Indeed, in the current framework of neoliberal policies, international human rights law is treated as subordinate to commercial and investment law. It is therefore essential to reaffirm the primacy of international human rights law over trade and investment agreements and legislation, and ensure that primacy is effectively enforced, in accordance with articles 1 (purposes of the United Nations) and 103[2] of the charter of the United Nations.

Scope

The change in the scope of the revised draft, which includes "all business", is an important political signal to the European Union and some other states. It also responds to the interference of private sector lobbyists who have called for the broadening of the scope in order to avoid developing an instrument that would truly fill the legal gaps in international law, thereby maintaining the status quo. This change of scope weakens the focus on TNCs throughout the treaty.

The spirit and purpose of Resolution 26/9 is very clear: the main target of the future binding treaty is TNCs and other companies with transnational activities. Indeed, the complex legal and economic structure of TNCs, as well as their economic power and high lobbying capacity allow them to easily slip through the cracks of domestic law.

In addition, other parts of the draft may allow natural and legal persons who control TNCs value chains to escape justice and legal prosecution. For example, the newly introduced term "contractual relationship" could be interpreted restrictively, which will make it difficult to prove these relationships and lift the corporate veil. Responsibility and accountability mechanisms should focus on the parent company and subcontractors. Nothing in the future Treaty should allow TNCs to blame human rights violations on other links within the value chains they control, especially when TNCs are making the key decisions and benefit the most from the activities of companies throughout the value chains they control.

For all these reasons, we call in the following comments and amendments for full respect towards the scope which is established by Resolution 26/9, which focuses on TNCs and other business enterprises with transnational activities.

Supply chains

We are concerned about the rollback in the revised draft on the matter of joint and several liability of TNCs with regards to their supply chains.

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[2] *"In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."*

Indeed, even if the definition proposed in article 1.4 would appear to be quite broad, the term "contractual relations" is likely to be interpreted restrictively; in this sense there is a high risk that other forms of non-contractual control are excluded and that TNCs exercising such non-contractual control could evade their joint and several liability.

In addition, the revised draft fails to address the key issue of "lifting the corporate veil". The corporate veil is the central element that enables corporate impunity, and therefore concrete provisions in the treaty must allow to lift that corporate veil: the legal conception of TNCs must change to match with their economic reality. Indeed, the corporate veil prevents all entities in the TNC supply chain from having a common legal existence, so that each is considered an autonomous legal entity. This fact prevents the recognition of the parent company's legal liability for violations caused by the entities in its chain, despite the existing links between them. In this way, this "autonomy" of the legal personality constitutes a veil between the parent company and the other entities along the chain. In addition, access to information provisions must must obligate TNCs to disclose both the supply chain and the chain of command in terms of corporate decision-making and responsibilities. TNCs must disclose all of the entities and relationships within their supply chains - including business relationships and corporate groups - and the Treaty must establish mechanisms to declare legal liability between the parent company and its supply chain. Finally, the Treaty should allow judges to recognise a presumption of control so that the burden of proof for control relationships falls on the entity concerned and not on the affected persons or communities.

TNCs obligations

The revised draft does not take into account the direct obligations of TNCs to respect human rights and their responsibility to prevent human rights violations, as discussed and demanded by many actors at the various sessions of the Working Group, and by many legal experts. Thus, the text limits from the beginning the purpose and efficacy of the future treaty by assigning all obligations exclusively to States.

In our view, it is essential that the draft treaty include human rights obligations for TNCs, independent from state obligations. In addition, these obligations should be directly applied. This direct application must be vertical for States parties (obligation to take measures against third parties to protect the human rights of their populations) and horizontal for TNCs (not to violate human rights in their activities). TNCs must respect the principles and standards set out in United Nations treaties. Exempting TNCs from any obligation is in our view a fundamental error and an unacceptable setback that runs against the spirit of the mandate of the Working Group since its creation.

Systematic reference to Domestic Law

Reference to domestic law is made throughout the new draft Treaty, which constitutes a risk to the effective enforcement of the future Treaty and the rights of the affected communities and individuals. Indeed, this notion, with a few justified exceptions, could dilute the obligations arising from the future treaty and severely limit its implementation.

Systematic use of the term "abuse"

In the revised draft, the terms "violations" and "abuse" are used interchangeably. However, the term "abuse" is confusing, establishing a hierarchy between States that would *violate* human rights and TNCs that may cause human rights *abuses*. Moreover, this term is not used in international human rights instruments. It is therefore necessary that it be deleted throughout the document and only use the term "violation" in order to avoid any confusion, given that the latter is defined and used throughout the legal corpus of international human rights law.

