Written contribution by FIAN International for the 3rd session of the OEIGWG on transnational corporations and other business enterprises with respect to human rights: Comments to the elements document presented by the Chairperson-Rapporteur

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1. Introduction

FIAN International, as member of the Treaty Alliance, the Global Campaign to Dismantle Corporate Power and End Impunity and of the ESCR-net, as well as secretariat of the Global Network on the Right to Food and Nutrition and the Consortium on Extraterritorial Obligations, would like to reiterate its support to this intergovernmental process of negotiations of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.

The International Secretariat of FIAN International considers that the document of elements for the draft legally binding instrument presented by the Chairperson Rapporteur for this open-ended intergovernmental working group (OEIGWG) reflects the wide spectrum of contributions made by civil society during the past two sessions. The document therefore represented a sufficiently broad base for the intergovernmental negotiations which began during the third session of the OEIGWG, in conformity with resolution 26/9 adopted by the Human Rights Council in 2014. This written contribution provides comments on the language, conceptual categories and elements presented.

We call on Ecuador as well as the other States members of the Core Group, in accordance with the conclusions of the report of the 3rd session of the OEIGWG, to undertake as soon as possible the necessary informal consultations as to decide on the next stages of this process, and to ensure that a zero draft of the legally binding instrument is presented in July 2018. This zero draft shall serve as the basis for the 4th session of the OEIGWG already scheduled for the 15-19 October 2018 by the Human Rights Council and for which funds were secured by resolution A/RES/72/263 of the General Assembly. We also strongly recommend that these consultations serve to adopt a work plan which goes beyond 2018 and which enables for the OEIGWG to comply with its mandate by 2023. States should ensure that at least one annual session takes place between 2018 and 2023 and that the necessary amount of informal consultations be organized to guaranty that the mandate of the OEIGWG is complied with.

We urge the other member States, as part of their obligation to cooperate in order to create an international enabling environment for the realisation of human rights[1], to actively participate in good faith in the consultations regarding the continuation of the process and follow the recommendations of the Chairperson Rapporteur of the OEIGWG.

In its written and oral contributions during the past two sessions of the OEIGWG, FIAN has demonstrated the adverse impacts of the activities of transnational corporations (TNCs) and other business enterprises on the right to adequate food and nutrition (RtFN) of people and communities, throughout the different stages of people's food systems. Such impacts include the interference in the access to productive

[1] 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, H.: 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, T., International Human Rights Law and Institutions: Accomplishments and Prospects, 63 Wash. L. Rev, 1998, p. 1, 5–6, 8–9; Simma, B., & Alston P.: 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, O.: 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.

resources and the destruction of means of livelihood and the environment of rural communities[2], the grabbing of lands driven by the investments of pension funds and other international investment funds[3], the lack of recognition and the marginalisation of traditional food systems, the practices that exclude the commercialisation of the products of small-scale food producers[4], the precarious[5] and unhealthy working conditions of rural and agricultural workers[6], the aggressive marketing of breastmilk substitutes which discourage breast-feeding[7], the impact on the right to food and nutrition of food consumers as a consequence of the marketing and promotion of ultra-processed products and their impact on health provoking illnesses such as diabetes, obesity and cancer[8], the adverse impact on the rights of future generations to produce, access and consume healthy foods in the context of ecological destruction and harm to the environment. Despite the development of a series of voluntary regulations, these abuses persist in impunity[9].

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[2] FIAN International, Mubende case in Uganda, Case el Hatillo in Colombia, Case Guarani Kaiowa in Brasil, Case Sawhoyamaya in Paraguay, for more information see: http://www.fian.org/what-we-do/case-work/ ; See Case Las Pavas in Colombia at: http://www.fian.org/es/nuestro-trabajo/casos/colombia-las-pavas/; See Parallel Report by The Ugandan National Coalition on ESCR c/o HURINET- Uganda, p. xxii, 9 and 23, and parallel report by FIAN International to Committee on Economic, Social and Cultural Rights. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fCSS%2fUGA%2f20412&Lang=en

[3] See parallel report by FIAN International for the CESCR review of Norway in 2013 on the human rights impact of Norwegian pension fund investments:
http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NOR/INT_CESCR_NGO_NOR_15162_E.pdf ;
CESCR (2013), *Concluding Observations on the fifth period review of Norway*, U.N Docs. E/C.12/NOR/CO/5, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fNOR%2fCO%2f5&Lang=en.

[4] See Ghana Chicken Case: EU exports destroying local markets. EU, Ghana in Coomans, F.; Künnemann, R.; Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, Cambridge, 2012, p.17.

[5] The Global Network for the Right to Food and Nutrition (2016). A life without dignity – the price of your cup of tea: Abuses and violations of human rights in tea plantations in India, see: http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf.

[6] See cases of victims of soya cultivation in Paraguay. Available at: http://www.rel-uita.org/index.php/es/agricultura/transgenicos/item/5289-soja-transgenica-y-la-violacion-de-los-derechos-humanos; See case Ocós in Guatemala, Informe sobre el Derecho a la Alimentación y la Situación de Defensoras y Defensores de Derechos, Humanos en Guatemala, Informe de Seguimiento, p.31 ss.
Available at: http://www.rtfn-watch.org/uploads/media/Guatemala_-_El_Derecho_a_la_Alimentaci%C3%B3n_y_la_Situaci%C3%B3n_de_Defensoras_y_Defensores_de_Derechos_Humanos_02.pdf; See case Las Pavas in Colombia, at: https://retornoalaspavas.wordpress.com/

[7] IBFAN, Breaking the Rules 2014 Evidence of Violations of the International Code of Marketing of Breastmilk Substitutes and subsequent resolutions compiled from January 2011 to December 2013 (2014). Available at: http://www.babymilkaction.org/wp-content/uploads/2014/05/BTR14inbrief.pdf.

[8] See pandemic of obesity and diabetes in Mexico, available at:
http://eleconomista.com.mx/entretenimiento/2015/04/16/sistema-alimentario-modo-industria;
http://www.vanguardia.com.mx/obesidadysuscifrasenmexico-1418223.html.

[9] FIAN International, Written Submission for the first session of the Open-ended Intergovernmental working group (OEIGWG) on transnational corporation and other business enterprises with respect to human rights (24 July 2015), July 2015, Part 3.1.2., The hurdles for stopping impunity and achieving remedy.
FIAN International, FI, CCFD, CCJ and SID, Written Submission 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, Part 4, para.9: Challenges to access to remedy: the

FIAN International's work has also demonstrated the interconnection between abuses of the RtFN and other human rights, as for instance the right to water, to health, to education, to work, the rights of human rights defenders, the right to liberty and freedom of association. We have furthermore documented the way in which the activities of TNCs have a differentiated impact on the human rights of women[10], on peasants and other rural communities such as pastoralists, fisher folk, indigenous peoples and agricultural workers[11].

The recent indicators of the latest FAO report on the State of Food Insecurity (SOFI)[12] in the world indicate an increase in hunger and malnutrition. Unfortunately, this report does not make any reference to the impact of the activities of TNCs on such indicators, as well as on how they influence States when designing public policies or how they impede policies which attempt to tackel the problems they are responsible for. The 2016 edition of the Right to Food and Nutrition Watch[13] includes an analysis from the perspective of social movements, academics and other actors from civil society, which shows how the transnational activities of enterprises producing and commercializing seeds affect the RtFN.

Our work for over 30 years and in over 50 countries has also demonstrated the intensification of these adverse impacts of TNCs and the risk of the perpetuation of these impacts given the context of corporate capture of governance spaces from the local to the international level, including within the area of human rights[14].

Mubende Case in Uganda. See: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx.

[10] The Global Network for the Right to Food and Nutrition (2016), A life without dignity – the price of your cup of tea: Abuses and violations of human rights in tea plantations in India, see: http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf; Parallel report prepared by FIAN Burkina Faso for the CEDAW review of Burkina Faso in 2017, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fNGO%2fBFA%2f28374&Lang=en.

[11] FIAN International, Analytical Briefings on Peasants´ Rights : http://www.fian.org/library/publication/publication_of_a_series_of_briefings_on_peasants_rights/; The Global Network for the Right to Food and Nutrition (2016), A life without dignity – the price of your cup of tea: Abuses and violations of human rights in tea plantations in India, see: http://www.fian.org/fileadmin/media/publications_2016/Reports_and_guidelines/FFMReport_June_2016.pdf; FIAN International (2012), The Human Rights Impact of Tree Plantations in Niassa Province, Mozambique, http://www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf.

[12] FAO, IFAD, UNICEF, WFP and WHO (2017). The State of Food Security and Nutrition in the World 2017: Building resilience for peace and food security, Rome, FAO, Report available at: http://www.fao.org/3/a-I7695e.pdf.

[13] The Right to Food and Nutrition Watch, Keeping Seeds in People's Hands. Issue 8 Available at: http://www.righttofoodandnutrition.org/watch. The Right to Food and Nutrition Watch is published by a consortium of 26 civil society organizations and social movements; it is also the flagship publication of the Global Network for the Right to Food and Nutrition.

[14] FIAN International, Right to Food Journal (2015), available at: http://www.fian.org/library/publication/right_to_food_journal_2015/
Adams B., Martens J., Fit for whose purpose? Private funding and corporate influence in the United Nations, Global Policy Forum, September 2015, available at: https://sustainabledevelopment.un.org/content/documents/2101Fit_for_whose_purpose_online.pdf ; The Right to Food and Nutrition Watch (2015). People's Nutrition is not a Business (Issue 7), available at: http://www.righttofoodandnutrition.org/files/R_t_F_a_N_Watch_2015_eng_single-page_Web.pdf; See press

In this context, we welcome with interest the developments of international human rights law in the area of corporate accountability with respect to extraterritorial obligations, especially from 2011 onwards. We consider that the advances in the authoritative interpretations of the Treaty Bodies and the work of the Special Procedures[15] are extremely relevant for the process towards the elaboration of a legally binding

release from ESCR-net: "Concerns regarding OHCHR partnership with Microsoft". Available at: https://www.escr-net.org/news/2017/concerns-regarding-ohchr-partnership-microsoft.

