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**Friends of  
the Earth  
International**

BELA - FoE Bangladesh vs Ship Wrecking (by Andreas Ragnarsson)

**this paper outlines the official contribution of Friends of the Earth International (FoEI)<sup>1</sup> to the second session of the open-ended intergovernmental working group on Transnational Corporations (TNCs) and other business enterprises with respect to Human Rights (IGWG), taking place on 24-28 October 2016, in Geneva**

## introduction

FoEI has welcomed resolution 26/09 at the 26th session of the United Nations Human Rights Council (UNHRC) in 2014, which calls for an international legally binding instrument on TNCs and other business enterprises with respect to Human Rights<sup>2</sup> (hereafter referred to as UN Treaty). Ever since, we have engaged in the process<sup>3</sup>, advocating proposals within national and regional coalitions as well the international Treaty Alliance<sup>4</sup> and the global Campaign to Dismantle Corporate Power<sup>5</sup>.

Hereby we outline the essential components that we believe are needed for a binding UN Treaty to bridge the historic gaps in the international Human Rights' system, provide access to victims and bring corporations to justice. Our arguments are based on concrete experiences from member groups across our federation. They demonstrate a pattern of impunity for TNCs, of which operations result in environmental crimes and systemic Human Rights violations. They highlight how victims and Environmental and Human Rights Defenders (EHRDs) suffer the cumulative impacts of this pattern and make the case for the process to put victims and EHRDs at the centre of the process<sup>6</sup>.

We call for this second IGWG session to allow further in-depth discussions on concrete provisions and mechanisms in a future Treaty and for UN member states to act and engage constructively.

## 1. scope and nature

### a) all human rights and all human rights violations

The UN Treaty should embrace all Human Rights. It should include civil and political rights (CPR)<sup>7</sup>, economic, social and cultural rights (ESCR)<sup>8</sup>, labour rights and rights in relation to living conditions, education, health, housing, access to information as well as rights of migrants, refugees and Indigenous

Peoples. It must include the set of rights related to the environment already established by international or national laws - such as right to food, to water, to a healthy environment - and build the space to define and recognize other collective rights under international law - such as peasants rights, rights of affected peoples, rights of climate refugees.

The Treaty should not establish a hierarchy between these rights, and rather seek to include them all and provide a space to advance on Human Rights struggles. Furthermore it should explicitly recognize the primacy of Human Rights<sup>9</sup>.

A binding Treaty should go beyond the scope of the Rome Statutes of the International Criminal Court (ICC)<sup>10</sup>. We therefore welcome the recent announcement about the potential extension of ICC mandate to include "crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land"<sup>11</sup>, and recognize other jurisdictions initiatives.

### *the African Union experience of extension of "international crimes"<sup>12</sup>*

In addition to "conventional crimes", the Maputo Protocol amending the Statute of the future African Court of Justice, Human Rights, and Peoples extends the jurisdiction of the Court to ten other crimes, including the smuggling of hazardous waste (Article 28 L) and the illicit exploitation of natural resources (section 28L bis). Moreover, according to Article 28 paragraph 2: "The Conference may extend, on consensus of the States Parties, the Court's jurisdiction to other crimes to reflect the development of international law." Paragraph 3 states that "The crimes within the jurisdiction or devolution to the Court should not suffer any limitation."

The Treaty should aim to advance both on civil and criminal law, in which both transnational corporations' liability and systemic environmental crimes are still to be incorporated. This is necessary because Human Rights' violations as a result of TNCs operations have been systematically repeated across countries and contexts, becoming commonly accepted or even sometimes promoted by states and institutions. Some of those violations would hardly be considered "gross violations" to be dealt by criminal law, but they still need to be recognized and the responsibility of corporations and states under the international Human Rights law needs to be defined.

**Philip Morris violates Human Right to health in Uruguay<sup>13</sup>**

In 2010, tobacco transnational Philip Morris filed a \$25 million investor-state claim at the International Centre for Settlement of Investment Disputes (ICSID) following Uruguay's introduction of anti-tobacco measures. In July 2016 arbitrators ruled in favor of Uruguay, ordering Philip Morris to reimburse \$7 million in legal costs.

However Uruguay will still have to pay a further \$2.6m in financial costs, not even accounting for the non-material resources mobilized to ensure its defense over the six-year legal battle. Those resources have put the implementation of an essential public policy at risk. Moreover the very fact that Philip Morris could initiate a claim in a private tribunal because of public health measures contradicts the UN framework convention on tobacco control – the only binding multilateral convention on public health.