III. COMMENTS AND AMENDMENTS ON THE ARTICLES

Preamble

The new preamble maintains the general guidelines set out in the first draft, with similar gaps.

In the preamble to the revised draft, emphasis is placed on the primary obligation to respect, protect, fulfil and promote human rights, which lies exclusively with States. As has been stressed out throughout the discussions in the Working Group, the obligation to respect human rights cannot be limited only to States. It is necessary to specify in this draft treaty the specific responsibilities and obligations of TNCs.

Placing the responsibility to protect human rights solely on States means maintaining the current status quo, which has failed to address the impunity with which transnational corporations operate. It is well known that the ability and political willingness of States to enforce human rights standards vis a vis TNCs—in conditions where TNCs often have more power than States-- has always been compromised by multiple factors. This Treaty must provide an effective response to precisely this notorious ability of TNCs to escape human rights norms - namely, a mandatory norm that obligates TNCs to respect human rights. In addition, it is important to note that international trade law recognizes specific rights of TNCs, particularly in multilateral and bilateral investment treaties. While TNCs may be de facto subjects of a branch of international law that recognizes them as holding rights, it is not only necessary, but also indispensable to recognize their obligations.

Apart from the inclusion of this fundamental principle in the preamble, other changes have to be made:

Preamble §3: In the list of the international instruments mentioned in the preamble, the following should be added.

> ***Amendment §3:*** *Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the Convention on Biological Diversity; the Convention on the Rights of the Child; the Convention on the Rights of Persons with Disabilities; the Convention relating to the Status of Refugees; the Convention against Corruption, the Conventions and Recommendations of the International Labour Organization, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on Slavery, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, the Declaration on the Right of Peoples to Peace, the Declaration on the rights of peasants and other people working in rural areas, the four Geneva Conventions and their Optional Protocols, the International Convention against the Recruitment, Use, Financing and Training of Mercenaries; the International Convention on the Suppression and Punishment of the Crime of Apartheid, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; the Rome Statute of the International Criminal Court and other relevant international instruments approved at the international level in the human rights framework.*

Preamble §9: As stressed out in the introduction, it is necessary to use only the term "violation" in order to avoid confusion and to delete the use of the term "abuse" as in paragraph 9 of the preamble but also in articles 1.1, 1.2, 2.1.b, 2.1.c, 4.10, 5.1, 5.2.a, 5.2.b, 5.2.d, 5.3.e, 6.1, 6.6 and 12.3.

> ***Amendment §9:*** *Stressing that the primary obligation to respect, protect, fulfil and promote human rights and fundamental freedoms lie with the State, and that States must protect against human rights* ~~***abuses***~~ ***violations*** *by third parties, including business enterprises, within the territory or otherwise under their jurisdiction or control, and ensure respect for implementation of international human rights law;*

Preamble §15: In the recognition of vulnerable groups (§15) which shall be especially protected, other categories should also be included :

> ***Amendment §15:*** *Recognizing the distinctive and disproportionate impact of certain business-related human rights* ~~***abuses***~~ ***violations*** *on women and girls, children, indigenous peoples,* ***peasants, landless, informal sector workers,*** *persons with disabilities, migrants and refugees, and the need for a perspective that takes into account their specific circumstances and vulnerabilities.*

In order to strengthen the provisions of the preamble, we propose to add the following paragraphs:

It is also necessary to include the affirmation of the primacy of human rights obligations over trade and investment agreements.

> ***Proposed new paragraph:*** *Reaffirming the primacy of International Human Rights Law over all other legal instruments, especially those related to trade and investment.*

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

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

ARTICLE 1: DEFINITIONS

1.1: Definition of victims: We propose to use the term "affected communities and individuals" instead of or in parallel with the term "victims".
In addition, we suggest to delete the reference to national legislation in article 1.1 which limits the scope of the purpose of the international human rights norm.

> ***Amendment 1.1: "Affected communities", or "victims"****, shall mean any persons or group of persons who inidividually or collectively have suffered or have alleged to have suffered human rights violation* ~~***or abuse***~~ *as defined in Article 1 paragraph 2 below. Where appropriate, the term "****affected communities", or "victims"****, also includes the immediate family or dependents of the direct victim.*

1.2: Definition of violation or abuse: It should be clarified in the definition of "violation ~~or abuse~~", when identifying the perpetrators of the violations, that TNCs responsible may be private, public or mixed.

