

**Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net)**

**Submission to the United Nations’ Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGWG)**

**Second meeting of the IGWG at the Human Rights Council, October 24-28, 2016**

We,the undersigned members of the Corporate Accountability Working Group (CAWG) of the International Network for Economic, Social and Cultural Rights (ESCR-Net), jointly call upon the United Nations’ *Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights* (IGWG) to include the elements outlined in this statement within any draft materials the IGWG develops to outline the content of the forthcoming binding international instrument (Treaty). We also reaffirm our continuing commitment to support the important activities of the IGWG in the process towards developing and seeking adoption for the Treaty.

Over the course of the past two years CAWG has led a [worldwide consultation](https://www.escr-net.org/corporateaccountability/treatyinitiative) with over 150 civil society organisations (CSOs), including in-person consultations with our members and partners in Asia-Pacific, Africa and Latin America, and online consultations with civil society organisations (CSOs) from all regions.[[1]](#footnote-1) This submission is a reflection of the priorities that emerged out of these consultations.[[2]](#footnote-2) ESCR-Net is also actively engaged in the global [Treaty Alliance](http://www.treatymovement.com/), and supports the collective Alliance statements.

In our first submission of 2016 to the IGWG, we recommend the Treaty reflect the realities of current TNC-OBE operations and their impact globally, the Treaty should **reaffirm the primacy of human rights obligations** (Section 2.1), **cover** **all human rights** (Section 2.2)and be **applicable to all TNC-OBE, but primarily address the activities of TNCs** (Section 2.3).

Contained in this second submission of 2016 to the IGWG, we recommend the need to ensure an enabling environment for the enjoyment of human rights in practice, the Treaty should outline the framework requirements for **operationalizing the legal responsibilities of TNC-OBE to respect human rights** (Section 2.4) and for ensuring **access to information and participation** (Section 2.5), and should affirm States’ **extraterritorial obligations** (Section 2.6).

In this third submission to the IGWG we recommend that, in order to facilitate access to justice for persons whose human rights enjoyment is impaired by TNC-OBE activities, the Treaty should address legal and practical obstacles to redress through framework requirements regarding **access to justice** (Section 2.7) and protection of **human rights defenders** (Section 2.8).

In our fourth and final submission of 2016 to the IGWG we recommend that specific consideration be given to the need for the Treaty to consider addressing the disproportionate influence of corporations on policy making by addressing the **prevalence of** ‘**corporate capture’** (Section 2.9), address the impacts of TNC-OBE activity from a **gender** perspective (Section 2.10) and consider the rights of **indigenous peoples** (Section 2.11), as well as strengthen effective oversight of TNC-OBE activities in **conflict and post-conflict situations** (Section 2.12).

* 1. **Operationalization of TNC-OBE Legal Responsibilities to Respect Human Rights**

Current legal frameworks around the world, far from protecting those whose human rights are impaired by TNC-OBE activity, often actively perpetuate a culture of corporate impunity, privileging the pursuit of profit and other corporate objectives over human rights. From the testimony of those affected, it is also clear that States often either actively collude with TNC-OBE, fail to prevent the harm done by TNC-OBE or make minimal or no effort to address such harm. Such failures by States to protect against human rights abuses by non-State actors amount to human rights violations by the States. States, jointly and separately, must take all appropriate measures to comply with their obligation to protect, including through explicit recognition that TNC-OBE have a legal responsibility to respect human rights and the establishment of a legal framework to address impairment of human rights enjoyment by TNC-OBE.

Many national laws recognize that corporate entities themselves, not merely their individual officers or employees, can be held criminally responsible for damage in connection with their activities. For example, in France companies are able to be found guilty of an offence, major or minor, under the Penal Code. Many other jurisdictions in Europe provide for corporate criminal liability including Belgium, Italy, Poland, the United Kingdom, the Netherlands, the Czech Republic, Romania, Luxembourg and Spain. In Australia, corporations are able to be prosecuted for certain crimes, as are corporations in other jurisdictions that have similarly incorporated components of the Rome Statute of the International Criminal Court into their national laws and applied them to “legal persons” (i.e. corporations). In Africa, the constitutions of both South Africa and Kenya impose responsibilities upon corporate entities as well.

