



Technical Note No. 5/2023-PFDC-Brazil

September 2023

Theme: Information to the Brazilian State for the 9th Negotiation Session of the International Treaty on Business and Human Rights, to be held in October 2023 at the headquarters of the Human Rights Council of the United Nations (UN).

1. Introduction to the global agenda on human rights and business

The tension between business and human rights is not a new issue. By their very nature, business corporations operate aiming to make a profit and, thus, pay their partners and shareholders. Although legal and protected by the principle of free enterprise, an essential element of the political-economic system adopted by the Brazilian Constitution, as well as by other capitalist countries, the permanent need to maximize profits imposes on business administration a persistent pressure to minimize costs, often at the expense of investments in the protection and promotion of human rights.

It is true that, originally, the set of norms for the protection and promotion of human rights was conceived with the State as the central figure, characterizing the government as both the one responsible for violations of individual rights and freedoms restrained, as well as the promoter of social, economic and cultural rights to be encouraged¹. This made, and still makes perfect sense, insofar as, in theory, it is the State that regulates social life and has the duty to implement the constitutional program.

However, in practice, it has been verified at the international level that States are gradually becoming less powerful in relation to economic agents. According to the non-governmental organization Oxfam International, in 2018, 71 (seventy-one) of the 100 (one hundred) largest global economic entities were companies and only 29 (twenty-nine) were States.². This enormous economic power of corporations makes them holders of indisputable political power, especially after globalization.

1 WEICHERT, Marlon. Human rights and business: asymmetries and responsibilities. Available in: <https://www.jota.info/opiniao-e-analise/artigos/direitos-humanos-e-empresas-assimetrias-e-responsabilidades-28082020>. Access on: August 30, 2023.

2 GREEN, Duncan. *Of the world's top 100 economic revenue collectors, 29 are States, 71 are corporations*, Oxfam International, 3 August 2018. Available in: <https://frompoverty.oxfam.org.uk/of-the-worlds-top-100-economic-entities-29-are-States-71-are-corporates/>. Access on: August 30, 2023.



Furthermore, world history reveals that business activities, although indispensable for economic growth, in addition to the consequent affirmation of a social welfare State, often cause numerous and great negative impacts of socio-environmental nature. Likewise, not rarely, they result in violations of rights, especially of populations in situations of greater vulnerability, such as residents of the outskirts of urban centers, as well as traditional peoples and communities, which usually suffer damage to life, physical integrity, health, adequate food, among others, due to this type of enterprise.

To deal with the complexity of this alleged antagonism between business activities and human rights, the international civil society has come to demand the creation of legal instruments and frameworks for the protection and promotion of human rights by companies.

In this context, for more than 50 (fifty) years the UN has discussed the relationship between human rights and the actions of transnational corporations. Although unknown to the general public, in recent decades several initiatives have been adopted with the aim of establishing a regulatory framework for corporate activity with respect to human rights.

Between 1970 and 1990, an attempt was made to build an international code of conduct that would provide companies with guidelines on respect for Human Rights, which, however, was not approved. Then, in the early 2000s, also unsuccessfully, a proposal was put forward to draw up international standards binding to States.

Against a backdrop of frustrated policy initiatives, and driven by the success of the Global Compact in articulating the business sector around human rights agendas, in 2005, the then UN Secretary-General, Kofi Annan, appointed a special representative on the issue of human rights and transnational corporations and other business enterprises to conduct a mapping of national and international initiatives and good business practices in the field of human rights.

Professor John Ruggie, from Harvard University, one of the creators of the Global Compact, was the one chosen and for 6 (six) years worked for the development of the UN Guiding Principles on Business and Human Rights – 31 (thirty – one), in total -, which, in the end, were divided into 3 (three) pillars: the duty of States to protect human rights; the responsibility of companies to respect human rights; and access to remedies.

Unanimously adopted by the UN Human Rights Council on 16 June 2011 (Resolution 17/4), The Guiding Principles have become the benchmark international normative framework on business and human rights. In its 10 (ten) years of existence, there is no doubt that they have contributed to a driving change in the global scenario of human rights violations by corporate entities.

