ANALYSIS OF THE UPDATED REVISED DRAFT LEGALLY BINDING INSTRUMENT ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES WITH REGARD TO HUMAN RIGHTS[1]

HOMA'S COMMENTS AND SUGGESTIONS BASED ON THE TEXTUAL PROPOSALS SUBMITTED BY THE STATES DURING THE NINTH SESSION AND THE BILL 572/2022

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[1]Official draft, available at: https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf

This document was developed by Homa - Brazilian Institute of Human Rights and Business in partnership with Justiça Global for the attendance of the 10th session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

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1. INTRODUCTION

On June 26th 2014 the Resolution 26/9 (A/HRC/RES/26/9) of the Human Rights Council of the United Nations was adopted and established the creation of the Open-Ended Intergovernmental Working Group (OEIGWG), since the beginning chaired by Ecuador, the first step to the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

A brief recap of the 10 years, the first two sessions were dedicated to build the first deliberations on the content, scope, nature and form of the instrument. However, this period was marked by the questioning of the need for the instrument on the grounds that the UN Guiding Principles, developed by Prof. John Ruggie, would be sufficient to regulate the Agenda. Thereby, civil society reinforced the importance of the existence of a treaty and the need for an international court to guarantee the effectiveness of a binding international instrument was brought into the debate

During the third session was presented "Elements for a Draft Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights" by the Chair in order to substantially move forward with the negotiations based on this proposal.

From the documents presented, *Draft 0*[2] was constructed, which was the focus of discussions at the fourth session in October 2018. Taken as an initial project, the text was met with some disappointment by civil society, as it was characterized by being very vague and broad, which would make it impossible to hold companies accountable, leaving the solutions open to different interpretations.

Moving on to the fifth session, with the low approval of the elements for a draft, Draft One[3] was presented in October 2019, as a revision of the first text. However, despite the improved wording, the text still did not establish concrete obligations for states and transnational corporations, revealing the fragility of the instrument and the influence of states opposed to the treaty. Besides, it changed the scope to "all business" with the support of delegations from the

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[2] *Draft Zero del Binding Treaty: análisis crítico del contenido del texto y su adecuación con el objetivo de la Resolución 26/9*, available at: https://homacdhe.com/wp-content/uploads/2018/09/Artigo-Analisys-Draft-Zero.pdf

[3] *Draft One Analysis: forwards or Backwards?*, available at: https://homacdhe.com/wp-content/uploads/2020/01/An%C3%A1lise-do-Draft-One-EN.pdf

Global North, a clear contradiction with what establishes the Resolution 26/9 which is to regulate transnational corporations.

During the sixth session, held in 2020 under the pandemic context and in a hybrid manner, Draft 2[4] was discussed. The new text brought some advances with regards to victims' rights, access to remedy and provisions on liability and jurisdiction in legal matters. Even so, issues such as the reversal of the burden of proof, extraterritorial obligations and the primacy of the treaty over domestic law remained unclear and unenforceable.

At the seventh session, held in 2021, the negotiations finally went to an article-by-article debate, with important proposals from Palestine, Panama and Cameroon. However, there were still positions from states trying to distort the negotiations with misinterpretations about the application of conventionality.

In 2022, the eighth session the countries of the Global South spoke out in strong support of the Binding Treaty process: South Africa, Namibia, India, Indonesia, Pakistan, the Philippines, Bolivia, Venezuela, Cuba and Palestine, among others. For the first time, delegates from the world's leading economies shared their views on the Binding Treaty process and content. This shows that, after seven rounds of negotiations, states can no longer ignore the urgent need for an effective instrument like the UN Binding Treaty.

Finally, the ninth session, held in 2023, revealed a disagreement with text in discussion because the document published sought to unite the two proposals discussed during the 8th negotiating session, the third “draft” and the text called the “Chair's proposal”. However, the choices made by the Presidency remain unclear given the lack of transparency and criteria adopted to define the working methodology, since the revised version includes proposals with less adherence and uses the one proposed by the WG leadership (OEIGWG) as the basic text for some articles. As a result, a considerable number of controversies raised concerns among civil society and were also subject of dispute between the delegations during the first day of negotiations on the Treaty.

Therefore, the difficulty of making progress in the negotiations alarmed the Chair about the future of the Treaty due to the low budget available to keep the working group moving forward. As a solution, a new working methodology was adopted with more regional

[4] *Analysis of the Second Revised Draft of the legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, available at: https://periodicos.ufjf.br/index.php/HOMA/article/view/35227/23212

consultations happening during the intersessional period , so that by the time of the 10th session, scheduled to take place between December 16th and 20th, discussions on the text could move forward with fewer controversies.

As Homa - Brazilian Institute of Human Rights and Business, we have analyzed the previous drafts and attended every session of the Open-Ended Intergovernmental Working Group (OEIGWG). Thus, the purpose of the present analysis is to highlight the most important aspects to consider of each article of the "*Fourth Draft*", followed by the best proposal made by the delegations present at the previous session, up to Article 3, along with a suggested contribution that Bill 572/22 could bring to the Binding Treaty.

Bill 572/22[5] is a Human Rights Law, currently in the legislative process under Brazilian jurisdiction, which is intended to be the framework for national regulation in Brazil. We believe that this initiative would play a complementary role to the Treaty at the national level. Above all, due to its innovative aspects, which have placed it as a regional reference, and its distinction from due diligence laws, we consider it pertinent to use it as a reference for this analysis.

2. FOUNDATION OF THE TREATY

2.1 Preambule

With regards to the Preamble of this Legally Binding Instrument under discussion, we would emphasize the need of clear and substantial proposals to build principles and guidelines to be the foundation of its application. The possibility of misinterpretation can be used to weaken the human rights provisions and leads to emptying its legal content.

Therefore, we sustain that the best proposal for PP3 would be to combine the propositions of Brazil, Honduras and Malawi to the Bolivia, South Africa, Malawi, Colombia and Egypt, which mentions the UN Declaration on the Rights of Peasants and other People Working in Rural Areas, in order to have the most complete mention of Declarations of Human Rights protection since they are all relevant to this document.

[5] Bill 572/22 translated to english, available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2022/08/Bill-Proposal-572.pdf

(PP3) Recalling also the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, **the Declaration on the Right to Development, the Durban Declaration and Programme of Action, the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples, relevant ILO Conventions**, and all other internationally agreed human rights Declarations, as well as the 2030 Agenda for Sustainable Development; **(Brazil, Honduras, Malawi)**

(PP3) Recalling also the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, **UN Declaration on the Rights of Peasants and Other People Working in Rural Areas**, and all other internationally agreed human rights Declarations, as well as the 2030 Agenda for Sustainable Development; **(Bolivia, South Africa, Malawi, Colombia, Egypt)**

On the PP4, which focuses on equal rights for all people and respect to treaties and other sources of international law, the best proposition is supported by the majority of the States, while on the PP6 it should maintain the proposals referring to international humanitarian law.

Moving to PP8, the mention of the Articles 55 and 66 of the UN Charter should be interpreted along with Article 103 of the same instrument in order to guarantee the primacy of Human Rights.

> *Article 103. 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.*

The primacy of Human Rights has to be the basis of any jurisdiction conflict and any interpretation of this Binding Instrument if we aim for its concrete implementation and effectiveness. For that, we suggest a clear inclusion in the text of this, based on the provisions of Bill 572/22:

Article 3. Principles and guidelines to enforce this bill:
III. The Human Rights framework will take precedence over any agreement, including those of an economic, trade, services, and investment nature;
VI. In the event of a conflict between human rights regulations, the one most favorable to the affected person must prevail;
VII. In the event of multiple and heterogeneous interpretations regarding the same Human Rights regulation, the one most favorable to the affected person must prevail;

Along with that, Brazil, Honduras and Colombia created an additional statement on PP11bis that would be complementary to the idea of premacy on Human Rights and concerning the pro persona principle.

> (PP 11 bis) To affirm the importance of the pro persona principle and the principle of the primacy of the most favorable norm to the human person in the interpretation of any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation, and security agreements; (**Brazil, Honduras, Colombia**)

Regarding the examples of forms of discrimination of PP8, they had been removed from the last draft and were brought back by the Brazilian Delegation's proposal. As mentioned previously, it is highly recommended that all provisions are as detailed and comprehensive as possible.