At the regional level, a 2014 Protocol to the African Court of Justice and Human and Peoples’ Rights establishes jurisdiction for the court over a series of criminal offences when committed by corporations. Furthermore, the trend in international standards in the area of human rights and business has been to recognize the responsibilities of TNC-OBE to respect human rights, including by acknowledging that they exist independently of States’ abilities and/or willingness to fulfill their own human rights obligations, and that they do not diminish these obligations. And yet, almost 70 years after the Universal Declaration of Human Rights (UDHR) first proclaimed that “every individual and every organ of society” shall respect human rights, States have not established a universal, binding international human rights legal framework to detail how to bring this into operation vis-à-vis TNC-OBE.

The current advances made at national and regional level are augmented only by a non-binding international framework, which does not connect the responsibilities of TNC-OBE to respect human rights with corresponding legal liabilities to address circumstances where they do not fulfill their responsibilities. This is problematic as it renders international human rights standards in this field merely aspirational. The result is an inconsistent patchwork of national and regional laws which provide limited legal bases in some States for taking action against TNC-OBE. These gaps are compounded by weak protection of human rights in the context of TNC-OBE activity, in stark contrast to the strong, binding framework established in the trade and investment field, as discussed in section 2.1 (in our first submission).

While affirming the State obligation to protect against human rights abuses by non-State actors, the Treaty provides the opportunity to confirm that TNC-OBE have legal responsibilities to respect human rights and to provide a framework for holding TNC-OBE legally liable for failure to comply with such responsibilities.

**Key Recommendation: The Treaty should:**

1. **Confirm that TNC-OBE are legally bound to respect human rights and can be held directly liable for their impairment of human rights under national law;**
2. **Outline the State obligation to develop and implement enabling legislation, policies and practices that impose liability on TNC-OBE for any activity which impairs the enjoyment of human rights; and**
3. **Ensure access to a complementary international recourse mechanism, as detailed in Recommendation 2.7(g) in our third submission.**
	1. **Ensuring Access to Information and Participation**

Where TNC-OBE activity could impair or has impaired the enjoyment of human rights, affected persons must have enough information to be able to understand and discuss the situation fully, in order to make informed decisions on what action to take to prevent and address human rights abuse. Currently, there is a serious lack of information available to local communities and the general public about corporate decisions and practices. In particular, access to relevant, sufficient, quality information necessary for meaningful participation is lacking at each stage of corporate activity: (1) prior to corporate activity, (2) during and after corporate activity, (3) during investor-State dispute settlement processes, and (4) when seeking accountability if human rights abuse occurs. The failure to gather and/or disclose necessary information can affect many other rights such as the right to a remedy. The proposed Treaty offers the opportunity to outline the State obligation to provide/strengthen (independent access to) key information and therefore reduce the information gaps.

Human rights due diligence is a key concept outlining the responsibility and activities by which TNC-OBE should identify, prevent, mitigate and account for the harms they cause, contribute to, or to which they are linked. The proposed Treaty offers the opportunity to outline the State obligation to clarify the concept and elements of human rights due diligence.

**Key Recommendation: The Treaty should set out a general framework to ensure public participation and access to relevant, sufficient, quality information, in connection with each stage of TNC-OBE activity, requiring States to take concrete, targeted measures to, among other things:**

1. **Establish national legislation requiring mandatory human rights due diligence by TNC-OBE in accordance with, at a minimum, existing international standards in the area of human rights and business, which among other things:**
	1. **cover of all TNC-OBE activity, including those of subsidiaries and other business enterprises in the supply chain;**
	2. **require regular human rights impacts assessments for all TNC-OBE activity;**
	3. **require timely public disclosure of all relevant documents and materials relating to any and all impacts on human rights and the environment; and**
	4. **ensure the right to participation including through offering safe spaces for women, marginalized and minority groups, and persons with disabilities to voice their concerns freely, and directly engage with TNC-OBE and State representatives in all capacities;**

