

Document of Analysis of the Updated Draft Legally Binding Instrument

Proposed language and amendments for the 10th session of the OEIGWG – 16-20 December 2024

Global Campaign, November 2024

This document compiles key proposals and amendments the 260 unions, social movements, and civil society organizations comprising the Global Campaign understand are necessary for the elaboration of an ambitious and effective Binding Treaty. Here, we analyze articles 4 through 9 of the Updated Draft, which are those likely to be negotiated during the coming session. Our amendments and proposals will be referenced either on the [Track-Changes Updated Draft](#) or on the [Track-Changes Third Revised Draft](#).

It is important to highlight that the Track-Changes Third Revised Draft is incorporated into the Track-Changes Updated Draft. However, the integral upgrading of the [Suggested Chair's Proposals](#), which from informal parallel propositions became almost the literality of articles 6 through 9, makes it difficult to explain what text is being referenced where. For the sake of clarity, we will refer to the Clean Version of the Updated Draft as “Updated Draft”, and to the Track-Changes Third Revised Draft as “Third Revised Draft” (for more context, see page 7).

In line with the objectives and the spirit of Resolution 26/9, we share this analysis with Global South States in the hope that it can support the building of deeper collaboration and articulation among those committed to ending the impunity of Transnational Corporations.

For any clarifications or concerns, please write to raffaele@cetim.ch

Color code:

- *Text in italic* are from the Clean version of the Updated Draft
- Text **in red** are from the Track-Changes version of the Third Revised Draft
- Text **in orange** are proposals from the Global Campaign
- Text **in blue** are proposals made by one or more States during the 7th, 8th or 9th Sessions
For each amendment, the name of the State proposing it will appear in blue, in brackets, at the end of the proposal
- If we merge proposals made by two or more States, we will use different colors (except for blue, red, and orange) to clearly match each State with their proposal.

ARTICLE 4: RIGHTS OF VICTIMS

TITLE

Proposal: Replace "Rights of victims" for "Rights of Affected Individuals and Communities" (Cameroon).

Legal Reasoning and Substantiation: The term "victim" is very restrictive, suggesting that a human rights violation may occur and cause harm to one single individual. To bring in the "affected" perspective means to emphasize that most human rights violations, although in different degrees, will have consequences to entire communities, even to whole countries or regions.

The term "victim" also implies a *fait accompli*, suggesting that the protection should only fall upon those who have already suffered the violation. However, the instrument should also protect the rights of communities and peoples still at risk of being affected by the activities of a TNC. For instance, if a certain project or legislation is being proposed that might have consequences to a community, to their lives, to their territories, they should be able to use the Treaty's dispositions to protect themselves also against *potential* violations.

The broadening of the definition of victim is also necessary to make sure communities can access specific rights related to the (potential) violation, such as the right to be informed of the proceedings and to legal assistance.

The Inter-American and the African systems of Human Rights already recognize collective rights, and groups and communities as legitimate parties. Many countries from the Global South have a legal framework protecting environmental rights and rights from indigenous peoples and traditional communities. For instance, the Brazilian [National Policy on the Rights of Peoples Affected by Dams](#), which recognizes the rights of affected individuals and communities.

A possible compromise would be to include both the term "victims" and "potentially affected individuals and communities", a change that would need to be harmonized throughout the whole of the draft.

ARTICLE 4.1

Proposal: *Victims of human rights abuses and violations in the context of business activities shall enjoy all internationally recognized human rights and fundamental freedoms* (Kenya, Palestine, and Ecuador)

Legal Reasoning and Substantiation: The term "abuse" is used in corporate law to create a false differentiation between the consequences of the activities of States and Corporations. For this doctrine, while States "violate" human rights, business could only "abuse" them.

This differentiation is harmful in two ways:

Politically, it implies that the extension of an offense a State could cause to human dignity is significantly higher than one a TNC could cause. However, it is important to remember that [out of the 100 biggest economic entities in the world, 69 are corporations, not States](#). Such economic power many times translates into huge projects, with a similarly high destructive potential. Moreover, for International Human Rights Law and its protection systems, a violation occurs if there is any level of offense or restriction to human dignity and rights. It does not matter who caused it, if it is a State or a TNC.

Juridically, the differentiation between the use of the terms “abuse” and “violation” wishes to imply that, because TNCs are not formal subjects of International Law, they cannot have international obligations. Given that only obligations can be violated, TNCs could then only abuse Human Rights.

The [Barcelona Traction case of the International Court of Justice](#), nonetheless, has already established in 1970 that human rights have an universally applicable effect (*erga omnes*). Private entities and individuals, therefore, are also legally obliged to respect human rights, which is reinforced, e.g., by Article 30 of the [Universal Declaration of Human Rights](#) and the American Declaration of Human Rights.

A possible compromise would be to include both the term “abuse” and “violations”. This language would have to be harmonized throughout the whole draft.

ARTICLE 4.2

Proposal: *Without prejudice to Article 4.1. above, victims and affected individuals and communities shall, [...]in accordance with applicable international law (or similar amendment to each sub provision)* (Egypt)

Legal Reasoning and Substantiation: Egypt’s proposal protects the future Treaty from legal loopholes, avoiding that a country can use domestic legislation to disobey the obligations enshrined in the future Treaty. This amendment reaffirms the principles of hierarchical superiority and universal application of international human rights conventions.

These principles have been recognized by the Charter of the Organization of the American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights.

ARTICLE 4.2a

Proposal: *be treated with humanity and respect for their dignity and human rights, and their safety, physical and psychological well-being and privacy shall be ensured, taking into consideration factors that affect those in conflict areas* (Palestine)

Legal Reasoning and Substantiation: Although the rights spelled out in this article should be understood in the most encompassing possible way, people in conflict areas or occupied territories, such as Palestine, are entitled to specific protections and rights according to Humanitarian Law and peremptory norms of General International Law (*jus cogens*).

These rights have been reaffirmed in the [report](#) of the UN Experts of the Business and Human Rights Working Group on corporate liability in conflict areas (2020); and in the recent International Court of Justice (ICJ) [Advisory Opinion](#) on Israel’s Palestine.

ARTICLE 4.2c

Proposal: *be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration, including covering expenses for relocation of victims, replacement of community facilities, and emergency and long-term health assistance. Victims shall be guaranteed the right for long-term monitoring of such remedies;”* (Palestine)

Legal Reasoning and Substantiation: Although the specification of remedy measures are always dependent on each concrete situation, the proposal from Palestine establishes a minimum standard that should be ensured in all situations. As minimum standard, the list, of course, is non-exhaustive.