It is also true that they revealed the limited scope of a normative act of voluntary adherence



in the field of human rights, and the consequent need to issue a binding framework capable of establishing a clear legal framework on the obligations of companies, associated with an effective remedial system, able to balance the correlation of forces between private economic agents, States and populations affected by business activities, thus impacting, in fact, the decision-making processes in corporations.

2. Importance and urgency of an internationally binding normative framework on human rights and business

At the international level, the United Nations Human Rights Council is currently leading two parallel initiatives to strengthen normative frameworks on human rights and business. The first led to the creation of the Working Group on Business and Human Rights, whose mandate relates to the dissemination and implementation of the UN Guiding Principles on Business and Human Rights. The second concerns the publishing of an international treaty on the subject, which is currently at the stage of discussion of the fourth draft.

At the national level, the first draft of the incorporation of the Guiding Principles into the Brazilian legal system took place in 2018, with the publication of Decree No. 9571/2018 (already revoked), which, based on voluntary adherence rules by corporations (Article 3), established the “National Guidelines on Business and Human Rights”. Also without a binding nature, but built in a largely democratic manner, with intense participation of representatives of civil society, Resolution 5/2020 of the National Human Rights Council deals with the “National Guidelines for a Public Policy on Human Rights and Business”.

The aforementioned norms represented a step forward, although clearly insufficient, given their voluntary nature, in the process of paradigm shift regarding the responsibility of companies for human rights violations in Brazil. A definitive turn on the issue, however, should only take place with the publishing of the international treaty, but also with the approval of Bill No. 572/2022 of the Chamber of Deputies, which aims to create a binding national framework on human rights and business.

We should note that, despite lack, so far, of a cherished binding normative framework, either international or domestic, which establishes, in the form of a statute, general rules related to the obligations of companies in relation to human rights, the duty of corporations to respect, protect



and promote rights of this nature is not only already present in the legal system, but its compliance is required by law.

In this sense, at the external level, for example, the Inter-American Court of Human Rights based its judgment on the Case of Employees of the Fireworks Factory of Santo Antônio de Jesus and their family members vs. Brazil (judgment of July 15, 2020) on the fact that the UN Guiding Principles on Human Rights and Business take place in the Inter-American system for the protection of human rights. According to the decision, these principles are in harmony with the obligations that must be observed based on Articles 1.1 and 2 of the American Convention on Human Rights (Pact of San José da Costa Rica)³, as well as other international instruments (such as Conventions 81 and 155 of the International Labor Organization - ILO) and interpretations that comprise obligations for States in this type of context.

Notwithstanding this, internally, the Federal Supreme Court (STF) has long established the understanding that violations of fundamental rights do not only occur in the context of relations between citizens and the State, but also in relations between individuals and legal entities governed by private law, so that the fundamental rights guaranteed by the Constitution are not only directly binding on public authorities, but are also aimed at protecting private individuals from private authorities, such as corporations (horizontal effectiveness)⁴.

In addition, advanced legislation on specific human rights issues, such as the law that deals with the protection against contemporary slavery (Law 10803/2003) and the international convention that provides for guarantee of free, prior and informed consultation from indigenous peoples and international communities (ILO Convention 169⁵) impose, in Brazil, certain standards of conduct in the context of the development of business activities.

Brazil's dual status in the field of human rights – that is, on the one hand, the country is well advanced in the normative field, but on the other hand, it still vulnerable to various forms of violations, especially in the context of global value chains – gives the Brazilian State a privileged position at the negotiating table of an internationally binding normative framework on human rights and business.

3 Enacted in Brazil by Decree 678/1992.

4 Cf. RE 201.819, rapporteur Justice Ellen Gracie, rapporteur for the appellate decision Justice Gilmar Mendes, Second Panel, judged on October 11, 2005.

5 Enacted in Brazil by Decree 5051/1992.

Indeed, as it can be inferred from the draft currently under discussion, not only would the country benefit from the signing of a possible international treaty on the subject – which would certainly bring innovations to the domestic legal system and reinforce normative forecasts already in force–, but it could also take on a leading role in the discussions and promote the advancement of



the agenda, by sharing successful internal experiences that can be replicated globally.

3. Possible contributions of Brazilian legislation to an international treaty on human rights and business

In a context of economic globalization, it is a notorious fact that Brazil is characterized as a major exporter of commodities that supply global value chains. According to the United Nations Conference on Trade and Development (UNCTAD), in 2019, the export of commodities represented 8.4% (eight whole and four-tenths percent) of the Brazilian Gross Domestic Product⁶. Despite being important for the Brazilian economy, the extraction or production of commodities often causes human rights violations and environmental damage⁷.

