

**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 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 this 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. **Addressing the Prevalence of Corporate Capture**

CSOs are becoming increasingly more aware of the means by which TNC-OBE undermine the realization of human rights and the environment by exerting undue influence over domestic and international decision-makers and public institutions,[[3]](#footnote-3) including by using their influence to soften (or inhibit implementation of) regulation, weaken the exercise of powers by regulatory authorities, bank-roll elections, privatize the conduct of State security services for use against communities, exercise revolving-door employment strategies, and many other practices. As such, the ever deepening corporate-government relationship is weakening the institutions and processes that are responsible for ensuring that States respect, protect and fulfill human rights. In this sense, ‘corporate capture’ is defined primarily by the undue influence that corporations exert over national and international public institutions, manipulating them to act according to their priorities at the expense of the public interest and the integrity of the systems required to safeguard human rights and the environment. The Universal Declaration of Human Rights has proclaimed that “the will of the people shall be the basis of the authority of government.” Corporate capture severely undermines this foundation and, as a result, is a root cause of many human rights abuses involving TNC-OBE.

In some specific industries the abilities of TNC-OBE to influence policy and regulation setting are curtailed. A pertinent example is the World Health Organisation’s Framework Convention on Tobacco Control (FCTC). Under the FCTC, States must act to protect against interference from commercial and other vested interests of the tobacco industry in the establishment and implementation of national health policies. The FCTC also requires States to be accountable and transparent in all dealings with the tobacco industry, and those working to further their interests, including by ensuring all interactions are documented and disclosed to the public as well as avoiding conflicts of interest for government officials and employees. In the United States the ‘Revolving Door Ban’ prohibits for two years any employee of any federal executive agency working on any matter that involves their former employer(s), and vice versa for those leaving an executive agency to join the private sector. Accepting gifts from lobbyists is also prohibited under this law. These and other examples provide useful direction for how the Treaty can establish an effective binding standard for enforcing appropriate separation between corporation and State.

When setting policies to rein in the abuses of profit-driven corporations, it is absolutely critical to acknowledge the inherent conflict of interest that exists between the corporations that will be regulated and the goals of that regulation. As such, it is fundamental to protect the legislative and policymaking space from the interests of these corporations by developing a ‘good governance’ article of the Treaty that establishes adequate safeguards against corporate legislative and policy interference at the national, regional and intergovernmental levels. The negotiations and policymaking toward the Treaty itself must also be protected from any undue influence from TNC-OBE on the process by virtue of their inherent conflict of interest.

**Key Recommendation: The Treaty should require that States establish national ‘good governance and conflict of interest mitigation’ legislation that aims to ensure appropriate separation between TNC-OBE and State, and require measures including but not limited to:**

1. **Ensuring that all States agencies and TNC-OBEs are transparent and accountable in all dealings, including regarding public access to information and participation, as detailed in Recommendation 2.5 (in our second submission);**
2. **Ensuring that all State decision-making processes concerning the establishment and implementation of legislation or policy, or administrative or judicial oversight, must be independent where engagement with TNC-OBE or their representatives would give rise to a conflict of interest;**
3. **Instituting “revolving door” bans covering employment between State agencies and TNC-OBE, and vice versa; and**
4. **Prohibiting the use by TNC-OBE of State public security personnel and/or armed forces, either through employment or inducement.**

**2.10. Gender**

The abuse of women’s human rights by TNC-OBE is particularly pronounced for women employed by TNC-OBE, and women in society who experience the impacts of TNC-OBE activities. In all regions, women are disproportionately represented in the most insecure, unsafe, lowest-paying and unstable forms of employment available TNC-OBE, their subsidiaries and partners in their supply chains, especially in the informal sectors of the economy. Informal workers, unrecognized under national labor legislation, lack basic labor protection and enjoyment of work-related human rights. In formal ‘white collar’ sectors, employment opportunities offered by TNC-OBE ordinarily pay more to men and provide greater opportunities for advancement for men, which contributes to the entrenchment of gender inequalities linked to access to resources within the household, and broader social and economic agency within society.