> (PP8) Recalling the United Nations Charter Articles 55 and 56 on international cooperation, including in particular with regard to universal respect for, and observance of, human rights and fundamental freedoms for all without distinction of any kind **including race, ethnicity, sex, language, religion, political opinion, national or social origin. (Brazil)**

In this case, when it comes to Bill 572/22, we also have a similar but broader statement, which also mentions the need to take anti-discriminatory measures and includes business companies as independently responsible as the States, as follows:

> Article 6. III – To abide by all international and national frameworks that forbid discrimination, in particular on grounds of race, color, gender, sexual orientation, religion, political view, trade union activity, nationality, social origin, belonging to a specific people or community, disability, age, migratory or another status that is not related to a job description. Business companies must also initiate positive anti-discrimination actions;

In this regard, it is important to clarify that Bill 572/22 considers companies and states to be subjects of law and therefore holders of rights and obligations, something that we have endorsed since the beginning of the negotiations, a topic that will be also discussed in more detail later.

On PP11, our full endorsement goes to Ghana's proposal.

(PP11) Underlining that transnational corporations and other business enterprises of transnational character regardless of their size, sector, location, operational context, ownership and structure have the obligation to respect all human rights including by preventing and avoiding human rights violations that are committed all along its global production chain, including investors, shareholders, economic conglomerates, banks, and pension funds that finance transnational operations and are directly and indirectly linked to their operations, products or services by their business relationships; **(Ghana)**

Likewise, Honduras and Cuba's proposal on PP12 should be taken as reference due to the appropriate use of nomenclature as "violations" instead of "impacts" or "abuses" and "obligation" instead of responsibility. Moreover, the proposal considers a broader reach of the obligations, covering direct and indirect violations as well as financial and economic services.

(PP12) Underlining that **transnational corporations and other** business enterprises,regardless of their size, sector, location, operational context, ownership and structure have the **obligation** to respect internationally recognized human rights, including by avoiding causing or contributing to human rights abuses **and violations** through their own activities and addressing such abuses **and violations** when they occur, as well as by preventing human rights abuses **and violations directly or indirectly** linked to their operations, products or services **including financial and economic services** by their business relationships; **(Honduras, Cuba)**

The mention of human rights defenders on the proposition made by Brazil and Colombia on PP13 is relevant and urgent to the needs of current worldwide threats. Unfortunately, the Global South suffers more with this type of violence towards human rights defenders, since is also where most violations occur, so the recognition of its importance is a way of preventing more harm.

(PP13) Emphasizing that civil society actors, including human rights defenders, have an important and legitimate role in promoting the respect of human rights by business enterprises, and in preventing, mitigating and in seeking effective remedy for business related human rights abuses **and violations**, and that States, **together with transnational corporations and other business enterprises**, have the obligation to take all appropriate measures to ensure an enabling and safe environment for the exercise of such role; **(Brazil, Colombia)**

The PP 18 bis added by the delegations of Cameroon, Colombia and Ghana, followed by the PP19 from Cuba's version are significant statements that represent the purpose of this Binding Instrument, recognizing the obligations of transnational corporations to respect and not violate human rights. Both of the paragraphs also are in coherence with Resolution 26/9 purpose.

(PP 18 bis) Recalling that transnational corporations and other business enterprises of transnational character have obligations derived from international human rights law and that these obligations are different, exist

independently and in addition of the legal framework in force in the host and home States; **(Cameroon, Colombia, Ghana)**

(PP19) Desiring to clarify and facilitate effective implementation of the obligations of States regarding business-related human rights abuses and the **obligations** of business enterprises in that regard; **(Cuba)**

From the perspective of Bill 572/22, Article 4 clearly outlines the obligations of the State and business companies, which is crucial to ending discussions about the role of each actor in this agenda. As we said earlier, it is not a question of making transnational companies subjects of International Law, but of recognizing them as subjects of law who are endowed with many rights and therefore must have their obligations declared as they have a social duty to fulfill based on Business Law.

Article 4. Business companies and the State partake in the following obligations:
I - To respect and not violate Human Rights;
II – To decline acts of collaboration, complicity, instigation, economic enticement or concealment, for finance or service, with entities, institutions, and persons that violate Human Rights;
III - In case of violations:
a) To act apropos of full compensation;
b) To ensure unlimited access to all documents and information beneficial to the defense of the affected people;
c) To prevent novel violations to the affected people in the course of reparation;
d) To collectively promote acts of prevention, compensation, and the reparation of damages to the affected people;

To conclude the preamble section, we would like to suggest adding a paragraph to mention the principle of the centrality of victims' suffering, establishing the participation of the affected people as the central aspect of this instrument, as a Human Rights Treaty. In addition, the ILO Convention 169 regarding the right to free and prior consultation, informed in good faith, above all including their right to consent and self determination, along with the right to full reparation should be included. This proposal is based on Article 3 from the Bill 572/2022 which comprehends all its principles and guidelines and we strongly encourage the inclusion of the full content in the Treaty.

Article 3. Principles and guidelines to enforce this bill:
I. The universality, indivisibility, inalienability, and interdependence of Human Rights;
II. The State's duty to respect, protect, guarantee, and ensure the enforcement of the Human Rights legal framework; securing the instruments for their enforcement;

III. The Human Rights framework will take precedence over any agreement, including those of an economic, trade, services, and investment nature;
IV. The rights of people and communities affected to full reparation for violations of Human Rights committed by corporations, observing the principle of centrality of the suffering of the victims.
V. Persons whose Human Rights were violated will be granted free and prior consultation, informed in good faith, with respect to their right to consent;
VI. In the event of a conflict between human rights regulations, the one most favourable to the affected person must prevail;
VII. In the event of multiple and heterogeneous interpretations regarding the same Human Rights regulation, the one most favourable to the affected person must prevail;
VIII. The compliance provisions of this bill must be implemented, monitored, and periodically evaluated;
IX. Persons and communities who have had their Human Rights somehow violated will not be incriminated nor prosecuted. This provision comprises male and female workers, citizens, grassroots movements, institutionalised and non-institutionalised social movements, their networks, and organisations.

2.2 Article 1. Definition

Definitions are also an important part of this Treaty because they set the standard for comprehending the text and its subsequent applicability, so it is important to keep their content cohesive and well explained. The first definition concerns "Victims" (Article 1.1) and the key elements of this definition are establishing their collective face and maintaining the appropriate nomenclature, using the word "violation" to define acts and omissions committed by companies against human rights. For all these reasons, we support the proposal made by Brazil, which specifically includes the terminology of affected communities.

1.1 "Victim" shall mean any person or group of persons **or affected communities** who suffered a human rights abuse **or violation** in the context of business activities, **as a result of acts or omissions**. The term "victim" may also include the immediate family members or dependents of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted. **(Brazil)**

Complementing this reasoning, the definition of Human Rights Violation on Article 1.3 should be adopted instead of the use of "Human Rights Abuse". The best explanation on this topic was given by Cameroon due to its completeness and terminology choices, mentioning as an example the violation of the right to a safe, clean, healthy and sustainable environment.

1.3 “Human rights violation” shall mean any **direct or indirect harm in the context of business activities through** acts or omissions **against any person or group of persons that impedes the full enjoyment of internationally-recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environmen**t. **(Cameroon)**

Paragraph four defines “ Business activities” (1.4), which is fundamental to the whole negotiation process. We have defended at every session the need to provide for joint and several liability along the value chain, along with maintaining the scope of Resolution 26/9 and therefore the scope of the Treaty. On this basis, we could support the proposal endorsed by Côte d'Ivoire (on behalf of the African Group), Ghana, South Africa, Egypt, Colombia, Cameroon, Malawi, Bolivia and Honduras, which restricts its definition to the activities of Transnational Corporations, regardless of their nature and including financial institutions, and describes the extent of the value chain.

1.4 “Business activities” means any economic or other activity, including but not limited to the manufacturing, production, transportation, distribution, commercialization, marketing and retailing of goods and services, undertaken by **transnational corporations and other business enterprises of transnational character**, **which can be private, public or mix,** including financial institutions and investment funds or joint ventures. This includes activities undertaken by electronic means. **(Côte d'Ivoire (on behalf of African Group), Ghana, South Africa, Egypt, Colombia, Cameroon, Malawi, Bolivia, Honduras)**

In addition, the following paragraph deals with “Business Relationship” (1.6) which should include the whole value chain as mentioned before and the same parameters already set on the previous definition. In this regard, Brazil’s proposal can be seen as complementary.

1.6 “Business relationship” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, and that of **financial institutions** or any other structure or relationship, including throughout their value chains, as provided under the domestic law of the State, including activities undertaken by electronic means. **(Brazil)**

The definitions of “Human Rights due diligence”(1.8) and “Relevant State agencies” (1.10) are quite recent and bring some concerns. First, the definition of Human Rights due diligence is weak when it sets less commitment than the Guiding Principles and damaging to the

process when due diligence is not clearly established as mandatory for the TNCs. To repair this definition we would use Articles 7 and 12 from Bill 572/22 as reference to a more complete approach of the process that should be later detailed on Article 6 about prevention.