**b) Ensure timely, regular, public disclosure of negotiations and agreements between States and TNC-OBE (including announcements of meetings and lists of attendees, and publication of contracts and other relevant legal documents), including, but not limited to, those related to trade and investment agreement negotiations and those emanating from investor-State dispute settlement processes; and**

**c) Ensure the right to an effective remedy by, in addition to the measures detailed in Recommendation 2.7 in our third submission, establishing and applying legal rules (for example, in relation to discovery/disclosure) to enable claimants to obtain all information necessary to support a claim against TNC-OBE of human rights abuse.**

* 1. **Extraterritorial Obligations**

The State obligation to protect against human rights abuses by non-State actors, including TNC-OBE, is a keystone of international human rights law and applies both within and outside State territory. States’ extraterritorial obligations (ETOs) – being the human rights obligations of a government toward people situated outside of its own territory – are clarified, on the basis of existing international law, in the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles).[[3]](#footnote-3)

However, while the application of ETOs to TNCs is supported by the opinions of international tribunals, treaty bodies, and UN Special Procedures, effective compliance with ETOs is lacking in practice. States often do not take necessary measures to respect human rights or protect against human rights abuse by TNCs extraterritorially, nor ensure accountability where such human rights violation or impairment occurs. Often the biggest challenge faced by people and communities whose human rights are impaired by TNC activity comes when remedies are unavailable or inadequate where they are located, and they try to access the courts or other remedial mechanisms in the TNC’s ‘home’ State.[[4]](#footnote-4) In this regard, inconsistencies across jurisdictions exist because different countries have different rules about whether or how a person harmed by a TNC operating in a host State can seek remedy in the TNC’s home State. Further, the practical and legal difficulties in pursuing remedies (as referenced in Section 2.7 in our third submission), are exacerbated when pursuing a remedy across borders.

Closing these governance gaps requires two things. First, States must take necessary measures to ensure that TNCs which they are in a position to regulate do not nullify or impair the enjoyment of human rights in any other State.[[5]](#footnote-5) Second, States must ensure the availability of effective mechanisms to provide for account­ability in the discharge of their ETOs, extending to the ability of persons whose human rights are impaired by a TNC in a host State to enjoy the right to a prompt, accessible and effective remedy in the TNC’s home State.

The Treaty provides the opportunity to create a uniform framework for States to address these governance gaps and provide effective protection against human rights abuses connected to TNC activity extraterritorially.

**Key Recommendation: The Treaty should set out a general framework for States to ensure compliance with ETOs in the context of TNC activity (including State-owned TNCs), including but not limited to:**

1. **The adoption and enforcement of all necessary administrative, legislative, investigative, adjudicatory and other measures to respect and fulfill human rights extraterritorially;**
2. **The undertaking of all necessary measures aimed at protecting against extraterritorial human rights abuse by TNCs which they are in a position to regulate, including but not limited to:**

**i. the establishment of national legislation requiring mandatory human rights due diligence by TNC-OBE, which, in addition to Recommendation 2.5(a) above, has extraterritorial effect;**

**ii. restricting, through national legislation, access to public procurement contracts to those TNCs that implement extraterritorial measures to respect human rights throughout their operations, supply chains and business relationships; and**

**iii. exercising all available additional means of influence over TNC activity extraterritorially, including for example, withholding or withdrawing economic, financial, political, military or other forms of support;**

1. **The adoption and enforcement of all necessary administrative, legislative, investigative, adjudicatory and other measures to guarantee the right to an effective remedy, in home States, for persons situated extraterritorially whose human rights are impaired by TNCs, which the State is in a position to regulate, including, in addition to the measures detailed in Recommendation 2.7 in our third submission:**

**i. eliminating *forum non conveniens* as a bar to lawsuits involving TNC activity;**

**ii. facilitating the ability of witnesses to provide testimony without being present in court, in a way that guarantees their personal safety; and**

**iii. working separately and together with other States through international cooperation and assistance, providing for reciprocal enforcement of remedial decisions.**

**Signatories from the ESCR-Net Corporate Accountability Working Group**

Above Ground (Canada)

