**Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights**

***Second session, 24 – 28 October 2016***

**FORM for NGOs and other relevant stakeholders submitting a written contribution**

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

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

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

**1.** Please indicate the contact information for the representative submitting the written contribution (i.e. name, mobile, email) here: ![MCj04421440000[1]]() FIAN International e.V, Ana María Suarez Franco, suarez-franco@fian.org; mobile: +41787962254

**2. (a)** If this is an individual contribution, please indicate here your organization's name (kindly state in brackets whether your organization has ECOSOC consultative status (i.e. General, Special, or Roster). ![MCj04421440000[1]]()

or,

**2. (b)** If this is a joint contribution including ECOSOC NGO(s), list here the co-sponsoring ECOSOC NGO(s) as they appear in the ECOSOC database and their status (in brackets): Group all General NGOs first, group the Special second, group the Roster third. ![MCj04421440000[1]]() Institute for Policy Studies/Transnational Institute (Special consultative status) ; FIAN International e.V (Roster status)

**4.** Indicate the TITLE for the written contribution (in original language) here: ![MCj04421440000[1]]() Accountability of TNCs for impairment of Human Rights: The Extraterritoriality Aspect

**Please make sure that:**

* The written contribution is in MS WORD document format (Font Times New Roman 10; no bold; no underline; no italics).
* Please use the Spell/grammar check on your text. (Go to Tools, Spelling & Grammar)
* Different language versions of one statement should be sent in the same email, but using **a separate form** for each.
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Accountability of TNCs for impairment of Human Rights: The Extraterritoriality Aspect

The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity facilitated the written submission of six points for consideration of the 2nd Session of the OEIGWG taking place in Geneva during October 24-28, 2016. It is part of the Campaign’s contribution to the work of the Open Ended Inter Governmental Working Group mandated to develop a “legally Binding International instrument on TNCs and other business enterprises with respect to Human Rights”. It expresses in its diversity the conviction that such a legally binding instrument is essential for two dimensions of the Campaign’s work: to end corporate impunity and address the systemic power of TNCs, which has reached unprecedented impacts on the daily lives of affected communities.

Effective protection of human rights demands that TNCs do not impair human rights wherever they operate. This includes the obligation not to harm the enjoyment of human rights and to redress such harm, when it occurs. Home States to TNCs are under a human rights obligation to respect, protect, fulfill and remedy the abuses and offences abroad of certain TNCs, as set out by the 2011 Maastricht Principles on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights[[1]](#footnote-1), drawn from international law.

In its statement on on the obligations of states Parties regarding the corporate sector and economic, social and
cultural rights[[2]](#footnote-2), the Committee on Economic Social and Cultural Rights (CESCR) details the obligation of States to protect from abuses by third parties.

In one of its decisions, the Human Rights Committee asked Germany stablishes “the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.”[[3]](#footnote-3)

The Committee on the Rights of the Child (CRC), the body that monitors and reports on implementation of the [United Nations](https://en.wikipedia.org/wiki/United_Nations) [Convention on the Rights of the Child](https://en.wikipedia.org/wiki/Convention_on_the_Rights_of_the_Child), adopted in 2013 a General Comment on obligations of states in relation to impacts of business on the Rights of the Child. The Committee affirms that the extra territorial activities of TNCs must be regulated by home States:

“Host States have the primary responsibility to respect, protect and fulfill children’s rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.” (§ 42).[[4]](#footnote-4)

The Maastricht Principles consider also the extraterritorial obligations of States to protect human rights from non-state actors:

Maastricht Principle 24 points out that the obligation of states to take necessary measures to ensure economic, social and cultural rights relates to non-state actors that are subject to States’ regulatory powers[[5]](#footnote-5). In other words, a State can only regulate and ensure protection in a foreign territory, if it has the powers and jurisdiction/permission to do so.

Maastricht Principles 25 describes when such jurisdiction is in place. The same principle also implies that several foreign States may have jurisdiction at the same time in line with the cooperation principle and with Maastricht Principles 37 that calls on “all States involved” to provide remedy. Maastricht 25c makes it clear which States carry the protect-obligation – either directly or through the parent of the controlling company. In this sense a company can have several home States.

This implies that it must be a common goal of the States to overcome corporate barriers that hide the responsibilities of transnational companies and of the people who make the decisions for them, - both in civil and criminal law.

Tax havens and the use of complex corporate arrangements to keep capital apart from accountability are legal mechanisms used to ensure the security of corporate assets - which translates into impunity for the harm caused by business activities. The strategy of Transnational Companies, therefore, is to shield their corporate assets from liability (in States they can rely on), while their subsidiaries, which are in fact held liable for their activities; remain asset-free (in States where the risks of their operations occur).

Thus, when applying the principle of limited liability to the creation of a subsidiary company abroad, the company headquarters and the subsidiary are understood as two completely separate legal entities. This strategy is often used as a shield to protect the parent company from any responsibility for the subsidiaries actions abroad.