Although this situation is a cause of constant concern for the State and society, the Brazilian legal system provides for some specific remedies aimed at confronting this reality, several of which are successfully used in cases of corporate abuse or human rights violations by companies.

In Brazil, for example, both judicial and non-judicial remedies are available to seek the accountability of State and non-State actors for actions or omissions that cause damage to the environment and human rights violations. Judicial remedies include criminal actions and public-interest civil actions. Non-judicial (or hybrid) remedies are the recommendations and terms of commitment for conduct adjustment.

With regard specifically to public-interest civil actions, they are one of the most important judicial instruments for the protection and defense of human rights. Since the enactment of Law 7347/1985, public-interest civil actions have been used, with recurrent positive results, to prevent harmful conduct and to seek redress in cases of human rights violations by companies.

6 United Nations Conference on Trade and Development, *State of Commodity Dependence 2021* (New York: UNCTAD, 2021), 13. Available at: https://unctad.org/system/files/official-document/ditccom2021d2_en.pdf. Access on: August 30, 2023.

7 COELHO, Thales Cavalcanti. Access to Remedies and Reparations: From Brazilian Practice to International Binding Standards, in *Business and Human Rights Journal* (2023), 8, 237-243.

In this sense, it is worth highlighting the case involving the textile company that owns the well-known M Officer brand. Based on a public-interest civil action filed by the Labor Prosecution, the Regional Labor Court of the 2nd Region held the corporation responsible for its failure to monitor its production chain, in which it was found that workers were subjected to conditions similar to slavery, imposing on it the duty to repair material damage and compensate for the moral



damage caused⁸.

Another example of a successful public-interest civil action in this area concerns the complaint filed by the Federal Prosecution Service against the television station RedeTV, due to the repeated transmission of discriminatory content. In this case, the 2nd Federal Civil District Court of the Judicial Section of São Paulo recognized the illegalities practiced, and ordered the company to, for 30 (thirty) days, broadcast human rights education programs in its listings⁹.

The success of public-interest civil actions, as an instrument for the protection of human rights and reparation of damages in case of violations, can be due to several characteristics that, from the point of view of comparative law, are unique. We should note in this line the guarantees for the Prosecution Service, as its legitimate assets, together with the constitutional guarantees granted to the institution and its members, among which, notably, administrative and financial autonomy and functional independence.

It is also relevant for the success of public-interest civil actions, as an instrument of democratization of access to justice and protection of vulnerable groups, the complete absence of payment of procedural expenses (such as advance costs, notary fees, expert fees, etc.) by the plaintiff - except, at the end of the process, if it is an association, and only in cases of proven bad faith.

The high rate of favorable results obtained in public-interest civil actions filed by the Prosecution Service is also due to the possibility of using procedural instruments essential to guarantee equality in litigation against large corporations, such as the inversion of the burden of proof and lifting the corporate veil – aimed, respectively, at the adequate responsibility of those causing harm in consumer, environmental and human rights matters and the full implementation of the favorable judicial provision obtained.

⁸ LABOR PROSECUTION SERVICE, M. Officer is convicted of enslaving. Available at: <https://www.prt2.mpt.mp.br/545-m-officer-e-condenada-por-trabalho-analogo-ao-de-escravo>. Access on: August 30, 2023.

⁹ BARBOSA, Bia. Justiça obriga Rede TV! a transmitir programas sobre direitos humanos, Repórter Brasil, 16 de novembro de 2005. Available at: <https://reporterbrasil.org.br/2005/11/justica-obriga-rede-tv-a-transmitir-programassobre-direitos-humanos/>.. Access on: August 30, 2023.

In summary, the attribution of the Prosecution Service to propose public-interest civil actions in defense of the interests of victims of human rights violations, the non-obligation for said rights holders to pay for procedural expenses and the provision of protective legal instruments, such as the inversion of the burden of proof and lifting of the corporate veil, which aim to counterbalance the asymmetry of forces usually verified between companies causing damage and those affected, undoubtedly constitute strengths of the Brazilian human rights protection system.

