economic
justice
resisting
neoliberalism

community resistance to palm oil and rubber plantation companies in Liberia @Jason Taylor for FoE International

A tribunal to live

A proposal presented by the coalition of African civil society organizations who are members of Friends of the Earth Africa (FoEA) with the aim of better protecting the rights of the communities and populations who have fallen victim to rights violations by transnational corporations and companies.

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Friends of the Earth Africa

Introduction

A community deprived of drinking water because an individual has decided to monopolize the village's only water source to water his plants and sell them; children with serious skin disease and newborns coming into the world with respiratory failure due to the garbage dump that the government has set up in the village without hygiene standards or waste treatment measures. These cases shock us, and we will not hesitate to demand that the culprits be punished, that compensation be provided to their innocent victims and that the abuse cease. Yet thousands of similar situations arise every day because the actors are able to seize the lands belonging to communities, deprive them of drinking water and pollute their environment with impunity, without the communities having the possibility to seek recourse. Today, in the globalized world, multinational corporations have unparalleled powers. Every day their activities, those of their subsidiaries and those of the companies in the supply chains that they control, adversely affect the lives of hundreds of millions of people and the planet through the exploitation of workers, the evictions of populations, the financing of militia, irreversible pollution, climate change and financial crisis, to mention a few. They do so with impunity because they have the unprecedented ability to influence governments and policy makers, and because they are not held legally responsible at international level for the human rights violations they commit around the world, using their complex economic structure to escape justice. States may be prosecuted for human rights violations, heads of state may have their immunity lifted and be sentenced before international courts for their responsibility in the suffering inflicted on human beings. But, paradoxically, this is not the case for multinationals.

Trying to hold multinationals accountable seems, in the current legal order, to be a real feat; so fraught is it with challenges. First of all, a judge needs to be found, national or international, who will accept to declare himself competent to examine the facts. The delaying tactics of the companies must then be overridden (for example, a multinational company may bankrupt its offending branch), as well as the appeals. The collusion between multinational companies and states may be encountered as well as, sometimes, the corruption of officials or judges. First of all, the facts must be proven beyond doubt, and then the control links between the parent company and the subsidiary, or between it and its subcontractors, must be established. In short, the opponent is powerful, very powerful; perhaps even too powerful: he has money (to pay lawyers) and time, two things that its victims cruelly lack.

In June 2014, the UN Human Rights Council adopted a historic resolution - Resolution 26/9[1] – with the aim of the 'elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'. This treaty could finally be a tool with which to protect people from human rights abuses by multinational corporations and guarantee victims access to justice. Yet some states that usually present themselves as champions of democracy, the rule of law, and human rights oppose the initiative and refuse to put in place a more binding legal framework that would make companies and their leaders liable for violations of human rights, in the same way that states and all other actors in the public sphere are. This proposal, born of the necessity arising from the ineffectiveness and inefficiency of existing mechanisms, aims to highlight why the current process must not only result in a binding treaty, but also, more importantly, in a jurisdictional mechanism allowing victims to be heard and get redress. Why is such a tribunal needed? How would it function? These are the two simple questions that FoEA would like to answer, on behalf of the many communities and victims that its member organizations support every day.

chapter 1: why a tribunal?

Establishing an international tribunal in order to try multinationals and other companies through a binding instrument is not merely a trend stemming from the increasing jurisdictionalization of international law. The need for an accessible institution to enable the judicial sanctioning of human rights violations is justified on the one hand by the ineffectiveness and inefficiency of existing mechanisms, and on the other hand by the need to avoid a new instrument whose usefulness and raison d'être will be paralyzed by ineffectiveness in its implementation. Without a legal sanction and enforcement guarantee, the future treaty will be nothing more than a new toothless instrument, limiting itself to a simple declaration of good intentions without any real possibility of holding possible violators, ever assured of their impunity, to account. Throughout the first three sessions of the working group established to elaborate the future instrument[2], Ecuador, the chair of the working group, has together with other states placed a central focus on victims: the future treaty must allow for reparation for victims of human rights violations and promote greater respect for human dignity. This approach, welcomed by all, will have been futile if it does not result in a genuine mechanism guaranteeing access to justice.

1.1 Only guaranteeing access to justice - the 'right to rights' of victims - can lead to appropriate redress

According to United Nations General Assembly Resolution 60/147 of 16 December 2005[3], *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*, 'in honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms international law in the field' (Preamble). That is the reason for which all the member states of the United Nations that adopted this Resolution insist on the necessity of following the guarantees provided for by international law: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms (UNGA 60/147, VII).