> ***Amendment 1.2 "****Human rights violation* ~~***or abuse"***~~ *shall mean any harm committed by a State or a business enterprise non-state* ***actor, which can be private, public or mixed****, through acts or omissions in the context of business activities against any*

person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

1.3: Definition of business activities: We propose to add to this paragraph the acts of commission and omission as well as the transnational nature of the activities of TNCs for the harmonization of the definition of the term "business activities", in accordance with the content of Resolution 26/9

> ***Amendment 1.3 "****Business activities" means any economic* ***or other activity*** *of transnational corporations and other business enterprises* ***with transnational activities, which can be private, public or mixed****, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means* ***and including both acts of commission or omission****.*

1.4: Definition of contractual relationship: The draft treaty includes a wide range of economic agents, which could indicate a willingness to broaden the responsible actors and possibly cover their responsibility in their supply chains. But there is a high risk that other forms of non-contractual control are excluded and that TNCs that exercise non-contractual control may escape liability. As "contractual relationship" is a concept that can be interpreted restrictively from a legal point of view, it will place an excessive burden on the communities or individuals concerned to prove the existence of this "contractual relationship", thus creating an insurmountable obstacle to effective access to justice. Furthermore, a presumption of effective control by the parent company when it has direct or indirect ownership or controlling interest over the entities part of a group should be introduced in the treaty. This kind of presumption is already used in other areas of law, for example the EU competition law. A similar mechanism of reversal of the burden of the proof concerning the relationships between the outsourcing companies and all entities in their value chains should be introduced.

It is necessary to find a more precise and broader definition, such as "business relations" or "supply chain". To be adequate, this definition must be linked to other mechanisms which extend legal liability (not just due diligence) throughout the given supply chain and must include instruments able to balance the asymmetry regarding the burden of proof. Therefore, the following points must be included in the future Treaty:

- the relationship between companies in the value chain (in article 1);
- the more detailed inclusion of the right to information, including regarding all companies in the supply chain (in article 4);
- a presumption of effective control (article 6);
- the joint and several liability of all companies belonging to the economic group or supply chain of the concerned TNC (in article 6 and 7);
- the prohibition of the *forum non-conveniens*, the inclusion of the *forum necessitatis* and universal jurisdiction (in article 7).

> ***Amendment 1.4: "Business relationship****" refers to any relationship between natural or legal persons to conduct business activities, including -but not limited to- those activities conducted through affiliates, subsidiaries, agents, suppliers, any business partnership or association, joint venture, beneficial proprietorship, or any other structure or* ***business*** *relationship as provided under the domestic law of the State****. The term contractual or 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 build upon the joint and several liability between the parent company of a TNC and all entities along their supply chain (as defined in this article), including private and public investors, including the International*

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

Amendment: The term "contractual" must also be replaced by "business" in **the articles 1.4, 3.2, 5.2, 5.3, 6.6 and 7.2**.

In conclusion, we consider it necessary to introduce two additional definitions:

Definition of supply chain:

> ***Proposed new paragraph 1.5****: The 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.*

Definition of international financial institutions (IFI): The IFIs have an undeniable impact on the enjoyment of human rights. The Global Campaign reiterates the need for the future treaty to include key actors such as the IFIs in the definitions.

> ***Proposed new paragraph 1.6:*** *IFIs include Inter-governmental organisations, the United Nations and its specialised 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

As formulated, this article omits the original objective of "regulating the activities of TNCs and other business enterprises in international human rights law", as set out in Resolution 26/9.

To remedy this, we propose the following amendments:

2.1.b: Such regulation must include the establishment of TNC's direct and concrete obligations and responsibilities vis a vis human rights, accompanied by necessary implementation mechanisms.

> ***Amendment 2.1.b:*** *To prevent the occurrence of such violations* ~~***and abuses***~~*, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities* ***by establishing obligations for States and concrete obligations to respect human rights for TNCs, and by creating effective and binding mechanisms of monitoring and enforceability.***

2.1.c: In the same vein, it should be noted that the objective set out in section 2.1.c might suggest a desire to focus the scope of the future treaty on domestic law. The objective of promoting international cooperation is important and must be done in accordance with international human rights standards. However, for international cooperation to be effective in addressing the problem of TNCs impunity, it is necessary to make the regulation of the activities of TNCs, within the framework of the provisions of the Binding Treaty, one of its objectives, in accordance with Resolution 26/9.

