

**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 the second submission 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 our 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. **Ensuring Access to Justice**

All people affected by human rights violations have a right to an effective remedy. The right to an effective remedy encompasses full, adequate, effective, prompt, and appropriate reparation for harm suffered. Under international law, reparation is a broad term that includes the following forms: restitution (which incorporates measures to restore the affected person to the situation that would have existed without the wrongful act, as far as possible), compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Reparation should be proportional to the gravity of the violations and the harm suffered. It must also be culturally appropriate, respectful of the culture of individuals and communities, sensitive to gender and age requirements, and attentive to the lived experiences of marginalized sections of society, indigenous peoples and minority groups. Survivors of abuses and their relatives have the right to full disclosure of the truth about corporate human rights abuses, to receive an apology for the harm caused, and to see that those that those responsible for the abuses are brought to justice.

However, those persons whose human rights are impaired by TNC-OBE often find it difficult or impossible to obtain an effective remedy in practice because of both legal and practical obstacles. Effective remedial mechanisms may not exist, affected persons may be unable to access justice, and/or available remedies may be inadequate.

The existing mechanisms that, in theory, offer remedies for human rights abuse connected with TNC-OBE are inadequate or insufficient in practice. Many are open to being directly or indirectly heavily influenced by corporations, institutionally weak, often underfunded, and/or unable to enforce judgments. State non-judicial remedies (for example, national human rights agencies, government procedures, OECD national contact points, etc.) often extend only to providing recommendations, not enforceable orders. Finally, company-based grievance procedures are usually designed to protect the corporation, not to provide access to appropriate remedies, and may improperly require complainants to waive other rights, including the right to go to court.

Further, multiple additional obstacles confound efforts to obtain meaningful access to justice.In particular, those impacted by TNC-OBE human rights abuses are often unable to access remedies for many reasons, including lack of legal assistance, the expense of initiating a legal action, technical difficulties and the cost of gathering evidence, and lack of information about corporate operations or knowledge of the existence of remedy mechanisms. Moreover, complex corporate structures and jurisdictional limitations in both host and home States may make it impossible to hold any corporate entity accountable. These obstacles are particularly onerous for diverse sections of the population, who may find that existing challenges in accessing remedial mechanisms are exacerbated by language barriers, societal backlash, and/or cultural unfamiliarity with these mechanisms. The threat of violence or other retaliation may further prevent survivors of corporate abuses from making use of any remedies that do exist.

Even when impacted communities and individuals are able to obtain some remedy, it is often inadequate, or at times unequally distributed, for instance, prioritizing men over women or the majority over an indigenous minority. For example, the possibility of future compensation is an inadequate remedy for people faced with imminent irreparable damage linked to TNC-OBE activity; rather, they need effective access to rapid interim orders to protect their security, their homes, and their property. Relocation assistance is an insufficient remedy for community members who have lost access to land, spiritual burial grounds or resources on which they depend for their livelihood. Monetary compensation, is usually far less than needed to repair the harms suffered and may, in fact, cause other difficulties in circumstances where peasant and indigenous communities are unacquainted with large influxes of money. Moreover, people devastated by TNC-OBE human rights abuses may need ongoing medical, psychological and social services. In the rare cases in which the affected persons obtain a judgment against a TNC-OBE, these judgments are not often enforced in practice.

**Key Recommendation: The Treaty should set out a general framework to ensure that persons whose enjoyment of human rights is impaired by TNC-OBE activity have access to justice in practice, requiring States to take concrete, targeted measures to ensure, among other things:**

