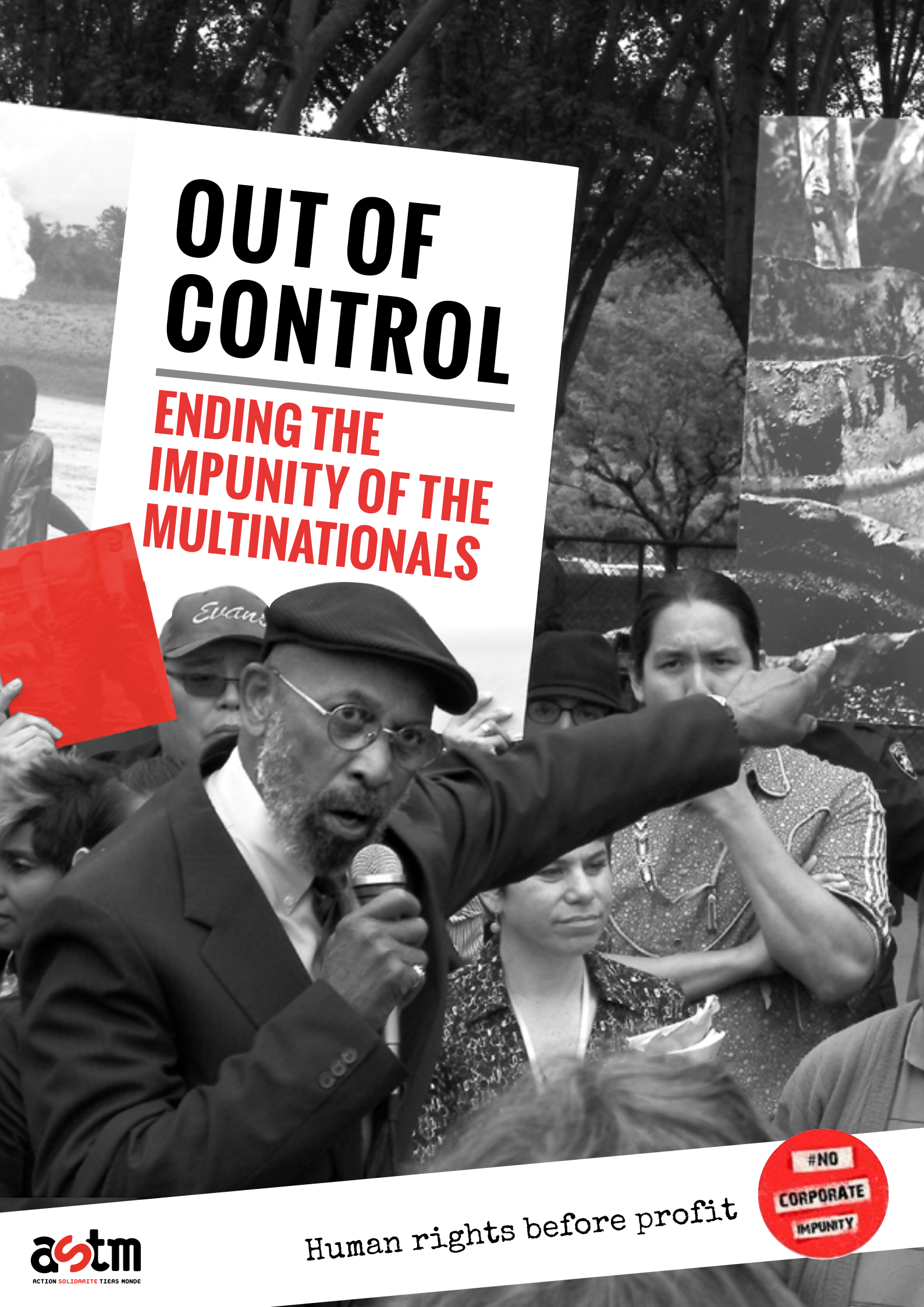

Human rights before profit

ACTION SOLIDARITE TIERS MONDE

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Publisher

ACTION SOLIDARITE TIERS MONDE

www.astm.lu

This publication was produced by Action Solidarité Tiers Monde asbl (ASTM) in the context of our campaign entitled #NO CORPORATE IMPUNITY – Human rights before profit.

ASTM is a Luxembourg development NGO that has been committed to building a society based on solidarity, social justice and the responsible use of natural resources since 1969. The respect and implementation of human rights are at the centre of all its activities, which include direct support for partner organisations in Africa, Asia, Latin America and the Middle East, information, training and awareness building for the Luxembourg public as well as political lobbying in Luxembourg and at European level.

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Contents

Out of control: Ending the impunity of the multinationals

Over the past decades multinational corporations have become key players in the global economy. While their activities can have a positive influence on economic development, it is now recognized that they also have the potential to cause human rights violations and serious environmental harm, particularly in the countries of the Global South. Such violations committed or made possible by multinational corporations regularly make the headlines: expulsion of indigenous peoples from their lands, pollution of the environment by oil or mining industries, violation of the freedom of association, inhuman working conditions in the textile industry or child labour on cocoa plantations.

While 85 % of multinational corporations have their headquarters in the Global North, most of those affected live in countries in the South[1] where governments do not always fulfil their obligation of protecting their citizens. When the victims of human rights violations try to obtain justice and compensation, they are confronted with considerable obstacles. Some of the partner organisations of Action Solidarité Tiers Monde (ASTM) have also experienced problems of this kind, as the case studies and personal accounts contained in this publication illustrate.

