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Draft One analysis:
forwards or backwards?

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DRAFT ONE ANALYSIS: FORWARDS OR BACKWARDS?

Homa, Human Rights and Business Centre of UFJF, member of the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity[1], proceeding its activity in the defense of Human Rights against violations caused by major ventures, focuses, in this document, to analyze the Draft One[2]. This analysis is presented as a continuation of the monitoring and of the research about the Human Rights theme and the whole process of negotiation of the Treaty, in an attempt to delimit its importance, its mistakes and successes and whether or not there was an evolution in the path to accountability of corporations for Human Rights violations, particularly when compared with what was previously established by Draft Zero[3].

The United Nations' (UN) engagement with the Human Rights theme is relatively recent. The discussions about the theme have started in the 1970s. However, only in 2011, with the expansion of globalization and transnational corporations (TNC´s) power, approximately 40 years later, the Guiding Principles on Business and Human Rights were introduced to the UN Human Rights Council. On the other hand, because of their voluntarism nature, there was an intense pressure of several countries and civil society. Three years later the Resolution 26/9 was adopted for the construction of the Business and Human Rights International Treaty. All in all, it can be seen as a milestone in the history of the struggle in defense of Human Rights against the violations perpetrated by corporations.

[1] Created in 2012, the Global Campaign to Claim Sovereignty of Peoples, Dismantling Corporate Power and Ending Impunity, called in this work "Campaign", is a network that brings together more than 250 movements, civil society organizations and communities affected by the activities of Transnational Corporations. The organization, created as a response to the frequent violations of Human Rights by companies, allows a global structure in search of the visibility of resistance against the activities of large enterprises. More information available at: https://www.stopcorporateimpunity.org

[2] For the purposes of this work the OEIGWG Revised Draft on the "Legally Binding Instrument to Regulate, in Internacional Human Rights Law, the activities of transnational corporations and other business enterprises" will be called "Draft One", and can be found at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

[3] For the purposes of this work the OEIGWG Draft on the "Legally Binding Instrument to Regulate, in Internacional Human Rights Law, the activities of transnational corporations and other business enterprises" will be called "Draft Zero", and can be found at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf

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The Elements to a Legally Binding Instrument to regulate in international Human Rights the activities of Transnational Corporations and other Business Enterprises[4] was achieved as a result of the negotiation. This document was drafted by Open-Ended Intergovernmental Working Group (OEIGWG), and on July 16th, 2018 the denominated "Draft Zero" was presented. Exactly one year later, the "Draft One" was released.

In the following pages, we analyze the evolution of the negotiation process of the normative construction in the United Nations of the Human Rights and Business agenda through the analysis of the substance of the Draft One, specially comparing with the Draft Zero and having the "Treaty on Transnational Corporations and their supply chains with regard to Human Rights"[5] as a desirable baseline to the proposal. This document has already been analyzed in previous research and was elaborated by ''Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign)''. Concerning the main aspects, as well as the determinants to an effective prevention against Human Rights violations and in order to achieving mechanisms for accountability of TNC´s for the violation of such rights, we provide proposals to the drafting of these main substance, such as the treaty outreach, the concept of TNC´s and contractual relationships, obligation to report directly for TNC´s, nature of liability, international cooperation and remedies.

1. ANALISIS

Draft One was presented by Ecuador - the country which has led the negotiation process - as a continuation of the process of drafting a binding international instrument and as a result of Resolution 26/9[6] from the UN Human Rights Council. The document has a greater structure and writing than Draft Zero, however,

[4] For the purposes of this article, the Elements for the International Treaty on Transnational Corporations and other Business and Human Rights will be referred to as the Elements and can be found at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

[5] One of the great works of the Campaign is the " Treaty on Transnational Corporations and their supply chains with regard to Human Rights", available at: https://www.stopcorporateimpunity.org/wp-content/uploads/2017/10/Treaty_draft-EN1.pdf

[6] Available at: https://www.ihrb.org/pdf/G1408252.pdf

it does not resolve any of the problems introduced by the civil society and by the countries about the previous discussion. It is divided into a preamble and three other parts, gathering a total number of twenty-two articles. The section I has only three articles. Section II is the longest, covering nine articles that discuss several other issues, such as the violation of victims' rights, jurisdiction, preclude, among others. To finalize, in section III we can find the institutional dispositions, with ten articles. It is worth to mention that the Draft One does not have any sections which specify the States' and TNC´s obligations, which can be analyzed as a direct emphasis on the States' obligations. In the course of this analysis, we are going to file some suggestions to specific alterations in a few articles, which we contemplate as essentials to fulfill the aim of the Treaty, constituting an instrument which avoid Human Rights violations and which enable effective accountability of the TNC´s for such violations.

PREAMBLE

As far as the preamble was concerned, Draft One brought this separately, as it should be. Therefore it revises the Draft Zero error, which inserted the preamble in article 1. Also, the instrument started to be named as a binding instrument, and not as a convention, such as the Draft Zero stipulated. Although the structural change, the main content of the original section was essentially kept, with only a few additions.

After the beginning of the analysis, we can notice that the Draft One, such as the previous document, does not have a principles section, which is indispensable in a Treaty on Human Rights and Business. Draft´s preamble introduces projections to be observed by the States that joined the Treaty, without mention to the TNC´s. Therefore, it is essential to revival some of the principles already existents in the Elements, especially concerning the Human Rights supremacy over investment treaties or other economic agreements; on the Elements, one of the presented principles recognized the Human Rights supremacy over any trade or investment agreement (p. 3). This topic is not even mentioned in the Draft One.

Article 13 of the Draft Zero still mentioned the matter in question, however within a draft which seeks to relativize the omission of the Human Rights supremacy over investment and commercial agreements.

