

GLOBAL CAMPAIGN TO RECLAIM PEOPLES'
SOVEREIGNTY, DISMANTLE CORPORATE POWER,
AND STOP IMPUNITY

stopcorporateimpunity.org



FRONTIERS OF AN EFFECTIVE BINDING TREATY

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



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his document compiles the reasoning and most important arguments the Global Campaign puts forwards regarding content that must be considered in the elaboration of an ambitious and effective Binding Treaty on Transnational Corporations (TNCs) and Human Rights as mandated by Resolution 26/9. A consolidation of the demands of affected communities, indigenous peoples, trade unions, social movements, and civil society organizations, the proposals spelled out here are necessary so the Treaty can effectively regulate the activities of TNCs. They are key to addressing the asymmetries generated by the immeasurable power TNCs exert over their value and production chains at the expenses of States' and peoples' sovereignty.

This document is complementary to the official written <u>contributions</u> of the <u>Global Campaign</u> submitted in the framework of the inter-sessional period (8th - 9th sessions) of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG). There, we analyse the proposals and amendments made by States in previous sessions stressing which articles we believe should be supported, which could be improved, and those we recommend are rejected in the elaboration of the future draft.

The themes and arguments we expose here are taken from and reflected in different articles of the 3rd revised draft with comments from States. They consolidate over a decade of work and extensive consultations, but they are also part of a living process. Our allies, and all those working to reclaim peoples' sovereignty, dismantle corporate power, and stop impunity, are welcome to comment and suggest provisions, arguments, precedents, and amendments that might strengthen our voice and the effectiveness of the future Binding Treaty.



1. SCOPE OF THE TREATY SHOULD BE ON TNCS AND OTHER BUSINESS ENTERPRISES WITH A TRANSNATIONAL CHARACTER

rade and investment regimes and treaties have created an international legal framework that protects corporate profits to the detriment of the peoples and the planet. This architecture of impunity allows TNCs to evade justice and interfere in democratic processes thus violating the sovereignty of States. The intricate legal and economic structure of TNCs, combined with their economic power and extensive capacity for influence and corruption, allows them to exploit legal loopholes and slip through the cracks of domestic legislations. There is therefore a significant regulatory gap in international human rights law enabling these powerful entities to violate human rights and environmental standards with relative impunity—a gap a strong and effective Binding Treaty will be able to fill. Ensuring corporate legal accountability across borders is thus essential for guaranteeing TNC accountability in an era where capital flows freely, but justice does not. The scope of application of the future Binding Treaty must then be to regulate the activities of TNCs and other business enterprises with a transnational character, as mandated by Resolution 26/9.

The change in the first revised draft (2019) to broaden the scope of the future Treaty to "all business", which the Chair is now unilaterally attempting to impose in their Guidelines for the intersessional period¹, is a tactic to dilute the content of the future Treaty. By putting on the same level corporations already subject to national control and TNCs, they make the application of the future treaty impossible. By expanding its scope to "all businesses", eliminating a clear reference to TNCs, the Treaty would establish common provisions to enterprises with very different structures and activities, thus compromi-

^{1. &}lt;a href="https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session9/2023-03-igwg-9th-guidelines-intersession.pdf">https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session9/2023-03-igwg-9th-guidelines-intersession.pdf

sing its effectiveness. Not only it would mean mixing apples and oranges, but it would also saturate the Treaty's enforcement mechanism. These changes are very much in line with the arguments corporate representatives and their political allies, mainly from the Western Group of States, have defended in previous sessions of the OEIGWG.

Lastly, throughout the negotiation sessions, the majority of participating countries have emphasized the importance of adhering to the mandated scope. Therefore, maintaining the scope on TNCs and other business enterprises with a transnational character is vital for preserving not only the future treaty's effectiveness but also the democratic nature of the process.



t is essential that the future treaty reaffirms and effectively implements the primacy of International Human Rights Law over economic activities, and trade and investment agreements and legislation, in accordance with Articles 1 (Purposes of the United Nations) and 103 of the UN Charter.

The primacy of human rights in International Law means that individuals and communities have the right to seek redress for human rights violations, and that adjudicators must ensure that remedies prevail over commercial interests. This may include the right to seek remedy for harm suffered, the right to seek justice through criminal proceedings, and the right to seek other forms of redress.

The principle of the primacy of human rights is fully consistent with Art. 103 of the UN Charter, interpreted in conjunction with its preamble and articles 55 and 56. Moreover many modern constitutions include the primacy of fundamental rights.



