Open-ended intergovernmental working group on

transnational corporations and other business enterprises with respect to human rights

Second session, 24 – 28 October 2016

FORM for NGOs and other relevant stakeholders submitting a written contribution

Please note that the written contribution is formatted and issued, unedited, in the language(s) received from the submitting organization (it should be submitted in one of the official UN languages).

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1. Please indicate the contact information for the representative submitting the written contribution (i.e. name, mobile, email) here: **Ana-María Suárez Franco, +41 78 796 22 54, suarez-franco@fian.org**

2. (a) If this is an individual contribution, please indicate here your organization's name (kindly state in brackets whether your organization has ECOSOC consultative status (i.e. General, Special, or Roster).

or,

2. (b) If this is a joint contribution including ECOSOC NGO(s), list here the co-sponsoring ECOSOC NGO(s) as they appear in the ECOSOC database and their status (in brackets): Group all General NGOs first, group the Special second, group the Roster third. **, Franciscans International (General), Society for International Development (General) Colombian Commission of Jurists (Comisión Colombiana de Juristas) (Special), Comité Catholique contre la Faim et pour le Développement - Terre Solidaire (Special), FIAN International E.W (Roster).**

3. Indicate here any non-ECOSOC NGO(s) supporting the joint contribution (they will appear as a footnote to the title – unless it is a joint contribution from non-ECOSOC stakeholders only): **Plataforma Internacional Contra la Impunidad**

4. Indicate the TITLE for the written contribution (in original language) here: **Written Submission by FIAN International, Franciscans International, CCFD-Terre Solidaire, the Colombian Commission of Jurists, La Plataforma Internacional Contra la Impunidad and Society for International Development for the second session of the Open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights (24-28 October 2016)**

Please make sure that:

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Written Submission by FIAN International, Franciscans International, CCFD-Terre Solidaire, the Colombian Commission of Jurists, La Plataforma Internacional Contra la Impunidad and Society for International Development for the second session of the Open-ended intergovernmental working group (OEIGWG) on transnational corporations and other business enterprises with respect to human rights (24-28 October 2016)

September 2016

1. Introductory remarks

This written submission has been jointly prepared by FIAN International, an international human rights organization advocating for the realization of the right to adequate food and nutrition, Franciscans International (FI), an international non-governmental organisation advocating at the United Nations for the promotion, protection, and respect of human rights, and environmental justice, CCFD-Terre Solidaire, which supports on the field the work of local players to promote a human and interdependent development in favour of the most deprived people, the Colombian Commission of Jurists, a non-profit non-governmental human rights organization that seeks to contribute to the development of international human rights law and international humanitarian law and the full force of human rights and the rule of law in Colombia, la Plataforma Internacional Contra la Impunidad, an alliance of European NGOs bringing attention to international mechanisms on the structural causes and effects of impunity in Central America, and Society For International Development (SID), a global network of individuals and institutions committed to promote social justice and foster democratic participation in the development process. All organizations are members of the Treaty Alliance, a wide alliance of organizations supporting the development of an international binding instrument to address human rights abuses committed by transnational corporations and other business enterprises.

We welcome the opportunity to contribute with this written submission for the second session of the OEIGWG on Transnational Corporations (TNCs) and other Business Enterprises with Respect to Human Rights. We believe that discussions during the first session were enriching and fruitful and that the participating States, legal experts and civil society representatives successfully raised key human rights issues which the future instrument should deal with. We hope that the second session of the OEIGWG will build on this positive outcome, deepening the discussion on particular issues.

The submitting organisations reiterate the points they raised with regard to the content, scope, nature and form of the future international instrument in their respective written submissions[1] and oral statements[2] during the first session. This joint written submission will go in depth on some specific points with the aim of providing the Chairperson-Rapporteur with elements to present a draft legally binding instrument to be negotiated during the third session.

2. The nature and process of the future instrument

The Vienna Convention on the Law of Treaties defines an international treaty as an international agreement concluded and ratified by States[3]. With regards to international human rights law (IHRL) in particular, States are the ones who negotiate and become parties to human rights treaties. The very nature of international human rights instruments requires, therefore, that the OEIGWG remain a State-led intergovernmental process. It is also the nature of international human rights law which entails that business companies, as non-State actors, cannot ratify, be parties to nor duty bearers under the future international human rights treaty under negotiation. We therefore request the OEIGWG to safeguard its integrity from any undue influence from actors from or related to the private sector and to exclude such actors from participating in the OEIGWG negotiations.

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[1] Franciscans International's written contribution:
http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/FranciscansInternational.pdf
FIAN International's written contribution:
http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/WrittenContributions.aspx

[2] See: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx

[3] Vienna Convention on the Law of Treaties, art. 2.1(a); See also. Küngt, Manfred; Eckert, Martin K: Repetitorium zum Völkerrecht, Stuttgart, Wien 1993, p. 46.

In addition to these legal reasons, there are important political reasons to avoid considering corporate actors as "stakeholders" of the future legally binding instrument: their primary interest is the pursuance of private profit and falls outside that of promoting and protecting human rights, as opposed to affected individuals and communities, social movements, grass roots communities and non-governmental organisations who represent rights-holders and strive to protect human rights. The considerable power asymmetry which exists between both of these groups further justifies the need for the OEIGWG to refrain from considering the corporate sector as an "equal stakeholder" in this process. We thus stress the importance for the OEIGWG to establish clear and transparent rules in providing spaces for consultation with the corporate sector, only if it is to further the aim of the process which is to close current gaps in the protection of human rights related to abuses committed by TNCs and other business enterprises.

In a recent joint statement[4], Treaty Alliance members reaffirmed their commitment "to facilitate the participation of affected people and communities in the IGWG meeting in Geneva in October", as this process should above all address the needs of individuals and communities to be protected against harm by corporate conduct and provided with effective remedy if abuses occur. This upcoming second session should therefore ensure a space for States to hear individuals and communities or their representatives affected by the activities of TNCs and other business enterprises who wish to contribute to the aims of the OEIGWG.

The organizations submitting this statement would also like to reiterate the importance for the upcoming coming session and entire OEIGWG process to be conducted in a transparent manner and which ensures that all States participate constructively and in good faith in the discussions.