[15] 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), available at: http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx ;
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.
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 ;
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;

instrument. They are also relevant to close the regulatory gaps resulting from the UN Guiding Principles on Business and Human Rights, in particular regarding States' extraterritorial obligations, quasi-judicial and judicial remedial mechanisms and the legal liability of business enterprises.

The legislative and jurisprudential processes which FIAN has followed at the national level (laws on due diligence, laws on the marketing of ultra-processed foods for children and adolescents, framework laws on the right to food and nutrition), including the processes towards the adoption of National Action Plans for the implementation of the UN Guiding Principles on Business and Human Rights, have evidenced the obstacles which parliaments face in order to adopt norms which effectively protect people and communities from the powerful agro-industry sector. This confirms our position on the necessity of a legally binding instrument of transnational character which reaffirms and strengthens States' regulatory capacity.

Only a legal regulation of transnational character can respond to the regulatory gaps created by the global activities and resulting impunity from the activities of corporations backed by the development of trade and investment law which serves their interests. To fill this gap, States must therefore individually and jointly with other States assume clear and detailed human rights obligations regarding the regulation of TNCs and other business enterprises, in accordance with the scope established in resolution 26/9.

In our opinion, an international legally binding instrument of this nature will contribute to creating an environment of legal certainty at the global level. This instrument should contribute to the recognition by international law of a legal hierarchy which puts people at the centre of public policies, as is the case under the constitutional laws of numerous States. This enables to overcome the risks of power abuses caused by the legal fragmentation of international law, which inevitably becomes "the law of the strongest". Furthermore, this international legally binding instrument will protect those business enterprises which undertake their activities without affecting the enjoyment of human rights from those enterprises which make profit out of human rights abuses and create a situation of "dumping" or "race to the bottom" based on human rights crimes and abuses.

To finalize this introduction, we would like to reiterate the importance for the current negotiations to be protected from undue corporate influence, as was the case for the WHO Framework Convention on Tobacco Control[16]. To this end, we ask the Chairperson Rapporteur and the Core Group of States to avoid any homogenisation of civil society and the corporate sector under the term "multistakeholders". A difference should be made between those organisations working for the public interest and those which have mainly financial interests, as well as those philanthropic organisation which are linked to the latter[17].

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

[16] A la hora de establecer y aplicar sus políticas de salud pública relativas al control del tabaco, las Partes actuarán de una manera que proteja dichas políticas contra los intereses comerciales y otros intereses creados de la industria tabacalera, de conformidad con la legislación nacional.
Art.5 para.3, Convenio Marco de la OMS para el Control del Tabaco (CMCT OMS), 2003, Texto del Convenio. Available at: http://apps.who.int/iris/bitstream/10665/42813/1/9243591010.pdf; http://www.who.int/fctc/text_download/es/.

[17] Adams B., Martens J., Fit for whose purpose? Private funding and corporate influence in the United Nations, Global Policy Forum, September 2015, at: https://sustainabledevelopment.un.org/content/documents/2101Fit_for_whose_purpose_online.pdf ; Martens, J.

Business enterprises, business associations and philanthropic organisations affiliated to businesses should not be given a legitimate role in these negotiations as this would go against the purpose of this process.

Below are our general and detailed comments on the document of elements.

2. General remarks

2.1 Language

In our opinion, the document of elements is broad and identifies the fundamental aspects which should be regulated by the international legally binding instrument. When preparing the first draft of the instrument, the Chairperson Rapporteur should "translate" the identified elements into detailed legal language, using as much as possible existing agreed language. In particular, it would be important to use the term "violations" when referring to conduct by States which harm human rights and to "abuses", "offenses" or "crimes" when referring to acts from TNCs and other business enterprises, which currently do not hold obligations under international human rights law. This differentiation is key to maintain clarity on the role of the State as the main human rights duty bearer. However, in certain situations the inclusion of new terminology to advance in this respect could be required.

The introduction of new language requires an effort from States negotiating the legally binding instrument, but is fundamental in order to continue advancing in the construction of the architecture of international human rights law and the building of bridges which can help to put an order in the current fragmentation of international law.

2.2 The obligations of States

We recommend that the document of elements use the typology of obligations most commonly used within the international human rights system of respect, protect and fulfil[18] (the fulfil obligation includes the obligation to facilitate, promote and provide) instead of "respect, promote and protect" as it currently stands in the elements document.

2.3 States as the main duty bearers of human rights and derived international obligations for TNCs and OBEs

& Seitz, K. (2015). Philanthropic Power and Development: Who Shapes the Agenda?, Global Policy Forum. Available at: https://www.globalpolicy.org/images/pdfs/GPFEurope/Philanthropic_Power_online.pdf.

[18] See for example: Committee on Economic, Social and Cultural Rights. Report on the twentieth and twenty-first sessions 1999. E/2000/22. E/C.12/1999/11. Para. 53 Annexe IX; Committee on Economic, Social and Cultural Rights. General Comment No. 12 (1999): The Right to Adequate Food (Art. 11). U.N. Doc. E/C.12/1999/5. Paras. 14-20; Committee on Economic, Social and Cultural Rights. General Comment No. 13 (1999). The Right to Education (Art. 13). U.N Doc. E/C.12/1999/10. Paras. 46-48; United Nations Office of the High Commissioner for Human Rights. Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (2005). Paras. 47-48; African Commission on Human and Peoples' Rights. The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria. No. 155/96 (2001), 60th ordinary session, Fifteenth Annual Activity report of the African Commission on Human and Peoples' Rights, paras. 44-48; See also: Olivier De Schutter (2010). International Human Rights Law. Cambridge University Press: Cambridge, pp. 242-253; Manfred Nowak. (2005). UN Covenant on Civil and Political Rights - CCPR Commentary. Kehl am Rhein, N.P. Engel Verlag. 2nd Edition, pp. 37-41; Committee on Economic, Social and Cultural Rights. General Comment No. 15 (2002). The Right to Water (Arts. 11 and 12 of the Covenant). U.N. Doc. E/C.12/2002/11; Committee on Economic, Social and Cultural Rights. General Comment 14 (2000), The Right to the Highest Attainable Standard of Health. U.N. Doc. E/C.12/2000/4.

We reiterate FIAN's position that human rights obligations are obligations for States and not for non-State actors, for reasons which we have elaborated in our previous two written contributions[19]. Because of their *erga omnes* character, such third parties are also obliged under international law to respect these obligations. We can therefore sustain that under international law, TNCs hold an obligation to respect human rights which only makes legal sense when understood as deriving from the obligation to protect human rights of States. This obligation can be exercised by States individually or jointly with other States at the national, regional and international level. Without the coercive capacity of States, the obligation for business enterprises to respect human rights would lose any form of legally binding character and would become a mere moral obligation without any effectiveness.

We believe that the elements document is not absolutely clear with regards to this particular aspect and we therefore recommend that the first draft of the international legally binding instrument clarify the difference in nature between the human rights obligations of States and the deriving international obligations of TNCs and other business enterprises. This recommendation also leads us to further recommend to maintain a different language for the harmful conduct of States (violations) and for TNCs and other business enterprises as was explained previously. This coherence should be maintained throughout the entire draft international legally binding instrument.

2.4 The exercise of States' obligations within their territory or jurisdiction

The repeated expression throughout the document of elements according to which States' human rights obligations should be exercised *within their territory or **jurisdiction*** is theoretically adequate. However, due to the historically restrictive use of this expression under international law it should only be maintained if *jurisdiction* is clearly defined already under the section on principles.

In this sense, we suggest that the draft legally binding instrument to be prepared for negotiations provides a definition of the term jurisdiction which includes the following situations, all based on existing jurisprudence:

a) Situations over which States exercise authority or effective control, whether or not such control is exercised in accordance with international law;
b) Situations over which State acts or omissions bring about foreseeable effects on the enjoyment of human rights, whether within or outside its territory;
c) Situations where State authorities or actors acting on the instructions or under the direction or control of the State beyond their borders produce effects beyond the State's territory.

[19] FIAN International, Written Submission for the first session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, 24 of July 2015; 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; Künnemann, R. (2017). Human Rights for People's Sovereignty: How to Govern Over Transnational Corporations. Available at: http://www.fian.org/fileadmin/media/publications_2017/ETO/Human_Rights_for_People_s_Sovereignty.pdf; See FIAN and SID's oral statement during Panel 3 on General Obligations during the 3rd session of the OEIGWG in October 2017, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/FIAN-SID-Subject3.Generalobligations.pdf ; Vienna Convention on the Law of the Treaties (1969).

d) Situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize human rights extraterritorially, in accordance with international law[20].

In the case of the impossibility of defining what is understood by jurisdiction, we recommend to avoid using the phrase "within their territory or jurisdiction" and use a different phrasing such as "under their jurisdiction".

2.5 Undue influence, conflicts of interest and corporate capture

Different voices from civil society have denounced the way in which the corporate sector has infiltrated many spaces of governance, such as those of local communities, of control and inspection bodies, the national legislative, executive and judicial branches and international spaces like the World Health Organisation and the Committee on World Food Security (CFS)[21]. This influence is not carried out within the limits of a democratic, diverse and plural participation, but is the result of the power of corporate actors to unduly influence decision-making processes. Their strategies include the use of their consulting services to legislative processes, the appointment of people recently retired from the corporate sector to governmental positions where they can take decisions with regards to the regulation business enterprises, as well as mechanisms contrary to the law such as corruption.

The Sustainable Development Goals base their implementation to a considerable extent of public-private associations and partnerships, which provide the corporate sector with important power to take actions with public support and over public services which originally are of the competence of States. Such public-private schemes are vulnerable to systems of governance and particularly detrimental to those with less or no power in these negotiations: marginalised communities.

