Bridging the gap: A stronger Binding Treaty for all - Webinar series July-September 2023

-

Summary of the three-part webinar series

Contents

Webinar 1: Complementarity of the Treaty, National Action Plans and Mandatory Human Right and Environmental Due Diligence legislation 2

Webinar 2: Regional Perspectives on the Treaty: What would a treaty mean around the world and what still needs to be resolved in the draft? 4

Webinar 3: A binding treaty and access to justice for affected communities 6

Between July and September 2023, the Business and Human Rights Resource Centre (the Resource Centre), together with the Centre for Applied Legal Studies (CALS), the International Commission of Jurists (ICJ), Justiça Ambiental, Lawyers for Human Rights (LHR), and the Zimbabwe Environmental Law Association (ZELA) organised a series of three webinars "Bridging the gap: A stronger Binding Treaty for all" to support and amplify the efforts of civil society organisations, workers, and communities towards the development of such a treaty, especially those in the Global South. These webinars helped foster critical thinking around the binding treaty– from its complementarity with other legal frameworks, to regional concerns, to outstanding matters for the treaty negotiations to cover.

Webinar 1: Complementarity of the Treaty, National Action Plans and Mandatory Human Right and Environmental Due Diligence legislation

The first webinar on *Complementarity of the treaty, NAPs and mHREDD legislation* was hosted on 11 July 2023. Michael Clements, the Director of International Programmes at the Resource Centre made introductory remarks while Jessica Lawrence, the Head of the Environmental Rights Programme at LHR moderated the webinar. Experts then shared their insights on key issues pertaining to the webinar's theme.

Joseph Purugganan, of Focus on the Global South (and part of the Asian Task Force (ATF) on a legally binding instrument (LBI)), **s**hared the *perspectives of Civil Society in Southeast Asia and Case Studies Showing Usefulness and Necessity of the Legally Binding Treaty*

Joseph highlighted several challenges facing the campaign for an LBI in Asia: 1. business-friendly economic policies and strong investor protections have made the region a hub for free trade and investment agreements; 2. corporations in Asia are increasingly causing adverse human rights and environmental impacts as their power grows; 3. political factors, such as elections and changes in governments, affect how States engage with business and human rights issues. He stated the importance of connecting campaigns for a LBI and corporate accountability with those for climate and environmental justice, as Asia's development agenda often favours corporations. 4. challenges to democracy and human rights, like authoritarian rule and attacks on human rights defenders, hinder the campaign's sustainability. Despite these challenges, the need for a legally binding treaty remains clear.

To illustrate the necessity and usefulness of a legally binding treaty *vis a vis* TNCs, Joseph mentioned two examples/case studies. First on illegal dismissal of workers by Coca-Cola Bottlers Philippines and second on a UK company that ignored human rights abuses in its value chain. Based on these examples, the speaker stressed the need to include TNCs in a binding treaty as they profit greatly while avoiding accountability. He highlighted the importance of joint and several liability in the treaty, which ensures all parties in the value chain responsible for human rights abuses and environmental harm are held legally accountable and provide remedies to affected individuals and communities.

Regarding jurisdictional issues, Joseph explained that, rather than using *forum non conveniens*, which allows a court to dismiss a case if another forum seems more suitable, the principle of *forum necessitatis* should be favoured. *Forum necessitatis* enables a court to hear a case when there's a compelling need, even if it's not the most convenient forum. This is because communities affected by TNCs activities often

lack the resources to seek choose favorable courts in their quest of justice. In Joseph Purugganan's words, "*TNCs engage in forum shopping, not the affected people.*"

He noted that complementarity should be about seeking the strongest form of accountability. While mandatory due diligence in domestic laws could be seen as an advancement, due diligence alone should not be the end goal. Instead, accountability and justice for victims and affected communities should constitute the ultimate goals and outcomes.

Andressa Oliveira Soares, Homa – Human Rights and Business Institute, talked about the *framework law to regulate TNCs in Brazil to demonstrate how domestic laws can also be shaped by the UN treaty process.*

Andressa highlighted that Brazil's proposed framework law (Bill No. 572 of 2022) for regulating transnational corporations (TNCs) resulted from collective civil society action and the treaty negotiations. Homa views the LBI and advocacy at the domestic level for strong laws as complementary approaches, with international regulations needed to address gaps not covered by national laws.

The Samarco and Brumadinho dam collapses revealed enforcement challenges despite strong environmental laws and constitutional rights in Brazil.