3. OBLIGATIONS FOR TNCS IN INTERNATIONAL HUMAN RIGHTS LAW²

here is a widespread misconception that only States, as formal subjects of International Law, can be held accountable for human rights violations. Next to it there is also a fear that, if the future Treaty establishes obligations to TNCs, the latter will automatically become subjects of International Law, undermining the sovereignty of States and their jurisdiction over a given territory. Neither of these concerns are reasoned within current international jurisprudence, as we will explain below. First, States jointly establishing concrete obligations to TNCs in the international level reflects just another way of them collectively exercising their regulatory power as representatives of the peoples. Second, these obligations will be of extreme relevance to support States regulating TNCs at the national level, giving them the upper hand when facing power asymmetries and circumventing corporate capture. Finally, establishing concrete obligations to TNCs in International Human Rights Law is a means for States to fulfil their obligation to cooperate internationally to create an enabling environment for the realization of human rights.

Establishing obligations for TNCs under International Human Rights Law only means that there would be an international legal threshold for decisions rendered by judges and juries of sub-national, national and international courts, as well as by administrative jurisdictional bodies, in the

^{2.} For further information on the importance of establishing obligations for TNCs, see the arguments in this document: https://www.stopcorporateimpunity.org/wp-content/uploads/2022/10/Argumentos obligaciones-directas-ETN-Campana-Global.pdf

absence of national legislation or when such legislation is deficient or contrary to the future Treaty.

In various legal spheres, we already have binding legal frameworks that establish obligations for corporations without making them formal subjects of International Law. Furthermore, it is never too much to remind us that the responsibilities of TNCs must be different, independent and separate from the responsibility of States. First, they are different because while States must respect, protect and fulfil human rights, companies must respect them, prevent violations and comply with judicial or quasi-judicial remedies defined by adjudication bodies. Second, their being independent only means that threatened or affected communities and individuals should be able to sue a corporation directly, without the need to sue a State. Finally, they need to be separated because one should not be able to choose whether to sue the State or the corporation³. Therefore, there is clearly no overlap among the obligations of States and those to be established for TNCs. While States must respect, protect, implement, comply, not discriminate and promote international cooperation on human rights, TNCs must have the obligation to respect, prevent and provide remedies in compliance with judicial decisions.

Establishing clear obligations to TNCs is thus necessary to ensure the effectiveness of the future Treaty, as non-specific obligations may delay the accountability process under domestic frameworks and hinder procedures for affected communities to access justice. To safeguard the human rights of communities affected by the activities of TNCs, the future Treaty cannot be relegated to a complementary role that is subsumed to national legislations. In this context, it is important to once again reject the informal proposals presented by the Chair (2022) that aim at depriving the future Treaty from its transnational character.

^{3.} Nevertheless, both States and TNcs could be held jointly liable in certain circumstances. If a company is sued but does not respond, the State, as guarantor of human rights, shall provide remedy to victims and affected communities. In this case, their capacity to sue the company to obtain compensation should be maintained.



4. JOINT AND SEVERAL LIABILITY ALONG THE VALUE CHAIN

o guarantee the full protection of human rights, the future Treaty must cover all activities along the value chains of TNCs. The understanding of value chains must comprise all companies that contribute to the TNCs' operations, including contractors, subcontractors, or suppliers of goods and digital and non-digital services with which the parent company or controlling company established formal or informal business relationships.

This means that accountability must also be applied upwards, so that investors, shareholders, holdings, economic conglomerates, banks, and pension funds that finance TNCs can be held responsible for human and environmental rights violations committed by the TNCs they financially support.

The inclusion of actors up and downstream of the chain is essential to break the logic whereby social, environmental and economic responsibilities are externalised along TNCs' chains and hidden behind the corporate veil. The Treaty must then set a comprehensive and adequate framework of criminal, civil, and administrative legal liability that must be joint and several. Each and all the parties can be then

held individually responsible for the entire obligation, as well as for a portion of it. Overall, joint and several liability along the value chain serves as a mechanism to ensure that all parties involved in a particular human rights and environmental violation are held accountable for any harm caused and that adequate remedy is provided to the affected communities and individuals.

In terms of precedents, the **UN ECOSOC** General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Paragraph 42, will describe how the corporate veil compromises the access of effective remedy for people affected by human rights violations. The Rome Statute and the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families set a specific framework for joint liability. Finally, **UNDRIP** (United Nations Declaration on the Rights of Indigenous Peoples) and **UNDROP** (United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas) set the basis for both the State and the communities to hold TNCs liable, including joint liability.