ARTICLE 4.2d

Proposal: *be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties, and that the right to submit claims to non-judicial grievance mechanisms shall not infringe upon the right to access judicial mechanisms;* (Palestine)

Legal Reasoning and Substantiation: In International Human Rights Law, access to justice must be granted in the most broad and comprehensive way. In this understanding, non-judicial grievance mechanisms, as part of the range of possible mechanisms for victims to access justice, can be relevant. However, as in the [Fundão Dam crimes](#), TNCs often use these non-judicial mechanisms to delay or even block the right of victims to submit judicial claims.

The amendment suggested by Palestine guarantees that the use of non-judicial grievance mechanisms are there to expand the range of options for communities and victims to access justice, and not to hamper their rights.

ARTICLE 4.2f

Proposal: *be guaranteed access to information and legal aid relevant to pursue effective remedy; This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable 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* (Cameroon and Namibia)

Legal Reasoning and Substantiation: The right to information is a key element to guarantee both prevention and remedy in the context of business operations.

According to the 2013 [Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression](#), the right to information has been established and protected as a Human Right by Article 19 of the [Universal Declaration of Human Rights](#) and by Article 19(2) of the [International Covenant on Civil and Political Rights](#).

In this same direction, Article X(24) of the [UN Basic Principles on Right to Remedy](#) (2005) established that victims of human rights violations and their representatives are “entitled to seek and obtain information on the causes leading to their victimization”. Within the Inter-American System, the [Declaration of Principles on Freedom of Expression](#) establishes not only the right of victims to access information *from public and private databases* but it also determines that the data provided needs to be accurate and up-to-date, easily found, intelligible and available in different languages, according to victims' needs.

Referring specifically to TNCs, the [German Act on Corporate Due Diligence Obligations in Supply Chains](#) and the [French Law on the Duty of Vigilance](#), for instance, already established the obligation businesses have to disclose information about possible risks and impacts their operations might have to human and environmental rights throughout their value chains.

The treaty should therefore foresee the binomial obligation-right as a global standard: on the one side, the proactive obligation of TNCs to disclose information about impacts and risks; on the other, the corresponding enforceable right of affected individuals and communities to access this information.

ADD ARTICLE 4.2f QUATER

Proposal: be guaranteed with access to independent technical advisory mechanisms that facilitate access to impartial evidence regarding the harm or risk of harm caused by companies (Cameroon)

Legal Reasoning and Substantiation: An important achievement of Brazilian Affected Individuals and Communities in the case of the [Mariana Crimes](#), this proposal aims to reduce the material and informational asymmetry between TNCs and those affected by a TNC violation. It should allow for the production of technically relevant information necessary for affected communities to fully understand the real extent of the violations to their rights.

ARTICLE 5: PROTECTION OF VICTIMS

ARTICLE 5.1

Proposal: States Parties shall protect victims, their representatives, families, **communities**, and witnesses from any unlawful interference with their human rights and fundamental freedoms, including prior, during and after they have instituted any proceedings to seek access to effective, prompt and adequate remedy, as well as from re-victimization in the course of these proceedings (Cameroon, South Africa and Palestine)

Legal Reasoning and Substantiation: It will allow for a more encompassing protection of victims, in line with the changes proposed in **Article 4, TITLE**.

ARTICLE 5.2

Proposal: States Parties shall take adequate and effective measures to guarantee **all rights of a safe and enabling environment** for persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence, insecurity, **harassment, or reprisals**. **This obligation requires taking into account their international obligations in the field of human rights, and their constitutional principles**. State Parties shall take adequate and effective measures including, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses and violations linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work. (Panama, South Africa, Mexico, Cameroon, Palestine)

Legal Reasoning and Substantiation: These amendments reiterate obligations States have to respect and protect human rights, emphasizing their guarantee in the context of business operations.

ARTICLE 5.3

Proposal: States Parties shall investigate human rights abuses **and violations** covered under this (Legally Binding Instrument), effectively, promptly, thoroughly, and impartially, and where appropriate, take action against those natural or legal persons responsible, in accordance with **domestic and** international law (Palestine)

Legal Reasoning and Substantiation: To guarantee the international character of Treaty, it must establish a minimum threshold to all parties. Its implementation, therefore, cannot be left to national prerogatives alone, as domestic judicial systems may be flawed, deficient or partial.

References to the domestic law of States in the Treaty, therefore, should only be to i) domestic legislation that is more protective of human rights, to ii) dispositions that call for international judicial cooperation in the prosecution of violations, and to iii) provisions determining ways in which domestic law must adapt and comply with the future Treaty.

The International Labour Organization (ILO) establishes good precedents in the referencing of domestic legislation in international agreements: in ILO [Convention 98](#) it is determined that the rights it encompasses will be applicable to all ILO member States, even if they have not yet ratified the Convention; in ILO's [Constitution](#), Art.19.8, it is stated that no international standard should undermine any national law, custom, ruling or agreement that is more favorable to workers.

BRIEF CONTEXT FOR ARTICLES 6, 7, 8 AND 9

The objective of track-changing any document is to allow for the accountability and transparency of those holding the pen, so that one can properly compare different versions of a same document. While a first look at the Track-Changes Updated Draft may imply that not much has changed between its wording and the wording of its predecessor, a closer observation reveals the opposite. For articles 6, 7, 8 and 9 of the Updated Draft, the document used as reference for tracking the changes was not the Third Revised Draft but the “Suggested Chair’s Proposals”¹.

Track-Changes Updated Draft

The screenshot displays a document with track changes. Article 6.3 is shown in two versions: a blue-highlighted version at the top and a red-highlighted version below it. The red version has several words crossed out and replaced with new text. A red arrow points from the text 'Informal Chair's Proposals' to the red version of article 6.3. Below this, the reference 'A/HRC/WG.16/8/CRP.2:' is shown, followed by another red-highlighted version of article 6.3. Article 6.4 is also shown in a blue-highlighted version at the bottom.

6.3. State Parties shall ensure that competent authorities relevant to the implementation of Article 6.2 have the necessary independence, in accordance with its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.

6.3. ~~Each~~ State Parties shall ensure that competent authorities relevant to the implementation of Article 6.2 have the necessary independence, in accordance with ~~the fundamental principles of~~ its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.

