



FIAN International written contribution to the zero draft of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights

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Introduction:

FIAN International, as a member of the Treaty Alliance, the Global Campaign to Dismantle Corporate Power and End Impunity and of the ESCR-Net, as well as secretariat of the Global Network on the Right to Food and Nutrition and the Consortium on Extraterritorial Obligations, would like to express its support to this intergovernmental process of negotiations of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises (OBEs) with respect to human rights (the “zero draft” or the “draft treaty”). The 4th session of the Open-Ended Intergovernmental Working Group (IGWG) was supported once again by a strong mobilization of civil society and groups representing affected communities, which is a testimony to the political and historical importance of this process. We also welcome the presence and participation of a significant number of States from all regions that engaged constructively on the provisions of the draft treaty.

The draft treaty and its Optional Protocol mark an important milestone in accomplishing the mandate of resolution 26/09 of 2013. During the 4th session of the IGWG, FIAN highlighted elements of the zero draft that should be maintained in the next draft¹. FIAN supports an effective instrument that will improve access to justice for affected individuals and communities and strengthen TNC and OBE legal accountability for human rights abuses and

¹ See Fourth Session of the Open ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Oral Statements, FIAN. <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session4/Pages/Session4.aspx>

crimes. To realize these objectives and improve the zero draft, the following comments identify additional elements that should be included in the first draft.

General Remarks

As we discuss in detail below, the zero draft omits various important provisions and takes a minimalist approach that increases the risk of further revisions that will weaken the treaty. Additionally, in various articles (e.g., arts. 8, 9, and 10) the draft treaty includes phrases that limit the effectiveness of the provisions, such as “in accordance with national/domestic law”. Such phrases undermine the entire purpose of an international legally binding instrument, and run contrary to the Vienna Convention’s prescription that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”² Instead, a new clause should clarify the duty for States to incorporate the treaty under their laws or to adapt their national laws to the provisions of the treaty.

Although civil society has demanded that the treaty include a strong gender approach, the zero draft does not include meaningful provisions to address gender aspects of corporate accountability. As part of the Feminists for a Binding Treaty, FIAN joins this group’s insistence on the needs for the treaty to include gender-responsive access to justice mechanisms and remedies, as well as gender impact assessments.³ The draft treaty must also recognize the attacks suffered by human rights defenders who speak out against abuses and crimes by corporations. We therefore urge States to include specific provisions for the protection of human rights defenders who face corporate human rights abuses.

In the few references to vulnerable groups, peasants and other rural communities are missing, despite the recent adoption by the Human Rights Council of the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas. We therefore recommend that peasants and other rural communities be explicitly mentioned in the provisions dealing with groups that may be particularly vulnerable to corporate human rights abuses.

² Art. 27, Vienna Convention on the Law of Treaties.

³ See Feminists for a Binding Treaty written contribution for the 3rd session of the IGWG (2017), available at: <https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-treaty-October-2017.pdf>; Feminists for a Binding Treaty, *Women’s Rights Beyond the Business Case: Ensuring Corporate Accountability* (2018), available at: <https://wilpf.org/wp-content/uploads/2018/09/Fem4BT-2018-Womens-rights-beyond-the-business-case.pdf>.

In addition, the draft treaty should clearly emphasize that States are the main duty bearers under the treaty and that they are obliged to implement the obligations for companies set in the treaty, including through legislation, the immediate application of the standards set in the binding instrument by their judicial power, and other measures. This is because States, as opposed to TNCs, have the democratic and legitimate authority from the people to respect, protect and fulfill human rights. TNCs have obligations, which derive from States' human rights obligations, some of them included in other international agreements (as for example in environmental or labor law). Giving TNCs human rights obligations would put them on equal footing with States, threatening democratic governance and facilitating corporate capture. Therefore, it is critical that states' human rights obligations and TNC and OBEs internationally recognized obligations are clearly differentiated in the first draft, including by setting them out in separate articles. States' obligation to enforce TNC and OBE obligations should also be explicit.

Specific remarks

In preparing this submission, FIAN consulted with its national sections, partner civil society organizations, and lawyers specialized in private law, public law, and labor law.⁴ This section analyses and provides text proposals or key elements for each of the articles of the draft treaty for the consideration of the IGWG and Chairperson-Rapporteur in preparing a revised version of the draft treaty for negotiations during the 5th session of the IGWG.

Article I: Preamble

Article I of the draft treaty is devoted to the preamble. A treaty's preamble provides a broad vision and interpretation of the text, incorporating the general guidelines (including principles, legislation or custom) on which the treaty will be based. The inclusion of the principles in the preamble helps to structure the content of the articles and contributes to their proper teleological interpretation (in accordance with the object and purpose of the treaty).⁵ It is for

⁴ This included a workshop, facilitated by FIAN's permanent representative in Geneva, at the Max Plank Institute for Comparative Constitutional Law and International Public Law in September 2018.

⁵ Art. 31, Vienna Convention on the Law of Treaties.

this reason that the preamble should not be part of the articles, but should appear separately from the main body, to ensure that the preamble's guidance applies to the entire agreement.

We support the treaty's reference to the universality, indivisibility, interdependence, and interrelation of human rights, the right to equal and effective access to justice and remedies, and the principle that all businesses must respect human rights, "irrespective of their size, sector, property and structure".

However, together with the principle of non-discrimination (paragraph 7), the principles of human dignity, effectiveness of human rights, participation and inclusion, transparency and information, precaution and accountability of the State should be included. The *in dubio pro persona* principle should also be included. In addition, the text needs to be strengthened so that the preamble clarifies the meaning of jurisdiction and recognizes the primacy of human rights, advances in human rights jurisprudence with respect to corporations and human rights, the differentiated impacts on women and girls as a result of structural gender inequality, human rights defenders, and conflict areas. Finally, the principle of intergenerational justice should be highlighted.

a) Primacy of human rights

While international trade and investment laws have developed through binding agreements that incorporate sanctions and create legal certainty, there are large gaps in the protection of the rights of victims of transnational business activities. The asymmetry between trade and investment agreements and international human rights law is one of the main elements obstructing access to justice and effective remedies for people whose rights are abused by TNCs and OBEs. It also undermines States' ability to comply with their human rights obligations, given the substantial financial liability they face within the framework of arbitration (e.g. Investor-State Dispute Settlement).⁶ The treaty cannot ignore the current context in which the corporate sector is gaining, without any democratic legitimacy, increasing access to

⁶ See, e.g., *Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (Aug. 20, 2007) (acknowledging water as a public interest but declining to address human rights arguments, and awarding nearly four hundred million dollars to the investor); *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award (Apr. 6, 2016) (awarding the company over one billion dollars, based entirely on the expected profits of a gold mine that had not yet started to produce, and notwithstanding the risks to the environment and the Indigenous Peoples in the Imataca National Forest Reserve).

governance and decision-making processes, such as through platforms of interest groups (e.g., multistakeholder initiatives) and public-private partnerships.

The treaty's preamble should contribute to correcting these asymmetries in international law by establishing the primacy of human rights over commercial and investment rights as one of the fundamental principles of the text. In this regard, along with articles 55 and 56 of the Charter of the United Nations (paragraph 5), the preamble should include a reference to the primacy of human rights, pursuant to article 103 of the same Charter, which establishes that "in case of conflict between the obligations assumed by the Members of the United Nations under this Charter and their obligations under any other international agreement, the obligations imposed by this Charter shall prevail".

Proposal to include primacy of human rights:

Reaffirming the primacy of human rights obligations and obligations under the Charter of the United Nations over trade and investment agreements.

b) Adequate terminology in relation to jurisdiction

The preamble correctly recalls that the obligations of States regarding human rights apply both within their territory and extraterritorially, where the respective State exercises its jurisdiction or control (paragraph 4). However, the wording of paragraph 4 can be improved, since the phrase "within its territory or otherwise under its jurisdiction" does not fully encapsulate the broad meaning of the term jurisdiction, which already covers areas within and outside a State's territory.⁷ Instead, the treaty should use the language established by the Human Rights mechanisms of the United Nations, which have dissociated the term territory from the term jurisdiction using the formula "companies domiciled in its territory and/or under its jurisdiction".⁸

⁷ See, for example, *Loizidou v. Turkey*, European Court of Human Rights, trial (Application No. 15.318 / 89), of December 18, 1996, holding that the jurisdiction "is not limited to the national territory of the States," para. 52; Advisory Opinion OC-23/17, Inter-American Court of Human Rights, of November 15, 2017, requested by the Republic of Colombia, reaffirming that the obligations regarding the human rights of States are not limited to their interior and explicitly stating that "a person is subject to the jurisdiction of the State does not mean that he is in its territory", para. 74.

⁸ Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway (2011), U.N. Doc. CERD/C/NOR/CO/19-20, para. 17; Concluding observations on the sixth periodic report of Germany, CCPR, 106th Session (2012), U.N. Doc. CCPR/C/DEU/CO/6, para. 16; General

Proposal for paragraph 4:

Emphasizing that the obligations and primary responsibility to respect, protect and fulfill human rights and fundamental freedoms fall on the State, and that States must protect against the abuse of human rights by third parties, including commercial enterprises, within its territory and/or under its jurisdiction or control, and guarantee respect for and application of international human rights law.

c) Recognition of developments in human rights and transnational corporations and other commercial enterprises beyond the guiding principles on business and human rights

Under no circumstances should the treaty represent a setback in the progress made in business regulation within the framework of human rights. It must therefore be built on existing standards. Given the abundant authoritative jurisprudence, it is difficult to include all references to, for example, the Human Rights Treaty Bodies that have clarified the obligations of States in the area of human rights with respect to the activities of transnational corporations. However, the preamble should recognize the advances of the jurisprudence established by the Treaty Bodies and the Special Procedures.⁹

observation no. 16 on the obligations of the State in relation to the impact of the business sector on the rights of the child (2013), CRC, U.N. Doc. CRC/C/GC/16, paras. 43-44; General observation no. 24 on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), CESCR, U.N. Doc. E/C.12/GC/24, para. 28.

⁹ General Comment no. 3 the nature of the obligations of the States Parties (art. 2, paragraph 1 of the Covenant) (1991), CESCR, U.N. Doc. E/1991/23, para. 14; General Comment no. 12 the right to adequate food (art. 11) (1999), CESCR, U.N. Doc. E/C.12/1999/5, para. 27; General Comment no. 14 the right to the highest possible level of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000), CESCR, U.N. Doc. E/C.12/2000/4, para. 35; General Comment no. 15 the right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002), CESCR, U.N. Doc. E/C.12/2002/11; General Comment no. 22 on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2016), CESCR, U.N. Doc. E/C.12/GC/22; General Comment no. 23 on the right to just and favorable conditions of work (Article 7 of the International Covenant on Economic, Social and Cultural Rights) (2016), CESCR, U.N. Doc. E/C.12/GC/23; Concluding observations on the fourth periodic report of Austria, CESCR, 51st Session (2013), U.N. Doc. E/C.12/AUT/CO/4; Concluding observations on the fifth periodic report of Norway, CESCR, 51st Session (2013), U.N. Doc. E/C.12/NOR/CO/5; Concluding observations on the sixth periodic report of Canada, CESCR, 57th Session (2016), U.N. Doc. E/C.12/CAN/CO/6; Concluding observations on the fourth periodic report of France, CESCR, 58th Session (2016), U.N. Doc. E/C.12/FRA/CO/4; Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, CESCR, 58th Session (2016), U.N. Doc. E/C.12/GBR/CO/6; Concluding observations on the sixth periodic report

Proposal to include the recognition of regulatory advances:

Recognizing the progress in defining human rights obligations and transnational corporations established by the Human Rights Treaty Bodies and the Special Procedures, as well as those of the regional systems and national laws.

d) Principle of *in dubio pro persona*

Because the objective of the treaty is to put an end to the barriers to access to justice and to the effective remedy by individuals or communities that have suffered damages in the context of transnational economic activities, it is necessary to include the *principle in dubio pro persona*.