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[20] Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, by Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, principle 9, Advance unedited version (29 February 2012) Upcoming in Vol. 34, No. 4 (Nov. 2012) Human Rights Quarterly, at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63; See Vienna Convention on the Law of Treaties, 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, article 29: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."; Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, at para. 109; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) 19 December 2005 at paras. 178-180 and 216-217; Human Rights Committee, General Comment 31, the Nature of the General Legal Obligation Imposed on State Parties to the Covenant, (Eightieth session, 2004) UN Doc. CCPR/C/21/Rev.1/Add.13, at para. 10; Communication no. 52/1979, Lopez Burgos v. Uruguay, final views of 29 July 1981 (thirteenth session) (UN Doc. CCPR/C/13/D/52/1979), para. 12.2; Committee against Torture, General Comment 2: Implementation of article 2 by State Parties, (2008) UN Doc.CAT/C/GC/2, at para 16; International Court of Justice, Provisional Measures in the case of Georgia v. Russia, no. 35/2008, order of 15 October 2008, at para. 109; Inter-American Commission on Human Rights, Victor Saldano v. Argentina, Report No. 38/99, 11 March 1999, at para. 19; Case of Al-Skeini and Others v. the United Kingdom (Appl. No.. 5572/107), judgment of 7 July 2011 (citations omitted), at para. 133; Ilascu and Others v. Moldova and Russia (Appl. No. 48787/99), judgment of 8 July 2004, para. 317; Inter-American Commission of Human Rights, Victor Saldano v. Argentina, Report No. 38/99 11 March 1999 at para. 17; Human Rights Committee, Munaf v. Romania, Communication No. 1539/2006, UN Doc. CCPR/C/96/D/1539/2006, 21 August 2009, at para 14.2.

[21] Supra note 17.

It is of utmost importance in this context to have clear norms which protect human rights from the undue influence of TNCs and other business enterprises. We consider that the international legally binding instrument should include an obligation for States to protect governance spaces relevant to human rights at the local, regional and international level from the undue influence of TNCs and other business enterprises. To this effect, States should adopt regulatory measures which include:

a) To impede the interference of economic interests in legislative processes and in the implementation of laws or policies which have as objective the monitoring, regulation or accountability of TNCs and other business enterprises for the realisation of human rights or the provision of public services.
b) To ensure the transparency of State agencies in their contracts with TNCs and other business enterprises, in particular in relation with the people and communities affected or potentially affected by the activities of TNCs and other business enterprises.
c) To document and make public the archives of contracts and other legal affairs with TNCs and other business enterprises, document monitoring their implementation with projects, including audits, and inspector reports, etc.
d) To establish norms of incompatibility to avoid a situation of "revolving doors" between TNCs and State agencies and vice-versa.
e) To establish norms under criminal law to avoid gifts from representatives of TNCs or "lobbyists" which favour the protection their interests before public servants.
f) To prohibit financial contributions by TNCs and other business enterprises to political parties
g) Measures to avoid situations of conflict of interest of public servants
h) Measures to ensure transparency in the relations between public authorities and TNCs and other business enterprises.
i) Measures to ensure that the financial support of TNCs to governmental entities is channelled by the State through its tax system, to avoid the "privatisation" of the agenda of State authorities and ensure that the State's priorities are determined by established democratic institutions and not by the choices of corporations.

2.6 Gender and Women's Rights

We recommend the OEIGWG to consider strengthening a gender perspective throughout the legally binding instrument, especially considering the differentiated impact of the activities of TNCs and other business enterprises on the rights of women[22]. Integrating a meaningful gender approach throughout the

[22] See, for example: Committee on Economic, Social and Cultural Rights. General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (2017). U.N. Doc. E/C.12/GC/24. Para. 9; See written contribution to 3rd session of the OEIGWG on TNCs and other business enterprises with respect to human rights by, APWLD, AWID, CELS, CIEL, CONECTAS, FIAN, FIDH, FOEE, FOEI, HUMANAS, ISHR, IWRAW, PODER, WILPF, "Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises: Statement on the draft elements proposed by the OEIGWG Chair". Available at: https://wilpf.org/wp-content/uploads/2017/10/Jt-statement-gender-into-the-treaty-October-2017.pdf. For an example of the differentiated impact of TNCs on women's rights see: FIAN International (2015). Women's Perspectives on the Impact on the Right to Food: The Human Right to Adequate Food and Nutrition of Women and Children of Communities Affected by Mining and Displacement in Essakane, Burkina Faso. Available at: http://www.fian.org/fileadmin/media/publications_2015/FIAN_Essakane_270315_Ansicht.pdf.

international legally binding instrument requires analysing how TNCs and other business enterprises can have different, disproportionate, or unanticipated impacts on women or men, as a result of their different gender-based social, legal, cultural roles and rights[23]. This difference of impact on the rights of women should therefore be reflected in the parts on preventive measures, access to justice, remedy and reparation to ensure that these are sensitive to the particular needs of women.

3. Preamble

Although the preamble refers to many important instruments and documents for this process, it should additionally make reference to the abundant authoritative jurisprudence of UN Treaty Bodies which have clarified the content of States' human rights obligations with regards to the activities of TNCs and other business enterprises. For instance, General Comment no. 16 of the Committee on the Rights of the Child on State obligations regarding the impact of the business sector on children's rights clearly urges "States to protect the rights of children who may be beyond their territorial borders".[24] General Recommendation no. 34 of the Committee on the Elimination of All Forms of Discriminations against Women on Rural women also stipulates that "States parties should regulate the activities of domestic non-State actors within their jurisdiction, including when they operate extraterritorially".[25] More recently and of extreme value to this process is General Comment no. 24 of the Committee on Economic, Social and Cultural Rights on States' obligations in the context of business activities which calls on "States to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially [but not exclusively] in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective".[26] The future legally binding instrument should most certainly not take a step backwards but build on these already existing standards under international human rights law.

UN Special Procedures have also developed valuable documents on the matter which should also be reflected in the preamble, such as for example the UN Guiding Principles on Extreme Poverty and Human Rights of the Special Rapporteur on Extreme Poverty and Human Rights and endorsed by consensus by the Human Rights Council in 2012. It is for instance stated in Guiding Principle 99 that "Where transnational corporations are involved, all relevant States should cooperate to ensure that businesses respect human rights abroad, including the human rights of persons and communities living in poverty".[27] The Minimum Human Rights Principles Applicable to large-scale land acquisitions or leases developed by the Special Rapporteur on the right to food can also guide this process as they reaffirm the obligation of home States of private investors to regulate the conduct of these investors abroad.[28]

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[23] *Ibid.*

[24] General comment No. 16 on State obligations regarding the impact of the business sector on children's rights (2013), U.N. Doc. CRC/C/GC/16, para.39

[25] General recommendation No. 34 on the Rights of Rural Women (2016) U.N. Doc. CEDAW/C/GC/34, para. 30.

[26] General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), U.N.Doc. E/C.12/GC/24, para. 30

[27] The Guiding Principles on Extreme Poverty and Human Rights (2012), Principle 99, at http://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf

[28] 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 (2009), U.N. Doc. A/HRC/13/33/Add.2.

When referring to decisions adopted at other relevant intergovernmental organizations, it would also be worth including instruments adopted at the World Health Organization which can be of inspiration for this process. The WHO Framework Convention on Tobacco Control includes explicit provisions to protect health policies from commercial or other vested interests.[29] We strongly call for the inclusion of a similar principle in the legally binding instrument to ensure that the protection of human rights remains the only concern driving the elaboration and implementation of this legally binding instrument.

We strongly support the reaffirmation of the principles of sovereign equality and territorial integrity of States and that of the non-intervention in the domestic affairs of other States, which should be read in consonance with their extraterritorial obligations under the binding instrument. Although the objectives of this legally binding instrument require States to take individual and joint actions through international cooperation with implications beyond their borders in order to respect, protect and fulfill human rights from the adverse impacts of TNCs and OBEs, the instrument should make it very clear that this does not give permission to States under any circumstances to take actions in contradiction with the UN Charter and general international law.[30]

4. Principles

In addition to the principles included in the document of elements, the international legally binding instrument should reiterate the principle of human dignity, the principle of the effectiveness of human rights, the principle of transparency and information, the principle of participation, the principle of precaution and of accountability of the State.

In addition, we propose the inclusion of four specific principles for this legally binding instrument:

- The principle of **joint liability** of States and TNCs and other business enterprises involved in the violation or abuse of the rights of individuals or communities. According to this principle, victims should have the possibility to hold the involved TNCs and other business enterprises accountable using the mechanisms provided by the States holding jurisdiction, or hold directly States accountable for breaching their obligation to protect human rights. In this case, States will have to respond to the entirety of the accusations, without prejudice to them taking sanctions against the business enterprises causing the abuse. The reason for this principle is the State's role as guarantor of people's human rights and need to ensure the effectiveness of mechanisms for reparation and compensation.
- In order to provide a framework for the issues raised in point 2.5 of this written contribution, the legally binding instrument should establish a **general principle to protect public governance and human rights spaces** from the undue influence of actors which have commercial interests and from corporate capture in general. A relevant precedent is article 5.3 of the WHO Framework Convention on Tobacco Control, which has been mentioned previously.
- Although the objective of the legally binding instrument is to regulate the activities of transnational corporations and not of domestic business enterprises, States have the obligation to

[29] Supra note 16.

[30] UN Charter, art. 2(4); See also, Maastricht Principles on Extraterritorial Obligations of States in the Area of economic, Social and Cultural Rights, Principle 10.

regulate the latter even though this obligation in practice is not always implemented. To avoid any form of discrimination *de facto* between people affected by TNCs and other business enterprises and those affected by enterprises which only carry their activities nationally, and to ensure equal legal protection, we propose the inclusion of two principles: a) The reaffirmation of the **obligation of States to protect people affected by the activities of all business enterprises** which impair the enjoyment of human rights, which includes domestic private, public or mixed enterprises; b) A principle which establishes that the standards adopted in this legally binding instrument to protect people affected by TNCs and other business enterprises shall not be used in any way to detriment the rights of those affected by the activities of other types of business enterprises. If necessary, States should consider extending the application of the norms developed within this process to the people affected by domestic business enterprises to ensure equal legal protection and consistency within their legal system.