> Article 7. Business companies must carry out a due diligence process to prevent, identify, monitor, and compensate for Human Rights violations, including social, labor, and environmental rights. They must, **at least**:
> I - Cover violations the company has caused or supported in the course of their business activities and operation, including products or services provided by commercial relationships;
> II - Be unremitting and recognise that risks for Human Rights violations may change over time as the company's activities and operational context develop;

> Article 12. Business companies must prepare a six-monthly periodic report on Human Rights, which will demonstrate: I - A summary of actions or projects to be implemented by the corporation in the following semester, provided the qualitative and quantitative analysis of the risk of Human Rights violations. The summary will associate the actions with the preventive measures to be adopted; II – A summary of actions or ongoing projects, also an evaluation of prevention actions already in place. A report on any Human Rights violation and the consequent plan for compensation for damage, which must be elaborated along with the affected communities; III - A summary of ongoing reparation and compensation plans, containing an evaluation of results and the detailing of protocol changes in the coming projects with similar features regarding possible Human Rights violations. IV - The company's political commitment to respect Human Rights, including labor and environmental rights, and its policies on the matter. At least the expectation that all personnel in the production chain should also regard the urgency of Human Rights must be made public. V – Details of personnel in charge of implementing action plans, as well as their schedule of completion; VI – A risk analysis on Human Rights comprehending the entire production chain, including labor and environmental risks. VII – Risk analysis with a scale for risk priority and risk urgency to implement measures and strategies to mitigate identified risks and protocols to monitor ongoing actions and what remains to be implemented. Paragraph One - The semestral reports on Human Rights must be sent to the Public Prosecutor's Office, at the federal and state level, and the Public Defender's Office, also including federal and state, as well as the National Human Rights Commission (CNDH).

With regard to “Relevant State Agencies”(1.10),we strongly recommend its removal from the text, following the position of Mexico, Panama, Colombia and Honduras, since the inclusion was made in place of the terminology “judicial and non-judicial mechanisms” throughout the instrument, a contradiction when we think of the importance of non-judicial mechanisms as administrative measures of access to justice for affected people as a cheaper and faster response.

2.3 Article 2. Statement of Purpose

The purpose of the Binding Instrument is as much directly connected with the Resolution 26/9 as the scope that will be discussed next. For that reason the additional statement suggested by Egypt, Colombia and Iran is very enlightening and direct as it should be. For this reason we support the following provision:

> (a bis) To regulate the activities of transnational corporations and other business enterprises with a transnational character within the framework of international human rights law; **(Egypt, Colombia, Iran)**

With regard to the other paragraphs of the same article, we agree with the propositions that use the terms "violations" and "obligations", broaden the list of human rights described and give due focus to Transnational Corporations.

3. DEFINITION OF THE SCOPE AND THE RESOLUTION 26/9 (A/HRC/RES/26/9)

3.1 Article 3. Scope

The scope has generated a lot of discussion in the previous sessions of negotiation and we stick to our understanding based on the Resolution 26/9, adopted by the Human Rights Council, that established the elaboration of an international legally binding instrument on transnational corporations with respect to human rights. Therefore, there is no doubt or space for divergent interpretations as we should focus on regulating Transnational Corporations,

Regarding the reach of all Transnational Corporations and its accountability when the violation occurs inside their global value chain, the scope of the treaty should be clear and include financial institutions and their subsidiaries, branches, subcontractors, suppliers, as the Bill 572/22 does at a national level.

> Article 2. This bill addresses State agents and institutions, including the justice system, as well as companies and **financial institutions** operating in the national territory and/or with transnational activity. Sole paragraph. This bill is to be enforced on business companies, **including their subsidiaries, branches, subcontractors, suppliers, and any other entity in their global value chain.**

Based on that, we could endorse the proposal made by Ghana, South Africa and Egypt which includes their value chain and it is precise about the reach of transnational corporations instead of all business.

> 3.1 This (Legally Binding Instrument) shall apply to **transnational corporations and other business enterprises of a transnational character including across their value chains** of a transnational character. **(Ghana, South Africa, Egypt)**

The maintenance of the scope defined by Resolution 26/9 is essential and should be harmonized with the whole text of the Binding Treaty. In addition, this article has suffered a change from the last draft with the removal of ILO Convention mentions which are relevant instruments of International Law. Thus, from the State amendments we would support the one made by Ghana and South Africa as the best one, even if it could be complemented and more detailed with the ILO Conventions..

> 3.3 This (Legally Binding Instrument) shall cover all internationally recognized human rights instruments. **(Ghana, South Africa)**

4. ABOUT THE AFFECTED PEOPLE

4.1 Article 4. Rights of Victims

From this article onwards, there have been no changes compared to the last draft, since negotiations during the ninth session stopped short. For this reason, we will only indicate the key elements and make suggestions based on Bill 572/22.

Our first observation would be about language and the name of this article. Instead of “Right of victims" we believe that it could be improved and named “Rights of the affected people and communities” to keep it coherent with the principles of this Biding Instrument stated in the preamble and reaffirm the collective aspect of human rights.

With regard to its content, it is possible to see positive points such as the right to access to justice, remedy and reparation on 4.2 (c) along with the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms (d) and the protection against re-victimization (e). For these provisions we would

include, based on Bill 572/22, that the protection of territorial rights and the self-determination rights of indigenous peoples, quilombolas, and traditional communities together with the right of prior consultation must be upheld, guaranteeing an effective participation of workers, their representatives, and Trade Unions. This provision is true to their sovereignty over natural resources and local genetic wealth, in compliance with Convention no. 169 of the International Labour Organisation (ILO), particularly their right to consent and to say no, as we quote Art.6.

> Article 6. Companies must **promote, respect, and ensure Human Rights** in their business activities, considering the following guidelines:
> VIII - **The territorial rights and the self-determination rights of indigenous peoples, quilombolas, and traditional communities must be upheld**. The same provision is true to their sovereignty over natural resources and local genetic wealth, in compliance with **Convention no. 169 of the International Labour Organisation (ILO), particularly their right to consultation.**
> IX - The right of **prior consultation** must be upheld. The effective **participation of workers, their representatives, and representative Trade Unions** must be ensured during procedures with potential impact on labor rights.
> XI – The **collectives, associations, union entities, organizations, movements, and all other structures of labor representation**, as well as any community, and Human Rights defender, must be regarded as **legitimate advocates** of the interest of those who had their Human Rights violated or threatened;

Moreover, we celebrate the inclusion on 4.2(f) of the right to access information, given due attention to the language used and with that we complement with the right to access to independent technical advice and the need to implement protocols that facilitate direct community participation, all based on Article 6 from Bill 572/22.

> Article 6. XII - The **corporate management structure must be easily accessible to the public**, expressing policies for the promotion and defense of Human Rights, and disclosing the personnel information of all decision-makers and their respective roles in the production chain;
> XIII – To disseminate information on business activities to affected communities employing **appropriate notification**, considering that some communities are remote, isolated, often illiterate, and deprived of internet access. **To ensure that said notification is not simply delivered, but fully understood in their language or dialect**;
> XV – To provide funds to **ensure access to independent technical advice** on behalf of populations affected by a disaster, supplying all provisions for optimal service, refraining from any interference, including the choice of entities, which must be made democratically by the affected people themselves;

XVI – To implement **protocols to facilitate direct community participation**, especially the leaderships, in the decision-making process regarding reparation and compensation for damages. Transportation and food supplies during events for popular consultation must be included

Furthermore, we suggest the inclusion of the right to full compensation, the reversal of the burden of proof and the centrality of victims' suffering as key elements for this article of the Treaty, which must be as protective as possible in order to understand the implementation and protection of human rights as much as possible. Besides, other provisions from Article 11 of Bill 572/22 as the prohibition to invoke the lack of absolute scientific certainty as an argument for postponing the implementation of protocols to prevent Human Rights violations, considering the health and safety of workers, the guarantee of non-recurrence and the primacy of State monitoring rather than self monitoring from the companie, should be considered by delegations.

