



economic  
justice  
resisting  
neoliberalism

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**Friends of the Earth International's written contribution to the *open-ended working group on transnational corporations and other business enterprises with respect to human rights*<sup>1</sup>**

Analysis of the Zero Draft discussed at the IGWG 4th session (October 2018) and towards the UN Treaty reviewed version and the IGWG 5th session (October 2019)

## 1. introduction

Friends of the Earth International (FoEI)<sup>i</sup> is the world largest grassroots environmental network, with a presence on all continents and member groups in 73 countries. FoEI aims at defending territories and resisting violations of human and peoples' rights, especially those perpetrated by transnational corporations (TNCs), while working with grassroots communities worldwide in the promotion of environmental, social, economic and gender justice.

FoEI is a founding member of the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign)<sup>iii</sup>. Established in 2012, the Global Campaign is today a network of over 250 social movements, civil society organizations, trade unions and communities affected by the activities of TNCs. As such, FoEI has been actively present at the United Nations Human Rights Council (UNHRC) since 2013, pushing for the approval and

further implementation of Resolution 26/9<sup>iv</sup>. Adopted in 2014, this resolution established an open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (IGWG), mandated to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises ("binding treaty"). In the same year FoEI joined the efforts to establish the Treaty Alliance<sup>v</sup>, a broader civil society international network dedicated to advancing a UN binding treaty to address human rights abuses committed by TNCs and other business enterprises, actively monitoring UNHRC negotiations on this matter in Geneva and nationally.

Together with these global networks, FoEI has been present at the UNHRC, during all IGWG sessions, as well as during regional and international informal consultations and other fora of experts and affected movements discussing, building proposals and publishing its demands for the content and structure of the binding treaty<sup>vi</sup>. FoEI's member groups have also been very active, advocating for public policies to regulate TNCs at the national level<sup>vii</sup>. FoEI's demands for the Treaty text structure and content are based on concrete experiences on the ground, of peoples defending their rights while facing the corporate grab of their territories and livelihoods. These experiences are reflected in the key points promoted through the Global Campaign<sup>viii</sup> and in our written contributions and oral statements individually or jointly submitted to the IGWG throughout this period<sup>ix</sup>.

This document summarizes general comments by FoEI with the contribution of HOMA Human Rights and Business Centre of Federal University of Juiz de Fora, Brazil, regarding the Zero Draft published by the IGWG Chairmanship in July 2018<sup>x</sup>, regarding its structure, content and coherence to the process mandated by resolution 26/9, including references to the conclusions and recommendations of the previous sessions and to the Chairmanship Elements paper presented before the 3rd IGWG session in 2017<sup>xi</sup>.

The text is followed by the statements delivered by FoEI representatives from all continents during the last session of the IGWG, in October 2018. They are presented in the order of the IGWG 4<sup>th</sup> session Program of Work (PoW), which in itself restricted the contributions to the disappointingly narrow structure and limited themes and articles proposed in the Zero Draft, especially when compared to the content and spirit of the previous Elements paper. Nevertheless, FoEI's interventions contain concrete text proposals for a binding treaty, in dialogue with the articles and topics proposed, or missing, in the Zero Draft, and are also testimonies of regional and national contexts of real peoples' struggles and concrete examples of environmental and human rights violations by TNCs happening on the ground where FoEI member groups are based.

Finally, this document provides an overview of the conclusions of the IGWG 4<sup>th</sup> session, which were overshadowed by the unilateral disengagement of the European Union. This last part of the document also highlights the imbalance between, on the one side, the inappropriate language used by and conduct of business representatives, that threaten to capture the process according to their interests and contrary to a treaty that might control the unregulated business of TNCs within the Human Rights Law. On the other side, it records the disrespect shown by some state representatives to the voices and testimonies of affected peoples and human rights defenders when, in Geneva, they were denouncing the role of business aligned with authoritarian and fascist governments that pose new threats to lives and territories. This attitude directly disregarded those actors and their legitimate link to the process of building peoples' demands and human rights policy proposals from below, and that it might be the only possible pathway for an effective UN binding treaty that could truly protect victims, ensure the rights of peoples defending their territories and stop corporate impunity.

For Friends of the Earth International, the Zero Draft presented by Ecuador is way too weak and as such does not constitute a robust basis for an effective treaty that peoples' movements are demanding and needing now and historically. The increasing international mobilization for this treaty, that has been growing exponentially since 2014, along with the participation of states in this UN process, can not be frustrated by a treaty which contains no means to end the impunity of TNCs. As part of a Global Campaign and in solidarity with peoples' resisting corporate crimes from the territories worldwide, we reaffirm the demand for an improved and meaningful Draft to be negotiated transparently and implemented by states - one that is centred on affected peoples' demands and free from undue business influence. It means a revised treaty Draft needs to be reformulated in terms of content and structure, and with the firm commitment of a growing number of states who support the process and the original mandate of the IGWG, to taking on board their peoples' demands and recognize them as the key points elaborated by movements working in solidarity at the international level on this historical process.

On the eve of the 41<sup>st</sup> regular UNHRC session Ecuador, in the capacity of IGWG Chairmanship, is expected to present a reviewed version of the Draft, partly based on a timely transparent period of three informal consultations held

during June 2019, convened at the very end of May. The last moment communication of the dates of consultations highly compromised the participation of civil society and was also raised with criticism by some states. FoEI's expectations go further: that a strong leadership of the process continues as it started in 2014, relying on core supportive states committed to taking this forward without delay nor dilution of the ambition of the text, with the vision of putting life above capital, and peoples' rights above TNCs' profits, in order to effectively protect victims of corporate crimes and human right violations, recognizing that the struggle for the binding treaty has already become part of peoples' resistance in defense of their territories and lives.

