

10 February 2023

Ms. Christine Kaufman  
Chair of the Working Party on Responsible Business Conduct  
Organisation for Economic Co-operation and Development (OECD)

Mr. Allan Jorgensen  
Head of the Responsible Business Conduct Unit  
OECD

Dear Ms. Kaufman and Mr. Jorgensen:

We send you this letter on behalf of 31 civil society organizations and human rights experts worldwide urging you to include **strong protections for human rights defenders in the updated OECD Guidelines for Multinational Enterprises**. We are pleased that the OECD has identified human rights defenders as a priority issue for the update but are deeply concerned that the current draft would undermine an emerging international consensus on the expectations for enterprises regarding human rights defenders. We believe that the OECD should adopt a stronger standard than what is proposed in the consultation draft.

Since the OECD Guidelines were last updated over a decade ago, civic space has closed dramatically and acts of retaliation against human rights defenders have grown in number and complexity. Many of these attacks link to business activities and range from outright physical and gender-based violence to arbitrary arrests, strategic lawsuits against public participation (SLAPPs) and other forms of judicial harassment, acts of intimidation, illegal surveillance, threats, and smear campaigns. Retaliation rarely happens in isolation; often, the killing of a human rights defender occurs within a broader, escalating atmosphere of threats, criminalization, discrimination, and harassment, both online and offline. Each act of retaliation can have a profound chilling effect on civic space, discouraging others from speaking up about issues of public concern.

Civil society, international organizations, and some governments have scaled up their efforts to respond to this crisis. The private sector has lagged behind but is beginning to take action. Fortunately, best practices have emerged through a decade of experience, case study research, and multi-stakeholder dialogue. There is now a general understanding that businesses have a responsibility to adopt and implement a policy of zero tolerance for retaliation against human rights defenders. Best practices for protecting human rights defenders are reflected in numerous emerging international standards, including recommendations made by the UN Working Group

on Business and Human Rights,<sup>1</sup> the UN Special Rapporteur on Human Rights Defenders,<sup>2</sup> the UN Committee on Economic, Social and Cultural Rights,<sup>3</sup> the International Finance Corporation and IDB Invest,<sup>4</sup> the Voluntary Principles on Security and Human Rights,<sup>5</sup> the Shared Space Under Pressure project,<sup>6</sup> investors,<sup>7</sup> and companies themselves.<sup>8</sup>

As the OECD updates its Guidelines, it is essential that its human rights defenders approach remains coherent with and reinforces, rather than contradicts or undermines, the efforts that are already underway. By aligning with emerging best practices, the OECD could play a significant role in encouraging wider uptake of these standards.

We urge the OECD to adopt updated language that reinforces existing standard setting initiatives, ensures responsible business conduct, and empowers civil society to continue playing its critical role of holding businesses to account. To do this, we recommend that the OECD:

1. **Develop the human rights defenders language in the next draft of the OECD Guidelines through a robust consultative process.** This includes direct engagement with key experts, including human rights defenders who have experienced business-related attacks firsthand, Indigenous rights advocates, rural and peasant defenders,<sup>9</sup> whistleblowers, journalists, civil society organizations that support human rights defenders and Indigenous Peoples, the UN Special Rapporteur on Human Rights Defenders, the UN Working Group on Business and Human Rights, and the individuals who are working to develop the private sector standards referenced above.

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<sup>1</sup> UN Working Group on Business and Human Rights, Guidance on Ensuring Respect for Human Rights Defenders (2021).

<sup>2</sup> UN Special Rapporteur on Human Rights Defenders, Doc. A/72/170 (2017).

<sup>3</sup> In addition to a wide range of country-specific recommendations, or ‘Concluding Observations’, see UN CESCR, General Comment No. 24 on State Obligations in the context of Business Activities (2017) and General Comment No. 26 on Land and Economic, Social and Cultural Rights (2022).

<sup>4</sup> IFC, Position Statement on Retaliation Against Civil Society and Project Stakeholders (2018); IFC and IDB Invest, Good Practice Note for the Private Sector: Addressing the Risks of Retaliation Against Project Stakeholders (2021).

<sup>5</sup> The secretariat of the Voluntary Principles on Security and Human Rights will issue forthcoming guidance on human rights defenders in early 2023.

<sup>6</sup> Bennett Freeman et al., Business and Human Rights Resource Centre and International Service for Human Rights, Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders - Guidance for Companies (2018).

