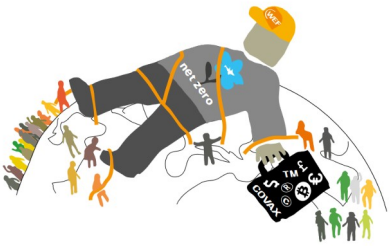
Global Campaign to RECLAIM PEOPLES SOVEREIGNTY, DISMANTLE CORPORATE POWER and STOP IMPUNITY



Neither due nor diligent: The European Union's directive, an insufficient pseudo-regulation

Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and Stop Impunity
25 April 2024

The priorities of the European Union's (EU) external action are set: increase public funds for war and reactivate the military industry, continue building "fortress Europe" through the externalisation of borders, and push for new trade and investment agreements to access and extract natural resources essential for the development of green and digital capitalism. In this context, the EU's agenda is to protect the interests of large European transnational corporations (TNCs) while offering largely ineffective pseudo-regulation of their operations.

This is where the EU Directive on Due Diligence comes into play. It is presented as an instrument to oblige European transnational corporations to comply with human rights in their activities around the world by self-regulating. After four years in the pipeline, the Directive was finally approved on 24 April 2024 by the European Parliament, and poses more problems than solutions to the issues it claims to address.

Due diligence is legal sophistry devoid of effective content

For the Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Corporate Power and Stop Impunity, the text of the EU Directive, with its legal framework being built around the notion of due diligence, is problematic in many respects. Although it may appear to be a step in the right direction for human rights protections and corporate accountability, we believe the Directive to be deeply misleading. It hinders decisive progress toward both establishing effective mechanisms to end the impunity of TNCs and providing effective access to justice and reparations for those affected along the global value chains controlled by TNCs and of which they are the main beneficiaries. It is a soft, harmless directive, based on corporate self-regulation, historically proven to benefit TNCs at the expense of peoples and the planet.

The Due Diligence Directive is presented as a binding standard, claiming to oblige companies to adopt prevention plans in which they identify risks and develop measures to prevent human rights violations and environmental damage being committed throughout their value chains. However, the Directive leaves a great deal of freedom to companies to define the content of these plans, hampering their effectiveness. Similarly, the companies themselves (or the auditors they subcontract) will, in the end, make the periodic evaluations of their action plans. In this way, the Directive echoes the paradigm of self-regulation that has dominated the regulatory agenda of business and human rights for at least 15 years.

In addition, sanctions and civil liability for violations will only apply when socio-environmental impacts are proven in the absence or failure of prevention plans. Further, if violations cannot be proven to have been caused by failures in the content and/or implementation of the plans, the company cannot be held liable for the damages that have occurred. And as to whether natural persons (managers) or legal persons (companies) can be held criminally liable for human right violations, the Directive simply has no mention. This is compounded by the problem of the burden of proof, placing the responsibility of providing evidence of violations entirely on the affected persons and the organisations or trade unions that might work alongside them.

Another fundamental gap in the Directive is that it does not guarantee transparency and rights of access to information related to the socio-environmental impacts of transnationals, limiting access of such information to private auditors appointed and accountable to the company itself. This implies a significant risk that such authorities will give the go-ahead to business and prevention plans without consulting affected persons or otherwise conducting an investigation on the ground in the jurisdictions where the TNCs' operations occur. This could then make it even more difficult to prove the failures of said TNCs to comply with their plans thereby guaranteeing corporate impunity by not ensuring real access to justice.

Due diligence seeks to be the normative ceiling, preventing the advancement of normative approaches based on human rights

We are faced with a discursive shift that consists in positioning due diligence as a binding framework which would be the normative horizon that all countries should pursue, thereby discouraging other truly effective regulatory frameworks.

In this context, due diligence may weaken other standards which are currently being negotiated in other forums. The effect is that, instead of requiring TNCs to comply with international human rights law, they will be required only to institute prevention mechanisms based on due diligence. In fact, regulations and policies are being developed at the European level that further lower environmental, social and fiscal control measures for TNCs. Due diligence appears in this context as the main regulatory instrument and as the ceiling of what is possible, when in reality it does not require the creation of effective legal mechanisms that encompass not only prevention but also obligations to respect fundamental rights.

Let us be clear: risk plans based on prevention are perfectly legitimate. However they cannot be the only tool for controlling corporate operations. Due diligence measures would be acceptable if they were to be inserted into a framework law that included other additional elements, such as: Direct obligations for TNCs and the financial institutions backing them, separate and independent from the obligations already imposed on States; mechanisms of joint and several liability along value and production chains; clear sanctions and a regime of administrative, civil and criminal legal liability in the event of human rights violations; primacy of human rights over trade and investment agreements and rules; mechanisms to guarantee effective access to remedy and justice (see the proposal of the Global Campaign for an International Tribunal).

Another type of regulation is possible

Regulation based on the principle of due diligence is a far cry from what we have been demanding for the last two decades as the Global Campaign. It actively ignores the demands of the majority of social movements and platforms that advocate for strict public control of TNCs as an indispensable measure to confront the polycrisis we face. Ten years ago, an important space for struggle began with the adoption of Resolution 26/9 by the UN Human Rights Council, which gave impetus to the process of drafting a legally binding instrument on transnational corporations and human rights, in the form of a Binding Treaty. The instrument is aimed at promoting norms that are not only obligatory but, above all, effective in confronting corporate impunity.

In addition to the advocacy work to advance the elaboration of the Binding Treaty, the Global Campaign also promotes national regulatory and legal accountability frameworks to tackle corporate impunity.

We have already seen that when corporate profits, energy supply or banks' liquidity needs are at stake, States are more than willing to change the rules in order to address the situation. For the right to protest, States do not hesitate to reform criminal codes and enact citizen security laws; for the right to profit, however, codes of conduct, "social responsibility" programmes and due diligence standards are promoted. It is not a question of legal technique: if human rights are not put before the rights of corporate power, it is because the political will is lacking or actively influenced by the corporations who stand to profit. Legal subterfuge such as due diligence, coupled with the injustices accumulated from colonialism to the present day, subjugate the peoples and most countries of the Global South to the dictates of the corporate power elites of the Global North and their political allies. The multiple setbacks that occurred throughout the negotiation of the EU Directive demonstrate, once again, that European leaders are more concerned with listening and pandering to the TNC lobbies than with fulfilling their duty to defend the general interest and protect the rights of peoples and the planet.

In conclusion, we believe that any regulatory framework for TNCs should be guided, politically and technically, by a human rights based approach. This requires a legal liability framework which is independent of due diligence. In this framework, prevention cannot be reduced to a mere formality and must include obligations of results (not to violate human rights) and not of means (to develop a risk plan). In other words, and as we have repeated many times, due diligence cannot exempt TNCs from legal liability for human rights violations. Due diligence is not a tool which is truly at the service of affected communities, but one among other sterile existing instruments grounded in the evasive strategies of powerful entities.

The Global Campaign will continue the struggle for a strong and effective binding instrument on transnational corporations and human rights, and for the adoption of national frameworks that promote effective responses to corporate impunity, in the continued struggle for people’s sovereignty.