Concerning the Treaty model proposed by the campaign, the provisions about the theme are way imposing, establishing that the States which take part in the Treaty

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recognizes the Human Rights primacy over any other legal instrument, especially the ones related to commerce and investments (p.14).

Furthermore, States which are already bounded in commerce and investment agreements would be subordinated to the obligations established in the Treaty. Olivier de Schutter (2017, p.2) criticizes the Elements, which was the first document presented by the Ecuadorian government, in 2017, as an initial reference to the Treaty´s negotiations. The author highlights that besides the principles that already exist in the Elements, it should be mentioned the Resolution 25/25, from the UN General Assembly on 10/24/1970. This assembly congregates the Public International Law general principles. Schutter also points out against the application of the term "primary responsibility" (ou primacy of the State), because it is implied that if States do not have a permissive national environment to fulfill its obligations, the company might have no responsibility (p.3).

This is a key issue: the necessity of directly accountability the companies for the committed violations. In the Elements, although we can find the expression "primary responsibility'' of the States, there are many other quotes to the responsibility of the companies, for example:

> *TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect internationally recognized human rights, wherever they operate, and throughout their supply chains* (p.6)

Moreover, in the Campaign document, there are many expositions about the responsibility of the companies, stipulating that even with the already existent primary obligations" of respect, protect and guaranteed the Human Rights and that the third parties also respect them, the TNC´s also have the obligation (essential term) of respect and protect the Human Rights as well (p.7).

It is necessary to emphasize the independent responsibility between states and companies. The Human Rights Council should fairly innovate in that sense, endorsing the existing Treaties and requiring companies to comply with them, even if the State in which it is located did not ratify it. The companies can not take benefits of a fragile national scope concerning Human Rights protection, as long as they are often transnational and more powerful than these nations. It is this scenario that fosters the phenomenon called "race to the bottom".

It is relevant to emphasize that the TNC's do not need to be required to become a subject of International Law. They would be understood only as a subject of law[7], responsible for the inherent purpose of their activities and their transnational character.

Reaffirming this idea, the inter-American system, in recent jurisprudence, recognizes that companies have the obligation of respecting Human Rights. Although the Inter-American Court does not have jurisdiction to accountability companies, in one of your most recent cases, Lagos del Campo vs. Perú[8], it was recognized that the Human Rights oughts to be also respected for private sectors. We can still mention other Treaties and Conventions, such as the United Nations Convention on the Law of the Sea; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Elimination; United Nations Convention against Corruption; Convention on the Rights of the Child, among others.

There was a large wondering in the doctrine of whether recognizing this direct obligation of companies would not recognize them as Human Rights holders. The Inter-American Court diverged this possibility in your Advisory Opinion 22/16, which affirmed that only individuals could be considered as victims in the Inter-American system since there are some intrinsical rights related to human dignity. Nevertheless, as the companies are holders of countless others rights in the domestic legislation of the countries which are members of the Court, recognizing the obligation to the company in respecting Human Rights does not violate the duty-right binomial[9].

Other topics worth highlighting in the preamble of Draft One. In paragraph 13, the text recognizes the importance of the action of the human rights defenders, stipulating the necessity to protect their integrity and the viability of their work. On the other hand, it does not point out an express mechanism of protection and does not impose defined and objective obligations in terms of protection of the defensors

7 This concept has already been approached in the research of Homa on the obligations of the States of origin, available in: http://homacdhe.com/wp-content/uploads/2016/06/AS-OBRIGAC%CC%A7O%CC%83ES-DOS-ESTADOS-DE-ORIGEM.pdf. Access on September 8th, 2019.

8 The case of Lagos del Campo VS. Perú (2017), available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_340_esp.pdf. Access on September 8th, 2019.

9 Advisory Opinion 22/16, available in: http://www.corteidh.or.cr/docs/opiniones/seriea_22_esp.pdf. Access on September 8th, 2019.

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in life and work areas, becoming a generic provision and without great chances of effectiveness. In the case of paragraph 14, it is reinforced that business activities can cause several impacts on some specific groups, such as women and children, being necessary different protection which takes into account their unique circumstances. In this way, we elaborated the following contents proposals which could be present in the Preamble:

Proposals

Also recognizing the Human Rights supremacy over all others commerce and investment agreements; Recognizing the necessity of compliance, both by States and by TNC´s of the International Human Rights Treaties, as well as their guiding principles; Built on the foundation of this international instrument of protection, the Principle of Centrality of the Victim's suffering, as well as access to justice and due process of law, configuring the concept of ´´expanded access to justice´´ as peremptory norm (jus cogens).

Section I

Article 1. Definitions

The first article of Draft One seeks to delimit five concepts: victims, violations or human rights abuses, business activity, contractual relationships, and regional integration organizations. This structure differs from the one established in Draft One, which brought the definitions of victims and business activities only. Concerning these points, the substance was maintained. We would recommend the modification of the terms ´´victims´´´by affected people and communities, and we analyze how necessary to further deepen the conception of ´´business relations´´. Paragraph 4 of the article, although including a wide range of potential violators, introduces a generic terminology, unable to encompass all the complexity of the activities of transnational corporations and all those involved in their Value Chain.

The Campaign, in the mentioned document “Treaty on Transnational Corporations and Their Supply Chains with Regard to Human Rights” clearly conceptualize a range of terms, such as “supply chain” and “transnational corporation”.

"Human rights violation or abuse" shall mean any harm committed by a State or a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their human rights, including environmental rights.

