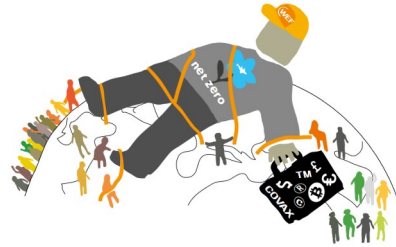


Global Campaign  
to **RECLAIM PEOPLES SOVEREIGNTY,  
DISMANTLE CORPORATE POWER  
and STOP IMPUNITY**



## ARGUMENTS FOR ESTABLISHING PROPER AND DIRECT OBLIGATIONS FOR TRANSNATIONAL CORPORATIONS IN THE UN BINDING TREATY ON TNCs AND HUMAN RIGHTS

Global Campaign to Reclaim People's Sovereignty, Dismantle Corporate Power and Stop Impunity

*October 2022*

Due to decades of impunity, initiatives to support a legal framework to hold transnational corporations (TNCs) legally liable for human rights violations committed directly or through their global production and value chains have gained momentum worldwide. To fill this significant gap in International Law, a legally binding instrument on TNCs and human rights is being negotiated at the United Nations Human Rights Council (UNHRC). Eight years of discussions around the Treaty have generated many theses, interests, and questions. One of the most controversial proposal concerns the establishment of direct obligations of TNCs.

### What does it mean to establish proper and direct obligations for TNCs?

Establishing direct obligations for TNCs means that TNCs that violate human rights can be held directly responsible under the UN Legally Binding Treaty on TNCs. They would, thus, provide the legal basis for decisions rendered by judges and juries at sub-national, national and international courts, as well as by administrative legal bodies, even in absence of national legislation or when national legislation is deficient or contrary to the Treaty.

This means also that all State Parties to the Treaty will have the obligation to recognize the jurisdiction of the domestic courts of the country where the alleged violations occurred, of the home country of the TNC, or of the future international enforcement mechanism of the Treaty (for example, an International Court on TNCs, as advocated by the Global Campaign) to judge human rights violations committed by any given TNC. These jurisdictions would be applicable regardless of where the violations occurred, as long as they happened within the activities of said TNC's global value chain.

There is strong resistance, however, to this proposal. Among academics, civil society organizations and States, there is a widespread understanding that only States, as formal

subjects of international law, can be held directly responsible by international enforcement bodies for the violation of human rights. Furthermore, there is also the fear that holding TNCs directly responsible would conflict with States' sovereignty and their jurisdiction over a given territory. In this document, we hope to address these concerns, showing the importance of establishing direct obligations for TNCs, arguing why this will not raise their legal international status. Moreover, we show how obligations for TNCs will actually empower States vis-à-vis TNCs operating within or across their borders. Finally, this document also explains the difference between human rights obligations of States and those of TNCs enshrined in international law.

First, it is important to note that, within the current international legal system, TNCs enjoy numerous privileges: they are de facto subjects of extraordinary rights. Examples include the right to intellectual property (TRIPs agreement and other treaties on intellectual property) and the right, as foreign investors, to sue States directly in private arbitration tribunals established by bilateral or multilateral investment treaties, typically referred to as Investor-State Dispute Settlement (ISDS). There is a clear asymmetry, therefore, between rights enjoyed and obligations due for TNCs in international law. There is a deeper asymmetry, however, in the relationship between those affected by human rights violations (economically and politically-marginalized persons and organizations, indigenous peoples, peasants, women, communities), States that might find their obligations to protect human rights threatened by TNCs that can sue them in private investment tribunals, and corporate perpetrators: an asymmetry of power. To address the latter, that is enforced through trade and investment law, and to safeguard the universal character and enforcement of international human rights law, the corporate privileges and rights have to be accompanied by obligations.

It is not effective—and definitely not fair— to demand from States that they hold full control over TNCs with disproportionate economic power and complex legal and administrative structures that enable them to escape national jurisdictions. What is more, we should not forget that TNCs also enjoy economic and political support from international financial institutions and powerful countries. The fear that listing obligations for TNCs in the Binding Treaty will somehow weaken State sovereignty does not stand if we look at these power relations. Establishing direct obligations, on the contrary, will strengthen State sovereignty vis-à-vis corporate power, in particular of those that are smaller and from the Global South. Additionally, courts, which are State institutions, will be the ones applying these obligations in their adjudication powers. The listing of obligations will not prevent States from issuing and enforcing their own regulations; they will just set international minimum standards to make sure TNCs cannot escape public accountability by jumping borders.