## 2. General comments on the Zero Draft structure and content

In collaboration with Ms. Manoela Roland Ph.D.<sup>1</sup>

The United Nations' agenda on Business and Human Rights is not recent. Discussions began in the 1970s with the expansion of globalization and TNCs' power. It was only in 2011, some 40 years later, that the Guiding Principles on Business and Human Rights<sup>xii</sup> were adopted within the framework of the UNHRC. However, due to its voluntary nature and the various resulting gaps in the effective implementation and as a consequence in the accountability of TNCs for human rights violations, there has been intense pressure from several countries, especially from the Global South, and from hundreds of civil society organizations and social movements for the preparation of another document, this time binding, and, three years later, Resolution 26/9 was adopted by the Human Rights Council.

This Resolution creates the "Open-Ended IGWG on Transnational Corporations and Other Business Enterprises with respect to Human Rights" mandated to elaborate of the International legally binding instrument on Transnational Corporations and Human Rights ("binding treaty") – a historic milestone in the struggle for Human Rights against violations committed by corporations.

Resolution 26/9 therefore defines the terms of reference of the IGWG. It recognizes that the mandate would include the regulation of TNCs, in accordance with the footnote provided in the Resolution, in line with the historical origin of the process, since addressed by Salvador Allende's memorable 1972 speech at UN. Indeed, the very nature of transnational corporations calls for a international regulation of these actors, as their political and economic power, sometimes bigger than states, and their complex structure and global value chains allow them to escape from their responsibilities and act with impunity. The resolution gave a roadmap for the three first sessions, leading to the presentation of "*elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working*

*group on the subject, taking into consideration the discussions held at its first two sessions”.*

Following these three initial sessions, a Zero Draft was thus prepared to start substantive negotiations in the fourth session, held in 2018. In order to initiate the Zero Draft analysis, we hereby highlight aspects that, in our view, limit the content and scope of the international instrument to be elaborated, further preventing the possibility of more effective accountability of transnational corporations for potential human rights violations.

The Zero Draft does not have a section of principles, which would be essential in a Human Rights and Business Treaty. The first article of the Draft brings forward provisions to be observed by States that become party to the Convention - without mentioning Transnational Corporations. Thus, it is necessary to recover those principles already present in the 2017 Elements paper presented by the IGWG Chair. In particular, in the Elements paper, one of the principles presented acknowledges the supremacy of Human Rights over any trade and / or investment agreement. Article 13 of the Draft, in paragraphs 6 and 7, resumed the point in question, but with a wording that seeks to minimize the suppression of the postulate of the supremacy of Human Rights. The Zero Draft states, therefore, that trade agreements should not be contrary to the agreement stipulated by it, but does not determine that the human rights treaties have supremacy. Thus, such agreements that do not respect the supremacy of human rights, will not necessarily be in conflict with the Convention, allowing breaches to violations.

Prof. Olivier de Schutter (2017, p. 2)<sup>xiii</sup>, an expert of the Economic, Social and Cultural Rights Committee, in his analysis of the Elements, has already pointed to the problem of insisting on the term “primary responsibility” (or primacy of the State) because it implies that if a State does not have a national environment permissive to the fulfilment of the obligations, the company will not have any responsibility. This is a key issue: the need to hold corporations directly accountable for violations. The Zero Draft can be broadly considered as a generic Drafting document, a not very effective one and one still predominantly addressed to the States. If the obligations to protect and fulfill human rights are undoubtedly States obligations, the treaty should also include direct obligations for corporations to respect human rights.

The scope of the business activities for supposed accountability would be based on the logic of due diligence<sup>xiv</sup>, whose fragility is already known. In the Elements, in turn, although we find the expression “primary responsibility” of the States, there are several references to the responsibilities of the Companies, such as: “TNCs and OBEs, regardless of their size, sector, operational context, ownership and structure, shall comply with all applicable laws and respect

internationally recognized human rights, wherever they operate, and throughout their supply chains (p.6)” Even the comments on the Guiding Principles have already foreseen the question of the independence of responsibilities, as can be seen in the commentary on Principle 11. This provision is also established by the OECD Guidelines for Multinational Enterprises in its Chapter 4 (p.31)<sup>xv</sup>. It is necessary to emphasize the independent responsibility between State and companies. The UNHRC should innovate in this sense, by endorsing the existing Treaties and by requiring businesses to respect the rights recognized and protected by these treaties, even if the State in which they are located has not ratified them. Corporations cannot benefit from a fragile national scope with regard to the protection of human rights, since they are transnational and often more powerful than these nations. It is this scenario that feeds the phenomenon called “race to the bottom”.

When referring to the scope of the Treaty, Article 3 of the Zero Draft is divided into two paragraphs, the first reissues a provision already established in the Elements, covering all violations of Human Rights carried out in the context of any business activity that has a transnational character. The Zero Draft provides for the protection of all international Human Rights and also of those recognized by domestic law. At this point, it is of utmost importance to highlight compliance with “all international human rights” even if not ratified by States. The Elements brought a somewhat more detailed definition, as can be seen: “All internationally recognized human rights, taking into account their universal, indivisible, interrelated and interdependent nature, as reflected in all human rights treaties, as well as in other intergovernmental instruments related, inter alia, to labour rights, environment, corruption (p.4)” It should be noted that it is not necessary for TNCs to become subjects of international law. They would be understood only as subjects of duties, responsible for the inherent risk of their activities and their transnational character. In this way, the Draft Treaty should present a specific section on obligations of TNCs to respect human rights.

Article 5 of the Zero Draft deals with the subject of jurisdiction but it also has implications for the scope of the instrument. One of the main aspects to note is that it does not sufficiently cover the concept of “value chain” or global chain of production, without mentioning, for example, the mechanisms for extraterritorial obligations already recommended by the Maastricht principles<sup>xvi</sup>. In fact, there is no forecast of liability for violations committed by subcontractors, nor provisions about how to link companies to their subsidiaries. To resolve this issue, article 5 should be better articulated with article 10.6, which elements should be reformulated in less restrictive terms. Moreover, the text, using the phrase “or the like”, resorts to an undue generality, on an extremely difficult agenda, in what seems to be an attempt to minimize the lack of a more comprehensive and precise

definition of Value Chains. Thus, the document, which should resolve such discussions, opens up more space for debates regarding imprecisions and generalities.