In this scenario, based on the Brazilian domestic experience, it is concluded that the



following are possible contributions to an international treaty on human rights and business: the provision, in the domestic legislation of the signatory countries, of the defense of the interests of rights holders to strong and independent public entities, which can exercise their functions both in and out of Courts; the exemption of procedural expenses of any kind to victims of human rights violations, as a way to enable access to justice and the search for full reparation for the damage caused; and the provision of procedural instruments aimed at reducing asymmetry of resources and the guarantee of equality in disputes involving human rights violations by companies (such as the inversion of the burden of proof and lifting of the corporate veil).

4. Possible contributions of an international treaty on human rights and business to the Brazilian legislation

Despite the strengths outlined above, which can be replicated globally, based on an international treaty on human rights and business, the Brazilian system for the protection of human rights also shows clear weaknesses, which make the country vulnerable to violations and an open space for corporate impunity.

Indeed, the judiciary is often unprepared to prosecute and try cases involving human rights violations, either because of lack of expertise in complex issues of this nature¹⁰, or due to the absence of legal provisions for adequate procedures. In judicial proceedings related to human rights violations that occurred

¹⁰ For this reason, in an unprecedented initiative, the National Council of Justice (CNJ), in September 2022, held the first course named “Training for Judges in Business and Human Rights”, in partnership with the United Nations (UN) Project about Responsible Business Conduct in Latin America and the Caribbean (CERALC). Cf. CNJ, First CNJ course on Business and Human Rights brings together more than 100 judges, September 12, 2022. Available at: <https://www.cnj.jus.br/primeiro-curso-do-cnj-sobre-empresas-e-direitos-humanos-reune-mais-of-100-judges/>. Access on: August 31, 2023.

in the context of socio-environmental disasters, mega-sports, entertainment events or infrastructure projects, problems such as insufficient participation of affected people, imbalance of resources between companies and victims of illegal conduct and delay in resolving the demand are common.

From a normative point of view, an international treaty on human rights and business, in addition to being able to provide instruments for addressing these issues, would also have the potential to bring innovations to the Brazilian legal system, advancing the current system of human rights protection.

In this sense, provisions, such as criminal liability of legal entities, imprescriptibility of



punitive claim of the State and legal responsibility throughout the value chain (from the lifting of the “corporate veil”) for cases of human rights violations are essential for fulfilling the main objective of the treaty, that is, to fill the regulatory gaps that currently lead to impunity for companies with transnational activities that violate the law.

With regard to the so-called “corporate veil”, it is a legal figure that prevents all legal entities that are part of the value chain from having a common legal existence, so that each is considered an independent entity. This fact presents itself as an obstacle to recognizing legal responsibility of the parent company for violations caused by companies that are part of its value chain, despite the close connection and intricate relationship between them. It is understood, therefore, that an international treaty on human rights and business cannot do without the establishment of clear mechanisms to fix the duty of vigilance of the parent company in relation to all legal entities integrating its value chain.

With regard to the issue of imprescriptibility, it is understood that human rights violations committed by transnational corporations should not be subject to the statute of limitations of the punitive claim of the State, as they represent violations of the dearest assets to the international community. In order to avoid gaps that open space for corporate impunity, it is necessary to avoid restricting imprescriptibility to offenses considered “more serious” “graver”, open expressions whose scope is difficult to define and which, thus, can weaken the effectiveness of the document.

As for the criminal liability of legal entities, it is a fundamental mechanism to combat corporate impunity, given that experience reveals the insufficiency of civil and administrative sanctions for disapproval and for the prevention of human rights violations committed by companies. An international human rights and business treaty have the potential to encourage States

to improve their domestic laws in an effort to internalize human rights protection standards. In relation to Brazil, there would certainly be no constitutional obstacle to a broad adoption of criminal responsibility of the legal entity, to the extent that such figure is already adopted in the domestic legal system – although currently restricted to environmental offenses.

The points listed above, drawn from the experience of the Federal Prosecution Service, are considered of special attention by the Office of the Federal Ombudsman for Human Rights. Without prejudice, there are other core points without which the elaboration of an international treaty on human rights and business would be meaningless and that the Brazilian State cannot forget in the negotiation sessions, namely: the scope of reducing the impunity of transnational corporations for



human rights violations; the primacy of human rights, especially over trade and investment treaties; the provision of direct obligations for companies, and not only for States; and the centrality of rights holders in any situations in which business activity may affect them, ensuring, at least, the rights to information, participation, access to justice and full reparation.