- The principle ***in dubio pro victims***, closely related to the principles of effectiveness and *pro persona*, according to which in case of a doubt on the implementation of the legally binding instrument or the standards developed at the national level for its implementation, the rights of the affected individuals and communities will always be favoured. This principle is similar to the principles *in dubio pro reo* or *in dubio pro operario* which exist under criminal law and labour law, applied to the impacts of TNCs and other business enterprises.

In relation to the above-mentioned principles, we would like to highlight the importance of the following points:

4.1 Recognition of the primacy of human rights over trade and investment agreements

The fragmentation of international law and the power asymmetries existing between powerful economic entities and "ordinary people" has generated *de facto* in various situations that the priority be given to standards under trade and investment agreements, which are mainly geared towards profit-making and the protection of foreign investment at the cost of the human rights of the most marginalised and excluded individuals and communities.

Many national constitutions have established a system of normative hierarchy in which fundamental rights prevail over other organic constitutional norms, as to guarantee the protection of human life or that of "good living" included in the constitutions of some Andean States. For this reason, it is possible to consider this normative hierarchy as a general principle of law. However, the third session of the OEIGWG showed how many States are questioning the normative superiority of human rights under international law. This international legally binding instrument, in line with the United Nations Charter, offers a possibility to put humans at the centre of international governance, not merely as the beneficiaries of economic and development policies but as human rights holders. In order to put human dignity, alone or in community, as a priority of international law, the legally binding instrument should include a principle of primacy of human rights as is suggested in the document of elements.[31]

[31] The legal sources supporting the recognition of this principle are: UN Charter, which in its article 103 establishes that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.", to be interpreted in light of article 55c. which establishes that the aim of international cooperation is "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion" and article 1.3 which defines the principles and purposes of the UN as "respect for

We therefore welcome the provision according to which it is State's duty to conduct impact assessments prior to the conclusion of trade and investment agreements to identify potential inconsistencies between their pre-existing human rights obligations and these agreements. States must abstain from entering in such agreements if any inconsistencies are identified.

4.2 Special protection to particular groups

With regards to the principle of special protection to particularly vulnerable groups, such as migrants, children and adolescents and LGBTTTIQ among others, we suggest that the draft legally binding instrument to be negotiated include a clearer reference to the differential impact of the human rights abuses suffered by women as a consequence of the activities of TNCs[32].

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human rights and for fundamental freedoms". The Preamble of the UN Charter also reaffirms "faith in fundamental human rights, in the dignity and worth of the human person"; The decision of the Inter-American Court of Human Rights on the case of the indigenous community of Sawhoyamaxa against Paraguay. Decision of the 29th March 2006. Serie C No. 146, para. 140 and the decision of the European Human Rights Court, Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi against Ireland. Lawsuit No.45036/98. Para. 154. 30th June 2005. Statements and General Comments of the Committee on Economic, Social and Cultural Rights, including the Statement to the Third Ministerial Conference of the World Trade Organization (Seattle, 30 November to 3 December 1999) U.N. Doc. E/C.12/1999/9; General Comment No. 12 (1999): The Right to Adequate Food (Art. 11) U.N Doc. E/C.12/1999/5, paras. 19 y 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end"); General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights). U.N. Doc.E/C.12/2000/4. Para. 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health"); General Comment No. 15 (2002), The Right to Water (article 11 and 12 of the International Covenant on Economic, Social and Cultural Rights. U.N. Doc. E/C.12/2002/11. 26. Paras. 31 and 35-36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.") General Comment No. 24 (2017). U.N. Doc. E/C.12/GC/24, para. 13, ("States parties should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist, as required under the principle of the binding character of treaties. The conclusion of such treaties should therefore be preceded by human rights impact assessments that take into account both the positive and negative human rights impacts of trade and investment treaties, including the contribution of such treaties to the realization of the right to development. Such impacts on human rights of the implementation of the agreements should be regularly assessed, to allow for the adoption of any corrective measures that may be required. The interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations. States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude. They are encouraged to insert, in future treaties, a provision explicitly referring to their human rights obligations, and to ensure that mechanisms for the settlement of investor-State disputes take human rights into account in the interpretation of investment treaties or of investment chapters in trade agreements."); The Report of the Special Rapporteur on the Right to Food in his report to the 19th session of the Human Rights Council (2011), in particular the Guiding Principles on human rights impact assessments of trade and investment agreements. U.N. Doc. A/HRC/19/59/Add.5. The report of the Independent Expert on the promotion of a democratic and equitable international order (2016), U.N. Doc. A/HRC/33/40 reaffirms the principle of the primacy of human rights

[32] Supra note 22.

Due to the systematic character of the human rights violations and abuses that they suffer, we consider that an explicit mention should be made to peasants and other people working in rural areas[33].

5. Purpose and Objective

We support the elements defining the purpose of the legally binding instrument under point 1.3. In particular, it is worth highlighting the importance of reaffirming and clarifying the content of States' obligations to respect, protect and fulfil human rights from the adverse impacts of TNCs and other business enterprises, which implies taking actions – as well as refraining from taking actions – with effect beyond their territory. In a highly globalized world, the universal protection of human rights cannot be ensured simply with the compliance by States of their "territorial" obligations. Such an assumption ignores the fact that human rights are universal (everybody has the same human rights everywhere at any time) and that in a context of deregulated globalization, with powerful TNCs and other business enterprises sometimes even supported by their home States, many States are not in a position to ensure human rights on their own[34]. It is precisely for this reason that the universal protection of human rights requires international cooperation and joint actions by States[35] and therefore obligation for States to ensure that the TNCs and other business enterprises they are in a capacity to regulate do not harm human rights abroad[36]. As previously mentioned, this is a widely established standard which needs to be reaffirmed in this instrument.

As the difference between the elements under the headings Purpose and Objectives is not clear, we propose that both these sections be merged together.

6. Scope of application

6.1 Protected rights

We support the scope of protected rights proposed under point 2.1 which includes all internationally recognized human rights, labour rights, as well as those rights included in instruments related to the environment and corruption. This definition should be maintained as such as TNCs and other business enterprises affect the whole spectrum of human rights and not solely "fundamental rights". We reiterate the principles of interdependency, indivisibility and interrelationship of human rights, clearly stated in the 1993 Vienna Declaration and Programme of Action[37].

The legally binding instrument should clearly state that those States which have not ratified all human rights instruments will nevertheless remain bound by the scope of protected rights defined under this

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[33] See Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas (2012). U.N. Doc. A/HRC/19/75.

[34] See: ETO Consortium, Fourteen misconceptions about Extraterritorial Human Rights Obligations, March 2014. Available at http://www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUid%5D=107.

[35] Charter of United Nations (1945) art. 56 and art. 2(1) International Covenant on Economic, Social and Cultural Rights (1966).

[36] Supra note 15.

[37] Vienna Declaration and Programme of Action (1993), para. I. 5. Available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx.

instrument, which includes all human rights. This stems from the fact that the Universal Declaration of Human Rights (UDHR), which compiles all recognized human rights, is considered today as part of customary international law, and therefore binding upon all States[38]. The UDHR complies with both criteria defining the status of customary international law which are 1) the proof of an identifiable State practice and 2) the recognition by States that such a practice is obligatory (opinio juris). Since its adoption some 70 years ago, the UDHR has been widely invoked, reaffirmed and even integrated into international, regional and national documents and decisions. The legally binding instrument should therefore reiterate the customary law nature of the rights enshrined in the UDHR and that although States have not ratified all international human rights instruments, they nevertheless remain bound to respect, protect and fulfil all human rights.

6.2 Acts subject to its application

We support the fact that the elements for the draft legally binding instrument focus on the human rights abuses "resulting from any business activity that has a transnational character". FIAN has from the beginning of the process emphasized the need for the prospective instrument to deal with the particular challenges which represent the regulation, monitoring, adjudication and enforcement of judicial decisions against TNCs and other business enterprises of transnational character, an area where there is precisely a void under international law, as existing standards deal with "business enterprises" in general and fail to tackle these particular transnational challenges. 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. The existing systematic impunity we witness from our documented casework results precisely from these particular transnational challenges which the legally binding should urgently address[39].

Nevertheless, from the perspective of the affected individuals and communities it is irrelevant if the enjoyment of human rights is impaired by a TNC or a domestic company. The focus of the legally binding instrument on TNCs and OBEs should therefore not be used in any way by States to create a discrimination in rights between those affected by TNCs and other business enterprises and those affected by domestic business enterprises. The legally binding instrument should not provide States with an excuse to establish lower standards for domestic business enterprises than those for TNCs and OBEs which would be developed under this legally binding instrument. In order to avoid such discrimination, we propose the inclusion of a clause which could read: "nothing in this instrument may be used in order for States to apply lower standards to their domestic business enterprises. Individuals and communities affected the activities of domestic business enterprises shall hold the same rights as those affected by TNCs and OBEs." To this

[38] See: Humphrey Waldock, Human Rights in Contemporary International Law and the Significance of the European Convention, in THE EUROPEAN CONVENTION OF HUMAN RIGHTS 1, 15 (Brit. Inst. Int'l & Comp. L., Ser. No. 5, 1965); John Humphrey, The International Bill of Rights: Scope and Implementation, 17 WM. & MARY L. REV. 527, 529 (1976); Patrick Thornberry, International Law and the Rights of Minorities 237-38 (Oxford: Clarendon Press, 1991); Philip Alston, The Universal Declaration at 35: Western and Passé or Alive and Universal, 1982/31 I.C.J. REV. 60, 69 (1982); A.H. Roberston & J.G Merrills, Human Rights in the World 96 (Manchester: Manchester University Press, 3d ed. 1989).

