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

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 with over 150 civil society organizations (CSOs), including in-person consultations with our members and partners in Asia-Pacific, Africa and Latin America, and online consultations with civil society organizations (CSOs) from all regions.[1] This submission is a reflection of the priorities that emerged out of these consultations.[2] ESCR-Net is also actively engaged in the global Treaty Alliance, and supports the collective Alliance statements.

GENERAL RECOMMENDATIONS

We strongly urge all States to take all possible measures to respect, protect and fulfill human rights in the context of the activities[3] of transnational corporations and other business enterprises (TNC-OBE), including by actively engaging in good faith in processes to strengthen the international human rights framework in this area, especially through the activities of the IGWG.

We strongly urge the IGWG to make all accommodations possible to ensure representatives of persons whose enjoyment of human rights is impaired by TNC-OBE are integral partners in the processes of designing the Treaty, including supporting their involvement during IGWG negotiations. In this context, we call on the IGWG to ensure the Treaty responds to the real needs of people in society by facilitating the meaningful engagement of women, indigenous peoples, persons with disabilities, children, and other sections of society disproportionately or differently affected by TNC-OBE activity. Proactively sharing pertinent information related to the IGWG in languages relevant for affected persons will also support continued, constructive engagement by a broad cross-section of civil society.

SPECIFIC RECOMMENDATIONS

In addition to these general considerations, we respectfully make the following specific submissions in relation to the Treaty:

To 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). To ensure an enabling environment for the enjoyment of human rights in practice, the Treaty should outline

1 For more information, see ESCR-Net and FIDH Treaty Initiative: https://www.escr-net.org/corporate-accountability/treaty-initiative/materials.

2 Access collective regional CSO statements from Asia-Pacific, Africa and Latin America Treaty Initiative consultations at: https://www.escr-net.org/corporateaccountability/treatyinitiative.

3 The term 'activity' in this submission refers to all parts of TNC-OBE operations, including but not limited to policies, practices, products and business relationships.

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). 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). Further, specific consideration should be given to the disproportionate influence of corporations on policy making by addressing the **prevalence of 'corporate capture'** (Section 2.9). The Treaty should also address the impacts of TNC-OBE activity from a **gender** perspective (Section 2.10) and **indigenous peoples** (Section 2.11), as well as strengthen effective oversight of TNC-OBE activities in **conflict and post-conflict situations** (Section 2.12).

2.1 Reaffirm the Primacy of Human Rights Obligations

The foundational principle of the primacy of human rights emanates from the Universal Declaration of Human Rights and the Charter of the United Nations, both established long before the creation of hundreds of trade and investment treaties between States, which have established a complex system governing trade and investment practices globally. These agreements have been subject to criticism from social movements, CSOs, human rights experts, UN Special Rapporteurs, academics, and others, who note that they are often negotiated secretly, entered into by States without necessary human rights assessment or safeguards in place, and driven by the interests of powerful corporations seeking to consolidate their profit and market share at the expense of human rights, decent work, sustainable and equitable economies, and environmental protection.

Trade and investment treaties also facilitate privatization of health, transport, water, energy and other basic services and infrastructure development, which are areas of central importance for States to meet their obligations to respect, protect and fulfill human rights obligations. Transferring the building, operation and ownership of physical and social infrastructure to the private sector can subordinate the delivery of these services to corporate profit interests, rather than ensuring their conformity with human rights, as has been widely noted, for example, in the privatization of water services across the world.

Further, critiques of investor-state dispute settlement (ISDS) focus on: the extremely broad view taken by ISDS tribunals regarding the scope of provisions that investors seek to enforce, therefore impacting on many areas relevant to the enjoyment of human rights; the perceived or actual lack of consistency, transparency and impartiality of ISDS decisions; and the direct undermining of States' obligations to protect human rights, the environment, or promote equitable development, through the favoring of investor privileges over human rights.

The current binding trade and investment framework can be contrasted with the very weak international enforcement mechanisms for compelling States to comply with their human rights obligations. In light of this asymmetry, with its serious implications for people whose enjoyment of human rights is impaired by TNC-OBE, the Treaty provides the opportunity for States to reaffirm and ensure that their human rights obligations, and the provisions of the Treaty itself, will be adequately safeguarded and will be given precedence in relation to obligations under trade and investment treaties.

Key Recommendation

States must reaffirm the primacy of human rights, as guaranteed by their pre-existing obligations to respect, protect and fulfill human rights, in the context of negotiation, interpretation and dispute resolution of trade and investment treaties.

