ESCR-NET

RED LINES

Principles and Legal Protections that States Must Include in the Legally Binding Instrument to Stop Corporate Impunity

December 2024

Socio-environmental catastrophe caused by the dam collapse of Vale mining company in Brumadinho (MG) Photo:Felipe Werneck/Ibama

ESCR-Net

International Network for Economic, Social and Cultural Rights

CONTENTS

1. A Decade of Advocacy and the Need for Urgent Action

In an effort to stop corporate impunity, members of the International Network for Economic, Social and Cultural Rights (ESCR-Net) issued an urgent call to action in 2013 calling on States to elaborate a legally binding instrument that would hold corporations accountable for committing or contributing to abuses and violations of human rights worldwide. By 2014, this call gained momentum as several States of the Global South championed a negotiation process through the United Nations (UN) Human Rights Council. This effort aimed to enhance the international legal framework on corporate accountability by introducing global accountability measures for actors engaging in unlawful business activity, as well as ensuring access to justice, remedy, and reparations for those affected by such activity.

Ten years on, we are witnessing corporations enjoy expanded impunity in some of the darkest times of our modern history. Corporations are complicit in genocide, mass displacement, famine, and the destruction of land and our nature – in the Democratic Republic of Congo, in Guatemala, in Thailand, in Palestine, in Sudan, and beyond. Corporations instigate and sustain conflict, occupation, colonization, pollution, land grabs and environmental degradation. Our earth and all life on this planet are on the line and at the forefront of people most affected are Indigenous Peoples, women, peasants, and human rights defenders. We are witnessing human rights defenders be killed, imprisoned, abused and harassed while striving to stop corporations from destroying our planet.

This must end now – corporate impunity cannot prevail.

A Renewed Call for Corporate Accountability

We take the opportunity of this tenth session to renew our urgent call on States to prioritize and drive forward a legally binding instrument to regulate corporate power and protect people from corporate greed and capitalist agendas. At the root of the slow progression of this process is corporate capture of UN and multilateral decision-making spaces. Both directly and indirectly –at the national level and in Geneva–corporations have influenced the process in a way that undermines key elements demanded by communities and people affected by corporate power - particularly in relation to establishing legal liability for corporate actors and the application of extraterritoriality as a legal principle.

With many corporations operating transnationally and affecting in large part the rights of people in the Global South, we see that several States in the Global North - with the support of States elsewhere subjugated by the dominant economic capitalist system - are carrying forward profit-making objectives in the interest of corporations domiciled in their countries. We ask, are States accepting of a world where public decision-making processes respond to corporate interests rather than the will of the people they represent? I It is surreal to observe that champions of so-called “democracy” are allowing the economic elite - the 1% of our global population - to govern and make decisions on

human rights and the environment. We know that a corporate-run world would be dangerous and is in no way sustainable - not for our earth nor for the majority of people and countries. This is the time for States to step up and take leadership - and prevent the total destruction of rights by limiting the power that corporations of the Global North hold over us. **We urge countries – particularly in the Global South – to continue taking leadership in this process to stop corporate capture and corporate impunity.**

Our Proposals for a Strong Legally Binding Instrument (LBI)

We call on all States to engage in the negotiations process this year and in the months to come in order to create a text that:

- Requires States Parties to **seek legal liability** for business enterprises for acts or omissions that infringe human rights;
- Requires States Parties to **ensure the primacy of human rights** in all trade and investment agreements;
- Requires States Parties to **provide for access to an effective remedy** by any State concerned, including access to justice for foreigners that suffered harm from acts or omissions of a business enterprise in situations where there are bases for the States involved to fulfill their obligations, including extraterritorially;
- Provides for an **international monitoring and accountability mechanism or tribunal** with meaningful participation of people and communities affected by corporate power;
- Provides for the **protection of people affected by corporate power**, Indigenous Peoples, women, peasants and workers in rural areas, whistle-blowers and human rights defenders that seek to prevent, expose or ensure accountability in cases of corporate abuse and violations and guarantees their right to access to information relevant in this context;
- Provides for the enhanced **protection of people in conflict-affected areas** and prohibits any contribution - direct or indirect - of corporate actors to situations where atrocity crimes are occurring.
- Establishes obligations on corporate actors to **respect environmental and human rights** and prevent abuses and violations of these rights.

Further, we urge for **transparency** in this process - with the demands of communities and Peoples affected by corporate power at the center of decision-making. We further call on representatives of movements, communities and human rights organizations to be included in all aspects of the process - with continued accessibility to discussions in intersessionals and in the main negotiation. Decisions on the Legally Binding Instrument (LBI) process should be made in the main negotiations session to ensure as much participation and input from those most affected by corporate power. We also call for the text to be discussed based on the third draft of the LBI as it incorporates comments by several key States that have centered people's demands for an effective LBI.

2. Key Priorities and Principles for the Legally Binding Instrument

The following points constitute key outcomes and priorities of several member-led discussions over the years, with majority or consensus agreements on various topics relevant to ensuring a strong LBI to end corporate impunity and regulate the operations of economic elites, particularly in the Global South where transnational companies headquartered in developed industrial States. The purpose of this paper is to provide some key advocacy points for what is non-negotiable in the process to articulate the LBI that should aim to regulate corporate power. This paper will also provide cases that illustrate the need to urgently adopt key principles and regulations that would advance efforts to stop corporate impunity.

2.1. Primacy of Human Rights (Article 14)

States must reaffirm the primacy of human rights, as guaranteed by their pre-existing obligations to respect, protect, and fulfill human rights, in the context of negotiation, interpretation, and dispute resolution of trade and investment treaties. Therefore, the provisions of the LBI must supersede pre-existing obligations between States and other parties. In order to retain the discretion necessary to meet their human rights obligations, the LBI shall include a provision to ensure that commercial, trade, and investment treaties do not impose limits on their ability to protect human rights or require that disputes over human rights be decided through binding international arbitration.[1]

Suggested language

Preamble: (PP11bis) To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements.

Article 14.5:

a) Any existing bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, including trade and investment agreements, shall be reviewed, adapted and implemented in compliance with and in a manner that does not undermine their obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights, environmental rights and humanitarian law conventions and instruments.

b) Any bilateral or multilateral trade and investment agreements shall be compatible with the State Parties' human rights and humanitarian law obligations under this (Legally Binding Instrument) and its protocols, as well as other relevant human rights, environmental rights and humanitarian law conventions and instruments.

[1] See: https://www.escr-net.org/resources/ten-key-proposals-for-the-treaty-a-legal-resource-for-advocates-and-diplomats-engaging-with-the-un-intergovernmental-working-group-on-transnational-corporations-and-other-business-enterprises/

c) To this effect, new[2] trade and investment agreements shall be designed, negotiated, and concluded to fully respect the State Parties' human rights obligations under this (Legally Binding Instrument) and its protocols, and related human rights, environmental rights and humanitarian law conventions and instruments, through inter alia:

a. Undertaking human rights and sustainability impact assessments prior to signing and ratification of the proposed agreement and periodically throughout their application period, and ensuring these agreements are in accordance with the results of these impact assessments; and

b. Ensuring the upholding of human rights, environmental rights and humanitarian law in the context of business activities by parties benefiting from trade and investment agreements."