It should be emphasized, once again, that this represents a regression in relation to the Elements paper, since these, although they do not expressly conceptualize the Value Chains, work the notion in a more satisfactory way, using it throughout the document.

Finally, we are missing a provision dealing with the requirement that the adopted criteria of jurisdiction should restrain the use of the *forum non conveniens* argument. Such a forecast is even contained, albeit briefly, in the Elements, but is not even addressed by the Draft. In addition, the prohibition of the use of this logic is essential for the proper accountability of companies in case of Human Rights violations.

We can also mention that the Zero Draft, despite being a document intended as guarantee of access to justice for victims of Human Rights violations, insists on depositing - mainly on the States - the responsibility for the imbalance present in the procedural relations between victims and Human Rights violators. As already mentioned, it ignores the complex relations among states and corporations. The Zero Draft also presents no provision for the protection of human rights defenders, as well as it lacks a gender approach.

The Elements paper at least foresees the possibility of creating an International Court to judge Human Rights violations committed by companies, a suggestion that corresponds to the proposal of many civil society organizations participating in the negotiation process. The Zero Draft, however, does not even mention this possibility, when such a mechanism of implementation was also defended by some states at the IGWG 4<sup>th</sup> session.

In conclusion, the Zero Draft document, rather than improving and establishing a promising starting point for the prevention of Human Rights violations, and the implementation of more effective mechanisms for making TNCs accountable, almost represents a rupture from previous sessions, both from civil society contributions and from official sources, such as the Elements paper. In this sense, the Zero Draft is seen as a setback in a long, participatory process of negotiations, which could include noncompliance with the mandate of Resolution 26/9.

We hope that the informal consultations necessary for a transparent and participatory negotiation process and the new document to be submitted by the Government of Ecuador, Draft 1 or Revised Draft, will restore the logic of accumulation established since the first IGWG session, thus allowing belief in a horizon of progress in the fight against corporate impunity for human rights violations.

### 3. FoEi's Contributions presented at the IGWG 4<sup>th</sup> session

#### 3.1) General statements

Ms. Karin Nansen<sup>2</sup>

Friends of the Earth International is a grassroots environmental federation present in 75 countries, with 20 national member groups participating in this important session, paying attention to the contributions of their countries for the building of a binding treaty on transnational corporations and human rights. We are also paying attention to the consultations to the civil society and the recognition by our governments to the daily struggles for social and environmental justice carried out by the defenders of the people and territories.

We are part of the Treaty Alliance and the Global Campaign to Dismantle Corporate Power. We are here today with over 130 members of the campaign, representing movements and people affected by the operations of transnational corporations that control the global production chains and the institutions that finance them. We are promoting the building of a Binding Treaty, incorporating the perspectives and joint work related to human rights from the grassroots, for peoples and communities to stop being victims and achieve justice against corporate impunity.

We congratulate Ecuador for continuing being Chair and for having submitted, according to the recommendations, the Zero Draft that represents a new stage in the negotiations, and we expect from States substantial contributions of content towards the fulfilment of the mandate clearly defined by resolution 26/9.

We also recognize the importance of the presence of so many countries that have shown interest in deepening the discussion around substantial content.

We have been working on concrete proposals around the different issues included in the agenda, we are committed to support the States and listen to their contributions that allow, based on the minimum structure provided by the Zero Draft, to recover the elements missing and proposals discussed in the three previous sessions, reflected in part in the Elements Paper elaborated by the chair in 2017.

We are convinced of the fact that the participation of social movements and organizations in this process has been key to ensure its continuity and to encourage debates at national and regional level.

We highlight the importance of this process being protected from corporate capture, so that it is not weakened, and to advance towards the adoption of an ambitious text capable of regulating transnational corporations in their role as centers of economic and political power and control of complex global value chains, whose structure and power make it indispensable to effectively control them in the framework of international law, in a way that human rights are prioritized

<sup>1</sup>. Director of HOMA – Human Rights and Business Centre of Federal University of Juiz de Fora, Minas Gerais State, Brazil

over the commercial rights protected by binding trade and investment agreements.

This advance is urgent and necessary, because for our people and defenders of human rights and democracy it is a matter of life or death. Even more so in the context where, after the democratic breakdown and brutal attacks against collective rights, for instance in Brazil, we are experiencing the dismantling of social institutions and policies, the privatization of resources and services and social destabilization that today entails the threat of fascist authoritarianism, which has already declared an attack against activism, human rights and against those of us who defend the environment and our rights as peoples.

“Let us wake up, human kind, there is no time left”, said Berta Cáceres. Today we demand justice for Berta and we demand that her murder is not left unpunished, together with other business crimes against those who defend life.

Ms. Lia Polotzek<sup>3</sup>

We would like to react to the statement made by the European Union who regard the implementation of the UN Guiding Principles as sufficient to protect affected people of human rights violations by corporations and refuse to engage on the content of the Zero Draft.

The Zero Draft builds on international developments in the field of business and human rights in recent years and takes up the basic principles of the UN Guiding Principles, such as human rights due diligence and access to remedy for affected parties. In the points where the Zero Draft goes beyond the UN Guiding Principles, it is filling the gaps in protection of affected people. None of the National Action Plans so far have improved access to justice for people affected by corporate human rights abuses in home States of transnational corporations. With regard to the proposed obligations of states, the Zero Draft contains numerous proposals, which can also be found in the General Comment No. 24 by the UN Committee on Economic, Social and Cultural Rights. The Draft is also in line with the adoption of binding national law on duty of vigilance in France and highly advanced debates on similar legislation in Switzerland. Furthermore, the Zero Draft has already taken up many of the concerns of the EU.