A/HRC/WG.16/8/CRP.2:

6.2. Each State Party shall ensure that competent authorities relevant to the implementation of Article 6.1 have the necessary independence, in accordance with the fundamental principles of its legal system, to enable such authorities to carry out their functions effectively and free from any undue influence.

6.4. Measures to achieve the ends referred to in Article 6.2 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures

The strikethroughs and colors suggest the proposals in articles 6 through 9 are simply “updating” the Third Revised Draft, which is the document that was actually negotiated during the 7th and 8th Sessions of the OEIGWG. However, changes tracked by the current Updated Draft in these articles are referenced in a document unilaterally developed by the Chairpersonship. These “Suggested Chair Proposals” were not only unsolicited and extemporaneous; more importantly, they imposed language alien to the terms being negotiated by the Working Group.

On the side of ethical and procedural concerns regarding the publication of these proposals—or on how they made their way into the negotiating text—the erasure of 3 years of negotiation in articles 6 through 9 effectively and at once changed the very nature of these key articles. Departing from the international human rights framework that mandates this negotiating process, the current articles on prevention (6), access to remedy (7), legal liability (8) and jurisdiction (9) have become, in their architecture and vocabulary, watered-down toothless private-law dispositions.

For the Global Campaign, therefore, our main efforts in with these articles should be twofold:

- 1) To recover the structure and the wording of the Third Revised Draft for articles 6, 7, 8, and 9, given their human rights framework, as opposed to a private law perspective;
- 2) To recover the good amendments that like-minded States had proposed within said structure which have not been incorporated into the Updated Draft;

These four articles, which address the main legal gaps communities affected by corporate violations face in their struggles for justice, are also precisely the issues an international legally binding instrument could and should advance with ambition. Among the many losses, we underscore a few to emphasize the importance of recovering not only good proposals suggested during the 7th and 8th sessions but also the structure provided by the Third Revised Draft.

For Article 6, the new language traded concrete norms for abstract principles, and the due diligence framework was imposed as the only possible preventive mechanism. Moreover, the text erases any

¹ For context, see the [Global Campaign's assessment of the 8th Session](#).

mentions of independent preventive obligations to TNCs that are and separate from those of the States.

Similarly, **for Article 7**, concrete measures that could allow communities to access justice have become generic provisions, most of them already tackled by other international instruments. It is telling that the article promoting access to justice does not address the issue of reparations, for instance.

For Article 8, the Third Revised Draft made it clear that parent companies would be liable for violations committed by entities *somehow* under their control, i.e., allowing for liability even when direct control could not be proven. The new text deleted said provision while implying that liability for corporations can only be established if they act like cartoon villains by aiding, advising, facilitating, and conspiring to commit violations. Such behaviors, dear to human subjectivity, are very difficult to prove in a corporate context. In the clean version of the Updated Draft, all articles mentioning criminal liability (**8.8, 8.9, and 8.10**) have been arbitrarily removed.

Finally, for **Article 9**, although the Third Revised Draft provided for conventional, even insufficient jurisdictional bases, it nonetheless allowed for the use of *forum necessitatis* and it prohibited the use of *forum non conveniens*, two unavoidable mechanisms if we are to seriously address corporate impunity.

The Campaign therefore proposes the reinstatement of the Third Revised Draft wording and structure for articles 6 through 9, with the incorporation of important amendments already postulated by many like-minded States committed to a truly effective Binding Treaty.

ARTICLE 6: PREVENTION

RECOVER ARTICLE 6.1

Proposal States Parties shall regulate effectively the activities of ~~all business enterprises transnational corporations and other business enterprises of transnational character within their territory, jurisdiction, or otherwise under their control, including transnational corporations and other business enterprises that undertake activities of a transnational character within their territory, jurisdiction, or otherwise under their control.~~²(Cameroon, Iran, Pakistan, Egypt, and the Philippines)

Legal Reasoning and Substantiation: By widening the scope to "all business enterprises", in violation of the mandate of Resolution 26/9, the Updated Draft turns the future Treaty into an "umbrella" for national laws on due diligence. While due diligence is one possible preventive measure among many others, its mechanisms alone cannot realize the mandate of the OEIGWG. Furthermore, the Updated Draft has privileged here the position of Mexico and Panama, dismissing the one shared by Cameroon, Pakistan, Iran, Egypt, and the Philippines without explanation. The reasoning behind privileging the position of 2 States instead of that of 5 is still unclear. Recovering the position of the latter would speak not only to the effectiveness of the future Treaty but it would also underline the need for transparency and democracy in the drafting process.

ADD ARTICLE 6.1 BIS

Proposal: In order to comply with their obligations to respect, protect and fulfill the rights of this instrument, States parties shall adapt their administrative law to prevent the authorization of business activities of transnational character that would not meet the standards of human rights protection provided in this Legally Binding Instrument. States shall adopt higher standards in their own business relationships, in particular but not limited to public contracts, public-private partnership services and not enter into any type of collaboration with transnational corporations and other business enterprises of transnational character condemned for human rights violations (Cameroon)

Legal Reasoning and Substantiation: Detailing the State's obligation to respect, protect and fulfill human rights, Cameroon's proposal underlines the importance that the States uphold themselves the highest standards of protection when operating cross-border, both in their own business enterprises and as contractors of third parties.

ADD ARTICLE 6.1 TER

Proposal: State Parties shall take precautionary measures, including the halt of business activities, when such activities can cause imminent human rights abuses or violations causing irreparable harm, independently from the existence or outcome of a legal proceeding relative to the situation (Palestine)

Legal Reasoning and Substantiation: A natural consequence of 6.1bis as proposed by Cameroon, Palestine's proposal imposes an obligation for the States that find themselves already in business relationships of a transnational character that might cause an imminent harm. Precautionary measures, as recognized in different International Environmental Law instruments and Case Laws, should apply every time business activities have the potential for gross and irreparable violations, and when people are facing urgent situations. For the implementation of precautionary measures, this proposal expands the States' obligations to prevent violations even if risks have not been legally proven.

RECOVER ARTICLE 6.2

Proposal: States Parties shall take appropriate legal and policy measures to ensure that ~~business enterprises, including transnational corporations and other business enterprises of that undertake activities of~~ a transnational character, within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent ~~and mitigate~~ human rights abuses **and violations** throughout their business activities and relationships (Egypt and Cuba)

Legal Reasoning and Substantiation: The new wording for 6.2 in the Updated Draft reinforces the due diligence framework but in a much looser way. The Third Revised Draft's wording, to be reinstated, is more open to other preventive measures, of which due diligence is but one mechanism. It also establishes the responsibility States should have to adequate their legal, regulatory and policy environments so as to guarantee that TNCs put in place effective preventive mechanisms.