The findings of a study conducted by Homa showed that a comprehensive framework law was necessary as existing legislation to address business and human rights issues were too scattered. This framework law encompasses due diligence, accountability, and liability. Due diligence is seen as one means to prevent abuses, but relying solely on it may allow companies to evade responsibility by mere compliance. Thus, the Brazilian framework law extends beyond due diligence.

Andressa stressed that Brazil's arguments in international negotiations should align with its domestic framework, even though it occupies a unique position as both a host and home country for transnational corporations (TNCs), and not contradict its existing domestic legislation; for example, by arguing against criminal liability in a LBI. The framework law prioritises human rights treaties over investment treaties and adopts a victim-centered approach. It combines various provisions and instruments into one law, benefiting individuals, litigators, and CSOs in their advocacy, litigation, and negotiation efforts. The framework law should be approved soon.

Giuseppe Cioffo, CIDSE gave an *overview of the EU Corporate Sustainability Due Diligence Directive (CSDDD) and complementarity with the treaty to demonstrate why both are needed.*

Giuseppe reflected that the CSDDD aims to prevent, mitigate, and terminate negative impacts caused by EU-based and operating companies on human rights and the environment. Giving victims access to justice forms the second goal of the Directive by imposing due diligence duties on companies.

Giuseppe pointed out that the CSDDD text falls short in aligning with internationally recognised standards such as the UN Guiding Principles. It lacks mandatory stakeholder consultation, overlooks Indigenous Peoples' rights on their lands, and lacks a gender-sensitive approach, essentially treating due diligence as a closed set of measures. Civil liability in the Directive does not cover harm caused by TNCs to human rights and the environment. Instead, it focuses on holding a company accountable for its failure to perform due diligence, which includes preventing, mitigating, and terminating negative

impacts. Civil liability also applies when this due diligence failure leads to harm. These specific and stringent criteria for civil liability have faced criticism from CSOs.

Regarding the scope, the binding treaty obliges all companies (article 3.2) to respect human rights but allows states to adjust prevention obligations based on factors such as size or sector. In contrast, the EU Directive applies to companies of a certain size and that operate in certain sectors - creating a contradiction where the EU supports a broader scope in the treaty but is restrictive in its own legislation.

Giuseppe discussed how Article 6 of the binding treaty and Articles 4-9 of the Directive, despite their differences, complement each other regarding due diligence duty. The treaty outlines a broad due diligence duty that includes stakeholders like Indigenous Peoples, women, human rights defenders, and vulnerable groups. In contrast, the CSDDD lacks stakeholder participation in its due diligence provision but provides more detailed requirements compared to the treaty.

The treaty could fill gaps in the Directive regarding access to justice, victims' rights, and remedies. Giuseppe pointed out that the CSDDD has limited civil liability options due to EU law's nature. Matters like jurisdiction and choice of law are addressed in other EU treaties and cannot be covered by the CSDDD.

However, the Treaty could benefit from the Directive by considering some of its provisions. For instance, the CSDDD includes a mandatory environmental due diligence obligation and thoroughly addresses environmental impacts, a topic still under debate for the Treaty's scope. Additionally, the Directive shall inform the Treaty in establishing the obligation for corporations to terminate business activities when they are causing harm.

Webinar 2: Regional Perspectives on the Treaty: What would a treaty mean around the world and what still needs to be resolved in the draft?

The second webinar on *Regional perspectives on the Treaty: What would a treaty mean around the world and what still needs to be resolved in the draft?* Took place on 22 August 2023. **Josephine Chiname, Program Lead - Responsible Investments and Business at ZELA** made introductory remarks, while **Sikho Luthango, Program Manager for Labour Relations and the Economy at Rosa-Luxemburg-Stiftung** moderated the webinar.

Lihle Mabuza, **Department of International Relations and Cooperation, South Africa**, delivered the keynote speech for the webinar and highlighted the importance of why exchanges amongst regional groupings are important for the Intergovernmental Working Group (IGWG) to work well, and the overall treaty process. She stressed the fact that countries from the Global South, such as South Africa and Ecuador have been particularly active in the treaty process, and were the first countries to initiate the process for a legally binding instrument (LBI). Commenting on how transnational corporations in the African region have not only had devastating impacts on citizens but also the environment, Lihle drew attention to the need to have a rule-based, just and equitable system to govern the operations of transnational corporations.

Lihle highlighted the lack of legal sanctity in the Friends of the Chair mandate and proposal, remarking on how the Chair's proposal broke the existing consensus on the draft treaty. She called for future negotiations to be done in good faith, and for much needed transparency in the treaty making process and in the workings of the Friends of the Chair. In her words, "*A trust deficiency has been created and this needs to be built back*." While the Africa Group is yet to have a consultation on the proposals by the Friends of the Chair, it has previously delivered a statement to the IGWG, and is seeing increased participation in the treaty making process from countries such as Kenya, Ethiopia, Namibia and Egypt.