PROPOSALS

The article 1.1 must be modified so the expression "victims" be changed for "persons" or "affected communities", suppressing the condition to adequacy with internal law set in article 1, paragraph 2. Also, definitions regarding "business activities" and "contractual relations" should be withdrawn, establishing a definition of "value chain", as mentioned previously. Nevertheless, the definition of TNCs, (Transnational Companies) should be clarified, so it could suppress the mentions of "all business", considering the reach of the Treaty. That way, the inclusion of transnational companies or transnational activities would apply, in all value chain, the joint responsibility of the parent companies as well as other constitutive entities of the chain, over which the parent company could exceed direct control or even indirect, regarding financial sphere or others.

ARTICLE 2. STATEMENT OF PURPOSE

The article 2 establishes three purposes of the Treaty. The Draft One makes an association close to the orientational principles of John Ruggie. Despite quoting the "promotion" of human rights in the paragraph "a", the draft's landmark aligns with the logic of "Protect, Respect and Remedy". In the same paragraph, as well as paragraph "c", it shows a need for a greater positivation, once the expression "Strength" has a significance that is not adequate, making "guarantee" more properly fit. Once more it is identified mitigation of the Human Rights responsibility referring to Transnational Companies. Back to paragraph "a", the term "transnational" is withdrawn, although it was present in the Draft Zero version. There is also a vision in the script that tends to expand the scope to all business activities. Once again, the voluntary nature of the companies is evident, with wide responsibility on the part of the States. Another

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matter is the elimination of all mention to the Human Rights International Law, previously fixed in paragraph "a".

ARTICLE 3. SCOPE

One of the most important and controversial articles of the document displays the reach of the Draft One. Divided into two paragraphs, the first one modifies the equivalent article of Draft Zero, increasing the Treaty's reach to "all commercial activities". It is important to highlight that this enlargement is characterized as a violation of the 26/9 Determination. It is complex for a lot of reasons. First, enlarging the Treaty's scope could result in growing more general dispositions to fit into very different business activities, thus reducing the effectiveness of the Treaty. Also, it is possible to have deflation in the discussion, given the violation of the 26/9 Determination and the matter's controversy. It is clear that pressure performed by the European Union, the United States and the big corporations, aiming the scope's enlargement has taken its effects upon the agenda, making assumable that a corporative capture has taken place.

That been said:

> It is understood that the proposal of including all companies in the scope of a treaty consists of a strategy adopted by the Transnationals host countries to empty the main goal of the binding instrument: fulfill the gaps in the accountability of Transnational Corporations for Human Rights violations. Thus, it is understood that, because of the arguments mentioned above, a treaty should include only TNCs - a fact that would avoid abstract rules and would allow focus on the real actor to be held accountable. (ROLAND, ANGELUCCI, NETO, GALIL, LELIS, 2018, p. 11)

This is an immense setback to the civil society as well as the countries that image their action in dispositions of the Determination, once the Zero Draft previously followed the established in the Elements, which was to guarantee that the companies had to be classified as "transnational" to be submitted to the Treaty. Also, in the Treaty drawn up by the Campaign, the transnational character is given as essential for accountability through the document.

In the third paragraph, the Draft One sets the protection of all international Human Rights. The Elements brought a more specific definition, such as:

All internationally recognized human rights, taking into account their universal, indivisible, interrelated and independent nature, as reflected in all human rights treaties, as well as in other intergovernmental instruments related, inter alia, to labor rights, environment, corruption (p.4).

Despite the possibility to discuss the expression "all intentionally recognized human rights", in the words of Adoración Guaman (2018 p.22), this is an extremely complex matter for the Human Rights International Law. What important here is not to delimit the expression "gross violations" since it can lead to an exclusion of rights affected directly by the business activity.

DRAFT ONE

Article 3. Scope

1. This (Legally Binding Instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.
2. For the purpose of paragraph 1 of this Article, a business activity is of a transnational character if:
a. It is undertaken in more than one national jurisdiction or State; or
b. It is undertaken in one State through any contractual relationship but a substantial part of its preparation, planning, direction, control, designing, processing or manufacturing takes place inanother State; or
c. It is undertaken in one State but has substantial effect in another State.
3. This (Legally Binding Instrument) shall cover all human rights.

PROPOSTA

Suppression of paragraphs 1 e 2, maintain the third one, determining in the caput, the following reach of the Treaty: This Treaty is enforced upon all TNCs and companies carrying out transnational activities.

Therefore, a new section that establishes a list of obligations that the transnational companies will be linked to can be proposed, such as:

_____

The transnational companies or the companies exercising transnational activities shall respect, protect and reassure, in the context of its activities, the Human rights, with guided actions by the following guidelines, in all its value chain:

1- The duty to refrain of all practice or conduct that may violate Human Rights by not taking the measures that implicate in the risk of damage or violation of these

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human rights, as well as the immediate termination of any possible violence in progress;

2- The duty to refrain from practices or conducts that weakens or creates a risk to weaken the State's obligation to respect, protect and reassure the Human Rights. The companies cannot make demands to the State based on international treaties or any other document guided by the lex mercatoria that might affect, if not violate directly the State's obligations regarding Human Rights;

3- Duty to refrain from all acts of collaboration, complicity, instigation, induction, and economic or financial concealment as well as services with other entities, institutions and even persons that violate Human Rights;

4- Duty to respect all national and international rules regulating the protection of Human Rights. With that is prohibited discrimination, in particular by race, color, sex, sex orientation, religion, politic diversions or syndical activity, nationality, social origin, social condition, indigenous belonging, deficiency, age, migratory condition or any other that does not regard requirements to carry out a job, and must also take positive anti-discriminatory actions;

5- Duty to respect territorial rights and free determination of indigenous people and traditional communities, as well as their sovereignty over natural resources and local genetic diversification. This way, there's a submission of companies activities to consult mechanisms, in which the results must be guiding decision-makings to ease the impacts;