In order for the treaty to play the important role expected, promoting a real paradigm shift in the issue of corporate abuse, an assertive text is necessary, which represents real advance in relation to what is already foreseen in the UN Guiding Principles on Business and Human Rights, as well as other non-binding international normative frameworks. To this end, it is essential to reach a text that does not relativize its own devices in view of domestic law and that is capable of real enforcement, committed to the primacy of human rights. That is the only manner that we may have progress in terms of reducing the impunity of transnational corporations and States for human rights violations on a global scale.

Brasília/DF, September 9, 2023.

Carlos Alberto Vilhena
Federal Ombudsman for Human Rights

Thales Cavalcanti Coelho
Working Group on Human Rights and Business
Coordinator

ANNEX

Suggestions of the PFDC-Brasil¹¹ to the wording of the draft of the International Treaty on Human Rights and Business, to be prepared by the OEIGWG/CDH/ONU Group

Preamble

1. In **paragraph 10** (PP10) of the Preamble, it is suggested to recover the previous wording, which indicates that companies must have the potential to promote and respect: *“internationally recognized human rights, labor rights, health and safety standards the*



environment and climate, in accordance with relevant international standards and agreements”.

A return to Brazil's original position about paragraph 10 (before the 7th session) is proposed in order to **expressly include some types of rights** that can be impacted by companies, such as the human right to the environment (recognized by UN General Assembly Resolution A/RES/76/300 of 2022).

In addition, the need to privilege the use of the term “**all business**” in the agreement is recognized, aiming at the applicability of the Treaty also to national enterprises.

*(Preamble, PP10) Acknowledging that all business enterprises have the capacity to foster sustainable development through increased productivity, including economic growth and job creation that **promote and respect internationally recognized human rights, labor rights, health and safety standards, the environment and climate, in accordance with relevant international standards and agreements;** (Brazil)*

¹¹ Office of the Federal Ombudsman (PFDC), of the Federal Prosecution Service, Brazil. <https://www.mpf.mp.br/pfdc>. Suggestions prepared by the PFDC/MPF in September 2023, with a view to holding the 9th Negotiation Session of the International Treaty on Business and Human Rights in October 2023.

2. Recover **paragraph 11 bis** in the wording to be adopted at the 9th Session of the OEIGWG, present in the 3rd *Draft*¹² (A/HRC/52/41/Add.1), a proposition made by the State of Palestine reaffirming the **primacy of human rights over trade and financial agreements**.

(Preamble, PP11 bis) To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements. (Palestine)



In the same sense, **our position, alternatively, is to adopt the wording of paragraph 18 bis**, drafted by Cameroon in the 3rd round of the draft (A/HRC/52/41/Add.1), which privileges human rights over trade or investment treaties:

(Preamble, PP18 bis) Reaffirming the primacy of International Human Rights Law over all other legal instruments, especially those related to trade and investment; (Cameroon)

Article 1. Definitions

3. In the definitions brought by the Treaty, we suggest the insertion and definition of the entry “**value chain**”, in order to value the application of the international standard for national companies, in addition to transnational ones, with respect for human rights also to all companies that make up the supply chain or the value chain.

12 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G23/008/93/PDF/G2300893.pdf?OpenElement>

4. In paragraph 10 of the definitions, in the concept of “Relevant State agencies”, we suggest the inclusion of “**ombudsperson offices**”, among the different State mechanisms that can act in cases of human rights violations by companies.

Article 2. Statement of Purpose

5. In the purposes of the Treaty, we suggest to work on the wording of Article 2, c, in order to include verbs related to **risk mitigation**, in addition to prevention, and, if possible, mention, in this article, something related to **repair obligations of enterprises** (*remedy*) and **accountability** for the acts, impacts and damages caused (*legal liability*).



Article 3. Scope

6. With regard to the scope of application of the Treaty, the positioning of the draft corroborates with Draft 4, so that the international standard is applicable for all kinds of enterprises and business, **including national and local companies** in addition to transnational enterprises.