5. JURISDICTION AND INTERNATIONAL TRIBUNAL⁴

o guarantee the implementation of the UN Binding Treaty and enforcement of the obligations set out by this instrument, and in case of failure of domestic complaint mechanisms, affected persons and communities shall be able to proceed before the courts of the home and host States of TNCs, in the States where the TNC carries out substantial activities, in the States where the human rights violations occurred or risks to occur, in the States where the affected persons or communities are a national or domiciled, or in the States where the TNC has its main assets.

Furthermore, it is necessary to entrust the control of compliance and sanctions for non-compliance to an international tribunal before which TNCs would be accountable, and which would act in a coordinated and complementary manner with State jurisdictional bodies. The need for an accessible institution to enable the judicial sanctioning of human rights violations is justified on the one hand by the ineffectiveness and inefficiency of existing mechanisms, and on the other hand by the need to avoid a new instrument whose usefulness and raison d'être will be paralysed by ineffectiveness in its implementation. It is worth reminding that the creation of an international judicial mechanism had already been suggested by a document elaborated by the Chair in 2017 (Elements, 9b.1).

Inspired by this document from the Chair, the Global Campaign proposes a new paragraph in art.15.8: State Parties shall decide for the establishment of an international judicial mechanism for the promotion, implementation and monitoring of the legally binding instrument, in the form for instance of an International Court on Transnational Corporations and Human Rights.

^{4.} For further information, see the Document of elements for an International Tribunal on TNCs and human rights: https://www.stopcorporateimpunity.org/wp-content/uploads/2022/10/Elementos-Tribunal_Oct2022.pdf

It is also important to support the provision about connected claims, which will allow, for instance, the possibility of judging a parent or controlling company and its subsidiary or other companies with which it has businesses relationships operating abroad before the same court. This inclusion in the 3rd revised draft is an important first step to then establish the joint and several liability of TNCs across their global value chains.

Finally, the compliance monitoring mechanism of the proposed Committee, in the current draft, is still very fragile and does not guarantee the effectiveness of the already limited demands that the text imposes on States, especially because it lacks any complaint mechanism. It is essential to have a clear definition of the criteria for the election of possible candidates designated by the States to integrate the Committee for both the International Court and for the Treaty body, which must explicitly

exclude people linked to the business sector, with vested interests, or in conflict of interests, to prevent undue corporate influence. The competences of the Committee should also be strengthened and include the possibility of receiving complaints against TNCs. Finally, the Committee's recommendations must also be binding.

Regarding access to jurisdiction, it is essential to reject unconditionally the general principle of *forum non conveniens*, and to defend the use of the principle of *forum necessitates*. It should also be acknowledged that it is unsubstantiated to suggest that *forum necessitates* would open way to forum shopping, as some businesses representatives have claimed. The reality on the ground is that communities affected by TNCs violations have barely the resources to pursue legal justice at all, let alone to choose more favourable courts. Forum shopping is typical of TNCs, not of peoples affected by their violations.



6. RIGHTS OF AFFECTED PERSONS AND COMMUNITIES

he future Treaty should establish strong and effective provisions to guarantee the rights of those threatened or affected by TNC activities through mechanisms of redress such as access to precautionary measures, effective remedy and compensation for damages, guarantees of non-repetition, and rehabilitation and satisfaction of any human rights violations.

Article 6 of the current revised draft indicates that, in an effort to prevent human rights violations [and as part of the required due diligence measures], business enterprises shall '[Ensure] that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consultations'.

Interestingly, the use of 'consultations' does not reflect the phrasing found in most sources of international law. The UN Declaration on the Rights of Indigenous Peoples itself promotes the right to free, prior and informed consent. While this may seem like a minor difference on the page, this has

major consequences on the ground. This change removes the communities' right to decide on their own development trajectory and instead favours transnational corporations' interests. It is clear from the testimonies of affected communities, especially those affected by extractive projects, that the procedural right to free, prior, and informed consent must be linked with a more substantial right: the right to say no.

The binding treaty must impose a standard of consent as opposed to consultation. To give force to the intentions of article 6, to prevent rights violations, communities and other affected parties must be placed at the centre of the decision-making process. This also implies that consultations must be conducted independently from the TNC and that consultations organized by the communities themselves shall be officially recognized. Finally, it is key to incorporate the amendments that aim at reinforcing the provisions of articles related to the rights of victims/affected people and communities (mainly articles 4, 5 and 7).



7. PREVENTION AGAINST CORPORATE CAPTURE

he Treaty must include concrete measures against the influence of TNCs throughout the process of preparation, negotiation, and implementation of the future Binding Treaty. The effectiveness and enforceability of the future Treaty depends on it.

