

WRITTEN CONTRIBUTION IN THE FRAMEWORK OF THE INTER-SESSIONAL PERIOD (8th - 9th SESSION) OF THE INTERGOVERNMENTAL WORKING GROUP ON TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

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On behalf of the Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and Stop Impunity¹

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Introduction

Within the context of the inter-sessional consultations leading up to the 9th session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), this document consolidates the written inputs from the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power, and Stop Impunity (the Global Campaign). Comprising over 250 social movements, trade unions, civil society organisations, and communities affected by the activities of Transnational Corporations (TNCs), the Global Campaign has been advocating for the regulation of TNCs under Human Rights International Law for over a decade. The process established by Resolution 26/9 is thus of great significance to our members who actively engage in the process, and work tirelessly to ensure it follows its mandate and intended purpose.

These written inputs are the result of the extensive work undertaken by affected communities, movements, lawyers, and activists from organisations that collectively represent over 260 million people. **They aim to both underline textual proposals that we consider indispensable and propose new language to consolidate or strengthen some provisions of the current and collectively developed revised draft.** These inputs are based on our historical claims, and on concrete proposals and amendments presented by the Global Campaign during the last negotiation sessions. They also take into account the sustained work and textual contributions of many States that, like us, are committed to the building of a Treaty that answers to the needs of those affected by violations committed by TNCs.

The diligence and dedication of these rightful parties has been tireless. The third revised draft, with the comments added by States during the 7th and 8th sessions, built upon over 8 years of negotiations, includes provisions and proposals that reflect the needs and proposals arising from those parties. Even if gaps still exist and although its content needs further consolidation, this text is the only legitimate basis for negotiation. Accordingly, our inputs are exclusively referring to its dispositions and comments. We therefore reiterate here our strong rejection of the Chair's

¹ The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) is a network of over 250 social movements, civil society organisations (CSOs), trade unions and communities affected by the activities of Transnational Corporations (TNCs).

informal proposals, which are part of a manoeuvre and a diversionary strategy to undermine the process and the mandate of Resolution 26/9. At the outset, the Chair's proposals are in complete contrast with the agreements and the methodology adopted at the end of the 7th session. Moreover, they are straying from the mandate established by Resolution 26/9, introducing new content that reflects exclusively the Chair's positions and that represents a threat to the democratic character of the process.

We are confident that our contributions, alongside those of committed States, will shape the legal architecture that must ultimately protect the interest of affected communities and rights-holders and assure the responsibility and sanction of TNCs that violate human rights. Given our sustained commitment to the process, the strength of our arguments, and the continuing negative consequences of the activities of TNCs on the lives of billions of people all over the world, we are confident that our voices will be heard, and our suggestions incorporated into the inter-sessional consultations, the 9th session, and the final text.

Preamble

- PP13bis: New article proposed by Palestine
→ This proposal shall be incorporated into the next draft to guarantee the protection of the human right to a clean, healthy and sustainable environment, as recognized by UNGA Resolution A/76/L.75.
- PP11: Amendment by Cameroon and South Africa
→ This proposal shall be incorporated into the next draft to align this paragraph with the original scope and to recognize that TNCs have obligations to respect human rights along their value chains.
- PP11 bis: New article proposed by Palestine
→ This proposal shall be incorporated into the next draft to reaffirm the primacy of human rights, especially in regards to other trade and investment provisions.
- PP18 ter and PP18 quater: New paragraphs proposed by Cameroon
→ This proposal shall be incorporated into the next draft to recognize that TNCs have obligations in international human rights law.

Article 1

- Art.1.1: Amendment by Cameroon and Palestine
→ This amendment shall be integrated in the next draft to include the term "affected persons and communities" next to "victims". Furthermore, the Global Campaign suggests the incorporation of "holders of individual and collective rights" so trade unions are explicitly encompassed by this definition. This shall be standardised throughout the text.
- Art. 1.2: Amendment by Cameroon
→ The proposal to add the term "violation" next to "abuse" must be incorporated and standardised through the next draft. The exclusive use of the term "abuse" implies a fictional hierarchy between States that would violate human rights and TNCs that may only abuse them, as if TNCs did not have an explicit obligation to respect human rights.