The UN Treaty should guarantee that the Human Rights framework (the UN Tobacco Control Framework convention in this case) is superior to, and should be enforced over, trade and investment treaties.

**ArcelorMittal violates the right to access information in South Africa<sup>14</sup>**

On June 2015, people's environmental rights in South Africa prevailed against multinational steel manufacturer ArcelorMittal SA (AMSA), when the local activist group Vaal Environmental Justice Alliance (VEJA) was given access to AMSA's 7,000-page environmental "Master Plan". This followed a long legal case of VEJA and the Centre for Environmental Rights supported by ground-work – Friends of the Earth South Africa) to disclose the document.

In November 2014, the Supreme Court of Appeal confirmed an earlier judgment of the High Court, despite AMSA's appeal. It ordered AMSA to release the "Master Plan" and other records and to pay VEJA's legal costs, pointing to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between its shareholder communications and its conduct. The legal battle lasted 12 years.

The UN Treaty should affirm the public right of access to information and include the obligation for TNCs to comply with international transparency obligations wherever they operate. Affected communities and civil society groups should not be burdened with heavy loads of long court cases to enjoy their rights to know and to "an environmental that is not harmful to their health or wellbeing".

**b) focus on transnational corporations (TNCs) and supply chains**

TNCs are currently not directly obliged by legally binding rules to respect Human Rights and cannot be held accountable as juridical persons for Human Rights violations. The Treaty should establish the civil and criminal responsibility of TNCs and their executives in order to close the current gap in international law.

The proposed Treaty should also apply to all TNCs' subsidiaries and business relationships, including all companies in global supply chains (i.e. subcontractors and financiers) that perpetrate, or are complicit in Human Rights violations. All too often the responsibilities of financiers in the chain of operation are forgotten (see example in box below).

The Treaty should require States to provide legal liability (civil and criminal) in their national jurisdiction for both TNCs and their executives (CEOs, managers, administrative board), based on the principle of double indictment.

The international standards, obligations and enforcement mechanisms of the Treaty should be applicable through appropriate means, wherever Human Rights are violated because of corporate operations, and they should provide access to remedy for all victims in the place where they occur.

**EU and US financiers of Wilmar and Bumitama Palm oil companies should be held accountable for peat land fires in Indonesia<sup>15</sup>**

In August and September 2015, fires in the forests and peatlands of Sumatra and Kalimantan caused 23 deaths and impacted 45 million people in Indonesia and neighboring countries by releasing 61 megatons of greenhouse gases. Research conducted by Friends of the Earth groups into five palm oil plantations in Central Kalimantan that belong to Wilmar International and BumitamaAgri Ltd. showed that, despite companies having adopted voluntary policies prohibiting burning, deforestation, and exploitation of peatlands, they appear to have violated national laws and their own voluntary guidelines. This includes violating the human right to health and to a healthy environment, allowing the destruction of high carbon stock areas, and taking insufficient measures to prevent forest fires in their plantations.

According to the national forest law no. 41/1999 article 49,3 companies are legally responsible for fires within their concessions, recognizing that accountability and legal liability rest ultimately with the concession owners, such as Wilmar and Bumitama. In this case, financiers of the companies based in the UK, Netherlands, France, the United States, and other countries should also be obliged to respect Human Rights.

The UN Treaty should apply to companies and financiers found in breach of environmental and Human Rights laws in the whole supply chain, allowing charging them with criminal and financial sanctions.

**c) direct obligations on TNCs and reinforcement of States' Extra Territorial Obligations (ETOs)**

A central point of the future Treaty should be the establishment of direct obligations on transnational corporations and other businesses to *respect* Human Rights, as well as reinforcing States' Extra Territorial Obligations (ETOs) to *respect, fulfill and protect* Human Rights, especially those ETOs clarified by the Maastricht Principles regarding transnational corporations operation<sup>16</sup>.

**2. content and provisions****a) environmental crimes and Human Rights violations resulting from cumulative impacts of TNCs operations**

In order to deliver legal responsibility for TNCs guilty of environmental crimes<sup>17</sup> and systemic Human Rights violations resulting from their operations, the UN Treaty must:

- establish penalties as well as economic and administrative sanctions for companies – for example the revocation of environmental license and the suspension of operational permits and public funds – and mechanisms to guarantee they redress, compensate, restore peoples livelihoods and clean-up the environment<sup>18</sup>.
- address the cumulative impact of TNCs' operations on the environment such as their historic responsibility in climate change and related Human Rights violations, as well as repeated or irreversible environmental crimes.