A true 'right to rights'– the right to access to justice, without which the enjoyment of other human rights is threatened – is now a customary norm of international law, recognized both universally in UN instruments and in all regional human rights systems. The effective and efficient protection of the individual necessarily entails the effectiveness of the right to a fair trial: 'one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'[4]. A comparative study of various legal systems, the definitions of justice and the latter's place in society shows that the right to access to justice is universally enshrined by high national standards at the top of the hierarchy of norms in different states, as well as in international instruments. The International Criminal Tribunal for the former Yugoslavia and the Court of First Instance of the European Communities respectively characterized the right to a fair trial, an element of the right to access to justice, as a 'peremptory norm of international law' and a 'norm of jus cogens'[5]. In its general comment No. 24 (52) of 11 November 1994 on reservations to human rights treaties, the United Nations Human Rights Committee placed the right of access to justice in the category of peremptory international law[6]. For its part, the Inter-American Court of Human Rights has repeatedly attributed the right to access to justice as a jus cogens obligation[7]. The right of access to justice is therefore a peremptory norm of international law that states must develop and preserve in order to offer victims of human rights violations a possibility of obtaining reparation.

'A right stripped of the possibility of being exercised is not a right.[8]' Without an effective sanctioning and enforcement judicial mechanism, it is more than likely that the rights developed in the future instrument will remain theoretical. The establishment of this court is all the more necessary due to the fact that the mechanisms existing up to now have shown their inability to provide adequate legal means to allow for victims to access the reparations to which they are entitled.

1.2 The inefficiency and ineffectiveness of existing mechanisms

Compiling a list of those who have fallen victim to investment projects and to the activities of multinationals in Africa would be an endless task: many communities have paid and continue to pay a heavy price in projects that are carried out without social environmental impact assessments, in violation of laws, without the consultation of local populations or while simply ignoring their fundamental rights. We can mention here some examples, in order to refresh our memory. On August 20, 2006, toxic waste dumped at approximately 18 sites around the city of Abidjan, Côte d'Ivoire, greatly affected the health of tens of thousands of people, and severely polluted the environment. This waste had been transported aboard the Probo Koala, a freighter chartered by Trafigura: an oil trading company with its operational headquarters in Switzerland and its head office in the Netherlands. On its website, the transnational company claims to have offices in 36 countries and to have made a profit of 2.6 billion on a turnover of 97.2 billion dollars in 2015. For the more than 110,000 victims affected by this deed, obtaining reparation is fierce battle. A second case: in a report published on September 10, 2015[9], the Swiss NGO 'the Berne Declaration' was surprised to discover that, every year, tons of gold – worth several tens of millions of euros – were imported from Togo; a country that does not number among the producers of the precious metal. Following from this observation they followed the trail, which led to Burkina-Faso. The Swiss NGO then proved that this 'Togolese gold' had in fact been extracted from mines in northern and western Burkina Faso, where child labor is commonplace, before passing through a number of other hands. Burkina Faso-based exporters had reportedly facilitated the crossing of the Togolese border. Wafex and MM Multitrade, two subsidiaries of the Lebanese merchant Ammar Group, located in Lomé and Geneva respectively, were the recipients of the gold. It was this Lebanese group that then organized the logistics of its air transfer via Air France with stops in Paris and Zurich, and then by truck to the Valcambi refinery in Balerna, in the extreme south of Switzerland, near the Italian border. According to the Swiss NGO, this trafficking through Togo cost the state of Burkina Faso nearly 3.5 billion CFA francs (5.35 million euros) in lost tax revenue for 2014. And, above all, it promotes child labor and conditions in which exploitation is rife, and that are particularly dangerous for human health.

There are hundreds of cases like these on the African continent, and thousands around the world. Addressing and putting an end to them requires that we no longer limit ourselves to branch offices and simple local subsidiaries for the purposes of legal action, but that we go as far as the decision makers who benefit from these 'crimes' – wherever they are. It is indeed absurd that shareholders can receive dividends and profits from subsidiaries and branches no matter where they are, but that, in case of action by victims, they invariably take refuge behind the 'national' nature of the subsidiaries in order to refuse to provide reparation and be accountable, leaving victims deprived of compensation and reparation. When faced with national jurisdictions, in particular in southern countries, where these multinationals have their businesses, the victims of human rights violations have to face subsidiaries, branch offices, service providers or other companies along the supply chain that have been deliberately left without sufficient means to provide fair reparation; while the decision makers continue to reap profits from the same company elsewhere. In many countries, a judiciary subject

Photo: People x SASOL in Durban, South Africa @groundWork/FoE South Africa

to orders, in submission to executive power or largely corrupted by multinationals, issues unfair decisions refusing to attribute cases of pollution or dispossession to multinational corporations, or even limits itself to ordering ridiculously low levels of reparation or compensation, so as not to affect the capital or the interests of the companies involved.

