



BUILDING A UN TREATY ON HUMAN RIGHTS AND TNCs A WAY FORWARD TO STOP CORPORATE IMPUNITY



PROPOSALS FROM THE GLOBAL CAMPAIGN TO
RECLAIM PEOPLES SOVEREIGNTY, DISMANTLE
CORPORATE POWER AND STOP IMPUNITY.

2nd SESSION OF THE OEIGWG – GENEVA
OCTOBER 2016



In June 2014, the Human Rights Council adopted resolution 26/9 on the elaboration of an international legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights. It has been a historic achievement after decades of discussions and failed attempts within the United Nations. Such an instrument has the potential to substantially promote the protection and fulfilment of human rights in the long-term and on a global scale. It can contribute to ending the impunity that TNCs routinely enjoy for their human rights violations, especially in countries of the Global South, and to ensuring access to justice for people affected by their activities.

This publication contains six points for consideration of the 2nd Session of the “Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” (OEIGWG) taking place in Geneva during October 24-28, 2016. The six points were presented by the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) as written submissions and as a contribution to the work of the OEIGWG. They express in their diversity the conviction that such a legally Binding Instrument is essential for two dimensions of the Campaign’s work: to end corporate impunity and address the systemic power of TNCs which has reached unprecedented impacts on the daily lives of affected communities.

Officially launched in 2012, the Global Campaign is a network of over 200 social movements, networks, organisations and affected communities resisting the land grabs, extractive mining, exploitative wages and environmental destruction of transnational corporations (TNCs) in different global regions particularly in Africa, Asia and Latin America. It is a peoples global structural response to unaccountable corporate power which provides facilitation for dialogue, strategizing, exchanging information and experiences, acting as a space for visibility of resistance and deepening of solidarity. The Global Campaign is actively involved and has facilitated the gathering of dozens of delegates in Geneva for a week of high profile mobilization during the Human Rights Council session in June 2014, July 2015 and October 2016, to demand new binding norms on human rights and TNCs.



CONTENTS

1 Treaty focus on TNCs & other Business Enterprises of international scope in relation to Human rights

PAGE 3

2 Extraterritorial Obligations on Governments in relation to TNCs and human rights

PAGE 9

3 An Instrument of Enforcement in relation to the Treaty application

PAGE 13

4 Obligations on Human Rights in TNC supply chains

PAGE 17

5 International Financial Institutions (IMF/WB) & the Trade and Investment regime (WTO/FTAs & BITS)

PAGE 21

6 Rights of Affected People

PAGE 28



1 Treaty focus on TNCs & other Business Enterprises of international scope in relation to Human rights

For a long time, it was considered that TNCs (and legal persons in general) could not be considered accountable for human rights violations¹ given that respect for human rights was considered incumbent on governments, which, alone, would be the subjects of international law.

This argument is not only contrary to international human rights law in force but also to its evolution. The Universal Declaration of Human Rights² states that :

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein” (Article 30).

The Declaration also specifies the duties of the individual to the community and the limits of the individual's rights:

“1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.” (Article 29)

Although this might be limited to “serious crimes in international law”, (including violations of certain human rights), in theory it is possible to bring the management of TNCs before the International Criminal Court.

In 2004, the Commission on Human Rights (replaced by the current Human Rights Council) recommended that the Economic and Social Council (ECOSOC) “confirm the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights”.³ The ECOSOC then confirmed this.⁴

Since 2008, the UN Human Rights Council has emphasized that “transnational corporations and other business enterprises have a responsibility to respect human rights”.⁵ In 2014, the Human Rights Council repeated this, when stating that: “transnational corporations and other business enterprises have the obligation to respect human rights”.⁶

The former Sub-Commission for the Promotion and Protection of Human Rights went even further, asserting:

“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”⁷

It is the term “ensure the respect of” that lends itself to diverse interpretations. While it goes without saying that TNCs must ensure the respect of human rights within the framework of their commercial relations, there is no question of them substituting for the state.

Other concerns were expressed in this regard by some legal experts favoring a regulation of TNC activities. For them, formally recognizing TNCs’ obligation to respect human rights would amount to according to these entities the same status as that of states.

SOME POINTS FOR CONSIDERATION ARE PRESENTED HERE.

First, TNCs are legal persons and thus, subjects and objects of law. Hence, the legal rules apply equally to them and their decision makers. Their transnational character does not justify considering them “international legal persons, even if they can be subjects of international law like physical persons, as international legal doctrine and practice currently recognizes when referring to them. As international law stands now, the only international legal persons are those of public law: state and interstate organizations”.⁸

Second, as already explained above, TNCs are bound to respect human rights. This obligation is obviously limited to the workings of the business enterprise and its commercial relations. It is thus not a general obligation, which is incumbent upon states. In fact, states have obligations to the overall population on their territory, besides their international obligations. The drafting of laws, their enforcement and the sanctions imposed on violators are the prerogatives of the states. In this regard, for example, the future treaty should also stipulate that TNCs may not use private security agents outside their business enterprise nor hire law enforcement agents to serve them.

Third, the power of the TNCs is not balanced by accountability on their side. On the contrary, in the course of the last decades, TNCs have greatly influenced the making of economic treaties in their own favour. Most bilateral and multilateral agreements on trade and investment place TNCs above the state, thus above the people and the citizens. Hence, these entities have all the rights (compensation in case of expropriation, unlimited transfer of assets abroad, compensation for claimed future income losses etc.), but they are not accountable for their acts (very often owing to the special status and/or their "skill" in maneuvering through national jurisdictions in the event of problems). Moreover, by short-circuiting national courts, TNCs have the right to bring states before the World Bank's tribunal, the International Center for Settlement of Investment Disputes (ICSID)⁹, which is unfailingly favorable to them, while states are denied this right.¹⁰ Apart from the procedural obstacles (composition of the panels of judges, high costs etc.), the ICSID ignores national and international legislation on human rights, the environment and workers' right. In other words, it is a clear attack on the sovereignty of states and on the right of peoples to self-determination.

Fourth, by virtue of current international law, TNCs are bound to respect human rights. The Human Rights Council has confirmed this several times. All that remains is to clarify the human rights obligations of these entities and establish an enforcement mechanism.

Fifth, the future international instrument will be ratified by the states, and its implementation will be assured by an international public mechanism.

Sixth, if its enforcement is left to the good will of TNCs, what difference will there be between binding norms and voluntary codes of conduct?

Finally, TNCs are not democratic and transparent entities. They ferociously oppose submitting to binding human rights norms. They defend private interests (especially those of a handful of majority shareholders) and not the public interest. They can also be ephemeral, can go bankrupt, can be bought by other entities (or by governments), can transform themselves (completely change orientation) or disappear.

As we have already stated, there is no question of demanding that private actors such as TNCs substitute for the state. On the other hand, it is possible to demand that these entities refrain from all acts that violate human rights and oblige them to act so that the respect of these rights is guaranteed. Barring that, necessary measures must be taken (legislative, administrative and political) to require of persons with authority (both legal and physical) accountability before the courts (national and international) for the non-respect of human rights.

Such responsibility is more than ever indispensable given that privatization and de-regulation policies imposed by certain international bodies (IMF and the World Bank, in particular) entrust to TNCs an ever greater number of public services that until recently were provided by the state. The people must thus have the possibility to defend their rights faced with those of the TNCs, which are supposed to supply services, including those essential for living in dignity.