**cumulative impacts of Oil Giants in Nigeria<sup>19</sup>**

Since the extra-judicial killing of Ken Saro Wiwa and eight other activists against Shell on November 10 1995, over 5,000 other Ogonis have died in repressive military actions and in oil instigated violent conflicts. The historic impact of Shell, Chevron, Eni, Total and other TNCs operating in the Niger Delta in impunity is severe on people and the planet. Gas flaring continues and, between 1976-2001, at least 6,817 oil spills were recorded<sup>20</sup>, an estimated average of one Valdez per year, or 500,000 barrels spilled annually. Mangroves, swamps, forests and rivers are polluted. About 1.8 billion cubic feet of gas is flared daily resulting in 45.8 billion kw of heat released into the atmosphere contributing to global warming and climate change.

UNEP's Ogoni Environmental Assessment report recorded benzene in drinking water 900 times above WHO standards and stated that the cumulative environmental degradation "exerts a significant environmental stress on Ogoniland"<sup>21</sup>. Environmental pollution from oil and gas extraction has resulted in lowering farm yields and depleting fish catch. Oil and gas extraction continues under impunity.

**National level measures on Vale and BHP violates the right of affected peoples in Brazil<sup>22</sup>**

The disruption of mining waste dams in the upstream of the Rio Doce basin in November of 2015<sup>23</sup> caused irreversible damage to an entire river basin, resulting in Brazil's worst ever environmental crime. Vale and BHP crime caused 19 deaths and destruction of rural communities 500 km downstream of the waste mining dams in Mariana, affecting water supply of a dozen other municipalities and the means of sustain of more than a thousand fisher folks in the river course and along the Atlantic coast.

In March 2016, an extra judicial agreement was signed between the Union, the States of Minas Gerais and Espírito Santo, the companies SAMRGO and shareholders Vale SA and BHP Billiton for US \$ 7 billion. It violates the right of affected peoples, including indigenous peoples and fisherfolks, to be included in alleged negotiations to restore their environment and livelihoods. In August 2016, the Regional Federal Tribunal of Minas Gerais suspended the agreement. Almost one year after the crime, corporations have not been judged or penalized under civil or criminal law and continue mining operations. SAMARCO have been alerted by technical diligence taken by the Public Attorney in 2013 about the risk of disruption of waste dams used by SAMARCO iron mines above capacity.

TNCs with record of environmental crimes in different countries should be judged by an international impartial court, where the complicity between states and corporations in home countries could be assessed and avoided.

**b) World Court on TNCs and Human Rights**

The future Treaty should establish a World Court on TNCs and Human Rights as a mechanism of international control, enforcement and implementation of binding rules, recognizing the criminal and civil liability of TNCs as legal persons<sup>24</sup>.

The Court should:

- be tasked to accept, investigate and judge complaints against TNCs, States and international financial institutions for Human Rights violations and environmental crimes;
- operate in total independence from UN executive bodies and the corresponding States, its decisions and sanctions being legally binding and fully enforceable;
- be complementary to national, regional and international civil court systems, jurisdictions and mechanisms. It should reaffirm the principles of universal jurisdiction, complementarity and subsidiarity, allowing claims to be made in the countries where Human Rights violations occur, in TNCs home countries, or in third parties states.

Extraterritorial jurisdiction should allow victims of corporate crimes to seek access to justice including but not limited to whenever TNCs, in the host country in which they operate:
 

- take advantage of the weak governance system or operate in complicity;

- are protected by investment treaties;
- raise legal obstacles such as the absence of jurisdiction in the country where victims are;
- allege lack of clear rules in relation to liability for TNCs operating in various locations and under different legal frameworks.

### Lessons from court cases against Shell

In Nigeria the lack of access to justice – including high cost of litigation, problem of *locus standi* or “right to sue”, *sleeping on your right* or non enforcement of rights within a stipulated period (usually short and to the advantage of oil companies), and the preponderance of the *burden of proof* or evidence on the victims - ensures that the status quo is maintained<sup>25</sup>. The experience of Earth Rights Action (ERA) – Friends of the Earth Nigeria shows national court system is hardly independent and also not respected by the big oil TNCs:

*Iwherekan Community versus Shell*: In 2003, the High Court of Justice<sup>26</sup> ruled that gas flaring was illegal and ordered it to be stopped forthwith<sup>27</sup>. To date, neither the oil companies nor the government complied with the court ruling.