Case in point: Free Trade Agreement Prioritizes Corporate Profits over Human Rights in Thailand

The Chatree mining complex, once operated by an Australian subsidiary, began in 2001 but was closed in 2017 due to health and environmental concerns. After more than six years, operations at the controversial gold mine resumed in 2023, following a decision by the Thai government to lift the closure imposed by the military junta./Photo Mongabay

Australian parent company: Kingsgate Consolidated Limited
Thai subsidiary: Akara Resources Public Company
Sector: Mining
Country: Thailand
Period: Since 2001 – Present

[2] 'New' would mean any agreement that has not come into force at the time that this LBI has been concluded.

The activities of a gold mine in central Thailand operated by the subsidiary of an Australian company caused human rights and environmental adverse impacts to villagers living in the vicinity of the mine. Their right to a clean, healthy and sustainable environment, right to water, right to land, right to adequate standard of living, right to health, right to information, consultation and public participation and right to effective remedy have been abused. Additionally, villagers have faced intimidation and threats, including Strategic legal actions against public participation (SLAPPs). Due to the impacts on local communities, notably contamination with heavy metals and health impacts, in 2016, Thai authorities ordered the suspension of the mine's operations. The parent company then initiated in 2017 proceedings against Thailand under the Australia-Thailand Free Trade Agreement. These proceedings led Thai authorities to grant the reopening of the mine which resumed activities last year, as well as new prospecting licenses while harms caused prior to the suspension have not been remediated.

More information:

https://www.manushyafoundation.org/post/breaking-chatree-gold-mine-restarted-threatening-villagers-health-and-livelihoods-again

2.2. Establishing Corporate Liability (Article 8)

It is paramount for this LBI to produce international legal standards that would be adopted nationally and regionally in an effort to end corporate impunity. With this in mind, legal liability is the most fundamental provision in the elaboration process of the LBI. There are certain expectations on this LBI to close a gap in international law that essentially grants corporate elite near complete immunity when key operations they undertake violate or abuse the rights of people – particularly where at-risk communities, such as Indigenous Peoples and peasants, live and work.

As such, it is key for this LBI to develop legal parameters for corporate obligations to respect international human rights and humanitarian law while maintaining that States have an overarching and primary obligation to prevent, promote, and respect human rights and the laws of armed conflict. Evolving positions in the Network, particularly with the guidance of social movement members, have highlighted the need to expand corporate accountability measures. As such, the LBI must recognise that corporations have legal liabilities if human rights are not respected. Additionally, the LBI must outline a framework for ensuring these legal responsibilities or obligations are observed in practice.

As a minimum requirement, domestic law should facilitate accountability and access to remedy through domestic corporate criminal and civil laws.

Suggested language

8.1 Each State Party shall adopt such measures as may be necessary to establish a comprehensive and adequate system of legal liability of legal or natural persons conducting business activities, particularly those of transnational character, that may have caused or contributed to human rights abuses and/or violations.

All companies involved in human rights abuses or violations, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and severally responsible for human rights abuses in which they are involved.

8.2 Subject to the legal principles of the State Party, the liability of legal and natural persons referred to in this Article shall be criminal, civil, or administrative, as appropriate to the circumstances. Each State Party shall ensure, consistent with its domestic legal and administrative systems, that the type of liability established under this article shall be:

(a) responsive to the rights of victims as regards to remedy;
(b) commensurate to the gravity of the human rights abuse; and
(c) at the disposal of those affected or impacted by human rights violations and abuses.

8.3 Subject to legal principles of the State Party, the liability of legal and natural persons shall be established for:

(a) violating and abusing human rights;
(b) conspiring to commit human rights abuses; and
(c) aiding, abetting, facilitating, and counseling the commission of human rights abuse.

Case in point: Brumadinho Case of Peasants and Quilombola [Afro] Communities Affected by Dam Rupture

In January 2019, a burst tailings dam in Brumadinho Valley, Minas Gerais, Brazil, devastated the territory surrounding the Paraopeba River, including the land inhabited by the Pataxó and Pataxó Hã-hã-hãe Indigenous groups. /Photo: Felipe Werneck/Ibama

Brazilian multinational company: Vale S.A
German subsidiary: Tüv Süd
Sector: Mining
Country: Brazil
Period: 2019

The case involves indigenous, peasants and quilombola [afro] communities living in Brumadinho valley, which was devastated by the rupture of a large dam.The peasant community of the Pátria Livre camp found that they could not gain access to the court-ordered emergency assistance, because they could not show evidence of their address, since they do not possess formal land titles. Besides, five Quilombola communities (runaway former-slaves communities) were affected by the mine rupture, and one of them has not even been recognized by the company which denied their dependency from the river.

Civil liability: Given the nature of the wrongs committed by Vale, the Parliamentary Committee of Inquiry (PCI) in Brazil reached the conclusion that the company is absolutely liable. This means that there is no need to prove guilt, fault or a lack of due diligence on the part of the company. Evidence of the damage and that the damage was caused by the company is sufficient for a finding of liability. Vale is also liable for compensation to its workers and their families under occupational accidents legislation. Since the day the dam broke, many different public bodies and unions filed civil actions seeking reparations on behalf of those affected by the disaster, or a sub-set of those affected such as the workers. These actions resulted in a number of out of court agreements with Vale, comprising a variety of reparation measures and payments.