2.1 Standards and instruments which the process should consider

During the process of drafting a legally binding instrument on the TNCs and other business enterprises with respect to human rights, the OEIGWG should consider and build up on all existing standards and instruments developed within international and regional human rights mechanisms in order to advance towards closing existing regulatory gaps to which the UN Guiding Principles on Business and Human Rights (UNGPs) belong. The submitting organisations thus emphasize the importance for the OEIGWG to go beyond the UNGPs and refer to the extensive range of other international and regional instruments and jurisprudence on the matter during the process of drafting a legally binding instrument on TNCs and other business enterprises and human rights, including those which have been developed since 2011. For instance, the submitting organizations wish to draw the attention to the use and interpretation of "due diligence" in IHRL instruments other than the UNGPs. For example, in the area of the rights of women, including of violence against women (VAW),[5] due diligence has been defined as imposing various types of measures to be taken by States to eliminate discrimination by public and private parties and to prevent, combat, protect, remedy and repair VAW. Due diligence helps to assess whether States are complying with their obligations as in article 2 of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).[6] In a similar vein, the

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[4] Treaty Alliance joint statement, UN Must Address Corporate Capture, http://static1.squarespace.com/static/53da9e43e4b07d85121c5448/t/57354276746fb9f00f573dae/1463108241728/UN+Treaty+Must+Address+Corporate+Capture+FINAL+ENG.pdf.

[5] See for instance Article 4(c) of the 1993 Declaration on the Elimination of Violence against Women urging States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by privates persons."; see also General Recommendation 19, CEDAW "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence."

[6] Article 2, CEDAW: " States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (…)
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
(g) To repeal all national penal provisions which constitute discrimination against women."

Committee on Economic, Social and Cultural Rights has followed the same model in defining States obligations to prevent, protect and remedy discrimination by private parties.[7]

Another area for which the OEIGWG should take due consideration of existing standards concerns the extensive extraterritorial dimension of the future instrument.

Below is a non-exhaustive list of instruments/jurisprudence we consider should inform the drafting process of the binding instrument:

International Human Rights treaties and declarations:

- UN Charter, art. 56, obligation to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in art. 55.

- UN Charter, art. 103, the obligations set forth under the Charter prevail over those from other international agreements.

- International Covenant on Economic, Social and Cultural Rights, Article 2 (1), State obligation to take steps individually and through international assistance and co-operation to achieve progressively the full realization of the rights in the Covenant, including the adoption of legislative measures. Articles on the diverse Economic, Social and Cultural Rights.

- International Convention on the Elimination of All Forms of Racial Discrimination, art. 6

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 9 (1), State obligation to assistance in connection with criminal proceedings, including supply of all evidence necessary for proceedings.

- Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, art. 13, 14.

- Convention on the Rights of the Child.

- International Convention for the Protection of all Persons from Enforced Disappearance, Annex, art. 15, State obligation to cooperate to assist victims of enforce disappearance.

- United Nations Convention against Transnational Organized Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, on the recognition of legal accountability for legal entities including business entities[8].

- WHO Framework Convention on Tobacco Control, especially art. 5.3 on protection against commercial and other vested interests.

UN Treaty Bodies:

- General Recommendation No. 34 on the Rights of Rural Women (2016), CEDAW, U.N. Doc. CEDAW/C/GC/34, para 62 (c).

- General Comment No. 3, The Nature of States Parties Obligations (1991), CESCR, U.N. Doc. E/1991/23, para. 14.

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[7] See: General Comment 20, CESCR Private sphere: "11. Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds."

[8] Adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

- General Comment No. 14, The Right to the Highest Attainable Standard of Health (2000), CESCR, U.N. Doc. E/C.12/2000/4, para 35.

- General Comment No. 12: The Right to Adequate Food (Art. 11) (1999), CESCR, U.N. Doc. E/C.12/1999/5, para. 27.

- Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (2011), CESCR, U.N. Doc. E/C.12/2011/1

- General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights (2013), CRC, U.N. Doc. CRC/C/GC/16

- Concluding Observations on the sixth periodic report of Canada, CESCR, 57th Session (2016), U.N. Doc. E/C.12/CAN/CO/6

- Concluding Observations on the fifth periodic report of Norway, CESCR, 51st Session (2013), U.N. Doc. E/C.12/NOR/CO/5

- Concluding Observations on the combined fourth and fifth periodic reports of India, CEDAW, 58th Session (2014), U.N. Doc. CEDAW/C/IND/CO/4-5

- Concluding Observations of the Committee, Canada, CERD, 17th Session (2007), U.N. Doc. CERD/C/CAN/CO/18

- Concluding Observations on the sixth periodic report of Sweden, CESCR, 58th Session (2016), U.N. Doc. E/C.12/SWE/CO/6

- Concluding Observations on the combined eighth and ninth periodic reports of Sweden, CEDAW, 63rd Session (2016), U.N. Doc. CEDAW/C/SWE/CO/8-9

- Concluding Observations on the fourth periodic report of Austria, CESCR, 51st Session (2013), U.N. Doc. E/C.12/AUT/CO/4

- Concluding Observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, CESCR, 58th Session (2016), U.N. Doc. E/C.12/GBR/CO/6

- Concluding Observations on the fourth periodic report of France, CESCR, 58th Session (2016), U.N. Doc. E/C.12/FRA/CO/4

- General Comment No. 15, The Right to Water (2003), CESCR, U.N. Doc. E/C.12/2002/11

- General Comment No. 22, The Right to Sexual and Reproductive Health (2016), CESCR, U.N. Doc. E/C.12/GC/22

- General Comment No. 23, The Right to just and favourable conditions of work (2016), CESCR, U.N. Doc. E/C.12/GC/23

- Statement on public debt, austerity and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E/C.12/2016/1

UN Special Procedures and other sources:

- Guiding Principles on Extreme Poverty and Human Rights, Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/HRC/21/39, 90 (b), 99, 102.

- Report of the Special Rapporteur on the right to food, Olivier De Schutter, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, A/HRC/13/33/Add.2, para. 5.

- Special Rapporteur on the Right to Food, Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5.

- Report of the Independent Expert on the promotion on a democratic and equitable international order, A/HRC/33/40

- Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights

- De Schutter, O., Eide, A., Khalfa, A., Orellana, M., Salomon, M and Seiderman, I, (2012). Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Human Rights Quarterly, 34, 1084-1196.

3. Principles for an International Legally Binding Instrument on Transnational Corporations (TNCs) and other Business Enterprises with respect to human rights

Building on submissions prepared for the first session of the OEIGWG, the submitting organisations remind hereafter a list of principles, including general principles of international law that should govern the future international legally binding instrument. These include: human dignity[9], good faith[10], effectiveness[11], transparency and information[12], participation[13], precautionary principle[14], international cooperation[15], due process of law and equality of arms[16], avoiding pro-(homine) persona[17] principle, the principle of primacy of human rights, universality, indivisibility, interdependency and interrelation of human rights[18], the principle of equality and non-discrimination of all human beings, State accountability for human rights violations related to the activities of Transnational Corporations and other

[9] Charter of the United Nations (1945), first paragraph; Universal Declaration of Human Rights (1948) [Hereinafter UDHR], preamble par. 1, 4; Art. 1 equality in dignity; International Covenant on Economic, Social and Cultural Rights (1966) [Hereinafter ICESCR] Preamble, par. 1, 2; International Covenant on Civil and Political Rights (1966) [Hereinafter ICCPR] Preamble, par. 1, 2. i.a.

