



THE PROCESS TOWARDS A TREATY TO STOP CORPORATE IMPUNITY FOR HUMAN RIGHTS ABUSES AND VIOLATIONS

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Already since the 70's, civil society organizations and movements have been calling for the adoption of binding international regulations for transnational corporations. Unfortunately, until today the main existing regulations adopted are voluntary and have not achieved the required effective protection of the human rights of communities and individuals affected by business activities, especially those of a transnational character.

Following the intensive advocacy by a large group of actors from civil society,¹ the Human Rights Council adopted in 2014 Resolution 26/9 creating an Open Ended Inter-Governmental Working Group (IGWG) mandated to elaborate an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

During the first three sessions (2015-2017) the IGWG discussed the content, scope, nature and form of the future treaty. In 2018, negotiations began on the basis of a "zero draft", presented by the Chairperson-Rapporteur of the IGWG. Civil society has been very active throughout this entire process.

Why do we need a treaty on transnational corporations, other business enterprises and human rights?

There currently exists no specific binding international law aimed at preventing harm by the activities of TNCs and the different enterprises connected to them within their supply or global productive chain. There is additionally a gap in international law with regards to the legal accountability of such entities. Existing voluntary regulations are vague and in some cases ambiguous. They have failed to provide effective human rights protection, especially with regards to the cross-border impacts of transnational business activities and the access to justice for affected individuals and communities. Instead, human rights crimes and abuses by companies have become widespread in the context of industrial globalization.

THE TREATY CAN cover these gaps and represent the first milestone in the evolving international human rights framework to regulate the activities of TNCs and other related enterprises. This means placing human beings, their communities and their human dignity at the centre of policymaking, implementation, and of the development of international human rights corporate law.

In view of the complexity of transnational business webs and structures, and the challenges posed by their strategies and patterns of behaviour for those seeking to prevent harm and access justice, it is crucial for States to address these existing gaps by adopting precise and detailed international law.

THE TREATY CAN include detailed obligations on how States, individually or jointly, have to regulate companies, on which changes in legislation, administration and adjudication they have to implement in order to ensure prevention of human rights harm and access to justice for the victims of business activities, including in cross-border cases.

There is a need to face the impunity of TNCs and other business enterprises. One of the major problems is the lack of effective liability mechanisms, especially in the home States of transnational or of controlling companies of the supply or global production chains.

THE TREATY CAN establish clear rules to hold corporations and the persons working for them liable under criminal, civil and administrative law, including for the abuses committed by their subsidiaries worldwide.

In many cases, the harm resulting from business activities is irreparable. Even if prevention is part of States' ex-isting obligation to protect human rights,

THE TREATY CAN clarify which prevention measures need to be taken by States and imposed on corporations throughout their supply or global production chain (for example but not only limited to due diligence).

Quite often, those affected by TNCs attempt to access remedies in the countries where the controlling en-terprises are based. In many opportunities the judges of such "home States" allege that they cannot decide on harm occurred in other States (using the doctrine of *forum non conveniens*). Also frequently, the courts in the States where the affected communities are based are not effective in facing powerful TNCs.

THE TREATY COULD prohibit judges of applying the doctrine of *forum non conveniens*. It could also fore-see cooperation between all the judges from the countries where the companies involved are based in order to ensure adequate protection to the victims. Furthermore, it should include the doctrine of "*forum necessitatis*", which means that the victims should be able to hold companies liable in any competent tribunal to provide for the better protection of affected individuals and communities.

In many cases it is impossible for the affected individuals and communities to access a court or to prove that the controlling or mother company of that directly producing the harm is responsible for the human rights abuse and should be held to account.

THE TREATY CAN adopt rules to ensure better access to courts for affected communities. It can oblige the companies involved -and not the affected individuals and communities- to prove that they are not connected to the harm (reversal of the burden of proof). It could also ensure that all of the companies involved in the abuse are obliged to pay the total amount of damages, no matter how the involved companies distribute the costs later (joint responsibility).

Human rights enforcement mechanisms for cases where States have failed to protect human rights from the impact of business activities are frequently weak or inexistent, especially regarding cross-border cases.

THE TREATY CAN provide for an international complaints mechanism which affected individuals and communities can access when they have been denied justice at the national level. It can also ensure more effective enforcement.

The abuses and crimes committed by TNCs are not gender neutral and affect women in a different manner.

THE TREATY CAN establish specific mechanisms to prevent such impacts on women and ensure that remedy mechanisms are gender sensitive. It can also ensure adequate participation of women in policy-making and enforcement mechanisms developed under the treaty.

Those protecting their communities from the harm committed by companies often face threats and are physically and psychologically attacked and criminalized.