Lessons for the LBI on Liability

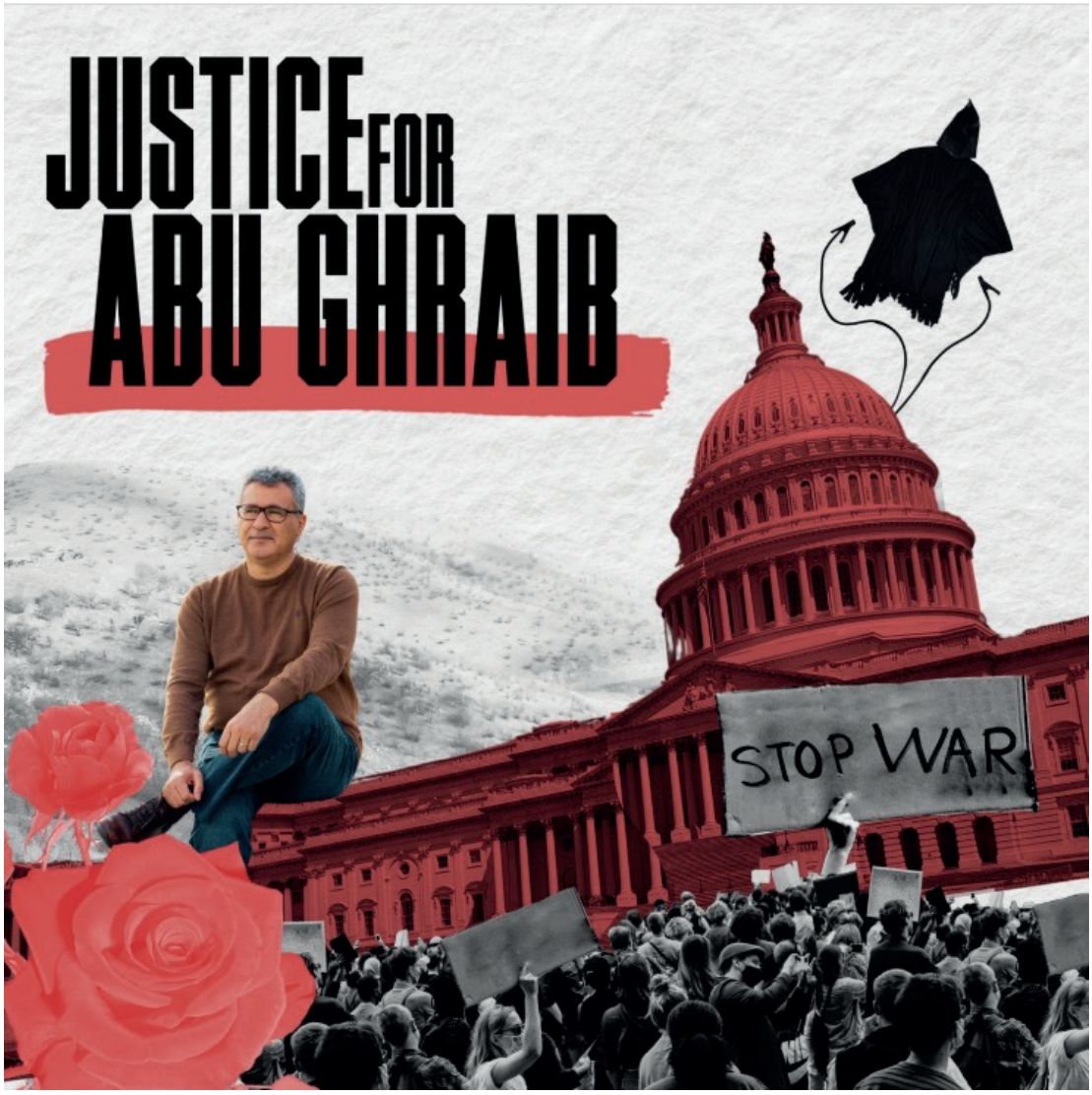
The scope and nature of harms caused by the Brumadinho disaster demonstrate the broad range of human rights abuses that can result from corporate wrongdoing and the importance of the concept of adequate and effective reparation currently reflected in Art. 4.2(c) of the draft LBI (a reduced version of Art. 4.5 from the first draft). This was recognised by the PCI, which emphasized the importance of full reparation when analyzing gaps in some of the court agreements. The case also illustrates the impact on public finances of disasters of this nature and the repercussions on the delivery of other services essential for the realization of human rights. The different and unique way in which the dam disaster impacted children, Indigenous peoples, Quilombola communities and the landless peasant community also underscores the importance of identifying and responding to specific, differentiated impacts and needs in reparation processes. Finally, some of the Brumadinho negotiations also show that a lack of independence and/ or effective participation of affected people in reparation programs can lead to inadequate remedy as well as further victimization and abuse. The legal grounds for Vale's liability under Brazilian law is absolute liability (which in civil law systems is generally called "objective" liability). Vale is also liable to its workers under various labor law provisions. This demonstrates the importance for the LBI to ensure that while establishing new grounds for corporate liability based on due diligence failures, it also preserves existing liability regimes that may provide stricter or additional basis for liability, which may be fairer under the circumstances.

German-based auditing company Tüv Süd also had control or supervision over the activities of Bureau de Projetos e Consultoria Ltda. It knew that the dam was unsafe through its engineers who travelled to Brazil to supervise the company's Brazilian operations and could have taken action to prevent the disaster. As argued in both the civil and criminal complaints against the company, it also had a duty to prevent the disaster and must be held liable for failing to do so.

Accordingly, the LBI must ensure that all companies involved in human rights abuse or violation, whether a subsidiary, a parent company, or any other business along the value chain, shall be jointly and severally responsible for human rights abuses in which they are involved.

More information:
https://www.fian.org/files/files/Brumandinho_Legal_analysis.pdf)

Success case: Torture Survivors of Abu Ghraib Military Prison Win Case Against CACI Premier Technology, Inc.



After an epic 16 year legal struggle for the three Iraqi Abu Ghraib torture survivors a U.S. jury found a private military contractor, CACI Premier Technology, Inc., liable for its role in the torture and cruel, inhuman, and degrading treatment that the men endured at the infamous prison.

U.S.A: CACI Premier Technology, Inc.
Sector: Private Military Contractor
Country: U.S.A / Iraq
Period: 2003-2024

After it invaded Iraq in 2003, the U.S. government hired CACI Premier Technology Inc. (CACI) to provide interrogation services at Abu Ghraib prison. In April 2004, news outlets broke stories of the torture of Iraqi prisoners there, releasing photographs and video showing naked, hooded detainees posed in human pyramids, prisoners on leashes, and widespread sexual assault. Internal U.S. military investigations concluded that CACI employees had conspired with U.S. soldiers to "soften up" imprisoned Iraqis. Some low-level military personnel were court-martialed for their role in the torture.

Suhail Al Shimari, a school principal, Asa'ad Zuba'e, a fruit vendor, and Salah Al-Ejaili, a journalist, were all held at Abu Ghraib between 2003 and 2004. They were released without ever being charged with a crime. They all continue to suffer from physical and mental injuries caused by the torture and other abuse they endured. In 2008 the Center for Constitutional Rights filed a case in U.S. federal court against CACI under the Alien Tort Statute (ATS) on behalf of the three men alleging violations of U.S. and international law, including torture; cruel, inhuman, or degrading treatment; war crimes; assault and battery; sexual assault and battery; intentional infliction of emotional distress; negligent hiring and supervision; and negligent infliction of emotional distress.

After more than 20 attempts by CACI to have the case dismissed, in November 2024 a jury found CACI liable for conspiring to torture and cruel, inhuman, and degrading treatment of the Iraqi men. CACI was ordered to pay each of the men $14 million in compensatory and punitive damages.

The first case of its kind to make it to trial, Al Shimari, et al. v. CACI delivers a rare measure of justice to survivors of the U.S. government's post-9/11 torture regime, which extended from Guantanamo to Iraq and Afghanistan to secret prisons around the world.

More information:
https://ccrjustice.org/AlShimari

2.3. Extraterritorial Obligations (Article 9)

Members of ESCR-Net are concerned that the updated draft of the LBI does not adequately address States' extraterritorial obligations (ETOs). Failure to ensure States' ETOs would undermine the purpose of this LBI. States must take necessary measures to ensure that transnational corporations (TNCs) which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State as per Article 6(1) on Prevention. Second, States must ensure the availability of effective mechanisms to provide for accountability in the discharge of their ETOs, extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible, and effective remedy in the TNC's home State. Where applicable under international law, States should incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes. Effective operationalization of ETOs under human rights law is critical to closing existing gaps of protection with regard to corporate accountability for human rights abuses and violations.

Forum non conveniens (the power of a court to dismiss a case where another forum may conveniently hear the case) and the **corporate veil doctrine** are legal concepts frequently used to avoid liability and other forms of responsibility of "parent companies" and shareholders of transnational enterprises involved in human rights violations. Extraterritorial obligations can benefit from clearer language articulating responsibilities of home and host states throughout the text of the LBI. For example, the concept of forum non conveniens is not explicitly marked in the LBI as not applicable for the purposes of this Legally Binding Document. This creates a redundancy in ensuring courts will take on the case brought forth to them even if other courts also have jurisdiction. If no court is able to hear a case where corporate violations or abuse is ongoing, a court of any member State to the LBI should be able to hear the case even if it does not fulfill the criteria set with regards to jurisdiction.

