

THE TREATY ON TNCs AND THE STRUGGLE TO STOP CORPORATE IMPUNITY

*An Interview with Civil Society*¹

On June 26, 2014, under the leadership of Ecuador and South Africa, the UN Human Rights Council passed landmark resolution 26/9,² establishing an open-ended inter-governmental working group (IGWG)³ that is mandated to elaborate an international legally binding instrument on transnational corporations (TNCs) and other business enterprises with respect to human rights (hereinafter, the Treaty). It was a tight vote: the resolution was supported by 20 states, mainly from Africa and Asia, and opposed by 14, including the United States and the European Union, with 13 abstentions. The resolution strikes a nerve—and there is much expectation around it.

The role of civil society organizations (CSOs) and social movements was fundamental in the adoption of the resolution. In early 2014, around 500 CSOs came together in the Treaty Alliance to collectively organize activities in support of the Treaty; now the Treaty Alliance is supported by more than 1,000 organizations and individuals worldwide.⁴ The *Campaign to Dismantle Corporate Power and Stop Impunity*,⁵ which was formally launched in 2012 and brings together 200 social movements and affected communities from around the world, has also played a key role in the establishment and activities of the Treaty Alliance. Additionally, the Campaign is developing a Peoples Treaty aimed at articulating a common vision of the future international architecture of justice and law, as well as giving visibility to alternative practices that are already transforming several aspects of our social and economic lives, such as food sovereignty. Affected communities and social movements are the main protagonists in this process.

To find out more about these two processes, the *Watch* Team interviewed Carlos López, Senior Legal Advisor for Business and Human Rights at the International Commission of Jurists (ICJ); Gonzalo Berrón, Associate Fellow at the Transnational Institute (TNI); and Rolf Künemann, Human Rights Director at FIAN International.

Question: Civil society and social movements are increasingly coming together to demand that corporations be held accountable for the impact of their activities on people's human rights. What is at stake within the context of the Treaty?

Answer—Gonzalo Berrón: Over the past few years TNCs have obtained many rights. With the aim of attracting foreign investments, states promote trade and investment agreements guaranteeing companies access to markets under conditions of legal stability, as well as other benefits. Companies are able to move from one place to another, to come and go between places, to deposit funds in a country and transfer them to a different country the following day. They often operate in that way without considering the harm that their activities cause to nature or to local populations, benefiting from the absence of legal standards to regulate and control their operations at the international level. The term we use to talk about this legal structure is 'the architecture of impunity'.⁶

Cases of abuses by TNCs are very common in Latin America and worldwide. In Brazil, for example, there is an increase in investments in the development of

- 1 This article is based on interviews conducted in English and Spanish in April 2015. Special thanks to M. Alejandra Morena, Felipe Bley Folly and Ana María Suárez Franco (FIAN International), as well as Nora McKeon (Terra Nuova) and Priscilla Claeys (University of Louvain and French Institute of Pondicherry) for their support in drafting and reviewing this article.
- 2 Human Rights Council. *Resolution 26/9 (A/HRC/RES/26/9)*. Geneva: Human Rights Council, July 14, 2014. Available at: ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9. Resolution 26/9 stemmed from a draft resolution signed and submitted on June 25, 2014, by Bolivia, Cuba, Ecuador, South Africa and Venezuela. Out of these five signatory countries, Ecuador and Bolivia were not members of the Human Rights Council and, for this reason, did not have the right to vote. Nonetheless, Ecuador, along with South Africa, spearheaded the process of its approval. The draft resolution is available at: ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.22/Rev.1.
- 3 The IGWG held its first meeting from July 6-10, 2014, in Geneva. For further information, please see: FIAN International. "A Victory vis-à-vis the Upcoming UN Treaty on TNCs and Human Rights." *FIAN*, July 10, 2015. Available at: www.fian.org/news/article/detail/a_victory_vis_a_vis_the_upcoming_un_treaty_on_tncs_and_human_rights. The report of the IGWG's first session will be made available at: www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/Session1.aspx.
- 4 Around 1,000 organizations and individuals from 95 countries signed the first Joint Statement of the Treaty Alliance, launched prior to the June 2014 session of the Human Rights Council during which resolution 26/9 was passed. For more information, please visit: www.treatymovement.com.
- 5 For more information, please visit: www.stopcorporateimpunity.org/?page_id=5530.

hydroelectric plants that displace indigenous populations and have negative impacts on the environment. An example is Tractebel,⁷ a very strong European energy conglomerate that promotes this type of investment in Brazil. Another example is Vale do Rio Doce,⁸ a Brazilian mining company whose activities have not only had a negative impact on Brazil, but also on Mozambique and other African countries.