In Article 3.1 it would be interesting to incorporate the **concept of "value chain"**, as proposed by Namibia and the State of Palestine, aimed at broadening the scope of application of the standard to all suppliers, while still enshrining the applicability of the instrument to domestic companies.

3.1. This (Legally Binding Instrument) shall apply to all business activities, including business activities of a transnational character.

7. The wording of Article 3.3 is supported:

3.3 This (Legally Binding Instrument) shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties of this (Legally Binding Instrument).

Article 5. Protection of Victims

8. We support the wording proposed by the Brazilian State (A/HRC/52/41/Add.) to Article 5.3, which considers the principle of reasonable duration of the process:



*5.3. States Parties shall investigate all human rights abuses covered under this (Legally Binding Instrument), effectively, promptly, thoroughly and impartially, considering the **principle of reasonable length of proceedings**, and where appropriate, take action against those natural and/or legal persons found responsible, in accordance with domestic and international law. (Brazil)*

Article 6. Prevention

9. With regard to **Article 6.2¹³**, we propose to include additional points in the Article to provide for the need for the adoption of measures by States: for **legal liability of companies whether in the civil, criminal or administrative spheres, and for the establishment of full reparation obligation and remedial mechanisms (remedy)**.
10. With regard to the items provided for in **Article 6.4**, which deals with the aspects to be observed in the procedures of due diligence in human rights by companies, the need to maintain the **gender and age perspective, in addition to**

13 “6.2. State Parties shall adopt appropriate legislative, regulatory, and other measures to (...)”.

assessment of the impacts of entrepreneurial activities on women and girls (Article 6.4, b), and subparagraph “e” of the article establishing the aspect of **protection of the safety of human rights defenders, journalists, workers, Indigenous Peoples, among others**.

In its latest position, the **The Brazilian State had suppressed the mentioning on women and girls**, in addition to the protection of **human rights, journalists, workers, Indigenous peoples and others vulnerable to retaliation by corporations**.

In addition, we propose to include provisions in this article that also include commitments to the perspective of “diversity among people”, and mentioning of “race” and “LGBTI+ representation”.



6.4. Measures to achieve the ends referred to in Article 6.2 shall include legally enforceable requirements for business enterprises to undertake human rights due diligence as well as such supporting or ancillary measures as may be needed to ensure that business enterprises while carrying out human rights due diligence:

(a) undertake and publish on a regular basis human rights impact assessments prior and throughout their operations;

(b) **integrate a gender, age, [racial and LGBTQIA+] perspective**, and take full and proper account of the differentiated human rights-related risks and adverse human rights impacts experienced **by women and girls**;

(c) take particular account of the needs of those who may be at heightened risks of vulnerability or marginalization;

(d) meaningful consult with potentially affected groups and other relevant stakeholders;

(e) **protect the safety of human rights defenders, journalists, workers, members of indigenous peoples, among others, as well as those who may be subject to retaliation**; and

(f) insofar as engagement with indigenous peoples takes place, undertake such process in accordance with the internationally recognized standards of free, prior, and informed consent.

11. Still referring to **Article 6.4**, we should note the need to improve the wording of the item that deals with prior consultation with local populations and interested parties, in order to **replace or define the term “stakeholder”**, which comes from business grammar, and adopt a greater focus on populations, groups and individuals susceptible to the impacts of business activities. In these terms, Indonesia's proposal (A/HRC/52/41/Add.1):



*6.4. (c) Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples and **local communities**, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas; (Indonesia)*

12. Regarding the theme of Article 6, we notice a **lack of a section** which deals autonomously with the **Corporate Obligations**, related to human rights. Article 6 deals with due diligence. However, it would be interesting to provide for autonomous obligations also not connected to the procedures of due diligence, which are often carried out by external consultants, which through evaluation confer a seal of quality to companies, and in this context many managers feel exonerated from their own and continuous obligations related to the respect and promotion of human rights in the context of business activities, environment and impacts.



13. We suggest resuming the wording expressed in the proposed item 6.8 quarter (A/HRC/52/41/Add.1), in the sense of the edition of norms for the respect of the rights of human rights defenders by companies.