*Four fishermen from the Niger Delta versus Shell*: Since 2008 Shell has delayed the case by raising objections on jurisdiction<sup>28</sup>. In December 2015, the court sitting in the Hague ruled in an appeal against Shell that the company has a case to answer over its human rights violations in Nigeria<sup>29</sup>. Yet the substantive case is yet to be dispensed since between 2004 and 2007 when the incident occurred and nine years since the court case began.

*Ekeremor Zion versus Shell*: Following 12 years of legal battles, the lower court granted compensation of about US\$200,000 for oil spills that destroyed local farmlands (May 1997)<sup>30</sup>. Shell appealed. In 2015 the Supreme Court finally upheld the earlier rulings. This case shows how Shell has used the weak court system to delay the judgment for 30 years.

The National Courts, Committees on the Human Rights Covenants and other quasi-judicial and international jurisdictions must accept as part of their mandates the possibility to receive direct complaints and to forward them to the World Court on TNCs and Human Rights.

The regional Human Rights courts can modify their statutes in order to exercise direct control over TNCs. Additionally, States must pass domestic laws that reinforce and regulate their extra-territorial responsibility for the operations of TNCs, as in the case of proposed French Law on duty of care of multinationals<sup>31</sup>.

### c) Public Centre on TNCs and Human Rights

A Public Centre for the control of TNCs must be established at UN level to conduct investigation in support to the World Court and centralize information on cases on TNCs and Human Rights. It would be responsible for analyzing,

investigating claims and testimonies, and inspecting the practices of corporations. It should be composed of a mixed balance of representatives from governments, victims, academics, social and indigenous movements, free of conflict of interest with the corporations targeted. States have a fundamental obligation to guarantee no repetition of violations to victims, EHRDs, and witnesses and take appropriate action to provide remedies for reprisals. The development of comprehensive, constructive, up-to-date and accessible national reports on TNCs on respect to Human Rights is an essential component of monitoring and implementing State compliance with these obligations.

Capacity must be built within the States, in consultation with NGOs, National Human Rights Institutions (NHRIs) and the Office of the High Commissioner for Human Rights (OHCHR), to ensure that reports to the Public Centre for the control of TNCs are timely, focused, and constructive. All branches of government must be involved in the process of domestic implementation of the UN Treaty and States should have in place a wide range of implementation mechanisms, including targeting national magistrates for training related to its implementation.

### d) access to justice and remedy for victims

Access to justice must be possible for all victims of, and people directly affected by, Human Rights violations and impacts of environmental crimes committed by TNCs. Therefore, courts systems must recognize in the first place the political and civil rights of affected communities, in the form they organize, as juridical/legal persons able to fill claims and access justice systems.

### in Mozambique communities affected by coal mining have been denied access to justice<sup>32</sup>

Vale's Moatize coal exploitation project has resulted in direct pollution of soils and water sources and forced displacement of 1,365 families<sup>33</sup>. A claim presented by the association of bricks makers, directly affected by Vale operations and resettlement process, was denied. Other lawsuits brought by NGOs have ended up stuck in courts. No decision has yet been made about the precarious and urgent situation in which communities displaced because of the project are living, and protests have been handled with violence by the company and the police<sup>34</sup>.

Indian company Jindal is also present in the Province. It started operating even before the environmental impact study was approved. To date more than 500 families from the communities of Cassoca, Luane, Cassica, Dzindza and Gulu have already been affected by Jindal, either because of the pollution of the project on the environment, or because of the displacements caused by the project<sup>35</sup>.

The state should have instead guaranteed the experience of affected people by coal mining in the area not to repeat before granting concessions to other mining companies.

### e) States' extra-territorial obligations to protect victims and Environmental and Human Rights' Defenders

States must protect victims and EHRDs and their rights according to:

- Articles 4, 5 and 6 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>36</sup>;
- Article 12 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted in 1999<sup>37</sup>;
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>38</sup>, in cases they are applicable;
- States' extra territorial obligations (ETOs), especially those defined by the articles of Maastricht Declaration 13, the obligation to avoid causing harm, and 25, on bases of protection<sup>39</sup>.

Obligations to protect EHRDs must be included in the process of negotiations on a UN Treaty as well as in relation to any claim brought by victims, EHRDs and whistleblowers to the UNHRC.

### challenging extraterritorial mechanisms in Spain

Since 2010, the communities of Santa Cruz Barillas in Guatemala have opposed the hydroelectric project of Spanish company Ecoener-Hidralia<sup>40</sup>, which lead to human rights violations and political intimidation of resisting community leaders, including political imprisonments<sup>41</sup>. In the absence of binding mechanisms for accountability of Spanish companies regarding human rights violations caused in other countries, the case have been filed at the Inter-American Court, brought by testimonies to the Permanent Peoples Tribunal session in Geneva in 2014<sup>42</sup>, as well as to the Spanish Public Ombudsman in Madrid<sup>43</sup>.