The complex organisational structure of multinational corporations can lead to a watering down of their legal responsibility, particularly that of parent companies. Today some multinational corporations are economically more powerful than certain states, but unlike national states they are outside the international regulatory system governing the respect of human rights. According to a study by Global Justice Now[2], in 2015 out of the 100 wealthiest economic entities only 31 were governments (total amount of tax income), while the other 69 were multinational companies (total turnover). Given the governance gap between the economic reach of the multinationals and the legislative framework that applies to them, there is an urgent need to adapt this framework in order to make them accountable for their activities.

While ASTM welcomes the various initiatives taken at international level such as voluntary commitments made by several multinational companies with regard to corporate social responsibility or the adoption of the UN Guiding Principles on Business and Human Rights, it must be pointed out that these measures do not contain any binding mechanisms. So far these initiatives have not succeeded in stopping human rights violations resulting from the activities of the multinationals.

Our association believes that the time has now come to put an end to these inacceptable practices. It is incumbent upon states to protect the rights of all the world's citizens, to contribute to the fight against poverty and to foster sustainable economic development.

This document explains the workings of the system of impunity from which certain multinationals benefit and provides an overview of the main international initiatives that have been undertaken to make multinational corporations accountable for their activities. It calls for Luxembourg's legal framework to be reinforced in order to prevent possible human rights violations by multinational corporations operating from Luxembourg and concludes by making a number of recommendations.

[1] Impunité des sociétés multinationales, Centre Europe – Tiers Monde (Cetim), Geneva, 2016, http://www.cetim.ch/wp-content/uploads/br-impunit%C3%A9-fusionn%C3%A9.pdf

[2] http://www.globaljustice.org.uk/news/2016/sep/12/10-biggest-corporations-make-more-money-most-countries-world-combined

1. THE ARCHITECTURE OF IMPUNITY

The victims of human rights violations in the countries of the Global South often encounter major obstacles when they try to make multinational corporations accountable for their activities. The problem of access to information and high legal costs work against local communities when faced with companies that have seemingly limitless financial resources at their disposal. Other major obstacles also prevent the victims from getting access to justice.

1.1. The Independence of legal entities

The 1980s marked the beginning of the era of the multinationals. The organisational structure of these large corporations has become increasingly complex. Made up of numerous subsidiaries, subcontractors and networks of partner organisations, their production chains are often spread over various countries. Multinational corporations make use of these structures in order to optimize their activities, profiting from the specific advantages of each production site such as low salaries, weak social protection for workers or non-binding environmental standards. Such advantages can prompt companies to set up part of their production cycle in countries of the global South. Today trade flows (in parts, intermediate or finished products) between the various units of one group ("intracompany trade") account for one third of total world trade, which is a clear indication of the spectacular level of the internationalisation of the major groups.

The independence of legal entities constitutes a corporate veil between the parent company and its subsidiaries.

In most European countries, company law does not consider a multinational corporation to be one single company but rather a group of companies, each one being independent from the legal point of view. This is referred to as the independence of legal entities; it means that each individual entity that is part of the multinational corporation is only responsible for its own actions. As a result, it is very difficult to make a parent company accountable for human rights violations committed by its subsidiaries abroad.

However, in reality the various entities of a single group are only relatively autonomous. The corporations themselves are shareholders (majority or minority) of their subsidiaries and generally have voting rights, which gives them a certain amount of control over the activities of their subsidiaries. The decision-making centres are often located at the level of the parent company and the flow of products and profits can cross legal boundaries unhindered. Consider the example of a multinational oil company that has its headquarters in a country that has no oil of its own. How can that company exist independently of its subsidiary whose task is to extract oil in oil-rich countries?

It is also possible for one company to exercise control over another one without owning shares in it. The relationship between outsourcing companies and their sub-contractors or suppliers is a case in point. Outsourcing companies put part of their cycle of production in the hands of other companies. These subcontractors are normally obliged to comply strictly with the specification contract and deadlines set by the outsourcing company and in reality have very little autonomy. However, the outsourcing company is able to avoid any legal responsibility with regard to the conditions in which its goods are produced.

The principle of legal autonomy often prevents the victims of abuse from taking legal action against the parent or outsourcing company. This principle, which dates back to the colonial era[3], is no longer appropriate to today's situation and the globalised character of multinational companies' economic activities. This incoherence between economic realities and the existing legal frameworks means that legislation needs to be adapted to enable it to exercise the necessary control over the multinationals and to prevent the violation of human rights. If harm is done as a result of the activities of a multinational company abroad, whether it is caused by the company's subsidiaries, subcontractors or suppliers, the parent company must also bear its share of the responsibility.

THE RANA PLAZA COLLAPSE: THE SYMBOL OF IMPUNITY

© FESPAD

Collapse of the Rana Plaza building

On 24 April 2013 the Rana Plaza building, which housed several garment factories, collapsed in Dhaka, Bangladesh, killing over 1,000 people. Thousands of others remain disabled for life. Many labels linked to well-known European clothing brands were found in the rubble. A number of the outsourcing companies that the Bangladeshi subcontractors work for are based in Europe, some of which denied having any relations with their subcontractors. While financial compensation was provided through a compensation fund, in no case was the legal responsibility of the outsourcing company recognised[4].

[3] Removing barriers to justice, SOMO https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf

[4] Pour une obligation de vigilance des entreprises multinationals, 2016, Amnesty International

1.2. Failure to comply with court decisions in countries of the Global South

Since it is extremely difficult to challenge the legal responsibility of the parent companies, the victims of human rights violations often have no other choice than to try to sue the subsidiary concerned in their own national courts.