With regard to the regional human rights courts: they are competent only to consider complaints brought against States. Cases concerning the responsibility of multinationals and other companies in the violation of human rights can never be brought. Multinationals enjoy complete impunity, assured of the absence of an international forum that can penalize their actions. In the *SERAC v Nigeria* case before the African Commission on Human and Peoples' Rights, the state argued for its inability to enforce compliance with national legislation and the African Charter on Human and Peoples' Rights. Although the Commission found that Nigeria had violated its obligation to protect communities from rights abuses by the multinational, the latter continued to operate with impunity, causing great environmental damage that now threatens the very lives of people and their communities.

Initiatives such as the UN Guiding Principles for Business and Human Rights and the OECD's Guidelines for Multinational Enterprises have shown their limits by not having binding mechanisms for implementation, sanctioning and enforcement. For example, after a lengthy process of Cameroonian local communities demanding the end of the violation of their rights by the European multinational company SOCFIN before the French, Luxembourgish and Belgian National Contact Points (PCN), the Belgian NCP chose to note that:

'The Belgian NCP, in consultation with the French and Luxembourgish NCPs, decides to end its mediation in the context of this specific circumstance. It notes that the action plan presented and accepted before the French NCP in 2013 will only be partially implemented by the Socfin Group. It regrets the refusal of the Socfin Group to carry out neutral and independent control and monitoring as accepted by the Bolloré Group and the SHERPA association, and validated by the French NCP. It further notes, notwithstanding its efforts, that it is impossible for it to reconcile the points of view between the complaining parties represented by Sherpa on the one hand and the Socfin group on the other[10]'.

This confession of helplessness exposed the emptiness of the current mechanisms when it comes to ensuring that multinational companies respect their human rights obligations, accentuating their lack of capacity to ensure effective sanction and reparation for victims. According to an OECD Watch report, 'Remedy remains rare', out of the 250 complaints to NCPs between 2001 and 2015, fewer than 1% of cases resulted in improved conditions for victims and 0% in compensation[11]. From this perspective, a tribunal is not merely necessary, but indispensable. For victims in Africa and elsewhere, it is not sufficient for the tribunal to exist: it must also be available to them.

chapter 2: how would an international tribunal function?

The development of a binding instrument on multinationals and other businesses and human rights is meaningless, and does not provide real added value, unless it results in better protecting the rights of individuals and communities. It is therefore neither a question of formulating a new list of human rights, nor of creating a new judicial institution functioning along the lines of those that already exist. The future treaty will have to create a sui generis tribunal that both espouses the traditional canons of the field and innovates in order to allow for the provision of satisfactory solutions to a problem that is inadequately addressed by existing mechanisms. The proposals below are intended to provide the approach that future treaties will need to take in order to establish a tribunal that meets the expectations of victims in Africa and around the world.

Photo: Resistance to corporate landgrabbing in Kasenyi village, western Uganda @Jason Taylor for FoE International

2.1 A permanent and itinerant tribunal

The tribunal should be composed of an odd number of judges originating in the states that are party to the future treaty. These judges should be elected in their personal capacity from jurists of very high moral standing, recognized competence and legal, judicial or academic experience in the field of international law and human rights. The international tribunal for multinationals should be a permanent court, whose seat should be in a southern state. To facilitate access to the tribunal for victims, the tribunal should have the opportunity to hold sessions elsewhere, including having mobile sessions in all regions of the world, following the example of the Permanent Peoples' Tribunal.

Article proposal:

'The Tribunal is headquartered in ....., ... («The host State»). (Preference for a southern country). The Tribunal and the host State decide on a headquarters agreement to be approved by the Conference of States Parties and thereafter concluded by the President of the Tribunal on behalf of that State.

If judges consider it desirable, the Tribunal may hold sessions elsewhere in accordance with the provisions of this Convention.

However, depending on the financial resources available to it, the Tribunal will hold mobile sessions in different parts of the world to be closer to the victims. With this in consideration, the Tribunal will conclude an agreement with the various regional human rights courts in order to be able, if necessary, to use their premises as well as the administrative and technical staff necessary for holding these mobile sessions.'

In order to ensure the greatest possible independence for the judges of the tribunal, their mandate should be non-renewable and the rules on conflicts of interest should be particularly strict. No person who has worked as an agent or as an adviser for a multinational company, or for a subsidiaries, partner organisation or subcontractor thereof, nor as arbitrator designated by any of these entities may be elected to the tribunal before fifteen years have expired from the moment of termination of these functions. Similarly, judges and registry staff will not be able to perform such functions for these entities, within ten years of terminating their functions at the tribunal.