This is very worrying and dangerous as often projects and investments are carried out without consulting the affected local communities, and without assessing the impact on society and the environment. Thus, what is at stake with the discussion of an international treaty is precisely that: to consider how we can find justice for affected communities and act as a kind of 'braking force' to TNCs regarding abuses of human rights. The Treaty is intended to address this issue in particular.

A—Rolf Künemann: The adverse impact of corporations on human rights values is well known. What is at stake in the Treaty is to regulate TNC behavior so that states implement their human rights obligations to *protect* people against harm from TNC activities.⁹ Since the activities of TNCs go beyond borders, their regulation also has to be cross-border. States have to implement their duty to cooperate: not only the states where people affected by the activities of TNCs live, but also the states where the TNCs are based or have major business activities. It means states have extra-territorial obligations (ETOs) in this context.¹⁰ States must be accountable to the people in order to ensure that these obligations are complied with.

Q: The document to be elaborated by the IGWG would be the first international human rights treaty to specifically regulate the activities of TNCs and other businesses. How will this treaty work?

A—Carlos Lopéz: The proposed treaty will indeed be the first legally binding treaty to link human rights with the operations of business enterprises, including TNCs, realized through an inter-governmental process. This is a great opportunity to achieve the long-term objective of subjecting business enterprises to the rule of law and human rights norms. There have been other initiatives in this area in the past. However, experts led these initiatives. Now we are talking about an inter-governmental process run by states, in which the IGWG will deliberate the rules and processes to be part of international law.

Other treaties, such as the statute of the International Criminal Court (ICC), can be used as an example in this process. What treaties require from ratifying states is to incorporate into national legislation a series of definitions of offenses and breaches of human rights norms that are defined in the treaty. In that way, the standards are defined in international law under the treaty, but they have to be implemented through national law and enforcement mechanisms, such as the judiciary, and other monitoring bodies.

This can only be effective if the enforcement mechanisms to hold companies accountable are expeditious and effective. Many human rights abuses by business enterprises involve numerous actors across several jurisdictions. To adequately deal with this problem, we need national courts to expand their jurisdiction to deal with cases that are of transnational nature, that is, with abuses that occur abroad. The Treaty can provide that national courts shall have extraterritorial jurisdiction.

Importantly, this also will require international judicial cooperation and mutual legal assistance between political, judicial and legal authorities from different countries.

6 A further key issue to highlight in relation to the growing power of TNCs and erosion of human rights is the proliferation of investor-state dispute settlement (ISDS) mechanisms, including in the framework of trade agreements. For instance, under the current Trans-Pacific Partnership (TPP) draft, companies can sue governments for alleged losses due to government policies made in the public interest. This is a concerning development, since the threat of international arbitration can have a 'chilling effect' on governments and prevent them from introducing legislation. For further information on ISDS mechanisms, please see the insight box 6.3 "The Trans-Pacific Partnership: A Threat to Human Rights" in this issue of the *Right to Food and Nutrition Watch*.

7 Vieira Prioste, Fernando G. and Thiago de Azevedo P. Hoshino. *Transnational Corporations in the Defendant's Seat: Human Rights Violations and Possibilities for Accountability*. Curitiba: Terra de Direitos, 2009. Available at: terradedireitos.org.br/wp-content/uploads/2011/08/Transnacional-em-ingl%C3%AAs.pdf#page=66. Victims of Tractebel's activities in Brazil have denounced the company in France, where the company has one of its main offices: Movimento dos Atingidos por Barragens. "MAB Denounces Tractebel's Action to French Parliamentarians." *Movimento dos Atingidos por Barragens*, September 9, 2014. Available at: www.mabnacional.org.br/en/english/mab-denounces-tractebels-action-french-parliamentarians. Tractebel Engineering GDF-Suez was contacted with a request for a reaction on the information included in this article on July 15, 2015. In their reply of July 27, 2015, Tractebel affirms that several dams have been built on the Tocantins river. The first Hydropower Plant (HPP) developed by the Belgian energy company Tractebel was Cana Brava HPP (owned and operated by Tractebel Energia, a listed Brazilian utility, part of ENGIE), which was constructed together with Serra da Mesa HPP (developed and operated by the Brazilian public companies FURNAS and CPFL). According to the corporation, during the construction of the latter, five members of the Avá Canoeiros indigenous community were encountered and installed in a created reserve. In this sense, the company alleges that since both HPPs Cana Brava and Serra da Mesa initially were to be developed by FURNAS, all impacts for the indigenous community were identified at the beginning, leaving the issue solved for Cana Brava HPP, located downstream. For this reason, Tractebel sustains that Cana Brava HPP did not impact any indigenous community and that "all the individuals or families who were directly affected by the building of Cana Brava have been duly identified and compensated, according to Brazilian regulation."