This principle will ensure that the rights of the people and affected communities will always take precedence in the implementation of the legally binding instrument or the standards developed at the national level. This principle is similar to the principles *in dubio pro reo* or *in dubio pro operario* that exist under criminal law and labor law, which are applied to the impacts of transnational corporations and other commercial enterprises.

of Sweden, CESCR, 58th Session (2016), U.N. Doc. E/C.12/SWE/CO/6; Concluding observations on the sixth periodic report of Germany, CESCR, 64th Session (2018), U.N. Doc. E/C.12/DEU/CO/6; Declaration on the obligations of States parties in relation to the business sector and economic, social and cultural rights (2011), CESCR, U.N. Doc. E/C.12/2011/1; Declaration on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E/C.12/2016/1; General Recommendation no. 34 on the rights of rural women (2016), CEDAW, U.N. Doc. CEDAW/C/GC/34, para. 62 (c); Concluding observations on the combined fourth and fifth periodic reports of India, CEDAW, 58th Session (2014), U.N. Doc. CEDAW/C/IND/CO/4-5; Concluding observations on the eighth and ninth combined periodic reports of Sweden, CEDAW, 63rd Session (2016), U.N. Doc. CEDAW/C/SWE/CO/8-9; General Comment no. 16 on the obligations of the State in relation to the impact of the business sector on the rights of the child (2013), CRC, U.N. Doc. CRC/C/GC/16; Concluding Observations of the Committee, Canada, CERD, 17th Session (2007), U.N. Doc. CERD/C/CAN/CO/18; Report of the Special Rapporteur on the right to food, Olivier De Schutter, Large-scale acquisitions or leases of land: set of minimum principles and measures to take human rights into account (2009), U.N. Doc. A/HRC/13/33/Add.2, para. 5; Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Guiding Principles on the Impact Assessments of Trade and Investment Agreements on Human Rights (2011), A/HRC/19/59/Add.5; Final draft of the Guiding Principles on extreme poverty and human rights, presented by the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona (2012), U.N. Doc. A/HRC/21/39, paras. 90 (b), 99, 102; Report of the Independent Expert on the promotion of a democratic and equitable international order (2016), U.N. Doc. A/HRC/33/40; Principles of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2013), ETOs Consortium; De Schutter, O., Eide, A., Khalfa, A., Orellana, M., Salomon, M and Seiderman, I, (2012); Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Human Rights Quarterly, 34, 1084-1196.

Proposal to include the principle of *in dubio pro persona*:

Guaranteeing that if there is any doubt about the implementation of the Convention, people and communities that have been or are affected or threatened by the activities of transnational corporations and other commercial companies will enjoy the widest protection of their rights.

e) Gender Perspective

The draft treaty does not broadly address gender discrimination. Women, especially those from rural areas, are disproportionately affected by the activities of transnational corporations and other companies and face greater barriers and risks when trying to access justice. The treaty must integrate an intersectional feminist perspective that addresses the specific impact of corporate abuse on women and historically marginalized communities, guaranteeing the protection of their rights, access to justice and reparation. Therefore, the preamble should include an overarching gender perspective that treats women as subjects of rights rather than victimizing them.

Proposal to include the gender perspective:

Recognizing the need to prevent the disproportionate adverse effects of human rights violations on women, and the distinct obstacles they face in access to justice and effective remedy.

f) Human rights defenders

Although the Special Rapporteur has pointed out the fundamental role that human rights defenders (HRDs) play in promoting respect for human rights by companies, the zero draft includes no specific references to HRDs.¹⁰

¹⁰ See, e.g., UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144 (8 March 1999); UN General Assembly Resolution 68/181, Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders, UN Doc. A/RES/68/181 (18 December 2013); Human Rights Council 40th Session Resolution 40, Recognizing the contribution of environmental human rights defenders to the

Proposal to include human rights defenders:

Recognizing the right of individuals and groups defending human rights to promote respect for and awareness of human rights at the national and international levels, especially in the context of the transnational activities of companies.

g) Conflict areas

With one exception (art. 15.4), the draft treaty also fails to address conflict-affected areas. Given the particular vulnerability to human rights abuses that people face in these areas, the obligations of States regarding commercial activities in conflict zones should be included in the preamble so as to guide interpretation throughout the main articles of the treaty.

Proposal to include conflict areas:

Highlighting the relevance of the implementation of States' human rights obligations in areas affected by conflicts.

Article 2: Purpose

As with the preamble, it is important that article 2 strongly reflects the overarching purpose of the binding instrument. This article must be coherent with other articles that help to shape the treaty, such as Articles 3, 4 and 5. In particular, the language related to the obligations of States, economic activities of a transnational nature, and extraterritorial obligations should be strengthened.

enjoyment of human rights, environmental protection and sustainable development, UN Doc. A/HRC/40/L.22/Rev.1 (20 March 2019); Human Rights Committee General Comment 36, paras. 23 & 53, UN Doc. CCPR/C/GC/36 (30 Oct. 2018); Committee on the Elimination of All Forms of Discrimination against Women General recommendation No. 35, paras. 12, 14, & 30(d), UN Doc. CEDAW/C/GC/35 (26 July 2017); CEDAW General recommendation No. 33 (2015) paras. 9 & 15(i); Report of the Special Rapporteur on the situation of human rights defenders, Michel Forst, UN Doc. A/73/215 (23 July 2018).

Article 2 incorporates the language commonly used in the field of human rights to “respect, protect and fulfill”.¹¹ The text also includes the duty to promote human rights. However, the duty to fulfill encompasses the duties to promote, facilitate, and provide. Through its reference to “business activities of a transnational nature,” the treaty not only recognizes the existence of a legal vacuum in international law with respect to this type of activity but also addresses it. This article also acknowledges the imminent need to prevent human rights violations and abuses and to guarantee access to justice and effective remedies for victims of such violations and abuses.

In the context of deregulated globalization, where transnational corporations have developed new business models and strategies, expanding their activities across multiple countries using complex business structures and networks, the obligations of States to respect, protect and fulfill human rights cannot be limited to their territory. While Article 2.1.c deals with international cooperation with a view to fulfilling the obligations of States regarding human rights, more explicit language could highlight the extraterritorial nature of those obligations. It is precisely in this context of deregulation that the universal protection of human rights requires international cooperation and joint actions by States and, therefore, the obligation of States to ensure that transnational corporations and other commercial enterprises do not damage human rights abroad.¹²

¹¹ See for example: Committee on Economic, Social and Cultural Rights. Report on the twentieth and twenty-second sessions 1999, E/2000/22. E/C.12/1999/11, para. 53 Annex IX; General Comment no. 12 the right to adequate food (art.11) (1999), CESCR, U.N. Doc. E/C.12/1999/5, paras. 14-20; General Comment no. 13 the right to education (art.13) (1999), CESCR, U.N. Doc. E/C.12/1999/10, paras. 46-48; General Comment no. 14 the right to the highest possible level of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights) (2000), CESCR, U.N. Doc. E/C.12/2000/4; General Comment no. 15 the right to water (articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) (2002), CESCR, U.N. Doc. E/C.12/2002/11; United Nations Office of the High Commissioner for Human Rights. Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2005). Paras 47-48; African Commission on Human and Peoples' Rights. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria. No. 155/96 (2001), 60th ordinary session, Fifteenth Annual Activity report of the African Commission on Human and Peoples' Rights, paras. 44-48; Olivier De Schutter (2010). International Human Rights Law. Cambridge University Press: Cambridge, pp. 242-253; Manfred Nowak (2005); UN Covenant on Civil and Political Rights - CCPR Commentary; Kehl am Rhein, N.P. Engel Verlag. 2nd Edition, pp. 37-41.

¹² Principles 8 and 9 of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights; Concluding observations of the Committee on the Elimination of Racial Discrimination: Norway (2011), U.N. Doc. CERD/C/NOR/CO/19-20, para. 17; Concluding observations on the sixth periodic report of Germany, CCPR, 106th Session (2012), U.N. Doc. CCPR/C/DEU/CO/6, para. 16; General observation no. 16 on the obligations of the State in relation to the impact of the business sector on the rights of the child (2013), CRC, U.N. Doc. CRC/C/GC/16,

Proposal for article 2.1.c:

Promote international cooperation with a view to fulfilling the obligations of States, including extraterritorial ones, under international human rights law.

Article 3: Scope of application

Covered activities

To address the legal gaps that currently exist and reinforcing the purpose of the treaty, article 3 broadly covers “any business activity of a transnational character.” During the 4th IGWG, some States demanded that the scope of application be restricted to the type of company (transnational corporations and other commercial enterprises). However, because human rights abuses are the same regardless of the type of company and to avoid discrimination between different companies, the treaty’s focus on the type of activity is the best approach. In addition, with this broad formula, the entire value chain can be covered.

Covered rights

In business activities of a transnational nature, the entire spectrum of human rights may be violated, and not only those rights considered “fundamental”. In line with paragraph I of the preamble, which recognizes the universality, indivisibility, interdependence, and interrelation of human rights, Article 3.2 guarantees coverage of “all international human rights and those rights recognized under national legislation”. The treaty also refers environmental rights and state obligations to ensure those rights (arts. 4.1, 8.1.b, 9.2.e). As the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment has explained, human rights and the environment are interdependent, and “a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of a vast range of human rights, including the rights to life, health, food, water and development,”¹³ and more than 150 States have already established legal recognition of the

paras. 43-44; General observation no. 24 on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), CESCR, U.N. Doc. E/C.12/GC/24, para. 28.

¹³ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) U.N. Doc. A/73/188, para. 2.

right to a healthy environment, with corresponding obligations.¹⁴ The treaty should therefore explicitly include environmental rights within its scope. Labor rights, which are similarly a fundamental part of human rights, should also be included.

The legally binding instrument should clearly indicate that those States that have not ratified all human rights instruments will remain subject to the scope of the protected rights defined in the treaty, which includes “Internationally recognized human rights” (Article 3.2). This derives from the fact that the Universal Declaration of Human Rights (UDHR), which compiles all recognized human rights, is considered to be part of customary international law and, therefore, binding on all States. The UDHR complies with both criteria that define the state of customary international law, which are proof of an identifiable state practice and recognition by States that such practice is mandatory (*opinio juris*). Since its adoption about 70 years ago, the UDHR has been invoked, reaffirmed and even integrated widely in international, regional and national documents and decisions. Therefore, the legally binding instrument must reiterate the customary law of the rights enshrined in the UDHR and make clear that, although States have not ratified all international human rights instruments, States remain obliged to respect, protect and fulfill all rights humans.

Proposal for article 3.2:

- a. This Convention covers all human rights recognized in the international law of treaties and international customary law. It also covers the rights recognized in regional human rights systems for the respective states.*
- b. Due to the interconnection with human rights, this treaty also covers environmental and labor rights.*

Article 4: Definitions

The treaty should not contain gaps that would allow perpetrators of abuses and violations of human rights to go unpunished. The treaty’s definition of victim achieves this objective by including individual and collective action, establishing a relationship between the environment and human rights, underlining the importance of both actions and omissions in transnational

¹⁴ Id. para. 36.

economic activities, and including people who have directly assisted victims at risk of danger or in preventing their victimization (Article 4.1).¹⁵ However, the reference “according to domestic legislation” should be eliminated, as discussed in our general comments.