6- Duty to respect the rights of coastal and peasants communities and prevent bribery as well as all other forms of corruption or intimidation in the access of land to extractive concessions, aquaculture, agribusiness, tourism, and others;

7- Duty to respect the collective process, the associations, organizations, and movements, as well as other forms of representations prived of the community. As legitimated subjects in the establishment of dialog and defense of interest from those who had their Human Rights violated, or in the risk of such, they must be recognized;

8- Duty to account for precise and specific public information:

a) Purpose, nature and scope of lease agreements of operations and/or other contracts as well as their terminations;

b) Activities, structure, ownership and company's governance;

c) Financial situation and company performance;

d) Availability of complaint and redress mechanisms and procedures for their use;

9- Duty to make public all identity of parts with whom the company's investors may establish commercial or financial activities, that way avoiding fraud or tax evasion. And besides, understand capital flows within the company that violates human rights;

10- Duty to make public the corporation government's structure, informing about those who are responsible for the company's decisions as well as their roles in the value chain. With that, aiming that the shareholders also become responsible in case of disregard of legal personality may the company eventually violate Human Rights;

11- Duty to spread information through all notification means, considering the existence of communities that live remotely or even isolated. Also, the non-alphabetized groups, aiming to guarantee that all information arrives and be understandable for those, in this case, using the language of the affected;

12- In case there are consequences due to the company's activities, they are to ensure that the communities and individuals affected in the process have a space in the management of the situation, ensuring the representation of collectivity. However, the inclusion of the affected does not liberate the company of any responsibility regarding risks or consequences from violating Human Rights by the actions taken;

§ 1 - In case of non-compliance with the guidelines, the companies, as well as it's managers, whose activities violate Human Rights will be held accountable in criminal, civil and eventually even administrative spheres.

Section II

Article 4. Rights of Victims

In Section II of the Treaty, the fourth article delimitates the rights of violation victims in sixteen paragraphs. Even though problems were still identified, including what regards the name "rights of victims", it must acknowledge that several criticisms made by the civil society in the Draft Zero corresponding article (article 8) were altered. However, the rights of the victims are much bigger than just what has been established

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by this Treaty. Therefore, nothing should allow any margin for a diverse interpretation to be made.

In the article's text is clear that there has been no approach regarding the corporate capture of Companies. It is also blank concerning the obligations that they should assume. In case the State or Government finds itself unable to ensure the victims' rights, the possibility of protection and even repair is almost non-existent. Therefore, the capacity of violating rights the companies hold is immense. At the same time, it is plain there is a resistance in establishing specific measures to control those activities.

Still, regarding the text, the order of the paragraphs has been modified, ensuring a more cohesive and ordinated text: first with the essential topics, like the protection of the victim's dignity. The "b" paragraph of paragraph 5 should be withdrawn since it propagates a logic of possibility of remediation of the Right to Nature as if it were negotiable. Nevertheless, is considered acceptable to relocate victims as if it was a positive measure for the traditional communities, which is not. This must be the last resource and in that case, would already be included in the paragraph "a".

Paragraph 9 has established the need to protect defenders of the Human Rights from direct persecution that may be performed by Companies alone, or even in collusion with the State. It also ensures that internal legal procedures won't be used to harm or affect these defenders' legitim acting.

Highlighting, paragraph 15 mentions the possibility to revert the burden of proof. This must become a solid practice, dispensing the need to be required given the disparity of power among those involved. Its application should be automatic. There is no mention about the possibility to use the doctrine of the "forum non conveniens", a kind of procedural defense through witch is requested of the capable judge that proceedings be transferred to a more qualified jurisdiction or even the possibility that victims be represented by social organizations or syndicates in the claim for their rights.

Article 5. Prevention

In the first paragraph of article 5, there is a review of the theme in the Draft One about the idea of "all business enterprises", withdrawn from the previous

document. There's a specific mention to "all persons conducting business activities, including those of a transnational character" highlighting once more that the scope of the Treaty does not concern only TNCs, but also those who operate exclusively on national soil. Important to say that the requirement for rationality within the adoption of prevention measures that the Draft Zero made concerning "size, nature, the context of and risk associated with the business activities", has been withdrawn of this draft. That fact might mitigate the effectiveness of the document. Besides, it is against the Determination 26/9 - as has been said by a lot of sectors during the current process of negotiation.

The idea of "all business enterprises" violates the mandate in the 26/9's determination is given by a non-restrictive interpretation of the text. The document is clear to say, in a footnote located on the first page, that the term "other business enterprises" refers to companies that have a transnational character regarding its activities. Despite formalist interpretation stating that the footnote must not be considered as the main text, it is understood that it should. If that happened, it would help interpret the determination.

Even though they don't feature in article 38 of the Statute of the International Courte, the Determinations are considered, unquestionably, a source of International Law. However, because there are no parameters to interpret determinations established in the international normative, analogies with section 3 of the Vienna Convention on the Law of Treaties can be made, bringing rules for interpreting treaties, considered as a primary source of the International Law.

The rules in articles 31 and 32 of the Convention foresees that, beyond the text, preamble and attachments must be considered as elements composing the wording and, therefore, suitable for interpretation proposes. In the case above - Determination 26/9 - despite the footnote not be a formal part of the wording, it is unquestionable that it is an element of the context that represents the will of the parts endorsing it. By any means, the footnote is essential to understand the wording itself, once it characterizes a term utilized in the title, which in case of absence would compromise the interpretation of the hole.

Ignoring a characterization as clear and manifested as this, only because is not in the main wording is to violate, in a certain way, the International Law once it does not consider the will of the part that formulated the determination, and also there is no argument to sustain this line of view that is not from the positivist matrix.