2.2 A tribunal with broad jurisdiction

As an institution created to be part of a normative instrument, the future tribunal should have as main functions the interpretation of the treaty and the sanctioning of violations of the obligations arising from it, not only by the states that are party to the treaty, but, in particular, also by entities[12], and natural or legal persons. The tribunal's substantive jurisdiction should cover not only the rights and obligations expressly enshrined in the future treaty, but also all the norms protecting the rights that have acquired customary status in international law.

While adopting the standard rules on the admissibility of applications before regional human rights courts, the conditions of admissibility for applications filed by persons should act as incentives, so as to ensure that the requirement of prior exhaustion of internal review procedures does not effectively deprive victims of an available, timely, effective and efficient remedy. The principle of complementarity means that the national courts are the first guarantors of the implementation of the future Convention. This is the reason for which states must provide them with the appropriate means (competence, independence, etc) to exercise their jurisdiction in accordance with the future treaty. The necessary principle of complementarity that must exist between the future tribunal and the domestic courts should not imply a subsidiarity of the former to the latter, and even less so its inaccessibility for victims.

Proposed provision:

'Jurisdiction of the Tribunal'

The Tribunal has jurisdiction over all cases and disputes relating to the violation of human rights by individuals and entities that come before it. It is also responsible for the interpretation and application of this agreement.

The Tribunal shall have jurisdiction over any person or entity having the nationality of one of the states parties to this Convention, or in the case of any violation committed in the territory of one of the States Parties. When a case is referred to the Tribunal, the Tribunal may receive complaints from victims against a parent company, its branch offices, its subsidiaries, other companies in the supply chain under its control, or subcontractors under its authority.

The court shall, in the cases brought before it, apply this Convention and any other relevant human rights instruments ratified by the state where the violation has occurred, the state of origin of the entity, and the state of nationality of the victim or the person prosecuted.

The Tribunal is able to declare itself competent in the event of a dispute arising over its competency..

Insterstate cases

Any High Contracting Party may submit to the Tribunal any breach of the provisions of this Convention if it considers that it may be imputed to another High Contracting Party.

Complementarity

The jurisdiction of the Tribunal is complementary to that of the national courts of the States Parties and regional human rights courts. It can exercise its jurisdiction only if these jurisdictions do not wish to or cannot satisfactorily exercise their jurisdiction over the pursued entities or those primarily responsible.

The principle of complementarity does not, however, prevent the Tribunal from exercising its jurisdiction when, in the interests of justice or of better protecting of the rights of victims, it encounters the need to declare itself competent.'

2.3 Admissibility of corporate actions

Due to the public nature and interest of the protection of human rights and the provision of reparation to victims of infringement, the future treaty must recognize and designate mechanisms, including actio popularis and class actions, enabling CSOs from States Parties to act on behalf of and for victims when they cannot, on security grounds or on grounds of access to information or to justice, refer the case to the tribunal. Similarly, victims from different geographical areas should be allowed to join an action against an entity or its leaders when they claim to have suffered similar violations by the same perpetrator elsewhere.

Proposed provisions:

'A case may be brought before the Tribunal by any private individual, non-governmental organization or group of individuals claiming to have fallen victim to a violation of the rights recognized in the Convention by a private individual, company or any other entity. States Parties and human rights associations with the capacity to sue under the domestic law of the States Parties may act in the common interest. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

An association for the defence of the rights of communities or citizens, representative at the national level and approved by the domestic law of a state party to this Convention, may appear before the Tribunal in order to obtain compensation for individual damage suffered by victims who are in an identical or similar situation and are united by the failure of a person or entity to fulfill its human rights obligations in their respect.'

2.4 A tribunal free of charge for victims and with the burden of proof on companies

In several countries, communities and victims who have already been dispossessed also have to face the significant cost of justice, which effectively results in depriving them of the right to an effective remedy. The future treaty must ensure cost-free justice for victims and for the organizations acting on their behalf. The cost of running the tribunal must be borne by the States Parties to the treaty, by means of an earmarked proportion of a wider tax on the profits of multinationals. Moreover, in the case of a proven violation of human rights by an accused entity or its main perpetrators, these may be sentenced, in to addition providing compensation to the victims, to fully bearing the costs of the proceedings.

In order to facilitate referrals to the tribunal and promote the sourcing of documents that relate to companies and their investments (which are in many countries covered by confidentiality, thereby depriving plaintiffs of valuable evidence), the burden of proof in court must fall on the alleged violators. It will be the responsibility of multinationals, other companies and their managers to demonstrate that they did not commit the alleged violations and that they have fulfilled their commitments under the Convention and other relevant international texts. The participation of the host state in the violation, or that of another entity, should in no way result in a reduction of the responsibility of the company indicted; it will be its responsibility to redress the violation in its entirety, before carrying a recourse action against the other co-perpetrators or accomplices, if appropriate.