Given the specific nature of human rights violations, which can never be fully repaired and therefore also never mitigated, effective prevention mechanisms must be central to the future Treaty. As argued by the Global Campaign [here](#), [here](#) and [here](#), the Due Diligence frame should not be the ceiling for preventive mechanisms when it comes to human and environmental rights violations. And to be effective, due diligence mechanisms must count on specific public external monitoring processes and establish, on the side of clear norms, the steps and the criteria for the diligence to be carried out by the TNCs.

ADD ARTICLE 6.2bis

Proposal: **Transnational corporations and other business enterprises of transnational character shall not take any measures that present a real risk of undermining and violating human rights. They shall identify and prevent human rights violations and risks of violations throughout their operations, including through their business relationships.** (Cameroon)

Legal Reasoning and Substantiation: Under the same understanding of Article 6.2, which emphasizes that, due to its very nature, human rights violations can never be mitigated, Cameroon's proposal establishes an obligation for TNCs not to take any action that may pose a real risk of violating human rights. With this wording, risk analysis then becomes much more encompassing and effective.

RECOVER ARTICLE 6.3

Proposal: For that purpose, States Parties shall require **transnational corporations and other business enterprises of a transnational character** to undertake **continuous** human rights due diligence **across the value chains**, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships, as follows: (South Africa, Iran)

a. Identify, assess and publish any actual or potential **environmental and/or** human rights abuses that may arise from their own business activities, or from their business relationships, **including those that infringe upon workers' rights** (Palestine)

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

c. Monitor the effectiveness of their measures to prevent ~~and mitigate~~ human rights abuses **and violations**, including in their business relationships; (Panama, Palestine)

d. Communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships

Legal Reasoning and Substantiation: Any restriction to human dignity, no matter how big or small, is already considered a human rights violation. As such, they can never be mitigated. Risks of violating human rights, however, can and should be mitigated wherever possible. The reinstatement of the wording of the Third Revised Draft, with the suggested amendments, guarantees that mechanisms of mitigation of risks are in place. Given that most TNCs operations will always have an impact on labour and on the environment, their specific mention emphasizes the importance of mitigating every risk that might violate these rights.

RECOVER ARTICLE 6.4

Proposal: ~~States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:~~ States parties shall designate a competent and independent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by **transnational corporations and other business enterprises of a transnational character**, as well as their effective implementation. (Palestine, Iran)

a. Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations;

a bis. ensuring basic labor rights, including but not limited to, freedom of association, the right to strike, collective bargaining, non-discrimination and gender equality - elimination of workplace violence and harassment in the world of work -, occupational safety and health, prohibition of child and forced labour, and social protection, as specific issues; (South Africa)

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

c. Conducting meaningful **and mandatory** consultations—**in line with principles of free, prior and informed consent and throughout all phases of operations**—with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, **peasants and other people working in rural areas**, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas, **such consultations shall be undertaken by an independent public body and protected from any undue influence from commercial and other vested interests—where it is not possible to conduct meaningful consultations such as in conflict areas, business operations should refrain from operating unless it is for the benefit of the oppressed population;** (Palestine, South Africa, Bolivia)

d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent;

d bis. Respecting that Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land without threats of retaliation. (Palestine)

e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards throughout their operations, including in their business relationships;

f. Integrating human rights due diligence ~~requirements~~–**obligations** in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate;

f bis. States parties shall provide mechanism for financial guarantees to communities for activities with a high potential of damage to human rights, to be made immediately available in case of harm (Cameroon).

g. Adopting and implementing enhanced **and ongoing** human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation – **the enhanced due diligence must take place prior to the commencement of business activities and throughout all phases of operations, corporations and/or State-entities already engaged in business activity in conflict-affected areas, including situations of occupation, shall also adopt and implement urgent and immediate measures, such as divestment and disengagement policies, to avoid corporate involvement in, or contribution to human rights abuses and violations in their activities and relationships. (Palestine)**

Legal reasoning and substantiation: As established in the Updated Draft, Article 6.4 determines that TNCs need to consult with potentially affected groups and other relevant stakeholders as part of their due diligence measures. However, this is an obligation that must be exclusively left to States: TNCs should not interfere in processes of prior consultation or any other mechanisms of citizen participation. Consultations must always be conducted by an independent public body.

With regard to article 6.4c, meaningful consultations are not enough to guarantee the respect for the right to participation of interested populations. It is important to also add that these meaningful consultations must be mandatory. Another important aspect of this paragraph is to recover the proposal from Palestine and South Africa to align said consultations with international standards of Free, Prior, and Informed Consent.

ADD ARTICLE 6.4bis

Proposal: States parties shall ensure that parent and outsourcing business enterprises give all the necessary technical and financial means to the legal persons with whom they have business relationships and/or within their global value chain for them to be able to effectively implement the due diligence measures identified in 6.2 and 6.3. Complying with this duty of effective implementation remains the responsibility of the parent or outsourcing company. (Cameroon)

Legal Reasoning and Substantiation: Cameroon’s proposal establishes the need for the State to guarantee the conditions for the parent or outsourcing company to effectively implement its due diligence measures. More importantly, it spells out that an effective implementation of due diligence mechanisms necessarily includes an encompassing obligation to support, technically and materially, those with whom they do business across their value chains.

In clear contrast with the wording of Article 6.5 of the Updated Draft, which conditions the obligation to prevent violations to the piece of the chain that the parent or outsourcing company “controls, manages or supervises”, Cameroon’s proposal recognizes that in the reality of TNC operations, “control”, “management” or “supervision” are not always easily proven. It also acknowledges the

fact that, independently of the formal business relationship within chains, the parent company is ultimately the one making most of the impactful decisions and reaping most of the profits.

[A REDESCA Report](#) of the Inter-American system of Human Rights argues for an extension of the theory of control, saying that corporations should be liable if they have the possibility to influence other entities along the chain—which does not necessarily mean having effective or formal control over them.