Without this, it will be difficult for any given country to effectively investigate or prosecute and enforce decisions of foreign courts in their territory. We have seen cases in the recent past in which even judicial decisions have gone unenforced because of the lack of clear rules and procedures on recognition of foreign judicial decisions. It is important that the Treaty defines or creates an international monitoring and oversight system. Generally, international human rights treaties establish independent monitoring by a committee of independent experts.

Q: What would be the practical implications of the Treaty on the enjoyment of, and accountability for, human rights by the people, and specifically the human right to adequate food and nutrition? How could it help to strengthen human rights?

A—Rolf Künemann: The Treaty is, first of all, an agreement between states to jointly regulate TNCs and other business enterprises. Its practical implications will depend on the nature of regulation provided by the Treaty. This in turn will depend on the scope of the Treaty, which is to be determined and negotiated by the IGWG in its future sessions in 2015, 2016 and beyond. Probably the Treaty will codify duties of international cooperation and mutual assistance between states to jointly regulate and sanction harm done by TNCs. It would also set standards on how states themselves have to avoid assisting TNCs in doing such harm, and specify obligations of TNCs and their related liability, so that people and states can take TNCs to court.

The human rights values that could then be legally protected with international cooperation include people's adequate food and nutritional well-being, and the possibility to feed themselves in dignity. The harm addressed by the Treaty could include land, water and seed grabbing, forced evictions, eco-destruction, unsustainable production methods, contamination of food production resources, destruction of food crops, marketing of unsafe food, breaches of the code on infant food,¹¹ and corporate capture of agricultural and nutritional policies.¹²

Currently, big TNCs try to get control over global food production.¹³ The Treaty could be a step to provide a remedy for such harm. These are not matters that trigger the human rights obligations of one state alone. Some states are directly or indirectly involved in supporting or tolerating the harm done by TNCs. Other states are threatened by international investment treaties in their human rights policies, for example, in the area of agrarian reform or indigenous peoples' land rights. The Treaty could provide international law that can roll back such malpractices.

Q: How would the future UN Treaty stand in relation to other documents, such as the UN Guiding Principles on Business and Human Rights (so-called Ruggie Principles)?

A—Carlos López: In principle, the Treaty should be complementary to and go hand in hand with other instruments. There is no necessary relationship of conflict between these instruments. On the contrary, the process around the Treaty can draw inspiration from certain provisions in the UN Guiding Principles on Business and Human Rights,¹⁴ spearheaded by John Ruggie, and from the Norms of Human Rights for Transnational Corporations,¹⁵ drafted by the UN Sub-Commission on the Promotion and Protection of Human Rights between 1997 and 2003. There is a good basis to start the discussion.

- 8 The company received the 2012 Public Eye Award on 'Corporate Irresponsibility'. For further information, please visit: www.publiceye.ch/hall-of-shame. The Institute of Alternative Policies for the Southern Cone recently published the Unsustainability Report (2015) on the impact of the company's activities on human rights in Brazil, Mozambique, Peru, Malaysia and other countries. Available in Portuguese at: www.pacs.org.br/files/2015/04/Relatorio_pdf.pdf. Vale S.A. was contacted with a request for a reaction on the information included in this article on July 15, 2015. In their reply of July 27, 2015, they claim Vale's activities have made a significant contribution to GDP, allowing mining regions to improve their HDI over the last 70 years in the State of Minas Gerais and over the last 30 years in the North of Brazil. They base their allegation in one study conducted by Oxford Policy Management, ICM and IBRAM, which is available at: www.icmm.com/document/5423. Two other reports were also mentioned, which are available at: www.fjp.mg.gov.br/index.php/noticias-em-destaque/1974-fundacao-joao-pinheiro-divulga-o-pib-dos-municipios-de-minas-gerais and www.mdic.gov.br/sitio/interna/interna.php?area=2&menu=208. The corporation also affirms that, in other countries where it also operates, similar results and local and national developments are aimed. In the reply, the company claims that its sustainability performance can be advanced and refutes the two reports mentioned at the beginning of footnote 8 (the 2012 Public Eye Award and the 2015 Unsustainability Report), alleging they are partial and contain misleading information. The corporation is working on the clarification and rectification of the main allegations made in both reports (available by August 3, 2015 at: business-humanrights.org/en/valebusiness-humanrights.org/en/vale).
- 9 According to the United Nations interpretation of International Human Rights Law, "States assume obligations and duties under international law to *respect*, to *protect* and to *fulfil* human rights. The obligation to *respect* means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to *protect* requires States to protect individuals and groups against human rights abuses. The obligation to *fulfil* means that States must take positive action to facilitate the enjoyment of basic human rights." [emphasis added]. Office of the High Commissioner for Human Rights (OHCHR). "International Human Rights Law." OHCHR, undated. Available at: www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx.
- 10 For more information on ETOs, please visit: www.ecoconsortium.org. See also: ETO Consortium. *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*. Heidelberg: FIAN, 2013. Available at: www.ecoconsortium.org/nc/en/library/maastricht-principles/?tx_arblob_pi1%5BdownloadUId%5D=23.