- Art.1.3: Amendment by Cameroon
→ This amendment is important to comply with the original scope established by the mandate of the OEIGWG in Resolution 26/9. It shall therefore be incorporated into the next draft.
- Art.1.5: Amendment by Palestine
→ This amendment shall be modified to also include financial capital that finances TNCs. It follows the Palestinian proposal with new language in green:
*1.5. “**Business relationship**” refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, ~~or any other structure or relationship as provided under the domestic law of the State~~, entities in the value and supply chain, any non-State or State entity linked to a business operation, product, or service even if the relationship is not contractual, as well as ~~including~~ activities undertaken by electronic means. **The business relationship shall include financial entities as investors, shareholders, banks and pension funds that finance the activities of TNCs.***

Article 2

As clearly stated by Resolution 26/9, it is necessary to make the regulation of the activities of TNCs, within the framework of the provisions of the Binding Treaty, the main purpose of this process. We propose that the first paragraph of this article reads as follows.

- The Global Campaign would like to propose the following new paragraph for Art.2.1.0 :
To regulate the activities of transnational corporations and other business enterprises of transnational character within the framework of international human rights law.
- Art.2.1a: Amendment by Egypt, China, Cuba, Iran and Bolivia
→ This proposal shall be incorporated into the next draft to comply with the scope established by Resolution 26/9.
- Art.2.1c: Amendment by Egypt / Art.2.1e: Amendment by Brazil and Panama:
→ Proposals to delete the term “mitigation” when referring to human rights violations or abuse shall be incorporated into the next draft. On the one hand, due to the nature of the crime, human rights violations should not be mitigated, but always prevented and fully repaired. Risks, on the other hand, can and should be mitigated in some circumstances.

Article 3

In Art.3.1 we propose to combine the amendments of Egypt/Pakistan and Palestine/Namibia, as follows:

This (Legally Binding Instrument) shall apply to transnational corporations and other business enterprises of a transnational character along the value chain.

Article 4

The proposal by Cameroon to change the title of this article to “**Rights of Affected Individuals and Communities/Right of victims**” shall be incorporated into the next draft. This change is

necessary to guarantee the rights of all individuals, communities and workers that are affected or might be affected by violations of human rights.

Throughout the article, States have proposed amendments and new language necessary for the effective protection of individuals, communities and workers against violations of human rights by TNCs. These proposals shall therefore be incorporated into the text:

- Art.4.2 c and 4.2 d: Amendment by Palestine
- Art.4.2f: The amendments by Palestine and Cameroon/Namibia are both very important, and should thus be merged as following:
4.2f: be guaranteed access to legal aid and information held by businesses and others and legal aid relevant to pursue effective remedy, paying particular attention to greater barriers that at-risk groups face such as Indigenous Peoples, as well as women and girls; the right to access information shall also extend to human rights defenders and includes information relative to all the different legal entities involved in the transnational business activity alleged to harm human rights, such as property titles, contracts, business ownership and control, communications and other relevant documents. This shall include information relative to all the different legal entities involved in the transnational business activity alleged to violate human rights, such as property titles, contracts, communications and other relevant documents. In case of the unavailability of such information, courts shall apply a rebuttable presumption of control of the controlling or parent companies. Such information shall serve for the adjudicator to determine the joint and several liability of the involved companies, according to the findings of the civil or administrative procedure;
- Art.4.2f ter and 4.2f quater: New paragraph proposals from Palestine and Cameroon
- Art.4.3 bis: New article proposed by Cameroon

Finally, all amendments proposed by the Plurinational State of Bolivia, and supported by several States, on the inclusion of peasants' rights throughout the articles, should be accepted and incorporated into the future Treaty.