There is a major legal gap in international human rights law that needs to be closed to end the impunity for human rights violations committed by TNCs. This must be the main objective of this new legally binding international instrument that will be developed by the UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

1. At this point, it is worth mentioning briefly a minor semantic problem between French and English concerning the term "responsibility", which can create confusion. The French word, *responsabilité*, has two meanings that are expressed in English by two different words: *responsible/responsibility* and *accountable/accountability*. The latter includes the idea of liability.
2. Adopted by the United Nations General Assembly 10 December 1948, it has become the source for all human rights norms and has acquired a binding character, for all the United Nations member states are bound to implement it.
3. Commission on Human Rights, Decision 2004/116, 20 April 2004.
4. ECOSOC, Decision 2004/279.
5. Human Rights Council, Resolution 8/7, 18 June 2008, and Resolution 17/4, 16 June 2011.
6. Human Rights Council, Resolution 26/9
7. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12, 26 August 2003, § 1: <http://www.cetim.ch/wp-content/uploads/G0316008.pdf>
8. The Activities of Transnational Corporations: The Need for a Legal Framework: Acts and Conclusions of the Seminar of Céligny, (Geneva: CETIM, July 2001).
9. See Alejandro Teitelbaum, International, Regional, Subregional and Bilateral Free Trade Agreements, July 2010, CETIM. Source : <http://www.cetim.ch/wp-content/uploads/report-7a.pdf>
10. See Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/27/51, § 16.

2 Extraterritorial Obligations on Governments in relation to TNCs and human rights

Effective protection of human rights demands that TNCs do not impair human rights wherever they operate. This includes the obligation not to harm the enjoyment of human rights and to redress such harm, when it occurs. Home States to TNCs are under a human rights obligation to respect, protect, fulfill and remedy the abuses and offences abroad of certain TNCs, as set out by the 2011 Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights¹, drawn from international law.

In its statement on the obligations of states Parties regarding the corporate sector and economic, social and cultural rights², the Committee on Economic Social and Cultural Rights (CESCR) details the obligation of States to protect from abuses by third parties.

In one of its decisions, the Human Rights Committee asked Germany to establish “the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.”³

The Committee on the Rights of the Child (CRC), the body that monitors and reports on implementation of the United Nations Convention on the Rights of the Child, adopted in 2013 a General Comment on obligations of states in relation to impacts of business on the Rights of the Child. The Committee affirms that the extra territorial activities of TNCs must be regulated by home States:

“Host States have the primary responsibility to respect, protect and fulfill children’s rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.” (§ 42).⁴

The Maastricht Principles consider also the extraterritorial obligations of States to protect human rights from non-state actors:

Maastricht Principle 24 points out that the obligation of states to take necessary measures to ensure economic, social and cultural rights relates to non-state actors that are subject to States’ regulatory powers⁵. In other words, a State can only regulate and ensure protection in a foreign territory, if it has the powers and jurisdiction/permission to do so.

Maastricht Principles 25 describes when such jurisdiction is in place. The same principle also implies that several foreign States may have jurisdiction at the same time in line with the cooperation principle and with Maastricht Principles 37 that calls on “all States involved” to provide remedy. Maastricht 25c makes it clear which States carry the pro-
tect-obligation – either directly or through the parent of the controlling company. In this sense a company can have several home States.

This implies that it must be a common goal of the States to overcome corporate barriers that hide the responsibilities of transnational companies and of the people who make the decisions for them, - both in civil and criminal law.

Tax havens and the use of complex corporate arrangements to keep capital apart from accountability are legal mechanisms used to ensure the security of corporate assets - which translates into impunity for the harm caused by business activities. The strategy of Transnational Companies, therefore, is to shield their corporate assets from liability (in States they can rely on), while their subsidiaries, which are in fact held liable for their activities remain asset-free (in States where the risks of their operations occur).

Thus, when applying the principle of limited liability to the creation of a subsidiary company abroad, the company headquarters and the subsidiary are understood as two completely separate legal entities. This strategy is often used as a shield to protect the parent company from any responsibility for the subsidiaries actions abroad.

Hence, from the understanding of the transnational company’s structure, it is necessary to establish the presumption that, in fact, although TNCs are composed of several legal entities, they consist of one economic unit - an articulated and cohesive group with common goals. Therefore, it is justifiable to consider that the actions performed by subsidiaries are the parent company’s responsibility and, as a consequence, the home states’ as well, as stipulated in Maastricht Principles 25. This is justified by the same decentralized nature of business activity, based on outsourcing mechanisms, which is the central element of its production process.

There is, therefore, a joint responsibility between parent companies and their subsidiaries, as well as in relation to its supply chain, licensees and contractors, since they all share responsibility for impairing civil, political, social, economic, cultural and environmental rights, for which they are connected, through economic transactions, with the TNCs.

Therefore, to make accountability of transnational companies for their production chains possible, information about their business activities should flow freely and transparently,

also to prevent that States cannot commit to secret agreements with TNCs. In order to do so, Transnational Companies must make public the countries in which they conduct their practices, identifying its affiliates, suppliers, subcontractors and licensees, as well as the legal form of participation in other companies or legal entities. They must publish their revenue, the number of workers they employ, their funds and the taxes paid in each country.

It is crucial that States develop corporate criminal law, the law of torts and administrative law so that they become instruments for the protection of human rights against TNCs and other business and that judges interpret legislation in accordance with the human rights obligations of their States and with the primacy of human rights. Moreover, Governments must incorporate social, labor and environmental clauses in public bidding calls, in addition to avoiding services and products derived from transnational companies - or from production chains - in which human rights have been harmed.

Moreover, when the cooperation mechanism, coupled with the complementarity principle, shows itself not sufficient, the possibility of access to an international court must be considered. The notion of "exhaustion of domestic remedies" must be more flexible when individual cases demonstrate a difficulty of access to the home states' justice system or even in the case of an unfair or ineffective due process on the issue.

Furthermore, if both the home states and the host state have difficulties in carrying out the necessary steps to redressing abuses, Professor Olivier de Schutter (2006)⁶ suggests the need for a provision of forum necessitatis. That mechanism would allow for victims the access to justice in any State in which the company responsible has a significant operational level.

The establishment of an international court addressing the harm done by TNCs to the enjoyment of human rights would also be an important contribution towards dismantling the impunity enjoyed by transnational corporations. The court should be provided with independent judicial functions, although an auxiliary body – the Public Center for the Control of Transnational Corporations - could have the constant task of coordination with States and civil society, and provide access to TNCs and information on its activities. The center would collect and gather information, receive claims and advise the complainants.

States should commit to cooperating with the Center and respecting and enforcing the Court's judgments against the company. They have to adjust their local laws in order to make this possible in their territory.

The Court would exercise a kind of international civil jurisdiction accepting legal action against the corporate assets of the company and against its directors, while criminal liability would be a different issue. An alternative would be to make use of the existing International Criminal Court or to change it, with the inclusion of corporate crimes against human rights in the list of crimes under its jurisdiction.

The Madrid and Buenos Aires Principles on Universal Jurisdiction⁷ state that the universal jurisdiction determines the obligation to investigate and, if necessary, file suits via national courts in cases of crimes under international law: genocide, crimes against humanity, war crimes, piracy, slavery, enforced disappearances, torture, human traffic, extrajudicial executions and the crime of aggression. These crimes can be committed in many ways, including that of economic activities and that may affect the environment.

The incorporation of the Universal Jurisdiction Principle in domestic law by the states would allow their application to economic crimes against the environment that seriously affects human rights of communities or involve the irreversible destruction of ecosystems, due to its scope and scale. As a result, of this integration, transnational corporations will become liable for action - accomplices, collaborators, instigators, inductors or concealers - or omission, criminally and/or in civil law for the crimes described.

1. <http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/>
2. Cf. E/C.12/2011/1, 12 July 2011.
3. CCPR/C/DEU/CO/6, § 16, 13 November 2012.
4. CRC, General Comment 16, CRC/C/GC/16, 17 April 2013.
5. Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO Consortium, 2013, p. 9.
6. Olivier de Schutter, « Extraterritorial Jurisdiction as a tool for Improving the Human Rights Accountability of Transnational Corporations». 2006. <https://business-humanrights.org/en/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations>
7. Principes de Madrid y Buenos Aires. Universal Jurisdiction 2015. At: <http://www.hormantruth.org/ht/sites/default/files/files/universal%20jurisdiction/MADRID%20-%20BUENOS%20AIRES%20PRINCIPLES%20OF%20UNIVERSAL%20JURISDICTION%20-%20EN.pdf>

3 An Instrument of Enforcement in relation to the Treaty application

1. CONTEXT

In addition to the fact that there are no binding norms on TNCs with respect to human rights, there is also no international instrument or mechanism of enforcement. The Global Campaign therefore proposes the establishment of an International Tribunal on Transnational Corporations and Human Rights that operates as a complement to national, regional and universal mechanisms and guarantees access to an independent judicial forum for affected people and communities to obtain justice for violations of their civil, political, social, economic, cultural and environmental rights.