[10] Charter of the United Nations (1945) art. 2; Vienna convention on the Law of Treaties (1969), art. 31.

[11] Kelsen, Hans: General Theory of Law and State, The Law Book State, 2007, p. 121; Brownlie Ian, Principles of Public International Law, 5. Ed., Oxford 1998, p. 636; Sepulveda, Magdalena, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights, Antwerpen, Oxford, New York, 2003, S. 174 ss., s. 79 ss.

[12] On transparency in cooperation see: Vienna Declaration and Programme of Action, adopted 25 June 1993, U.N. GAOR, World Conference on Hum. Rights, 48th Session, 22d plenary meeting, art. I, par.1, U.N. Doc. A/CONF.157/23 (1993), reprinted in 32 I.L.M. 1661 (1993) [hereinafter Vienna Declaration] art. II, para.74; on the principle of transparency in trade, development and international investment see: United Nations Conference on Trade and Development (UNCTAD), Transparency, Issues in International Investment Agreements, U.N. Doc. UNCTAD/ITE/IIT/2003/4, U.N. Sales No. E. 04.II.D.7 (2004); on the right to information: UDHR Art. 19; ICCPR art. 19; Inter- American Convention on Human Rights Art. 13; On Transparency in cooperation see Vienna Declaration, supra note 3, art. II, 74.

[13] See i.a. ICCPR Art. 25; U.N. Doc E/C.12/2001/10 (2001), CESCR: Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights, Par 12; U.N. Doc. A/RES/S-27/2 (2002), G. A. Res. S-27/2, U.N. GAOR, 27th, Special Session: A World Fit for Children, adopted 10 May 2002, para. 32.

[14] See: Commentary to Article 3 of the International Law Commission's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the work of its 53rd Session, U.N. GAOR, Int. Law Commission, 53rd Session, at 155, art. 3, par 14; Case concerning Pulp Mills on the River Uruguay (Argentina. vs. Uruguay.), Judgment, 2010 I.C.J. 14, par. 164 (20 Apr.); Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, ITLOS Reports 2011, para. 135 (1 Feb.) at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[15] See: U.N. Charter art. 56–55, signed 26 June 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (entered into force 24 Oct. 1945); International Conference on Human Rights, Tehran, Iran, 22 April – 13 May 1968, Final Act of the International Conference on Human Rights, U.N. Doc. A/CONF. 32/41; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 42 (24 May); Hannum, Hurst: The Status of the Universal Declaration of Human Rights in National and International Law, 25 Georgia J. International & Comparative Law, 1995/96, p. 287, 351–52; Buergenthal, Thomas, International Human Rights Law and Institutions: Accomplishments and Prospects, 63 Wash. L. Rev, 1998, p. 1, 5–6, 8–9; Simma, Bruno & Alston Philip: The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, Year Book of International Law 1988/1989, p. 82, 100–02; De Schutter, Olivier: The Status of Human Rights in International Law, in Krause, Catarina & Scheinin Martin (eds.) International Protection of Human Rights: A Textbook., 2009, p. 39, 41.

[16] On due process of law and fair trial see: Inter-American Human Rights Curt: Case Velásquez-Rodriguez v. Honduras, Preliminary Objections, Judgment, (ser. C) No. 1, par 91 (26 June 1987); African Commission on Human and Peoples Rights: Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, principle C (a), DOC/OS(XXX) 247, reprinted in 12 International Human Rights Report, 2005, p. 1180; European Court of Human Rights: Case Conka v. Belgium (Appl. No. 51564/99), judgment of 5 Feb. 2002, par. 75. On Equality of arms see: Cançado Trindade, Antônio: The Construction of a Humanized International Law, Brill, Nijhoff, 2014, p. 1638.

[17] On pro persona or pro homine principle, commonly applied in the Inter American Human Rights System see: Pinto, Mónica: El Principio Pro Homine, Criterios de Hermenéutica y pautas para la regulación de los derechos humanos in M. Abregú, C. Courtis. [Ed.]: La aplicación de los tratados sobre derechos humanos por los tribunales locales, Buenos Aires 2004, p. 163; Condä, H.Victor: A Hand Book of International Human Rights Terminology, 2004, p. 108.

[18] Vienna Declaration, art. I, para. 5.

business[19], liability of enterprises for human rights offenses[20], States obligations to respect, protect and fulfil human rights territorially and extraterritorially[21].

Furthermore, a new principle should be integrated in the treaty to protect governance spaces and human rights bodies from undue influence from commercial and other vested interests and more generally from corporate capture[22]. Such a principle is needed to preserve democracy and people's sovereignty. A relevant precedent is the WHO Framework Convention on Tobacco Control, Art 5.3. [23].

4. Overview of impacts

In the written submissions to the first session of the OEIGWG, the submitting organizations briefly presented some of the human rights impacts of the activities and conduct of TNCs and other business enterprises, demonstrating how they can negatively affect all human rights, civil and political rights, and economic, social and cultural rights alike. Whilst reiterating these points and the need for the instrument to cover all human rights, we would like to go here in depth on some cases of abuses and impunity resulting from the activities of TNCs and other business enterprises which our organizations have been confronted with recently. They highlight the existing human rights protection and accountability gaps related to abuses committed by TNCs and other business enterprises. The cases below demonstrate how the main hurdles to stopping impunity and achieving remedy for affected individuals and communities relate to TNCs' transnational character, complex corporate and contractual structures and power. It is these hurdles, which we have identified through our experience working with affected individuals and communities which should determine the scope of the future legally binding instrument, as well as States' obligations and conditions for determining corporate liability.

4.1 Abuses and violations of human rights in tea plantations in India

[19] On the principle of accountability see: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess., Agenda Item 71(a), preamble., U.N. Doc. A/RES/60/147 (2006). ("Recognizing that, in honoring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law."); Eur. Consult. Ass., Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations, 1110th Meeting, Appendix 5 Item 4.8 (2011). "Considering that a lack of accountability encourages repetition of crimes, as perpetrators and others feel free to commit further offences without fear of punishment." The Committee of Ministers recommends that states establish mechanisms to ensure the integrity and accountability of their agents. States should remove from office individuals who have been found, by a competent authority, to be responsible for serious human rights violations or for furthering or tolerating impunity, or adopt other appropriate disciplinary measures.

[20] A precedent on the recognition of legal accountability for legal entities including business entities is the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted under General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Article 3(4) of the Optional Protocol builds on the model adopted at the same time in the UN Convention on organized crime and the Convention against corruption.

[21] See i.a. Committee on Economic, Social and Cultural Rights, Report on the Twentieth and Twenty-first Sessions, CESCR, 20–21st Sessions, paras. 236, 276, U.N. Doc. E/2000/22, E/C.12/1999/11 (2000); General Comment No. 12: The Right to Adequate Food, CESCR, 20th Session, paras. 14–20, U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13: The Right to Education; CESC, 21st Session, paras. 46–48 (1999); Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies, Office of the High Commissioner for Hum. Rights, paras 47–48, U.N Doc. HR/PUB/06/12 (2005); Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria, Comm. No. 155/96, A.H.R.L.R. 60 (15th Annual Activity Report), paras. 44–48. See also Olivier De Schutter, International Human Rights Law 242–53 (2010); Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 37–41 (2d ed. 2005).