The internationalization of Hidralia's business is supported by the Spanish state and protected by free trade agreements. Home and host states violate environmental, cultural, economic or social rights of indigenous communities in Guatemala. This examples shows that an international binding mechanism under the UN Treaty is as essential as the approval of national level extraterritorial policies<sup>44</sup>.

The UN Treaty should be a legal instrument to oblige States to comply with their ETOs regarding the protection of victims and EHRDs in case of States' direct involvement on public financing.

### Agua Zarca: obligations for home countries of financiers<sup>45</sup>

The murder of renowned activist Berta Caceres and other community leaders of the COPINH movement, who have long resisted the Agua Zarca hydroproject, illustrates the dangers facing activists and social leaders who stand up in front of companies to defend their rights. In Honduras and Latin America these murders are not isolated cases<sup>46</sup>.

Spain, the Netherlands and Finland, as shareholders and home countries of key public financiers of DESA (the company operating the Agua Zarca project) have not acted to avoid or stop funding projects that clearly violate human rights and threaten EHRDs in the region.

In this case, FMO and Finfund considered suspending loans to DESA after being communicated of Berta's assassination, and proposed to carry their own investigation process about possible flaws of the project. At the same time, the CEOs of the financial institutions themselves called on the responsibility of the Honduran government for the pacification of conflicts, a govern-

Spain, the Netherlands or Finland, as the main shareholders of BCIE, FMO and FinFund, respectively, have not been made accountable for their extra territorial obligations in relation to the assassination of indigenous leaders and arbitrary detention of EHRDs and social activists in Honduras.

### protection of EHRDs under the African Human Rights Charter

Further to the United Nations Declaration on Human Rights Defenders<sup>47</sup>, the African Commission on Human and Peoples' Rights has adopted resolutions that specifically address the protection of Human Rights defenders in Africa in the context of its own charter<sup>48</sup>. The Commission has produced a jurisprudence that clarifies the obligations of States in relation to the environment and its defenders.

Centre for Economic and Social rights in Nigeria<sup>49</sup>- the Commission considered that the Nigerian government violated the people's rights by allowing private actors and oil companies affect the well-being of Ogoni people.

Centre for Minority Rights Development in Kenya and Minority Rights Group (on behalf of Endorois Welfare Council)<sup>50</sup> - the Commission considered that the Kenyan state violated the right of the Endorois People by denying the community the right to control and use the natural resources in their traditional land as well as access to an important lake for the life of the community.

According to the Commission, the state not only must act and prevent the people's well being from being affected by oil companies, but it must also refrain from plundering the resources of another state, and thereby to hinder the possibility for its people to have access to their own wealth.

#### f) extra territorial obligations and duties of third parties

All states have extraterritorial duties in relation to companies that are under their jurisdiction and sphere of influence (through incorporation, contracts, operations), regardless of the companies' home country or the place where the Human Rights violations and environmental crimes are committed.

States have to ensure that their conduct does not facilitate or recognize, directly or indirectly, companies that are complicit in, or responsible for breaches of peremptory norms of international law. In addition, States have the obligation to refrain from any conduct that may aid and assist in unlawful policies by third states, including when those policies are implemented by TNCs<sup>51</sup>.

#### Third parties states complicity with Mekorot Water Apartheid in Palestine<sup>52</sup>

Since the 1950s, Mekorot has been responsible for water rights violations and discrimination, diverting the Jordan River from the West Bank and Jordan to serve Israeli communities. Palestinian communities are deprived from access to water, at a level well below the daily 100 liters per capita recommended by the World Health Organization (WHO)<sup>53 54</sup>. Mekorot has denied water supply to Palestinian communities inside Israel, despite an Israeli high court ruling recognizing their right to water<sup>55</sup>.

Third party States, where water public companies operate or have planned to develop partnership with Mekorot, like the Netherlands, Portugal, Argentina, Mexico, Brazil and Paraguay, are called on their extra territorial obligation for the realization of the basic Human Right to water and sanitation and cancelation of partnerships and investments on Mekorot.

#### g) Rights of Affected Peoples

Communities affected by environmental crimes or Human Rights violations are not always recognized either as victims, or as EHRDs. There are many ways communities are, can be, or recognize themselves as affected peoples, resulting from localized TNCs projects or from systemic and cumulative impact related to their operations.