This international tribunal should be tasked to accept, investigate and judge complaints against TNCs, States and International Economic and Financial Institutions for human rights violations and their criminal responsibility and civil liability for international economic, corporate and environmental crimes.

To secure its effectiveness, the International Tribunal on Transnational Corporations and Human Rights must be organized and operate autonomously and with total independence from UN executive bodies and the corresponding States. Furthermore, the decisions and sanctions by the International Tribunal on Transnational Corporations and Human Rights must be enforceable and legally binding.

2. IMPORTANCE AND ROLE OF THE TRIBUNAL

The establishment of this international tribunal must be a key feature in the development of the Treaty, as we have already emphasized, if we want it to address the fact that the applicable rules to control the obligations of TNCs at the international level are only voluntary codes of conduct and non-justiciable or actionable.

In contrast, international trade and investment rules protect the interests of TNCs with enforceable and justiciable/actionable rules and Binding Agreements and Treaties. There is thus a glaring asymmetry and imbalance in terms of rights and obligations of TNCs with regards to human rights.

In the current historical context, peoples and social movements alike demand that the new Treaty for the control of TNCs include legally binding and fully enforceable rules that go beyond soft law. However, these will be insufficient if they are not complemented with an International Tribunal that can render those enforceable rules fully

actionable/justiciable. The Treaty must fully protect the interests of the communities and the people that are adversely affected by the operations of TNCs, and it must include full reparations for victims and sanctions to these corporations and their executive directors and other high executives.

3. RATIONALE AND JUSTIFICATION

The Treaty must break with and aim to bridge the existing asymmetry between trade and investment arbitration tribunals that protect the rights of TNCs at the international level, and the absence of instruments to control their international obligations.

International investment arbitration tribunals play a key role in the legal architecture of impunity: they offer full legal security to investments by TNCs, at the expense of the country hosting a given investment. The prevailing concept of 'legal security' is the one included in bilateral, multilateral or regional trade and investment agreements promoted by the World Trade Organization (WTO), International Monetary Fund (IMF) and World Bank (WB) as well as other international organizations and institutions, whose sole rationale is the protection of the contracts and the defense of the business and profit interests of big corporations. Meanwhile, that which should be considered truly as legal security --the one that establishes the preeminence of International Human Rights Law over *lex mercatoria*-- is sidelined, and while there are no effective international instruments to control TNCs, the awards rendered by arbitration tribunals are in fact coercive mechanisms and enforceable "rulings", given that their financial implications are very punitive for countries in the global South.

The Permanent Court of Arbitration, the International Court of Arbitration at the International Chamber of Commerce, the Dispute Settlement Body at the WTO, the International Center for Settlement of Investment Disputes (ICSID) hosted by the World Bank - all these tribunals conform to a sort of parallel system to the judiciary power of the state, favoring big corporations and operating outside national and international judiciary systems. In this privatized justice, it is TNCs that sue States – never the other way around – and can select a jurisdiction of their choosing, without needing to exhaust the internal legal resources available at the national level. In fact, these international investment arbitration tribunals can constitute an instance of appeal against the rulings of ordinary courts, while their own arbitrary decisions cannot be appealed.

Here is one example. The expropriation of Repsol by the Argentine government in 2012 set the architecture of impunity rolling: the oil company was able to claim on the basis of the contract they had signed with Argentina and deployed legal actions in the national courts; it was able to file a case at an ICSID international arbitration tribunal based on a

Bilateral Investment Treaty between Spain and Argentina. Together with a US based finance corporation, Texas Yale Capital, the Spanish oil company was able to file a class action against the Republic of Argentina at a New York district court, for expropriation. It also managed to file a claim at Madrid Commercial Court Nr.1, for unfair competition and in addition, it benefited from all the political, economic, diplomatic and media pressure exerted by the Spanish government and the European Union. Contrary to the treatment Repsol had, the Mapuche indigenous people in Argentina can only defend their lives and integrity at the Argentine courts. They cannot sue Repsol directly at any international tribunal. Why can't they and their allied environmental friends in Europe sue energy companies at the new investment tribunal proposed by the European Commission, while those same companies do have the possibility to sue States? This is justice at the service of the powerful.

4. INTERNATIONAL TRIBUNAL ON THE LAW OF THE SEA

This Tribunal is a judiciary body established under the UN Convention on the Law of the Sea, signed in Jamaica in 1982. The Tribunal operates according to the dispositions of said Convention (basically Part XV and Section 5 in Part XI) and its Statute, which is part of Annex VI of the Convention since 1996¹. The Statute includes general clauses, organization of the tribunal, its competence and attributions, procedures, various courts and amendments. States and non-State actors have access to the Tribunal.

The International Tribunal on the Law of the Sea could serve as a model for the International Tribunal on Transnational Corporations and Human Rights which will be included in the Treaty. This institution could be developed afterwards, incorporating it to the Treaty as one of its Annexes, with a Statute that includes the organization of the Tribunal, its composition, members, their selection, duration of their mandate, incompatibilities, appeals, nationality of the members, their wages, procedures, rulings, the binding nature of their decisions.

5. PROVISIONAL AND COMPLEMENTARY MEASURES

The treaty bodies of the UN and other quasi-judicial international jurisdictions must accept as part of their mandates the possibility to receive direct complaints against TNCs and International Economic Financial Institutions, and to forward them to the International Tribunal on Transnational Corporations and Human Rights to process them.

The regional human rights courts can modify their Statutes and adapt them to exercise direct control over TNCs.

Furthermore, the Statute of the International Criminal Court should be extended so it can hear and judge cases against juridical persons (especially against TNCs) and to include environmental crimes, colonial domination and other forms of foreign control, foreign intervention and economic crimes as massive serious violations of social and economic rights.

There is a need to promote amendments in that direction to be able to sue the CEOs of TNCs at the International Criminal Court, based on its Article 25, paragraph 3, sub-para d².

States need to pass domestic laws that regulate their extra-territorial responsibility for the operations of TNCs, their subsidiaries de jure or de facto and their suppliers, sub-contractors and licensed operators, in such a way that communities affected by those operations are allowed to present charges and sue them in the courts of their home State.

Within the universal jurisdiction framework, States should take on actions and receive complaints in relation to genocide, crimes against humanity and other offenses that are regulated under the Rome Statute, perpetrated by natural or juridical persons, within their territories as well as extra-territorially.

1. http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
2. "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose." Source : https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

4 Obligations on Human Rights in TNC supply chains

TNCs consist of several economic entities which work in two or more countries and are linked by a decision making system that makes it possible to produce a common strategy, and by the setting-up of a network between those entities, which allows one or more of them to control the whole value chain.

By generating this kind of networks, the main corporation can create a complex organisational structure by means of production decentralizing strategies, thus getting TNCs' legal personality fragmented among subsidiaries, contractors, suppliers or licensees and adopting several legal forms through many different links of commercial character. With this fragmentation two goals are being pursued, on the one hand, the dissolution of the parent company's liability into the whole value chain and, on the other hand, encouragement of internationalisation of the commercial activity, which is developed directly or indirectly in different countries. When decentralising its production, the transnational corporation can, in addition, use the receiving State's legislation as a competitiveness factor, using the low levels of protection as regards social, labour, environmental and cultural issues as competitive advantages.

Dissolution of liabilities of the parent company along its value chain, through the setting up of contracts and subcontracts under the appearance of existing independent legal entities is one of the problems that a binding treaty on TNCs must face. To this end, the mechanisms by which TNCs externalise social, labour and environmental liabilities, while at the same time enormous profits along these value chain, must be broken up. The solution depends on affirming the existence of a responsible solidarity for action or omission of parent corporations with relation to the violations of human rights along the value chain, which is based upon an objective obligation of warranty. In this sense, there is a proposal that any economic agents getting profits from a commercial activity be held accountable for any consequences the activity generates. Thus, the victim must be recognised to have the right to reparation and to claim from those liable, jointly or one by one, or to some of them and, if these are insolvent, to the one that is solvent.