Should the victims succeed in obtaining recognition of the local subsidiary's legal responsibility, which rarely happens, the subsidiary will sometimes plead a lack of financial resources or that it has only a limited level of insurance to compensate for the harm done and declares itself insolvent. The victims cannot turn to the parent company and are left without compensation for the harm caused, while the parent company pockets the profits.

In the rare cases where a court in the country where the subsidiary is based manages to take action against a parent company and finds the latter liable, the victims encounter numerous difficulties in getting the court's decision enforced in the parent company's country. This is what happened in a number of prominent cases in which American multinationals succeeded in convincing the US courts to refuse to implement the rulings of the Ecuadorian and Nicaraguan courts[5].

[5] Removing barriers to justice, SOMO https://www.somo.nl/wp-content/uploads/2017/08/Removing-barriers-web.pdf
[6] http://texacotoxioco.net
[7] ASTM has supported the activities of Frente de Defensa de la Amazonia for ten years. In 2012 Frente formed the organisation UDAPT to focus on the lawsuit led by the lawyer Pablo Fajardo, while Frente itself concentrates on the sustainable development of the region.
[8] www.chevrontoxico.com
[9] www.csrwire.com/press_releases
[10] B. Ekwurzel et.al: The rise in global atmospheric CO2, surface …, April 2017, in https://link.springer.com/…/10.1007%2Fs10584-017-1978-0.pdf
[11] http://globaljusticenow.org.uk/news/2016/sep/12/10-biggest corporations-make-more-money-most-countries-world-combined

Pollution of the environment …

UNTIL HELL FREEZES OVER: THE CHEVRON/TEXACO CASE

Between 1964 and 1992 Texaco, an oil company based in the US, extracted oil from Ecuador's Amazon rainforest, leaving behind more than 1,000 toxic oil-filled pits that contaminated the region's waters[6] and soils. In addition to destroying the environment, the damage caused led to an increased level of cancer and mortality rates in the local population. In 1993 30,000 residents and human rights organisations in the region formed an organisation "*Frente de Defensa de la Amazonia*"[7] and filed a lawsuit against Texaco in New York to claim compensation for the environmental damage caused. In 2001 Chevron purchased Texaco and succeeded in having the case transferred to Ecuador.

In February 2011, after an eight-year legal battle, an Ecuadorian court ruled in favour of the plaintiffs. In 2013 the Supreme Court of Ecuador ordered Chevron to pay 9.6 billion dollars in compensation. But since Chevron had divested itself of its assets in Ecuador as a precautionary measure, the plaintiffs were obliged to claim the damages awarded in other countries including Canada and the United States[8].

However in 2014 the New York District judge refused to recognize the Ecuadorian ruling following a

1.3. Obstacles to accessing justice in countries of the Global South

Furthermore, in many countries of the Global South, access to justice is not sufficiently guaranteed. This is primarily because the regulatory mechanisms are often weak. The structural adjustment programmes imposed on the indebted countries of the Global South since the 1980s dismantled the regulatory mechanisms and regulation that apply to commercial firms. In addition, competition between governments to attract foreign investment leads them to offer very investment incentives to the multinationals. States no longer play the role of regulator and have lost a significant part of their control over economic activities.

According to a recent report by the non-governmental organisation Global Witness the number of human rights and environmental defenders killed has doubled in 5 years, reaching over 200 in 2016.

The judicial system has also been weakened and exposed to corruption in many countries. In recent decades many of the multinationals have grown to such an extent that today they are wealthier than some governments. According to a study by Global Justice Now[11] published in 2015, the total annual turnover of the world's top 10 corporations is equivalent to that of the 180 poorest countries on the planet (total budgetary revenue). The potential of the multinationals to influence the regulatory bodies of nation states, the police or the judiciary is therefore very real and has the capacity to render prosecution in countries of the Global South ineffective. As a result, when certain multinationals are involved in expropriation, the forced displacement of people or cause environmental pollution, there is a considerable risk that the local courts will dismiss the case or find the company not guilty.

In some cases the states fail in their obligation to protect human rights defenders or becomes accomplices of the multinationals. Where local populations organise to defend their rights and to oppose the activities of multinational companies, they risk being intimidated, harassed or even murdered in a bid by the companies involved to quell their resistance.

... by Texaco/Chevron

statement by the Ecuadorian ex-judge, Alberto Guerra, that the plaintiffs had tried to bribe him. Their lawyer Steven Donzinger appealed. Then in 2015 ex-judge Guerra admitted before an international arbitration panel (which Chevron had filed against the Government of Ecuador) that he had received more than 2 million dollars from Chevron in exchange for making false allegations against the plaintiffs[9].

Despite this corruption scandal, in June 2017 the US Supreme Court confirmed the ruling of the New York District Court. So far Chevron, the world's biggest non-state oil firm and greenhouse gas emitter[10], has spent over 2 billion dollars on lawyers' and detectives' fees and on public relations firms.

In 2016 a Canadian court upheld the Ecuadorian ruling. In October 2017 an Ontario court will decide in Toronto whether the Chevron's subsidiary, Chevron Canada, which is 100 % owned by Chevron and has at least 15 billion dollars worth of assets, has to pay the compensation. Will this decision mark the end of the legal ordeal that the victims have been going through for over 20 years?