[39] Supra note 2, 3 and 5.

effect, the legally binding instrument could take inspiration from similar existing provisions included in, for instance, the UN Declaration on the Rights of Indigenous Peoples (art. 46 al. 2)[40].

We welcome the inclusion of "other associations" under the definition of the scope of application. This is of utmost importance as it covers for instance public or private pension funds or philanthropic organizations or foundations which are core actors of business activities that have a transnational character. Documented cases of land grabs involving transnational corporations and other business enterprises demonstrate the key financial role played by philanthropic foundations or pension funds as the main investors – in the name of "development" – of land grabbing operations around the world which impair peoples' human rights[41]. Land deals 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). These business associations should be held accountable for their involvement in such activities which harm peoples' human rights.

Even though the parent-subsidiary relationship is the most analysed structure when determining due diligence or the duty of care and liability of legal entities conforming an economic group, the example concerning land deals cited above demonstrates how groups of enterprises involved in transnational operations are not necessarily connected to a central controlling node, but can be linked through cross cutting investments, division of tasks across groups of companies, participation in the supply chain, contractual relationships (including credits, franchises and other) i.a. The recognition of these kinds of linkages between the legal entities is necessary to determine the influence that related companies have in the specific human rights offenses they are involved in, to determine due diligence and liability, independently of the concept of TNC. (See later the part on liability 3.3.6). We therefore welcome the definition of acts subject to the application of the legally binding instrument under point 2.2, which reflects this reality and is open enough to encompass the wide array of actors involved in business activities of transnational character which harm human rights.

[40] United Nations Declaration on Rights of Indigenous people (A/RES/61/295), adopted by the UN General Assembly on Thursday, 13 September 2007, art. 46 al. 2. Available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[41] Rede Social de Justiça e Direitos Humanos, GRAIN, Inter Pares, and Solidarity Sweden – Latin America (November 2015). Foreign Pension Funds and Land grabbing in Brazil. Available at: https://www.grain.org/article/entries/5336-foreign-pension-funds-and-land-grabbing-in-brazil ; 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; FIAN International (2012), The Human Rights impacts of tree plantations in Niassa province, Mozambique. Available at: http://www.fian.org/fileadmin/media/publications_2015/PR_-_2012.10.16_-_Tree_plantations_Niassa_Mozambique.pdf.

6.3 Actors subject to its application

The actors subject to the application of the legally binding instrument under point 2.3 could be better clarified. In particular, the scope should not be limited to "States and organizations of regional economic integration", but rather include international organizations in general. The current definition as it stands would fail to include development banks, financial institutions and other agencies of international character and not uniquely working at a regional level. Point 3.3 of the obligations of international organizations provides actually a better definition which includes "international and regional economic, financial and trade institutions".

7. General obligations

FIAN supports the importance which is given in the document of elements to the primary obligation of States to protect human rights. We however recommend, as previously mentioned, to use the language commonly used in this field, whereby States protect from the *abuses* or *offenses* committed by TNCs and other business enterprises. From the failure to comply with this obligation derives a *violation* from States.

We also welcome that the document of elements reiterates the transnational character of the negative impact on human rights of the activities of TNCs and would like to reaffirm the importance for the international system to be strengthened by establishing clear standards for States as well as for those carrying out transnational business activities.

Nevertheless, in our opinion, the category of "General Obligations" is a confusing one, especially with regards to the jurisprudence of the Treaty Bodies. For purposes of clarity, it would be more adequate to only make reference under one heading to States' human rights obligations and under a separate heading to the international obligations of TNCs and other business enterprises.

7.1 Obligations of States

We suggest that when preparing the first draft, States' obligations to respect, protect and fulfil human rights are not mixed but included under diverse subsections of the treaty, clarifying which are the specific obligations under each one of these categories.

Regarding each category we would like to highlight some aspects that should be included in the binding instrument, following also the elements included in the elements paper:

7.1.1 Obligation to respect

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.[42] We welcome the reference made to States' obligation to design, adopt and implement policies on human rights and TNCs and OBEs, taking into account the primacy of human rights over financial and other interests of corporations. This is in line with

[42] Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principles 19 – 21.

paragraph 12 of the General Comment 24 of the CESCR which clearly explains that "The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights".

We recommend that when detailing States' obligation to respect, the following elements should be included:

a) The obligation for 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.

b) States must comply with their pre-existing human rights obligations and in general with existing human rights standards when entering into trade and investment agreements, in the context of the design and implementation of policies in the area of international development cooperation as well as more generally in their diplomatic work[43]

c) States must refrain from conduct impairing other States or international organisations to comply with their respective obligations regarding the activities of TNCs and other business enterprises.[44] 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.

d) States have the obligation to comply with their human rights obligations and in general with human rights standards when acting in the context of intergovernmental organisations, including international financial institutions. (Please see below part on International organizations).

e) States must ensure that public procurement contracts are celebrated, implemented and interpreted in line with their human rights obligations

f) The obligation to ensure that the activities of business-related State entities such as development banks, pension funds, development cooperation entities and others carry out their activities and investments in full compliance with the State's human rights obligations, in accordance with the principles of transparency, information and participation of the beneficiaries of such entities (e.g. of those contributing to pension funds)

g) States should refrain from privatizing public services which will cause a foreseeable impact on the enjoyment of human rights.

[43] General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/GC/23 para. 13ss

[44] See supra note 23.

7.1.2 Obligation to protect

FIAN recognizes the relevance of diverse elements related to the obligation to protect, including States' obligation to adopt measures to prevent, investigate, punish and redress human rights abuses by TNCs and other business enterprises through legislative, administrative and judicial measures.

We equally welcome the reference to States' obligation to ensure access to justice and effective remedy for the individuals and communities affected by TNCs and other business enterprises as well as their obligation to ensure enforcement.

The explicit mention of States' obligation to adopt all necessary legislative and other measures needed to ensure that TNCs and OBEs under their jurisdiction adopt adequate mechanisms to prevent human rights abuses and offenses through their supply chains is also relevant.

However, FIAN recommends the inclusion of the following clarifications to be included under States' obligation to protect in the legally binding instrument:

a) Taking into account the transnational character of the activities to be regulated under this treaty and the complexity of TNCs and other business enterprises States must regulate, this part should clearly establish when such obligations arise for States. In this sense, we recommend to include an article on the criteria to determine when States' obligation to protect emerges. We propose the following[45]:

[45] See Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, by Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon and Ian Seiderman, Principle 25 at http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=63; See Olivier De Schutter, 'Sovereignty-plus in the Era of Interdependence: Towards an International Convention on Combating Human Rights Violations by Transnational Corporations', in P. Bekker, R. Dolzer and M. Waibel (eds), Making Transnational Law work in the Global Economy: Essays in Honour of Detlev Vagts, (Cambridge University Press, 2010) pp. 245-284; P. Dailler et A. Pellet, Droit international public, Paris, L.G.D.J., 7th ed. 2002, p. 506; The Case of the S.S. 'Lotus' (France v. Turkey), Judgment No. 9 of 7 September 1927, P.C.I.J. Reports 1928, Series A, No. 10, at pp. 18-19 ('Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable'). There is still disagreement
within legal scholarship as to the validity of the premise put forward in the Case of S.S. Lotus, according to which States are free to seek to regulate conduct outside their territory provided there is no specific prohibition under international law to do so: see R. Higgins, 'The Legal Basis of Jurisdiction', in C.J. Olmstead, Extra-territorial Application of Laws and Responses Thereto (I.L.A. & E.S.C. Publ. Ltd., 1984), p. 14; See, e.g., Restatement (Third) of the Foreign Relations Law of the United States (American Law Institute, 1987), § 402, (2) ("...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory"); 133 International Court of Justice, Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain) (second phase - merits), 5 February 1970, (1970) I.C.J. Rep. 3, 184; bid., at 38-39; Doubts were raised at an early stage concerning the relevance of the Barcelona Traction case beyond the exercise of diplomatic protection: see S. D. Metzger, Nationality of Corporate Investment Under Investment Guaranty Schemes – The Relevance of Barcelona Traction, 65 American Journal of International Law 532, (1971), pp. 532-543; Restatement (Third) of the Foreign Relations of the United States (American Law Institute, 1987), at 213, n. 5; Restatement (Third) of the Foreign Relations of the United States (American Law Institute, 1987), § 414; International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (merits), judgment of 27 June 1986, para. 205;
Solutions may have to be found in exceptional situations where obligations imposed by the home State on foreign

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

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

iii) 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;

iv) 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:

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investors enter into conflict with those which would be imposed by other States, including the home States of the investors concerned; See Case concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain) (second phase - merits), 5 February 1970, (1970) I.C.J. Rep. 3, para. 33-34, and above, para. 4 of the commentary to Principle 2; See, e.g., Menno T. Kamminga, Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses, 23 Human Rights Quarterly 940 (2001), pp. 941-942 ("Under the principle of universal jurisdiction a State is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim"). See the joint separate opinion by Judges Higgins, Kooijmans, and Buergenthal, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, at para. 46 (citing Cherif Bassiouni, International Criminal Law, Vol III: Enforcement, 2nd edn, (1999), p. 228; T. Meron, International Criminalization of Internal Atrocities, 89 American Journal of International Law 576 (1995). 143 Article 49 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; article 50 of the Geneva Convention (II) for the Amelioration of the Condition of Wounded,
Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; article 129 of the Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949; article 146 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949; and article 85(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. 144 The jus cogens character of the prohibition of crimes against humanity is generally considered to imply an obligation to contribute to their universal repression: see C. Bassiouni, Crimes against Humanity: The need for a specialized Convention, 31 Columbia Journal of Transnational Law 457 (1994), at pp. 480-481; K.C. Randall, Universal Jurisdiction Under International Law, 66 Texas L. Rev. 785 (1988), at pp. 829-830; and the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity adopted by the UN General Assembly resolution 3074 (XXVIII) of 3 December 1973 (G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78, UN Doc. A/9030 (1973); See the Advisory Opinion delivered on 28 May 1951 by the International Court of Justice relating to the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Rep., 1951, p. 23 (noting that "the principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, 78 UNTS 1021) are principles which are recognized by civilized nations as binding on States, even without any conventional obligation", and that "both (…) the condemnation of genocide and (…) the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention) have a 'universal character'", i.e., are obligations imposed on all States of the international community). On the erga omnes character of the obligations imposed by the
Convention, implying that "the obligation each State (...) has to prevent and to punish the crime of genocide is not territorially limited by the Convention", see the Judgment of 11 July 1996 delivered in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Hezegovina v. Yugoslavia), Preliminary objections, ICJ Rep., 1996, pp. 615-616, para. 31; 146 Article 5(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UN Doc. A/39/51 (1984). (1465 UNTS 85); Article 9(2) of the International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177, (2006); (Report to the General Assembly on the First Session of the Human Rights Council, at 32, UN Doc.A/HRC/1/L.10 (2006).

