

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).

In order for your contribution to be published on the OEIWG web page prior to the session, the deadline for submission is 30 September 2016. All submissions are final.

Please fill out this FORM and CHECKLIST to submit your written contribution and send it to the address indicated below. Your information goes after each arrow.

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](mailto: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:

- ✘ The written contribution is in MS WORD document format (Font Times New Roman 10; no bold; no underline; no italics).
- ✘ Please use the Spell/grammar check on your text. (Go to Tools, Spelling & Grammar)
- ✘ Different language versions of one statement should be sent in the same email, but using a separate form for each.
- ✘ Email the document to: [igwg-tncs@ohchr.org](mailto:igwg-tncs@ohchr.org)

PLEASE PASTE THE FINAL TEXT BELOW: 

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)

Part 1

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<sup>1</sup> and oral statements<sup>2</sup> 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<sup>3</sup>. 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

---

<sup>1</sup> 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>

<sup>2</sup> See: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session1/Pages/Statements.aspx>

<sup>3</sup> Vienna Convention on the Law of Treaties, art. 2.1(a); See also. Künig, Manfred; Eckert, Martin K: Repetitorium zum Völkerrecht, Stuttgart, Wien 1993, p. 46.

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.

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<sup>4</sup>, 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),<sup>5</sup> 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).<sup>6</sup> In a similar vein, the

---

<sup>4</sup> 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>.

<sup>5</sup> 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 private 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.”

<sup>6</sup> 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;

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.<sup>7</sup>

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<sup>8</sup>.
- 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.

---

(g) To repeal all national penal provisions which constitute discrimination against women.”

<sup>7</sup> 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.”

<sup>8</sup> 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, 57<sup>th</sup> Session (2016), U.N. Doc. E/C.12/CAN/CO/6
- Concluding Observations on the fifth periodic report of Norway, CESCR, 51<sup>st</sup> Session (2013), U.N. Doc. E/C.12/NOR/CO/5
- Concluding Observations on the combined fourth and fifth periodic reports of India, CEDAW, 58<sup>th</sup> Session (2014), U.N. Doc. CEDAW/C/IND/CO/4-5
- Concluding Observations of the Committee, Canada, CERD, 17<sup>th</sup> Session (2007), U.N. Doc. CERD/C/CAN/CO/18
- Concluding Observations on the sixth periodic report of Sweden, CESCR, 58<sup>th</sup> Session (2016), U.N. Doc. E/C.12/SWE/CO/6
- Concluding Observations on the combined eighth and ninth periodic reports of Sweden, CEDAW, 63<sup>rd</sup> Session (2016), U.N. Doc. CEDAW/C/SWE/CO/8-9
- Concluding Observations on the fourth periodic report of Austria, CESCR, 51<sup>st</sup> 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, 58<sup>th</sup> Session (2016), U.N. Doc. E/C.12/GBR/CO/6
- Concluding Observations on the fourth periodic report of France, CESCR, 58<sup>th</sup> 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.