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The One Draft does not establish, not even regarding prevention, direct obligations to Companies, shifting them only to the States. However, both share mutual responsibility concerning the topic. Not only the State is obliged to create binding rules of due diligence that establishes obligations for the Companies, but also them, independently, must submit itself to the rules fulfilling the due diligence that guides the Human Rights protection. Therefore, the Treaty should have different sections of obligations: one regarding the State and the other regarding the Companies.

The writing of the second paragraph of the analyzed section infers this idea. Therefore,

> it is necessary that the Value Chains fit in the logic of the Human Rights Due Diligence and find applicable ways of making the whole productive system liable, from the company's headquarters to the subsidiary institutions and the suppliers, establishing a system in which the company's headquarters is compelled to monitor the performance of the others that play a role in the production process. This instrument seems to be the most reliable way out of transnational corporate impunity and the solution in order that the due diligence do not only stay restricted to the company's headquarters' countries, protecting, however, all the companies involved with the production, even the ones in which the environmental and the labor law are more flexible. (ROLAND, SOARES, BREGA, OLIVEIRA, CARVALHO, ROCHA, 2017, p.8, our translation)

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For the purpose of paragraph 1 of this Article, State Parties shall adopt measures necessary to ensure that all persons conducting business activities, including those of transnational character, to undertake human rights due diligence as follows:
a. Identify and assess any actual or potential human rights violations or abuses that may arise from their own business activities, or from their contractual relationships;
b. Take appropriate actions to prevent human rights violations or abuses in the context of its business activities, including those under their contractual relationships;
c. Monitor the human rights impact of their business activities, including those under their contractual relationships;
d. Communicate to stakeholders and account for the policies and measures adopted to identify, assess, prevent and monitor any actual or potential human rights violations or abuses that may arise from their activities, or from those under their contractual relationships. concerning the conduct of their business activities, including those of their contractual relationships.
d. Integrating human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed.
e. Adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services;

Proposals

The article only mentions the "contractual relationships" of the company. This term does not reach the whole production system, from the company's headquarters to the subsidiary institutions and the suppliers, but only a limited number of involved agents. This situation should be substituted for a transnational company to act on all the value chain and control relationships. Despite the contribution given by the previous Testament disposition to the value chain's accountability, this kind of disposition should clearly be written.

Also, all the used "human rights impact" expressions - as in the line "c" from the second paragraph and the line "a" from the third one - should be substituted for "human rights violations". That is because "impact" only strengthens the soft law logic disseminated by the Guiding Principles, which can have a positive or a negative meaning. The other important points are the nonexistence of a sanction for the non-compliance of the proposed measures and the elimination of the financial guarantee.

Lastly, the fifth paragraph should be removed. This clause gives margin to interpretations about the meaning of "small" and "medium-sized" obligations because they are open-ended concepts. That is why, quantifying them, speaking of Human Rights, is insensible. There is an inaccuracy related to the passive and active legitimates to define who are the holders of the obligations. Therefore, juridical insecurity is produced among the affected people, since the decision of making the compliance keeps conditioned to the State criterion, that, many times, suffers from the corporative capture.

Article 6. Legal Liability

One more time, in the first paragraph, it is already possible to notice the change in the Treaty scope. By adopting the side of all business enterprises, it starts to englobe not only the transnational companies but also the ones that only act inside the countries borders - this can be inferred by the "including those of transnational character" expression use.

Furthermore, the actual version of the document, which is clearly regressive, does not expressly predict the possibility of reversing the burden of proof, which could

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have been adopted by Draft Zero as a way of guaranteeing the Justice Access by the affected ones.

In Draft One, the expression "supply chain" was removed and this structure was not mentioned throughout the document. As it was affirmed before, it is based on a logic that does not contemplate the value chains' complex structure, therefore the due diligence proposed by the document will not be able to effectively settle the Human Rights' violations committed by the companies.

Still stuck to the regression perspective, Draft One also brings an exhaustive conduction provision in which the States must impose criminal, civil or administrative sanctions. This provision is problematic because the roll does not contemplate all the situations in which the companies should be liable for - the document is omissive at this point. Furthermore, an incomplete exhaustive roll definition can harm accountability in many different ways. The alternative proposal would be:

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State Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

2. Liability of legal persons shall be without prejudice to the liability of natural persons.
3. Civil liability shall not be made contingent upon finding of criminal liability or its equivalent for the same acts.
4. States Parties shall adopt legal and other measures necessary to ensure that their domestic jurisdiction provides for effective, proportionate, and dissuasive sanctions and reparations to the benefit of the victims where business activities, including those of transnational character, have caused harm to victims.
5. State Parties may require natural or legal persons engaged in business activities to establish and maintain financial security, such as insurance bonds or other financial guarantees to cover potential claims of compensation.

PROPOSALS

The dispositions fixed in the article about the transnational or national company's activities should be limited by the suppressing of the 6, 7, 8 and 9 paragraphs. They should be substituted for the civil, criminal and administrative accountability provision to all the transnational companies' obligations fixed by the actual Convention. This accountability should be extended to the managers, including the integrants, of the whole Value Chain.

Article 7. Adjudicative Jurisdiction

Article 7 presents a series of failures and some points that could have been developed in a better way. Firstly, concerning the second paragraph, it is necessary to include the company's patrimony as one of the possible criteria to establish a domicile for the enterprises. Although that idea is touched by the line "d", this one only explicates it inaccurately, insofar as the "substantial business interest" expression is used. This expression can give rise to interpretations contrary to affected-people interests. In the same sense, the line "a" does not sufficiently define the concept of "Value Chains", which should have been better-established before. By the way, there is no accountability provision about violations committed by subcontractors, neither how it should be linked to its subsidiary companies.