The LBI must further detail how it will address these issues. The LBI should also provide for specific provisions encouraging forum necessitatis. **Forum necessitatis, or forum of necessity,** is the power of a court to assume jurisdiction over a dispute where the court considers that there is no other forum where the dispute may be adjudicated or in which the plaintiff may reasonably be expected to initiate the suit. The LBI should provide for specific provisions, encouraging the use of this power especially for cases relating to corporate abuse or violations in conflict-affected settings and situations of occupation where access to remedy and justice are often deliberately hindered and denied.

Suggested language

6.5. should be strengthened to incorporate accountability across the value chain: States Parties shall require business enterprises and associated actors across the full value chain, to undertake ongoing and frequently updated human rights due diligence.... across all operations

9.1. State Parties shall take such measures as may be necessary to establish its jurisdiction in respect of human rights abuse in cases where: ...

(d) a victim chooses to seek remedy through civil law proceedings, independently of their nationality or place of domicile, arising from acts or omissions that result in abuses or violations of human rights covered under this Legally Binding Instrument.

Proposed to add to 9.3: Where victims find that in complex cases, no court is able to adjudicate where violations or abuses by corporate entities may have occurred, forum necessitatis may be applied; in contrast, and knowing that in regular cases more than one court will be able to adjudicate cases, the doctrine of forum non conveniens will not be allowed to be instituted.

In order to avert a denial of justice when no other court is available or the claimant cannot reasonably be expected to have access to justice or access to remedy, the courts of any State with a connection to the dispute shall have jurisdiction. This connection may consist in the presence of the claimant in a State Party's territory; the claimant or defendant's nationality; the existence of assets of the defendant under a State Party's jurisdiction; the defendant's activity in a State party, or any analogous circumstance.

9.4. If a State Party exercising its jurisdiction under this Article has been notified, or has otherwise learned, of judicial proceedings taking place in another State Party relating to the same human rights abuse, or any aspect of such human rights abuse, the relevant State agencies of each State shall consult one another with a view to coordinating their actions. A court shall not decline its jurisdiction to hear a case on the basis that there is another Court that also has jurisdiction, in accordance with the adjudicative jurisdiction criteria contained in article 9.1.

9.4bis Where applicable under international law, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction over human rights violations that amount to international crimes.

Case in point: Boeing Supplies Israeli Military with Fighter Jets, Apaches, and Munitions for Genocidal Actions

Israeli Air Force F-15i - 69 Squadron "The Hammers Squadron"/ Tomás Del Coro

US multinational company: Boeing
Sector: Arms industry
Country: Palestine (Israeli occupied)
Period: 2024

Boeing - an American airplane manufacturer - makes F-15 fighter jets and Apache AH-64 attack helicopters used by the Israeli forces, as well as multiple types of unguided small diameter bombs and joint direct attack munition (JDAM) kits that have been used extensively in Gaza including in a bombing of Jabalia refugee camp. This is according to a legal opinion commissioned by Al-Haq Europe and SOMO in the Netherlands.

As highlighted in this legal opinion "[t]he Genocide Convention imposes a minimum legal obligation on States to each take reasonable action to prevent genocide, a duty that extends extraterritorially and applies regardless of whether any one State's actions alone are sufficient to

prevent genocide. As such, it is key for the LBI to ensure that States will carry out their duty to prevent human rights violations or abuses, especially when corporations headquartered within their territory are contributing to or directly committing such violations - all the more urgently when they are part of atrocity crimes such as the ongoing genocide of Palestinians in Gaza and beyond.

More information:

https://www.somo.nl/wp-content/uploads/2024/06/Obligations-of-Third-States-and-Corporations-to-Prevent-and-Punish-Genocide-in-Gaza-3.pdf

Case in point: Canadian Goldcorp Inc. Imposes Marlin Mine on 13 Indigenous Maya Mam and Maya Sipakapense Communities and Results in Human and Environmental Rights Violated in Guatemala

Canadian company: Goldcorp Inc.
Guatemalan subsidiary: Montana Exploradora de Guatemala
Sector: Mining
Country: Guatemala
Period: From 2004 (affects still felt today)

The Marlin mine was owned by Montana Exploradora de Guatemala, a subsidiary of the Canadian company Goldcorp Inc. The mine, on Mayan territory, was closed in 2017 but its destructive legacy lives on in rivers contaminated with leachate, dried springs, damaged houses and health impacts in the Indigenous Mayan community, including children traumatised by tremors and loud noises from the mine which operated throughout the night.

Marlin mine - acquired in 2006 by Canadian company Goldcorp Inc. - was imposed on the Indigenous Peoples of the land without the consent of affected communities and has been associated with immense violence and conflict, alongside serious and credible allegations of environmental contamination and violations to human rights - particularly the right to health.

While the mine closed down in 2017, Indigenous People and local communities continue to be affected by its activity. This case illustrates how business enterprises in a position of control or supervision over the activities of others often fail to take action to prevent harm when they could have, while ripping off the benefits of those activities. Thus far, Goldcorp Inc. has not been held accountable for the activities of its subsidiary in Guatemala. A parent company should be held responsible jointly and severally for actions carried out by its subsidiary.

On extraterritorial obligations, the LBI should retain the provisions on liability of a business enterprise for its failure to prevent others from causing or contributing to human rights violations (to capture relationships of control and supervision embodied by Goldcorp Inc. and Montana Exploradora de Guatemala). The LBI should also retain provisions under Art 9 (former Art 7) on

adjudicative jurisdiction that establishes the jurisdiction of the courts of a place where a company is domiciled (the company's home state - Canada in this case) to hear civil and criminal claims against this company to secure the possibility of bringing claims against foreign companies in their home states.

More information:

https://www.facebook.com/watch/?v=437399929604763 3 and see also: https://www.business-humanrights.org/en/blog/effective-participation-of-affected-communities-in-the-treaty-process-a-perspective-from-latin-america-ten-years-into-its-negotiation/, and https://miningwatch.ca/sites/default/files/appendix_3_-_marlin_report.pdf

2.4. Protection in Conflict-affected Areas

ESCR-Net is concerned that provisions to protect communities in conflict-affected areas have been either removed or watered down significantly in the clean updated draft of the LBI. This happened contrary to calls from Palestine, South Africa, Namibia, and several other States calling for provisions to strengthen the protection of oppressed populations in conflict-affected areas – particularly from economic elite who customarily take advantage of communities at risk for their financial gains.

To ensure prevention of human rights abuses and violations by corporate activities **in conflict-affected areas, fragile, and post conflict States,** mandatory heightened and enhanced due diligence is necessary and must include a requirement not to pursue or start operations in certain situations in which no due diligence can guarantee that there will not be complicity or contribution to violations that in some cases may amount to international crimes. It is important also to introduce more urgent and immediate preventive measures, divestment, and disengagement policies, to avoid corporate involvement in and/or contribution to human rights violations in their activities and relationships.