There are many domestic and international jurisdictions that tackle and regulate the levels of liability of companies linked by value chains -regarding labour, environmental, financial, criminal matters- in the cause of harm. There are even some examples within the European Union as regards regulation of liability of both parent companies and subsidiaries or suppliers, but they have some loopholes that hinder extension of liability to the whole value chain.

One of these examples is the European Directive on the regulation of liability of both parent companies and subsidiaries or suppliers. Indeed, the European Council decided to set an obligation to companies to verify that their products did not contain any minerals that could have been used to finance armed conflicts (as in Democratic Republic of Congo or in Colombia). However, such obligation will not affect refineries, foundries and companies that import rough metals. Transformed and then imported metals will not be the object of the obligation. Moreover, most of imports of electronic products and components come from Asia. Therefore, most of the products will not be affected and, as a consequence, the directive is deprived of its contents. So, the question is: How to take into account the whole TNC's activity in order to include activities that are related but legally independent?

Therefore, it is necessary to include in the treaty a legal tool to make it possible to extend liability according to the sort of relationship between the parent company and the other dependent companies. To this end, the following is to be included:

- Clear legal criteria to identify those that are part of the decentralizing networks and their power relationships. Thus, it is essential to know the real origin of capitals, the nationality of the board of directors' members, the commercial decisions, the profits destination, the production externalisation, in order to lift the corporative veil and determine existent legal links among the different companies, regardless of the commercial formula they have chosen. Despite its appearance of several autonomous companies with different nationalities, the one that coordinates and manages the business group must be held liable, since it is acting as an economic unity. To that end, TNCs must be forced to identify their subsidiaries, suppliers, subcontractors and licensees and clarify the legal way in which they take part in other companies or entities with legal personality in all their commercial and/or financial practices. Such entities must make their incomes public, as well as their workforce, own funds and taxes paid in each country.
- Legal criteria to establish responsibility of TNCs and its executives with respect to legal actions (in the host country or in the parent country) for human rights violations, including labour rights, committed by one of the legal entities linked to its value chain, directly or indirectly. To this end, it is essential that parent States impose on TNCs the obligation to comply with the International Law of Human Rights, including particularly ILO Conventions, wherever they develop their activity and all along their value chain. One of the tools to be used is regulating extraterritoriality on criminal and civil rules; this involves authorizing claims based on the TNC's nationality or place of constitution, regardless of the place where rights have been violated.

- As a guarantee in this sense, States must have legal authority to identify and confiscate goods from TNCs in order to enforce judgements issued abroad. In this regard it is important to consider the role of the International Framework Agreements (IFAs). This is an agreement negotiated between TNCs and a global union federation in order to establish a relationship between the parties and ensure that TNCs respect the same standards in all countries in which they operate. For example, on the 21st of December 2006, France Telecom signed an agreement with the International Union Network, covering about 200,000 employees worldwide. The agreement dealt with the adherence to ILO's standards across the group, granting workers the right to join a union and to reject discrimination, as well as freedom from forced and child labor.
- The invocation of the universal jurisdiction for violations of fundamental rights. For example, in the labour field (slave labour, child labour...) and in the environmental field, in order to prevent the violations of these rights.
- Tools to promote respect for human rights by TNCs. In this sense, public contracts can play a fundamental role, by including social, labour and environmental clauses on their public bids, and avoiding services, products, works with specific precautionary measures as regards TNCs or value chains, so as to prevent human rights violations by such corporations.

These are not impossible goals, since there already exist some rules at the domestic level as well as recommendations in international law aiming to allow the creation of links between TNCs and their value chains. Such examples can serve as models upon which to work in order to develop tools extending responsibility if there is lack of surveillance by TNCs as well as its malicious or negligent responsibility.

France recognises, for example, an "economic state of dependence". This shows the business links between TNC and supplier, and subcontractor. The old version of the French text talks of "economic dependence", that is a commercial relationship where one of the partners, customer company or supplier, "does not have an equivalent solution". This dimension of power comes not from a market objective domination, as is the case of a dominant position but from the fact that a company's relative power makes their partners vulnerable and dependent. Criteria held by jurisprudence are the following: the company share of its partner(s) turnover, the brand (or logo) reputation and the importance of its partner(s) share, factors that lead to a situation of dependence (strategic or "obliged" choice by the victim of the denounced behaviour). Such criteria must be simultaneously present in order to qualify. This alternative can be completed by the classical rule of malicious or negligent responsibility, which implies that the claimant must prove the harm, which is difficult in the value chain.

In civil and criminal matters, some domestic legislations (especially in Europe) are already recognising liability of legal entities admitting double indictment (of the legal entity and of the natural person). In this sense, when it comes to responsibility it must be taken into account not only if there was direct responsibility but also indirect (complicity, collaboration, instigation, induction and covering up).

The European Parliament is in process of discussing the Report "On corporate liability for serious human rights abuses in third countries"¹. During the amendment period many proposals were submitted towards control of contractors and subcontractors, but these were not accepted when voted at the commission². The proposal to create a Public Agency to control TNCs was also not accepted³.

The ILO⁴ has issued a report on value chains in the Report IV on Decent work in global value chains. This was a reference at the International Labour Conference, 105th Session, in 2016. The ILO also published recommendations in relation to the Resolution on decent work for global supply chains, which was adopted the 10th of June 2016⁵.

In conclusion, these reflections and proposals are put forward to be taken into account by the Inter Governmental Working Group on TNCs with respect to human rights.

1. 2015/2315(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+COMPARL+PE-578.743+01+NOT+XML+V0//EN>

2. The amendment stated the following: « a solidarity responsibility must be established between the company and its contractors or subcontractors, in a way that, independently of the nationality of the subcontractor that commits the crime, affected people could sue the home company, either at home or host state”.

3. The amendment stated the following : « Propose the creation of a public agency to monitor the activity of European businesses, with the mandate to analyze, investigate and monitor activities of corporations in third countries. Its main role should be to investigate the operation of businesses in third countries and the complaints presented by affected communities and organizations on the activities of European companies in third states. The agency would also publish its conclusions and present these to the European Parliament.”

4. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_468097.pdf

5. http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_498373.pdf

5a International Financial Institutions (IFIs)

The future legally binding international instrument must include provisions on the obligations of the IFIs and related instruments as well as on the conduct of the Trade and Investment regime.

The economic policies imposed by the International Monetary Fund (IMF), the World Bank (WB), regional banks and other Financial instruments (Export Credit Agencies etc) contribute to the architecture of impunity of transnational corporations (TNCs) and lead to responsibility for human rights violations. The conditions demanded by the international financial institutions on the countries of the Global South through structural adjustment policies and the demands of liberalisation through free trade agreements, operate as mechanisms that oblige states to open up their countries and economies to TNCs.

Multilateral organizations, particularly the WB, IMF and the WTO, as subjects of international law, are linked not only by the rules derived from its statutes or international agreements to which these institutions are parties, but also to all relevant norms and rules of international law in general¹. In addition, the WB and IMF, as specialized UN agencies, are bound by the general objectives and principles of the United Nations Charter, which include respect for human rights and fundamental freedoms².

THE INTERNATIONAL MONETARY FUND (IMF) AND THE WORLD BANK (WB)

In order to be effective, the future international binding treaty needs to address the policies of those IFIs that violate human rights. In 72 years since their creation in Bretton Woods in 1944, the WB and the IMF have never been held to account. Their legal status could be qualified as a “human rights-free zone”, as pointed out by UN expert Philip Alston³.

The WB adopted instruments called “safeguard policies” which claimed to avoid or limit negative socio-environmental impacts arising from its projects. In addition, the private lending framework within the WB, controlled by the International Finance Corporation (IFC, member association of the World Bank Group), has the function to examine a number of “rules on income” that share the same goals as protection of investment policies. The IFC’s resorting to financial intermediaries and its policies on private loans are a matter of grave concern as are those on public loans of the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA).