The UN Treaty must develop and fully recognize the rights of affected people and enshrines them in the scope of the future instrument.

#### MOVIAC - Movement of Victims and Affected People by Climate Change and Corporations<sup>56</sup>

El Salvador and the Central American region have been hit directly by phenomena associated with climate change and other environmental problems. The responses proposed by TNCs respond to their own commercial interests and exacerbate the health and environmental impacts.

Under the pretext of improving food production, toxics used in agriculture have caused high levels of pollution of air, water or land, including the loss of human lives and severe illnesses, such as kidney failure or cancer.

Faced with accusations by victims and environmental groups, TNCs respond with systemic violations of human rights, including the criminalization of social struggle and protest, harassment of defenders of nature and in some cases deaths.

The moral, historical and legitimate authority of affected communities must be recognized beyond individual cases - and yet with respect for their individual suffering and their particular context - in order for them to be able to take a stand to access justice and contribute to enhancement of justice systems.

The UN Treaty must ensure the respect the Universal Declaration on Human Rights as well as recognize the Universal Declaration of the Rights of Peoples<sup>57</sup> and create norms and rules to secure communities rights to analyze processes that have an impact on them - as already guaranteed, but not enforced in practice, by the International Labour Organisation Convention 169 and the Declaration on the Rights of Indigenous Peoples, through the right to free prior and informed consent of Indigenous Peoples.<sup>58</sup>

#### 3. process and participation

FoEI believes that the United Nations is currently the most democratic and appropriate global institution for states to lead international negotiations on Human Rights and environmental issues. We therefore support further strengthening of intergovernmental decision making processes within the UN framework - such as the IGWG - making them fully democratic, transparent and responsive to the needs of people. We call for the affected communities and victims of corporate crimes to be put at the centre of the process and fully heard by states developing a UN binding Treaty on TNCs and other business enterprises with respect to Human Rights.

On several occasions FoEI alongside other civil society organizations<sup>59</sup> have expressed deep concerns about the growing influence of major companies and business lobby groups in UN forums. This has been visible from the dominance of

corporate actors in certain UN spaces to the multiplication of partnerships between companies and lobby platforms with UN institutions. In fact, corporate lobbying within UN negotiations has managed to block effective solutions for global problems related to climate change, food production, poverty, water and deforestation - and in particular the emergence of binding regulations for business at the international level.

We have called for action to be taken so that UN spaces are safeguarded from the interference of companies and lobby groups that have commercial interests in influencing the negotiations held in those spaces<sup>60</sup>. Clear commitment to do so is absolutely essential to protect the UN from accusation of cooptation in its mission to serve the interests of the people and protect them and their environment against corporate crimes and Human Rights violations.

FoEI considers the space of the IGWG as an opportunity to set good precedents and challenge the earlier attempts of corporate capture that have undermined UN processes. In the field of corporate accountability, for years corporate interference has watered down the establishment of mandatory regulations, limiting the ambition to the establishment of voluntary principles (such as the UN "Guiding Principles on Business and Human Rights") - which have not delivered for communities impacted by corporate abuses and environmental crimes<sup>61</sup>. The process of the UN Treaty is a historic opportunity to change this trend, but it requires bold action<sup>62</sup>.

To respect and deliver on the mandate established for the IGWG by resolution 26/09, it is essential that States agree on a different approach than the ones that have prevailed in the past and through which, corporations were part of negotiations on Human Rights. The Treaty should recognize that corporations have an essential conflict of interest with the delivery of corporate accountability and that they should remain the targets of the negotiations. On the contrary, special attention should be given to the participation of the communities affected by these corporations.

The Treaty must follow the example of the World Health Organization (WHO) and the UN Framework Convention on Tobacco Control (UNFCTC)<sup>63</sup>. In particular article 5.3 of the UNFCTC states: "In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law". The Treaty should include clear-cut language to protect the process from corporate interference, which could impede on its proper implementation and enforcement. At a minimum, it should:

- Affirm the priority of access to justice and remedies for individuals and communities victims of Human Rights violations and environmental crimes by companies, including offering protection for affected communities, Environmental and Human Rights Defenders, testimonies and whistleblowers;
- Ban corporations from participating in decision making process about binding regulations and obligations for business on respect to Human Rights at the international and at the national level;

- Protect the entire UN Treaty process from interference from corporations including through:
  - strong ethics rules to prevent conflicts of interest cases of revolving door, and unethical lobbying, and
  - requirements of full transparency over industry interactions with parties to the negotiations

- Ban companies associated with Human Rights violations and environmental crimes from promoting their image through participation in the UN Treaty process (for instance, partnerships with UN bodies, joint organization of UN-hosted events, or participation in UN-hosted multi-stakeholder forums should not be possible).