Against this background, the EU and the German Federal Government should participate actively and constructively in the negotiations on the content of the agreement instead of questioning the process at a formal level. We cannot accept that after three working sessions and three months after the publication of the Zero Draft, the EU are still not willing to enter discussions on the content of the treaty.

This is not in line with the EU's self-conception that human rights are core values that the EU promotes around the world. It is also not in line with Germany's foreign policy, which regards human rights as the basic tenet. Furthermore, the German foreign minister has recently called for an “Alliance on Multilateralism” defending existing rules in times of upheaval and calling on the United Nations and human rights

to be at the centre of the international order. It is now time to stand up to these principles.

<sup>2</sup> Chairperson of Friends of the Earth International federation, from Uruguay, on 15/10/2018

<sup>3</sup> BUND Head of Business, Finance and Commerce, from Germany, on behalf of attac, Brot für die Welt, BUND-Friends of the Earth Germany, Global Policy Forum, MISEREOR and Südwind Institut, member organisations of the Treaty Alliance Germany, on 15/10/2018

### 3.2) Article 2 - State of Purpose

Mr. Paul de Clerck<sup>4</sup>

We live in a globalised world where capital and investments go around the world, looking for the easiest and cheapest places to generate profits. We see a global trade and investment regime that not only allows companies to do so but that gives them excessive and enforceable VIP rights to sue governments if they act in the public interest by agreeing on environmental, health, labour or other social standards. Through this ISDS mechanism they can claim millions or even billions of compensation if their profits are affected.

On the other hand, we see that people who suffer from these international investments - because their land is grabbed, because their environment is polluted, because they have to work under unacceptable conditions, because their lives are threatened when they defend their communities – are left unprotected. They don't have good tools to hold transnational companies accountable for their human rights abuses and they don't have access to justice at the international level. So we face an international regulatory framework that is completely favouring international investors and transnational companies, while denying the rights of citizens, local communities, women, indigenous groups, the environment, and many others. It is this grave system of injustice that a UN Treaty will need to change.

Unfortunately, we see that many rich countries continue to side with companies instead of citizens. They prefer private interests over the public interest. They prioritise investor rights over human rights. We see that in another forum, UNCITRAL, in two weeks' time from now, the EU and Canada will promote further strengthening of investor rights by proposing a Multilateral Investment Court. We also see that these same countries are either not here or continue to raise procedural objections while they have given hardly any support for international legally binding rights for citizens and affected communities.

So the same countries that object to a global court for citizens against human rights violations, propose to establish such a court to give rights to investors. The countries that give direct rights to investors, don't want to give direct obligations to the same investors to respect human rights. The same countries that argue that human rights should continue to rely on voluntary and ineffective systems such as the OECD guidelines, make proposals for strong and legally binding enforcement mechanisms for investors.

This is not acceptable. We call specially on the EU:

- to prioritise human rights over investment rights,
- to stop relying on ineffective voluntary mechanisms to stop corporate human rights violations,

- and to support direct obligations derived from international Human Rights law to transnational corporations.

The EU said that 'they don't shy away from regulation when it is needed'. We say, the time is now. We need to regulate transnational business and this is the mandate of this intergovernmental working group.

4. Coordinator Economic Justice Campaign at Friends of the Earth Europe, from The Netherlands, on 16/10/2018

### 3.3) Article 6 State of limitations, 7 - Applicable law and 13 - Consistency with International Law

Mr. Alberto Villarreal<sup>5</sup>

We hope Draft One recovers some of the elements included in the Elements Paper submitted by the Chair in October 2017 and in our Treaty proposal submitted at the same third session.

First of all we demand that the primacy of human rights and international human rights law is unequivocally established in the preamble and that it includes direct obligations both for States as well as for transnational corporations and other business enterprises.

Particularly, sections 6 and 7 of article 13 should be replaced and include the obligation of member States to conduct human rights impact studies before concluding any trade or investment agreement or contract with a company of another member State, and to refrain from signing it in case inconsistencies are found in terms of international human rights law and the provisions in this treaty. They should also be obliged to review those in force and renegotiate them or unilaterally denounce them in case of current or potential inconsistencies, according to the precautionary principle.

It is very important to remove the first sentence of section 3, article 13, because it implies that the member States could ignore any obligation established by this treaty in case they consider it goes against their national law.

This article should also include the obligation of transnational companies and other business enterprises to respect judicial decisions and national laws and regulations and to refrain from suing before international trade and investment arbitration tribunals other member States for any public interest decision, law or regulation that affects human rights of citizens or the ability of the State to comply with its human rights obligations.

Article 7 should be better articulated with article 5. It should include a section that explicitly mentions that in any dispute that could affect human rights between member States or between a transnational corporation and a member State, the applicable law to solve the dispute should first of all be the international human rights law and the provisions of this treaty, or the national law that benefits those affected the most, as suggested in section 2.

For more information, we refer to the document for comments to the Zero Draft submitted by CETIM, Transnational Institute and FoEi on behalf of the Global Campaign<sup>xvii</sup>, and the Peoples Treaty submitted in the third session.

5. Friends of the Earth Latin America and Caribbean (ATALC) Economic Justice program regional coordinator, trade and investment campaigner from Uruguay, on 16/10/2018

### 3.4) Article 9 - Prevention

Mr. Kwami Kpondzo<sup>6</sup>

Prevention is a central concept, which implies obligations for the States, but should also be directly applicable with obligations for the companies directly recognized in the treaty, so as not to depend on the translation into national law of these essential principles and obligations. In this perspective, we propose to reformulate paragraph 1 of the article 9.

Regarding the concept of "due diligence", we prefer the concept of "duty of care", inspired on the French law, which includes not only the obligation to develop preventive measures, but also the obligation to implement them effectively, to evaluate their effectiveness.

Above all it includes the obligation to repair with a mechanism to incur the liability of the company.