The language under Article 6 of the draft text, in particular, must be strengthened to ensure that States and corporations are not directly linked to or are not causing and contributing to human rights abuses and violations in the context of conflict. In this provision, it is also important to make a distinction between the obligations or responsibilities of corporations already conducting business in conflict-affected areas and those yet to venture into business therein. In general, enhanced due diligence must take place prior to the commencement of business activities and throughout all phases of operations. Corporations and/or State-entities must refrain from pursuing or starting operations in situations profiting the oppressive regime or harming in any way. To this effect, corporations must carry out independent, heightened and enhanced due diligence assessments that meaningfully engage communities and work with existing leadership structures and processes of local communities and Indigenous Peoples to verify such assessments. These assessments must guarantee that operations will neither directly cause, contribute to, nor be directly linked to human rights abuses or violations of human rights and humanitarian law standards arising from business activities or from contractual business relationships across the value chain, including with respect to products and services. Entities already engaged in business activity in conflict-affected areas, including situations of occupation, shall adopt and implement urgent and immediate measures, such as divestment and disengagement policies where they are profiting the oppressed.

Suggested language

Article 6.4bis Adopting and implementing enhanced human rights and environmental due diligence, and urgent and immediate preventive measures, including divestment and disengagement policies, to avoid corporate involvement in or contribution to human rights abuses in their activities and relationships, as well as measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual business relationships across the value chain, including with respect to their products and services; companies must further not pursue or start operations in certain situations in which no due diligence assessment can guarantee that there will not be complicity in or contribution to violations.

Case in point: Airbus Partners with China's AVIC, Key Supplier of Arms and Military Aircraft Used in Rohingya Genocide

The Rohingya refugees rallying at Cox's Bazar, Bangladesh, on Aug. 25, 2023, demanded rights such as dignified repatriation, citizenship and legal employment / Md. Jamal / VOA

French / Spanish / German multinational company: Airbus
Chinese company: Aviation Industry of China (AVIC)
Sector: Aviation / Arms
Country: Myanmar/Burma
Period: Current

French aerospace giant Airbus is an investor and partner of Aviation Industry Corporation of China (AVIC). AVIC is a key supplier to the Myanmar military of military aircraft and arms used for the commission of international crimes. By obtaining military aircraft and maintenance, repair

and overhaul support from AVIC, the military regime (also known as the junta) can continue to commit atrocities with impunity. The information highlighted in a report by Justice For Myanmar and Info Birmanie illustrates that companies such as Airbus have a responsibility to divest and/or stop their business dealings where they are unable to verify or ensure adherence to due diligence measures. The LBI should specify this as an inherent and significant part of the text in an effort to regulate corporations and prevent their involvement (directly or indirectly) in human rights violations - especially at the scale of atrocities crimes such a genocide.

More information:

https://cdn.prod.website-files.com/5e691d0b7de02f1fd6919876/66fe38597e5be463bb42eec1_%23Airbusted_EN.pdf

Success case: Post-WWII Military Tribunals Find Corporations Liable for War Crimes and Hold Various Executives Accountable

The various military tribunals established in Nuremburg after World War II found various corporations liable for committing war crimes, which led to convictions for various corporate executives and other company officials. In the photo, The IG Farben defendants hear the indictments against them before the start of the trial, case #6 of the Subsequent Nuremberg Proceedings. May 5, 1947.

German companies: Tesch and Stabenow, Roechling, Flick Concern, I.G. Farben, Krupp
Sectors: Arms, chemicals, fossil fuels
Country: German
Period: 1939-1945

A series of cases were brought aganst companies and some of their employees at British, French and U.S. military tribunals established in Nuremberg in the wake of World War II to prosecute war crimes committed by the Nazi regime and its supporters. In 1946, the British Military Tribunal indicted the owner and employees of Tesch and Stabenow for selling highly toxic Zyklon B gas to German concentration camps on the basis that they 'knew' or 'must have known' how the Nazi regime was using the product. In 1948, the French Military tribunal convicted the directors of the iron and steel company Roechling Company for war crimes. It was deemed they must have known that their plants were run under atrocious working conditions but did nothing to alleviate them. They had petitioned the Nazi regime to obtain slave labor.

A year earlier the US Military Tribunal indicted several top executives of the Flick Concern corporation for the use of slave labor in its coal, iron and steel plants and other crimes, including accessorial liability for crimes committed by the SS. In 1948 the U.S. tribunal convicted executives of the Krupp arms corporation for supplying munitions to the Nazi regime during the war. They were held liable for plunder, spoilation and labor exploitation of prisoners of war. The tribunal did not extend fiduciary liability to various corporate officials. The U.S. Military Tribunal later convicted members of the governing body of I.G. Farben corporation for various crimes.

While there are nuances in the conclusions each military tribunal drew in these cases it is important to note the means by which the tribunals establish liability in many of the cases. For example, in the Farben and Krupp cases, the U.S. Military Tribunal convicted individuals for having acted 'through the instrumentality' of the corporation to commit crimes, but it held that the primary perpetrator was the company itself. The Tribunal explicitly identified the collective purpose and intent of the enterprise. The individual company officials were sentenced in lieu of the legal entity.

The summary above is an adaption of Stoitchkova, Desislava (2010) Towards Corporate Liability in International Criminal Law, Chapter 3. Full text here:
https://research-portal.uu.nl/files/2108834/stoitchkova.pdf

2.5. Indigenous Peoples and the Right to Self-determination

ESCR-Net is concerned that the draft LBI remains weak or fail in ensuring protection of Indigenous Peoples rights, and particularly the right to self-determination. There are over 476 million Indigenous Peoples living in 90 countries across the world. All Indigenous Peoples have in common a history of territorial uprooting, subjugation, discrimination, rights violations and abuses of power caused by business activities, particularly of transnational character.
In response to the grave violations against Indigenous Peoples and as a result of the struggles and lobbying of Indigenous Peoples' leadership worldwide, the UN system has recognized and gradually strengthened the rights of Indigenous Peoples through the ILO Indigenous and Tribal Peoples Convention (No. 169), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the UN Declaration on the Rights to Indigenous People.

To fully implement existing legal instruments, the LBI needs to include provisions to safeguard the substantive rights of Indigenous Peoples, especially the right to self-determination, and to lands, territories and resources. ESCR-Net is disappointed by the continued absence of an explicit reference to the right to self-determination in the ILB. Through a dynamic patchwork of corporate means and legal methods in the context of unequal bargaining positions, States have continued to insulate corporate actors from accountability in furthering their neo-colonial ambitions through exploitative means under the contemporary umbrella of international law.

Suggested language

- Add the following paragraph in the preamble as PP9bis: "Recalling the UN Charter and one of the fundamental purposes of the United Nations being the respect for the right to self-determination of peoples, recalling also, the confirmation of the right of all peoples to self-determination according to the UN General Assembly (GA) Declaration of Friendly Relations, unanimously adopted in 1970 and considered an authoritative indication of customary international law, recalling finally that Article 1, common to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), reaffirms the right of all peoples to self-determination, and lays upon State parties the obligation to promote and to respect it."

- Add an operative paragraph under Article 6(4) on the right to self-determination in line with the suggested text in the Preamble to read under Article 6(4)(d) bis: "Respecting that Indigenous Peoples have a right to self-determination and, therefore, a right to refuse business activity on their land without threats of retaliation."