[22] For instance, analysis by civil society organizations has shown that the current trend of privatization of international cooperation – through for instance advisory sources for law drafting, humanitarian assistance, procurement i.a – has a negative impact the enjoyment of human rights. The binding instrument should adopt all needed measures to ensure that these remain exceptions and not the rule, and that ex-ante and ex-post human rights impact assessments are in place to avoid human rights harm in international cooperation or to adopt the needed corrective measures. Monitoring and recourse mechanisms should be available in the donor and recipient countries for communities and individuals threatened or affected by privatized cooperation programs or measures.

[23] Article 5.3 of the Tobacco Convention states that: In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law. On conflicts of interests see: Peters, Anne; Handschin, Lukas (Editors): Conflict of Interest in Global, Public and Corporate Governance, Cambridge 2012.

In November-December 2015, the Global Network for the Right to Food and Nutrition conducted a fact finding mission (FFM)[24] to the Indian regions of Assam and West Bengal, which together comprise for 70% of India's tea production and which are also home to the worst working conditions. After visiting 17 tea plantations and interviewing approximately 300 workers the following human rights abuses and violations were observed:

- Discrimination on the basis of gender in the enjoyment of the right to work, meaning that women almost exclusively work as tea pluckers and are barred, as opposed to men, from promotional opportunities for higher wages;
- Violation of maternity protection rights, including absence of maternity leave benefits, breastfeeding breaks, pre-natal and post-natal care and access to sanitation facilities;
- Tea plantations receive insufficient wages in order to sustain their livelihoods and often turn to money lenders to then find themselves in a cycle of indebtedness;
- Tea plantation workers live in precarious housing which is exposed to extreme weather conditions and water contamination;
- Free medication is not provided to all workers and there is a lack of adequate potable water and high risks of water contamination due to the mixing of chemicals done near water pumps and tube wells;
- All the above-mentioned violations and abuses of human rights have detrimental impacts on the workers' ability to feed themselves and their families adequately. They affect not only the nutritional well-being of the workers and the girls' growing bodies, but also that of their children, thus creating an inter-generational cycle of undernutrition.

At the other end of the global tea supply chain, a few large transnational corporations sell the overwhelmingly majority of the world tea production. They collect the profit margins of the most lucrative processes of tea production which are the blending, packaging and marketing of the tea, in a context where global tea prices are at peak levels. Meanwhile, the wages of tea plantation workers are levelled with what they were 30 years.

The Government of India holds the primary obligation to guarantee all human rights of tea plantation workers and prosecute tea garden owners failing to comply with legislation in order to ensure adequate remedy for affected workers. However, the Indian government has failed to comply with these human rights obligations and deliver justice to the tea workers.

Tea packing companies and retailers, as the leaders of the global tea supply chain, have clearly failed to adequately conduct all due diligence requirements to ensure the human rights of workers and in particular vulnerable workers and women workers are not violated. They furthermore do not pay a fair price for their tea, which would enable the tea plantation workers to earn a living wage and work under decent conditions.

Home States of global tea packing companies and retailers have also failed to comply with their extraterritorial obligations to protect human rights by putting in place regulatory frameworks that make it a criminal offence for companies to contribute to human rights abuses abroad, and enabling affected individuals and communities to access remedy.

This case illustrates the importance for a broad interpretation of the scope of coverage of the future legally binding instrument. Whilst focusing on TNCs, the future instrument should include all business enterprises linked to global supply chains, for whom international markets and cross-border relations with business partners are a central element of their business model. Such an interpretation of the scope would enable, in this particular case, for the activities of the tea gardens, the tea processing factories and the global tea packing companies and retailers to be covered under the instrument.

This case furthermore highlights the importance of States' extraterritorial obligations to protect human rights and of international cooperation between States to regulate, monitor, adjudicate and enforce judicial decisions as to put an end to impunity directly from or driven by TNCs. The case also shows the need to have clear international legal rules for the determination of liability of the different legal units participating in the supply chain and impairing the enjoyment of human rights.

4.2 The involvement of European corporate and financial entities in land grabbing outside the European Union

[24] Report of the fact finding mission: http://www.fian.org/fileadmin/media/publications_2016/FFMReport_June_2016.pdf

In a recent study on the involvement of EU Corporate and financial entities in land grabbing outside the EU requested by the European Parliament's Subcommittee on Human Rights[25], the Transnational Institute and FIAN point to the negative human rights impact of land grabbing and to the 'multilayeredness' and complexity of land grabbing processes which involve diverse types of public and private actors.

The access to land and to other natural resources is the condition for the realisation of several human rights, such as the right to adequate food and nutrition, the right to water and sanitation, the right to health, the right to housing, the right to work, the right not to be deprived of one's means of subsistence and the right to take part in cultural life. They are fundamental for the realisation of the rights of indigenous peoples, rights of peasants and also women's rights. In addition to these economic, social and cultural rights, land grabbing can also impair civil and political rights, including the right to self-determination, the right to information and the principle of free, prior and informed consent.

Among the different cases presented in the study, the case of land grabbing involving Mozambican company Chikweti Forests of Niassa in the Niassa province of Mozambique for large-scale pine and eucalyptus plantations is emblematic[26]. Given that the majority of the inhabitants in the project area are peasant farmers who depend on small-scale farming for their livelihood, the loss of access to water, to fertile land, and the destruction of ecosystems due to the large-scale forest plantations have impaired the realization of their human right to food and nutrition. The right to water of local communities is also seriously threatened as both eucalyptus and pine tree plantations require important volumes of water and fertilizers and pesticides risk polluting the local waters. Furthermore, the consultations undertaken with the local communities have not ensured their effective participation, a right which is guaranteed by Mozambican Law. The jobs that Chikweti Forests of Niassa promised to create for those who ceded their land have not proven to represent an alternative source of livelihood. Complaints have also related to the harsh working conditions on the plantations, delays in salary payments and lack of work equipment.

Behind the Niassa land grabbing case, there lie multiple actors and thus distinct responsibilities and related attributable accountabilities. In the context of a cooperation agreement between Mozambique and Sweden, the Swedish development agency (SIDA) set up the Malonda Foundation, whose purpose is to facilitate and promote foreign investments in forestry, agriculture and tourism in the Niassa province. The foundation facilitated the establishment of Chikweti Forests of Niassa, a subsidiary company of the Global Solidarity Forest Fund (GSFF), a Swedish-based investment fund. Investors of the fund include amongst others the National Church endowment OVF from Norway (5%), the private Dutch pension fund Stichting Pensioenfonds ABP (54.5%) and the Diocese of Västerås in Sweden (5%).