Ariella Scher, **Centre For Applied Legal Studies**, echoed Lihle's sentiments on the Chair's proposal leading to a subsequent trust deficit. She also noted that while there is confusion around the African region's support of the Chair's proposal, African CSOs are committed to working with states on the best way forward and continue to support the legitimate development of the treaty.

The keynote speech was followed by an open discussion with our renowned panellists, with conversations on the overwhelming need for binding measures for businesses to respect and promote human rights, the necessity of a victims centred approach with a focus on accessible and effective remedies, and the role of the Inter-American system in providing essential jurisprudence on the corporate responsibility to champion human rights.

Sanyu Awori, Association for Women's Rights in Development, and **Jaybee Garganera, Alliance To Stop Mining** expressed their views on the relevance of a LBI. **Sanyu** remarked that "*Without binding standards, we're left with impunity as voluntary measures have proven insufficient,*" and stressed that systems level change which aims at shifting entrenched power balances and changing the narrative of profit driven business practices require clear binding rules of operations. It is essential that codes of conduct and redressal mechanisms for harm caused be explicitly agreed upon and codified. In a similar vein, **Jaybee** highlighted that in the Asian region, we are often grappling with countries which don't have national human rights institutions in place, and thus lack the institutional mandate to promote, protect and fulfil human rights. The need for a LBI is pronounced in these contexts, particularly when large corporations also benefit from a close relationship with governments.

Commenting on the role of the Inter-American system in the implementation of the treaty, **Soledad Garcia Muñóz, Special Rapporteur on Economic, Social, Cultural and Environmental Rights - Inter-American Commission on Human Rights**, highlighted the system's rich jurisprudence on businesses impact on human rights, especially within the Indigenous community. There is a need to set essential standards to invoke the international responsibility of States from human rights violations committed by companies. Particularly in the case of environmental violations, Soledad emphasised the importance of companies' adopting plans to stop emitting greenhouse gas emissions and make public disclosures to that effect. She argued that such measures should specially target business sectors which disproportionately contribute to environmental degradation, such as livestock farming, which leads to more deforestation, especially in the Amazon.

Extractive industries have been wreaking havoc on the environment from time immemorial. **Daniel Cerquieria, Due Process of Law Foundation** drew attention to the need for present day environmental violations to be linked with an obligation to prevent new environmental disasters. The international community is looking to America to find a minimum standard of binding obligations for companies to respect in relation to environmental disasters, which are not limited to the UN Guiding Principles. He drew back to **Lihle's** words on centring the discussion around victims of such harms and highlighted this as a

key pillar of the treaty. **Sanyu** commented on the nexus between companies in the mining industry and the potential hazardous ramifications for those speaking out against them, particularly for human rights defenders. **Soledad** echoed similar concerns in the Latin American region, and noted that "*it has become the most dangerous region to promote human rights, particularly Indigenous women defenders have been increasingly attacked."* She argued for the treaty to explicitly protect human rights defenders, and that the right to defend human rights be included as a fundamental right within the business and human rights framework. **Jaybee** stated that "*there is shrinking space for environmental and land rights defenders*." This shrinking space for defenders reinforces state impunity and perpetuates the state's failure to protect and promote human rights of affected communities.

Although the treaty has good representation of Indigenous communities, **Jaybee** took issue with the lack of an intersectional approach to the victims of corporate human rights abuses, specifically recognising the dearth of a gender lens in the treaty. Examining the role of CSOs, **Soledad** attributed the push for a feminist lens in the treaty-making process to the work of CSOs, while **Anna Maria Suarez-Franco, FIAN International** commented on the important work done by Latin American CSOs in promoting "*centrality of the victims*", advocating for clear rights for people and rules for corporations which extend beyond state borders. As Anna Maria puts it, "*The challenge is that the economy is globalized, but the law is localized*."

Sanyu noted the demands of African CSOs to include treaty provisions on free and informed consent, victim centric access to remedy, punitive measures and the right to reparations. **Rachmi Hertanti** from the **Transnational Institute** echoed the need for a victim-based approach to the LBI, and commenting on the deviations in the Chair's proposal remarked that Asian CSOs continue to focus on accountability for businesses with a transnational character, and suggested new modes of legal liability, including joint and several liability. **,** She considered how growing trends of nationalism and self-determination in southern countries may also affect positions of Asian states in future negotiations. Succinctly put by **Anna Maria,** "*The focus cannot be on due diligence, but on prevention and liability, including civil, administrative and criminal liability along the value chain or the businesses relationships*."