Recently, [a report on business and human rights issued within the Inter-American System of Human Rights](#), seeking to contribute to the discussions taking place in the Human Rights Council, analyzed three interrelated questions: 1) Do companies violate human rights?; 2) Is it necessary to make TNCs subjects of international law to establish direct obligations?; 3) What are the risks and implications of establishing international human rights direct obligations for TNCs?

The arguments presented in this paper emanate from an inductive approach built upon bibliographic review and documental analyses. We conclude that establishing direct obligations for TNCs in the UN Binding Treaty is legally granted and possible, and politically desirable.

#### *Legal Precedents*

First, since Human Rights obligations are *erga omnes*, they are horizontally binding to all. Indeed, despite the Inter-American System not being able to acquire jurisdiction over and render judgment against private subjects (both legal or natural persons), it recognizes their obligations to respect human rights established internationally in the Inter-American Convention, as stated, for instance, in the Advisory Opinion 18/03.

In addition, the Inter-American Court, in Advisory Opinion 22/16, asserts that legal persons have human rights obligations while not being protected by the Inter-American system, since they already have their rights safeguarded in domestic legislations. This interpretation, therefore, clearly shows that, despite having international obligations, companies do not become subjects of international law. No rights are derived from this recognition of their obligations; contrariwise, they have only limited their boundless rights. Similarly, individuals have international rights and obligations, but are not to be considered subjects of international law.

It is important that all States, in particular American countries that are signatories of the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, recognize these precedents from the Inter-American System and advocate for them in the negotiations of the UN Binding Treaty. Treaties are, of course, political negotiations, but having clear juridical precedents to back one's claim grounds the discussion and provides substance to the development of a strong and effective Binding Treaty.

#### *Liability*

Liability of TNCs should be different, independent, and separated from the liability of States. There shouldn't be any overlapping between States' obligations and those of TNCs: while States must respect, protect, implement, fulfill, non-discriminate and promote international cooperation in the field of human rights; TNCs must have the obligation to respect, prevent and provide remedies pursuant to judicial decisions.

The Treaty, consequently, can and must establish a clear and open list of legal obligations of TNCs to respect human rights within the framework of their activities, to be applied and enforced directly by judges in national and international courts, independently from States' human rights obligations.

The importance, then, of clearly listing obligations for TNCs cannot be reiterated enough, as it is the only way we can guarantee maximum efficacy for the Treaty. Non-specific obligations could delay or in fact prevent the enforcement of the liability for human rights violations committed by TNCs, as TNCs would then be able to limit the access to justice of affected communities to national frameworks and procedures exclusively.

## Examples of binding obligations in existing legal instruments

Legally binding norms that contain specific provisions and direct obligations applicable to the private sector, including TNCs, already exist at the international level. These norms, adopted by States, are in the areas of the environment, corruption, organized crime, workers' rights, and human rights.

### *1) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*

The Convention provides a list of the obligations of companies, designated as “importer”, “person” (physical or legal), “exporter” and “generator”. It also states that it is the duty of the state under whose jurisdiction the company is located to monitor the implementation of these obligations.

### *2) Protocol of the Basel Convention on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*

This protocol aims to “to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes” (Article 1). It is not limited to the States Parties to the Basel Convention, but applies to “all persons”, including, in particular, TNCs that might cause damage during a transfer of hazardous waste.

### *3) Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*

The preamble recalls the responsibilities of the waste generator during the transport, disposal and treatment of hazardous wastes, which must be carried out with regard for human health and the environment, and the duty of the States Parties to oversee compliance procedures.

Apart from the norms listed above, similar provisions can be found in many ILO instruments, in the “United Nations Convention against Corruption”, in the Council of Europe’s “Criminal Law Convention on Corruption”, in the “United Nations Convention against Transnational Organized Crime”, in the “International Convention for the Suppression of the Financing of Terrorism”, and others.

It is clear, thus, that there are plenty of legal examples and precedents that support the argument for the international human rights system to establish clear, proper and direct obligations for TNCs to respect human rights. It is time the international community fills in this huge legal gap and develops a strong binding instrument capable of directly sanctioning human rights violations committed by TNCs.