It is also important to stress the responsibility of parent and outsourcing companies for the activities of companies in their corporate group (subsidiaries) but also throughout their supply chain. Article 9 (1c) should thus more clearly include subcontractors and suppliers.

With regard to paragraph 2g, the term "meaningful consultations" is too vague. An explicit reference must therefore be made to the obligation for States to obtain the free prior and informed consent of the communities potentially affected by any investment project in their territories.

Preventive measures must be developed with the participation of affected communities and social organizations, not based on a risk-reduction logic for the corporations, but on the prevention of risks of human rights violations and environmental damage. Finally, it is very important to integrate the gender perspective and, in particular, to ensure that the specific impacts of transnational corporations' activities on women are considered.

6. Member of the Executive Committee of Friends of the Earth International, from Togo, on 16/10/2018

### 3.5) Article 10 - Legal Liability

Ms. Abeer Al Butmeh<sup>7</sup>

As Palestinians, bringing the perspective of people under occupation, apartheid and in war torn areas, we suffer decades of crimes for which the state of Israel holds the primary responsibility.

These include forced displacement of over half of our people, unlawful colonial occupation that destroys our lands,

uproots our trees and exploits our natural resources, repeated massacres, torture and ever tightening apartheid laws. The International Criminal Court can - and indeed should without delay - hold the state of Israel and individuals accountable for these violations.

Yet, this Binding Treaty is crucial for us. Corporations are central for these crimes to happen: Israel's water company Mekorot exploits our water, Hewlett & Packard has provided digital technology for Israeli prisons and checkpoints, Veolia has built settlement infrastructure, Volvo bulldozers are in this moment literally paving the way for the destruction of the Palestinian village of Khan al Ahmar, Israel's military and security companies test weapons during war crimes and then export them globally.

Some states and corporations are both involved in human rights violations and therefore, distinguishing the actions of corporations as abuses, simply ends up shielding corporates from full duties.

Further, article 10 needs to be explicit and unequivocal in creating a uniform rule that imposes criminal, civil and administrative responsibility on transnational corporations - including the entire value chain - and obliges all states to enforce it. Criminal liability can not be limited to 'intentional' cases as this has served repeatedly as smokescreen for TNCs to continue their human rights violations in Palestine. The case of Palestine, with Israeli laws conforming a system of human rights violations, shows the need to ensure an international mechanism that allows us to directly hold TNCs accountable when we don't have a government or a government too weak to enforce the Binding Treaty in front of occupants and TNCs.

We finally need to insist that 'special attention' to be given to conflict areas, as mentioned in article 15 is far too vague to have effect. TNCs and states should have special independent obligations, in particular in cases of crimes under the Rome Statute.

7. Coordinator of PENGON - Friends of the Earth Palestine, on 17/10/2018

### 3.6) Articles 3 and 4 - Scope and Definition

Ms. Alejandra Porras Rozas<sup>8</sup>

Our Central American region is strongly affected by the economic model; a model seemingly about economic and financial integration, under mechanisms such as Free Trade Agreements and investment treaties that open the door with no restrictions to transnational corporations and their voracious interests.

This model has only brought poverty, the looting of our common resources, territorial displacement, persecution, criminalization, murder and death of our peoples.

Specifically about the scope of the Treaty we think it is fundamental to respect the mandate of resolution 26/9, that is, a focus on transnational companies since the nature itself of these companies, due to their economic and political power and their transnational nature, makes it essential to regulate

them in the context of international law through the creation of a binding treaty.

The rights included in section 3.2 should include the main international human rights treaties, and in particular, the right to the free determination of the peoples and to a healthy environment, and all collective rights of indigenous peoples and communities. It is key to recognize environmental rights as human rights.

About the article related to definitions (art. 4). Defining "transnational corporations" could be complicated given the complexity of the legal structure of these companies and the creativity they have to come up with new legal ways to escape the law. However, it could include definitions about the dynamics of control, and we propose the following: "The control of the parent company over its value chain could be direct, indirect, financial, economic or of another kind".

It would be important as well to add a definition of "supply chain" or "production chain" in order to determine the scope of TNC's responsibility for human rights violations taking place due to their activities and outside the parent company's home country. This element is fundamental to ensure the efficacy of the future Treaty.

Ultimately, it is necessary to include the definitions of other concepts, such as: "Official economic and financial international institutions" and "affected communities".

The definitions of these concepts can be found in the Global Campaign Treaty proposal submitted as contribution to the 4th session.

Berta Cáceres lives on, the struggles continues... She didn't die, she multiplied herself...

8. Coordinator of COECO Ceiba - Friends of the Earth Costa Rica, on 17/10/2018

### 3.7) Articles 5 - Jurisdiction

Ms. Juliette Renaud<sup>9</sup>

Article 5 is a key article of the Treaty and must facilitate access to justice of victims. It must put an end to corporate impunity and provide wider jurisdiction to Courts so that victims can get adequate and effective relief.

To achieve the purposes of Article 5.2, it must be better articulated with Articles 7 and 10.6: the Treaty must lift the corporate veil to enable the Courts ascertain the liability of parent and outsourcing companies over the activities of their subsidiaries and the entire value and supply chain, as the French law on duty of vigilance.

So the Treaty must allow affected people to sue the guilty transnational corporations in the courts of their home country, and in the countries where they concentrate their assets. It seems that it is the spirit of Article 5.2. However, to reach this objective, it is indispensable to bring in more clarity and add several provisions to Article 5.

First, a provision must be added recognizing the joint responsibility of corporations as co-authors of a violation, thus enabling action against the parent, subsidiary, outsourcing or other entities in the supply chain before the same jurisdiction, including financiers. In this regard, we propose that the Convention borrows from the wordings of Article 2.2 on connected claims of the Sofia Guidelines of the International Law Association<sup>9</sup>.

Moreover, a provision should be added to exclude the possibility for parent companies to carry out declaratory actions disclaiming their responsibility.