Webinar 3: A binding treaty and access to justice for affected communities

The webinar series concluded on 19 September 2023 with the last discussion on *A binding treaty and access to justice for affected communities.* Marina Novaes, Brazil Researcher and Representative at the Resource Centre made introductory remarks. Carlos Lopez, Senior Legal Advisor and Head of the programme on Business and Human Rights at the International Commission of Jurists (ICJ), moderated the webinar.

In her opening remarks, **Marina Novaes**, Brazil Researcher and Representative at the Resource Centre presented *a Brazilian perspective on the significance of LBI.* To address shortcomings in Brazil's voluntary regulatory framework, the adoption of the LBI and the enactment of Bill 572/2022 in the Brazilian Parliament, which seeks to establish a legally binding framework for business and human rights, are crucial. Marina emphasised that issues related to access to justice, such as limited participation by affected individuals, the imbalance of resources between companies and victims, and prolonged dispute

resolution, are common in Brazil. The LBI could offer tools to address these challenges and improve Brazil's legal system. Provisions on corporate criminal liability and legal responsibility in all the supply chain for human rights abuses are indispensable for improving access to justice and fulfilling the treaty's main objective of filling the gaps that lead to corporate impunity.

Carlos Lopez, Senior Legal Advisor and Head of the Programme on Business and Human Rights at the ICJ, presented the advocacy brief on how to overcome barriers to access to justice for victims of corporate human rights abuses. Carlos emphasised 4 key recommendations: The LBI should: 1) require states to reduce the financial burden that might deter or inhibit victims from accessing justice; 2) contain an obligation for States to allow the reversal or reduction of evidentiary burdens of proof for establishing legal liability; 3) require states to provide for collective actions; 4) require states to ensure victims have access to information regarding their rights and the status of their claims.

Sacha Feierabend, Senior Programme Officer at the International Federation for Human Rights (FIDH), **Surya Deva**, UN Special Rapporteur on the Right to Development, **Ruwan Subasinghe,** Legal Director at the International Transport Workers' Federation (ITF), and **Erika Mendes**, social and environmental activist from Mozambique and member of Justiça Ambiental (JA) provided their general assessments of the provisions on access to justice in the latest draft of LBI.

Sacha Feierabend emphasised the setbacks in the current draft. 1) numerous provisions require consistency with domestic law and domestic administrative systems which undermine the effectiveness of the provisions and diminish the purpose of the instrument as an international binding treaty. The added value of the LBI is to set universal international binding standards instead of allowing states to maintain existing lower standards in domestic laws; 2) the substantive scope of the instrument has been restricted. References to the environment and climate have been omitted in the third revised draft.

Surya Deva noted that treaty provisions carry well-intentioned goals, but their effective implementation is lacking. The positive intent of the treaty can be discerned in Article 2, which recognises that access to justice is a fundamental objective of the LBI. Furthermore, there is a recognition of mutual legal assistance and international cooperation. However, the LBI is evolving inconsistently. The use of concepts such as *business responsibility* and *business liability* is ambiguous. In the preamble, the LBI states that businesses bear the responsibility to uphold human rights. However, if businesses are solely tasked with the responsibility to respect human rights, it raises a question about how they can be held liable.

Ruwan Subasinghe emphasised that access to justice in LBI shall be assessed holistically. There are serious deficiencies in Article 8 due to the lack of provisions on joint and several liability. Aligning the treaty provisions with domestic legal principles presents its own set of challenges. From a victims' rights perspective, provisions regarding precautionary measures hold significant importance for workers, particularly for those engaged in global supply chains. Ruwan positively assessed the reversal of the burden of proof but noted that the evidentiary burden needs to be reduced. According to him, key issues for trade unions relate to legal and financial assistance and lack of collective/group claims. Meaningful consultation with victims and rightsholders is crucial.

Erika Mendes pointed out that the treaty has regressed. Provisions on consistency with domestic laws limit access to justice. Articles on the reversal of the burden of proof have been weakened - Article 9 no longer includes *forum non-conveniens,* and the notion of *forum necessitatis* has been diluted. According

to Erika, the current draft is evolving into guidelines for states to create their own due diligence legislation rather than serving as an international treaty, thereby compromising access to justice.