- Add an operative paragraph under Article 6(4)(d)ter: "Safeguarding the rights of Indigenous Peoples to environmental governance as means to respect their right to a safe and healthy environment."

- Include provision under Article 6 of the LBI to guarantee Indigenous Peoples' right to self-determination, including the "right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (as per UNDRIP).

- The right to self-determination may further be reflected in the LBI, for instance by recognizing indigenous customary laws - and their right to continuous free, prior and informed consent - d under Applicable laws (Art. 11) and traditional justice systems under Access to Remedy (Art. 7) and Adjudicative Jurisdiction (Art. 9).

Case in point: Nepal Electricity Authorities (NEA) fails to consult Indigenous Tamang and other locals of Shankharapur municipality on a high voltage transmission line being developed on their lands

Affected Tamang indigenous community in Nepal. Photo: RK Tamang

Nepalese Company: Nepal Electricity Authorities (NEA)
Financed by: the Asian Development Bank (ADB), the US Millennium Challenge Corporation (MCC)
Sector: transmission line
Country: Nepal
Period: January 2023 to till now

Indigenous Tamang and other locals of Shankharapur municipality, Ward no. 3 of Kathmandu in Nepal are adversely affected by the Asian Development Bank (ADB) financed Tamakoshi-Kathmandu 200/400 kV Transmission Line and their substation projects. The substation is being built in the middle of a human settlement, and the transmission line runs over houses, lands, and sacred sites of Indigenous Peoples, affecting their lands, livelihoods and environment.On 1 January 2023, the Nepal Electricity Authorities (NEA) forcefully initiated the survey work to construct the projects by deploying security forces. The communities started a two-week long protest against the project, demanding that the company obtains Free Prior Informed Consent (FPIC) and reroutes the line to protect human settlements. Police brutality led to 10 community leaders being detained (including a woman and a minor). Further, the police threatened the protestors at gunpoint and manhandled the Ward Chair, women and other protestors, causing injuries to at least a dozen people. The mobilization of armed police in the village created an atmosphere of fear among the residents. This substation is planned to be connected to a high voltage transmission line and substation in Ratmate, Nuwakot district, and to another substation in Changu Narayan, Kathmandu. Thus, creating a web of transmission lines in the area has been a major concern for the affected communities.

Corporate Accountability

Business companies and investors must recognise and respect the collective rights of Indigenous Peoples, and act to promote or support indigenous community-led development priorities. Introduce human rights due diligence policies and procedures, including environmental, social, cultural and other impact assessments, integrating mandatory requirements at the upper management, as well as field levels.

Nepal is a State Party to the Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization (ILO). The Project is a blatant violation of ILO 169, particularly Articles 13-19 and Article 14 (2), which guarantees the land rights of Indigenous Peoples. Article 14 (2) of the Convention explicitly states, "Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession." Further, the state, business companies and investors must secure the free, prior and informed consent (FPIC) enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of the Indigenous Peoples, which Nepal voted in favour of at the UN General Assembly. The legally binding instrument would be key to ensure such protections and must incorporate legal standards that have been developed with the leadership of Indigenous Peoples.

More information:
https://aippnet.org/nepal-stop-state-brutality-against-tamang-indigenous-peoples-locals/

2.6. Peasants and Workers in Rural Areas

Following the COVID-19 pandemic, the International Labour Organisation (ILO) estimated a loss of more than 400 million jobs worldwide. Workers part of the informal economy - who are disproportionately women - were most severely impacted. For women, COVID-19 intensified the double and, often, triple burden women confront. On top of the loss of paid work, the amount of time women needed to dedicate to unpaid care work increased because of the closure of schools and day care centres, cuts in services for the elderly and people with disabilities, and the need to look after dependents suffering from COVID-19. Women's employment was also at greater risk than men's, as they are over-represented in the informal and service sectors, which as mentioned were particularly badly impacted by the economic disruption of COVID-19. In addition, women usually dominate front-line occupations – including healthcare – making them more directly at-risk.

In this context, workers' rights, particularly those in the informal sector and the rights of peasants and other people working in rural areas, must be the object of increased protection in the LBI. Stated simply, workers' rights are human rights, and this is not sufficiently expressed in the second revised draft. There's an absolute obligation on States to regulate corporations in a manner that will

ensure worker rights are protected. This includes the protection of care workers, frontline workers, workers in informal economies, and workers in the extractive sectors, to name a few. Amidst the COVID-19 pandemic, we have seen that care workers, a majority of whom are women, are exposed to higher levels of risk and increased vulnerability. This LBI must ensure that in carrying out human rights and environmental due diligence, workers' rights are prioritised, encompassing international standards of protection and enhanced consultation and participation as part of the due diligence process, e.g. ensuring safe conditions of work. In doing so, it should be clearer that a failure to respect workers' rights, whether in an informal economy or a formal one, would give rise to criminal, civil or administrative liability.

Given the lack of provisions dedicated to workers' rights in the second revised draft LBI on, we suggest the following key additions to the text.

Recommendations to States:

- The Preamble and all those clauses referring to the groups that are most vulnerable to corporate abuses should also include the mention of peasants and other people working in rural areas. Furthermore, when recalling international human rights standards in the Preamble, the UN declaration on the Rights of Peasants and other People Working in Rural Areas (UNDROP) should be included under PP3.
- In order to ensure that human rights abuse also refers to the infringement of workers' rights, we propose the following amendment to Article 1(2): "Human rights abuse" shall mean any harm committed by a business enterprise, through acts or omissions in the context of business activities, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment and workers' rights.
- In Article 6(3)(a), the text should be amended to specifically include a reference to workers' rights as a way to seriously consider such rights in the conduct of both human rights and environmental due diligence by corporations and/or States active in business. We recommend that the provision change accordingly: "Identify, assess and publish any actual or potential environmental risks and/or human rights abuses or violations that may arise from their own business activities, or from their business relationships - including those that infringe upon workers' rights"
- Similarly, in Article 6(4)(a) should read: "Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout all phases of their operations – taking into account workers' rights – such impact assessments shall be undertaken by independent third parties with no conflicts of interests."

Case in point: Corporate Impunity Directly Harms Peasants in the Cajamarca Valley in Colombia

Protest against Anglogold Ashanti in Tolima, Colombia/ Photo: Notiagen

South African company: Anglogold Ashanti (relocating to Britain)
Sector: Mining (specifically La Colosa Mine)
Country: Colombia
Period: Current

Peasant communities in the Cajamarca valley, known as Colombia's "agricultural pantry", are fighting to defend the territory against South African mining giant Anglogold Ashanti and its La Colosa mine. This megaproject affects the peasants' right to food and jeopardizes access to water for several cities with millions of inhabitants. The case shows how transnational corporations threaten to cause harm and actually harm peasants' communities and workers, including their economic, social and cultural rights. The peasants have succeeded in suspending the mining operations temporarily, through a popular referendum, but the company still insists on laying siege to the territory. This shows how beyond due diligence other prevention measures could be more effective. So for example the recognition and respect of popular – community lead consultations on the continuation or not of investment projects, in this case a mining project.

In 2023, AngloGold Ashanti relinquished two mining titles, which reduced the percentage of the concessioned territory but it still retains almost a fifth (17.9%) of the Cajamarca territory. Lawsuits filed by the company against the state in order to continue operating are still pending. These facts show how states can be threatened and affected by companies in the frame of investment agreements. As such, the LBI must ensure the primacy of human rights in the context of business and State agreements.