The use of violence has increased in recent years. According to a recent report by the non-governmental organisation Global Witness[12] the number of human rights and environmental defenders killed has doubled in 5 years, reaching over 200 in 2016. According to information obtained by the NGO most of the killers were hired by multinational corporations or by governments.

In some cases multinationals and states (rather than protecting the rights of their citizens) even go so far as to launch criminalisation campaigns and bring lawsuits against human rights and environmental defenders. The case of Maxima Acuña (see box below) is by no means an isolated case.

[12] Global Witness, Defenders of the Earth: https//www.globalwitness.org/en/campaigns/environmental-activists/defenders-earth/

Peru: A regulatory framework serving business interests

In order to encourage private investment, Peru has adopted policies designed to ease existing environmental regulations, shortening the deadlines for the completion of impact studies on soils, weakening the role of the environmental control body and authorising the State or local authorities to award lands to private companies without the approval of the National Assembly, thus violating Peru's legislation and the Constitution. This institutional fragility also affects people's right to safety and freedom of expression. In 2012 Peru legalised the use of the armed forces to suppress public demonstrations. A law adopted in 2014 grants immunity to members of the armed forces and the police who injure civilians in the course of their duties. Finally, a new Legislative Decree allows the police to conclude contracts with private companies for the provision of security services by off-duty police personnel, authorizing them to wear their official uniforms and make use of their service arms.

David Velazco. Director of the Peruvian NGO Fedepaz, a partner organisation of ASTM

MÁXIMA ACUÑA: SYMBOL OF RESISTANCE AGAINST THE MULTINATIONALS

The Yanacocha gold mine in the Peruvian Andes is the largest gold mine on the South American continent. Since 1993 it has been operated by the Minera Yanacocha company, in which the US corporation Newmont Mining is the majority shareholder. The local population are opposing the mine because of its disastrous ecological consequences, the water shortages it has caused and the contamination of fresh water resulting from the mining activities.

The announcement by Minera Yanacocha of plans for an extension of the mining project, called Minas Conga, has been met with widespread protests on the part of the local population. For the mining corporation Newmont Mining, Máxima Acuña is an obstacle to the implementation of the Conga project: a 25-hectare plot of land that the indigenous peasant woman bought in 1994 is situated on the land needed by Minera Yanacocha. In 2011, after Máxima Acuña refused to sell her land, private security agents from Minera Yanacocha and special police units set fire to her house. The Acuña family was assaulted. The police officers beat her daughter Gilda unconscious. Acuña has had two breakdowns and has suffered several depressions – but she and her family have not given up their struggle.

The complaints filed by the Acuña family against the mining company and its strategies of intimidation were rejected. Minera Yanacocha in turn initiated legal proceedings against Máxima Acuña, accusing her of usurping land belonging to the mine. Despite the fact that she held legal titles to the land, she was sentenced in first instance to three years' imprisonment and ordered to pay 2 000 USD in compensation to the company. Máxima Acuña appealed and in December 2014 the Court of Appeals in Cajamarca lifted the charges against her. However, Minera Yanacocha applied to the Peruvian Supreme Court for the annulment of the Court of Appeal's ruling and continued to harass Máxima Acuña and her family. On 3 May 2017 the Supreme Court acquitted Máxima Acuña. According to her lawyer, Mirtha Vásquez, director of the human rights organisation Grufides, Minera Yanacocha had been unable to prove that the land belonged to them. From the outset, the mining company had used strategies based on bluff, intimidation and violence.

Máxima Acuña has become a symbol of resistance against the multinationals throughout Latin America. In 2016 she was awarded the prestigious Goldman Environmental Prize.

1.4. Arbitral tribunals

Since the 1990s a plethora of trade deals and free-trade agreements has contributed to a dramatic expansion of the power of the multinationals. The Investor-State Dispute Settlement (ISDS) mechanism, which is included in many free trade agreements, enables a multinational corporation to challenge a host State that takes a political decision that is contrary to the corporation's interests. This instrument is intended to limit the legal risks to which corporations are exposed when investing in a foreign country. Investor-State disputes are dealt with by an arbitral tribunal, a private tribunal tasked with resolving the dispute. Most disputes are handled by the International Centre for Settlement of Investment Disputes (ICSID), an institution that is part of and funded by the World Bank[13]. In most cases the tribunal consists of three arbitrators (generally corporate lawyers) who are selected on a case-to-case basis, one by the company, one by the host State and the third by both parties or by the Secretary-General of the ICSID[14].

Both the numbers of disputes administered by the ISDS and the sums being claimed by the investors are on the increase. Most of the complaints are filed against governments of developing or emerging countries, for whom the lawsuits prove very costly. A study carried out by journalists from De Groene Amsterdammer and Oneworld[15] revealed that on average an ISDS procedure costs eight million dollars (excluding the compensation to be paid in the case of being found liable).

Unlike the public judicial system, this private system for the resolution of disputes is obscure and there is no right of appeal, even if the fines to be paid by the host State amount to billions, if not tens of millions, of dollars[16].

The threat of legal action inevitably tends to restrict the host States' policy space and to inhibit the adoption of measures designed to serve the public good and protect the rights of its citizens (environmental protection, banning the exploitation of resources etc.).

Photo: Mass demonstration against mining operations in El Salvador

When multinationals attack host States: the case of Pacific Rim/ OceanaGold[17] against El Salvador

For several years the Canadian mining company Pacific Rim tried to gain access to gold deposits in the North of El Salvador. On 15 June 2009 Pacific Rim filed a case at the ICSID demanding compensation from the government of El Salvador for the alleged loss of millions of dollars in potential profits because the country had refused to grant permits to start digging in a mining project in the department of Cabanas (one of the poorest departments of El Salvador according to the Atlas of Poverty). The government had withheld the permits on the grounds that Pacific Rim had failed to respect the requirements of El Salvador's environmental legislation.