- 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 enterprises 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, no matter how distantly related to the case.

In our opinion, more than having an independent section on jurisdiction, as proposed in the point 7 of the elements paper, we recommend for purposes of clarity to include a clear definition of jurisdiction in the principles, as suggested in point 2.4 above and to include this clause on the basis for protection under the obligation to protect, which is also applicable for the instrument's sections on legal liability and remedy mechanisms, which are both parts of States' obligation to protect.

b) States' obligation to protect, including to take preventive measures, should not be restricted to the TNC and its supply chain, but be extended to all the respective economic group or holding, including, i.a. the investors in the respective TNCs (such as hedge funds or pension funds) and associations or philanthropic funds related to the same (See point 6.2 of this written contribution).

c) An obligation for States to monitor the activities of TNCs and other business enterprises under their jurisdiction should be included in this part. An adequate human rights monitoring will allow for the adoption of missing regulations, for the correction of inadequate regulations as well as for the abolition of regulations which are contrary to existing States' human rights obligations. Monitoring will ensure that abusive TNCs and other business enterprise can be held legally accountable.

d) In countries where the legal system foresees the immediate application of international human rights instruments by their national courts, (for example in most Latin-American countries which apply the "constitutional block"), judges should apply the binding instrument immediately in order to ensure its effective implementation in the absence of laws implementing the legally binding instrument. In all States parties, the interpretation of national legal frameworks shall be done in accordance with this international legally binding instrument in order to ensure its compliance in good faith.

d) According to the testimonies of communities and social movements with which FIAN has worked together, impact assessments realized by companies have shown to be vied, manipulated or just considered as desk work.[46] Therefore, impact assessments should be realized by the State, ensuring impartiality and objectivity and not by business enterprises.

[46] For examples of flawed impact assessment, participation and consultation processes see El Hatillo Case, Colombia: Pensamiento y Accion Social, Terre des Hommes (2015). Caso Emblemático de Derechos Ambientales de los Niños, Niñas y Adolescentes de El Hatillo Afectados por la Explotación Carbonífera, p. 64 Available at: https://docs.wixstatic.com/ugd/b432f9_0217ac8132064249abc82f658b1fc316.pdf; See also publications of *Grupo de Estudos em Tematicas Ambientais* from Brazil which provide analysis of wrongful and flawed impact assessment studies or consultation processes. Available at: http://conflitosambientaismg.lcc.ufmg.br/producao-academica/categoria/relatorios-e-pareceres-tecnicos/.

7.1.3 Obligation to fulfil

The elements paper does not refer to States' obligation to fulfil human rights and how this is related to the field of transnational business activities. We suggest the OEIGWG to take the following aspects into account:

a) The international legally binding instrument should reiterate that the obligation to fulfil human rights is only for States. Such a reaffirmation is especially relevant in the current context of corporate capture.
b) Within this obligation, the binding instrument should reaffirm that 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
c) The compliance with this obligation is to be achieved through, inter alia: elaboration, interpretation, application and regular review of multilateral and bilateral agreements as well as international standards; adoption of 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 human rights extraterritorially.

7.2 Obligations of Transnational Corporations and Other Business Enterprises

We would like to make the following comments regarding the obligations of TNCs and other business enterprises:

a) As explained in the general remarks, FIAN considers that TNCs' international obligations included in the binding instrument can only be effective if considered as international obligations derived from States' obligation to protect human rights and if they are to be enforced by States. Therefore, the obligations of TNCs and other business enterprises shall be incorporated under national legal systems through national legislations under civil, administrative, criminal, commercial, tax, environmental, competition and other laws by States. The OEIGWG can decide to stipulate a non-exhaustive list of international law obligations for TNCs and other business enterprises in order to guide States on how to legislate to implement the treaty. This would also serve as a list of standards for those States which incorporate human rights instruments in their constitutional block and therefore allow for the immediate implementation of international human rights instruments by their courts or tribunals.

   In this context, we recall here the list of obligations included in our written contribution to the second session of the OEIGWG, which are detailed applications of the obligations to cause no harm and to prevent harm that States should impose on TNCs and other business enterprises[47].

b) As some contributions to the last session affirmed that direct human rights obligations for TNCs are needed particularly in States which are too weak to control TNCs and other business

[47] Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Principle 29.

enterprises, FIAN would like to argue that the allocation of direct human rights obligations, instead of being a solution, constitute a risk of corporate capture of the national institutions and of privatization. The international community of States, in compliance of its obligation to cooperate towards an international enabling environment for the realization of human rights, must recover the regulatory function of States, on the basis of democracy.

c) We reaffirm that States are and shall remain the fundamental subjects of international law and we 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.

d) We call the attention of the OEIGWG on the last sentence of point 3.2 affirming that TNCs and other business enterprises shall use their influence in order to help, promote and ensure respect for human rights. This is an inadequate sentence which should be withdrawn from the draft of the legally binding instrument. Delegating these tasks to TNCs and other business enterprises, when they are in fact obligations for States opens a dangerous door for business enterprises to replace States functions with regards to human rights. Taking into account that TNCs and other business enterprises' main goal is to generate profit, this would convert a *common good* function in a *for profit* activity, far from democratic principles, which would further expand all the negative impacts that corporate capture has on the enjoyment of human rights.

7.3 Obligations of International Organizations

FIAN welcomes the elements under this section but considers that when preparing the legally binding instrument the language should be clearer and not just refer to the obligation to refrain from taking decisions that harm human rights, but go further as to ensure that all the decisions taken by such organizations are in line with international human rights standards[48].

We recommend to include the following obligations of States when taking decisions and undertaking activities in the context of international organizations:

a) To act in compliance with their existing human rights obligations when taking decisions in the context of international organizations.
b) To 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[49].

[48] ETO Consortium, Extraterritorial Obligations in the Context of International Finance Institutions (2014). Available at: http://www.fian.org/fileadmin/media/publications_2015/ETO_and_IFIs.pdf; Committee on Economic, Social and Cultural Rights (2016). Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights. U.N. Doc. E/C.12/2016/1. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2016%2f1&Lang=en.

[49] General comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017), U.N.Doc. E/C.12/GC/24.

8. Preventive Measures

FIAN International strongly believes that the prevention aspect of the legally binding instrument is fundamental in addition to that of mitigation and remediation, and therefore welcomes the elements presented under point 4. The legally binding instrument, in particular due to its binding nature, will play a preventive role. Experience has shown that it is not sufficient to only count on mechanisms for reparation, as human abuses and violations are often irreparable, causing not only harm in the short term but also impairing the human rights of future generations. They do not only impact the material condition of people, but can destroy families and disarticulate communities, taking away peoples' dignity as well as that of future generations. Such harms cannot be repaired with monetary compensations.

From the outset, it should be emphasized that preventive measures should not only be referred to under point 4 of the elements paper but rather mainstreamed throughout the different sections of the document, including under States' obligations to respect and protect, the parts on legal liability and access to justice and remedies. Preventive measures must go beyond the due diligence of TNCs and other business enterprises and also encompass the obligation for all State entities to conduct due diligence when they engage in economic activities, such as development agencies, public pension funds or public finance institutions *inter alia*, which are involved in transnational business activities. In this context, States must develop "vigilance" and preventive procedures for their own entities involved in transnational business activities or which interact with TNCs and OBEs. This includes undertaking human rights impact assessments of the activities of such public entities beyond their borders, in line with the CESCR's recommendations to Sweden, Germany and Norway and General Comment no. 24 of the CESCR, which point to this specific obligation.[50]

States' preventive measures also apply when States adopt laws or engage in agreements in the area of trade, investment, tax, the environment and development *inter alia*, as to ensure that the policies in these areas create an environment where TNCs and other business enterprises do not abuse human rights.

Under their obligation to protect human rights against the conduct of TNCs and OBEs, States must impose binding obligations to these actors under their domestic civil, criminal, administrative law and other relevant laws to ensure that they do not harm the enjoyment of human rights. We take note that the elements make reference to the recently adopted law in France "*Loi relative au devoir de vigilance des sociétés mères et des entreprises donnueses d'ordre*" which obliges certain large companies to establish a "vigilance plan"[51]. Although we welcome this legislative development in a country home to many TNCs and believe that it should serve as an example to other States, we would however like to stress that the preventive measures of this international legally binding instrument must go further beyond in order to have a meaningful impact.

To avoid that due diligence procedures become a "box-ticking exercise" for TNCs and other business enterprises and as a tool for them to escape all liability, the legally binding instrument must provide safeguards against such abuse and instrumentalisation of these preventive procedures by companies. It is

[50] Concluding observations on the sixth periodic report of Sweden, 14 July 2016, para. 11-12, U.N Doc. E/C.12/SWE/CO/6; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Germany*, 12 July 2011, para. 10-11, U.N. Doc. E/C.12/DEU/CO/5; UNCESCR, *Concluding observations on the fifth periodic report of Norway*, 13 December 2013, para. 6, U.N. Doc. E/C.12/NOR/CO/5.