6.8 quarter. State parties shall enact norms to ensure that business enterprises respect the rights of human rights defenders. (Uruguay, Panama (potential add to Chair's proposal), Palestine, Mexico, Brazil)

Article 7. Access to Remedy

14. Our position is to expressly indicate the Prohibition of the **doctrine “forum non conveniens”** in the items of Article 7, so that there are no obstacles to the judicial assessment of human rights violations by companies in the countries. It refers to the proposal made by Egypt (A / HRC/52/41/Add.1):

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

15. We should note the importance of maintaining the norm of Article 7.4, d, which establishes the **reversal of the burden of proof** for the most vulnerable parties to the procedural relationship against the companies.

7.4. The measures to achieve the aims set out in Article 7.2 (b) shall include, to the extent applicable to the State agency in question and necessary to address the obstacle in question: (...)

(d) adopting measures to facilitate the production of evidence, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof;



Article 8. Legal Liability

16. The wording of Article 8.2, which provides for the **liability of legal entities and natural persons in the civil, criminal and administrative spheres** is supported. This provision is in line with Brazilian legislation on the matter.

*8.2. Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in this Article **shall be criminal, civil, or administrative**, as appropriate to the circumstances. Each State Party shall ensure, consistent with its domestic legal and administrative systems, that the type of liability established under this article shall be: (...)*

Article 9. Jurisdiction

17. We support maintaining the wording of Article 9.2, which, for purposes of liability and definition of jurisdictional competence, considers as domicile of companies (legal entities):
- a) place of incorporation or registration;
 - b) main place of assets or operations;
 - c) administration or central management;
 - d) main place of business or activities.



9.2. *For the purposes of Article 9.1, a legal person is considered domiciled in any territory or jurisdiction in which it has its:*

- (a) place of incorporation or registration;*
- (b) principal assets or operations;*
- (c) central administration or management; or*
- (d) principal place of business or activity.*

Article 10. Statute of limitations

18. Our opinion is that the current wording of Draft 4 is **not enough** to curb human rights violations committed by business enterprises, whether national or transnational, especially in the context of collaboration with authoritarian regimes.

The wording under discussion **establishes imprescriptibility only** for the initiation of legal proceedings related to human rights violations that characterize **war crimes, crimes against humanity and crimes of genocide**. One notices in these terms an **undue restraint** to the application of the imprescriptibility regime.

Neither does the wording proposed by the Brazilian State for Article 10.1 (A/HRC/52/41/Add.1) comprises a broad regime of imprescriptibility for human rights violations committed by companies that are the subject of the respective Treaty:

10.1. States Parties shall adopt legislative or other measures to ensure that limiting or prescriptive time limits are not applied for bringing legal proceedings related to human rights abuses covered by this legally binding instrument, which, according to international law, constitute the most serious crimes of concern to the international community as a whole. (Brazil)

We note that **the Brazilian position also restricts the application of imprescriptibility to serious crimes, provided for by international law.**



It is therefore suggested to **propose a broader wording that admits imprescriptibility for all human rights violations committed by national and transnational companies, in order to combat corporate impunity**, in certain contexts. It comes to mind, in this regard, the judgment of the Extraordinary Appeal (RE) No. 654.833, with general repercussion, by the Supreme Court, which establishes the thesis of imprescriptibility for the claim of civil reparation for environmental damage, which was recently considered by the UN Assembly a fundamental human right. In this line, still related to human rights, the Brazilian Constitution of 1988 establishes the imprescriptibility to the crime of racism and crimes against the constitutional order and the Rule of Law, which can also be committed by companies.

From this perspective, the following wording is proposed for Article 10.1 of the document, aiming to be, as far as possible, adopted by the Brazilian State:

(PFDC Proposal) 10.1. State Parties shall adopt legislative or other measures to ensure that limitation or prescription periods shall not apply to the initiation of legal proceedings related to human rights abuses covered by this (Legally Binding Instrument), particularly in cases involving violations by transnational corporations.

Article 14. Consistency with International Law (Consistência com o Direito Internacional)

19. We agree with the maintenance of the wording proposed by Brazil and China in the 3rd Draft (A/HRC/52/41/Add.1), which establishes that the implementation of the obligations provided for in the International Covenant by States must also observe the **principle of non-intervention** in the domestic affairs of other States.

By inserting this principle, dear to Brazilian diplomacy and governing Brazil's International



Relations (Federal Constitution, Article 4, IV), we would prevent intervention in other countries, normally practiced by major powers and nations with a history of colonization, under the justification of combating corporate abuses defined in the future pact.