After eight years the final toll is heavy: five environmental defenders were killed in the course of the social conflict resulting from the dispute between the State and the multinational and the government of El Salvador had had to invest over 13 million dollars in order to defend itself against a company that had never complied with El Salvador's environmental standards.

In October 2016 the ICSID finally decided in favour of El Salvador and ordered Pacific Rim/OceanaGold to pay the Salvadoran government 8 million dollars, a sum that does not even cover the country's defence costs. Even so, no payment has yet been made by the company.

Saul Banos, Director of the Salvadoran NGO FESPAD (Foundation for the Study of the Application of the Law), a partner organisation of ASTM.

[13] ISDS mort vivant, Corporate Europe Observatory
[14] https://icsid.worldbank.org/en/Pages/process/Number-of-Arbitrators-and-Method-of-Appointment-Convention-Arbitration.aspx
[15] https://www.bastamag.net/1-5-Quand-des-multinationales-s-attaquent-aux-Etats-pour-accroitre-leurs
[16] https://www.bastamag.net/Quand-les-Etats-meme-democratiques-doivent-payer-de-gigantesques-amendes-aux
[17] Pacific Rim was bought in 2013 by the Australian mining firm OceanaGold

2. THE NEED FOR A LEGALLY BINDING INSTRUMENT

In the face of these problems that transcend national borders, various national and international initiatives are underway with a view to holding the multinationals and their value chains accountable.[18]

[18] A value chain consists of all the companies involved in the production process, from the raw materials up to the finished product. It includes the following stages: the definition, manufacture and distribution of the product as well as strategic positioning (brand, marketing, …)

2.1. Corporate social responsibility: voluntary measures are not enough

In order to take better account of the potential impact of their activities, many European multinationals have adopted codes of conduct or introduced Corporate Social Responsibility (CSR) programmes. While welcoming these initiatives, some of which are very positive, we have to note that these voluntary measures have not prevented the continuation of human rights violations globally. CSR is based on voluntary commitments and does not in any way change the socio-political and economic power balance in play at the global level .

While many companies have adopted responsible practices, others continue to violate human rights and there is no guaranty that they will gravitate naturally towards CSR. Furthermore, there is no shortage of examples of "Greenwashing"[19] that show that certain companies see CSR as part of their communications strategy rather than a genuine ethical approach. In order to ensure that the rights of all those affected by the activities of a company are respected, a legally binding instrument is therefore needed.

THE LIMITS OF CSR: WILMAR'S BROKEN PROMISES

Palm oil is the world's most widely used vegetable oil. It is found in every second product in the supermarket. Wilmar International is the largest palm oil trader and producer in the world, but has been criticized for many years on account of its illegal forest fires, the destruction of peatlands and land grabbing. In 2013, bowing to public pressure, Wilmar committed to eliminate deforestation and any activities that could be considered human rights violations from its supply chain by December 2015 as part of its corporate responsibility policy.

However, a study published by Amnesty International in 2016 entitled "The Great Palm Oil Scandal"[20] revealed labour exploitation on Wilmar's palm oil plantations as well as on those of its suppliers in Indonesia. The human rights organisation recorded serious human rights violations: children under 15 years of age working on the plantations, hazardous practices that endanger the health of the workers and payment of salaries below the legal Indonesian minimum wage. Some workers were paid on a piecework basis for work that is physically highly demanding and often had to meet impossible daily targets. As a result, some people were working twelve hours a day, seven days a week for a salary below the minimum Indonesian wage, which is already very low.

In 2017, following Amnesty's investigation, Wilmar announced that it would take new measures regarding working conditions on its plantations[21]. This example shows that regrettably voluntary commitments are often insufficient.

[19] Greenwashing is the practice by a company of conveying a distorted presentation of reality to the public in order to present an environmentally and/or socially friendly image.

[20] https://www.amnesty.org/fr/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/

[21] https://business-humanrights.org/fr/wilmar-international-dit-qu%E2%80%99il-prendra-des-mesures-pour-am%C3%A9liorer-conditions-de-travail-dans-ses-plantations

2.2. A propitious international climate for the introduction of binding regulations

In recent years significant initiatives have been taken at international level to address the need to make the multinationals accountable.

2.2.1. United Nations Guiding Principles on Business and Human Rights

The Guiding Principles on Business and Human Rights were adopted unanimously by the United Nations Human Rights Council in June 2011. These Guidelines, proposed by Professor John Ruggie, are based on three pillars. Firstly, they oblige States to protect their citizens from human rights abuses by third parties, including multinational corporations. Secondly they require multinational corporations to respect human rights by putting in place due diligence procedures, which means that they must assess actual and potential human rights impacts, take appropriate measures and report openly on the measures taken with regard to these impacts[22]. Thirdly they underline the necessity for effective access to remedy or compensation measures. The Guiding Principles extend the responsibility of businesses to include all the activities in the value chain.

While the Guiding Principles have created significant international momentum, their application is based on the political will of each State, which restricts their effectiveness. In many countries various initiatives are underway seeking to make partial aspects of the Guiding Principles binding[23]. States now need to draw up national action plans to make the Guiding Principles operational. Luxembourg could take the opportunity of developing a national action plan in order to create a binding instrument in Luxembourg, thus reinforcing the respect of human rights in its legislation.