The negative impacts of the operations of TNC-OBE are compounded for marginalized sectors of women in society, particularly indigenous women, especially in industries focused on exploiting natural resources such as large-scale energy, forestry and mining, as well as agroindustry and garment manufacturing. Again, the forms of employment that are made available by these sectors are far more likely to be in the informal sector, where labor conditions, compared to jobs available to men, are less safe, with lower or inconsistent wages, shorter-term employment status, and irregular work hours. Women employed in these sectors are also particularly vulnerable to harassment, physical abuse, including sexual violence, in their workplace, and/or traveling to and from work, especially in conflict and post-conflict environments.

The impact of the operations of TNC-OBE activity on the enjoyment of human rights by indigenous women, as well as small farmers— a majority of whom are women, living directly in connection with local land, forest and water sources, are often particularly severe. In many communities, socially constructed gender roles mean that women are responsible for securing access to water and other basic needs, bear a disproportionate responsibility for care of children and other family members, and are more likely to experience a greater loss of livelihood and social status in the case of loss of access to land, forests and other forms of natural resources. Moreover, corporate activities that result in land confiscation, displacement, or environmental damage often go hand in hand with increasing vulnerability of women and children to violence, forced labor and trafficking. At the level of corporate projects, TNC-OBE that attempt to engage with communities, for example by informing them of their operations, or offering compensation for losses or damages, tend to meet with mostly or only men, such as with male village elders or perceived heads of households. The use of military or (private) security forces by TNC-OBE and/or States in connection with TNC-OBE activity is associated with gender-based violence, including sexual violence, as retaliation against women human rights defenders.

The existing system of international human rights law is well developed in the area of women’s human rights; however, these instruments are not articulated to explicitly address the impacts of TNC-OBE.

**Key Recommendation: The Treaty should explicitly reaffirm the human rights of women in the context of TNC-OBE activity and require States to take concrete, targeted measures including but not limited to:**

* 1. **Full legal prohibition against all forms of discrimination against women (including gender-based violence) in relation to all TNC-OBE activity (for example, employment practices, establishing a safe working environment, and remuneration) in accordance with the provisions of international human rights instruments, including but not limited to CEDAW, ICESCR, and ILO conventions;**
	2. **All appropriate measures to ensure enjoyment of human rights and the maintenance of a safe environment for women in connection with TNC-OBE activity, and to prevent forced labor, forced migration, trafficking and violence against women;**
	3. **Ensuring the right to effective remedy as detailed in Recommendation 2.7 (in our third submission), for women whose human rights have been impaired by TNC-OBE activity, with particular attention to women who have experience of gender-based violence, and attentive to the specific challenges some women can face in bringing legal action, particularly those marginalized and affected by intersectional discrimination; and**
	4. **The establishment of national legislation requiring mandatory human rights due diligence by TNC-OBE, as detailed in Recommendation 2.5(a) (in our second submission), which ensures the full and active participation of women, represented at least in equal proportions to men, in any relevant consultation, decision-making and remedial processes.**
	5. **The Rights of Indigenous Peoples**

Indigenous peoples in all areas of the world remain among those most affected by human rights abuses involving TNC-OBE, with differing and disproportionate impacts often experienced by indigenous women, children and persons with disabilities. Certain industries have a particularly significant impact on the rights of indigenous people, including energy, private water, agriculture, forestry, mining, fishing and other forms of natural resource extraction and investment that affected their land, and territories of traditional occupation, as well as their national resources, including water, forests and wildlife. Such impact is often characterized by the interruption that investment in these industries has on the ability of indigenous peoples to maintain control of the decisions concerning their ways of life and culture, which are often intrinsically linked to land, water and forest habitats.

The rights of indigenous peoples are recognized in various international legal instruments. Of particular relevance to the Treaty is the right to free, prior and informed consent (FPIC). Within the international legal sphere, FPIC is the most coherent legal acknowledgment of indigenous peoples’ legitimate decision-making authority over activities impacting their lives. This authority is characterized by the ability to approve or disapprove of activities on the land to which their peoples’ culture and identity is intrinsically bound. FPIC is derived from the legal right to self-determination which is recognized as part of customary international law and contained in various seminal international legal instruments, such as the Charter of the United Nations, the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights. More recently, it has also been affirmed by the United National Declaration on the Rights of Indigenous Peoples (UN DRIP).