Additionally, Article 4.1 should recognize collective groups, such as indigenous peoples and local rural communities.¹⁶ The word “substantial” when referring to the deterioration of human rights should be eliminated, because it creates ambiguity as to what amounts a human rights abuse or violation should be stopped or punished. This term is also in tension with the definitions provided by Articles 3.2 and the references to “physical or mental injury, mental suffering, economic loss” in Article 4.1. In addition, to make the text more consistent and to recognize the violations and historical and structural violations suffered by certain groups, an additional paragraph should refer to the groups whose human rights may be potentially affected that are detailed in the in other articles (e.g., arts. 9.2.g and 15.5). Peasants and other rural communities should be added to the explicitly mentioned groups, given the recent adoption by the Human Rights Council of the United Nations Declaration on the Rights of Peasants and Other Persons Working in Rural Areas. However, the special attention placed on these groups must not be to the detriment of the rights of other unmentioned individuals or groups.

Proposal for article 4.1:

*“Victims” shall mean persons who individually or collectively alleged to have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights, through acts or omissions in the context of business activities of a transnational character. **Victims include, but are not limited to, women, children, persons with disabilities, indigenous peoples, migrants, refugees, internal displaced persons, and peasants and other rural communities.**”*

In addition, the reference in article 4.2 to “any economic activity for profit” leaves a gap in protection for victims of abuses and violations that result from activities by entities that are

¹⁵ Basic principles and guidelines on the right of victims of gross violations of international human rights standards and serious violations of international humanitarian rights to file appeals and obtain reparations, Resolution adopted by the General Assembly on December 16, 2005, U.S. Doc. A/RES/60/147, paras. 8-9.

¹⁶ Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

structured as a non-profit but contribute financially to entities that are operating on a for-profit basis. For example, there are documented cases of land grabbing involving transnational corporations and other commercial enterprises that demonstrate the key financial role played by philanthropic foundations or pension funds.¹⁷ In these cases, although the foundations do not themselves have a profit motive, their specific actions generate a basis for the profit of other legal entities that are part of the business group.

One way to close this potential gap is to include a reference to the entire value chain, thereby making it explicit that the treaty applies to all companies that directly or indirectly work, collaborate or facilitate an economic activity of a transnational nature, whether from its financing, control, execution, intermediation, or through any other mechanism.

The current formulation of the article also appears to exclude the responsibility of state-owned companies. However, the evidence shows that a number of cases of human rights violations occur in the context of their economic activities of public or mixed companies, often linked to the mining or extractive sector.¹⁸ Therefore, state enterprises, international financial institutions, and philanthropic organizations involved in transnational commercial activities should be explicitly included.

Throughout the four sessions of the IGWG, States and civil society have discussed whether to distinguish between victims of activities of transnational corporations and victims of activities of national companies. To accommodate the various viewpoints on this question, even if focusing on activities of transnational character, the treaty should include a clause that

¹⁷ FIAN and al., *The Human and Environmental Cost of Land Business. The Case of Matopiba, Brazil, 2018*, Heidelberg: FIAN International, available at: https://www.fian.org/fileadmin/media/publications_2018/Reports_and_guidelines/The_Human_and_Environmental_Cost_of_Land_Business-The_case_of_MATOPIBA_240818.pdf; Rede Social de Justiça e Direitos Humanos, GRAIN, Inter Pares, and Solidarity Sweden - Latin America (November 2015). *Foreign Pension Funds and Land grabbing in Brazil*. Available at: <https://www.grain.org/article/entries/5336-foreign-pension-funds-and-land-grabbing-in-brazil>; Borrás, J., Seufert, P. et al., (2016) *Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union*, EP/EXPO/B/DROI/2015/02; FIAN International (2012), *The Human Rights of Tree plantings in Niassa province, Mozambique*. Available at: http://www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf.

¹⁸ See the written contribution coordinated by FIAN International for the Universal Periodic Review of China: *China's Extraterritorial Obligations vis-a-vis the Rights to Adequate Food and Nutrition of Fishers in the Philippines, Indonesia, and Sri Lanka*, 31st Session of the UPR, November 2018.

affirms that the obligations under the treaty also apply to commercial activities that have a national character, when this is feasible.¹⁹

Proposal for article 4.2.a:

Transnational economic activities are those productive or commercial activities carried out by a natural or legal person that are carried out or have an impact on the territory of more than one state. Transnational economic activities can be carried out by the various legal entities that constitute an economic group or a transnational company, including, among others, parent companies, subsidiaries, franchises, or others active along the value chain, state companies, international financial institutions, or philanthropic organizations linked to the respective value chain.

Proposal to include a non-discrimination clause (4.2.b.):

To avoid any discrimination in the protection and access to justice and ensure the most effective protection of human rights, the obligations contracted under this Convention shall apply to the activities of national companies, when applicable due to the nature of the activity or abuse.

Article 5: Jurisdiction

The tendency of States to limit the scope of their human rights obligations to within their borders leads to gaps in the protection of human rights, especially in the context of transnational commercial activities. This happens because while States' authorities tend to confine the scope of regulation, adjudication and enforcement of judicial decisions to their territories, enterprises carrying out transnational activities obtain their commercial advantage

¹⁹ There are similar provisions in international human rights law, such as in the United Nations Declaration on Indigenous Peoples, which states that "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. Art. 46.2. Available at: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

and profit from their action as part of economic groups or networks active in a number of territories and jurisdictions.

Through their operation in these networks, corporations can potentially impair or nullify the realization of human rights in the places where they directly or indirectly operate. This can happen individually, where corporations are domiciled or have substantial activities, or in a joint manner, through the operation of their subsidiaries and other commercial partners.

The simplistic territorial approach in human rights regulation, adjudication and enforcement of judicial decisions does not correspond to the complex structure and operations of today's corporations. The ability of corporations to operate outside the reach of governments has increased their power, encouraged their impunity and exposed people, especially the most marginalized and disadvantaged, to serious vulnerability to harm caused by corporations. The adverse impact to people is especially egregious in light of the fact that states have embraced extraterritorial obligations in other contexts, such as when they provide protections to corporations through international investment and commercial law.

The lack of coherence between the complex demands of human rights law and the minimalist way it is implemented in practice, as well as the legal asymmetries between human rights law and investment and trade law, create barriers in access to justice for those affected by corporate abuse and crime and contribute to a status quo of non-compliance with the provisions of the UN Charter, in which states have committed to creating an enabling environment for the realization of human rights.²⁰

Although the concept of jurisdiction has been expanded beyond the territorial borders of states in diverse legal sources,²¹ the extraterritorial application of human rights obligations is still contested by a number of states. The negotiation of the binding instrument creates a

²⁰ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, arts. 13(b) & 55(c).

²¹ See, e.g., International Court of Justice, *SS Lotus (Fr. v. Turk.)*, 1927 PCIJ (Ser. A) No. 10 (Sept. 7), available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm (05.12.2018); Committee on Economic, Social and Cultural Rights adopted its General Comment No. 24, paragraph 28; Art. 5(1) (b) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted in 1984 and entered into force on June 28, 1987; Art. 7(1)(a) of the International Convention for the Suppression of the Financing of Terrorism (Signed on December 9, 1999 and entered into force on April 10, 2002); *United States v. Aluminum Co of America*, 148 F.2d 416, 443 (2d Cir. 1945) (stating "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that have consequences within its borders which the state reprehends"). See generally, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights," *Human Rights Quarterly*, vol. 34 (2012), pp. 1084-1171.

special opportunity for States to jointly adapt existing international human rights regulations to the mandate of the UN Charter concerning the protection of human rights. This can be achieved through the clarification of the concept of jurisdiction for the application of human rights obligations, including its regulatory, adjudicative and enforcement dimensions. The negotiation of the binding instrument also creates the opportunity for states to clarify the extent of these extraterritorial obligations in the context of harm caused through the value or commercial chain.

A clarification of the scope of jurisdiction beyond territorial borders would not threaten the sovereign equality or respect for the territorial integrity of States.²² Nor should it serve as an excuse to diminish the human rights obligations of other States – namely those where the harm occurs (host States).²³

The zero draft makes an effort to expand the concept of judicial jurisdiction, including the principle of active nationality, according to which a state can exercise jurisdiction over its own nationals (including legal persons) acting outside of its territory.²⁴ It also allocates judicial competence to the courts where the harm occurred or to the court where the company is domiciled. Through the definition of the criteria to define where a company is domiciled, the zero draft expands the judicial jurisdiction to all the states in which diverse companies part of the value chain are active.

FIAN welcomes these provisions but substantial modifications are necessary in order to ensure coherence with international law. To be aligned with the commonly agreed definition

²² See Maastricht Principle 10; UN Charter, Article 2; General Comment no. 24 para. 26.

²³ This has been reaffirmed by the Committee on Economic, Social and Cultural Rights in its recent General Comment No. 24, recommending that states “take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction (whether they were incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory), without infringing the sovereignty or diminishing the obligations of the host States under the Covenant”. The legally binding instrument should therefore clearly reaffirm such international law principles preamble as well as include a provision in this article which could read: “Nothing in this article should be understood as to authorize State to act in violation of the UN Charter”.

²⁴ Kamminga, Meno T, in Wolfrum, Rüdiger, [Ed.] *Enciclopedia Max Plank de Derecho Internacional Publico*, Artículo actualizado en Noviembre 2012, Oxford Public International Law (<http://opil.oup.com>). (c) Oxford University Press, 2015. This principle is applied also in Art. 5 (1) (b) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (adopted in 1984 and entered into force on June 28, 1987; Art. 7(1)(a) of the Convention International for the Suppression of the Financing of Terrorism (Signed on December 9, 1999 and entered into force on April 10, 2002).

of jurisdiction under international law,²⁵ which goes beyond the adjudicative jurisdiction, a new article entitled jurisdiction should be included.

Proposal for a new article on jurisdiction:

The jurisdiction of states concerning the transnational activities of TNCs and other Business enterprises include regulatory jurisdiction, adjudicative jurisdiction and enforcement jurisdiction, which can be exercised:

In situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law;

In situations over which State acts or omissions bring about foreseeable effects on the enjoyment of human rights, whether within or outside its territory; or

In situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to ensure human rights extraterritorially, in accordance with international law.

Furthermore, the article should clarify that:

States have the obligation to incorporate within their legal regimes the obligation that all bodies of the State to respect human rights within their territory and/or jurisdiction in their regulations, contracts, procurements and similar conducts which relate to transnational business activities.

²⁵ International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, para. 109; International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* 19 December 2005 at paras. 178-180 and 216-217; Human Rights Committee, *General Comment 31, the Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, (Eightieth session, 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10; Communication no. 52/1979, *Lopez Burgos v. Uruguay*, final views of 29 July 1981 (thirteenth session) (UN Doc. CCPR/C/13/D/52/1979), para. 12.2; Committee against Torture, *General Comment 2: Implementation of article 2 by State Parties*, (2008) UN Doc. CAT/C/GC/2, para 16; International Court of Justice, *Provisional Measures in the case of Georgia v. Russia*, no. 35/2008, order of 15 October 2008, para. 109; Inter-American Commission on Human Rights, *Victor Saldano v. Argentina*, Report No. 38/99, 11 March 1999, para. 19; *Case of Al-Skeini and Others v. the United Kingdom* (Appl. No. 5572/107), judgment of 7 July 2011 (citations omitted), para. 133; *Ilascu and Others v. Moldova and Russia* (Appl. No. 48787/99), judgment of 8 July 2004, para. 317; Inter-American Commission of Human Rights, *Victor Saldano v. Argentina*, Report No. 38/99 11 March 1999, para. 17; Human Rights Committee, *Munaf v. Romania*, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, para 14.2.

States have the obligation to protect human rights from transnational business activities through regulation, monitoring, investigation and remedy for the victims of human rights abuses by legal or natural persons.

Such an article would be more coherent with the aim of the binding instrument, as well as with the text of art. 10.6 regarding the duty of care and with the obligations of cooperation, addressed in article 12.