The discourse surrounding international law seems to establish an evolution of the international legal order towards a system centered on the individual. International relations have ceased to be an amoral setting where all is permitted in the name of the national interest. The protection of the individual is the ultimate goal of international relations, and the same is true of the state, which has meaning only in so far as it exists through and for its citizens, whose collective and individual welfare it must ensure. A man's home is no longer his castle, and sovereignty should not be used as a pretext to allow violations against a background of general indifference to human rights. It is on the basis of this new paradigm, and what the experts call the emergence of an international public order, that lawsuits against African rulers were brought before international courts (Charles Taylor, Jean-Pierre Bemba, Muammar Gaddafi, Laurent Gbagbo, Uhuru Kenyatta, William Ruto, Omar El-Bashir, etc). In order to demonstrate that this new paradigm of international law is more than an instrument in the hands of the powerful, it is important to ensure that everyone can react to the human rights violations that have unfortunately become so commonplace in the context of business. An international tribunal in the framework of the future treaty is a significant contribution to that goal. It is not a mere luxury, but a necessity; the credibility and coherence of the entire system is at stake.

Photo: Kegbara dere oil spill in Nigeria @Luka Tomac/FoE International

Proposed provisions:

'Operating expenses of the Tribunal

The expenditure on the tribunal shall be borne by the Conference of States Parties. The expenses of the tribunal, the emoluments and allowances of the judges, including the expenses of the Registry, shall be set out by the Conference of States Parties on the proposal of the Tribunal.

Trial proceedings

The Tribunal shall examine the case together with the representatives of the parties and, if need be, undertake an investigation for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

In the case of an individual action being brought before the Tribunal, it is the responsibility of the State Party or the defendant entity to prove that it has acted in accordance with its obligations under this Convention.

The hearing is public unless the Tribunal decides otherwise, owing to exceptional circumstances.

Any party to a case has the right to be represented by the legal counsel of its choice. Legal representation or assistance may be provided free of charge where the interests of justice so require. The rules of the court specify the terms and conditions for granting such assistance.

All persons, witnesses or representatives of parties appearing before the Tribunal shall enjoy the protection and facilities recognized by international law and that are necessary for the performance of their functions, duties and obligations in relation to the Tribunal.

Documents filed with the registry are available to the public unless the President of the Tribunal decides otherwise.'

Statute of the international tribunal on multinationals, other companies and Human Rights

Article 1: Institution of the tribunal

In order to ensure compliance with the commitments resulting from this Convention, an International Tribunal on Multinationals, Other Enterprises and Human Rights (TIMEDH), hereinafter referred to as «the Tribunal», is hereby established.

The Tribunal may exercise jurisdiction over persons and entities found guilty of human rights violations in accordance with the provisions of this Convention.

The Tribunal may try persons and entities found guilty of human rights violations in accordance with the provisions of this Convention.

The court is complementary to the national courts. Its jurisdiction and operation shall be governed by the provisions of this Convention and the Rules of Procedure adopted in accordance with the relevant provisions of this Agreement.

Article 2: Seat of the Tribunal

The Tribunal has its seat at ....., ... ('The host State'). (Preference for a southern country).

The Tribunal and the host State decide on a headquarters agreement to be approved by the Conference of States Parties and thereafter concluded by the President of the Tribunal on behalf of that State.

However, depending on the financial resources available to it, the Tribunal will hold mobile sessions in different parts of the world to be closer to the victims. With this in consideration, the Tribunal will strike an agreement with the various regional human rights courts in order to be able, if necessary, to use their premises as well as the administrative and technical staff necessary for the holding of these mobile sessions.

Article 3: Regime and legal powers of the Tribunal

The Tribunal has international legal personality. It also has the legal capacity it needs to perform its duties and accomplish its mission.

The tribunal may exercise its functions and powers, as provided in this Convention, in the territory of any State Party and, by a Convention to that effect, on the territory of any other State.

Article 4: Composition of the Tribunal

The Tribunal is composed of eleven judges, nationals of the States Parties to this Convention, elected in their personal capacity from jurists of very high moral standing, with recognized competence and experience in legal, judicial or academic law, international law and human rights.

The Tribunal cannot include more than one judge of the same nationality. In this regard, he who may be considered to be a national of more than one State is deemed to be a national of the State in which he habitually exercises his civil and political rights.

Article 5: Conditions imposed on the functions of judges

Judges sit on the Tribunal as individuals.

All judges are elected as full-time members of the Tribunal and are available to serve on a full-time basis as soon as their mandate begins.

After their election, the judges take an oath to perform their duties with impartiality and loyalty.

