**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:  **Melik ÖZDEN (0797288058,** **contact@cetim.ch****) Lúcia ORTIZ, +55 48 99150071, lucia@foei.org)**

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

or,

**2. (b)** If this is a joint contribution including ECOSOC NGO(s), list here the co-sponsoring ECOSOC NGO(s) as they appear in the ECOSOC database and their status (in brackets): Group all General NGOs first, group the Special second, group the Roster third**.** **Europe-Third World Centre (CETIM), non-governmental organization in general consultative status, Friends of the Earth International, non-governmental organization in Roster consultative status**

**3.** Indicate here any non-ECOSOC NGO(s) supporting the joint contribution (they will appear as a footnote to the title – unless it is a joint contribution from non-ECOSOC stakeholders only): 

**4.** Indicate the TITLE for the written contribution (in original language) here:  **Theme 1: Transnational Corporations (TNCs) Human Rights Obligations**

**Please make sure that:**

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

**PLEASE PASTE THE FINAL TEXT BELOW**:

The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity (Global Campaign) facilitated the written submission of six points for consideration of the 2nd Session of the “Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” taking place in Geneva during October 24-28, 2016. It is part of the Campaign’s contribution to the work of the 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.

For a long time, it was considered that TNCs (and legal persons in general) could not be considered accountable for human rights violations[[1]](#footnote-2) given that respect for human rights was considered incumbent on governments, which, alone, would be the subjects of international law.

This argument is not only contrary to international human rights law in force but also to its evolution. The Universal Declaration of Human Rights[[2]](#footnote-3) states that :

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein” (Article 30).

The Declaration also specifies the duties of the individual to the community and the limits of the individual's rights:

“1. Everyone has duties to the community in which alone the free and full development of his personality is possible.

2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.” (Article 29)

Although this might be limited to “serious crimes in international law”, (including violations of certain human rights), in theory it is possible to bring the management of TNCs before the International Criminal Court.

In 2004, the Commission on Human Rights (replaced by the current Human Rights Council) recommended that the Economic and Social Council (ECOSOC) “confirm the importance and priority it accords to the question of the responsibilities of transnational corporations and related business enterprises with regard to human rights”.[[3]](#footnote-4) The ECOSOC then confirmed this.[[4]](#footnote-5)

Since 2008, the UN Human Rights Council has emphasized that “transnational corporations and other business enterprises have a responsibility to respect human rights”.[[5]](#footnote-6) In 2014, the Human Rights Council repeated this, when stating that: “transnational corporations and other business enterprises have the obligation to respect human rights”[[6]](#footnote-7).

The former Sub-Commission for the Promotion and Protection of Human Rights went even further, asserting:

“Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.”[[7]](#footnote-8)

It is the term “ensure the respect of” that lends itself to diverse interpretations. While it goes without saying that TNCs must ensure the respect of human rights within the framework of their commercial relations, there is no question of them substituting for the state.

Other concerns were expressed in this regard by some legal experts favoring a regulation of TNC activities. For them, formally recognizing TNCs' obligation to respect human rights would amount to according to these entities the same status as that of states.

Some points for consideration are presented here.

First, TNCs are legal persons and thus, subjects and objects of law. Hence, the legal rules apply equally to them and their decision makers. Their transnational character does not justify considering them “international legal persons, even if they can be subjects of international law like physical persons, as international legal doctrine and practice currently recognizes when referring to them. As international law stands now, the only international legal persons are those of public law: state and interstate organizations”.[[8]](#footnote-9)

Second, as already explained above, TNCs are bound to respect human rights. This obligation is obviously limited to the workings of the business enterprise and its commercial relations. It is thus not a general obligation, which is incumbent upon states. In fact, states have obligations to the overall population on their territory, besides their international obligations. The drafting of laws, their enforcement and the sanctions imposed on violators are the prerogatives of the states. In this regard, for example, the future treaty should also stipulate that TNCs may not use private security agents outside their business enterprise nor hire law enforcement agents to serve them.