States must refrain from being party to such agreements where the provisions interfere with the ability to meet their human rights obligations. In this context, before signing trade or investment

agreements, States must make full and proper assessment of the impact of implementing these agreements on the realization of human rights in their country (including, among other issues, in connection with the privatization of public health, transport, infrastructure, energy and other services).

2.2 Human Rights are Interrelated, Interdependent and Indivisible

All human rights are interrelated, interdependent and indivisible. Further, the realization of human rights is dependent on the maintenance of a safe, clean, healthy and sustainable environment. To ensure a meaningful international regulatory response to the extensive human rights impairment connected with TNC-OBE activity, the scope of the Treaty should be determined above all else with reference to the needs of the rights holders. As the activities of TNC-OBE can and do directly or indirectly impact the full range of human rights, drawing a distinction within international human rights law that results in some internationally recognized human rights being given protection and others not would be an arbitrary and unacceptable division from the perspective of affected people and communities, and is contrary to the interrelated, interdependent and indivisible nature of human rights.

Key Recommendation

The Treaty should cover the full range of interrelated, interdependent and indivisible human rights (i.e. civil, cultural, economic, political and social rights), and recognize that human rights enjoyment is dependent on the maintenance of a safe, clean, healthy and sustainable environment.

2.3 The Treaty Should Apply to All Transnational Corporations and Other Business Enterprises

Inconsistent, inadequate and/or unimplemented regulatory approaches within and across national and regional legal systems continue to expose individuals and communities to human rights abuses, and often undermine the ability to access effective remedies. Corporate operations with a 'transnational character' (TNCs) pose especially difficult regulatory challenges due to their cross-border operations and presence in several jurisdictions, and therefore represent the largest corporate accountability gap in the international human rights legal framework.

While each State remains the sovereign authority to regulate conduct within their territory and jurisdiction, a principle justification for establishing new international human rights instruments is to address gaps in the human rights system and to provide clarity to each State on their obligations for realizing human rights. For example, while there is still great progress to be made in realizing women's human rights in all countries, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) sets out uniform standards as agreed by States, thereby building broad consistency in relation to the legal obligations across all States. Likewise, the Treaty provides the opportunity for States to agree on a binding framework that facilitates a consistent approach to regulate the activities of TNC-OBE. If the Treaty addresses only some business enterprises, and not those registered and/or operating in only one State (including State-owned enterprises), this would leave gaps in the human rights system, and maintain inconsistencies in the way each State forms and implements laws to regulate TNC-OBE. Moreover, if the Treaty were to leave out some types of corporations this may create perverse incentives for corporate groups to structure their operations in way that would avoid coverage under the Treaty.

Further, it is clear from existing research and extensive consultation with civil society that it is of little consequence to those individuals and communities whose human rights are infringed if the entity responsible for violating their human rights operates in more than one country. In this context, the primary concern is that human rights impairment that occurs in connection with TNC-OBE activity must be adequately remedied and be prevented from reoccurring. Therefore, the Treaty offers the opportunity

to ensure that the regulation of corporate conduct adequately corresponds to reality and provides a practical response to human rights abuses by TNC-OBE.

Key Recommendation

The Treaty should ensure that the regulation of TNC-OBE activity reflects the existing conditions and lived experiences of people globally, requiring States to, among other things:

a) Address in detail the particularly complex regulatory challenges posed by TNCs, including in relation to subsidiary companies, supply chains, and all other business enterprises otherwise associated with their operations, products or services through their business relationships; and
b) Reaffirm that States have obligations to respect, protect and fulfill human rights in connection with the activities of all TNC-OBE, including those registered and/or operating in one State.

2.4 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 above in section 2.1.

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:

a) 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;
b) 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
c) Ensure access to a complementary international recourse mechanism, as detailed in Recommendation 2.7(g) below.

2.5 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:

a) 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:
    i) cover of all TNC-OBE activity, including those of subsidiaries and other business enterprises in the supply chain;
    ii) require regular human rights impacts assessments for all TNC-OBE activity;
    iii) require timely public disclosure of all relevant documents and materials relating to any and all impacts on human rights and the environment; and
    iv) 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 below, 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.

2.6 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).[4]

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.[5] 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 below), 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.[6] 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:

a) The adoption and enforcement of all necessary administrative, legislative, investigative, adjudicatory and other measures to respect and fulfill human rights extraterritorially;

4 For more information about the Maastricht Principles, see http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/.

5 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".