During their term of office, judges shall not engage in any activity that is incompatible with the requirements of independence, impartiality or availability required by a full-time activity. No person who has worked as an agent or an adviser in a multinational company, or for a subsidiary, partner organisation or subcontractor thereof, nor as arbitrator designated by any of these entities may be elected to the Tribunal before fifteen years have expired from the moment of termination of these functions. Similarly, judges and registry staff will not be able to perform such functions for these entities, within ten years of terminating their functions at the Tribunal. Any question arising under this paragraph shall be decided by the Tribunal.

Communities from Grand Cape Mount and Gbarpolu Counties in Liberia gather to discuss the effects of Sime Darby's oil palm plantations on their livelihoods @FoE International

Article 6: Election of judges

Judges are elected by the Conference of States Parties, by a majority of votes cast, from a list of candidates drawn up in alphabetical order by the Secretariat of the Conference of States Parties.

All candidates must have excellent knowledge of and current practice in at least one of the working languages of the Tribunal.

Each State Party may nominate two candidates, only one of whom must be a national. When nominating candidates, due consideration will be given to gender balance.

The Secretariat of the Conference of States Parties shall draw up the list of candidates in alphabetical order and communicate it to the States at least sixty (60) days before the date of the Conference of States Parties at which the election will be held.

In selecting judges, States Parties shall take into account the need to ensure, in the composition of the Tribunal:

a) The representation of the main legal systems of the world;

b) Equal geographical representation; and

c) Equal representation of men and women.

Article 7: Mandate of judges

Judges are elected for a nine-year term. They cannot be re-elected.

At the first election, at the instance of the Secretary of the Conference of States Parties, four of the elected judges, chosen by the drawing of lots, shall be appointed for a term of three years; three of the elected judges, chosen by the drawing of lots, are appointed for a six-year term; the other judges are appointed for a nine-year term. Judges appointed for a three-year term following the draw are eligible for re-election for a full term.

The mandate of judges ends as soon as they reach the age of 70.

The judges remain in office until they are replaced. However, they continue to hear cases that are already before them.

A judge may be removed from office only if the other judges decide, by a two-thirds majority, that the judge has ceased to fulfill the required conditions.

Vacances shall be filled by means of election in accordance with the provisions of Article 7.

A judge elected to a vacant seat completes the mandate of his predecessor; if the term of office to be completed is less than or equal to three years, he may be re-elected for a full term.

Article 8: End of mandate and vacancy

A judge may be suspended or removed from office only if, in the unanimous opinion of the other judges of the Tribunal, he has ceased to fulfill the required conditions.

The decision of the Tribunal is final.

In the event of the death or resignation of a judge, the President of the Tribunal shall immediately inform the Secretary of the Conference of States Parties, which declares the seat vacant from the date of death or from the date on which the resignation takes effect.

The Conference of States Parties shall replace the judge whose seat has become vacant, in accordance with the provisions of Article 7, unless the remaining term of office is of under two years.

Article 9: Registry

The Tribunal has a Registry, which is responsible for the non-judicial aspects of the Tribunal's administration and service. The tasks and organization of the Registry are specified by the Rules of the Tribunal.

The Registry is headed by the Clerk, who is the Chief Administrative Officer of the Tribunal. The Clerk performs his functions under the authority of the President of the Tribunal. He is assisted by a deputy Clerk.

The Clerk and the deputy Clerk must be persons of high moral character and competence, with excellent knowledge and standard practice of at least one of the working languages of the Tribunal.

Judges shall elect the Clerk by absolute majority and by secret ballot. They similarly elect a deputy clerk on the recommendation of the Clerk.

The Clerk and the Deputy Clerk reside at the seat of the tribunal.

Article 10: Staff of the Tribunal

The Clerk shall appoint the qualified staff necessary for the proper functioning of the Registry.

When recruiting staff, the Clerk ensures that the individuals recruited are of the highest standard of efficiency, competence and integrity.

The Clerk, in agreement with the Presidency, proposes the Staff Regulations, which include the conditions of appointment, payment and termination of service. The Staff regulations are approved by the Conference of States Parties.

The Tribunal may, in exceptional circumstances, use the expertise of gratis personnel provided by States Parties, intergovernmental organizations or non-governmental organizations in order to assist any organ of the Tribunal in its work. Gratis personnel are employed in accordance with guidelines to be established by the Conference of States Parties.

Article 11: Plenary assembly

The Tribunal, convened in Plenary Assembly:

a) elects, for a period of three years (non-renewable), its President and Vice-President;

b) Establishes, if needed, chambers constituted for a fixed period of time;

c) Elects the Presidents of the Chambers of the Court, who may be re-elected;

d) Adopts the rules of the Court;

e) Elects the Clerk and the deputy Clerk;

f) Settles any other matter relating to the functioning of the Tribunal at the request of its President.

Article 12: President of the Tribunal

The President holds office on a full-time basis. He resides at the seat of the Tribunal.