But there is one key difference: a treaty is a legally binding instrument that contains regulations that are obligatory for ratifying states, whereas the provisions of non-binding instruments are recommendatory and declaratory only. A considerable number of CSOs have criticized the UN Guiding Principles for their lack of binding character and gaps in content in, *inter alia*, the area of access to remedies and justice. The Treaty, I hope, will mend those problems.

A—Rolf Künemann: In order to regulate TNCs and other businesses it is necessary to have binding international agreements on the cooperation of states; regulation is something that principles and guidelines cannot do. It is very difficult to protect rights just by providing ‘guidance’ to TNCs and businesses. TNCs are not just national corporations that could easily be regulated at the national level. While the Ruggie Principles focus on guidance and stress the obligation to *protect*,¹⁶ they do not fully exploit the ETOs that need to be implemented by a binding international mechanism to jointly regulate TNCs.¹⁷

Q: The Maastricht Principles on Extraterritorial Obligations provide a summary on states’ obligations to respect, protect and fulfill human rights beyond their own borders—separately and jointly.¹⁸ How relevant are ETOs to the Treaty?

A—Rolf Künemann: ETOs are a key element to the Treaty. The Treaty needs to further operationalize states’ extraterritorial obligations to respect and protect human rights when it comes to transnational businesses. ETOs include the obligation to cooperate with each other in the protection of people against harm done by TNCs. The Maastricht Principles summarize international human rights law that needs to be taken into consideration when drafting the Treaty. Without ETOs the Treaty cannot properly address the human rights challenges in regulating TNCs. It is not necessary for states to make promises to each other about how they would regulate business activities that do not impact abroad. We don’t need this kind of mutual promises; we need reliable standards for what is to be considered an offense by a TNC and international cooperation of states in remedies.

Q: The Treaty Alliance comprises of more than 900 CSOs and social movements, including various members of the Watch Consortium and the Global Network for the Right to Food and Nutrition. Who is represented in the Treaty Alliance? How is its work organized and what are the key demands?

A—Rolf Künemann: The Treaty Alliance is an alliance of CSOs, many of whom have significant experience working with human rights issues that relate to the activities of TNCs. They know the difficulties that states encounter in meeting their obligations to protect human rights—and that such obligations need international cooperation and binding agreements to be implemented.

Members of the Treaty Alliance include ESCR-Net, FIAN International, International Federation for Human Rights (FIDH), International Commission of Jurists (ICJ), the Transnational Institute (TNI), Europe Third World Centre (CETIM), Friends of the Earth, Franciscans International, International Alliance of Catholic Development Agencies (CIDSE), International Baby Food Action Network (IBFAN) and other organizations that have been asking for such an instrument for quite some time. The Alliance is not an organization, but a loose coalition. Work is organized in

11 For more information, please visit: World Health Organization. *International Code of Marketing of Breast-milk Substitutes*. Geneva: WHO, 1981. Available at: www.who.int/nutrition/publications/code_english.pdf.

12 For more information on this issue, see article “The Corporate Capture of Food and Nutrition Governance: A Threat to Human Rights and Peoples’ Sovereignty” in this issue of the *Right to Food and Nutrition Watch*.

13 For more information on this issue, please see: Nora McKeon. *Food Security Governance: Empowering Communities, Regulating Corporations*. New York/Oxford: Routledge, 2015.

14 OHCHR. *Guiding Principles on Business and Human Rights*. New York/Geneva: UN, 2011. Available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

15 United Nations Sub-Commission on the Promotion and Protection of Human Rights. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*. Geneva: UN, 2003. Available at: www1.unm.edu/humanrts/links/res2003-16.html. These norms were not approved by the former UN Commission on Human Rights, although they were able to start the debate on the topic within the UN.

16 *Supra* note 9.

17 *Supra* note 10.

18 *Supra* note 10.

a very decentralized way. There is a facilitating group, some working groups and a good flow of cooperation and communication.