The Niassa case, as the other cases mentioned in the study, illustrate the complexity of land deals which involve a web of transnational corporate and financial actors: business managers of the agricultural project; parent companies who (fully or partially) own the business managing the project (subsidiary or local branch); investors/shareholders who invest money in a company in return for shares; lenders who make loans to a project or a company (commercial banks, investment banks, multilateral development banks/IFI, investment funds (hedge funds, pension funds, private equity funds); governments who offer land to the business managing the project and allow a company to be registered and operate in their country or region; brokers who play a role in helping to secure business deals and communicating between or supporting different actors involved; contractors who carry out certain jobs on the ground on behalf of the project; and buyers who buy the produce grown or processed by the project (trading companies, processor/manufacturer, retailer).

The difficulties in the determination of liability of the diverse legal entities involved in human rights abuses is one of the hurdles in ending impunity and achieving remedy. This is due to the lack of clear rules to determine corporate liability, as for example the rebuttable of presumption of liability of a parent company, the inversion of the burden of proof and/or rules on the elevation of the corporate veil for human rights abuses[27]. The scope of coverage of the future instrument should therefore ensure that the existing challenges in the regulation of transnational groups or networks of companies are identified and faced. The study furthermore illustrates the importance for the instrument to enact clear

[25] Borras, J., Seufert, P. et al., (2016) Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing outside the European Union, EP/EXPO/B/DROI/2015/02.
[26] See also: FIAN International for the Hands off the Land Alliance (2012) The Human Rights Impact of Tree Plantations in Niassa Province, Mozambique.
[27] See below heading 8: Determining Corporate Legal Accountability.

rules on the determination of corporate legal liability which take into account the complex web of transnational corporate and financial entities potentially linked to human rights abuses.

5. Form of the future legally binding instrument:

The submitting organizations consider that the binding instrument should have the form of a framework treaty leaving open the possibility for the Conferences Of States Parties to revise its content and to adopt optional protocols regulating additional normative elements, as for example regarding international accountability mechanisms or sectoral regulation.

6. Scope of the future instrument

Human Rights Council Resolution 26/9 is clear with respect to the mandate of the OEIGWG. It shall "elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises". We believe that discussions regarding the coverage of the future treaty should not deviate from this mandate conferred to the OEIGWG by a resolution adopted by a majority of States at the Human Rights Council.

Our experience, as illustrated by the cases presented above, furthermore demonstrates the importance of focusing on TNCs and interpreting other business enterprises in the sense of this focus. The case on tea plantations highlights how TNCs drive most of the global economy and control many of the domestic businesses. The cases we presented in our study to the European Parliament also show the web of different actors which are involved in the human rights abuses committed by TNCs.

A scope of coverage which focuses on TNCs and other businesses enterprises should therefore be interpreted in a way as to take these complex realities into account and cover all those business enterprises involved in transnational operations, linked to TNCs through cross cutting investments, participating in TNCs' supply chain or having a contractual relationships with TNCs and other business enterprises (including credits, franchises and other).

Due to their flexibility, complex structures, power and the fact they are almost always in a different jurisdiction as the individuals and communities they affect, TNCs' parent or controlling companies have been able to escape liability, leaving affected individuals and communities without any remedy. New international law is therefore required in order to fill the current protection and accountability gap to deal with these cross-border crimes and human rights abuses committed by TNCs and other business enterprises.

It is frequently almost impossible to prove the interdependency of the national companies connected to an international web due to the strategies used by these economic units operating abroad. These legal units which belong to TNCs are national legal persons and in various opportunities affected individuals and communities have denounced the impunity they face due to the lack of existence or implementation of national laws. In this context, the treaty can stipulate in specific clauses the need for national regulations for national companies or reaffirm the obligation to implement national existing laws for other business enterprises.

With regard to the human rights to be covered under the future instrument, the submitting organisations reiterate the principles of interdependency and indivisibility of human rights and therefore call on the instrument to cover all human rights. When referring to criminal accountability, the submitting organizations emphasize the need for the future legally binding instrument to cover crimes which impair the enjoyment of economic, social and cultural rights. We welcome the recent decision of the International Criminal Court to give particular attention to crimes involving environmental destruction, land grabbing and illegal exploitation of natural resources[28].

7. States' obligations

Taking into account the complicated structures and webs of businesses of transnational character as well as the strategies used by diverse units involved in investments webs, the future legally binding instrument should spell out

[28] See: https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf

clear human rights obligations for all states involved. To this end, the instrument should first set out to clearly define what is understood as a Home and a Host State. The definition of a Home State could, for instance, take inspiration from Principle 25 (c) of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights: "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, in the State concerned." Under such a definition, it is important to emphasize that TNCs and other business enterprises can have several home States.

As for all human rights instruments, the future legally binding instrument should follow the respect, protect and fulfil typology of States' human rights obligations.[29]

7.1 Obligation to respect human rights

We reiterate the importance for the future legally binding instrument to clearly define States' territorial and extraterritorial obligations to respect human rights with regards to the policies and conducts they have relating to the activities of TNCs and other business enterprises. This should provide for affected individuals and communities to hold States to account for the cases in which States are complicit in the abuses committed by TNCs and other business enterprises.

States' obligation to respect requires them to refrain from any conduct which could nullify or impair the enjoyment of human rights within or outside their territory. [30] In the context of the discussed instrument, this obligation requires all States to avoid establishing laws and policies favourable to harmful investments by companies within their jurisdiction or abroad, therefore acting in complicity with the involved TNCs. The future instrument should clearly specify that this obligation applies to States when signing trade and investment agreements, in the context of the design and implementation of international development cooperation as well as more generally in their diplomatic work.

In the framework of this instrument, it should also be stipulated that States' obligation to respect requires them to refrain from conduct impairing other States or international organisations to comply with their respective obligations regarding the activities of TNCs and other business enterprises.[31] This obligation furthermore requires States to refrain from aiding, assisting, directing, controlling or coercing other States or international organisations to breach their human rights obligations in knowledge of the circumstances of the act.