<sup>7</sup> Investor Alliance for Human Rights, Business and Human Rights Resource Centre, and International Service for Human Rights, Safeguarding Human Rights Defenders: Practical Guidance for Investors (2020).

<sup>8</sup> Business Network on Civic Freedoms and Human Rights Defenders, “Supporting Civic Freedoms, Human Rights Defenders and the Rule of Law” (2018). The OECD stocktaking report and the Shared Space Under Pressure report both mention specific companies that have adopted human rights defenders policies.

<sup>9</sup> UN Office of the High Commissioner for Human Rights, “UN Declaration on the Rights of Peasants: UN experts call for action ahead of anniversary,” 16 Dec. 2022.

2. **Include framing language that businesses everywhere have a baseline responsibility to “do no harm” to human rights defenders and civic freedoms.** This includes ensuring that businesses do not:
  - Cause an adverse impact on human rights defenders through their own actions or failure to act;
  - Contribute to an adverse impact on human rights defenders, either *in parallel with* external public or private entities (such as governments or security forces) or *through* external entities (such as suppliers, users, or customers);
  - Directly link their products, services, or operations to an adverse impact on human rights defenders through a business relationship.<sup>10</sup>
  
3. **Ensure that the language in the updated OECD Guidelines reflects emerging best practices by encouraging businesses to adopt zero tolerance policies that are designed in consultation with human rights defenders themselves, integrated into the business’s human rights due diligence, and include the following elements:**
  - High level commitment from company leadership to zero tolerance for retaliation against human rights defenders;
  - Awareness raising on the substance of the policy to the enterprise’s employees, business partners, contractors, and local stakeholders, including the procedures the company will follow when issues or allegations arise.
  - Operational clarity on who is considered a human rights defender, consistent with the UN Declaration on Human Rights Defenders;
  - Planning both for risk mitigation (before acts of retaliation occur) and incident response (after these acts occur);
  - Extra measures for vulnerable subgroups of human rights defenders, such as environmental defenders, Indigenous communities, rural and peasant defenders, LGBTQ advocates, and others who might face discrimination or marginalization;
  - Access to secure, effective, accessible, and non-retaliatory grievance processes; and
  - An open-door approach that welcomes ongoing engagement with civil society and human rights defenders on issues of concern.
  
4. **Incorporate the following technical revisions into the next draft of the Guidelines:**
  - “Undue pressure” standard: The OECD proposes to use a standard of “refraining from applying undue pressure” on human rights defenders and other stakeholders.<sup>11</sup> We strongly oppose use of the term “undue pressure,” which does not align with international standards on human rights defenders, does not take a

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<sup>10</sup> See Investor Alliance for Human Rights et al., *Safeguarding Human Rights Defenders*, note 7.

<sup>11</sup> In the draft OECD Guidelines, see chapter 2, paragraphs 9 and 10; chapter 2, commentary 14; page 60, paragraph 8; and page 70, paragraph 26.

rights-based approach, and suggests that “due” pressure is acceptable. Rather, we encourage the OECD to use the approach described above: that enterprises should refrain from causing, contributing, or directly linking their products, services, or operations to acts of retaliation against human rights defenders. We recommend using the term “act of retaliation” or another term decided in coordination with the UN Special Rapporteur on Human Rights Defenders and the UN Working Group on Business and Human Rights.

- Scope of human rights defenders’ activities that are covered: The OECD proposes to cover a very narrow range of activities within the scope of its standard. According to the current draft, only two kinds of activities would be covered: “monitoring” and “reporting.” Additionally, these activities would only be covered to the extent that they are alleging that the enterprise’s activities are “illegal” or “inconsistent with the Guidelines.”<sup>12</sup> We would like to emphasize that human rights defenders engage in a wide range of activities in response to business-related human rights abuses. This might include, for example, protests, demonstration, community mobilizing, awareness raising, advocacy or lobbying, civil disobedience, raising complaints to judicial or non-judicial bodies, among many others. Additionally, enterprises can still cause or contribute to human rights violations even when their actions are “legal” or otherwise sanctioned by the host government – this is why there is a strong correlation between corruption, discrimination, and retaliation against human rights defenders. Furthermore, it is unreasonable to require human rights defenders to raise their concerns using the language of the OECD Guidelines. We encourage the OECD to work with the UN Special Rapporteur on Human Rights Defenders and the UN Working Group on Business and Human Rights to determine a more appropriate scope for this policy.
- Recognition of gender-based retaliation: We also encourage the OECD to include references to gender-based violence and harassment as examples of the types of retaliation that human rights defenders can experience.
- Recognition of the links to racial, ethnic, and gender discrimination: Shrinking civic space and retaliation against human rights defenders disproportionately impact those speaking up about the rights of Indigenous Peoples, women, the LGBTQI community, and others who face discrimination and marginalization in the societies where they live. Accordingly, we urge the OECD to call on enterprises to take an intersectional approach that accounts for these linkages in their human rights defenders policies.