The future treaty must also protect the domestic and international policy space of States against undue interference by TNCs. This is to say that States should re-

fuse to give TNC representative the means to influence relevant policies that have an impact on human rights in their bilateral, regional, multilateral, or other trade and investment agreements. Therefore, it is key to incorporate in the future Treaty the amendments that aim at strengthening provisions to impede corporate capture both in its prevention clauses and in articles related to its implementation (mainly article 6 and article 16).



8. THE TERM "VIOLATION" SHOULD SUBSTITUTE, OR AT LEAST ALWAYS ACCOMPANY, THE TERM "ABUSE"

he term "abuse" creates a false hierarchy between States that violate human rights and TNCs that may cause human rights abuses, implying that TNCs cannot commit violations and therefore have no legal obligation to respect human rights. According to the prevailing theories on Human Rights in International Law, a violation is characterized as such if

there is an offence to human dignity, and not by whom caused it, if a State, a person or a TNC.

For these reasons, it is imperative to include the term "violation" alongside "abuse," as proposed by Cameroon in Article 1.2, and to standardize this terminology throughout the articles of the future treaty.



9. THE TERM "VICTIM" SHOULD BE FOLLOWED BY "AFFECTED PEOPLE AND COMMUNITIES"

istorically, social movements that have been affected by the activities of transnational corporations have claimed the use of the term "affected people and communities" instead of victims when referring to those suffering human rights violations caused by TNCs. First, the term victim is very restrictive, suggesting that a human rights violation may occur and cause harm to one single individual. Bringing in the "affected" perspective means emphasising that most human rights violations, although in different degrees, will have consequences to entire communities, sometimes even a whole region or country.

Furthermore, the term victim implies a fait accompli, while the future Treaty should also protect the rights of communities

and peoples at risk of being affected by the proposition of a certain project or legislation which will have consequences to their lives and territories. It is very important for movements and organisations part of the Global Campaign that the rights of affected people and communities are protected, so that it is guaranteed to the collective e.g. the right to be informed of the proceedings, the right to legal assistance, and the right to information. Furthermore, the Global Campaign suggests the incorporation of "holders of individual and collective rights" so trade unions are explicitly encompassed by this definition.

Therefore it is important to include the term "affected persons and communities" next to "victims" in the definition of Art.1.1 and standardize them throughout the text.

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10. REFERENCES TO THE DOMESTIC LAW OF THE STATES

there are plenty of references to the domestic law of States. However, in several countries judicial systems may be flawed, deficient or partial. The future Binding Treaty must be able to protect human rights against violations committed by TNCs in their operations and along their value chains, and to do so it must be able to establish a common threshold to all parties.

References to domestic law in the current draft Treaty not only recharacterizes its international *animus* but it also risks its effective implementation. If the implementation of the Treaty is limited to national prerogatives, the Treaty loses its meaning, moves away from its original mandate and risks becoming a "toothless", ineffective instrument.

It is therefore necessary to reject all provisions asserting the prerogative or supremacy of the domestic law of States that would undermine the effectiveness of the

future Treaty. The exceptions are references i) to national law that is more protective of human rights, ii) to dispositions that claim for international judicial cooperation in the prosecution of violations, and iii) to provisions determining ways in which domestic law must adapt and comply with the future Treaty.

A good international reference in this regard is established by the International Labour Organization (ILO). First, in ILO Convention 98, it is determined that the rights encompassed by it will be applicable to all member States of the organisation, even if they have not ratified the Convention (yet). Second, in its Constitution, Art. 19.8. it is Stated that no international standard should undermine any national law, custom, ruling or agreement that is more favourable to workers. Both stipulations should be emulated by the future Treaty for the effective protection of communities and individuals affected by the activities of TNCs.



11. THE TERM "MITIGATION" SHOULD BE REPLACED BY "PREVENTION" IF IT REFERS TO HUMAN RIGHTS VIOLATIONS

n the one hand, due to the nature of the crime, human rights violations should not be mitigated, but prevented—accepting mitigation means accepting a certain level of violation of a human right. There is never mitigation enough to having violated the rights of a person or community. Risks, on the other

hand, can and should be mitigated in certain circumstances.

In the third revised draft, some States amendments positively aim to reinstate this issue by deleting the term "mitigation" when it refers to violations, as it cannot be seen as a preventive measure.



12. REFERENCES TO ENVIRONMENTAL HARM

s cases such as Chevron-Texaco in Ecuador, the BHP oil spill in the Gulf of Mexico and Total in France evidence, it is impossible to address climate change without recognizing the insurmountable impact TNCs play both in emissions and in environmental disasters. Global by nature, environmental crimes are intrinsically connected to human rights

violations. So much so that in July 2022 the United Nations General Assembly passed Resolution A/76/L.75 recognizing the right to a clean, healthy, and sustainable environment as a human right.