#### 4. Human Rights and Investors protection

There is currently a gross imbalance between the strength and application of international investor protection rules as compared with Human Rights protection. International law and institutions are failing to address the lack of access to justice for affected people and those who defend Human Rights. While rights for investors are guaranteed and enforceable globally in law, citizens and affected communities can only rely on business voluntary guidelines when struggling to defend their rights from big corporations interests and have to depend on non-functioning grievance mechanisms that lack effective sanctions and enforcement.

International free trade and investment agreements provide corporations with internationally binding rights and protection. The Investor-State Dispute Settlement (ISDS) mechanism is an international legally binding instrument that enables foreign corporations to sue governments for billions of dollars in private and often secret tribunals, when their profits are alleged as negatively affected by new laws or changes in policy<sup>64</sup>.

Many scholars, lawyers, and departments of the United Nations have raised concern with this policy incoherence. The UN Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, declared he was "especially worried about the impact that inves-

#### investor protection frequently undermines Human Rights protection

In El Salvador, the Pacific Rim mining company has used ISDS to sue the government for \$301 million after mining permits were denied due water supplies pollution.<sup>66</sup> Environmental activists protesting against the mine were murdered and to this day families of the victims are still demanding justice.

In 2016 an ISDS tribunal ordered Ecuador to pay Copper Mesa Canadian mining \$31 millions of dollars under a bilateral investment agreement for terminating an environmentally dangerous mining project opposed by local community members. Copper Mesa's claim was upheld despite the tribunal acknowledging that the corporation had been "recruiting and using armed men, firing guns and spraying mace at civilians, not as an accidental or isolated incident but as part of premeditated, disguised and well-funded plans to take the law into its own hands."<sup>67</sup>

tor-state-arbitrations (ISDS) have already had and foreseeably will have on human rights<sup>65</sup>.

FoEI believes that economic policy and investment must support sustainable societies, based on the respect of Human Rights. This means in practice that investors' rights should fully conform to the obligation to respect all Human Rights.

The new juridical instruments under the Treaty must be mandatory and reinforce the hierarchical superiority of the Human Rights framework over other treaties, including trade and investment agreements, as well as arbitration tribunals and ISDS mechanisms. In this regard, FoEI recommends that the UN Treaty should:

#### a) give primacy to treaty obligations through a hierarchy clause

Possible language for the UN Treaty based on input by Prof. Dr. Markus Krajewski<sup>68</sup>:

"In case of conflict between this treaty and another treaty concluded by (at least two of) the Parties, the former shall prevail (in the relationship of the parties of the latter treaty)."

#### b) give primacy to all Human Rights obligations with regards to Investor-State Dispute Settlement specifically

The Treaty should oblige states to take substantive action to prohibit ISDS cases that undermine their obligations to fulfill all Human Rights commitments. This could be implemented through renegotiating existing agreements to this effect, or else cancelling those investment agreements that do not explicitly recognize the supremacy of Human Rights obligations.

One possible scenario is to include an ISDS carve-out with regards to actions related to the fulfillment of all Human Rights obligations, including economic, social and cultural Rights (ESCR) as well as environmental, labor civil and political rights.

Possible language for the IGWG to consider for the Treaty based in a substantial part on a framework developed by Dr Gus Van Harten<sup>69</sup>:

"This Article applies to any measure adopted by a Party to this Agreement and relating to the objective of protecting all Human Rights, including economic, social and cultural Rights (ESCR) as well as environmental, labor civil and political rights or relating to any of the principles or commitments contained in Articles X and Y of the [UN Binding Treaty on Multinational Enterprises with regards to Human Rights]

Such a measure shall not be subject to any existing or future treaty of a Party to the extent that it allows for investor-state dispute settlement. For greater certainty, in the absence of such a reference in a future treaty between two or more Parties, the future treaty is presumed to include in full and without qualification the first three paragraphs of this Article.

Any dispute over the scope or application of this Article shall be referred to, and fall within, the sole and exclusive jurisdiction of [specific body and process pursuant the multilateral binding treaty on transnational corporations]. For greater certainty, no investor-state dispute settlement tribunal, arbitrator,

body, or process has jurisdiction over any dispute related to the scope or application of this Article."