ADD ARTICLE 6.4ter

Proposal: States parties shall designate a competent authority with allocated responsibilities and adequate financial and human resources to monitor the effectiveness of the due diligence measures undertaken by business enterprises as well as their effective implementation. (Cameroon)

Legal Reasoning and Substantiation: This proposal underlines that the implementation of due diligence mechanisms should include the State's duty to designate competent and independent authorities to monitor them. This is the only way due diligence mechanisms can function as a preventive measure. Otherwise, it is just another loose self-regulation guiding principle. The States' obligation to monitor the information provided by companies is highlighted, for instance, in the [case *Kaliña y Lokono vs. Surinam*](#) and the REDESCA report, both from the Inter-American System of Human Rights.

RECOVER ARTICLE 6.5

Proposal: States Parties may provide incentives and adopt other measures to facilitate compliance with requirements under this Article by micro, small and medium sized business enterprises that undertake activities of a transnational character. (Egypt)

Legal Reasoning and Substantiation: This article and its amendment guarantees protection and incentives to SMEs to comply with the Treaty dispositions while excluding those without transnational activities from these obligations. As defended by the Global Campaign, SMEs that do not have a transnational character do need to comply with human and environmental rights obligations, but given their exclusively national structure, they can, and are, and should be regulated by strong and encompassing domestic legislation.

To guarantee strong and effective dispositions to also regulate transnational activities, the Binding Treaty's scope, as mandated by Resolution 26/9, must be on TNCs and on businesses that have a transnational character. If they are SMEs, States should be allowed to provide incentives to support their compliance. For more information, see the Global Campaign's document on scope.

RECOVER ARTICLE 6.6

Proposal: States 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 human rights abuses and violations resulting from the transnational corporations and other business enterprises of a transnational character size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory, jurisdiction, or otherwise under their control, including those of transnational character. (Iran)

Legal Reasoning and Substantiation: The proposal aims at re-establishing the focus on the scope of Resolution 26/9. For more information, see the Global Campaign's document on scope.

RECOVER ARTICLE 6.7

Proposal: Without prejudice to the provisions on criminal, civil and administrative liability under Article 8, State Parties shall provide for adequate penalties, including appropriate corrective action where suitable, for transnational corporations and other business enterprises failing to comply with provisions of Articles 6.3 and 6.4 (Iran)

Legal Reasoning and Substantiation: Deleted from the Updated Draft, this article establishes the needed sanctions for non-compliance with preventive measures, without prejudice to civil, criminal, or administrative liability. This was an important way to ensure that due diligence mechanisms do not become just another loophole for TNCs to escape legal liability.

ADD ARTICLE 6.7bis

Proposal: Where applicable under international law, State Parties shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes. (Palestine)

Legal Reasoning and Substantiation: Implementing universal jurisdiction to judge international crimes is a State's obligation, and it refers not only to natural but also to legal persons. Given that it is more related to Jurisdiction than to Prevention, we propose this Article to be moved to Article 9 (Jurisdiction).

RECOVER ARTICLE 6.8

Proposal: In setting and implementing their public policies and legislation with respect to the implementation of this (Legally Binding Instrument), State Parties shall act in a transparent manner and protect these policies, laws, policymaking processes, government and regulatory bodies, and judicial institutions from the undue influence of commercial and other vested interests of entities of the private sector including natural or legal persons ~~business enterprises, including those conducting business activities of transnational character.~~ Moreover, transnational corporations and other business enterprises of transnational character shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation by States Parties to this instrument, whether home states, host States or States affected by the activities of TNCs. (Cameroon)

Legal Reasoning and Substantiation: Deleted in the Updated Draft, this key provision aimed at strengthening the protection from corporate capture (undue influence of TNCs), according to the spirit of article 5.3 of the World Health Organization [Framework Convention on Tobacco Control](#).

ADD ARTICLE 6.8 BIS

Proposal: International financial institutions shall identify and prevent human rights violations by any entity they support financially. They shall not give any form of financial support (such as loans, subsidies, guarantees) to business enterprises, including through their business relationships, if they know or should have known that the operations of those entities present risks for human rights and the environment. Any conduct of these institutions and their managers that contravenes these duties stands to be corrected by suitable disciplinary, administrative or other measures including the possibility of affected people or communities seeking compensation and reparations from the concerned International Financial Institutions. (Cameroon)

Legal Reasoning and Substantiation: Cameroon's proposal is extremely relevant so that International Financial Institutions (IFIs) are also obliged by the prevention mechanisms established in the Binding Treaty. Considering the last-minute exclusion of IFIs from the European Corporate Sustainability Due Diligence Directive, it is also an important provision to fill one of the many holes left by the European bill.

ADD ARTICLE 6.8 TER

6.8 ter. When participating in decision-making processes or any other action as member of International Financial Institutions, States shall do so in accordance with the States Parties' obligations established by the current (Legally Binding Instrument). 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 transnational corporations and other business enterprises of transnational character, including in their business relationships. (Cameroon)

Legal Reasoning and Substantiation: *(same as 6.8 BIS)* Cameroon's proposal is extremely relevant so that International Financial Institutions (IFIs) are also obliged by the prevention mechanisms established in the Binding Treaty. Considering the last-minute exclusion of IFIs from the European Corporate Sustainability Due Diligence Directive, it is also an important provision to fill one of the many holes left by the bill.

ARTICLE 7 – ACCESS TO REMEDY

RECOVER ARTICLE 7.1

Proposal: States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims' access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women, ~~vulnerable and marginalized~~ people and groups in marginalized situations face in accessing such mechanisms and remedies. (Egypt, South Africa)

Legal Reasoning and Substantiation: The new language used for article 7.1 of the Updated Draft is focused on the concept of “relevant State agencies”, which could allow States and TNCs to only provide remedy through administrative or arbitral mechanisms. Such wording can be used as a loophole TNCs can explore to avoid victim’s jurisdictional access to remedy.

Although judicial and non-judicial mechanisms can co-exist, the latter can never replace jurisdictional remedies. Affected individuals and communities should always have the widest array of options to achieve integral and effective remedy, including, e.g., access to different types of reparation and timely decisions, as established by the European and the Inter-American Courts of Human Rights. It is therefore imperative to recover the wording of the Third Revised Draft, which enshrines the obligation of States to provide the necessary conditions for their own judicial and non-judicial mechanisms to effectively ensure access to justice.

ADD ARTICLE 7.1BIS

Proposal: State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented, in consultation with, and with the full participation of affected communities, are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected (Palestine)

Legal Reasoning and Substantiation: Important provision to guarantee that those violating human rights are not determining how these same violations should be remediated. It also ensures that reparation processes are carried out with the full participation of affected communities and without the involvement of TNCs. The centrality of the victims in reparation processes is a fundamental criterion for effective remedy as per the European, the African and the Inter-american Human Rights Systems.