[51] LOI n° 2017-399 du 27 mars 2017 relative au Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1). Republic of France.

vital to include measures to ensure that the "risk assessment of human rights violations or abuses" to be conducted under "vigilance plans" is undertaken ***independently*** as to ensure that TNCs and other business enterprises do not manipulate the results of these assessments.[52] It should be made clear in this section that this risk assessment shall not be limited to the potential harm to all human rights, but additionally include labour rights, harm to the environment and corruption, in order to correspond with the scope of protected rights of this instrument defined under point 2.1. Due to the disproportionate negative impact which the activities TNCs and other business enterprises can have on the human rights of women, children, indigenous peoples and peasant communities *inter alia*, the legally binding instrument should also require that risk assessments be undertaken on the impact on each of these particular groups. Risk assessments shall be carried out prior (ex-ante) to any activity as well as periodically (ex-post) after the activities have begun to ensure that corrective measures can be taken in the case of unexpected negative impacts. States must require TNCs and other business enterprises to apply the precautionary principle when there is no certainty about the impact on the enjoyment of human rights or on the environment of their activities.

The elements fail to include the requirement for all risk assessment procedures and results to be made available for the public, and in particular for those individuals and communities with a higher risk of being affected by the activities of TNCs and OBEs. This includes providing this information in the appropriate form and language for those concerned. Effective and transparent information procedures should be made available for individuals and communities potentially affected by the activities of TNCs and OBEs. This includes the requirement for groups of enterprises or other entities linked together to publicly declare their existence in order to facilitate the determination of joint liability of all the legal entities involved in harming the enjoyment of human rights.[53] The instrument should furthermore require States to make available effective and adequate recourse mechanisms for those communities threatened or affected by the activities of TNCs and OBEs when they disagree with the results of the risk assessments or believe that these have not been undertaken in a proper manner.

We believe that the point on adequate consultation processes is not sufficiently clear nor elaborate. The instrument should clarify that prior consultation processes are a duty of States and not of TNCs and other business enterprises, and that they shall adopt all necessary measures to ensure that TNCs and OBEs do not influence or impede these to take place or instrumentalize them in any way as to divide communities. The legally binding instrument should also clarify the situations in which such consultation processes are required, without limiting them to cases concerning large-scale projects. Such consultations should be undertaken prior to the adoption of State policies (trade, investment, tax, environment *inter alia*) which aim at creating a favourable environment for businesses and which could impact peoples' human rights[54].

Concerning indigenous peoples, the principle of free, prior and informed consent (FPIC) should be applied in compliance with existing standards such as ILO Convention 169 on Indigenous and Tribal Peoples and the UN Declaration on the Rights of Indigenous Peoples. However, consultation processes should not be reserved for indigenous peoples, but consultation mechanisms to allow meaningful participation should

[52] Supra note 46.

[53] This obligation exists in some countries for the control of payment of taxes, competition and labor law among others. The IGWG could for example explore the law 222/95 of the republic of Colombia.

[54] See for example: Special Rapporteur on the Right to Food (2011). Guiding Principles on human rights impact assessments of trade and investment agreements. U.N. Doc. A/HRC/19/59/Add.5; Committee on Economic, Social and Cultural Rights (2017). General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. U.N. Doc. E/C.12/GC/24. Para. 13.

also be established for other rural communities which could be affected by the activities and projects of TNCs and other business enterprises. In this respect, we propose the use of the language agreed under the Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security: "engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes".[55]

9. Legal liability

FIAN welcomes the inclusion of elements enabling for the administrative, civil and criminal liability of TNCs and other business enterprises under domestic legal systems. Not all States currently have developed corporate criminal liability, and this legally binding instrument is the opportunity to do so. Our experience furthermore demonstrates that providing clear rules for the determination of liability of the different legal entities involved in human rights abuses is fundamental in order to end impunity resulting from the activities of TNCs and other business enterprises and achieve remedy. We would like to point out here the evident close link between the legal liability of TNCs and other business enterprises and the access to justice and remedies for affected people. Certain elements under this section should therefore also be included in the section 10 on Access to Justice.

FIAN believes, however, that the elements in this section, in particular the criminal liability of TNCs and other business enterprises "for criminal offences recognized as violations or abuses of human rights in their domestic legislation and in international applicable human rights instruments" is inconsistent with the scope of protected rights outlined in section 2.1 on protected rights. First, it may well be that many of the criminal offences under domestic legal systems are not defined as human rights crimes, but nevertheless lead to human rights abuses. This can be the case for example with forced labour or the pollution of the environment dumping of toxic wastes which lead to the impairment of people's right to health, food and water inter alia. TNCs and other business enterprises must be held accountable for such conducts.

In order to facilitate the determination of liability of all the legal entities involved in the activities of TNCs and OBEs and avoid cases of impunity, the elements should include a requirement for States to oblige TNCs and other business enterprises to declare the existence of all the groups of business enterprises and other entities to which they are linked to in their supply chains, investment webs and global operations. The elements should therefore include for the legal liability of subsidiaries, suppliers and also the investors funding the activities of TNCs and other business enterprises (i.a pension funds and other investment funds). We have also included this point under the section on preventive measures, as it is part of information disclosure procedures for people potentially affected by the activities of TNCs and other business enterprises.

Mechanisms to hold parent companies liable for the activities of their subsidiaries or other related business enterprises which impair the enjoyment of human rights should be a key aspect of this section and be spelled out clearer. It is not clear whether parent company liability is captured under the elements

[55] See Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 3B, 6, available at http://www.fao.org"/docrep/016/i2801e/i2801e.pdf

referring to the liability of TNCs and OBEs for human rights abuses that occur "throughout their activities". Parent company liability already exists in certain legal systems, for instance under American corporate criminal laws based on the doctrine of "the directing mind." [56] Similarly to this effect, the elements should provide for the criminal liability of parent or controlling companies for cases of complicity with human rights offenses committed by their subsidiaries or all other types of legal entities they are linked to throughout their operations.

It is therefore vital for the elements to strongly affirm that States will hold TNCs and OBEs liable under their domestic legal systems for operations throughout their activities, including extraterritorially. We reiterate that this is what should be understood when the elements stipulate "under their territory or jurisdiction".

The inclusion of elements which open the possibility for civil and criminal liability of natural persons, such as company members, is welcomed. The elements could furthermore require States to include the "piercing of the corporate veil" so that the responsibility of company representatives can be examined and then held liable under domestic corporate criminal and civil laws. The "piercing of the corporate veil" should also be provided for in order to identify how separate legal entities operate in practice as a single economic unit with common owners, shareholders and operational policies, in order to therefore determine the responsibility of the parent company. In this sense, we recommend the elements to also include the requirement for domestic legal systems to incorporate a rebuttable presumption of control by the parent company over its subsidiary's operations which have caused harm. This presumption would be exercised by courts in situations where the parent company has control over the subsidiary company with regards to tax, accounting or when it holds a majority of shares or voting rights of the subsidiary.

We welcome that the draft elements include the reversal of the burden of proof under section 10 on Access to justice in order to ensure equality of arms and due process for the affected individuals and communities. This is however also an important element to consider under this section on legal liability. The elements should clarify that in the case of civil or criminal proceedings, the burden of proof shall lay on the TNCs and other business enterprises to demonstrate that they did everything to avoid the harm occurred in accordance with the precautionary principle, in line with the duty of care. This is a key aspect for the prospective legally binding instrument as legal liability has to be based on the real impact on the affected individuals and communities and not solely TNCs and other business enterprises' due diligence procedures. This would be contradictory to the goal of enhancing accountability and effective remedy for affected people.

Administrative liability can play an important role in preventing and redressing abuses by TNCs and other business enterprises. FIAN therefore welcomes the inclusion of provisions in the draft elements, which require States to establish the legal liability of TNCs and other business enterprises under their domestic administrative law. Nevertheless, these should go beyond simply the "denial of the awarding of public contracts to companies that have engaged in a conduct leading to a violation of a human right".

[56] See for example Canadian Dredge & Dock Co. v. The Queen, [1985] 1 SCR 662, 1985 CanLII 32 (SCC) before the Canadian Supreme Court, "In order to trigger its operation and through it corporate criminal liability for the actions of the employee (who must generally be liable himself), the actor-employee who physically committed the offence must be the "ego", the "center" of the corporate personality, the "vital organ" of the body corporate, the "alter ego" of the corporation or its "directing mind", p. 682.

Administrative sanction should include stronger sanctions like the suspension of operations or licenses, cancellation, fines or eventually blacklisting.

10. Access to justice, effective remedy and guarantees of non-repetition

The elements under point 6 on access to justice, effective remedy and guarantees of non-repetition[57] cover many of the issues raised by FIAN International in its written and oral contributions to the 2nd session of this OEIGWG. The elements in this section include fundamental mechanisms to reduce barriers, which individuals and communities face in order to access justice, such as enabling for class actions and public interest litigations, limiting the use of the doctrine of *forum non conveniens* in cases involving TNCs and other business enterprises, the reversal of the burden of proof and the provision of legal aid.

Although we praise the recognition by the elements paper of the "regulatory, procedural and financial obstacles" which affected people face in attempting to access justice, the legally binding instrument should not propose a closed list of barriers which could exclude other important existing barriers (e.g. practical, cultural *inter alia*). Indeed, the geographic location of courts and the language in which legal proceedings take place are practical barriers which affected people face and which the legally binding instrument should explicitly tackle.[58] The stigmatization, threats and criminalization which human rights defenders are confronted with also act as barriers in the access to justice, as these hostile conditions push individuals and communities to abandon procedures to obtain remedies.[59] We therefore welcome that the draft elements require States to adopt protective measures for those seeking remedy those in the entourage and supporting the affected individuals and communities in their proceedings.

We echo the point raised by Richard Meeran in his presentation during the third session of the OEIGWG calling on the draft legally binding instrument to include the abolition of the "loser pays rule" for human rights related cases. This rule, derived from English law, requires the losing litigant to have to pay for the winning party's costs and attorney fees. This serves as a considerable disincentive for affected people and communities to seek remedies and undertake a legal procedure. It moreover does not take into consideration the immense asymmetry in power existing between TNCs and the affected people seeking justice, in contradiction with the principle of equality of arms, which is stipulated in the elements paper.