Despite these policies, it has been proven that several projects financed by the WB and related international financial organizations have led to serious violations of human

rights – as for example land grabbing, repression, arbitrary arrests and murder in order to silence protest movements. The WB itself admitted in March 2015 that “oversight of those projects often had poor or no documentation, lacked follow through to ensure that protection measures were implemented, and some projects were not sufficiently identified as high-risk for populations living in the vicinity”⁴.

The founding rationale of the IMF claimed to stabilize the international financial system by regulating the flow of capital. In fact, the IMF’s operational policy contradicts this claim and its statutes, especially article 1 (par.2)⁵. The IMF, under the influence of the United States and other northern countries, has become a major player in the international economic (and political) system. One of its main objectives is to promote the free trade and investment regime all over the world, through its Structural Adjustment Programs (SAPs), accelerating the full liberalization of the movement of capital and promoting transnational corporations as main actors of the neoliberal economic system.

Additionally, the IMF has an undemocratic mode of operation. Any country that joins the IMF must pay an membership fee or “share”, calculated according to the economic importance of the country. This explains why the board of the IMF is in fact controlled by the United States (which holds 16.75% of voting rights), followed by Japan, Germany, France and United Kingdom. In reality the OECD countries have 63.09% of voting rights in the IMF while representing 45.6% of global GDP.

PROPOSALS

The future legally binding instrument on TNCs must require of these international and regional financial and economic institutions to contribute to the implementation of the treaty and refrain from taking measures contrary to its objectives and provisions. Therefore, the following proposals are made:

- 1) IFIs should be obliged to abstain taking steps that threaten the ability of States to meet their national and international obligations related to Human Rights. Furthermore, IFIs should not promote regulations that contradict the respect of human rights and should not place conditionalities on their loans.
- 2) These IFIs should be obliged to conduct ex-post evaluations of the projects they finance and policies they recommend to States. These assessments should include clear reference to the international instruments on human rights. They should also be responsible for reparations for damage caused and states should be obliged to enforce this.
- 3) The WB should be obliged to refrain from participating, in the extraction of fossil fuels through the investments of the IFC in private companies dealing with extractives.

- 4) The IFC should be obliged to not resort to financial intermediaries - commercial banks, private equity funds and hedge funds. The IFC should reject loan requests from TNCs and enterprises belonging to TNCs that are convicted of human rights violations in other cases.
- 5) In the case of violations of human rights by IFIs (through the conditions attached to loans, the social and environmental impact of their policies and projects funded), the controversial loan should be cancelled without conditions. The IFIs should reject loan applications from States that failed to regulate TNCs in proven cases of violations of human rights.
- 6) In case of violations of human rights by these IFIs or related regional development banks (through the conditionalities imposed), these entities must submit to national courts and answer for the impacts of their actions.

1. International Court of Justice, interpretation of the 25th of March 1991 agreement between WHO and Egypt, advisory opinion of the 20th of December 1980, ICJ Rec. 1980, par.37, pp. 89-90.
2. United Nations Charter, articles 57, 63, 1(3) et 55(3).
3. OHCHR, "The World Bank is a Human Rights-Free Zone". Source : <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16517&LangID=E>
4. World Bank, "World Bank acknowledges shortcomings in resettlement projects, announces action plan to fix problems", Press release. Source : <http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems>
5. "The purposes of the International Monetary Fund are : [...] ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment [...]". Source : <https://www.imf.org/external/pubs/ft/aa/>

5b The Trade and Investment regime (WTO/FTAs & BITS)

The legally binding international instrument must develop specific state obligations in relation to the international trade and investment regime, affirming the hierarchical superiority of human rights norms (jus cogens).

Decades of accumulated evidence from affected communities, Hearings of the Permanent Peoples Tribunal (PPT), extensive reports from civil society organisations¹, academics², experts and official sources³ have consistently contested the global corporate law underpinning the conduct of international trade and investment. Increasingly international and national legislation has been skewed exclusively in favour of capital, transnational corporations and the privileges of investors⁴.

GLOBAL SOUTH AND GLOBAL NORTH

Multiple Free Trade Agreements (FTAs), Investment Agreements (IIAs & BITS) and other neoliberal instruments and institutions such as the WTO have rolled back the economic, social, cultural and environmental rights of people across the Global South⁵. Increasingly these Agreements also aim for a similar roll-back of peoples rights in the global North⁶.

SOVEREIGNTY OF THE STATE VS CORPORATE ARCHITECTURE OF IMPUNITY

These Trade and Investment frameworks have functioned as a sustained assault on the sovereignty of the State and its international obligation and capacity to regulate TNCs and to make economic and development policies in the national interest serving the economic and political well-being of its people.

This global corporate rule has led to an unprecedented regulatory asymmetry that functions as an architecture of legitimation and impunity for the operations of TNCs⁷. It functions solely to protect and privilege the interests and profits of TNCs⁸ and perpetuates in this way the imbalance between soft law for the protection of human rights versus hard law in the form of powerful enforcement mechanisms regarding corporate rights.

UN Rapporteur Alfred de Zayas, in his 2015 report to the UN General Assembly analyses the incompatibility of ISDS with human rights norms⁹.

ARCHITECTURE OF LEGITIMATION AND IMPUNITY FOR CORPORATIONS VS PEOPLE'S ACCESS TO JUSTICE

Under the FTAs, IIAs and Bi-lateral Investment Treaties which carry Investment protection clauses, TNCs are legitimated to make demands that challenge national and constitutional provisions protecting the interests of citizens. One of the most contested features of the current Trade and Investment regime is the Investor-state dispute settlement mechanism (ISDS)¹⁰. With ISDS, TNCs have been given the power to sue states while states are denied (or have renounced) their power to act in protection of their citizens' interests and rights.

There are currently 739 known investment treaty cases against States. The majority of those come as a result of regulatory measures taken by the States¹¹. The number of investment arbitration cases and the mega sums of money siphoned from public coffers paid to TNCs has surged in the last two decades. The amount of money awarded to TNCs in these cases has also expanded dramatically.¹²

There are hundreds of examples of multimillion dollar lawsuits by TNCs and investors when governments try to protect public health, access to water, access to public services, indigenous populations right to self-determination, and degradation of the environment, just to give some examples¹³. Growing evidence confirms that the ISDS system has helped corporations to roll back vital protections for people and the environment, and has allowed them to override democratic decisions. Some examples are¹⁴:

- An ISDS tribunal sided with the Canadian mining corporation Copper Mesa in a case against Ecuador where peasants had prevented a mining project to defend their farms, biodiversity, water supplies, and community forest reserves. Copper Mesa employed paramilitaries to try to force its way in¹⁵. While the Tribunal acknowledged that Copper Mesa responded to the local opposition with unabashed violence, it still ordered Ecuador to pay \$24 million in compensation¹⁶.
- Since 2009, the Canadian Mining corporation Pacific Rim (owned by Oceanic Gold) is suing El Salvador (the most water-stressed country in Latin America) for its sovereign decision and refusal to grant a license on the grounds that Pacific Rim failed to meet environmental requirements. The claim is for USD250 million.

CORPORATE ARBITRATION INDUSTRY ABUSE

The corporate arbitration industry and the privatisation of justice which it represents is not confined only to ICSID but is also pursued through several other arbitration tribunals.

In contrast, so many cases pursued in national and International Courts of law by citizens, including the cases of Chevron or Bophal, illustrate the insurmountable obstacles faced in the search for justice. These national and international juridical systems have been skewed to unilaterally privilege TNCs destructive practices and profits; in prohibitive legal fees even for most states and an arsenal of repressive and propaganda attacks on affected communities even during the process of seeking justice.

PROPOSALS

While members of the global TNC Campaign seek the abrogation of the current Trade and Investment Institutions and Agreements in the long run as unjust treaties, the following proposals are advocated in the framework of the work currently going forward at the UN OEIGWG on TNCs and other business enterprises with respect to human rights.

We propose three principles towards the construction of the general framework on trade and investment:

- affirming the supremacy of human rights and the protection of the environment over the rights of investors and TNCs

- ending the investor-to-state dispute settlement (ISDS) regime
- reclaiming state sovereignty over public policy and state priorities.