1. **The availability of judicial remedies in all States involved, within judicial systems that provide fair and impartial proceedings before independent tribunals, protected from corporate or political manipulation;**
2. **That both practical and legal obstacles to judicial remedies are addressed, including but not limited to:**
	1. **the maintenance of efficient, quality, adequately funded judicial systems;**
	2. **the provision of legal, financial and other assistance to individuals and communities;**
	3. **the prohibition of the “loser pays rule” in human rights litigation where the claimant loses (except in cases where the action is clearly frivolous);**
	4. **elimination of any statute of limitations for claims against TNC-OBE involving human rights abuses, in both civil and criminal lawsuits;**
	5. **sovereign immunity for State-owned enterprises involved in human rights litigation is waived;**
	6. **ensuring the safety of anyone seeking redress against TNC-OBE or cooperating with a mechanism in the process of resolving complaints (e.g. witnesses), including by guaranteeing the safety of anyone providing testimony;**
	7. **requiring recusal of judges holding any ownership interest in a TNC-OBE defendant and/or their affiliate(s);**
	8. **the establishment and application of 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;**
	9. **the clarification of the criteria to lift the ‘corporate veil’ that inhibits the establishment of legal responsibility for parent companies for the actions of their subsidiaries; and**
	10. **the resolution of claims within a reasonable time frame;**
3. **That the design and operation of any non-State mechanisms are subject to adequate State supervision, do not delay access to other remedies or require people to waive their right to other remedies;**
4. **Full reparation including, as appropriate, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, with such redress being subject to effective implementation;**
5. **Quick access to affordable and fully enforceable interim or provisional measures of protection to avoid irreparable harm and prevent imminent human rights impairment in connection with TNC-OBE activity;**
6. **The availability of adequate civil, criminal, administrative and other sanctions, which extends to, among other things:**
	1. **confirmation that corporate liability includes (among other forms) criminal corporate liability (in relation to both the TNC-OBE itself, and individuals within TNC-OBE);**
	2. **measures to ensure that the assessment of liability takes into account both the acts and omissions of TNC-OBE acting alone, as well as the acts or omissions by TNC-OBE that contribute to human rights violations or abuses by States and other parties; and**
	3. **all appropriate measures to address human rights abuse and, if possible, prevent abuse, extending, as necessary in the circumstances, to the cessation of TNC-OBE activity through corporate deregistration or similar;**
7. **Access to a complementary international recourse mechanism to oversee Treaty implementation and compliance when State remedies are unavailable or inadequate. Among other things, the mechanism must have the authority to:**
	1. **thoroughly investigate allegations of TNC-OBE activity that impairs the enjoyment of human rights; and,**
	2. **issue binding and enforceable rulings on both States and TNC-OBE involved.**
	3. **Human Rights Defenders**

As widely acknowledged by leading CSOs engaged in human rights and business,[[3]](#footnote-3) the legitimate and valuable role that human rights defenders play in identifying, mitigating, exposing and ensuring accountability for the adverse human rights impacts of TNC-OBE activity and development projects is increasingly under threat from attacks, harassment, restrictions, intimidation and reprisals by both State and non-State actors, including arbitrary arrest and detention, disappearances, judicial harassment, torture and ill-treatment, and even killings. State agencies, often at the behest of TNC-OBE, apply restrictive or vague laws to inhibit the work of human rights defenders, particularly those laws relating to national security, counter-terrorism, defamation and sedition.

The challenges facing human rights defenders responding to TNC-OBE activity are particularly acute for those belonging to or working with marginalized sections of society, including indigenous peoples, women human rights defenders and those working on issues of sexual orientation or gender identity, and ethnic, religious and other minorities.

These actions are contrary to United Nations Declaration on Human Rights Defenders, and the Treaty provides an opportunity to strengthen these protections in a binding international instrument.

**Key Recommendation: The Treaty should reaffirm that States have the obligation to respect, protect and fulfill the rights of all human rights defenders in accordance, at a minimum, with the UN Declaration on Human Rights Defenders, and require measures including but not limited to:**

1. **Legislative prohibition of interference by TNC-OBE, including through their use of public or private security forces, with the activities of any person who seeks to exercise their human right to participate in decision-making processes in connection with, and/or exercises in peaceful protest against, TNC-OBE activity, including by fully respecting their human rights to freedom of expression, association, and assembly, and freedom from cruel, inhuman or degrading treatment;**
2. **All necessary steps to ensure the rights of people affected or potentially affected by TNC-OBE activity to participate actively, freely and meaningfully in project assessment and analysis, design and planning, implementation, and monitoring and evaluation; and**
3. **Ensuring the right to effective remedy as detailed in Recommendation 2.7 above for human rights violations and abuses against human rights defenders working on issues of corporate accountability, whether perpetrated by the State or TNC-OBE.**

**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. ESCR-Net Members Joint Statement on ‘Protecting and supporting human rights defenders who work on issues of corporate accountability’, 2013 Peoples’ Forum on Human Rights and Business. Available at: <https://www.forum-asia.org/?p=16570>. [↑](#footnote-ref-3)