In the same sense, the text, in which the expression "incorporation" is used, presents an undue generality about an extremely complex subject, in an attempt of minimizing the lack of a more embracing and more accurate definition about the Value Chains. Therefore, the document, that should solve controversies like this one, turns out to make room for more controversial debates about other inaccurate subjects; this situation is regressive. This happens because, although the previous document did not bring the ideal provision about the Value Chains, it analyzed it more completely than the actual one does.

Moreover, the inclusion of a single paragraph, discoursing that the adopted Jurisdiction criteria should restrain the use of "forum non conveniens" arguments, is essential. This provision, developed by the Campaign Project (item 35), is inserted, even though briefly, in the Elements - it was not even mentioned by Draft One, in spite of the criticism made about its absence in Draft Zero. The restraint on the using of the above-mentioned doctrine is essential to have success in making the companies duly liable for Human Rights violations, as it is expected from the Treaty.[10]

[10] Read Homa's text about extraterritoriality.

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Article 8. Statute of Limitations

Article 8 discourses on the "statute of limitations"[11] subject-matter and establish that this institution should not be applied when the Human Rights violations consist of "gross violations", according to the international community. Besides, the clause provides that, even when there are violations that do not fit this crime category, the institution must be used as enough time guarantee to the violation investigation, especially when it happens in a foreign territory.

Moreover, on this point, Draft One differs from the previous document, in which this relation embraces all and any crimes from the International Law, not only the most serious ones. The addition of "the most serious" expression characterizing "crimes" does not only brings an unwanted inaccurateness but also makes room for the company's impunity concerning Human Rights violations.

Article 9. Applicable Law

Regarding Article 9, the writing remained similar to the previous Draft, despite the criticism. Thereby, the elimination of the "relevant" expression that refers to the "human rights law" is necessary. This is because all Human Rights are relevant and this expression only expands the gaps where Companies and States can discourse on which are the most and least important rights in the conception of the affected people, leading to judicial discussions that could harm them.

Besides, it is essential the definition of a guiding principle that provides that, when there is a law conflict situation, the applicable clause should be the one that benefits the affected people the most. This suggestion was largely provided by Draft Zero, but it was not applied to the new document.

It is still necessary to establish a minimum common point in Human Rights, which should establish a juridical order of a minimum compliance obligation to all States that takes part in the Treaty - always reserving the using of expressions like "gross violations" or of eloquence that takes the economic, social and environmental rights out of the protection reach.

[11] "Statute of limitations" is an institution that establishes the maximum time the parts have to file a lawsuit, starting from the day the claimed offense happened.

Article 10. Mutual Legal Assistance

Article 10 provides mutual legal assistance through many different mechanisms that seek for an extraterritorial reach for the judicial sentences. Its content does not significantly differ from the one presented in Draft Zero. However, the article has a fundamental problem: its language permits mutual assistance and information exchange, but it does not stipulate it obligatorily to the States. An obligation in providing information and legal assistance should be established by the solicited State, as well as the support obligation for the implementation of the Court's decisions by them. Furthermore, it does not provide a formal institutional arrangement with the view to structure the legal requisitions transmission to reach mutual assistance, even as it does not enumerate the proceedings that would make the assistance easier to the solicitant authorities.

Regarding paragraph 10, line c, two subject-matters should be mentioned: the expressions "public order" and "sovereignty". The contrary argument about the public order is identified as one of the biggest obstacles to foreign sentence homologations; this situation harms many times the affected people's access to damage repair. Besides, the maintenance of sovereignty as an impediment to the Treaty imposition establishes an outlet valve to the State. The imposition of Human Rights' sovereignty as a principle through the writing of the article is necessary.

Another point that should be brought up is the necessity of implementing a clause preventing the use of the forum non conveniens argument, as it was already said before.

To effectuate these issues, Professor Surya Deva comments on the necessity of establishing new bilateral or multilateral agreements, or, at least, supplementing already-established agreements insight of including Human Rights and Companies' cooperation terms in them.

Article 11. International Cooperation

Regarding Draft Zero, previously published, there were no changes in the writing, but, about the Campaign Draft and the Elements, the topic was undermined until it meant only a recommendation, contrasting the logic and the goal of a binding Human Rights and Business' Treaty.

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In the Campaign document, the equivalent article was mentioned in "Part VI. International cooperation mechanisms for investigations, enforcement of rulings and jurisdiction" and the suggested clauses show the importance of cooperation between the Treaty signatories States, regarding the criminal, civil and administrative spheres, to enable the support for the victims and so that the jurisdictions can complement themselves. It is necessary to emphasize, as defended by Zubizarreta and Ramiro (2016, p. 91), the necessity of building a binding treaty that requires the establishment of civil and criminal accountability to corporations and their directors, concomitantly. This accountability should be imposed, irrespectively of their operation, on the offenders or their accomplices; it also should be extended to all the parts of the corporation's productive chain.

Draft One restricts the academic cooperation destined to study and research; the experience exchange in the Treaty implementation; and the effective technical cooperation and know-how of the agents that will deal with the damage repair instruments. This because it does not even mention which ones these would be.

