

AN IER SUBMISSION

**Submission to the
United Nations Open-ended
Inter-Governmental Working Group
on Transnational Corporations
and Human Rights
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**By
*Stefanie Khoury and David Whyte***



**The Institute of Employment Rights
4TH Floor
Jack Jones House
1 Islington
Liverpool
L3 8EG
0151 207 5265
www.ier.org.uk**

The Institute of Employment Rights is an independent charity. We exist to inform the debate around trade union rights and labour law by providing information, critical analysis, and policy ideas through our network of academics, researchers and lawyers.

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Stefanie Khoury is a Research Fellow in the School of Law and Social Justice at the University of Liverpool.

David Whyte is an Executive Committee member of IER and Professor of Socio-legal Studies at the University of Liverpool.

Carolyn Jones
Director, Institute of Employment Rights
8 September 2016
cad@ier.org.uk
07941 076245

Human Rights - standards and principles

Following the end of John Ruggie's mandate as Special Representative to the Secretary General on the issue of Transnational Corporations and Other Business Entities in 2011, the Institute for Employment Rights issued a response to the UN Working Group on Human Rights And Transnational Corporations and Other Business Enterprises' call for input. In this response, we called for "a re-opening of the debate on a set of universal standards that have legal force, through the mechanism of an international set of standards and/or a tribunal designed to hear cases of corporate human rights violations"

(<http://www.ohchr.org/Documents/Issues/TransCorporations/Submissions/AcademiaAndIndependentResearchers/InstituteEmploymentRights.pdf>).

The subsequent remit of the OEIGWG is consistent with our response in 2011. Indeed, our response is entirely consistent with what has transpired in the UN Human Rights Council. We strongly welcome this call by the OEIGWG for input on *possible principles, scope and elements of an internationally binding instrument*.

Since there is insufficient space here to elaborate on what such an instrument might look like, the comments here offer our position on what we see as two key principles that need to be adopted in any such exercise.

Corporations and human rights

First, a commitment to the principle that the privileges of human rights protections should *not* apply to corporations will be essential to the success of any new set of legally binding standards. Whilst the corporation has benefitted from such protections in various contexts, the mandate of the OEIGWG "*to develop an internationally legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*" constitutes an opportunity to reserve human rights law for the protection of human beings, rather than legal persons. As it stands, there are fundamental contradictions in human rights law that create the possibility for corporations to have the same 'rights' as people.

There are anomalies across jurisdictions regarding the rights-holder status of corporations. Corporations have a formal status as rights-holder at the European Court of Human Rights (set out in Article 1, Protocol 1 of the European Convention on Human Rights); however, those privileges are very specifically excluded, for example, by the Inter-American Court of Human Rights (Article 1.2 American Convention on Human Rights). In a forthcoming book by the authors of this submission¹, a significant number of cases at both courts call attention to the differences and inconsistencies within human rights law across jurisdictions. Those inconsistencies show that there is no legal principle that requires adherence to the anomaly that corporations are able to claim 'human' rights.

Consensus versus regulation enforcement

Second, there needs to be an explicit rejection of the theoretically and empirically flawed ‘consensus’ approach to ensuring corporate human rights compliance. By this we mean that any future mechanism that seeks corporate compliance should not be based on the assumption that a consensus across different stakeholder groups is in fact achieved consensually. Our reason for saying this is based on evidence that points to the lack of success of the OECD’s National Contact Point (NCP) system that is used to scrutinise adoption of the Guidelines on Multinational Enterprises. Using an in-depth analysis of 281 cases recorded by the NGOs OECD Watch and the Trade Union Advisory Committee to the OECD over a 10-year period (2002-2012), we have found that only around 13 per cent, or one in eight cases, reach a settlement that we can describe as achieving some kind of mutual resolution.

We would thus urge the OEIGWG to avoid compromising human rights in order to attain ‘consensus’. Rather, we would emphasise that despite the intensity with which former SRSG John Ruggie pursued the consensus of all stakeholders – and in particular with business – this is an approach that is unlikely to meet with success. To put it plainly, the regulation of TNCs should not require that corporations sign-off on the terms of their own regulation.

Human rights and trade unions

We also wish to reaffirm the centrality of trade union consultation and involvement in the activities of the OEIGWG. There is no more significant, positive effect upon the protection of workers’ human rights than the presence of active, democratic and independent representation. For these reasons the perspective of trade unions, where they are democratically organised at the level of the workplace, are absolutely crucial to the prevention of human rights violations and to the development of effective mechanisms of accountability for human rights violations involving corporations.

We have considerable experience and our range and depth of legal expert advisors makes us the foremost labour rights think-tank in the UK. Our legal expertise covers a broad range of areas that overlap with the OEIGWG’s remit. For those reasons, as well as the fact that the OEIGWG shares the same position that we have consistently adopted over the past 6 years, we are keen to be closely involved in discussions and debates that will influence the shape of any future instrument on corporate human rights.

6th September, 2016

ⁱ Khoury, S and Whyte, D (2017) *Global Human Rights Violations: global prospects for legal action*, Abington: Routledge.