2.2.2. The OECD Guidelines for Multinational Enterprises

The OECD Guidelines for Multinational Enterprises were adopted in 1976 and revised in 2011, when a chapter on human rights was also incorporated. The Guidelines consist of a catalogue of recommendations for responsible business conduct, including in the field of human rights. Signatory governments to the OECD Guidelines (including Luxembourg) are required to apply them, but they are not directly binding for companies. National Contact Points (NCP), agencies established by each adhering government, are required to promote and implement the Guidelines. Among other things they can deal with complaints about the failure of business enterprises to comply with the Guidelines. Between 2000

and 2015 the NCPs handled at least 250 complaints introduced by communities, private individuals or NGOs. The primary role of the NCPs is one of mediation. A recent report by OECD Watch[24] found that in the case of most complaints the NCPs do not succeed in improving the performance of the companies concerned or in ensuring access to remedy for the victims.

2.2.3. Progress at European level

At European level, the European Commission called on the Member States to transpose the UN Guiding Principles into national law in an opinion published on 5 December 2012. The Commission stressed the importance of human rights due diligence, particularly in the case of high-risk regions or sectors, for instance in the case of minerals from conflict-affected areas, land confiscation or in areas where labour laws do not guarantee sufficient protection of workers' rights.

In March 2016 the Council of Europe adopted a recommendation to the Member States encouraging them to pass laws obliging companies in certain circumstances to exercise due diligence[25] in conformity with the UN Guiding Principles[26].

In May 2016 the national parliaments of eight EU States called on the European Commission to initiate a legislative procedure placing EU companies under a duty of care27 in order to prevent or remedy the serious abuses of human, social and environmental rights28. The so-called "green card initiative" is a procedure that enables national parliaments to propose new legislative or non-legislative initiatives to the European Commission. The initiative in question reflects the desire for a European initiative based on the example of the French Law imposing duty of vigilance on multinationals; the Bill was presented to the National Assembly on 11 February 2015 and adopted on 21 February 2017 (see below). The initiative was launched by the national parliaments of the following States: Estonia, Lithuania, Slovakia, Portugal as well as the UK House of Lords, the Netherlands House of Representatives, the Italian Senate and the French National Assembly.

2.2.4. The Inter-Governmental Working Group for the elaboration of an international treaty

In June 2014 the UN Human Rights Council adopted a resolution sponsored by Ecuador and South Africa establishing an intergovernmental working group with a mandate to elaborate "an international legally binding instrument on multinational companies and other business enterprises with respect to human rights".[29]

(Photo): Demonstration organised by the global campaign "Dismantle Corporate Power and Stop Impunity"

© Global Campaign Dismantle Corporate Power and Stop Impunity

The working group met for discussions in two sessions in 2015 and 2016. A preliminary draft of the Treaty will be presented by Ecuador during the third session, which will take place from 23 – 26 October 2017.

The Treaty Alliance[30], a coalition of over 900 civil society networks and organisations around the world, plays an active role in this process, contributing concrete written and oral proposals.

[22] Principle 17 of the UN Guidelines
[23] http://Konzern-initiative.ch/wp-content/uploads/2016/10/FS2_F_Online.pdf
[24] OECD Watch, Remedy Remains Rare, An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct, June 2015, https://www.oecdwatch.org/publications-en/Publication_4201
[25] http://konzern.initiative.ch/wp-content/uploads/2016/10/FS2_F_Online.pdf
[26] Face à l'impunité des multinationals, l'Europe avance, http://forumci-toyenpourlarse.org/wp-content/uploads/2016/10/impunite_multinationales_Europe_avance.pdf
[27] According to Amnesty International duty of care would constitute the mandatory form of due diligence.
[28] http://konzern.initiative.ch/wp-content/uploads/2016/10/FS2_F_Online.pdf
[29] http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx
[30] http://www.treatymovement.com/alliance-pour-un-traite-1/

2.3. National and regional initiatives to make the multinationals accountable

In Europe various countries and regions have already taken measures to strengthen their national legislation to protect people from abuses committed by multinational companies.