Another relevant question is who are the agents that will cooperate for the Treaty accomplishment: here, the international cooperation is based on the good faith between the States, but it is reduced to technical and academic terms between the state agents and the civil society, without mentioning the role played by the companies throughout the process, which exempt them from the accountability and the obligations. This situation leads to the wrong direction regarding the Treaty goals. By mentioning that the States should promote cooperation between themselves, as well as international, regional and relevant civil society entities, the Draft makes room for the affected community and expert discussions that lead to an exchange of experiences, techniques, and knowledge. This measure is positive, however, there are insufficient elements that can define the conditions and the time that might be taken to the exchanges happen. In this perspective, there is a lesson given by professor Juan Zubizarreta that states:

> *Account must be taken of global, national and local spheres – both from regulatory perspectives and in social and trade-union mechanisms – for controlling transnational companies. Various forms of legal pluralism above and below State level should be explored as systems for legal and social cooperation for the control of multinationals.* (2008, p.28)

Paragraph 4, article 10: Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit and exchange information relating to criminal offences covered under this (Legally Binding Instrument) to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this (Legally Binding Instrument). The transmission and exchange of information shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information.

Proposals

The "no harm to the internal right" expression should be removed from the paragraph 4 from the Article 10 to allow controversy when the provision in the Treaty guarantees better resources to the states' cooperation and mutual assistance. New paragraphs providing the cooperation obligation between the States in the judicial sphere are accepted. They can go from information exchange and investigation and proceedings support to the execution of the judicial sentence, insofar as the other jurisdictions decisions, inclusively, allowing extradition.

Article 12. Consistency with International Law

The Draft states that the Treaty and its provisions should observe the States' sovereignty, territorial integrity, and non-intervention in internal matters principles, to maintain the competences of each State, which external interferences should not be allowed to affect. Furthermore, this document lists a series of clauses that reaffirms its sovereign power and imposes respect to the other proclaimed national or international law.

This treatment differs from what was proposed in the Campaign and the Elements in that the States are placed as independent actors; in the Elements, these principles were placed in the preamble of the document and the Campaign treats the negotiation of this international legislation not as state sovereignty, but as the sovereignty of peoples. Considering the importance of human rights norms to prevent and remedy violations, the point defended by the Campaign deserves to be included

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in the perspective of the Treaty to allow those affected and affected to be emancipated.

By excluding the possibility of applying mechanisms of extraterritorial jurisdiction and, consequently, restricting access to justice (ARAGÃO, D, ROLAND, M.), it further limits the terms of cooperation among States and weakens international human rights provisions by determining that countries must comply with their legislation and not the other way around, which can be dangerous since different countries possess different normative landmarks and that especially the emerging ones are weaker and more dependent on TNCs. Consequently, the emerging ones will be inclined to complicit with destruction in the name of economic development.

Notably, it can be seen that this is how the so-called "architecture of impunity" is established. This expression is defined by Zubizarreta as the process in which the commercial agreements of inversion redefine the legal rules. As a result of the architecture of impunity, the logic of capital invades and privatizes the public spaces. It happens with the support of the States, which dominate peoples, nature, and people.[12]

In this sense, it is important to highlight that human rights must be supreme to be effective. To make that happen it's necessary the dissemination of this matter in the international system through instruments that are capable of establishing direct and consistent obligations. These obligations need to overcome the weaknesses present at the national level (ARAGÃO, D; ROLAND, M, 2017).

Section III

Article 13. Institutional Arrangements

This point is subdivided into four other points concerning aspects of cooperation between States for the implementation of the Treaty.

The other documents had not yet discussed procedural issues related to the implementation and operation of the Treaty at the time its entry into force. Despite this, the Elements mention, in the "non-judicial mechanisms", the creation of a Committee of Human Rights and Business formed by eighteen experts elected by the

12 P. 19, THE INTERNATIONAL TREATY OF PEOPLES FOR THE CONTROL OF TRANSNATIONAL COMPANIES An analysis from the legal sociology (our translation).

signatories considering the trajectory in the matter, the geographical distribution, and gender. It provides for the following obligations:

> *Examining the progress made by State Parties in achieving the realization of the obligations undertaken in the present instrument; Assess, investigate and monitor the conduct and operations of TNCs; Conduct country visits in accordance to its mandate; Examine the periodical reports according to its mandate; Receive and examine communications according to its mandate* (p. 13)

In the first paragraph, line c must be established by the public and opening vote. Considering principles such as publicity and transparency, there is no reason for the secret vote.

The Committee's activities are listed and describe a framework for preparing annual reports, making general recommendations to the states and making comments and recommendations on the implementation and interpretation of the treaty.

In calling for the creation of an international fund for victims, the Treaty recognizes that companies may seriously violate human rights, but even so, these agents are not held responsible for the damage caused, since the fund will be financed by the States. At this point, the Draft misses one of the great opportunities to establish direct obligations that would allow for the reparation of victims.

Once again, there is here a normative instrument that is centered on the protagonism of the States and that maintains the character of voluntariness proven inadequate and insufficient to convey matters of Human Rights.

A better proposal would be that of Zubizarreta. The author suggests the creation of a World Court about Corporations and Human Rights. The entity would be complementary to national and regional mechanisms, but also independent of States. Furthermore, it would be responsible for "accepting, investigating and judging cases involving civil, political, social, economic, cultural and environmental violations committed by companies, States and financial institutions for human rights violations and civil and criminal liability for corporate, ecological and economic crimes." (p.40, our translation).

Still, according to Zubizarreta, the Court would be a way to soften the International Arbitration Courts, legitimized to judge controversies in contracts and business agreements. Thus, they contribute to impunity by granting legal security to decisions that are in disagreement with human rights. (ZUBIZARRETA, 2016, our translation).