In general, the provisions included under this article should be better reflected throughout the draft legally binding instrument, in particular in articles 8, 9 and 10.

Furthermore, the zero draft uses diverse formulations when referring to the applicability of specific states' obligations with respect to companies. We recommend the use of language that supports a broad interpretation, such as "under their jurisdiction".

Renaming and complementing article 5

Secondly, the draft should maintain the elements currently included in article 5, changing the title to "judicial competence", to avoid confusion between mere adjudicative jurisdiction and the complete definition of jurisdiction, which, as proposed above, would be clarified in a new article.

To eliminate gaps in access to justice, additional elements should be included in this provision on judicial competence, including:

A provision on the applicability of universal jurisdiction for crimes against peremptory norms of international law and crimes against humanity linked to the transnational activities of TNCs and other businesses. Such a provision would ensure coherence between articles 5 and 10.11

- a) **A prohibition of the application of the doctrine of the *forum non conveniens*.**²⁶ The doctrine of *forum non conveniens* has been applied by some legal systems whereby the courts of a State refuse to take jurisdiction arguing that other courts would represent a more adequate forum. This doctrine has

²⁶

See

[https://ca.practicallaw.thomsonreuters.com/0-621-0110?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://ca.practicallaw.thomsonreuters.com/0-621-0110?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

proven to impede access to justice in many cases.²⁷ The proposed provision should seek to limit the use of such a legal doctrine for cases of transnational corporate human rights abuses.

- b) **A provision establishing the application of *forum necessitatis*** for cases brought to courts by victims of the transnational activities of TNCs and OBEs, as proposed by certain States and participants during the 4th IGWG. This principle already exists in various regional and domestic legal systems, to avoid a denial of justice and guarantee the right to access justice.²⁸ The inclusion of *forum necessitatis* would ensure that a State would have jurisdiction in cases where States closely connected to the case have denied jurisdiction.

Article 6: Statute of limitations

FIAN supports the inclusion of an article limiting the use of statutes of limitations, as these can present an additional barrier that affected individuals and communities face when accessing justice. Statutes of limitations should not apply to violations or abuses of international human rights that constitute crimes under international law. With regard to other types of violations that do not constitute international crimes, the draft provision should be strengthened by removing the vague standard of “unduly restrictive” and by changing “adequate period of time” to “a reasonable period of time.”

Article 7: Applicable law

²⁷ See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (affirming dismissal of Ecuadorian plaintiffs claims based on *forum non conveniens*). See also, *Recherches Internationales Quebec (Petitioner) v. Cambior Inc. L. (Respondent) and Home Insurance and Golder Associes LTEE (C0-Respondents)*, Quebec Superior Court, August 14, 1998.

²⁸ See, e.g., Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, art. 49; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, art. 50; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, art. 129; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 146; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 21 March 2006, A/RES/60/147, paras. 4-5. See generally, Nwapi, Chilenye. “Jurisdiction by necessity and the regulation of the transnational corporate actor.” *Utrecht J. Int'l & Eur. L* 30 (2014): 24. <https://www.utrechtjournal.org/articles/10.5334/ujiel.cb/>

Article 7 on applicable law provides affected individuals and communities with the choice of the best applicable law, between that of the State where the harm occurred or where the TNC is domiciled. This is an innovative article in international law and therefore very much welcomed as it is aimed at strengthening the protection of victims by providing them with the choice of the most favorable law to them. Such a provision is furthermore very much in line with the *pro persona principle* (see chapter on preamble) and with the ambition expressed by the Chairperson-Rapporteur and many States of developing a treaty that is truly centered on the interests of affected individuals and communities. It is important for this article to be read in conjunction with article 5 on jurisdiction and the provisions on *forum non conveniens* and *forum necessitates* (see chapter on article 5) which aim at avoiding a situation of systematic denial of justice for affected individuals and communities on jurisdictional grounds. We therefore support this article and call for it to remain unchanged in the next draft treaty.

Article 8: Rights of victims

We welcome the provisions addressing the procedural, financial, cultural, practical and many other types of barriers which people face when they try to access justice, such as the provision on legal assistance (8.5), the possibility for class actions (8.2), access to information (8.4) and financial and administrative support (8.6 and 8.7). We also welcome the creation of an International Fund for victims, which will support victims with legal and financial assistance. However, several provisions should be clarified or improved.

Article 8.2 –

Because of the inability of international arbitration and other non-judicial mechanisms related to international trade and investment to adequately address cases that address human rights concerns, the treaty should clarify the importance of domestic legal systems, adjudicating territorially and extraterritorially, in this regard.

Proposal for Art. 8.2, to add to existing text:

All cases involving human rights concerns must be brought to courts with human rights jurisdiction, notwithstanding other existing dispute settlement procedures

Article 8.4 – Access to information

A particular challenge that we have identified through our casework is the legal requirement for victims to prove the link between the damage caused and the conduct of the companies alleged to have caused the harm. This is especially difficult for those companies that are not directly operating where the affected communities live, but rather when those operating are their subsidiaries, sub-contractors or other linked companies. We therefore recommend that article 8.4 be modified to include stronger requirements for the disclosure of information that can facilitate legal procedures, especially when the crime has been committed by controlling companies not directly operating in the domicile of the victims. The provision should explicitly mention victims' right to access comprehensive information about the different companies forming the respective economic group or network, TNC or holding, and their legal relationships (e.g. land titles, contracts and other relevant documents) involved in the transnational business activities that have allegedly threatened or harmed their human rights. The treaty should additionally require that if such information is unavailable, the judges of domestic courts will apply a rebuttable presumption of control, whereby the court would presume sufficient links between the different companies involved unless the companies can prove to the contrary, effectively piercing the corporate veil.²⁹ Such a measure would ensure the principle of equality of arms in a situation where there is a considerable asymmetry of power between TNCs and affected individuals and communities seeking to access justice.

Proposal for Art. 8.4:

Victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, communications and other relevant documents. In the case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent company.

Articles 8.10 – 8.13: Human Rights Defenders

Although arts. 8.10 – 8.13 include important protections for victims and their representatives, families and witnesses, we are concerned about the absence of any references to 'human

²⁹ The European Court of Human Rights has identified this principle as part of the right to a fair trial. *Airey v Ireland* (App no 6289/73) [1981] ECHR 1). See also Amnesty International, *Injustice Incorporated*, (7 March 2014), p. 202 <https://www.amnesty.org/en/documents/POL30/001/2014/en/>.

rights defenders' throughout the entire draft treaty. As a specific constituency whose need for protection has been recognized in different international human rights instruments and resolutions of the Human Rights Council,³⁰ 'human rights defenders' should be explicitly included in the draft treaty.

New article proposed: Rights of Human Rights Defenders

States will adopt all measures to ensure the physical and psychological integrity of human rights defenders defending causes related to the transnational activities of enterprises, including preventive measures.

Human rights defenders have the right to request precautionary measures and all needed measures required for the protection of their integrity, that of their communities, organizations and families.

Human Rights defenders have the right to recourse mechanisms and remedies in cases of criminalization or attacks to their personal or physical integrity or that of their families or members of their organizations or communities, derived from their defense of human rights of potential or factual victims of abuses by business enterprises.

States shall ensure adequate criminal, civil and other sanctions to those legal or natural persons threatening or abusing of human rights defenders' rights.

Inclusion of precautionary measures

Victims face a critical challenge in avoiding additional and potentially irreparable harm whilst they seek protection for their human rights with their authorities or during the judicial processes. Article 8 should provide victims with a right to demand precautionary measures pending the outcome of a case. In this respect, the IGWG could take inspiration from the precautionary measures provided by the Inter-American Human Rights system, which can

³⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, 1998, General Assembly Resolution A/RES/53/144; Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights A/HRC/RES/31/32.

require States to “take immediate injunctive measures in serious and urgent cases, and whenever necessary [. . .] to prevent irreparable harm to persons”.³¹

Proposal for precautionary measures:

Victims shall have the right to request State parties to adopt precautionary measures relative to serious or urgent situations that present a risk of irreparable harm pending the resolution of a case.

Safeguards against non-judicial remedy mechanisms

Although quasi-judicial or non-judicial remedy mechanisms can in certain circumstances help to redress human rights abuses, they are rarely effective as they depend on the good will of the involved companies and happen in a context of power asymmetries.³² As our experience working with the OECD contact points and other research have demonstrated, non-judicial mechanisms can intimidate victims or impede access to judicial mechanisms if they are not properly structured in a transparent and independent manner, or if they include waivers prohibiting victims from initiating judicial proceedings.³³ Thus, such mechanisms should not be seen as a substitute for judicial remedies.³⁴ Article 8 should therefore provide safeguards to victims who decide to access non-judicial remedy mechanisms, in particular company-based grievance mechanisms.

Proposal for non-judicial mechanisms:

³¹ See Rules of Procedure of the Inter-American Commission on Human Rights, art. 25 (approved by the Commission at its 137th regular period of sessions, held from October 28 to November 13, 2009, and modified on September 2, 2011)

³² See e.g., Acacia mining case in Tanzania: <http://miningwatch.ca/news/2015/11/17/broken-bones-andbroken-promises-barrick-gold-fails-address-ongoing-violence>

³³ General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, CESCR (10 August 2017) U.N. Doc. E/C.12/GC/24, para. 39; Feeney, P., ‘Principles without Justice: The corporate takeover of human rights, Rights and Accountability in Development,’ 2016. Accessed at: http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf; Anton Pieper, Forced Evictions in Uganda: The Victims’ Experience in Using the OECD Guidelines for Multinational Enterprises to Demand Accountability, in Right to Food and Nutrition Watch, the Accountability, p. 88 Challenge, https://www.righttofoodandnutrition.org/files/Watch_2011_ENG.pdf

³⁴ General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, CESCR (10 August 2017) U.N. Doc. E/C.12/GC/24, para. 51.

States Parties shall adopt measures to ensure that non-judicial remedy mechanisms do not substitute nor hinder victims' access to judicial remedy mechanisms. States Parties shall adopt particular measures with regards to company-based grievance mechanisms, by prohibiting those that are conditional on victims renouncing from undertaking any judicial proceedings.

States shall provide judicial review and recourse for cases in which the outcome may have been influenced by fear, force or other forms of manipulation. In such cases, the competent judges may nullify the result of the grievance mechanism and proceed to the adjudication of the merits of the case.

Coherence with provisions under articles 5 and 10

To ensure coherence with articles 5 on jurisdiction and 10.6 on civil liability, additional provisions should be included under article 8. These additional provisions would represent the correlative rights of victims, which derive from provisions included in other articles.

Proposal to ensure coherence between articles 5 and 10:

Victims, independently of their nationality or place of domicile shall have the right to bring claims to the courts of State where the natural or legal person or association of natural or legal persons alleged to have committed the acts or omissions are domiciled. Victims shall additionally have the right to bring claims against and demand reparations against all persons with business activities as defined under 10.6.

This inclusion would enable to ensure that article 5 on jurisdiction and article 10.6 on civil liability is clearly reflected in article 8 on the rights of victims.

Article 9: Prevention

Often, the damages caused by TNCs and OBEs are irreparable. For this reason, the prevention article must be one of the fundamental pillars of the treaty since it must provide specific measures and obligations to be taken by the State and imposed on the corporations to prevent these companies from causing human rights abuses. Given the ineffectiveness of voluntary systems to adequately support prevention, especially in cases in which profits could be diminished and therefore contrary to the fundamental purpose of the commercial legal entity,

the binding instrument has the opportunity to establish clear guidelines to advance the protection of human rights.

Most of the text is dedicated to due diligence. However, the treaty should include other measures to provide individuals and communities the necessary tools to protect their rights and prevent future violations. All prevention measures must take into account the principle of intergenerational justice.