Article 11. The rights of affected persons, groups, and communities apropos of Human Rights violations or potential violations are as follow:
I – The admission hereby of the lack of sufficiency of those affected vis-àvis the business companies, which requires the **reversal of the burden of proof** because the infeasibility of its production may hinder the access to justice;
II – The **technical support** to guarantee a balanced arbitration between business companies and vulnerable groups. Whenever possible, the Public Defender's Office, the Federal District, the States and the Union will assist in the negotiations;
VII – **State monitoring** and inspection must prevail over the self-monitoring of business companies regarding preventive and compensation measures such as safety protocols, disaster prevention, severe work-related injuries, and compliance with the Brazilian environmental legislation;
X – **Full compensation** for Human Rights violations perpetrated by business activities;
XI - In compliance with the United Nations Office for Disaster Risk Reduction (UNDRR), all legal proceedings involving disasters resulting from business activities must take **priority in processing**;
XII – **The centrality of the suffering of the victims**.
XIII – It is hereby **prohibited to invoke the lack of absolute scientific certainty** as an argument for postponing the implementation of protocols to prevent Human Rights violations, considering the health and safety of workers;
XIV – The **guarantee of non-recurrence**.

Moreover, as a form to protect victim’s rights to full reparation we suggest the incorporation of Article 13 of the Bill 572/22 which establishes the creation of a Fund, that could be also explored in the article concerning access to remedy. By centralizing resources in a fund

exclusively for victims this proposal offers a better protection of the victims rights while ensuring the right to full compensation.

Article 13. In case of obligation of reparation, **the violating company must create a Fund intended to cover the basic needs of the affected persons, groups, and communities until the completion of the process of full reparation of damages.**

4.2 Article 5. Protection of Victims

With regard to the protection, as in the previous article, we support changing the language from "victims" to "affected people and communities' and suggest the adoption of a specific protective provision for human rights defenders, in addition to the preamble, and a guarantee of non-incrimination and non-prosecution towards persons and communities who have had their Human Rights somehow violated, as the Bill 572/22 does.

Article 3. IX. Persons and communities who have had their Human Rights somehow violated **will not be incriminated nor prosecuted**. This provision comprises male and female workers, citizens, grassroots movements, institutionalized and non-institutionalised social movements, their networks, and organizations.

5. PREVENTION

5.1 Article 6. Prevention

The article dedicated to the prevention is fundamental to the safeguarding of Human Rights and for that we should establish obligations to both States and TNCs, as Bill 572/22 does.

Article 4. **Business companies and the State** partake in the following obligations: d) To collectively promote acts of **prevention**, compensation, and the reparation of damages to the affected people;

Once more, on 6.1 the text uses "all business" when it should be focused on Transnational Corporations and business with transnational character as established by Resolution 26/9. Moreover, the use of "abuse" rather than "obligations" is damaging to its sense and purpose. Despite these language problems, the provision in 6.2 (d) regarding the effective participation of various relevant actors in this agenda as "trade unions, civil society, non-governmental organizations, indigenous peoples, and community-based organizations" should be maintained.

Regarding the role of TNCs, on 6.4 there is a reference to Human Rights Due Diligence. However, we believe that prevention mechanisms are more than that. As far as we have seen from national experiences, especially in the european context, the implementation of the due diligence process has maintained the monitoring of the activities under the responsibility of companies through the development of action plans that do not necessarily hold the company accountable for the violation, but rather for non-compliance with the plan. Thus, we can see the configuration of an obligation of means and not of result, which can ultimately be used as a check-list mechanism for companies to evade responsibility. In addition, there is a privatization of this monitoring by auditing companies that create a new market in which the logic of capital prevails.

Therefore, any reference to Due Diligence in the Binding Treaty should be clear on the scope of application, applying to the whole of global value chain; include sanctions and administrative, civil and criminal liability regimes when there is a lack of compliance; cover all human and environmental rights; state the primacy of human rights over any trade and investment instruments; provide for specific obligations, separated and independent from those of States, for TNCs and international financial institutions involved in violations; include provisions to improve access to justice and establish a multi-party body (State, trade unions, civil society, human and social rights organizations) that monitors complaints to avoid self-monitoring.

Art. 9 XVIII- The self-monitoring of business companies must not obsolete the inspection enforced by the State regarding safety measures, disaster prevention, severe work-related injuries, compliance with the Brazilian environmental legislation, and all additional matters related to the fundamental Human Rights guarantees;

As far as Bill 572/22 is concerned, we don't have a detailed due diligence process, as this could be complemented by the Treaty, but we do have minimum standards on what should be expected, such as a mandatory process to prevent, identify, monitor and compensate for human rights violations, and also a provision on maintaining the company's civil, administrative and criminal liability in the event of a violation.

Article 5. § 2 Companies must implement protocols for control, prevention, and compensation that are capable of identifying and preventing Human Rights violations in the course of their operation. **Said protocols will not abridge the company"s civil, administrative, and criminal liability in case of violation.**

Article 7. Business companies must carry out a **due diligence process** to **prevent, identify, monitor, and compensate for Human Rights violations**, including social, labor, and environmental rights. They must, at least: I - **Cover violations the company has caused or supported in the course of their business activities and operation**, including products or services provided by commercial relationships; II - Be **unremitting and recognise that risks for Human Rights violations may change over time** as the company's activities and operational context develop;

Article 8. The Union, the States, the Federal District, and the Municipalities are obliged to **implement measures for the prevention, protection, monitoring, and compensation of Human Rights violations** in business activities. They must **compel companies to implement participatory mechanisms intended to fully compensate the affected party.**

As part of the prevention methods, we also support the inclusion of the right to consent as an interpretation of the ILO Convention 169 to fully cover the right to self determination of indigenous people and traditional communities, something the Brazilian proposal takes into consideration in its Article 6. This should also replace the mention of “meaningful consultations”, as a concept adopted by the Guiding Principles of Prof John Ruggie, to properly adequate this instrument into becoming a Human Rights Treaty going further from this outdated logic and reflecting the current international standards of human rights protection.

Article 6. Companies must **promote, respect, and ensure Human Rights** in their business activities, considering the following guidelines:
VIII - **The territorial rights and the self-determination rights of indigenous peoples, quilombolas, and traditional communities must be upheld**. The same provision is true to their sovereignty over natural resources and local genetic wealth, in compliance with **Convention no. 169 of the International Labour Organisation (ILO), particularly their right to consultation.**

5.2 Article on Corporate Obligation

As an additional article to this Treaty, following the prevention, we suggest the insertion of solid and clear obligations to TNCs apart from the duty to carry out the due diligence process.. This initiative has been supported by civil society organizations since the beginning of this working group and our proposal is also based on Bill 572/22 as it follows.

Therefore, the main provisions of this new article should be:

a. Establish the independency on State and Corporate obligation, including joint and several liability for corporations;
b. State the obligation to promote, respect, and ensure Human Rights, with a complete and detailed description of the discrimination prohibitions based on Internationally recognized instruments;
c. Mention that the territorial rights and the self-determination rights of indigenous peoples, quilombolas, and traditional communities should be upheld, particularly their right to consultation;
d. Provide effective participation of workers, their representatives, and representative Union entities during procedures with potential impact on labour rights;
e. Provide funds to ensure access to independent technical advice on behalf of populations affected by a disaster, supplying all provisions for optimal service, refraining from any interference, including the choice of entities, which must be made democratically by the affected people themselves.

Section II: On corporate obligation

Article 5. Companies domiciled or economically active in the Brazilian territory are liable for Human Rights violations in the course of their business operation, caused either directly or indirectly. § 1 There is **joint and several liability** which comprehends the **extension of the business production chain**, including the parent company, the controlled companies, as well as every public and private investor. It also comprises subcontractors, branches, subsidiaries, economic and financial institutions operating overseas, and all national economic and financial entities that invest in or benefit from any given stage of the production process, regardless of any formal contractual relationship. § 2 Companies must implement protocols for control, prevention, and compensation that are capable of identifying and preventing Human Rights violations in the course of their operation. Said protocols will not abridge the company‟s civil, administrative, and criminal liability in case of violation.

Article 6. Companies **must promote, respect, and ensure Human Rights** in their business activities, considering the following guidelines:

I – To avoid perpetrating or contributing to Human Rights violations by not afflicting any damage in the course of business activity or service provided. In case of damage, the associated activity must be ceased immediately;

II – To decline acts of collaboration, complicity, instigation, economic enticement or concealment, for finance or service, with entities, institutions, and persons that violate Human Rights;

III – To abide by all international and national frameworks that forbid discrimination, in particular on grounds of race, colour, gender, sexual orientation, religion, political view, trade union activity, nationality, social origin, belonging to a specific people or community, disability, age, migratory or another status that is not related to a job description. Business companies must also initiate positive anti-discrimination actions;

IV – To abide by all international and national frameworks that forbid the exploitation of child labour and labour analogous to slavery in the course of the production chain;

V - Goals are not to be set abusively. Said behaviour typifies both individual and organisational moral harassment;

VI – To foster the appreciation for Human Rights during commercial transactions, whether contractual or not, with associated business partners;

VII – Personnel‟s private information must be appreciated and protected. The same provision is true for customer data;

VIII - The territorial rights and the self-determination rights of indigenous peoples, quilombolas, and traditional communities must be upheld. The same provision is true to their sovereignty over natural resources and local genetic wealth, in compliance with Convention no. 169 of the International Labour Organisation (ILO), particularly their right to consultation.