> ***Amendment 2.1.c:*** *To promote and strengthen international cooperation,* ***carried out in accordance with international human rights standards,*** *to prevent human rights violations* ~~***and abuses***~~ *in the context of business activities,* ***providing concrete***

provisions to regulate TNCs activities *and* ~~***provide***~~ ***to ensure*** *effective access to justice and remedy to victims of such violations* ~~***and abuses***~~*.*

ARTICLE 3: SCOPE

3.1: With the formulation *including particularly but not limited to those of a transnational character"*, article 3 departs from the mandate of the Working group (Resolution 26/9) and also contradicts the definition in article 1.3 of the present draft. Therefore, it is necessary to harmonize throughout the future legally binding instrument the terms used when referring to TNCs and other enterprises with transnational activities.

> ***Amendment 3.1:*** *This (Legally Binding Instrument) shall apply* ~~***, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character***~~ ***to TNCs and other business enterprises with transnational activities.***

In **articles 5.1, 5.2, 5.5, 6.1, 6.4, 6.6, 6.9, 7.1.c et 11.2.c**, the reference to« business activities » shall be consistent with the amendment presented for article 1.3. Any language referring to « business activities » must comply with the amended definition in art. 1.3.

3.3: This paragraph indicates that the rights concerned encompass all human rights without further clarification. This section should include the main international human rights treaties and, in particular, economic, social, cultural, civil, political and labour rights; the right to development, to self-determination of peoples and to a healthy environment; and all collective rights of indigenous and peasant peoples and communities.

> ***Amendment 3.3:*** *This legally binding instrument shall cover all human rights, in particular those protected by the international instruments mentioned in the Preamble.*

ARTICLE 4: RIGHTS OF VICTIMS

4.6: Right to information: the expression "*Victims shall be guaranteed access to information relevant to the pursuit of remedies*" is very vague. It should include, for example, access to information on public and private enterprises (legal persons) that form an economic group and/or are linked in the value chain, etc. Indeed, this information must reveal the links between a given TNC and its supply chain, especially capital and economic control links and decision making processes between these entities, so that national courts and the future international implementation mechanism can be operational. In this sense, the right to information would complement the reversal of the burden of proof in order to counterbalance the problems caused by the opaque functioning of TNCs (article 4.16).

> ***Amendment 4.6:*** *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.***

4.8: We suggest to include a safeguard clause, to ensure that the use of non-judicial or grievance mechanism does not compromise the access of rights holders to judicial mechanisms. It will also be necessary to re-establish the possibility of lodging complaints without the consent of the victim or a group of victims, as provided for in article 5 of the previous draft. Indeed, in certain circumstances it is

not always possible to obtain the consent of affected communities and individuals. This should not be a barrier to access to justice.

> ***Amendment 4.8:*** *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 domestic judicial and other competent authorities with the necessary jurisdiction in accordance with this (Legally Binding Instrument), as applicable, in order to allow for victim's access to adequate, timely and effective remedies.*
>
> ***Proposed new paragraph 4.8bis:*** *The use and access to non-judicial mechanisms shall not compromise the rights-holders' access to judicial mechanisms.*

4.9: Despite the provision on human rights defenders and the recognition of their role in the draft treaty, it is important to specify in this article special guarantees concerning them and to recognize their status as vulnerable persons, using the language of the Escazú Treaty[3].

> ***Proposed new paragraph 4.9bis:*** *States parties shall take adequate and effective measures to recognize, protect and promote all 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.*

4.11, 4.12b, 4.14, 4.16: The references to national legislation should be deleted.

> ***Amendments:***
> **4.11:** *State parties shall ensure that their domestic laws and courts facilitate access to information through international cooperation, as set out in this LBI,* ~~***and in a manner consistent with their domestic law.***~~
>
> **4.12b:** *Guaranteeing the rights of victims to be heard in all stages of proceedings* ~~***as consistent with their domestic law.***~~
>
> **4.14:** *State parties shall provide effective mechanisms for the enforcement of remedies for violations of human rights, including through prompt execution of national or foreign judgements or awards, in accordance with the present LBI,* ~~***domestic law***~~ *and international legal obligations.*
>
> **4.16:** ~~***Subject to domestic law,***~~ *Courts, asserting jurisdiction under this LBI* ~~*may*~~ ***shall*** *require*~~*, where needed,*~~ *reversal of the burden of proof for the purpose of fulfilling the victim's access to justice and remedies.*

[3] "Each Party shall take adequate and effective measures to recognize, protect and promote all 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,..." (Article 9.2 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted the 4th March 2018).

ARTICLE 5: PREVENTION

It should be noted that the preventive measures listed in article 5 do not contain the preventive standards that the State must adopt in administrative law to prevent human rights violations by TNCs, in particular, in the context of their relations such as public contracts, public-private partnerships, and provision of services or activities.