Human rights due diligence (arts. 9.1, 9.2.a, 9.2.b, 9.2.c)

States must require transnational corporations and other business enterprises to carry out due diligence under their jurisdiction, within or beyond their borders (Article 9.1). As CESCR General Comment 24 points out, such due diligence must be carried out along the value chain.³⁵ However, thus far, voluntary due diligence mechanisms have proved ineffective in preventing violations and abuses of human rights, either because companies do not carry out due diligence or because these processes do not sufficiently analyze the impacts of economic activities, rendering the process into a check the box exercise.³⁶ For this reason, the treaty should clarify the specific elements of due diligence and strengthen its human rights approach.

First, due diligence is a business measure to prevent economic risks when carrying out an economic activity. However, in the context of this instrument, due diligence refers to the impacts that economic activity generates on individuals and communities. Therefore, to differentiate both processes, the treaty must explicitly refer to “human rights due diligence”. This nuance is important because it establishes a relationship between prevention and civil liability as included in Article 10.6, although legal responsibility must cover the entire spectrum of prevention measures. This point is addressed below in our discussion of Article 10.

³⁵ General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the context of business activities, CESCR (10 August 2017) U.N. Doc. E/C.12/GC/24, para. 16.

³⁶ The Special Procedures give a good account of this. An example of the absence of due diligence processes can be found in the visit to the United Kingdom of the Special Rapporteur on human rights obligations related to the environmentally sound management and disposal of hazardous substances and wastes (A/HRC/36/41/Add.1 para. 67) or his visit to Germany (A/HRC/33/41/Add.2 para. 136.a).

Second, to make human rights due diligence more effective, the treaty should specify how this process should be carried out, including the monitoring of human rights impacts (Article 9.2.a.), the identification and assess of human rights violations and abuses (Article 9.2.b.), and the prevention of human rights violations and abuses (Article 9.2.c.). Additionally, it is essential that the treaty require that corporations use disaggregated data on the impact on the environment, women, workers, and other groups that need special attention.

However, strengthening corporate human rights due diligence alone is insufficient to ensure prevention of human rights abuses. Therefore, the treaty should include provisions on the following: impact assessments, consultations and participation; access to information; precautionary measures; and prevention in the adoption of public policies.³⁷

Impact assessments (art. 9.2.e)

The current draft of the treaty links the notion of impact assessments to due diligence, suggesting that only corporations are required to conduct such an analysis (Article 9.2.e).³⁸ However, due to the asymmetry of power between transnational corporations and other business enterprises and the individuals and communities that are affected by economic activities, impact assessments by corporations are insufficient. Therefore, human rights impacts assessments should be carried out by the state authorities in charge of the implementation of human rights and environmental policies or by national human rights institutions under the Paris principles, which can help to ensure adequate information and independence.³⁹ Members of the public must have the right to challenge the adequacy of such

³⁷ Certainly there are elements (evaluation of impacts, consultations, access to information) included here that we find in the draft under the umbrella of due diligence (Article 9.2). However, we have decided to address them separately as we understand that they must transcend the limitations of the due diligence of human rights carried out by companies. In the same way, there are elements (precautionary measures, adoption of public policies) that we will develop that are not reflected in any article and suppose a lack in the prevention of violations and violations of human rights.

³⁸ See, for example, the recommendation that the States carry out the impact evaluations: Declaration on public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E / C.12 / 2016/1, para. 11.

³⁹ To see defective examples of impact evaluations and participation and consultation processes: El Hatillo Case, Colombia: Thought and Social Action, Terre des Hommes (2015). Emblematic Case of Environmental Rights of Children and Adolescents of El Hatillo Affected by Carboniferous Exploitation, p. 64 Available at: https://docs.wixstatic.com/ugd/b432f9_0217ac8132064249abc82f658b1fc316.pdf; See also the publications of: Group of Studies in Thematic Environments from Brazil which provide analysis of wrongful and flawed impact assessment studies or consultation processes. Available at: <http://conflitosambientaismg.lcc.ufmg.br/producao-academica/categoria/relatorios-e-pareceres-tecnicos/>.

assessment in administrative and judicial review. Similar to corporate human rights due diligence, this process cannot be a purely administrative exercise that in practice does not evaluate accurately the potential impacts on rights. In addition, impact assessments must be done prior (ex-ante) of any activity as well as periodically (ex-post) after the activities have begun, to guarantee that corrective measures can be taken in response to unexpected negative impacts.

The treaty should require that the assessments include an analysis of impacts to gender, the environment, and to labor rights.⁴⁰ In particular, as members of Feminists for the Binding Treaty, we reiterate the need for governments to consider and include the impacts operations have on gender roles and discrimination based on gender, women's health, including maternal and prenatal health, sexual and gender-based violence, division of labor according to gender at family and community levels, and access to and control of social and economic resources. In this evaluation, moreover, multiple or crossed forms of discrimination must be addressed.⁴¹

Proposal for article 9.2.e:

States shall, through their national human rights institutions or other State bodies with the needed autonomy and knowledge, conduct independent and transparent impact assessments on human, environmental, gender and labor rights. Impact assessments shall take place before and after the activities of transnational corporations and other business enterprises and those of their subsidiaries and entities under their direct or indirect control, paying special attention to the possible forms of multiple or crossed discrimination. Such assessments shall be subject to administrative and judicial review.

Consultations (art. 9.2.g)

Impact assessments should include public participation, ensuring the presence of potentially affected communities.⁴² Article 9.2.g promotes the elaboration of “meaningful consultations with groups whose human rights are potentially affected”. However, the text does not clarify

⁴⁰ General Recommendation No.35 on gender-based violence against women (2017), CEDAW, U.N. Doc. CEDAW / C / GC / 35, paras. 20.22.24.35.

⁴¹ See the written contribution of Feminists for the Binding Treaty for the 3rd Session of the Intergovernmental Working Group (2017), available at <https://wilpf.org/wp-content/uploads/2017/10/jt-statement-gender-into-the-treaty-October-2017.pdf>.

⁴² Principle 14 of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

what is meant by meaningful, which is a broad and vague term subject to different interpretations. In addition, although we support the treaty's inclusion of the groups that require special attention, peasants and other persons from rural communities should also be explicitly mentioned, especially in light of the recent adoption of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.⁴³

When transnational companies and their subsidiaries or affiliated companies carry out these consultations, there is a risk that they will be conducted insufficiently, such as by neglecting to include the entire population that could be affected or failing to take into account the specific needs of the communities to participate.⁴⁴ Therefore, the instrument must clarify that the consultation processes are a duty of the States and not of the transnational companies and other business enterprises. States should adopt all the necessary measures to guarantee that the corporations do not influence or carry out these consultations or instruct in any way to divide communities.

According to FIAN's casework, one of the biggest challenges communities face is the internal division that often results in response to the behavior of companies planning large projects. Such divisions affect the social fabric in an irreparable way and increase conflicts. Therefore, all needed support should be provided by the State to the communities to avoid such divisions and protect their human rights. Such measures could include provision to ensure that reliable information on the impacts of the project is available, accompaniment by national human rights institutions or similar institutions to avoid intimidation or misleading information, and consultation procedures that comply with the community's internal decision-making processes.

⁴³ With reference to the inclusion of women in article 9.2.g, we would like to reiterate the need for the text to address the gender perspective as a whole. Without the proposed measures for access to justice (Article 8) or for impact evaluations (Article 9), the aggregate discrimination suffered by the activities of transnational corporations and other commercial enterprises will not be seriously addressed.

⁴⁴ An example of this is the case of pine and eucalyptus plantations in the Niassa region. The consultations that were carried out excluded a large part of the communities, as well as women (although they are traditionally the ones in charge of caring for the land), and used concepts (exclusive rights over land and measurements in hectares, with which they are not familiar. For more information on the case see: FIAN, The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique, 2012, https://www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.Pdf

The treaty must also include the obligation of the States to obtain Free, Prior and Informed Consent (FPIC) of the communities before any investment project that may affect them.⁴⁵ As it is well known, FPIC is a manifestation of the right of indigenous peoples to determine for themselves their political, social, economic or cultural priorities.⁴⁶ In addition to securing indigenous peoples' rights, the treaty could also require meaningful participation of other local communities that might be affected by the activities and projects of transnational corporations and other business enterprises.⁴⁷ In this regard, we suggest to take into account the language agreed in the Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: “*engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes*”.⁴⁸

Such consultations must follow the protocols established by the communities themselves in such a way that guarantee that their decisions are respected.⁴⁹

Proposal for article 9.2.g:

1. Prior to the start of economic activities, public and participatory consultations shall be held by the competent state authorities and/or by the respective community with groups

⁴⁵ In accordance with the normative framework of Convention No. 169 of the International Labor Organization (1989) and the United Nations Declaration on the Rights of Indigenous Peoples (2007).

⁴⁶ Free, prior and informed consent: an approach based on human rights (2018), Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A / HRC / 39 / L.18 / Rev.1 para. 14.

⁴⁷ General observation no. 12: right of self-determination (1984), CCPR; General observation no. 20: Non-discrimination and economic, social and cultural rights (2009), CESCR, U.N. Doc. E / C.12 / GC / 20, para. 36; General comment no. 23 (50) to article 27 (1994), CCPR, U.N. Doc. CCPR / C / 21 / Rev.1 / Add.5, para. 7; General recommendation 23 on the rights of indigenous peoples (1997), CERD, U.N. Doc. A / 52/18, annex V, paras. 4 (d), 5; General observation no. 21: right of every person to participate in cultural life (2009), CESCR, U.N. Doc. E / C.12 / GC / 21, para. 55 (e).

⁴⁸ Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012), <http://www.fao.org/3/a-i2801e.pdf>, para. 3B.6.

⁴⁹ General Comment No. 34 on Article 19. Freedom of opinion and freedom of expression (2011), CCPR, U.N. Doc. CCPR / C / CG / 34, paras. 18-19; Principle 14 of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights; Report of the Independent Expert on the promotion of a democratic and equitable international order (2016), U.N. Doc. A/HRC/33/40; Report of the Special Rapporteur on the right of indigenous peoples (2016), U.N. Doc. A/HRC/33/42; Report of the Special Rapporteur on the human rights of migrants on the effects of bilateral and multilateral trade agreements on the human rights of migrants (2016), U.N. Doc. A/HRC/32/40.

whose human rights, environmental rights and / or labor rights may be affected by such activities.

- 2. The state has the obligation to guarantee the active, free, effective, meaningful and informed participation of the groups that may be affected to obtain their consent.*
- 3. Free, prior and informed consent must be obtained by the competent state authorities from the communities that face the greatest risk of violations and abuses of human rights, including, among others, women, girls and boys, people with disabilities, indigenous peoples, peasants and other rural communities, migrants, refugees and displaced persons.*
- 4. States shall adopt all needed measures to impede community division caused by consultations carried out in bad faith. These measures can include accompaniment by National Human Rights Institutions by request of the communities, provision of reliable information on the human rights and environmental impacts of the projects, guaranteeing free spaces for community debate, including for women; legal recourse in case the communities have motives to request the nullification or invalidity of the consultation.*

Access to information (art. 9.2.d and art. 9.2.g)

As we discussed under Article 8.4, access to information plays a fundamental role in ensuring access to justice of affected individuals and communities. Additionally, this tool could avoid possible future human rights violations and abuses. The right of access to information allows communities to know in advance the details of a project, including its potential impacts, as well as all the responsible legal and natural persons potentially accountable for those impacts. The text of the treaty must therefore recognize the right to access to information as an inalienable right to the right to freedom of expression and to include it within its prevention tools.⁵⁰

In addition, the treaty should expand the provisions regarding public and periodic reports of non-financial affairs included under human rights due diligence (Article 9.2.d). Although the treaty specifies that relevant information includes “at a minimum environmental and human rights matters, including policies, risks, outcomes and indicators”, the article does not specify which documents individuals and communities have a right to access. In addition, the treaty

⁵⁰ International Covenant on Civil and Political Rights (1976), para. 19

does not require disclosure for financial matters, severely limiting the right of access to information.