IX - The right of prior consultation must be upheld. The effective participation of workers, their representatives, and representative Union entities must be ensured during procedures with potential impact on labour rights.

X - The communities living by river banks, along the coast, and in the countryside must have their rights upheld. Bribery and other forms of corruption must be repressed. There must be no intimidation at the access to the land, nor to the access to resources for extractive exploration, aquaculture, agribusiness, tourism, electricity generations, and others;

XI – The collectives, associations, union entities, organisations, movements, and all other structures of labour representation, as well as any community, and Human Rights defender, must be regarded as legitimate advocates of the interest of those who had their Human Rights violated or threatened; XII - The corporate management structure must be easily accessible to the public, expressing policies for the promotion and defence of Human Rights, and disclosing the personnel information of all decision-makers and their respective roles in the production chain;

XIII – To disseminate information on business activities to affected communities employing appropriate notification, considering that some communities are remote, isolated, often illiterate, and deprived of internet access. To ensure that said notification is not simply delivered, but fully understood in their language or dialect;

XIV - In case of hazardous activities, the affected persons and communities, as well as the workers, must take part in the preparation, management, and inspection of risk prevention plans;

XV – To provide funds to ensure access to independent technical advice on behalf of populations affected by a disaster, supplying all provisions for optimal service, refraining from any interference, including the choice of entities, which must be made democratically by the affected people themselves;

XVI – To implement protocols to facilitate direct community participation, especially the leaderships, in the decision-making process regarding reparation and compensation for damages. Transportation and food supplies during events for popular consultation must be included;

XVII – To contribute to investigations, and enable the collection of evidence by interested parties;

XVIII- Considering all regulations enforced in the various locations where transnational business companies operate, they must abide by the regulation that guarantees greater Human Rights protection, independently of the place where damage has happened;
XIX- In the event of a violation in progress throughout the production chain, to promptly discontinue the activity, or act so that the violation which might influence the chain ceases immediately;

6. CORE OF THE TREATY

Now we begin the discussions on what we call the core of the Treaty, because of its importance in properly ensuring corporate accountability and ending impunity, which covers access to remedy, legal liability and jurisdiction.

6.1 Article 7. Access to Remedy

Article 7 deals with the necessity of ensuring access to remedies for victims. It emphasizes the need for States to provide adequate and accessible mechanisms for claiming rights. While the previous version adopted a straightforward and pragmatic approach, the new draft takes a more detailed perspective, incorporating a broader recognition of structural inequalities and specific vulnerabilities.

The provision highlights an understanding that victims often face not only the harm caused by corporations but also the omission or inefficiency of States themselves, which ultimately hinders access to justice. By placing the responsibility on States to guarantee access to justice and reduce legal and practical barriers, the article addresses the dual challenge faced by victims: the initial violation perpetrated by corporations and the structural obstacles that complicate the pursuit of remedies. In this sense, it acknowledges that the lack of accessible and effective mechanisms perpetuates the marginalization of victims, making the pursuit of justice and effective reparations unfeasible. The text incorporates elements such as the reversal of the burden of proof and the need for monitoring the implementation of reparations.

However, there are gaps that may limit the practical effectiveness of these provisions. A critical point is the emphasis on non-judicial mechanisms, mentioned as a viable alternative in Article 7.2. While such mechanisms can be useful in some contexts, the power disparity between victims and transnational corporations is often so significant that extrajudicial solutions tend to

favor corporations. Without guarantees that non-judicial mechanisms are binding and adequately supervised, there is a risk of undermining the treaty's purpose.

It is essential to ensure that these mechanisms complement rather than substitute judicial pathways, respecting victims' rights to choose the forum that best suits their needs. Furthermore, the inclusion of provisions allowing third parties to file claims on behalf of victims, with their consent or justified absence thereof, strengthens the system's accessibility and effectiveness. Such adjustments are crucial to prevent administrative implementation from being captured by corporate or bureaucratic interests, weakening human rights protection.

Another significant but absent aspect is the centrality of victims' suffering, a principle already consolidated in human rights debates and recognized by international courts, such as the Inter-American Court of Human Rights. The lack of this focus weakens the treaty's narrative of victim protection and prioritization, which should aim primarily to restore their rights. Additionally, the omission of measures to address corporate capture of state structures is a notable flaw, as this phenomenon is often one of the greatest barriers to accountability and reparations.

The article also falls short in addressing critical issues related to extraterritoriality, such as *forum necessitatis*, which would allow victims to bring claims in alternative jurisdictions when judgment in their home country is not possible. Moreover, the removal of the prohibition of *forum non conveniens,* included in Draft 2, represents a missed opportunity. Although briefly addressed in the previous document, it was an important measure, as national courts often dismiss cases based on this doctrine.

Lastly, the use of the term "human rights abuse" in Article 7.3.b is problematic, as it shifts the focus away from the real impact on victims, who suffer violations of their rights, not mere "abuses." This term, besides being imprecise, may downplay the gravity of the acts and confuse legal analysis, particularly in contexts involving both private and state actors, where the State itself could be the violator. The choice of "violation" would be more appropriate, as it reflects the nature of the act as a clear and direct transgression of human rights, in line with terminology already established in International Law. Such a change would enhance the precision and seriousness of the text, avoiding interpretations that might dilute the accountability of the actors involved.

In summary, Article 7 progresses by proposing a detailed structure of state responsibilities and measures to facilitate victims' access to justice, but it fails to address fundamental elements to ensure the effectiveness and centrality of victims in this process. In this context, Brazil's Bill No. 572/2022, in its Article 13, introduces a significant innovation by mandating the creation of a Fund by violating companies to finance the reparation process. This measure addresses historical failures observed in similar contexts, where resource management for reparations was under the direct control of companies or affiliated entities. While the international treaty attempts to establish mechanisms to ensure access to remedies, it does not specifically address the allocation of financial resources, potentially creating similar vulnerabilities. The Brazilian proposal, by centralizing resources in a fund exclusively for victims, offers a concrete and more reliable solution to overcome practical inefficiencies and conflicts of interest often associated with company-managed reparations.

> Article 13. In case of obligation of reparation, **the violating company must create a Fund intended to cover the basic needs of the affected persons, groups, and communities until the completion of the process of full reparation of damages.**

An interesting aspect introduced by the Brazilian Bill, specifically in its Article 16, is its detailed approach to corporate accountability, establishing criteria that ensure the proportionality of sanctions by considering factors such as the severity of the violation, the impact on victims, the direct and indirect effects, and the economic capacity of the violating company. Although it does not define rigid metrics, the article provides guidelines that facilitate judicial decision-making.

> Article 16. **In regards to compensation and business liability, the following will be taken into account for sanctions**: I - the degree of the violation; II - the advantage possibly taken by business companies that perpetrated the violation, either directly or indirectly; III - the degree of injury or the level of danger; IV - the effects generated either directly or indirectly by the violation; V - the economic power of companies that committed the violations or its danger of occurrence, either directly or indirectly. VI - the number of people affected in their rights or exposed to danger; Sole paragraph: **no legal or conventional time limit for arbitration will be applied to claims for damage reparation resulting from Human Rights violations.**

Besides, among the dispositions from Article 11 of Bill 572/22, there is an important safeguard to the right of full compensation which is the annulment of agreements celebrated

between States and companies in order to invade responsibility and obligations to fully compensate affected communities.

> Article 11. The rights of affected persons, groups, and communities apropos of Human Rights violations or potential violations are as follow:
> IX – **Any judicial agreement carried out by the Justice system or a State body that exempts business companies from their obligations to fully compensate persons and communities affected by their operations must be annulled.**

This provision is also a response to what we experienced in the case of Mariana, in Brazil, with the collapse of the Fudão dam and the contamination of the Rio Doce basin. As a major social and environmental crime-disaster, the number of people and ecosystems affected was enormous, spanning several Brazilian states. However, there was the option of a negotiated solution to implement the reparation plan, which did not include the participation of those affected and generated a new re-victimization.

While reparations have yet to be fully implemented, the companies involved in this crime-disaster have recently been found not guilty in the criminal proceedings they were answering for the violations committed. This raises concerns about the system of corporate impunity in which we live and the need for international cooperation, as we see reflected in the cases in the United Kingdom and the Netherlands which are still ongoing.

