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Joint Written Submission to the 3rd session of the Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (IGWG)

27 February 2018

UN treaty on business and human rights; a historic opportunity to remove barriers to justice

In this written submission we would like to draw attention to a [report](#) written by Daniel Blackburn (Director of the International Centre for Trade Union Rights) and co-commissioned by the undersigned organizations.

Access to justice for victims of business-related human rights violations is a widespread and growing problem around the world. For decades, communities have been bearing the brunt of corporate misconduct without any proper access to remedy. On a daily basis, people have been [risking](#) their lives in order to protect their land, their livelihoods, the environment and their rights as workers. Often, communities stand alone on the frontline – with international human rights standards on their side, but without (judicial) enforcement to back them up.

The ‘Removing Barriers to Justice’ report gives an overview of several obstacles currently faced by victims of business-related human rights abuses when trying to access remedy, illustrated by analysis of transnational business and human rights litigation.

Firstly, issues regarding forum selection, the legal applicable framework and extraterritorial jurisdiction can result in victims not being able to access the courts in their home state or in the host state either. Once able to access court, legal barriers – specifically the *corporate veil* – can effectively shield the parent company from liability for the acts of its subsidiaries.

After the case has reached substantive review, the lack of criminal liability provisions or binding due diligence requirements makes it challenging to hold companies to account for their acts and omissions causing harmful impacts. Safety concerns, the lack of financial resources and lack of access to information, combined with a burden of proof, form a significant obstacle between affected individuals and communities and courts, which is equally detrimental to victims’ cases. Finally, the willingness and ability of domestic agencies to enforce the limited existing laws in relation to corporate misconduct both remain issues of concern.

The report puts forward concrete recommendations for how the UN treaty can remove barriers to justice while building upon and complementing the UN Guiding Principles on Business and Human Rights (UNGPs).

A treaty needs to create an international framework for jurisdiction and choice of law for transnational business and human rights cases, decreasing the likelihood of jurisdictional battles. Removing legal barriers to corporate liability, the treaty should also establish parent company liability and criminal liability for corporate offenders, as well as a binding duty of care related to companies' subsidiaries and supply chain.

The due diligence framework set out by the UNGPs can be given legally binding force, with a vision to improve corporate planning, oversight and transparency. Critical to protecting lives and a safe space for civil society, the treaty needs to extend protection to human rights defenders, possibly through the introduction of libel law reform, judicial protection for whistle-blowers and firmly establishing community participation in relation to business projects.

Improving victims' access to courts, the treaty should include provisions on financial and legal support for plaintiffs, reversed burden of proof and victims' access to information. Last but not least, an internationally binding instrument should address the weak links in domestic legal systems by creating agreement on judicial cooperation, mutual recognition and enforcement of judicial decisions, strengthening domestic agencies in responding to transnational cases, stipulating effective sanctions to be imposed by domestic legal processes and establishing an effective global oversight body on implementation of the treaty.

Whether through the use of domestic courts, the establishment of a transnational court and/or a global oversight body, the added value of the treaty will – among other things – be measured by the remedy it delivers on the ground. In its [report](#) on the right to an effective remedy, the UN Working Group on Business and Human Rights emphasizes that rights holders should be central to the entire remedy process, if there is to be access to effective remedy. Furthermore, effectiveness of remedies concerns both process and outcome: if the rights holders are not satisfied at the end of the remedial process, no remedy was achieved. Without effective remedy on the ground, the treaty will fail the very people it is supposed to serve. We have reiterated on different occasions that the UNGPs alone are not enough to hold companies to account. This UN treaty will complement the UNGPs, as is further elaborated in the report.

Undersigned,

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