This year, AngloGold Ashanti announced that its headquarters will move from Johannesburg to London and that its main listing will move from Johannesburg to New York. By leaving South Africa all progress in the company's auditing in that territory would be put on hold, and it would have to start again from scratch in London, where the company would have a clean record.

This shows TNCs strategies to move between jurisdictions, those escaping liability. The case proves the relevance of extraterritorial jurisdiction and the relevance of the possibility of affected communities to suit the perpetrators in diverse jurisdictions, elements relevant for the articles on extraterritoriality and liability.

More information:

https://www.fian.org/en/press-release/article/cajamarca-peasants-continue-struggle-against-south-africa-mining-giant-3206.

2.7. Climate Justice and Corporate Accountability

The LBI process must not be developed in isolation from the reality of the global climate crisis, while at the same time, recognizing that the protection of human rights is an essential factor in addressing the climate crisis. This demands effective global leadership, and it is imperative that the United Nations Human Rights Council and State parties to the LBI or IGWG process ensure the creation of an effective mechanism for the protection of rights, the redress of grievances and the establishment of accountability as a means to protect local communities in the face of the climate crisis. In this year's negotiations, States have the opportunity through the process of building and adopting aLBI to respond to the needs resulting from the systematic violations of human rights caused by transnational corporations, and to develop international law that responds to the scientific reality framing the climate crisis.

ESCR-Net has identified environmental degradation and climate change as one of five common conditions threatening communities globally, highlighting corporate impunity, the extractive nature of our dominant economic system and the commodification of nature, all of which are driven by big polluters and corporate giants. Environmental destruction and the climate crisis threaten human survival and the enjoyment of all human rights for present and future generations. These include the rights to a healthy environment, life, health, housing, food, land, water and sanitation, livelihood and non-discrimination. Thus, States must take urgent action to address environmental destruction and the climate crisis, including through regulating and holding corporate and financial actors accountable to meeting their obligations to respect, protect and fulfil human rights, domestically and extraterritorially. Climate solutions must not violate human rights.

The latest Intergovernmental Panel on Climate Change report, published in August, makes it clear: time is running out: we must act now to avoid irreversible global warming and surpassing the 1.5 C threshold. If the current trajectory continues, the impacts will disproportionately affect local communities that have historically suffered the impacts of extractive activities, have been impoverished and dispossessed by the economic system and have been confronted by structural violence. The climate crisis will generate increasingly adverse living conditions for these communities, l potentially leading to ongoing violations of their fundamental rights. Additionally, corporate actors, including fossil fuel companies and other major polluters, are actively influencing responses to the climate crisis, often packinging profit-driven strategies as

"solutions". However, this involvement represents a clear conflict of interest. This is leading to 'false' solutions such as those that pave the new wave for new extractivism (e.g. transition minerals) or that only benefit the private sector while not addressing the real causes of climate change (e.g. carbon markets). The responsibility that transnational corporations, especially fossil fuel companies, have in creating and exacerbating the climate crisis is directly related to the systematic violation of the human rights of the communities directly impacted by their extractive practices, as well as to the destruction of the natural ecosystems that enable life on the planet.

Recommendations to States:

- Amend PP10 so that it reads: Acknowledging that all business enterprises have the capacity to foster sustainable development through an increased productivity, inclusive economic growth and job creation that respect internationally recognized human rights, labour rights, health and safety standards, the environment and climate justice, in accordance with relevant international standards and agreements.
- Adding paragraph in the preamble (PP11bis) that will read: "To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation, and security agreements."
- Amend PP13 so that it reads: Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, Indigenous Peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, ~~climate vulnerable~~ communities most affected by the impacts of climate change, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons
- Adding paragraph in the preamble that will read as PP13bis: Acknowledging the climate emergency and the short time window available to protect human rights affected by climate change, and the urgent need of limiting global warming to 1.5 degrees C by 2030, in order to avoid the worst impacts of climate warming, and that developed countries and multinational corporations must take the lead in combating climate change as recognized by Article 3 of the United Nations Framework Convention on Climate Change.
- Add paragraph in the preamble that will read as PP13ter: Recognizing that the climate emergency is multifaceted and approaches to mitigate warming are also approaches to environmental justice and human rights in line with the Bali Principles of Climate Justice, improvements in labour rights, Indigenous rights, and economic equity.
- Amend Article 6(4)(e) to read: Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental ~~impacts~~ and climate change impacts ~~standards~~ throughout their operations, including in their business relationships, using accountability metrics as recognized by the United Nations.

- Add Article 6(9)bis to read: States and corporations shall provide individuals and communities, including human rights defenders, safe access to relevant, timely, sufficient, and quality information in connection with each stage of business activities, including accurate emissions reporting, in order to facilitate meaningful participation in the prevention of and response to human rights and environmental impacts. Information should be made available in language and formats that are truly accessible to relevant stakeholders within the community and civil society. The choice of what information should be made available should respond to specific needs of affected communities, who are best placed to determine what information is relevant to them to make informed decisions about projects;
- Add Article 6(10)bis: State Parties shall take all necessary steps, particularly through human rights and environmental impact assessments, to respect and protect human rights in the context of business activities that the State Party is engaged in, supports, or shapes. This includes but is not limited to, State ownership or control in business activities, State engagement in business activities with companies or other States, State regulatory oversight, or political or financial support;
- Add Article 6(11)bis to read: State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented in consultation with, and with the full participation of those affected, [including women...] are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected, and include accountability metrics as identified by third-party reporting and analysis;
- Add Article 7.1 bis to read: State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented in consultation with, and with the full participation of Indigenous Peoples and affected communities are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected.
- Add paragraph in Article 7.2.ter that would read: State Parties shall ensure that reparations processes and mechanisms established to repair the harm caused by large-scale industrial disasters are designed and implemented in consultation with, and with the full participation of Indigenous Peoples and affected communities are transparent and independent from the business enterprise that caused or contributed to the harm, ensure independent technical assistance and are sufficiently resourced to offer the prospect of full reparation to all those affected, and include accountability
- Add Article 16(4)bis to read: Special attention shall also be undertaken in climate-vulnerable communities that are facing current and future environmental and climate related threats that cause, among other impacts, mass migration and other climate-related conflicts from droughts, heatwaves, and resource extraction, or pose severe health risks.

Case in point: Devastating Threat to Natural Resources in Tolima (Colombia) Due to Corporate Impunity

Swiss multinational company: Holcim (previously LaFarge)
Sector: Mining sector
Country: Colombia
Period: Current

'It is alarming that in territories already threatened by extractive activities, such as the municipality of Valle de San Juan in Tolima, the installation of mining megaprojects that undermine the right to a healthy environment and the quality of life of its inhabitants continues to be allowed. The Philadelphia project of the multinational Holcim, which intends to exploit 540,000 tons of materials over 14 years in an area of high ecological vulnerability, represents a devastating threat to biodiversity, water resources and the health of local communities. Despite evidence of environmental and social impacts in previous projects, such as the Cemex mine in Payandé and the recent approval of a licence to extract from the Saldaña river despite the massive participation of indigenous and peasant communities, fisherfolk, women and students who demonstrated against the project, the environmental authorities continue to prioritise corporate interests over the rights of the people and the care of the ecosystems, granting Holcim permission to operate, without taking into account that other projects are already underway on this river that extract the same material and without sufficient time or the demand for adequate ecological compensation, and in the same area. This binding LBI is a historic opportunity to establish effective protection of human rights in the face of irresponsible exploitation of natural resources. We urge the international community to demand justice and accountability in the granting of mining licenses and to put an end to the negligence of local institutions, such as the National Environmental Licensing Agency (ANLA) and Cortolima, which continue to put communities and their environment at risk for commercial interests.'