Accountability Counsel (USA)

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|  | Action Contre Impunitie Pour Les Droits Humains |

African Resources Watch (AfreWatch)  (DRC)

Al-Haq (Palestine)

Alternative ASEAN Network on Burma

Arab NGO Network for Development (Lebanon)

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|  | [Asian Forum for Human Rights and Development](https://www.forum-asia.org/wp) (Thailand)Asian Indigenous Peoples' Pact (Thailand)Asia Pacific Forum on Women, Law and Development (Thailand) |

Asociacion Pro Derechos Humanos (Peru)

Association for Women's Rights in Development

Association of Environmental Lawyers of Liberia - Green Advocates

Center for Constitutional Rights (USA)

Center for International Environmental Law (USA)

Centre for Applied Legal Studies (South Africa)

Centre for Human Rights and Development (Mongolia)

Centro de Derechos Humanos de la Montaña Tlachinollan (Mexico)

Centro de Estudios Legales y Sociales (Argentina)

Centro Mexicano de Derecho Ambiental A.C (Mexico)

Chiadzwa Community Development Trust (Zimbabwe)

Citizen News Service (India)

Citizens for Justice (Malawi)

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|  | Comite Ambiental en Defensa de la Vida (Colombia) |
|  | Conectas Direitos Humanos (Brazil) |
|  | Confederación Campesina Del Peru |

Consejo de Pueblos Wuxhtaj (Guatemala)

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|  | Coordinadora Andina de Organizaciones Indígenas (Peru) |

Corporate Accountability International  (USA)

Defend Job Philippines

The Democracy Center (Bolivia)

Desarrollo, Educación Y Cultura Autogestionarios, Equipo Pueblo A.C. (Mexico)

Due Process of Law Foundation (USA)

Equitable Cambodia

Fédération internationale des droits de l'Homme (France)

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|  | Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (Argentina) |

Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)

Habi Center for Environmental Rights (Egypt)

Human Rights Law Network (India)

Human Rights Law Resource Centre (Australia)

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|  | Inclusive Development International (USA) |

International Accountability Project (USA)

International Commission of Jurists

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|  | Justiça Global (Brazil) |

Kenya Human Rights Commission

Legal Resource Centre (South Africa)

MiningWatch Canada

Movement for the Survival of the Ogoni People (Nigeria)

Narasha Community Development Group (Kenya)

National Center for Advocacy Studies (India)

National Economic and Social Rights Initiative (USA)

National Fisheries Solidarity Organization (India)

Natural Resources Alliance of Kenya

Network Movement for Justice and Development (Sierra Leone)

Observatorio Ciudadano (Chile)

Organización Fraternal Negra Hondureña (Honduras)

Otros Mundos Chiapas (Mexico)

Posco Pratirodh Sangram Samiti (India)

Project on Organizing, Development, Education and Research (Mexico)

Proyecto de Derechos Económicos, Sociales y Culturales (Mexico)

Red Internacional de Derechos Humanos (Switzerland)

Rights and Accountability in Development (UK)

Sahmakum Teang Tnaut (Cambodia)

Tebtebba Foundation (Philippines)

Terra de Direitos (Brazil)

Video Volunteers (India)

Zimbabwe Environmental Law Association

1. For more information, see ESCR-Net and FIDH Treaty Initiative: <https://www.escr-net.org/corporate-accountability/treaty-initiative/materials>. [↑](#footnote-ref-1)
2. Access collective regional CSO statements from Asia-Pacific, Africa and Latin America Treaty Initiative consultations at: <https://www.escr-net.org/corporateaccountability/treatyinitiative>. [↑](#footnote-ref-2)
3. For more information about the Maastricht Principles, see http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/. [↑](#footnote-ref-3)
4. Reference to ‘home State’ in this document is in accordance with Principle 25(c) of the Maastricht Principles, “…where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities”. [↑](#footnote-ref-4)
5. For more information about the circumstances in which a State is in a position to regulate a TNC, see the bases for protection outlined in Principle 25 of the Maastricht Principles. [↑](#footnote-ref-5)