Many other cases related to toxic substances, or the impact of agro-industrial food systems, also show how corporations are contributing to environmental pollution

and the destruction of biodiversity, harming both the people and the planet.

The Global Campaign understands that the Binding Treaty, because of the inextricable connection between human and environmental rights, must ensure that both are integrally protected. There should, therefore, be references to climate change and environmental rights beyond the preamble, also in chapters dedicated to the definition of victims, harm and liability.



13. REFERENCES TO DUE DILIGENCE LAWS AND MECHANISMS⁵

ue diligence establishes an internal process through which companies identify the risks of their activities and ways to prevent or mitigate them. Due diligence is thus "a mean", but it does not establish an outcome, "a result". It does not in itself allow for reparations, but rather tries to prevent them from occurring through the development of unilateral internal company processes for assessing and orientating the company's behaviour, without external control. On

many occasions, the norms that regulate these mechanisms use terms such as "mitigation" of harm which, as mentioned, is not compatible with a human rights perspective.

Due to the lack of effective monitoring and enforcement mechanisms, TNCs can use Due Diligence to evade responsibility, especially when it is seen as the only criteria adjudicators should take into account when defining liability. Liability of TNCs regarding human rights violations should

^{5.} See the position paper of the Global Campaign on the Due Diligence Directive in discussion in the European Parliament: https://www.stopcorporateimpunity.org/global-campaign-Statement-on-the-process-towards-the-european-directive-on-mandatory-due-diligence/; and see also the Global Campaign's position paper on due diligence: https://www.stopcorporateimpunity.org/Statement-2/

not be determined by a list of precautions eventual perpetrators themselves decide they must take, but by the actual harm caused to individuals, communities, and the environment. It must be up to the judge to decide if the company complied with the needed prevention measures according to broader criteria, as those already applied under the duty of care, for common law systems, or other criteria of civil liability for continental law systems.

Furthermore, any reference to Due Diligence in the Binding Treaty should i) make clear its encompassing scope of application (the whole of global value chain, up and downstream); ii) include clear sanctions and administrative, civil and criminal liability regimes when transnational corpora-

tions do not comply with their obligation; iii) cover all human and environmental violations; iv) ensure the primacy of human rights over any trade and investment instruments; v) provide for specific obligations, separated and independent from those of States, for TNCs and international financial institutions involved in violations; vi) include provisions to improve access to justice and vii) establish a multi-party body (State, unions, human and social rights organisations) that monitors complaints and reparations.

Due diligence must not be a central concept in the Binding Treaty, but rather an auxiliary obligation, linked to prevention and established as a direct obligation for TNCs.



14. LIABILITY



A) CRIMINAL LIABILITY

Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedy for victims and affected communities. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be forced to change their practices to prevent similar violations in the future.

There are domestic precedents for holding corporations criminally liable for their actions, such as in cases of environmental pollution or fraud. For example, in the United States, the Enron scandal resulted in the criminal prosecution of several corporate executives, including the CEO. In France, Total S.A. was found criminally liable for environmental pollution in 2010. These precedents demonstrate that it is possible to hold corporations criminally liable for their actions, even when those actions involve complex and far reaching consequences. Brazil also recognizes the criminal liability of legal entities in its environmental legislation.

There are also precedents in international law for criminal liability of TNCs for human rights violations. For example, the International Criminal Court (ICC) has jurisdiction over corporations for certain crimes under its jurisdiction, including war crimes and crimes against humanity. The Rome Statute of the ICC also provides for individual

criminal responsibility for corporate officers and executives who are involved in such crimes. Furthermore, these other international conventions also establish criminal liability to TNCs: The United Nations Convention against Corruption (UNCAC), the ILO Convention on the Worst Forms of Child Labour, and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.



B) CIVIL LIABILITY

In article 8.4 of the third revised draft, it is important to ensure that there is a presumption of liability of the parent or controlling company when i) this company controls, supervises or has influence over the company directly violating human rights; ii) this company has control or supervision over the specific activity causing the violation and when iii) this company could have foreseen the harm.

The fact that the liability is assumed, and the company has to discharge the presumption implies per se a reversal of the burden of proof. Furthermore, this article implies joint liability to all companies involved. Art. 8.4, therefore, should be undoubtably defended.

Furthermore, the demand for strict liability for dangerous activities, for their very nature, should also be maintained in the future Treaty.

FOR MORE INFORMATION ON THE GLOBAL CAMPAIGN:

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