2.8. Corporate Capture

Corporate elites are growing their influence on government decision-making through "corporate capture". We see this happening increasingly in the context of the United Nations (UN) and other multilateral decision-making spaces such as at the UN Food Systems Summit. The process of negotiating an LBI to regulate corporate power is undermined by corporate capture of the UN.[Corporations have been given privileged access to this space and at the same time have captured governments nationally, particularly in the Global North, driving them to ignore the process to establish an LBI, and to push for initiatives that delay corporate accountability and promote profit-making agendas.

Precedents for stopping corporate capture in UN decision-making spaces exist. The World Health Organization's Framework Convention on Tobacco Control (FCTC) protects policymaking from industry interference. The FCTC explicitly recognized the tobacco industry's irreconcilable

conflict of interest with public health policymaking and measures were put in place to protect treaty processes and implementation from industry interference. We can, and we must insist, that policymaking be protected from corporate capture, so that the public interest – the voice and human rights of the 99% – prevails.

Case in point: United States Council for International Business is Profiteering from Israel's Genocide Against the Palestinian People in Gaza

The world's fifth largest weapons manufacturer, Boeing manufactures Apache AH-64 attack helicopters and F-15 fighter jets, which the Israeli Air Force has used extensively in all of its attacks on Gaza and Lebanon. Photo/Nehemia Gershuni-Aylho.

Business representative: United States Council for International Business
Sectors: Arms, Banking/Finance, Technology
Country: U.S.A.
Period: 2023 – Ongoing

Since the beginning of Israel's genocidal campaign against the 2.2 million Palestinian residents of Gaza numerous members of the United States Council for International Business (USCIB) have made significant profits selling arms to the State of Israel. The Israeli military has used the military equipment and other support that various companies have provided it with to kill more than 43,000 people in Gaza, injure more than 100,000 others and displace more than 85% percent of the total population (1.9 million people).

Research into publicly available data shows that at least ten members of USCIB have manufactured weapons for Israel. Boeing has sold F-15 combat aircraft, AH-64A "Apache" combat helicopter, guided missiles and other arms to Israel. According to press reports Boeing sped up the delivery of its sales to Israel in October 2023. Another USICB member, General Dynamics Corporation, provides Gatling Gun Systems for jet planes used by the Israeli military. Honeywell International, renowned retailer of home heating systems, manufactures component parts for Israeli weapons

systems. A Honeywell-manufactured component used to guide the Israeli Army's missiles was found among the rubble of a bombarded school in central Gaza's Nuseirat refugee camp. L3Harris, Lockheed Martin, RTX, Textron, Eaton Corporation and Caterpillar all provide essential materials Israel needs to continue its ongoing genocide in Gaza.

Many of these USCIB member companies have been identified in a June 2024 statement by UN human rights experts, including Boeing, Caterpillar, General Dynamics, RTX and Lockheed Martin. The joint statement by twenty UN special procedure mandate holders warned these and other companies arming the Israeli military, such as Rolls-Royce, that ""by sending weapons, parts, components, and ammunition to Israeli forces, [they] risk being complicit in serious violations of international human rights and international humanitarian laws". The experts also warned banks and financial institutions that "Failure to prevent or mitigate their business relationships with these arms manufacturers transferring arms to Israel could move from being directly linked to human rights abuses to contributing to them, with repercussions for complicity in potential atrocity crimes". Despite this, many USCIB members from the banking and financial sector, such as Bank of America, Citigroup, J.P. Morgan Chase, Bank of New York Mellon and Wells Fargo, invest in arms companies like Elbit Systems - one of the largest suppliers of military equipment to the Israeli military.

While USCIB members continue to profiteer from supplying the arms they know Israel uses to continue its illegal genocide in Gaza, USCIB representatives are permitted by the United Nations, as part of an ECOSOC accredited organization, to actively participate without any restriction at these OEIGWG negotiations. This is despite the USCIB's active involvement representing a clear conflict of interest to ensure the final text of the legally binding instrument does not impose any form of regulation on the activities of its members operating in so-called "conflict-affected areas".

Recommendations to States

- Restrict the participation of the International Organization of Employers (IOE), International Chamber of Commerce (ICC), the United States Council for International Business (USCIB) and any other representatives of corporate power in the negotiations for an LBI by adopting lessons from the Framework Convention on Tobacco Control which explicitly recognized the tobacco industry's irreconcilable conflict of interest with public health policymaking and put measures in place to protect treaty processes and implementation from industry interference.
- Remove the IOE, ICC, USCIB and other representatives for corporate power from the classification of "civil society organizations". These corporate-backed entities represent some of the most abusive corporations in the world—including Dow, Chevron, and Shell—which have been implicated in serious human rights violations affecting communities, human rights defenders, and civil society.[3]
- Maintain and strengthen the text of the LBI to (a) stop corporate capture, and (b) develop an independent and international court to hold corporations, particularly those that operate transnationally, accountable for committing or contributing to human rights abuses and violations.

The third draft LBI contained one broad corporate capture related provision (Art 6.8), guaranteeing protection for the setting and implementation of public policy and legislation from "the influence of commercial and other vested interests of business enterprises". In the current updated LBI, Article 6.8 has been removed but now the LBI contains two capture-related provisions. Firstly, an article in the Prevention section (Art 6.3) of the draft LBI would guarantee the "necessary independence" of each state's "competent authorities" to enable them to "carry out their functions...free from undue influence" as they go about implementing laws to ensure business respect for human rights, prevent business involvement in human rights abuse, promote meaningful participation in the development and implementation of laws, and "ensure the practice" of human rights due diligence. A second article under Implementation (Art 16.6) states plainly that "State Parties shall protect public policies and decision making spaces from undue political influence by businesses".

Suggested language

Maintain both Articles 6.3 and 16.6 with the removal of the word "undue" from both provisions. Referring to undue influence provides room for businesses to interpret a right to participate in decision making processes that are State driven and guided by democratic values.

3. Additional Resources

- ESCR-Net submission to the Chair-Rapporteur and UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (March 2023): https://www.escr-net.org/resources/call-for-stronger-provisions-to-hold-corporations-accountable/
- Collective Submission on the Second Revised Draft Legally Binding Instrument (2020): https://www.escr-net.org/resources/2020-collective-submission-on-the-second-revised-draft-legally-binding-instrument/
- Ten Key Proposals for the UN Treaty on Business and Human Rights (October 2016): https://www.escr-net.org/resources/ten-key-proposals-for-the-un-treaty/
- Foundational Statement: https://www.treatymovement.com/statement-2013
- ESCR-Net Advocacy Paper on the Legally Binding Instrument (2022): https://www.escr-net.org/resources/advocacy-paper-legally-binding-instrument-2022/