THE TREATY CAN establish specific rules for the protection of human rights and environmental defenders.

The adoption of policies and regulations to prevent and protect corporate abuses and crimes are negatively influenced by corporate power (corporate capture).

THE TREATY CAN establish standards to counter undue influence by the corporate sector when States are willing to adopt regulations to protect human rights holders from corporate crimes and abuses, implement such rules or when judges decide on related cases.

Even when States want to protect human rights holders from the adverse impact of corporate activities, these efforts can be undermined by their existing obligations under trade or investment law. This derives from the fact that trade and investment law is binding, robust and detailed whilst human rights instruments aimed at protecting from corporate abuses and crimes remain still very vague.

THE TREATY CAN reaffirm the primacy of human rights over trade and investment law.

¹ See Treaty Alliance at: <https://www.treatymovement.com> and Global Campaign for Peoples Sovereignty, to dismantle corporate power and stop impunity at: <https://www.stopcorporateimpunity.com>

How would the Draft Treaty deal with a case of corporate human rights abuses and violations?

The case of Niassa Tree Plantations

The key question is **how a treaty would better serve the individuals and communities whose human rights are abused by the activities of transnational corporations and other business enterprises?**

Our infographic seeks to analyse how the zero draft as it stands would deal with a case of corporate human rights abuse and which aspects would need to be improved to ensure effective prevention, remedy and accountability. Although not exhaustive, the infographic focuses on the key concepts and articles for three different moments: the arrival of the TNC to the territory; the human rights crimes and abuses committed by the TNC, its subsidiaries and/or subcontractors; and peoples' struggle for the legal liability of the company and enforcement of decisions.

In this document, we use a real case documented by FIAN International in 2012 which involves the establishment of large-scale tree plantations in the Niassa province of Mozambique, impairing the human rights of peasant communities, especially their access to land and water which are fundamental for their livelihoods. In 2005, a subsidiary company of the Global Solidarity Forest Fund in Mozambique, namely Chikweti Forest of Niassa, acquired some 45000 hectares of land to establish pine and eucalyptus plantations. In addition to the impact on the communities' access to land and other natural resources for their livelihoods which constitute abuses of their right to food and right to water, there were no adequate consultations undertaken with the communities affected neither proper impact assessments.

For each of these moments, we look at what happened in the actual Niassa case before then seeing which articles of the draft treaty could deal with this situation (in green) and what we believe are the missing or negative elements from the draft treaty (in red).

Arrival of TNC subsidiary

Due diligence obligations

Consultations were not conducted with women.

Not all communities were consulted.

Meaningful consultation should be carried out with all groups potentially affected.

Art.9.2.g

The Treaty must include a gender approach that acknowledges power imbalances.

The draft treaty doesn't recognize peasants as a group requiring special attention.

1

GENDER JUSTICE

NEED TO INCLUDE FREE PRIOR AND INFORMED CONSENT

Chikweti Forests of Niassa (Global Solidarity Forest Fund)

Impact assessment

Impact assessment was carried out by Chikweti FN (neither reports nor records are available for the public).

"Pre and post environmental and human rights impact assessments must be undertaken".

Art.9.2.e

TNCs should not be the actors carrying out impact assessments (these should be independent and transparent).

Disclosure

This could be essential in order to see how Chikweti FN is connected to foreign investors in order to attribute responsibilities.

Disclosure requirements are “subject to an assessment of the severity of the potential impacts on the individuals and communities concerned”. **Art.9.2.d**

NEED TO ENABLE FOR THE
PIERCING OF THE CORPORATE VEIL

Should go beyond “non-financial matters”. TNCs should have to disclose information and declare the different enterprises or entities to which they are linked.

Human Rights abuses by TNCs or its subsidiaries

2

Chikweti Forests of Niassa impacts communities' access to land, livelihoods, water and the environment.

Access to justice

Communities filed a non-judicial complaint to the government, however there hasn't been a serious follow-up. Chikweti FN didn't cease its activities despite it being clear that they were producing harm.

“Effective and prompt access to justice and remedies”, including “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims” **Art.8.1**
Art.8.1.a

and “environmental remediation and ecological restoration when applicable, including covering of expenses for relocation of victims, and replacement of community facilities”. **Art.8.1.b**

There is no reference to precautionary measures which could immediately stop the harm.

Chikweti FN is linked to actors under different jurisdictions, making it difficult for victims to access information and proof.

“Victims shall be guaranteed appropriate access to information relevant to the pursuit of remedies” **Art.8.4**

and “States shall provide proper and effective legal assistance to victims throughout the legal process”. **Art.8.5**

The rights of affected communities to claim all involved companies along the value chain and their joint responsibility should be recognized. The right to information should be more detailed, including disclosing all the companies part of the TNC group or network - if no: Rebuttable presumption of control.