6 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.

b) 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;

c) 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 below:
   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.

2.7 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:

a) 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;
b) That both practical and legal obstacles to judicial remedies are addressed, including but not limited to:
    i) the maintenance of efficient, quality, adequately funded judicial systems;
    ii) the provision of legal, financial and other assistance to individuals and communities;
    iii) the prohibition of the "loser pays rule" in human rights litigation where the claimant loses (except in cases where the action is clearly frivolous);
    iv) elimination of any statute of limitations for claims against TNC-OBE involving human rights abuses, in both civil and criminal lawsuits;
    v) sovereign immunity for State-owned enterprises involved in human rights litigation is waived;
    vi) 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;
    vii) requiring recusal of judges holding any ownership interest in a TNC-OBE defendant and/or their affiliate(s);
    viii) 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;
    ix) 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
    x) the resolution of claims within a reasonable time frame;
c) 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;
d) Full reparation including, as appropriate, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, with such redress being subject to effective implementation;

e) 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;
f) The availability of adequate civil, criminal, administrative and other sanctions, which extends to, among other things:
    i) confirmation that corporate liability includes (among other forms) criminal corporate liability (in relation to both the TNC-OBE itself, and individuals within TNC-OBE);
    ii) 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
    iii) 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;
g) 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:
    i) thoroughly investigate allegations of TNC-OBE activity that impairs the enjoyment of human rights; and,
    ii) issue binding and enforceable rulings on both States and TNC-OBE involved.

2.8 Human Rights Defenders

As widely acknowledged by leading CSOs engaged in human rights and business,[7] 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:

a) 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;

7 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.

b) 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
c) 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.

2.9 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,[8] 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

8 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.pdf

mitigation' legislation that aims to ensure appropriate separation between TNC-OBE and State, and require measures including but not limited to:

a) 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 above;
b) 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;
c) Instituting "revolving door" bans covering employment between State agencies and TNC-OBE, and vice versa; and
d) 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:

a) 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;
b) 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;
c) Ensuring the right to effective remedy as detailed in Recommendation 2.7 above, 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
d) The establishment of national legislation requiring mandatory human rights due diligence by TNC-OBE, as detailed in Recommendation 2.5(a) above, 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.

2.11 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:

a) The right to self-determination, and as such the right to determine their development priorities;
b) The right to FPIC;
c) The rights to benefit from the activities generated by TNC-OBE, after first obtaining FPIC;
d) The right to protection of indigenous and traditional knowledge from TNC-OBE activity, particularly in relation to appropriation through patenting; and
e) The right to an effective remedy as detailed in Recommendation 2.7 above, 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.

2.12 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:

a) The establishment of national legislation requiring mandatory human rights due diligence by TNC-OBE, as detailed in Recommendation 2.5(a) above, 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;
b) Ensuring the right to an effective remedy, as detailed in Recommendation 2.7 above, 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)
Action Contre Impunitie Pour Les Droits Humains (DRC)
African Resources Watch (AfreWatch) (DRC)
Al-Haq (Palestine)
Alternative ASEAN Network on Burma
Arab NGO Network for Development (Lebanon)
Asian Forum for Human Rights and Development (Thailand)
Asian Indigenous Peoples' Pact (Thailand)
Asia Pacific Forum on Women, Law and Development (Thailand)
Asociación 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)
Comité Ambiental en Defensa de la Vida (Colombia)
Conectas Direitos Humanos (Brazil)
Confederación Campesina Del Peru
Consejo de Pueblos Wuxhtaj (Guatemala)
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)
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)
Inclusive Development International (USA)
International Accountability Project (USA)
International Commission of Jurists (Switzerland)
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

Corporate Accountability Working Group

The International Network for Economic, Social and Cultural Rights (ESCR-Net) unites over 270 NGOs, grassroots groups, and advocates across 70 countries, facilitating strategic exchange, building solidarity, and coordinating collective advocacy to secure social and economic justice through human rights. ESCR-Net members define common strategies and advance joint action foremost through international working groups, including the Corporate Accountability Working Group (CAWG). CAWG coordinates collective actions, supports member-to-member capacity-building to challenge emblematic cases of corporate abuse, collectively challenges undue influence corporations exert on the decision-making of the state, and advocates for new accountability and remedy structures.

International Network for Economic, Social & Cultural Rights
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