Hence, from the understanding of the transnational company´s structure, it is necessary to establish the presumption that, in fact, although TNCs are composed of several legal entities, they consist of one economic unit - an articulated and cohesive group with common goals. Therefore, it is justifiable to consider that the actions performed by subsidiaries are the parent company´s responsibility and, as a consequence, the home states’ as well, as stipulated in Maastricht Principles 25. This is justified by the same decentralized nature of business activity, based on outsourcing mechanisms, which is the central element of its production process.

There is, therefore, a joint responsibility between parent companies and their subsidiaries, as well as in relation to its supply chain, licensees and contractors, since they all share responsibility for impairing civil, political, social, economic, cultural and environmental rights, for which they are connected, through economic transactions, with the TNCs.

Therefore, to make accountability of transnational companies for their production chains possible, information about their business activities should flow freely and transparently, also to prevent that States cannot commit to secret agreements with TNCs. In order to do so, Transnational Companies must make public the countries in which they conduct their practices, identifying its affiliates, suppliers, subcontractors and licensees, as well as the legal form of participation in other companies or legal entities. They must publish their revenue, the number of workers they employ, their funds and the taxes paid in each country.

It is crucial that States develop corporate criminal law, the law of torts and administrative law so that they become instruments for the protection of human rights against TNCs and other business and that judges interpret legislation in accordance with the human rights obligations of their States and with the primacy of human rights. Moreover, Governments must incorporate social, labor and environmental clauses in public bidding calls, in addition to avoiding services and products derived from transnational companies - or from production chains - in which human rights have been harmed.

Moreover, when the cooperation mechanism, coupled with the complementarity principle, shows itself not sufficient, the possibility of access to an international court must be considered. The notion of "exhaustion of domestic remedies" must be more flexible when individual cases demonstrate a difficulty of access to the home states’ justice system or even in the case of an unfair or ineffective due process on the issue.

Furthermore, if both the home states and the host state have difficulties in carrying out the necessary steps to redressing abuses, Professor Olivier de Schutter (2006)[[6]](#footnote-6) suggests the need for a provision of forum necessitatis. That mechanism would allow for victims the access to justice in any State in which the company responsible has a significant operational level.

The establishment of an international court addressing the harm done by TNCs to the enjoyment of human rights would also be an important contribution towards dismantling the impunity enjoyed by transnational corporations. The court should be provided with independent judicial functions, although an auxiliary body – the Public Center for the Control of Transnational Corporations - could have the constant task of coordination with States and civil society, and provide access to TNCs and information on its activities. The center would collect and gather information, receive claims and advise the complainants.

States should commit to cooperating with the Center and respecting and enforcing the Court’s judgments against the company. They have to adjust their local laws in order to make this possible in their territory.

The Court would exercise a kind of international civil jurisdiction accepting legal action against the corporate assets of the company and against its directors, while criminal liability would be a different issue. An alternative would be to make use of the existing International Criminal Court or to change it, with the inclusion of corporate crimes against human rights in the list of crimes under its jurisdiction.

The Madrid and Buenos Aires Principles on Universal Jurisdiction[[7]](#footnote-7) state that the universal jurisdiction determines the obligation to investigate and, if necessary, file suits via national courts in cases of crimes under international law: genocide, crimes against humanity, war crimes, piracy, slavery, enforced disappearances, torture, human traffic, extrajudicial executions and the crime of aggression. These crimes can be committed in many ways, including that of economic activities and that may affect the environment.

The incorporation of the Universal Jurisdiction Principle in domestic law by the states would allow their application to economic crimes against the environment that seriously affects human rights of communities or involve the irreversible destruction of ecosystems, due to its scope and scale. As a result, of this integration, transnational corporations will become liable for action - accomplices, collaborators, instigators, inductors or concealers - or omission, criminally and/or in civil law for the crimes described.

1. http://www.etoconsortium.org/en/main-navigation/library/maastricht-principles/ [↑](#footnote-ref-1)
2. Cf. E/C.12/2011/1, 12 July 2011. [↑](#footnote-ref-2)
3. CCPR/C/DEU/CO/6, § 16, 13 November 2012. [↑](#footnote-ref-3)
4. CRC, General Comment 16, CRC/C/GC/16, 17 April 2013. [↑](#footnote-ref-4)
5. Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, ETO Consortium, 2013, p. 9. [↑](#footnote-ref-5)
6. Olivier de Schutter, « Extraterritorial Jurisdiction as a tool for Improving the Human Rights Accountability of Transnational Corporations». 2006. https://business-humanrights.org/en/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations

 [↑](#footnote-ref-6)
7. Principles de Madrid y Buenos Aires. Universal Jurisdiction 2015. At: http://www.hormantruth.org/ht/sites/default/files/files/universal%20jurisdiction/MADRID%20-%20BUENOS%20AIRES%20PRINCIPLES%20OF%20UNIVERSAL%20JURISDICTION%20%20%20%20-EN.pdf [↑](#footnote-ref-7)