The legally binding instrument should furthermore establish sanctions for those TNCs and other business enterprises which use dilatory mechanisms to undermine or slow down effective justice for affected communities and individuals.

FIAN believes that the section could better reflect the specific barriers, which women face in accessing justice. Because of gendered power relations, discriminatory laws against women, economic marginalization of women, social stigma, religious values and cultural norms, women face additional barriers when accessing justice. The conjunction with other types of discrimination, such as institutional

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[57] ICJ, The Factory at Chorzow case, claim for indemnity, 26th July 1927; 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, General Assembly resolution 60/147 of 16 December 2005.

[58] See Oral statement by the Swiss Catholic Lent Fund, FIAN International and 7 other organisations during the 3rd session of the OEIGWG. Available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/SwissCatholicLentenFund-Subject6.Accesstojustice.pdf.

[59] *Ibid.*

racism, can aggravate this situation. The draft legally binding instrument should therefore include the obligation for States to take positive measures to ensure effective access to justice for women without discrimination.[60]

When women do have access to justice, the remedies or compensation awarded can lack a gender responsive approach and do not reach all women and fail to address the harm occurred. The elements should provide for the active participation and consultation of women in the design and operation of remedial mechanisms.

FIAN recognizes the role that quasi-judicial or non-judicial remedy mechanisms can in certain occasions play in redressing human rights abuses, if structured in a transparent and independent manner and if safeguards are provided. Nevertheless, FIAN strongly supports the obligation for States in the elements paper to "[…] adopt measures to ensure that non-judicial mechanisms are not considered a substitute for judicial mechanisms […]". Such measures should include for instance the prohibition by States of all company-based grievance mechanisms which are conditional on affected people renouncing from undertaking any judicial proceedings.[61]

The inclusion of arbitration clauses in investment and trade agreements has enabled TNCs to present claims against States when the latter fail to comply with such agreements in order to protect the human rights of their population. The elements should clearly state that the provisions under investment and trade agreements and such arbitration clauses cannot be used in any way by States to hinder affected people's access to justice. To this effect, the requirement in the elements for States to "adopt protective measures to avoid the use of 'chilling-effect' strategies by TNCs and OBEs to discourage claims against them" is an important point.

The elements under this section could better clarify the extraterritorial dimension of States' obligation to provide effective remedies, an obligation consistent with the jurisprudence under international human rights law.[62] Affected individuals and communities must be able to seek remedies in the States 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. Furthermore, for cases concerning preemptory norms of international law or *jus cogens*, the legally binding instrument should require States to hold universal jurisdiction, meaning that all States would be required to open their legal systems for the affected individuals and communities to seek remedies.

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[60] See the written contribution of WILPF, FIAN and 12 other organisations to the 3rd session of the OEIGWG: "Integrating a gender perspective into the legally binding instrument on transnational corporations and other business enterprises". Available at : http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/WILPF_JointStatement.pdf; Right to food and nutrition Watch (2011). The Challenges in Accessing Justice When Claiming the Right to Adequate Food, Ana María Suárez Franco, p. 40. Available at: http://www.fian.org/fileadmin/media/publications_2015/Watch_2011_ENG.pdf.

[61] See: Feeney, P., 'Principles without Justice: The corporate takeover of human rights, Rights and Accountability in Development,' 2016. Accessed at: http://www.raid-uk.org/sites/default/files/principles_without_justice.pdf.

[62] Supra note 15.

11. Jurisdiction

FIAN considers that the definition of jurisdiction is a key element in order for the international legally binding instrument to achieve its purpose of closing the existing legal gaps in the human rights protection against the activities of TNCs and other business enterprises, and we therefore welcome its explicit mention in the document of elements.

Defining jurisdiction is important in order to clarify when it is to be exercised beyond the territorial limits of States and to determine over which TNCs and other business enterprises States hold an obligation to protect human rights, which includes to hold TNCs and other business enterprises legally accountable and the obligation to guarantee access to justice and remedies. The criteria to determine jurisdiction should be based on existing international law, so that it is not restricted to the territory of States, which would render impossible the compliance with the objectives of this legally binding instrument. In this sense, we reaffirm the importance of being cautious with the terminology "within their territory or jurisdiction" and suggest using a different one which does not create the risk of a restrictive interpretation, such as "within their jurisdiction and under their jurisdiction".

In order for it to be incorporated throughout the legally binding instrument, we recommend that the term of jurisdiction be defined already in the section on Principles (point 1.3 of the document of elements), following the elements which were presented in our general comments (part 2.4 of this written contribution). In addition, we consider that in order to clarify the situations in which States hold obligations beyond their borders, the bases for protection should be already clearly defined under the section on State's obligation to protect human rights. We have suggested some elements in the parts 2.4 and 7.1.2 of this written contribution which are in line with some of the elements spelled out in the introduction of the section on jurisdiction of the elements document. Principle 25 of the Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights can serve here as a useful reference (see chapter 7.1.2 of this written contribution).

We also suggest that the obligation to take legislative measures in order to guarantee access to remedies which is included in this section of the document of elements be rather included in the section corresponding to the obligations of States.

Furthermore, the section on jurisdiction of the draft legally binding instrument should include a provision whereby if an abuse by a TNC constitutes a violation of a peremptory norm of international law or a crime under international law (e.g. war crime, crime against humanity, genocide, torture, forced disappearance), States should exercise universal jurisdiction even though they have no relation to the case[63]. The principle of universality requires that particularly atrocious crimes which are universally condemned be prosecuted by any State acting in the name of the international community.

12. International cooperation

Similar to some of the other sections in the elements for the draft legally binding instrument, the obligation for international cooperation is a cross-cutting obligation to be included and mainstreaming throughout the different parts of the elements paper (e.g. Obligations of States, Preventive Measures, Legal Liability

[63] Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights Principio 25 (e).

and Access to Justice inter alia). In the context of globalization, the universal protection of human rights – one of the objectives of the United Nations – requires States to take actions in international cooperation.[64] It is fundamental for the regulation, monitoring, adjudication and enforcement of judicial decisions against TNCs and other business enterprises due to the fact they operate in different jurisdictions and that no State can tackle these challenges alone adopting a purely territorial approach.

FIAN therefore strongly supports the proposed elements under this particular section. One of the key added values of this legally binding instrument should be to create a framework for international cooperation, to make this cooperation mandatory for States in the context of the activities of TNCs and OBEs and to clarify its content. The elements providing for mutual legal and judicial assistance for the collection of evidence and cross-border investigations, including for the transfer of legal proceedings, and the recognition of foreign judgments should be maintained and included in the future legally binding instrument.

We additionally welcome the provision requiring States to enter into bilateral or multilateral cooperation agreements in order to facilitate the implementation of State's obligations under this section on international cooperation.

FIAN however believes that the elements should approach international cooperation more broadly as to include the obligation for States to create, through international cooperation, to an international enabling environment where the rights and obligations of States under this treaty are fulfilled and complied with. As outlined in precedent sections, the obligation to take actions through international cooperation in the context of this legally binding instrument should not only include the requirement for mutual legal assistance or the cooperation of judicial bodies in cross border cases, but also international cooperation, including within international organizations, in policy areas concerning bilateral and multilateral trade, investment, taxation, finance, environmental protection, and development cooperation to ensure the universal fulfilment of human rights and compliance with the present instrument.

13. Mechanisms for promotion, implementation and monitoring

With regards to mechanisms for monitoring and accountability at the national level, domestic civil, criminal and administrative courts shall have the competence to receive cases against TNCs and other business enterprises for abuses of the rights outlined under section 2.1 on the scope of protected rights of the draft elements paper. The elements should clearly spell out that such courts will have the competence to receive cases of abuses and violations having occurred beyond their borders for which they hold jurisdiction. Following models adopted in other fields of international law[65], parent or controlling companies should be prosecuted wherever the specific company has its assets, independently of its domicile as to ensure the enforceability of judicial decisions against them.

[64] Charter of United Nations Arts. 1(3), 55 and 56.

[65] For example, tax law and competition law. See for example: International Commission for Jurists (2016). Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises, p. 25. Available at: https://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf.

In this sense, an effective implementation of the international legally binding instrument will require States to ensure that judges and other State actors and entities have an adequate knowledge on the issue of corporate human rights abuses, on communities' right to free prior and informed consent.

We welcome the inclusion at the national level of non-judicial mechanisms such as National Human Rights Institutions or Ombudsperson which should have the mandate to receive and investigate complaints against TNCs and other business enterprises. Once again, these mechanisms should also be able to receive complaints for extraterritorial abuses. The elements could stipulate that both these non-judicial mechanisms shall additionally have the competence to point to inconsistencies between the States' obligations under this treaty and their policies in other areas (trade, investment, climate, tax policies i.a).

With regards to an international judicial mechanism, FIAN supports the second option presented in the elements paper which consists in establishing "special chambers on Transnational Corporations and Human Rights in existing international or regional Courts". Given the weak support from many States for existing international tribunals, the creation of a new tribunal seems unfeasible. Furthermore, FIAN is concerned that a newly created tribunal which judges both TNCs and States could create a situation where both these actors collude during the legal proceedings in order to escape liability, thereby exacerbating the already existing asymmetry in power between affected people both TNCs and States. FIAN supports the idea of an international corporate criminal court or the expansion of the jurisdiction of the International Criminal Court to legal entities and an extension of the list of crimes covered as to include the scope of protected rights under this Treaty, outlined in section 2.1 of the draft elements.

We support and welcome the establishment at the international level of a Treaty Body or Committee whose mandate shall be to monitor the implementation and interpret the provisions of the treaty as is foreseen in the draft elements. In addition to a Treaty Body, FIAN reiterates the importance of establishing a study centre on TNCs and other business enterprises that assists the treaty body in its monitoring efforts and provides information of public interest on the activities of TNCs and OBEs which adversely impact human rights.