6.2 Article 8. Legal Liability

Article 8 aims to structure the legal responsibilities of both natural and legal persons, as stated in the first section. This generic approach risks diluting the treaty's primary objective: establishing clear and binding mechanisms for holding transnational corporations accountable. document, it was an important measure, as national courts often dismiss cases based on this doctrine.

Including natural persons within the same scope as legal entities overlooks the distinct nature of their responsibilities. Human conduct involves an element of voluntariness and awareness that does not apply to the collective and structured decisions of legal entities. This indistinct treatment could lead to legal confusion, hinder the application of sanctions, and divert

attention from the essential focus: the need to specifically hold transnational corporations accountable, considering their complex structures and global value chains.

Moreover, the repetition of this approach since Draft Zero indicates a persistent difficulty in adequately differentiating individual human actions from corporate actions. Transnational corporations, as organized entities, operate within hierarchies, internal policies, and collective decision-making processes that require a specific form of accountability capable of targeting the entity as a whole without exclusively relying on penalties for the individuals involved.

The treaty could make progress by adopting a more refined approach, ensuring that the responsibilities attributed to natural persons take into account their position and degree of control within the organization, while treating the responsibilities of transnational corporations independently, with mechanisms tailored to their corporate structures. This approach would prevent the treaty from weakening its core impact by dispersing its application among subjects of such distinct nature.

The issue of penalties and sanctions also warrants critical analysis. Although the article requires sanctions to be "effective, proportionate, and dissuasive" (Article 8.6), it fails to establish minimum criteria or mandatory parameters to ensure that these sanctions genuinely deter corporate misconduct. In contexts where the economic power of corporations surpasses the regulatory capacity of the State, there is a risk of ineffective or symbolic sanctions that fail to drive structural change in corporate behavior.

Another problematic aspect is the allocation of the burden of proof, which, although it acknowledges the disparities between corporations and victims in terms of access to information, remains dependent on the States' ability to implement such measures effectively. In countries with weak judicial systems or those captured by corporate interests, these guarantees may be insufficient to balance the power between parties, leaving victims at a disadvantage once again.

It would be beneficial for the article to include provisions addressing the specific needs and vulnerabilities of victims. Factors such as gender, race, sexual orientation, and substantial life changes are crucial to determining the real impact of human rights violations and ensuring that reparations are adequate and fair. Including this perspective in the article would enhance its

practical relevance, ensuring that reparations not only address the harm caused but also contribute to overcoming the structural inequalities that often exacerbate the suffering of victims.

Additionally, the article's approach to establishing legal responsibility does not yet fully address the reality of corporate capture of States or the challenges of holding transnational corporations accountable when they operate through subsidiaries and third parties across multiple jurisdictions. The absence of clear and mandatory regulation directly linking parent companies to their global value chains perpetuates a system where violations are diluted across fragmented legal structures.

On this matter, the Brazilian Bill introduces significant innovations by directly addressing joint and several liability, encompassing not only parent companies but also subsidiaries, subcontractors, branches, and financial institutions, both national and international, regardless of formal contractual ties (Article 5, §1).

Furthermore, §2 of Article 5 establishes that initiatives implemented by companies to prevent and identify human rights violations do not exempt them from civil, administrative, or criminal liability if such violations occur. This provision prevents internal protocols or compliance programs from being used as shields against legal sanctions. Unlike compensatory approaches that often prioritize damage mitigation over effective accountability, this rule ensures that companies remain fully responsible for their actions or omissions, regardless of preventive measures adopted. It is an essential mechanism to combat impunity and reinforce corporate commitment to practices genuinely aligned with human rights, going beyond corporate social responsibility initiatives, which are often merely symbolic.

Article 5. Companies domiciled or economically active in the Brazilian territory are liable for Human Rights violations in the course of their business operation, caused either directly or indirectly.
§ 1 There is **joint and several liability** which comprehends the extension of the business production chain, including the parent company, the controlled companies, as well as every public and private investor. It also comprises subcontractors, branches, subsidiaries, economic and financial institutions operating overseas, and all national economic and financial entities that invest in or benefit from any given stage of the production process, regardless of any formal contractual relationship. § 2 Companies

must implement protocols for control, prevention, and compensation that are capable of identifying and preventing Human Rights violations in the course of their operation. Said **protocols will not abridge the company"s civil,administrative, and criminal liability in case of violation.**

Article15. The Union, the States, the Federal District, and the Municipalities, acting within the scope of their competencies, will implement the **necessary instruments for an extrajudicial complaint or will apply the effective and appropriate existing instruments, at the administrative level, to file a complaint on Human Rights violations by business companies**

In addition, Article 18 of the Brazilian Bill introduces concrete accountability mechanisms, such as the suspension of operations, forfeiture of assets and illicitly obtained property, prohibition of contracts with public agencies, and, in cases of malicious intent, even the transfer of corporate control and compulsory dissolution of the company. These measures are more effective in addressing severe violations, whereas the treaty merely requires sanctions to be "proportionate and dissuasive," without providing clear criteria or specific tools to ensure their enforcement.

Another noteworthy aspect of the Brazilian Bill is its approach to the production chain and the solidarity of economic actors, which includes investors and financial institutions benefiting from activities related to violations. This provision broadens the scope of accountability and ensures that no part of the production chain can evade sanctions, a provision we believe the treaty should include within its legal liability framework.

Article 18. The **instruments for accountability**. Others may apply: I - prohibition or suspension of operations of companies that may be related to violations until they implement the necessary damage compensation and preventive measures; II - loss of assets, rights, and monetary values possibly obtained in activities related to violations; III – prohibition of receiving incentives and celebrating contracts with public agencies until submitting to the provisions of this Law; IV - payment of a fine; V - In case of proved malicious intent, the loss of control over company shares and assets will guarantee the source of funds. The corporate control may be transferred to workers, and the entity itself may have compulsory dissolution; VI – Judicial rulings will be prejudicial to cases of recurrence regarding Human Rights violations. VII- Piercing of the corporate veil, as provided in the Consumer Defence Code;

6.3 Article 9. Jurisdiction

The new wording of Article 9 introduces substantial changes that impact the scope and effectiveness of the treaty concerning the accountability of transnational corporations and the protection of victims. The previous version established broader criteria for jurisdiction, allowing the courts of a State Party to assume competence based on multiple factors, such as the location of the violation, the contribution to the violation, or the domicile of those responsible. Now, jurisdiction is limited to cases where the harm occurred, in whole or in part, within the territory or jurisdiction of the State Party, or when those responsible are domiciled or have a significant connection with that territory.

A positive change was the inclusion of provision 9.1(d), which allows claims to be filed in the domicile of the victim, considering the difficulties faced by affected individuals in traveling from one location to another.

As previously addressed, the wording of draft 2 prohibited courts from dismissing cases based on the doctrine of *forum non conveniens*, a crucial measure to prevent States from evading their responsibilities under the guise of procedural convenience. The explicit removal of this prohibition represents a significant setback in the Treaty's text. The Brazilian Bill, on the other hand, includes such a provision with the following text:

> Artigo 9º. XX - In case of Human Rights violations committed by Brazilian companies operating in other countries, the company must facilitate the victims' access to Brazilian jurisdiction. The institute "**forum non conveniens"** is hereby **prohibited.**

Moreover, it is essential to include *forum necessitatis*, where courts are obligated to accept jurisdiction when no other effective jurisdiction is available, ensuring a minimum level of protection for victims in contexts where no appropriate forum exists. The absence of such safeguards in the new version creates additional barriers for victims, who are often forced to navigate ineffective legal systems or those captured by corporate interests.

In Article 9.2, which establishes the criteria for determining a company's domicile, the absence of a crucial element is evident: the location of the transnational corporation's (TNC) assets. Including this criterion would be a strategic and efficient measure to enhance the reach and effectiveness of the provision, especially in cases involving the enforcement of judicial decisions.

By considering the location of assets as an additional criterion for domicile, it would become possible to facilitate the enforcement of judgments and expedite the resolution of cases. This is because identifying assets within the jurisdiction where the case is being pursued eliminates potential obstacles related to the international transfer of resources or the need for the recognition of judgments in other countries. In cases of human rights violations involving TNCs, where promptness is crucial to ensuring justice for victims, such an amendment would strengthen the States' ability to guarantee effective reparations.

Furthermore, such an inclusion would align with the principles of justice and procedural efficiency, preventing the fragmentation of judicial efforts and promoting greater legal security for victims. Therefore, expanding the provision to encompass the location of assets as a domicile criterion would not only reinforce the treaty's applicability but also consolidate the accountability of TNCs in contexts of human rights violations.

The determination of jurisdiction in cases of human rights violations by companies should be guided by a clear commitment to access to justice, considering not only legal and jurisprudential aspects but also a broader set of factors involving the jurisdiction's context. This includes the robustness of local institutions, the capacity to conduct impartial and effective investigations, the protection of victims throughout the process, and the feasibility of enforcing judgments effectively.