Sacha Feierabend gave an overview of the treaty provisions on access to justice and elaborated on key shortfalls. One of the greatest weaknesses relates to Article 8 which mixes civil, criminal, and administrative liability without explicitly naming them. The link between the liability standard and the rest of the draft is not clear enough. For instance, article 8.3 establishes liability standards for various offenses found in criminal domestic laws, such as conspiring, aiding, and abetting. Nevertheless, it does not explicitly address situations involving the direct commission of human rights abuses. Sacha regrettably noted that the provision on *forum necessitatis* has been eliminated.

Surya Deva expressed his views as to whether current provisions on access to justice facilitate access for affected communities and how they could be improved. Surya noted that the LBI does not address the issue of power imbalances in terms of information, expertise, and the burden of proof. The treaty shall impose direct obligations on businesses, and this is where the serious gap lies. The treaty should also contemplate a strict liability in certain cases. LBI shall make more references to environment-related abuses, especially given the General Assembly's recognition of the right to a clean, healthy, and sustainable environment. Besides, the liability element requires more clarification.

Ruwan Subasinghe provided insights on how LBI can take into account workers' and unions' demands for better access to justice in the context of global supply chains. He stressed that there is no provision for a monitoring mechanism where workers and CSOs can be involved. Enforcement mechanisms and monitoring body for the treaty will be a critical source of remedy for rightsholders. Additionally, the key issue for workers is the lack of remedy in relation to reinstatement in employment. Ruwan stated that Article 10 (statute of limitations) is progressive but there is a need to extend limitation periods for certain human rights violations (i.e., industrial diseases, claims related to discrimination and GBV).

Tony Salvador, a lawyer working with the Third World Network, touched upon the importance of joint and several liability in the treaty. Tony noted that the concept is absent from the draft. Joint and several liability involves multiple respondents in the global value chain. When rightsholders receive a court award, it can be enforced solely against the TNC, with the responsibility for dividing the award among value chain parties resting on them. Rightsholders shall not bear the burden of dividing liability among different actors. He stressed that without joint and several liability, LBI can become ineffective, as TNCs might shift responsibility to subcontractors for human rights violations and environmental harm.

Sor.Rattanamanee Polkla, lawyer and the Executive Coordinator of the Community Resource Centre (CRC), gave examples of barriers she has faced as a practitioner in access to justice. Sor noted that Thai law does not impose liability on parent companies when their subsidiary companies engage in human rights violations. Therefore, in case subsidiary companies cease to exist, there is no way of getting a remedy for their abuses. LBI would help implement the law in relation to subsidiary companies.

Letícia Aleixo, a lawyer who works for the Environmental Law Alliance Worldwide (ELAW), talked about why it is important to involve affected communities in the treaty drafting process. She stressed that affected communities are the best sources of information when it comes to the damage they have suffered, and reparation measures they may consider appropriate. Leticia recalled her experience with the collapse of a large mining tailings dam in Brazil and noted that placing communities at the centre of the reparation process would have saved lots of money and effort. The treaty will guarantee access to

justice within reasonable time frames. For example, many victims of the dam collapse seek redress and remedies transnationally through litigation in the UK where courts took years to decide on jurisdiction. The inclusion of affected communities in treaty negotiations will generate more awareness and empathy in negotiators who stand distant from local contexts.

Erika Mendes elaborated on the key characteristics of the proposal for the establishment of an international tribunal for TNCs. Erika noted that the tribunal is needed to ensure the implementation of the treaty. Otherwise, we risk a document of good intentions without execution. According to her, if there is political will, the creation of an international tribunal is realistic. The treaty must impose direct obligations on TNCs instead of reinstating state obligations. She stressed that: 1) the tribunal needs to have jurisdiction over TNCs and other enterprises with transnational activities; 2) the tribunal must be governed by the principle of complementarity; 3) affected communities and their rights need to be the core of the tribunal; 4) the seat of the tribunal needs to be in a country of the Global South.

Letícia Aleixo, Tony Salvador, and Sor.Rattanamanee Polkla talked about the key element of access to justice that the treaty should include to effectively support communities affected by corporations.

Letícia noted that provisions on intimidation, harassment, reprisals, and revictimization of victims are essential. LBI shall ensure the independence of the reparation process that should not be handled by corporations. This will eradicate revictimization in affected communities. According to **Tony**, hard laws for communities and workers are necessary. There should be concurrent jurisdiction between the international tribunal and the tribunal inside of the home country of TNCs. All states shall be bound by concurrent jurisdiction. **Sor** stressed that LBI shall address supply chain issues sufficiently so that communities affected by supply chains shall have access to justice. LBI will ensure more effective implementation of domestic laws as it will serve as a tool to push governments to hold corporations accountable.