Proposal for article 9.2.d:

Reporting publicly and periodically on human, environmental, gender and labor rights issues, including policies, risks, results and indicators, which concern transnational corporations' economic activities or those of the companies that make up the value chain. The requirement to disclose this information should be subject to an assessment of the seriousness of the potential impacts on the affected individuals and communities, not to a consideration of its materiality to the financial interests of the company or its shareholders.

The right of access to information is also related to impact assessments and public participation. In line with existing regulations on transparency, States must guarantee access to information in decision-making processes, including policies, projects and plans that enable the existence of economic activities of a transnational nature.⁵¹ For such access to be effective, States have the obligation to publicly report on the process of preparing such projects and on the communications (regardless of the means of such communications) with the commercial and/or investment sectors that facilitate the establishment of any economic activity. This information must include, but not be limited to, minutes of meetings and communications with parent companies, subsidiaries, affiliated companies, or representatives thereof.⁵²

Additionally, the treaty should require that the information provided in the consultations prior to the activities of TNCs also includes a statement on the different groups of companies or entities to which they are linked, to ensure adequate disclosure of the nature and scope of the projects, as well as to facilitate the determination of legal responsibility and allow proper

⁵¹ The binding instrument can find a basis on which to develop its provisions in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998, Aarhus, Economic Commission of the United Nations for Europe; or Regulation 1049/2011 of the European Parliament and of the Council, Official Journal of the European Communities, L 145/43, May 31, 2001. The treaty, however, should not limit access to documents only in the possession of the administration, but must guarantee true access to information, obliging, if necessary, the States to have to produce documents in case it is necessary to transmit the information to the public.

⁵² General Comment No. 34 on Article 19. Freedom of opinion and freedom of expression (2011), CCPR, U.N. Doc. CCPR / C / CG / 34, paras. 18-19.

access to justice and effective remedy in the event that such entities abuse the human rights of individuals and communities.

Proposal for a clause under article 9.2.g (public and participatory consultations)

Information relating to economic activities, including, among others, project plans, results of human rights monitoring, and minutes of meetings and communications between transnational corporations and other business enterprises, including those of its chain of value, and public bodies, should be public and easily accessible to allow active and informed participation of communities consulted.

Precautionary measures

To prevent irreparable damage, the treaty should require precautionary measures to protect the rights of threatened affected communities:

1. States shall apply precautionary measures that are necessary to prevent violations and abuses of rights in the context of transnational economic activities.

Prevention in the design of public policies

In terms of prevention, the zero draft focuses only on human rights violations and abuses in the context of the activities carried out by transnational corporations and other business enterprises. This frame is too narrow in light of the fact that States create economic policies that directly enable human rights abuses. For example, when States sign agreements related to trade, investment or development, they create conditions that attract foreign trade and investment and support the internationalization of national and local companies. These conditions may prevail over more protective domestic standards and can create an enabling environment for human rights abuses.

Therefore, the treaty should specify that the obligations of due diligence, impact assessments, public and participatory consultations, and right of access to information apply to public

policies on trade, investment or development.⁵³ State contracts and procurement should also be subject to these provisions.

Proposal to include a clause on public policy:

- 1. States Parties shall apply the prevention obligations included in the Convention to the set of public policies they carry out, including, especially, those related to trade, investment or development.*
- 2. Such prevention measures shall also be applied to procurement, concessions and other kind of contracts with legal or natural persons carrying out transnational activities.*

Conflict-affected areas

Aside from a reference for the need for “special attention” for conflict-affected areas, the treaty otherwise neglect this fundamental issue. The treaty should include a clause to reaffirm the States’ obligations in conflict-affected areas to prevent transnational corporations and other business enterprises from benefiting or contributing to the abuses of human rights in this context.⁵⁴

Proposal for a clause on conflict-affected areas:

- 1. Companies that directly or indirectly through the value chain carry out economic activities of a transnational nature in conflict-affected areas or high risk areas must conduct specific human rights due diligence that take into account the possible contributions of these activities to the abuses and violations of human rights and of humanitarian law*
- 2. If the preventive measures have not been carried out, no economic activities of a transnational nature of any of the companies that make up the value chain shall proceed, until, in consultation with affected communities, adequate mitigation is identified and implemented.*

⁵³ General Comment No.24 on the obligations of States under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), CESCR, U.N. Doc. E / C.12 / GC / 24; Special Rapporteur on the right to food (2017), Guiding Principles on Assessments of the Effects of Trade and Investment Agreements on Human Rights, U.N. Doc. A / HRC / 19/59 / Add.5.

⁵⁴ See, for example, OECD (2013), OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition, OECD Publishing. <http://dx.doi.org/10.1787/9789264185050-en>

SMEs (art. 9.5)

Contrary to the language in Article 9.5, no company can be exempted from the obligations to prevent human rights abuses. The exclusion of small and medium-sized enterprises is incompatible with the purpose, scope and definitions of the treaty (Articles 2, 3 and 4, respectively) and, consequently, could give rise to new strategies on the part of the corporate sector to escape control and avoid responsibility, as for example the fragmentation/division of legal persons, leaving much of the treaty's objectives without effect. For this reason, this provision must be deleted.

In order to ensure that small companies are not under undue burden, a clause such as the following could be introduced:

In their regulation on due diligence, States may define differential treatment regarding prevention measures according to the size of the company. Such regulations shall include adequate safeguards to avoid abuse of these distinctions, such as through fragmentation into multiple legal persons. Such measures shall include the declaration of economic groups or holdings and the lifting of the corporate veil.

Article 10: Legal responsibility

As explained above, one of the fundamental pillars of a victim-centered treaty must be access to justice and effective remedy. One of the gaps in national and international law obstructing access to justice and effective remedy is the absence of clear rules governing legal liability for damage caused by TNCs and OBEs.⁵⁵ Likewise, responsibility should refer not only to the

⁵⁵ FIAN International, Case Mubende in Uganda, Case el Hatillo in Colombia, Case Guarani Kaiowa in Brazil, Case Sawhoyamaya in Paraguay, for more information access: <http://www.fian.org/what-we-do/case-work/> ; See Case Las Pavas in Colombia at: <http://www.fian.org/es/nuestro-trabajo/casos/colombia-las-pavas/>; See Parallel Report by The Ugandan National Coalition on ESCR c / o HURINET-Uganda, p. xxii, 9 and 23, and Parallel Report by FIAN International to Committee on Economic, Social and Cultural Rights. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fUGA%2f20412&Lang=en; See Parallel Report by FIAN International for the CESCR review of Norway in 2013 on the human rights impact of Norwegian pension fund investments: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NOR/INT_CESCR_NGO_NOR_15162_E.pdf; Concluding observations on the fifth periodic report of Norway (2013), CESCR, U.N Docs. E / C.12 / NOR / CO / 5, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNOR%2fCO%2f5&Lang=en; The Global Network for the Right to Food and Nutrition (2016). A life without dignity - the price of your cup of tea: Abuses and violations of human rights in tea plantations

direct perpetrators, but also to the responsibility of the parent company. That is why States must more stringently regulate the responsibility of both the companies in their territory and those linked to these companies but that have activities abroad (principle of active nationality). The treaty must therefore include the responsibility of all the companies involved in the value chain and, in particular, that of the parent or controlling companies that often provide the financial and organizational resources and the corporate culture, and obtain profits from the activity that causes the damage. The inclusion in Article 10 of natural and legal persons, civil, criminal and administrative responsibilities, as well as a broad approach based on transnational commercial activities (art. 10.1), helpfully develops the concept of corporate responsibility and implicitly recognizes the extraterritorial obligation of States to protect human rights.

International trade and investment agreements can serve to limit or preclude the liability of TNCs and OBEs. The treaty should clarify that such agreements, including their dispute resolution mechanisms, shall not operate to limit the liability of foreign investors.

Reversal of the burden of proof (Article 10.4)

The draft treaty recognizes the possibility of reversing the burden of proof (Article 10.4). Given the complexity that the economic activities of transnational corporations and other commercial enterprises can have, it is often difficult for victims of corporate activities of transnational character to establish causation, in large part because victims are unable to access relevant information (which is usually in the hands of these companies). The reversal of the burden of proof in article 10.4 can help to address this problem, but it should be applied automatically.

In order to strengthen the reversal of the burden of proof, and complimenting existing provisions in civil law, Article 10 could clearly require national legal systems to incorporate a rebuttable presumption of control of the parent company over the operations of its subsidiary, in line with our proposal for Article 8.4. Thus, the link between the different companies involved in the structure of a transnational company would be presumed unless the company can demonstrate otherwise. The courts would exercise this presumption in situations in which the parent company has, for example, control over the subsidiary as it

in India, see:
http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf.

See House of Lords, Caparo Industries Plc. Respondents

represents accounting, has the majority of its shares or voting rights, imposes a specific corporate culture which contributes to human rights abuses, or has a directing power that influences all the legal persons linked to the respective TNC, economic group or holding.

Proposal for article 10.4:

States Parties shall establish in their national legislation a rebuttable presumption of control by the home or controlling companies over [related companies/ all companies in the supply chain] alleged to have caused human rights abuses. As a consequence, the company will have the burden to prove the absence of any control over the alleged abusing company in order to be exonerated from liability regarding the damages caused by it.

Civil liability (articles 10.5 - 10.7)

Article 10.6 is central to the draft treaty since it establishes the civil responsibility of the parent companies of TNCs for the activities of their subsidiaries or other commercial companies to which they are linked and which negatively impact the enjoyment of human rights.

This is a positive development in line with the joint and several liability and the duty of care, already recognized in the law of Anglo-Saxon civil liability. Through this principle, civil liability for human rights abuses is shared among all the companies that make up the value chain, including not only the direct perpetrators but also the parents or controllers. This duty is defined according to the need for actors to anticipate harm that is reasonably foreseeable, and to impose impartial, fair and reasonable responsibilities.⁵⁶ This represents a considerable advance to the current legal situation, although we recommend explicitly adding the requirement of joint liability and the mention of the term “duty of care”.

Additional changes should reinforce the content of the article, so as not to leave any possible gap in its implementation that prevents effective access to justice and remedy for the victims.

⁵⁶ See House of Lords, Caparo Industries Plc. Respondents and Dickman and Others Appellants, [1990] 2 AC 605-663, available at: <http://www.bailii.org/uk/cases/UKHL/1990/2.pdf>; see as current adaptation of the duty of care French law LOI n ° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1), which translates "duty of care" by "duty of vigilance" in the field of human rights and transnational corporations, available at: <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>.

The specific language limiting the responsibilities to the “direct relationship” between a company and its subsidiary (Article 10.6.b), or those that only establish the “strong and direct connection” between the conduct of the companies and the injuries should be eliminated. It is not always easy to determine the relationship or proximity between subsidiary companies, contractors, or partners along the value chain with parent companies or their investors. Therefore, indirect relationships, where control is not exercised directly but influence their actions, should also be included. As with the issue of control, the connections between the damage caused and the activities of a company can also be indirect, such as when the activities of a parent company do not have a direct relationship with the damages produced by one of its subsidiaries, but the company is still the ultimate beneficiary of the value chain or imposes an specific corporate culture which indirectly contributes to the alleged damage. These minor editorial changes should be made in line with articles 5.1 and 5.2 on jurisdiction, so that the binding instrument does not allow corporations to escape their responsibilities.

Article 10.6 should include a clause that indicates that responsibility concerns both human rights abuses committed by transnational corporations and other commercial enterprises, as well as the lack of implementation of prevention measures by natural and legal persons in exercise of commercial activities of transnational character.