Further, the Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention 169 on the rights of indigenous and tribal people, and UN DRIP all implicitly or explicitly include broad recognition of the human rights of indigenous peoples, including rights relating to consultation and participation. On a regional level, the Inter-American Court of Human Rights has also elaborated extensively on the content of FPIC on the basis of human rights law.

Despite the international legal standards regarding the human rights of indigenous peoples, there is no specific binding law addressing the particular impacts of TNC-OBE activity on the enjoyment of indigenous peoples’ human rights. The Treaty provides the opportunity to complement the existing framework by ensuring the rights of indigenous peoples, who still bear the brunt of a significant proportion of TNC-OBE-related human rights abuse, are directly protected.

**Key Recommendation: The Treaty should explicitly reaffirm the human rights of indigenous peoples in the context of TNC-OBE activity and require States to take concrete, targeted measures including but not limited to ensure:**

**The right to self-determination, and as such the right to determine their development priorities;**

**The right to FPIC;**

**The rights to benefit from the activities generated by TNC-OBE, after first obtaining FPIC;**

**The right to protection of indigenous and traditional knowledge from TNC-OBE activity, particularly in relation to appropriation through patenting; and**

**The right to an effective remedy as detailed in Recommendation 2.7 (in our third submission), with particular focus on mechanisms and remedies that are culturally appropriate, and attentive to any damages caused or contributed to by TNC-OBE to land, territories, natural resources and biodiversity as enjoyed by indigenous peoples.**

* 1. **Conflict, Post-Conflict and Occupied Areas**

Impairment of human rights enjoyment by TNC-OBE is especially acute in the case of people and communities living in conflict, post-conflict and occupied areas. The impacts of mineral and other resource extraction in these areas is well documented, but other examples of human rights affected by TNC-OBE in these areas include labor rights violations in the case of TNC-OBE use of slave and exploitative child labor practices in the production of goods in these areas, as well as interferences with the availability and accessibility of basic services such as housing and water.

The obligations of States under international human rights law as well as international humanitarian law are specific to the concerns of people within these areas. Correspondingly, the operations of TNC-OBE are also subject to more stringent standards under both these regimes of international law when they operate in these areas. For example, the standard of human rights due diligence is higher, and greater vigilance is required for ensuring TNC-OBE are not complicit in human rights violations committed by State armed forces.

**Key Recommendation: The Treaty should confirm the legal responsibilities of TNC-OBE operating in conflict, post-conflict and occupied areas, and require States to take concrete, targeted measures including but not limited to:**

1. **The establishment of national legislation requiring mandatory human rights due diligence by TNC-OBE, as detailed in Recommendation 2.5(a) (in our second submission), with special provisions for TNC-OBE operating in such areas that require them to:**

**i. undertake detailed and independent human rights impact assessment before commencing any operations in conflict, post-conflict and occupied areas;**

**ii. refrain from commencing activity if potential human rights impacts cannot be fully mitigated; and**

**iii. withdraw from operating in these areas in circumstances where human rights impact assessment, human rights due diligence, and/or credible third-party documentation indicates that their activity threatens to, or currently does, impair the enjoyment of human rights or international humanitarian law;**

1. **Ensuring the right to an effective remedy, as detailed in Recommendation 2.7 (in our third submission), working separately and together with other States through international cooperation and assistance to address any legal or practical obstacles to access to justice for human rights harms by TNC-OBE in conflict, post-conflict and occupied areas.**

**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) |
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Corporate Accountability International  (USA)

Defend Job Philippines

The Democracy Center (Bolivia)

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Due Process of Law Foundation (USA)

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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. Statement of the Treaty Alliance, ‘UN Treaty Must Address Corporate Capture’, Rio de Janeiro, Brazil, 2016. Available here: [http://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/UN+Treaty+Must+Address+Corporate+Capture+FINAL+ENG.pdfhttp://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/UN+Treaty+Must+Address+Corporate+Capture+FINAL+ENG.pdf](http://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/UN%2BTreaty%2BMust%2BAddress%2BCorporate%2BCapture%2BFINAL%2BENG.pdf). [↑](#footnote-ref-3)