RECOVER ARTICLE 7.2

Proposal: States Parties to this legally binding instrument shall ensure that their domestic laws and court proceedings facilitate access to information, ~~including through international cooperation, as set out in this (Legally Binding Instrument),~~ in a gender sensitive manner from both States and corporate entities enabling ~~and enable~~ courts to allow proceedings in all appropriate cases, through international cooperation, facilitating requests for disclosure of State or corporate finances or relations and other relevant information, and expanding admissible evidence to include different types of evidence, such as oral and visual, in efforts to prioritize that which is more suitable for communities to remove barriers for community-led data. (Palestine)

Legal Reasoning and Substantiation: If the access to remedy is conditioned by domestic legal and administrative systems, as established by the new wording of the Updated Draft, the Treaty loses its international *animus* and its *raison d'etre*.

According to the Vienna Convention, when a treaty is ratified by a State, this same State cannot use its domestic laws or overall sovereignty to justify non-compliance. As primary sources of International Law, treaties should not adequate themselves to domestic legislations but the other way around. Furthermore, according to the hierarchy of international norms, Human Rights treaties and conventions have primacy over other legal frameworks. If the implementation of the future Treaty is limited to and by multiple national prerogatives, it moves away from the mandate established by Resolution 26/9. It risks becoming a “toothless”, ineffective instrument.

Finally, the Updated Draft excludes the mention to “international cooperation”, despite it being crucial for the implementation of juridical decisions across borders.

RECOVER ARTICLE 7.3

Proposal: States Parties shall provide adequate and effective legal assistance to victims and affected individuals and communities throughout the legal process, including by: (Palestine, South Africa)

a. Making information available and accessible to victims and affected individuals and communities of their rights and the status of their claims, in relevant languages and accessible formats to adults and children alike, including those with disabilities;

b. Guaranteeing the rights of victims to be heard in all stages of proceedings in a gender-sensitive, age-sensitive, and child-sensitive manner; (Egypt)

c. Avoiding unnecessary costs or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards; and,

d. Removing legal obstacles, including the doctrine of *forum non conveniens*, to initiate proceedings in the courts of another State Party in all appropriate cases of human rights abuses and violations resulting from business activities of a transnational character. (Palestine)

Legal Reasoning and Substantiation: *Forum non conveniens* is a legal doctrine that was extensively used by courts to reject jurisdiction over cases of human and environmental rights violations. Especially in the Global North, where most parent and outsourcing companies are based, victims have been denied justice for violations committed throughout TNCs’ value chains with the argument that the Court was not *the most convenient*, even when they could have exercised jurisdiction.

In the last decade, Case Laws have been moving towards forbidding *forum non conveniens*, given its role in denying justice to so many victims. Without any explanation, and against the current spirit of the times, however, this provision was unilaterally removed in the new wording of the Updated Draft.

RECOVER ARTICLE 7.4

Proposal: States Parties shall ensure that court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases.

Legal Reasoning and Substantiation: This possibility is already foreseen in most national jurisdictions. It should be reinforced by the future Treaty to allow victims to pursue remedy independent of their material means.

RECOVER ARTICLE 7.5

Proposal: States Parties shall, consistent with international human rights, humanitarian, criminal and environmental laws, enact or amend domestic laws allowing judges to reverse the burden of proof in order appropriate cases to fulfill the victims' right to access to remedy, where ~~consistent with international law and its domestic constitutional law~~ requiring corporate and State entities involved in the case to provide sufficient evidence for acquittal (Palestine)

Legal Reasoning and Substantiation: The reversal of the burden of proof is a essential to ensure access to justice and the primacy of human rights because most of the information needed to prove a violation was committed by a TNCs is in the hands of the very same TNC. It is impossible for victims to prove a violation occurred if they are not allowed to access corporate data.

Very common in Consumer Law in many jurisdictions, it is also foreseen in some due diligence legislations. Article 7.4d of the Updated Draft has significantly weakened the provision by introducing discretion and suggesting the possibility of a "dynamic" burden of proof. With this new wording, the burden of proof would be evaluated on a case-by-case basis, putting such a necessary means of access to justice on the hands and the assessment of individual judges.

RECOVER ARTICLE 7.6

Proposal: State Parties shall provide effective mechanisms for the enforcement of remedies for human rights abuses and violations, including through prompt execution of national or foreign judgments or awards, in accordance with the present (Legally Binding Instrument), ~~domestic law and international legal obligations~~. (Palestine)

Legal Reasoning and Substantiation: International judicial cooperation is central for victims and affected individuals and communities to access reparations. Private International Law already establishes some criteria for extraterritorial and international cooperation regarding investigation and enforcement of sentences. These provisions should be recovered and expanded in the future Treaty, given that the complex and transnational nature of TNCs allows them to leave a country without ever remedying the victims.

The reparation process, however, only finishes with the enforcement of the reparation sentence. Without provisions establishing the international enforcement of such sentences, victims might be left with the damage and without justice for decades on end. The Peoples Affected by Chevron/Texaco ([UDAPT](#)) in Ecuador, for instance, despite having a Constitutional Court sentence in their favour, are still fighting to get their sentence executed. After 31 years, justice is still out of sight.

ARTICLE 8 – LEGAL LIABILITY

RECOVER ARTICLE 8.1

Proposal: States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability, including joint and several liability, of legal and natural persons conducting business activities of a transnational character, within their territory, jurisdiction, or otherwise under their control, for human rights abuses and violations that may arise from actions or omissions in the context of their own said business activities, including those of transnational character, or from their business relationships (Egypt, Pakistan; Palestine)

Legal Reasoning and Substantiation: The treaty must unequivocally establish that a TNC and all its suppliers, subcontractors, subsidiaries, and all other entities within its global value chain are jointly responsible for any wrongdoing or violation committed by any of these entities, even when there is no formal contractual relationship.

For instance, if a supplier commits a human rights violation, it should be possible for victims to claim reparations from both the parent company and the supplier, with the option to enforce the full amount of the judgment against either the TNC or the supplier. The TNC should not be able to claim they are not liable because they did not commit the violation directly, nor should they be able to limit their liability to the violation of prevention mechanisms. As the owners of brands, and given their control over core decisions, parent companies, who benefit the most from chain operations, should be jointly and severally liable for any human rights violations committed within their value chains.