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<sup>12</sup> In the draft OECD Guidelines, see chapter 2, paragraph 10; and chapter 2, commentary 14.

- Clarification on the definition of SLAPP: We appreciate the reference to SLAPPs, which we have found to be a prevalent form of attacks against human rights defenders. For example, the Business and Human Rights Resource Centre documented 615 alleged acts of retaliation against human rights defenders advocating on business-related issues in 2021, three-fifths of which were SLAPPs and other forms of judicial harassment.<sup>13</sup> However, we also caution that some confusion has arisen over the definition of SLAPP, especially in the United States where state anti-SLAPP laws have been expanded in scope to cover a wide range of activities that go well beyond the original understanding of the term.<sup>14</sup> Accordingly, we encourage the OECD to coordinate with the UN Working Group on Business and Human Rights and the UN Special Rapporteur on Human Rights Defenders to determine a definition of SLAPP for purposes of the Guidelines.<sup>15</sup>
- Strengthened guidance for National Contact Points (NCPs) in preventing and addressing retaliation: We appreciate that the OECD’s consultation draft includes expectations for NCPs to respond to retaliation against human rights defenders. However, the text seems to convey that NCPs should only address acts of retaliation that occur as a direct result of the filing of complaints and that only affect individuals, while working only with governments to address these issues. In practice, retaliation rarely occurs in a bubble and is often part of a longer term, escalating situation that threatens broader communities. Accordingly, we urge the OECD NCPs to work on a multi-stakeholder basis to respond to acts of retaliation that link to the underlying concerns raised in the complaint, including situations that begin before the complaint is filed. In some cases, this might involve collective risks to broader communities. To minimize the risk of retaliation related to the filing of complaints, NCPs should also set conditions for safe engagement, for example by protecting communications and making clear to all parties to the dispute that the NCP has a zero tolerance policy.

This year marks the 25th anniversary of the United Nations Declaration on Human Rights Defenders and the 75th anniversary of the Universal Declaration of Human Rights. We urge the OECD to work closely with civil society, the United Nations, and other human rights experts so

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<sup>13</sup> Business and Human Rights Resource Centre, Human rights defenders & business in 2021: Protecting the rights of people driving a just transition (2022).

<sup>14</sup> For example, under many of U.S. anti-SLAPP laws, even the world’s largest enterprises can claim to be the victim of a SLAPP in lawsuits filed by citizen groups and small nonprofit organizations, simply because the plaintiffs’ claims did not survive on the merits and happened to trigger free speech issues.

<sup>15</sup> UN Office of the High Commissioner for Human Rights, Press Release: “Critical part of the UNGPs 10+ Roadmap: Increasing the protection of human rights defenders in the face of strategic lawsuits against public participation,” 4 Feb. 2022.

that we can collectively make significant progress this year in strengthening protections for human rights defenders.

Sincerely,

African Law Foundation (AFRILAW)

Agency for Turkana Development Initiatives (Atudis)

BankTrack

Bennett Freeman, Former U.S. Deputy Assistant Secretary of State for Democracy, Human Rights and Labor, and Lead Author, *Shared Space Under Pressure*<sup>16</sup>

Business and Human Rights Resource Centre

Community Empowerment and Social Justice Network (CEMSOJ)

EarthRights International

Front Line Defenders

Global Witness

Greenpeace

Inclusive Development International

International Service for Human Rights (ISHR)

Just Finance International

Just Ground

Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP)

London Mining Network

NGO Forum on ADB

OECD Watch

Oxfam International

Polish Institute for Human Rights and Business

Project HEARD

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<sup>16</sup> Bennett Freeman et al., *Shared Space Under Pressure: Business Support for Civic Freedoms and Human Rights Defenders*, note 6.

Project on Organizing, Development, Education, and Research (PODER)

Protection International (PI)

Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC)

Sierra Leone Land Alliance

SOMO (Centre for Research on Multinational Corporations)

Star Kampuchea

Südwind, Austria

Swedish Society for Nature Conservation

Swedwatch

Worthy Association for Tackling Environment Ruins