The following six proposals are put forward:

1. The Treaty's starting point needs to re-assert/reclaim State sovereignty and the State's right to regulate and its obligations to protect the human rights of its citizens and its commitment to develop an alternative model of the economy placing peoples basic needs before corporate profits.
 2. The Treaty needs to guarantee the primacy and superiority of the overall framework of human rights in relation to Trade and Investment policy and Agreements and Contracts that guarantee the rights of all women and men - farmers, fishers and indigenous people - to the means of livelihood; of workers, including migrant workers, to decent and safe working conditions and a living wage; to the rights of nature and to the protection of public services and the public interest.
 3. The Treaty must overturn the current ISDS mechanism and the privatisation of justice in the current abusive system of investment arbitration as it is currently the practice at the ICSID and several other arbitration institutions. Put in place an Investment regulation system including the resolution of investment disputes that guarantees the States sovereignty and the resolution of disputes that does not compromise the interests of citizens.
 4. Prohibit the current mega billion dollar secretive arbitration industry currently benefiting a small clique of mainly American and European legal corporations.
 5. The Treaty must provide regulation on financial transactions and speculation, prohibit practices of tax and wage evasion and transfer pricing.
 6. Provide reasonable and affordable mechanisms facilitating access to justice for affected communities destroyed by exploitative and extractive trade and investment policies.
-
1. A Call for the Building of an Alternative Legal Framework to the International Investment Treaties: favoring the Public Interest while doing away with Transnational Corporate Impunity <http://www.ips-dc.org/call-building-alternative-legal-framework-international-investment-treaties-favoring-public-interest-away-transnational-corporate-impunity>; Over 200 civil society groups ask EU and US negotiators to exclude ISDS from TTIP talks. http://corporateeurope.org/sites/default/files/attachments/ttip_investment_letter_final.pdf
 2. Public Statement on the International Investment Regime by academics <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>

3. Stiglitz op-ed against ISDS "On the wrong side of globalization", 15 Mar 2014 http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?_r=0; A "health warning" on international investment agreements by the UN Special Rapporteur on the Right to Health, 11 Aug 2014 <http://www.rightingfinance.org/wp-content/uploads/2015/02/report.pdf>; Alfred de Zayas, UN Independent Expert on the promotion of a democratic and equitable international order by the Human Rights Council 2015 report to the UN General Assembly on the incompatibility of ISDS with human rights norms (A/70/285) on the impacts of ISDS. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285
4. Juan Hernández Zubizarreta (2015) The new Global Corporate Law, State of Power 2015, Transnational Institute, <https://www.tni.org/en/briefing/new-global-corporate-law>
5. <http://www.isdscorporateattacks.org/> and <http://isds.bilaterals.org/>
6. <https://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements> <https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>
7. M. Sornarajah (2011) Mutations of Neo-Liberalism in International Investment Law 3(1) TRADE L. & DEV.203
8. <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E>
9. http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/285
10. In 2015, Cecilia Malmström, EU trade Commissioner called ISDS: "the most toxic acronym in Europe" <http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/>
11. <http://investmentpolicyhub.unctad.org/ISDS>
12. Goldhaber, Michael D. (2015) "Deciding the world's biggest disputes", 2015 Arbitration Scorecard, American Lawyer, Focus Europe, July.
13. UNCTAD database on known investment treaty ISDS cases worldwide <http://investmentpolicyhub.unctad.org/ISDS>
14. Other examples : Pacific Rim vs. El Salvador; Crystallex vs. Venezuela; Renco Group vs Perú y Bear Creek vs Perú; Infinito Gold vs. Costa Rica; Dominion Minerals vs. Panamá; TransCanada vs. Estados Unidos; Lone Pine vs. Canadá; Bilcon vs. Canada ; y Glencore vs. Colombia.
15. <https://business-humanrights.org/en/copper-mesa-mining-lawsuit-re-ecuador>
16. <http://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>

6 Rights of Affected People

INTRODUCTION

When thinking about a Human Rights Treaty on TNCs and other business, it is necessary to think about the victims of corporations and States and their place in these processes. Under the perspective of a Treaty that intends to regulate TNCs, the moral and legitimate authority of peoples -since they play a key role- must be recognized in order for them to be able to oppose such situations and to create norms and rules to strengthen the primacy of human rights. Moreover, the historical role played by these affected communities by resisting continuously the various violations and crimes of corporations must be recognized as well. Most of these crimes against human rights are still unpunished.

This growing and systematic impunity, with which TNCs act, results in threats and attacks against human rights defenders, trade unionists, indigenous peoples, Afro-descendants, peasants, children, among other affected groups. At the same time these TNCs accumulate extraordinary profits.

The affected people feel outraged due to the failure of human rights law so far to impose itself on the regulation of TNCs activities. By contrast, the strong position of TNCs in the Global Corporate Law (Lex Mercatoria) guarantees in an imperative and coercive manner the privileges of transnational corporations.

Therefore, the constructive work of a Treaty on Human Rights with respect to Transnational Corporations must be a process, where affected communities are the subjects that formulate and ensure the primacy of human rights and the dismantling of corporate legal privileges.

Protection policies of foreign investment that entitle TNCs to sue states before international arbitration courts, under the pretext of attracting investment, should be rejected. TNCs can not and should not have the freedom to establish conditions on production and determine national policies. Governments should develop and ensure democratic processes of participation and consultation.

RIGHTS OF THE AFFECTED PEOPLE

In history, social movements of people affected by TNCs have led many struggles and succeeded many times. However, successes and advances, the result of decades of mobilization and struggle, have not resulted in regulation and remedy. This has led

the affected people to differentiated levels of protection in different States against harm by TNCs.

The restrictive and limited definition of the concept “persons affected by corporations” and reparation in each case results from the fact that people’s conquests have not been linked to human rights, because there is no international legal framework to implement the (separate and/or joint) obligations of States to protect people against TNCs. Therefore, the existence of a treaty containing a broad definition of the concept of affected people is of the utmost importance.

It is, thus, crucial, to have a treaty with one of its chapters devoted to tackling such a concept and the ways to repair rights violations already achieved through struggles in several countries. Creating such a framework for peoples rights to remedy against corporate harm to recognize the rights of affected people (affected either by dams, mining or other corporate activities) would mean a great attainment by social movements that demand a legal recognition of their social conquests as full rights.

So, we can see that some already existing principles set up by international law are linked to this proposal such as the right to know, the right to justice, the right to reparation, the right to guarantees of non-repetition etc. It is to be noticed that some particular issues are extremely important for TNCs’ victims in their search of justice during legal procedures. These are:

- no court costs;
- possibility of class actions;
- prompt processes;
- limitation of transactional remedies.

I. NO COURT COSTS

One of the most important problems victims have to face is lack of financial means to commence and carry through the judicial process. This is particularly due to the fact that often victims face TNCs with financial means sometimes larger than those of the State that is competent to carry out the process.

To illustrate this, The UN budget for human rights protection mechanisms for 2014 was 34,6 million dollars¹, that is 50% the amount General Motors spends (70 million) for one-year sponsoring Manchester United² football team shirt!

Similarly, Apple’s 37 million profits in 2013, could finance the work of such mechanisms until 3014³!

In order to limit the pernicious consequences of such inequality, processes for victims of human rights violations should be free. This means that where there is enough evidence that the person who addresses the court is likely to have been indeed a victim of human rights violations or corporate impairment of his/her human rights, he/she should be free from paying legal costs and to compensate the potential perpetrators if they were acquitted. Furthermore, legal advisers' fees, which usually are the most important burden as well as the main hindrance for victims to access justice, should be met by a fund administered by the State, but taxed from the corporate sector.

Such possibility is, on the other hand, expressly previewed by the Rules of the European Court of Human Rights⁴, although limited to persons that have insufficient means. It happens similarly in some domestic legislation. For instance, the Spanish law for "victims of terrorism"⁵ exempts these people from any legal cost and puts a free lawyer at their disposal for the whole process. It is to be noticed that this law was passed in September 2011, when the economy was in full recession. This shows that a government's decision to grant free legal process to a limited group of actionable cases does not have a decisive influence as regards public investment and is just the result of a political decision.