#### c) require proper consultation and Human Rights impact assessments of trade and investment agreements

The Treaty must also establish obligations in relation to substantive, independent and enforceable Human Rights impact assessment in advance of trade and investment negotiations, which would shape the trade and investment agenda and define trade negotiations. This must also include provisions for a democratic and transparent process in such negotiations based on free prior informed consent and extensive consultation of people, social movements, affected communities and consumers.

Possible language based on input by Prof. Dr. Markus Krajewski<sup>70</sup>:

"Each Party shall periodically assess the impact of every already agreed trade and investment agreements ratified by the Party on the protection and fulfillment of internationally recognized human rights / the international human rights obligations of the Party / fundamental human rights. Such assessment shall be based on objective and transparent criteria, incorporate the views of potential victims of human rights violations and be carried out by an independent institution. Taking the findings of the assessment into account, the Party shall take any measures necessary to observe its human rights obligations in accordance with international law."

## references

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- 2 <http://www.foei.org/press/archive-by-subject/economic-justice-resisting-neoliberalism-press/foei-celebrates-an-agreement-on-internationally-legally-binding-rules-to-stop-human-rights-violations-by-transnational-corporations>
- 3 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/A.HRC.WG.16.1.NGO.13.pdf>
- 4 <http://www.treatymovement.com/>
- 5 FoEI is one of the founding members of the the Global Campaign to Dismantle Corporate Power: <http://www.stopcorporateimpunity.org/>
- 6 See more about the discussion on the Principle of Centrality of Victim, at: Human Right and Business: The State of Art in the Brazilian law <http://homacde.com/index.php/pt/documentos>
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- 9 Primacy is given to Human Rights should there be a conflict of obligations as stated by art. 103 of the Charter of the United Nations. Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail".
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- 16 Maastricht Principles complement and build on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural rights (1986) and on the Maastricht Guidelines on Violations of Economic, Social and Cultural rights (1997): [http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx\\_drblob\\_pi1%5BdownloadUid%5D=23](http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23)
- 17 According to UNEP, environmental crime "is often understood as a collective term to describe illegal activities harming the environment and aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of natural resources, including serious crimes and transnational organized crime.": [http://unep.org/documents/tw/environmental\\_crimes.pdf](http://unep.org/documents/tw/environmental_crimes.pdf)
- 18 Criminal penalties for individuals such as chief operating officers (CEOs) for Ecocide associated with TNCs operations, as currently foreseen in the expansion of ICC Rome Statute, are not enough to deal with administrative process in host affected countries, where redress measures must be applied and monitored at international level, avoiding national politics and extra judicial arrangements that often protect economic interests.
- 19 See the report ERA/FoEN (2016) "Challenges of access to justice in Nigeria: A case for global Environment Court of Justice." Benin City.
- 20 United Nations Development Programme (2006): [https://www.eia.gov/beta/international/analysis\\_cfm?iso=NGA](https://www.eia.gov/beta/international/analysis_cfm?iso=NGA)
- 21 United Nations Environmental Programme (2011), Environmental Assessment of Ogoniland: [www.unep.org](http://www.unep.org)
- 22 <http://agenciabrasil.ebc.com.br/geral/noticia/2016-08/justica-anula-acordo-entre-samarco-vale-bhp-e-uniao-e-mantem-acao>
- 23 The contaminated basin will keep being source of toxic heavy metal to the sea for the decades to come, affecting permanently the ESC rights of the population with potential risk to affect endemic coral reefs of Abrolhos island reserve. See technical report at: <http://www.icmbio.gov.br/portal/publicacoes?id=7862:documentos-rio-doce>
- 24 Existing systems to protect Human Rights, such as the Inter-American Court of Human Rights only apply to the State's duties to protect, fulfil and respect. The Rome Statutes ICC were not designed so the ICC judges violations by TNCs based on obligations to respect Human Rights. The Maputo Protocol provides for such a possibility for the African Court, Article 28A Paragraph 3 states that "The crimes within the jurisdiction or devolution to the Court should not suffer any limitation"
- 25 Environmental Laws of Nigeria: A Critical Review Ed. By Godwin Uyi Ojo & Jayeoba Gaskiya (2003) P. 36
- 26 See the Federal High Court of Nigeria Benin Judicial Division judgment in the case Between Mr. Jonah Gbemre and Shell Petroleum Development Company Nigeria Ltd, Nigeria National Petroleum Corporation, Attorney general of the Federation, in suit No: fhc/bcs/53/05 (Judgment of 14 November, 2005): <http://www.climatelaw.org/cases/case-documents/nigeria/ni-pleadings.doc>
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- 30 <http://askthelawyeronline.com/version2/members/judgments/details.php?id=1874>
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