These factors are essential to ensure that victims' rights are fully respected and that justice is delivered promptly and concretely. However, it is evident that these conditions are not present in their fullest potential in all jurisdictions. Many legal systems may lack the necessary infrastructure, judicial independence, or technical resources to adequately address the complexities of human rights violations by companies, particularly those of a transnational nature.

In light of this, the inclusion of extraterritoriality in the Treaty is not only a necessary measure but also an indispensable adjustment to align with human rights protection standards. Extraterritoriality allows States to exercise jurisdiction beyond their borders when local conditions are insufficient to ensure justice. This approach ensures that victims are not doubly penalized—first by the violation of their rights and then by the inability of the local system to provide them with a viable path to reparation.

Therefore, the Treaty must ensure that the rules of extraterritoriality are clear, accessible, and fully aligned with human rights principles. This includes defining objective criteria for the exercise of extraterritorial jurisdiction and establishing mechanisms of international cooperation that prioritize victim protection and corporate accountability. In this way, the Treaty can serve as an effective instrument to overcome jurisdictional gaps and strengthen global access to justice.

7. PROCEDURES AND IMPLEMENTATION

7.1 Article 10. Statute of limitations

Regarding Article 10, the inclusion of the term “most serious crimes”, as previously analyzed by Homa, is problematic due to its lack of clear definition and the risk of subjective interpretations that could weaken the effective application of the Treaty (Homa, 2021, p. 21). Crimes considered "most serious" vary significantly depending on the legal and cultural contexts of different States, creating potential disputes over which violations fall into this category. This ambiguity could be exploited by States or companies to evade accountability for serious violations that, although not classified as "most serious," still cause significant harm to victims and affected communities.

Moreover, by limiting the scope solely to "most serious crimes," the article creates room for interpretations that might exclude human rights violations that, while not fitting this vague definition, have lasting and devastating impacts, such as large-scale labor exploitation or environmental degradation. This weakens the Treaty’s scope, creating a protection gap for situations that should be addressed by an international instrument designed to ensure justice and reparations for victims. The Treaty could be strengthened by incorporating provisions inspired by Article 16 of the Brazilian Bill that addresses statutes of limitations:

Article 16. In regards to compensation and business liability, the following will be taken into account for sanctions Sole paragraph: no legal or conventional time limit for arbitration will be applied to claims for damage reparation resulting from Human Rights violations.

7.2 Article 11. Applicable Law

The most significant change in Article 11 was the inclusion of the term "produced effects" in Art. 11.2(b), expanding the possibilities for choosing the applicable law. Previously, the text was limited to the location where the acts or omissions occurred, restricting victims to legal frameworks directly tied to the territory where the violations took place. With this change, it is now possible to also consider the effects generated by the violations in other States, even if the actions that caused these damages occurred in a different jurisdiction.

The issue of the victims' place of domicile, previously mentioned, remains a critical point, particularly because the major problems identified in the earlier version of the document remain unresolved. The Treaty should function as an instrument to ensure the primacy of Human Rights over investment treaties. To this end, in cases of conflicts between laws or jurisdictions, it is essential that the applicable norm be the one that best guarantees the protection of Human Rights and most effectively serves the interests of the victims. This approach not only reinforces the Treaty’s central objective of prioritizing reparation and justice but also prevents economic or commercial interests from taking precedence over the dignity and human rights of those affected.

On this point, the Brazilian Bill takes a step forward by establishing that, in cases of conflict between human rights regulations, the one most favorable to the affected person must prevail. Furthermore, the Framework Law not only guides the interpretation of norms in favor of the victim but also mandates the adoption of the legislation that provides greater protection for human rights, regardless of where the damage occurred:

Article 6. VI. In the event of a conflict between human rights regulations, the one most favourable to the affected person must prevail; VII. In the event of multiple and heterogeneous interpretations regarding the same Human Rights regulation, the one most favourable to the affected person must prevail;
XVIII- Considering all regulations enforced in the various locations where transnational business companies operate, they must abide by the regulation that guarantees greater Human Rights protection, independently of the place where damage has happened;

7.3 Article 12. Mutual Legal Assistance

Article 12 addresses collaboration between States through mutual legal assistance and international cooperation, enabling the exchange of relevant information and ensuring that judicial decisions are effective across borders. While the previous version of the article in Draft 2 presented a comprehensive and detailed approach to mutual legal assistance, the new text simplifies its content, making it more concise but at the same time less robust in terms of practical and operational provisions.

The previous version encompassed a broader range of mechanisms and obligations, including information sharing, assistance in obtaining evidence, execution of searches and seizures, and measures to identify or recover assets linked to human rights violations. This comprehensiveness was reflected in the inclusion of specific provisions for the protection of victims and witnesses and the creation of mechanisms for joint investigations between States Parties. Additionally, the older version detailed forms of assistance, such as the exchange of judicial documents, cooperation in asset freezing, and the establishment of communication channels to facilitate the fulfillment of obligations.

The new version, while maintaining the principle of mutual assistance, shifts focus away from practical measures and instead emphasizes general obligations related to cooperation in civil, criminal, and administrative proceedings as outlined in Articles 6 to 8. This simplification is evident, for instance, in the absence of explicit provisions for the protection of victims and witnesses or the recovery of assets. Moreover, the new text highlights the need for bilateral or multilateral agreements to facilitate the implementation of measures but does not specify the

actions that States Parties must take in the absence of such agreements, leaving gaps in situations involving jurisdictions with limited cooperation.

The main feature introduced by the new text is the emphasis on the exchange of experiences and best practices among States Parties, aimed at strengthening relevant state agencies. The removal of the term "order public" is also a positive development; however, although the concept is no longer explicitly mentioned, the reliance on compliance with bilateral treaties or arrangements and the focus on communication and information exchange between national agencies still leaves room for interpretations based on domestic interests.

The new text reinforces the case-by-case nature of cooperation, as provided in Article 12.3, which weakens the treaty's commitment to the uniform and mandatory application of measures. This flexibility, in practice, reduces the effectiveness of the provisions, allowing States to condition or even deny mutual legal assistance in cases involving human rights violations by transnational corporations (TNCs). This voluntary model facilitates the perpetuation of TNC impunity, particularly in contexts of fragile legal systems or those captured by corporate interests. Thus, the article diverges from the central purpose of the Treaty, which is to establish binding and mandatory rules to regulate the relationship between Human Rights and Businesses. Provisions based on voluntariness or that allow loopholes perpetuating the impunity of Transnational Corporations (TNCs) should be rejected, as they undermine the effectiveness of the instrument.

7.4 Article 13. International Cooperation

Article 13 of the Treaty emphasizes international cooperation but fails to expand its obligations beyond States, neglecting to include businesses as accountable actors in the process of reparation and prevention of human rights violations. This omission reinforces the possibility of businesses evading responsibility, as they remain excluded as direct agents in fulfilling the established obligations. The inclusion of raising awareness about the rights of victims and the obligations of States is a positive measure, but it lacks concrete details on how this initiative will be effectively implemented, which limits its practical impact.

Furthermore, the planning of an International Fund for Victims, as provided in Article 13.2(e), represents significant progress in improving access to reparation. However, by placing the financial responsibility for the Fund solely on States, the treaty diverges from its central objective of holding transnational corporations accountable. This approach disregards the direct role of businesses in causing harm and allows them to evade financial and reparative obligations, shifting the burden onto States.

Bill No. 572/2022 aligns itself with the provisions of the Treaty, emphasizing the need for a binding international legal instrument. By preemptively incorporating into Brazilian domestic law elements still under negotiation at the international level, the bill demonstrates a pioneering commitment to the protection and promotion of human rights. This stance is reinforced by Article 10, which highlights the obligation to comply with commitments undertaken in international human rights treaties, consolidating a robust legal framework aligned with global demands for accountability and reparation of violations.

> Article 10. The Union, the States, the Federal District, and the Municipalities, within the limits of their powers, must comply with their obligations in this matter in accordance with all other treaties and agreements of mutual legal assistance or international legal cooperation, and even in their absence, the aforementioned entities must promote the facilitation as committed as possible to domestic and international law.

Article 13 of the Treaty and Article 20 of the Brazilian Framework Law share the goal of promoting international cooperation and protecting human rights but differ in scope and detail. While the Treaty focuses on collaboration between States, the Framework Law goes further by including concrete mechanisms, such as monitoring supply chains, active participation of civil society, and direct accountability of companies.