First of all, the replacement of the reference to subsidiaries, subcontractors, etc. by the term "contractual relations" as defined in Article 1 is restrictive, as argued above.

> ***Amendment:*** Replace throughout the article "contractual relationship" by "business relationship" and include the term "supply chain".

Secondly, there is no reference to the sanction for non-compliance with the measures. If there is no sanction, how can we ensure that these measures are respected? It is therefore important to include provisions inspired in the French law on the duty of care that goes beyond due diligence. It shall also include an implementation and sanction mechanism. We propose the creation of an implementation and sanction mechanism linked to the duty of prevention. In this sense, it is necessary to reinstate the clause contained in the previous draft treaty (the so-called Zero Draft from July 2018):

> ***Amendment 5.2:*** *For the purpose of paragraph 1 of this Article, State Parties shall adopt measures* ~~***necessary***~~ ***including legislative binding measures, in order*** *to ensure that all persons conducting business activities,* ~~***including those of transnational character***~~*,* ~~***to undertake human rights due diligence***~~ *elaborate and put in place preventive measures as follows…*
>
> ***Proposed new paragraph 5.2bis:*** *TNCs shall not take any measures that present a real risk of undermining and violating human rights.*
>
> ***Proposed new paragraph 5.2bis2:*** *The IFIs shall not finance TNCs and their supply chains if they know or should know that there is the risk to nullify or violate human rights, otherwise they will be held accountable for the abuses under subsidiary liability. Any conduct of these institutions 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.*
>
> ***Proposed new paragraph 5.2bis3:*** *When acting in the context of IFIs, States shall do so in accordance with the States Parties' obligations established by the current Treaty. They shall take all steps at their disposal to ensure that the institutions or the agreement concerned does not contribute to violations of human rights caused by TNCs.*
>
> ***Proposed new paragraph 5.2bis4:*** *Failure to comply with due diligence duties under this article shall result in commensurate liability, administrative sanctions such as exclusions for public procurement and compensation in accordance with the articles of this convention.*

Thirdly, there is no obligation to make public the results of the monitoring, identification and evaluation mechanisms, although they will have to be provided for ex ante and ex post.

> ***Proposed new paragraph 5.2bis5:*** *All legal persons part of a TNC are obliged to make public the result of their ex post and ex ante impact assessments and other monitoring activities, as well as the measures adopted to prevent eventual risks.*

5.3.b: In terms of consent, art. 5.3.b includes an obligation to conduct meaningful consultations, which is not sufficient to guarantee respect for the right to participate in the decision-making of the populations concerned. It is necessary to replace "meaningful consultations" by "mandatory consultations" and to include in this paragraph respect for consent, which means the right of the populations concerned to reject projects carried out by TNCs on their territory that violate their fundamental rights. Besides, "peasants" should be in the list of persons that face heightened risks of violations.

> ***Amendment 5.3b:*** *Carrying out* ~~***meaningful***~~ ***mandatory consultations*** *with groups [...]* ***Consultations*** *with indigenous peoples,* ***peasants and other concerned populations****, will be undertaken in accordance with the internationally agreed standards of free, prior and informed* ~~***consultations***~~ ***consent****, as applicable.*
>
> ***Amendment 5.3.e****: Adopting and implementing,* ***in an effective manner, adequate*** *measures to prevent human rights violations...*

5.4 : Delete the references to national legislation in paragraphs 4 which limit the scope of article 5.

> ***Amendment 5.4***: State Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential impact on human rights resulting from the size, nature, context of and risk associated with the business activities, including those of transnational character, and that those procedures are available to all natural and legal persons having a legitimate interest~~**, in accordance with domestic law**~~.

5.5: The article 5.5 also refers to the mechanisms of undue influence of TNCs on public policies. Although this paragraph is welcome, its scope is limited by the reference to national legislation. In addition, this subject should not be included in article 5, rather in a separate article, in order to cover the full dispositions of the Treaty. This article on undue influence could possibly cover other general obligations of States under this Treaty and its implementation.
In this other article, the content of paragraph 5.5 should be formulated as follows:

> ***Amendment:*** *In setting and implementing their public policies with respect to the implantation of this LBI, State Parties shall act to protect these policies,* ***laws, policymaking processes, government and regulatory bodies, and judicial institutions from undue influence of commercial and other vested interests of the private sector,*** ~~***of persons conducting business activities, including those of transnational character, in accordance with domestic law.***~~

ARTICLE 6. LEGAL LIABILITY

In this article, there is confusion, as in the whole draft, in the use of the terms "TNCs", "other enterprises", "all enterprises", etc., as well as in the use of the term "other enterprises". These terms will need to be harmonised in line with our amendment to Article 1.3.