The powers of the President and the Vice-President are set out in the Rules of Procedure of the Tribunal.

Article 13: Judgement and quorum formation

For the consideration of each case brought before it, the Tribunal shall sit in its entirety, with a quorum of no fewer than eight judges.

However, in view of the number of cases brought before it, the Tribunal may decide to set up chambers composed of five (05) judges each. The Chambers render their decisions on behalf of the Tribunal.

Article 14: Jurisdiction of the Tribunal

The Tribunal has jurisdiction over all cases and disputes relating to the violation of human rights by individuals and entities before it. It is also responsible for the interpretation and application of this agreement.

The Tribunal shall have jurisdiction over any person or entity having the nationality of one of the States Parties to this Convention, or in the case of any violation committed in the territory of one of the States Parties. When a case is referred to the Tribunal, the Tribunal may receive complaints from victims against a parent company, its branch offices, its subsidiaries, other companies in the supply chain under its control, or subcontractors under its authority.

The court shall, in the cases brought before it, apply this Convention and any other relevant human rights instruments ratified by the State where the violation has occurred, the State of origin of the entity, and the state of nationality of the victim or the person prosecuted.

The Tribunal is able to declare itself competent in the event of a dispute arising over its competency.

Article 15: Complementarity

The jurisdiction of the Tribunal is complementary to that of the national courts of the States Parties and regional human rights courts. It can exercise its jurisdiction only if these jurisdictions do not wish to or cannot satisfactorily exercise their jurisdiction over the prosecuted entities or those primarily responsible.

The High Contracting Parties undertake in this context to provide their national courts with the necessary powers and means to exercise their jurisdiction in accordance with this Convention.

The principle of complementarity does not, however, prevent the Tribunal from exercising its jurisdiction when, in the interest of justice or of better protecting the rights of victims, it encounters the need declare itself competent.

Article 16: Interstate cases

Any High Contracting Party may refer to the Tribunal any alleged breach of the provisions of this Convention by another High Contracting Party.

Article 17: Individual application

A case may be brought before the Tribunal by any private individual, non-governmental organization or group of individuals claiming to have fallen victim to a violation of the rights recognized in the Convention by a private individual, company or any other entity. States Parties and human rights associations with the capacity to sue under the domestic law of the States Parties may act in the common interest. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

An association for the defence of the rights of communities or citizens, representative at the national level and approved by the domestic law of a state party to this Convention, may appear before the Tribunal in order to obtain compensation for individual injuries suffered by victims who are in the same or a similar situation and and are united by the failure of a person or entity to fulfill his or her human rights obligations in their respect.

Article 18: Admissibility

A case can only be brought before the Tribunal after domestic remedies have been exhausted, as agreed in accordance with generally recognized principles of international law, and within six months of the date of the final domestic decision.

The Tribunal does not accept any individual application made under Article 17 when:

a) It is anonymous; or

b) It is essentially the same as an application previously considered by the Tribunal or already submitted to another international body of investigation or settlement, and if it does not contain new facts.

The Tribunal declares inadmissible any individual application made under Article 16 when it considers:

a) That the application is incompatible with the provisions of the Convention, manifestly ill-founded or abusive; or

b) That the applicant has not suffered a significant disadvantage, unless the respect of the human rights guaranteed by the Convention requires a consideration of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

The Tribunal rejects any request that it considers inadmissible under this article. It may do so at any stage of the proceedings.

Article 19: Third party intervention

In all cases, a High contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

President of the Tribunal may, in the interests of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the the applicant to submit written comments or to take part in hearings.

Article 20: Radiation

At any time during the proceedings, the Tribunal may decide to strike an application off the list when circumstances permit to determine:

a) that the applicant no longer intends to maintain it; or

b) that the dispute has been settled; or

c) that, for any other reason for which the Tribunal provides a justification, it is no longer justifiable to continue with the examination of the application.

However, the Tribunal continues to consider the application if the respect of the human rights guaranteed by the Convention and its protocols requires it to do so.

The Tribunal may decide to reinstate the application if it considers that the circumstances warrant it.

Article 21: Trial proceedings

The Tribunal shall examine the case together with the representatives of the parties and, if need be, undertake an investigation for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

In the context of an action under Article 17, it is the responsibility of the State Party or the defendant entity to provide evidence that it has acted in accordance with its obligations, as is stated under the Convention.

The hearing is public unless the Tribunal decides otherwise, owing to exceptional circumstances and in the interest of the victims.

Any party to a case has the right to be represented by the legal counsel of its choice. Legal representation or assistance may be provided free of charge where the interests of justice so require. The rules of the court specify the terms and conditions for granting such assistance.