Article 5

In order to strengthen the provisions of this article, it is key to support and incorporate the following amendments into the next draft:

- Art.5.1: Amendment by Cameroon, South Africa and Palestine
- Art.5.2: The amendments by Cameroon and Palestine could be merged. The paragraph would read as follows :
*States Parties shall take adequate and effective measures to guarantee **all rights of a safe and enabling environment for** persons, groups and organizations that promote and defend human rights and the environment, so that they are able to exercise their human rights free from any threat, intimidation, violence or insecurity. **This obligation requires taking into account their international obligations in the field of human rights, and***

their constitutional principles. State Parties shall take adequate and effective measures including, but are not limited to, legislative provisions that prohibit interference, including through use of public or private security forces, with the activities of any persons who seek to exercise their right to peacefully protest against and denounce abuses and violations linked to corporate activity; refraining from restrictive laws and establishing specific measures to protect against any form of criminalization and obstruction to their work.

- Art.5.3: Amendment by Palestine
→ This amendment is important to guarantee the international character the Treaty must have. As judicial systems in several countries may be flawed, deficient or partial, the implementation of the Treaty cannot be a national prerogative exclusively. References to domestic law of states, thus, should be limited to i) national law that is more protective of human rights, ii) dispositions that claim for international judicial cooperation in the prosecution of violations, and iii) provisions determining ways in which domestic law must adapt and comply with this draft Treaty.
- Art. 5.3bis: New article proposed by Cameroon

Article 6

The article on prevention is a pillar of the future Treaty. This is the article where obligations for TNCs² should be stipulated, in addition to and separated from the obligations listed for States. Furthermore, this article should ensure that due diligence mechanisms are obligations of results and not only of means.

- Art.6.1: Amendment by Egypt, Pakistan and Philippines
→ This amendment shall be incorporated into the next draft so the future treaty complies with the scope established in Resolution 26/9 and article 3.
- Art.6.1 bis: New article proposed by Cameroon
→ This proposal shall be incorporated into the next draft to ensure States adapt their laws and behaviour to prevent human rights violations in the context of business activities of transnational character.
- Art.6.2: Amendment by Egypt and Cuba
→ This amendment as well shall be integrated to comply with the original scope, to standardise the term “violations”, as well as to delete the term “mitigate” which weakens the provision.
- Art.6.2 bis: New article proposed by Cameroon
→ This proposal is key to recognise the obligations of TNCs to prevent human rights violations.
- Art.6.3b: Amendment by Panama, Mexico, Brazil and Palestine
→ This amendment seeks to establish that violations shall not be mitigated but rather

² See here our [document of arguments on the importance of recognizing and establishing clear and proper obligations for TNCs](#).

prevented, as stated before. The term “abuses” should be changed to “violations”, and it shall be incorporated into the next draft.

- Art. 6.4: Amendment by Cameroon
→ This amendment is important because it suggests another external entity to monitor business due diligence, but it should also include a public mechanism of control.
- Art.6.4c: Amendment by Palestine and South Africa
→ This amendment is very important to allow communities to be consulted, as a possibility to enshrine the “Right to say NO” to corporate projects in their territories. This amendment is also important because it states that consultations must be carried out by a public body and not by TNCs.
→ The obligation to carry out meaningful consultations is not enough to guarantee respect for the right to participate in decision-making of the interested populations. Therefore, it is necessary to add the term “*mandatory*”:
6.4c: *Conducting meaningful and mandatory consultations...*
- Art. 6.4d bis: New proposed paragraph from Palestine
→ This important proposal adds to meaningful consultations The Right to Say No, guaranteeing communities on the ground have control over their territories and their ways of living.
- Art.6.4f bis: New proposed paragraph from Cameroon
→ This proposal shall be incorporated into the next draft as it will provide a mechanism for financial guarantees to already vulnerable affected communities.
- Art. 6.8: Amendment by Cameroon
→ This amendment is very important, and shall be incorporated into and integrated in the next draft, as it strengthens the provision on prevention of corporate capture.
→ We propose to add “philanthropic institutions” that also have to be identified as corporate capture actors.
- Art.6.8 bis and ter: New articles proposed by Cameroon
→ These proposals shall be incorporated into the next draft, as they rightly point out the role of International Financial Institutions in corporate violations. These proposals rightly aim at establishing obligations for these entities.