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Compared to the Committee's proposal, the Court is much more appropriate to the nature of the violations committed by transnational corporations, because if large corporations are able to transit the globe in order to distribute their productive chain, assessing which location is most beneficial for the enterprise, those affected should also be legally protected by a jurisdiction that allows for redress. This time, our alternative wording proposal would be:

Proposals

Here, we reproduce the proposal already foreseen in the Global Campaign document, inserting two devices:

- **International Centre for Monitoring Transnational Corporations,** responsible for evaluating, investigating and inspecting the activities and practices of TNCs (jointly managed by States, social movements, affected communities, and other civil society organizations).
- **International Court on Transnational Corporations**, to ensure the effectiveness of the obligations provided for in this Treaty. The Court has the competence to receive, investigate and judge complaints against TNCs for violations of human rights mentioned in this Convention. The Court protects the interests of communities and individuals affected by TNCs operations by ensuring full reparation and sanctions for TNCs and their managers. The Court's decisions and sanctions are directly applicable and legally binding.

We also advocate the suppression of the Committee. If it is maintained, a provision should attribute to it the power to monitor compliance with the Treaty, as well as a Protocol that allows individual or community denunciations of human rights violations perpetrated by NTCs. It should also be ensured that, in all mechanisms, the gender balance is established, in accordance with CEDAW.

Article 14. Implementation

The implementation of the Treaty is the responsibility of the State. The State must identify which undertakings pose the greatest risks in its territory and, from then

on, seek the means to remedy them. To this end, they should consider gender cuts, children, people with special needs and migrants. Although it mentions that implementation must take into account all legislation on international human rights, the Treaty does not make further specifications on how it will occur.

Article 15. Relation with protocols

According to Article 15, the binding instrument may be supplemented by one or more protocols. It also stipulates that States and regional organizations should behave not only as a part of a protocol but also as a part of the treaty in question. However, it is observed that, in the very process of stipulating the draft treaties, there is no consultation and effective participation of civil society, without the proper participation of regional organizations. Furthermore, this article states that a State Part will only be bound by a protocol in cases where it is in agreement with all its provisions.

Article 16. Settlement of Disputes

Article 16 of Draft One deals with the settlement of disputes arising from divergent interpretations of the Treaty between States. First, the article states that the States involved must find a solution through negotiation or other means of dispute resolution. In the case of continuing conflict, it is expressed in the second paragraph of the article that it is referred to the International Court of Justice or that its arbitration is carried out by an organization or procedure mutually agreed between the two States.

Article 17. Signature, Ratification, Acceptance, Approval and Accession

Concerning Article 17, this express provision states that the signing of the Treaty must be open to all States and presented to all regional organizations present at United Nations Headquarters in New York at the date of signature.

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Article 18. Entry into force

Article 18 of Draft One provides that it shall enter into force within thirty days of the deposit of the instrument of ratification of access. This process will also work for the entry into force of each State

Article 19. Amendments

As far as amendments are concerned, Article 19 of Draft One states that any State Party may propose an amendment to the Treaty. In this context, the Draft provides that a conference to assess the proposals must be approved by ⅓ of the States and the amendment itself must be approved by ⅔ of the States. This amendment will enter into force within thirty days of being reached ⅔ in the vote on the amendment. In addition, it is worth noting that the first paragraph of the article states that the amendment will only be binding on the states that have accepted it.

Article 20. Reservations

Article 20 states that reservations incompatible with the object and purpose of the Treaty shall not be permitted. In addition, the Article provides that reservations may be removed at any time.

Article 21. Denunciation

Article 21 regulates denunciation. In its content, it is stated that States may make denunciations to the Secretary-General of the United Nations and that the denunciation must become effective within a period of one year after the receipt of notification of the denunciation.

Article 22. Depositary and Languages

In its last article, Draft One states that the Secretary-General of the United Nations shall be the depositary of the Treaty and that its text shall be translated into Arabic, Chinese, English, French, Russian and Spanish, official languages of the UN.

2. CONCLUSIONS

According to all the information and observations presented here, it is concluded that the document, although it represents the continuity of the process of drafting a treaty on human rights and business, which should be considered positive, presents a series of issues that are extremely problematic for the schedule and that may strongly influence a future application of the Treaty.

Draft One focuses on state accountability and access to justice and remedies. However, for this mission to be efficiently accomplished, it would be necessary to further deconstruct the founding structures of the system, because it is not possible to achieve the objectives of the Treaty without questioning basic issues of the so-called lex mercatoria[13]. Points such as the scope of the Treaty now expanded to all commercial activities and the lack of direct obligations for companies, but this efficiency in doubt. In this sense, the Elements contributed more. If the Treaty is not able to meet the needs of those affected by violations that face an enormous imbalance in comparison to transnational corporations and fails to provide them with this possibility of resistance, it loses its reason to exist.

The creation of a Court should also be a key element of the Treaty, in order to ensure greater effectiveness in complying with its provisions. After all, there is no global international court with binding sentences that exercises jurisdiction over human rights and where the individual can be an active part of its process, denouncing the violation suffered, and receiving the corresponding reparation. Without this type of binding decision, the effectiveness of treaties is often diminished.

In terms of structure and language, there is an evident improvement in the general text and standardization of its structure. However, just like Draft One, as well as Draft Zero, it uses the entire term "shall" all the time, which is much less incisive than "must". The terminology chosen indicates an alignment of the draft with a less binding and more voluntarist logic.[14]

A more assertive text will be needed if the Treaty is to play a real role in changing the paradigm. It is necessary that the text does not relativize its provisions

13 Zubizarreta and Ramiro (2016, p. 7) define lex mercatoria as the new global normative regime that guarantees legal certainty to businesses conducted by large corporations, but that relegates their social, labor and environmental obligations to a voluntary logic, based on the concept of "corporate ethics".

14 https://plainlanguage.gov/guidelines/conversational/shall-and-must/

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because of domestic law and that it is capable of true enforcement, committed to the primacy of human rights. This is the only way to talk about reducing the impunity of transnational corporations and states for human rights violations on a global scale.

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