PRO-PERSONA PRINCIPLE

Jurisdiction

The affected individuals and communities were not able to access justice in Sweden and the Netherlands.

Victims can access justice both in the “court of the State where acts or omissions occurred” **Art.5.1.a**

or in the court of where the TNCs “are domiciled” – including, where the TNC has its “statutory seat”, “central administrations”, “substantial business interests” or “subsidiary, agency, instrumentally, branch, representative office or the like”. **Art.5.2**

The draft should clearly prohibit forum non conveniens.

Applicable law

Victim's protection is strengthened by allowing them to choose the law which is most favorable to them.

Art.7.2



3 Liability

LIABILITY THROUGH THE
GLOBAL VALUE CHAIN

It is important that TNCs became accountable of their economic activities, making GSFF responsible for Chikweti FN's impacts and human rights abuses.

States are required to establish legal liability for TNCs under both their civil and criminal laws.

Art.10

TNCs' harms are included when they "exercise control over the operations",

Art.10.6.a

they "exhibits a sufficient close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim"

Art.10.6.b

or "to the extent risk have been foreseen or should have been foreseen of human rights violations within its chain of economic activity".

Art.10.6.c

Liability should not depend on the compliance with due diligence requirements, but determined departing from the produced harm.

DUTY OF CARE

Not all States have the same standards for the legal liability of TNCs and other business enterprises.

Creates an international standard for criminal liability of TNCs.

Art.10.8

The last paragraph of **Art. 10** restricts criminal liability. It should instead be mandatory. More details on administrative liability are needed.

JOINT
RESPONSIBILITY

Mutual legal assistance and international cooperation

In order to facilitate access to justice in this case, Mozambique could request both Sweden and the Netherlands for legal assistance for the investigation and enforcement of any legal decision (and vice versa). Regarding Niassa plantations, the Netherlands didn't want to intervene and didn't conduct any research (as Mozambique and Sweden did).

"information and supply of all evidence at their disposal and necessary for the proceedings in order to allow effective, prompt, thorough and impartial investigations".

Art.11.2

Such information could be provided "without prior request" if it "could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings".

Art.11.4

"Any judgement of a court [...] shall be recognized and enforced in any Party".

Art.11.9

States may "refuse" recognition and enforcement "where the judgement if contrary to the public policy of the Party on which its recognition is sought".

This provision is limiting and may jeopardize the effective protection of victims.

Art.11.10.c



Consistency with international law

The rights which investors hold under trade and investment agreements can impede access to justice for victims.

“Nothing in these articles shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law”. **Art.13.3**

This is contrary with Art.13.7.

Existing and future Free Trade and Investment Agreements shall be “interpreted in a way that is least restrictive on their ability to respect and ensure their obligations [...], notwithstanding other conflicting rules of conflict arising from customary international law or from existing trade and investment agreements”. **Art.13.7**

Committee

The victims of the Niassa plantations were not able to access any international legal mechanism despite the impunity at the national level.

The Committee has the capacity to receive and consider complaints.

“Make general comments on the understanding and implementation of the Convention based on the examination of reports and information received from the States Parties and other stakeholders”. **Art.14.4.a**

The Committee foreseen in the treaty is similar to other existing Committees and has weak enforcement powers. A strong international mechanism is needed with the competence to emit binding decisions.

PRIMACY OF HUMAN RIGHTS REAFFIRMED

BINDING DECISIONS OF THE COMMITTEE

Justice



FIAN International was founded in 1986 as the first international human rights organization to advocate for the realization of the right to food and nutrition. Holding a consultative status with the United Nations Economic and Social Council, FIAN is active in more than 50 countries, through national sections and seeds groups, which account for 25 of these, as well as individual members and international networks.

With no religious or political affiliation dictating our work, we expose violations of people's right to food and related rights wherever they may occur and stand up against undue and oppressive practices that prevent people from feeding themselves. By holding governments accountable, FIAN strives to secure people's access to and control over natural resources and means of subsistence, crucial to ensure a life of dignity, now and for future generations. The struggle for adequate nutrition is a critical component to the right to food, moving the debate beyond medicalized interventions and towards food systems that support healthy diets and ecosystems.

As the struggle against gender discrimination and other forms of exclusion is an integral part of our mission, we work with and in favor of the most marginalized and affected groups. Our vision is of a world free from hunger, in which every woman, man, boy and girl can fully enjoy their right to food, as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

FIAN International's Secretariat is based in Heidelberg, Germany, and has UN representation in Geneva, Switzerland.