Proposal to include a clause on the responsibility in compliance with the prevention measures (Article 10.6.d):

Abuses of human rights included in this article also include the non-implementation of preventive measures in accordance with Article 9 of the Convention.

Finally, liability must not be limited to specific situations in which the risk is foreseeable. Companies must be held liable for their human rights abuses even when they have not acted negligently. Strict liability is appropriate in cases where businesses are engaged in hazardous or inherently dangerous industry that poses a potential threat to the health and safety of the persons working for the company as well as others who are affected by the activities of the company.

Proposal to include a clause on strict liability (Article 10.6.e):

TNCs and OBEs owe an absolute and non-delegable duty to the communities in which they operate to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity that it has undertaken. The corporation must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the corporation must be absolutely liable to compensate for such harm, without regard to whether the corporation had taken all reasonable care nor whether the corporation was negligent.

Criminal liability (articles 10.8 - 10.12)

The criminal liability of legal persons is widely recognized in international law, including human rights treaty bodies.⁵⁷ However, because it does not exist in all States, the draft treaty helpfully creates a uniform international standard for the criminal responsibility of transnational corporations and other commercial enterprises (articles 10.8 - 10.12).

The inclusion of universal jurisdiction is also remarkable, but the legally binding instrument must require States to implement it in cases related to ius cogens norms, opening up their legal systems so that affected individuals and communities can seek justice and redress.⁵⁸

Though the restriction in article 10.12 attempts to embrace those states that have still not adopted a system of corporative criminal responsibility, the current text sends the wrong message since it does not oblige states to advance their criminal systems in order to include this kind of liability. Therefore, this provision should be eliminated to avoid contradiction with paragraph 10.8. The elimination of the paragraph does not exclude the applicability of the other parts of article 10 referring to civil and administrative liability.

Additionally, Article 10.8 defines criminal responsibility only with respect to the intentionality of causing human rights violations, thereby allowing corporations to escape liability for inherently dangerous or negligent activities. This reference should therefore be removed.

⁵⁷ See the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and the use of children in pornography (2002), CRC, U.N. Doc. A / RES / 54/263, art. 3.4; the United Nations Convention against Organized Crime (2000), art. 10; or the United Nations Convention against Corruption (2003), art. 26; Principle 25 of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

⁵⁸ Principle 25 of Maastricht on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights.

Proposal for article 10.8:

[...] for all persons with commercial activities of a transnational nature who, either directly or through intermediaries, commit violations of human rights ...

Administrative responsibility

Although it is mentioned (art.10.1), administrative responsibility is not developed in the draft treaty. Nonetheless, administrative liability is key in the prevention and redress of abuses committed by transnational corporations and other business enterprises. The zero draft has not even maintained the proposal included in the draft elements, which requires States to establish the legal responsibility of transnational corporations and other commercial enterprises under their national administrative legislation.

Therefore, we recommend that the "denial of the awarding of public contracts to companies that have committed to a conduct that leads to a violation of a human right" contemplated in the draft elements be included again. Likewise, as we expressed in our previous contribution, we recommend that administrative sanctions also include other stronger sanctions, such as the suspension and cancellation of operations or licenses, fines or, eventually, the creation of blacklists.⁵⁹

Article 11: Mutual legal assistance

Due to the globalized and fragmented nature of the economic system in which TNCs and OBEs operate directly or indirectly in different jurisdictions, cooperation among States in matters of mutual legal assistance is central to the implementation of treaty obligations. The adoption of judicial decisions that effectively protect human rights in the context of corporate human rights abuses, or their implementation, can be a challenge when the companies involved are based in different States. While there are clear rules governing cooperation and mutual assistance between judicial bodies and other legal bodies in matters of the environment, child trafficking or international organized crime,⁶⁰ such rules do not exist for human rights abuses

⁵⁹ See FIAN written contribution 3rd session OEIGWG on Transnational Corporations and Other Commercial Companies regarding Human Rights (2018).

⁶⁰ Furthermore, we can see that a large part of the provisions included in article 11 on mutual legal assistance derive directly from article 18 of the United Nations Convention against Transnational

committed by companies more generally. The lack of cooperation and mutual assistance create an obstacle to access to justice and to implementation of judicial decisions, such as when it is the parent or controlling company that has information about the transnational business activity or owns the assets that are necessary to comply with a judicial decision.

The norms established in Article 11 regarding compulsory assistance among States are clear and cover the obligation to provide information and evidence necessary to conduct investigations, prosecutions and judicial proceedings (Article 11.2), the provision of government, banking, financial, and corporate or business records (Article 11.3.f), the freezing and recovery of assets (Article 11.3.i), and the protection of victims (art. 13.3.j). However, Article 11.3.k, which provides for assistance “in regard to application and interpretation of human rights law,” should be removed, because it causes uncertainty in the interpretation of what constitutes human rights law. As discussed under the scope, the treaty should apply to all human rights, including environmental and labor rights, and subject States to the obligations of respecting, protecting and fulfilling, even in those cases where they have not ratified all human rights instruments but such rights are part of international customary law.

The mutual legal assistance article also includes a provision that encourages the proactive transmission of information related to criminal matters from one State party to another, without the need for a prior request (Article 11.4). This provision is in recognition of the international cooperation necessary to facilitate access to justice and effective remedy for victims, and to hold transnational corporations and other business enterprises responsible and accountable for their human rights abuses. The draft also rightfully requires that any court awards or decisions be recognized and applied in any State party (Article 11.9). However, the formulation of the article hinders its application and implementation. It should be rewritten in such a way that, in case of doubt at the time of implementing the judgments, the rights of the affected individuals and communities will always be favored, in line with the principle of *in dubio pro persona*.

Proposal for article 11.9:

Organized Crime, and from article 46 of the United Nations Convention against Transnational Organized Crime.

The States Parties, in order to comply with the obligations to guarantee access to justice and effective remedy for victims, shall recognize and execute any judgment of a court that has jurisdiction in accordance with this Convention.

Refusal of the recognition and implementation of a judgment (art. 11.10)

The zero draft outlines the bases upon which a party can refuse recognition and implementation of a judgment of another party. One basis is "where the judgment is contrary to the public policy of the Party in which its recognition is sought" (Article 11.10.c). This is excessively broad and vague, and fails to account for the fact that public policies of a State may contravene the provisions of this treaty. For this reason, the fact that a judgment is contrary to such public policies should not be a sufficient reason to reject its recognition and application, and this provision should be deleted.

Finally, because States are subject to the scope defined in the treaty, article 11.11 is unnecessary, and could undermine the treaty. For example, this provision would eliminate the obligation of mutual legal assistance after a state has adopted the prospected treaty but before it has enacted implementing legislation. Therefore art. 11.11 shall be eliminated.

Article 12: International cooperation

Because some policies, such as those related to trade, investment or the environment, have potential human rights effects both inside and outside the territory of the country that applies them, cooperation among States on these issues is necessary to prevent such impacts. Therefore, the treaty should require States to share information on topics such as these, even if they are for purposes other than judicial proceedings (as in Article 13.3.f). Such cooperation will support the right of access to information, participation, and free, prior and informed consent.

The treaty should also include collaboration with international and regional organizations and civil society. In addition, because States also are part of international and regional organizations, the treaty should clarify that such organizations also have the obligation to

cooperate to ensure that their policies, plans and projects do not impede or nullify the enjoyment of human rights.⁶¹

Article 13: Consistency with International Law

The special protections which international investors hold under international investment treaties through investor-state dispute settlement (ISDS) mechanisms undermine human rights protection and can prevent affected individuals and communities from accessing justice.⁶² These mechanisms enable international investors to sue States for policy changes, including those intended to protect human rights, labor rights and the environment, if these changes might reduce a corporation's expected profits. Thus, these agreements allow investor rights to take precedence over the public interest and human rights.

Unless States' human rights obligations are deemed superior to their obligations towards international investors, impunity for transnational corporate human rights abuses will persist. We therefore strongly welcome the inclusion of an article that can clarify the relationship between States' human rights obligations and its obligations under other international agreements.

However, article 13 fails to achieve this clarification because it is contradictory and confusing. First, article 13.3 states that the treaty does not alter State obligations under domestic and international law, which could include those they hold towards investors under trade and investment agreements. As discussed in our introductory comments, this undermines the purpose of the treaty and is contrary to international human rights law, with which states must bring their domestic law in conformity with international obligations. Article 13.3 should therefore be deleted.

Second, the zero draft helpfully includes a stipulation that future trade and investment agreements shall not contain any provisions that conflict with the implementation of the

⁶¹ Principle of Maastricht 15; General Observation 24 of the State Obligations of the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017), CESCR, U.N. Doc. CESCR / GC / 24; Concluding Observations on the sixth periodic reports of Germany, CESCR, 64th Session (2018), U.N. Doc. E / C.12 / DEU / CO / 6; Public waste, austerity measures and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E / C.12 / 2016/1, para. 9

⁶² See generally, Cotula, Lorenzo, and Mika Schröder. "Community perspectives in investor-state arbitration." *Community perspectives in investor-state arbitration*. (2017).

agreement (13.6). However, the draft then provides that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under the treaty (13.7). With respect to future agreements, this provision undermines the immediately preceding prescription that such agreements shall not contain provisions that conflict with human rights. In addition, as recognized by the MEP from Uruguay during the 4th round of negotiations of the TNC treaty, by requiring panels to interpret trade and investment agreements in a manner that is least restrictive, the draft elevates commercial interests by implying that they shall prevail but must do so with as little damage to human rights as possible.

Instead, the treaty should explicitly reaffirm the primacy of human rights over other agreements as is stipulated under articles 55 and 103 of the UN Charter.⁶³ We also

⁶³ Article 103 establishes that “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.” Article 55c establishes that the aim of international cooperation is “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” and article 1.3 which defines the principles and purposes of the UN as “respect for human rights and for fundamental freedoms”. The Preamble of the UN Charter also reaffirms “faith in fundamental human rights, in the dignity and worth of the human person”; The decision of the Inter-American Court of Human Rights on the case of the indigenous community of Sawhoymaxa against Paraguay. Decision of the 29th March 2006. Serie C No. 146, para. 140 and the decision of the European Human Rights Court, Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi against Ireland. Lawsuit No.45036/98. Para. 154. 30th June 2005. Statements and General Comments of the Committee on Economic, Social and Cultural Rights, including the Statement to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999) U.N. Doc. E/C.12/1999/9; General Comment No. 12 (1999): The Right to Adequate Food (Art. 11) U.N Doc. E/C.12/1999/5, paras. 19 y 36 (“States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end”); General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights). U.N. Doc.E/C.12/2000/4. Para. 39 (“In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health”); General Comment No. 15 (2002), The Right to Water (article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. U.N. Doc. E/C.12/2002/11. 26. Paras. 31 and 35-36 (“States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country’s capacity to ensure the full realization of the right to water.”) General Comment No. 24 (2017). U.N. Doc. E/C.12/GC/24, para. 13, (“States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights

recommend the inclusion of an obligation for States to conduct human rights impact assessments to ensure that future agreements do not undermine their obligations under the treaty.

Proposal for art. 13.7:

States Parties shall ensure that existing trade and investment agreements do not obstruct their capacity to comply with their obligations under the present treaty and shall withdraw from such agreements if such is the case. They shall conduct ex ante and post human rights impact assessments to this effect. States shall refrain from entering into future trade and investment agreements that obstruct their capacity and that of the other parties to comply with the present treaty.