In exercising jurisdiction, the courts should rely on the principles of precaution, prevention, polluter pays, and absolute liability.

Again, to avoid denial of justice to victims, it is very important that Article 5 includes a provision on *forum necessitatis*, which already exist in many countries, including 10 European countries, so that a Court can declare itself competent when there is no forum available. When there is a conflict of jurisdiction, the choice should be for the best jurisdiction able to provide adequate remedies.

Finally, Article 5 must prohibit the use of the argument of *forum non conveniens*.

Article 2.2. Connected claims:

2.2(1) The courts of the State where one of a number of defendants is domiciled shall have jurisdiction over all of the defendants in respect of closely connected claims.

2.2(2) Claims are closely connected in the sense of paragraph 2.2(1) if:

- (a) it is efficient to hear and determine them together; and
- (b) the defendants are related.

2.2(3) Defendants are related in the sense of paragraph 2.2(2)(b), in particular if at the time the cause of action arose:

- (a) they formed part of the same corporate group;
- (b) one defendant controlled another defendant;
- (c) one defendant directed the litigious acts of another defendant; or
- (d) they took part in a concerted manner in the activity giving rise to the cause of action.

<sup>9</sup>. FoE Europe Economic Justice regional program coordinator, from France, also speaking by the French Coalition for the binding treaty: ActionAid France-Peuples Solidaires, AITEC, Amis de la Terre France, ATTAC Franc, CCFD-Terre Solidaire, CGT, Colletif Éthique sur l'étiquette, France Amérique Latine, Ligue des Droits de l'Homme, Sherpa, Union syndicale Solidaires, on 18/10/2018

### 3.8) Article 1 - Preamble, Article 14 - Institutional and Article 15 - Final Provisions

Ms. Erika Mendes<sup>10</sup>

The timely publication of the Zero Draft was a crucial sign of the vitality of this process, but we were disappointed to discover that many recommendations contained in the Elements Paper published last year were not included in this Draft.

It is clear that the treaty must include direct legal obligations for TNCs, as firmly corroborated by some States as well as many civil society and experts' interventions. This is a crucial aspect that we expect to see included in Draft One.

Thousands of victims around the world look to this treaty as a much needed tool with which to access justice, reparation and prevent future violations by TNCs in their territories, where the ineffectiveness and inefficiency of existing mechanisms are cruelly witnessed daily. Besides reinforcing national jurisdictions (through article 5), we need strong implementation mechanisms at the international level, that affected communities in different countries, and in along different links of the complex transnational supply chains, can go to when their national courts fail to bring those corporations to justice. With this in mind we call for the establishment of an International Court on TNCs and Human Rights.

A coalition of groups from Friends of the Earth Africa has elaborated a concrete proposal that includes a model statute of this future Court<sup>xix</sup>, which we believe should be: permanent and itinerant; independent and protected from conflicts of interest; have broad jurisdiction; and allow for collective actions in the interests of the victims. It should also be accessible and free of cost for victims, and ensure that the requirement of prior exhaustion of internal review procedures does not deprive victims of an available and timely remedy.

Without an effective sanctioning and enforcement judicial mechanism at the international level, we believe that the rights developed in this instrument will remain merely theoretical. We stand firm with civil society organisations here in the strong condemnation of the commercial retaliation that the IoE has threatened states in this room with, and highlight the impact it could have on the ongoing integrity of the activities of this working group if concrete proposals on protecting the process from corporate capture are not taken.

<sup>10</sup>. FoE Africa Economic Justice regional program coordinator, from Mozambique, on 18/10/2018

### 3.9) Panel on Affected Peoples' voices

Mr. James Otto<sup>11</sup>

Africans remain victims to most of the grave human rights violations associated with the operations of transnational corporations, which builds on a history of colonization and oppression against our peoples. The current situation of corporate impunity is not exclusive to Africa, but extends to other regions of the globe where legal frameworks of the state

institutions are powerless due to the bilateral relations with the home countries of companies that control global chains of production.

In 2015, Golden Veroleum Liberia, a transnational oil palm company operating in Liberia, made use of state security forces to harass, intimidate, abuse and imprison community members of Butaw district who were simply seeking the fulfilment of social agreements promised to the community by the company.

A young man died in prison from his wounds sustained during this brutality, 15 men and women remained in prison for over a year without any formal charges, and another woman died a month after being released from prison.

To date, not a single action has been taken by the government and/or the company to address the plight of these people. This inhumane incident clearly shows the power of TNCs to circumvent state laws and is indicative of the inability of national institutions to hold companies accountable for their gross human rights violations in areas where they operate. It is therefore crucial that this treaty establishes direct obligations for TNCs to respect Human Rights therefore enabling affected people to seek justice and reparation in the courts of the TNC's home country and in an international human rights court on TNCs.

Unless there is a framework (such as the binding treaty) to hold these kinds of companies accountable outside of the jurisdiction in which they operate, communities and human rights defenders in regions like Africa will perpetually remain targets of such atrocities.

I am very proud to see unity in the African region voiced here by Togo regarding a commitment to support this urgently needed treaty as a mean to right the wrongs of decades of corporate impunity.

This is the moment for all states to respond to those who elect them and civil society to protect the interests of the communities they represent and work with.

11. FoE Africa Economic Justice regional program co-coordinator, from Liberia, on 19/10/2018

### 3.10) Final Statement - Declaration of the Global Campaign for the closing session of the OEWG on TNCs and human rights, October 18, 2018

The Global Campaign to reclaim people's sovereignty, dismantle corporate power and stop impunity (Global Campaign), an international network of more than 250 members representing social movements and affected communities and those affected by the activities of the transnational corporations, has been firmly committed to the creation of the mandate of the Intergovernmental Working Group on transnational corporations (TNCs) and human rights, so that the latter may draw up a binding treaty with respect to TNCs.