All persons, witnesses or representatives of parties appearing before the Tribunal shall enjoy the protection and facilities recognized by international law and that are necessary for the performance of their functions, duties and obligations in relation to the Tribunal.

Entities and all parties to the trial are required to submit to the Tribunal all documents relied upon during the proceedings and that the latter requires. The argument of confidentiality as regards documents may not be used against the Tribunal.

Documents filed with the registry are available to the public unless the President of the Tribunal decides otherwise.

Article 22: Satisfaction

If the Tribunal finds that there has been a violation of the Convention, and if the domestic law of the High Contracting Party does not allow complete reparation to be made, the Tribunal shall grant the damaged party a fair satisfaction, if necessary.

The Tribunal may also, in the particular circumstances of a case, decide to grant punitive damages, and/or a custodial sentence to the natural persons responsible for the violation, in accordance with the rules relating to its jurisdiction.

Article 23: Judgement of the Tribunal

The judgement of the Tribunal is final. It is published.

Judgements, as well as decisions declaring admissible or inadmissible applications, are reasoned.

If the judgement does not express in whole or in part the unanimous opinion of the judges, any judge has the right to append to it the statement of his separate opinion.

The High Contracting Parties undertake to comply with the decisions of the Tribunal and to implement them within the prescribed period. They cannot invoke a contrary obligation, in particular any based on investment agreements or any sort of contract that can be used to postpone or evade the implementation of the Tribunal's decision.

The final judgement of the tribunal is transmitted to the Secretariat of the Conference of States Parties, which supervises its execution. The Secretariat reports regularly to the Conference of States Parties on the implementation of the Tribunal's judgements.

Article 24: Operating expenses of the Tribunal

The expenditure on the tribunal shall be borne by the Conference of States Parties. The expenses of the Tribunal, the emoluments and allowances of the judges, including the expenses of the Registry are set out by the Conference of States Parties on the proposal of the Tribunal.

Article 25: Privileges and immunities of the judges

The Tribunal shall enjoy in the territory of the States Parties the privileges and immunities necessary for the accomplishment of its mission.

The judges and the Clerk shall enjoy, in the exercise of their functions or in connection with such functions, the privileges and immunities accorded to the heads of diplomatic missions. After the expiration of their mandate, they will continue to enjoy immunity from legal processes in respect of words spoken and written, and all acts done by them in the discharge of their official duties.

The deputy Clerk and the staff of the Registry shall enjoy the privileges, immunities and facilities necessary for the performance of their duties in accordance with the agreement on privileges and immunities of the Tribunal.

The lawyers, experts, witnesses or other persons whose presence is required at the seat of the Tribunal shall enjoy the necessary treatment for the proper functioning of the Tribunal, in accordance with the agreement on the privileges and immunities of the Tribunal.

Privileges and immunities can be lifted:

a) in the case of a judge, by a decision taken by an absolute majority of the judges ;

b) in the case of the Clerk, by the president of the court ;

c) in the case of the deputy Clerk and Registry staff, by the Registry.

Article 26: Rules of Procedure and Rules of the Tribunal

The Tribunal shall establish its Rules of Procedure and determine its own procedure in accordance with the provisions of this Convention.

Article 27: Languages of the Tribunal

The languages of the tribunal are French, English and Spanish.

All decisions of the Tribunal are written in each of these languages. Each decision indicates which language should prevail.

Geneva …….

Brick makers displaced by VALE coal mine in Tete province, Mozambique @ JA! FoE Mozambique

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economic justice resisting neoliberalism

Friends of the Earth Europe

Friends of the Earth International

About this paper: This is a first working paper elaborated by Friends of the Earth Africa member groups with the support of Friends of the Earth Europe and Friends of the Earth International Economic Justice Resisting Neoliberalism program. We hope to improve these proposals after receiving feedback by legal experts and other civil society organizations. It was presented as a contribution to the Treaty proposals built in the last years within the Global Campaign to Dismantle Corporate Power (www. stopcorporateimpunity. org) towards the UN Intergovernmental Working Group mandated in 2014 to elaborate legally binding instrument to regulate transnational corporations on respect to Human Righst. It provides concrete propositions to be considered by States in order to achieve a strong international mechanism of implementation to bring corporates to justice and to provide effective access to justices for affected peoples worldwide.

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Friends of the Earth International is the world's largest grassroots environmental network with 75 member groups and over two million members and supporters around the world.

Our vision is of a peaceful and sustainable world based on societies living in harmony with nature. We envision a society of interdependent people living in dignity, wholeness and fulfilment in which equity and human and peoples' rights are realised. This will be a society built upon peoples' sovereignty and participation. It will be founded on social, economic, gender and environmental justice and be free from all forms of domination and exploitation, such as neoliberalism, corporate globalization, neo-colonialism and militarism.

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