Third, the power of the TNCs is not balanced by accountability on their side. On the contrary, in the course of the last decades, TNCs have greatly influenced the making of economic treaties in their own favour. Most bilateral and multilateral agreements on trade and investment place TNCs above the state, thus above the people and the citizens. Hence, these entities have all the rights (compensation in case of expropriation, unlimited transfer of assets abroad, compensation for claimed future income losses etc.), but they are not accountable for their acts (very often owing to the special status and/or their “skill” in maneuvering through national jurisdictions in the event of problems). Moreover, by short-circuiting national courts, TNCs have the right to bring states before the World Bank's tribunal, the International Center for Settlement of Investment Disputes (ICSID)[[9]](#footnote-10), which is unfailingly favorable to them, while states are denied this right.[[10]](#footnote-11)Apart from the procedural obstacles (composition of the panels of judges, high costs etc.), the ICSID ignores national and international legislation on human rights, the environment and workers' right. In other words, it is a clear attack on the sovereignty of states and on the right of peoples to self-determination.

Fourth, by virtue of current international law, TNCs are bound to respect human rights. The Human Rights Council has confirmed this several times. All that remains is to clarify the human rights obligations of these entities and establish an enforcement mechanism.

Fifth, the future international instrument will be ratified by the states, and its implementation will be assured by an international public mechanism.

Sixth, if its enforcement is left to the good will of TNCs, what difference will there be between binding norms and voluntary codes of conduct?

Finally, TNCs are not democratic and transparent entities. They ferociously oppose submitting to binding human rights norms. They defend private interests (especially those of a handful of majority shareholders) and not the public interest. They can also be ephemeral, can go bankrupt, can be bought by other entities (or by governments), can transform themselves (completely change orientation) or disappear.

As we have already stated, there is no question of demanding that private actors such as TNCs substitute for the state. On the other hand, it is possible to demand that these entities refrain from all acts that violate human rights and oblige them to act so that the respect of these rights is guaranteed. Barring that, necessary measures must be taken (legislative, administrative and political) to require of persons with authority (both legal and physical) accountability before the courts (national and international) for the non-respect of human rights.

Such responsibility is more than ever indispensable given that privatization and deregulation policies imposed by certain international bodies (IMF and the World Bank, in particular) entrust to TNCs an ever greater number of public services that until recently were provided by the state. The people must thus have the possibility to defend their rights faced with those of the TNCs, which are supposed to supply services, including those essential for living in dignity.

There is a major legal gap in international human rights law that needs to be closed to end the impunity for human rights violations committed by TNCs. This must be the main objective of this new legally binding international instrument that will be developed by the UN open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

1. At this point, it is worth mentioning briefly a minor semantic problem between French and English concerning the term “responsibility”, which can create confusion. The French word, responsabilité, has two meanings that are expressed in English by two different words: responsible/responsibility and accountable/accountability. The latter includes the idea of liability. [↑](#footnote-ref-2)
2. Adopted by the United Nations General Assembly10 December 1948, it has become the source for all human rights norms and has acquired a binding character, for all the United Nations member states are bound to implement it. [↑](#footnote-ref-3)
3. Commission on Human Rights, Decision 2004/116, 20 April 2004. [↑](#footnote-ref-4)
4. ECOSOC, Decision 2004/279. [↑](#footnote-ref-5)
5. Human Rights Council, Resolution 8/7, 18 June 2008, and Resolution 17/4, 16 June 2011. [↑](#footnote-ref-6)
6. Human Rights Council, Resolution 26/9 [↑](#footnote-ref-7)
7. Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12, 26 August 2003, § 1: http://www.cetim.ch/wp-content/uploads/G0316008.pdf [↑](#footnote-ref-8)
8. The Activities of Transnational Corporations: The Need for a Legal Framework: Acts and Conclusions of the Seminar of Céligny, (Geneva: CETIM, July 2001). [↑](#footnote-ref-9)
9. See Alejandro Teitelbaum, International, Regional, Subregional and Bilateral Free Trade Agreements, July 2010, CETIM. Source : http://www.cetim.ch/wp-content/uploads/report-7a.pdf [↑](#footnote-ref-10)
10. See Report of the Independent Expert on the promotion of a democratic and equitable international order, A/HRC/27/51, § 16. [↑](#footnote-ref-11)