This being said, financing this sort of processes could be a problem for some States that do not have enough financial resources. Also, the fact that States have to take legal measures against TNCs that often use dilatory legal tricks against victims (see the example of Chevron-Ecuador in the United States), leads to the proposal of a fund to be raised by a fixed tax to be paid by TNCs.

II. CLASS ACTION

Human rights violations, torts and crimes, particularly those of ESCR, often affect a high number of victims. In order to make the process easier, they should be able to take a class action.

This means that victims could designate one person to represent them, who would initiate the action on behalf of all of them in order to defend all their interests. Such a measure could avoid multiple and contradictory processes, reduce the States' judicial costs and concentrate all victims' means in a sole process.

UN treaty bodies such as the Committee on Economic, Social and Cultural Rights⁶ preview this kind of procedures. They are also included in some domestic legislation in countries such as the United States, Canada, Brazil, United Kingdom, Portugal and Sweden⁷. In other countries, associations with legal status that bring together all of the victims can take action.

III. PROMPT PROCESSES

The principles of an equal process must be respected along the whole procedure, including, among other things, respect for the requirement of promptness, in the interest of the victim as well as in that of the accused person/entity. Thus, any instance that is sought should have all necessary means to make possible for the victims to get conviction for those accountable, as well as reparation for the harm caused within a reasonable time. This happened, for instance, in the case of the asbestos' victims, who died before justice was achieved.

IV. LIMITATION OF TRANSACTIONAL REMEDIES OR OUT OF COURT SETTLEMENTS

Another common problem is that of transactional remedies proposed to the victims in order to avoid a judgement. This is particularly important since victims are often in a situation of vulnerability that pushes them to accept transactional proposals as they foresee a partial compensation in the short term if they withdraw any action. This can happen even when it could take victims to an overall compensation for the harm suffered as well as the effective conviction of those accountable. From Unocal-Burma to Probo Koala, examples are numerous.

For example, we can look at two cases of fraud. Fines of several hundreds or thousands of million dollars, imposed for tax evasion in the United States and some European countries on banking societies do not deter these corporations as they already preview this kind of sanction in their budgets, without significantly changing their practices.

Even worse, friendly settlements can be seen as a "permission" to continue to commit crimes and violations. This is what Roland Arnall, founder of Ameriquet⁸ did, to avoid sentences and turned friendly settlements (goods deliveries to minorities associations in the US) to his advantage:

"Payments made case by case with Ameriquet were worse than useless: they did not deter fraud neither pillage against minorities. Arnall saw payment of fines and donations imposed by such agreements as a real permission to evade. Fines were not too strong and they did not serve at all to make profits made out of evasions useless. These friendly payments only improved Arnall's image and reputation. He got out of this wealthier and more powerful."⁹

Obviously, friendly settlements must not be forbidden. They can be taken into account, according to each case, but they must be a sufficient deterrent so as to put an end to certain practices and not perpetuate impunity.

1. United Nations Human Rights Office of the High Commissioner, "OHCHR Report 2014", http://www2.ohchr.org/english/OHCHRReport2014/WEB_version/allegati/Downloads/1_The_whole_Report_2014.pdf
2. "Manchester United to get \$559 million in GM shirt sponsor deal", *Reuters* (4 de agosto de 2012), <http://www.reuters.com/article/2012/08/04/us-soccer-manchesterunited-jerseys-idUSBRE8730KV20120804>
3. "Fortune Global 500 (2013)", in Wikipédia, online: <[http://fr.wikipedia.org/w/index.php?title=Fortune_Global_500_\(2013\)&oldid=105977188](http://fr.wikipedia.org/w/index.php?title=Fortune_Global_500_(2013)&oldid=105977188)> (accessed on the 6th August 2014).
4. Rules of the European Court of Human Rights, January 2016, Article 100 ff.
5. Law on the recognition and overall protection to victims of terrorism, (2011), Law 29/2011, on Recognition and Overall Protection to Victims of Terrorism, art. 48.1.
6. <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm>
7. Bruno Deffains, Myriam Doriat-Duban, Eric Langlais y Tatiana Markova, Analyse économique de la prise en charge des victimes d'accidents collectifs par le droit, Université Nancy 2, 2005, p. 29, http://www.gip-recherche-justice.fr/catalogue/PDF/rapports/143-RF_Deffains_AZF.pdf (data related to 2004).
8. A mortgage loan society that was at the core of the subprime crisis (2007-2010) in the United States for their systematic frauds.
9. Aurore Lalucq and William K. Black (eds), *Les banquiers contre les banques: Le rôle de la criminalité en col blanc dans les crises financières*, p. 64 (Paris: Charles Léopold Mayer, October 2015).

collectively building a global movement



stopcorporateimpunity.org

reclaiming peoples sovereignty

[FACEBOOK.COM/STOPCORPORATEIMPUNITY](https://www.facebook.com/STOPCORPORATEIMPUNITY) @STOPTNCIMPUNITY

CAMPAIGN BACKED BY:

INTERNATIONAL

Bi-regional Europe-Latin America and the Caribbean Enlazando Alternativas Network
Blue Planet Project
CADTM International
Corporate Accountability International
FIAN International
Food & Water Watch
Friends of the Earth International
Global Forest Coalition (GFC)
International Articulation of those Affected by Vale
La Via Campesina
The International Office for Human Rights Action on Colombia (OIDHACO)
Transnational Institute – TNI
World Forum for Alternatives
World March of Women
World Rainforest Movement

REGIONAL

African Uranium Alliance, Africa
Amigos de la Tierra América Latina y el Caribe – ATALC
CADTM – AYNA, Americas
Campaña Justicia Climática, Americas
Coordinadora Andina de Organizaciones Indígenas – CAO, Andean region
Focus on the Global South, India/Thailand/Philippines
Food & Water Watch Europe
Hemispheric Social Alliance, Americas
International Alliance of Natural Resources in Africa (IANRA)
Jubilee South – Asia Pacific Movement on Debt and Development
Jubilee Sur Americas
Plataforma Interamericana de Derechos Humanos, Democracia y Desarrollo (PIDHDH), Americas
Red Latinoamericana por el Acceso a Medicamentos
Red Latinoamericana sobre Deuda, Desarrollo y Derechos (LATINDADD)
Red Vida
Social Movements for an Alternative Asia (SMAA)
Southern Africa Faith Communities Environmental Initiative (SAFCEI)
Third World Network Africa
TransformEurope
Transnational Migrant Platform, Europe
Young Friends of the Earth Europe

NATIONAL

ACSUR – Las Segovias, Spain
Action from Ireland (AFRI)
African Women Unite Against Destructive Natural Resource Extraction (WoMin), South Africa
Association Internationale de Techniciens, Experts et Chercheurs (AITEC), France
Alianza Mexicana por la Autodeterminación de los Pueblos (AMAP)
All India Forum of Forest Movement (AIFM), India
Alliance of Progressive Labour (APL), Philippines
Alternative Information Development Center (AIDC), South Africa
Alanya Tigil Mina (ATM), Philippines
AMS-net (APEC Monitor NGO Network)
Amigos de la Tierra, Spain
Anti-Apartheid Wall Campaign (Stop the Wall), Palestine
Arlac, Belgium
ATTAC Argentina
ATTAC Austria
ATTAC France
ATTAC Japan
ATTAC Maroc