2.3.1. France: The French Corporate Duty of Vigilance Law

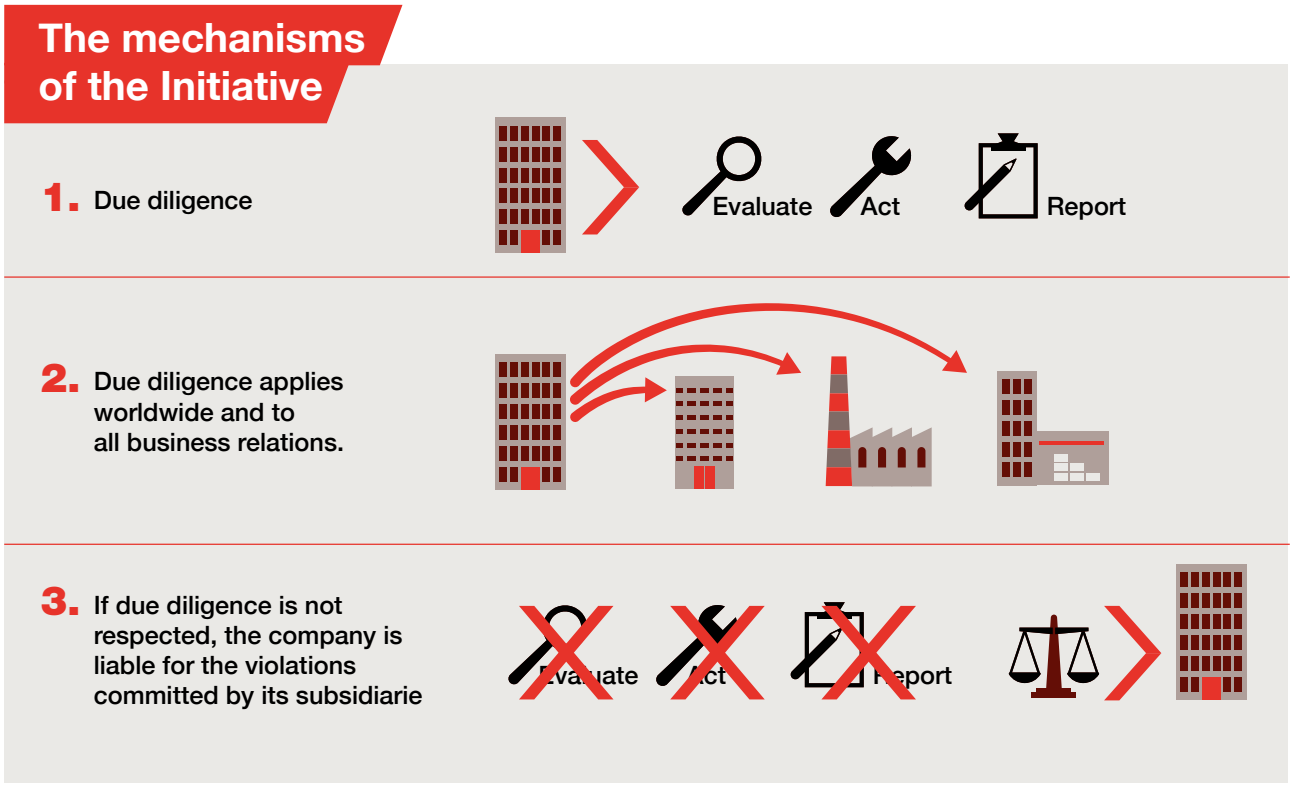
On 21 February 2017 the French National Assembly adopted the "French Corporate Duty of Vigilance Law". This was a milestone in the fight against the impunity of multinational companies. The Law seeks to prevent serious violations of human rights and damage to the environment resulting from the activities of large companies, their subsidiaries, subcontractors and suppliers. From now on, parent and outsourcing companies are obliged to draw up and implement a vigilance plan[31]. A French judge could be asked to compel companies to publish and implement their plan. A company could be made accountable should it fail to adhere to the new requirements and the judge could sentence it to repair any damages caused.

However the Law also has a number of limitations, particularly with regard to the size of the companies affected by the Law[32]. Furthermore, the onus is on the victims to prove that the harm caused is the result of the company's failure to respect the requirements imposed by the Law. Human rights organisations consider that it would have been fairer and more just if the more powerful party, i.e. the multinational company concerned, had to prove that it had done everything in its power to avoid the harm caused. Finally, the law does not provide for a control body to monitor the implementation of vigilance plans; a role that will therefore have to be assumed by civil society.

This Law is the result of a lengthy legislative process and years of campaigning by civil society. It makes it possible to finally lift the veil of autonomy of legal personalities and clearly recognizes the existence of a responsibility between parent companies and their subsidiaries and between the outsourcing companies and their subcontractors and suppliers.

2.3.2. Switzerland: The Responsible Business Initiative[33]

Following a petition launched in 2011 denouncing the ineffectiveness of voluntary measures taken by the multinationals to protect human rights, a coalition of 84 Swiss civil society organisations launched a federal popular initiative in 2015. The popular initiative was formally submitted in October 2016 after 120 000 signatures had been collected from Swiss citizens. The initiative aims to make companies operating from Swiss territory, whose activities violate human rights abroad, accountable for their activities. The initiative is based on the belief that the multinationals must respect internationally recognized human rights and environmental standards. Furthermore, they must fulfil reasonable due diligence, which consists in assessing the existing and potential consequences of their activities, taking appropriate measures to prevent any violation of human rights and reporting on the measures taken. These mandatory requirements also apply to companies controlled by the



Due diligence is the central element of the Responsible Business Initiative in Switzerland

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parent company and all their business relations. Thus if a company controlled by a Swiss multinational commits human rights violations, the parent company may be held responsible unless it can prove that it had fulfilled its due diligence obligations correctly. The text of the initiative is to be discussed in Parliament shortly and a vote will be taken on it by referendum between 2018 and 2019.

2.3.3. Catalonia: An impact assessment centre for Catalan businesses[34]

In November 2016 the Catalan Parliament approved a proposal to create a "Impact Assessment Centre of Catalan Businesses Abroad" *(Centro de evaluación de los impactos de las empresas catalanas en el exterior*), an initiative brought forward by a group of civil society organisations.

This initiative makes Catalonia a pioneer region in terms of the defence of human rights. The Centre will be an independent institution, accountable to civil society and to the Catalan Parliament and Government. Its mandate is to investigate allegations of human rights abuses committed by Catalan firms and to help affected communities to obtain access to justice.

It will also ensure that human rights criteria are included in public procurement procedures at the various levels of the Catalan administration, that there are restrictions on the amount of public support given to Catalan companies that fail to respect human rights and that strict human rights criteria are applied to support given for the internationalisation of Catalan companies.