14.1. States Parties shall carry out their obligations under this (Legally Binding Instrument) in a manner consistent with, and fully respecting, the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. (China, Brazil)

Article 15. Institutional Arrangements

20. We understand as fundamental the establishment by the Treaty of a mechanism or body for monitoring the application of the international instrument. As stated in the Draft 4, Brazil requested the deletion of Articles 15.1-15.4, demonstrating, therefore, a position contrary to the creation of a committee for monitoring compliance with treaty obligations.

Similar to the Committee Against Torture, Committee on the elimination of Racial Discrimination, Committee of the International Covenant on Civil and Political Rights, Committee of the International Covenant on Economic, Social and Cultural Rights, Treaty bodies to which the Brazilian State submits periodic reports, undergoes examinations and receives recommendations, the creation of a **Committee related to the International Human Rights Treaty appears to be an important mechanism** for the enforcement of the rules and principles of the Covenant at the international level in question, and which ends up complementing the internal protection systems, whether judicial, administrative or extrajudicial, responsible for giving effectiveness to the agreed norms.

In these terms, it expresses its support for the adoption by Brazil of the norms contained in Articles 15.1 to 15.4.



15.1. There shall be a Committee established in accordance with the following procedures: (..)

15.2. States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this (Legally Binding Instrument), within one year after the entry into force of the (Legally Binding Instrument) for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.

21. With regard to the functions foreseen for the Committee, it is suggested a proposal that allows the **inclusion of the prerogative of receipt and consideration by the committee of complaints/claims, whether individual or collective**, regarding human rights violations by companies in a given national context, and to assess possible inertia or non-compliance with treaty obligations by States Parties. The inclusion of this additional attribution could be done by negotiating an Additional Protocol, to the model of the protocols complementary to the ICCPR and the ICESCR.

22. We also support the **establishment of a Conference of the Parties (COP) to the Treaty**, provided for in Article 15.5, in order to enable periodic debates on the subject. Likewise, we are also in favour of the **establishment of an International Fund for Victims**, provided for in Article 15.7. In these terms, it is suggested to adopt the proposal built by Bolivia, South Africa, Palestine, Egypt, Namibia and Kenya, which include in the wording “peasants and people working in rural areas”. We also support including this public in the list of Article 16.4, as proposed by the same countries.



15.5. The States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the (Legally Binding Instrument), including any further development needed towards fulfilling its purposes.

*15.7. States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims, taking into account the additional barriers faced by women, children, persons with disabilities, Indigenous peoples, **peasants and other people working in rural areas**, migrants, refugees, internally displaced persons, and other vulnerable or marginalized persons or groups in seeking access to remedies. This Fund shall be established at most after (X) years of the entry into force of this (Legally Binding Instrument). The Conference of States Parties shall define and establish the relevant provisions for the functioning of the Fund.*

Article 16. Implementation

23. Article 16.1, which provides for the establishment of **national mechanisms to ensure effective implementation** of the Treaty, should be maintained. Alternatively, if this is the adopted method, we support the eventual adhesion of the Brazilian State to an alleged **additional protocol related to the implementation of the National Implementation Mechanism**, as suggested in the 4th Session (2018).

16.1. States Parties shall take all necessary legislative, administrative or other action including the establishment of adequate monitoring mechanisms to ensure effective implementation of this (Legally Binding Instrument).

24. The wording of Article 16.5 should be maintained, ratifying the primacy of international human rights law and humanitarian law so that there are no exceptions to the application of the Treaty on account of internal provisions of States.

16.5. The application and interpretation of these Articles shall be consistent with international law, including international human rights law and international humanitarian law, and shall be without any discrimination of any kind or on any ground, without exception.



FEDERAL PROSECUTION SERVICE

Signature/Document Certificate **PGR-00327980/2023 technical note nº 5-2023**

Signee: **CARLOS ALBERTO CARVALHO DE VILHENA COELHO**

Date and time: **09/09/2023 17:12:54**

Signed with login and password

Signee: **THALES CAVALCANTI COELHO**

Date and time: **09/09/2023 17:14:54**

Signed with login and password

Go to <http://www.transparencia.mpf.mp.br/validacaodocumento> Key c0af5451.a18adb7b.0351d201.60b93ccd