We reiterate here that the legally binding instrument should make clear that States' human rights obligations to respect, as well as to protect (developed below) apply when acting in the context of intergovernmental organisations, including international financial institutions. It should be made clear that States' acts within these organisations shall be in compliance with the States Parties obligations under the future legally binding instrument, that is, that they shall take all reasonable steps to ensure that the relevant organization does not assist or facilitate human rights abuses by TNCs and other businesses in harming human rights, and that – on the contrary – the organization protects the enjoyment of human rights from being impaired by TNCs and other business enterprises. Such obligations have been reiterated by the Committee on Economic, Social and Cultural Rights in a recent Statement.[32]

7.2 Obligation to protect

States' obligation to take separate and joint action, through international cooperation, to protect human rights from the adverse impact generated by activities of TNCs and other business enterprises territorially and extraterritorially should be clearly spelled out in the treaty, following the jurisprudence of different treaty bodies and the work of various special

[29] E.g: General Comment No. 12 on the Right to Adequate Food, CESCR, U.N. Doc. E/C.12/1999/5.
[30] Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principles 19 – 21.
[31] See supra note 23.
[32] Statement on public debt, austerity and the International Covenant on Economic, Social and Cultural Rights (2016), CESCR, U.N. Doc. E/C.12/2016/1; General Comment No. 12 on the Right to Adequate Food (1999), CESCR, U.N. Doc. E/C.12/1999/5, para. 19; General Comment No. 14: The Right to the Highest Attainable Standard of Health (2000), CESCR, U.N. Doc. E/C.12/2000/4, para. 39.

procedures[33]. Beyond the differentiation between the obligations of Home States and a Host States, Principle 25 of the Maastricht Principles on the Extraterritorial Obligations of States provides for the different conditions under which States have the obligation to adopt and enforce measures, through legal, diplomatic and other means to protect human rights:

a) if the harm or threat originates or occurs in its territory;

b) if the non-State actor has the nationality of the State concerned;

c) if the corporation or its parent or controlling company has its activity, is registered or domiciled, or has its main place of business or substantial business activities in the State concerned;

d) if there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory. Examples of a reasonable link would be:

- The company has assets in that country that can be seized to implement a judgment of a court.
- There is evidence or there are eye witnesses in the country.
- Accused company officials are present in the country.
- The company carried out part of the incriminated operations in that country;

e) if the abuses committed by TNCs and other business enterprise constitute a violation of a peremptory norms of international law, and also constitute a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction. This is therefore the obligation for all States, each State, no matter how distantly related to the case.

7.2.1 Obligation to protect of host States of TNCs and other business enterprises

For host States of TNCs and other business enterprises, the obligation to protect human rights against the conduct of TNCs and other business enterprise requires them to regulate, monitor, adjudicate and enforce judicial decisions in order to ensure the liability of the involved companies and enable the affected individuals and communities to access effective remedies and reparation. Under this human rights obligation, Home States are required to jointly or individually define and enforce obligations for TNCs and other business enterprises under their national civil, administrative and criminal law which include the following:

- To abstain from any conduct, project or activity threatening or causing harm to the enjoyment of human rights or leading to related ecological harm.
- To report on policies they have, in order to prevent harm to the enjoyment of human rights. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity.
- To carry out ex ante and ex post an independent human rights and environmental impact assessments and adopt the required corrective measures in order to eliminate harm to the enjoyment of human rights and to the ecology. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity. Measures should be taken to ensure that impact assessments are independent and to ensure remedy recourse mechanisms for threatened or affected communities when they disagree with the impact assessments or think these are invalid.
- To have effective and transparent information procedures for individuals and communities potentially affected by the activities or projects of the specific enterprise, without excluding their responsibilities to

[33] E.g: Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights (2011), CESCR, U.N. Doc. E/C.12/2011/1; - General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights (2013), CRC, U.N. Doc. CRC/C/GC/16; - Report of the Special Rapporteur on the right to food, Olivier De Schutter, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, A/HRC/13/33/Add.2, para. 5; See list of standards above for a more complete list.

respect the results of prior and informed consent. This information should also allow the affected communities to identify investments and supply chains in order to ensure closing gaps when determining liability.

- To establish a vigilance plan in order to be able to identify risks of human rights and ecologic harm and to adopt the needed measures in order to prevent or stop impairing the enjoyment of human rights. These plans shall be available for the public. This obligation can be regulated in different ways depending on the size, nature and capacity of the business legal entity.
- To apply the precautionary principles when there is no certainty if an activity will impair the enjoyment of human rights or will harm ecosystems and climate.
- To abstain of influencing in or impeding prior consultations with affected communities or individuals carried out by states in exercise of their obligation to protect. We affirm that prior consultations are a duty of States. States should adopt all measures to ensure that consultations are not instrumentalized to divide communities.
- To abstain from harassment and criminalization of human rights defenders and whistle-blowers.
- To abstain from abusive and dilatory use of recourse mechanisms and other legal remedies thereby impeding the protection of threatened or affected individuals and communities (obstruction of justice).
- To comply prompt and effectively with the commitments acquired in negotiations carried with threatened or affected individuals and communities.
- To comply promptly and in good faith with administrative, judicial and quasi-judicial decisions protecting the enjoyment of human rights of individuals and communities that may be negatively affected by their conduct, including compliance with the ordered compensation, rehabilitation and adoption of measures to avoid repetition of the offenses.

Depending of the national context and legal culture, rules in specific fields of law such as commercial law, environmental law, competition law, anti-trust law, financial and tax law are also fields where TNCs and other business enterprises can be regulated in order to protect human rights.

States can jointly decide to include in the future instrument a list containing the above-mentioned obligations as well as other obligations of TNCs and other business enterprises to be regulated and implemented jointly and/or individually by States.

We reiterate here that TNCs and other business enterprises hold obligations under administrative, civil or criminal law and shall be held liable under such laws for the harm they do to the enjoyment of human rights. The treaty should ensure that States adapt, modify and amend the respective areas of law in line with their obligations to protect the enjoyment of human rights against TNCs and other business enterprises. Moreover judges have to interpret the law in line with the human rights obligations of their States. We reaffirm that TNCs and other business enterprises do not and shall not hold international human rights obligations under the future legally binding instrument. Human rights law mandates States to realize the human rights of their populations. TNCs and other business enterprises are mandated by their shareholders and investors, are licensed by States, and by their very nature they do not work for the public good but for private profit. Human rights are fundamental elements for democracy and the Rule of Law and States remain the only ones to hold human rights obligations, and must be held accountable for human rights violations. We reaffirm that States are and shall remain the fundamental subjects of international law and reject tendencies in international investment law, in particular in the context of investor state dispute settlement, that undermine these principles and the sovereignty of States and peoples. Moreover the treaty must guard its implementation against being blocked by such elements of international investment law. We consider many ISDS-related elements and tendencies illegitimate.

7.2.2 Extraterritorial obligation to protect of home States and all States in a position to regulate TNCs and other business enterprises

The extraterritorial obligation to protect human rights from the adverse impact generated by the conduct of TNCs and other business enterprises of home States of TNCs and other business enterprises, or of any other State concerned under the definition of Maastricht Principle 25, requires them to take administrative, legislative, investigative, adjudicatory and other measures, to ensure that TNCs they are in a position to regulate do not impair human rights

abroad. This obligation includes home States to open up their legal systems (including offering legal aid) to individual and affected communities of abuses committed by TNCs and other business enterprises abroad. This legal avenue should not require the "exhaustion" of remedies in the State of the affected individual or communities. Victims shall be free to choose in which State they want to sue the corporation.