Article 7

- Art. 7.1bis: New article proposed by Palestine
→ This new article is very important to guarantee that those violating human rights are not determining how these same violations should be remediated. It shall therefore be incorporated into the next draft.
- Art.7.2: Amendment by Palestine
→ This amendment is very important to strengthen the right to information of those affected. It shall therefore be incorporated into the next draft.

- Art.7.3: It is important to keep the language “*States Parties shall provide adequate and effective legal assistance to victims throughout the legal process*”, which is the most favourable for those affected.
- Art.7.3d: Amendment by Palestine
→ This amendment shall be incorporated into the next draft in order to remove legal obstacles as the *forum non conveniens* and to add the term “violations”.
- Art.7.5: Amendment by Palestine
→ This amendment shall be incorporated into the next draft to enshrine the reverse of the burden of proof, needed to fulfil the right to access to remedy.
- Art. 7.2, 7.5, and 7.6: Amendments by Palestine
→ These amendments, just as 5.3, also guarantee that references to domestic law of States are there to expand the human and environmental rights of affected individuals or communities—and not to their detriment. As such, they shall be incorporated into the next draft.

Article 8

To safeguard the rights stipulated by the treaty, and to guarantee accountability in case of their violation by TNCs or other businesses along its value chain, the Treaty must explicitly establish **administrative, civil and criminal regimes of liability for natural and legal persons in the context of human rights violations committed by TNCs**. Criminal liability for TNCs will work both as a deterrent and as a mechanism to provide remedies for victims of human rights violations. By imposing criminal penalties on TNCs, affected people and communities can receive compensation and TNCs can be legally obliged to change their practices to prevent similar violations in the future.

- Art. 8.1 and 8.2: Amendments and support by Palestine
→ These two articles shall be incorporated into the next draft; just as Art. 5.3, they reference domestic law of States to expand human and environmental rights of individuals and communities.
- Art.8.3 and 8.8: Amendments by Palestine
→ These two amendments shall be incorporated into the next draft. The first allows for the establishment of concrete liability provisions and a regime of sanctions in case of violations of human rights committed by TNCs. The second is key to guarantee that national legislations establish criminal liability to legal persons for human rights violations.
- Art. 8.7: Amendment by Palestine
→ This amendment shall be incorporated in this paragraph about due diligence. It is important to highlight that, due to the lack of effective monitoring and enforcement mechanisms, TNCs can use Due Diligence to evade responsibility. Liability of TNCs regarding human rights violations should not be determined by a list of precautions

eventual perpetrators must take, but by the actual harm caused to individuals, communities, and the environment.

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 corporations 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. The amendment shall thus be incorporated into the text. Due diligence can not be a central concept, but rather an auxiliary obligation, linked to prevention and established as a direct obligation for transnational companies.

- Art.8.10 bis: New article proposed by Palestine
→ This amendment is important to establish the joint and several liability of parent companies along their value chains. It shall therefore be incorporated into the next draft.
- Art. 8.10 ter: New article proposed by Palestine -->
→ This amendment is also important for the establishment of criminal liability in the context of human rights violations committed by TNCs.
- In order to guarantee the effectiveness of the provisions of this article, the amendments made by Brazil and China in Art.8.5, 8.6 and 8.7 shall be rejected.

- **New proposals from the Global Campaign :**

8.11: The parent company, the outsourcing companies it uses, their respective subsidiaries, and all persons with whom the parent and its outsourcing companies have business relationships and/or which are part of their global value chains, shall be jointly and severally liable for the obligations established in this (Legally Binding Instrument.)