6.1: In general, Article 6 should clearly state the administrative, civil and criminal responsibilities of TNCs and their leaders. Criminal liability is necessary since civil convictions are not sufficient and do not act as a deterrent.

> ***Amendment 6.1:*** *State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of* ***civil, administrative and criminal*** *legal liability for human rights violations or abuses in the context of business activities,* ~~***including those of transnational character.***~~

Proposed new paragraph 6.1.bis: *States Parties shall hold liable, even for their complicity, collaboration, instigation, incitement or concealment, the IFIs that fund TNCs responsible for human rights violations and who knew or should have known of these violations.*

6.6: A provision in article 6.6 should be added to cover the liability of legal and natural persons for their failure to prevent violations arising **from their own activities**. Furthermore it is very difficult to prove the links of control or supervision between different companies or entities; instead a provision about presumption of control of parent companies and about the reversal of the burden of proof should be added.

Amendment 6.6*: States Parties shall ensure that their domestic legislation provides for the liability of* ***any*** *natural or legal person conducting business activities~~, including those~~ of transnational character, for its failure to prevent human rights violations* ***caused by its own activities****, and for its failure to prevent another natural of legal person with whom it has a ~~contractual~~* ***business*** *relationship from causing harm to third parties when ~~the former sufficiently controls or supervises the relevant activity that caused the harm ; or~~ it should foresee or should have foreseen risks of human rights violations or abuses in the conduct of business activities~~, including those of transnational character~~, regardless of where the activity takes place.*
In addition, States Parties shall ensure that their domestic legislative provides for a rebuttal presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure.
In the conditions defined above, any natural or legal person will be found liable for the damages caused by the activities of the entities in its value chain or with which it has a business relationships.

6.7: The crimes listed in 6.7 are very restrictive. They must include all human rights (civil, political, economic, social and cultural rights as well as the right to development), the right to self-determination, etc. but also ILO standards, environmental standards and international humanitarian law. The latter is justified by the fact that some TNCs are involved in armed conflicts.

Amendment 6.7: ~~*Subject to their domestic law*~~*, State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal* ***and natural*** *persons for ~~the following criminal~~ offences* ***and violations of all Human Rights, Labour Rights, Environnemental norms and Humanitarian law as mentioned in the Preamble.***

6.8 and 6.9 The references to national legislation in paragraphs 7, 8 and 9 limit the scope of article 6. They should therefore be deleted.

Amendment 6.8: *Such liability shall be without prejudice to the criminal liability* ~~***under the applicable domestic law***~~ *of the natural persons who have committed the offences.*

Amendment 6.9: *State Parties shall provide measures under domestic law to establish legal liability for natural or legal persons conducting business activities, including those of a transnational character, for acts that constitute attempt, participation or complicity in a criminal offence in accordance with Article 6 (7) and criminal offences* ~~***as defined by their domestic law.***~~

Proposals for new paragraphs:
It is also important to include a clause establishing the obligations of TNCs for human rights violations, also for those violations along their supply chain:

> ***Proposed new paragraph 6.6bis:*** *TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, wether home states, host States or States affected by the operation of TNCs. To this end:*
> *a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.*
> *b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities as the case may be.*
> *c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.*

> ***Proposed new paragraph 6.6bis2:*** *The parent companies detent several and joint liability with their subsidiaries and the legal persons constituiting their supply chains regarding the obligations established in this Treaty. 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 or in the states in which the affected persons or communities are based is not adequate for the implementation of this LBI.*

ARTICLE 7 ADJUDICATIVE JURISDICTION

7.1: This paragraph should include an explicit reference to supply chains of TNCs.

> ***Amendment 7.1.c*****:** *... the natural or legal persons alleged to have committed such acts or omissions in the context of business activities are domiciled,* ***even if this is due to the action of an entity from the supply chain for which the parent company is responsible.***

> ***Proposed new paragraph 7.1.d:*** *... the natural or legal persons that has business relationships with the natural or legal person alleged to have committed such acts or omissions in the context of business activities, are domiciled.*

Proposals for new paragraphs:

The prohibition of the *forum non-conveniens* must be included whenever the link is established between prosecuted TNCs and the violations committed. That is why we propose adding a third paragraph to Article 7.

> ***Proposed new paragraph 7.3:*** *A court shall not decline its jurisdiction to hear a case on the basis that there is another court that also has jurisdiction, especially when the alleged perpetrator has assets or substantial interests under the jurisdiction of the state of the court receiving the specific complaint.*

The inclusion of the forum necessitatis is necessary whenever the link is established between the TNCs prosecteur and the violations committed.