The Global Campaign actively participated in the negotiation process of said Working Group since its inception. As such, in addition to many written and oral contributions, we presented a Draft Treaty last year and this year we presented comments and proposals on the Draft Convention submitted by the Chair of the Intergovernmental Working Group.

The Global Campaign assures its support to the Working Group to continue in the elaboration of the legally binding international instrument on transnational corporations. In our opinion, it is essential that the Working Group

thoroughly review the Draft Convention presented at the fourth session, taking into account the following six elements:

- 1) The future Convention should be addressed to TNCs and other companies with transnational activities, in accordance with the mandate given to the Intergovernmental Working Group in resolution 26/9.
- 2) The future Convention must contain direct obligations for TNCs. It must also establish the joint and several liability of the parent companies with the entities throughout its global production chain (subsidiaries, subcontractors, suppliers, etc.).
- 3) The future Convention should provide for an international enforcement mechanism with effective and binding enforcement powers. In this regard, the Global Campaign proposes the creation of an International Court to prosecute TNCs that commit human rights violations and an International Monitoring Centre of TNCs.
- 4) The future Convention must clearly establish the primacy of human rights obligations over trade or investment agreements.
- 5) The future Convention should include concrete measures against the undue influence of TNCs.
- 6) Effective participation of civil society in all stages of negotiations on the Draft Convention.

These are key elements for the success of the work of the Intergovernmental Working Group and to be able to elaborate an effective and useful instrument that allows those affected to have access to comprehensive justice.

For almost 50 years, United Nations bodies have worked to establish binding standards for TNCs, without success. Those affected have placed their hope in the work of this Working Group in their search for justice.

In a context of multiple crises (social, economic, political, environmental) and conflicts, this Working Group could make its modest contribution by regulating the activities of these entities that escape all democratic and legal control. This regulation will also allow States and peoples, victims of TNCs, to recover an important part of their sovereignty.

#### 4. Conclusions and recommendations

Friends of the Earth International and social movements worldwide have been increasingly engaged in this UN treaty process to address the gaps in international human rights law regarding the regulation of transnational business activities. This has lifted hopes towards the UNHRC as a space where States can defend their peoples' demands with a view to halting human rights violations perpetrated by TNCs that so far remain unpunished and unregulated.

But despite our frustration in respect to the content and structure of the UN Treaty Zero Draft presented at the 4<sup>th</sup> IGWG session, as discussed in this document along with proposals to get it back on track in addressing peoples' demands, a change the dynamics of the IGWG plenary must be noticed, if UNHRC is to recover the trust it needs to be successful in moving the binding treaty process forward to fulfil its duty to this historical demand.

During the 4<sup>th</sup> plenary of IGWG in Geneva last October, where a record number of civil society representatives subscribed (up to 400), many of the interventions and text proposals to the Treaty came, as in previous years, from the voices of affected peoples facing human right violations by TNCs on the ground, most of them already experiencing threats to their lives, to their rights and to their livelihoods, as environmental and human rights defenders that should be protected by the UN and under this future treaty.

But while the IGWG Chairmanship presented a Zero Draft as a *"victim-oriented Draft of a legally binding instrument on business activities and human rights aiming to ensure and effective access to justice and remedy for victims of human rights violation in the context of business activities of transnational character(...)"*<sup>xx</sup>, it has not facilitated the principle of the centrality of the demands of those affected to prevail in the plenary. States with the highest records of killings and threats to defenders of rights and territories, such as Brazil and Colombia, have intimidated affected peoples' voices by accusing them of having used "inappropriate language", when referring to coup d'États that lead illegitimate governments to power and to the rise of fascist forces, or threatening to leave negotiations when listening to testimonies of indigenous leaders or trade unionists persecuted because of their fight against TNCs' projects and militarization of their territories. Responding to appeals like these, the IGWG Chair once even cut out the sound to a panelist woman representing the voice of La Via Campesina, one of the largest global social movements, invited to speak on an expert experts panel of affected people's voices.

These unprecedented and unacceptable dynamics in the UNHRC room were summarized in the oral intervention by the Brazilian Interdisciplinary Association on SIDA (ABIA), on 19 October 2018,

stressing that democracy is a starting point for the construction of health policies: "The civil society point of view was and is key to guarantee the right to health of people living with HIV/AIDS. This is because in democracy and in formulation of policies to guarantee fundamental rights, the life and experience of people that suffer violations must serve as evidence. (...) This is a forum of Human Rights (...) where, as a consensus, affected people talk. It is fundamental that that those debates evolve from the pain of these people, based on the established principle of the centrality of the suffering of the victim. We consider the technical discussion of the Zero Draft fundamental, to each we are invited and contribute to, but without forgetting ever what brings us here to such an important International Human Rights forum."

On the other hand, private sector lobbies are already participating in the negotiations in Geneva through the voices of the International Organization of Employers (IOE) and the International Chamber of Commerce. In the 4<sup>th</sup> session, the IOE directly threatened Southern States with commercial retaliation if they support the binding treaty. Civil society representatives collectively stood up in the plenary to denounce this blackmailing attempt and to demand the process be protected from corporate capture. However, not a single state has labelled the IOE language as "inappropriate". As repeatedly demanded by the civil society treaty movement, this treaty itself must contain obligations for States to prevent corporate capture from happening at the national level whenever measures to regulate the private sector are being discussed in order to protect workers, communities and the environment.

Regarding the positive recommendations and conclusions of the 4<sup>th</sup> IGWG, which calls for the process moving forwards to comply with the negotiation of a treaty to be adopted by the UNHRC in the near future, according to its mandate, the attitude of European Union towards the subject remains as unproductive as it was at the time of the resolution in 2014. Despite the committed presence of European civil society in Geneva, the EU failed to participate in a substantive manner in the process, blatantly ignoring repeated resolutions by the European Parliament<sup>xxi</sup> in support of the binding treaty. With the exception of a single statement from France on the content, they remained silent for most of the negotiations and even left the room during discussions on the conclusions of the working group. As a final statement, the EU dissociated from the conclusions, isolating itself from the consensus reached by all the other countries. It is clear that the EU is siding with business and not the people whose rights are being violated, including by European transnational corporations.