> Article 20. It is incumbent upon the State to create instruments for civil society participation, and include other interested parties in the elaboration, implementation, and execution of public policies related to this Law, considering: I - holding conferences, promoting public hearings, and fostering the selforganisation of those affected, amongst other instruments; II - Policies for the recovery of territories

affected by business activities, and the monitoring of repairs funded by business companies. III - Promoting experience exchanges between current judicial and nonjudicial instruments and tackling the present hindrances in their actions; IV - Concrete legislative proposals to improve participation, accessibility, predictability, equity, and transparency in the legislation regulating the relationship between economic players and Human Rights subjects. Particular consideration must be taken to the improvement of inspection instruments and the strengthening of their integrity, in addition to the broadening of the access to information available for those who have been affected; V – Concrete proposals for monitoring and intervening in production chains in violation of Human Rights, and those with greater potential for violations;VI – Preparation of research studies or their financial promotion in collaboration with civil society, academic institutions, and other interested parties. Improvement of public policies and legislations, implementation of plans to protect and promote respect for Human Rights in the corporate world; VII - Preparation of research studies or their financial promotion on the social impacts of business operations, contemplating gender inequalities, sexual diversity, race, and the class system. It is imperative to guarantee the protection of indigenous peoples, quilombolas, and traditional communities. The compliance with Human Rights provisions, in all their implications, must be conditional on the implementation of new enterprises; IX – Preparation of research studies or their financial promotion on the environmental impacts of business activities, including the work environment. The compliance with Human Rights provisions, in all their implications, must be conditional on the implementation of new enterprises;

7.5 Article 14. Consistency with International Law

Article 14 of the Legally Binding Treaty reinforces the preservation of state sovereignty, limiting the scope of its extraterritorial application and restricting international cooperation on issues related to human rights violations by transnational corporations (TNCs). While the article emphasizes the need to respect the sovereign equality and territorial integrity of States, as highlighted in Article 14.1, such an approach weakens the central purpose of the Treaty, which is to combat the impunity of TNCs. Subjecting international cooperation to the exclusive jurisdiction of States with potentially fragile or insufficient domestic frameworks creates significant barriers for victims.

Moreover, Article 14.2 expressly excludes the possibility of extraterritorial jurisdiction, representing a setback in victims' access to justice. This exclusion contradicts the Treaty's stated aim of facilitating international cooperation and exacerbates a dangerous gap: in many cases,

TNCs operate in countries where legal systems do not provide adequate protection for human rights, thereby reinforcing the perpetuation of impunity.

However, Article 14.5 introduces a positive element by establishing that bilateral and multilateral treaties or agreements, such as those on trade and investment, must not undermine the obligations of States under the Treaty. While this provision is relevant, it remains limited to the relationship between States and does not directly extend to corporations. To achieve greater effectiveness, the Treaty should include mechanisms that subordinate public-private agreements and corporate contracts to the principle of the supremacy of human rights.

Finally, the article remains focused on the primacy of States as responsible for respecting, protecting, and promoting human rights, without establishing direct and specific obligations for companies. This model perpetuates a structural gap in the Treaty, which should assign clear and binding responsibilities to private entities as well, recognizing that human rights violations often stem directly from their operations.

7.6 Article 15. Institutional Arrangements

The establishment of a Committee is once again present in the document, but its current configuration reveals significant limitations in addressing the systemic impunity enjoyed by transnational corporations, even with existing international and national regulations (Homa, 2021, p. 24). To ensure the effectiveness of this body, it is crucial to establish strict criteria for the selection of its members, guaranteeing independence and excluding any ties to the corporate sector that could compromise its impartiality.

Additionally, the inclusion of an Optional Protocol allowing for the submission of both individual and collective complaints is essential to strengthen access to justice for victims of human rights violations. Furthermore, initiating a debate on the creation of an International Court, even gradually, would be fundamental to ensure the effective accountability of companies for their actions. This debate was risen by The Chair when proposing mechanisms for promotion, implementation and monitoring in the document “Elements for the Draft legally binding

instrument on transnational corporations and other business enterprises with respect to Human Rights"[6] proposed in 2017 in order to advance with the instrument negotiations .

> ***9. Mechanisms for promotion, implementation and monitoring***
> *Throughout the process of Res. 26/9, there has been much emphasis on the need to have adequate mechanisms at the national and international levels. Therefore, this binding instrument should take into consideration the role of national institutions in charge of the promotion and protection of human rights, as well as international judicial and/or non-judicial mechanisms, including treaty bodies and their experience from monitoring other international instruments on human rights. Moreover, the existence of national and international mechanisms can strengthen the joint efforts of stakeholders to ensure prompt and effective accountability and redress as well as achieve good practices and tackle the challenges in the framework of the instrument. Some elements that could be considered are:*
>
> *b) International level:*
>
> *- b.1. Judicial mechanisms - State Parties may decide that international judicial mechanisms should be established, for instance,* ***an International Court on Transnational Corporations and Human Rights****. - State Parties may also decide to strengthen existing international judicial mechanisms and propose, for instance, special chambers on Transnational Corporations and Human Rights in existing international or regional Courts.*

Without these measures, the Committee risks operating in a limited capacity, leaving significant gaps in holding large corporations accountable for human rights violations.

8. CONCLUSION

The analysis of the Treaty revealed significant advances as well as considerable limitations. Although adjustments and occasional incorporations of suggestions from States and civil society were made, the text remains insufficient in several crucial aspects for combating corporate impunity and effectively protecting human rights. The emphasis on state sovereignty, the absence of direct accountability mechanisms for companies, and the fragility of certain

[6] Elements for the Draft legally binding instrument on transnational corporations and other business enterprises with respect to Human Rights Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 (29/09/2017)", available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

components, such as the Committee and reporting protocols, undermine its capacity to become a truly transformative instrument in addressing corporate impunity.

One of the main problems with the text is the lack of a robust approach to ensuring the centrality of victims' rights. The omission of references to the principle of victims' suffering and full access to reparations is particularly concerning, as it weakens the treaty's primary objective of ensuring justice and comprehensive reparation. Furthermore, the document fails to assert the supremacy of human rights over trade and investment agreements, a fundamental aspect to prevent economic interests from taking precedence over the rights of affected individuals.

The issue of corporate capture also remains inadequately addressed in the text. In a context of economic, legal, and political inequalities between States and transnational corporations, the treaty should include clear mechanisms to prevent private interests from influencing public policies and compromising the protection of human rights. Similarly, the continued use of the term "all business" in the treaty's scope dilutes its effectiveness by failing to recognize the specific role of transnational corporations as key actors in human rights violations.

Another critical issue is the absence of enforcement mechanisms. The proposed Committee remains a weak body, lacking coercive powers, clear criteria to prevent conflicts of interest in its composition, and, more alarmingly, no provision for receiving complaints of violations. The absence of proposals for the creation of an International Court or binding mechanisms to ensure the treaty's implementation represents a significant gap that undermines its practical effectiveness.

On the other hand, the Brazilian Framework Law, while aligning with many principles of the treaty, offers a more concrete and operational approach. It places human rights at the center of corporate regulation, creating more direct mechanisms for accountability and civil society participation. The law also addresses corporate responsibility more explicitly, incorporating elements of monitoring and controlling supply chains, which represents a considerable improvement compared to the treaty.

Thus, the Framework Law serves as a practical example of how the treaty's guidelines can be translated into more effective national legislation, going beyond the delegation of

responsibilities to States and providing clear mechanisms to hold companies accountable. The relationship between the treaty and the Framework Law highlights the importance of effective integration between international norms and national legislation to ensure that transnational corporations are truly held accountable for their actions and that victims have access to reparation.

As part of Brazilian civil society, Homa has been actively engaged for over a decade in consolidating a Brazilian agenda on Business and Human Rights that prioritizes the supremacy of human rights and the centrality of victims' suffering. Homa has participated in key processes to advance proposals addressing this issue, representing the demands of affected communities. Examples include Resolution No. 5 of March 12, 2020, issued by Brazil's National Human Rights Council, Bill No. 572 of 2022, currently under negotiation in the Brazilian Congress, and the proposed National Policy on Business and Human Rights, overseen by Brazil's Ministry of Human Rights and Citizenship, to which Homa and other civil society organizations have contributed.

During this negotiation round, considering that several States base their proposals on precedents or shared language found in due diligence laws or national action plans, we chose to present as an alternative a proposal rooted in strong legitimacy and shaped by the historical demands of affected communities. This proposal aims to combat corporate impunity and establish better mechanisms for preventing human rights violations committed by businesses, particularly transnational corporations, as well as ensuring proper reparation, including extraterritorial mechanisms. Ultimately, it is the national and international dialogue, following the principle of peoples' self-determination, that must prevail. This is our contribution.