RECOVER ARTICLE 8.2

Proposal: State Parties shall ensure that their domestic liability regime provides for liability of legal persons without prejudice to the liability of natural persons, and does not make civil liability contingent upon finding of criminal liability or its equivalent for the same acts.

Legal Reasoning and Substantiation: Given their different extensions and legal basis, liability of legal and natural persons should not overlap. Therefore, natural persons should be prosecuted even if a legal person has already been found liable. This is standard procedure in Corporate and Civil Law in cases such as in fraud or corruption.

RECOVER ARTICLE 8.3

Proposal: States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive criminal, civil and/or administrative sanctions where legal or natural persons conducting business activities have caused or contributed to human rights abuses and violations—such as withdrawal of licenses, termination of contracts for company projects, or inclusion on a prohibited list of companies for business. (Palestine)

Legal Reasoning and Substantiation: The Treaty must explicitly establish administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs. Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

RECOVER ARTICLE 8.4

Proposal: States Parties shall adopt measures necessary to ensure that their domestic law provides for adequate, prompt, effective, gender and age responsive reparations to the victims of human rights abuses and violations in the context of business activities, including those of a transnational

character, in line with applicable international standards for reparations to the victims of human rights violations.

Where a legal or natural person conducting business activities **of a transnational character** is found liable for reparation to a victim of a human rights abuse **or violation**, such person shall provide reparation to the victim or compensate the State, if that State has already provided reparation to the victim for the human rights abuse **or violation** resulting from acts or omissions for which that legal or natural person conducting **said** business activities is responsible. (Egypt)

Legal Reasoning and Substantiation: The wording of the Third Revised Draft is essential to ensure reparations when a TNCs is found liable. Egypt's amendments aim at re-establishing the focus on the scope of Resolution 26/9. For more information, see the Global Campaign's document on scope.

RECOVER ARTICLE 8.5

Proposal: States Parties shall require legal or natural persons conducting business activities [of transnational character] in their territory or jurisdiction, including those of a transnational character, to establish and maintain financial security, such as insurance bonds or other financial guarantees, to cover potential claims of compensation **and judicial costs**. (Palestine, Uruguay)

Legal Reasoning and Substantiation: It is common for TNCs to divest and transfer or withdraw assets from a State where they are facing judicial claims. If found liable, the full payment of reparations and judicial costs must be guaranteed.

RECOVER ARTICLE 8.6

Proposal: States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, **including those of a transnational character**, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses **and violations**, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse **or violation**, or should have foreseen risks of human rights abuses **or violations** in the conduct of their business activities, ~~including those of transnational character~~, or in their business relationships, but failed to take adequate measures to prevent the abuse **or violation**.

Legal Reasoning and Substantiation: This paragraph allows for the establishment of liability mechanisms for different TNCs that are in relation with one another. Moreover, the new wording of 8.6 deletes the reference to the responsibility of the Duty of Prevention or Care, which determines that companies could be liable even when due diligence mechanisms have been carried out appropriately. This is important to guarantee liability even when prevention mechanisms are used but fail. In case of violations, compliance to prevention mechanisms should not automatically absolve a TNC.

The amendment re-establishes the scope of Resolution 26/9. For more information, see the Global Campaign's document on scope.

RECOVER ARTICLE 8.7

Proposal: Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities of a transnational character from liability for causing or contributing to human rights abuses **or violations** or failing to prevent such abuses **and violations** by a natural or legal person as laid down in Article 8.6. ~~The court or other competent authority will decide the liability of such legal or natural persons after an examination of compliance with applicable human rights due diligence standards.~~ (Palestine)

Legal Reasoning and Substantiation: (Same as Article 8.6) This paragraph allows for the establishment of liability mechanisms for different TNCs that are in relation with one another. Moreover, the new wording of 8.6 deletes the reference to the responsibility of the Duty of Prevention or Care, which determines that companies could be liable even when due diligence mechanisms have been carried out appropriately. This is important to guarantee liability even when prevention mechanisms are used but fail. In case of violations, compliance to prevention mechanisms should not automatically absolve a TNC.

The amendment re-establishes the scope of Resolution 26/9. For more information, see the Global Campaign's document on scope.

RECOVER ARTICLE 8.8

Proposal: ~~Subject to their legal principles,~~ States Parties shall ensure that their domestic law provides for the criminal ~~or functionally equivalent~~ liability of legal persons for human rights abuses ~~or violations~~ that amount to criminal offenses under international ~~human rights law binding on the State Party or,~~ including but not limited to customary international law, and humanitarian law ~~or their domestic law.~~ Regardless of the nature of the liability, States Parties shall ensure that the applicable penalties are proportionate with the gravity of the offense. This Article shall apply without prejudice to any other international instrument which requires or establishes the criminal or administrative liability of legal persons for other offenses. (Palestine)

Legal Reasoning and Substantiation: According to Humanitarian Law, private actors, such as TNCs, when operating in war zones, can and should be held accountable for their actions that assisted and/or did not prevent war crimes, crimes against humanity and genocide. States have the obligation to implement universal jurisdictions in such cases.

RECOVER ARTICLE 8.9

Proposal: The liability of legal persons under Article 8.9. shall be without prejudice to the criminal liability of the natural person who have committed the offenses under the applicable domestic law.

Legal Reasoning and Substantiation: (Same as 8.2) Given their different extensions and legal basis, liability of legal and natural persons should not overlap. Therefore, natural persons can be prosecuted even if a legal person has already been found liable. This is standard procedure in Corporate and Civil Law in cases such as in fraud or corruption.

RECOVER ARTICLE 8.10

Proposal: States Parties shall provide measures under domestic law to establish the criminal ~~or functionally equivalent~~ legal liability for legal or natural persons conducting business activities, ~~including those of a transnational character,~~ for acts or omissions that constitute attempt, participation or complicity in a criminal offense in accordance with this Article and criminal offenses as defined by their domestic law.

Legal Reasoning and Substantiation: (Same as 8.3) The Treaty must explicitly establish administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs. Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

ADD ARTICLE 8.10 BIS

Proposal: All companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and several responsibility for human rights abuses in which they are involved. (Palestine)

Legal Reasoning and Substantiation: *(Same as Article 8.1)* The treaty must unequivocally establish that a TNC and all its suppliers, subcontractors, subsidiaries, and all other entities within its global value chain are jointly responsible for any wrongdoing or violation committed by any of these entities, even when there is no formal contractual relationship.