Indeed, at the beginning of the week of negotiations, a report published by Friends of the Earth France and other partners<sup>xxii</sup>, revealed how the European Union uses the same arguments as corporate lobbies, stubbornly defending ineffective voluntary

guidelines. Among other things, the EU has demanded that businesses participate in the negotiations, following a trend at the UN and in Brussels to legitimize participation of the private sector and invite corporations to “co-write” regulations that would apply to them. This would inevitably lead to a weakening of the ambition of the future treaty and the likely derailing of the negotiations, as business lobbies have proved they are able to and will do anything possible to prevent the adoption of binding norms.

As the largest grassroots worldwide environmental federation, Friends of the Earth International, as we await a substantially reviewed treaty Draft to be presented and discussed in the 5<sup>th</sup> IGWG in October 2019, we expect that:

- states reinforce their commitment with the Treaty, in the spirit established by the Resolution 26/9, bring support to the Ecuadorean chairmanship, in order to raise ambition of the Revised Draft text and to guarantee a good path of negotiations, without unnecessary delay
- states bring concrete text proposals to informal consultations in a transparent and constructive way prior to the presentation of a new Draft by the IGWG chairmanship, and engage firmly on negotiations for the adoption of an effective treaty to regulate TNCs' activities under International Human Rights Law;
- a revised Draft be published by the IGWG, according to the conclusions of the 4thIGWG session and contributions from the informal consultations, and that the content of this Revised Draft be reinforced in order to reach the main objectives of regulating TNCs to prevent human rights violations caused by their activities, and of bringing justice to the affected communities ;
- states and their regional groups work to secure UN funding for the accomplishment of the mandate Resolution 26/9 of and for a proper process of negotiations for the next sessions, in the presence of affected peoples and civil society;
- states agree on concrete measures to prevent corporate capture of the processes due to explicit conflict of business interests with the treaty subject, similar to those contained in the Tobacco convention, to be implemented in the treaty content and applied to the process of negotiations;
- and finally that the voices of defenders of rights and territories, social movement leaders and affected

communities representatives are guaranteed, protected and encouraged in order to defend their rights within the UNHRC space, as a minimum as worded in the UN Human Rights defenders declaration.

## references

- i <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgotnc.aspx>
- ii [www.foei.org](http://www.foei.org)
- iii <https://www.stopcorporateimpunity.org/>
- iv [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/26/9](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9)
- v <https://www.treatymovement.com/>
- vi For an overview of FoEI work for the UN Binding Treaty on TNCs, visit: <https://www.foei.org/un-treaty-tncs-human-rights>
- vii See example of national work lead by REDEs FoE Uruguay with the Uruguayan parliament at: <http://homacde.com/wp-content/uploads/2017/11/Empresas-transnacionales-y-derechos-humanos.pdf>
- viii [https://www.foei.org/wp-content/uploads/2018/10/Treaty\\_draft-EN1.pdf](https://www.foei.org/wp-content/uploads/2018/10/Treaty_draft-EN1.pdf)
- ix see written contributions by FoEI and the Global Campaign at the IGWG official page: <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgotnc.aspx> and oral statements, interviews and media coverage by Real World Radio at: <https://www.foei.org/un-treaty-tncs-human-rights#rwr>
- x <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>
- xi [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf)
- xii [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- xiii DE SCHUTTER, Olivier. The Elements for the Draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights: A Comment: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/OlivierDeSchutterSubject3.pdf>
- xiv The application of due diligence principles, based, in turn, on the logic of compliance, do not face the possibility of companies self-monitoring , which make them capable of interfering in their own repair process. In addition, we must combat the concept of due diligence based on the assessment of corporate risk, subjecting it fully to the Human Rights principles
- xv <http://www.oecd.org/daf/inv/mne/48004323.pdf>
- xvi <https://www.etoconsortium.org/mc/en/main-navigation/library/maastricht-principles>
- xvii <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/SubmissionLater/CETIM.pdf>
- xviii International Law Association, Sofia Guidelines on Best Practices for International Civil Litigation for Human Rights Violations, 2012
- xix [https://www.foei.org/wp-content/uploads/2018/10/Foei\\_Africa\\_english\\_FINAL\\_spread.pdf](https://www.foei.org/wp-content/uploads/2018/10/Foei_Africa_english_FINAL_spread.pdf)
- xx <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/NoteVerbateLBI.PDF>
- xxi The European Parliament has passed the following resolutions in support to the UN Binding Treaty process:
  - European Parliament resolution on the EU's input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights (2018/2763(RSP));
  - European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries (2015/2315(INI));
  - European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI));
  - European Parliament resolution of 27 April 2017 on the EU flagship initiative on the garment sector (2016/2140(INI));
  - European Parliament resolution of 14 February 2017 on the revision of the European Consensus on Development (2016/2094(INI));
  - European Parliament resolution of 14 April 2016 on the private sector and development (2014/2205(INI));
  - European Parliament resolution of 21 January 2016 on the EU's priorities for the UNHRC sessions in 2016 (2015/3035(RSP));
  - European Parliament resolution of 8 July 2015 on tax avoidance and tax evasion as challenges for governance, social protection and development in developing countries (2015/2058(INI));
  - European Parliament resolution of 12 March 2015 on the EU's priorities for the UN Human Rights Council in 2015 (2015/2572(RSP)).
- xxii The report « The EU and the corporate impunity nexus - Building the UN binding treaty on transnational corporations and human rights », published by Amis de la Terre/Friends of the Earth France, CETIM, Observatoire des multinationales and the Transnational Institute (TNI), is available in English, French and Spanish : <https://www.amisdelaterre.org/EU-and-corporate-impunity-nexus.html>

[www.foei.org](http://www.foei.org)