[31] The plan contains due diligence measures intended to identify risks and prevent serious violations with respect to human rights and fundamental freedoms, the health and safety of persons and the environment. The vigilance plans and reports on their implementation in the course of the preceding year must be made public and included in a company's annual report.

[32] Companies headquartered in France that employ more than 5 000 employees, subsidiaries based in France belonging to companies headquartered in France with over 10 000 employees, subsidiaries based in France belonging to multinationals whose headquarters are not in France but which employ over 10 000 employees. German text is different!!

[33] http://konzern-initiative.ch/?lang=fr

[34] http//konzern-initiative.ch/?lang=fr

3.

THE NEED FOR A LEGALLY BINDING INSTRUMENT IN LUXEMBOURG

The evolution of the economic landscape and the increasing importance of the role of multinational corporations in the past two decades have led to a governance gap between the economic reach of the multinationals and the legislative framework that applies to them. It has become difficult to monitor internationally fragmented and often opaque production chains, with the result that one area of global economic activity is today beyond the control of individual nation States. As a result of this legal vacuum, serious human rights abuses committed by multinational corporations against the peoples of countries in the Global South often remain unpunished. The time has now come to put an end to these unacceptable practices, which are incompatible with our code of ethics, by making the necessary changes to the legal framework.

While a large number of companies show exemplary behaviour in terms of social responsibility, it is difficult for them to claim credit for their efforts as long as others continue to make their profits while flouting labour laws and human rights. A binding legal framework on human rights would make it possible to end the global race to the bottom in terms of social standards, which not only leads to human rights violations, but also has a negative effect on our economy and small and medium-sized businesses in Europe. These practices act as a break to human and economic development both in the countries of the Global South and in the North.

Luxembourg has ratified the United Nations human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It has also ratified the eight fundamental conventions of the International Labour Organization. Furthermore, the UNO and the European Union have called on European countries to transpose the United Nations Guiding Principles into national law. Since human rights are universal, Luxembourg must guarantee that Luxembourg-based multinationals ensure the same level of human rights protection in countries overseas as they do at home.

Furthermore, Luxembourg has committed itself to achieving the 17 Sustainable Development Goals of the 2030 Agenda. These objectives include the eradication of extreme poverty, promoting decent work and protecting the planet. The prevention of human rights violations by multinational companies operating overseas constitutes an integral part of the implementation of the sustainable development goals.

In order for Luxembourg to honour its commitments in terms of human rights and sustainable development, it would, therefore, have to adapt its legislation in order to address the current challenges with regard to human rights. This would make it possible to bolster Luxembourg's legislation to prevent human rights abuses being committed overseas by multinationals operating from Luxembourg.

The Rana Plaza disaster cost the lives of 1,129 people. Most of the Bangladeshi subcontractors worked for well-known Western clothing brands. This disaster along with numerous other cases of human rights violations directly linked to the activities of multinational corporations challenge European countries to pass legislation to prevent such dramatic situations occurring again in the future. The pursuit of economic interests and respect for human rights are not mutually exclusive. By introducing duty of care for the multinational corporations based in Luxembourg, the Grand Duchy would have a binding preventative framework and would be able to guarantee access to justice for the victims in cases where duty of care is not observed.

At present the European and international climate is favourable to holding the multinationals accountable. Other European countries are working towards the adoption of binding rules in their national legislation. The moment therefore seems propitious for Luxembourg to adapt its legislative framework.

By adopting binding standards Luxembourg would no longer be at risk of attracting irresponsible companies looking for unregulated spaces. It would also prevent the image of our country being tarnished by the bad practices of certain companies. The Grand Duchy would be sending out a clear message that it will only accept companies that act responsibly. Luxembourg is keen to play a key role in the world economy and should therefore set a good example as a driving force for the respect of human rights in business at both European and international level.

ASTM
calls on Luxembourg to:

■ **Establish binding standards obliging multinationals based in the country to prevent human rights abuses and environmental damage and to take responsibility for harm caused by their activities throughout their value chains. A control body must be set up to monitor the implementation of these standards.**

■ **Support the initiatives taken at European and international level with a view to making the multinationals accountable, in particular:**
☐ The Green Card initiative launched by eight European Union national parliaments calling on the European Commission to develop duty of care legislation to be applied to European businesses in order to prevent and where necessary remedy serious abuses in the field of human, social and environmental rights resulting from their direct or indirect activities.
☐ The adoption by the UN member States of a strong and effective binding international treaty on business and human rights.

Facts & figures:

While over **85%** of all **multinational corporations have their headquarters in the Global North**, most of the peoples affected live in countries in the Global South. (Source: CETIM)

In 2015 the world's top **10** corporations had a combined revenue of more than that of the 180 poorest' countries combined. (Source: Global Justice Now)

According to a recent report by the NGO Global Witness entitled "Defenders of the Earth" **the number of human rights and environmental defenders murdered has doubled in 5 years, reaching over 200 in 2016.** 40 % of the defenders killed were members of indigenous communities. According to information obtained by the NGO, most of the killers had been hired by multinational corporations or by governments.

There are over **70,000** multinationals in the world. However, unlike national states, they remain outside the international human rights regulatory system.

In 2017 France was the first country to adopt a binding law making it possible to hold the multinationals accountable for human rights violations and harm done to the environment resulting from their activities.

In 2015 **69** **of the world's top 100 economic entities** were multinational corporations rather than countries. In 2014 multinationals accounted for 63 of leading economic entities. (Source: Global Justice Now)