In accordance with the UN Charter, all States in a position to influence the conduct of TNCs and other business enterprises, without being in a position to regulate such conduct, should exercise their influence, through international diplomacy or public procurement system to protect human rights from the conduct of TNCs and other business enterprises.[34]

7.3 Obligation to fulfil

As expressed in the Maastricht Principles on the extraterritorial obligations of States, princple 29, "States must take deliberate, concrete and targeted steps, separately, and jointly through international cooperation, to create an international enabling environment conducive to the universal fulfilment of economic, social and cultural rights, including in matters relating to bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation.

The compliance with this obligation is to be achieved through, inter alia:

a) elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards;

b) measures and policies by each State in respect of its foreign relations, including actions within international organisations, and its domestic measures and policies that can contribute to the fulfilment of economic, social and cultural rights extraterritorially"

These obligations also apply to States with regards to the regulation of TNCs and other business enterprises.

8. Determining corporate legal liability

The lack of clear rules to determine the liability of the diverse legal entities involved in human rights abuses is one of the main hurdles to ending impunity and achieving remedy. The cases which have been developed under heading 4. "Overview of impacts" of this present written submission have highlighted the complex nature of global supply chains as well as the web of global actors which can lie behind the operations and human rights abuses of TNCs and other business enterprises. It should therefore be one of the main aims for the legally binding instrument under discussion to set out clear standards for the national and international legal liability of TNCs and other business enterprises involved in human rights abuses.

We reiterate here that under their obligation to protect human rights, States must regulate and monitor TNCs and other business enterprises as to ensure that they do not impair the enjoyment of human rights. Under this obligation, States must also create liability mechanisms under their national civil, administrative and criminal laws as to achieve remedies for those affected who have their human rights affected by TNCs and other business enterprises.

Below are some examples of rules with regards to the determination of liability which we believe the future treaty should provide for:

- The future legally binding instrument should clearly define which conduct of TNCs and other business enterprises impairing human rights they will be held liable for under States' national civil, administrative and criminal laws.
- The treaty shall require States to oblige groups of enterprises (also recognized in some legal systems as economic units or undertakings) to declare their existence and the enterprises confirming the group or the specific supply chain, in order to facilitate the determination of liability of all enterprises jointly harming the enjoyment of human rights.

[34] Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principles 26.

- The treaty shall clearly define situations where the corporate veil shall be lifted or where a rebuttable of the presumption of control should be incorporated in the national legislation in order to determine full liability for crimes and offences committed by TNCs and other business enterprises which impair the enjoyment of human rights. Mechanisms used in other fields of law as for example in competition, tax or labour law should be explored and its inclusion in the treaty should be at least considered during the negotiations.[35]
- Mechanisms that ensure the liability of parent companies or other companies whose specific subsidiary or related company impair the enjoyment of human rights shall be explored. To this aim, the OEIGWG should explore theories and models existing in diverse legal systems to determine criminal liability, including the theories of "directing mind", the "respondent superior" or the "corporate culture". The norms included in this respect in the treaty should be developed in light of the good faith (bona fides) and effectiveness principle. This allows tackling the mentioned challenges in the diverse legal cultures different States in a way that provides the most effective protection.
- The burden of proof regarding for instance the due diligence of parent or controlling companies should be on TNCs and other business enterprises as to ensure equality of arms and due process for the affected individuals and communities. While due diligence procedures can be useful for prevention and in the context of establishing liability, such procedures cannot exhaust the determination of liability. Legal liability has to be based on the real impact on the affected individuals and communities. Every case has to be considered starting with this perspective – and taking into consideration whether the company did everything to avoid this harm that was reasonable in this situation – beyond precautionary procedures of due diligence. Using due diligence to define business liability, would be contradictory to the goal of enhancing accountability and effective remedy for victims, especially taking into account the risk that companies misuse the due diligence tests to escape their accountability in order to protect their profit interests.
- The legally binding instrument should include clear norms which define complicity in order to determine the criminal liability of parent or controlling companies when involved in human rights offenses committed by their subsidiaries or contractual related legal entities.

9. Challenges to access to remedy: The Mubende Case in Uganda

The Mubende case, which concerns the eviction of over 4,000 people in the district of Mubende in Uganda, illustrates the hurdles which affected people and communities of the activities of TNCs and other business enterprises face in order to access remedy. The eviction took place in 2001 by the Uganda People's Defense Force which stormed the villages of Kitemba, Luwunga, Kijunga and Kiryamakobe in Mubende, to lease land to Kaweri Coffee Plantation Ltd., a 100% subsidiary of the German company Neumann Kaffee Gruppe (NKG). The eviction was conducted in a very violent manner, causing the death of three people, dozens injured and destroying amongst other things the farmers' crops and houses. In addition to these immediate impacts, the terrible conditions the community was left with after the eviction, (no shelter, no adequate access to drinking water, no health care, to mention just a few) has led to an increase in diseases and deaths. The lack of shelter, water and land has severely affected the evictees' human rights to water, housing, food, healthcare and education, guaranteed in the International Covenant on Economic, Social and Cultural Rights.

After 15 years of mobilization and legal struggle, the evictees from the Mubende district have still not seen justice and moreover continue to suffer the collateral consequences of this brutal act. In 2002, the evicted community decided to bring the case to the Nakawa High Court against the Ugandan Government and Kaweri Coffee Plantation Ltd for human rights violations and abuses. Eleven years later, in 2013, after delayed hearings and a disrupted process, the High Court ruled in favour of the affected communities. However, 396 families are still awaiting redress as the case has been sent back by the Court of Appeal to the High Court for retrial and there is uncertainty about when and if the case will move forward.

[35] See for example: Miller, Sandra K. Piercing the corporate veil among affiliated companies in the European community and in the us.: a comparative analysis of U.S., German, and U.K. veil-piercing approaches in American Business Law Journal Volume 36, Issue 1, pages 73–149, 1998.

The unsuccessful attempts to seek remedy within domestic courts, led the affected communities to lodge a complaint to the German National Contact Point (NCP) in 2009 for the OECD Guidelines for Multinational Enterprises. NCP's are government bodies, most often part of trade or economic ministries and are responsible for promoting the Guidelines and handling complaints relative to them.

The complaint was filed on the basis that NKG had breached the Guidelines relative to:

- the destruction of property of the persons concerned without compensation;
- the rejection of any dialogue with the persons concerned;
- the obstruction of court proceedings and;
- the presentation of obstacles to an out–of-court settlement.

The experience at the OECD Guidelines NCP has been unsatisfactory for the evictees. It took 18 months for the first and last meeting between the representatives of NKG and the evictees to take place, without any outcome. In April 2011, Germany's NCP closed the complaints procedure and furthermore asked civil society to stop publicly criticizing NKG, leaving the communities without any remedy, 10 years after being evicted from their land and after energy and time-consuming procedures.