Article 14: Institutional arrangements

We welcome the creation of a Committee or Treaty Body with the mandate of monitoring States' compliance with the treaty and providing them with authoritative interpretations of the treaty's provisions, in the form of General Comments or Statements. However, the proposed Committee unfortunately follows the same model of existing Committees and therefore replicates the mechanisms that have already proven to be insufficient in enforcing human rights law. We therefore recommend that this article be revised so as to strengthen the enforceability of the Committees' decisions.

impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor- State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements.”); The Report of the Special Rapporteur on the Right to Food in his report to the 19th session of the Human Rights Council (2011), in particular the Guiding Principles on human rights impact assessments of trade and investment agreements. U.N. Doc. A/HRC/19/59/Add.5. The report of the Independent Expert on the promotion of a democratic and equitable international order (2016), U.N. Doc. A/HRC/33/40 reaffirms the principle of the primacy of human rights.

In view of strengthening the enforceability and follow up of the decisions and recommendations made by Committee we also recommend the inclusion of a mechanism to monitor these:

“States shall put into place a body within their government whose responsibility shall be to follow up on the concluding observations made by the Committee”.

Considering that the current draft treaty takes the shape of a “framework treaty”, the Conference of States Parties (COP) is important. The COP will contribute to ensuring the development of new standards and protective measures in accordance with the evolution of society, with the framework treaty representing only the first step in the construction of ‘international corporate human rights law’.

It is our understanding that this would be the first time that an international convention has both a Committee/Treaty Body as well as a COP. Without putting into question the extremely useful nature of both of these bodies for the evolution of human rights law in this particular field, there is a risk that conflicts could arise between these bodies. The draft treaty should therefore include clear rules regarding the competence of each of these bodies so to encourage harmonization of their work and to avoid a situation where the Committee and COP would develop contradictory standards.

This article should also include provisions to protect both the Committee and the COP from the undue influence of commercial or other vested interests that are not aimed at promoting and protecting human rights. First, the treaty should include a provision regarding the membership of the Committee that prevents conflict of interest. We therefore propose to amend article 14.1.a. as follows:

“The members of the Committee shall serve in their personal capacity and shall be of high moral standing and recognized competence in the field of human rights, public international law or other relevant fields, who shall serve in their personal capacity. Membership of the Committee shall be refused to candidates who have a present or past link with the business sector or associations which have commercial interests”.

This article of the treaty should also provide clear rules prohibiting the business sector and business related associations defending commercial interests or other interests which do not

pertain to the protection of human rights from participating in both the sessions of the Committee and the COP. The Committee and COP, as well as the current IGWG, should be spaces free from corporate influence, where private interest considerations should be not be taken into account.

Article 15: Final Provisions

Art. 15.1 – Implementation

The legal systems of many States foresee the immediate application of international human rights instruments by their courts (for example in most Latin American countries which apply the “constitutional block”).⁶⁴ In order to ensure its effective implementation, the treaty could take inspiration from such legal systems and provide the power for national courts to apply the treaty directly in cases where the State omits to legislate or take measures in order to ensure the adequate implementation of the treaty.⁶⁵ This provision would serve to strengthen the implementation of the treaty and would enable to avoid situations where States can circumvent their obligation to implement the treaty.

⁶⁴ See, e.g., *Góngora* (Anm. 125); *Uprimny*, Bloque de constitucionalidad, derechos humanos y nuevo procedimiento penal en Reflexiones sobre el Nuevo Sistema Procesal Penal. Bogotá, Consejo Superior de la Judicatura, 2004; *Uprimny* (Anm. 122); *Rey Cantor* (Anm. 17), S. 299- 334; *Michael Krennerich*, *Manuel E. Góngora Mera*, Soziale Menschenrechte in Lateinamerika Herausforderungen an Justiz, Politik und Wirtschaft, in Brennpunkt Lateinamerika: Politik, Wirtschaft, Gesellschaft: Institut Für Iberoamerikakunde, Hamburg Nr. 15 vom 08. 2005. Bolivian Constitutional Court SC/2004 vom 6.09.2004, Abs. III.1.1; *Supreme Court of Justice Costa Ricas*, Verfassungskammer, Urteil V-282-90 vom 13. 03. 1990 in *Gilbert. Armijo*, La tutela supraconstitucional de los derechos humanos en Costa Rica, Zeitschrift Jus et Praxis, Año 4 Nr. 1, Chile, 2003, S. 51; Supreme court from El Salvador, Unconstitutionality Process Antimaras Urteil 52-2003/56 –2003/57/2003 from 1.04.2004, in *Diálogo Jurisprudencial* Nr. 1 von Juli- Dec 2006, Ed. IIDH-KAS Instituto de Investigaciones Jurídicas UNAM-México 2006. S. 153-163; Supreme Court Chile, Urteil vom März 2007 in *Revista de Derecho y Jurisprudencia*, Band LII, zweiter Teil, erste Sektion, S. 478; *Zeitschrift Fallos del Mes*, 09.1969, S. 223 bis 224 und Juni 1975, S. 90 und *Alfredo Etcheberry O.*: “El Derecho Penal en la Jurisprudencia”, Vol. I, General Part, Editorial Jurídica de Chile, nachdruck“Ausg. Santiago de Chile 2002, S. 38, 39; Oberster Gerichtshof Chile, Strafkammer, „Rol“ Nr. 3125 – 04, vom 13.03.2007, Erwägungsgrund 36; Urteil des Obersten Gerichtshofs, Strafkammer, „Rol“ Nr. 3125 – 04, vom 13.03.2007 zitiert von *Nogeira* (Anm. 55), S. 17ff.; Ecuadorian Constitutional Court, decision Nr. 002-2002-CC vom 12.0203 cited by *Marcos Morales Tobar*, Derechos Humanos y los tratados que los contienen in: *El derecho constitucional y la jurisprudencia en el Ecuador*, in *Revista Jus et Praxis*, año 9 N° 1, Talca, Chile, Ed. Universidad de Talca 2003, S. 104-105; Peruvian Constitutional Court, N2730-2006-PA/CT – 21.07.2006, case Arturo Castillo Chirinos, mentioned in *Diálogo Jurisprudencial* Nr 2; Ed. IIDHKAS- Instituto de Investigaciones Jurídicas, UNAM, Mexico City, 2007. des Urteils, S. 275 – 307. Colombian Constitutional Court, Urteil T-426/1992, Urteil T-622/1997, Urteil T-568/1999, C- 551/ 2003, T-642/2004, T-666/2004, T-697/2004; T-827/2004.

⁶⁵ UN CESCR, General Comment 3, 14 December 1990, UN Doc. E/1991/23 para 5-7.

In order to further strengthen the effective implementation of the treaty and ensure its compliance in good faith, article 15.1 should clarify that States parties shall interpret national legal frameworks in accordance with the treaty. To this end, we propose the inclusion of an additional paragraph under article 15.1 which could read:

In the case where States Parties fail to take such measures within a reasonable period of time or when the existing national legal framework allows the immediate application of human rights treaties, domestic Courts shall have the competence to order its enforcement by the executive branch in specific cases and/or through the harmonization of the legal framework by the legislative branch.

Art. 15.3 – Conflicts of interest and corporate capture

The provisions included under this article tackle important issues which have been raised by civil society, namely that of corporate capture and that of the lack of a meaningful gender approach to tackle the impunity of TNCs. With regards to corporate capture or business undue influence, FIAN has observed that the increasing participation of the business sector in policy-making spaces and the fueling of ‘multistakeholder’ initiatives have been accompanied by a corresponding weakening of human rights standards and enforcement.⁶⁶ Corporate capture, undue corporate influence and conflicts of interest also undermine democracy and peoples’ sovereignty as corporations are unelected entities defending, by nature and mandate, private interests [concretely private profit] which nevertheless influence decisions that impact people’s lives and undermine democracy, with negative consequences specially for the most marginalized groups.

We therefore welcome art. 15.3 of the draft treaty, which draws its inspiration from art. 5.3 of the Framework Convention on Tobacco Control (FCTC), an important milestone in the struggle to protect policy and governance spaces from commercial and other vested interests in order to safeguard the integrity of these spaces.

However, article 15.3 of the draft treaty should be strengthened by providing detailed measures which States should take at the national, regional and international level to protect legislative,

⁶⁶ See, e.g., Nicoletta Dentico and Karolin Seitz, *Philanthrocapitalism in global health and nutrition: analysis and implications*, Bischöfliches Hilfswerk MISEREOR/Brot für die Welt/Health Innovation in Practice/Global Policy Forum/medico international, October 2018

https://www.globalpolicy.org/images/pdfs/Philanthrocapitalism_DiscussionPaper_10-2018.pdf

executive and judicial bodies from the undue influence of TNCs and other business enterprises. For instance, such measures could include:

- a) *Regulatory measures to impede the interference of economic interests in legislative processes and in the implementation of laws or policies which have as objective the monitoring, regulation or accountability of TNCs and other business enterprises for the realization of human rights or the provision of public services;*
- b) *To ensure the transparency of State agencies in their contracts with TNCs and other business enterprises, in particular in relation with the people and communities affected or potentially affected, domestically or abroad, by the activities of TNCs and other business enterprises;*
- c) *To document and make public the archives of contracts and other legal affairs with TNCs and other business enterprises and documents monitoring their implementation with projects, including audits, minutes of meetings and other communications, and inspector reports.*
- d) *To establish norms of incompatibility to avoid a situation of “revolving doors” between TNCs and State agencies and vice-versa;*
- e) *To establish norms under criminal law to avoid gifts from representatives of TNCs or “lobbyists” which favor the protection of their interests before public servants;*
- f) *To prohibit financial contributions by TNCs and other business enterprises to political parties;*
- g) *Measures to avoid situations of conflict of interest of public servants;*
- h) *Measures to ensure transparency in the relations between public authorities and TNCs and other business enterprises;*
- i) *Measures to ensure that the financial support of TNCs to governmental entities is channeled by the State through its tax system, to avoid the “privatization” of the agenda of State authorities and ensure that the State’s priorities are determined by established democratic institutions and not by the choices of corporations.*

In addition to these specific measures, we believe that the issue of conflicts of interest and corporate capture should be mainstreamed throughout the treaty and not solely mentioned in one article on final provisions. This would be particularly important for articles 8 on the rights of victims, article 9 on prevention and even article 14 on institutional arrangements. Judicial as well as non-judicial remedial processes should be protected from any interference

from corporations, which can intimidate the victims or representatives of judicial bodies and even influence judicial decisions. With regards to prevention (article 9), consultations with communities and impact assessments should also be free from any influence from corporations to avoid manipulated results which can lead to harm and defeats the purpose of robust preventive mechanisms.

Art. 15.4 – Conflict-affected areas

The reference to conflict affected areas under 15.4 is too vague, in particular the wording “special attention shall be undertaken...”. This article should, at a minimum, reaffirm the obligations States hold under international human rights law, international humanitarian law and international criminal law with regards to business activities in conflict-affected areas:

“States shall respect and protect human rights in line with their obligations under international criminal and humanitarian law in the cases where businesses operate in conflict affected areas”.

Similar to the other provisions included under article 15, we believe that States’ obligations with regards to business activities in conflict-affected areas should also be mainstreamed throughout the other relevant articles of the treaty, rather than addressed solely in the final provisions. We have therefore made comments to the preamble as well as to article 9 on prevention where we believe that mention should be made to conflict-affected areas.

Art. 15.5 – Gender approach

The provision under article 15.5 requiring States to pay particular attention to groups facing heightened risks in the context of business activities, including women, is also positive. We nevertheless strongly support the position held by the ‘Feminists for The Binding Treaty’ calling for the treaty to integrate a meaningful gender approach throughout the articles of the treaty and not only in the article on final provision of the treaty. We have therefore made proposals in our comments to the different articles above, notably on the preamble, article 8 (right of victims) and article 9 (prevention). Taking a gender approach requires more than simply including women in the list of people requiring particular attention. It instead requires an analysis of the ways in which business activities can have a disproportionate impact on women as a result of their different gender-based social, legal, cultural roles and rights, and reflecting this in all the different provisions of the treaty.