> ***Proposed new paragraph 7.4:*** *In order to avert a denial of justice when no other court is available or the claimant cannot reasonably be expected to have access to justice or access to remedy for human rights violations, the courts of any State shall have jurisdiction over a dispute involving human rights violations.*

A clause should also be included establishing that private arbitration structures, such as investor-state dispute settlement mechanisms (ISDS), which are vested in the interests of TNCs, cannot be competent to deal with any dispute that has human rights implications.

> ***Proposed new paragraph 7.5:*** *States Parties shall not enter into any agreement that gives international investor-State arbitration bodies (ISDS) jurisdiction over any dispute that involve human rights implications.*

In addition, we propose to incorporate universal jurisdiction for crimes against humanity and violations of jus cogens.

> ***Proposed new paragraph 7.6:*** *Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction for crimes against peremptory norms of international law and crimes against humanity perpetrated by TNCs.*

Finally, we believe that in case of failure of domestic complaints, affected people and communities should be able to proceed to an international jurisdiction. To this regard, the Global Campaign proposes an international court that would guarantee the implementation of the obligations of the future treaty (see proposal in article 13 below).

ARTICLE 8. STATUTE OF LIMITATIONS

8.1: The reference to national legislation in article 8.1 limits the scope of this article. It must therefore be deleted. Moreover, we propose to delete the reference to the most serious crimes (in accordance to our amendment in article 6.7 above) and to add a reference to labour rights and environmental norms.

> ***Amendment 8.1:*** *The State Parties to the present (Legally Binding Instrument) undertake to adopt,* ~~***in accordance with their domestic law***~~*, 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,* ***Labour rights, Environnemental norms*** *and international humanitarian law.* ~~***which constitute the most serious crimes of concern to the international community as a whole.***~~

8.2: The paragraph 2 of article 8 specifies that statutes of limitations for violations that do not constitute the most serious crimes "s*hall allow a reasonable period of time*". This notion of reasonable time remains far too vague to guarantee adequate protection for affected communities and individuals. It is necessary to return to the prior formulation, namely an adequate period of time, which is more protective.

> ***Amendment 8.2:*** *Domestic statutes of limitations for violations that do not constitute the most serious crimes of concern to the international community as a whole, including those time limitations applicable to civil claims and other procedures shall allow* ***an*** ~~***reasonable***~~ ***adequate period of time*** *for the investigation and prosecution of the violation, particularly in cases where the violations occurred in another State.*

ARTICLE 9. APPLICABLE LAW

Article 9 does not allow for a clear resolution of conflicts between different national legislations or between international human rights law and trade and investment law for example. It should be

explicitly stated that the choice of applicable law should be the choice of affected communities and persons and/or the law most protective of victims' rights. In this sense, we propose the addition of the following paragraph:

> ***Proposed new paragraph 9.1bis:*** *The choice of the applicable law shall be the choice of the affected communities (or "victims") and/or the law that better protects their rights.*
>
> ***Proposed new paragraph 9.1bis2:*** *The choice of applicable law shall always be in accordance with the provisions regarding the primacy of human rights over trade and investment agreements.*

9.2: The reference to compliance with domestic law in paragraph 9.2 should be deleted.

> ***Amendment 9.2:*** *All matters of substance regarding human rights law relevant to claims before the competent court may, in accordance* ***with the present LBI and the UN Charter*** ~~***with domestic law***~~***,*** *be governed by the law of another State where…*

9.2.c: An explicit reference to TNC value chains should also be made.

> ***Amendment 9.2.c:*** *"The natural or legal person,* ***either from the parent company or from the others entities along the supply chain****, alleged to have committed the acts or omissions that result in violations of human rights covered under this (Legally Binding Instrument) is domiciled."*

9.3: It is important to stress that national laws that are more protective or beneficial to affected communities and individuals must prevail.

> ***Amendment 9.3:*** *The (Legally Binding Instrument) does not prejudge* ***a greater*** *recognition and protection of any rights of victims that may be provided under applicable domestic law".*

ARTICLE 10: MUTUAL LEGAL ASSISTANCE AND INTERNATIONAL COOPERATION

10.3.l: The references to national legislation in paragraphs 3.l and 4 reduce the scope of this article. They must be deleted.

> ***Amendment 10.3.1:*** *Any other type of assistance* ~~***that is not contrary to the domestic law***~~ *of the requested State Party.*

10.4: Here also, we propose to delete the reference to domestic law.