For instance, if a supplier commits a human rights violation, it should be possible for victims to claim reparations from both the parent company and the supplier, with the option to enforce the full amount of the judgment against either the TNC or the supplier. The TNC should not be able to claim they are not liable because they did not commit the violation directly, nor should they be able to limit their liability to the violation of prevention mechanisms. As the owners of brands, and given their control over core decisions, parent companies, who benefit the most from chain operations, should be jointly and severally liable for any human rights violations committed within their value chains.

ADD ARTICLE 8.10 TER

Proposal: State Parties shall ensure that their domestic law provides for the criminal liability of legal or natural persons for acts that directly or indirectly contribute, cause or are linked to human rights abuses or violations. (Palestine)

Legal Reasoning and Substantiation: *(Same as 8.3)* The Treaty must explicitly establish administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs. Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

ADD ARTICLE 8.10 QUATER

Proposal: The rule on exhaustion of local remedies shall not be applicable where the circumstances render it unreasonable to exhaust local remedies or where adequate or effective remedies are unavailable at the domestic level (Namibia, South Africa, Palestine)

Legal Reasoning and Substantiation: The European, Inter-American, and African Human Rights Courts have established that the rule of exhaustion of local remedies must be waived when this exhaustion was not possible due to e.g., unavailability of the remedies, corporate capture, and excessively long judicial procedures.

ADD ARTICLE 8.10 QUINTES

Proposal: The parent company, the outsourcing companies it uses, their respective subsidiaries, and all persons with whom the parent and its outsourcing companies have business relationships and/or which are part of their global value chains, shall be jointly and severally liable for the obligations established in this (Legally Binding Instrument.) The obligation to assume this joint and several liability shall be directly applied by judges where the existing legal framework in force in the home and/or host states or in the states where the affected persons or communities are based or domiciled is not adequate for the implementation of this (Legally Binding Instrument).

Legal Reasoning and Substantiation: The main goal of the liability regime should be to provide remedy to people and communities affected by a violation. To that aim, the parent company should be jointly liable with regards to the acts of their subsidiaries or suppliers, independent of the legal regime where violations occurred. No companies should be able to evade liability by closing doors,

leaving the country, or claiming that there are no sufficient assets to provide reparations if there is a parent company somewhere in the world that could be jointly liable. For more information, see Case Laws Vedanta case (UK), Panasonic case (Brazil), Tobacco Industry (Brazil), Unidad de empresa (Colombia), French Telecom/Orange (France).

ADD ARTICLE 8.10 SIIES

Proposal: TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, whether 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.

Legal Reasoning and Substantiation: TNCs' obligations to respect Human Rights and provide remedy if violations occur **already exist** and do not depend on the future Treaty. Such obligations are enshrined in many instruments, such as the REDESCA Report; many Inter-American, European and African Case Laws and Advisory Opinions; the Barcelona Traction Case (ICJ), the Reports of the UN Working Group on Business and Human Rights. The establishment of concrete obligations for TNCs by the future Treaty aims at consolidating these existing obligations and to filling the legal gaps that currently allow for impunity.

ARTICLE 9 - JURISDICTION

RECOVER ARTICLE 9.1

Proposal: Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses **or violations** covered under this (Legally Binding Instrument), **shall upon the victims and their family's choice**, vest in the courts of the State where: (Palestine, South Africa)

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

Legal Reasoning and Substantiation: This provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or domestic laws. The Updated Draft established conventional and limited jurisdictional connections, which are much lower requirements than the obligations recognized by Human Rights Regional Systems and domestic courts. While the text of the Third Revised Draft refers to the place where the effects of the harm occurred, the Updated Draft talks about the place where "relevant harm" occurred, introducing ambiguity since the concept of relevance is not clearly defined.

RECOVER ARTICLE 9.2

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

- a. place of incorporation or registration; or
 - b. place where the principal assets or operations are located; or
 - c. central administration or management is located; or
 - d. principal place of business or activity on a regular basis.
- d bis. substantial assets are held.** (Palestine)

Legal Reasoning and Substantiation: while the Third Revised Draft established a company's domicile wherever it conducted any business activities, the Updated Draft determines as domicile only the place where the company executes its principal activities. It also eliminated the possibility of expanding the definition of domicile through international or domestic instruments.

RECOVER ARTICLE 9.3

Proposal: Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, **including the doctrine of forum non conveniens**, to initiate proceedings in line with Article 7.5 of this (legally binding instrument), **including the doctrine of forum non conveniens**

unless an adequate alternative forum exists that would likely provide a timely, fair, and impartial remedy. (Egypt)

Legal Reasoning and Substantiation: The prohibition of the use of the doctrine of *forum non conveniens* has been deleted in the Updated Draft, which allows its use under the justification of decision efficiency. Moreover, the term "court" has been replaced with "State agencies", (*Same as Article 7.1*) which could allow States and TNCs to only provide remedy through administrative or arbitral mechanisms. Such wording can be used as a loophole TNCs can explore to avoid victim's jurisdictional access to remedy.

Although judicial and non-judicial mechanisms can co-exist, the latter can never replace jurisdictional remedies. Affected individuals and communities should always have the widest array of options to achieve integral and effective remedy, including, e.g., access to different types of reparation and timely decisions, as established by the European and the Inter-American Courts of Human Rights. It is therefore imperative to recover the wording of the Third Revised Draft, which enshrines the obligation of States to provide the necessary conditions for their own judicial and non-judicial mechanisms to effectively ensure access to justice.

RECOVER ARTICLE 9.4

Proposal: Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State.

Legal Reasoning and Substantiation: The Updated Draft introduces the concept of international *lis pendens*, in which States are obliged to consult with one another if a same issue is already under litigation. If a case is being considered in one State, according to the Updated Draft wording, it could not be considered in another. For victims, however, it is often necessary to access multiple jurisdictions simultaneously to ensure comprehensive reparations and the effectiveness of possible judgments. Article 9.4 from the Third Revised Draft should therefore be recovered to allow for multiple jurisdictions if necessary.

RECOVER ARTICLE 9.5

Proposal: Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows:

- a. the presence of the claimant on the territory of the forum;
- b. the presence of assets of the defendant; or
- c. a substantial activity of the defendant.

Legal Reasoning and Substantiation: Although limited, the Third Revised Draft allowed for some possibilities of *forum necessitatis*, which has completely disappeared from the Updated Draft.