this paper outlines the official contribution of Friends of the Earth International (FoEI)1 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 Rights2 (hereafter referred to as UN Treaty). Ever since, we have engaged in the process3, advocating proposals within national and regional coalitions as well the international Treaty Alliance4 and the global Campaign to Dismantle Corporate Power5.

Hereby we outline the essential components that we believe are needed for a binding UN Treaty to bridge the historic gaps in the international Humans 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 process6.

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)7, economic, social and cultural rights (ESCR)8, 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 Rights9.

A binding Treaty should go beyond the scope of the Rome Statutes of the International Criminal Court (ICC)10. 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”11, and recognize other jurisdictions initiatives.

the African Union experience of extension of “international crimes”12

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.
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 indemnity.

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.

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

A central point of the 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.

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 crimes24 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 environment25.

• 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.

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 liability of TNCs as legal persons26.

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 party states.

Extraterritorial jurisdiction should allow victims of corporate crimes to seek access to justice including but not limited to whenever the direct perpetrator:

• take advantage of the weak governance system or operate with impunity.

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 the World Bank, 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. The Order has 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 in this case) is superior to, and should be enforced over, trade and investment treaties.
- 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 related to 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 maintained41. 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.

Iwhekeren Community versus Shell: In 2003, the High Court of Justice42 ruled that gas flaring was illegal and ordered it to be stopped forthwith43. 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 jurisdiction44. In 2015 the court ruling in the Hague ruled in an appeal against Shell that the company has a case to answer over its human rights violations in Nigeria45. Yet the substantive case is yet to be disposed of since 2004 and 2007 when the incident occurred and nine years since the court case began.

Elemeron Zion versus Shell: Following 12 years of legal battles, the lower court granted compensation of about US$200,000 for all the victims who were removed from their local farms (May 1997)46. 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.

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 file claims and access justice systems.

In Mozambique communities affected by coal mining have been denied access to justice48.

Valé’s Moatize coal exploitation project has resulted in direct pollution of soils and water sources and forced displacement of 1,365 families49. 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 moved because the protests have been handled with violence by the company and the police50.

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, Dzinze 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 project51.

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 Power52;
- Article 12 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organisations of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted in 199153;
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Violations of Internationa Human Rights Law and Serious Violations of Internation Humanitarian Law54, in cases they are applicable;
- States’ extra-territorial obligations (ETO’s), especially those defined by the articles of Maastricht Declaration 13, the obligation to avoid causing harm, and 25, on bases of protection55.

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 the company Hidralaya56, which lead to human rights violations and political intimidation of resisting community leaders, including political imprisonment57. In the absence of binding mechanisms for accountability of Spanish companies regarding human rights violations caused in other countries, the case have been handled by the Spanish National Court, brought by territories to the Permanent Peoples Tribunal session in Geneva in 201458, as well as to the Spanish Public Ombudsman in Madrid59.

The internationalization of Hidralaya’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. The example shows that an international binding mechanism under the UN Treaty is as essential as the approval of national level extraterritorial policies.

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

Agua Zarca: obligations for home countries of financiers

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 cases60.

Spain, the Netherlands and Finland, as shareholders and home countries of key public financials 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 government that 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 to protect EHRDs and social activists in Honduras.

Protection of EHRDs under the African Human Rights Charter

Further to the United Nations Declaration on Human Rights Defenders70, 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 charter71. The Commission has produced a jurisprudence that defines the obligations of States in relation to the environment and its defenders.

Centre for Economic and Social rights in Nigeria72, 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.

The UN Treaty should be a legal instrument to oblige States to comply with their ETOs regarding the protection of victims and EHRDs in cases of TNCs’ direct involvement on public financing.
The UN Treaty must develop and fully recognize the rights of affected people and enshrines them in the scope of the future instrument.

MOYAC - Movement of Victims and Affected People by Climate Change and Corporations

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, toxic substances 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 systematic violations of human rights, including the criminalization of social struggle and protest, assessment of defenders of nature and in some cases death.

The moral, historical and legitimate authority of affected communities must be recognized by international law - and yet with respect for their individual suffering and their particular context - in order for them to be able to take a stand to attend 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 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.

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 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 such as 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 not safeguarded from the interference of companies and lobby groups that have commercial interests in influencing the negotiations held in these spaces. Clear commitment to do so is absolutely essential to protect the UN from accusations of complicity in relation to the interests of the companies 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 interfer- ence has watered down the establishment of mandatory regu- lations, 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 com- munities impacted by corporate abuses and environmental crimes.

The process of the UN Treaty is a historic opportuni- ty to change this trend, but it requires bold action.

To respect and deliver on the mandate established for the IGWG by resolution 28/9, it is essential that States agree on a law that makes itself necessary to protect people deprived 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 paid to the participation of the communi- ties affected by these corporations.

The Treaty must follow the example of the World Health Organization (WHO) and the UN Framework Convention to Tobacco Control (UNFCTC). In particular article 5.3 of the UNFCTC States that 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 ide- ntiﬁcation of the proper implementation and enforcement. At a minimum, it should:

• Affirm the priority of access to justice and remedies for indi- viduals and communities victims of Human Rights violations and environmental crimes by companies, including offering protection for affected communities, Environmental and Hu- man Rights Defenders, testimonies and whistleblowers;

• Ban corporations from participating in decision making pro- cess 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 corporate entities, including:
  - 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, partner- ships 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 internationally binding legal instrument that enables foreign corporations to sue governments for billions of dollars in pri- vate and often secret tribunals, whose when their profits are alleged as negatively affected by new laws or changes in policy.

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 invest-

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In the newly formed United Nations, the issue of the role of transnational corporations in the world economy is a significant and pressing concern. The report outlines the official contributions of Friends of the Earth International (FoEI) and other organizations to the international debate on corporate accountability and corporate capture. The report highlights the need for a binding treaty on transnational corporations and human rights, and the importance of including a provision for investor-state dispute settlement. The report also explores the role of the UN and other international organizations in addressing issues related to corporate capture and human rights.

The document provides a comprehensive overview of the current state of international law and policy on corporate responsibility, including recent developments in the context of human rights and environmental protection. It identifies key areas for further action and provides recommendations for governments, businesses, and civil society organizations. The report is an important resource for anyone seeking to understand the complex and rapidly evolving landscape of international law and policy on corporate responsibility.

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