Key demands of the Treaty Alliance relate, first of all, to the need for states to monitor and regulate the operations of TNCs under their jurisdiction in order to protect human rights values—even outside their national territories. There is a need to create international monitoring and accountability mechanisms—and such mechanisms are a key demand of the Treaty Alliance.

One demand that should be stressed is that the Treaty Alliance wants a treaty; it is not enough to have just any type of legal instrument, such as an optional protocol or something of this nature. The TNC issue is a key component of globalization and such a treaty is actually overdue. So, the demand is to finally get the community of states to set up legal liability for TNCs if they harm human rights values.

A further vital issue in this context is the situation of human rights defenders. They are being increasingly criminalized, as are whistle-blowers, who are people inside TNCs or organizations that inform about activities that affect human rights values. The Treaty should provide protection for these groups too.

Q: Civil society and social movements are also negotiating a ‘Peoples Treaty’. What is the goal of this treaty?¹⁹

A—Gonzalo Berrón: The Peoples Treaty (PT) is a political and conceptual structure that we have built together with social movements and organizations, as well as with communities affected by the operations of TNCs. The goal is to generate the laws, regulations, rules and institutions needed by the world and global society to stop human rights abuses by TNCs, which result from the growing economic power they have acquired, and to put an end to what we call the ‘commoditization’ of our lives and excessive consumerism.

Why a Peoples Treaty outside of the UN system? This idea arises from the mistrust that many social movements and organizations have towards the UN. TNCs’ interests have largely captured the UN system.²⁰ In spite of being an organization where states take part, lately TNCs are the ones—indirectly—appointing the civil servants of those institutions and other international bodies. Thus, it is logical that we have some mistrust towards this institution and that, in this sense, we, movements, social organizations and affected communities, have decided to build our own instrument. Laws are created either as a tool to impose obligations on those who are dominated by others, or as a tool to stop abuses and defend the vulnerable. The latter case applies to the PT, through which the vulnerable are fighting to claim our rights at the international level.

This is a mobilization and discussion process, which started before the recent initiative in the UN. We have drawn up a first draft that will be discussed globally in 2015 and 2016, and which will serve as our reference in our discussions with the UN.

An important dimension of this document is that it is not merely a legal document, but it moves towards alternatives and proposals of different public policies to organize life in our societies and to protect peoples and communities, our environment, workers, women, youth and indigenous peoples. It is a tool for the struggle, which we hope turns into a reference towards a change for a better world.

¹⁹ For more information, please visit: www.stopcorporateimpunity.org/?page_id=5530

²⁰ *Supra* note 12.

Q: There is controversy over the UN Treaty among states. How can people contribute to a meaningful outcome in the next months and years? What are the next steps?

A—Gonzalo Berrón: The most important element to help this process move forward is people’s mobilization. Governments need to feel that popular pressure in the capitals and at the international level is strong, that the public knows what’s going on and is determined to effectively change the rules of the game for TNCs and people, and that there are many organizations supporting this process. Obviously, it is essential to develop a binding tool that protects them against abuses by TNCs.

Without mobilization and people’s pressure, we cannot change the current correlation of power. As I mentioned before, there is a dispute within the UN in which the interests of TNCs have captured the political decision-making system. In the absence of people’s mobilization, TNCs will end up winning. Therefore, we have to change this correlation of power and, as we have seen with the approval of resolution 26/9 in June 2014,²¹ it is possible to achieve some victories. But this will only happen if, and only if, we mobilize and fight together for a treaty as comprehensive and inclusive as possible to be able to realize the human rights of all peoples.

A—Rolf Künemann: Firstly, for those who have not done so yet, organizations and social movements should join the Treaty Alliance. This ensures that member CSOs and social movements are in the loop about what is happening and what is needed. Individual members can also sign statements of the Treaty Alliance.²² Secondly, advocacy and publicity with the general public on how such a Treaty can prevent or stop harm done by TNCs and other business is needed. Thirdly, governments must be lobbied and pressurized in the countries and capitals. Make your government and parliament understand that your state has to protect human rights values, not only at home but also towards populations abroad, and that it has to cooperate in the Treaty process to implement these obligations. We all depend on states being accountable to the people and doing their duties in regulating TNCs, including on issues of ecology. So, this is something highly significant politically. People should develop their vision on how states have to cooperate globally in the future in order to govern TNCs, instead of being governed by them—and use the Treaty process as a step towards realizing such cooperation.

²¹ *Supra* note 2.

²² For the latest statement of the Treaty Alliance, please visit:
www.treatymovement.com/statement.