ATTAC Spain
ATTAC Switzerland
ATTAC Vlaanderen
A Seed Japan (Action for Solidarity, Equality, Environment and Development)
Bench Marks Foundation, South Africa
Beyond Copenhagen (BCPH), India
Biowatch South Africa
Both ENDS, The Netherlands
Brazilian Interdisciplinary AIDS Association (ABIA)
Campaña de Afectados por Repsol, Catalunya
Campaña Explotación a Precio de Saldo, Spain
Campaña Mesoamericana Para la Justicia Climática, El Salvador
Centro de Documentación e Información Bolivia (CEDIB)
Censat Agua Viva – Amigos de la Tierra Colombia
Central de Trabajadores de la Argentina (CTA)
Centre Europe Tiers Monde (CETIM), Switzerland
Centre for Natural Resource Governance, Zimbabwe
Centre for Trade Policy and Development (CTPD), Zambia
Centre for the Development of Women and Children (CDWC), Zimbabwe
Centro de Documentación en Derechos Humanos “Segundo Montes Mozo S.J.” (CSMM), Ecuador
Centro de Estudios para la Justicia Social Tierra Digna, Colombia
Centro de Investigación y Documentación Chile-América Latina (FDCL), Germany
Centro de Investigaciones e Información en Desarrollo (CIID), Guatemala
CIVICUS, South Africa
COECCOceiba, Costa Rica
Colectivo de Abogados José Alvear Restrepo (CCAJAR), Colombia
Colectivo de Mujeres Hondureñas (CODEMUH), Honduras
Colibri, Germany
Col-lectiu de Respostes a les Transnacionals (RETS), Catalunya, Spain
Comision Interclerkal de Justicia y Paz, Colombia
Comisión Nacional de Enlace (CNE), Costa Rica
Comité por los Derechos Humanos en América Latina (CDHAL), Canada
Comité Permanente por la Defensa de los Derechos Humanos (CDH)
Comité pour le respect des droits humains “Daniel Gillard”
Commission for Filipino Migrant Workers – International Office, Philippines
Common Frontiers, Canada
Confederación General del Trabajo (CGT)
Coordinación por los Derechos de los Pueblos Indígenas (CODPI), Spain
Corporate Europe Observatory (CEO), Belgium
Council of Canadians, Canada
Cristianos de Base, Spain
CSAAWU, South Africa
Democracy Center, Bolivia
Derechos Humanos sin Fronteras, Perú
Eastern and Southern Africa Farmers Forum (ESAFF) – Zambia
EcoDorc Africa
Ecologistas en Acción-Ecologistas Marxan – Ecologistes en Acció, Spain
¿Economía Verde? ¿Futuro Imposible! – Alianza por una alternativa ecológica, social y urgente al capitalismo, Spain
Economic Justice Network of FOCCISA, South Africa
Enginyeria sense Fronteres, Catalonia
Entrepueblos, Spain

Environmental Monitoring Group, South Africa
Environmental Rights Action/ Friends of the Earth Nigeria
Federation of Organs for Social and Educational Assistance (FASE), Brazil
Federació de Associacions Veïnals de Mataró (FAMV), Catalunya
Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (FOCO), Argentina
France Amérique Latine (FAL), France
Fresh Eyes- People to People Travel
Friends of the Earth, Japan
Friends of the Earth Scotland
Friends of the Earth, Finland
Friends of the Landless, Finland
Fundación de Estudios para la Aplicación del Derecho (FESPAD), El Salvador
Fundación de Investigaciones Sociales y políticas (FISYP), Argentina
Fundación para la Cooperación APY – Solidaridad en Acción, Spanish State
Fundación Solon, Bolivia
Global Change Factory, Germany
Global Economy Project
Global Justice Now/ Attac UK
Grassroots Global Justice, United States of America
Grassroots International, USA
Groundwork – Friends of the Earth South Africa
Groupe de Recherche pour une Stratégie Economique Alternative (GRESEA), Belgium
Grupo Sur, Belgium
Hegoa, Instituto de Estudios sobre el Desarrollo y la Cooperación Internacional del País Vasco, Basque Country
HOMA Center for Business and Human Rightswork
IBASE – Instituto Brasileiro de Análises Sociais e Econômicas
India FDI Watch, India
Indian Social Action Forum (INSAF), India
Indonesia for Global Justice, Indonesia
Ingeniería Sin Fronteras, Asturias
Innovations for Change, Nigeria
Institute for Policy Studies (IPS) – Global Economy Project
Institute for Socioeconomic Studies (INESC)
Instituto de Ciencias Alejandro Lipschutz (ICAL), Chile
Instituto Equit – Género, Economía e Ciudadanía Global, Brazil
Instituto Latinoamericano para una sociedad y un derecho alternativo (ILSA), Colombia
Instituto Mais Democracia, Brazil
Janpahal, India
LAB Euskal Herria/Pais Vasco
Laboratorio de Investigación en Desarrollo Comunitario y Sustentabilidad de México
Labour Research Service – LRS, South Africa
Legal Resources Centre
Jubilee Debt Campaign, United Kingdom
Justiça Global, Brazil
Koalisi Anti Utang (KAU) – Anti Debt Colition Indonesia
KRuHA, Indonesia
La Via Campesina Africa
1 – Mozambique
Mahlatini Organics, South Africa
Marcha Mundial de Mujeres Chile – Colectivo VientoSur
Mesa Nacional frente a Minería Metálica, El Salvador
Militau Defensie – Friends of the Earth, Netherlands
Mining Affected Communities United in Action (MACUA), South Africa
MiningWatch Canada
Movimento dos Atingidos por Barragens (MAB), Brazil
Movimiento Rios Vivos, Colombia

Movimiento Social Nicaragüense – Otro Mundo Es Posible, Nicaragua
Multiwatch, Switzerland
National Garment Workers Federation (NGWF), Bangladesh
North East Peoples Alliance, India
Northern Alliance for Sustainability (ANPED), Belgium
NOVACT, Spain
Observatorio de la Deuda en la Globalización (ODG), Spain
Observatorio de Multinacionales en América Latina (OMAL), Spain
Observatorio Petrolero Sur (OPSur), Argentina
Otramera, Paraguay
Pacific Asia Resource Centre (PARC)
PACS – Instituto Políticas Alternativas para o Cone Sul, Brazil
Palenke del Alto Cauca (PCN), Colombia
Partido de la Rifondazione Comunista/Isquierda Europea, Italia
Pax Romana, Switzerland
Philippine Rural Reconstruction Movement (PRRM), Philippines
Plataforma Alternativa para el Desarrollo de Haití (Papda)
Plataforma DHESC, Brazil
Plataforma Rural – Alianza por un Mundo Rural Vivo, Spain
Polaris Institute, Canada
REBRIP – Brazilian Network for the Integration of the Peoples, Brazil
Recaica, Colombia
Red Internacional de Derechos Humanos (RIDH), Switzerland
Red Mexicana de Acción frente al Libre Comercio (RMALC), Mexico
Red Muqui Sur, Peru
Red Nacional Genero y Economía Mujeres para el Diálogo, AC, Mexico
Rede Social de Justiça e Direitos Humanos, Brazil
Revueita verde/Rising Tide, Mexico
SEATINI, Zimbabwe
SETEM Catalonia
SIEMBRA, AC, Mexico
Sindicato de Trabajadoras de la Enseñanza de Euskalherria – STEE-EILAS, Basque Country
Soldepaz Pachakuti, Spain
Solidaridad Suecia – America Latina (SAL) / Latinamerikagrupperna, Sweden
SOLIFONDS, Switzerland
SOMO – Centre for Research on Multinational Corporations, Netherlands
South African and Allied Workers Union (SATAWU), South Africa
South African Water Caucus (SAWC), South Africa
South Asian Dialogues on Ecological Democracy (SADED), India
South Durban Community Environmental Alliance, South Africa
Southern Africa Green Revolutionary Council (SAGRC)
Spaces for Change (S4C), Nigeria
Students and Scholars
Against Corporate Misbehavior (SACOM), Hong Kong, China
Sustaining the Wild Coast (SWC), South Africa
Swiss Working Group on Colombia
Terra de Direitos, Brazil
Toxics Watch Alliance (TWA), India
Trust for Community Outreach and Education (TSOE), South Africa
Unidad Ecológica Salvadoreña (UNES), El Salvador
Unión de Afectados y Afectadas por las Operaciones Petroleras de Texaco (UDIAPT), Ecuador
UNISON, United Kingdom
Veterinarios sin Fronteras, Spanish State
VIGENCIA!
War on Want, United Kingdom
Xingu Vivo para Sempre, Brazil