The obligation to assume this joint and several liability shall be directly applied by judges where the existing legal framework in force in the home and/or host states or in the states where the affected persons or communities are based or domiciled is not adequate for the implementation of this (Legally Binding Instrument).

8.12 TNCs shall be bound by their obligations under this Treaty and shall refrain from obstructing its implementation in States Parties to this instrument, whether home states, host States or States affected by the operation of TNCs. To this end :

a. TNCs have obligations derived from international human rights law. These obligations exist independently of the legal framework in force in the host and home States.

b. TNCs and their managers, whose activities violate human rights, incur criminal, civil and administrative liabilities as the case may be. c. The obligations established by the present instrument are applicable to TNCs and to the entities that finance them.

Finally, it is crucial to reject the proposal for an Article 8bis made by Brazil, as it will limit the capacity of the future Treaty to ensure access to justice and remedy for affected individuals, communities and holders of individual and collective rights.

Article 9

There are many important amendments that strengthen provisions widening the jurisdiction of courts to judge human rights violations committed by TNCs. They should therefore be incorporated into the next draft.

- Art. 9.1: Amendments by Palestine and South Africa
- Art.9.2: Amendment by Palestine
- Art. 9.1b, Art.9.1c, Art.9.2, Art.9.2d bis, Art.9.5: Amendments by Palestine
- Art. 9.3: Amendment by South Africa

Finally, to protect the provisions of this article, and thus the effectiveness of the future Treaty, it is key to reject the amendments that aim at weakening the text:

- Art. 9.3: Amendment by China
- Art. 9.4 and 9.5: Amendments by Brazil

Article 14

- Art. 14.3: Amendment by Palestine
→ This article, with the amendment, is very important to guarantee that only domestic law that is more protective of human and environmental rights than those stipulated by this Treaty prevail
- Art. 14.5a and 14.5b: Amendment by Palestine
→ In order to strengthen the provisions that aim at re-affirming the primacy of human rights over trade norms and agreements, it is important to incorporate these amendments
→ The Global Campaign would like to propose a slight change in Art.15.5b: instead of “*be compatible*”, the paragraph should say “*adjust and strictly comply*”

Article 15

One of the most serious limitations of the current draft is the design of the compliance monitoring mechanism. As currently established, the Committee is very weak and unable to guarantee the effectiveness of the provisions of the Treaty, even when they are as limited as those imposed on the States by this draft. Article 15 should, therefore, include the possibility for affected people and communities to file complaints against TNCs, and to make the Committee's recommendations binding.

Furthermore, the Global Campaign understands that it is essential to establish, in complementarity to the Committee, an International Tribunal³ that receives individual and collective lawsuits in the event of human rights violations committed by TNCs directly or through their global production chains, even if this is done, during the Conference of States Parties, ex-post the adoption of the Treaty—as suggested in the Elements Paper published in 2017 by the Chair of the OEIGWG.

In this sense, we propose to add the following provisions:

New proposals from the Global Campaign:

15.4.a.bis: The Committee receives and considers complaints submitted by victims and affected communities concerning the activities of transnational corporations that act in contradiction to this legally binding instrument. 15.4.a.2bis: States Parties recognize the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Treaty.

15.4.b.bis: The decisions rendered by the Committee shall be binding and shall be followed by action by transnational corporations and other business enterprises of transnational character, States Parties and related organisations (such as a special fund for victims, administrative sanctions for the companies concerned by the decisions, etc.).

15.4.c.bis: The Committee may also make recommendations to States parties to guide them in their strategies to regulate transnational corporations' activities in order to prevent human rights violations. For this purpose, the latter may be assisted by independent experts and professionals in the fields in question.

The Global Campaign also proposes a new paragraph in art.15.8 (inspired from the language used in the Elements Document published by the Chair of the OEIGWG in 2017): *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.*

³ See here our [document of elements for an International Tribunal on TNCs and human rights](#).