> ***Amendment 10.4:*** ~~***Without prejudice to domestic law***~~***,*** *the competent authorities of a state party may, without prior request, transmit and exchange information […].*

10.10.c: This paragraph must not make the recognition of a foreign judgment, favourable to the victims of TNCs, conditional on respect for the sovereignty, security and public order or other essential interests of the party concerned. This wording maintains a very vague margin of objection by the State concerned and goes against the supremacy of human rights and the demand to fight against TNCs impunity.

> ***Amendment 10.10.c***: W*here the judgement is likely to prejudice the sovereignty,* ~~***security, ordre public or other essential interests***~~ *of the Party in which its recognition is sought*.

ARTICLE 12: CONSISTENCY WITH INTERNATIONAL LAW

This article has to establish and reaffirm the primacy of international human rights law over trade and investment agreements. To that effect, we propose the following wording:

> ***Amendment 12.6:*** *States Parties agree that any* ***provision in*** *bilateral or multilateral agreements,* ***including trade and/or investment agreements****,* ~~***on issues relevant to this (Legally Binding Instrument) and its protocols***~~*, shall* ***comply*** ~~***be compatible***~~ *and shall be interpreted in accordance with their obligations,* ***and the obligations of transnational corporations and other business enterprises with transnational activity,*** *under this (Legally Binding Instrument) and its protocols.*
>
> ***Proposed new paragraph 12.7:*** *States Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the implementation of this LBI and shall ensure upholding human rights in the context of business activities by parties benefiting from such agreements.*
>
> ***Proposed new paragraph 12.8:*** *This provision should be extended to include the revision of compliance of existing trade and investment agreements with the proposed LBI, and a recommendation for them to be renegotiated or cancelled if they do not comply with the provisions of the LBI.*

ARTICLE 13: INSTITUTIONAL ARRANGEMENTS

Article 13 should include the possibility of lodging complaints against TNCs and make the Committee's recommendations binding. In this sense, we propose adding the following provisions:

> ***Proposed new paragraph 13.4.a.bis****: The Committee receives and considers complaints submitted by victims and affected communities concerning the activities of transnational corporations that act in contradiction to this legally biding instrument.*
>
> ***Proposed new paragraph 13.4.a.2bis:*** *States Parties recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Treaty.*
>
> ***Proposed new paragraph 13.4.b.bis:*** *The decisions rendered by the Committee shall be binding and shall be followed by action by States Parties and related organizations (such as a special fund for victims, administrative sanctions for the companies concerned by the decisions, etc.).*

In addition, the Committee should guide States in their strategies for regulating TNC activities on preventing human rights violations.

> ***Proposed new paragraph 13.4.c.bis:*** *The Committee may also make recommendations to States parties to guide them in their strategies to regulate TNC activities in order to prevent human rights violations. For this purpose, the latter may be assisted by independent experts and professionals in the fields in question.*

It is also necessary to create a fund that would be financed by a tax imposed on TNCs.

> ***Proposed new paragraph 13.5:*** *States parties will impose an international tax to corporations with a capital over an amount of ... dollars, to guarantee the functioning of the institutions created by this binding treaty. Before the tax is implemented, only state parties will be in charge of financing the funding of these institutions, through the general UN budget. The Conference of States Parties shall define and establish the relevant provisions for the functioning of the fund during its first session.*

The Global Campaign believes that without the establishment of an independent international treaty implementation mechanism, whose decisions must be followed, it will not be possible to end TNC impunity and to ensure access to justice for affected communities and individuals. This mechanism may be set up in parallel and be complementary to the Committee proposed in this article. We propose a new chapter within article 13:

International monitoring and enforcement mechanisms

1. The UN Treaty Bodies on Human Rights and other UN related complaint mechanisms shall be competent to directly receive complaints against TNCs and International Economic and Financial Institutions. They shall forward these to the International Court on TNCs, as instituted below.

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.

3. To guarantee the implementation of the obligations set out by this Treaty, an International Court on Transnational Corporations and human rights is established. The Court has the competence to receive, investigate and judge complaints against TNCs for violations of the rights concerned and the obligations established in this Treaty.

4. 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.

5. The Court's rulings and sanctions are enforceable and legally binding.

6. The International Court shall function in accordance with the annexed Statute of the present Treaty.

7. An International Monitoring Centre on Transnational Corporations and human rights is created. It will be responsible for evaluating, investigating and inspecting TNCs' activities and practices. The Centre shall issue recommendations based on its findings.

8. The Centre is managed collectively by States, social movements, affected communities and other civil society organizations.