The case demonstrates the numerous hurdles which the affected individuals and communities have faced in attempting to access effective remedy. At the national level, the legal action undertaken by the evictees to reclaim their land and properties has been continuously obstructed and delayed. The involved company denied any contact with the affected communities, failed to support efforts for compensation and even tried to impede the proceedings. At the international level, the OECD Guidelines for Multinational Enterprises demonstrated their weaknesses, notably their voluntary nature and apparent conflict of interest, in light of the body's location in the Office of Foreign Investment's sub-department for foreign trade promotion within the German Federal Ministry of Economics and Technology. The case demonstrates the limits of voluntary standards which do not guarantee effective remedy for affected individuals and communities, and the need therefore for a binding instrument. The case furthermore illustrates the importance for the future legally binding instrument to provide for mandatory cooperation between the home and host States in regulating and monitoring TNCs and other business enterprises and providing remedies for affected individuals and communities.

10. Remedy mechanisms

10.1 Right to effective remedy and reparation

Remedying abuses by business actors often poses important challenges to States, especially when transnational business entities are involved and when the so-called corporate veil allow business actors to escape liability. Specific difficulties may arise in cases in which there is a large group of (alleged) affected individuals or communities. More generally, "transnational" litigation is even more time and resource consuming than litigation in a purely domestic setting.

The future legally binding instrument shall therefore require States to take necessary steps to address these challenges and difficulties, prevent denial of justice and ensure the right of victims of abuses and violations to effective remedy[36] and reparation. Remedies shall thus be available and effective. For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm. Under the right to an effective remedy, victims must be ensured of the cessation of the violation and of "full and effective reparation…which include the following forms:

[36] On access to remedy see: UDHR art. 8; the ICCPR (Article 2 (3)); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention on the Rights of the Child (Article 39); the American Convention on Human Rights (Articles 25 and 63 (1)); the African Charter on Human and Peoples' Rights (Article 7(1)(a)); the Arab Charter on Human Rights (Articles 12 and 23); the European Convention on Human Rights (Articles 5 (5), 13 and 41); the Charter of Fundamental Rights of the EU (Article 47) and the Vienna Declaration and Program of Action (Article 27). Although the International Covenant on Economic, Social and Cultural Rights makes no express provision regarding remedy, the Committee has reaffirmed that an obligation to provide remedies is inherent in the Covenant, for example, in General Comment 9 on The Domestic Application of the Covenant, adopted in Dec. 1998, U.N. Doc. E/C.12/1998/24 (1998).

restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" [37]. This implies, notably, that States should adapt and reform their domestic procedural laws and the administration of justice in order to address normative, procedural and practical obstacles. In particular, procedures allowing for group or class actions, and for public interest litigation should be put in place; legal aid schemes should be foreseen in litigation of business abuses; provisions should be made to enable to gather and use of evidence and testimonies across borders.

The submitting organisations recall that through ratification or accession to the IHRL treaties, all States branches of government are bound to the obligations. The judiciary has thus an essential role in ensuring the right to effective remedy in cases of abuses or violations in the context of business activities. It is therefore of utmost importance that justice actors, and in particular judges and lawyers, have the necessary knowledge about human rights standards, the obligations of their State, and enforce laws that prevent, protect against and /or remedy abuses of human rights by TNCs and other business entities. Justice actors have to be guaranteed independence and have to be accountable, especially as corruption may be a particular issue in the context of litigation involving business actors. In addition, judges have a specific role to play and a deep influence on the protection of rights and on the guarantee of the right to an effective remedy, for instance, through the use of judicial doctrines such as the one of forum non conveniens under which cases, especially those with an extraterritorial dimension, may be dismissed by a court who considers that another one is better placed to hear the case. Another area in which judges have a particularly powerful interpretive and protective role concerns the cases in which States argue public or general interest to justify actions to the benefit of business activities to the detriment of the enjoyment of human rights of individuals and groups affected by these activities.

10.2 Types of remedies

Mechanisms aimed at ensuring accountability for abuses by corporate actors may take various forms. However, effective remedies must include judicial remedies as described above. Judicial remedies must be made available to all affected individuals and communities without discrimination to their financial or other situation. Non-judicial mechanisms can sometimes fail to bring effective redress and satisfaction to the alleged affected individuals and communities.

10.2.1 Judicial remedies

Judicial remedies themselves can be provided in different areas of law. Since the violations of human rights essentially involve a claim from an individual or group of individual against the State, constitutional and administrative remedies are of particular relevance. However, some domestic legal systems foresee the horizontal effect of constitutional human rights protections and thus victims may directly introduce a petition against a business actor. Additionally, especially in the context of business activities, civil and criminal remedies may play an important role in the redress of abuses of human rights.

- Civil. In the majority of domestic legal systems, civil remedies represent the most natural avenue for victims of abuses by business actors to claim their rights and obtain reparation, including compensation and damage awards. Depending on the system concerned, they can be pursued in parallel or in addition to criminal remedies. Civil law remedies may also be available in the context of consumer protection and may represent an important avenue for redress for abuses of rights committed by business actors. The submitting organisations call on States to also make civil remedies available extraterritorially, when victims of abuses live abroad.
- Criminal. Criminal law remedies may not be the first or principal avenue for victims of abuses by business

[37] The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, establishes at its Principle 3 that "the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation…"

actors to seek redress. However, they may be relevant on two accounts: a) when an abuse of a human right may amount to a crime or offense under national or international law; and, b) when the penal sanction of the perpetrator of the abuse contributes to ensure satisfaction of the victims as an element of the right to reparation as defined in international law and/or have a deterrent and preventive effect and thus contribute to the guarantee of non-repetition of abuses and violations.

- Administrative. Administrative law and remedies, while they are typically dedicated to the regulation of the conduct of governmental bodies at central and local levels, can play an important role in preventing and redressing abuses by business actors in a variety of ways. Under certain domestic legal systems, business actors may be considered as State agents and be directly suable before an administrative court. In addition, administrative remedies may be pursued to challenge administrative decisions regarding licences of exploration and exploitation of natural resources; the regulation of building licences for housing or industrial infrastructures; the regulation and the administration of education, health facilities or of services including water or electricity.

10.2.2 Non-judicial remedies

Non-judicial remedies must not replace judicial mechanisms. However they may contribute to remedy and redress abuses of human rights, and contribute to accountability,[38] if they do not prevent adequate reparation.[39]

10.3 International accountability mechanisms

Finally, we reiterate that at the international level, a treaty body should be created with the mandate to monitor the implementation and interpret the provisions of the Treaty. Moreover a study centre on TNCs and other business enterprises should be created, that assists the treaty body in its monitoring efforts and provides information of public interest of TNC activities which adversely impact human rights.

[38] United Nations Guiding Principles on Business and Human Rights, Guiding Principle 27: Non- judicial mechanisms can be national or international, State-based or non-State- based.
[39] ibid, Principle 31.